

## ORIGINAL RESEARCH ARTICLE

# Whistleblowers or Offenders? A Judicial Approach to Whistleblowing – The LuxLeaks Case

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## Abstract

The aim of this article is to study the role of judges and their impact on the retaliation processes initiated by organisations against whistleblowers. More specifically, we question the normative logics used by judges to validate or invalidate such processes. To this end, we cross-check and analyse judicial data from the LuxLeaks case (2010–2018). Our results firstly enable us to establish a relationship between, on the one hand, the interpretative power of judges and their profile and, on the other, the attitude that judges may have at the end of the retaliation process towards whistleblowers, that is, retaliatory actors or protective actors. Our results also explain the normative dynamics that permeate the judicial retaliation process. They show that judges can challenge existing legal norms, clarify and operationalise others, and create new norms regulating ethical behaviour in organisations.

**Keywords:** *Whistleblower; Whistleblowing; Retaliation; Judge; Judicialisation; Normativity; Ethics*

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Whistleblowing benefits society and organisations (Miceli et al., 2008), particularly in the fight against fraud and corruption (Carr & Lewis, 2010). However, organisations retaliate against whistleblowers (Alford, 2002; Kenny et al., 2019). Retaliation can be defined as all 'undesirable action taken against a whistleblower – in direct response to the whistle-blowing – who reported wrongdoing internally or externally, outside the organization' (Rehg et al., 2008, p. 222). The literature on whistleblowing addresses retaliation as an internal process that is adopted and deployed within the organisation itself (Bjørkelo, 2013; Dworkin & Baucus, 1998; Kenny et al., 2019; Lee et al., 2004; Mesmer-Magnus & Viswesvaran, 2005; Miceli et al., 2009). Aside from a few exceptions (Charreire Petit & Cusin, 2013; Richardson & McGlynn, 2011), retaliation is studied within the limited framework of the two main parties involved in whistleblowing: the organisation (and its members) and the individual whistleblower. However, stakeholders external to the organisation may join this dyadic process and transform it; judges are one key example. Near and Miceli (1995) described early

on the principle of involving parties from outside the organisation in whistleblowing processes. However, the extent of this involvement and its effects have yet to be determined (Richardson & McGlynn, 2011). Lawsuits filed against whistleblowers can be considered retaliation in the sense of Rehg et al. (2008), and we will refer to them as judicial retaliation. They represent a process that is triggered when the organisation files its complaint and that ends with the judge's decision. The judge examines the case in the light of existing legal norms (international standards, laws, case law, regulations), before delivering a ruling that either validates the process (legal sanctions: imprisonment or a fine, for example) or nullifies it (acquitting the whistleblowers and thus protecting them).

The management science literature has focused on the legal environment of whistleblowing, and more generally on the norms external to the organisation that aim to protect whistleblowers from retaliation (Culiberg & Mihelič, 2017). These norms are generally addressed using the predictive logic that has dominated the whistleblowing literature since the 1980s.

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Researchers have thus addressed the effects of legal norms (laws, case law) on the occurrence of whistleblowing and retaliation (Miceli et al., 1999). Critical and comparative studies of various normative frameworks (Vandekerckhove, 2010; Vandekerckhove & Lewis, 2012) have also been proposed, sometimes leading to recommendations for managers and legislators (Miceli et al., 2009). Nevertheless, the rationale behind these norms, the way in which they are created and the role of the actors who create them, particularly with regard to case law norms, remain unclear. They do, however, affect the status of the whistleblower and modify whistleblowing and whistleblower management practices in organisations.

Our study questions the role of the judge in the process of judicial retaliation initiated by organisations against whistleblowers and examines its effects. More specifically, we aim to highlight the judge's interpretative process and normative scope as a process external to the organisation. To do so, we draw on work in the sociology of law relating to judicialisation (Chevallier, 2014; Commaille & Dumoulin, 2009; Delpeuch et al., 2014; Dumoulin & Roussel, 2010). These works highlight the increase in the judge's power, which is essentially an interpretative power. We mobilise these aspects of judicialisation to highlight the normative logics deployed by the judge in the retaliation processes undertaken by organisations against whistleblowers, and to underline the judge's role as a regulator of the ethical arena within organisations. In this last respect, we complement and enrich other works in the sociology of law (Edelman, 1990, 1992, 2011), studying the interpretative processes implemented internally within organisations.

The empirical study examined in this article is based on an emblematic whistleblowing case: the LuxLeaks affair (2010–2018). We cross-check and interpret data predominantly sourced from the legal proceedings (judgements and rulings). Other data are also mobilised: judicial sources relating to other European whistleblowing cases as well as various legislative texts on the same issue.

Our results, first of all, enable us to establish a relationship between, on the one hand, the interpretative power of judges and their profile and, on the other, the postures that judges may have towards whistleblowers at the end of the retaliation process, that is, retaliatory actors or protective actors. Our results also explain the normative dynamics that permeate the judicial retaliation process. They show that judges can challenge existing legal norms, clarify and operationalise others, and create new norms regulating ethical behaviour in organisations. Our contributions relate to the external aspect of the retaliation process. The fate of this process may be determined by stakeholders outside the organisation, who are regularly overlooked in the literature. We help to highlight the role of the judge as an external party who can weaken the organisation's ability to retaliate in certain ways against whistleblowers. The study of this role moves the whistleblowing phenomenon

(and the retaliation it engenders) beyond the organisational framework in order to better place it in its social context. Our contributions also relate to the normative aspect of the retaliation process. It is not always a repressive moment; it can also be an opportunity to develop the normative field of whistleblowing. The interpretative process exercised by the judge thus helps to regulate the ethical field in general by introducing external norms.

## Whistleblowers, retaliation and judicialisation

We present here the main works that have studied retaliation against whistleblowers, and the works in the sociology of law that have focused on judicialisation.

### Whistleblowers and the retaliation they face

Whistleblowing may be defined as 'the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action' (Near & Miceli, 1985, p. 4). Although considered to have a positive impact on society (Miceli et al., 2008), particularly in the fight against fraud and corruption (Carr & Lewis, 2010), whistleblowers almost systematically face retaliation from organisations (Alford, 2002; Kenny et al., 2019). In practice, the retaliation exercised by the organisation towards the whistleblower may take varied and non-exclusive forms: demotion, deterioration of working conditions, threats, harassment, ostracism, referral to psychiatrists, dismissal, legal proceedings, etc. (Kenny et al., 2019; Parmerlee et al., 1982).

Early studies on retaliation – mainly quantitative – reported on these various forms but also on the predictors of retaliation (Near & Miceli, 1986; Parmerlee et al., 1982; Rehg et al., 2008). Later studies identified that whistleblowers using channels external to the organisation suffered more extensive retaliation (Dworkin & Baucus, 1998; Mesmer-Magnus & Viswesvaran, 2005). With regard to external retaliation, some studies refer to legal proceedings and the resulting sentences (Arnold & Ponemon, 1991; Liyanarachchi & Newdick, 2009). When whistleblowing discloses confidential information to the public, complaints are filed by the organisation against the whistleblower. This then leads to legal proceedings, which are often long and costly for the whistleblower and whose outcome, decided by the judge, is not always in their favour. Whistleblowing thus moves outside the bilateral relationship between the organisation and the whistleblower to involve external parties such as the media, the state, civil society and, as mentioned, the judge (Johnson et al., 2004; Near & Miceli, 1995). These parties may then become sources of retaliation in the same way as the organisation. Nevertheless, work on retaliation essentially focuses on the relationship between the organisation and the

whistleblower (Bjørkelo, 2013; Dworkin & Baucus, 1998; Kenny et al., 2019; Lee et al., 2004; Mesmer-Magnus & Viswesvaran, 2005; Miceli et al., 2009), with very few studies examining retaliation outside this context.

Notable exceptions are the works of Richardson and McGlynn (2011) and Charreire Petit and Cusin (2013). Their studies on retaliation in the sporting world highlight a group of stakeholders – the fans – who ‘invite themselves’ to the retaliation process against whistleblowers. By interfering in the process, this party sides from the outset with either the organisation or the whistleblower, becoming a retaliation or rehabilitation ‘agent’ depending on its opinion of the whistleblower. In the wake of these studies, which remain limited, our research aims to broaden the field of analysis of the retaliation against whistleblowers by studying a frequent third party in external whistleblowing: the judge. In particular, we examine how the judge can be the source of a specific form of ‘judicial’ retaliation. In addition to the consequences for whistleblowers, court rulings (case law) also affect organisations. Judges interpret the law, which is by default ambiguous (Edelman, 1990, 1992), particularly with regard to business ethics (Ben Khaled & Gond, 2020). They often specify grey areas, indicating whether organisational behaviour is considered ethical or unethical (Crane & Matten, 2010). Thus, through their decisions on external whistleblowing, judges indirectly (in)validate organisational behaviour. This role played by judges in managerial issues is more generally part of the phenomenon of the judicialisation of society studied by the sociology of law.

### **The judicialisation movement: From society to the organisation**

The sociology of law is concerned with social regulation and, more specifically, with the place that legal norms occupy in the set of norms governing social activities (Delpeuch et al., 2014). The judicialisation of society forms part of this context (Chevallier, 2014; Commaille & Dumoulin, 2009; Delpeuch et al., 2014; Dumoulin & Roussel, 2010), considered here as the rise in power of judges as regulators, particularly when the law is absent or ambiguous.

The term judicialisation is polysemic and encompasses distinct social and legal phenomena (Delpeuch et al., 2014). In its primary meaning in the United States, judicialisation refers to the intervention of the United States Supreme Court in public affairs (Hirschl, 2008). This meaning has been extended in Europe to refer to the same phenomenon but concerning supranational jurisdictions such as the European Court of Human Rights (ECHR). In the literature on the sociology of law, these meanings are shifting to also apply to the domestic judiciary (Commaille & Dumoulin, 2009; Delpeuch et al., 2014; Dumoulin & Roussel, 2010). Judicialisation is thus understood in the sense of increasing the role of the judge in social regulation.

It is clearly not possible for the legislator to cover all of society’s concerns, particularly not its new realities (Lavite, 2016). In addition, the multiplication of ‘general’ legal rules increases the involvement of the judge to an even great extent, since it is difficult for the legislator to establish precise standards applicable to all situations (Bastuck, 2015; Chevallier, 2014). To adopt the typology of Ost (2004), the classic figure of the judge as a ‘mouthpiece of the law’, neutral and passively following the rules, is losing ground. The new problems of society and their complexity make it difficult for the judge to adopt a ‘Jupiterian’ posture, merely ‘whistling the fouls without worrying about the quality of the game or its outcome’ (Ost, 2004, pp. 699–700). On the other hand, born of globalisation, European integration and the respect of human rights, the figure of the ‘regulatory judge’ is gaining ground. Located at the heart of different sources and logics of law (public/private, national/international), the judge ‘exchanges the sword of codes and public policies for the scales with which to weigh interests’ (Ost, 2004, pp. 699–700). The judge’s approach is above all to ‘define the extent to which a measure is necessary, relevant and proportionate’ (Ost, 2004, pp. 699–700). This figure of the ‘regulatory judge’ forms part of a context marked by judicialisation, where the interpretative power of the judge is reinforced accordingly (Dournaux, 2013, p. 208).

This interpretative power corresponds to the freedom exercised by judges with regard to selecting the legal norms (international standards, laws, regulations, case law) to be applied as well as their interpretation.<sup>1</sup> In a context marked by the ambiguity or absence of legal norms, the interpretative process initiated by the judge is endowed with normativity (Canivet, 2009). Normativity, as applied by Canguilhem (2013), is defined as the ability to question the customary norms in critical situations while at the same time establishing new ones. Indeed, through their interpretative power, judges will evaluate the existing legal norms in order to choose the norm to be applied. In addition, they will operationalise this norm, creating a new, more precise norm (Canivet, 2009). Organisations are in turn affected by the norms created by judges’ interpretative processes.

Edelman’s work on the sociology of law of organisations studies the way in which organisations understand their legal environment. Organisations do not simply apply the rules of law. Such laws are often ambiguous and require translation by compliance professionals, who interpret them and implement procedures to ensure compliance. These professionals are thus considered to be responsible for the ‘endogenisation of law’ in organisations, or its ‘managerialisation’ (Edelman, 1990, 1992, 2011). The interpretative work of this professional group is so important that it influences judicial power (Edelman, 2011). In the event of a legal dispute involving the organisation, the

<sup>1</sup> For more information on the normative power of the judge, see: ‘Le pouvoir normatif du juge’, *Actualités juridiques* (Cabinet Catala & Associés). <http://www.catala-associés.com/le-pouvoir-normatif-du-juge/>

procedures devised by compliance professionals may be used by judges in their decision-making and thus legalised as norms. Once a 'compliance model' wins acceptance in an organisational field, judges tend to view it as a justifiable basis for their decisions (Edelman, 2011). Nevertheless, in their interpretative processes, judges may not necessarily refer to the endogenised rules within organisations, but may instead impose external normative logics on them. They thus play a less passive and more normative role than that shown in Edelman's work. Judicialisation, as an increase in the judge's interpretative power, reflects this role.

This article documents a whistleblowing case, specifically a judicial retaliation process against a whistleblower. As an external process, it involved the intervention of judges as a third party, who were called upon to (in)validate the organisation's retaliation against the whistleblower. The judges exercised a productive interpretative power over the norms that govern ethical behaviour in organisations. All the more so as the legal framework for whistleblowing remains premature and very much in its infancy. Furthermore, the definition of ethical organisational behaviour is a source of debate and overlaps with the law, which is itself ambiguous (Ben Khaled & Gond, 2020; Crane & Matten, 2010; Edelman, 1990, 1992), reinforcing the need for interpretation by judges. By focusing on the way in which judges criticise, interpret and create norms through their decisions in a whistleblowing case, the article aims to enrich and complement the work on the endogenisation of law in organisations (Edelman, 1990, 1992, 2011). The regulation of whistleblowing in organisations not only stems from the internal interpretative process performed within organisations by compliance professionals; this internal process also coexists with the interpretative process of the judge, external to the organisation.

## Methodology

Our study focuses on the role of judges in the judicial retaliation process. We have therefore primarily relied on judicial data. Coupled with our qualitative research design, this data enabled us to highlight the interpretative powers exercised by the judges in the LuxLeaks case, and the normative logics they used to (in)validate the judicial retaliation against the whistleblowers.

### **The reasons for choosing the LuxLeaks case**

The legal case chosen is LuxLeaks (2010–2018), an emblematic case and one of the most highly publicised whistleblowing affairs. It is also a distinctive case since it moves beyond the usual retaliation from organisations such as ostracism or dismissal. LuxLeaks also illustrates an example of judicial retaliation, provoked by PricewaterhouseCoopers (PwC) complaints against two of its (former) employees, which materialised in lengthy legal proceedings against them. In these proceedings, it

fell on the various judges to either consider the defendants as whistleblowers, and thus protect them by acquitting<sup>2</sup> them, or to consider them as offenders who had broken the law, and punish them. Finally, LuxLeaks is a legal case with many twists and turns and a wealth of lessons to be learned. It comprises two different whistleblowing cases (Deltour and Halet), and it moved through all the stages of the judicial procedure: first instance, appeal, cassation and final appeal, totalling seven legal decisions. The judges reserved a different fate for the two defendants, which evolved as the case progressed through the various stages of this legal drama. The case is thus a dense and rich source of material for studying whistleblowing from a judicial perspective and for highlighting the role of judges in the retaliation process against whistleblowers.

### **Nature and origin of the data employed**

In order to better analyse the position of the judge as an actor in the retaliation process, we exploited and cross-checked the sources that emerge from the legal proceedings in the LuxLeaks case. The use of this type of data is uncommon in management science, despite its obvious interest (see Gabbioneta et al., 2013; Neu et al., 2013; Ouriemmi & Gérard, 2017). Because they stem from the judicial inquiry and trials, judicial data allow us to identify and understand the transformations taking place in judges' problematisation processes with regard to the issue of whistleblowing.

In order to highlight the content and quality of the documentation we use, the legal proceedings that produced it were recalled. The decision (judgement or ruling) made by a tribunal or court is the 'end product' of the legal proceedings. In countries with a civil law tradition, such as France and Luxembourg, legal proceedings are divided into two stages: investigation and trial. An investigating judge, possibly assisted by the police, is in charge of the investigation, which is called the 'judicial inquiry'. This involves gathering information, issuing search warrants, interviewing witnesses, confronting the protagonists, mobilising experts, etc. Investigators record, verify and cross-check the information gathered during these operations. Once the investigation has been completed, the investigating judge decides on the next stages for the proceedings: referral to a court or dismissal of the case. If the case is referred to court, the judges appointed to give their decision on the case will hear the parties to the dispute. They may request the collection of new elements (witnesses, expert opinions, etc.), which will then be introduced into the case. The hearings are theoretically public. The resulting legal decision (judgement, ruling) will be pronounced orally and then written down. It is also publicly accessible. Legal documents, as a

<sup>2</sup> Unlike the French system, which reserves this term for the Assize Court, in Luxembourg it refers to the not guilty verdict made by any criminal court. <https://justice.public.lu/fr/support/glossaire/a/acquittement.html>

set of reliable data, although still worthy of critical scrutiny (Neu et al., 2013), provide a rich field of analysis for management science research. They were the main information source of our work, allowing us to get as close as possible to the question of the judge's role in the retaliation process.

### **Collection and presentation of case study data**

The selection principle for our data collection process was to collect all the documents produced by the judges during the various LuxLeaks trials (judgements and rulings) and after the trials (press releases). In addition, we endeavoured to identify and collect all the legislative or case law texts used and cited by the judges in the LuxLeaks trials as well as those useful for understanding their different normative approaches. Table 1 lists the data collected: data from the LuxLeaks trials, data from other cases, and other documentation.

The LuxLeaks investigation and trials lasted several years, resulting in an abundance of documentation (see Table 1): the judgement of the Correctional Tribunal of Luxembourg, the first judgement of the Court of Appeal of the Grand Duchy of Luxembourg, the two judgements of the Court of Cassation of the Grand Duchy of Luxembourg concerning the appeals of Deltour and Halet, the second judgement of the (newly constituted) Court of Appeal as well as the various press releases produced by the courts (see Table 1). All of this documentation is available online. We downloaded it from the official portal of the Grand Duchy of Luxembourg's judicial administration service<sup>3</sup> (non-commercial website published by the Public Prosecutor's Office). This documentation reconstructs the facts of the case, cross-references the protagonists' statements (the two whistleblowers, the journalist who relayed their information and the firm PwC), and highlights the different rationales behind the legal judgements. In order to rule on the LuxLeaks case, the successive judges referred in their justifications to case law (other whistleblowing cases at a European level) and to legislative and administrative texts, in particular European directives. All these documents were downloaded from the HUDOC<sup>4</sup> and EUR-Lex<sup>5</sup> databases (official European databases), consulted and listed in Table 1.

### **Data analysis**

Legal documents, judgements and rulings are texts that require methodical reading. The formalism of these texts nevertheless makes them easier to read and to analyse. They often follow a structure that specifies the following elements: the court, the parties, the facts at the origin of the dispute, the progress of

the proceedings, the arguments of the parties, the reasons for the decision and the decision. We began our work by reading these documents in detail, carefully and repeatedly. Following this reading, and in order to make sense of this dataset (see Table 1), we proceeded with a three-step analysis.

In the first step, we organised the data into two categories. The first comprises contextual elements (the protagonists of the dispute and the facts related to its subject matter: the actions of the two whistleblowers and the progress of the legal proceedings). In research examining a process, it is essential to identify and analyse contextual elements in order to conceptualise the phases of the process being studied and understand the outcome of the process (Langley, 1999). The second category concerns data relating to the judges' decisions. This category of data includes all the elements relating to judicial decision-making: the normative references used (the texts of laws and case law), the interpretative logics and the final decisions. This first stage of our analysis enabled us to identify and select the data relevant to our research (Miles & Huberman, 1994).

The second step involved analysing these two categories of data in order to identify the themes relating to them. For example, the themes: 'protagonists of the dispute', 'whistleblowers' actions' and 'progress of the legal proceedings' were created as were the themes: 'interpretation of national laws', 'interpretation of European case law' and 'decisions and justification of decisions'. As analysing data from a process is complex and sometimes ambiguous (Langley, 1999), we did not integrate theoretical elements at this stage of our analysis, deliberately remaining close to the meaning of the empirical data (Van Maanen, 1979) in order to exploit them in their totality. It was only in the third stage of the analysis that we were guided by theoretical elements from the literature on judicialisation. More specifically, we used elements that illustrate the increased power of judges – in particular their interpretative power – and the evolution of the figure of the judge that accompanies this increased power (from 'mouthpiece of the law' to 'regulatory judge').

The third step comprised an axial analysis to gather and link all the themes in order to retrace and understand the different interpretative logics applied by the judges (Charmaz, 2006; Strauss & Corbin, 1998). These logics emerged when we aggregated data from the different themes relating to the two categories (context and decisions). We thus analysed the judges' reading of the facts at first instance in the light of Luxembourg's national laws. We also studied the decision of the appeal judges to go beyond the national legal framework and to start interpreting European case law. Finally, we analysed the new interpretation of this case law by the judges from the Court of Cassation, which led to a reclassification of the facts of the case. Three successive interpretative logics emerged from our analysis, determined by interpretative powers ranging from the

<sup>3</sup> <https://justice.public.lu/fr/actualites.html>

<sup>4</sup> <https://hudoc.echr.coe.int/fre>

<sup>5</sup> <https://eur-lex.europa.eu/homepage.html>

**Table 1.** Data sources and use in the analysis

Document type	Document	Date	Volume	Content used
<b>LuxLeaks legal proceedings</b>	Judgement of the Correctional Tribunal of Luxembourg	29 June 2016	55 pages	Facts, status of the whistleblower in Luxembourg and Europe, reasoning of the judges at first instance
	Judgement of the Court of Appeal of the Grand Duchy of Luxembourg	15 March 2017	56 pages	Facts, criteria for whistleblower protection according to the European Court, case law on whistleblowers, reasoning of the appeal judges
	Press release concerning the judgement of the Court of Appeal of the Grand Duchy of Luxembourg in the so-called 'LuxLeaks' case	15 March 2017	1 page	Explanation of the appeal decision
	Judgement of the Court of Cassation of the Grand Duchy of Luxembourg concerning the appeal of Mr Halet	11 January 2018	8 pages	Status of the whistleblower; validation of the appeal decision by the Court of Cassation
	Judgement of the Court of Cassation of the Grand Duchy of Luxembourg concerning the appeal of Mr Deltour	11 January 2018	12 pages	Status of the whistleblower; the Court of Cassation's counter-argument
	Press release concerning the judgement of the Court of Cassation of the Grand Duchy of Luxembourg in the 'LuxLeaks' case	11 January 2018	1 page	Further explanations of the decision made by the Court of Cassation
	Judgement of the newly constituted Court of Appeal of the Grand Duchy of Luxembourg	15 May 2018	123 pages	Judicial decision on Deltour's extraction of internal training documents
<b>Other legal documents</b>	Judgement of the European Court of Human Rights in the Guja case	12 February 2008	31 pages	Protection criteria used in the case of Guja, an official from the Moldovan Prosecutor General's Office
	Judgement of the European Court of Human Rights in the Heinisch case	21 July 2011	28 pages	Protection criteria used in the case of the German nurse Heinisch
	Judgement of the European Court of Human Rights in the Bucur case	19 June 2013	51 pages	Protection criteria used in the case of Bucur, an agent of the Romanian Intelligence Service
<b>Other documents</b>	(Luxembourg) Law of 13 February 2011 strengthening the means to fight corruption	18 February 2011	3 pages	Article I amending Title VII of the Luxembourg Labour Code – Protection of employees in the fight against corruption, traffic of influence, and the misuse of privileged information
	EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure	8 June 2016	18 pages	Protection of trade secrets in the European Union (EU)
	EU Directive 2019/1937 on the protection of persons who report breaches of Union law	23 October 2019	40 pages	Measures to protect whistleblowers who report breaches of EU law (including legal but abusive practices)

most limited to the most extensive. The analysis also highlighted two specific positions that could be taken by the judge as a stakeholder in the retaliation process against whistleblowers: the judge as a retaliatory actor and the judge as a protective actor.

### The context of the case: Facts and trial

In this contextualisation section, we return to two aspects of the LuxLeaks case: the facts and the various stages of the legal proceedings.

### Summary of the facts

The LuxLeaks case came to light during preparations for the 4 April 2012 episode of *Cash Investigation* (a French television news show on France 2) on international taxation. During an interview with journalist Élise Lucet, the head of PwC Luxembourg's tax department found it hard to hide his amazement as the journalist presented him with strictly confidential documents – an advance tax agreement (or ATA) prepared by PwC on behalf of a client and favourably approved by the Luxembourg tax authorities. When the programme was

broadcast on 11 May 2012, several ATAs were shown, concerning 18 PwC clients. They revealed intergroup revenue transfer mechanisms that resulted in a marginal effective tax rate of between 3 and 5%, compared with the statutory rate of almost 29%. The journalists referred to 47,000 pages of similar documents obtained by an anonymous source.

The identity of this source was revealed by an internal investigation at PwC. The person identified was Antoine Deltour, a former auditor with the firm who had resigned almost 2 years previously, on 14 October 2010. On the eve of his departure from the firm, on 13 October 2010, he had taken internal training documents and 538 ATAs. A PwC internal audit report at the trial stated that Deltour had taken advantage of a flaw (the report called it a 'specificity') in the computer system that made the tax documents accessible to a large number of auditors, despite the fact that the documents were in a secure directory. 'Due to their confidential nature, as soon as the [ATAs] had been scanned, they were moved to a specific secure directory. However, when documents are moved by "copy and paste," Windows retains access rights from the original directory for the documents moved' (Court of Appeal of the Grand Duchy of Luxembourg 'CAL', 2017a). PwC filed an initial complaint on 5 June 2012.

The 'leaked' documents continued to be shown in the media, notably in a new episode of *Cash Investigation* on 10 June 2013. In that episode, the programme revealed a different kind of tax document: the tax returns of certain PwC clients. The broadcast came ahead of the International Consortium of Investigative Journalists' release of a large number of tax documents on 5 and 6 November 2014.<sup>6</sup> These documents comprised 554 files, including the 538 ATAs taken by Deltour from PwC, plus 14 tax returns from PwC clients taken after Deltour's departure. The LuxLeaks case had been launched.

At PwC, an additional internal investigation identified the new source of the leaks: Raphaël Halet, an administrative employee whose role at PwC was to centralise, scan and save tax returns – and then send them to clients for archiving. The investigation established that, in this role, Halet had accessed 'on 16 November 2012, 12 minutes apart, the tax returns/correspondence relating to IKEA and the 2010 annual VAT return of ArcelorMittal Long Carbon Europe SA' (Correctional Tribunal of Luxembourg 'TCL', 2016). On 23 December 2014, PwC filed an additional complaint and on 29 December 2014 Halet was dismissed. The judicial inquiry indirectly links Halet to Deltour via *Cash Investigation* journalist Edouard Perrin, since Deltour and Halet's information was disseminated to the public via Perrin. Nevertheless, although Deltour was contacted by Perrin, who persuaded him to publish the ATAs in his

possession, Halet spontaneously contacted the journalist and proposed disclosing the tax returns.

### Summary of the trials

Table 2 summarises the stages of the court proceedings and the decisions of successive judges regarding the defendants, Deltour and Halet. Deltour and Halet acknowledged the facts for which they were being prosecuted at first instance. Nevertheless, they requested protection, asking for recognition of their status as whistleblowers and for acquittal. Table 2 highlights the following three points: at first instance, the court charged Deltour and Halet with five offences and denied them whistleblower status and its associated protection. On appeal, the court reserved a different fate for the two defendants. Deltour was found guilty of three offences, but recognised as a whistleblower and as such cleared of the other two offences. Halet, however, did not benefit from this partial protection. He was found guilty of four offences (one being quashed on appeal). In cassation, Halet's appeal was refused by the Court and the initial appeal decision was upheld. As for Deltour, the Court of Cassation overturned and annulled the decision of the Court of Appeal. Considered definitively by the Court of Appeal as a whistleblower to be protected, he was retried by a newly constituted Court of Appeal for the sole act of having extracted and held PwC's professional training documents. On 18 May 2018, he was found guilty of these acts, but no sentence was imposed on him (apart from paying a symbolic fine of one euro).

### Interpretative power of judges and normativity in the process of judicial retaliation against whistleblowers

The three phases of the LuxLeaks trial allow us to explain the normative logic behind the judges' decisions. We note the degree of interpretative power adopted each time by the judges, their profile and their attitude towards the whistleblower, that is, retaliatory or protective actors. We use these elements to highlight the normativity that permeates the judicial retaliation process as a process external to the organisation.

#### Limited interpretative power at first instance: The judge as a 'mouthpiece of the law'

At first instance, in the Correctional Tribunal, the debate between the State Prosecutor, the civil party (PwC) and the defence of Deltour and Halet quickly moved in the following direction: should the defendants be recognised as whistleblowers and, if so, would such recognition have legal consequences, namely their acquittal? (TCL, 2016). The judgement states that: 'In order to avoid unnecessary discussion', the court 'establishes' the fact that Deltour and Halet 'are to be regarded as

<sup>6</sup><https://www.icij.org/investigations/luxembourg-leaks/explore-documents-luxembourg-leaks-database/>

**Table 2.** Judicial decisions in the LuxLeaks case

Dates	Judicial instances	Decisions	
		Antoine Deltour	Raphaël Halet
25 November 2015	Council Chamber	Transfer to the Correctional Tribunal	Transfer to the Correctional Tribunal
29 June 2016	Correctional Tribunal of Luxembourg (TCL)	<p>Charged with the following offences under criminal law:</p> <ul style="list-style-type: none"> <li>i. Domestic theft;</li> <li>ii. Fraudulent access to a computer system;</li> <li>iii. Breach of professional secrecy;</li> <li>iv. Breach of trade secrets; and</li> <li>v. Laundering and possession of data acquired via theft.</li> </ul> <p>He was also given a 12-month suspended prison sentence and a €1,500 fine.</p> <p>Civil sanctions: the two men were jointly and severally ordered to pay PwC the symbolic amount of €1.</p>	<p>Charged with the following offences under criminal law:</p> <ul style="list-style-type: none"> <li>i. Domestic theft;</li> <li>ii. Fraudulent access to a computer system;</li> <li>iii. Breach of professional secrecy;</li> <li>iv. Breach of trade secrets; and</li> <li>v. Laundering and possession of data acquired via theft.</li> </ul> <p>He was also given a 9-month suspended prison sentence and a €1,000 fine.</p>
15 March 2017	Court of Appeal of the Grand Duchy of Luxembourg (CAL)	<p>Only charged with the following offences under criminal law:</p> <ul style="list-style-type: none"> <li>i. Domestic theft;</li> <li>ii. Fraudulent access to a computer system; and</li> <li>iii. Laundering and possession of data acquired via theft.</li> </ul> <p>Deltour was acquitted of the remaining offences on the basis of his status as a whistleblower. The suspended prison sentence pronounced at first instance was reduced to 6 months and the fine of €1,500 was maintained.</p> <p>Civil sanctions: the judgement made at first instance was confirmed.</p>	<p>Only charged with the following offences under criminal law:</p> <ul style="list-style-type: none"> <li>i. Domestic theft;</li> <li>ii. Fraudulent access to a computer system;</li> <li>iii. Breach of professional secrecy; and</li> <li>iv. Laundering and possession of data acquired via theft.</li> </ul> <p>Halet was acquitted of the remaining offence as it was 'not established in law'. Only the fine of €1,000 was maintained.</p>
11 January 2018	Court of Cassation of the Grand Duchy of Luxembourg (CCL)	Overtaken and annulled the judgement of 15 March 2017 and referred the case to the newly constituted Court of Appeal.	Appeal rejected in cassation.
15 May 2018	Newly constituted Court of Appeal of the Grand Duchy of Luxembourg (CAL)	<p>Criminal sanctions: the court ruled in his favour and the sentence was suspended.</p> <p>Civil sanctions: the court confirmed the judgement made at first instance.</p>	-

**Based on judicial sources.**

whistleblowers'. The judges' argument on this point should be emphasised:

We cannot seriously admit the contrary in 2016 – since the LuxLeaks scandal and its global consequences have been revealed. It remains incontrovertible that Deltour's and Halet's disclosures have been in the public interest, as they have led to greater transparency and tax fairness. (TCL, 2016)

However, this recognition had no legal basis in the eyes of the judges. The judges were immediately at pains to demonstrate that the two whistleblowers could not benefit from any criminal law protection that would allow them to be acquitted. According to the judges at first instance, there was no protection in Luxembourg law for whistleblowers. The only case is

provided for by the Luxembourg Labour Code, introduced by the Law of 13 February 2011, which reinforces the 'protection of employees in the fight against corruption, traffic of influence and the misuse of privileged information'.<sup>7</sup> In Luxembourg law, there is also a 'general obligation to report in the fight against money laundering and terrorist financing' (TCL, 2016). It should be noted that these provisions do not correspond to the facts of the LuxLeaks case. Moreover, the judges stated that there was no protection at the European level for whistleblowers. They even pointed out that, on the contrary, the new proposal for a directive on trade secrets adopted by the European Parliament (UE, 2016) intended to strengthen the protection

<sup>7</sup> <http://data.legilux.public.lu/file/eli-etat-leg-memorial-2011-32-fr-pdf.pdf>

of trade secrets at a European level (TCL, 2016). Finally, the judges disagreed with the defence's analysis that defendants could benefit from criminal protection under Article 10 of the European Convention on Human Rights (from now on the 'Convention') (Box 1).

Article 10 of the Convention (see Box 1) gives everyone the right to freely 'impart information and ideas'. However, it also specifies that the exercise of this freedom may be subject to 'restrictions or penalties as are prescribed by law'. In fact, the Article strikes a balance between the individual right to freedom of expression and the collective right (of the State, organisations, etc.) to protect oneself (Lewis, 2011). The Correctional Tribunal's assessment of this balance was to the detriment of the two defendants, Deltour and Halet. The judges effectively affirmed that Article 10 of the Convention allows only a limited right of expression, such as criticising the employer's practices, without risk of dismissal (TCL, 2016). The decision of the judges at first instance thus went against the whistleblowers for the five criminal offences that they were being charged with (see Table 2). Deltour and Halet were recognised as offenders whose actions deserved criminal prosecution.

These empirical elements show that whistleblowing was judicialised through the judges' intervention. The judges were effectively entering a new field, in which they were called upon to resolve a new societal dilemma where legal standards were especially ambiguous: this is one of the two senses of judicialisation highlighted in studies on the sociology of law. Nevertheless, this phase of the trial process does not yet fully illustrate the phenomenon of judicialisation since it cannot really be argued that the judges had increased their interpretative power. Indeed, the interpretative power of the judges at first instance was limited, both in the way they interpreted the legal norm and also by the choice of this norm. The judges did not criticise Luxembourg's national legal standards and in fact applied them strictly, remaining very close to the letter of the text. Luxembourg law was thus privileged over any other extra-national norms such as the Convention, with the judges adopting a narrow and risk-free reading of Article 10. This very limited interpretative power characterises a figure of the judge

#### Box 1. Article 10 of the convention

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...] 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [...] for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence [...]

Source: TCL (2016), emphasis added.

as historically in decline, a 'mouthpiece of the law', an 'arbiter' and passively close to the codes (Ost, 2004). This passivity was not without consequences for the whistleblowers since it validated the judicial retaliation process initiated by the organisation against them. Through this decision, the judges cast themselves, alongside the organisation that lodged the complaint, as retaliatory actors.

### **Extensive interpretative power on appeal: The regulatory judge**

#### **The European course of the Court of Appeal**

On appeal, the judges set a new course in the LuxLeaks case: the protection of the defendants as whistleblowers. This course went against the original purpose of the trial as envisaged by the plaintiff (PwC), whose aim was to legally repress the whistleblowers. In the absence of a Luxembourg legal text protecting whistleblowers, the appeal judges decided, unlike those at first instance, to refer to ECHR case law interpreting Article 10 of the Convention (see Box 1). The ECHR does not explicitly define the whistleblower; although its judgements (see Table 1) reveal a general protection framework, which was pieced together by the Court of Appeal. According to the latter, the ECHR aims to protect:

A person who, by approaching the authorities or the media, reports, reveals or denounces facts that are not apparent or that are concealed, that, in the general interest, go beyond the person's professional sphere if necessary, and that are contrary to law, ethics or the public interest. (CAL, 2017a)

The judges from the Court of Appeal thus took a different approach from those of the court of first instance by considering that the facts denounced by the whistleblower may relate to facts that are legal but that are unethical or contrary to the public interest. They also emphasised that ECHR case law made the protection of the whistleblower conditional on compliance with six criteria (CAL, 2017a): the information disclosed must be of genuine public interest (1), it must be authentic (exact and believable) (2), and disclosure must be a means of last resort, when it is impossible to pursue other courses of action (3). Furthermore, the benefit to the public of receiving this information must outweigh the damage caused to the employer by its disclosure (4). Finally, the whistleblower must have acted in good faith, be convinced that the information is authentic (5), and be exposed to a verifiable sanction (6). Once these criteria are met, whistleblowers, whether civil servants, private employees or agents, are likely to be protected, even if they do not themselves publish the information they denounce, provided that they reveal facts that are not already widely known (CAL, 2017a). We will now examine the analysis of the Court of Appeal judges

**Table 3.** Protecting the whistleblower according to the six criteria of European case law

Criteria	Justification of the Court of Appeal		Decision	
	Deltour	Halet	Deltour	Halet
<b>(1) The information is of genuine public interest</b>	‘[The revelations have] enabled public debate in Europe and Luxembourg on the taxation of multinational companies, on tax transparency, the practice of advance tax agreements and on fair taxation in general. [They] have been, and still are, at the heart of European current events and the European Commission has made the fight against fraud and tax evasion a top priority’.		Met	
<b>(2) The information must be authentic</b>	‘The authenticity and veracity of the documents is not disputed’.		Met	
<b>(3) Alternative action is impossible</b>	‘Informing the public through the media was the only realistic alternative for blowing the whistle. Informing the public authorities was not an option since [PwC’s ATA] practices were not considered illegal. For the same reason, PwC’s internal [whistleblowing] procedure, known as the “Complain Allegation Procedure,” could not be employed’.		Met	
<b>(4) Balance of interests (private/public)</b>	‘The disclosure of ATAs covered by trade secrets and professional secrecy has caused damage to PwC stemming from reputational damage and its clients’ loss of trust in the firm’s security arrangements. The public interest of this information is, however, undeniable and considerable and far outweighs any damage that may have been suffered by PwC and its clients’.	‘Because of the limited relevance of the documents disclosed [tax returns], the defendant has caused damage to his employer that outweighs the public interest. The tax returns were disclosed when the public debate on ATAs had already been launched and they made no contribution to the public interest debate on tax evasion’.	Met	Not met
<b>(5) Good faith</b>	‘It has not been established that the defendant pursued the goal of disclosing the documents when he fraudulently accessed his employer’s automated data processing system and copied the ATAs on 13 October 2010. Article 10 of the Convention can only apply if the acts have been committed with a view to blowing the whistle, with the aim of exercising freedom of expression and alerting the public. The defendant did not act in good faith on 13 October 2010’.	‘The defendant acted in good faith. This has already been demonstrated by the investigation, as seen in the defendant’s correspondence with the journalist before he fraudulently accessed his employer’s system. [He already intended to disclose the documents before performing this act.]’	Not met	Met
<b>(6) Exposure to risk of sanction</b>	The defendants ran the risk of incurring severe penalties (particularly criminal penalties).		Met	

Source: Based on CAL (2017a).

(Table 3), who preceded by verifying these criteria with respect to Deltour and Halet.

In the view of the Luxembourg Court of Appeal, neither of the two defendants met all six criteria, as determined by ECHR case law (see Table 3). In this respect, criteria (4) and (5) deserve particular attention. Unlike Deltour, Halet did not meet criterion (4) of balancing (private/public) interests. ‘The low value of the documents per se and their disclosure when the issue had already been amply illustrated’, following Deltour’s disclosures, tilted the balance against the public interest value of the information (CAL, 2017a). Halet could not, therefore, take advantage of whistleblower status as justification for his actions. Regarding criterion (5) of ‘good faith’, the Court of Appeal affirmed that, admittedly, the two defendants had acted out of ‘pure motives’, without animosity towards PwC and without wishing to derive any pecuniary interest from their

disclosure. Nevertheless, only Halet was considered to have acted in ‘good faith’. The appeal judges argued that Halet’s plan, when he took the documents from PwC, was to disclose them to the public via the journalist Perrin. This was not the case for Deltour, who, according to his own assertions, was not yet planning to disclose the documents when he extracted them (CAL, 2017a). The Court of Appeal concluded that Deltour could not benefit from whistleblower status when he copied the documents on 13 October 2010.

The use of ECHR case law by the appeal judges illustrates the phenomenon of judicialisation as it represents an increased judges’ power. The appeal judges’ reference to European case law illustrates a primary aspect of judicialisation: the intervention of supreme (international) courts in domestic courts (Commaile & Dumoulin, 2009; Delpuch et al., 2014; Dumoulin & Roussel, 2010). In their search for a legal whistleblowing

framework that was lacking at a national level in Luxembourg, the judges used a normative framework adopted by the supra-national jurisdiction of the ECHR and thus established its authority. Luxembourg's national standards, in particular the laws on trade secrets and professional secrecy, were put to the test by the appeal judges in the Deltour and Halet cases. In bypassing them to move towards other case-law-based legal norms, the courts questioned these norms and revealed their shortcomings (specifically the failure to take account of whistleblowers). This normative choice and questioning illustrate the extent of the Court of Appeal judges' interpretative power. Extensive, this interpretative power characterises the new figure of the 'regulatory judge' who mobilises different sources of law (here, European case law), exchanging the codes of Luxembourg's national law for a weighing of the parties' interests (Ost, 2004).

The interpretative latitude of the appeal judges nonetheless led to the sanctioning of the two whistleblowers (see Table 2). Thus, during this second judicial stage, the judges in turn considered the two whistleblowers as offenders whose actions merited criminal punishment (CAL, 2017b). The judges thus continued to play the role of retaliatory actors. However, we should nuance this repressive posture. The new reference to ECHR case law made it possible to reduce the charges against the two parties concerned (3/5 for Deltour and 4/5 for Halet), and consequently to soften the sentences. The prison sentence for Halet was even withdrawn (see Table 2).

### **The final word of the Court of Cassation: 'Do not strip the status of the whistleblower of its substance'**

The third stage of the LuxLeaks legal proceedings, the Court of Cassation, marked a change in the judges' attitude, based on a new interpretation of ECHR case law. With regard to the Halet case, the cassation judges confirmed that:

The limited relevance of the documents means that the damage caused to the employer by their disclosure exceeds their public interest value. This disclosure provides no fundamental information, hitherto unknown, that could revive or fuel the debate on tax evasion. (Court of Cassation of the Grand Duchy of Luxembourg 'CCL', 2018a)

Halet's appeal in cassation was thus rejected. The appeal decision was maintained – he was not a whistleblower to be protected in the eyes of the Luxembourg judiciary. By rejecting Halet's appeal, the judges of cassation definitively validated the organisation's reprisals against him. However, they took a different position with regard to the Deltour case. The judges of cassation accepted his appeal; they noted a point of contradiction in the appeal judgement of 15 March 2017. On the one hand, the appeal judges had ruled that Deltour's delivery of the documents to the journalist met the six criteria of the case law

under Article 10 of the Convention (see Table 3). In this respect, the appeal judges had considered Deltour to be a whistleblower to be protected and, consequently, had acquitted him of the offences relating to the breach of trade secrets and professional secrecy. On the other hand, the appeal judges had concluded that Deltour could not benefit from whistleblower status when he extracted the documents, on the sole ground that at the time he took possession of the documents, he had not yet intended to blow the whistle (CCL, 2018b). But according to the judges of cassation, 'recognition of the status of whistleblower should in principle apply to all offences for which a person exercising the right guaranteed by Article 10 of the Convention is prosecuted', at the risk of 'stripping the protection afforded by the status of whistleblower of its substance'. Thus, the appeal judges had violated (by misapplication) Article 10 of the Convention 'by refusing the general character [...] of the defence based on the status of whistleblower' (CCL, 2018b). In other words, the judges of cassation considered that it was not possible to be a partial whistleblower: a person is either a whistleblower or not. This was the point at which the judges' power of interpretation reached its peak in the LuxLeaks case.

On the basis of this justification, the Court of Cassation quashed and annulled the decision of the Court of Appeal. The case was referred back to the 'newly constituted' Luxembourg Court of Appeal. A press release from the Court of Cassation stated that 'neither the whistleblower status granted to Deltour, nor his appropriation of the documents relating to the advance tax agreements will be called into question' (CCL, 2018c). Deltour was definitively considered a protected whistleblower. However, he was still to be judged on the fact that he had extracted documents relating to professional training from PwC, the content of which he did not disclose. In the final decision of the 'newly constituted' Court of Appeal, the Court considered that, by the sole effect of the decision of the Court of Cassation, Deltour was automatically acquitted of all allegations relating to the ATAs (CAL, 2018c).

The judges of cassation questioned the strict and limited reading of European case law adopted on appeal with regard to the question of the whistleblower's good faith. They thus showed an even more extensive power of interpretation than that of appeal judges who had referred to European case law. It is worth highlighting here the novelty of the use of such interpretative power by national judges in the field of whistleblowing in Europe. Indeed, according to Deltour's lawyer William Bourdon, it was the 'first time that a supreme court of a European country [the Luxembourg Court of Cassation] has upheld ECHR case law in favour of whistleblowers'.<sup>8</sup> This validation required the rectification in

<sup>8</sup> 'On en parle à Luxembourg : Une décision de justice renforce la protection des lanceurs d'alerte', *Les Échos* (French daily newspaper), 11 January 2018.

cassation of the interpretation made by the appeal judges of the case law norms of the ECHR. The process of judicial retaliation triggered by the organisation's complaint against its former employee was therefore definitively invalidated, and the judge thus assumed the role of protective actor. By strengthening their interpretative power, and in addition to ruling on a conflict between a company and its (former) employee, the judges in the LuxLeaks case appear as actors in the public debate, attuned to society's concerns (Dournaux, 2013; Ouriemmi & Gérard, 2017). Despite the legal void in Luxembourg on whistleblowing relating to legal acts (absence of a law protecting whistleblowers but the presence of laws incriminating them), the judges recognised the importance of protecting whistleblowers.

The judicial retaliation process is deployed outside the organisation and involves parties other than the organisation (or its members) and the whistleblower, namely judges, who are a

key figure in the process. Our analysis of judicial data enabled us to establish a relationship between the interpretative power of judges and their profile, on the one hand, and their attitude towards whistleblowers at the end of the retaliation process, on the other (see Table 4). This process enables us to depict the judge as a retaliating actor or a protective actor. The elements summarised in Table 4 clarify a normative dynamic in the work of the judge. The judges in the LuxLeaks case highlighted the limits of the Luxembourg legal framework (laws on trade secrets and professional secrecy), which does not take into account whistleblowing and which, in their view, could not apply to the case. Through their recourse to European case law and their questioning of the national legal framework, the judges upheld the judgements of the ECHR as the reference norm in the case. Moreover, they gave a precise interpretation of the facts of the LuxLeaks case. The appeal and the interpretation resulted in new, more precise legal standards that made

**Table 4.** Interpretative power, profile and attitude of the judge

Judges	Interpretative power		Profile	Attitude to	
	Normative choice	Interpretation of norms		Deltour	Halet
<b>1<sup>st</sup> instance</b>	Luxembourg legal norms: laws on professional secrecy and trade secrets	Proximity to the text and strict application of the standard laws customary in Luxembourg on professional secrecy and trade secrets;  Narrow and risk-free reading that excludes any application of Article 10 of the Convention.  <b>Limited</b>	'Mouthpiece of the law'	Retaliating actor	Retaliating actor
<b>Appeal</b>	ECHR case law interpreting the provisions of Article 10 of the Convention	Testing the customary laws through application of the ECHR criteria and the interpretation of two of these criteria in particular:  - Criterion 4: the public interest of the information disclosed by the whistleblower must outweigh the damage caused to his employer;  - Criterion 5: Article 10 of the Convention can only be applied if the acts were committed with the aim of blowing the whistle in order to exercise freedom of expression and alert the public.  <b>Extensive</b>	Regulatory judge	Retaliating actor	Retaliating actor
<b>Cassation</b>	ECHR case law interpreting the provisions of Article 10 of the Convention	Reinterpretation of criterion 5 of the ECHR:  - The whistleblower's good faith cannot be recognised with respect to the communication of information to the public without also being applied to the extraction of documents from the employer.  <b>Extensive</b>		Protective actor	Retaliating actor

it possible to distinguish the whistleblower to be protected (see Table 4).

### **The judge and the regulation of ethics in organisations**

The judicial retaliation process studied reveals a normative dynamic in judges' exercise of interpretative power. This dynamic corresponds to what Canguilhem (2013) refers to as normativity: the capacity to question the customary norms in critical situations, and the institution of new norms as a result. Indeed, through their normative choices, the judges called into question existing norms by testing them in light of the facts of the dispute. They also operationalised and clarified other norms, thereby producing new whistleblowing norms. They in turn created case law, which will be applied in similar cases in the future.

This normativity shown by the judges when (in)validating the retaliation process against the whistleblower affected the whistleblower's status. Recourse to ECHR case law and the judges' interpretation of it, in particular of the six criteria, made it possible to empirically define the whistleblower to be protected (see Table 3). This definition is interesting insofar as it differs from the whistleblower definitions used in the management science literature (e.g., Near & Miceli, 1985) or adopted by legislators (e.g., the definition of whistleblower accepted by the Sapin 2 law in France, etc.).<sup>9</sup> The normativity identified in the judicial retaliation process also affected the organisation, its practices and its management. When the organisation's attempts to repress the whistleblower for disclosing information were rejected by the judges, the organisation found itself implicitly disavowed. More specifically, the organisational practices disclosed by the whistleblower were called into question by the decision to protect him as a whistleblower. Thus, the appeal judges in the LuxLeaks case considered that PwC's tax practices were indeed 'distortion(s) of competition between transnational companies that benefited from Advance Tax Agreements and small national companies that did not benefit from them' (CAL, 2017a). Furthermore, in the LuxLeaks case, the outcome of the judicial retaliation process clarified another normative aspect relating to the organisation and its management: it determined the scope of the right to prosecute whistleblowers for disclosing information. The LuxLeaks case sheds practical light on the conditions to be verified by an organisation's management before any legal action is taken against whistleblowers. Management that does not take into account the legal criteria for recognising whistleblowers could suffer setbacks in legal action against (former) employees of their organisation.

<sup>9</sup> [https://www.legifrance.gouv.fr/jo\\_pdf.do?id=JORFTEXT000033558528](https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000033558528)

Ultimately, the protection of the whistleblower in the LuxLeaks affair has normative consequences in two respects. On the one hand, an organisation's members, past or present, may disclose information about organisational practices (even if legal). These members will not be legally sanctioned if they validate a certain number of criteria. On the other hand, with regard to these criteria, organisations, even if legally entitled to do so, will not be able to obtain sanctions against their members, old or new, if they divulge organisational information.

The normative dynamic established in the judicial retaliation process, by defining the whistleblower and by specifying the criteria for recognising the whistleblower, is a regulatory moment in the field of ethics in organisations. This field may contain some ambiguity (Ben Khaled & Gond, 2020), particularly since it is not fully covered by the law in several countries. Ethical behaviour does not always correspond to legal behaviour (Crane & Matten, 2010). In this case, the legal process involving the organisation and its members is a moment when this grey area between legality and ethics in organisations becomes clearer. Beyond the specific case of whistleblowing and beyond judicialisation – employed in this article as a marker to highlight the interpretative power of the judge – the judge proves to be an important actor in regulating the ethical field in organisations. The judge's interpretative power is exercised independently of the organisation and gives rise to standards that apply externally to the organisation.

### **Discussion**

In this article, we studied one particular type of retaliation in context to whistleblowing. We have highlighted the role of the judge in the judicial retaliation process initiated by organisations against whistleblowers and the normative logics it mobilises, on the basis of an analysis of (mainly judicial) data from the LuxLeaks case (2010–2018). We now discuss our findings regarding the external aspect and the normativity of the judicial retaliation process. We explain how they contribute both to the literature on retaliation against whistleblowers and to the literature on the sociology of law on ethical behaviour in organisations.

#### **The judicial retaliation process as an external process**

Management science studies on retaliation against whistleblowers enshrine the idea that this retaliation is primarily generated by the organisation and its members (Bjørkelo, 2013; Dworkin & Baucus, 1998; Kenny et al., 2019; Lee et al., 2004; Mesmer-Magnus & Viswesvaran, 2005; Miceli et al., 2009). The literature has thus limited itself to studying the retaliation process within the restricted and internal boundaries of the organisation, continually

ignoring the potential role of non-organisational stakeholders (Richardson & McGlynn, 2011). Our work clarifies the external aspect of this process, by studying the role of the judge as a stakeholder outside the organisation, responsible for (in)validating judicial retaliation against the whistleblower.

The article broadens the horizon of study of whistleblowing to look beyond the organisation. It also helps to better place it in the social field in which it is evolving. The judiciary is part of this social field and its main figure – the judge – participates in a (judicial) form of retaliation that has been neglected by the literature since the first studies on forms of retaliation (Parmerlee et al., 1982). From this perspective, our work transforms whistleblowing – and more precisely the reprisals it generates – from a dyadic relationship to a triadic relationship involving, in addition to the whistleblower and the organisation, the judge. It thus echoes the work of Richardson and McGlynn (2011) and Charreire Petit and Cusin (2013) on the role of fans in retaliation against whistleblowers in the world of sports. These fans are characterised as a stakeholder dependent on the main parties to the whistleblowing, emotionally involved in the retaliation process and with a clear position from the outset. Given their dependence and their type of involvement, they are, in the words of Richardson and McGlynn (2011) and Charreire Petit and Cusin (2013), 'agents of retaliation'.

Our work highlights a different role for the judge in the retaliation process and attempts to determine its scope. The contours of this role are determined in the light of work on the sociology of law on a phenomenon external to the organisation – judicialisation, or the increase in the (essentially interpretative) power of the judge in society. Judicialisation emphasises that the role of judges depends on the exercise of their interpretative power. In a legal context marked by the absence of legal norms on whistleblowing, the judge may demonstrate limited interpretative power and judicially repress the whistleblower or may alternatively demonstrate extensive interpretative power and protect the whistleblower from legal repression. The judge thus appears as a third party to the whistleblowing, independent of its protagonists, yet at the same time sensitive to the concerns of society, in particular to new problems not yet covered by the law. In this sense, we consider the judge as an actor in the retaliation process against whistleblowers rather than just an 'agent' in the process (Charreire Petit & Cusin, 2013; Richardson & McGlynn, 2011).

By determining the extent of judges' power, and by clarifying the contours of their role, we contribute to a better understanding of the retaliation process by examining its participants, and more specifically their type of intervention. The interest of analysing the role of judges lies in the fact that their intervention calls into question the linear understanding of the retaliation process depicted in the literature. The position of the judge as the party who decides whether to (in)validate the retaliation not only transforms the process from a dyadic to a

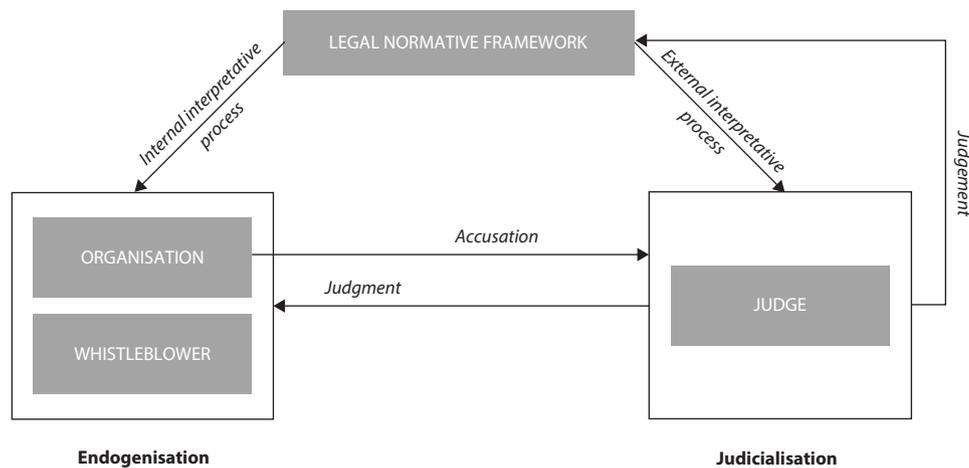
triadic relationship, but may even reverse the direction of the process or, at least, indirectly turn the charge against the organisation, in the case of whistleblower protection. In this approach, which differs from that studied by Richardson and McGlynn (2011) and Charreire Petit and Cusin (2013) in the case of external stakeholders dependent on the organisation or emotionally involved, the role of the judge offers a new dimension in the study of the retaliation process. Moreover, by underlining the triadic nature of the judicial retaliation process, our results echo the work of Contu (2014) on the multiple relationships in which the whistleblower is embedded, contrary to the dominant idea in the literature that often portrays the whistleblower as a solitary and isolated person facing the organisation. The judge is part of this relational fabric of whistleblowing and the resulting retaliation. In some cases, the judge may be able to weaken the organisation's ability to retaliate against the whistleblower.

### ***The judicial retaliation process as a normative process***

Edelman's work (1990, 1992, 2011) shows that organisations (via compliance professionals) set up an internal process that interprets, translates and reformulates legal standards into managerial language. This effort to endogenise law in organisations, or its managerialisation, produces new norms that regulate ethical behaviour internally (Edelman, 1990, 1992, 2011). The results of our work highlight another type of interpretative process, external to the organisation. We show that, in the face of ambiguity or the absence of legal texts, judges exercise an important interpretative power, concerning the choice of the norm and how to apply it. Through their interpretative efforts, judges operationalise and clarify existing norms and in fact create new legal norms.

The judge's external interpretative process has direct and indirect normative effects on the organisation and on ethical behaviour within it. Firstly, the judge's decision provides a legal solution to the conflict involving the organisation (Figure 1). In the case of whistleblowing, this decision either validates the judicial retaliation process launched by the organisation and consequently represses the whistleblower's behaviour, or invalidates the retaliation process, protects the whistleblower, and implicitly rejects the practices of the organisation that is the subject of the whistleblowing.

The judge's decision then feeds the normative framework governing organisations. In the specific case of whistleblowing, the judge provides clarifications and changes to the status of the whistleblower. The judge accordingly adopts an empirical definition of the whistleblower and the criteria for identifying an individual as a whistleblower. Court decisions serve as case law standards that can be applied to resolve similar conflicts. In a circular fashion, organisations will have to interpret these new



**Figure 1.** The regulation of business ethics

external legal standards via the compliance processes in place internally and highlighted by Edelman (1990, 1992, 2011). In this respect, the interpretative process of the judge, which forms part of the judicialisation process, complements and fuels the internal interpretative process referred to by Edelman as the endogenisation of law (see Figure 1). We can thus say that ethical behaviour within the organisation is regulated internally via an interpretative process controlled by compliance professionals but also by an external interpretative process exercised by the judge. The two processes, although they stem from two distinct phenomena – the endogenisation (or managerialisation) of law and judicialisation – have the same origin, namely the ambiguity and absence of legal standards. The two processes also have the same effect: the clarification of grey areas between ethics and legality, and thus the regulation of behaviour in organisations.

The results of our article correspond to a particular normative framework in place in Europe at the time of the LuxLeaks affair. This framework was characterised, on the one hand, by incomplete or even absent legislation on the protection of whistleblowers, both at national and EU level; and on the other, by the presence of increasingly engrained European case law (ECHR judgements) in favour of whistleblowers. Under the impetus of the LuxLeaks affair, national and European legislation has emerged to better protect whistleblowers. In France, for example, the so-called Sapin 2 law on transparency, the fight against corruption and the modernisation of economic life was passed on 9 December 2016.<sup>10</sup> It establishes a whistleblowing procedure in organisations and creates a legal status protecting the whistleblower. More recently, in another corollary of the LuxLeaks affair, the EU adopted, in December 2019,

a directive on ‘the protection of persons who report breaches of Union law’ (UE, 2019). Member States have until 2021 to transpose the directive into their own national laws. Do our results still make sense in this new post-LuxLeaks whistleblowing framework? In other words, will judges still have a role in the whistleblowing process and will they retain significant interpretative power?

The first elements of a response may come from the sociology of law. The ambiguous and general (not covering all individual cases) nature of the law gives the judge significant interpretative power during its application (Chevallier, 2014; Edelman, 1990, 1992, 2011). For example, although influenced by the LuxLeaks case and the way the judges in Luxembourg interpreted the case, the provisions of the Sapin 2 law would not have protected Deltour and Halet. The text of the French law is in fact rather rigid as regards whistleblowing channels – the whistle must first be blown internally. As for the new European directive, and from a scope of application perspective, the text would cover the Deltour and Halet cases. Nevertheless, this directive would not, in the letter of its text, protect other whistleblowers. Unlike French law, which has a broad scope of application (‘public interest’), the European directive will only apply to whistleblowing denouncing ‘breaches of Union law’. More generally, and beyond the case of whistleblowing, the judge will always have an important role to play, even in the presence of a legislative framework governing organisations. The legislative framework, as Cailleba and Charreire Petit (2018) stated, is not always able to reflect all the moral issues encountered in organisations. Research work in management science should pay more attention to the judge as a potential stakeholder in the organisation, particularly at a time when there are

<sup>10</sup> [https://www.legifrance.gouv.fr/jo\\_pdf.do?id=JORFTEXT000033558528](https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000033558528)

increasing calls in France to legislate in the field of business. The recent integration of a 'social purpose' for companies in the civil code (Pacte law),<sup>11</sup> supported by management science researchers (Segrestin & Levillain, 2018), is one of the results of these calls. Paradoxically, increasing the number of general legislative provisions only increases the intervention of judges and their interpretative power, assuming that their role is to clarify and operationalise the law.

Our focus on the role of judges as a third party in the judicial retaliation process undertaken by organisations against whistleblowers presents one key limitation. It intentionally disregards the various dimensions of non-judicial retaliation that may occur before, during or after the validation or invalidation of the judicial retaliation process by the judge. Thus, to return to the LuxLeaks case, Halet, the second protagonist in the case, was dismissed, intimidated and forced to remain silent by PwC until his trial. It would be interesting in further work to study judicial retaliation against whistleblowers as part of the overall retaliation process implemented by organisations.

Finally, future research could be undertaken to study other aspects such as the judicial effects of whistleblower trials. Beyond the effects on whistleblowers (repressed or protected) and on the field of case law (energised or reinvented), the study of the effects of these lawsuits should be extended to the legislative framework (the European Directive adopted on 16 April 2019 on the protection of whistleblowers after the LuxLeaks affair is proof of this dynamic), to organisational practices and more broadly to the perception of whistleblowers in society.

## Conclusion

Our objective in this article was to study the role of judges and their impact on the retaliation processes initiated by organisations against whistleblowers. More specifically, we examined the normative logics applied by judges to validate or invalidate these processes. To this end, we cross-checked and analysed predominantly judicial data from the LuxLeaks case (2010–2018). Our analysis of the judges' work, in a European context marked by a legislative framework that is unfavourable to whistleblowers, revealed two main results. Firstly, two attitudes regarding whistleblowers can be distinguished: the judge as a retaliating actor and the judge as a protective actor. These attitudes correspond to two different profiles of the judge – the 'mouthpiece of the law' and the 'regulatory judge' – and depend on the interpretative power the judge brings to the proceedings in terms of the choice of the norm and the way it is applied. The judicial retaliation process is thus an external process, independent even of the organisation that initiated it. Secondly, the judicial retaliation

process is permeated by a normative dynamic. Judges may question existing legal norms, clarify and operationalise others, and thus create new norms regulating whistleblowing in organisations. The retaliation process does not always result in repression, it can turn out to be an opportunity to review the normative field of whistleblowing: it may define whistleblowers and specify the technical criteria for identifying them.

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<sup>11</sup> <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038496102&categorieLien=id#JORFARTI000038496206>

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