European Parliament

Protecting whistle-blowers in the EU

SUMMARY

In December 2019, Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (hereafter 'the directive') entered into force. Member States had 2 years to transpose the directive into their domestic legal systems. Prior to the entry into force of the directive, the legal framework was fragmented at national level and limited in scope to specific sectors at EU level (i.e. financial services and transport safety). Transposition did not prove easy, and the European Commission was obliged to open infringement procedures against a number of Member States.

The directive came into force after major cases of whistle-blowing (Panama Papers, Dieselgate, Wikileaks, Luxleaks, Cambridge Analytica) drew strong public attention to the situation of those who reveal misconduct and malpractice in public and private entities. Those who 'blow the whistle', and also their colleagues and their relatives, can face retaliation and suffer both economic and reputational harm. Fear of retaliatory measures can foster a culture of silence, with a dissuasive effect on individuals who are willing to report unlawful practices ('chilling effect').

The EU legislator has recognised the positive impact of whistle-blowers who act as public watchdogs. They promote a culture where speaking out is not penalised and where disclosing information in the public interest increases transparency, improves integrity and ensures public accountability. Whistle-blowers help the public to access accurate information on matters of public concern.

Nevertheless, it has been pointed out that legislation alone is not enough, a cultural change in the workplace will also be necessary to ensure that those blowing the whistle are not stigmatised and do not suffer social, professional and personal repercussions.

IN THIS BRIEFING

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Background

In recent years, a number of major whistle-blowing cases have been brought to public attention. Examples include Antoine Deltour, the founding father of 'Luxleaks', who leaked the tax rulings on several multinational companies based in Luxembourg, Edward Snowden, who leaked classified documents revealing surveillance programmes led by the United States National Security Agency, and Chelsea Manning who leaked documents revealing human rights violations in Iraq and elsewhere. Following these and other whistle-blowers' revelations, as well as the brutal murders of the investigative journalists Daphne Caruana Galicia and Ján Kuciak, **public pressure** in Europe grew to a point that policy makers could not ignore the call to address the worrying situation of those who decide to reveal illegal or unethical behaviour in public and private entities. In 2017, a Special Eurobarometer Survey on corruption found that while 5 % of European citizens had experienced or witnessed corruption, 81 % of them did not report it due to fear of retaliation, among other reasons. The same year, a European Commission public consultation on whistle-blower protection, received more than 5 700 contributions and 50 position papers.[1]

In 2019, Directive (EU) 2019/1937 on the protection of **persons who report breaches of Union law** was adopted. Prior to 2019, the level of whistle-blower protection was considered inadequate, with great disparities between the EU Member States, which may have led to legal insecurity and unequal treatment. The directive, which was described as a major step toward whistle-blower protection and as a 'game changer', introduces **minimum common rules** to protect those who report breaches of EU law through official channels and ultimately break the 'culture of silence' against retaliation. Often, whistle-blowers are subject to harassment, job loss, social and economic sanctions. They are accompanied by the 'social and cultural stigma' associated with blowing the whistle, they are seen as 'snitches'. This is why the 2019 directive was negotiated and adopted with the intent of introducing clear and safe reporting channels and procedures to protect whistle-blowers from any form of retaliation, not limited to dismissal. The adoption of the directive was welcomed by the Parliamentary Assembly of the Council of Europe (PACE) (Resolution 2300(2019)) as a 'real step forward' for the protection of whistle-blowers.

Whistle-blowing has a positive impact on **transparency and accountability**, and improves **integrity** (take for instance the recent cases of Frances Haugen and Mark MacGann, who testified before the European Parliament in 2021 and 2022 respectively. Whistle-blowers play an essential role in open democracies and the recognition of their activities, as well as their protection against retaliation, are 'genuine indicators of democracy' (PACE Resolution 2300(2019)). As the 2016 OECD report stated, 'whistle-blower protection is the ultimate line of defence for safeguarding the public interest'. Whistle-blowers can also **contribute to economic wealth.** In 2017, the Commission estimated the potential benefits of effective whistle-blower protection for the EU, in public procurement alone, at between €5.8 and €9.6 billion each year.

Notwithstanding the fact that we commonly talk about whistle-blowers, it is worth mentioning that **there is no 'unequivocal legal definition'**. Neither was the term used in 1971, when Ralph Nader started what some defined as the whistle-blower revolution by hosting the Conference on Professional Responsibility in Washington D.C.. Nader argued that by reporting crimes, employees were fulfilling an individual responsibility related to 'the basic status of a citizen in a democracy' because employees 'allegiance to society should outweigh that to a company'. Today, it is understood that whistle-blowers are individuals who, in their workplace, come across information about wrongdoing or about acts or omissions which represent a threat or harm to the public interest (e.g. fraud, corruption, tax evasion, and lack of protection of food safety or the environment) and report such acts or omissions to their employers, the competent authorities or the media. Nor does the 2019 directive provide a legal definition of whom is to be considered a whistle-blower. The word whistle-blower appears in Recital 1 (not in the normative part of the directive), which states that:

'Persons who work for a public or private organisation or are in contact with such an organisation in the context of their work-related activities are often the first to know about threats or harm to the

public interest which arise in that context. By reporting breaches of Union law that are harmful to the public interest, such persons act as 'whistle-blowers' and thereby play a key role in exposing and preventing such breaches and in safeguarding the welfare of society'. Along similar lines, the European Court of Human Rights (ECtHR) has confirmed that the concept of whistle-blower has not been given an unequivocal legal definition, most recently in the case *Halet v Luxembourg* (2023) (paragraph 156) and that each case requires an assessment of the individual specific circumstances.[2]

Table 1 – Defining whistle-blowers

Source	Text
Report A/70/361 of the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression of 8 September 2015	A whistle-blower is a person who **exposes information that he or she reasonably believes**, **at the time of disclosure, to be true** and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.
Parliamentary Assembly of the Council of Europe Resolution 1729 (2010) on the protection of whistle-blowers	Whistle-blowers – concerned individuals **who sound an alarm in order to stop wrongdoings** that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, **both in the public and private sectors**.
Council of Europe Recommendation (2014)7	'Whistle-blower' means any person who **reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship**, whether it be in the public or private sector.

Source: Prepared by the author. Emphasis added by the author.

The EU directive on whistle-blowing

Over the years, Parliament has consistently called for EU provisions to protect whistle-blowers. For instance, in a 2013 resolution on organised crime, corruption and money laundering, Parliament called on the Commission 'to submit a legislative proposal establishing an effective and comprehensive European whistle-blower protection programme in the public and in the private sector'. In a 2015 resolution on tax rulings, Parliament regretted that whistle-blowers might be subject to repercussions both in their private and professional life and called on the Commission to propose an EU legislative framework for the effective protection of whistle-blowers. The same year, in a resolution about transparency, coordination and convergence of corporate tax policies in the EU, Parliament called on the Commission to put forward a legislative proposal to protect whistle-blowers who act in the public interest, which could take into consideration the Council of Europe's Recommendation CM/Rec(2014)7. Initially, the European Commission replied to Parliament's demands by recalling that international standards were already in place and questioning the existence of an appropriate legal basis to put forward a EU legislative proposal on the matter.[3] On 14 February 2017, Parliament adopted a resolution on the role of whistle-blowers in protecting the EU's financial interests. It regretted that the Commission had failed to submit any legislative proposals aimed at establishing a minimum level of protection for European whistle-blowers. In October of the same year, Parliament adopted another resolution, calling on the Commission to present a horizontal legislative proposal before the end of 2017, with a view to protecting whistle-blowers effectively in the EU.

Since its 2016 communication on the fight against tax evasion and avoidance, the European Commission has expressed its full support for the protection of whistle-blowers, and announced that it would continue to monitor Member States' provisions and facilitate exchange of best practices to encourage improved protection at national level. It has also indicated its intention to assess the scope for horizontal or further sectoral actions at EU level, while respecting the principle of subsidiarity. This commitment was reaffirmed in the 2017 work programme – a legislative proposal was presented in 2018 and was adopted by the co-legislators in 2019. The main objective of the directive is not to protect those who blow the whistle and their right to freedom of expression,

but to 'enhance the enforcement of Union law and policies' (Article 1). Whistle-blowers' reports may lead to detection, investigation and ultimately prosecution of breaches of EU law. In that sense, ordinary citizens become involved in the enforcement of EU law, because they contribute to informing judicial authorities about wrongdoing and thus they promote the public interest. As mentioned in Recital 46 of the directive, whistle-blowers are sources for investigative journalists, thus 'protection of whistle-blowers as journalistic sources is crucial for safeguarding the "watchdog" role of investigative journalism in democratic societies'.

Although the 2019 directive was the first overarching piece of legislation introducing common minimum standards[4] on the protection of persons who report breaches of EU law,[5] it did not intervene in a total legal vacuum. Firstly, a number of pieces of EU sector-specific legislation were already in force; secondly, the Council of Europe (CoE) and the ECtHR have developed a set of legal standards. On the first point, Article 3(1) of the directive clarifies that the directive should be considered ***lex generalis***, while the existing sector-specific provisions should be considered *lex specialis*. The directive complements these acts and is applicable to 'the extent that the matter is not mandatorily regulated in those specific-sector Union acts'. The list of sector-specific EU acts is provided in Part II of the Annex and covers areas such as financial services, prevention of money laundering and terrorist financing, transport safety and protection of the environment.

Council of Europe and European Court of Human Rights

Recital 31 clearly refers to the fact that whistle-blowers make use of their right to freedom of expression, which is recognised in both Article 11 of the EU Charter of Fundamental Rights and Article 10 of the Council of Europe Convention on Human Rights and Fundamental Freedom (ECHR). The directive was built upon ECtHR case law, although it diverges from it on certain elements, as well as upon CoE recommendations and resolutions. These include PACE Resolution 1729(2010) inviting all CoE States to review their domestic legislation concerning the protection of whistle-blowers and the CoE Recommendation of 2014 on the protection of whistle-blowers, which includes 29 principles to help countries to design and develop domestic legal frameworks to protect whistle-blowers. In 2013, PACE Resolution 1954 recommended that persons who disclose 'wrongdoings in the public interest (whistle-blower) should be protected from any type of retaliation'. In its 2015 Resolution 2060, PACE invited members to improve the protection of whistle-blowers to fight corruption and mismanagement; it recalled the developed ECtHR case law and regretted disclosure of 'information related to national security are generally excluded from protection available to whistle-blowers'. This is still the case under the EU directive (Article 3(2))[6]. Most recently in 2019, PACE welcomed the adoption of the directive and the fact that it would allow whistle-blowers to freely choose between internal and external channels. The resolution invited CoE Member States that are not, or not yet, members of the EU to adopt or update their domestic legislation in accordance with the new European standards. In 2020, PACE Resolution 1214 on the role of Parliaments in fighting corruption, invited national parliaments to adopt measures to protect the position and career prospects of whistle-blowers who are 'officials who unmask and report cases of corruption; and establish, where this has not yet been done, a code of conduct for civil servants and public officials'.

Over the years, and starting with the landmark *Guja* v *Moldova* (2008) case,[7] the Strasbourg Court has designed six criteria to establish under which conditions protection under Article 10 ECHR (freedom of expression) is granted to whistle-blowers. The 'Guja criteria' are:

- whether the whistle-blower had alternative channels to report before going public;
- whether the disclosed information was in the public interest;
- whether a preliminary check about the authenticity of the disclosed information was made;
- what damage was caused to the employer as a result of the disclosure;
- whether the whistle-blower acted in good faith;
- whether the penalty imposed was proportional.

As some experts have pointed out, it remains to be seen if and to what extent the ECtHR case law will evolve to take into consideration the EU directive, or if it will remain a 'broken promise', as argued by others. There are indeed a number of clear differences between the directive and the ECtHR case law; first and foremost the EU directive only protects those reporting breaches of EU law. According to the ECtHR, the whistle-blower is usually expected to report first within the organisation (while the directive refrains from requiring a preferential use of internal reporting). The Court applies the 'good faith' and 'a public interest' tests, none of which are required by the directive. The ECtHR establishes a link between the protection of whistle-blowers and the harm caused to the employer, while no link is established by the directive. Also, under the EU directive, whistle-blowers are not protected if they report on national security (Recital 24 and Article 3(2)), although they can be protected under Article 10 ECHR (see for example Bucur and Toma v Romania). At any rate, as established in Article 53 ECHR, no provision of the ECtHR should be applied and interpreted in a way that limits or derogates from the standards offered by the directive.

Luxleaks legal battle ends

A recent example of the evolving jurisprudence on the matter is the ECtHR ruling in *Halet v Luxembourg* (2023), which has been qualified by some as a major victory for whistle-blowers.* Raphael Halet and Antoine Deltour were the two persons involved in the 'Luxleaks' case. The Luxembourg District Court sentenced Halet to pay a criminal fine of €1 000, to pay a symbolic sum of €1 to his employer to compensate for non-pecuniary damage caused by the disclosed information. The Luxembourgish Court of Appeal confirmed that protection under Article 10 ECHR could not be granted. In May 2018, Halet lodged an application with the ECtHR. In May 2021, the ECtHR's Third Chamber ruled that there was no violation of Article 10 ECHR. The following month, Halet requested the referral of the case to the Grand Chamber of the ECtHR. On 14 February 2023, the Grand Chamber of the ECtHR put an end to Halet's legal battle, with a very different result compared to the previous rulings of the Luxembourgish Court and of the ECtHR Third Chamber. The Grand Chamber stated that Halet should indeed be protected under Article 10 of the ECHR, because he reported on facts (i.e. tax matters) that were of public interest. In particular, the Court clarified how to strike a balance between the public interest in the disclosed information and the detrimental effects deriving from the disclosure. To begin with, the Court clarified that there is no need for the disclosed information to be 'essential, new and previously unknown'. The fact that a debate is already ongoing does not exclude *a priori* the relevance of the disclosed information. Besides, it is often necessary to blow the whistle several times before public authorities take action. Commentators argue that in doing so, the Court sent a clear message that the objective of whistle-blowing is not only to bring to light issues of public interest but also to 'bring about change in the situation to which that information relates'. The Court further clarified and reaffirmed the broad scope of the 'public interest' notion. In a democratic system, the legitimate interest of the public may include having information on: 1) unlawful acts, 2) conduct that although legal is reprehensible thus questionable or debatable and 3) matters that 'concern the functioning of public authorities in a democratic society and sparks a public debate'. To summarise, matters that affect the public to such an extent that it may legitimately take an interest in them, matters that may lead to controversy, that concern a social issue or problems that the public might be interested in being informed about and could justify further disclosure of information. Finally, according to the Court, the public interest needs to be evaluated considering the national and the supranational levels – either international or European.**

* For an account of the case, see ECtHR press release of 14 February 2023.

** The EU directive does not define 'public interest', which according to some would leave the whistle-blower in a situation of legal uncertainty whether or not the disclosure will be protected under the directive. See: E.R. Boot, The feasibility of a public interest defence for whistleblowing, Law and Philosophy, May 2019.

The 'who' and the 'what'

In the absence of a clear legal definition of who is to be considered a whistle-blower, Article 5(7) of the directive defines a reporting person as a 'natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities'. The directive introduces a broad personal scope (i.e. who is covered by the directive) and a material scope limited to a set of policy areas. Concerning the **personal scope**, Article 4 provides a comprehensive definition of who should be protected, including people working in the private or public sector, workers (part-time or fixed-term), including civil servants and public service employees,

shareholders, management, self-employed, volunteers, paid or unpaid trainees, subcontractors and suppliers. The directive also applies to people who have ended their working relation and to those for whom the relation has not yet started – for instance in cases where they acquired information during the recruitment process or other pre-contractual negotiations. In that sense, and as recognised by the ECtHR case law in *Halet v Luxembourg*, it is the working relationship of the reporting person that matters, rather than his/her legal status (i.e. the person had privileged access to information because she was working, regardless of whether she was an employee or a trainee or self-employed). As defined under Article 5(8), the directive applies to facilitators, colleagues and relatives of the person reporting, recipients of the service, customers, as well as legal entities connected to that person in a work-related context (Article 4(2)). By extending the personal scope, the directive takes into consideration that relatives, colleagues or other individuals connected to the whistle-blower often have to face negative consequences. Recital 37 clarifies that protection should be offered to the 'broadest possible range of categories of people', whether the person is an EU citizen or a third-country national. This is because, to ensure enforcement of EU law, what is important is not the nationality of the reporting person but the fact that this person has privileged access to information, within his work-related activities, on breaches that are in the public interest to report.

Whistle-blower protection in the EU institutions, agencies and bodies

Recital 23 of the directive clarifies that the directive is not applicable to the staff of the European institutions, whose rights and obligations fall under the scope of the EU Staff Regulations adopted in 1962 and subsequently modified.* However, the directive would be applicable when EU staff report 'breaches that occur in a work-related context outside their employment relationship with the Union institution, bodies, offices or agencies'. The EU Staff Regulations were modified in 2004 and 2013 to introduce new obligations on the EU institutions and their staff with respect to reporting illegal activities and to the protection of reporting persons. Council Regulation (EC, Euratom) 723/2004 introduced reporting channels for EU staff wishing to raise concerns regarding possible illegal activities committed within the EU institutions (new Articles 22a and 22b), and a reporting procedure should a EU staff member consider they have received 'irregular orders or likely to give rise to serious difficulties' (new Article 21a). Under Articles 22a and 22b, EU staff and other servants do not need to be directly affected by the action on which they want to report. Council Regulation (EC, Euratom) 1023/2013 further specified that EU staff should not suffer any prejudice as a consequence of reporting to superiors about orders considered to be irregular or likely to lead to serious difficulties (new Article 21a(3)). It introduced the obligation for each EU institution to establish its own internal rules to handle reporting based on Articles 22a and 22b (new Article 22c), as of 1 January 2014. In 2014, the European Ombudsman opened an own-initiative inquiry addressing nine EU bodies.** In March 2015, this resulted in only two of the nine EU bodies (the European Commission and European Court of Auditors/ECA) being found to have adopted rules to comply with the obligation set in Article 22c. However, since then, all nine EU bodies, as well as the European Ombudsman, have adopted internal rules on the protection of whistle-blowers.

* According to Article 336 TFEU, the Staff Regulations can be modified following the ordinary legislative procedure.

** Court of Justice of the European Union (CJEU), European External Action Service, Council of the European Union, European Committee of the Regions, European Commission, European Court of Auditors, European Data Protection Supervisor, European Economic and Social Committee, European Parliament.

All the relevant circumstances should be considered to grant protection, not only the nature of the relationship. Individuals registered as informants who are due to receive a reward or a compensation for reporting remain outside the scope of the directive (Recital 30). It is up to the Member States to decide how to treat persons anonymously reporting breaches falling within the scope of the directive (Article 6(2)). Other elements are also left at the discretion of the Member States, including for instance, how to communicate the final outcome of the investigation to the reporting person (Article 11(2)(e)) in case of external reporting channels and, which reported breaches can be classified as 'minor' (Article 11(3)). It remains to be seen whether the directive will bring about a real change at Member State level and to what extent Member State discretion did not impinge on one of the main reasons to adopt the directive i.e. to overcome the patchy legal framework at Member State level. Some experts stressed the need for an 'ambitious implementation' so that the directive becomes a chance to 'enact a comprehensive and all-

encompassing national whistleblowing regulation'. This is why the European Commission has ensured close monitoring and launched infringement procedures against a number of non-compliant Member States (see Recent developments and transposition).

Whistle-blower protection in the EU institutions: the European Parliament

The **European Parliament's** Internal Rules implementing Article 22c were adopted in December 2015 and entered into force on 1 January 2016.* They apply to staff and *mutadis mutandis* to trainees and national experts (Article 1), but not to accredited parliamentary assistants (APAs). Within Parliament, advice and assistance are to be provided to individuals blowing the whistle – at their request – by the superior and/or by the member of the Secretary-General's Office with responsibility for relations with the European Anti-fraud Office (OLAF) (Article 3). Whereas a whistle-blower may not remain anonymous, confidentiality is ensured (Article 4). The European Parliament administration should ensure that colleagues blowing the whistle are not subject to retaliatory measures, and if need be they can also be transferred. The reporting person has also the right to be kept informed of the follow-up given to her/his transmission of information (Article 5) and to request assistance under Article 24 of the Staff Regulations (Article 6(1)) in case of detrimental measures against the whistle-blower. It is worth noting that Article 6 does not clarify who should carry the burden of proof in case the whistle-blower claims that the measures he/she suffered were indeed a consequence of blowing the whistle (i.e. a retaliatory measure).

The 2019 Court of Auditors Special Report on the ethical framework applicable to the European Parliament, Commission, Council and European Council confirmed that the audited institutions have established adequate whistle-blowing procedures. However, the report mentioned that the European Parliament's Internal Rules implementing Article 22c did not include any 'safeguards specifically designed to reflect the specific nature' of accredited parliamentary assistants. Parliament's reply to the ECA's observations, as adopted by the Bureau, and attached to the ECA report, stated that APAs 'are a specific population for which not all measures that can be applied to staff are available. However, Parliament is already able, by application of Article 24 of the Staff Regulations to APAs, to achieve appropriate solutions. This is covered by the reference to Article 24 in the existing whistleblowing rules'. In December 2019, the European Data Protection Supervisor (EDPS) addressed some guidance to the EU institutions, bodies and agencies to clarify how to process personal data within the whistle-blowing procedure – before they are referred or sent to OLAF – in accordance with the General Data Protection Regulation (GDPR).

On 15 December 2022, following the start of an investigation on corruption involving former and current Members of the European Parliament, Parliament adopted a resolution recommending, inter alia, the revision of Article 22c of the Staff Regulations and the revision of Parliament's Internal Rules implementing Article 22c, to align them with the provisions of the whistle-blower directive. Parliament called once again for measures to strengthen the integrity of the European institutions in its resolution of February 2023. Concerning whistle-blower protection in particular, Parliament called for the revision of Article 22(c) to align it with the Whistle-blower Directive and for the revision of the 'whistle-blower rules applicable to assistants'. In February 2023, the Conference of Presidents endorsed a set of measures put forward by Parliament President Roberta Metsola to strengthen Parliament's 'integrity, independence and accountability, while protecting the free mandate of Members'. Some of the measures require modification of the Parliament Rules of Procedure, others require implementing measures to be adopted by the Bureau. This latter adopted a first set of measures related to former Members in April 2023.

* Internal rules implementing Article 22c of the Staff Regulations, signed by the European Parliament Secretary-General on 4 December 2015.

However, **anonymous whistle-blowers** will enjoy protection if they meet the conditions of the directive and are subsequently identified and suffer retaliation (Articles 6(2) and 6(3), Recital 34). Finally, protection granted by the directive should not be applicable to individuals who disclose information already 'fully available in the public domain or unsubstantiated rumours' (Recital 43). **Breach** means any act or omission that: 1) is unlawful and is related to EU acts and areas falling within the material scope of the directive; 2) defeats the object or the purpose of the rules in the EU acts falling within the material scope of the directive (Article 5(1)). Therefore, breaches of strictly domestic laws and policies remain out of the directive's scope. **Information** includes **reasonable suspicions** about **actual or potential breaches**, therefore not only breaches that already happened in the past, but also breaches very likely to occur in the future (Article 5(2)). Article 2 of the directive defines the **material scope** by referring to the list of EU acts in the Annex, which covers no less than 12 policy areas including public procurement, public health, financial services, product safety,

transport safety, food and feed safety, consumer protection, personal data and privacy, EU financial interests (as defined in Article 325 TFEU) and the internal market, including competition, state aid, and corporate tax rules. The list should be intended as including all domestic provisions implementing the listed EU acts, as well as EU implementing and delegated acts pursuant to the EU legislation. Moreover if an act listed in Annex I defines its material scope by referring to other EU acts, these latter are also part of the material scope of Directive 2019/1937. Finally, Articles 3(2), 3(3) and 3(4) clarify what remains outside the material scope of Directive 2019/1937, including for instance national security, breaches of the procurement rules involving defence or security aspects, protection of legal and medical professional privilege, protection of classified information and domestic provisions concerning the right of workers to consult their representatives or trade unions.

The 'how' and the 'when'

For a person to invoke the protection of the directive, certain conditions have to be met (Article 6). In particular, the reporting person must have '**reasonable grounds'** to believe that, in light of the circumstances and the information available at the time of reporting, the information on breaches reported was true and fell within the scope of the directive. This does not mean that the reporting person is required to establish the authenticity of the disclosed information. Along similar lines, Principle 22 of CoE Recommendation (2014)7 recognises that 'Even where an individual may have grounds to believe that there is a problem which could be serious, they are rarely in a position to know the full picture'. It is possible, that the subsequent investigation may show that the whistle-blower was mistaken. Along similar lines, the Report A/70/361 (Paragraph 30) of the UN Special Rapporteur, considers that 'whistle-blowers who, based on a reasonable belief, report information that turns out not to be correct should nonetheless be protected against retaliation'. The **motive** of the reporting person **is not relevant** in assessing whether or not he/she should benefit from the protection granted by the directive. On the contrary, the motive (e.g. to assess whether the reporting person had a personal grievance against the employer or was motivated by a desire to obtain a personal advantage) is one of the criteria for the ECtHR to determine whether the reporting person is entitled to protection under Article 10 of the ECHR. For instance, allegations based on rumour and not supported by evidence could not be considered resulting from good faith (see *Soares v Portugal*, 2016). If these conditions are met and the person reports in the manner prescribed by the directive, then the protection measures detailed in Chapter VI of the directive would apply.

As defined by some experts, the directive follows a **three-tiered model of reporting**, based on **internal** (within the organisation), **external** (outside the organisation to the relevant authorities) and **public** (media) channels. The internal (Article 9(2)) and external (Article 12(2)) reporting may take place orally, in writing or even by means of a physical meeting. It is for the reporting person to choose the most appropriate channel for reporting, depending on the circumstances of the case, though the directive acknowledges (Recital 33) that the majority of whistle-blowers tend to report internally. Nonetheless, Member States 'shall encourage' reporting through internal channels before external ones (Article 7(2)) under certain conditions. This was a point of debate among Member States during the negotiation phase of the directive, with some governments arguing that internal reporting should be mandatory before acceding to other reporting channels. This gradual approach to reporting was supported by the argument that the organisation concerned should have been given the possibility to react and to deal with the reputational damage, as it is closest to the source of the problem and most capable of addressing it. Concerning **external reporting**, Member States shall designate authorities competent to receive the reporting and provide the appropriate follow up; they could be judicial authorities, regulatory or supervisory bodies competent in the specific areas concerned, or authorities at a central level, law enforcement agencies, anticorruption bodies or ombudsmen (Recital 64). Article 11(f) requires the competent national authorities to transmit the information in a timely manner to the competent EU institutions, bodies, offices or agencies, for further investigation, where provided for under EU or national law. The directive defines the criteria according to which external reporting channels should be chosen (Article 12) in order to be considered independent and autonomous; it clarifies which information the designated authorities

should make publicly available (Article 13). The directive also envisages the possibility of external reporting channels at EU level (Recital 69).[8]

Legal entities in the private sector with more than 50 workers[9] should establish channels and procedures for internal reporting (Article 8).[10] The rationale behind this requirement is to ensure the proximity and accessibility of the reporting channel to the prospective whistle-blower. Those with 50 to 249 workers may decide to share resources to set up common reporting channels (Article 8(6)), while for entities with fewer than 50 workers, it is up to the Member States to decide whether or not to establish internal reporting channels and procedures. Should they decide to do so, the Member State will inform the Commission about the decision and the reasons why it was decided to set up internal reporting channels. Concerning public entities, Member States may exempt municipalities with fewer than 10 000 habitants or fewer than 50 workers from the obligation of setting up internal reporting channels.

The directive introduces clear **procedural steps** for both internal and external reporting, but not for public reporting (see Table 2). In this latter case, additional conditions must be met (Article 15) for the reporting person to benefit from the protection granted by the directive. The conditions are intended to establish a fair balance, on the one hand between the public interest to know about breaches of EU law, the right to freedom of speech and of information, and on the other to protect the interest of the persons concerned by the disclosure (including reputational damage). It also requests Member States to ensure confidentiality, to protect the identity of the reporting person unless otherwise provided for in the context of investigations and judicial proceedings (Article 16).

Table 2 – Summary of the three-tiered reporting channels

Article	Type of reporting	Steps
9	Internal	Secure channels to ensure confidentiality Acknowledgement of receipt within seven days of reporting Diligent follow-up, including for anonymous reporting if provided by domestic provisions Reasonable timeframe for feedback i.e. within 3 months from the acknowledgement of receipt Clear and easily accessible information on procedures for external reporting
11	External	Establish independent and autonomous reporting channels Acknowledgement of receipt within seven days of reporting[11] Diligent follow-up Reasonable timeframe for feedback i.e. within 3 months from the acknowledgement of receipt or 6 months in duly-justified cases Communicate the final outcome of the investigation, according to domestic provisions Transmit the information contained in the report to the competent authorities for further investigation, where appropriate
15	Public	No particular procedure to follow, but threshold rules apply – i.e. protection, under the directive, will be granted if any of the following conditions is met: 1) The person first reported internally and externally or directly externally, but no appropriate measures were taken within the set timeframe OR 2) the person has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest, OR the person has reasonable grounds to believe that, in the case of external reporting, there is a risk of retaliation, or a low prospect of the breach being addressed, for instance because the authority might be in collusion with the perpetrator.

Source: Prepared by the author. Articles are not reported in full.

Article 27 of the directive requests the Member States to inform the Commission about the implementation and application of the directive, on the basis of which the Commission will present a **report to Parliament and the Council by 17 December 2023**. Member States shall also submit other annual statistics to the Commission and on the basis of these, together with the information on implementation, the Commission will again report to Parliament and to the Council, this time by

December 2025. This report may suggest amendments, including the possibility to extend the scope of the directive to other policy areas (see also Recital 106).

What comes after reporting

The directive obliges Member States to make the necessary **provisions to protect whistle-blowers** from any direct or indirect act or omission which could constitute a form of **retaliation** (Article 5(11)),[12] including 'threats' of retaliation. The list (Article 19) of possible forms of retaliation is quite extensive and includes not only dismissal or lay-off but also transfer to another post, change of place of work, withholding of promotion, imposition of disciplinary measures, discriminatory and unfair treatment, early termination, etc. Member States must adopt **measures of support** (Article 20), such as comprehensive and independent advice, legal assistance; they may also provide for financial assistance; they shall ensure that the reporting person does not incur liability, under certain conditions (Article 21); that the reporting person enjoys the right to an effective remedy, fair trial, presumption of innocence and the rights of defence (Article 22). Finally, Member States must introduce **effective, proportionate and dissuasive penalties** for natural or legal persons that breach the duty of the confidentiality of the reporting person's identity, or introduce vexatious proceedings against the reporting person, as well as for those who knowingly report false information (Article 23).

Penalties for disclosing the identity of a whistle-blower should be provided for, because disclosing the identity of the whistle-blower could expose the person to retaliation and also weaken trust in the system. Both journalists and whistle-blowers may face groundless or exaggerated lawsuits, the most common being defamation, which result in a 'chilling effect' on the reporting persons. Suffice it to recall the case of Valérie Murat who reported information on how pesticides were used in Bordeaux wine and was required to pay a fine of €125 000 for defamation, or the case of Daphne Caruana Galicia. The Maltese investigative journalist was facing 47 defamation cases in Malta, the United States and the United Kingdom at the time of her assassination in 2017. In relation to abusive or meritless lawsuits, in 2022 the Commission put forward a proposal to protect persons engaging in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation' – SLAPPs), which is currently on the EU co-legislators' table. As regards the protection against retaliation, it is worth noticing the reversal of the burden of proof (*onus probandi*) in court proceedings set out in Article 21(5). This means that the reporting person must only report: 1) on the disclosure; and 2) on the retaliatory measures she/he suffered, without the need to prove the causal link between the former and the latter. It is for the person who took the detrimental measure to prove that it was not a retaliatory act.

Recent developments and transposition

In May 2019, the Network of European Integrity and Whistleblowing Authorities was established to bring together public entities in the Member States entrusted with the protection of whistle-blowers, to share best practices, knowledge and experience. As of August 2022, the network consisted of all 27 EU Member States. In January 2020, the Commission set up a whistle-blower Protection Expert Group to assist the Commission in relation to the implementation of the directive. Although it is still too early to assess the effectiveness of the directive, some academics have already pointed to what they consider possible shortcomings. These include, for instance, that the deadlines for acknowledging receipt of the reported allegations would not be appropriate for certain types of violations (e.g. public health); that there is no obligation to keep records of the actions taken to address the wrongdoings, or the identity of those who took the decisions. The author also points to the fact that a law on whistle-blowing alone will not suffice to protect whistle-blowers if not accompanied by a well-functioning judicial system. Others have anticipated that the Member States' transposition of the directive in their respective national legislation could result in a piecemeal of dispositions. They regret that 'national security' whistle-blowers are not covered by the directive. For this reason, academics suggest that the transposition of the directive could be the

ideal occasion for a national-level debate on how to 'enact comprehensive and all-encompassing national whistle-blowing regulations'.

In a 2021 resolution on avoiding corruption, Parliament stressed 'the need to keep citizens informed about the fight against corruption', as well as the need to protect those revealing cases of corruption, especially whistle-blowers, and demanded a 'swift implementation of Directive (EU) 2019/1937'. In February 2022, Parliament called on the Commission to promote the EU-wide harmonisation of definitions of corruption offences and the same resolution recognised the role of whistle-blowers and investigative journalists in the fight against corruption. It once again called for a swift transposition and implementation of the EU whistle-blower directive.

The deadline for transposing Directive (EU) 2019/1937 was 17 December 2021, but Member States had the possibility to postpone transposition until 17 December 2023, for entities in the private sector with 50 to 249 employees. The 2-year implementation deadline was considered necessary given the patchy and fragmented situation at Member State level, as reported by the Impact Assessment accompanying the Commission proposal. In light of the slow progress, the European Commission sent **24 letters of formal notice**[13] to the following Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia, Slovenia and Spain, in January 2022. In February 2022, two additional letters of formal notice were sent to Portugal and Sweden, due to the delayed entry into force of their national measures transposing the whistle-blowing directive. Both cases (Portugal and Sweden) were closed in January 2023. In July 2022, the Commission sent **reasoned opinions** to 15 Member States, and in September 2022, four additional reasoned opinions were sent to Austria, Belgium, Romania, and Slovenia for failing to fully transpose Directive 2019/1937 within the deadline. These Member States had 2 months to provide their replies. Considering some replies insufficient, the Commission referred **eight Member States** (Czechia, Estonia, Germany, Italy, Hungary, Luxembourg, Poland and Spain,) **to the Court of Justice of the European Union** in February 2023. The European Commission remains competent to verify the completeness and correctness of the transposition into the Member States' domestic law.

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Gerdemann S. and Colneric N., 'The EU Whistleblower Directive and its Transposition: Part I and Part II', *European Labour Law Journal*, 2021.

Abazi V., 'Whistleblowing in the European Union', *Common Market Law Review*, Vol. 58, pp. 813-850, Kluwer Law International, 2021 and Abazi V., 'The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?', *Industrial Law Journal*, Vol.49(4), pages 640-656, 2020.

Kagiaros D., 'Reassessing the framework for the protection of civil servant whistle-blowers in the European Court of Human Rights', *Netherlands Quarterly of Human Rights* 2021, Vol. 39(3), pp. 220-240, 2021.

ENDNOTES

[1] Abazi V., The European Union Whistleblower Directive: A 'Game Changer' for whistleblowing Protection?, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, Pages 640–656.

[2] For a short overview of the ECtHR case law on whistle-blowers, see the Factsheet on: Whistle-blowers and freedom to impart and to receive information, European Court of Human Rights, February 2023.

[3] The question of the legal basis was solved by combining multiple legal bases. The directive brings together no fewer than 11 legal bases, notably Articles 16, 43(2), 50, 53(1), 91, 100, 114, 168(4), 169, 192(1) and 325(4) TFEU. This use of multiple legal bases is not exceptional and has been accepted by the CJEU under two conditions, namely: 1) when it is not possible to identify a main or predominant aim or component of the act; and 2) when the procedures laid down for each legal basis are compatible with each other (Case C-155/07, whose Paragraph 37 refers to Joined Cases C-164/97 and C-165/97; Cases C-338/01; C-94/03; and C-178/03).

[4] This means that Member States remain free to go beyond these minimum standards and offer an enhanced protection to those blowing the whistle.

[5] This means that disclosing information on breaches of purely domestic law is not covered by the directive.

[6] Article 3(2): 'This directive shall not affect the responsibility of Member States to ensure national security or their power to protect their essential national interests.' Article 4(2) TEU leaves the exclusive competence to legislate on national security to Member States.

[7] For other relevant cases, see: *Gawlik v Liechtenstein* (2021) and *Bucur and Toma v Romania* (2013) (employee in the public sector), *Heinisch v Germany* (2011) (employee in the private sector), *Wojczuk v Poland* (2021) (elements that rule out the protection), and *Halet v Luxembourg* (2023).

[8] Recital 69: The Commission, as well as some bodies, offices and agencies of the Union, such as the European Anti-Fraud Office (OLAF), the European Maritime Safety Agency (EMSA), the European Aviation Safety Agency (EASA), the European Security and Markets Authority (ESMA) and the European Medicines Agency (EMA), have external reporting channels and procedures in place for receiving reports of breaches falling within the scope of this directive, which mainly provide for confidentiality of the identity of the reporting persons. This directive should not affect such external reporting channels and procedures, where they exist, but should ensure that persons reporting to institutions, bodies, offices or agencies of the Union benefit from common minimum standards of protection throughout the Union.

[9] It is for the Member States to decide whether private legal entities with fewer than 50 workers need to set up internal reporting channels, based on an 'appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk for, in particular, the environment and public health' (Article 8(7)).

[10] Reporting might be established internally or provided externally by a third party (Article 8(5)).

[11] Article 11(2)) states that the obligation to acknowledge receipt of the report may be lifted should the competent authority reasonably consider that acknowledging 'would jeopardise the protection of the reporting person's identity' or if the reporting person requests it explicitly.

[12] The directive provides for protection against direct and indirect retaliation (the latter referring to retaliatory measures 'that can be taken indirectly, including vis-à-vis facilitators, colleagues or relatives of the reporting person who are also in a work-related connection with the reporting person's employer or customer or recipient of services', or 'actions taken against the legal entity that the reporting person owns, works for or is otherwise connected with in a work-related context' (Recital 41)).

[13] The infringement procedure includes a number of procedural steps. First, the Commission sends a letter of formal notice to request Member States to provide detailed information. Usually, the Member State has to reply within a 2-month period. Based on the information provided, or in the absence of any information, the Commission may send a reasoned opinion if it considers that the Member State does not fulfil its obligations under EU law (Article 258 TFEU), following which, if compliance is still lacking, the Commission may bring the Member State before the Court of Justice.

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