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ECtHR GC Judgment in Halet v. Luxembourg –

Did Halet Win the Battle But Whistleblowers Lose the War in Strasbourg?

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Preface

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ECtHR GC Judgment in *Halet v. Luxembourg* – Did Halet Win the Battle But Whistleblowers Lose the War in Strasbourg?

A. Introduction

On Valentine's day last year, the European Court of Human Rights (ECtHR) Grand Chamber (GC) delivered its judgment in the case *Halet v. Luxembourg*,[1] settling the almost decade-long legal battle between the applicant, Mr Raphaël Halet, who was criminally charged for having disclosed confidential information revealing multinational companies' sophisticated tax optimization schemes in Luxembourg (LuxLeaks), and the State of Luxembourg. The 2014 LuxLeaks scandal sparked an intense debate on corporate taxation and led to wide-spread reforms on the national and international stage. The latest outcome of this ongoing debate can be found in the minimum corporate taxation agreed by members of the Organization for Economic Co-operation and Development (OECD)/G20 Inclusive Framework.[2]

In its judgment, the ECtHR GC held that the criminal conviction of Mr Halet constituted a violation of the European Convention on Human Rights (ECHR). A pretty sweet Valentine's gift for Mr Halet, who was granted whistleblower status under Art. 10 ECHR. The special protection granted to whistleblowers under the ECHR was first established by the ECtHR GC *Guja* ruling of 2008.[3] In the latter judgment, the ECtHR GC considered that "*the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection*".[4] It developed the following six criteria (hereinafter "*Guja* criteria") guiding the balancing exercise between the public interest of receiving the information disclosed, and the employee's duty of loyalty, reserve and discretion owed to the employer: (1) the reporting channel used, (2) the public interest in the disclosed information, (3) the authenticity of the information, (4) the good faith of the employee, (5) the damage suffered by the employer, and (6) the severity of the sanction imposed.

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[1] ECtHR, *Halet v. Luxembourg* [GC], Appl. no. 21884/18, Judgment of 14 February 2023.
[2] European Commission, *Minimum corporate taxation*, available at https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation_en (last accessed on 10/04/2024).
[3] ECtHR, *Guja v. Moldova* [GC], Appl. no. 14277/04, Judgment of 12 February 2008.
[4] *Ibid.*, para. 72.

Using these criteria in the *Halet v. Luxembourg* case, which involved for the first time a fully private employer, the Third Section of the ECtHR concluded in 2021 that the criminal conviction of the applicant by Luxembourg national courts did not amount to a violation of his right under Art. 10 ECHR.[5] The judgment and the interpretation of the six *Guja* criteria by the ECtHR Third Section was at odds with previous case-law[6] and led to the referral of the case to the ECtHR GC.[7] This referral was an exceptional opportunity for the ECtHR GC to reassess the *Guja* case-law in the light of new developments in the field of whistleblower protection,[8] an evolution I analyzed in my book entitled "*Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union: An Emerging Consensus*".[9]

The present case analysis of the ECtHR GC *Halet v Luxembourg* judgment will be divided into three main sections: First, given the lengthy legal battle preceding the ECtHR GC judgment of 2023, a summary of the proceedings before the domestic courts and the ECtHR Third section will provide the necessary legal background on the basis of which the ECtHR GC had to take its decision (B.); in a second part, the 2023 judgment of the ECtHR GC will be analyzed in detail (C.); in the last part of this paper, I will provide my assessment of the ECtHR GC judgment and discuss the impact it might have on future whistleblowing cases before the ECtHR (D.).

B. Summary of the proceedings before the domestic courts and the ECtHR Chamber

A brief summary of the legal battle preceding the 2023 ECtHR GC judgment will highlight the main legal issues at stake and the pending questions regarding the interpretation and implementation of the six *Guja* criteria.

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[5] ECtHR, *Halet v. Luxembourg*, Appl. no. 21884/18, Judgment of 11 May 2021.
[6] *Yurttagül*, LuxLeaks Whistleblower Not Protected by Article 10 ECHR - Case Analysis of "Halet v Luxembourg" (ECtHR, Appl. no. 21884/18), *Saarbrief*, 02/06/2021, available at https://jean-monnet-saar.eu/?page_id=61634 (last accessed on 10/04/2024).
[7] ECtHR Grand Chamber Panel's decisions - September 2021, *Press release*, CEDH 261 (2021), 06/09/2021.
[8] *Yurttagül*, Luxleaks scandal and Corporate Whistleblowing: Reflecting on 'Halet v Luxembourg', *Oxford Business Law Blog*, 27/07/2021, available at https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/07/luxleaks-scandal-and-corporate-whistleblowing-reflecting-halet-v (last accessed on 10/04/2024).
[9] *Yurttagül*, Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union: An Emerging Consensus, *Springer Nature*, 2021.

I. The assessment of the domestic courts

The legal battle between the applicant and Luxembourg started after the applicant, who at the time worked for PricewaterhouseCoopers (hereinafter "PwC"), transmitted to the journalist Mr Edouard Perrin PwC internal documents relating to the tax returns of several well-known multinational companies.[10] The Luxembourg District Court sentenced Mr Halet to nine months of imprisonment and a € 1,000 fine based on charged of internal theft, computer fraud, breach of professional secrecy, breach of trade secretary and laundering and possession (*blanchiment-détention*). He was also ordered to pay the symbolic sum of € 1 to PwC as civil-law compensation for the non-pecuniary damage. While the Luxembourg District Court acknowledged that the information disclosed by the applicant was undeniably in the public interest and led to greater transparency and financial equity,[11] it held that the applicant could not enjoy protection under Art. 10 ECHR because the seriousness of the offenses outweighed the public interest in the information disclosed.[12]

While more nuanced in its assessment of the whistleblowing criteria under Art. 10 ECHR, the Luxembourg Court of Appeal agreed with the District Court in that the damage caused outweighs the public interests in the disclosure made by the applicant, so that the justification of whistleblowing cannot be retained in his case.[13] The Court of Appeal indeed considered that the value of the information contained in the documents disclosed was too low as to legitimize a violation of the applicant's duty of professional secrecy.[14] In its view, "*the documents handed over […] neither contributed to the public debate […] nor triggered the debate on tax evasion, and they did not provide any* ***information that was essential, new and previously unknown***".[15] That said, the Court of Appeal recognized the mitigating circumstances related to the good faith of the applicant and reduced the sentenced to a € 1,000 fine

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[10] A brief summary of the facts of the case and the national court proceedings can be found in *Yurttagül*, LuxLeaks Whistleblower Not Protected by Article 10 ECHR (Fn. 6); see also ECtHR, *Halet v Luxembourg* [GC] (Fn. 1), paras 10-16 and paras 17-49.
[11] Luxembourg District Court, *No. 1981/2016*, Judgment of 29 June 2016, p. 35.
[12] *Ibid.*, pp. 51 and 54.
[13] Luxembourg Court of Appeal, *No. 117/17X*, Judgment of 15 March 2017, p. 45.
[14] *Ibid.*, p. 43.
[15] French original "*[l]es documents […] n'ont […] ni contribué au débat public sur la pratique luxembourgeoise des ATAs ni déclenché le débat sur l'évasion fiscale ou apporté* ***une information essentielle, nouvelle et inconnue jusqu'alors.***"; See Luxembourg Court of Appeal (Fn. 13), p. 45. *Emphasis added*.

without imprisonment. The judgment was upheld by the Luxembourg Cour de cassation.[16]

II. The ECtHR Third Section Judgment

In a judgment delivered on 11 May 2021, the ECtHR third section essentially had to decide whether the "*essential, new and previously unknown*" nature of the information was pertinent to determine the legitimacy of a disclosure, and thus the extent of the whistleblower protection under Art. 10 ECHR. The main issue therefore concerned the balancing exercise between the extent and seriousness of the detrimental effect suffered by the employer and the importance of the public interest in receiving the information disclosed.

1. Purely private employer

The case *Halet v. Luxembourg* was unprecedented in so far as it involved for the first time a fully private employer.[17] In previous cases involving employees under private-law contracts, the ECtHR held that although in a lesser extent than in the case of civil servants, employees in private law employment relationships also have a duty of loyalty, reserve and discretion towards their employers, which can legitimately limit the exercise of their right to freedom of expression.[18] The ECtHR further noted "*that there is an interest in protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good*".[19] In light of these observations, the ECtHR thus held in its *Heinisch* ruling that "*the principles and criteria established in the Court's case-law with a view to weighing an employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of his or her employer against the latter's right to protection of its reputation and commercial interests also apply in the case*" of private-law employment relationships.[20]

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[16] Luxembourg Cour de cassation, *No. 3911*, Judgment of 11 January 2018.
[17] ECtHR, *Halet v. Luxembourg* [Chamber] (Fn. 5), Dissenting opinion of judges Lemmens and Pavli, para. 11.
[18] ECtHR, *Wojtas-Kaleta v. Poland*, Appl. no. 20436/02, 16 July 2009, para. 43 ; ECtHR, *Heinisch v. Germany*, Appl. no. 28274/08, 21 July 2011, para. 64; ECtHR, *Matúz v. Hungary*, Appl. no. 73571/10, 21 October 2014, para. 32; ECtHR, *Marunić v. Croatia*, Appl. no. 51706/11, 28 March 2017, para 52.
[19] ECtHR, *Heinisch v. Germany* (Fn. 18), para. 89.
[20] *Ibid.*, para. 64.

2. The Assessment of the ECtHR Third Section

In view of the above principles, the ECtHR Third Section remained brief in recognizing the interference in the applicant's right to freedom of expression under Art. 10 ECHR,[21] noting that the criminal convention of the applicant was prescribed by law and pursued the legitimate aim of preventing the disclosure of confidential information and protecting the reputation of the applicant's employer PwC.[22] The ECtHR Third Section thus had to determine whether the interference was "*necessary in a democratic society*" and whether the domestic authority had conducted its balancing exercise with due regard for the relevant facts and the principles developed by the ECtHR.[23] The ECtHR Third Section underlined in this respect that it would need strong reasons to substitute its opinion for that of the domestic authority if the latter had conducted its balancing exercise in compliance with the criteria developed by the ECtHR.[24]

The main points of dispute in the balancing exercise conducted by the domestic courts evolved around the fifth and sixth *Guja* criteria, namely the damage suffered by the employer and the sanction imposed on the applicant. With regard to the fifth criterion, the ECtHR Third Section considered that PwC suffered a short-lived damage, with no long-term consequences for its reputation.[25] This damage having to be balanced with the public interest of the information disclosed, the ECtHR Third Section held that it did not have serious reasons to substitute its opinion to that of the domestic court since the latter carefully assessed the interest of the applicant's disclosure and gave a detailed explanation for its reasoning.[26]

While it acknowledged that the three qualifying criteria developed by the domestic court, namely information that is "*essential, new and previously unknown*", might be considered too narrow in other circumstances, the ECtHR Third Section argued that in the case at hand, it should be seen as clarifications of the domestic court's reasoning when balancing the private and public interests at stake, which led it to

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[21] ECtHR, *Halet v. Luxembourg* [Chamber] (Fn. 5), para. 86.
[22] *Ibid.*, para. 87.
[23] *Ibid.*, para. 96.
[24] *Ibid.*, para. 96.
[25] *Ibid.*, para. 100.
[26] *Ibid.*, para 106.

conclude that the harm suffered by the employer outweighed the public interest in the disclosure.[27] In light of these considerations and arguing that the criminal sanction was relatively mild, with no genuine chilling effect on the applicant's freedom of expression nor on other employees, the ECtHR Third Section concluded that the domestic courts struck a fair balance between the different interests at stake, deciding five to two against a breach of Art. 10 ECHR.[28]

C. The ruling of the Grand Chamber

The Third Section judgment, I argued in a Saarbrief, contradicted the ECtHR case-law and did not take into account the consensus which emerged over the last decade with regard to whistleblower protection.[29] From the nature and extent of the loyalty of employees under private-law employment contracts to the contribution of the disclosed information to an ongoing public debate, judges Lemmens and Pavli indeed emphasized in their dissenting opinion to the Third Section judgment that "*the balance struck by the majority between the public interest in whistle-blower disclosures and the private-sector interests in secrecy is in tension with the Guja line of this Court's case-law, as well as with emerging European standards in this area.*"[30]

Mr Halet submitted a referral request to the GC, a referral which I argued would give the GC the opportunity to clarify and further develop its case-law with regard to whistleblower protection under Art. 10 ECHR.[31] In September 2021, the request for referral submitted by Mr Halet was accepted by the panel of the GC.[32] The stakes before the ECtHR GC were high: not only would it need to review the decisions of the domestic courts in light of the *Guja* criteria, it would also need to take into account the European and international development in the field of whistleblower protection and determine if and to what extent it should be reflected into its case-law. Would the ECtHR GC revise its whistleblowing case-law, or consolidate the existing principles, and if so, to what extent? That question represented the main

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[27] *Ibid.*, para. 109.
[28] *Ibid.*, paras 112-113.
[29] *Yurttagül*, LuxLeaks Whistleblower Not Protected by Article 10 ECHR (Fn. 6), under "*E. Final opinion*".
[30] ECtHR, *Halet v. Luxembourg* [Third Section] (Fn. 5), Dissenting opinion of judges Lemmens and Pavli, para. 17.
[31] *Yurttagül*, Luxleaks scandal and Corporate Whistleblowing (Fn. 8).
[32] ECtHR Grand Chamber Panel's decisions (Fn. 7).

issue at stake in the *Halet v. Luxembourg* GC judgment delivered on 14 February 2023.

I. The Guja criteria in the light of the new European and international context

From the outset, the ECtHR GC acknowledged "*the developments which have occurred since the* Guja *judgment was adopted in 2008, whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they are liable to play by bringing to light information that is in the public interest, or in terms of the* ***development of the European and international legal framework for the protection of whistle-blowers****. In consequence, it considers it appropriate to grasp the opportunity afforded by the referral of the present case to the Grand Chamber to* ***confirm and consolidate the principles established in its case-law*** *with regard to the protection of whistle-blowers, by* ***refining the criteria for their implementation in the light of the current European and international context***".[33] On the basis of this observation, the ECtHR reviewed each *Guja* criterion individually in light of these new developments.

II. The subsidiarity principle

Recognizing the specific circumstances related to the *Halet* case, namely a fully private employer, the statutory obligation of professional secrecy incumbent on the applicant, and the fact that other revelations concerning the activities of the same employer were made before the applicant's own disclosure, the ECtHR GC considered that it remains appropriate to apply its *Guja* criteria to the case at hand,[34] keeping in mind its intention to "*confirm*", "*consolidate*" and "*refine*" them in light of new developments in the field of whistleblower protection. It made it also very clear that it does not intend to provide a definition of the concept of whistleblower *in abstracto* since "*this concept has not, to date, been given an unequivocal legal definition*".[35]

Instead, the ECtHR GC would limit itself to the assessment of the specific circumstances of the case in the light of the criteria and principles developed in the Court's

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[33] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 120, *emphasis added*.
[34] *Ibid.*, paras 155, 158.
[35] *Ibid.*, para. 156.

case-law to determine whether the criminal conviction of the applicant amount to a disproportionate interference in his right under Art. 10 ECHR.[36] By expressly referring to the principle of subsidiarity, a principle now enshrined in the ECHR's preamble,[37] the ECtHR GC first assessed the domestic court's interpretation of these criteria and principles to determine whether it complied with the ECtHR's case-law. As a reminder, the ECtHR Third section had ruled that the domestic court's balancing exercise was undertaken in compliance with the ECtHR's whistleblowing case-law and that it thus did not have reasons to substitute its view to that of the domestic court.

Reaffirming the importance it attaches to the protection of whistleblowers,[38] and the "*series of objective principles and criteria*" it established in a "*substantial and stable*" case-law,[39] the ECtHR GC commended the Luxembourg Court of Appeal's diligent application of the *Guja* criteria[40] in the light of the ECtHR's case-law under Art. 10 ECHR,[41] and noted that the Luxembourg national authorities had endeavoured to comply with the principles enshrined in the ECtHR's case-law.[42]

III. Assessment of the Halet case in the light of a global analysis of the Guja criteria

Against the Luxembourg Government's request to limit the scope of its examination to the balancing between the public interest of the disclosure and the damage suffered by the employer,[43] the ECtHR emphasized that while there is no hierarchy between the *Guja* criteria, they are interdependent and must be assessed as part of a global analysis,[44] a comprehensive review which was already promoted by judges

[36] *Ibid.*, paras 156-158.
[37] Protocol No. 15 amending the ECHR, *24.VI.2013*.
[38] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 163.
[39] *Ibid.*, para. 161.
[40] *Ibid.*, para. 166.
[41] *Ibid.*, para. 164.
[42] *Ibid.*, paras 163, 166.
[43] *Ibid.*, para. 168.
[44] *Ibid.*, para. 170.

Lemmens and Pavli in their dissenting opinion to the ECtHR Third Section judgment.[45]

When assessing the specific circumstances of the *Halet* case in light of this global analysis of the *Guja* criteria, it is interesting to note that instead of analyzing the public interest of the disclosure and the damage suffered by the employer under separate headings, the ECtHR GC merged the analysis of both criteria under a common heading, establishing new sub-headings in that category. This restructuring may indicate the importance the ECtHR GC places on the global analysis of the different criteria in its balancing exercise. The structure of the ECtHR GC's assessment can be read as follows:

1. whether other channels existed to make the disclosure
2. the authenticity of the disclosed information
3. the applicant's good faith
4. the balancing of the public interest in the disclosed information and the detrimental effects of the disclosure
   - the context of the impugned disclosure
   - the public interest of the disclosed information
   - the detrimental effects
   - the outcome of the balancing exercise
5. the severity of the sanction

*The application of the "*refined*"* Guja *criteria to the* Halet *case*

1. Whether other channels existed to make the disclosure

The ECtHR GC reiterated its tiered approach,[46] stating that "*[t]he internal hierarchical channel is, in principle, the best means for reconciling employees' duty of loyalty with the public interest served by disclosure*",[47] but that the circumstances

[45] ECtHR, *Halet v. Luxembourg* [Chamber] (Fn. 5), Dissenting opinion of judges Lemmens and Pavli, para. 9. "*the weighing of the competing interests under the "fifth Guja criterion" should not be made in isolation, but in the light of the global Article-10 analysis, encompassing all the relevant criteria. In other words, the Guja criteria are not to be viewed as mere boxes to be checked, but as principles guiding a comprehensive review by the national courts*."
[46] *Yurttagül*, Whistleblower Protection (Fn. 9), pp. 124 ff.
[47] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para 121.

of the case may render the internal reporting channel impracticable.[48] However, the ECtHR GC also referred to the *Gawlik* ruling and the Appendix to Recommendation CM/Rec(2014)7 adopted by the Council of Europe Committee of Ministers[49] to emphasize that "*the criterion relating to the reporting channel must be assessed in the light of the circumstances of each case*".[50]

In the *Halet* case, the ECtHR GC recognized that, in view of the broad interpretation of "the range of information of public interest that may fall within the scope of whistle-blowing",[51] and the acceptance that not only illegal but also reprehensible acts may justify whistleblowing under Art. 10 ECHR,[52] "o*nly direct recourse to an external reporting channel is likely to be an effective means of alert*" in situations "*where conduct or practices relating to an employer's normal activities are involved and these are not, in themselves, illegal*".[53] In those circumstances, when the use of internal channels would in all likelihood be ineffective, the ECtHR GC concluded that the use of external reporting channels, which may include the media when necessary, should be considered acceptable for the effective respect of the right to impart information of public interest.[54] Thus agreeing with the Luxembourg Court of Appeal on this point, the ECtHR GC considered that Mr Halet had no other choice but to resort to the use of external means of reporting.[55]

2. The authenticity of the disclosed information

In view of the considerations set out in the Explanatory Memorandum to Recommendation CM/Rec(2014)7 and the Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,[56] the ECtHR GC confirmed its previous case-law[57] by holding: "*[w]here a whistleblower has diligently taken steps to verify, as far as possible, the authenticity of the*

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[48] *Ibid.*, para. 122.
[49] See *Committee of Ministers (CM)*, Recommendation CM/Rec(2014)7 on the Protection of Whistleblowers, *Explanatory Memorandum*, principle 22, para. 85.
[50] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 123.
[51] *Ibid.*, para. 133.
[52] *Ibid.*, para. 137.
[53] *Ibid.*, para. 172.
[54] *Ibid.*
[55] *Ibid.*
[56] See *United Nations (UN)*, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye (hereinafter "Report of the Special Rapporteur David Kaye"), *A/70/361*, 8 September 2015, para. 30.
[57] *Yurttagül*, Whistleblower Protection (Fn. 9), pp. 129-130.

disclosed information, he or she cannot be refused the protection granted by Article 10 of the Convention on the sole ground that the information was subsequently shown to be inaccurate".[58] The Luxembourg Court of Appeal having confirmed the accuracy and authenticity of the information disclosed, the ECtHR did not see any reason to depart from these findings.[59]

3. The applicant's good faith

Interestingly, the ECtHR GC confirmed the qualifying criteria it previously developed to assess the good faith of the employee, departing thereby from the Recommendation CM/Rec(2014)7 and the Report of the UN Special Rapporteur. Indeed, the Court reiterated that the motive behind the disclosure is relevant to determine whether the employee acted in good faith under Art. 10 ECHR.[60] In the case at hand, the ECtHR quoted the Luxembourg Court of Appeal, which held that the applicant "*did not act "for profit or in order to harm his employer"*", and confirmed that he thus fulfilled the good-faith requirement.[61]

4. The balancing of the public interest in the disclosed information and the detrimental effects of the disclosure

According to the ECtHR GC, while it "*confirmed*" and "*consolidated*" existing principles in the present *Halet* judgment, it also "*refined the terms of the balancing exercise to be carried out between the competing interests at stake*", and it is on the basis of this "*refined*" case-law that the balancing exercise of the domestic courts should be assessed.[62] Hence, if the ECtHR GC finds that the domestic courts did "*not satisfy the requirement thus defined*", it would undertake the balancing exercise itself.[63]

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[58] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 126.
[59] *Ibid.*, para. 173.
[60] *Ibid.*, para. 128.
[61] *Ibid.*, para. 174.
[62] *Ibid.*
[63] *Ibid.*, para. 178.

a. the context of the impugned disclosure

The ECtHR GC emphasized that the balancing exercise should take into account the context and the specific circumstances of each case.[64] The main point addressed by the ECtHR GC in this respect was the three qualifying criteria developed by the Luxembourg Court of Appeal to conclude that the disclosure "*neither contributed to the public debate […] nor triggered the debate on tax evasion*", namely the fact that the information disclosed was not, in its view, "*essential, new and previously unknown*".[65] Contradicting the Luxembourg Court of Appeals, the ECtHR GC reaffirmed its previous case-law according to which "*a public debate may be of an ongoing nature and draw on additional information*".[66] "*[P]ublic debates is not frozen in time*" the ECtHR GC underlined, "*[r]evelations concerning current events or pre-existing debates may also serve the general interest*".[67] In light of these considerations, the ECtHR GC thus concluded that "*the sole fact that a public debate on tax practices in Luxembourg was already underway when the applicant disclosed the impugned information cannot in itself rule out the possibility that this information might also be of public interest, in view of this debate, which had given rise to controversy as to corporate tax practices in Europe and particularly in France […] and the public's legitimate interest in being apprised of them*".[68]

b. the public interest of the disclosed information

In line with its constant case-law, the ECtHR GC recalled that debate on questions of public interest bears only limited restrictions.[69] In this respect, it emphasized that information with a supranational (*i.e.*, European or international) element,[70] as well as information related to conduct of private companies,[71] can also be matters of public interest. In its judgment, the ECtHR identified three categories of information of value for the public interest structured in a hierarchical order:[72] (1)

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[64] *Ibid.*, paras 156 and 180.
[65] See reference to the Luxembourg Court of Appeal judgment in ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 35.
[66] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 184.
[67] *Ibid.*
[68] *Ibid.*, para. 184 *in fine*.
[69] *Ibid.*, para. 131.
[70] *Ibid.*, para. 143.
[71] *Ibid.*, para. 142.
[72] *Ibid.*, para. 140-141.

unlawful acts, practices or conduct, (2) reprehensible acts, practices or conduct,[73] and (3) "*information that concerns the functioning of public authorities in a democratic society and sparks a public debate, giving rise to controversy likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed opinion as to whether or not it reveals harm to the public interest*".[74]

The ECtHR GC underlined however that, while the public access to certain information, including taxation data, could enable a debate on questions of public interest, "*the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism*".[75] In determining whether the public interest in obtaining the disclosed information protected by a duty of confidentiality or of secrecy is susceptible to override said duty, the ECtHR must thus balance the public interest in the information disclosed against the interests the duty of confidentiality or of secrecy was intended to protect,[76] taking into account the particular circumstances of the case.[77]

When considering the context of the disclosure, the ECtHR GC already hinted at the outcome of its evaluation regarding the public interest in receiving the information disclosed by the applicant. Since it had already recognized in previous case-law the relevance of taxation data for the debate on matters of public interest, the ECtHR agreed with the Luxembourg Court of Appeal's findings that the information disclosed by the applicant could be regarded as "*alarming and scandalous*",[78] but diverged in its assessment of the relevance of the information for the public debate. Indeed, the ECtHR GC held that "*the purpose of whistle-blowing is not only to uncover and draw attention to information of public interest, but also to bring about change in the situation to which that information relates, where appropriate, by securing remedial action by the competent public authorities or the private persons concerned, such as companies*".[79] In this respect, the ECtHR noted that "*it is sometimes necessary for the alarm to be raised several times on the same*

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[73] *Ibid.*, para. 137.
[74] *Ibid.*, para. 138.
[75] *Ibid.*, para. 132.
[76] *Ibid.*, para. 136.
[77] *Ibid.*, para. 144.
[78] *Ibid.*, para. 185.
[79] *Ibid.*, para. 187.

subject before complaints are effectively dealt with by the public authorities, or in order to mobilise society as a whole and enable it to exercise increased vigilance".[80] Contrary to the Luxembourg Court of Appeal's position, the ECtHR therefore held that the fact that the public debate on tax optimisation practices was already ongoing is not sufficient ground to reduce the relevance of the information disclosed.[81]

In the ECtHR's view, "*the disclosure of those two types of document […] contributed, in the present case, to building up a picture of the taxation practices in force in Luxembourg, their impact at European level and the tax strategies put in place by renowned multinational companies in order artificially to shift profits to low-tax countries and, in so doing, to erode the tax bases of other States*".[82] Because the documents disclosed concerned the tax returned of well-known multinational companies and provided insight into their financial situations and assets, the ECtHR GC considered that it was more easily understandable and therefore helped to inform the public on the complex but important issue of corporate taxation, especially in view of the economic and social position now held by global multinational companies.[83] The ECtHR thus concluded that the information disclosed by the applicant "*undoubtedly contributed to the ongoing debate […] on tax evasion, transparency, fairness and tax justice*".[84]

c. the detrimental effects

The ECtHR noted that the disclosure of information by an employee can have a wide array of detrimental consequences, which can be public and private in nature.[85] This observation led the ECtHR GC to clarify "*the terms of the balancing exercise to be conducted between the competing interests at stake: over and above the sole detriment to the employer, it is the detrimental effects, taken as a whole, that the disclosure in issue is likely to entail which should be taken into account in*

[80] *Ibid.*
[81] *Ibid.*, para. 187 *in fine*.
[82] *Ibid.*, para. 188.
[83] *Ibid.*, para. 190-192.
[84] *Ibid.*, para. 192.
[85] *Ibid.*, para. 147.

assessing the proportionality of the interference with the right to freedom of expression of whistle-blowers who are protected by Article 10 of the Convention".[86]

The ECtHR reaffirmed the relevance of the damage caused to the employer in determining the proportionality of the interference in the employee's right to freedom of expression following a disclosure, but reiterated that the detrimental effects must be assessed as a whole, not only with respect to the damage caused to the employer.[87] With this aim in mind, the ECtHR GC not only acknowledged the financial and reputational damage suffered by PwC taken into account by the Luxembourg Court of Appeal, it also recognized the prejudicial effect the disclosure might have had on the private interests and reputation of the multinational companies whose names were disclosed by the documents.[88] With regard to the damage to the public interest, the ECtHR considered that preventing and punishing theft, as well as preserving professional secrecy are in the public interest and should be taken into account in determining the detrimental effects of the disclosure. [89] In the light of these findings, the ECtHR considered that the Luxembourg Court of Appeal limited itself to assessing in general terms the damage suffered by the employer instead of taking all the other detrimental effects into account, and failed to explain why the damage suffered by the employer should prevail over the public interest in the disclosure.[90]

d. the outcome of the balancing exercise

The ECtHR GC concluded that because the Luxembourg Court of Appeal failed to take into account the specific circumstances and requirements of the present case,[91] it must undertake the balancing exercise itself and decided that, in view of its previous findings, "*the public interest in the disclosure of that information outweighs all of the detrimental effects*".[92]

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[86] *Ibid.*, para. 148.
[87] *Ibid.*, para. 193.
[88] *Ibid.*, para. 194-196.
[89] *Ibid.*, para. 197-198.
[90] *Ibid.*, para. 200.
[91] *Ibid.*, para. 201.
[92] *Ibid.*, para. 202.

5. the severity of the sanction

In previous cases, the ECtHR had already established that the sanction imposed on a whistleblower can take various forms, from dismissal to the imposition of criminal penalties. Such sanctions can not only negatively impact the career of the whistleblower, they can also have a chilling effect on other employees.[93] Thus, "*the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression*".[94] However, the ECtHR GC underlined that the content of the disclosure and the nature of the duty of confidentiality breached may amount to a criminal offense, and emphasized that the cumulative effect of different sanctions may not systematically have a chilling effect on the exercise of freedom of expression.[95] In the *Halet* case, the ECtHR decided that considering the chilling effect of the penalties and their accumulation, namely the dismissal and prosecution, on the applicant and other whistleblowers, the criminal conviction of the applicant amounted to a disproportionate interference in view of the legitimate aim pursued.[96]

IV. Conclusion of the GC

For these reasons, the GC concluded by twelve votes to five that the interference in the applicant's right and freedom to impart information was not necessary in a democratic society[97] and ruled, twelve votes to five, in favour of a violation of Art. 10 ECHR. The applicant was awarded Euro 15,000 in respect of non-pecuniary damage and Euro 40,000 in respect of the costs and expenses.

D. Critique of the Grand Chamber Judgment and Outlook

The recognition by the GC of Mr Halet's status of whistleblower, which entitled him to the special protection under Art. 10 ECHR, should be welcomed. But beyond the value of the decision for the specific case of Mr Halet and the LuxLeaks disclosure, which gave the GC an opportunity to reaffirm the essential role of

[93] *Ibid.*, para. 149-150.
[94] *Ibid.*, para. 154.
[95] *Ibid.*, paras 152-153.
[96] *Ibid.*, para. 204-205.
[97] *Ibid.*, para. 206-207.

whistleblowers in democratic societies[98] and the special protection they are entitled to under the ECHR,[99] this judgment was also a chance for the ECtHR GC to assess the new developments on the European and international level with regard to whistleblower protection, and decide if and to what extent the criteria and principles developed in its *Guja* case-law should reflect these new developments. In this respect, all the GC judges appear to agree that the *Guja* criteria need to be re-evaluated,[100] but the dissenting opinions of the judges who decided to vote against a violation of Art. 10 ECHR appear to suggest that an intense debate took place with regard to the extent of this reevaluation, the final judgment representing, in all likelihood, the result of a delicate compromise.

In my view, this compromise led to unfortunate consequences with regard to the protection of whistleblowers under Art. 10 ECHR. As a "*living instrument*", the ECHR must be interpreted in the light of present-day conditions,[101] and the ECtHR had given itself the freedom to depart from its earlier decisions **"***in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions*"[102] so as to align the application of the ECHR **"***to any emerging consensus***"**.[103] In the present case however, while the GC reaffirmed some of the more controversial elements of its case-law, refusing to reflect the consensus which emerged on the European and international stage, it decided to innovate on other points at the risk of weakening the special protection under Art. 10 ECHR and jeopardizing the stability and foreseeability of its case-law. Rather than "*confirming*" and "*consolidating*" existing principles[104] in the light of the European and international development, as it claimed, the ECtHR GC went above and

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[98] *Ibid.*, para. 204.
[99] *Ibid.*, para. 112.
[100] In their dissenting opinion to the ECtHR GC *Halet v. Luxembourg* judgment, judges Ravarani, Mourou-Vikström, Chanturia and Sabato agreed "*on the need to "revisit" the Guja criteria*", while in his dissenting opinion, judge Kjølbro only distanced himself from the public interest assessment part of the judgment, which seems to imply that he does not disagree with the majority's wish to take the new developments into account when assessing the *Guja* critera. See ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabato, p. 71, and Dissenting opinion of judge Kjølbro, p. 80.
[101] ECtHR, *Tyrer v. UK*, Appl. no. 5856/72, 25 April 1978, para. 31; ECtHR, *Johnston and Others v. Ireland*, Appl. no. 9697/82, 18 December 1986, para. 53; ECtHR, *Inze v. Austria*, Appl. no. 8695/79, 28 October 1987, para. 41; ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 9 October 1979, para. 26.
[102] ECtHR, *Cossey v. United Kingdom*, Appl. no. 10843/84, 27 September 1990, para. 35.
[103] ECtHR, *Chapman v. United Kingdom* [GC], Appl. no. 27238/95, 18 January 2001, para. 70.
[104] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 120.

beyond "*refining*" the *Guja* criteria and created instead entirely new principles, initiating thereby a shift away from the emerging consensus and into "*unknown territory*".[105]

I. Reporting channel used

The ECtHR GC appears to take a more nuanced approach to the tiered model of reporting established in the *Guja* ruling, as it emphasized in its *Halet* ruling that the criterion should be assessed taking into account the circumstances of the case, in reference to the Committee of Ministers Recommendation CM/Rec(2014)7.[106] While this formulation remains vague and does not provide the necessary clarification with regard to the requirements that need to be fulfilled when using external reporting channel or public disclosure, it appears to hint at the ECtHR GC's willingness to gradually align its case-law to the European and international consensus. While it acknowledged that certain circumstances may legitimately require an employee to directly use external reporting channels, and where necessary, the media,[107] the ECtHR GC did not establish clear guidelines that would prevent a fragmentation of the protection shield under the ECtHR, which is unfortunate.

II. Good faith & the motive behind the disclosure

Regrettably, the ECtHR GC decided to confirm one essential principle of its case-law, in opposition to the European and international consensus, namely the motives of the whistleblower as a qualifying element of the good faith.[108] In doing so, it referred to the formulation of the Parliamentary Assembly resolution 1729 dated 2010 which states that: "*Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the*

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[105] Term used in reference to the dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabato, where they considered that the *Halet* GC judgment "v*entures into unknown territory*" with regard to the balancing exercise between the duty of professional secrecy and whistleblowing disclosure. See ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabato, p. 73.
[106] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 123.
[107] *Ibid.*, para. 172.
[108] *Ibid.*, para. 128.

information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives".[109]

Irrespective of whether "*objectives*" and "*motives*" should be construed as synonymous in the context of the Parliamentary Assembly resolution 1729, the fact remains that the ECtHR GC conveniently omitted to mention the European and international consensus which emerged in the decade that followed its *Guja* ruling and this 2010 Parliamentary Assembly resolution. Indeed, while the *Halet* judgment reproduces other passages of the relevant European and international framework, such as the 2015 report of the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression,[110] the 2014 Council of Ministers Recommendation,[111] and the 2019 EU Whistleblower Directive,[112] the ECtHR GC did not include or disregarded these documents' stand with regard to this specific point. It is particularly unfortunate since the UN Special Rapporteur, the Council of Ministers and the EU all excluded the motive as an element of the good faith.[113]

In a passage of the UN report reproduced in the GC *Halet* Judgment, the UN Special Rapporteur indeed emphasized that "[i]t should not matter why the whistle-blower brought the information to attention if he or she believed it to be true".[114] In another passage reproducing the considerations of the EU Whistleblower Directive, it is stated that "*[t]he motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection*".[115] In the Appendix to the

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[109] *Ibid.*, para. 126; See Council of Europe Parliamentary Assembly, Resolution 1729 (2010), para.6.2.4 "*Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she does not pursue any unlawful or unethical objectives*". On the initiating role of the Parliamentary Assembly, see *Yurttagül*, Whistleblower Protection (Fn. 9), pp. 81-85.

[110] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 54.

[111] *Ibid.*, para. 57.

[112] *Ibid.*, para. 58.

[113] *UN*, Report of the Special Rapporteur David Kaye (Fn. 56), para. 31; *CM*, Recommendation CM/Rec (2014)7 (Fn. 49), Explanatory memorandum, para 85; Article 6(1)(a) Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [hereinafter **"**EU Whistleblower Directive**"**], OJ L 305, 26.11.2019.

[114] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 54; see *UN*, Report of the Special Rapporteur David Kaye (Fn. 56), para. 31.

[115] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 58; see Consideration 32 to EU Whistleblower Directive (Fn. 113) and Article 6(1) of the same Directive, where the motive is not stated as a condition for the protection of whistleblowers.

Explanatory Memorandum of the Committee of Ministers Recommendation, not reproduced in the GC *Halet* judgment, it is stated that the principle establishing the extent of protection for whistleblowers "*has been drafted in such a way as to preclude […] the motive of the whistleblower in making the report or disclosure*".[116]

Also not mentioned in the GC *Halet* Judgment but relevant nonetheless considering its position in the Council of Europe framework, the opinion of the Venice Commission on the matter concurs with the positions described above, as it held that "*the protection the law offers to the whistleblowers should be primarily based on the service to society, and not on the question whether the person who rendered this service was self-interested or not.* Mala fides *disclosures may still serve a good and important cause while* bona fides *does not guarantee a positive contribution to the public interest*".[117] Without developing further on the element of good faith and motive, an issue I have discussed in extensive details elsewhere,[118] suffice it to say that aside from the procedural difficulty of establishing the true motives of an individual,[119] "*malice is [indeed] very difficult to prove*",[120] determining a whistleblower's motivation does not influence the veracity of the information reported or the legitimate public interest in its disclosure.[121]

In view of the above considerations, the ECtHR GC's continued support for the element of "motive" as one of the conditions for the protection of whistleblowers under Art. 10 ECHR, an opinion which seems to be shared by all the judges of the GC,[122] is particularly unfortunate as it does not reflect the consensus which emerged since the *Guja* ruling with respect to the determination of good faith. The ECtHR GC therefore missed an excellent opportunity to depart from its *Guja* ruling

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[116] *CM*, Recommendation CM/Rec (2014)7 (Fn. 49), Appendix to the Explanatory Memorandum, para. 85.
[117] *European Commission for Democracy through Law* [hereinafter **"**Venice Commission**"**], Opinion on the Law on the protection of privacy and on the Law on the protection of whistleblowers of **"**the former Yugoslav Republic of Macedonia**"**, *Op. No. 829/2015*, CDL-AD(2016)008, 15 March 2016, para. 73.
[118] *Yurttagül*, Whistleblower Protection (Fn. 9).
[119] *Nader*, *Petkas*, *Blackwell* (eds) (1972), Whistleblowing: the report of the conference on professional responsibility, New York: *Grossman Publishers*, p. 203.
[120] *Venice Commission*, Op. No. 829/2015 (Fn. 117), para. 71.
[121] *International Bar Association* (2018) Whistleblower protections: a guide, p. 23, available at https://www.ibanet.org/MediaHandler?id=a8bac0a9-ea7e-472d-a48e-ee76cb3cdef8 (last accessed 10/04/2024); *Elliston* (1982), Anonymity and Whistleblowing, *Journal of Business Ethics*, Vol. 1, No. 3, p. 174.
[122] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, p. 71.

in order to align the application of the living instrument that is the ECHR to this emerging consensus.

III. The public interest of the disclosure

If the ECtHR GC used the *Halet* ruling as an opportunity to reaffirm the *Guja* criterion of "*good faith*", it decided to refine its position with regard to the criterion of "*public interest of the disclosure*", a position which attracted strong criticism from dissenting judges.[123] As a reminder, the ECtHR GC developed in its judgment three categories of public interest information.[124] The dissenting judges strongly criticized the third category, namely: "*certain information that concerns the* ***functioning of public authorities*** *in a democratic society and sparks a public debate,* ***giving rise to controversy*** *likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed opinion as to whether or not it reveals harm to the public interest.*"[125]

In their dissenting opinions, all the judges who voted against the majority strongly disagreed with this wording,[126] judges Ravarani, Mourou-Vikström, Chanturia and Sabat claiming that it extended the concept of the public interest with negative consequences for the legal certainty of the Court's whistleblowing case-law.[127] However, this would be ignoring the fact that the majority merely reflected previous case-law on the matter. Admittedly, while it may have for the first time organized these categories in a structured order of importance for the public interest, consolidating thereby its existing case-law, the ECtHR GC relied on precedent,[128] contrary to the allegation of dissenting judges Ravarani, Mourou-Vikström, Chanturia and

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[123] See ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, and dissenting opinion of judge Kjølbro.
[124] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), paras 137-138.
[125] *Ibid.*, para. 138, *emphasis added*.
[126] See ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, and dissenting opinion of judge Kjølbro, pp. 71 *et sequ*.
[127] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat.
[128] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), paras 134-135, referring to ECtHR, *Guja v Moldova* [GC] (Fn. 3); ECtHR, *Bucur and Toma v. Romania*, Appl. no. 40238/02, 8 January 2013; ECtHR, *Gawlik v. Liechtenstein*, Appl. no. 23922/19, 16 February 2021; ECtHR, *Heinisch v. Germany* (Fn. 18); and ECtHR, *Görmüş and Others v. Turkey*, Appl. no. 49085/07, 19 Janvier 2016.

Sabat.[129] The "*functioning of public authorities*" is indeed an element the ECtHR consistently took into account when determining the public interest of a disclosure.

In its *Guja* ruling for example, the ECtHR GC ruled that the documents disclosed by the applicant related to "*the separation of powers, the improper conduct by a high-ranking politician and the government's attitude towards police brutality*", which constituted information of public interest.[130] In the *Bucur and Toma* ruling, the disclosure of irregularities within the surveillance apparatus of Romania was also considered in the public interest.[131] The ECtHR also reiterated in its *Kudeshkina* ruling that "*issues concerning the functioning of the justice system constitute questions of public interest*".[132] In its *Görmüş and Others* ruling, the ECtHR held that the disclosure of information regarding questionable practices of the Turkish armed forces is in the public interest.[133] Hence, the wording used by the ECtHR GC in its *Halet* ruling does not appear particularly novel in light of these precedents. The intention of the ECtHR GC to consolidate its case-law rather than develop a new principle may also be inferred from the structure of the judgment itself, where the ECtHR GC first analyzed the precedent[134] to draw the different categories from it.[135]

Nonetheless, one element which may lead to confusion is the fact that the ECtHR refers only to "*the functioning of public authorities*" at first, which seems to limit the scope of this third category to the public sector, but later specifies that "*although information capable of being considered of public interest concerns, in principle, public authorities or public bodies, it cannot be ruled out that it may also, in certain cases, concern the conduct of private parties, such as companies*".[136] Should this extension to the private sector be also applicable to the third category? If so, why

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[129] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, pp. 72 under "*A doubtful case-law precedent*".
[130] ECtHR, *Guja v Moldova* [GC] (Fn. 3), para. 88.
[131] ECtHR, *Bucur and Toma v. Romania* (Fn. 128), paras 101-104.
[132] ECtHR, *Kudeshkina v. Russia*, Appl. no. 29492/05, 26 February 2009, para. 86.
[133] ECtHR, *Görmüş and Others v. Turkey* (Fn. 128), para. 63: "*pratiques discutables*". See also para. 76 of the same judgment: "*fonctionnaires ayant constaté et signalé des comportements ou des pratiques qu'ils estimaient contestables sur leur lieu de travail",* English transl. *"public employees who have observed and reported behaviors or practices in their workplace which they consider questionable*".
[134] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), paras 134-135.
[135] *Ibid.*, paras 137-142.
[136] *Ibid.*, para. 142.

did the ECtHR GC choose to formulate the third category in such restrictive terms if it is to broaden its scope a few paragraphs later? The reasoning of the ECtHR GC which follows the description of the three categories does little to clarify the situation. With a reference to its *Heinisch* ruling, which concerned an applicant under a private-law employment contract, the ECtHR GC indeed states that "*[i]nformation concerning acts, practices or conduct which, while not unlawful in themselves, are nonetheless reprehensible or controversial may also be particularly important*".[137] It thereby makes mention of the second category (reprehensible acts, practices or conduct), but also uses the same notion as in its third category, namely the controversial nature of the information.

This sentence casts doubt on the GC's actual intention to create three distinct categories of information to be appreciated in a hierarchical order of value for the public interest. At first, the ECtHR GC clearly held that, after confirming the public interest of information on unlawful and reprehensible acts, practices or conduct, which may justify whistleblowing, it "***could also apply**, as appropriate, to certain information that concerns the functioning of public authorities* ..",[138] thus creating a distinct category for this specific kind of information, described in a separate paragraph. However, the subsequent phrasing laying down the ECtHR GC's reasoning under the criterion of "*public interest of the disclosed information*" would tend to suggest that the second ('reprehensible acts, practices and conduct) and third categories (information giving rise to controversy) enjoy the same value and should be considered jointly. In view of these considerations, I agree with the dissenting judges Ravarani, Mourou-Vikström, Chanturia and Sabat[139] that this sentence was unnecessary to resolve the dispute in the case at hand, and created legal uncertainty which could have been avoided. If one was to interpret the third category in the light of precedents involving disclosures made by employees in private-law employment relationships, such as in the *Heinisch* and *Gawlik* cases where the ECtHR considered that the disclosure of information regarding shortcomings in the care for the elderly or suspicions of medical malpractice are in the public interest,[140] the

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[137] *Ibid.*, para. 141.
[138] *Ibid.*, para. 138.
[139] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, pp 73-74.
[140] ECtHR, *Heinisch v. Germany* (Fn. 18), para. 71; ECtHR, *Gawlik v. Liechtenstein* (Fn. 128), para. 73.

question of whether the third category should also extend to the functioning of private entities, not only public authorities, would likely have to be answered in the affirmative. The reasoning followed by the ECtHR GC in its *Halet* ruling appears to reinforce this assumption.

In cases of disclosures involving public employers, the latter's function in a democratic society was indeed systematically taken into consideration by the ECtHR to determine the public interest in the information disclosed. In its *Halet* ruling, where the employer was a fully private entity which provided, inter alia, tax advice and developed tax optimization techniques for its clients, the ECtHR GC held that "*[t]he role of tax revenues on States' economies and budgets and the considerable challenges posed for governments by tax strategies such as profit shifting […] must also be taken into consideration*" in determining the weight of the public interest in the disclosure. Furthermore, the latter must also account for "*the place now occupied by global multinational companies [whose taxation data were disclosed], in both economic and social terms*".[141] In the case of a disclosure involving a private employer, the ECtHR thus included not only the assessment of the function or place of this private employer in society, but also of third parties, including private entities, to determine the weight of the public interest in the disclosure.

Consequently, the ECtHR GC broadens the range of factors which could be included in its assessment, influencing thereby the balancing exercise between the different interests at stake, a clarification the ECtHR GC did not fail to emphasize in its judgment when it noted that due regard must be given to the interests of the employers and third parties when they are protected by professional secrecy.[142]

This brings us, in my view, to the most consequential and controversial novelty of the ECtHR GC *Halet* ruling.

IV. Damage suffered by the employer vs. all the detrimental effects

The most significant development of the GC *Halet* ruling is indeed the redefinition of the "*damage*" criterion. As previously observed, the ECtHR GC merged the

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[141] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 192.
[142] *Ibid.*, para. 136.

analysis of the "*public interest of the disclosed information*" and the "*damage*" criteria under the same heading. It also expressly refers to the damage the disclosure may have caused to the public interest in general,[143] a component already implied in the *Guja* ruling.[144] But the fundamental change relates to the nature of the "damage" criterion, which now not only incorporates "*the damage suffered by the employer"*, but also *"all of the detrimental effects arising from the impugned disclosure*".[145] On the basis of this new definition, the ECtHR GC includes into the balance not only the prejudicial effect suffered by PwC as the employer but also the detrimental effect to the private interests of third parties impacted by the disclosure.[146]

According to this new precedent, which fundamentally changes the nature of the fifth criterion and greatly broadens its scope, three different categories of detrimental effects must thus be taken into account: (1) the damage to the interests of the employer; (2) the damage to the interests of third parties affected by the disclosure; and (3) the damage to the public interest in general. Furthermore, where the *Guja* ruling assessed the underlying damage to the public interest through the assessment of the damage suffered by the employer as a result of the disclosure, the *Halet* ruling seems to undertake a clear divide, creating independent categories to be assessed separately. This represents a fundamental shift from previous case-law, since this dissociation creates a separate category to take account of the detrimental effect to the public interest, and clears the way for the inclusion of purely private interests entirely void of a public interest component. Indeed, if the assessment of the damage is not carried out to determine its underlying impact on the public interest, as it was the case so far, interests which do not entail a public interest component can thus be taken into account. Consistent with this new approach, the

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[143] *Ibid.*, para. 197.
[144] ECtHR, *Guja v Moldova* [GC] (Fn. 3), para. 76: It refers in particular to its *Hadjianastassiou* and *Stoll* rulings. In those two cases, the ECtHR held that the disclosures of the information were likely to cause a considerable damage to the States' national interests, concluding that the interferences in the applicants' right to freedom of expression were therefore legitimate under Article 10 ECHR. See ECtHR, *Hadjianastassiou v. Greece*, Appl. no. 12945/87, 16 December 1992, para. 45; ECtHR, *Stoll v. Switzerland* [GC], Appl. no. 69698/01, 10 December 2007, para. 130. See also ECtHR, *Halet v. Luxembourg* [Chamber] (Fn. 5), Dissenting opinion of judges Lemmens and Pavli, para. 6.
[145] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 193.
[146] *Ibid.*, paras 194-196.

ECtHR GC held that the private interests and reputation of PwC's clients are to be included into the balance of detrimental effects arising from the disclosure.[147]

On the basis of this new precedent, the balancing exercise is therefore not between two public interests, as in previous cases,[148] but between the public interest of the information disclosed and all the detrimental effects caused by the disclosure.[149] The damage to the public interest thus becomes a fully-fledge and independent category and does not represent the underlying substantial element on the other side of the scale. In its *Gawlik* and *Heinisch* rulings involving employees with private-law employment contracts, the ECtHR already had an occasion to specify that the commercial success and viability of companies deserve protection, for the benefit of shareholders, employees and the wider economic good,[150] emphasizing the detrimental effect that a disclosure can cause to the business reputation and interests of an institution, as well as to the reputation of the institution's other employees.[151] In those cases however, even if the applicants' employment contracts were governed by private law, the employers were public and majority state-owned institutions, where the public confidence in these institutions was at stake.[152]

As discussed earlier, the proper functioning of public authorities or companies influences the assessment of the ECtHR when determining the public interest of the disclosed information. Similarly, the public confidence in the functioning of these public institutions or companies hitherto played an important role when determining the damage suffered by the employer. In line with the *Guja* ruling, where the ECtHR GC underlined that "*the subject matter of the disclosure and the nature of the [employer] concerned may be relevant*" when conducting the balancing exercise between the damage suffered and the public interest in the information,[153] the ECtHR whistleblowing case-law regularly reiterated that a disclosure by an employee may have a detrimental effect on the proper function of the tasks undertaken

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[147] *Ibid.*, para. 196.
[148] ECtHR, *Halet v. Luxembourg* [Chamber] (Fn. 5), Dissenting opinion of judges Lemmens and Pavli, para. 6.
[149] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 148.
[150] ECtHR, *Heinisch v. Germany* (Fn. 18), para. 89.
[151] ECtHR, *Gawlik v. Liechtenstein* (Fn. 128), para. 79.
[152] ECtHR, *Heinisch v. Germany* (Fn. 18), para. 89; ECtHR, *Gawlik v. Liechtenstein* (Fn. 128), para. 79.
[153] ECtHR, *Guja v Moldova* [GC] (Fn. 3), para. 76.

by the employer concerned. For instance, the disclosure of information may jeopardize the confidence in the "*independence and political neutrality of the prosecuting authorities of a State*",[154] in the national intelligence agencies,[155] in the judiciary's authority[156] or in the equal treatment of the press by the State.[157] Until now, the nature of the tasks undertaken by the institution concerned and the related interest to maintain confidence in its proper functioning constituted factors to take into account when determining whether the damage suffered by the employer is susceptible to outweigh the interest of the public to receive the information disclosed.

In the *Hadjianastassiou* case for example, the ECtHR considered that the disclosure of technical information about a weapon used in the national army can cause "*a considerable damage*" to the national security of a country[158] and therefore concluded that applicant's conviction did not amount to a violation of Art. 10 ECHR.[159] In the *Stoll* case, the ECtHR held that the disclosure of an ambassador's internal report during a sensitive period of negotiation undermined the climate of discretion necessary to the proper functioning of diplomatic relations, causing "*considerable damage*",[160] and concluded that the applicant's conviction can be regarded as proportionate in the light of the legitimate aim pursued.[161] On the other hand, the ECtHR held in the *Bucur and Toma* case that even if the intelligence service of a State has a legitimate interest in maintaining public trust, the interest of the public to obtain information about illegal activities within its institution is so important in a democratic society that it overrides the interest of that institution in preserving public confidence.[162]

The damage to the public interest was thus the underlying element to consider in order for the ECtHR to determine whether said damage should prevail over the public interest of the information disclosed. The ECtHR GC departs from this

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[154] *Ibid.*, para 90.
[155] ECtHR, *Bucur and Toma v. Romania* (Fn. 128).
[156] ECtHR, *Kudeshkina v. Russia* (Fn. 132), para. 86.
[157] ECtHR, *Görmüş and Others v. Turkey* (Fn. 128), para. 63.
[158] ECtHR, *Hadjianastassiou v. Greece* [Fn. 144], para. 45 "*préjudice considérable*".
[159] *Ibid.*, para. 47.
[160] ECtHR, *Stoll v. Switzerland* [GC] (Fn. 144), para. 136 "*préjudice considérable*".
[161] *Ibid.*, para. 162.
[162] ECtHR, *Bucur and Toma v. Romania* (Fn. 128), para. 115.

jurisprudence in the *Halet* case, changing the nature of the fifth criterion. This change, which redefines the essence of the criterion itself, may have been motivated by the consolidation the ECtHR GC had undertaken with respect to the public interest of the disclosure. Under the ”public interest of the disclosed information” criterion, the ECtHR indeed took into account the place occupied by PwC’s clients, third parties whose relevance in society was also considered to influence the weight of the public interest in the disclosure.[163] These considerations may have motivated the ECtHR GC to ”*fine-tune*”[164] the balancing exercise between the different interests at stake, for the purpose of coherence and consistency, especially if the information disclosed was protected by professional secrecy aimed at preserving not only the interests of the employer, but that of third parties.[165] In other words, if the position of third parties in society was included on one side of the scale, rendering information related to their functioning matters of public interest, their own interests, may they be purely private ones, should be included on the other side of the scale.

If we can only speculate about the motivation of the ECtHR GC for including the entirety of detrimental effects in its assessment of the fifth criterion, one thing is for certain: more than merely ”*fine-tuning*” the balancing exercise to be carried out between the different interests at stake, the ECtHR GC significantly alters the whistleblowing principles under Art. 10 ECHR.

V. Un revirement de jurisprudence?[166]

In view of the above considerations, I agree with the assessment made by the dissenting judges Ravarani, Mourou-Vikström, Chanturia and Sabat, who noted that the majority substantially modified the *Guja* criteria which could be seen as a *revirement de jurisprudence*.[167] If it did confirm in many respect established case-law (regrettably when it comes to the criterion of good faith), and consolidated other

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[163] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 192.
[164] Term used by the GC in ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 148.
[165] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 136.
[166] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, p. 75. In their dissenting opinion, judges Ravarani, Mourou-Vikström, Chanturia and Sabat refer to a ”*departure from the case-law*” (p. 75) (”*revirement de jurisprudence*” in the original French version of the opinion, p. 77).
[167] *Ibid.*, p. 75 (p. 77 in the original French version).

principles (under the "*public interest of the disclosed information*" in particular), the majority went beyond "*refining*" the balancing exercise, it fundamentally changed the scale. I would argue that this "*revirement*" should be understood as a revision of its jurisprudence rather than a true departure from existing case-law. The ECtHR GC did indeed not really overturn its jurisprudence but it did also not simply clarify or refine it. This "in between" will probably cause a lot of confusion in the years to come, and calls for a clear position of the ECtHR as to the significance of the changes introduced by the *Halet* ruling. For now, it claims to have merely "*clarified*", "*consolidated*" and "*refined*" the *Guja* principles, but it did much more than that as we have illustrated above. This position is particularly detrimental to the clarity and legal certainty whistleblowers deserve. This position of the ECtHR GC, refusing to acknowledge the changes it has introduced, has already led to a flawed reasoning in the *Halet* judgment itself.

The change in the case-law must have indeed led the ECtHR to apply the new criteria to the specific circumstances of the case instead of applying it to the reasoning followed by the Luxembourg Court of Appeal.[168] It should have recognized that far from merely "refining" the terms of the balancing exercise,[169] it fundamentally changed the scale. Hence, it should have looked at the interference in the light of the case as a whole and determined whether it was proportionate to the legitimate aim pursued. It is true that the subsidiary role and supervisory power requires the ECtHR to review the decisions of the domestic authorities under Article 10 ECHR to see if it "*applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts*".[170] But in the case at hand, the whistleblowing principles embodied in Article 10 ECHR and developed by the ECtHR GC in its *Guja* ruling had been significantly modified by the ECtHR GC in its *Halet* ruling. To apply the new standards it had developed to a domestic decision which applied old standards necessarily leads to a flawed result. While the Luxembourg Court of Appeal's reasoning is certainly not exempt from criticism,[171] it cannot be blamed for having failed to

[168] *Ibid.*, p. 75.
[169] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 178.
[170] See e.g. ECtHR, *Hertel v. Switzerland*, Appl. no. 59/1997/843/1049, Judgment of 25 August 1998, para. 46.
[171] See *Yurttagül*, LuxLeaks Whistleblower Not Protected by Article 10 ECHR.

foresee the new principles the ECtHR GC developed in its *Halet* ruling, especially considering the unexpected turn of this evolution as it was not prompted by the emerging consensus on the European and international stage.

But that did not prevent the ECtHR GC to criticize the Luxembourg Court of Appeal for having ”simply” considered the damage suffered by the employer,[172] instead of taking all the detrimental effects of the disclosure into account.[173] In doing so, the ECtHR GC ignores the fact that the detriment suffered by the employer was the only element to take into account when assessing this fifth criterion, at least until its present *Halet* ruling substantially changed and extended the latter to include all detrimental effects arising from the disclosure. As it were, the Luxembourg Court of Appeal would have failed to faithfully apply ”*standards which were in conformity with the principles embodied in Article 10*” if it had taken the detrimental effects to the private interests and reputation of PwC’s clients into account, as the ECtHR GC did in its *Halet* ruling.[174] The dissenting judges Ravarani, Mourou-Vikström, Chanturia and Sabat underlined in this context that in order to account for this new jurisprudence, the ECtHR GC should have limited itself to reviewing the specific circumstances of the case on the basis of this new evaluation to subsequently determine whether the Luxembourg Court of Appeal’s decision applying the old criteria aligned with its own findings.[175] Indeed, by assessing the Luxembourg Court of Appeal’s judgment, which applied the ”old” *Guja* criteria, against the new standards developed in its present ruling, the ECtHR GC could not but conclude that the balance struck by the domestic courts did not satisfy the requirements it had just established.[176]

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[172] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 199.
[173] *Ibid.*, para. 200.
[174] *Ibid.*, para. 194-196.
[175] See ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, p. 75. The dissenting judges refers to case ECtHR, *Sergey Zolotukhin v. Russia* ([GC], Appl. no. 14939/03, Judgment of 10 February 2009.
[176] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 201.

VI. The balancing exercise

Following this inevitable result, the ECtHR GC carried out the balancing exercise itself,[177] which it could have admittedly done from the start.[178] But if the ECtHR GC concluded that the applicant's conviction constituted a violation of his freedom to impart information, one can wonder whether ECtHR did in fact carry out the balancing exercise taking into account all the requirements it itself established. On the one hand, the ECtHR indeed stresses that by solely focussing on the damage to the employer, without taking into account the entirety of the detrimental effects arising from the disclosure, including the harm caused to the public interest and to the reputation and interests of PwC's clients, the Luxembourg Court of Appeal essentially failed to take sufficient account "*of the specific features of the present case*".[179] On the other hand however, when the ECtHR GC substituted its own view for that of the domestic court, for which it requires strong reasons one may add,[180] the ECtHR GC merely concluded "*that the public interest in the disclosure of that information outweighs all of the detrimental effects*"[181] without taking into account all the detrimental effects the Luxembourg Court of Appeal was just criticized for having failed to consider. The expeditious balancing exercise carried out by the ECtHR only referred to its findings relating to the public interest of the disclosed information, without taking into account its conclusions under the fifth criterion.[182] In so doing, the ECtHR GC reproduces the shortcoming it had aimed at overcoming by substituting its own view for that of the Luxembourg Court of Appeal.

It is particularly unfortunate considering that the ECtHR GC expressly stated in its judgment that the interest of the public in a subject cannot suffice to justify the public disclosure of confidential information, emphasizing that the circumstances of each case must be assessed *in concreto* to determine whether a breach of a duty of confidentiality may attract the special protection afforded to whistleblowers

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[177] *Ibid.*, para. 202.
[178] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, p. 75.
[179] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 201.
[180] See ECtHR, *Von Hannover v. Germany (no.* 2) [GC], Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, para. 107.
[181] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), para. 202 *in fine*.
[182] *Ibid.*, para. 202. The GC only refers to paragraphs 191-192, which concern the public interest in the information disclosed. The detrimental effects criterion was analyzed subsequently in paragraphs 193-200, which the GC did not refer to in the outcome of the balancing exercise.

under Art. 10 ECHR.[183] In the present case however, the ECtHR did not see it necessary "*to assess the scope of the professional secrecy to which the applicant was subject*".[184] However, if it emphasized that "*it cannot overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound*",[185] the fact that it did not assess in the present case the very scope of this duty of professional secrecy incumbent upon the applicant flawed the overall reasoning and outcome of the balancing exercise carried out by the ECtHR GC. In its *Halet* ruling, the ECtHR indeed held that the duty of professional secrecy exists "*over and above the duty of loyalty which usually governs employee-employer working relationships*",[186] emphasizing that the preservation of this duty to which the applicant was legally bound "*is undeniably in the public interest, in so far as its aim is to ensure the credibility of certain professions*".[187] If this duty of professional secrecy goes beyond the duty of loyalty owed to an employer, it thus becomes paramount to determine its extent in the present case as it relates to the very essence of the whistleblowing principles embodied in Article 10 ECHR by the *Guja* ruling. As a reminder, the ECtHR GC developed the six *Guja* criteria to guide its balancing exercise between, on the one hand, the duty of loyalty, reserve and discretion of employees, which can legitimately limit the extent to which they can exercise their right to free speech, and on the other hand, their right to report illegal conduct and wrongdoing at their place of work, which can in certain circumstances enjoy special protection under Art. 10 ECHR.

If a legally imposed duty of professional secrecy goes beyond employees' duty of loyalty, reserve and discretion owned to their employers, and if the preservation of such legal duty is in the public interest, it must be determined to what extent it should be weighed in the balance against the public interest of a disclosure. While the ECtHR GC did consider that "*[i]n certain cases, the interest which the public may have in particular information can be so strong as to override even a legally imposed duty of confidentiality*",[188] it did not determine the scope of this duty of

[183] *Ibid.*, para. 144.
[184] *Ibid.*, para. 198.
[185] *Ibid*., para. 202.
[186] *Ibid.*, para. 155.
[187] *Ibid.*, para. 197.
[188] *Ibid.*, para. 132.

professional secrecy in the present case, failing to include an important, if not the most important weight in the balance. While the ECtHR GC considered that in the case at hand, the interest of the public to receive the information disclosed prevails over the legally imposed duty of professional secrecy, it did not explain why this was the case, leaving us wondering as to the specific circumstances of the *Halet* case which made the balance tip in favor of the public interest in the disclosed information. Furthermore and considering the greater weight given by the ECtHR GC to the duty of professional secrecy compared to the duty of loyalty, reserve and discretion owed to employers, the question remains as to the interplay between this new principle and previous case-law which stated that the duty of loyalty, reserve and discretion is less pronounced in private-law employment relationships as compared to civil servants.[189]

E. Conclusion

Instead of clarifying its case-law and refining the terms of the balancing exercise, I would argue that the ECtHR GC's new ruling raises more questions than it answers. Without a clear understanding of the balancing exercise carried out by the ECtHR GC, it could indeed appear surprising, as the dissenting judges noted, that the ECtHR GC considered nonetheless that the public interest in the disclosure prevails.[190] On the basis of the *Halet* newly defined fifth criterion, which incorporates all the detrimental effects arising from the disclosure, it would be difficult not to see this evolution as a restriction to the special protection under Article 10 ECHR, increasing the stakes for potential whistleblowers. If the *Guja* case-law of 2008 was particularly forward-thinking and played a leading role in the European and international development that followed,[191] the *Halet* ruling as it stands makes it more arduous for potential whistleblowers to assess whether they will be afforded special protection under Article 10 ECHR, as they will be de facto required to determine

[189] ECtHR, *Wojtas-Kaleta v. Poland* (Fn. 18), para. 43; ECtHR, *Heinisch v. Germany* (Fn. 18), para. 64; ECtHR, *Matúz v. Hungary* (Fn. 18), para. 32; ECtHR, *Marunić v. Croatia* (Fn. 18), para. 52.
[190] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, p. 78.
[191] See e.g. reference to ECtHR, *Guja v. Moldova* [GC] (Fn. 1) in *CM*, Recommendation CM/Rec(2014)7; EU Whistleblower Directive, consideration 31; *Human Rights Committee*, Kouider Kerrouche v. Algeria, Views concerning communication No. 2128/2012, Annex, Individual opinion of Olivier de Frouville, *CCPR/C/118/D/2128/2012*, 29 December 2016; para. 2; *UN*, Report of the Special Rapporteur David Kaye (Fn. 56), para. 37.

whether the public interest of an information has the potential to outweigh the entirety of the detrimental effects arising from a disclosure. It is unreasonable to expect a potential whistleblower to evaluate all the detrimental effects that a disclosure could cause, which are undoubtedly very difficult to foresee. In putting the emphasis on the detrimental effects caused by the disclosure, the ECtHR goes against the emerging consensus which focusses on the damage whistleblowers are trying to alert on or prevent, establishing strong protection mechanisms which ensure that they do not suffer from retaliatory measures as a result of the disclosure. In effect, the new fifth criterion developed by the ECtHR GC in its *Halet* ruling deprives the whistleblower protection framework established in its *Guja* ruling of its substance, especially now that the public interest on the other side of the scale, namely on the side of the detriment to the employer, third parties, etc, is a separate element entirely, and does not constitute the underlying factor of this criterion.

The *Halet* fifth criterion must be overturned, or at the very least clarified, in order to avoid setting a new precedent which may significantly fragment the protection shield established by the *Guja* ruling, compromising the latter's paramount role in establishing new standards of protection for whistleblowers, which had an important global reach. For now, the new principles established by the *Halet* ruling may raise the legitimate question of its retroactivity. Considering the declaratory and thus retrospective character of ECtHR judgments, the dissenting judges Ravarani, Mourou-Vikström, Chanturia and Sabat suggested "the possibility of temporal adjustment of the effects of its judgments".[192] If not overturned, the restrictive nature of the *Halet* ruling, compared to previous case-law, requires such a temporal adjustment considering that the new definition of the fifth criterion provided by the GC *Halet* judgment was unforeseeable and is less favorable for potential whistleblowers. This reversal of case-law not reasonably foreseeable and *in defavorem* prevents the retroactive effect of this judgment, since the change introduced under the fifth criterion subjects the access to the special protection under Art. 10 ECHR to stricter conditions and was not prompted by the emerging consensus on the European and international level. If the GC *Halet* ruling represents a happy ending for

[192] ECtHR, *Halet v. Luxembourg* [GC] (Fn. 1), Dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabat, pp. 75-76.

the applicant, it is a step backwards for whistleblowers in general as the ECtHR GC may have made it ultimately harder to benefit from the special protection afforded to whistleblowers under the ECHR.