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On 15 March 2017, the Luxembourg court of appeal ruled on the 'LuxLeaks' scandal. Although the court did not dare sentence the journalist, who it commends as a 'responsible journalist', the sentences issued to the whistleblowers are disgraceful, albeit less severe than the initial sentences. Just as concerning, the court's decision is based on a highly disturbing reasoning…

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On 15 March, Luxembourg's court of appeal decided to punish the sources behind what is internationally referred to as the LuxLeaks scandal. The scandal revealed to the public that multinationals – aided and abetted by the Big Four and the Luxembourg government, in particular its tax department – are not paying their taxes. These multinationals steal vast sums of money from a number of countries across Europe and around the world. Yet it is not these thieves, these fraudsters who are punished: no, it's the messengers, the people who blew the whistle and informed the public of this mammoth scam.

The fact that the sentences handed down to the whistleblowers Antoine Deltour and Raphaël Halet are not as harsh as they were after the first trial does not make the fact they have been convicted any less of a disgrace.

They should be thanked, not convicted

The *Plateforme Paradis Fiscaux et Judiciaires* [tax and legal havens platform][1], that made a stand along with the Luxembourgish Solidarity Committee and the French Solidarity Committees throughout the case, accurately described why this verdict is a disgrace: *"The sentences handed down are still disgraceful and worrying, even though they are reduced compared to the sentences from the first trial. Instead of being convicted, Antoine Deltour and Raphaël Halet should be thanked for their actions. It remains unacceptable that individuals who stand up for the public interest are punished, while multinational companies, aided by audit firms such as PwC, continue to avoid taxation on such a large scale, without suffering any negative consequences. It should be the other way around."*

A number of high-profile figures have shown a disgraceful attitude throughout this case. PwC, for example, which, for all it claimed to be disinterested, triggered the trial by filing a complaint and sank a lot of money into bringing about the conviction of the whistleblowers and whitewashing the actions of the fraudsters and their acolytes. The same can be said of Bettel, though he is the country's prime minister, Vogel, Urbany and others who all campaigned for criminal law to be applied, while ignoring fundamental human rights.[2]

The disgraceful attitude of Luxembourg's public prosecutor

Let us take a closer look at Luxembourg's public prosecutor, which represents the office of the public prosecutor and the state of Luxembourg, and whose attitude throughout the case was astounding. Firstly, because it applies a double standard, depending on whether it is dealing with tax dodgers or whistleblowers[3]. Second, because this public prosecutor did not even question PwC's internal review; it simply adopted the review as its own, without carrying out an independent investigation at PwC[4]. During the first trial, Luxembourg's public prosecutor only referred to criminal law, domestic law, in its indictment and submissions, with no consideration of the fundamental right to freedom of expression and the right to information, even though these rights are pillars of the European Convention on Human Rights that

1 The '*Plateforme Paradis Fiscaux et Judiciaires*' comprises 19 French civil society organisations, including ATTAC France, ActionAid Peuples Solidaires, CCFD-Terre Solidaire, UGICT-CGT Anticor. See http://www.stopparadisfiscaux.fr

2 See, inter alia, article by Véronique Bruck and Justin Turpel "*L'ignorance des droits fondamentaux: un privilège luxembourgeois*", in Forum no 371, May 2017.

3 See also my article "*Un Parquet aveugle d'un œil: fraudeurs fiscaux et lanceurs d'alerte – deux poids et deux mesures!* " www.justin-turpel.lu/un-parquet-aveugle-dun-oeil-fraudeurs-fiscaux-et-lanceurs-dalerte-deux-poids-et-deux-mesures/

4 Because – as the public prosecutor's office representative David Lentz justified the choice during the first trial – "*they*" (PwC) would be "*much better than the police at conducting such an investigation*"!

Luxembourg formally adhered to 64 years ago[5]! The extensive case law of the European Court of Human Rights was given no weight by the office of the public prosecutor.

Worse: following the acquittal of the journalist Edouard Perrin during the first trial, the public prosecutor deemed it useful and necessary to appeal this verdict, seeking a criminal sentence for the journalist for having "*participated in violating trade secrets and professional confidentiality*" and for "*the crime of laundering and/or holding assets derived from the commission of crimes*". The public prosecutor's representative, namely Deputy Public Prosecutor John Petry, when stating his case before the court of appeal, publically apologised for the stance of Luxembourg's public prosecutor on this matter, ultimately declaring that the work of journalist Edouard Perrin was beyond reproach.

However, this volte-face by Luxembourg's public prosecutor is by no means the result of a sudden and happy burst of clarity on the part of the public prosecutor's office. Instead, it can be ascribed to the attention attracted by the case on an international level, following large-scale protests and exemplary manifestation of solidarity with the journalist and the whistleblowers who had been charged. Pressure about the journalist's case at least was too strong to allow him to be convicted. But let's be clear about this, it is not because Luxembourg's legal system *no longer wanted* to convict journalist Edouard Perrin, but because it *no longer dared* – and with good reason! It is also highly likely that Luxembourg's prosecutor was keen to avoid being overruled by the European Court of Human Rights on an issue of freedom of the press.

The conviction of the whistleblowers, both by the judges presiding over the first trial and over the appeal, is no less surprising. The first time, the judges recognised Antoine Deltour and Raphaël Halet's status as whistleblowers, yet still found them guilty. In spite of the reduced sentences, this contradiction is even more blatant in the decision of the court of appeal.

The court that bends the rules

This decision states that "*the Court holds that Antoine Deltour acted in good faith in summer 2011 when he shared documentation with Edouard Perrin for his documentary on ATAs*[6] *and the tax practices of multinational companies.*" The judges found that "*the breaching of professional confidentiality by Antoine Deltour is justified by his status of whistleblower, meaning that he can be exempted from this requirement.*" And yet, this "*good faith*" was not allowed to Antoine Deltour on 13 October 2010, his last day working at PwC, on which he made copies of the documents in question. As the court does not allow him the status of whistleblower for the date on which he made the copies, he was charged with "*theft, theft by an employee, fraudulent maintenance of an automated data handling and storage system and use of internal training documents (!) and confidential documentation of 538 clients of the company PwC.*" That's some impressive flexibility: the court of appeal recognises that Antoine Deltour acted in the public interest, yet still punishes him for theft![7]

For Raphaël Halet, the judges of the court of appeal found that his actions were superfluous, that the documents he passed to the journalist Edouard Perrin did not provide any new information[8], which is why he should be charged, even though they took into consideration the "*mitigating*

5 With approving law of 29 August 1953.

6 Advance tax agreements, the infamous tax 'rulings'.

7 In response to the question of Le Quotidien, a Luxembourgish newspaper: "Antoine Deltour was found guilty of stealing the documents and acquitted for passing them on. Do you understand this decision?", Edouard Perrin replied: "No, because it's either one or the other. The fact that he was a whistleblower should mitigate the theft. But no, that is what he was found guilty of. If people in this situation are breaking the law, it's by revealing information, not for anything else. You have to follow through with a line of reasoning." See www.lequotidien.lu/politique-et-societe/proces-luxleaks-edouard-perrin-les-voleurs-nont-pas-ete-condamnes/

8 Citation from judgement of 15 March 2017: "*The documents provided by Raphaël David Halet to the journalist did not therefore contribute to the public debate about Luxembourg's ATA practice, nor did it initiate the debate about tax evasion or provide any essential, new or previously unknown information.*"

circumstance that he thought his motive was an honourable one". Yet this assertion that the documents in question were not relevant is categorically refuted by Edouard Perrin, who asks: *"How could we have uncovered the fact that ArcelorMittal moved €173m between one of the group's companies and the Dubai treasury, via Luxembourg, without Raphaël Halet's documents?"*[9] And he is surely the person who would know.

Without wanting to get bogged down in a legal analysis of the verdict of the appeal, I would like to raise another important aspect of this judgement, which relates to the methodology applied by the court of appeal. The judgement handed down on 15 March 2017 shows that Luxembourg's judges do not consider the fundamental rights enshrined in the European Convention on Human Rights as a substantive law, that they are obliged to apply, but at the very most a circumstance that can mitigate a criminal offence. The entire thrust of the appeal verdict is based on this reasoning: the judges do not believe freedom of expression is a fundamental right which may only be restricted by measures which are "*necessary in a democratic society*" – as stated by the text of Article 10 and evident in the entire case law of the European Court. Yet Luxembourg's judges started from a position of an established (criminal) offence, which could not be cleared but at the most "*neutralised*" or "*mitigated*" by the "*justifying act of whistleblowing*". We really have strayed through the looking-glass here.

A topsy-turvy world

With this verdict, Luxembourg's judges are not following the case law of the European Court of Human Rights, they are trying to set a new precedent based on the doctrine of the new European trade secrets directive[10]. This fall-out is one of the major reasons for the wide-spread opposition to the directive, the spirit of which runs completely counter to the case law of the European Court of Human Rights. Yet Luxembourg's judges are happy to set a new precedent based on a regressive directive, not yet implemented, and for which there is no case law to date and, at the same time, blithely ignore the established body of case law for human rights.

In doing so, Luxembourg's judges are actually adding conditions not provided for by the European Court of Human Rights[11].

Once again, the judges aren't shy of contradicting themselves: they found that the charge of "*violation of trade secrets*" cannot be brought against Antoine Deltour because of the "*justification of acting as whistleblower*", yet they don't grant the same status to Raphaël Halet.

This legal dissection maybe be a bore to some of our readers, but let us be clear that this analysis is important because the law, in this case legislation and case law, is a reflection of the social and political evolution of a society. Case law echoes the balance of power in a society and how evolved it is.

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9 Edouard Perrin continues: "*But the new documents Raphaël Halet gave us actually formed the basis of the second episode of Cash Investigation. The judges say: "Okay, so you kicked up a stink with Antoine Deltour, but that was enough". But they don't get to decide if the debate should continue, intensify or stop! This paragraph says it all: it shows just how carefully this judgement was considered.*" See www.lequotidien.lu/politique-et-societe/proces-luxleaks-edouard-perrin-les-voleurs-nont-pas-ete-condamnes/

10 "*Of course, the text states that sanctioning measures are withdrawn when the disclosed information is justified* "by exercising freedom of expression and information, to protect the public interest, or in order to protect a legitimate interest recognised by the law of the European Union." *But it is still classed as an offence, justification of which must be proven on a case-by-case basis. Journalists and whistleblowers will always be the defendants and that is not a comfortable situation to be in." (See* www.lemonde.fr/idees/article/2016/04/24/le-proces-des-luxleaks-aura-l-apparence-d-un-proces-de-droit-commun-mais-la-realite-d-un-proces-politique_4907749_3232.html)

11 Namely, *"the information disclosed, which must not go beyond that which is necessary"*; this is a condition not stipulated by the European Court of Human Rights that the judges associate with the principle of subsidiarity.

More robust protection for whistle-blowers urgently required

Even in this context, it is still revealing that the judges followed the public prosecutor's reasoning to the letter, largely ignoring the arguments and considerations put forward by the defence. It is clear that without the protests and public debate, the sanctions against the whistleblowers (and therefore the journalist also) would have been much harsher. The most oft-stated reasoning related to the journalist and freedom of the press. The court of appeal recognised that "*Edouard Perrin, in acting as a 'responsible journalist' within the meaning of the European Convention on Human Rights, acted in good faith, disclosed information that was correct, accurate and trustworthy. In addition, publication [of the information] contributed to a debate of public interest.*" Recognising the whistleblower status of Antoine Deltour and Raphaël Halet did not follow such a logical path, even though their actions form the basis of this wide-spread debate that is in the public interest. Without their brave actions, the LuxLeaks information, the debate it provoked and the subsequent changes would not have been possible. And yet they have been found guilty.

Irrespective of an eventual trial at the European Court of Human Rights (and before that at Luxembourg's court of cassation) – which is a decision only the defendants themselves can make – urgent action is needed to create laws that provide proper protection for whistleblowers, both at the European and national level. It is an issue that will need further and more in-depth consideration; but right now a solution is undeniably urgent.

As long as there are such blatant inequalities and companies willing to take fraudulent advantage, we need whistleblowers, sources and journalists willing to inform the general public, a general public that has a duty to protect them, both by protesting and by creating laws.

To end this overview of the court of appeal in the LuxLeaks trial, let us look at one aspect noted only by a few perceptive observers: the legality of the tax rulings themselves copied by Antoine Deltour and published by the ICIJ. On the first day of the appeals process, Bernard Colin, Raphaël Halet's lawyer, addressed the issue of the rulings, or ATAs, at length. To this end, the lawyer felt that the testimony of Marius Kohl, a former official of the tax office in question, was essential, "*in order to question him on the functioning and the administrative practice of the ATAs.*"

Bernard Colin "*states in support of his request that hearing this witness who managed to avoid appearing in court during the first trial, would be essential to provide clarifications regarding the material and operational conditions of the tax rulings; to allow the defence to establish the illegal nature of the fiscal mechanisms put in place by the tax rulings granted by Luxembourg; to establish that Marius Kohl created the standard contained in the financial rulings negotiated with the four largest accountancy firms, referred to as the Big Four; and to establish the illegal nature of these practices.*"[12]

Tax rulings: the illegal industry practice

In its verdict, the court of appeal states that "*the actions of which Raphaël David Halet's defence seeks to establish the existence, i.e. the practice of tax rulings, the material and operational conditions of how they are handled by office VI of the tax department, the conditions under which the tax rulings were treated, the circumstance that Marius Kohl decided alone whether to grant or refuse them, thereby establishing the legal norm, the absence of detailed legislation governing this practice, the preparation of the ATAs at the initiative of PwC and the continuation of this practice until 2014,* ***are not called into question by any of the parties***" (emphasis ours). Concluding that "*the Court, as a body exercising legal authority, will not rule on the legality of an individual administrative decision such as a tax ruling, or on the legality of an administrative practice.*"

In other words: all the facts referred to by Bernard Colin to prove that the practice of tax rulings (ATAs) is illegal are recognised by the court, but it doesn't want to issue a final conclusion as it is not competent to do so.

That is a pretty weighty admission. From now on, it will be

12 Taken from the judgement of 15 March 2017.

impossible to claim that these tax rulings were legal all along. Will Luxembourg's public prosecutor, very quick to convict the whistleblowers, be just as keen to finally look into the legality of the use of tax rulings, as put in place in collaboration with PwC (and others) and the tax office (at least its Sociétés 6 office under Marius Kohl)?[13]

Against such a backdrop, we should also wonder whether a single civil servant can truly be responsible for the business practice of tax rulings, or whether this practice is actually part of a wider system and machine.

Justin Turpel,
Member of the Committee for Solidarity with the defendants in the LuxLeaks case
Luxembourg, 21 March 2017

13 The Justice Minister could also ask the public prosecutor to investigate the issue.