Simon Gerdemann (ed.)

Europe's New Whistleblowing Laws

Research Papers from the 2nd European Conference on Whistleblowing Legislation

Universitätsdrucke Göttingen

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Preface

The "European Whistleblowing Directive" (Directive (EU) 2019/1937) is the most far-reaching piece of whistleblowing legislation in history with an unprecedented impact on countries all across the European Union. To transpose the Directive, all 27 Member States were required to enact their own national whistleblowing laws by 17 December 2021, in many cases leading to the creation of an entirely new field of law previously unknown to many national legal systems.

From 10-11 September 2022, the "2nd European Conference on Whistleblowing Legislation" took place at the University of Goettingen in Germany and provided a forum for a thorough analysis of Europe's new whistleblowing laws, their commonalities, differences, and expected impact. The conference included presentations by and discussions with renowned experts in the field from across Europe – thus giving researchers, policy makers, and practitioners a unique opportunity to discuss national whistleblowing laws that had already been enacted, the most pressing questions for countries that still had to transpose the Directive as well as other current developments in whistleblowing law.

The papers included in this book are the result of this conference. They seek to provide readers with a first in-depth look into the emerging field of research that is European Whistleblowing Law. Both the conference and the book are funded by the German Research Foundation as part of the project entitled "Impact Analysis of German and European Whistleblowing Law" (project no. 470338817). The slides of all presentations held at the conference can be accessed via the link below:
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Göttingen, April 2023 *Simon Gerdemann*

Legal Consequences of Non-Transposition of EU Directives

Ninon Colneric

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1 Preliminary remarks

The presidents of the European Court of Justice (EJC) regularly emphasize in their speeches that the European Union is not held together by soldiers, but by law. Respect for the law of the European Union is of paramount importance for its existence.

Today, I shall explain in some detail how EU law is enforced. In particular, I would like to show what toolbox is at the disposal of actors at EU and national level to enforce EU law when EU directives have not been transposed at all or have been transposed inadequately. Regarding the Whistleblowing Directive1, this topic is of major relevance because a large number of Member States have not implemented the directive in time, and there are strong forces trying to reduce its effect as far as possible.

To begin with, I shall briefly set out what the obligation to transpose directives implies and what are the rules for interpreting EU law. In the following, I shall deal with infringement proceedings, the principle of interpretation in conformity with EU law, the problem of whether directives have direct effect, state liability for damages caused to individuals by breaches of Union law and the preliminary ruling procedure.

2 General Principles

2.1 The obligation to transpose directives

According to Article 288, subparagraph 3 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Thus, unlike EU regulations, which are directly applicable in all Member States (Article 288, second subparagraph, TFEU), EU directives require transposition. Pursuant to Article

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union Law, OJ L 305, 26.11.2019, p. 17.

291(1) TFEU, Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

The ECJ has set out what constitutes proper implementation. According to the Court's established case law, a directive must be transposed with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty. In the case of a directive intended to confer rights on individuals, persons concerned must be enabled to ascertain the full extent of their rights.[2]

Implementation by the administrative authorities of a Member State in conformity with the directive cannot, in itself, satisfy the requirement of legal certainty.[3] The same goes for interpretation of the provisions of national law by the national courts in conformity with the directive.[4]

However, the transposition of a directive into national law does not necessarily require an act of the legislator in each Member State. It is not always necessary to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content. In particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures, provided however, that those principles actually ensure the full application of the directive by the national administrative authorities and that, where the relevant provision of the directive in question seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are placed in a position to know the full extent of their rights and obligations and, where appropriate, to be able to invoke them before the national courts.[5]

2.2 Interpretation of EU law

The proper implementation of directives requires the correct interpretation of those directives. Therefore, I would like to briefly explain how EU law is to be interpreted.

The legal cultures united in the EU have developed different methodological doctrines for the interpretation of legal norms. However, the interpretation of Union law must follow a uniform methodology because it is only in this way that legal unity can be realized. One must be careful not to simply ascribe the same meaning to terms in Union law as in national law, for Union law uses its own terminology. The number of official languages of the EU is currently 24, and the different language versions are equally authentic.

According to the settled case-law of the Court of Justice, the meaning and scope of terms for which Union law provides no definition must be determined by

[2] See, e.g., Case C-354/98, Commission v France, EU:C:1999:386, para. 11.
[3] See, e.g., Case C-767/19, Commission v Belgium, EU:C:2020:984, para. 57.
[4] Case C-144/99, Commission v Netherlands, EU:C:2001:257, para. 21.
[5] Case C-29/14, Commission v Poland, EU:C:2015:379, para. 38 and case-law cited.

reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules of which they form part. The interpretation of a provision of Union law also involves a comparison of the language versions. Where there is a divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and the general scheme of the rules of which it forms part.[6]

In consistent case law, the ECJ interprets exceptions strictly.[7] In general, the Court strives to avoid interpretations that would reduce the practical effectiveness, the so-called *effet utile*, of the provision to be interpreted.

Not infrequently, there is a tension between the recitals of a directive and its provisions. In this regard, the ECJ has stated that the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording.[8]

Sometimes the first problem of interpretation to be resolved is whether a term refers to national law. In this respect, it must be examined to what extent the Union law measure is intended to achieve harmonization. For example, the ECJ interpreted the term "employee" as referring to national law in the Transfer of Undertakings Directive.[9] In contrast, it interpreted this term as a term having a Community meaning in Regulation No 3 concerning social security of migrant workers.[10]

One of the problems of interpretation raised by the Whistleblowing Directive is the interpretation of a term the German version of which is "juristische Person", that is "legal person". It is used in the provisions defining the personal scope of the directive and the obligation to establish internal reporting channels. The English version uses the term "legal entity". Many other language versions use words similar to "legal entity". If you apply the methods of interpretation I described, you will find that the term cannot be interpreted as referring to national law and that it is broader than the term "juristische Person" in German civil law, e.g., partnerships are not "juristische Personen" within the meaning of German civil law. However, they fall within the scope of the directive. When transposing the Whistleblowing Directive into German law, Germany will have to take this into account. Otherwise, the transposition of the Directive will be incomplete.

2.3 Infringement proceedings

The EU Commission monitors the application of Union law and thus also the implementation of EU directives. In this context, its most important instrument are infringement proceedings (Articles 258 and 260 TFEU). If, in the Commission's

[6] Case C-207/14, Hotel Sava Rogaška, EU:C:2015:414, paras. 25-26 and case-law cited.
[7] See, e.g., Case C-209/18, Commission v Austria, EU:C:2019:632, para. 38.
[8] Case C-345/13, Karen Milen Fashions, EU:C:2014:2013, para. 31.
[9] Case 105/84, Mikkelsen, EU:C:1985:331, para.26-28.
[10] Case 75-63, Unger, EU:C:1964:19.

view, a Member State has failed to fulfil an obligation under the Treaties on which the EU is founded, it first gives the Member State concerned the opportunity to submit its observations. If this first step does not lead to the Commission's concerns being allayed, the Commission issues a reasoned opinion. If the State concerned does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the ECJ. Whether the Commission initiates infringement proceedings is at its discretion.

The Commission bears the burden of proof in infringement proceedings. However, the Member States have a comprehensive duty to provide information by virtue of the principle of sincere cooperation (Article 4 (3) TEU).

According to the established case law of the Court of Justice, a Member State cannot invoke difficulties of an internal nature to justify non-compliance with the obligations deriving from Union law.[11]

If the Court finds that a Member State has failed to fulfil an obligation under the Treaties, the State must take the measures necessary to comply with the judgment of the Court. Technically, this is a declaratory judgment.

Originally, if a Member State did not comply with a judgment of the ECJ, the Commission could only initiate a second infringement procedure. The judgment then stated that the Member State had breached its obligations under the judgment in question. This actually happened.

The Maastricht Treaty gave bite to infringement proceedings in 1993. Since then, if the Court of Justice, at the request of the Commission, finds that the Member State concerned has not complied with its judgment, it can impose a lump sum or penalty payment. However, the procedure was cumbersome, requiring a two-stage preliminary procedure as before.

In 2009, the Lisbon Treaty brought further innovations to make the procedure more effective. First, the preliminary procedure for infringement proceedings for failure to comply with a judgment was reduced to one stage; it is now sufficient for the member state to be given the opportunity to submit its observations in advance. Second, the Treaty of Lisbon created a special provision for cases where the Commission brings an action because it considers that the Member State concerned has failed to comply with its obligation to notify measures transposing a directive. The ECJ can then impose the payment of a lump sum or penalty payment in the very first judgment at the request of the Commission.

The ECJ has since explained the scope of the new procedure. The issue in dispute was whether it only applies if the Member State has not notified any measures at all to transpose a directive. In the case in question, Belgium had failed to transpose certain provisions of the directive for the Brussels-Capital Region.

The ECJ interpreted Article 260(3) TFEU as follows[12]: The expression "obligation to notify measures transposing a directive" provided for therein must be

[11] See, e.g., Case C-473/99 Commission v. Austria, EU:C:2001:336, para. 12.
[12] Case C-543/17, EU:C:2019:573, para. 59.

interpreted as referring to the obligation of the Member States to provide sufficiently clear and precise information on the measures transposing a directive. In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout the territory, Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, where relevant in addition to a correlation table, it is for the Commission to establish, for the purposes of seeking the financial penalty to be imposed on the Member State in question laid down in that provision, whether certain transposing measures are clearly lacking or do not cover all of the territory of the Member State in question. It is not for the Court of Justice, in court proceedings brought under Article 260(3) TFEU, to examine whether the national measures notified to the Commission ensure a correct transposition of the provisions of the directive in question.

Thus, if the question is whether the notified national measures constitute a correct implementation of the provisions of the Directive, the more cumbersome procedure under Article 260(2) TFEU remains applicable.

Regarding the Whistleblowing Directive, the Commission has started infringement proceedings against 24 Member States in January 2022. In July 2022, it issued reasoned opinions for failing to fully transpose the Directive against 15 Member States, namely, Bulgaria, Czechia, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, The Netherlands, Poland, Slovakia and Spain.[13]

Where the imposition of a lump sum or penalty payment is at stake, the Commission specifies the amount it considers appropriate in the circumstances. It regularly publishes the data it uses for calculating this amount. The calculation of the penalty payment is based on a uniform basic amount. To this is applied the gravity factor, the duration factor and the factor "n", which takes into account the gross domestic product of the Member State concerned and the number of its seats in the European Parliament. A similar procedure is used to calculate the lump sum.[14]

Member States may also initiate infringement proceedings (Article 259 TFEU). Before a Member State brings an action against another Member State for an alleged infringement, it must refer the matter to the Commission, which then conducts a two-stage preliminary procedure. Actions brought by a Member State against another Member State are extremely rare.

The big question is how the financial sanctions imposed by the ECJ can be enforced if the Member State does not pay voluntarily. According to Article 280

[13] European Commission, July Infringements package: key decisions, https://ec.eruopa.eu/commission/presscorner/detail/en/inf_22_3768 , under 4.

[14] See, e.g., Communication from the Commission - Adjustment of the calculation for lump sum and penalty payments proposed by the Commission in infringement proceedings before the Court of Justice of the European Union, following the withdrawal of the United Kingdom (2021/C 129/01), OJ C 129, 13.4.2021, p. 1.

TFEU, judgments of the Court of Justice of the European Union are enforceable under the conditions laid down in Article 299 TFEU. The first subparagraph of the latter provision reads: "Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable." For the rest, this provision deals with enforcement under national law, e.g., the issuance of the enforcement order. Because of the unclear reference to Article 299 TFEU, it is disputed whether financial sanctions against Member States based on a judgment of the ECJ are enforceable at all.[15] However, the ECJ has qualified the procedure for sanctioning Member States now provided for in Article 260(2) TFEU, "as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement."[16] This argues for interpreting the reference in Article 280 TFEU as referring only to the procedure.

As an alternative, offsetting against claims to EU funds due to the affected Member State, e.g., from a fund in the agricultural sector, is discussed in the literature.[17] There is no explicit regulation on this. Up to now, the ECJ has dealt with the problem of offsetting only insofar as it has been used against claims of economic operators. It follows from this case law that EU law generally permits offsetting against such claims, even in the absence of an explicit legal basis. Whether, in the absence of an explicit legal basis, offsetting could also be used against claims to EU funds when it comes to financial sanctions against Member States is a matter of dispute.

Individuals cannot bring infringement actions. However, they do have the option of lodging a complaint with the EU Commission. The latter then examines whether to initiate infringement proceedings. There is a form for such complaints on the Commission's website.

2.4 The principle of interpretation in conformity with Union law

According to the settled case law of the ECJ, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under what is now Article 4(3) TEU to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.[18]

The judges of the Member States must interpret national law in conformity with Union law. In *Pfeiffer and Others*, decided while the EC Treaty was still in force, the ECJ summarized and further developed its previous case law and worked out in

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[15] See Marcus Klamert, *Die Durchsetzung finanzieller Sanktionen gegenüber den Mitgliedstaaten*, EuR 2018, 159, 167, with further references.

[16] See, e.g., Case C-304/02, Commission v France, EU:C:2005:44, para. 92.

[17] Klamert (Fn. 15), 170, with further references.

[18] See Case C-397/01-C-403/01, Pfeiffer e.a., EU:C:2004:584, para. 110, and case-law cited.

detail what requirements arise from the requirement that national law be interpreted in conformity with Community law. The original case concerned the maximum working hours of rescue assistants of the German Red Cross.

The ECJ referred to the primary law provision that determines the effect of directives, at that time Article 249(3) EC.[19] The national court must presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned.[20] Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC.[21]

Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.[22]

In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.[23]

The ECJ emphasizes that the principle of interpreting national law in conformity with Union law has certain limits. It cannot serve as the basis for an interpretation of national law that is *contra legem*.[24]

To illustrate the application of these rules in the context of the Whistleblowing Directive, let me come back to the problem of how to interpret the term "juristische Personen" used in the provisions of the directive defining the personal scope and stating the obligation to establish internal reporting channels. Let's assume that the German legislator, when transposing the directive, simply sticks to the term "juristische Personen" without adding anything. This approach would be too narrow if you construe the term as it is defined in German civil law. However, the same wording is used in a clause of the German Constitution which states that the basic rights shall also apply to domestic legal persons to the extent that the nature of such rights

[19] Identical with Art. 288(3) TFEU.
[20] Para. 112.
[21] Para. 113.
[22] Para. 115.
[23] Para. 115.
[24] See, e.g., Case C-122/17, Smith, EU:C:2018:631, para. 40.

permits. The German Constitutional Court interprets this term more broadly than in civil law. The same approach would have to be adopted when interpreting the term "juristische Personen" in the example I invented.

3 Direct effect of directives?

Where the national law cannot be interpreted in conformity with an EU directive, the question arises whether the directive can be invoked directly by individuals concerned.

Let me briefly recall the early rulings which the EJC gave with respect to the foundations of what is now the European Union:

In its fundamental judgment *Van Gend & Loos*[25], rendered in 1963, the ECJ deduced from the objective and the organizational structure of the EEC Treaty that the Community constitutes a new legal order of international law the subjects of which comprise not only the Member States, but also their nationals. Community law therefore not only imposes obligations on individuals but is also intended to confer rights upon them. Consequently, the ECJ held that the prohibition of new customs duties or tariff increases contained in Article 12 EEC Treaty had direct effects in the legal relations between the Member States and the individuals subject to their law.

In 1964, in the equally fundamental *Costa* judgment[26], the ECJ developed the principle of the primacy of Community law, for, without such a principle, the legal basis of the Community itself would be called into question. In the 1978 *Simmenthal* case[27], the ECJ clarified the consequences of the principle of the primacy of Community law. It is stated that "a national court which is called upon […] to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary, refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means".

In *Simmenthal*, the case at issue in the national proceedings concerned the compatibility of provisions of national law with an EEC regulation. The ECJ later modified this case-law for the event that national law is incompatible with an EEC directive. Here, a distinction must be made between the vertical relationship between the citizen and the state and the horizontal relationship of private individuals to each other.

[25] Case 26/62, EU:C:1963:1.
[26] Case 6/64, EU:C:1964:66.
[27] Case 106/77, EU:C:1978:49.

3.1 Vertical relationships

According to the established case-law of the ECJ, in all cases in which the provisions of a directive are unconditional, as far as their subject-matter is concerned, and sufficiently precise, the individual may invoke these provisions before national courts against the State if the latter has not transposed the directive into national law within the prescribed period or has done so only inadequately. Such provisions may be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State. The State cannot hold against it that it has not fulfilled the obligations arising from this directive. The ECJ developed this doctrine in *Becker* which concerned sales tax exemption under a directive that Germany had not transposed.[28]

The case-law of the ECJ on the direct effect of directives in vertical relationships in favour of the individual is based on a legal idea already known in Roman law: *Nemo turpitudinem suam allegans auditur*. No one should be able to derive claims from his own turpitude.

Consequently, the ECJ rejects the direct effect of directives in vertical relationships to the detriment of individuals. Thus, for example, a directive cannot, of itself and independently of a national law adopted by a member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.[29]

3.2 Horizontal relationships

As for the relationship between private parties, the ECJ has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. It follows that even a clear, precise, and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. However, this does not affect the obligation to interpret national law in conformity with Union law.[30]

This case law is ultimately based on considerations of competence. The Union may only enact obligations for individuals with immediate effect where it is empowered to adopt regulations.[31]

3.3 Consequences for national law that does not comply with a directive

If the national court cannot interpret a national provision in accordance with the requirements of Union law, it is obliged, by virtue of the primacy of Union law, not

[28] Case 8/81, EU:C:1982:271.
[29] Case 14/86, Pretore di Salò, EU:C:1987:275, paras 18-10.
[30] Cases C-397/91 – C-403/01, Pfeiffer and Others, paras 108 et seq.
[31] Case 193/17, Cresco Investigation, EU:C:2019:43, para. 72.

to apply it, provided that the Union law provision in question has direct effect. Accordingly, in the case of directives, a distinction must be made between the horizontal and the vertical relationship. A directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive. A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State or institutions and bodies attributable to it.[32]

3.4 Directives overlaid by primary law

The situation is different when primary law is involved. Labour lawyers are familiar with this constellation due to the case-law on the principle of equal pay for men and women enshrined in primary law. As the EJC held in its famous *Defrenne* ruling, this principle is directly applicable also in relations between individuals.[33]

In *Kücükdevici*, the ECJ elaborated on how to proceed when a directive is overlaid by primary law. The case concerned the Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. The ECJ held that this directive merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment.

In those circumstances, it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.[34]

The ECJ adopted the same approach in cases involving discrimination on the grounds of religion or belief.[35] In these cases, it also referred to the prohibition of discrimination on grounds of religion or belief laid down in Article 21 of the Charter of Fundamental Rights of the European Union. Another example is provided by a discrimination case in which the defendant airline had recognized the passenger's claim for damages without admitting an alleged discrimination.[36] The case concerned provisions of the Racial Equality Directive requiring effective legal protection and sanctions. The ECJ regarded them as merely giving specific expression to the right to an effective judicial remedy as guaranteed in Article 47 of the Charter.

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[32] See, e.g., Case C-122/17, Smith, EU:C:2018:631, paras 44-45.
[33] Case 43-75, Defrenne, EU:C:1976:56.
[34] C-555/07, EU:C:2010:21, paras 50-51.
[35] Cases C-416/16, Egenberger, EU:C:2918:257, paras 74-80, C-193/17, Cresco Investigation, EU:C:2019:269, paras 75-80.
[36] Case C-30/19, Diskriminerungsombudsmannen, EU:C:2021:269, paras 57-59.

Conflicting provisions of national law therefore had to be disapplied even in a dispute between private parties.

3.5 Consequences for the protection of whistleblowers

What does this mean for the protection of whistleblowers? The provisions of the Whistleblowing Directive on protective measures for whistleblowers give specific expression to the freedom of expression and information enshrined in Article 11 of the Charter of Fundamental Rights of the European Union. As the protective provisions of the directive must be read in conjunction with that fundamental right, the effects are the same in horizontal relationships as in vertical ones.

However, only provisions that are unconditional, as far as their subject-matter is concerned, can have direct effect. Wherever the Whistleblowing Directive makes the protection of the whistleblower dependent on the use of reporting channels, its provisions are not unconditional because these channels must be established first.

On the other hand, the provisions on disclosure without prior external reporting contained in Article 15(1)(b) Whistleblowing Directive are unconditional within the meaning of the said rule. Read in conjunction with Article 11 of the Charter of Fundamental Rights of the European Union, they have direct effect.

3.6 Effects of provisions of a directive not conferring rights on individuals

So far, I have only discussed the effects of provisions conferring rights on individuals. Now I will address the effect of other provisions.

In infringement proceedings concerning the obligation to assess the environmental impact of a certain project, Germany submitted that the provisions of the relevant directive could not have direct effect before implementing the directive because they did not confer specific rights on individuals. The ECJ held that the question was whether the directive could be construed as imposing an obligation to assess the environmental impact of the project concerned. The Court went on to state: "That question is quite separate from the question whether individuals may rely as against the State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise."[37]

Consequently, the provisions of the Whistleblowing Directive imposing an obligation on legal entities in the public sector to establish internal reporting channels must be implemented even in the absence of a law implementing the Whistleblowing Directive.

[37] Case C-431/92, Commission v Germany, EU:C:1995:260, paras 24-26.

4 State liability for damage caused to individuals by infringements of Union law

When the provisions of directives cannot be directly applied because their content is not unconditional and sufficiently precise, the individuals concerned can nevertheless invoke a remedy.

The ECJ developed it in *Francovich*.[38] It concerned the directive on the protection of employees in the event of the insolvency of their employer. This directive required the establishment of a guarantee institution. It gave the Member States a broad discretion regarding the organization, operation and financing of the guarantee institutions. Initially, Italy had not transposed this directive. Therefore, an affected employee claimed to be entitled to obtain from the Italian State the guarantees provided for in the insolvency directive or, in the alternative, compensation. A guarantee institution had not yet been established in Italy at the time in question. The ECJ concluded that the persons concerned could not enforce the rights under the directive against the State before the national courts where no implementing measures were adopted within the prescribed period.

The ECJ closed the gap in protection by recognizing a claim for damages based on state liability. It derived the principle of state liability for damage caused to individuals by violations of Community law attributable to the State from the essence of the legal order created by the EEC Treaty and from a provision in the EEC Treaty requiring the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law.

The Court explained that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage. Where a Member State fails to fulfil its obligation to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled. First, the result prescribed by the directive should entail the grant of rights to individuals. Second, it should be possible to identify the content of those rights on the basis of the provisions of the directive. Third, there must be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

The Member State must remedy the consequences of the damage caused within the framework of the national law on liability. The substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation. Thus, the principles of equivalence and effectiveness apply.

[38] Cases C-6/90 and C-9/90, Francovich and Bonifaci, EU:C:1991:428, paras 31 et seq.

In later decisions, the ECJ listed a further condition for a State liability claim: the breach must be sufficiently serious. This was first mentioned in *Brasserie du Pêcheur and Factortame*.[39] A sufficiently serious breach was also a condition for the non-contractual liability of the EEC. The ECJ explicitly referred to this in its reasoning.

In *Dillenkofer*[40], the ECJ explained that the condition of a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case.[41] *Dillenkofer* concerned the Package Travel Directive, which Germany had not transposed. The *Dillenkofer* judgment is therefore particularly instructive for cases where a directive has not been implemented at all. It states:

> On the one hand, a breach of Community law is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (…). On the other hand, if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (…).
>
> So where, as in Francovich, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits on its discretion.
>
> Consequently, such a breach gives rise to a right to reparation on the part of individuals if the result prescribed by the directive entails the grant of rights to them, the content of those rights is identifiable on the basis of the provisions of the directive and a causal link exists between the breach of the State's obligation and the loss and damage suffered by the injured parties: no other conditions need be taken into consideration.

The principle of State liability applies to any breach by a Member State regardless of which Member State institution committed the breach by its act or omission. Liability may also be triggered by an infringement of the judiciary that causes damage. This applies even if it is the court of last instance of a Member State. However, in *Köbler*, the ECJ clarified that State liability for an infringement of Community law

[39] Cases C-46/93 and C-48/93, EU:C:1966:79, paras 46 et seq.
[40] Cases C-178/84, C-179/94, C-188/94 and C-190/94, Dillenkofer and Others, EU:C:1996:375.
[41] Para. 23.

by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.[42] The ECJ derived this limitation from the specific nature of the judicial function and the legitimate requirements of legal certainty.

In order to determine whether there has been a manifest infringement, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court of last instance in question with its obligation to make a reference for a preliminary ruling. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the ECJ in the matter.[43]

5 Preliminary ruling procedure

If judges have the impression that an EU directive has not been implemented correctly and they need to know an answer to the respective problems of interpretation in order to give a judgment, they can ask the ECJ for a preliminary ruling under Article 267 TFEU. Thus, they can make their own contribution to the enforcement of EU law. The parties to a case can promote the use of this procedure by submitting corresponding applications.

This instrument has proved very effective in a dispute over the correct implementation in Germany of the Equal Treatment Directive 76/207. References for a preliminary ruling made by vigilant judges compelled the legislator to change the law adopted for implementing that directive twice.

To give you an example of a possible request for a preliminary ruling in the context of the Whistleblowing Directive: In Germany, a time limit on the reversal of the burden of proof has been demanded by certain business circles. If this became law and the time limit were relevant in a whistleblower case, the ECJ could be asked whether such a limit is compatible with the Whistleblowing Directive.

On the ECJ website, there are recommendations to national courts regarding the submission of references for preliminary rulings (2019/C380/01). There are also practice directions to parties concerning cases brought before the Court. The duration of the preliminary ruling procedure is surprisingly short, considering the multilingualism. It averaged 16.7 months in 2021—and that despite the protective measures against Covid-19.[44]

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[42] C-224/01, EU:C:2003:513, para. 53.
[43] Ibid., paras. 54-56.
[44] Court of Justice of the European Union, Annual Report 2021, Judicial Activity, p. 243.

6 Outlook

For a long time, whistleblowers had a very negative image in wide circles of the public. They were considered as traitors. The Whistleblowing Directive acknowledges that by reporting breaches that are harmful to the public interest, whistleblowers play a key role in safeguarding the welfare of society. For most Member States of the European Union, the directive marks a turning point in the protection of whistleblowers. This may explain the fact that the rate of transposition is very unsatisfactory so far. It needs a collective effort to make the directive fully effective. EU law provides powerful instruments for this purpose.

The Evolution and Implementation of Whistleblower Protection in Sweden

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1 The evolution and implementation of whistleblower protection in Sweden

The 2019 EU whistleblowing directive (WBD)[1] highlights the vital role whistleblowers have in society.[2] The WBD was enacted to strengthen the position of whistleblowers and provide more effective protection throughout the EU, not least through mandatory whistleblower functions now being implemented by large employers such as government agencies and companies. The implementation of the directive in Sweden has to date been fairly swift, arguably as whistleblowing protection is already a part of Swedish legal culture.

Whistleblower protection in Sweden has its historic roots in the 1766 Freedom of the Press Act (FPA). A reaction to corruption and secretive government, the drafters of the Act viewed the participation of citizens and civil servants through the freedom of informants and right to access public documents as central checks on government. Over the centuries this freedom of informants has been strengthened, through the addition of prohibitions on public agencies as to making inquiries into the identity of informants as well as retaliation. Nevertheless, it was not until

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[2] Special thanks to Dr. Simon Gerdemann, Georg-August-Universität Göttingen and Professor Laura Carlsson, Stockholm University for valuable comments and suggestions. I am also grateful to Paul Lappalainen, Swedish and American Lawyer for comments and language review. Finally, I wish to thank Erik Sinander, senior lecturer in private international law, Stockholm University for valuable information and materials.

2016 that the Swedish legislator introduced the first specific Whistleblower Act, which applies to both the public and private sectors.

The aim of this paper is to analyze the evolution of whistleblower protection as well as the current system of the whistleblower legislation in Sweden leading up to the implementation of the WBD in Swedish law. Some reflections related to issues concerning legal culture are given, with the possible challenges regarding the integration of the new European rules in Sweden as well as an analysis of the effectiveness of the Swedish whistleblower protection system.

This study is mainly doctrinal, analyzing general sources of law. However, studying the Swedish whistleblower protection is not tenable without considering other important sources of legal relevance such as the opinions of the Justice Ombudsman or the Chancellor of Justice. While not legally binding, they are of importance regarding the interpretation of the law as well as a vital instrument for ethical assessments. Moreover, whistleblower protection is not merely a legal issue. Law is not only in the books but also in action, to paraphrase Roscoe Pound.[3] An important aim of the whistleblower protection is to facilitate the ability of individuals to report wrongdoings of different kinds in the workplace in order to serve the public interest. The disclosure of crimes or abuse of public funds benefits society as a whole. In order to evaluate whether the law has the effects intended, it is necessary to also consult sources beyond simply legal sources in order to be able to deepen this understanding, such as media reports and surveys regarding ethics in the workplace.

1.1 The evolution of whistleblower protection in the Swedish legal system

The year 1766 marks the beginning of the legal journey of Swedish whistleblower protection. In this year, the initial Freedom of the Press Act (*Tryckfrihetsförordningen*), considered the first of its kind in the world, was introduced in Sweden and Finland, which were part of the same country at the time, during the Age of Liberty (*Frihetstiden*, 1719-1772).[4] What mainly sparked this development was the idea that freedom of expression would contribute to society's well-being through access to information of public interest and freedom of speech. This was vehemently advocated by the intellectuals at the time, such as Peter Forsskål, a Linnaean disciple and

[3] Pound, Roscoe, *Law in Books and Law in Action*, 44 American Law Review, 1910, p. 12.

[4] Nokkala, Ere, *World's First Freedom of Writing and of the Press Ordinance as History of Political Thought*, in Carlsson, Ulla and Goldberg, David (eds.) The Legacy of Peter Forsskål – 250 Years of Freedom of Expression, Nordicom 2017, p. 39 ff. A main inspiration was the abolishment of censorship in Britain in the late 17th Century, Government investigation SOU 1947:60, Proposal for a Freedom of the Press Act (*Förslag till Tryckfrihetsförordningen*), p. 31. A translation of the Freedom of the Press Act of 1766 in English by Peter Hogg can be found in Mustonen, Juha (ed.), The World's First Freedom of Information Act – Anders Chydenius' Legacy Today, Anders Chydenius Foundation 2006, p. 8, available at https://www.chydenius.net/tiedostot/worlds_first_foia.pdf

alumni of the University of Göttingen, in his "Thoughts on Civil Liberty" of 1759.[5] In § 21 of his pamphlet Forsskål concludes that:

Finally, it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, it must be possible for society's state of affairs to become known to everyone, and it must be possible for everyone to speak his mind freely about it. Where this is lacking, liberty is not worth its name.[6]

A major focus of the act was the anti-corruption fight against secret and unaccountable government in the 1760s,[7] a focus passionately pursued by one of the most prominent drafters of the Freedom of the Press Act (FPA), the Finnish clergyman Anders Chydenius (1729-1803).[8] An important part of these efforts was to enable all citizens, and in particular independent and wary civil servants, to raise the alarm if they came across any mishandling of funds or corruption.[9] The preamble to the FPA of 1766 can be seen as the embryo whistleblowing legislation, with its focus on transparency and public access as means to reveal corruption and other injustices:

That, having considered the great advantages that flow to the public from a lawful freedom of writing and of the press, and whereas an unrestricted mutual enlightenment in various useful subjects not only promotes the development and dissemination of sciences and useful crafts but also offers greater opportunities to each of Our loyal subjects to gain improved knowledge and appreciation of a wisely ordered system of government; while this freedom should also be regarded as one of the best means of improving morality and promoting obedience to the laws, when abuses and illegalities are revealed to the public through the press; We have graciously decided that the regulations issued previously on this matter require such appropriate amendment and improvement that all ambiguity, as well as any such coerciveness as is incompatible with their intended purpose, may be removed.[10]

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[5] Goldberg, David, *Who was Peter Forsskål?* in Carlsson, Ulla and Goldberg, David (eds.) The Legacy of Peter Forsskål – 250 Years of Freedom of Expression, Nordicom 2017, p. 13 ff.

[6] Forsskål, Peter, *Thoughts on Civil Liberties*, translated into English by Goldberg et al. in Carlsson and Goldberg 2017, p. 35.

[7] Skuncke, Marie-Christine, *Press freedom in the Riksdag 1760-62 and 1765-66* in Wennberg, Bertil & Örtenhed, Kristina, Press Freedom 250 Years – Freedom of the Press and Public Access to Official Documents in Sweden and Finland – a living heritage from 1766, Swedish Parliament 2017, p 109 ff.

[8] Manninen, Juha, *Anders Chydenius and the Origins of World's First Freedom of Information Act* in in Mustonen 2006. p. 31 ff.

[9] Larsson, Per, *Skyddet för visselblåsare i arbetslivet – en konstitutionell och arbetsrättslig studie*, Jure 2015, p. 100 ff. (Whistleblower protection in working life – a study in constitutional and labour law).

[10] *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press* (1766), Translated by Hogg, Peter in Mustonen, Juha (ed.), The World's First Freedom of Information Act – Anders Chydenius' Legacy Today, Anders Chydenius Foundation 2006, p. 8.

Central to the protection laid down in the 1766 Act was the principle of publicity (*offentlighetsprincipen*) including the right to anonymously access public documents. More importantly, in the context of whistleblower protection, were the provisions regarding the freedom of informants (*meddelarskyddet*), which enabled civil servants to criticize and expose corruption in different forms.[11] It was, however, not until the introduction of the 1949 Freedom of the Press Act that a more modern whistleblower protection evolved under the panoply of the right to anonymity, consisting of source confidentiality. Here, the principle of the prohibition to make inquiries into the identity of the informant was seen as a vital component.[12]

The reform contained in the 1949 FPA[13] strengthened the fundamental rights protection, built on a system with sole, successive and vicarious responsibility designed to protect anonymity, where source and whistle-blowing protections were among the new features, meaning that a public employee who blows the whistle will be free from liability, unless they disclose classified information. This system, with sole responsibilityassessed through different vicarious "liability chains" (*ansvarskedjor*), appears to be unique in a comparative legal perspective.[14]

The liability chain consists of different actors who will be held liable in turn. There are two different liability chains in the FPA, one for periodicals and one for non-periodical publications. Regarding periodicals, the publisher is at the top of the chain followed by the owner, then the printer and lastly the distributor. Only one

[11] Larsson 2015, p. 101.

[12] SOU 1947:60, p. 87 f.

[13] The 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression as updated in Swedish can be found at the Swedish Parliament's website: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/tryckfrihetsforordning-1949105_sfs-1949-105 and https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/yttrandefrihetsgrundlag-19911469_sfs-1991-1469. Official English translations of these acts can be found at the Parliament's website, but are not regularly updated: https://www.riksdagen.se/en/Documents-and-laws/ (October 2022).

[14] Hirschfeldt, Johan, *Constitutional protection of freedom of expression in Sweden – conflicts and turning points* in in Wennberg, Bertil & Örtenhed, Kristina, Press Freedom 250 Years – Freedom of the Press and Public Access to Official Documents in Sweden and Finland – a living heritage from 1766, Swedish Parliament 2017, p. 604. The chain of responsibility means only one person can be prosecuted and are different for periodical and non-periodical publications as well as for a programme or technical recording. The chains of responsibility are the following. FPA periodicals, ch. 8, §§ 1-5 FPA: first the editor, second the owner, third the printer, fourth the disseminator. FPA non-periodicals, ch. 8 FPA §§ 6-10: First the writer, second the editor third the publisher, fourth the printer and sixth the disseminator. According to ch. 6 Fundamental Law on Freedom of Expression (FLFE), the sole responsible for offences related to programme or technical recording is: first the editor, second the producer, third the disseminator.

link in the chain can be held liable and prosecuted for criminal acts listed in the FPA.[15]

Anonymity and source protection were deemed key elements of an effective enforcement of the freedom of speech, due to the many different practical restrictions of freedom of speech in our daily lives such as the social, working and business life of an individual as well as spiritual and economic prerequisites.[16] This was a clear response to several instances of interference by the Government during World War II and the censorship that temporarily was in place. The 1949 reform thus clearly indicated a return to the Swedish freedom of the press tradition.[17]

During the coming decades, further efforts were made to strengthen source protection and the freedom of informants through the codification of the bans against investigations and retalation by public officials towards, for example, employees that might have raised the alarm regarding a certain issue. These bans initially were mainly not sanctioned criminally and could be better described as being part of government ethics, which are enforced through disciplinary sanctions, in particular through the opinions of the Justice Ombudsman (the Ombudsman of the Riksdag) or the Chancellor of Justice (the highest ombudsman of the government). In certain cases, however, a breach of the ban would amount to a breach of official duties, which could be prosecuted according to the penal code (*Brottsbalken*) by either the Chancellor of Justice or the Justice Ombudsman as special prosecutors.[18] In 1976 the ban on investigation was1 complemented with an express criminal provision in the FPA, which meant that public officials could be directly prosecuted under the FPA, with the Chancellor of Justice as the sole prosecutor of freedom of speech offences according to Chapter 9 § 2 FPA. This development was to some extent a result of the decriminalization of breaches of official duties carried out in the 1970s as well as a means to strengthen the exclusivity of the FPA.[19]

The ban on retaliation, similar to the ban on interrogation, has been considered to be a component of the protection of anonymity. However, this was not codified in law until 2011. Prior to 2011, it was enforced through disciplinary sanctions and

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[15] Funcke, Nils, *Openness and the freedom to communicate information* in Wennberg, Bertil & Örtenhed, Kristina, Press Freedom 250 Years – Freedom of the Press and Public Access to Official Documents in Sweden and Finland – a living heritage from 1766, Swedish Parliament 2017, p. 480.

[16] SOU 1947:60, p. 83.

[17] SOU 1947:60, p. 34 ff; Axberger, Hans-Gunnar, *The legal heritage of 1766* in Wennberg, Bertil & Örtenhed, Kristina, Press Freedom 250 Years – Freedom of the Press and Public Access to Official Documents in Sweden and Finland – a living heritage from 1766, Swedish Parliament 2017, p. 262 ff.

[18] The Chancellor of Justice and the Justice Ombudsman are special prosecutors in cases of breach of official duty according to their respective instructions: Förordning (1975:1345) med instruktion för Justitiekanslern § 3,
Lag (1986:765) med instruktion för Riksdagens ombudsmän § 6.

[19] Government bill, prop. 1975/76:204, p. 56 ff, p. 136 f, the ban was introduced in Chapter 3 § 4 together with a criminal provision in Chapter 3 § 5 of the FPA; Larsson 2015, p. 147.

could in certain rare circumstances be enforced through criminal procedure.[20] This meant that it could only be enforced under criminal law if the retaliatory actions were part of an exercise of public authority. In practice the ban on retaliation was only "enforced" through the opinions of the Justice Ombudsman and the Chancellor of Justice, which with time were deemed to be insufficient,[21] not least due to the developments in European law.[22] Through the reform of 2011, the ban on retaliation, has been given its own provision in the FPA as well as a complementary criminal provision.[23]

1.2 Public v. private actors, privatization and outsourcing

Whistleblower protection in Sweden was, until fairly recently, related mainly to the public sector. In the 1960s and 1970s the need to extend the freedom of informants to the private sector, to allow for increased transparency and scrutiny of this sector, was debated in the media.[24] One aspect that was pointed out, was the fact that research and development were increasingly taking place within large corporations, private as well as state owned. This gave rise to a need for increased independence for researchers and technicians working in these organizations and a greater freedom to raise the alarm in cases of serious wrongdoing by corporations.[25]

During the mid-1980s and onwards, rapid privatizations of the public sector and in particular welfare services were carried out, which further underlined the need for reform. As a consequence, the need to extend the freedom of informants especially to taxpayer-funded businesses was identified. Several government investigations were carried out which proposed that the freedom of informants laid down in the FPA should be extended to the private sector, but did not result in legislation,[26]

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[20] Government bill, prop. 2009/10:81, Constitutional protection for digital cinema and other issues regarding freedom of speech (*Grundlagsskydd för digital bio och andra yttrandefrihetsrättsliga frågor*) p. 37 ff.
[21] Larsson 2015, p. 148.
[22] See e.g. Council of Europe Recommendation, CM Rec (2014) 7 on the protection of whistleblowers, principle 21, see also Larsson 2015, p. 149 f.
[23] Government bill, prop. 2009/10:81.
[24] This was mentioned in a government bill and it was concluded there was a need for an extended freedom of informants in regard to state or municipally-owned corporations, but that this had to be further investigated, see government proposal 1975/76:160, *om nya grundlagsbestämmelser angående allmänna handlingars offentlighet*, p. 74 (on new constitutional provisions regarding access to public documents). This issue was further addressed in a government inquiry SOU 1983:70, *Värna yttrandefriheten, Förslag av Yttrandefrihetsutredningen*, p. 163-165 (Government inquiry by the Freedom of speech investigation: "Defend the freedom of speech").
[25] SOU 1983:70, p. 163-165. A reference is made to a then renowned article in the Swedish Newspaper Dagens Nyheter 15 June 1965 by the technician Klas Jirlow at the corporation Atomenergi AB.
[26] SOU 1983:70, p. 66; SOU 1990:12 *Meddelarrätt – Meddelarfrihet i företag, föreningar mm*, Betänkande av meddelarskyddskommittén, (Government inquiry by the committee on the freedom of informants, "Freedom of informants in corporations, associations etc"); Ds 2001:9, See Öman, Sören,

although there was an extension in regard to the principle of access to public documents that was made regarding certain corporations, associations or foundations exercising public authority.[27]

Moreover, changes were made in the Swedish Trade Secrets Act in 1990 which made explicit that serious misconduct or criminal activity can never be invoked as trade secrets. Hence, a contract prohibiting an employee to raise the alarm against such misconduct will not be considered valid and cannot trigger any contractual liability.[28]

Furthermore, a reform in 2006 extended the freedom of informants to employees in municipally-owned corporations, which led to a change in the Secrecy Act of 1980.[29] The provision is currently regulated in the Public Access to Information and Secrecy Act, *Offentlighets- och sekretesslag (2009:400)*, Chapter 13 § 2.

In the 2010s, a series of scandals regarding private taxpayer-funded elderly care providers took place, which sparked a public debate and laid bare the lack of whistleblower protection in these businesses.[30] An infamous example was the so-called "Carema Scandal" which played out during 2011 and 2012, where systematic neglect and inhumane treatment of the elderly in nursing homes run by private equity nursing home chains, some of them based in tax havens, was revealed by the media.[31]

A new law concerning the freedom of informants in certain private businesses (*lag (2017:151) om meddelarsskydd i vissa enskilda verksamheter*) was introduced in 2017 which expanded the right to anonymity and freedom of informants to private companies in the welfare sector, such as schools, healthcare and social services.

Visselblåsarlagen – En kommentar till lagen om skydd för personer som rapporterar om missförhållanden, Norstedts Juridik, Stockholm 2021, p. 17 (A commentary to the Whistleblower Act (2021:890).

[27] Government bill, prop. 1986/87:151, om ändringar i tryckfrihetsförordningen m.m., p. 146 ff. (on changes in the Freedom of the Press Act etc.).

[28] Parliamentary Committee on Legislation, Deliberations 1988/89:LU37, *Skydd för företagshemligheter*, p. 20-35. Öman 2021, p. 17. This rule is currently regulated in the Trade Secret Act of 2018, 4 § regarding the scope of application, Lag (2018:558) om företagshemligheter.

[29] Government bill, prop. 205/06:162, *Förstärkt meddelarskydd för anställda i kommunala företag m.m.* (Extended freedom of informants for employees of municipally owned corporations), p. 7 ff.

[30] Larsson 2015, p. 99; Government Inquiry SOU 2013:79, Stärkt meddelarskydd för privatanställda i offentligt finansierad verksamhet Betänkande av Utredningen om meddelarfrihet för privatanställda i offentligt finanseriad verksamhet, p. 25.(Inquiry regarding Enhanced protection of informers concerning employees in taxpayer-funded private businesses).

[31] This was mainly due to the work of the investigative journalist Erik Palm through his documentary "We gave them our dad", which sparked a national debate. Palm later published a book based on the documentary *Carema skandalen: riskkapitalets fantastiska resa i äldrevården*, Carlsson 2013. See also Svallfors, Stefan, Tyllström, Anna, *Lobbying for Profits: Private Companies and the Privatization of the Welfare State in Sweden*, Insitute for Future Studies, Working paper 2017 nr 1, p. 9.

1.3 Prohibiting retaliation

As a parallel, the first Whistleblower Act in Sweden, the Act on a particular protection against retaliation for employees who raise the alarm regarding serious wrongdoings (*lagen (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden)* was launched in 2016, with a general scope embracing both public and private entities. The Act included protection for permanent as well as temporary employees against retaliatory measures for reporting serious illegal behavior and activities within an organization. The law included requirements concerning both internal and external reporting as well as rules concerning damages and a reversed burden of proof.[32]

The previous Whistleblower Act of 2016 did not result in many court cases before the new Act of 2021 came into force. One acclaimed case in 2020, which has been presented as the first court case, concerned a director of the social services of a Swedish municipality, who together with a colleague raised the alarm regarding serious wrongdoing.[33] Preliminary warning referrals regarding children were not being investigated and, in some cases, were not even registered. Certain cases had not been reported to the police in spite of suspicions of sexual abuse. The director managed to negotiate with the municipality that paid damages. They were also supposed to rehire her, which they later did not go through with, which led the director to sue the municipality for damages, which they finally had to pay.[34] In this case the Act was enforced to some extent, although the director did not keep her job.

The 2016 Act was replaced by the new Whistleblower Act in 2021, implementing the EU Whistleblowing Directive. This Act, enlarging the scope of whistleblower protections even further as well as introducing new requirements and enforcement mechanisms, is analyzed further below.[35] The new specific whistleblower protection legislation was generally welcomed in both the public and the private sectors. Nevertheless, it has been criticized for requiring employees to make more or less complicated assessments, as well as forming a threat to trade secrets.[36]

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[32] Government bill 2015/16:128, A particular protection against retaliation for employees who raise the alarm regarding serious wrongdoings (*Ett särskilt skydd för arbetstagare som slår larm om allvarliga missförhållanden*); Government Inquiry SOU 2014:31, Whistleblowers - enhanced protection for employees who report or disclose wrongdoings in the workplace (*Visselblåsare – Stärkt skydd för arbetstagare som slår larm om allvarliga missförhållanden*, Betänkande av Utredningen om stärkt skydd för arbetstagare som slår larm), Summary in English p. 29-33.

[33] Hansson, Anton, *Unikt rättsfall när Visselblåsare stämmer Båstad kommun*, Sveriges Radio 2020-06-01; *Båstad stäms för brott mot visselblåsarlagen,* Lag & Avtal 2020-06-01 (TT).

[34] Hedlund, Cecilia, Båstads kommun betalar skadestånd till visselblåsare, SVT Nyheter Helsingborg, 28 January 2021.

[35] Government bill, prop. 2020/21:193, Implementation of the Whistleblower Directive (*Genomförande av visselblåsardirektivet*).

[36] See below, section 5.

1.4 The impact of the whistleblower evolution

The evolution of whistleblower protection in Sweden has been slow but steady, expanding into different areas in society over the years. A fairly thorough set of rules is in place to protect whistleblowers. Effectively moving from words to action is, however, another issue.

There are some fact-based indications that support the idea that the Swedish whistleblower protection has an important impact at the societal level, in particular the fairly low level of corruption in Sweden, from a comparative perspective, especially in the public sector. Sweden scores well and has scored well over time internationally according to the Transparency International Corruption Perceptions. In 2021 the Index Score for Sweden was 85/100, where 100 is very clean and 0 is very corrupt. During the past decade Sweden has scored between 84-88.[37]

Using these scores does not give a complete picture of the state of corruption in Sweden, not least since it does not cover municipal and regional governments, but it can serve as an indication.[38] The hybrid privatization of the Swedish welfare state through taxpayer-funded for-profit providers of different welfare services, mainly at the municipal level, has not surprisingly its own particular challenges from a transparency perspective.

Moreover, a yearly report on court cases regarding bribery conducted by the Swedish Anti-corruption Institute (*Institutet mot mutor*) shows that the value of bribes increased as much as 600% from 2020 to 2021 from 16.6 million SEK in 2020 to 117 million in 2021. Nevertheless, it must be noted that the number of court judgments regarding crimes of corruption is fairly limited.[39]

How whistleblower protection is actually functioning at the individual level is however another matter. Several surveys show that most employees, more than 50 percent according to some surveys, refrain from reporting on wrongdoings at the workplace out of fear of retaliation or feelings of loyalty, even though many of them acknowledge that they are experiencing unethical behavior daily.[40]

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[37] Available at the webpage of Transparency International: https://www.transparency.org/en/cpi/2021/index/swe

[38] See e.g. Castillo, Daniel, *Statens förändrade gränser – en studie om sponsring, korruption och relationen till marknaden* (Reshaping the Boundaries of the State – a study on sponsorship, corruption and market-state interactions) Stockholm Studies in Sociology, New series 39, Stockholm university 2009, English Summary p. 223-229; Open data and the fight against corruption in Latvia, Sweden and Finland, Open Knowledge Foundation 2018, p. 17, available at https://blog.okfn.org/2018/12/07/open-data-and-the-fight-against-corruption-in-latvia-sweden-and-finland/.

[39] Judgements regarding corruption crimes in Sweden 2021, case law collection by the Swedish Anti-Corruption Institute, sector by sector (*Mutbrottsdomar i Sverige 2021, IMM:s rättsfallssamling sektor för sektor*).

[40] According to for example the Nordic Business Ethics Survey of 2019 comprising 1500 employees in the Nordics, 80 percent of the respondents experience unethical situations at the workplace daily, albeit only 47 percent feel that they can address their superiors on these issues. Furthermore 96 percent

2 Constitutional provisions on whistleblower protection

In Swedish law, whistleblower protection at the constitutional level is regulated in the 1949 Freedom of the Press Act (FPA) and the 1991 Fundamental Law on Freedom of Expression (FLFE), the former addressing printed matter and the latter other media such as TV, Radio, databases, etc. A whistleblower, employed by a public body, who raises the alarm related to a public agency or other public body in Sweden through constitutionally protected media has certain constitutional protections.[41]

Firstly, the freedom of speech laws, as mentioned above, have a system of sole, successive and vicarious responsibility, which in itself provides a fairly strong protection for the informant/whistleblower, since they normally will not be held liable for any offence that might be a result of the publication. There are, however, some situations where the informant might be held liable for an offence against the freedom to communicate information (*meddelarbrott*) according to Chapter 7 § 22 FPA and Chapter 5 § 4 FLFE if they hereby have committed certain serious crimes against national security such as insurrection, high treason and espionage. As of 1 January 2023, the new offence of foreign espionage was added to this list.[42] Furthermore, the informant can be held liable for the wrongful release of a document to which the public does not have access, due to secrecy provisions, or a deliberate disregard of a duty of confidentiality in breach of qualified duties of confidentiality that are specifically regulated in the Public Access to Information and Secrecy Act.[43]

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of the respondents view compliance with ethical rules as more important that increased career possibilities or pay raises, see Kutinlahti, Sonja, *Anställda dåliga på att ingripa mot missförhållanden på arbetsplatsen*, Sveriges Radio 2019-04-08; see also https://www.nordicbusinessethics.com/nordic-business-ethics-survey-2019/. Other surveys conducted by Unions show the same pattern, e.g. a Survey by a couple of Newspapers, Swedish Radio and Swedish Television in northern Sweden in 2019 showed that more than half of the respondents, working in the public sector, would not or would be hesitant to talk to the media regarding wrongdoings in the workplace. The reasons differ. Some are afraid of retaliation, others think it is more appropriate to speak out internally, see *Anställda i offentlig sektor - bara hälften vågar tipsa om missförhållan*den, Norran 2019-09-02.

[41] The 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression as updated in Swedish can be found at the Swedish Parliament's website: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/tryckfrihetsforordning-1949105_sfs-1949-105 and https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/yttrandefrihetsgrundlag-19911469_sfs-1991-1469. Official English translations of these acts can be found at the Parliament's website, but are not regularly updated: https://www.riksdagen.se/en/Documents-and-laws/ (October 2022).

[42] Parliamentary protocol, Riksdagsskrivelse 2022/23:11; Constitutional Committee, report 2022/23:KU7, Foreign Espionage (*Utlandsspionen*).

[43] The provisions concerning qualified confidentiality are regulated in the end of the different chapters of the Public Access to Information and Secrecy, for example secrecy rules regarding the defence or sensitive information concerning medical secrecy. In ch. 44 of the said Act, qualified confidentiality provisions in other laws are mentioned, for example the FPA, the Code of Judicial Procedure, the Social Services Act or the Patient Security Act.

Central to whistleblower protection are the chapters on the right to anonymity laid down in Chapter 3 of the FPA and Chapter 2 of the FLFE, which outline the limits of source confidentiality. Vital to the right to anonymity are the bans on inquiry and on reprisals, which serve as important safeguards to uphold this right.

The ban on inquiries is stipulated in Chapter 3 § 5 of the FPA and Chapter 2 § 5 of the FLFE and means that a public authority or other public body may not inquire into the identity of persons who have the role of authors, originators, publishers, or persons who communicate information, with the exception for inquiries that are necessary for prosecution or other actions against such actors which are contrary to the FPA or FLFE. When the exception applies it is however noteworthy that the duty of confidentiality in Chapter 3 § 3 of the FPA and Chapter 2 § 3 of the FLFE is upheld.

The ban on inquiries does not provide a complete protection without the ban on reprisals contained in Chapter 3 § 6 of the FPA or Chapter 2 § 6 FLFE. These provisions stipulate that a public authority or other public body may not intervene against a person because he or she has made use of his or her freedom of the press or of expression or assisted in such use in printed matter, a program or technical recording. These bans have both a disciplinary and a criminal law dimension. Normally the bans are enforced through disciplinary means, which can be made through either the Justice Ombudsman or the Chancellor of Justice.

The bans on inquiries and on reprisals further entail a criminal liability and are important components of the constitutional whistleblower protection. According to Chapter 3 § 7 p. 4 and 5 FPA or Chapters 2 § 7, p. 3 and 4 FLFE, a person who through deliberate intent makes inquiries in breach of the ban on inquires or acts in breach of the ban on reprisals, will be punished by a fine or imprisonment for up to one year. These crimes are considered as public misdemeanors (*ordningsförseelser*) and will not be handled within the particular rules of liability in the FPA and the FLFE, which is vicarious. The official responsible for these actions will therefore not be able to avoid responsibility. Nevertheless, the Chancellor of Justice remains the sole prosecutor according to Chapter 9 § 3 of the FPA and Chapter 7 § 1 FLFE.

2.1 Application of the ban on inquiries

The ban on inquiries in practice mean that most attempts by, for example, an official to investigate the identity of the person who has leaked information to the press, will be unlawful or subject to disciplinary measures. By asking for instance an employee or reporter about who has provided information to the press or other news media or how certain information has been obtained by a journalist, an official can be held criminally liable for a breach of this ban. An example of this can be found in a 2019 judgment from the Court of Appeal for Western Sweden, where the director of a library in the Swedish town of Karlstad was convicted for a breach of the ban on inquiries during an interview with a journalist regarding a so-called Roma registry, which was allegedly established by the library. The director asked the

reporter at least three times who had provided him with this information, in spite of the reporter reminding her that she was not allowed to ask that kind of question. The director was punished with a fine.[44]

In another case from 2019, the Justice Ombudsman (*Justitieombudsmannen*) decided not to prosecute a case where a director of a municipality had repeatedly made requests to a reporter about the identity of a person who revealed information about different workplace related issues at the municipality. The director maintained that the conversation with the journalist was not serious and that he was just asking general questions needed to understand the context. The Justice Ombudsman however found that the director clearly was guilty of a breach of the ban on inquiry and pointed out that he had showed a lack of respect for the ban. It is not entirely clear why this case was not prosecuted and instead handled via a supervisory procedure, since it showed great similarities with the case from the Appeal Court.

According to one of the few precedents, a judgment by the Supreme Court, NJA 2001 s. 673, it was not considered to be established beyond a reasonable doubt that a breach of the ban had occurred when a local politician asked an employee of the municipality to whom she had leaked information about a conversation that they had had regarding a certain event, a conversation that was later reported in the media.

2.2 The Ban on Retaliation

Furthermore, a breach of the ban on inquiries is often accompanied by a breach of the ban on retaliation (*repressalieförbudet*).[45] What acts of retalation that belong to the criminal sphere and what acts that are considered inappropriate can sometimes seem unclear and the consequences differ substantially.

In the reform of 2011 related to a change in the FPA and the FLFE, which codified the ban on retalation, which was up until now applied as a principle of constitutional law.[46]. The preparatory works contained an attempt to clarify this issue through the description of typical acts constituting retalation of criminal nature. Reference was made to the praxis of the Justice Ombudsman and the Chancellor of Justice, where for instance dismissal, disciplinary measures, denial of pay raise, deprivation of duties are clear acts ofretaliation, but also less severe acts such as scolding and ostracism.[47] The Justice Ombudsman particularly pointed out in its

[44] Judgment by the Court of Appeal for Western Sweden (Hovrätten för Västra Sverige) 2019-04-08, Case B 5057-18.
[45] Larsson 2015, p. 147.
[46] Funcke 2017, p. 482.
[47] Government bill, prop. 2009/10:81, p. 40.

comments on the proposed legislation that the effectiveness of social sanctions should not be underestimated as a means to combat retaliation.[48]

Similarly, as stated by Larsson, the constitutional ban on retaliation does not necessarily provide employees with a stronger protection than what is in place for privately employed persons, when it comes to retaliation that is less direct, such as bullying. The criticism of these types of retaliation are also dependent on actions taken by the Justice Ombudsmen or the Chancellor of Justice and they rarely reach the courts.[49] The praxis of these institutions can be said to be overwhelmingly concerned with the appropriateness of a retaliatory act.

The Justice Ombudsman has for example deemed contrary to the bans the fact that a director of a municipality held staff meetings where he made inquiries into the source of a leak regarding a letter written by a group of teachers regarding a toxic workplace environment at a school, as well as to making threats to the entire staff. These actions were obviously aimed at influencing them not to go public with negative information regarding the municipality.[50] The acts, however, did not lead to a prosecution.

In a more recent case that received a great deal of attention in the media, the Chancellor of Justice decided to close a preliminary investigation regarding the ban on retaliation that related to the transfer of an employee of a regional government, a medical secretary, who had written an article in a local newspaper in which she expressed criticism concerning the covid prevention policy at a medical clinic where she was working during the pandemic that allowed employees to go to work with symptoms of a cold. Her employer had several meetings with her where she was accused of, among other things, spreading information that was not fact-based, that she had no right to make herself the spokesperson for the municipality and ironically referred to her as "Miss Whistleblower" ("*Fröken Visselblåsare*"). She recorded these meetings. Shortly hereafter, she was transferred to a clinic in another area. The Chancellor of Justice determined that the measures taken against the employee were contrary to the ban and that the transfer was a retaliatory measure. Nonetheless, these measures were not serious enough to fall within the criminal sphere of the ban. Part of the assessment seemed to be that the clinic she was working for was going to be closed and moved to the clinic to which she had been transferred shortly after this incident.[51] The decision was criticized in the media as being too limited and risking harming the trust in the system.[52]

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[48] Government bill, prop. 2009/10:81, p. 41.

[49] Larsson 2015, p. 243.

[50] JO:s ämbetsberättelse 2014/15, p. 663, dnr. 5051-2012.

[51] Justitiekanslern, decision 2021-12-15, dnr 2021/2037.

[52] See e.g., SVT Nyheter, Västerbotten, *Yttrandefrihetsexperten Nils Funke kritisk till att utredning om repressalier lades ner*, 11 January 2022 (The Expert in Freedom of Speech Nils Funke is critical of the closure of a preliminary investigation regarding retaliation), available at https://www.svt.se/nyheter/lokalt/vasterbotten/yttrandefrihetsexpert-om-visselblasaren-fran-skelleftea-som-inte-kom-till-domstol.

The ban on retaliation not only means that direct actions are not allowed but also that the employer must refrain from any attempts at actions aimed at influencing the effective use of freedom of speech by employees. This is illustrated by a decision by the Chancellor of Justice (*Justitiekanslern*) of 2018, where a trade union representative, L.K., working for the Prison and Probation Service (*Kriminalvården*) made remarks regarding the working conditions and the high staff turnover at a provisional detention prison in the city of Gothenburg which were published in a regional newspaper. During a meeting, which had the media attention on the agenda, the regional director S.O. openly criticized L.K. for making it difficult to recruit new employees due to the statements reported in the media. The question at hand was whether this was in conflict with the ban on retalation. The Chancellor of Justice did not find that the acts of S.O. constituted a criminal infringement but concluded that the ban on retaliation has a wider scope beyond the criminal sphere. The Chancellor deemed the acts of S.O. contrary to the essence of the ban on retaliation. An employer must not in general terms or in relation to a specific employee try to influence employees not to use their freedom of speech in relation to their agency or its activities.[53]

2.3 Exceptions to the Bans

Finally, exceptions to the bans on investigation and retaliation should be mentioned. This is the case where the information that has been leaked is covered by qualified secrecy rules (*kvalificerad sekretess*), for example regarding a preliminary criminal investigation or sensitive personal information such as a person's sexual orientation. The Justice Ombudsman pronounced in a 2017 opinion that although the freedom of informants does not encompass such information, it was nevertheless unethical for a director of communication at a police agency to issue a letter to the staff regarding leaked information about a police officer who had been under investigation for child pornography crime but which was later closed, containing passages that could be interpreted as giving the perception that the freedom of speech of the employees is more limited than it actually is.[54]

The limitations on the freedom of informants adds substantial complexity to the protection of whistleblowers at the constitutional level.[55] There is also a risk that this complexity will increase even more due to the recent amendments concerning foreign espionage that will limit the fundamental laws on freedom of speech.[56]

To conclude, the Swedish constitutional whistleblower protection has a strong historical and cultural significance and enjoys special institutional support, in particular by the Justice Ombudsman and the Chancellor of Justice. The system of sole,

[53] Decision of the Chancellor of Justice, JK, Dnr. 2630-17-2.4, 2018-04-06, Beslut i initiativärende med anledning av en anmälan av ett ifrågasatt brott mot repressalieförbudet.
[54] JO:s ämbetsberättelse 2017/18.p. 177
[55] Larsson 2015, p. 122 ff.
[56] Government bill, prop. 2021/22:55.

successive and vicarious responsibility is perhaps the most important safeguard to an effective whistleblower protection, which means that the whistleblower will normally be free from liability if he or she communicates information to the press. At the same time there is a lack of case law regarding the constitutional whistleblower protection, especially in regard to the ban on investigation and retaliation. Its increasing complexity also leaves much to be desired. Its effectiveness in practice can therefore be perceived as fairly limited. Nevertheless, it is worth pointing out that the effectiveness of predominantly ethical assessments and social sanctions should not be underestimated.

3 Implementation of the European Whistleblowing Directive in Swedish Law

More than 250 years after the initial 1766 Act, whistleblower protection is more relevant than ever globally, and the WBD is likely to pave the way for further developments in both the public and the private sectors and has the potential to lead to cultural changes in society. The implementation process in Sweden regarding the WBD was fairly swift. A government investigation was established already on 29 May 2019 well before the WBD was finally published on 23 October 2019.[57] A new remit was consequently published after the publication of the WBD. The government investigation was led by a Justice of the Supreme Administrative Court and the head secretary was a principal administrative officer at the Ministry of Labor, a person who also happens to be the author of the one and only Swedish doctoral thesis in the field of whistleblower law.

The government investigation published its report in June 2020. The report proposed the adoption of a new act on the reporting of wrongdoings which would replace the act of 2016 regarding a particular protection against retaliation for employees who raise the alarm concerning serious wrongdoings (*lagen (2016:749) om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden*).[58]The scope of the Act was, however, in reality limited to the private sector as it was subsidiary to the FPA and FLFE (1 §).

The 2016 Act was not regarded as sufficient to live up to the requirements of the WBD.[59] The report by the investigation was circulated for formal consultation in accordance with the Swedish legislative procedure, from 6 July 2020 to 16

[57] Dir. 2019:24, Genomförande av visselblåsardirektivet.
[58] Government investigation, SOU 2020:38, Enhanced whistleblower protection (*Ökad trygghet för visselblåsare*), summary in English, pp. 33-40.
[59] Government bill, prop. 2020/21:193, pp. 29 and 31.

September 2020.[60] Around 120 consultation bodies from both the public and private sectors responded and only a few abstained.[61] In May of 2021, the government bill was published and in September the same year the Riksdag adopted the Act. The new Whistleblower Act, *lagen (2021:890) om skydd för den som rapporterar om missförhållanden*, came into force on 17 December 2021 in accordance with the WBD (hereafter referred to as the 2021 Act).[62]

The implementation of the WBD through the new Act builds on the Act of 2016. It has introduced novelties as well as enhancements in relation to the prior whistleblower act. The act of 2016 was a labor law, and the new act provides a more general legal whistleblower protection with a significantly broader scope,[63] both in quality as well as quantity.

The new law is made up of 10 chapters and 60 provisions, whereas the 2016 Act consisted of only 11 provisions. It also generally follows the structure of the WBD and has the following disposition:

Chapter 1 Introductory provisions
Chapter 2 Protection in the form of freedom from liability
Chapter 3 Protection against discouraging and retaliatory tactics
Chapter 4 Requirements in order to receive protection
Chapter 5 Internal disclosure channels and procedures for reporting and the investigation of reports
Chapter 6 External disclosure channels and procedures for reporting and the investigation of reports
Chapter 7 Processing of personal data
Chapter 8 Documentation preservation and destruction
Chapter 9 Duty of confidentiality
Chapter 10 Supervision

[60] This procedure is obligatory under ch. 7 § 2 of the Swedish Instrument of Government, one of the basic laws.
[61] Available at the webpage of the Swedish Government, https://www.regeringen.se/remisser/2020/07/remiss-av-sou-202038/.
[62] Sweden made us of the exception in art. 26.2 of the WBD and introduced transitional provisions regarding legal entities in the private sector to apply the rules by 17 December 2023. In addition to this, other actors would also get a grace period. Other actors would have until 17 July 2022 to fulfill its obligations to establish internal reporting channels and until 17 December 2023 to establish the external reporting channels. See government bill 2020/21:193, p. 266. The Commission therefore sent a reasoned opinion to Sweden. See https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601.
[63] Prop. 2020/21:193, p. 32.

Regarding the scope of the 2021 Act, it applies to both the private and public sectors, including civil society.[64] The Act protects reporting emanating from a work-related activity concerning wrongdoings of public interest.

The term work-related activity (*arbetsrelaterat sammanhang*), which relates to Recitals 36 and 37 of the WBD, includes not only reporting related to wrongdoings of public interest that take place during an employment or similar relationship, but also before and after such a relationship is at hand.[65]

The Act protects two kinds of reporting according to Chapter 1 § 2, 1) general reporting (external and internal) concerning wrongdoings of public interest and 2) reporting related to EU-law.[66] This means that the 2021 Act covers wrongdoings of public interest more generally, and thus goes beyond the scope of the WBD (Article 2.2).

3.1 Wrongdoing in the public interest

What is meant by the term "wrongdoing of public interest" (*missförhållande av allmänt intresse*)? It is clear that the Act of 2021 also goes further than the Act of 2016 in that the former only comprised "serious wrongdoing", which was defined in § 1 section 2 as a wrongdoing that can constitute a crime with a prescribed imprisonment penalty or comparable circumstances, which the latter according to the preparatory works was defined as follows:

Serious wrongdoings are also breaches of fundamental human rights; breaches of public policy; corrupt conduct; threats to life, security and health; threats and damages to the environment; misuse of public funds; breaches of financial market regulation; breaches of an organization's internal regulation; and more serious unethical conduct.[67]

The use of the concept of "serious wrongdoing" was highly criticized , most notably by the Council on Legislation, already at the investigatory stage of the 2016 Act, as it requires the whistleblower to make fairly complex assessments concerning what would constitute such a wrongdoing.[68] More importantly the threshold of "serious" did not seem compatible with the WBD.[69] Consequently, the new act does not make any such requirement but simply uses the term "wrongdoing", with the inspiration coming from the Trade Secrets Act of 2017. Wrongdoings can consist of intentional or unintentional actions or inactions. This means for example that circumstances for which no one can be held responsible, such as an accident, but

[64] Prop. 2020/21:193, p. 33 f.
[65] SOU 2020:38, p. 152.
[66] Prop. 2020/21:193, p. 35, Öman 2021, pp. 26-30.
[67] SOU 2014:31, p. 31 (English), prop. 2015/16:128 p. 96 f.
[68] Prop. 2020/21:193, p. 39.
[69] SOU 2020:38, p. 173 f.

that are being concealed by an organization, can in itself be regarded as a wrongdoing. The whistleblower might even be or have been involved in such wrongdoing. The Act applies not only to ongoing or newly committed wrongdoings but can relate to both wrongdoings that are likely to happen or wrongdoings that have already taken place.[70]

It is however not enough to establish a wrongdoing. The wrongdoing will have to be not only of importance to the individual but of public interest, which means it must be of a certain kind and degree.[71] Making an assessment if a wrongdoing is of public interest is nevertheless difficult. In the government report it was also stated that most issues regarding the work environment of the individual are regulated through other laws, such as labor laws or criminal laws, which also finds a basis in Recital 22 of the WBD. Nonetheless, there are situations where the situation is so serious that it is of public interest that it be revealed, such as the exploitation of a migrant worker or young person as well as situations of slave-like labor or trafficking, but they can also be systematic breaches of the law in relation to an individual employee.[72]

Apart from drawing the limits between public and private interests, it is not only necessary that the alleged wrongdoing is of relevance to the public, there also has to be a legitimate interest for the public to obtain knowledge of the wrongdoing. The objective ought to be forward-looking and on the achievement of change and not merely the satisfaction of the curiosity of the public.[73] More obvious areas where a public interest can be deemed to be at hand are the areas that covered by Article 2.1 a of the WBD, such as public procurement, financial services, product safety, protection of the environment and public health.

Generally, violations of national laws and regulations fall within the scope of the 2021 Act. The same applies to the internal rules and principles of an organization, such as codes of conduct, codes of business ethics, etc. as this might have an impact not only regarding employees but also other groups such as consumers and shareholders. Some internal rules and principles imply that a corporation has made a special moral commitment which can give it a competitive advantage. Breaches of such internal rules or principles might therefore be of public interest, even though they are not in and of themselves of a very serious nature.[74]

Another area where a public interest is generally at hand is regarding the misuse of public funds. The government stressed that the public, the taxpayer, normally has an interest to make sure that public funds are used for their intended purpose, which is not necessarily always the case concerning the misuse of private funds.[75]

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[70] Prop. 2020/21:193, p. 39.
[71] The investigation and the government are here relying on recital 70 of the WBD, SOU 2020:38, p. 174; prop. 2020/21:193, p. 39.
[72] Prop. 2020/21:193, p. 41; SOU 2020:38, p. 176.
[73] Prop. 2020/21:193, p. 42, Öman 2021, p. 26.
[74] Prop. 2020/21:193, p. 43.
[75] Prop. 2020/21:193, p. 43.

The 2021 Act goes beyond what is required in the WBD and also provides a necessary change by eliminating the requirement that wrongdoings be considered as serious. The assessments regarding the seriousness of the wrongdoing will pose less of a problem to whistleblowers in the future. However, the public interest requirement is vague and is likely to disincentivize whistleblowing, which was pointed out by several consultation bodies, such as the Justice Ombudsman, with some such as Civil Rights Defenders going as far as to reject the requirement. The government, however, referred to several other laws containing the public interest requirement, which makes it fairly well established within Swedish law.[76] This is a valid argument but does not deal with the problem that potential whistleblowers might abstain from reporting wrongdoings if it appears unclear if such a wrongdoing is of public interest. This makes the need for effective supporting measures as prescribed in Article 20 of the WBD even more important, which will be explained later.

3.2 Exceptions

Certain areas that concern national security mentioned in Chapter 1 § 3 fall outside the scope of the 2021 Act.[77] Lawful whistleblowing in the area of national security is highly restricted and not covered by EU law as the EU does not have competence in this area according to the Treaty of the European Union.

The first exception deals with information in businesses that are security sensitive or otherwise engaged in security-sensitive activities within for example manufacturing, transportation, telecom, the food industry or the energy sector, that are classified according to the Swedish Protective Security Act (2018:585).[78] The second exception concerns information regarding national security within a government defense or security agency which are specified in the Swedish Whistleblower Ordinance (2021:949).[79]

3.3 The Whistleblower Act and its relationship to other laws, provisions and contracts

Pursuant to Chapter 1 § 4, the Whistleblower Act of 2021 will not affect the protection that applies according to other laws, ordinances or other legal grounds. This is the result of a fair amount of "slicing" in regard to the initial proposal, which was fairly complicated, mentioning laws, case law, etc. It partly followed from the recommendations of the Swedish Union of Journalists and Civil Rights Defenders in

[76] Prop. 2020/21:193, p. 30.
[77] Prop. 2020/21:193, p. 44-47.
[78] Government bill, prop. 2020/21:194, A stronger protection for the security of Sweden (*Ett starkare skydd för Sveriges säkerhet*).
[79] Förordning 2021:949 om skydd för personer som rapporterar om missförhållanden. According to ch. 8 of the Swedish Instrument of Government ordinances are issued by the Government.

their respective opinions of the proposal. The provision makes clear the *lex generalis* character of the 2021 Act and the fact that the Act cannot in any way limit whistleblower protection according to other laws, such as the FPA, FLFE, the European Convention of Human Rights as well as case law and contracts. It also serves as a reminder that the Whistleblower Act is not exhaustive and consequently prescribes a minimum standard.[80]

Another reminder is expressly stipulated in Chapter 1 § 5 regarding the FPA and the FLFE, which in the preparatory works is defined as an informational provision that refers to the provisions regarding the freedom of informants in these respective acts. This is to further clarify the non-exhaustiveness of the Whistleblower Act.[81]

Furthermore, the Act clarifies that any contract that would repeal or limit the rights of the Whistleblower is invalid, with the exception of the situation that a collective agreement under certain circumstances deviates from the provisions regarding internal reporting channels and procedures. This exception was made to adapt the implementation of the WBD to the Swedish labour market model,[82] which "is characterized by a high degree of self-regulation between the social partners", namely the trade unions and the employers.[83] Non-intervention by the state is thus a vital element of the model and it is regarded as important that the parties be able to decide in what way the internal reporting channels ought to be designed and how procedures should be implemented in different areas. Nevertheless, it is only applicable as long as it does not repeal or limit the rights of individuals in the WBD.[84]

3.4 Personal scope

The Whistleblower Act of 2021 has been given a wide personal scope in line with the WBD. This was considered necessary to ensure reporting not only in the context of work-related activities during an employment or similar relationship, but also before such a relationship has begun or after it has ended. The Swedish Act, however, does not protect any other categories of persons than those mentioned in Article 4 of the WBD. The consultation bodies recommended that other categories be included, such as employees of a delivering company and doctoral students without employment. The government found that a wider personal reach than given in the WBD could have serious consequences in relation to conflicting interests, for example through increased administrative costs.[85] The definition of "reporting

[80] Prop. 2020/21:193, p. 57-66.
[81] Prop. 2020/21:193, p. 59.
[82] Prop. 2020/21:193, p. 62.
[83] Carlson, Laura, *Workers, Collectivism and the Law: Grappling with Democracy*, Elgar Studies in Law and Society 2018, p. 122; Carlson, Laura, *Anchoring the Union Mandate – A Look at the Swedish Labour Law Model* (Jan 1, 2013). Available at SSRN: https://ssrn.com/abstract=2275749 or http://dx.doi.org/10.2139/ssrn.2275749.
[84] Prop. 2020/21:193, p. 61-66.
[85] Prop. 2020/21:193, p. 54.

persons" in the Swedish Whistleblower Act laid down in Chapter 1 § 8 p. 2 is therefore more or less identical with Article 4 of the WBD.

3.5 Conditions for whistleblower protection and freedom from liability

The Whistleblower Act of 2016 did not include a freedom from liability for persons reporting serious wrongdoings. Protection in this regard is to a certain extent given by the constitutional provisions in the FPA and FLFE regarding the protection of freedom of informants. The government concluded that the Swedish legal protection was not sufficient in order to implement the directive and needed to be expanded.

The protection is of material character and concerns freedom from liability regarding a breach of confidentiality in a work-related context, whether according to the law, a decision or contract, as well as certain situations concerning the collection of information as part of a reporting of a wrongdoing. According to the government, there appears to be no need for any procedural legal protection since the Swedish system rests on the principles of free examination and evaluation of evidence.[86] Nevertheless, if the whistleblower will be free from liability is dependent on how he or she reports for example a perceived wrongdoing, which is through internal or external reporting channels.

The freedom from liability rule in Chapter 2 § 1, stipulates that a reporting person may not be held liable for breach of confidentiality, if this person, at the moment of the reporting, had reason to suspect that the reporting of the information in question was necessary in order to reveal the reported wrongdoing. The provision has been given a similar design to the provisions regarding offences against the freedom to communicate information (*meddelarbrott*) according to Chapter 7 § 22 FPA and Chapter 5 § 4 FLFE. The freedom from liability is thus limited if the whistleblower has committed serious crimes against the security of the nation, such as high treason and espionage. It is also limited in regard to the intentional breach of qualified confidentiality laid down in the Public Information and Secrecy Act as well as in certain other laws, for example the Social Services Act. Since the Whistleblower Act also applies generally to private companies, whistleblowing is also limited if the reporting person is obliged to comply with confidentiality requirements under the Act (1971:1078) on defense inventions (*lagen om försvarsuppfinningar*).

Moreover, the whistleblower like the informant as stated in the FPA, can be held liable for the wrongful release of a document to which the public does not have access according to Chapter 2 § 2, that is documents that are covered by

[86] Prop. 2020/21:193, p. 68.

secrecy provisions. This provision embraces both secret public documents as well as documents related to private organizations in general.[87]

It is not entirely clear that the design of the rules of freedom from liability and its limitations are compatible with the WBD, especially since several of the qualified confidentiality rules in Swedish laws are not mentioned in the WBD, like tax secrecy or preschool secrecy rules.[88] In the preparatory works to the Whistleblower Act of 2021 this issue has been fairly thoroughly analyzed in the light of EU Law and European Human Rights law, and the conclusion has been reached that it ought to be possible to limit the freedom of liability in a manner that is in accord with the Swedish tradition.[89] At least the Swedish legislator seems to be inclined to take a risk in this regard, not least in the interest of maintaining the consistency of Swedish law. If this position is sustainable in all situations is left to be decided by the courts. However, there might be situations where it could be necessary to breach even qualified secrecy rules, which was also stated by the Union of Journalists in the referral round. This is certainly an important issue that has not been more deeply analyzed by the government. Consistency and simplicity are important parts of good legislation, but this is not the main goal of whistleblower protection, where the fact that wrongdoings are revealed might be of great significance to society as a whole.

It was also pointed out by several consultation bodies, such as the police authority and the Justice Ombudsman, that the requisite of necessity is problematic and that it can be difficult for an individual whistleblower to assess whether information is necessary to reveal a wrongdoing.[90] Furthermore, it is noteworthy that any breach of confidentiality by the whistleblower has to be intentional. Negligence is not mentioned, which is likely to give the whistleblower a certain amount of leeway in case of a misunderstanding or misperception.

To conclude, the Whistleblower Act will generally override legal provisions regarding confidentiality that are not qualified, which is generally the case regarding the exercise of public authority. Nevertheless, the legislation regarding confidentiality, especially in the Public Information and Secrecy Act, is complex. This will require comprehensive and pedagogical information and advice to potential whistleblowers regarding their rights. However, even if this is in place, the wording might still disincentivize potential whistleblowers.

The fact that the whistleblower can be held liable for the wrongful release of a document to which the public does not have access might also pose a problem, as the whistleblower might need to prove that the information that he/she reveals is accurate. The investigation was also criticized in this regard by the Union of

[87] Prop. 2020/21:193, p. 78.
[88] Prop. 2020/21:193, p. 71.
[89] Prop. 2020/21:193, p. 72.
[90] Prop. 2020/21:193, p. 66.

Journalists, two unions and Uppsala University in their respective opinions. They questioned if this rule really aligns with the WBD.[91] The Union of Journalists stressed the fact that some leaks, such as the Panama Papers, which were part of the background of the WBD, were based on documents. Without these documents being leaked, none of the information they contained, would have been revealed to the public.[92] The government did not share this view and concluded that there are situations where it is legal to breach obligations of confidentiality orally. Furthermore, it is legally possible in some circumstances to release documents, for example regarding illegitimate "trade secrets". The wrongful release of a secret document would furthermore be contrary to the FPA and FLFE.[93] Nevertheless, the FPA and the FLFE protect the informant from liability due to the liability chains. This means in practice that the whistleblower would normally not be held responsible. Furthermore, consequences of such informational activity are limited by the crimes listed in these laws

The whistleblower is not, according to Chapter 2 § 4, allowed to access or obtain information illegally through for example break-ins or hacking, which also follows from the WBD, in particular Recital 92.

There are, however, as mentioned above, limitations to the freedom of liability in regard to the use of internal and external reporting channels. This can be said to be a deviation from the Swedish constitutional protection, where reporting is presupposed to be undertaken via the media. During the referral procedure this was highlighted by some consultation bodies, like the Union of Journalists, as a threat to this tradition.[94]

The reporting person can only report to the media under the certain circumstances. According to Chapter 4 § 8: 1) he or she has made use of external reporting channels and the receiving authority has not taken appropriate action in response to the report within the stipulated time frame; 2) the wrongdoing might constitute an imminent or manifest danger to life, health, safety or risk for extensive damage to the environment, such as if there is an emergency or risk of irreversible damage or otherwise has a justified reason to make the information public or 3) there is reason to believe that an external reporting might lead to a risk of retaliation or that the external reporting might not remedy the wrongdoings in an effective manner.

The wording is very close to Article 15 of the WBD, with some exceptions, such as the requirement of having exhausted internal reporting channels.[95] In spite of the deviation from the Swedish constitutional tradition in relation to the freedom of informants, the 2021 Whistleblower Act provides stronger protection than the 2016 Act, since there is no longer a requirement to first report through internal reporting

[91] Prop. 2020/21:193, p. 76.
[92] Opinion by the Swedish Union of Journalists 2020-10-16, dnr. 2020/22, p. 3.
[93] Prop. 2020/21:193, p. 78 f.
[94] Prop. 2020/21:193, p. 126.
[95] Prop. 2020/21:193, p. 127.

channels before going public through the media. This also marks a partial return to the traditional order where media whistleblowing is the norm.

3.6 Protection against retaliation

The protection against retaliatory measures for the whistleblower is regulated in Chapter 3 of the Whistleblower Act, which follows the minimum standard in the WBD, especially Article 19. It is also generally comparable to that of the FPA and FLFE. In the 2021 Whistleblower Act a definition of retaliatory measures has also been introduced in Swedish law, which has the same meaning as that of the WBD, Article 5(11).[96] It has been regarded as comparable to concepts of retaliation that are already used in Swedish law, such as those found in the FPA and FLFE as well as the Discrimination Act (2008:567).[97]

Nonetheless, there are some differences. The personal scope of the new Whistleblower Act is much wider than in the FPA, FLFE and the Whistleblower Act of 2016, which only protect the informant. This seems to be a novelty in Swedish law. In the Act, the protection against retaliation also involves persons that assist or act as facilitators to the whistleblower. In this regard the role of union stewards or safety representatives is explicitly mentioned in Chapter 3 § 1.[98]

Furthermore, an employer is prohibited from preventing reporting persons consulting with their union representatives regarding a possible reporting of wrongdoings. The Whistleblower Act of 2021 also follows the tradition of the 2016 Act, where the unions had a central role, and the whistleblower would be free from liability when turning to their union representatives (§ 6 of the 2016 Act). The whistleblower can only receive freedom from liability in his or her contacts with a union if he or she is a member and if the person would be deemed free from liability in accordance with the 2021 Act.[99]

Third persons who are somehow related to the reporting person and are targeted by retaliatory measures, such as family and colleagues as well as legal entities that the reporting person owns, works for or is otherwise connected to, can also be protected by the Act.

Concerning the level of sanctions, the 2021 Whistleblower Act and the freedom of informants differ to some extent. The Whistleblower Act as well as its predecessor focus on damages, whereas the Swedish constitutional protection relates to criminal liability.

Both whistleblower acts from 2016 and 2021 include rules regarding a reversed burden of proof, albeit the rule in the 2021 Act is wider in scope and also embraces measures regarding attempts to hinder reporting of wrongdoings. The burden of proof in the new Act is constructed so that the burden of proof falls on the

[96] Prop. 2020/21:193, p. 87.
[97] Prop. 2020/21:193, p. 87 f.
[98] Prop. 2020/21:193, p. 86 f., SOU 2020:38, p. 164.
[99] Prop. 2020/21:193, p. 92.

operator/employer when the whistleblower can show that there is reason to believe that the measures concerning attempts to hinder reporting and/or retaliation have been taken by the operator/employer. The government received some criticism in this regard by the consultation bodies, such as Stockholm university, that it was not far-reaching enough to be compatible with the directive, which is due to the requirement that the whistleblower has to show that measures have been taken to prevent him or her from reporting or retaliatory actions. Nevertheless, the difference with the WBD was not considered to be important in practice. Consistency with other rules on the burden of proof laid down in for example the Discrimination Act (2008:567) seems to have overridden this concern.[100]

The 2021 Whistleblower Act also established a new rule concerning pre-dispute arbitration agreements in conformity with the WBD. The provision in Chapter 3 § 6 is to ensure that in the case of such an agreement, it can only be valid if it is possible to appeal.[101]

Legal procedures that might result from the 2021 Act will, similarly to the 2016 Act generally be regulated by the Labor Disputes Act (1974:371), with the Labor Court as the highest court. However, since the personal scope is wider than that of employees, the Labor Disputes Act will nevertheless apply to some of the categories of persons that are not regarded as employees according to that Act, which is the case with, for example, persons doing voluntary work or working standby. When the reporting person is for example self-employed or a shareholder, the Code of Judicial Procedure (1942:740) applies instead, with the Supreme Court being the highest court.[102]

The fact that different procedural systems will be applicable in different situations is likely to complicate matters for whistleblowers, which was brought up by multiple consultation bodies, for example the District Court of Gothenburg. The government, however, explained that there might be disparate issues regarding whistleblowers belonging to different categories. For example, an employee might encounter other legal issues as compared to a board member raising the alarm concerning a wrongdoing. Furthermore, there are already several examples of this in Swedish law and the courts already have experience in coordinating different procedures, particularly in the area of labor disputes.[103]

3.7 Reporting channels

The 2021 Whistleblower Act includes rules regarding internal and external reporting channels in Chapters II and III. These are an important part of European whistleblower protection.

[100] Prop. 2020/21:193, p. 102.
[101] Prop. 2020/21:193, p. 103.
[102] Prop. 2020/21:193, p. 106 f.
[103] Prop. 2020/21:193, p. 106 f.

The Whistleblower Act of 2016 contained a general requirement that the whistleblower had to report internally to obtain protection (§ 7.1), which was seen as an outflow of the employee's duty of loyalty. In practice this Act was mainly relevant to the private sector as mentioned above. In order to comply with the WBD this requirement was removed. Even though the WBD in Article 7.2 states that the Member States shall encourage reporting through internal reporting channels before turning to external reporting channels, the government found that it would be difficult to assess the individual circumstances of a case in relation to the perceived risk of retaliation that the reporting person might experience (Recital 33). The whistleblower will henceforth be able to independently choose among the different reporting channels.

3.7.1 Internal reporting channels

The Whistleblower Act of 2016 had a requirement that the reporting person report internally but did not as the WBD make demands regarding obligatory internal reporting channels and did consequently not give any details on how such channels ought to be designed. It simply referred to "internal routines for reporting of wrongdoings" (§ 5). The Swedish legislator therefore had to make adjustments to comply with the WBD.

According to the 2021 Whistleblower Act operators/employers with more than 50 employees have an obligation to establish internal reporting channels as prescribed in Article 8(3) of the WBD. These have to be available to reporting persons under the supervision and direction of the operator.[104]

The operator/employer is further required to choose an impartial person or department for handling the reporting channel and executing the follow-up of the reporting. Appointed impartial persons who are handling reports are covered by professional secrecy according to Chapter 9 § 1. In the public sector, the Whistleblower Act refers to relevant professional secrecy provisions in the Public Access to Information and Secrecy Act.[105] The time limit for secrecy is set at 50 years.[106] A breach of the duty of confidentiality according to statutory law involves criminal liability (Chapter 20 § 3 Penal Code), which is to be punished by a fine or imprisonment for up to one year.

The Act according to Chapter 5 § 3 also provides a possibility for private employers with 50-249 workers to share reporting channels. Local authorities are also able to share reporting channels with each other as well as municipal corporations. This is stipulated in Chapter 5 § 4. However, it is not possible for private and public entities to share channels.

There are some minimum requirements laid down in Chapter 5 § 7 on how an internal reporting channels should be designed and made accessible. These generally

[104] Prop. 2020/21:193, p. 140.
[105] Prop. 2020/21:193, p. 207 ff.
[106] Prop. 2002/21:193, p. 215.

align with Article 9 of the WBD. First of all, an internal reporting channel has to be made accessible to all the personnel categories that are included in the Act. Secondly the operator/employer has to establish procedures for reporting as well as for evaluation.

Information regarding reporting is also a key issue. The provision in Chapter 5 § 9 outlines what information the operators/employers have to provide. Information regarding how reporting can be made through internal reporting channels as well as external reporting channels has to be made available, as well as information on the freedom of informants and the prohibition on investigations, where this is applicable.

Follow-ups in relation to reports are mandatory. Public agencies can also be obliged to take further measures in relation to an alleged wrongdoing and, if necessary, make reports to other entities inside the agency or to other agencies, for example, the police. This is a lawful exception to the applicable rules on confidentiality according to the Public Access to Information and Secrecy Act.

Working internal reporting channels include the processing of personal data concerning the individuals involved. Article 17 of the WBD emphasizes that the implementation of the directive has to take into account the EU data protection legislation.

In the 2021 Whistleblower Act, the processing of personal data, when a report is being investigated, is regulated in a separate chapter, Chapter 7, which provides rules that are complementary to the General Data Protection Regulation (GDPR).[107] The initial legislative proposal was criticized by consultation bodies like the Data Protection Agency for lacking sufficient rules regarding, for instance, purpose limitation.[108] Consequently, the government included this in the government bill. Chapter 7 stipulates a requirement that it has to be necessary for the investigation to process personal data. Furthermore, it can only be done for the sole purpose of conducting the investigation of a report in accordance with the principle of finality laid down in Article 51(b) of the GDPR. There are also rules in Chapter 7 § 6 limiting the access to this data. Access can only be given to certain persons who have been appointed to work on the channel or persons working at internal units dealing with reports on wrongdoings.[109] Finally, the chapter provides rules concerning storage limitations, which prescribe that personal data which is not clearly relevant to the investigation must be immediately erased. Personal data that is relevant to the investigation has a maximum storage limitation of two years after an investigation has been closed.

Article 18 of the WBD concerning record keeping of the reports has been implemented through Chapter 8 of the 2021 Whistleblower Act. It contains rules

[107] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.; prop. 2020/21:193, p. 169 ff.
[108] Prop. 2020/21:193, p. 187.
[109] Prop. 2020/21:193, p. 194.

regarding the obligation to keep records for private entities and/or for a legal or physical person that has been appointed to take care of the internal reporting channel. A report has to be kept as long as it is necessary but no longer than two years after an investigation has been closed, at which point it must be destroyed. For organizations in the public sector the legislation related to record-keeping and public archives apply.

The reporting person is also entitled to a certain amount of control over the documentation, for example, the right to scrutinize and sign minutes from meetings or consent to recordings of such meetings or contacts. These rules apply to both public and private organizations.[110]

To ensure effective enforcement, Chapter 10 provides rules regarding supervision. The Swedish Work Environment Authority (*Arbetsmiljöverket*) has the responsibility to supervise that employers meet the obligations in regard to establishing internal reporting channels and procedures. The supervision should generally be carried out in a system-oriented manner, and not focus on individual cases. This means that the operator/employer has the duty to provide the information needed for the investigation under the threat of a fine. If the operator is not complying, the Supervisory Authority can order it to provide the information if it is not complying. The decisions of the Supervisory Authority can be contested in court.[111]

Finally, transitional provisions have been introduced for both public and private entities to have the necessary time to establish internal reporting channels. Public entities should have established internal reporting channels in place by 17 July 2022 and external reporting channels by 17 December 2023. Private entities have until 17 December 2023 to comply with the rules.[112] Nevertheless, Article 26 (2) of the WBD does not mention an option of a grace period for public entities. The Commission therefore sent a reasoned opinion to Sweden.[113]

3.7.2 External reporting channels

The 2021 Whistleblower Act introduces external reporting channels and procedures to which a whistleblower can turn to in different areas, such as product safety, food security etc. According to the Act, the government has the mandate to designate competent authorities to set up and maintain external reporting channels and procedures for feedback and following up reports and statistics on breaches of law within areas of the material scope of the WBD. This is regulated in closer detail in a government ordinance, the Whistleblower ordinance (*Förordning (2021:949) om skydd för personer som rapporterar om missförhållanden*). The Swedish Work Environment Authority has been given the responsibility to coordinate the work regarding external reporting channels. Moreover, the government has designated 30 different

[110] Prop. 2020/21:193, p, 198 ff.
[111] Prop. 2020/21:193, p. 228 ff.
[112] Prop. 2020/21:193, p. 236 ff.
[113] See https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601.

agencies as competent authorities, such as the Tax Agency, the National Food Agency and the Competition Agency.

Using an external reporting channel, the reporting person has to be able to leave information both in writing and orally. If the reporting person so demands an in-person meeting has to be arranged within a reasonable time.

The agency has to confirm to the reporting person within seven days that it has received the report except in cases of anonymous reporting, where no contact information is available.

The agency has to provide the reporting person with necessary feedback regarding which measures have been taken to follow up the report. The time frame for this is generally three months but cannot exceed more than six months. Finally, the reporting person should receive information concerning the end result of the follow up. If there is a risk that information will be used that might reveal the identity of the reporting person, the person needs to be informed of this assuming that this will not make the measures needed useless.

The Whistleblower Ordinance also establishes minimum requirements concerning clear and accessible information concerning the external reporting channels and procedures that will apply to various agencies respective websites.

3.7.3 The development of reporting systems in the public sphere

According to the transitional provisions, public entities should have established internal reporting channels by 17 July 2022. One question is how have different government agencies, municipalities and private companies implemented the legislation in practice. More importantly, how are they planning to establish the whistleblowing function in their respective organizations? This will have to be evaluated over time, but some efforts in this regard have already been made.

In a fairly recent report issued by the Swedish Contingencies Agency (*Myndigheten för samhällsskydd och beredskap, MSB*) and researchers at the School of Global Studies, Gothenburg University, the practical implementation of the new whistleblowing legislation by all Swedish municipalities and regions, 290 municipalities and 21 regions as well as 65 government agencies has been mapped out.[114] The report shows that the work with establishing whistleblowing functions has been fairly slow and that a majority of Swedish municipalities and regions have not yet established a whistleblowing function as of February 2022 (the last implementation date was set to the month of July).

The implementation within the organizations varies. Most of the public entities that had already established a whistleblower function have only internal routines

[114] Johansson, Peter, Berndtsson, Joakim, Hansson, Sven Ove, Fahlnaes, Felicia, *Visselblåsarfunktioner i svenska offentliga organisationer: En nationell kartläggning och inventering av frågor och utmaningar,* Myndigheten för samhällsskydd och beredskap, Forskning/Studie January 2022, Summary in English p. 4; available at https://www.msb.se/sv/publikationer/visselblasarfunktioner-i-svenska-offentliga-organisationer--en-nationell-kartlaggning-och-inventering-av-fragor-och-utmaningar/.

(23), while a few solely use external whistleblower functions through outsourcing with the help of for example a law firm or a firm specializing in whistleblower protection (2). There are also a group of public entities that use a combination of both internal and external functions (12). The number of operators that will outsource the whistleblower function to external parties is likely to increase, which however might entail important security risks.[115]

How the functions are used also differs, where some of the entities that were part of the mapping were only directing their functions to employees or consultants, whereas some give it broader use, such as municipalities directing it to all of its citizens.

Information regarding what information can be reported through the internal reporting channels is more or less explicit as well as more or less encouraging from a whistleblower point of view. In some cases, the descriptions are rather detailed, but in others they are of a more general nature with reference to the values of the organization.[116] Differences in the handling of the anonymity of the reporting persons were also noted.

According to the report, by January 2022 it was clear that several of the whistleblower functions that had been established did not seem to fully comply with the legal requirements. There was also hesitancy about the ability of the organizations to have enough time to be able to make the necessary changes. In the report, recommendations were given regarding the methodology for designing and developing the whistleblower function. One conclusion is that this can be rather challenging since neither the WBD or the Whistleblower Act give any more specific guidance on how to practically design and develop internal reporting channels.[117]

3.8 Supportive measures

In the Government investigation the issue of supportive measures was discussed in a specific chapter, but there was no further elaboration on this in the Government bill that followed.[118] The reason for this is that it was deemed appropriate to regulate supportive measures to persons who are reporting wrongdoings through a government ordinance,[119] the Government Ordinance (2021:950) on government grants for information and counselling regarding the protection for persons who report wrongdoings (*förordning (2021:950) om statsbidrag för information och rådgivning om skydd för personer som rapporterar om missförhållanden*). Supportive measures are, as the title of the ordinance indicates, limited to information and counselling. Government grants will be given to the social partners, i.e., the trade unions and the employers organizations as well as civil society organizations.

[115] Johansson, Berndtsson, Hansson, Fahlnaes, MSB 2022, p. 21.
[116] Johansson, Berndtsson, Hansson, Fahlnaes, MSB 2022, p. 23 f.
[117] Johansson, Berndtsson, Hansson, Fahlnaes, MSB 2022, p. 30 f.
[118] SOU 2020:38, p. 519-532.
[119] Prop. 2020/21:193, p. 33.

According to Article 20.2 of the WBD it is also possible to provide economic and psychological help to whistleblowers. The reason why such supportive measures are not prescribed in the ordinance is the Swedish welfare state. It is presupposed that the economic support to the unemployed as well as the health care system will be able to deal with the problems that might arise for the whistleblower.[120]

It should also be noted that according to the Swedish Employment Protection Act (1982:80),[121] section 34, that if a notice of termination is given without objective grounds, the notice shall be declared invalid upon the application of the employee. This means that if a whistleblower has lost his or her job due to the reporting of wrongdoings, such a measure lacks an objective ground, and the whistleblower has the right to get his or her employment back. Nevertheless, a court does not have the mandate to reinstate the employment of the whistleblower until the dispute is finally settled.

3.9 Public debate

The new Whistleblower Act has not evoked any broad public debate. The debate that has taken place has involved topics similar to those found in the opinions of the consultation bodies during the referral procedure. The public debate has largely centered around the functioning of the free media, the complexity of the legislation as well as corporate interests.

Representatives of journalists have made remarks to the effect that the freedom of informants in the FPA is more robust and the public needs to be made more aware of it. They especially point out the risk that whistleblowers will turn to internal disclosure channels, having to abide by strict secrecy rules, instead of turning to the media. This, some fear, will make the media less efficient as a watchdog over corporations.[122]

As to union representatives, they have warned that the Whistleblower Act is too complicated and necessitates intricate legal assessments. There are also fears that the freedom of informants will be overshadowed by the Whistleblower Act and that there might be a mix-up, which can result in some employees refraining from getting in touch with the press.[123]

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120 SOU 2020:38, p. 132.

121 A non-official translation of the Swedish Employment Protection Act can be found at https://www.government.se/4abdc0/contentassets/b58069e2c0f24aa6be53d8932de85d86/sfs-1982_80-employment-protection-act-sfs-2022_835.pdf.

122 Lundquist, Hanna, *Nya visselblåsarlagen får kritik: "Meddelarskyddet mer robust"*, Journalisten 17 December 2021. Available at https://www.journalisten.se/nyheter/nya-visselblasarlagen-far-kritik-meddelarskyddet-mer-robust.

123 Kvarntorp, Kamilla, *Oenighet om effekter av snårigt lagförslag*, Lag & Avtal 2020-09-17, available at https://www.lag-avtal.se/nyhetsarkiv/oenighet-om-effekter-av-snarigt-lagforslag-7001033.

Among the Swedish business community, worries have mainly concerned trade secrets and how the Trade Secrets Act and the Whistleblower Act might overlap, but also the fact that they have contrary aims.[124] Administrative issues have also been discussed regarding changes regarding disclosure channels. Some companies had already established internal reporting channels, which might have to be revised in order to comply with the new Act, which requires channels both at the "local" and group levels. This will make it costly to comply and are deemed to be detrimental to the whistleblower since the he or she might feel uncomfortable reporting at the "local" level where they can more easily be identified.[125]

4 Is the whistleblowing system in Sweden effective?

Regarding penalties the WBD prescribes in Article 23 that Member states shall make sure to have effective, proportionate and dissuasive penalties that apply to reporting persons in cases where it is established that he or she has knowingly reported or publicly disclosed false information. There are however no such provisions in the 2021 Whistleblower Act. The reason for this is that Swedish law was considered satisfactory in this regard, as it already stipulates sanctions of a criminal and civil nature that fulfil the demands of the WBD. Similarly, it was not deemed necessary to introduce a special provision regarding damages in relation to "false" whistleblowers, which had been put forth by some consultation bodies such as the Confederation of Swedish Enterprise.[126]

The Swedish whistleblower system has developed over a long period of time in the public sector, which makes it an important part of the Swedish constitutional culture. Awareness among government officials and especially journalists is surely fairly high, also by international standards.

The case of Miss Whistleblower and others described above give an indication that the Swedish whistleblowing system is not always effective. The overall number of precedents and court cases is quite limited. The main source in practice on how the protection is functioning, or should function, in practice is the opinions of the Justice Ombudsman and the Chancellor of Justice, albeit their opinions do not constitute traditional sources of law. It is therefore difficult to assess how effective the system is solely based on the available sources.

The former Whistleblower Act of 2016 did not result in any precedents, nor in many court cases, before it was replaced by the 2021 Act, which can to some extent

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[124] Kvarntorp, Kamilla, *Företag kan bli blåsta på hemligheter*, Lag & Avtal 2021-06-22, available at https://www.lag-avtal.se/tidningen/foretag-kan-bli-blasta-pa-hemligheter-7016984.

[125] Sundling, Janne, *Risk för parallella system för visselblåsare*, Lag & Avtal 2022-03-15; Belanger, Brian S. and 22 other company lawyers for large Swedish corporations, the government is impairing the whistleblower function (*Regeringen försämrar visselblåsarfunktionen)*, Dagens Industri Debatt, 9 June 2021, available at https://www.di.se/debatt/regeringen-forsamrar-visselblasarfunktionen/.

[126] Prop. 2020/21:193, p. 101.

be explained due to the short period of time that it was in force. It is also not clear if the Act had any impact on the negotiations between unions and employers. The impact that the new 2021 Whistleblower Act will have remains an open question.

Nonetheless, there is an ongoing case against Sweden in the European Court of Human Rights, *Grinnemo v. Sweden*, regarding the whistleblowers involved in the internationally renowned so-called Macchiarini scandal. This case shed light on the fact that the Swedish Whistleblower system is not foolproof and that there is room for improvement. In this case, the issue that is contested is not mainly the freedom of informants, which would be applicable in the case. In this case, the key issue is rather the consequences of whistleblowing. If a whistleblower cannot receive access to justice regarding what the whistleblower perceives as retaliatory actions, this is a threat to an effective whistleblower protection and hits at the core of the prohibition of retaliatory measures.

The circumstances in the Grinnemo-case started in 2014 when a scandal involving multiple tragic deaths and fraud of epic proportions was unraveled by four researchers at Karolinska University Hospital (Karolinska). This was even depicted as the "Biggest scandal in Swedish Medicine" by the Washington Post.[127]

A few years earlier Karolinska had hired the world-famous star surgeon Macchiarini on what later was revealed to be loose grounds.[128] The newly employed professor did not initially disappoint, when performing the world's first synthetic organ transplant on a young man by replacing his windpipe with a plastic tube. This was followed by other operations in Sweden and other countries.[129]

However, what appeared to be sensational at first, resulted in several fatal outcomes. Seven of the nine patients that received the surgery died. Little by little it occurred to the researchers who were working with Macchiarini and had co-written articles with him, that some things did not add up. They started to question the scientific foundation of the operations and made their own inquiry after having received an ethics approval and obtained consent from the relatives to the patients to gain access to their journals.[130] After several months of work, they produced a 500-page report which they handed to the vice-chancellor.[131]

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127 Andrews, Travis M, *'Biggest scandal' in Swedish medicine touches Nobel Prize with two committee members asked to resign*, Washington Post, 7 September 2016.

128 Heckscher, Sten, Carlberg, Ingrid, Gahmberg, Carl, *Karolinska Institutet and the Macchiarini case. Summary in English and Swedish: An external inquiry*, September 2016, p. 5.

129 Kremer, William, Paolo Macchiarini: A surgeon's downfall, BBC World, 10 September 2016.

130 Kindbom, Mikael, *Visselblåsarna på KI: Vi är dödförklarade som forskare*, Lag & Avtal 2018-12-17; Some of the information referred to is described in the appeal to the Administrative Court of Appeal in Stockholm by Centrum för Rättvisa 2018-12-18, available at https://centrumforrattvisa.se/fall/grinnemo-m-fl-mot-staten/.

131 This information is provided in the appeal to the Administrative Court of Appeal in Stockholm by Centrum för Rättvisa 2018-12-18, available at https://centrumforrattvisa.se/fall/grinnemo-m-fl-mot-staten/.

Little did they know, at the time of the disclosure, what they would be up against. At first, the management appointed an external reviewer, who concurred with the assessment of the four researchers and concluded that Macchiarini was responsible for scientific misconduct. The management however, consisting of high-profile members of the Nobel Committee, concluded that the reviewer had not taken into account all of the evidence and extended Macchiarini's contract.[132] The researchers were consequently exposed to what they perceived as retaliatory measures by the management, including themselves being accused and "convicted" of scientific misconduct by Karolinska. Hereafter, their research financiers withdrew their grants, and they were denied further funding for research. Finally, they had to quit their positions.

The researchers wanted to contest the decisions by Karolinska, but the decisions could not be appealed to a court according to The Higher Education Ordinance (1993:100) Chapter 12 § 4 (*Högskoleförordningen*), a so-called prohibition to appeal (*överklagandeförbud*).

The researchers, having suffered severe professional and social consequences, appealed Karolinska's decisions with the help of a civil rights organization with reference to Article 6 of the European Convention on Human Rights (ECHR) regarding the right to a fair trial. The County Administrative Court decided that the prohibition to appeal the decisions of Karolinska was not contrary to Article 6 ECHR, since it did not constitute a civil right or obligation.[133] In 2019 the researchers were denied leave to appeal by the Administrative Court of Appeal as well as the Supreme Administrative Court.[134]

The researchers also applied for damages with the Chancellor of Justice due to their alleged breach of the right to a fair trial. This time they received support from their union, The Swedish Medical Association (*Läkarförbundet*), which stressed the importance of whistleblowers coming forward in the medical profession for the sake of patient security. The Chancellor of Justice, however, denied them damages, repeating the arguments of the County Administrative Court, that the issue at hand was not within the scope of civil rights and obligations.[135]

Having exhausted the internal remedies, the researchers made an application to the European Court of Human Rights in Strasbourg in 2021.[136]

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[132] Heckscher, Sten, Carlberg, Ingrid, Gahmberg, Carl, *Karolinska Institutet and the Macchiarini case. Summary in English and Swedish: An external inquiry*, September 2016, p. 7.

[133] Förvaltningsrätten i Stockholm, Beslut 2018-11-06, Mål nr. 16070-18, 16102-18, 16112-18, 16281, 16914-18. Available at https://centrumforrattvisa.se/fall/grinnemo-m-fl-mot-staten/

[134] The Administrative Court of Appeal of Stockholm (*Kammarrätten i Stockholm*), decision (*beslut*) 2019-03-19, case (*mål*) nr. 9475-9478-18 and The Supreme Administrative Court (*Högsta förvaltningsdomstolen*), decision (*beslut*) 2019-06-05, case (mål) nr 2110-19, 2129-2132-19.

[135] Chancellor of Justice (*Justitiekanslern*), decision (*beslut*) 2021-02-24, dnr. 2020/3484.

[136] The application is available at https://centrumforrattvisa.se/fall/grinnemo-m-fl-mot-staten/.

In the meantime, the star surgeon would experience the doors closing in on him with accusations from other researchers and professionals in other countries as well as a highly acclaimed SVT-documentary, *The Experiments*, by the journalist Bosse Lindquist, who had followed Macchiarini during a year. The scandal was a fact. Karolinska appointed an external investigation led by the former Supreme Court Justice, Sten Heckscher. In an extensive report, the investigation presented damning conclusions regarding the leadership and the culture at Karolinska in 2016 and stated that the organization was partly responsible for what had happened to the patients.[137]

The scandal sent shockwaves throughout Swedish society. The management of Karolinska resigned. The scandal also sparked action from the legislator and changes in the Ethical Review Act were introduced in 2020. The new legislation clarified the responsibility of the research principal, in particular that the "management must have overall responsibility for ensuring that routines and instructions on ethical testing of research involving humans are applied in the work".[138] Moreover, the lack of clarity related to the supervision of the compliance with the law had to be dealt with since several authorities were involved. An overview of the penal provisions in the Ethical Review Act was also carried out and extended to include criminal liability for gross negligence.[139]

In June 2022, Macchiarini was given a suspended sentence of for the causing of bodily harm to the patient.[140]

Despite the recognition of the wrongdoings of Macchiarini, for which he was later partly convicted, as well as the serious mismanagement by the former management of Karolinska, by the public as well as the legal system, the four researchers, are still struggling. It is an open question whether they would be successful if their cases were tried in court, but that is impossible to know, since it isn't even an option. The Grinnemo-case is likely to have serious consequences in society as it might disincentivize other researchers from reporting suspected scientific misconduct and threats to patient security.

Moreover, there are some dark clouds looming over the Swedish whistleblower protection. The Riksdag has recently adopted amendments changing the constitutional freedom of speech laws that will come into effect 1 January 2023, meaning that a new freedom of speech crime will be introduced concerning so-called foreign espionage (*utlandsspioneri*) in order to strengthen national security. An exception is stated in Chapter 7 § 14 a of the FPA, where an act, considering the circumstances,

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137 Heckscher, Sten, Carlberg, Ingrid, Gahmberg, Carl, *Karolinska Institutet and the Macchiarini case. Summary in English and Swedish: An external inquiry*, September 2016.

138 Government investigation, SOU 2017:104, Etikprövning – en översyn av reglerna om forskning och hälso- och sjukvård, p. 31 (summary in English).

139 SOU 2017:104, p. 37-38.

140 County Court of Solna (*Solna Tingsrätt*), judgment 2022-06-16, case (*mål*) B 10553-18.

can be deemed as justifiable. These amendments however, risk constraining not only journalists but also the interest of whistleblowers in raising the alarm regarding for example Sweden's dealings with foreign states.[141]

One of the more vocal critics of the amendments is the famous UN whistleblower Anders Kompass, who exposed the sexual abuse of children by International armed forces in Central African Republic in 2014. His employer, the UN, condemned him for violating protocols and sharing a secret internal document. He was suspended and had to undergo a disciplinary investigation that lasted nine months. He was later exonerated but resigned shortly thereafter.[142] Kompass is of the opinion that his actions would typically fall within this criminal provision, even though it is possible that they would afterwards be regarded as justifiable by a court of law. According to his view, this means that a person will first be accused of a crime and suspended, with all that it entails, and in hindsight possibly be acquitted. This is surely not creating the right incentives to save vulnerable persons.[143]

5 Concluding remarks

The implementation of the WBD in Swedish law has certainly contributed to a strengthened whistleblower protection in Sweden. What impact it will have in practice, how it will evolve in the Swedish legal culture and to what extent it will incentivize whistleblowing to a larger extent than today is hard to say at the moment.

The whistleblower protection in the private sector, which is more recent, will be especially interesting to follow, particularly given the newly implemented directive. Considering the Swedish experience, with a fairly long tradition of whistleblower protection, the tendency to raise the alarm regarding wrongdoings will surely not change considerably. Employees and similar actors can have various reasons to refrain from doing so, which can be both economic and social.

Even though there is a new and strengthened whistleblowing protection, protecting whistleblowers is a challenging endeavor. In spite of our often posthumous, praise of several well-known whistleblowers, the whistleblower herself or himself tends to take blows, such as losing their job, status and reputation. The stakes are high. The Kompass and Grinnemo cases are good examples. In both cases the reporting persons were well-educated, white men with high-paying jobs. If they have to struggle, how do we establish more effective incentives that would encourage people with less powerful positions, i.e., those with with lower incomes, less education, foreign backgrounds, disabilities, etc., that will enable them to blow the whistle

[141] Government bill 2021/22:55, Utlandsspionerі (Foreign Espionage); Opinion of the Constitutional Committee 2021/22:KU16; Government investigation SOU 2017:70 (summary in English, p. 59 ff).
[142] Laville, Sandra, UN Whistleblower who exposed sexual abuse by peacekeepers is exonerated, Guardian, Monday 18 January 2016.
[143] Karlsson, Josefine; Granlund, John, Anders Kompass rasar över förslag om visselblåsarlag, Aftonbladet 2022-11-15.

on wrongdoings in the workplace? Information and most of all supportive measures seem vital in this regard and it can be discussed whether it is enough to merely rely on the welfare state, especially considering the Swedish example.

Just as the implementation of the WBD in Swedish law strengthens the whistleblower protection, it also creates a higher degree of complexity, which might lead to it being weakened in practice. The constitutional protection has precedence over the Whistleblower Act, but when which provisions are to apply might not be clear in all cases. Most of all it might be confusing for potential whistleblowers.

What is perhaps one of the most concerning issues, is the fact that the Whistleblower Act requires the whistleblower to follow certain procedures. Although this can create a comprehensible procedure and, in some ways, facilitate reporting of wrongdoings, it can also constitute a restraint on the freedom to report as the whistleblower sees fit together with, for example, a professional reporter.

The importance of a free media cannot be overstated. The fact that whistleblowers generally have to report through external reporting channels before he or she can go public might undermine the role of the media as the public watchdog as well as a corporate watchdog. To some extent the information provided by the reporting person will be filtered by professional journalists. Not every story will be reported by the media.

The recent constitutional development in Sweden regarding the criminalization of foreign espionage in the FPA is also to be seen as a backlash in regard to these interests and must not be applied in a manner that it undermines the whistleblower protection.

Moreover, there are still important access to justice issues related to whistleblowing in Sweden that need to be overcome. This became abundantly apparent with the Grinnemo-case. Hopefully the implementation of the WBD will raise awareness regarding this right, which can be said to have a special standing in EU-law. The WBD thus might create new opportunities to modernize the Swedish whistleblower protection with a much broader scope than before. A statement by Gerdemann and Colneric regarding the power of the WBD to modernize national law with the view of a strengthened whistleblower protection will serve here as a final inspiration:

The undoubtedly complex nature of the Directive should not, however, be viewed primarily as a legislative problem or a merely compulsory task to adopt the Directive´s requirements word by word, but as a welcome opportunity to modernise and decisively improve national legal systems in an area that is becoming increasingly important both as a matter of general policy as well as a relevant issue of daily legal practice.[144]

Well-functioning and transparent democratic societies need whistleblowers, and whistleblowers must be protected.

[144] Gerdemann, Simon, Colneric, Ninon, *The EU Whistleblower Directive and its Transposition: Part 2*, European Labour Law Journal 2021, Vol 12(3), p. 265.

The Transposition of the Whistleblowers Directive in Luxembourg

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Luxembourg has a strange relationship to whistleblowing considering the impact of the Luxleaks scandal.[1] It became known for the long legal battle the Luxleaks whistleblowers, Antoine Deltour and Raphael Halet, had to give.[2] The latter finished his legal adventure recently; the European Court of Human Rights (ECtHR) decided that Luxembourg has violated Halet's right to freedom of expression.[3] The impact of the Luxleaks scandal did not bring any legislative changes for a better legal framework on the protection of whistleblowers, following the Court decisions of Deltour and Halet. The advent of the Whistleblowing Directive seems to have changed the landscape;[4] after months of delay, Luxembourg presented its draft law (*projet de loi*) and is in the process of adopting a law, the first of its kind, on the protection of whistleblowers by transposing the Directive.[5]

Despite its unwillingness to adopt a law after the Luxleaks scandal, the Luxembourg government seems to have changed its approach to whistleblowing. The draft law, as it stands at the moment, respects the provisions of the Directive and goes beyond the minimum standards in certain important points. These points will be discussed further in the main analysis of this contribution. Whistleblowing legislation in Luxembourg, prior to the adoption of the Directive, was quite poor and sectoral; by respecting its international and European obligations, provisions on whistleblowing existed in the corruption legislation and in the banking and financial sector. These provisions were not used throughout the years and there was no demand for a comprehensive legal framework, a horizontal legislation on whistleblowing.

This paper aims to present the Luxembourg draft law and discuss its consistencies and inconsistencies. In the first part, a brief analysis will be made on the legal situation of whistleblowers prior to the transposition of the Directive. In the second part, the draft law will be presented, and several points will be analysed, mainly the definition of the whistleblower, the channels for disclosure and the protection. At

[1] Jim Brunsden, 'Luxleaks: Luxembourg's response to an international tax scandal' (2017) Financial Times, disponible en ligne : https://www.ft.com/content/de228b90- 3632-11e7-99bd-13beb0903fa3.
[2] TA Lux, 29 Juin 2016, n° 1981/2016.
CA Luxembourg, 15 Mars 2017, n° 117/17 X.
CSJ, cass., 11 Janvier 2018, n° 3911.
CSJ, cass., 11 Janvier 2018, n° 3912.
[3] https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-223259%22%5D%7D.
[4] European Parliament and European Council Directive 2019/1937/EU of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.
[5] Projet de Loi no 7945 portant transposition de la Directive (UE) 2019/1937 du Parlement Européen et du Conseil du 23 Octobre 2019 sur la protection des personnes qui signalent violations du droit de l'Union. For more information https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=7945.

the end, concluding remarks will be drawn on the future Luxembourg legislation on the protection of whistleblowers.

1 The legal landscape for whistleblowers in Luxembourg prior to the advent of the Directive

Whistleblowing made its appearance in Luxembourg with the Law of 13 February 2011 related to the fight against corruption.[6] The adoption of this Law was motivated by the need of Luxembourg to comply with its international legal obligations.[7] Luxembourg had ratified several international legal instruments on corruption at the EU, OECD and CoE level. Following the ratification of these different conventions, different evaluations of the country's legal framework on corruption had demonstrated that the protection of whistleblowers was missing. With the adoption of its Law, several articles were added to the Labour code under the title "protection of employees in the issue of fighting corruption".[8] The Law was not widely used for whistleblowing as it missed basic elements such as a definition for whistleblowers.

The other provisions on whistleblowing in Luxembourg are found in the banking and financial sector legislation. As the EU had adopted several sectoral provisions on whistleblowing when adopting legislation at the EU banking and financial sector, Luxembourg had to transpose these provisions. For instance, the Law of 23 December 2016 on the market abuse has provisions on the protection of whistleblowers when reporting wrongdoings related to the market abuse.[9] Several clarifications on these provisions are provided by the Luxembourg Financial Authority (*Commission de Surveillance du Secteur Financier* – CSSF). There are no official statistics on the use made of these provisions, but it is believed that there are reports submitted to the CSSF, given the existence of a department on whistleblowing within the CSSF.

[6] Loi du 13 Février 2011 renforçant les moyens de lutte contre la corruption, Mémorial A32 348.

[7] Projet de loi renforçant les moyens de lutte contre la corruption, n° 6104 (2010) Chambre des Députés, 6.

[8] Projet de loi renforçant les moyens de lutte contre la corruption, n° 6104 (2010) Chambre des Députés, 9.

[9] Loi du 23 Décembre 2016 relative aux abus de marché, Mémorial A279 5905.

2 The draft Law transposing the Directive

Luxembourg presented its draft law after the expiration of the two years transposition period (December 2021). As other Member States, Luxembourg has not still adopted a law on the protection of whistleblowers transposing the Directive. On 12 January 2022, Sam Tanson, Minister of Justice, and her team presented the Draft Law (*projet de loi 7945*).[10] In a special event, the Minister and her team presented the draft and highlighted key points of the proposed law. The draft law follows the Directive's articles and is almost identical to the Directive. There are certain points, though, that should be given more attention, before analysing the draft law, as Luxembourg has decided to provide a comprehensive legal framework and to go beyond the minimum standards of the Directive.

First, the proposed law extends the material scope covering not only breaches of EU law, as enumerated in the Directive, but covering all the national, EU and international legislation in Luxembourg.[11] This is a delicate point for several Member States transposing the Directive as to whether to extend the material scope to cover breaches of national as well as EU law. Luxembourg decided to go beyond the areas covered by the Directive and to cover breaches of national and EU law as well as international rules as ratified by Luxembourg. This means that the whistleblower in Luxembourg will be able to report on anything without the burden to discern what is covered or not by the Directive. This point was welcome by several public bodies which gave their opinion on the law. Nevertheless, some of them were not fully in favour as it will be seen below.

Second, the draft law proposes the creation of an office for reportings (*Office de signalements*).[12] The Ministry of Justice recognised that whistleblowing has several challenges so the creation of the office will help whistleblowers.[13] The proposed law is quite detailed on the responsibilities of this office. The primary goal will be to inform and guide the whistleblower as to the procedures and to inform the public about whistleblowing law. More details for the office will be given below. Certain public authorities welcomed this idea and certain were quite reserved. In any case, this is a major step, the creation of the office, towards an effective guidance and assistance to whistleblowers in Luxembourg.

2.1 The definition of whistleblower

The Luxembourg draft law definition of the whistleblower is identical to the Directive's. The whistleblower should have a work-related context either in the public or private sector.[14] As the Directive dictates, the definition is quite extensive. It

[10] Le gouvernement luxembourgeois: <https://gouvernement.lu/dam-assets/documents/actualites/2022/01-janvier/12-tanson-projet-loi-ue/Projet-loi-nr7945.pdf> accessed 1 March 2023.
[11] Projet de Loi no 7945, p 3.
[12] Projet de Loi no 7945, Chapitre 3.
[13] Projet de Loi no 7945, p 3.
[14] Projet de Loi no 7945, Article 2

covers public agents, employees, contractors, sub-contractors, interim staff, interns and even facilitators or persons connected with the whistleblower. The working relation can be ongoing, finished or about to start. The whistleblower should be a physical person and the proposed law excludes legal persons from being whistleblowers. On that point, the Luxembourg Medical College (*Collège Médical*) proposed that legal persons should be considered as facilitators in order to cover, for instance, professional bodies and syndicates which may help the whistleblower throughout the reporting process.[15]

The whistleblower should reasonably believe that a wrongdoing occurs or is about to happen in order to report and be protected.[16] There is no distinction in the proposed law between good and bad faith whistleblowers. The whistleblower should report facts or suspicious events about potential or actual wrongdoings which are illegal or are against the spirit of the national law and can cause harm to the public interest.[17] The latter is problematic and vague. The proposed law talks about the finality (*finalité*) of the law which is a vague term. The whistleblower cannot be certain if something is against the spirit of the law and will harm the public interest. The government should provide clarifications on this important point or, once the law is adopted, the national courts will shed light on this important point.

There are restrictions, though, on what the whistleblower can report.[18] Information or documents that are classified as well as those related to national security are excluded by the proposed law. In addition, facts, information or documents covered by the medical secrecy or the duty of secrecy between a lawyer and their client and rules related to a criminal procedure are excluded by the proposed law. There is an exception to this last prohibition; the whistleblower can be protected if their reporting is proportional and is necessary to the public interest. On that point, several public authorities reacted.

The Order for accountants (*Ordre des experts-comptables*) highlighted that their duty of secrecy between themselves and their clients should be entailed in the proposed law.[19] The Notaries Chamber (*Chambre des notaires*) stressed the same issue;[20] their duty of secrecy between themselves and their clients should be added to the exceptions of the proposed law. In the same way, the Institute of Statutory Auditors (*Institut des reviseurs d'entreprises*) should be included in the exceptions as presented in the proposed law.[21] These reactions are founded under Luxembourg law. The violation of professional secrecy, in Luxembourg, is punished by criminal law. Under Article

15 Avis du Collège Médical, p 2.
16 Projet de Loi no 7945, Article 3(2).
17 Projet de Loi no 7945, Article 3(1).
18 Projet de Loi no 7945, Article 1(2),(3),(4).
19 Avis de l'Ordre des Experts-Comptables, p 1.
20 Avis de la Chambre des Notaires, pp 1-2.
21 Avis de l'Institut des Reviseurs d'Entreprises, pp 1-2.

458 of the Criminal Code, the divulgation of a secret is a criminal offence if done in an unjustified way.[22] The professional secrecy is of public order and only the law can create exceptions to this rule. Nevertheless, when an employee reports a wrongdoing, they should be exempted from any criminal liability, and this should be made clear in the proposed law. It seems that the Luxembourg government has an important task. The relation between secrecy, professions, clients and whistleblowers should be clarified and the ultimate goal should be to protect the whistleblower.

2.2 Channels for disclosure

For the whistle-blower to be protected, they should comply with the aforementioned requirements. The next step is to respect the channels for disclosure. The Luxembourg proposed law respects the requirements of the Directive so only some comments will be made. First, the proposed law allows the whistleblower to choose if they want to report internally or to the authorities, a point coming from the Directive. Nevertheless, there are doubts as to the will of the government. In Article 5, paragraph 2 of the proposed law, it is stated that "the reporting persons have, at first, the possibility to report internally […]". The use of "at first (*en premier lieu*)" has brought reactions from public authorities which gave their opinion on the draft law.[23] It is stated that the use of "at first" does not comply with the spirit of the Directive and the free choice of internal or external for the whistleblower. In addition, Article 7 of the proposed law uses the term "encourage" which, combined with "at first", should not give the impression of an obligation to the whistleblower to report internally. It should be clear that it is a free choice for the whistleblower not an obligation.

Coming to the obligation to establish internal reporting channels, the reactions from the public authorities were mixed. On the one hand, certain authorities have argued that the obligation for small and medium size businesses to establish internal reporting channels will have negative financial consequences to these businesses.[24] The main argument is that most of these businesses have already established internal reporting procedures such as for money laundering and they now have to add more. The point raised is that the legislation is not clear but complex. The existing sectoral provisions become a *lex specialis* and the new law will be another level not the main point of reference. They argue that this complex situation and the financial cost will be a burden for small and medium businesses.[25] On the other hand, other public authorities have argued that when a business has more than 15 employees should be obliged to establish internal reporting channels (and not the over 50 rule

[22] Art. 458, Titre VIII, Chapitre VI bis, Code Pénal Luxembourgeois.
[23] Avis du Conseil de la Concurrence, pp 6-7.
[24] Avis de la Chambre des Métiers, p 5.
[25] Ibid., p 3.

of the Directive).[26] Also, it is argued that every business should have a risk assessment in order to examine whether internal reporting channels should be established when they are small and medium size businesses.

When it comes to reporting to the authorities, the proposed law establishes a list of 22 competent authorities to receive reports about wrongdoings.[27] This list has drawn attention to almost all the opinions submitted for the proposed law by these competent authorities. The first argument is that it is not clear which authority should be preferred or have priority over an issue which can be reported to several authorities.[28] Second, the powers of the authorities are not clear; consequently, it is asked from the government to amend their respective laws, that establish these authorities, in order to have the legitimacy to receive, control, investigate and sanction when necessary. Finally, the proposed law is not clear when it comes to the cooperation of these authorities;[29] which authority should be responsible? How to ensure confidentiality when information is provided to another authority? The government is invited to solve this issue and to be more precise for the role and powers of the designated competent authorities. A mere list of authorities without specific analysis on their competences is not a meaningful contribution to whistleblowing. The government should provide detailed analysis on the competences, powers and rights of these authorities when they receive whistleblowing provisions.

The Luxembourg government made an innovation in its proposed law with its aim to establish a special office, under the Ministry of Justice, which will have certain responsibilities for whistleblowing.[30] The proposed law analyses this new institution which should inform and help whistleblowers when they want to report by precising which steps should be made, should inform the public about the protection of whistleblowers, inform the competent authorities when they have not respected their internal reporting obligations and elaborate recommendation on every question related to the application of the proposed law. In addition, this new authority will have the obligation to report all the statistics on whistleblowing, as required by the Directive, and a progress report to be sent to the European Commission about Luxembourg.

The proposal for this new authority had mixed reactions by the authorities which gave their opinion on the proposed law. Some of them argued that this new authority is a positive step towards a better protection for whistleblowers and it should be of great help to them.[31] Others have raised the point that the tendency to create authorities cannot solve the problem; they proposed that the existing

[26] Avis de la Chambre des Salariés, p 4.
[27] Projet de Loi 7945, Article 18.
[28] Avis de la Chambre des Métiers, p 5.
[29] Avis de la Chambre des Métiers, p 5.
[30] Projet de Loi 7945, Chapitre 3.
[31] Avis de la Chambre des Salariés, pp 4-5.

governmental authorities should be responsible for the above and there is no need for a new one.[32] Another comment was made about the independence of this new authority. As it stands now, the authority will be under the Ministry of Justice. The proposal is to establish this authority with a new law and to give it full independence in order to ensure that no influence can be made to it by the government.

The final point for the channels for disclosure is about public disclosures. The proposed law, abiding by the Directive's requirements, restricts public disclosures as a final choice, after having reported internally or to the authorities, or directly to the public in case of eminent danger or harm to the public interest. This point has brought reactions not only at the Luxembourg level but also at the European one. Several arguments were made by the public authorities which gave their opinion to the proposed law that public disclosures cannot be limited in that way.[33] In addition, they argued that the scenario where the whistleblower can go public directly is unclear as it is based to vague notions such as eminent danger. It was argued that the whistleblower should have the possibility to go public and be protected without being obliged to have reported internally or to the authorities at first.

2.3 Protection of the whistleblower

The proposed law adopts all the protective measures as dictated by the Directive.[34] The whistleblower is protected against any type of retaliation and does not incur any civil, administrative or criminal liability. Their identity should be kept confidential and should only be known to the persons handling the report. Exceptions are made when a legal process or investigation is opened where the identity of the whistleblower cannot be confidential anymore. As the proposed law abides by the wording of the Directive, certain comments will be made. First, the Employees Chamber (Chambre des salariés) argued that the protective measures, as enumerated in the proposed law, should also be adopted in the Labour code.[35] In this way, the rights and protection of whistleblowers will have a solid legal place, that of the Labour code.

Another issue that raised concerns is the confidentiality. Certain authorities argued against it as it would undermine whistleblowing and will provide shelter to bad faith whistleblowers who aim to provoke harm.[36] They raised concerns that confidentiality is not necessary, even though it is required by the Directive's provisions, and confused confidentiality to anonymity.[37] Furthermore, an important point, that of criminal liability, went unnoticed. The proposed law, as the Directive, is laconic and the existing provision is not detailed. The way the provision is written does not

[32] Avis de la Chambre des Métiers, p 6.
[33] Avis de la Chambre des Salariés, p 3.
[34] Projet de loi no 7945, Chapitre 7.
[35] Avis de la Chambre des Salariés, p 1.
[36] Avis de la Chambre des Métiers, p 1.
[37] Ibid.

really explain under which circumstances can the criminal liability be availed, and this may be a weak point for whistleblower. The government should take more care of this provision and come with more concrete explanations rather than a laconic provision which provides insecurity for a criminal law related measure.

Finally, an interesting point was raised by the Luxembourg Competition Authority (*Conseil de la Concurrence*). The authority, given the experience of other states on financial rewards in relation to competition cases, argued that financial rewards should become available to whistleblowers.[38] They based their argument on the fact that 50 per cent of whistleblowers report because of the promise of a financial reward (the statistics they provided are not linked to an official study or source). It is the first time that the issue of financial rewards is mentioned in Luxembourg in relation to whistleblowers in a positive way. It seems, though, that the government has no intention to adopt such a measure.

3 Concluding remarks

The proposed law in Luxembourg is a victory for whistleblowers in the country. While the situation, prior to the adoption of the Directive, was not optimistic in Luxembourg for whistleblowers, the proposed law is a solid legal basis that will allow whistleblowing to grow in the country. Despite the flows and the points raised for the proposed law, it is an important step for the country to further discuss the proposed law and to transpose the Directive by adopting a final law. The situation has not evolved, since January 2022, but it is hoped that the proposed law will be adopted soon.

[38] Avis du Conseil de la Concurrence, pp 7-8

The New Whistleblowing Laws of Ireland

Lauren Kierans

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1 Introduction

The Protected Disclosures (Amendment) Act 2022 (2022 Act) was signed into law by the President of Ireland on 21 July 2022 and commenced on 1 January 2023.[1] It transposes Directive 2019/1937/EU of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Directive) into into Irish law and amends the Protected Disclosures Act 2014 (2014 Act). There was a commitment by the Irish Government to "Use the opportunity of the EU consideration of reforms to European-wide whistleblowing provisions to review, update and reform our whistleblowing legislation and ensure that it remains as effective as possible."[2]

The 2014 Act was Ireland's first pan-sectoral whistleblowing legislation. It was modelled primarily on the UK and New Zealand whistleblowing legislation.[3] The purpose of the 2014 Act is described in its long title as being "An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes." In order for a disclosure to fall within the scope of the legislation, a worker must make a disclosure of "relevant information" through one or more specific disclosure channels.[4] Information will be considered "relevant information" if *(i)* in the reasonable belief of the worker, the information tends to show one or more relevant wrongdoings, and *(ii)* the information came to the attention of the worker in a work-related context.[5]

The Department of Public Expenditure and Reform (DPER) conducted a public consultation on the discretionary provisions of the Directive between June and July 2020 and the submissions to this consultation helped inform the approach to its transposition.[6] On foot of this, the General Scheme of the Protected Disclosures

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[1] Protected Disclosures (Amendment) Act 2022 (Commencement) Order 2022, SI 2022/510.

[2] Department of the Taoiseach, 'Programme for Government- Our Shared Future' (*Department of the Taoiseach* 2020) 121 <www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> accessed 11 January 2023.

[3] Whistleblowers Ireland, 'Brendan Howlin promises the whistleblower legislation will be 'best in the world" (Whistleblowers Ireland, 28 February 2012) <https://whistleblowersireland.com/2012/02/28/brendan-howlin-promises-whistleblower-legislation-in-ireland-will-be-best-in-the-world/> accessed 11 January 2023.

[4] Protected Disclosures Act 2014 ('PDA 2014'), s 5(1).

[5] Protected Disclosures (Amendment) Act 2022 ('PDA(A) 2022'), s 6(b), amending PDA 2014, s 5(2). Under the 2014 Act, the test had been that the information must have come to the attention of the worker 'in connection with their employment' as opposed to 'in a work-related context.' The widening of this test means that those with non-standard employment relationships, such as shareholders or volunteers, for example, can satisfy the test for a protected disclosure as under the previous test they would not have been able to satisfy the 'employment' aspect of the test.

[6] Department of Public Expenditure and Reform, 'Protected Disclosures Act: Information for Citizens and Public Bodies' (*DPER*) <www.gov.ie/en/consultation/8b345-consultation-on-the-

(Amendment) Bill 2021 (Heads of Bill) was published on 12 May 2021.[7] The Heads of Bill were referred to the Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach (Joint Committee) who agreed on 26 May 2021 to commence pre-legislative scrutiny. The Joint Committee met on four occasions to consider oral submissions from a number of interested stakeholders, including Transparency International Ireland, journalist Mick Clifford, and the author herein;[8] by Raiseaconcern, and whistleblowers John Wilson, Noel McGree and Julie Grace;[9] and the Bar of Ireland, the Irish Council for Civil Liberties, and the Mental Health Commission;[10] and DPER.[11] It further sought twenty-six written submissions on the Heads of Bill from various organisations.[12] On foot of both the oral and written submissions, the Joint Committee published a report on 16 December 2021 setting out sixty recommendations.[13] Following on from this, the Protected Disclosures (Amendment) Bill 2022 (Bill) was published on 8 February 2022 and the 2022 Act was enacted on 21 July 2022.

The 2022 Act comprises of two parts, divided into six chapters which are sub-divided into thirty-five sections. There are also three schedules to the 2022 Act:

Part I- Preliminary and General
Part II- Amendments to Principal Act
Chpt 1: Application of the Principal Act
Chpt 2: Internal and external reporting channels and follow-up
Chpt 3: Office of the Protected Disclosures Commissioner
Chpt 4: Provisions applicable to internal and external reporting
Chpt 5: Protection measures
Chpt 6: Miscellaneous and supplementary

Some of the key provisions of the 2022 Act are discussed below.

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transposition-of-directive-eu-20191937-of-the-european-parliament-and-the-council-on-the-protection-of-persons-who-report-breaches-of-union-law-eu-whistleblowing-directive/> accessed 11 January 2023.

[7] Minister McGrath publishes General Scheme of Protected Disclosures (Amendment) Bill (*DPER*, 12 May 2021) <www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/> accessed 11 January 2023.

[8] Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach Deb 27 May 2021.

[9] ibid 22 September 2021.

[10] ibid 29 September 2021.

[11] ibid 6 October 2021.

[12] For access to the links to the written submissions see, Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach, Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021 (33/JF/4, 2021), Appendix 2.

[13] ibid.

2 Personal scope

The 2014 Act introduced a new definition of "worker" into Irish law covering employees, former employees, temporary employees, contractors, agency staff, members of the police and defence forces, and certain interns and trainees.[14] The personal scope of the legislation has now been broadened under the 2022 Act to include persons with non-standard employment relationships, such as trainees, shareholders, volunteers, individuals who acquire information on a relevant wrongdoing during a recruitment process or other pre-contractual negotiations, and individuals belonging to the administrative, management or supervisory body of an undertaking, including non-executive members.[15] The 2022 Act uses the terms "worker" and "reporting person" interchangeably.[16]

3 Material scope

3.1 Overview

Section 5(3) of the 2014 Act provided that the following matters were "relevant wrongdoings" for the purposes of the 2014 Act:

(a) that an offence has been, is being or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

[14] PDA 2014, s 3(1) and (2). See also, Michael Doherty, 'Ireland' in Claudia Schubert (ed), Economically-dependent Workers as Part of a Decent Economy International, European and Comparative Perspective (Hamburg: Beck/ Hart/ Nomos 2021) 66.

[15] Protected Disclosure (Amendment) Act 2022 ('PD(A)A 2022'), s 4(a)(iii), amending PDA 2014, s 3.

[16] PD(A)A 2022, s 4(a)(iv), amending PDA 2014, s 3(1) provides that "reporting person' means a worker who makes a report in accordance with this Act'.

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.[17]

The definition of "disclosure" covers circumstances where the information disclosed is information of which the person receiving the information is already aware and provides that it means in those circumstances "bringing to the person's attention".[18]

Although the list of relevant wrongdoings in section 5(3) of the 2014 Act encompasses most of the EU laws contained in the Directive, in order to ensure that the material scope of the Directive was fully transposed, the 2022 Act amends the 2014 Act by inserting the Annex to the Directive into Schedule 6 of the 2014 Act, whilst also amending the list of relevant wrongdoings to insert a new section 5(3)(h) to include "a breach" which is further defined at section 4(iv)(a). The original version of section 5(3)(h) is amended to include "an attempt has been, is being or is likely to be made to conceal or destroy".[19]

3.2 Interpersonal grievances

The 2014 Act endeavoured to exclude personal grievances from its scope by providing in section 5(3)(b) that a relevant wrongdoing includes "that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services."[20] This approach was subject to robust criticism by the Irish Supreme Court in *Baranya v Rosderra Irish Meats Group Limited*[21] where Hogan J stated that "Taken on its own, this might suggest that purely private complaints which are entirely personal to the worker making the complaint fall outside the scope of the Act. But even here the apparent width of the statutory exclusion is deceptive and, at one level, ineffective."[22] In the *Baranya* case, the Supreme Court found that a disclosure about a worker's own health and safety that solely affected him fell within the scope of the legislation. The only reference in the Directive to "interpersonal grievances" is contained at Recital 22. It appears that the *Baranya* decision was taken into consideration at the time of the drafting of the 2022 Act, as not only was Recital 22 included in the 2022 Act, but the scope of the provision went even further to exclude matters concerning a complaint by a worker to, or about, their employer, which concern the worker exclusively.[23] Section 5(5A) of the 2022 Act provides that:

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[17] PDA 2014 s 5(3)(a)-(h).
[18] PDA 2014 s 3(1).
[19] PD(A)A 2022, s 6(c)(iii), inserting PDA 2014, s 5(3)(i).
[20] PDA 2014 s 5(3)(b).
[21] Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77
[22] ibid [25].
[23] Protected Disclosures (Amendment) Bill 2022, s 6(c), inserting s 5(5A) into the 2014 Act.

A matter concerning interpersonal grievances exclusively affecting a reporting person, namely, grievances about interpersonal conflicts between the reporting person and another worker, or a matter concerning a complaint by a reporting person to, or about, his or her employer which concerns the worker exclusively, shall not be a relevant wrongdoing for the purposes of this Act and may be dealt with through any agreed procedures applicable to such grievances or complaint to which the reporting person has access or such other procedures, provided in accordance with any rule of law or enactment (other than this Act), to which the reporting person has access. [24]

The interim guidance for public bodies and prescribed persons on the protected disclosures legislation published by DPER provides advice on what should be done when a disclosure is received and states that "Care should be taken when assessing whether a potential protected disclosure concerns the worker exclusively. If the potential protected disclosure refers to information that could also apply to other workers, or other workers could also be affected, then it may be a relevant wrongdoing for the purposes of the Act."[25] It provides that when assessing a matter that is raised as a protected disclosure, it may need to be dealt with under alternative procedures and therefore grievance and dignity at work procedures must be reviewed and aligned with the organisation's protected disclosures procedures as is "appropriate and feasible".[26] It further advises that the public body should consider obtaining legal advice if it is unclear as regards whether the report is "an interpersonal grievance exclusively affecting a reporting person / a complaint concerning the worker exclusively, or a protected disclosure".[27]

The recommendation by DPER for public bodies to seek legal advice if they cannot differentiate between an interpersonal grievance and a protected disclosure is potentially an expensive approach to this problem. The reality is that this new exclusionary provision is non-sensical and will arguably prevent disclosures of serious wrongdoings falling outside of the scope of the legislation, resulting in workers remaining silent about such matters for fear that they will not be protected from retaliation because of the focus being solely on the numbers affected by the wrongdoing. It is suggested that a better approach to this issue would have been the introduction of a public interest test.[28]

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[24] PD(A)A 2022, s 6(d), inserting PDA 2014, s 5(5A).

[25] Department of Public Expenditure and Reform, 'Protected Disclosures Act Interim guidance for public bodies and prescribed persons (DPER November 2022) para 7.6.

[26] ibid.

[27] ibid.

[28] For further information see: Lauren Kierans, 'It's nothing personal: The ineffective exclusion of personal grievances in the Protected Disclosures Act 2014- Baranya v Rosderra Irish Meats Group Ltd' (2023) Irish Supreme Court Review (forthcoming).

4 Protections

Under the 2014 Act, employees could seek redress for unfair dismissal[29] and penalisation[30] before the Workplace Relations Commission (WRC) and for detriment[31] in a tort claim before the civil courts, whilst workers other than employees could only avail of redress for detriment in a tort claim before the civil courts. The tort claim is also available for third parties who suffer detriment because a person made a protected disclosure.[32] In addition, employees who alleged that they had been dismissed could also make an interim relief application before the Circuit Court.[33] An employee must present their application for interim relief before the Circuit Court before the end of the period of twenty-one days immediately following the date of the dismissal.[34] Further, all workers who had made a protected disclosure could bring a claim before the civil courts for any loss they suffered because of a breach of their confidentiality.[35] Under the 2014 Act, the identity of the worker making the disclosure was protected to the extent that the person to whom the protected disclosure is made or the person to whom a protected disclosure is referred in the performance of that person's duties, must not disclose to another person, information that might identify the person who made the protected disclosure.[36] This protection was not absolute, however, and disclosure of identity could occur in certain specific circumstances, for example, if the person to whom the protected disclosure was made or referred reasonably believed that disclosing any such information was necessary for the effective investigation of the relevant wrongdoing concerned or the prevention of serious risk to the security of the State, public health, public safety, or the environment.[37]

There is a statutory presumption under the 2014 Act that in any proceedings involving an issue as to whether a disclosure is a protected disclosure, it is presumed that it is, until the contrary is proved.[38] However, case law under the 2014 Act had imposed the burden of proof in retaliation claims, other than unfair dismissal, on the worker. Hyland J in *Conway v The Department of Agriculture, Food and the Marine*[39] confirmed that, under the 2014 Act, the worker bore the evidential burden of

[29] Unfair Dismissals Act 1977, s 6(ba), as inserted by PDA 2014, s 11(1)(b).
[30] PDA 2014, s 12 and sch 2.
[31] PDA 2014, s 13.
[32] PDA 2014, s 13(1).
[33] PDA 2014, s 11(2) and sch 1.
[34] PDA 2014, sch 1, s 1(2).
[35] PDA 2014, s 16.
[36] PDA 2014, s 16(1)
[37] PDA 2014, s 16(2).
[38] PDA 2014, s 5(8).
[39] [2020] IEHC 664, [2021] ELR 142.

establishing detriment and penalisation.[40] In successful unfair dismissal and penalisation claims before the WRC, the 2014 Act provides that compensation that can be awarded to a successful complainant is capped at 260 weeks remuneration.[41] There is no provision in the 2014 Act for an award of damages to be capped in a claim by a worker for detriment or breach of confidentiality before the civil courts and the only limitation on the amount that can be awarded is the monetary jurisdiction of the particular court in which the claim is brought.[42]

The protections outlined above have been retained under the 2022 Act, but there have also been some amendments made, including, inter alia:

(a) The definition of "penalisation" has been extended to include the acts and omissions (including threats thereof) contained in Article 19 of the Directive.[43]

(b) The definition of "detriment" in section 3(3) of the 2014 Act for a tort claim has been amended to extend it from its previous limited definition to reflect all the acts and omissions that employees are protected from in relation to "penalisation".[44]

(c) Trainees, volunteers, and those who acquire information on a relevant wrongdoing during the recruitment process will also be able to bring a claim before the WRC for penalisation.[45]

(d) The burden of proof in penalisation and detriment claims has been reversed, meaning that in any proceedings for penalisation or detriment, it will be deemed that they were as a result a protected disclosure being made, unless the employer or person whom it is alleged to have caused the damage proves that the act or omission concerned was based on "duly justified grounds".[46]

(e) The amount of compensation that can be awarded in a penalisation claim to individuals who acquire information on a relevant wrongdoing during a recruitment process is capped at €15,000.[47]

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[40] ibid [74].

[41] Unfair Dismissals Act 1977, s 7(1A), as inserted by PDA 2014, s 11(1)(d) and sch 2, s 1(3)(c).

[42] The general monetary jurisdiction of the District Court is €15,000, Courts of Justice Act 1924, s 77(a)(i), (iii) and (v) carried forward by the Courts (Supplemental Provisions) Act 1961, s 33, and amended from time to time, most recently by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the Circuit Court is €75,000 or €60,000 for personal injury actions, Courts (Supplemental Provisions) Act 1961, Third Schedule, as amended by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the High Court is for claims of damages in excess of €75,000, or for personal injuries actions in excess of €60,000, there is no ceiling on the amount of damages that can be awarded.

[43] PD(A)A 2022, s 4(a)(ii), amending PDA 2014, s 3.

[44] PD(A)A 2022 s 22(b), substituting PDA 2014, s 13(3).

[45] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7B).

[46] PD(A)A 2022, ss 21 and 22(a), inserting PDA 2014, ss 12(7C) and 13(2B).

[47] PD(A)A 2022, s 25(a), amending, PDA 2014, sch 2(1)(c).

(f) Interim relief claims can be brought by employees for all forms of penalisation.[48]

(g) A new tort claim has been introduced providing that "A person who suffers damage resulting from the making of a report, where the reporting person knowingly reported false information, has a right of action in tort against the reporting person."[49]

(h) New conditions around protecting the identity of the reporting person have been introduced, including a new obligation not to disclose information where the identity of the reporting person may be directly or indirectly deduced without their consent. This excludes disclosing information to any persons to whom a protected disclosure is referred for the purposes of receipt, transmission or follow-up.[50] Again, under the new provision, the identity of the reporting person can be disclosed in certain cases.[51] Where the identity of the reporting person is disclosed to another person, the reporting person must be informed in writing before their identity is disclosed unless such information would jeopardise related investigations or judicial proceedings.[52] Such a notification must include the reasons for the disclosure of their identity.[53] Further, a prescribed person, the Protected Disclosures Commissioner (discussed below), and an "other suitable person" to whom a report is made or transmitted must protect the identity of any "person concerned" (i.e., the alleged perpetrator of the wrongdoing) for as long as any investigation triggered by the report is ongoing, except where the disclosure of the identity of such a person concerned is required by law.[54]

Some observations can be made on these amendments. First, Article 21(8) of the Directive provides that "Member States shall take the necessary measures to ensure that remedies and full compensation are provided for damage suffered by persons referred to in Article 4 in accordance with national law."[55] Arguably the caps on compensation, as mentioned above, do not ensure "full compensation".

Second, the extension of interim relief to claims of penalisation by employees only, and not to workers other than employees alleging detriment before the civil courts in a tort claim, is flawed, and should have been afforded to all workers who suffer retaliation.

Third, a complication arises with the statutory time limits for filing penalisation and interim relief claims. Complaints of penalisation must initially be presented in

[48] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7A).
[49] PD(A)A 2022, s 23 inserting PDA 2014, s 13A.
[50] PD(A)A 2022, s 16, substituting PDA 2014, s 16(1).
[51] PD(A)A 2022, s 16, substituting PDA 2014, s16(2).
[52] PD(A)A 2022, s 16, substituting PDA 2014, s16(3)(a).
[53] PD(A)A 2022, s 16, substituting PDA 2014, s 16(3)(b).
[54] PD(A)A 2022, s 17 inserting PDA 2014, s 16A(1).
[55] Dir 2019/1937, art 21(8).

writing[56] to the Director General of the WRC within six months of the date of the alleged contravention.[57] If a complaint is not received within the six-month time frame, an extension may be granted by an Adjudication Officer up to a maximum time limit of twelve months where the complainant has demonstrated reasonable cause for the delay.[58] However, interim relief applications for penalisation must be made within twenty-one days immediately following the date of the last instance of penalisation.[59] The different treatment as regards when time starts to run for a penalisation claim and an interim relief application under the 2022 Act means that an employee may be "in time" for their interim relief application, but "out of time" for the hearing of the substantive penalisation claim before the WRC.

Fourth, the shifting of the burden of proof is a welcome amendment under the 2022 Act as it is easier for an employer to demonstrate and substantiate the reason for any alleged retaliation because this should be something peculiarly within their knowledge. Nonetheless, the scope of the phrase "on duly justified grounds" in the 2022 Act is ambiguous. The Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights explains that it is "important for transposition laws to clarify this wording" and emphasises that the recitals of the Directive "point the way forward" in this regard.[60] Recital 93 of the Directive explains that the person who took the detrimental action should be "required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure." This test should have been included in the 2022 Act.

5 Disclosure channels

The 2014 Act provides for a stepped disclosure regime whereby the worker must comply with certain requirements when making their disclosure to specific recipients in order for their disclosure to attract the protections contained in the 2014 Act. The concept of a stepped disclosure regime in the 2014 Act, or a "three-tiered" whistleblowing model of disclosure channels, was developed by Vandekerckhove in 2010.[61] The stepped disclosure regime under the 2014 Act consisted of three distinct levels of disclosure requirements: *(i)* the first step covered disclosures to the worker's employer or other responsible person (section 6), to a Minister by a worker in a public body that falls under the Minister's function (section 8), and to a legal advisor in the course of obtaining legal advice (section 9); *(ii)* the second step was a

[56] Workplace Relations Act 2015 ('WRA 2015'), s 41(9)(a).
[57] WRA 2015, s 41(6).
[58] WRA 2015, s 41(8).
[59] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7A).
[60] Council of Europe Parliamentary Assembly, Draft Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe, Explanatory memorandum, para 3.6.3.62.
[61] Wim Vandekerckhove, 'European Whistleblower Protection: Tiers or Tears?' in D. Lewis (ed), A Global Approach to Public Interest Disclosure (Cheltenham: Edward Elgar 2008).

disclosure to a prescribed person (section 7); and *(iii)* the third step was a disclosure in other cases other than to those recipients in the first and second steps (section 10). It is not necessary for a worker to make their disclosure via the first or second step before making their disclosure through the third step but the higher a worker goes up the stepped disclosure regime when making their disclosure, the more requirements that they have to satisfy in order for their disclosure to be considered a protected disclosure. The 2022 Act retains the stepped disclosure channel model of the 2014 Act; however, it has now created a four stepped disclosure regime where disclosure to a Minister is now a separate level in the regime. Some observations on the statutory approach to disclosures to prescribed persons and to Ministers are set out below.

5.1 Disclosures to prescribed persons

The Directive requires Member States to introduce an external disclosures system known as "competent authorities".[62] Section 7 of the 2014 Act had established an external disclosures channel which is known as a "prescribed persons" system. The prescribed persons system was influenced by the existence of such a system under the UK Employment Rights Act 1996 (1996 Act).[63] The prescribed persons system has been described as a "halfway house" between disclosures to an employer and disclosures in the public domain.[64] A prescribed person is independent of the worker's employer and usually has the authority to both investigate disclosures and to hold their regulated entities to account.[65] In general, prescribed persons have regulatory functions in the area that is the subject of the disclosure.[66] Under the Protected Disclosures Act 2014 (Disclosure to Prescribed Persons) Order 2020, SI 2020/367, there are one hundred and ten persons prescribed by the Minister for the purpose of receiving disclosures under section 7 of the 2014 Act.[67] These prescribed persons consist of seventy-nine regulatory and supervisory bodies and thirty-one local authorities. The 2022 Act establishes the Office of the Protected

[62] Dir 2019/1937/EC, art 5(14) defines 'competent authority' as 'any national authority designated to receive reports in accordance with Chapter III and give feedback to the reporting person, and/or designated to carry out the duties provided for in this Directive, in particular as regards follow-up.'
[63] Employment Rights Act 1996, s 43F.
[64] Ashley Savage and Richard Hyde, 'The response to whistleblowing by regulators: a practical perspective' (2015) 35 Legal Studies 408, 415.
[65] Arron Phillips and David Lewis, 'Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose?' (October 2013) 5 Middlesex University Erepository.
[66] Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (DPER July 2018) 7.
[67] Protected Disclosures Act 2014 (Disclosure to Prescribed Persons) Order 2020, SI 2020/367.

Disclosures Commissioner (OPDC).[68] The Protected Disclosures Commissioner (PDC) is a new prescribed person under section 7 of the 2014 Act.[69] The 2022 Act provides that the PDC is the person who holds the office of Ombudsman.[70] When the PDC receives a protected disclosures, it must, within fourteen days (or longer in exceptional circumstances), identify and transmit it to another prescribed person or other suitable person as it considers appropriate.[71] If another prescribed person or other suitable person cannot be identified, the PDC must accept the disclosure and notify the reporting person in writing of this and the reasons for accepting the report.[72] The PDC is required to establish procedures for handling disclosures accepted by it and for follow-up.[73]

In order to make a protected disclosure to a prescribed person, there is a higher evidential burden than a first step disclosure, in that the worker must reasonably believe that the information disclosed, and any allegation contained therein, are substantially true.[74] Further, in making the disclosure to a prescribed person, the worker must reasonably believe that the relevant wrongdoing falls within the description of matters in respect of which the person is prescribed.[75] This threshold has been retained under the 2022 Act. It is argued that this threshold should have been amended in line with the Directive, which requires the same legal threshold as an internal disclosure.[76]

When the 2022 Bill was initially published, it proposed to amend section 7 of the 2014 Act and delete the term "substantially" from section 7(1)(b)(ii).[77] However, the deletion of the term "substantially" alone from this section did not reflect the threshold for disclosures to competent authorities under the Directive and introduced an additional requirement that the worker reasonably believes that not only the information disclosed is true but also that any allegation contained in the disclosure is also true. The author herein argued in her written submissions to the Joint Committee during its pre-legislative scrutiny on the Heads of Bill that this proposal to amend section 7(1)(b)(ii) and merely delete the term "substantially" failed to reflect the lower threshold of disclosures to such recipients under the Directive and therefore section 7(1)(b)(ii) in the 2014 Act itself needed to be deleted in its entirety

[68] PD(A)A 2022, ss 14, 15, and sch 1, inserting PDA 2014, ss 10A, 10B, 10C, 10D, 10E, 10F, and sch 5.
[69] PD(A)A 2022, s 10(a)(i), amending PDA 2014, s 7(1)(a).
[70] PD(A)A 2022, s 14, inserting PDA 2014, s 10A(2).
[71] PD(A)A 2022, s 14, inserting PDA 2014, s 10C(1).
[72] PD(A)A 2022, s 14, inserting PDA 2014, s 10C(5).
[73] PD(A)A 2022, s 14, inserting PDA 2014, s 10C(6).
[74] PDA 2014, s 7(1)(b)(ii).
[75] PDA 2014 s 7(1)(b)(i).
[76] Dir 2019/1937, arts 6 and 10.
[77] PD(A)B 2022, s 10(a), amending PDA 2014, s 7(1)(b)(ii).

from the legislation.[78] Unfortunately, this submission was misinterpreted by the Joint Committee who believed that the submission was that the amendment be deleted and not the sub-section in the 2014 Act. Thus, in reliance on this erroneous interpretation, the Joint Committee recommended that the sub-section should not be amended.[79] This recommendation by the Joint Committee was accepted by the legislature at Committee Stage of the 2022 Bill. The author notified the Minister of the misinterpretation of her submission but Minister McGrath explained at Committee Stage that the Attorney General's advice was that the "substantially true" test should be retained for disclosures to prescribed persons as this would provide 'stronger protection than is required under the directive and that "in accordance with the non-regression clause at Article 25 of the directive, the conditions in the 2014 Act will remain unchanged if this amendment is accepted."[80] It is argued by the author that this retention of the test for protected disclosures to prescribed persons is regressive, as an internal disclosure under the 2014 Act merely requires that the worker reasonably believes that the relevant information disclosed "tends to show" one or more relevant wrongdoings but a disclosure to a prescribed person requires the worker to reasonably believe that both the information disclosed, and any allegation contained therein, is substantially true. As McMullen J explained in respect of this equivalent requirement under the 1996 Act in the UK in *Korashi v Abertawe Bro Morgannwg University Local Health Board*:[81]

> [O]nce one goes outside the immediate confines of the employment relationship and to an outsider… additional layers of responsibility are required upon the discloser. The information must in the reasonable belief of the discloser be substantially true. There is no obligation to make allegations but if they are made they too must in the reasonable belief of the discloser be substantially true. Both information and allegations must fit that criterion. Here on the facts found by the Tribunal they did not. If we were required to decide this matter it would not be sufficient to show that a matter was believed to be substantially true when a number of the allegations were not so believed.[82]

It is acknowledged by the author that the test for a first step disclosure in the Directive requires that the worker has "reasonable grounds to believe that the information on breaches reported was true at the time of reporting"[83] and that "substantially true" could be considered a lower threshold than a requirement of "true".

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[78] Lauren Kierans, 'Written Submissions on the General Scheme of the Protected Disclosures (Amendment) Bill 2021' (15 July 2021) 10-11 <https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/submissions/2021/2021-12-14_submission-dr-lauren-kierans-bl-lecturer-in-law-national-university-of-ireland-maynooth_en.pdf> accessed 11 January 2023.

[79] Joint Committee (n12) 15, 67.

[80] Dáil Deb 23 March 2022, vol 285 col 8.

[81] [2012] IRLR 4.

[82] ibid [66].

[83] Dir 2019/1937, art 6(1)(a).

However, the decision to retain the current test for a disclosure to a prescribed person under the 2014 Act requires more than just a reasonable belief that the information is substantially true but also that the worker reasonably believes that any "allegations" made at the same time as the information is disclosed, are substantially true. Furthermore, the test defeats the intention of the Directive that both internal disclosures and disclosures to competent authorities would attract the same threshold for protection and as the test for internal disclosures under the 2014 Act is merely that the worker reasonable believes that the information "tends to show" one or more relevant wrongdoings, this being a lower threshold than what is required for an internal disclosure under the Directive, section 7(1)(b)(ii) should have been deleted in its entirety from the 2014 Act so that both internal disclosures and disclosures to prescribed persons had the same legal test for protection.

Disclosures to Ministers

Under section 8 of the 2014 Act, a public body worker could make a disclosure to a Minister who had a function relating to the public body where the worker worked.[84] The same evidential threshold applied as if the disclosure was made to the worker's employer under section 6. Section 12 of the 2022 Act substitutes a new section 8 into the 2014 Act regarding disclosures to a Minister. It introduces additional thresholds for disclosures by a worker to be protected than those that applied under section 8 of the 2014 Act. The 2022 Act requires one or more additional conditions to be met, including that the worker previously made a disclosure of substantially the same information to their employer or to a prescribed person and no feedback was given within the required timeframes or if feedback was furnished, they reasonably believe that there has been no or inadequate follow-up; or the worker reasonably believes the head of the public body concerned is complicit in the relevant wrongdoing; or the worker reasonably believes that the relevant wrongdoing constitutes an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage.[85]

There was no requirement to change the legal threshold for protections for disclosures to a Minister under the Directive as there is no equivalent provision contained therein. DPER's Regulatory Impact Analysis provides an insight as to why this section was to be amended, stating:

In addition, the following issues with the operation of the Ministerial channel have been raised in the 2018 Statutory Review of the PDA and in the Third Interim Report of the Disclosures Tribunal (Charleton Report):

- Persons making simultaneous disclosures through multiple channels: internal, external and Ministerial leading to lack of clarity as to what action it is appropriate for a Minister to take if another party is already in the process of following up on a disclosure;

[84] PDA 2014, s 8.

[85] PD(A)A 2022, s 12, inserting PDA 2014, s 8(2).

- Lack of clarity/legal certainty as to what action Ministers are expected to take on foot of receiving a protected disclosure; and
- Uncertainty as to whether Ministers can refer disclosures to appropriate third parties for action on account of the duty of confidentiality imposed under section 16 of the Act.[86]

The decision was taken to amend section 8 on the basis that by doing so it would still comply with what DPER considered to be the minimum standards of the Directive in respect of the operation of reporting channels, those being "acknowledgment, follow-up and feedback in respect of the disclosures received" and that it would also address issues associated with this specific disclosure channel.[87] DPER also recommended that this disclosure channel be supported by the creation of the PDC.[88] Now under the 2022 Act, when a Minister receives a disclosure, they must, without having considered it, transmit it to the PDC within ten days.[89] The 2022 Act sets out detailed obligations on the PDC when it receives disclosures from a Minister and this includes acknowledging receipt of the disclosure in writing within seven days;[90] within fourteen days (or longer in exceptional circumstances) identify and transmit it to another a prescribed person or other suitable person;[91] or accept it[92] and establish procedures for handling such accepted disclosures.[93]

Although disclosures to Ministers are not specifically referenced in the Directive, it is arguable that this is a regressive clause in breach of Article 25 of the Directive, a view shared by the Joint Committee.[94] Under the Directive, it is only public disclosures that are subject to stringent conditions for protection under Article 15. As the Directive required Member States to treat internal and external disclosures the same in respect of legal requirements for protection, it is suggested that disclosures by public sector workers to a relevant Minister would at most be considered an "external" disclosure and not a "public" one. Therefore, in transposing the Directive, section 8 of the 2014 Act should not have been narrowed. Despite this position being supported by the Joint Committee, it was also acknowledged by it that it is unlikely that a challenge to this amendment would succeed if it can be justified on policy grounds.[95] This is unfortunate from the perspective of a public sector worker as it effectively removes this disclosure channel from the 2014 Act. It is clear that there have been complexities around the operation of this disclosure

[86] Department of Public Expenditure and Reform, 'Regulatory Impact Analysis Transposition of the EU Whistleblowing Directive' (DPER 13 January 2022)14.
[87] ibid 14-15.
[88] ibid 15.
[89] PDA(A) 2022, s 12, inserting PDA 2014, s 8(3)(a).
[90] PDA(A) 2022, s 14, inserting PDA 2014, s 10D(1)(a).
[91] PDA(A) 2022, s 14, inserting PDA 2014, s 10D(1)(b).
[92] PDA(A) 2022, s 14, inserting PDA 2014, s 10D(5).
[93] PDA(A) 2022, s 14, inserting PDA 2014, s 10D(6).
[94] Joint Committee (n12) 69.
[95] ibid 71.

channel, as summarised in DPER's Regulatory Impact Analysis above, but these could have been resolved by maintaining the original statutory requirements for the disclosure to be protected, whilst also facilitating Ministers to avail of the assistance of the OPDC where necessary and appropriate.

5.2 Procedures

5.2.1 Internal reporting procedures

The 2022 Act requires all employers with fifty or more employees to establish and maintain internal channels and procedures for the making of protected disclosures by their employees and for follow-up.[96] This obligation applies to all public bodies irrespective of their size,[97] as they already had an obligation under the 2014 Act to establish and maintain protected disclosure procedures.[98] The threshold of fifty or more employees does not apply to employers in the financial services, products and markets, prevention of money laundering and terrorist financing, transport safety, and protection of the environment.[99] Employers, other than public bodies, with between fifty and two hundred and forty-nine employees have until 17 December 2023 to establish such internal channels and procedures.[100] This will mean that in Ireland, approximately 4,000 organisations will be subject to this requirement to establish internal reporting channels and procedures.[101]

The internal reporting channels may be operated by a person or department designated for that purpose or provided externally by a third party.[102] The procedures for making a protected disclosure and follow-up must include, inter alia:

(a) Acknowledgement in writing of the receipt of the protected disclosure within seven days of that receipt.[103]

(b) The designation of an impartial person or persons competent to follow-up on protected disclosures (which may be the same person or persons as the recipient of the protected disclosure) who will maintain communication with the reporting person and, where necessary, ask for further information from and provide feedback to that reporting person.[104]

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[96] PD(A)A 22, s 8, inserting PDA 2014, s 6(3).
[97] PD(A)A 22, s 8, inserting PDA 2014, s 6(4)(a).
[98] PDA 2014, s 21.
[99] PD(A)A 22, s 8, inserting PDA 2014, s 6(4)(b).
[100] PD(A)A 22, s 8, inserting PDA 2014, s 6(5).
[101] DPER (n86) 18.
[102] PD(A)A 22, s 8, inserting PDA 2014, s 6(9)(a) and (b).
[103] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1)(b).
[104] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1)(c).

(c) Disclosures can be made in writing or orally, or both.[105]

(d) Diligent follow-up by the designated person.[106]

(e) A reasonable timeframe to provide feedback, not exceeding three months from the acknowledgement of receipt or if no acknowledgement was sent to the reporting person, three months from the expiry of the seven-day period after the report was made.[107]

(f) The provision to the reporting person, where they request in writing, of further feedback at intervals of three months until such time as the procedure relating to the report concerned is closed.[108]

(g) Provision of clear and easily accessible information regarding:

(i) the procedures for making a protected disclosure using the internal channels established;

(ii) where the employer accepts anonymous reports, the conditions pursuant to which those reports may be accepted and follow-up undertaken; and

(iii) the procedures for making a protected disclosure to a prescribed person.[109]

(h) Without prejudice to the provisions of any other enactment relating to anonymous reporting of wrongdoing, there is no obligation to accept and follow-up on anonymous reports unless the recipient considers it appropriate to do so[110] and in such circumstances, the same procedures apply (with any necessary modifications).[111]

The safeguards and requirements outlined also apply to any third party entrusted with operating a reporting channel for an employer.[112]

5.2.2 External reporting procedures

Under the 2014 Act, there was no obligation for prescribed persons to establish and maintain procedures for external disclosures. Research conducted by the author in March 2021 of the websites of one hundred and seven prescribed persons identified that only twenty-three (21.5%) prescribed persons had protected disclosures procedures publicly available for workers who wished to make a disclosure to the organisation in its capacity as a prescribed person. This is in stark contrast to the estimated

[105] PD(A)A 22, s 9, inserting PDA 2014, s 6A(2)(a).
[106] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1)(d).
[107] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1)(e).
[108] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1)(f).
[109] PD(A)A 22, s 9, inserting PDA 2014, s 6A(1).
[110] PD(A)A 22, s 7, inserting PDA 2014, s 5A(1).
[111] PD(A)A 22, s 9, inserting PDA 2014, s 6A(3).
[112] PD(A)A 22, s 9, inserting PDA 2014, s 6A(5).

94% of public bodies which in 2017 had established and maintained internal protected disclosures procedures for their employees.[113]

The 2022 Act requires prescribed persons to establish independent and autonomous external reporting channels, for receiving and handling reports, and for follow-up.[114] External reporting channels and procedures must include many of the requirements for internal procedures, but there are some distinctions, including, inter alia:

(a) Acknowledgement in writing of the receipt of the disclosure within seven days of that receipt, unless the reporting person explicitly requested, or the prescribed person reasonably believes that acknowledging receipt would jeopardise the protection of the reporting person's identity.[115]

(b) Provide feedback to the reporting person within a reasonable timeframe not exceeding three months, or six months in duly justified cases due to the particular nature and complexity of the report.[116]

(c) A reporting person must cooperate with a prescribed person in respect of the disclosure made and any follow-up procedures, without prejudice to their rights under the 2022 Act.[117]

(d) Disclosures can be made in writing and orally.[118]

(e) A prescribed person may deal with disclosures of a serious relevant wrongdoing as a matter of priority.[119]

(f) In the case of repetitive disclosures that do not contain any meaningful new information about a relevant wrongdoing compared to a previous disclosure, the prescribed person can close the procedure unless new legal or factual circumstances justify a different follow-up.[120]

(e) If having conducted an initial assessment, the prescribed person decides that the disclosure concerns matters that do not fall within its remit, the disclosure must be transmitted to an appropriate prescribed person or to the PDC.[121]

(f) Designated persons must receive specific training for the purposes of handling reports.[122]

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113 Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 33.
114 PD(A)A 2022, s 10, inserting PDA 2014, s 7(2A).
115 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(1)(a).
116 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(1)(c).
117 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(2).
118 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(6).
119 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(3).
120 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(1)(b)(iv).
121 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(1)(b)(vi).
122 PD(A)A 2022, s 11, inserting PDA 2014, s 7A(9).

(g) Prescribed persons must apply the same statutory provisions to anonymous disclosures unless they are prohibited by or under any other enactment.[123]

In the prescribed person research conducted by the author in March 2021, in addition to the fifty-three prescribed persons whose protected disclosures procedures were located on their websites, ten further prescribed persons had information on their websites about the making of a protected disclosure to the organisation in its capacity as a prescribed person. Taking this into consideration, the 2021 research demonstrates that thirty-three (31%) had information publicly available in relation to disclosures to it as a prescribed person. Under the 2022 Act, all prescribed persons are now legally obliged to make specific information about their role on a separate, easily identifiable, and accessible section of their website.[124]

6 Criminal Offences

According to DPER's Regulatory Impact Analysis, the decision was taken to create criminal penalties based on equivalent offences that are contained already in national law because of the position of the CJEU that Member States should not introduce penalties for breaches of EU law that are "less than those contained in national laws for equivalent offences."[125] DPER explained to the Joint Committee that the introduction of administrative penalties had been explored but that the Attorney General was of the view that such penalties would be "problematic for this type of legislation."[126] Section 24 of the 2022 Act transposes Article 23 and creates criminal offences in respect of those matters listed therein, whilst also introducing an offence of failing to establish, maintain, and operate internal reporting channels and procedures. The offence of failing to establish, maintain, and operate internal reporting channels and procedures was not specifically included in Article 23 as requiring penalties but the European Commission expert group on the Directive stated that the requirement on Member States under Article 8(1) to "ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up" means not only transposing this article but also "to enforce the respect of this obligation by the private entities concerned" pursuant to the principle of sincere cooperation in EU law in art 4(3) of the Treaty

[123] PD(A)A 2022, s 9, inserting PDA 2014, s 6A(3).
[124] PD(A)A 2022, s 11, inserting PDA 2014, s 7A(10).
[125] DPER (n86) 13.
[126] Joint Committee (n11).

on European Union.[127] Under the 2022 Act, the WRC can bring and prosecute summary proceedings for this offence.[128]

The 2022 Act introduces the following penalties:

1. On summary conviction, a class A fine and/or imprisonment up to twelve months or on indictment, a fine not exceeding €250,000 and/or imprisonment up to two years[129] for the following offences by a person who:

(a) Hinders or attempts to hinder a worker making a report.

(b) Penalises or threatens to penalise a worker or facilitator; any third person connected to the worker; or any legal entity that the worker owns, works for, or is otherwise connected to.

(c) Brings vexatious proceedings against a worker or facilitator; any third person connected to the worker; or any legal entity that the worker owns, works for, or is otherwise connected to.

(d) Fails to establish, maintain and operate internal reporting channels and procedures[130]

2. On summary conviction, a class A fine and/or imprisonment up to twelve months or on indictment, a fine not exceeding €75,000 and/or imprisonment up to two years[131] for a person who breaches the duty of confidentiality regarding the identity of reporting persons.[132]

3. On summary conviction, a class A fine and/or imprisonment up to twelve months or on indictment, a fine not exceeding €100,000 and/or imprisonment up to two years[133] for a person who makes a report containing any information that they know to be false.[134]

Transparency International Ireland have been very critical of the introduction of a criminal offence for a person who makes a report containing any information that they know to be false, arguing that this will have a chilling effect on workers.[135] Although the introduction of the penalties in the 2022 Act complies with the requirements under the Directive, the use of criminal penalties will have to be evaluated. As Gerdemann and Colneric stress, although criminal law provisions may

[127] European Commission Directorate-General Justice and Consumers, 'Minutes of the third meeting of the Commission expert group on Directive (EU) 2019/1937' (7 December 2020) 4.
[128] PD(A)A 2022, s 24, inserting PDA 2014, s 14A(7).
[129] PD(A) A 2022, s 24, inserting PDA 2014, s14A(3).
[130] PD(A)A 2022, s 24, inserting PDA 2014, s14A(1)(a), (b), (c), and (e).
[131] PD(A)A 2022, s 24, inserting PDA 2014, s14A(4).
[132] PD(A)A 2022, s 24, inserting PDA 2014, s14A(1)(d).
[133] PD(A)A 2022, s 24, inserting PDA 2014, s14A(5).
[134] PD(A)A 2022, s 24, inserting PDA 2014, s14A(2).
[135] Transparency International Ireland, 'Letter to Minister McGrath on the Protected Disclosures Amendment Bill' (*TII*) <https://transparency.ie/resources/submissions/2022-letter-minister-michael-mcgrath-protected-disclosures-amendment-bill> accessed 11 January 2023.

seem far-reaching, international experience suggests that "it might actually [be] the least influential of the four regulatory elements, given that proving retaliatory intent beyond reasonable doubt has proven to be notoriously difficult in whistleblowing cases."[136]

7 Conclusion

On the signing of the commencement order for the 2022 Act, the sponsoring Minister for the legislation, Minister Michael McGrath TD, stated that "This Act substantially overhauls the legal framework for the protection of whistleblowers. It gives greater certainty to workers who report wrongdoing that the information they disclose will be properly followed-up on. It also strengthens the protections for workers who suffer penalisation for raising a concern about wrongdoing in the workplace."[137] On 27 January 2022, the EU Commission commenced infringement proceedings against Ireland and twenty-three other Member States for delay in transposing the Directive.[138] The 2022 Act commenced just over a year after the transposition deadline of 17 December 2021. Minister McGrath explained that the delay between the enactment of the 2022 Act and its commencement was necessary to allow employers to make any necessary arrangements to comply with the 2022 Act, as well as providing the PDC with "sufficient time to get ready to be in a position to fulfil his obligations under the Act."[139] Despite the affording of additional time, it is argued that, for the reasons set out above, the 2022 Act does not afford greater certainty to workers that their disclosure will be properly follow-up on or that they will be adequately protected. The transposition of the Directive into Irish Law by the 2022 Act has both directly and indirectly weakened the statutory provisions of 2014 Act and it remains to be seen whether the European Commission will consider the Directive to be properly transposed and whether it has breached its more favourable treatment and non-regression clause.[140]

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136 Simon Gerdemann and Ninon Colneric, 'The EU Whistleblower Directive and its transposition: Part 1' [2021] ELLJ 195, 196.

137 Merrion Street Irish Government News Service, 'Minister Michael McGrath announces commencement of the Protected Disclosures (Amendment) Act 2022' (Merrion Street) https://merrionstreet.ie/en/news-room/news/minister_michael_mcgrath_announces_commencement_of_the_protected_disclosures_amendment_act_2022.174986.shortcut.html> accessed 11 January 2023.

138 European Commission, 'Infringement decisions' <https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=32019L1937&submit=Search> accessed 4 February 2022.

139 Merrion Street (n137).

140 Dir 2019/1937, art 25.

The New Whistleblowing Laws of France

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1 Introduction

Since September 1 2022, the new French law dated March 21 2022, aimed at "improving the protection of whistleblowers"[1] and the organic law of the same day "aimed at reinforcing the role of the Defender of Rights in the field of whistleblowing"[2] have come into force. On October 3 2022, the decree relating to the procedures for collecting and processing whistleblowers' reports and establishing the list of external authorities[3] was published. If the title of the two new laws uses the terms "improving" and "reinforcing", it is because whistleblower protection existed in France long before the October 23 2019 Directive[4].

The question to be answered here is whether and to what extent the new legal framework effectively improves the protection of whistleblowers in France; in other words, which substantive and procedural elements enable improvement and which, in contrast, still leave doubts as to the effectiveness of protection.

The answer to this question will be structured around the two stages of an alert: before and after. The demonstration that will follow starts from the premise of the indispensable balance of legal guarantees before and after the alert.

Thus, it will first be explained what has evolved in terms of protection in the pre-reporting phase (the broadening of the definition of whistleblower, the extension of protection to other persons, the simplification of reporting channels, the granting of whistleblower status by the Defender of Rights on an advisory basis) (3).

Secondly, we will discuss the changes in the protection afforded by the French legislator once an alert has been issued, firstly by observing the main changes in protection in the *strict sense of the term* and then by explaining the changes in the legal framework with regard to the internal processing of alerts (4).

Nevertheless, it is logically impossible to measure a possible evolution towards better or worse without briefly stating the French legal framework applicable before the entry into force of the Directive of October 23, 2019 (hereafter Directive 2019/1937).

[1] Loi n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte.

[2] Loi organique n° 2022-400 du 21 mars 2022 visant à renforcer le rôle du Défenseur des droits en matière de signalement d'alerte.

[3] Décret n° 2022-1284 du 3 octobre 2022 relatif aux procédures de recueil et de traitement des signalements émis par les lanceurs d'alerte et fixant la liste des autorités externes instituées par la loi n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte.

[4] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

2 The french legal framework before directive 2019/1937[5]

It should be remembered that the protection of whistleblowers in France is progressive and is divided into two phases.

During the first period, from the 1980s to the 2000s, protection remained sectoral, discrete and scattered. For example, and without claiming to be exhaustive, there are reports of corruption by private sector employees[6] , reports relating to health safety[7] , reports relating to a serious risk to public health and the environment[8] , reports of discrimination on the grounds of sex in the public and private sectors[9], reports in the civil service relating to conflicts of interest[10] , as well as other types of alerts[11] .

Then there was a second period in which protection claimed to be harmonized to some extent and in any case, to an officialization of whistleblower protection with Law n°2016-1691 of December 9, 2016. This concerned transparency, the fight against corruption, and the modernization of economic life[12] , and is known as the "Sapin II Law" (the name we will use below).

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[5] For a detailed analysis of the previous regime, see in particular the many excellent contributions in the book Mathieu Disant and Delphine Pollet-Panoussis (dir.), *Les lanceurs d'alerte. What legal protection ? Quelles limites ?* LGDJ, 2017. Florence Chaltiel Terral, *Les lanceurs d'alerte*, Dalloz, 2018. Olivier Leclerc, *Protéger les lanceurs d'alerte, La démocratie technique à l'épreuve de la loi*, Lextenso LGDJ, 2017; also C. Koumpli (leader contributor), A. Taillefait (scientific direction), *Le cadre légal de protection des lanceurs d'alerte, Rapport national - France,* Deliverable Report within the framework of the research project "Whistleblowing Open Data Impact Assessment" (WOODIe), research program financed by the European Commission (Grant Agreement number: 823799 - WOODIe - ISFP-2017-AG-CORRUPT), consultable: http://www.woodie.unito.it/

[6] Loi du 13 novembre 2007 protégeant le salarié du secteur privé signalant des faits de corruption constatés dans l'exercice de ses fonctions.

[7] Loi du 29 décembre 2011 concernant le signalement de faits relatifs à la sécurité sanitaire du médicament et des produits de santé.

[8] Loi du 16 avril 2013 concernant le signalement de faits relatifs à un risque grave pour la santé publique ou l'environnement.

[9] Loi n° 2005-843 du 26 juillet 2005 a modifié l'article 6 bis de la loi du 13 juillet 1983 portant droits et obligations des fonctionnaires en prévoyant la protection des fonctionnaires relatant des agissements constitutifs d'une discrimination en raison du sexe.

[10] Loi 29 juin 2016 créant une protection des agents publics (ainsi que des militaires) dénonçant des conflits d'intérêts.

[11] In addition to these texts, there are those protecting public employees who make reports ("*décret n° 82-453 du 28 mai 1982 relatif à l'hygiène et à la sécurité, ce droit d'alerte a été instauré dans la fonction publique de l'Etat*"). It was extended to local civil servants by "*décret n° 95-680 du 9 mai 1995 et aux agents de la fonction publique hospitalière (par les dispositions L. 4111-1 du Code du travail*") who, in any case, have been obliged since 1957 to report to the Public Prosecutor any crime or offence observed during the performance of their duties by virtue of article 40 of the Code of Criminal Procedure.

[12] Loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

The latter is the cornerstone of the consolidation of whistleblowing protection in France insofar as it would constitute the legal basis that simplified and strengthened the protection of whistleblowers in 2016.

The merit of the Sapin II Law is therefore that it created a "general whistleblower status" applicable to the public and private sectors. It consisted of a common definition as well as a protection conditioned by two elements, substantive and procedural. It is necessary to satisfy the terms of the legal definition of "whistleblower" provided for by article 6 of the Sapin II Law[13] and to have respected the order of the reporting channels provided for (internal channel, external channel, public disclosure). Once these criteria have been met, the author of a whistleblowing report could claim before the judge the protection *stricto sensu* that the Sapin II law had improved.

The corpus of the protection *stricto sensu* consisted in the sum of the following elements:

- Nullitfication of retaliation
- No criminal liability in case of violation of a professional secret (except medical secret, secret between client and lawyer, defense secret)
- Guarantee of confidentiality (of identities and information)
- Civil and criminal sanctions against perpetrators of retaliation
- Protection against all reprisals, direct or indirect, in the context of work with adjustment of the burden of proof
- Suspensive appeal following a dismissal - including in the case of a fixed-term contract.

However, as mentioned, the Sapin II law formalized a procedural criterion of admissibility, consisting of a specific procedure for reporting in stages. Not respecting these steps deprived the author of the alert of a protective status, except in cases of serious and imminent danger (which would be assessed by the judge *a posteriori*).

For the internal channel [supervisor, employer, or whistleblower/alert referent ("*référent alerte*") designated by the latter], Article 8-III of the Sapin II Law had provided for a "procedure for the collection of reports made by whistleblowers within

[13] Was a whistleblower under Section 6 of the Law of December 9, 2016 (Sapin II Law):
"A natural person who discloses or reports, disinterestedly and in good faith, a crime or misdemeanor, a serious and manifest violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law or of regulations, or a threat or harm of which he or she has personal knowledge".
According to the third paragraph of article 8: any public employee (permanent or temporary civil servant, contractual, apprentice), or permanent or occasional external collaborator, could be a whistleblower.

legal persons under public or private law or State administrations"[14] (open only to persons with a professional link to the entity).

In addition, the internal reporting procedure benefited from a fairly well-developed regulatory framework:

- Decree No. 2017-564 of April 19 2017[15], containing the terms and conditions for the implementation of the reporting system in the public sector, followed by various ministerial orders[16] , such as the Ministry of Higher Education order,[17], [18] .
- The circular of July 19, 2018[19] adopted by the Ministry of Action and Public Accounts explaining its implementation in the civil service (below Circular of July 19, 2018).
- Recommendations of the French Anti-Corruption Agency published in the Official Journal, providing details on the implementation of internal whistleblowing in large private sector companies[20] .

[14] The obligation to set up an internal reporting procedure was depending on the size of the entity according to the Decree of 19th April 2017 (Article 1 (I.) : « Legal persons governed by public law other than the State or legal persons governed by private law with at least fifty employees or agents, municipalities with more than 10,000 inhabitants, departments and regions as well as public establishments under their authority and public establishments for inter-communal cooperation with their own tax system comprising at least one municipality with more than 10,000 inhabitants shall establish the procedures for collecting alerts provided for in III of Article 8 of the aforementioned Act of 9 December 2016, in accordance with the rules governing the legal instrument that they adopt […]) ».

[15] Décret n° 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'Etat.

[16] Arrêté du 10 décembre 2018 relatif à la procédure de recueil des signalements émis par les lanceurs d'alerte au sein du ministère chargé de l'éducation nationale ; Arrêté du 12 mars 2019 relatif à la procédure de recueil des signalements émis par les lanceurs d'alerte au sein du ministère de la culture ; Arrêté du 16 novembre 2018 relatif à la procédure de recueil des signalements émis par les lanceurs d'alerte au sein du ministère de l'intérieur et du ministère chargé de l'outre-mer ; Arrêté du 29 juin 2018 relatif à la procédure de recueil des signalements d'alerte au ministère des affaires étrangères.

[17] Arrêté du 3 décembre 2018 relatif à la procédure de recueil des signalements émis par les lanceurs d'alerte au sein du ministère chargé de l'enseignement supérieur et de la recherche.

[18] On the basis of the order of December 3, 2018 of the Ministry of Higher Education, the President of Avignon University appointed the author of this text as a "whistleblower referent" (*Décision n°20216-009 portant nomination des référentes lanceurs d'alerte, déontologie, et laïcité d'Avignon Université*) and sent him a letter of mission relating to the implementation of a whistleblower collection system (LL-2021-124 of September 17, 2021).

[19] Circulaire du 19 juillet 2018 relative à la procédure de signalement des alertes émises par les agents publics et aux garanties et protections qui leur sont accordées.

[20] Avis relatif aux recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêt, de détournement de fonds publics et de favoritisme, JORF n°0298 du 22 décembre 2017.

- The French authority for the protection of personal data (the CNIL) on the processing of personal data for the implementation of a professional alert system[21].

Without denying the protective potential of this legal arsenal, a report to the National Assembly, known as the "Gauvain-Marleix report", underlined the shortcomings of the current status of whistleblowers and the need to consolidate it[22].

According to the authors of this report,

> *"the status of whistleblowers faces a contradiction: while the Sapin II law encourages whistleblowing by affirming the existence of high guarantees for whistleblowers, the protection and support for whistleblowers remain weak in practice, sometimes exposing whistleblowers to great difficulties"*[23].

In light of this and the obligation to transpose Directive 2019/1937, the provisions of two laws (organic and ordinary) of March 22, 2022 led to a rewriting of the Sapin II law, which remains the reference text in this area in the French legal system.

3 Pre-reporting protection

It is appropriate here to outline the changes that the 2022 legislature made in the *ex ante* phase, with the goal of facilitating and encouraging reporting.

We will first look at the broadening of the definition of whistleblower (3.1), then at the changes relating to the channels of reporting (3.2), the clear improvements relating to the support of whistleblowers (3.3), and finally the central change giving the Defender of Rights ("*Défenseur des droits*") the competence to grant whistleblower status (in an advisory capacity) (3.4).

3.1 Broadening the definition of whistleblower

We will discuss both the changes to the definition of whistleblower (3.1.1) and the extension of protection to new persons (3.1.2).

3.1.1 Changes to the definition of whistleblower

In French law now

[21] CNIL, référentiel relatif au traitement des données personnelles destinés à la mise en œuvre d'un dispositif d'alertes professionnelles, adopté le 18 juillet 2019.
[22] Assemblée nationale, Rapport d'information n° 4325 en conclusion des travaux d'une mission d'information sur l'évaluation de l'impact de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite « loi Sapin 2 », présenté par MM. Raphaël Gauvain et Olivier Marleix, 7 juillet 2021, 187 p.
[23] Assemblée nationale, Rapport d'information n° 4325, *op.cit.*, p. 139.

> *"A whistleblower is a natural person who reports or discloses, without direct financial compensation and in good faith, information concerning a crime, an offence, a threat or harm to the public interest, a violation or an attempt to conceal a violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law of the European Union, or of the law or regulations. When the information was not obtained in the context of the professional activities mentioned in Article 8, paragraph 1, the whistleblower must have had personal knowledge of it."*

This definition is very similar to the previous one resulting from the Sapin II law of 2016, but the law of March 21, 2022 made a certain number of changes in order to improve whistleblower protection.

The changes are measured *rationae personae* (a) as well as *rationae materiae* (b).

3.1.2 Rationae personae: from "disinterestedness" to "absence of direct financial consideration"

According to Article 6 of the Sapin II law amended in 2022, the alert must no longer be launched "disinterestedly and in good faith", but "without direct financial consideration and in good faith". While the condition of good faith is maintained[24], the evaluation report of the Sapin II law explained that the term "disinterestedness" was confusing as it could exclude the author of a warning from legitimate protection because, for example, of a dispute with the employer for another reason or when the consequences of his warning could indirectly benefit him (for example by reporting the illegal act of a competitor or an administration)[25].

The choice was made to replace the criterion of disinterestedness by the criterion of the "absence of direct financial compensation", in order to compensate for the disadvantages of the criterion of disinterestedness, without opening the way to the possibility of financial rewards, according to certain authors. [26] It seems, however, that while this clarification excluding the "bounty hunter" whistleblower from protection is to be welcomed, it should be noted that it is no longer excluded that the employer may encourage the whistleblower through decisions providing him with "indirect" financial compensation. This could also be interpreted as a timid

[24] Judges have had an extensive appreciation of the criterion of good faith. In a decision of July 8, 2020, the Court of Cassation considered that bad faith "can only result from the employee's knowledge of the falsity of the facts he or she denounces and not from the mere fact that the facts denounced are not established" (Cass. Soc. July 8, 2020, n° 18-13593.). The trial judge assesses the contours of good faith on a case-by-case basis: the Amiens Court of Appeal thus considered that good faith requires that the report be made with "honesty and loyalty, […] without any malice" (Amiens Court of Appeal, 5th industrial tribunal chamber, January 9, 2020, no. 18-00584.); Assemblée nationale, Rapport d'information n° 4325, *op.cit.*, p. 140.

[25] Assemblée nationale, *Rapport d'information* n° 4325, *op.cit.*, p. 142

[26] L. Ragimbeau, "Le nouveau cadre juridique des lanceurs d'alerte. Entre avancées et questions en suspens", *AJDA* n° 19/2022, p. 1086

approximation of the French legislation to the American legislation from which France wants to distinguish itself[27] . Moreover, this loophole could be read as an implicit incentive to use the internal alert mechanism (which the French legislator of 2022 puts - at first glance[28] - in second place) without contradicting the obligation made by the European legislator and without this constituting a failure in the transposition. It could also be argued that the criterion of absence of direct financial compensation could be opposite to the spirit of the Directive asking not to include whistleblowers motives in the requirements of their protective status.

Moreover, it should be noted that good faith remains a confusing criterion in the new regime and has not been specified, despite the suggestion of the rapporteurs in the National Assembly[29]. Until now, judges have assessed it on a case-by-case basis, which is a cause of discouraging legal uncertainty for potential whistleblowers[30] . This is why the doctrine rightly affirms that "the question of the motivation of whistleblowers should be excluded by the protection systems"[31].

However, it is important to mention a recent decision of the Court of Cassation in which the judge adopted an extensive definition of good faith; indeed, the high court considered that bad faith

> *"can only result from the employee's knowledge of the falsity of the facts he or she is reporting and not from the mere fact that the facts reported are not established"*[32].

In addition, the new article 10-1 of the Sapin II law relating to the non-liability of whistleblowers, now teaches us that a person who has made a report is not civilly liable

> *"where the person had reasonable grounds to believe, at the time the person made the disclosure, that the reporting or public disclosure of all such information was necessary to protect the interests at stake.*
>
> *These same terms are used in the recent guide of the Whistleblowers' House, which considers it as the only possible interpretation of "good faith"*[33].

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[27] Jean-Philippe Foegle, "Les lanceurs d'alerte. Étude comparée France-États-Unis," *Revue des droits de l'Homme*, 6, 2014.

[28] See below our reflections on the internal alert in the new regime designed by the law of March 22, 2022.

[29] Assemblée nationale, Rapport d'information n° 4325, *op.cit.*, p. 140 et s.

[30] For a summary, see Assemblée nationale, *Rapport d'information* n° 4325, *op.cit.*, p. 140 et seq.

[31] A. Taillefait, "La rôle des motivations de la lanceuse ou du lanceur d'alerte dans le régime de sa protection", in G. Bargain, C. Koumpli, *L'avenir de la protection des lanceurs d'alerte dans l'Union européenne*, Mare & Martin, 2023 (pubication in progress); as well as A. Taillefait, "Santé et environnement : la protection des lanceurs d'alerte éthique dans la fonction publique", in A. Dubuis and B. Lapérou-Sheneider (eds.), *La société civile et la protection juridique de l'environnement et de la santé*, Mare & Martin 2022, coll. Sept. 16-17, 2021 of the University of Franche-Comté.

[32] Cass. Soc. July 8, 2020, n° 18-13593.

[33] Maison des Lanceurs d'alerte, *Lancer l'alerte, Guide à l'usage du lanceur d'alerte et de ses soutiens*, octobre 2022, p. 16

3.2 Rationae materiae

The material scope of alerts that may fall within the scope of the Sapin II Law has been amended. These changes can be summarized in five points.

3.2.1 From reporting offences to reporting "information about" offences

The previous formulation of the subject of an alert concerned facts constituting

> *"a crime or misdemeanor, a serious and manifest violation of an international commitment regularly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law or regulations, or a serious threat or harm to the public interest, of which it has personal knowledge"* (Article 6 § 1 Sapin II, 2016).

The problem with this definition was that the author of the report was obliged to legally qualify the facts before reporting, a requirement that is not easy for a non-lawyer.

Directive 201/1937 made it possible to ease this requirement. The French legislator now states that the alert concerns "*information* relating to a crime, an offence, a threat or harm to the public interest". (Article 6(I) Sapin II, 2022).

Consequently, it is no longer a question of "violations" but of "information about violations of the law" that the whistleblower can report. This considerably alleviates the situation of the whistleblower who no longer has the burden of legal qualification, which is a clear improvement to his situation.

Nevertheless, it is important to understand to what extent this relief combined with the following one (the removal of the condition of the seriousness of the facts) opens the "Pandora's box" with regard to the internal channel, since from now on employees or public officials may refer to both the internal and external channels without verification of the probability of the legal qualification of an infraction. Moreover, as the doctrine explains[34] , although the legislator's intention is to improve the status of whistleblowing, the result risks being counterproductive insofar as the scope of application of the amended Sapin II law is much wider than that of the Directive (which is no less wide-ranging). In its opinion, the Conseil d'Etat had suggested that the reference to the notion of "information on violations" should be limited to the scope of the European Directive[35] but it was not followed on this point.

Time will tell whether this openness increases or decreases the number of reports, and whether it increases the risk of missteps for the whistleblower.

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[34] Olivier Leclerc, « L'enquête consécutive à une alerte », 46e Colloque organisé par la Commission de droit social du SAF, 11 décembre 2021, *Le Droit ouvrier*, 2022, 883, pp.110-122.

[35] CE, avis, 4 nov. 2021, n° 404001 sur une proposition de loi visant à améliorer la protection des lanceurs d'alerte, pt.10

3.2.2 The deletion of the "serious and manifest" condition of the reported facts

While the "serious and manifest nature" of the violation could constitute a benchmark for the author of an alert, as well as for a whistleblower, Directive 2019/1937 does not provide such a delimitation. As a result, the 2016 Sapin II law could have been seen as weakening protection. With the aim of harmonization without the risk of fault for France, and the desire to encourage whistleblowing, the French legislator of 2022 removed the "serious and manifest" nature of the reported violations. The Council of State was not followed there either. In its opinion, it emphasized that without a delimitation of the scope of application of the alert (at least at the level of the Directive), the balance of the system was jeopardized[36]. The extension is therefore now valid for the entire field covered by the national provisions. Here again, the future will show whether such extensions do not neutralize the system, especially since the new system coexists with other warning systems specific to certain sectors[37].

One thing remains certain: the combination of these three elements (information about…, no requirement of seriousness of the facts, lighter interpretation of good faith), considerably facilitates the admissibility of the alert, at least within the framework of the internal alert system, and obliges the alert referent to deal with them.

3.2.3 Introduction of the "attempt" to conceal a breach of an international obligation

The legislator of 2022 has introduced into the material scope of the object of an alert "the attempt to conceal a violation of an international commitment". Thus, the list of legal texts whose violation - or attempted concealment of a violation - may justify an alert has been extended. It includes the law of the Union, international commitments regularly ratified or approved by France, unilateral acts of an international organization taken on the basis of such a commitment, as well as laws and regulations.

3.2.4 New contours to the requirement of "personal knowledge" of reported information

This change regarding the source of information constituting a report is substantial. The Sapin II Law of 2016 initially limited the scope of application to facts of which the whistleblower had "personal knowledge". Following the Directive 2019/1937 and the transposition law of 2022, this condition is now well circumscribed. Personal knowledge of the facts disclosed is only required when the information was obtained outside the professional context. As a result, one can now be a

[36] CE, avis, n° 404001, above.

[37] For an example O. Leclerc, « A quelles conditions un régime unifié de signalement des alertes est-il souhaitable ? Réflexions à partir de l'alerte sanitaire et environnementale », in G. Bargain, C. Koumpli, *L'avenir des lanceurs de l'alerte dans l'Union européenne*, *op.cit.*; Olivier Leclerc, « L'enquête consécutive à une alerte », 46e Colloque organisé par la Commission de droit social du SAF, 11 décembre 2021Le Droit ouvrier, 2022, 883, pp.110-122.

whistleblower in France when one forwards information that has come to one's attention through a colleague and without having to specify the origin of the information.
Time will tell how this framework manages to maintain the balance so that such openings do not neutralize the whistleblower, nor expose the whistleblower to the risk of slanderous denunciation.

3.2.5 A new limit to the protective regime: the secrecy of deliberations

In addition to defense secrecy, medical secrecy, and lawyer-client secrecy, which are maintained, Article 6 -II of the Sapin II, 2022 law has excluded from the alert regime information, facts or documents covered by the secrecy of deliberations (only judicial), and the secrecy of an investigation or of a judicial inquiry.

3.3 Extension of the protection to new persons

3.3.1 The new category of "facilitators"

One of the major advances of the law of March 21 2022 is the extension of the protection of whistleblowers to natural or legal persons related to the whistleblower, who could suffer reprisals like the whistleblower (e.g. withdrawal of a subsidy or the withdrawal of an authorization following the assistance provided to a whistleblower[38]). This extension is in line with the desire to strengthen the support of whistleblowers by offering a legal status to the persons who can support them in their action.

This extension required by the Directive has led to three types of persons benefiting from the protection provided for in articles 10-1 and 12 of the Sapin II law (i.e. reversal of the burden of proof, exemption from civil liability for reporting or disclosure, exemption from civil or criminal liability for obtaining and storing information, possibility of requesting an advance on the costs of the proceedings, access to the summary procedure at the industrial tribunal, and funding of the personal training account).

These categories are:

- *facilitators*, defined as any individual or legal entity under private, non-profit law who assists a whistleblower in making a report or disclosure
- *natural persons in contact with a whistleblower* who are at risk of retaliation in the context of their professional activities by their employer, their client, or the recipient of their services (colleagues or relatives);

[38] « Transposition de la directive européenne sur les lanceurs d'alerte. Quels changements ? Entretien croisé avec Claire Hédon Défenseure des droits et Pascale Lagesse Avocate associée au cabinet Bredit Prat », *Semaine sociale Lamy*, 10 janvier 2022, n° 1982, p. 8

- *legal entities controlled by the whistleblower*, for which he or she works or with which he or she is in contact in a professional context.

In the case of reprisals against the whistleblower's companions, and after an impartial and contradictory investigation, the Defender of Rights will mobilize all his powers to restore the rights of the legal entity (mediation, observations before the courts, etc.). This is undoubtedly a very positive development.

3.3.2 Expansion of those entitled to use the internal alert channel

The reading of Article 8 of the Sapin II law amended following the transposition of Directive 2019/1937 shows a significant extension of those persons who can use the internal channel of the alert.
This procedure is now open not only to staff members and to external and occasional collaborators, but also to:

- individuals whose employment relationship has ended, where the information was obtained in the course of that relationship,
- individuals who have applied for employment with the entity, where the information was obtained as part of that application;
- shareholders, partners, and holders of voting rights in the entity's general meeting;
- the members of the administrative, management, or supervisory body;
- the entity's co-contractors, their subcontractors or, in the case of legal entities, to the members of the administrative, management or supervisory bodies of these co-contractors and subcontractors, as well as to their employees.

This widening of the circle of persons allowed to report can be seen as a pragmatic development that reinforces the guarantees of the public interest; in this sense, it is to be welcomed. However, it should be noted that the internal channel of alert is becoming a field of action that is likely to be increasingly mobilized and should therefore benefit from resources corresponding to the new legal context.

3.3.3 Anonymous whistleblower

For the first time, and certainly because of Directive 2019/1937, the anonymous whistleblower is protected in the same way as a whistleblower whose name will be known by the recipient of the whistleblowing (hierarchical superior or whistleblower referent), under the new article 7-1, last paragraph of the Sapin II law (with certain logical details due to the fact that communication with him or her is impossible).

> *"When an alert or public disclosure has been made anonymously, the whistleblower whose identity is subsequently revealed shall enjoy the same protections. The provisions of I and*

II of the same article 8, which require feedback to the author of an internal or external alert, are not applicable in the case of an anonymous alert (…)".

In the same direction, the decree of October 3 2022 provides that the internal alert systems that will be set up by public and private organizations must henceforth provide for the conditions under which an anonymous alert is receivable and assessed by the recipients of the alert (article 4-II - decree of October 3, 2022), since they will no longer be able to exclude it.

3.4 Simplification of reporting channels

Not surprisingly, given the media coverage of the simplification of reporting channels by Directive 2019/1937, it was transposed by the French legislator. It is undoubtedly one of the essential modifications of the new legal framework, and therefore deserves to be discussed.

As a reminder, and as mentioned in the introduction, the rule introduced by the Sapin II law of 2016 was that of reporting by stages (except in cases of serious and imminent danger justifying direct public disclosure), without forgetting that reporting by stages is part of the logic of proportionality controlled by the ECtHR[39] . In France, these are the following levels:

- internal alert (the report was first brought to the attention of the employee's direct or indirect supervisor, employer, or a person designated by the latter);
- should the internal recipient fail to act, the whistleblower could turn to external authorities (judicial authority, administrative authorities or professional orders);
- if there is no reaction by the competent external authorities within three months, and only as a last resort, the whistleblower could disclose to the press.

Moreover, as mentioned above, the respect of these steps constituted a condition of admissibility of the alert (article 122-9 of the Penal Code[40]) or as P. Adam pertinently puts it "a right of legal whistleblowing, by setting the conditions of validity

[39] ECtHR 21 July 2011, no. 28274/08, *Heinisch v. Germany*, § 65

[40] Article 122-9 CP before the law of 2022 "Is not criminally liable the person who violates a secret protected by law, provided that such disclosure is necessary and proportionate to the safeguarding of the interests involved, that it occurs in compliance with the reporting procedures defined by law and that the person meets the criteria for the definition of whistleblower provided for in Article 6 of Law No. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life."

of the whistleblower's act of speech"[41]. Its short-circuiting was retained by the courts as proof of the whistleblower's bad faith.

As it was assumed to be one of the main causes of ineffectiveness of the protection, insofar as it exposed the potential whistleblower to reprisals[42] especially when the hierarchy was involved in the illegal facts, Directive 2019/1937 (Article 10) reduced the hierarchy of channels and by way of transposition, the evolution of the French legislation on this point became inevitable.

For P. Lagesse it was a question of consistency with the case law of the Court of Cassation of 2016[43], which had already admitted

> *"… that the fact that an employee brings to the attention of the public prosecutor facts concerning the company which he or she considers abnormal, whether or not they are likely to be classified as criminal, does not in itself constitute misconduct"*[44].

In all cases, the law of March 21, 2022 now provides that

> *"Any whistleblower, as defined in Article 6 I, may also send an external alert, either after having made an internal alert under the conditions provided for in I of this article, or directly …"*

a. to authorities designated by the October 3, 2019 order, [45], [46]
b. to the Defender of Rights, who will direct the complainant to the authority or authorities best suited to deal with the complaint,

[41] P. Adam, « Alerte et autres dispositifs de protection du dénonciateur salarié. Questions d'articulation », in G. Bargain, C. Koumpli, *op.cit.*

[42] See also Assemblée nationale, Rapport d'information n° 4325, *op.cit.*

[43] Pascale Lagesse, in « Transposition de la Directive européenne sur les lanceurs d'alerte : quels changements ? », *Semaine sociale Lamy*, 10 janvier 2022 n°1982, p. 7

[44] Cour de cassation, civile, Chambre sociale, 30 juin 2016, 15-10.557, Published in the Bulletin

[45] In its initial version submitted on July 21, 2021, the bill to improve the protection of whistleblowers did not specify the identity of the authorities concerned. This laconism had been criticized by the Council of State, in its opinion on the said proposal. The Council pointed out that "by imposing the obligation to set up a channel for collecting and processing external whistleblowers and by referring to a decree of the Council of State the task of determining the list of authorities subject to these obligations, without in any way framing this reference, the proposed law fails to take into account the scope of the legislator's competence" (Opinion n° 404001, pt 20). Without requiring the legislator to draw up a list of all the authorities concerned, the Council of State nevertheless insisted on the importance of specifying, at the very least, the legal categories to which they belong. This is why the law of 21 March 2022 is finally a little more loquacious, specifying that the authorities concerned will be chosen from among the administrative authorities, the independent public authorities, the independent administrative authorities, the professional orders and the legal persons entrusted with a public service mission (Article 3).

[46] These authorities are currently listed in the annex to decree no. 2°22-1284 of October 3, 2022 and categorized into 23 themes (public procurement, financial markets, product safety and conformity, transport safety, environmental protection, radiation protection and nuclear safety, food safety, public health, consumer protection, protection of privacy and personal data, network and information system

c. or to the judicial authority,
d. or to an institution, body or agency of the European Union competent to collect information on violations falling within the scope of the Directive of October 23. (Article 8(II) Sapin II Law of 2022).

However, under Article 8(III), the protection of the whistleblower in the event of public disclosure is still conditional on

- either external reporting, preceded or not by internal reporting,
- or the existence of a serious and imminent danger that will have to be proven,
- the fact that referring the matter to external authorities would put the reporter at risk of retaliation, or would not effectively address the subject matter of the disclosure.

One could say that the conditioning of whistleblower protection by prior internal reporting seems to be over, which may seem very positive in terms of freedom of expression.

However, two points should be made:

Firstly, it is a question of making the hierarchy of channels more flexible and in no way eliminating the hierarchy altogether. We can therefore speak of a simplified hierarchy. In fact, since the indispensable framework of public disclosure is a measure of balance of the interests involved in a report, the French legislator obliges one to go either through the internal channel or the external channel before reaching public disclosure (Article 8(III) Sapin II of 2022). The only exceptions authorizing direct public disclosure are serious *and* imminent danger (as in the previous legal framework) and the risk that the external authorities would not stop the risk incurred.

Secondly, the neutralization of the first stage must be put into perspective. While the absence of an obligation to go through the internal channel is no longer in doubt, the existence of the internal channel is still present, and in a particularly prolix manner in the law[47] .

security, violations affecting the financial interests of the European Union violations relating to the internal market, activities conducted by the Ministry of Defense, public statistics, agriculture, national education and higher education, individual and collective labor relations, working conditions, employment and vocational training, culture, rights and freedoms in the context of relations with State administrations, best interests and rights of the child, discrimination, ethics of persons performing security activities); each area of reporting has one or more competent authorities in the sector. It is interesting to note that the Defender of Rights becomes the exclusive external authority for a certain number of alerts (Rights and freedoms in relations with state administrations, local authorities, Higher interest and rights of the child, Discrimination, ethics of persons exercising security activities).

[47] As we explain in the last paragraphs of this contribution, the obligation for private and public entities to have a reliable internal alert channel could indirectly encourage its use.

It should also be remembered that a reading of recital 33[48] of Directive 2019/1937 suggests the usefulness of the internal route.

> *"Empirical studies show that the majority of whistleblowers tend to report internally, within the organization where they work. Internal whistleblowing is also the best way to ensure that information reaches those who can contribute to the rapid and effective resolution of risks to the public interest. At the same time, the whistleblower should be able to choose the most appropriate channel for reporting, based on the particular circumstances of the case"* (Recital 33).

Moreover, on the basis of this reading and that of the case law of the ECtHR[49] , it is conceivable that sometimes the damage to the reputation of the company or public body resulting from referral to the external channel or from public disclosure will be qualified as disproportionate to the interests defended by the alert. Such reasoning could always indirectly justify the use of the internal channel, all the more so since its implementation is now mandatory under the law[50] .

Moreover, following the example of recital 47 of Directive 2019/1937, the Sapin II law recommends the use of the internal channel

> *"in particular when [the persons likely to issue an alert] believe that the violation can be effectively remedied by this means and that they do not expose themselves to a risk of retaliation."* (Article 8(I)(A) Sapin II law)

One may wonder whether this recommendation could not turn against the whistleblower in the future and weaken his position, since the accused employer could now argue that it would have been possible to effectively remedy the violation if the whistleblower had kept him informed, especially since the internal whistleblowing system is now a legal obligation, specified by the decree of October 3, 2022. To put it differently, we could consider that the referral to the internal whistleblowing system becomes the way to considerably reduce the risk of being accused of slanderous denunciation against the author of a report without proven seriousness; in this sense, the protection that internal whistleblowing benefits from in the new legal framework legitimizes the encouragement of its use, if not the obligation.

What remains certain is that while the law of 21 March 2022 has considerably relaxed the hierarchy of internal and external channels of disclosure, it continues to rigorously structure the possibility of public disclosure, which constitutes the subsidiary way of alert.

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[49] ECtHR, 21 July 2011, no. 28274/08, *Heinisch v/ Germany*, § 65

[50] see below, last paragraphs

3.5 Qualification by the Defender of Rights in an advisory capacity

Another significant change brought about by the law of 21 March 2022 (in the pre-reporting phase) is the strengthening of the role of the Defender of Rights with regard to whistleblower protection. It is perhaps one of the most essential changes in the entire evolution of the legal framework in terms of strengthening the legal security of their status.

A few words about the previous legal framework are in order here. The legislator of the Sapin II law had granted by virtue of the organic law n°2016-1690[51] to the Defender of Rights (the only independent administrative authority with constitutional status in France) the *mission of guidance and protection of whistleblowers*, a mission that was added to its other missions[52] .

This development had already borne fruit since 2016, since the Defender of Rights had set up concrete orientation and protection work for whistleblowers[53] . However, he was faced with the following considerable problems:

- Neither the 2016 legislature nor the 2017 implementing decree made it clear whether the Institution was one of the authorities in the external channel to which the whistleblower could legitimately turn when confronted with a lack of diligent response following the internal alert.
- The Defender of Rights was unable to follow up on the alert due to the lack of a legal obligation on the part of the authority to report to him on the

[51] Note that on the occasion of the adoption of the Sapin II law in 2016, the French constitutional judge had abrogated the financial support and compensation for whistleblowers that had initially been provided for by the organic legislator, due to lack of jurisdiction. (Conseil constitutionnel, décision n° 2016-740 DC du 8 décembre 2016, cons. 5 "… *the organic legislator could not, without disregarding the limits of the competence conferred on the Defender of Rights by the Constitution, provide that this authority could award financial assistance or financial relief to the persons concerned*"). This repeal met with the satisfaction of the Defender of Rights, who saw in the attribution of this competence a "distortion" of his constitutional vocation, see Jacques Toubon, « Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte », in M. Disant et D. Pollet-Panoussis, *Les lanceurs d'alerte. Quelle protection juridique ? Quelles limites ?,* LGDJ, 2017, pp. 404 -409; The doctrine saw a weakening of the intervention of the Defender of Rights in the protection of whistleblowers v. O. Leclerc, *Protéger les lanceurs d'alerte, La démocratie technique à l'épreuve de la loi*, LGDJ, 2017, p. 69; Florence Chaltiel Terral, *Les lanceurs d'alerte*, Dalloz, 2018, p. 84; S. Dyens, "Le lanceur d'alerte dans la loi "Sapin 3" : un renforcement en trompe-œil", in *Anticorruption, La loi Sapin II en application*, Dalloz, coll. Grand Angle, pp. 17-27 (article published in *AJCT*, March 2017, pp. 127 et seq.).

[52] Namely, the defense of the rights of users of public services, the defense and promotion of children's rights, the fight against discrimination and the promotion of equality, the respect of the ethics of security professionals.

[53] The author of these lines came to this conclusion during interviews conducted at the Institution in the framework of the program "*Whistleblowing open data impact. An implementation and impact assessment (WOODIe)*", funded by the European Commission, ISFP-2017-AG-CORRUPT, http://www.woodie.unito.it

handling of the alert. This meant that once the person was referred to the potentially competent body (e.g. Ministry of Health), the Institution did not know whether this authority had responded to the alert. The creation of a single portal had been envisaged (according to a proposal of the Council of State) allowing the whistleblower to know the steps to follow from the beginning of his alert until the treatment of the facts at its origin[54] but was finally not created.

- Above all, the intervention of the Defender of Rights did not consist in verifying whether the alert was well-founded, but only in verifying that the criteria of the Sapin II law had been met in principle. The legal framework put the Institution in the paradoxical situation of not being able to grant the status of whistleblower, while it was obliged, as the Institution in charge of its orientation, to qualify the whistleblower in order to be able to advise and thus protect him.

The organic law of March 21, 2022 provided some answers to these problems, as well as the decree of October 3, 2022:

- When asked whether the Defender of Rights is part of the external channel authorities, the legislature replied as follows:

From now on, it is clearly stated that any whistleblower meeting the new definition resulting from the law of March 21 2022 can send a report to the Defender of Rights.

If the alert sent to him falls within his original competence or that attributed by the decree of October 3, 2022[55] (e.g. alerts relating to discrimination or child abuse, which are areas in which he has his own competence), the Defender of Rights will collect it, process it, according to an independent and autonomous procedure, and provide feedback to its author Chapter II of the decree of October 3 2022 specifies the conditions under which reporting to external authorities, and in this case to the Defender of Rights, will be carried out (Articles 10 to 14).

On the other hand, if the alert falls within the competence of another authority mentioned in 1° of II of Article 8 of the newly amended Sapin II Act - i.e. one of the competent authorities set out in the decree - the Defender of Rights shall refer the author to this authority.

[54] Jacques Toubon, « Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte », in M. Disant et D. Pollet-Panoussis, *Les lanceurs d'alerte. Quelle protection juridique ? Quelles limites ?,* LGDJ, 2017, p. 411

[55] The Defender of Rights becomes the exclusive external authority for a number of reports in accordance with the annex to Decree No. 2022-1284 of October 3, 2022; namely, 1) rights and freedoms in relations with state administrations, local authorities, public establishments and bodies with a public interest mission, 2) best interests and rights of the child, 3) discrimination, 4) ethics of persons performing security activities.

The last scenario concerns the case where the alert does not fall within the competence of any of these authorities or where its subject matter concerns the competence of several of them. In this case, the Defender of Rights directs the whistleblower to the authority, administration, or body that is best placed to deal with it (Article 351 of the Organic Law of March 29, 2022 on the Defender of Rights).

Thus, the Defender of Rights always constitutes both a pivotal authority (it is then maintained in its guidance role) as well as being among the authorities of the external channel (it is then transformed into a protection authority).

In addition, the new legal framework now expressly recognizes the *role of information and advice*; this does not contribute anything new, but consolidates the practice that the Institution has developed since 2016 in the treatment of reports (it is still the referral mission).

Moreover, it will not only have to "watch over" the rights and freedoms of whistleblowers, but it will have to "defend" them[56] . In reality, this is not a step forward for the Institution but a consolidation of its practice since 2016. Interviews[57] in 2019 had already made it possible to understand that "defense" was then practiced by the services of the Defender of Rights, thanks to the competences he had in terms of the fight against discrimination (self-referral, mediation in order to avoid litigation, investigation, consultation by the judge in case of litigation). From now on, he has expressly investigative powers in matters of reporting, which will undoubtedly strengthen interventions with employers and the courts.

Another innovation that could have a concrete positive impact on better support for whistleblowers is the creation by the Organic Law of 21 March 2022 of a "*deputy responsible for supporting whistleblowers*" placed under the Defender of Rights. This point responds to the problem of human resources that the Defender of Rights has lacked since the organic law assigned him his new mission.

However, the most essential advance that the new legal framework brings is that concerning the qualification of the whistleblower by the services of the Defender of Rights. As mentioned above, one of the greatest insecurities of the previous legal framework was the self-qualification of whistleblowers. The 2017 whistleblower orientation and protection guide displayed in bold type on its very first page "*No authority will issue you whistleblower status*."[58] This is no longer valid and is to be welcomed.

From now on, the person can ask the Defender of Rights for an opinion on his "*whistleblower status*". This is a formal recognition of the status of whistleblower, a

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[56] Modifications introduced by « *5° de l'article 4 de la loi organique n° 2011-333 du 29 mars 2011 par la loi organique n°2022-400 du 21 mars 2022* ».

[57] Interviews conducted by C. Koumpli & A. Taillefait during the Whistleblowing Open Data Impact Assessment" (WOODIe), research program financed by the European Commission (Grant Agreement number: 823799 - WOODIe - ISFP-2017-AG-CORRUPT)

[58] Défenseur des droits, *Guide orientation et protection des lanceurs d'alerte*, 2017, p. 7.

kind of "certification"[59] to the judicial and administrative authorities. Of course, the opinion of the Defender of Rights will not be binding on the judge, but it will be part of the elements that he will take into account in his decision[60].

In addition, the organic legislator has provided that the Defender of Rights may also issue an opinion in which he assesses whether the person issuing an alert has complied with the conditions for benefiting from the protection provided by another specific mechanism (Article 35-1 organic law of 21 March 2022).

However, it is necessary to underline the problematic point of this opinion: its deadline. The Institution has to give its opinion within six months, which is not negligible when the public interest is potentially endangered.

Before moving on to the advances in terms of protection *stricto sensu*, once the alert has been issued, it should first be remembered that the advances in the pre-alert phase are very numerous.

Some are more substantial than others (e.g. the extension of the protection to new persons, the consultative qualification of the whistleblower by the Defender of Rights), while others are simply welcome and go in the direction of the symbolic consolidation of a reinforcement of whistleblower protection (e.g. the clarification "without financial compensation", the competence of defense of the whistleblower attributed to the Defender of Rights).

However, there are still a number of issues that only the future will be able to determine whether they are positive or negative. These include the question of good faith, the excessive extension of the scope of application by repealing the condition of personal knowledge of the facts in the professional environment, the deletion of the condition of the serious and manifest nature of the violation, and, above all, the balancing act of reducing the hierarchy of the alert channels on the one hand, and on the other, implicitly making the internal alert mechanism central, as we will discuss below.

4 Post-reporting protection

What about protection once the alert has been issued?

This question will be answered in two stages: first, protection in the *strict sense* once reprisals have been suffered (4.1), and second, the enshrinement of the obligation to *handle* whistleblowing internally (4.2).

4.1 Points of improvement in the protection *stricto sensu*

It is certain that the Sapin II law had already established a fairly complete protective legal framework.

[59] Assemblée nationale, Rapport d'information n° 4325 du 7 juill. 2021, *op. cit.* p. 148.

[60] Conseil d'Etat, avis n° 404001 du 4 novembre 2021 sur une proposition de loi visant à améliorer la protection des lanceurs d'alerte.

This base of protection *stricto sensu* has undergone slight modifications following the law of March 21 2022, which are supposed to improve the protection already offered. The protection *stricto sensu can be* found in articles 10-1, 11, 12-1, 13, 13-1, 14, 14-1 of the Sapin II law.

Three items are entirely new and result from the transposition of Directive 2019/1937, but the other improvements will be addressed as well.

4.1.1 The financial impact of whistleblowing on the whistleblower

While "American-style" whistleblower compensation was an option outruled by the French constitutional judge since the passage of the Sapin II law in 2016[61], the question of the financial risk these individuals face remained entirely open.

The improvement brought about by the new legal framework is measured firstly in terms of costs related to legal proceedings and secondly in terms of compensation for immediate loss of income.

First, as a result of Article 6-I of the Act of March 21, 2022:

> *"the plaintiff may ask the judge to award him or her, at the expense of the other party, a provision for the costs of the proceedings based on the respective economic situations of the parties and the foreseeable cost of the proceedings or, where the plaintiff's financial situation has seriously deteriorated as a result of the report or public disclosure, a provision to cover his or her expenses. The judge shall give a decision within a short period of time."* (article 10-1-III-A al.2 Sapin II law version 2022).

In order to qualify for an award of attorney's fees, there must be a claim of retaliation and the whistleblower must "present facts from which it can be inferred" that he or she has reported or disclosed information under the substantive and procedural conditions discussed above.

Secondly, Article 12 of the Act of March 21 2022 added to the Sapin II Act (Article 14-1) the possibility of granting temporary financial assistance to the whistleblower when his or her financial situation had seriously deteriorated as a result of the report.

The authorities competent to decide on this temporary financial measure should have been provided for in the decree of the Council of State. However, the decree of October 3 2022 does not provide the desired precision.

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[61] As a reminder, the financial support and compensation for whistleblowers that was initially provided for by the organic legislator was abrogated by the French Constitutional Court Constitutional Council, decision no. 2016-740 DC of December 8, 2016, cons. 5 "… the organic legislator could not, without disregarding the limits of the competence conferred on the Defender of Rights by the Constitution, provide that this authority could grant financial aid or financial assistance to the persons concerned"; it should be noted that this repeal met with the satisfaction of the Defender of Rights, who saw in the granting of this competence a "denaturation" of his constitutional vocation; Jacques Toubon, « Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte », in M. Disant et D. Pollet-Panoussis, *Les lanceurs d'alerte. Quelle protection juridique ? Quelles limites ?* LGDJ, 2017, pp. 404 -4099

4.1.2 Psychological support

Thanks to Directive 2019/1937, and in the same logic of financial support for whistleblowers, the Sapin II law now includes Article 14-1 according to which the authorities competent to receive alerts can also decide to grant psychological support to the whistleblower.

> *"…ensure the implementation of psychological support measures for persons who have issued an alert under the conditions provided for in Articles 6 and 8 and grant them temporary financial assistance if they consider that their financial situation has seriously deteriorated as a result of the alert."* (Article 12 law of 21 March 2022).

However, the October 3 2022 decree does not provide any clarification on this point either.

4.1.3 The personal training account

Another clear improvement in the status of whistleblowers consists in the fact that the Sapin II Law now contains a new provision in the second paragraph of Article 12, according to which the industrial tribunal, in the event of an application for interim relief following a breach of contract, may oblige the employer to fund the whistleblower's personal training account "*compte personnel de formation*") up to the maximum amount, in addition to any other employer sanction. This pragmatic measure aims at allowing a new professional reintegration of the whistleblower who encounters difficulties or no longer wishes to work in the sector of activity concerned by his or her report.

Apart from these three key measures, the law of March 21 2022 makes certain other changes to the Sapin II law that are intended to improve the situation.

4.1.4 Various other improvements to the protection stricto sensu

The new legal framework explicitly provides for *the whistleblower*'s *non-liability* for damages caused by the reporting "if they had reasonable grounds to believe, when they made the report, that the reporting or public disclosure of all the information was necessary to safeguard the interests at stake" (art. 10-1(I) Sapin II law version 2022).

Secondly, the article of the Penal Code relating to the *lack of criminal responsibility* for the disclosure of information covered by secrets has been amended so as to make criminal irresponsibility dependent on the new simplified hierarchy of reporting channels. Article 1229 of the Criminal Code now provides that "a person who violates a secret protected by law shall not be criminally liable, provided that such disclosure is necessary and proportionate to the protection of the interests in question, that it is made in compliance with the conditions for reporting defined by law, and that the person meets the criteria for the definition of a whistleblower" (Article 6 of the Act of 21 March 2022).

It is important to note that criminal disqualification now applies to facilitators as well as to the list of non-professional persons who can make an internal report.

In addition, Article 10-1-II now defines what constitutes retaliation and even attempted retaliation in some detail, and while keeping this list open by the use of "including", it gives 15 examples:

"(1) Suspension, layoff, termination or equivalent action;

(2) Demotion or denial of promotion;

(3) Transfer of duties, change of work location, reduction in pay, change in work schedule;

(4) Suspension of training;

(5) Negative performance evaluation or work certification;

(6) Imposed or administered discipline, reprimand, or other sanction, i

cluding a financial penalty;

7) Coercion, intimidation, harassment, or ostracism;

(8) Discrimination, disadvantageous or unfair treatment;

(9) Failure to convert a fixed-term employment contract or temporary contract into a permanent contract, where the worker had a legitimate expectation of being offered permanent employment;

(10) Non-renewal or early termination of a fixed-term employment contract or a temporary contract;

(11) Damage, including damage to the person's reputation, in particular on an online public communication service, or financial loss, including loss of business and loss of income;

(12) Blacklisting on the basis of a formal or informal industry-wide or industry-wide agreement, which may imply that the person will not find future employment in the industry or industry;

(13) Early termination or cancellation of a contract for goods or services;

(14) Cancellation of a license or permit;

(15) Improper referral for psychiatric or medical treatment."

In addition, a reputational sanction has been added against the organization that has obstructed or attempted to obstruct the report (Article 13-1 of the Sapin II law, version 2022), consisting of an additional penalty of posting or broadcasting the decision.

It is also interesting to note that the Legislator has taken care to provide, in article 12-1 of the new version of the Sapin II law, for the nullification of any waiver or other de jure or de facto limitation of the protection enjoyed by the

whistleblower, which automatically renders null and void any contractual clause in this regard between the employer and the employees or agents at the time of recruitment or establishment of the contractual relationship.

The rest of the protection *stricto sensu* is maintained by the new legal framework (reversal of the burden of proof, very high penal sanctions against the obstruction of a report, protection of the confidentiality of persons and information accompanied by high sanctions - protection of personal data).

4.2 Processing internal reports: now a legal obligation?

We mentioned in the introduction that the improvement of whistleblower protection is measured by the sum of the guarantees provided both before and after reporting. The protection *in the strict sense* described above is considerable and the new legal framework has undoubtedly made it more pragmatic (financial and psychological support, personal training account). However, this protection is mainly aimed at restoring the whistleblower's situation once it has deteriorated following the alert.

What about the handling of the alert in the place where the reported events are taking place?

It should be remembered that according to the statistics of the Defender of Rights in 2021 (5 years after the implementation of the Sapin II law), only 30% of local authorities had procedures in place for collecting reports and had subscribed to the obligation to inform their employees about this new system [62], [63] .

We must not lose sight of the fact that the protection of whistleblowers is only a means to ensure the effectiveness of freedom of expression, and thus to guarantee the public interest. The treatment of internal whistleblowing is therefore more essential than was mentioned during the adoption of Directive 2019/1937 or following the adoption of the law of 21 March 2022 [64] . The move to make the first tier optional has almost obscured the place that the 2022 legal framework has given to internal whistleblowing.

This role is becoming central, in the sense that public and private organizations are now legally obliged to deal with internal alerts and consequently to have a visible, reliable, and effective internal system, even though the authors of the alerts are no longer obliged to use it.

The Legislator's attention to the internal channel is both quantitative and qualitative.

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[62] S. Ramondou (in charge of whistleblower protection at the Defender of Rights), in G. Bargain, C. Koumpli, *L'avenir de la protection des lanceurs d'alerte dans l'Union européenne,* 2023, *op.cit.*

[63] The statistics were better in the private sector according to the AFA, L. Goutard-Chamoux (deputy director of the strategic analysis and international affairs council of the French Anti-Corruption Agency), in G. Bargain, C. Koumpli, *op.cit.*

[64] In this sense, see P. Villeneuve (deontologist referent of the Prefecture of the Brittany Region), in G. Bargain, C. Koumpli, *op.cit.*

From a quantitative point of view, we note that the French Legislator of 2022 thus devoted almost three pages in the law of 2022 (without forgetting the eight articles of the decree of October 3 2022) whereas the Sapin II law in its initial version devoted only four lines to the internal alert system.

However, from a qualitative point of view, it is above all the contours and content of the internal alert system that have become very detailed, with a feeling that the "(previous) decree has entered into the law". Indeed, the law now opens the possibility of internal referral not only to people with a professional relationship with the organization but also to people who do not have such a professional relationship[65] .

In addition, the law maintains the obligation to establish an internal whistleblowing system for the same type of large organizations as before (public and private legal entities with more than 50 employees, or municipalities with more than 10,000 inhabitants), for all State administrations, and adds the entities covered by Union law (specified by the 2019 Directive).

It also specifies for the first time the possibility of pooling the system. Thus, small and medium-sized companies with fewer than 250 employees "*may pool their procedures for collecting and processing alerts*". Furthermore, "*Municipalities and their public establishments that are members of a management center of the territorial civil service may entrust the latter with the collection and processing of internal alerts*". (Article 8(I) (B), Sapin II law, 2022). In addition, pooling is also provided for "*several or all of the companies in a group, according to terms set by decree.*" (Article 8 -I- C, Sapin II Law, 2022).

Finally, the Sapin II Act now specifies that the internal procedure for collecting reports must be established "after consultation with the social dialogue bodies" and in accordance with the conditions set out in the Council of State decree of October 3 2022[66].

The decree of October 3 2022, regarding procedures for collecting and processing alerts, concerns both the internal and external levels. Its analysis would require several pages. Let us simply specify here, as far as the internal level is concerned, that the decree provides a fairly detailed and yet general regulatory framework, insofar as it leaves the entities free to specify its operation by means of instruments that they choose (decrees for the ministries, service notes for other organizations, etc.).

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[65] Persons whose employment relationship has ended, where the information was obtained in the course of that relationship, and persons who have applied for employment with the entity concerned, where the information was obtained in the course of that application, but also shareholders, partners and holders of voting rights in the general meeting of the entity, the members of the administrative, management or supervisory body, as well as the co-contractors of the entity concerned, their subcontractors or, in the case of legal persons, the members of the administrative, management or supervisory body of such co-contractors and subcontractors and the members of their staff; (4° of Article 8. I. A of Law n° 2016-1691 of 9 Dec. 2016).

[66] It replaces Décret n° 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'Etat.

This regulatory framework (articles 1 to 8 of the decree of October 3 2022) consists mainly in specifying the response time (7 days to acknowledge receipt and a maximum of 3 months to provide a response on the measures undertaken and those envisaged), the mandatory written form of the response and the acknowledgement of receipt, and the possibility of collecting an alert orally by telephone line or other voice mail system by drawing up a record of the conversation, which the author of the alert must be able to verify, rectify, and approve by signing. It also specifies that the persons or services designated to collect and process the alerts must benefit from an impartial exercise of these missions as well as the broad outlines of how the alert must be assessed. It should also be noted here that the AFA, in its most recent recommendations published in the Journal Officielle de la République, devotes very instructive recitals to the way in which the internal investigation following an alert should be carried out[67] ; the doctrine considers, following the French administrative judge, that these recommendations have prescriptive value despite their flexible legal character[68] .

We note that internal whistleblowing has become a subsidiary channel for whistleblowers after the transposition of the Directive, but its implementation by public and private entities has become an obligation. However, this obligation remains "lame". In fact, if the prolix character of the Legislator of 2022 gives the impression that "the decree has entered into the law" and that the regulatory obligation has now become a legal obligation, which is symbolically and legally not negligible, but it should be emphasized that the Legislator has not chosen to impose a sanction on entities that do not comply within a certain period of time with the obligation to set up an internal whistleblowing system. This lack of sanction had been underlined by both the Defender of Rights and the evaluation report of the Sapin II law, which once again were not followed up. Moreover, there is no obligation for public and private bodies to inform the Defender of Rights of the creation of the internal channel so that he can be more effective in his role as a pivot.

Finally, a last remark is in order: the law has inserted a new word to the description of the internal alert system. From now on, the internal procedure is not only a procedure for "collecting" but also for "processing" alerts. This could seem almost like a pleonasm given that in France the "processing" of the alert was implied by the fact that "*In the absence of diligence on the part of the person receiving the alert*" internally, the whistleblower could send it to the judicial authority. Henceforth, not only the collection but also the "processing" become a legal obligation. The question that needs to be asked is to what extent the legal obligation to process alerts internally would not encourage complaints of slander of the author of an alert who did not use the internal channel, considered to be the most effective? To put it briefly, the obligation to use the internal channel has certainly been abrogated in France under

[67] French Anti-Corruption Agency, *The French Anti-Corruption Agency Guidelines*, 2020 (replacing the 2017 version), published in the *Journal officiel de la République* n°0010 of January 12, 2021, pp. 33-34
[68] P. Villeneuve, *op. cit.*

the effect of European Union law, but the French tradition of internal whistleblowing seems to persist as a pernicious incentive.

4.3 What is the outcome of post-reporting protection?

The protection provided before 2022 was undoubtedly quite complete and the new provisions only add brushstrokes to improve the picture of protection in the strict sense. The problem, moreover, which was pointed out by the parliamentarians in the evaluation report, was not so much the protection in the *strict sensu* as the support of the whistleblower. It is certain that the addition of the possibility of financial assistance to the whistleblower as well as the extension of the protection to facilitators are new measures with a strong impact on the effectiveness of the protection. However, doubts persist as to the use that will be made of internal whistleblowing (by whistleblowers, by employers, not by the courts) because internal "processing" takes on a particularly solemn form in this new legal framework, whereas the Directive had originally announced that its importance would be diminished.

Knowing that the protection of whistleblowers is only a means of protecting the public interest, it is important to ensure that the proceduralization of whistleblower protection does not annihilate the essence of the implementation of this protection, which is none other than freedom of expression, a fundamental freedom.

Implementation of the EU Whistleblower Directive in Poland[1]

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1 Introduction

The Polish legal order will be influenced by the 2019/1937 Directive (the Directive)[2], as there is no comprehensive whistleblowing regulation so far, and the scope of protection for persons reporting violations on the basis of the national law in force is insufficient. The objective of this paper is to present the new bill on protection of persons who report breaches of law[3] (the Draft Act or the Bill), focusing on the chosen aspects that differ from the Directive. Before discussing the new Bill, the socio-cultural context of whistleblowing in Poland will be highlighted. The social perception of reporting persons is a crucial element that can have impact on the effectiveness of whistleblowing regulation. Then the legal situation of a whistleblower under the national law in force will be presented. The main part discusses the proposal of new draft of whistleblowing law as follows: material and personal scope, protection measures, internal and external whistleblowing channels and sanctions.

2 The socio-cultural context

The social dimension and cultural context play an important role in analysing whistleblowing in Poland. In the Polish culture, the whistleblower is associated with the informer (Polish word "*donosiciel*") that is understood in the historical context as a man who, intending to harm someone, provided the authorities with information (foreign authorities or communist authorities), very often for personal benefits.[4] This perception of whistleblowers is rooted in the Polish culture[5]. Research from 2019 carried out on behalf of the Batory Foundation shows that Poles are unable to define what acting in the public interest is.[6] For this reason, they are willing to turn a blind eye to abuses in the workplace. According to the survey, the main factor demotivating for reporting, internally or externally is the fear of social ostracism in the workplace and being considered a denunciator, as well as high probability of

[22] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, PE/78/2019/REV/1.

[3] Projekt ustawy z dnia 5 stycznia 2023 r. o ochronie osób zgłaszających naruszenia prawa, available at: https://legislacja.rcl.gov.pl/docs//2/12352401/12822867/12822871/dokument599335.pdf Legislative process: https://legislacja.gov.pl/projekt/12352401/katalog/12822867#12822867.

[4] Kiciński, K., "Sygnaliści" w państwie prawa – spojrzenie z perspektywy socjologii moralności, [in:] Skarżypyty, donosiciele, sygnaliści, Arcimowicz, J., Bieńko, M., Łaciak, B. (ed.), Warszawa 2018, p. 232.

[5] Lewicka-Strzalecka, A., Whistleblowing at Work: The Polish Perspective [in:] Arszułowicz, M., Gasparski, W. (ed.), 2011, p. 171 et seq.

[6] Makowski, G., Waszak, M., Gnębieni, podziwiani i… zasługujący na ochronę. Polacy o sygnalistach, Warszawa 2019.

suffering negative consequences such as dismissal.[7] The social norm stigmatizing informers is a characteristic element of the Polish culture in the sphere of ethics and attitudes.[8] Therefore a whistleblower still has negative connotations and his/her behaviour may be seen as disloyal to an employer and coworkers.[9] It can negatively influence the effectiveness of the future whistleblowing law, since statutory regulations such as whistleblower protection are not effective if organizations are not convinced of the benefits.[10] Vandekerckhove argues that no country with legislation protecting whistleblowers has been exempt from the "it is not in our culture" debate, including the United States[11]. Therefore, on the one hand it is necessary to disseminate knowledge about whistleblowing, explain why whistleblowing is an example of "pro-social behaviour"[12] and should be perceived as a positive mechanism protecting public interest and enabling earlier detection of undesirable phenomena and solving problems within the organisation. On the other hand, we should discuss and develop whistleblower protection that will work best.

3 The Polish law related to whistleblowing

Poland does not have in force a comprehensive regulation on the protection of whistleblowers. Only in certain sectors, such as banking and finance, there are regulations regarding whistleblowers that implement EU standards.[13] Since there is no comprehensive regulation, the general provisions of labour law apply to the protection of whistleblowers. In the Polish Labour Code there are provisions regarding the protection of employees against unjustified termination of employment contracts, equal treatment in employment (prohibition of discrimination) and anti-mobbing regulations.[14] However, the above-mentioned labour law provision has been

[7] Makowski, G., Waszak, M., Gnębieni, podziwiani i…, p. 13.
[8] Kiciński, K., "Sygnaliści" w państwie prawa…, p. 236.
[9] Moberly, R. E., Sarbanes Oxley's structural model to encourage corporate whistleblowers, Brigham Young University Law Review, 5/2006, p. 1155.
[10] Pittroff E., Whistle-Blowing Systems and Legitimacy Theory: A Study of the Motivation to Implement Whistle-Blowing Systems in German Organizations, Journal of Business Ethics, 124/2014, pp. 410-411.
[11] Vandekerckhove, W., The Perception of Whistleblowing Worldwide, [in:] Whistleblowing. In defense of proper action, Arszułowicz, M., Gasparski, W. (ed.), 2011, p. 104.
[12] Brown A.J. (ed.), Whistleblowing in the Australian Public Sector. Enhancing the Theory and Practice of internal witness management in public sector organizations, Canberra 2008, p.11.
[13] Bolesta, Ł., In Search of a Model for the Legal Protection of a Whistleblower in the Workplace in Poland. A legal and comparative study, Berlin 2020, p.108-115.
[14] Raczkowski, M., Ekspertyza w sprawie ochrony osób zatrudnionych sygnalizujących nieprawidłowości przed nadużyciami ze strony podmiotu zatrudniającego, Warszawa 2009, p. 2-8.

identified as ineffective and insufficient in cases of whistleblowing.[15] Firstly, the protection of labour law does not cover approximately several millions of workers who provide work on a basis other than an employment relationship (e.g., civil law contractors, self-employed persons),[16] so that large group do not enjoy any protection from retaliation. What is more, the court jurisdiction is limited to investigating only the reasons for termination given by an employer, while employers usually give a reason other than blowing the whistle like redundancy, loss of trust, or personal conflict that makes it impossible to continue cooperation with the employee[17]. As a result, the court is unable to investigate if the actual reason for termination was blowing the whistle by an employee.[18] Thirdly, the provisions on equal treatment and harassment in practice turn out to be useless for whistleblowers protection. Although at first glance the dismissal of a whistleblower seems to be an obvious discrimination, the employee may not be able to prove that due to the report, he was treated worse than others in a comparable situation (it is not clear to whom he should be compared)[19]. Applying harassment provisions, a whistleblower has to bear the burden of proof of all prerequisites of mobbing, which means that his/her chances of success are very low. Hence new, comprehensive regulation on whistleblowers protection is needed.

There are two draft bills that, to a limited extent, cover the issue of whistleblowing. These are: the draft law on the transparency of public life[20] and the draft law on the liability of collective entities.[21] The first of the mentioned draft laws is from 2017; however, it contains the special chapter 9 dedicated to "principles and measures for the protection of whistleblowers". The solutions proposed in the draft law concern reporting information outside the organisation. A public prosecutor plays a fundamental role in the regulation. They may make a discretionary decision to grant and withdraw the status of whistleblower to a person reporting reliable information about crimes specified in this act. The prosecutor's power to decide on

[15] Skupień, D. Whistleblowing in Poland According to Legislation and Case Law, [in:] Thusing, G., Forst, G. (ed.), Whistleblowing – A Comparative Study, Cham 2016, p. 232-233.
[16] Statistics Poland, Labour force survey in Poland – quarter 2/2021, available at: https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-3-kwartal-2021-roku,4,43.html.
[17] Wojciechowska-Nowak, A., Building Legal Protection to Whistleblowers in Poland [in:] Arszułowicz, M., Gasparski, W. (ed.), 2011, p. 184-185.
[18] Wojciechowska-Nowak, A., Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań, Warszawa 2011, p. 27-35.
[19] Raczkowski, M., Ekspertyza w sprawie ochrony osób zatrudnionych…, p. 15.
[20] https://legislacja.gov.pl/projekt/12304351
[21] https://legislacja.rcl.gov.pl/projekt/12363700/katalog/12908957

the fate of the whistleblower has been widely criticised.[22] The second project concerns the liability of collective entities for prohibited acts. The new version of the amendments to the draft act[23] provides an exclusion for liability if a collective entity demonstrates that has taken all due care despite the wrongdoing. Therefore, reporting systems, investigation and combat misconducts, can save from fines up to PLN 30 million (ca. EUR 6.3 million). It can encourage big entities for implementing whistleblowing channels. None of these projects meets the requirements of the Directive.

4 The new Draft Act transposing the Directive

The transposition of the Directive began in December 2020 when the Ministry of Development, Labour and Technology was assigned to prepare proper draft law and make public consultation. The Bill was published in October 2021 and then amended in April, July, December 2022, and January 2023 (while the transposition deadline expired on 17 December 2021)[24]. The first versions contained a lot of provisions that explicitly did not comply with the Directive. Successive versions have generally removed provisions that are inconsistent with the Directive. However numerous amendments to the draft create legislative chaos. Some changes are ill-conceived and were not consulted with relevant parties. The latest bill is much better; nevertheless, the legislator transposed the Directive mainly literally and some provisions may be difficult to interpret and apply in practice. The Bill in principle does not go beyond the minimum standards set out by the Directive. However, there are a few provisions where the legislator has established higher standards of protection than the Directive. The Bill will likely be altered, and it is difficult to assess the direction in which changes to the above-mentioned draft law are headed.

On February 15, 2023, the European Commission decided to refer Poland and seven other Member States to the Court of Justice of the European Union for failure to transpose and notify the national measures transposing the Directive[25]. This should incentivize the Polish government to complete the law,

[22] K. Sobczak, Niełatwe życie czeka sygnalistów i ich pracodawców, prawo.pl, accesible at: https://www.prawo.pl/prawnicy-sady/sygnalista-w-ustawie-o-jawnosci-zycia-publicznego,74083.html

[23] The bill of 3 November 2022 on amending the Act on liability of collective entities for acts prohibited under
threat of punishment, access 22 February 2023 https://legislacja.rcl.gov.pl/projekt/12363700/katalog/12908958#12908958.

[24] All versions are accesible at (access 20 February 2023) https://legislacja.rcl.gov.pl/projekt/12352401/katalog/12822867#12822867.

[25] https://ec.europa.eu/commission/presscorner/detail/EN/IP_23_703.

4.1 Material scope of the Draft Act

Article 3 of the Bill goes slightly beyond the Directive requirements and extends the material scope to violations of national law within the areas of law listed by the Directive, as well as the financial interests of the State Treasury and financial interests of the local government units. Moreover, legal entities may extend the material scope of their internal whistleblowing procedures on breaches of internal regulation and ethical standards. In this case, the provisions on external reporting and public disclosure do not apply. This is a paradox because a whistleblower may report ethical wrongdoing and cannot report breaches of labour law (if the obligation to comply with the Labour Code is not explicitly mentioned in internal regulations, e.g., in the work regulations). Following the Directive, the Draft Act shall not apply to violations of the law in the field of defence and security procurement as well as to classified information like secrecy of the medical and legal professions or criminal proceedings. This is widely recommended to extend the scope of the act to all violations of law and information about threat and damage to the public interest. Otherwise, the fragmented material scope may effectively discourage potential whistleblowers, who may not know whether the information that they want to report qualifies as a violation of the national or EU law within one of the areas identified by the legislator.

4.2 Personal scope of the Draft Act

The Draft Act will apply to a natural person who reports or publicly discloses information about a violation of the law obtained in a work-related context (Article 4 of the Bill)—such a definition is similar to Article 3(1) of the Directive. Work-related context excludes such categories of persons as doctoral students, students, pupils, or patients, who are exposed to negative consequences of reporting in the form of, for example, expulsion from studies, harassment, mobbing, or denial of service. Hence, work-related context should be interpreted broadly.[26]

The Draft Act indicates an open catalogue of reporting persons where additionally (above categories indicated in the Directive) protected are temporary workers, persons providing work on a basis other than employment contract (including civil law contract), interns, public officers (e.g., officers of the Police, the Internal Security Agency, the Intelligence Agency, Border Guard) and soldiers (Article 4 of the Bill). Such an extension of the personal scope is a tailor-made solution that takes into account the specificities of Polish employment law and the Polish legal system. The definition of an employee in the meaning of EU law is broader than the concept of employee according to the Polish Labour Code. For this reason, the Polish government intends to expand the personal scope to persons working on a basis other than employment contract like civil law contractors, who provide work often very

[26] H. Szewczyk, Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia, Wydawnictwo Naukowe Scholar, Warszawa 2020, s. 151.

similar or the same to employees, but in their case employing entities do not have to bear high employees costs and social security contributions. This is a characteristic element of the Polish labour market. The inclusion of public officials and soldiers in the scope of the Bill's subject matter has little practical significance, as they will not be protected in the case of reporting the most common wrongdoings in their areas (due to the narrow scope of the subject matter—only areas of law listed by the Directive).

A higher level of protection is also guaranteed concerning the protection of third parties. Protection is granted additionally to legal persons and organisational units assisting the whistleblower, which includes non-governmental organisations providing support to reporting persons (Article 21 (2) of the Bill).

Article 6 of the Bill indicates conditions for the protection of reporting persons that are to have reasonable grounds to believe that the information on breaches reported: i.) concerns the public interest; ii.) was true at the time of reporting, and iii.) that such information is a violation of the law. This provision is unclear even for lawyers and the requirements for a whistleblower differ from the Directive. Firstly the last update to the Bill added a "concerns public interest" element. It can be assumed that the government's goal was to exclude notifications concerning personal matters from protection. Moreover, in the Directive's preamble, there are a lot of references to the public interest. Nevertheless, the way the provision is worded is unfortunate and from a legal point of view, it can be interpreted as an additional barrier for whistleblowers who should assess if the information they want to report concerns public interest. In practice, the decision as to whether a report contains information of public interest may be subjective and will depend on who will review the notification. There is one more doubt if the public interest element excludes protection of notification that concerns an organization's interest[27]. Secondly, the third prerequisite that such information is a violation of law also can be interpreted differently, for example as an additional obligation for a reporter who has to have evidence that reported information refers to breaches of the law. However, in my opinion, the third prerequisite refers to the material scope of the Draft Act and does not add any special requirements for a whistleblower.

4.3 Protection measures

The protection measures are formulated rather vaguely in the Bill (if adopted) and seem likely to cause most problems in practice. Despite the general prohibition of retaliation, there are two exemplary lists of retaliatory actions separately for employees and persons working on other basis than employment contract. The employer (or employing entity) shall bear the burden of proof that the action taken is not retaliatory (Article 12 (3) of the Bill). The aim of proving that the action taken is not

[27] Leśniak, G., Niefortunnie sformułowany przepis pozbawi ochrony niektórych sygnalistów, https://www.prawo.pl/kadry/zmiany-w-zasadach-ochrony-sygnalistow-projekt-z-5-stycznia-2023-r,519269.html.

retaliatory is to exclude the liability from the Draft Act (i.e., the whistleblower may enforce their rights under other provisions). The difference between the Directive and the Draft Act is that in the national law the burden of proof has been shifted to the employer and not to the person who has taken the detrimental measure (this may not be the same person as the employer).

The Draft Act does not establish any dedicated interim relief and it is one of the main disadvantages. Theoretically, a reporting person can use security measures for claims civil law proceedings (Article 730 et. seq. of the Polish Code of Civil Procedure) or, in the case of an employee, request the court for reinstatement until the case is finally adjudicated (Article 4772 of the Polish Code of Civil Procedure). Nevertheless, the reinstatement ordered in the first-instance judgment in practice has not been adopted. Proceedings in labour law cases take a very long time, even one or two years. Thus, it will be highly advisable to establish an interim measure that would guarantee the economic security for the duration of the legal proceedings such as reinstatement (if possible) or remuneration payment until the legal claim has been adjudicated.

Article 14 of the Draft Act grants full compensation for a whistleblower against whom retaliation has been committed. The Article does not mention explicitly compensation for intangible damages. The justification for the Draft Act[28] indicates that the compensation under the act relates only to material damage and is an additional measure to the whistleblower's possible claims based on the various types of legal relationships under which the work is provided. Thus, a whistleblower could claim compensation for intangible damages under general civil law. This is unfavourable to whistleblowers due to the burden of proof shifted to them. Moreover, Article 14 of the Draft Act does not specify any minimum amount of compensation for a whistleblower. While Article 15 of the Draft Act refers to persons who have suffered damage due to the deliberate reporting or public disclosure of false information, entitled them to compensation from a whistleblower of at least the average monthly salary in the business sector in force on the date of the reporting. Such differentiation is unjustified; why is Article 15 of the Draft Act more dissuasive than Article 14 of the Draft Act?

The Bill indicates supportive measures like free information and legal advice from the State Labour Inspectorate (Article 46 of the Draft Act). On the other hand, there are no specific psychological support or compensation funds for whistleblowers. Most experts share the opinion that financial awards are not the best idea in the Polish legal culture.[29]

[28] See https://legislacja.gov.pl/docs//2/12352401/12822867/12822868/dokument568769.pdf.

[29] Compare: Ł. Kobroń-Gąsiorowska, Modele ochrony whistleblowera (sygnalisty), Warszawa 2022, p. 261.

4.4 Internal and external whistleblowing channels

The regulation of internal and external channels in the Draft Act is largely based on the Directive. Obligation to establish internal channels regards legal entities with 50 or more workers except for municipalities with fewer than 10 000 inhabitants (Article 23 of the Draft Act). The internal procedure may indicate wrongdoings that may be additionally reported (regarding internal regulations or ethics). A whistleblower is informed of the receipt of the notification and feedback only if he/she has provided a contact address (Article 25 (1) point 6 and 34 of the Draft Act). There is no obligation to receive and follow up on anonymous reports by both private and public entities through internal and external channels (Article 7 of the Draft Act). Of course, anonymous whistleblowers, who are subsequently identified and suffer retaliation, shall qualify for protection (if they meet the conditions). The internal procedure should specify a system of incentives to use internal channel first where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation (Article 25 (1) point 7 of the Draft Act).

An external notification can be made to the public authority or in case the reporting person cannot identify the competent public authority to the State Labour Inspectorate (Article 30 (2-3) of the Draft Act). If the information may relate to a crime, it shall be reported to the Police and when the notification concerns a violation of European Union law, the financial interests of the Union or corporate tax, which may constitute a crime, it can also be made to the public prosecutor (Article 31 of the Draft Act). At the request of a reporting person, the competent public authority, after the substantiation of the violation of the law, shall issue a certificate confirming that the reporting person is subject to the protection specified in the Draft Act (Article 36 (2) of the Bill).

In the previous versions of the Bill, the Ombudsman has been designated as a whistleblowing authority with a special task. Due to the Ombudsman's reluctance to fulfill this role, the State Labour Inspectorate is a new authority that has to receive external reports. The role of the State Labour Inspectorate is to carry out an initial review of external notification - determine whether the report concerns information on a violation of the law. If so, the State Labour Inspectorate forwards the report to the public body competent to take follow-up action (Article 40 of the Bill). The State Labour Inspectorate informs a reporting person about the transmission of the report to the authority or that they have refrained from transmitting the notification and why. Moreover, realizes the obligation to ensure public access to information on the rights and remedies of whistleblowers, third persons (connected to whistleblowers or facilitators) and persons concerned, as well as to provide advice for the abovementioned persons (Article 46 of the Draft Act). Replacement of the Ombudsman with the State Labour Inspectorate is highly controversial. The State Labour Inspectorate supervise and inspect the observance of labour law, in particular occupational safety and health rules, legality of employment and other paid work.

None of the areas covered by the Draft Act are within the competence of the State Labour Inspectorate. Moreover, the State Labour Inspectorate does not have specialists with the appropriate qualifications, as well as material resources dedicated to this task. Therefore, there is a high probability that the implementation of the Directive in its current shape will neither encourage whistleblowers to report violations nor provide them with adequate protection.

4.5 Sanctions

Sanctions are not very dissuasive, although the case law will demonstrate how high the penalties will be (Article 51-56 of the Draft Act). For example, a person who hinders reporting shall be subject to a fine or the penalty of restriction of liberty or imprisonment for up to one year (in qualified cases up to 3 years). A person who retaliates against a whistleblower shall be subject to a fine or the penalty of restriction of liberty or deprivation of liberty for up to 2 years. If more than two acts of retaliation are committed the penalty is higher (deprivation of liberty for up to 3 years). Similar penalty to retaliatory action is for whoever knowingly made a report or public disclosure of false information or assisted in making a report of false information. Breaching the duty of confidentiality shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. The Polish legislator introduces an offence in case the person responsible for the establishment of the internal reporting procedure, does not establish this procedure or establishes it with a significant violation of the requirements arising from the Act, is punishable by a fine.

5 Conclusions

Poland does not have comprehensive whistleblowing regulation so far, and the scope of protection for persons reporting violations based on the national law in force is insufficient. Hence, new and comprehensive regulation on whistleblowers protection is needed. Work on the implementation of the Directive has been going on for more than two years, during which time there have been five versions of the Draft Act on the protection of whistleblowers. The latest version of the Bill is largely based on the Directive. The material scope is fragmented and refers to areas of law listed by the Directive. The Draft Act goes beyond the minimum standards in with respect to its personal scope and includes persons providing work on a basis other than an employment contract, public officials, and soldiers, taking into account Polish specificities. However, the additional prerequisite for the protection of reporting persons (reported information has to concern the public interest) is unclear and can be a barrier that discourages the reporting of irregularities. The protection measures are formulated in a rather hazy manner and appear likely to result in issues in practice. The State Labour Inspectorate has to play a special role - receiving external reports and forwarding them to the competent authorities, as

well as providing information and advice on the rights of whistleblowers and the person concerned. The Polish government has rightly proposed sanctions for not establishing a whistleblowing channel and for not meeting internal procedure requirements. There are a lot of potential improvements to be made in the course of the legislative process. For example, the Draft Act does not foresee the obligation to receive and follow up on anonymous reports and no dedicated interim relief has been established. It is difficult to assess the direction in which changes to the aforementioned Bill are headed, but the draft will likely be altered. The scope of amendments in law should be determined not only by the objectives set by the Directive but, above all, by taking into account the best practices of international organizations and the Polish socio-cultural context. The negative perception of the whistleblower makes it extremely important that introducing the new whistleblowing law should be accompanied by a long-term educational campaign to raise public awareness about the whistleblower's rights.

The European Court of Human Rights' Effects on the Transposition of the Whistleblowing Directive

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1 Introduction

In the past years, the topic of "whistleblowing", i.e., the phenomenon of reporting or disclosing illegal or unethical conduct to an addressee within or outside an organisation motivated by an autonomous interest in their exposure,[1] has gained increasing attention from legislators as well as the general public around the word. The most important result of this development within the European Union has been the "Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law",[2] which was to be transposed by the Member States mostly until 17 December 2021.[3] While this "Whistleblowing Directive (WBD)" is undoubtedly the most far-reaching piece of whistleblowing legislation in the European Union to this date and may arguably be seen as the starting point of an entirely new field of European law,[4] it is by no means the first source of whistleblowing-specific legal rules in Europe. For one, the use of whistleblowing-specific legislation has been a staple of the EU's regulatory arsenal for quite some time now, albeit mostly in the form of limited annex provisions designed to enhance the enforcement of European law only in specific regulatory areas.[5] Furthermore, the idea of whistleblowing legislation as a distinct area of law had already taken hold within the European Union, with some Member States already having enacted their own whistleblowing statutes long before the Directive was drafted.[6] Nonetheless, the overall state of whistleblowing law in the European Union was one of fragmentation and insufficient standards of protection, which also was one of the main driving forces for the Commission to develop its draft for a harmonizing directive.[7]

Even before the WBD was drafted, however, another European institution had already stepped in to fill the void created by a lack of comprehensive whistleblower protection: The European Court of Human Rights. With a series of influential decisions starting in 2008, the ECtHR arguably became the most influential player in European whistleblowing law for more than a decade, shaping how countries across Europe conceptualized and dealt with an increasing number of important

[1] C.f. the still influential definition by *Near/Miceli*, Organizational Dissidence: The Case of Whistle-Blowing, 4 Journal of Business Ethics 1, 4 (1985): "We, therefore, define whistleblowing to be 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." Differences to the definition used in this article mostly result from the latter seeking to account for the fact that the Whistleblowing Directive also covers whistleblowing situations outside of employment relationships.

[2] OJ L 305, 26.09.2019, p. 17; amended by Regulation (EU) 2020/1503, 20.10.2020, OJ L 347 p. 1.

[3] Art. 26(1) WBD.

[4] *Abazi*, Whistleblowing in the European Union, 58(3) Common Market Law Review 813, 817 (2021).

[5] See e.g. Art. 71 Directive 2013/36/EU ("CRD IV"); Art. 32 Regulation 596/2014/EU ("MAR").

[6] This notably includes the United Kingdom's "Public Interest Disclosure Act of 1998 (PIDA)" (c.23) as one of the earliest and most influential of these laws by a (former) Member State.

[7] C.f. Impact Assessment SWD(2018) 116 final, p. 12-13, 57-59, Annex 6; Recital 4 WBD.

whistleblowing cases. Against this background, it is no wonder that the WBD explicitly considers the ECtHR's case law as one of its most important sources of inspiration, or, as Recital 31 of the Directive puts it:

> *"Persons who report information about threats or harm to the public interest obtained in the context of their work-related activities make use of their right to freedom of expression.* The right to freedom of expression and information, enshrined in Article 11 of the Charter and in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, encompasses the right to receive and impart information as well as the freedom and pluralism of the media. Accordingly, this Directive draws upon the case law of the European Court of Human Rights (ECHR) on the right to freedom of expression, *and the principles developed on this basis by the Council of Europe in its Recommendation on the Protection of Whistleblowers adopted by its Committee of Ministers on 30 April 2014."*[8]

Given this prominent mentioning of the ECtHR's case law, it comes as a bit of a surprise that very little has been said or written about the relationship between the Whistleblowing Directive and its most influential counterpart. As the following discussion will show, this relationship is a lot more complicated than the straight-forward wording of Recital 31 might suggest. In fact, we may be entering a new stage in the development of European whistleblowing law, dominated by two very different and potentially competing concepts of whistleblower protection that will shape the emerging landscape of this still novel area of law for years to come.

2 The ECtHR's case law on whistleblowing

The ECtHR's tenure as a driving force of whistleblower protection in Europe started with the now famous case of *Guja v. Moldova*[9] in the year 2008. In it, the Grand Chamber of the court was faced with the case of the head of the press department of the Prosecutor General's Office in Moldova, who forwarded two letters he received from the parliament's deputy speaker and a deputy minister in the Ministry of the Interior to a newspaper. Those letters, he argued, were evidence of the fact that the government tried to pressure him into discontinuing a high-profile criminal investigation against four police officers for cases of ill treatment and unlawful detention. When the article was published, he voluntarily admitted to being the source and subsequently got dismissed as a prosecutor. After losing his reinstatement proceeding in national courts, he appealed to the ECtHR, asserting a violation of his freedom of expression granted by Article 10 ECHR.[10]

[8] Recital 31 WBD (emphasis added).
[9] *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, https://hudoc.echr.coe.int/eng?i=001-85016.
[10] Ibid. §§ 8-29.

In accordance with its general standard of review under Article 10 ECHR, the Grand Chamber first assessed whether the dismissal constituted an interference of the freedom of expression, whether that interference was prescribed by law and whether it pursued a legitimate aim, holding each to be the case. It then turned to the decisive question of whether the interference was "necessary in a democratic society" in accordance with Article 10(2) ECHR, which generally requires the existence of a "pressing social need".[11] Since the court does, however, grant the Contracting States a sovereign power of appreciation, the court's standard of review was limited to checking whether the interference was (still) proportionate to the legitimate aim pursued and whether the authority's reasons were "relevant and sufficient", thereby effectively establishing a human rights based minimum standard of whistleblower protection. In order to set up criteria to flesh out this minimum standard, the Grand Chamber established a whistleblowing-specific balancing test with six independent factors that came to serve as a general framework for all future whistleblowing cases to come. In its February 2023 decision in *Halet v. Luxembourg*,[12] the Grand Chamber confirmed the continuing validity of these factors with certain specifications as a "refined" Guja test.[13] The individual factors of the test are:

(1) the public interest in the disclosed information,
(2) the authenticity of that information,
(3) the availability of alternative reporting channels or remedies,
(4) the good faith motives of the whistleblower,
(5) the detriments caused toother interests involved, and
(6) the severity of the sanction taken against the whistleblower.[14]

Factor (1) has arguably been the most influential one both in deciding the *Guja* case itself as well as in the ECtHR's subsequent decisions over the years. In *Guja*, the court highlighted that the public discussion of topics of public concern is "essential to a democracy", which is why "regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters".[15] Considering that the applicant's information concerned important issues concerning "the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality", the court had "no doubt that

[11] *Guja* (note 9) § 69.
[12] *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023, https://hudoc.echr.coe.int/eng?i=001-223259.
[13] Ibid. §§ 120, 158. To reflect the changes of the "refined" Guja test, the analysis in this paper has been updated from the original September 2022 presentation.
[14] *Guja* (note 9) §§ 73 et seq.; *Halet* (note 12) § 114, 120 ff. The order in which the factors are mentioned tends to vary between the ECtHR's judgments. Due to the nature of the balancing test, the order iteslef does not imply a specific hierarchy between the factors (c.f. *Halet* (note 12) § 170.
[15] *Guja* (note 9) § 91.

these are very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate."[16] Together with a favourable assessments of the other five factors, the public interest factor ultimately lead to applicant in Guja winning his case.[17]

In the years following *Guja*, the ECtHR's different sections have built on and in expanded upon this concept. In the case of *Heinisch v. Germany* in 2011,[18] for example, the fifth section applied the public interest factor to a case in which a geriatric nurse made a criminal complaint about the ill-treatment of elderly people in a private company owned by the state, with the perceived misconduct later also being disclosed to co-workers through the distribution of a leaflet.[19] The court held that the information revealed was "undeniably" of public interest given the growing number and particular vulnerability of elderly people in institutional care,[20] thereby also applying the public interest factor to cases of external whistleblowing to state authorities[21] and employment relationships govern by private law. In the case of *Bucur and Toma v. Romania* in 2013,[22] the court's third section made it clear that the public's legitimate interest in being informed even extends to areas with an inherently heightened interest in secrecy, including military intelligence services.[23] Repeatedly, the court emphasized the general principle that there is little scope under Article 10(1) ECHR for restricting debates on matters of public interest,[24] further highlighting the role of whistleblowing as a means to reveal matters of general public interest and to strengthen the principles of a democratic society.

In *Halet v. Luxembourg*, the Grand Chamber has confirmed these principles and underlined the increased importance of whistleblowing, both "in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they are liable to play by bringing to light information that is in the public interest [and] in terms of the development of the European and international legal framework for the protection of whistle-blowers", in particular with respect to the WBD.[25] As the

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[16] *Guja* (note 9) § 88.
[17] See *Guja* (note 9) §§ 85-88, 97.
[18] *Heinisch v. Germany*, no. 28274/08, 21 July 2011, https://hudoc.echr.coe.int/fre?i=001-105777.
[19] Ibid. §§ 7-26.
[20] Ibid. § 71.
[21] See also *Marchenko v. Ukraine*, no 4063/04, §§ 43 et seq., 19 February 2019, https://hudoc.echr.coe.int/eng?i=001-91415.
[22] *Bucur and Toma v. Romania*, no 40238/02, 8 January 2013, https://hudoc.echr.coe.int/eng?i=001-115844.
[23] Ibid. §§ 101-103.
[24] See e.g. *Gawlik v. Liechtenstein*, no. 23922/19, § 67, 16 February 2021, https://hudoc.echr.coe.int/eng?i=001-208280, citing (inter alia) *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, https://hudoc.echr.coe.int/fre?i=001-62831; see already *Guja* (note 9) § 67; confirmed by *Halet* (note 12) § 120.
[25] *Halet* (note 12) § 131.

most notable addition to the established *Guja* principles, the court has specified its understanding of the matters falling under the public interest criterion by sorting them into three distict categories. The first two categories, which have already been explicitly mentioned in the original *Guja* test,[26] consist of "unlawful acts" and legal, but "reprehensible acts".[27] The third and broadest categorie, which until then could only be inferred from the court's prior judgments,[28] concerns matters that spark "a debate giving rise to controversy as to whether or not there is harm to the public interest".[29] Evidently, this categorie has been crafted to encompass the specific matters relevant to the case at hand, the so called "LuxLeaks scandal", which concerned large scale tax avoidance pratices by international companies, carried out mostly by artificially shifting profits and reducing the effective tax burden through secret taxation agreements with the state of Luxembourg.[30] Though the court generally consideres the public interest in the disclosed information to be decreasing from one category to the next,[31] the abstract category alone is not prejudicial to the eventual outcome of the balancing test, as is evidenced by the case in *Halet* falling into the third category but still turning out in the applicant's favour.[32]

While the public interest in the information often serves as a point of entrance for the ECtHR to justify why an act of whistleblowing is in principle worthy of protection, factor (2), the authenticity of the information, often serves rather as a limiting factor. Despite its wording, however, this factor does not merely look at whether the information is true or false, but whether the whistleblower had reasons to assume it was true at the time of a report or disclosure, thus also protecting him or her when the allegations cannot be proven or are even later proven to be unfounded. This already follows from the rationale provided in *Guja*, stating that state authorities are allowed to "react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith"[33] and has later been confirmed by other case law,[34] including *Halet*.[35] On the other hand, a whistleblower who chooses to disclose information must "carefully verify, to the extent permitted

[26] See *Guja* (note 9) §§ 72, 97, using the terms "ilegal conduct" and "wrongdoing". While it may be argued that the matters disclosed in *Halet* could have simply been qualified as a case of "wrongdoing", it follows from the court's reasoning that this category is now meant to only refer to cases of clearly unethical behavior by certain individuals.
[27] *Halet* (note 12) § 137.
[28] C.f. in particular *Heinisch* (note 18) § 71.
[29] *Halet* (note 12) § 140; see also §§ 138, 142-144.
[30] See ibid., §§ 10 et seq.
[31] Ibid. § 140.
[32] Ibid. § 206.
[33] *Guja* (note 9) § 75.
[34] See e.g. *Heinisch* (note 18) §§ 67, 80; *Bucur and Toma* (note 22) §§ 107, 113.
[35] *Halet* (note 12) §§ 125-127.

by the circumstances, that it is accurate and reliable."[36] It is, however, still unclear if and to what extent this criterion requires whistleblowers to personally investigate a matter before disclosing it to the public or reporting it to competent authorities, since later decisions have applied slightly differing standards in this regard. In *Heinisch*, for example, the fifth section noted that "it is primarily the task of the law-enforcement authorities to investigate the veracity of allegations made in the context of a criminal complaint and that it cannot reasonably be expected from a person having lodged such a complaint in good faith to anticipate whether the investigations will lead to an indictment or will be terminated."[37] Conversely, in the decision *Gawlik v. Liechtenstein*, the second section held in 2021 that when a criminal complaint later turns out to be factually untrue, whistleblowers are only protected "under certain circumstances".[38] In the case at hand, this meant that a doctor, who suspected a hospital's chief physician of committing acts of euthanasia based on information found in patients' electronic medical files, should have first investigated the matter on his own by tracking down and analysing the (more comprehensive) physical files of those patients before informing public prosecutors about his suspicions.[39] In *Halet*, the Grand Chamber has, in principle, affirmed this approach by quoting *Gawlik* when explaining its understanding of the authenticity criterion.[40] It did so, however, in the context of a public disclosure case and without explicitly taking a stance with respect to the differences between *Gawlik* and *Heinisch*, despite being made aware of them by a third party intervention. Hence, the degree to which whistleblowers may be obliged to privately investigate a matter and whether or not the eventual outcome of a public investigation may subsequently impact the level of protection afforded to whistleblowers is still somewhat unclear within the ECtHR's own body of case law.[41]

Factor number (3) in the ECtHR's "balancing exercise" is the availability of alternative reporting channels or remedies, i.e., whether the whistleblower made use of "any other effective means of remedying the wrongdoing which he intended to uncover" before they disclosed the information.[42] In *Guja*, the court asked whether the applicant could have first turned his "superior or other competent authority or body",[43] thereby in principle establishing a hierarchy between public disclosures and

[36] *Guja* (note 9) § 75, citing (inter alia) *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, 20 May 1999, https://hudoc.echr.coe.int/eng?i=001-58369 (concerning the duties of newspapers and their editors).
[37] *Heinisch* (note 18) § 80.
[38] *Gawlik* (note 24) § 75.
[39] Ibid. § 5-17.
[40] *Halet* (note 12) § 127.
[41] This issue will be discussed further in Section 4.2.2 of this article.
[42] *Guja* (note 9) § 73.
[43] *Guja* (note 9) §§ 73, 80-84.

internal and/or external reports. In subsequent decisions, the court reiterated this principle: for example in *Marchenko v. Ukraine*, where a public-school teacher sent several letters with allegations about the misappropriation of public funds and other allegations to a public auditing body and the public prosecutor's office, which the court deemed to be the competent bodies in this case.[44] While a general hierarchy between public disclosures and reports is thus an established principle of the court, it is a little less clear if there is also another hierarchy between internal and external reporting, i.e., whether the court would specifically take into account if a person could have blown the whistle internally first by turning to an addressee within their respective institution or company before reporting the incident externally to a public (prosecuting) authority. The one case which might point in that direction is the case of *Heinisch v. Germany*, where the fifth section pointed out, in favour of the whistleblower, that she had previously complained about problems within the nursing home to her employer before filing a criminal complaint.[45] The court did so, however, in the context of referencing the Contracting State's national law, which generally required previous internal reporting.[46] Although the court's language is not entirely clear in this regard, it therefore seems more likely that the court simply assessed the case under the state's own legal standards, thereby implicitly declaring that a national requirement of prior internal reporting is still within a state's power of appreciation, but without introducing a general hierarchy between internal and external reporting as a new criterion under the court's factor test.

Under factor (4), the ECtHR looks at the good faith motives of a whistleblower. As examples of motives which would not justify "a particularly strong level protection", the court in *Guja* mentioned acts which are "motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain".[47] Though the evaluation of motives necessarily goes along with a considerable degree of subjectivity and is thus susceptible to an inevitably high level legal uncertainty, the factor itself has not yet played a detrimental role for whistleblowers in subsequent cases, since the court usually held that the whistleblower clearly acted in good faith and/or that the other party has not provided sufficient evidence to question the applicant's good faith motivation.[48]

With respect to factor (5), the detriments caused to other interests involved, the court has recognized both the interest of public employers to maintain confidence in state intuitions[49] as well as an employer's commercial interests in their business

[44] *Marchenko v. Ukraine*, no 4063/04, §§ 6-16, 46-47, 19 February 2019, https://hudoc.echr.coe.int/eng?i=001-91415.
[45] *Heinisch* (note 18) § 72.
[46] Ibid. §§ 35, 73.
[47] *Guja* (note 9) § 77.
[48] See e.g. *Guja* (note 9) §§ 92-94.
[49] *Guja* (note 9) § 90.

reputation,[50] often weighting the degree to which these interests are concerned directly against the public interest in the information being revealed.[51] In addition to the employer's own interests, the court in *Gawlik v. Liechtenstein* has also taken into account the personal and professional reputation of the individual person concerned by the report, in that case the chief physician who was personally accused of acts of euthanasia.[52] Expanding upon this concept, the Grand Chamber in *Halet* held that the detriments taken into account are not limited to the employer's own interests, but instead encompass all detrimental effects on private and public interests involved taken as a whole.[53] Noteably, this also includes general public interests which may be in conflict with the public interest in the disclosure of information, such as the wider economic good, the protection of property and the preservation of protected secrets.[54]

The final factor number (6), the severity of the sanctions, deals with the proportionality between the specific kind of whistleblowing at hand and the individual sanctions taken against the whistleblower. In this context, the court has repeatedly stressed that a dismissal is the heaviest sanction possible under labour law and is therefore in need of particular justification.[55] Additionally, criminal convictions are viewed as already being severe due to their very nature, even if the particular penalty imposed in a case is relatively minor.[56] When assessing the severity of a sanction, the ECtHR does not only consider the personal repercussions for the whistleblower, but also takes into account potential chilling effects those sanctions might have on other potential whistleblowers,[57] thereby underlining a society's general public interest in acts whistleblowing beyond the individual case before the court.[58]

3 The ECtHR's six-factor test vis-à-vis the provisions of the Whistleblowing Directive

Having discussed the different elements of the ECtHR's six-factor test, we can now turn to the Whistleblowing Directive and determine to what extent its conditions

[50] *Heinisch* (note 18) § 88-89.
[51] See e.g. *Guja* (note 9) § 91*Heinisch* (note 18) §§ 88, 89; *Gawlik* (note 24) § 80.
[52] *Gawlik* (note 24) § 79.
[53] *Halet* (note 12) § 147-48.
[54] Ibid. § 147. More specifically, the court takes into account whether a disclosure came into conflict with applicable criminal provisions which are seen as indicators for a particularily strong public interests and then used as counter weight against the public interest in the disclose being made (see ibid. §§ 196-97, 202).
[55] See e.g. *Guja* (note 9) § 95; *Heinisch* (note 18) § 91; *Gawlik* (note 24) § 84.
[56] *Halet* (note 12) §§ 150-52.
[57] *Guja* (note 9) § 95; *Heinisch* (note 18) § 91.; *Gawlik* (note 24) § 91; *Halet* (note 12) §§ 149, 205.
[58] C.f. e.g. *Heinisch* (note 18) § 91; *Halet* (note 12) § 149.

for protection actually "draw" from the ECtHR's case law as stated by Recital 31 WBD.

Before looking at the individual elements of the WBD's relevant provisions, it is worthy to note one key difference between the two systems of protection that is rooted in their respective origins. While the ECtHR's six-factor test is a "balancing exercise",[59] meaning that the court will consider each factor and the degree to which it is indicative of the party's legitimate interests to determine the outcome of the case,[60] the WBD's requirements for protection are strict conditions, meaning that each condition has to be fulfilled individually in order for a whistleblower to receive protection. From the perspective of whistleblowers, each system has its advantages as well as disadvantages. On the one hand, the ECtHR's approach is more flexible in that a whistleblower may be protected under Article 10 ECHR even if not every single factor turns out in their favour. On the other hand, the WBD's conditions create a significantly more legally certain environment for whistleblowers because they can trust being protected as long as they meet all the criteria explicitly mentioned in the Directive, not having to fear that this protection could by stripped away from them because the balancing scales do eventually not tip their favour. Keeping in mind that legal certainty has proven to be a benchmark of effective whistleblower protection statutes that seek to encourage potential whistleblowers to share their information,[61] it made perfect sense for the Union legislator to place an emphasis on legally certain conditions in order to meet the Directive's main purpose of enhancing the enforcement of Union law through whistleblowing as a means to an end (see Article 1 WBD). The ECtHR's method on the other hand follows a traditional case-by-case approach typical for judicial rulemaking, allowing the court to assess future cases from a perspective of individual justice without backing itself into a corner of strict legal conditions.

Now looking at the WBD's conditions for protection, even a rough overview already reveals both structural similarities as well as remarkable differences between the two standards. While it is not the purpose of this article to provide an in depth-

[59] *Guja* (note 9) § 75.

[60] The six-factor test's nature as an overall balancing exercise has been called into question by the majority opinion of the third section's decision in Halet v. Luxembourg. In this decision, the first four factors seem to have been treated as strict conditions that needed to be fulfilled before entering the actual balancing phase of the fifth and sixth factor. See *Halet v. Luxembourg* [3rd section], no. 21884/18, §§ 89-91, 11 May 2021, https://hudoc.echr.coe.int/eng?i=001-210131.; c.f. ibid. § 9 of the minority opinion. However, this interpretation of the Guja test has been disregarded by the following decision of the Grand Chamber, stressing that each of the interdependent factors is part of a global analysis and subsequent porporionality test. See *Halet* (note 12) §§ 170.

[61] C.f. *Gerdemann*, Transatlantic Whistleblowing, 2018, paras. 49-50, 52, 56, 64 et seq., 88, 129, 166-67, 189, 207, 211, 220, 222, 225, 238, 253, 262, 273, 284, 287 (in German).

analysis of the WBD's and its provisions,[62] the requirements set up by the Directive can be grouped into the following four general conditions:

[1] Applicability of the personal scope of application[63]
[2] Reasonable grounds to believe in a breach of Union law within the Directive's material scope[64]
[3] Forwarding information believed to be necessary to reveal a breach either
- through an internal reporting channel, or
- through an external reporting channel, or
- by disclosing it to the public[65]

[4] In case of public disclosures, either
- prior external reporting without appropriate action being taken, or
- reasonable belief in an imminent or manifest danger to the public interest, or
- reasonable belief in a risk of retaliation in case of external reporting, or
- reasonable belief in a low prospect of the breach being effectively addressed.[66]

Right from the outset, we can see that the personal and material scope of application of conditions [1] and [2] have no counterpart in any of the ECtHR's six factors. For the most part, this is, however, no intentional deviation from the ECtHR's standards, but a direct consequence of the EU's limited legislative competences, which required the legislator to limit the material scope to (specific) breaches of Union law.[67] Though the same cannot be said with respect to the personal scope of application, the difference between the two standards of protection are mostly of minor consequence, because the personal scope in Article 4 WBD is deliberately broad in nature and covers most kinds of potential whistleblowers who may acquire relevant information in a work-related context and would also be covered under the ECtHR's standards.

The other element included in condition [2], the reasonable grounds to believe in a breach, finds its general counterpart in factor (2) of the ECtHR's test, the authenticity of the information. Both elements concern the whistleblower's state of mind at the time of a report or disclosure, and both elements do in principle give priority to the whistleblower's subjective assessment of the situation, not taking

[62] For a more detailed discussion of the WBD's anti-retaliation provisions, see *Gerdemann/Colneric*, The EU Whistleblower Directive and its Transposition, 12(2) European Labour Law Journal 193 (2021) (part 1) and 12(3) European Labour Law Journal 253 (2021) (part 2).
[63] Art. 4 WBD.
[64] Art. 6 (1) (a) WBD in connection with Art. 2 WBD
[65] Art. 6 (1) (b) WBD; Art. 21 (2), (4), (7) subpara (2) sent. 2 WBD.
[66] Art. 6(1)(b) in connection with 15 (1) WBD.
[67] See Art. 2 WBD in connection with the Annex Parts I and II; Recitals 5 et seq., 105 WBD.

away their protection if the information later turns out to be (unintentionally) false. Though it cannot yet be said whether the WBD's "reasonable belief" standard will eventually be fully in tune with the ECtHR's case law standard, both thus share the same abstract principles. Both standards do, however, also have different levels of specificity when compared to the other, in that they have both explicitly dealt with certain issues the other standard has not. The WBD protects whistleblowers not only in case they make reasonable, but factually false assumptions about the existence of a breach, but also if their assumptions are legally incorrect, specifically if they falsely believe that the information in question falls within the scope of the Directive.[68] On the other hand, the ECtHR has not yet dealt with any legal errors on behalf of a whistleblower and therefore has not yet answered the questions of how such errors may or may not affect the outcome of the balancing test. Unlike the WBD, however, the ECtHR's fifth and second sections in *Heinisch* and *Gawlik* respectively have already weighed in on the question to what degree a whistleblower may be required to verify their information by investigating a matter on their own before reporting it to an external authority.[69] Furthermore, the court in *Gawlik* appears to apply a stricter standard if the accusations later turn out to be false,[70] a principle that is nowhere to found in the WBD and one that would be in conflict with the Directive's goal to effectively encourage potential whistleblowers to report breaches of Union law.

The most apparent deviation from the ECtHR's six-factor test can, however, be observed when comparing the requirements for internal and external reporting in condition [3] vis-à-vis the ECtHR's six-factor text. In order to receive protection under the WDB when reporting a breach of Union law, most of what a whistleblower has to do is to forward their information through the correct channel, i.e., an internal reporting channel set up according to Article 8.9 WBD and/or an external reporting channel established on the basis of 11-13 WBD.[71] In doing so, they also have to limit the information reported to the extent that they may reasonably believe is necessary to reveal the breach.[72] Conversely, the ECtHR's takes into account no less than four other factors when assessing whether a report warrants protection, the factors [1], [4], [5] and [6], which are in almost no way reflected in the WBD's whistleblower protection scheme. The only factor one may argue is at least implicitly present in the Directive, albeit in a modified form, is the public

[68] Art. 6 (1) (a) WBD.
[69] See above in Section 2 and below in Section 4.2.2.
[70] *Gawlik* (note 24) § 75; quoted by *Halet* (note 12) § 127.
[71] Art. 6(1)(b) WBD.
[72] Art. 21(4) WBD e contrario. Though this criterion is not included directly in Art. 6 WBD due to its late introduction in the legislative process, it is to be read as a general criterion applying to all cases. See *Gerdemann/Colneric*, The EU Whistleblower Directive and its Transposition: Part 1, 12(2) European Labour Law Journal 193, 202-03 (2021).

interest factor. Although the WBD's conditions for protections to not include any concrete assessment of the public interest concerned in each individual case,[73] the kinds of breaches of Union law that were included in the Directive's material scope have been selected based their potential harm to the public interest,[74] thereby creating a kind of abstract, pre-determined public interest test. The other factors, however, do not have any kind of equivalence in the WBD's conditions for protection. Neither does the WBD consider the detriments to the employer (factor [5]), nor does it look at the severity of the sanction taken against the whistleblower (factor [6]). Moreover, the whistleblower' s individual motives (factor [4]) are not just omitted as a condition for protection but are explicitly disregarded as irrelevant for the protection of whistleblowers.[75] All of this inevitably creates the impression that legislator's intent when drafting the conditions for reporting was not so much to "draw" from the ECtHR's case law, but to deviate from it in almost every way possible.

A much more nuanced relationship can, however, be observed when looking at the criteria for public disclosures. From the outset, both systems of protection see this variant of whistleblowing as something of a last resort that requires additional justification. The ECtHR generally requires whistleblowers to consider the availability of other effective reporting channels or remedies before going public (factor [3]). Much in the same way, Article 15(1)(a) WBD requires whistleblowers to first turn to an external reporting channel, only allowing them to disclose the information publicly if no appropriate action was taken in response to their report within a timeframe of three to six month,[76] thereby demonstrating the ineffectiveness of the available external channel in the particular case. Beyond that, Article 15(1)(b) WBD allows for three other ways to directly disclose information to the public, most of which are guided by the legislative concept of effectively enforcing Union law. Under Article 15(1)(b)(i) WBD, whistleblowers can go public if the breach may constitute an imminent or manifest danger to the public interest, i.e., the negative consequences of the breach could not be prevented in time through means of internal or external reporting. Under Article 15(1)(b)(ii) WBD, whistleblowers have two further options to directly inform the public, both of which mainly concern cases where the external channel's ability to handle a case is foreseeably compromised, e.g., if there is a specific risk of retaliation or a low prospect of the breach being effectively addressed. For the most part, the situations covered by Article 15(b) WBD have not yet come into play in cases before the ECtHR, though it can be assumed that the court would take aspects of such nature into account when deciding a case.[77] Beyond this, however, the way the ECtHR looks at public disclosure cases is notably different from the enforcement-driven approach of the

[73] A limited exception to this rule is Art. 15(1)(b)(i) WBD.
[74] See Recitals 3, 5, 6 et seq. WBD.
[75] See Recital 32 sent. 5 WBD.
[76] Art. 15(1)(a) WBD in connection with Art. 11(2)(d) WBD.
[77] The most likely "home" for most of these aspects would be factor (3).

Directive and potentially covers a much different range of justifications for disclosures to the general public. The reason for this lies in the different rationale the ECtHR has applied since *Guja*, which again is based on the rationale of Article 10 ECHR's freedom of expression. From the perspective of the ECtHR, the main function of whistleblowing is to enable discussions about matters of public concern, making the act of whistleblowing itself essential to democracy as a whole.[78] As much as democratic societies have a legitimate interest to be informed about issues that give rise to political debate, whistleblowers have a right to be protected and not to be discouraged to voice their opinion.[79] This became particularly apparent in the explicit recognition of a disclosure category relating to matters that spark a debate giving rise to controversy as to whether or not there is harm to the public interest in the *Halet* case.[80] It is this essential connection between a whistleblower's freedom of expression and the interests of the public that creates a general public interest in the act of whistleblowing, one that is largely independent from the conceptially narrower interest of law enforcement. Consequently, many whistleblowing cases which might not fall under the umbrella of Article 15(1) WBD's exhaustive list of reasons would nonetheless in principle be eligible for protection under the ECtHR's more flexible case law, even if they fell within the material scope of the Directive. This may very well include future cases similar to the ones in seminal decisions like *Guja*, *Heinisch* and *Halet*, where the main issue was not about uncovering certain breaches of law, but about a general public interest in the information being disclosed to the general public. Hence, although the WBD's conditions for protection and the ECtHR's six-factor test share some similar concepts, the practical overlap of each system's principles is anything but complete and may give rise to some significantly different outcomes in future cases.

Looking at the overall picture of the comparison between the WBD's and the ECtHR's standards of protection, it now becomes clear that Directive's harmonious claim that it "draws upon the case law of the European Court of Human Rights" has to been read as more of a statement of intent rather than one of fact. None of this is to say, however, that either set of criteria is in principle superior to the other from a jurisprudential or legal policy perspective. For most whistleblowers falling under the Directive's scope of application, the WBD's legally certain set of comparatively few conditions, together with its comprehensive array of anti-retaliation rights and privileges (Article 21 WBD), will create a much stronger and more reliable level of statutory protection than the ECtHR's six-factor test has been doing so far. Nonetheless, the ECtHR's distinctly different approach of creating a minimum standard of protection based on intentionally flexible case law principles and

[78] C.f. *Guja* (note 9) § 91.
[79] C.f. ibid. § 91; *Heinisch* (note 18) § 91.
[80] *Halet* (note 12) § 140.

considerations of general public interest will remain to play an important role in various situations. This coexistence of these two very different standards of whistleblower protection bears in it a potential both for legal conflict as well as complementary benefits, the consequences of which will be discussed below.[81]

4 Legal consequences of the differences between each system of protection

The following discussion will primarily look at three different ways the ECtHR's six-factor test can influence the WBD transposition and effects within the Member States. First, it will look at the six-factor test as a potential invalidating factor, i.e., whether the ECtHR's case law may lead to a partial annulment of the Whistleblowing Directive due to a violation of EU primary law. The analysis will then turn to the six-factor test as a potential interpretive factor, i.e., whether the principles established by the ECtHR's decisions may influence and concretize the interpretation of some of the WBD's provisions. Finally, the ECtHR's case law future role as an independent factor will be discussed, i.e., in what kind of whistleblowing situation will the six-factor test likely continue to play an important role beyond the scope of the Directive.

4.1 The ECtHR's case law as an invalidating factor

4.1.1 The ECHR's place in EU primary law

When considering the six-factor test as a potential factor for legally invalidating parts of the Directive, one first has to look at the relationship between the EU's secondary and primary law and its interplay with the ECHR. According to Article 6(1) TEU, the Union "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union" (CFR) to be part of the EU's primary law. Article 52(3) sentence 1 CFR then declares that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention." This synchronisation of the rights granted by the CFR and the ECHR is further specified in Article 52(3) sentence 2 CFR, whereby Union law is not hindered to

[81] While the following discussion will focus on the ECtHR's effects on the WBD, it is worth noting that the relationship potentially works both ways, especially since the ECtHR has now recognized the WBD as a relevant source of law. See for the first time *Halet* [3rd section] no. 21884/18§ 51, 11 Mai 2021, https://hudoc.echr.coe.int/eng?i=001-210131, and – in much more detail – *Halet* [GC] (note 12) § 58.

provide a more extensive level of protection than the ECHR. In effect, Article 6(1) TEU thereby incorporates the ECtHR's minimum standard of human rights protection as the EU's own minimum standard of fundamental rights protection.[82] If an act of secondary Union law violates this minimum standard, it can hence be annulled in full or in part[83] by the ECJ based on Article 263(1) sentence 1, Article 264 TEU.[84] Another route to the same result leads through Article 6(3) TEU, which states that fundamental rights guaranteed by the ECHR constitute general principles of Union law. Given that the ECJ has long recognized that a violation of the EU's general principles and in particular of the ECtHR's minimum standards of human rights protection constitutes a violation of primary Union law,[85] any provision of the WBD whose level of protection falls below the one provided by ECtHR's six-factor test can be annulled on the basis of both Article 6(1) TEU as well as Article 6(3) TEU.[86]

From the opposite perspective, this also means that any other kinds of differences, in particular those caused by a more favourable treatment of whistleblowers under the WBD, are irrelevant in this regard. The previous comparison of the ECtHR's and the WBD's standards has already revealed that most of the differences between the two standards stem from the fact that the ECtHR considers several factors which the WBD does not require as conditions for protection. As a

[82] See e.g. judgment of 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier Ministre and Others*, ECLI:EU:C:2020:791, para. 124 with further references; c.f. as part of the historical basis of this approach judgment of 12 November 1969, *Stauder v. City of Ulm*, C-29/69, ECLI:EU:C:1969:57.

[83] An annulment in part requires the provision in question to be severable, i.e. that a partial annulment would not have the effect of altering the Directive's substance as a whole. See judgment of 6 December 2012, *Commission v. Verhuizingen Coppens NV*, C-441/11 P, ECLI:EU:C:2012:778, paras. 34-38; judgment of 24 May 2005, *French Republic v. Parliament and Council*, C-244/03, ECLI:EU:C:2005:299, paras. 12-13 (with further references); judgment of 10 December 2002, *Commission v. Council*, C-29/99, ECLI:EU:C:2002:734, paras. 45-50.

[84] Effectively the same result could also be achieved by a declaration of invalidity in a preliminary ruling under Art. 267 TFEU. See e.g. judgment of 26 April 1994, *Roquette Frères SA v Hauptzollamt Geldern*, C-228/92, ECLI:EU:C:1994:168, paras. 17 et seq.

[85] C.f. as the foundation of this concept judgment of 14 May 1974, *Nold v. Commission*, C-4/73, ECLI:EU:C:1969:57, para. 13; judgment of 21 September 1989, joined cases 46/87 and 227/88, *Hoechst v. Commission*, ECLI:EU:C:1989:337, para. 13.

[86] Art. 6(3) TEU's key difference to Art. 6(1) TEU as well as its main raison d'être lies in the fact that the EJC traditionally derived fundamental rights from general principles found in the ECHR as well "constitutional traditions common to the Member States". Since this judicial approach is thought to be more flexible and adaptive than having to stick to the words of a codified text, Art. 6 (3) TEU explicitly allowed it to continue even after the CFR's introduction. For the problem at hand, however, this dual form of fundamental rights protection bears no specific relevance, because both Art. 6(1) TEU as well as Art. 6(3) TEU ultimately point to the ECtHR's case law as being the defining minimum standard for whistleblower protection under primary Union law.

consequence, there are only a few—albeit important—candidates for the rather dramatic role as potential causes for a partial annulment of Directive.

4.1.2 Potential annulment of Article 10 WBD with respect to direct external reporting

Although the precise relationship between the ECtHR's six-factor test and the WBD's conditions for protection has thus far not been analysed in much detail within academic and/or political discourse, there is one of the ECtHR's factors that has repeatedly been interpreted in a way that would effectively cause it to be irreconcilable with the WBD's scheme of protection. The factor in question is the availability of alternative reporting channels or remedies (factor (3)). Relying on certain language found in the *Heinisch* decision by the ECtHR's fifth section,[87] many legal scholars, especially in Germany, have interpreted this factor in a way that it generally requires whistleblowers to report relevant incidents internally first to allow their employers to address the underlying problem themselves, thereby avoiding any potentially detrimental involvement of external authorities.[88] This in turn has led a considerable number of scholars to believe that any secondary law provision that disregards this priority of internal reporting, in particular any unconditional external reporting right, would violate primary Union law, more specifically Article 11 CFR (freedom of expression and information) and/or Article 16 CFR (freedom to conduct a business).[89] The WBD's conditions for protection do, however, not entail any kind of priority of internal reporting. To the contrary, Article 10 WBD explicitly grants whistleblower an intentionally[90] unconditional right to report relevant breaches of Union law directly to the Member State's external reporting channels, making it impossible to even attempt to interpret the Directive in a way that would render it to be consistent with any kind of initial internal reporting requirement.[91] As a consequence, at least Article 10 WBD would have to be annulled either in full or in part based on Article 6 (1), (3) TEU. Moreover, should the ECJ arrive at the conclusion that Article 10 WBD and/or the right for direct external reporting are

[87] *Heinisch* (note 18) § 65, 72, 76.

[88] See e.g. *Forst*, Strafanzeige gegen den Arbeitgeber – Grund zur Kündigung des Arbeitsvertrags?, Neue Juristische Wochenschrift 2011, 3477, 3481; *Ohly*, Das neue Geschäftsgeheimnisgesetz im Überblick, Gewerblicher Rechtsschutz und Urheberrecht 2019, 441, 448.

[89] See e.g. *Schmitt*, Whistleblowing revisited – Anpassungs- und Regelungsbedarf im deutschen Recht – Zugleich ein Beitrag zu den arbeitsrechtlichen Auswirkungen der Geheimnisschutzrichtlinie, Recht der Arbeit 2017, 365, 367-68; *Thüsing/Rombey*, Nachdenken über den Richtlinienvorschlag der EU-Kommission zum Schutz von Whistleblowern, Neue Zeitschrift für Gesellschaftsrecht 2018, 1001, 1003 (each with further references).

[90] The direct internal reporting right was introduced during the Trialogue procedure upon the specific request of the European Parliament.

[91] Regarding the general method of interpreting secondary law in a way that renders it consistent with primary law, c.f. e.g. judgment of 21 March 1991, *Rauh v. Hauptzollamt Nürnberg-Fürth*, C-314/89, ECLI:EU:C:1991:143, para. 17.

inseparable from the rest of the WBD's whistleblower protection scheme, the eventual scope of annulment might even go way beyond that and affect large parts of the Directive as a whole.[92]

The actual threat of the EJC eventually disbanding much the WBD's regulatory structure is, however, less grave than this line of argument may suggest. First of all, a systematic reading of the ECtHR's case law, including the *Heinisch* decision, does not support the concept of a principle of prior internal reporting being part of the ECtHR's mandatory minimum standard for whistleblowing cases. As has already been explained above,[93] the court in *Heinisch* only mentioned the requirement of initial internal reports in the context of reviewing the applicable standard under the Contracting State's national law, deeming it to be within the limits of a "necessary" interference in the freedom of expression granted by Article 10 ECHR.[94] Hence, limiting an employee's freedom of expression in such a manner may be justifiable, but is by no means required as a mandatory condition for protection. While it is true that the court in *Heinisch* is "mindful that employees owe to their employer a duty of loyalty",[95] this mindfulness is not to be confused with a minimum standard for the protection of human rights. This reading of the decision is also supported by the fact that the *Heinisch* case has only been reviewed from the perspective of the whistleblower's freedom of expression, not from the angle of the employer's business interest, which do not even constitute a human right under the ECHR. As a consequence, factor (3) of the ECtHR's six-factor test cannot serve as a viable reason to question Article 10 WBD's compliance with primary law.

That being said, one may of course argue that an unconditional right to external reporting could violate the employer's right to conduct a business under Article 16 CFR. While not entirely out of question, such an argument could, however, neither rely on the ECtHR's case law, nor does it seem likely that the ECJ would interpret Article 16 CFR in such a way. For one, the ECJ generally grants the Union legislator an explicitly wide margin of discretion when striking a balance between two fundamental rights such as Articles 11 CFR and 16 CFR.[96] Secondly, the ECJ has often pointed out that the freedom to conduct a business is not absolute and traditionally respects the legislator's discretion when determining its proportionate limits, especially when it is clear that those limits genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others in accordance with Article 52(1) CFR.[97] The right for direct external

[92] C.f. (note 83).
[93] See in Section 2.
[94] *Heinisch* (note 18) § 73.
[95] Ibid. § 64.
[96] See e.g. judgment of 12 June 2003, *Schmidberger v. Republic of Austria*, C-112/00, ECLI:EU:C:2003:333, paras 80-82.
[97] See e.g. judgment of 22 January 2013, Sky Österreich v. Österreichischer Rundfunk, C-283/11, EU:C:2013:28, paras. 45 et seq.; judgment of 26 October 2017, *Finančné riaditeľstvo Slovenskej republiky v. BB construct*, C-534/16, ECLI:EU:C:2017:820, paras. 35 et seq.

reporting clearly serves the Whistleblowing Directive's major purpose to enhance the enforcement of Union law and policies (Article 1 WBD) by making competent authorities aware of a breach, protects the whistleblowers' freedom of expression (Article 11 CFR) and pre-emptively shields them from the prevalent threat of internal retaliation. In light of this as well as the WBD's compliance with factor (3) of the ECtHR's minimum standard test, it seems quite unlikely that the ECJ would interfere with the legislator's decision to equally protect both internal and external reports without giving one form of whistleblowing preference over the other.

In sum, the absence of a principle of prior internal whistleblowing in the WBD's conditions for protection constitutes no conflict with primary law under the standards of Article 6(1), (3) TEU.

4.1.3 Potential annulment of Article 15 WBD with respect to public interest disclosures

While the Union legislator's decision to allow for direct external reporting to whistleblowing authorities does not create an irreconcilable rift between the WBD and the ECtHR's case law, there is another issue that might very well cause some conflict. As described above, the ECtHR generally allows for public disclosures in cases where common knowledge of relevant information is in the public interest.[98] The WBD on the other hand allows for direct public disclosures only under the specific circumstances mentioned in Article 15(1)(b) WBD, i.e., if a breach may constitute an imminent or manifest danger to the public interest, when there is a risk of retaliation even in cases of external reporting, or when there is a low prospect of the breach being effectively addressed. On its face, this provision does not include a wide variety of cases decided by the ECtHR in which the underlying reason for the disclosure did not primarily stem from a lack of options to immediately rectify a problem, but from the legitimate interest of a democratic society to learn about and debate matters of general public concern.[99]

This conceptual difference would of course only be relevant with respect to Article 6(1), (3) TEU if one assumes that Article 15 WBD was designed not only to improve whistleblower protection under specific circumstances, but also to restrict whistleblower protection in all other cases of public interest disclosures which are not explicitly mentioned within the provision. While such a reading may seem counterintuitive given the overall goal of the Directive to improve whistleblower protection across Europe through the introduction of mandatory minimum standards, it appears that the Commission in inclined to interpret Article 15(1) WBD in this very way. Upon being asked by Member States whether the Directive would keep them from allowing other kinds of direct public disclosures, the unit responsible for overseeing the transposition process explained that it considers Article 15(1) WBD to be exclusive since "[the] conditions set in Article 15(1) are meant to strike a fair balance between the public interest to bring to light breaches that may harm the

[98] See Section 2 above.
[99] C.f. e.g. *Guja* (note 9) §§ 74, 88, 91.

public interest and the right to freedom of speech and of information on the one hand, and to protect the interests of the persons concerned by the disclosure on the other hand (including reputational damage)"[100].

At first glance, this interpretation appears like a clear violation of Article 25 WBD, which explicitly states in its section 1 that "Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive […]" and in its section 2 that "[the] implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive." At second sight, however, there is indeed some merit to this line of argument, since Article 25 WBD is not the only provision in the Directive dealing with the issue of more favourable conditions for protection. Instead, Article 15(2) WBD also allows for exception to the rules of Article 15(1) WBD, but only in cases "where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information". The original intent of this exception was to preserve the longstanding whistleblowing rights granted by the Swedish constitution that do in many ways go beyond the level of protection afforded by the Directive,[101] which is why Article 15(2) WBD has also been dubbed the "Swedish exception".[102] Although the provision is phrased in an abstract manner, this history of the provision together with the fact that no other Member State has a comparable high-level system of protection arguably means that no other Member State will be able to meet Article 15(2) WBD's specific requirements, therefore making it effectively impossible to deviate from Article 15(1) WBD.[103] From a systematic point of view, it could hence be argued that Article 15(2) WBD is a more specific clause than Article 25 WBD, thereby limiting additional whistleblowing rights (exclusively) in the context of

[100] *European Commission (Unit C2)*, Minutes of the fifth meeting of the Commission expert group on Directive (EU) 2019/1937, 14 June 2021, S. 4-5, https://ec.europa.eu/transparency/expert-groups-register/core/api/front/document/54869/download.

[101] See the article by *Fast*, at page 35 et seq. of this book.

[102] The exception has been included during the Trialogue proceeding in the Council upon request of the Swedish government. C.f. the Council's mandate for negotiations in the document ST_5747_2019_INIT, 29 January 2019, at page 47. Regarding the effects of a provision's history on its interpretation, see e.g. judgment of 10 December 2018, *Whightman and Others v. Secretary of State for Exiting the European Union*, C-621/18, ECLI:EU:C:2018:999, para. 47 (with further references).

[103] The abstract wording of Art. 15(2) WBD does no hinder an individual interpretation for just one Member State, because the ECJ generally does not consider the form of an act or provision to be prejudicial to its content. C.f. generally e.g. judgment of 12 July 2022, *Nord Stream 2 v. Parliament and Council*, C-348/20 P, ECLI:EU:C:2022:548, paras. 62-67.

public disclosures.[104] This in turn would, however, send Article 15 WBD on a direct collision course with the ECtHR's established minimum protection standards for public disclosures in the general public interest,[105] arguably resulting in a violation of Article 6(1), (3) TEU and eventually leading to a (partial) annulment of the Directive.[106]

Although this line of argument is not entirely far-fetched, there are also various reasons why the serious ramifications of a partially invalid Directive can probably be avoided. First of all, the idea that the Union legislator deliberately constructed Article 15 WBD in a way that would in effect limit the Member State's ability to allow for and protect other types of public interest disclosures and thus restrict and/or reduce the level of whistleblower protection in every country but Sweden seems less than plausible. While it is true that the "Swedish exception" was designed to address Sweden's particular concerns that the Directive might create conflicts with its constitution, there is nothing in the Directive's text (or its recitals) to assume that the favourability and non-regression clauses of Article 25 WBD were supposed to be set aside (solely) in the context of public disclosures for all but one Member State. To the contrary, Article 25(1) WBD mentions only two provisions which may not be touched when creating more favourable national whistleblowing standards: the specific measures for the protection of persons concerned in Article 22 WBD as well as penalties and compensations in the context of knowingly false reports and disclosures in Article 23(3) WBD. Both provisions have nothing to do with public disclosures in general, nor is Article 15 WBD mentioned in Article 23(1) WBD. Furthermore, the main rationale provided by the Commission, i.e., that Article 15 WBD seeks to strike a fair balance between the interests of whistleblowers and other concerned persons, equally applies to all other provisions of the Directive as well, including the general conditions for internal and external reporting in Article 6 WBD. Why then should only a whistleblower's right to publicly disclose information to the public be forever set in stone by Article 15 WBD, when, on the other hand, Member States are entirely free to improve all other aspects of national whistleblowing laws beyond the Directive's minimum standard?

Secondly, even if one was to assume that the legislator's intent was indeed to implicitly limit disclosures in the public interest, there would still be serious doubts that such an objective would even be within the EU's legislative competences. After

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[104] Even if one were to assume that other Member States' national provisions might theoretically fall under Art. 15(2) WBD, meeting the requirements of Art. 15(2) WBD would virtually be impossible and thus ultimately hinder the enactment of further disclosure provisions in other Member States.

[105] See above under Section 2.

[106] Since Art. 15 WBD deals with the specific issue of public disclosures, it can be assumed that the ECJ would consider it to be separable from the rest of the Directive and thus only annul Art. 15 WBD either in full or in part, leaving the rest of the Directive untouched. C.f. judgment of 10 December 2002, *Commission v. Council*, C-29/99, ECLI:EU:C:2002:734, paras. 45-50.

all, the sovereign power to decide what kind of matters are of such grave importance to the public interest that they should be discussed in the public sphere and thus be dealt with through the means of the democratic decision-making process arguably touches the very core of a state's fundamental structure as a democracy within the meaning of Article 4(2) sentence 1 TEU. Although the EU has the power to comprehensively and exhaustively regulate whistleblowing matters for the purpose of enhancing the enforcement of Union law,[107] this power does not entail a right to prohibit Member States from dealing with matters of essential relevance for their democratic public order, at least not by virtue of a mere ancillary consequence of secondary law.

If, however, one was to accept the notion that Article 15(2) WBD was in principle both intended as well as capable of limiting public disclosures to the specific situations mentioned in Article 15(1) WBD, such an interpretation would still have to comply with ECJ's case law on the relationship between primary and secondary law. According to principles long established by the ECJ[108] and nowadays enshrined in Article 6(3) TEU, the ECHR's fundamental rights are part of the general principles of Union law. Given that secondary law always has to be interpreted as far as possible in a manner that is consistent with the general principles of Union law,[109] the provisions of the WBD always have to be interpreted in accordance with the ECtHR's relevant case law on public disclosures, thereby respecting the fact that the rights under the ECHR constitute the "minimum threshold of protection"[110] under Union law. Consequentially, one could argue that Article 15(2) WBD's "Swedish exception" for specific national systems protecting disclosures to the press should be interpreted in a way that it also includes the ECtHR's specific case law on public disclosures, which has in past served as a frequent point of reference for national courts when interpreting their own national protection standards and are thereby ultimately part of a disclosure-specific national system of protection. While such an interpretation would certainly test the limits of a fair reading of the provision's text, it could find additional support in Recital 33 sentence 4 WBD, which states that the Directive's criteria for public disclosures is supposed to be "in line with the criteria developed in the case law of the ECHR". Even though the above analysis under Section 2 has revealed that this has to be read more like a statement

[107] C.f. Recital 105 WBD.

[108] See judgment of 13 December 1979, *Hauer v. Rheinland-Pfalz*, 44-79, ECLI:EU:C:1979:290, paras. 15 et seq.; judgment of 21 September 1989, *Hoechst v. Commission*, joined cases 46/87 and 227/88, ECLI:EU:C:1989:337, para. 13.

[109] See judgment of 21 March 1991, *Rauh v. Hauptzollamt Nürnberg-Fürth*, C-314/89, ECLI:EU:C:1991:143, para. 17; judgment of 27 January 1994, *Herbrink v. Minister van Landbouw, Natuurbeheer en Visserij*, C-98/91, ECLI:EU:C:1994:24, para. 9.

[110] Judgment of 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier Ministre and Others*, ECLI:EU:C:2020:791, para. 124 (with further references).

of intent rather than of fact, one could even argue that the ECtHR case law is not only shielded by Article 15(2) WBD, but implicitly included in Article 15(1) WBD, meaning that public disclosures would not only be protected based on the ECtHR minimum standard of protection, but would also trigger the various whistleblower rights granted under the Directive. In any case, if one accepts the premise of a more lenient interpretation of Article 15 (2) WBD's scope, public disclosures would in effect not be limited to the specific situations mentioned by Article 15(1) WBD.[111]

Finally, even under the assumption that Article 15(1) WBD is exclusive in nature and cannot be interpreted to include other kinds of public disclosures, there would still be one final way to give effect to the ECtHR's broader understanding of what a protected disclosure can be. Generally speaking, the applicability of Article 15(1) WBD depends on the applicability of the Directive as a whole. Hence, protecting additional kinds of public disclosures can only violate the presumed exclusivity of Article 15(1) WBD to the extent that the nature of the information disclosed falls under the WBD's material scope of application as defined by Article 2, Annex Parts I and II WBD. If, however, the actual reason for a whistleblower to disclose information was not that their information contained elements which concerned specific breaches of Union law, but that it revealed a far greater problem of general concern for the public interest, then this reason can be seen as lying outside the scope of the Directive and therefore be open for justification on other grounds and under other conditions than those required by the Directive. If, for example, a whistleblower discovers that government agencies deliberately violate Union law on a massive scale by engaging in surveillance practices contrary to the rules established by the GDPR and other legislation within the WBD's material scope,[112] then it could still by argued that such a whistleblower may not only invoke the rights and privileges granted by the WBD, but also rely on the protection afforded by the ECtHR's specific case law dealing with disclosures general public interest. This kind of parallel coexistence would not exactly solve the partial rift between Article 15 WBD and the ECtHR's case law, but at least create a modus vivendi that could avoid a direct conflict between the two systems of protection.[113]

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[111] Though it is possible that the ECJ would follow this line of thought, it should, however, be noted that the ECJ is traditionally less keen than some Member States' national courts to "save" a provisions from annulment if clear indications in the provision's text and historical purpose point towards an interpretation in conflict with primary law. Rahter than interpreting Art. 15(2) WBD to cover more than just a very specific and distinctly national system of protection, it thus appears more likely that the ECJ would follow one of the two more convincing lines of argument above or resort to a partial annulment of Art. 15 WBD.

[112] See Art. 2(1)(a)(x), Annex Part I, J. WBD.

[113] Accepting the concept that the same piece of information can simultaneously fall both inside and outside the WBD's scope of application would of course create its own follow-up problems. Specifically, it raises a question of when breaches of Union law become a matter so important to a democratic society that the public has a legitimate interest in being informed about them even if the conditions for a disclosure under Art. 15(1) WBD are not met (c.f. *Guja v. Moldova* [GC], no. 14277/04, §§ 88, 12 February 2008, https://hudoc.echr.coe.int/eng?i=001-85016).

All things considered, there are several plausibly ways to avoid a direct conflict between the Directive's provisions on public disclosures and the principles set up by the ECtHR, making a violation of Article 6(1), (3) TEU less likely than it might seem at first glance. It is, however, worthy to note that the concrete results would differ depending on which of the four above-mentioned arguments one might follow. While arguments one and two would in effect grant Member States ample authority to establish their own additional reasons for disclosures even if those are not mentioned in Article 15(1) WBD, arguments three and four would only secure a minimum level of protection that is still in accordance with the ECtHR's minimum standards, without allowing Member States to go even further than that. Furthermore, only the first two arguments stand in direct contrast to the Commission's current interpretation of Article 15 WBD, since the Commission has not yet explicitly weighed in on the question of how Article 15 WBD could be aligned with the ECtHR's principles concerning public disclosures.

Given that the Directive's overall objective is to improve whistleblower protection across Europe and not to hinder it by means of some kind of implicit principle of exclusivity, it does, however, seem most convincing to already challenge the Commission's base-line argument that the true intention of Article 15(2) WBD was to limit the protection of other kinds of public disclosures. Instead, Article 15(2) WBD should essentially be read as a clarifying reiteration of Article 25 WBD's general favourability and non-regression clauses that mainly served as a kind of assurance for one individual Member State and its specific concerns. If one wants to find a meaningful objective purpose in Article 15(2) WBD beyond its historic purpose to ease one Member State's worries during the draft process, such a purpose could be seen in Article 15(2) WBD exempting national systems of whistleblower protection which are part of a Member State's national (constitutional) identity from having to comply with the requirements Article 25 WBD's, i.e., that such systems may even contain some less-favourable elements without violating the Directive's minimum standard.

Regardless of which line of argument and outcome one might find most convincing or desirable, the threat of Article 15 WBD potentially violating primary Union law will nonetheless be looming around the corner likely up until the ECJ is given a chance to have a clarifying say on the matter.

4.2 The ECHR's case law as an interpretive factor

4.2.1 The ECHR as a source of interpretation for secondary Union law

Besides being a potential cause for the partial annulment of the Directive's provisions, the rules and principles established by the ECHR may also function as an interpretative factor, meaning that they can serve as a means to concretize some of the Directive's provisions which are still open to interpretation. Importantly, this kind of influence on the WBD would not rest on the primary law principles of

Article 6(1), (3) TEU, but rather stem from an interpretation of the provision's purpose against the backdrop of the ECtHR's case law as a source of inspiration for parts of the WBD. The ECJ has long held that every provision of Union law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[114] Within this contextual interpretation, the recitals of a Directive, while not being able to serve as an independent source of rules,[115] may help to resolve linguistic ambiguities within a Directive's provisions[116] and/or determine their purpose and scope.[117] Furthermore, the ECJ has recognized various times that the origins of a provision may also provide information relevant to its interpretation.[118] Thus, in theory, a reference like the one in Recital 31 WBD, which explicitly states that the legislator "drew" on the ECtHR's whistleblowing case law to design its own scheme of whistleblower protection, may be seen as a conceptual link between the WBD and the ECtHR's case law principles, which may therefore be consulted when interpreting the purpose and meaning of a provision.

There are, however, several caveats to be kept in mind when trying to use the ECtHR's case law to give further meaning to the WBD's conditions for protection, both with respect to the general method of interpretation described above as well as its application to the WBD in particular. First, while the above line of argument is coherent with the ECJ's general principles on the interpretation of secondary law, to the author's knowledge there has not yet been a case where the ECJ has explicitly made use of ECtHR case law being mentioned in a directive's recitals as a distinct source of interpretation. Second, although the ECJ has declared that the origins of a provision may be valuable to interpret its meaning, the ECJ traditionally gives more weight to other methods of interpretation, often resorting to a more "objective" approach to determine a provision's purpose based on their "effet utile" and ability to promote Union policies.[119] Third, the principles found in the ECtHR's

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[114] Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 283/81, ECLI:EU:C:1982:335, para. 20.

[115] Judgment of 13 July 1989, *Casa Fleischhandels-GmbH v. Bundesanstalt für landwirtschaftliche Marktordnung*, C-215/88, ECLI:EU:C:1989:331, para. 31; judgment of 19 November 1998, *Nilsson and Others*, C-162/97, ECLI:EU:C:1998:554, para. 54.

[116] Judgment of 20 November 1997, *Moskof v. Ethnikos Organismos Kapnou*, C-244/95, ECLI:EU:C:1997:551, paras. 44-45.

[117] Judgment of 26 June 2001, *The Queen v. BECTU*, C-173/99, ECLI:EU:C:2001:356, paras. 36-39.

[118] Judgment of 14 July 2022, *Italian Republic v. Council*, joined cases C-59/18 and C-182/18, ECLI:EU:C:2022:567, para. 67; judgment of 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier Ministre and Others*, ECLI:EU:C:2020:791, para. 105.

[119] Even in cases where a provision's specific origins serve as the starting point of a line of argument, the ECJ will often turn to more general considerations and look at a provision's practical capacity to promote Union policy and/or principles derived from primary law. See e.g. judgment of 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier Ministre and Others*, ECLI:EU:C:2020:791, paras. 105 et seq.

case law have to be understood in the context of the court's limited standard of review, meaning that they usually just determine the outer limits of what a Contracting State can do when interfering with Article 10 ECHR. What the court does not do is to declare whether it considers these kinds of interferences to be a sound, much less the best possible legislative approach to design a whistleblowing statute. Fourth, as the analysis above has shown, the claim that the WBD "drew" on the ECtHR's six-factor test to design its conditions for protection is far from being an accurate description of the actual relationship between the two standards, limiting the extent to which the rules and principles found in the six-factor test can actually be used to understand the true purpose behind the WBD's provisions. Finally, when resorting to the ECtHR's case law to determine the legislator's intent at the time of drafting the WBD, the potential clues found in the ECtHR's decisions are on the same level as any other accepted source of secondary law interpretation, in particular other indications derived from the WBD's text, its recitals, and its general regulatory purpose.

4.2.2 Potential interpretation of the reasonable belief standard based on the ECtHR's case law

Keeping in mind those methodical considerations, there is especially one element of the WBD's conditions for protection that seems promising as a candidate for the interpretive force of the ECtHR's case law: The interpretation of the WBD's condition [2], the reasonable grounds to believe in a breach of Union law, in light of the corresponding case law under factor (2) of the ECtHR's test, the authenticity of the information. More specifically, the decisions under factor (2) that have already dealt with the question of whether a whistleblower may have an obligation to privately investigate an issue before reporting it to an authority or disclosing it to the public may help to interpret the reasonable belief requirement in Article 6(1)(a) WBD, which remains silent on this particular matter.

As a preliminary observation, this silence in the WBD's text could be interpreted as a conscious decision by the legislator not to include a criterion by which a whistleblower must "carefully verify, to the extent permitted by the circumstances, that [the information] is accurate and reliable".[120] Instead, all that is required by Article 6(1)(a) WBD is that the whistleblower "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive". This speaks in favour of a subjective interpretation of the WBD's factor (2) linked to a specific point in time, meaning that it is sufficient that a whistleblower personally believed in the information being true in a way that can be described as reasonable at the time of reporting or disclosing the information, without being required to privately investigate the veracity of their suspicions before forwarding relevant information.

[120] *Guja* (note 9) § 75.

Despite this, the WBD's text alone does not provide a definitive answer to the question of a whistleblower's potential investigative duties, especially since it does not elaborate on the interpretation of the word "reasonable". What is to be considered reasonable naturally depends both on the precise purpose of a law as well as the specific circumstances of a case. Keeping in mind the interests of the people and entities concerned by a report or disclosure, especially in cases where the accusations against them eventually turn out to be false, one may very well argue that it would be unreasonable for whistleblowers to immediately forward their information without even trying to verify their suspicions beforehand. Such an interpretation may further be supported by the existence of Article 21(3) WBD, which offers whistleblowers additional protection when trying to acquire or gain access to information they seek to report or disclosure.

In light of this ambiguity, the ECtHR's established case law may now serve as a means to clarify Article 6(1)(a) WBD's purpose and application with respect to cases where previous attempts of verification might serve a useful purpose. To do so, one must first differentiate between cases of disclosures and of external reports. In the leading case of *Guja* in 2008, the Grand Chamber had to decide the case of public disclosure. In this context, the court reiterated two previous, press-related decisions under Article 10 ECHR that recognized a potential duty to previously verify disclosed information through personal investigation mutatis mutandis, without further specifying what this duty may amount to under the specific circumstances of whistleblowing cases.[121] In the 2011 case of *Heinisch*, the fifth section mainly concerned itself with external reporting, recognising, in principle, that *Guja*'s six-factor test also applies to these situations.[122] The court did, however, explicitly note that when a whistleblower reports information to law-enforcement authorities, it is primarily the task of these authorities to investigate the veracity of the allegations, merely requiring whistleblower to act in good faith when reporting.[123] The *Gawlik* case in 2021 likewise concerned a case of external reporting and was decided with the second section referencing both *Heinisch* and *Guja*. In contrast to *Heinisch*, however, the court held that when information that is reported to a law-enforcement authority is later proven to be wrong or could not be proven to be true, the protection of the whistleblowers depends on whether they complied with a duty to carefully verify the information to the extent permitted by the circumstances.[124]

Taken together, the ECJ's case law on potential investigative duties paints a picture sharper than the WBD, but nonetheless blurry at the margins. In public disclosure cases, whistleblowers may in principle be expected to previously investigate the accuracy of their suspicions (*Guja*). When reporting to a competent authority,

[121] Ibid., citing *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, 20 May 1999, https://hudoc.echr.coe.int/eng?i=001-58369; and *Morissens v. Belgium* (Commission Decision), no. 11389/85, 3 May 1988, https://hudoc.echr.coe.int/eng?i=001-24095.
[122] *Heinisch* (note 18) §§ 7 et seq., 62 et seq.
[123] Ibid para. 80.
[124] *Gawlik* (note 24) §§ 74-75.

however, whistleblowers are either effectively released from this duty (*Heinisch*) or re-confronted with it if the official investigation cannot prove or disproves the veracity of the information (*Gawlik*).

Assuming that the legislator "drew" on the ECtHR's case law when drafting Article 6(1)(a) WBD, we might now be able fill the "reasonable grounds" criterion with some substance, again differentiating between public disclosures (Article 15 WBD) and reports though internal and/or external reporting channels (Article 7(1), 10 WBD). When disclosing information to the public, whistleblowers may—under certain circumstances—be required to previously investigate the matter on their own (*Guja*). With respect to internal and external reports, *Heinisch's* rationale that investigations into a matter are primarily the task of the competent law-enforcement authorities can readily be applied to the internal and external reporting channels competent to investigate incoming reports under the Directive,[125] effectively releasing whistleblowers from their duty to verify the information if they chose to rely on these channels. To the extent that the *Gawlik* decision conflicts with this principle, preference should in this case be given to the *Heinisch* decision for mainly two reasons. First, the *Gawlik* case was decided only in 2021, making it impossible for the legislator to know about the decision and draw upon its content when drafting Article 6(1)(a) WBD. Second, even if one were to interpret the reference to the ECtHR's case law in Recital 31 to be a dynamic one, meaning that it also relates to cases not decided by the court at the time the Directive had been passed,[126] *Gawlik's* rationale would still stand in conflict with the rationale of the WBD's reasonable believe standard, the explicit purpose of which is not to burden whistleblowers with the uncertainty of the outcome of an eventual investigation.[127] Consequently, the reasonable belief criterion in condition (2) of the WBD could only be interpreted in partial compliance with the ECtHR's body of decisions under factor (2). Nonetheless, such an interpretation would still significantly help to concretize the WBD's comparatively vague legal standard in this regard.

Despite the apparent utility of this approach of filling in the gaps in the WBD's scheme of protection with the help of the ECtHR's case law, there are, however, very reasonable grounds to believe that this kind of interpretation stands on somewhat shaky ground and may eventually not be followed by the ECJ. These reasons essentially go back to methodical caveats mentioned above. First, the results of the comparative analysis of the two standards of protection have shown that Recital 31's claim that the Directive "draws" from the ECtHR's six-factor test is—to put it

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125 See Art. 9(1)(d) WBD and Art. 11(2)(c) WBD in connection with Art. 5 pt. 12 WBD.

126 Such a concept would be in line with the ECJ's general inclination to avoid rifts between its judgments and the evolution of the ECtHR's case law in the context of interpreting primary law. C.f. e.g. judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 283/81, ECLI:EU:C:1982:335, para. 20.

127 See Recital 32 sent. 3 WBD: "At the same time, the requirement [of Art. 6(1)(a) WBD] ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake."

mildly—less than reliable. While it is entirely possible that the legislator only drew on some of the ECtHR's factors and their respective case law, the general incoherence between the two standards makes inferences regarding specific questions of interpretation anything but a foregone conclusion. Second, the technique of using the ECtHR's case law to determine the scope and purpose of a provision holds no primacy over other methods with the same goal in mind, in particular the established methods of considering a Directive's ability to further its policy goals as well as looking into other recitals that could shed a light on a provision's meaning. If the results of these methods point towards a different direction than the ECtHR's case law, then it would become increasingly hard to justify why certain elements taken from the six-factor test should be read into the Directive's conditions for protection.

It now happens to be that the main reasons to disregard the ECtHR case law as an interpretive factor regarding a whistleblower's investigative duties are to be found in Recital 32 WBD, right after the Directive's reference to the ECtHR's case law. The recital in its entirety reads as follows:

To enjoy protection under this Directive, reporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true. That requirement is an essential safeguard against malicious and frivolous or abusive reports as it ensures that those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection. At the same time, the requirement ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake. Similarly, reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported falls within its scope. The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection.

These remarks on the main purpose of the reasonable belief criterion are of considerable value for the problem at hand in several ways. First, there is no reference to be found in any of the five sentences above that connects them with a whistleblower's potential investigative duties in accordance with the ECtHR's case law neither explicitly, nor in the form of linguistic similarities with the court's judgments on the matter. Second, the first sentence specifies the whistleblowers' reasonable grounds to believe in terms of the information available to them "at the time of reporting", thereby supporting the preliminary interpretation of Article 6(1)(a) WBD as merely requiring an individual (albeit objectively reasonable) belief based on the information available at that specific point in time rather than requiring

further action to confirm that belief by acquiring new sources of information.[128] Third, sentence three states that it is the provision's purpose to prevent people from deliberately and knowingly reporting false information, making it questionable to withhold protection from whistleblowers who just unintentionally report inaccurate information solely on the grounds that they did not investigate the matter extensively enough before the time of reporting.[129] This interpretation is further strengthened by the fourth sentence's statement that protection should not be lost when the whistleblower acts by honest mistake. Finally, an interpretation of Article 6(1)(a) WBD that allows whistleblowers to report relevant observations to competent recipients as soon as possible, that does not require them to take the risks of being discovered in the course of private investigations and that avoids the legal uncertainty of not knowing whether a court may deem their efforts to verify a suspicion to be sufficient for protection is particularly capable to convince potential whistleblowers to help uncover breaches of Union law, thereby serving the Directive's main purpose in a more effective way (c.f. Article 1 WBD). Taken together, all these aspects speak against the idea that the ECtHR's concept of investigative duties has actually served as source of inspiration for the legislator and should therefore be considered when interpreting Article 6(1)(a). Even beyond that, they make a strong case against considering a lack of personal efforts to verify suspicions of a breach of Union law by means of private investigations to ever play a role in determining the level of protection received under the WBD's regulatory framework.

Hence, the ECtHR's case law under factor (2) of its six-factor test cannot serve as a viable source of interpretation for the reasonable belief criterion under condition [2] of the WBD's conditions for protection.

4.3. The ECtHR's case law as an independent factor for the protection of whistleblowers

4.3.1 General relationship between the two standards of protection

In the future, the most influential role of the ECtHR's whistleblowing case law and its six-factor test will arguably not be its direct influence on the Whistleblowing Directive's conditions for protection, but its continued importance as a separate

[128] It would, of course, also be possible, albeit not particularly convincing, to interpret the reference to the "information available" as an implicit call upon the whistleblower to obtain any relevant information that may be within their reach ahead of reporting the incident. More plausibly, however, this part of the sentence merely refers to the information which the whistleblower already knows at the time of reporting.

[129] In this context, it should, however, be noted that even though the main purpose of the reasonable believe criterion is prevent intentionally malicious reports, whistleblowers may nonetheless also lose protection if their believe is merely unreasonable, which follows directly from Art. 6(1)(a) WBD e contrario.

source of whistleblower protection in the ECHR's Contraction States. Depending on the country in question, that country's transposition of the WBD and its other legal rules and practices with relevance for whistleblowing cases, the ECtHR's six-factor test will very likely still serve an important function as both a minimum standard of protection as well as a source of inspiration and interpretation of national laws in the years to come. In the past, national courts have given weight to the ECtHR's judgments in various different ways, e.g., by applying the six-factor test more or less directly as a distinct legal source of protection for whistleblowers[130] or by using its elements to reshape existing national criteria applied in whistleblowing cases.[131] Although the WBD's generally more favourable conditions for protection will likely diminish the six-factor test's ultimate importance in many cases, there is very little reason to believe that the ECtHR will completely modify its traditional approach and replace its six established factors with criteria more in line with the WBD's statutory requirements,[132] especially after the Grand Chamber just recently "confirmed and consolidated" the established principles.[133]

In light of the often-striking differences between the two standards of protection that have been revealed during the course of this analysis, it also becomes apparent that delineating the precise frontlines between these competing concepts is of immediate relevance for the future of whistleblower protection in Europe. As it turns out, this task will likely be both easier as well as more complicated than one might first expect when looking at the problem.

As a matter of principle, the relationship between the WBD and the six-factor test is fairly straight forward thanks to Article 25 WBD, which allows Member States to introduce or retain provisions more favourable to the rights of whistleblowers, stating that the implementation of the Directive shall under no circumstances constitute grounds for a reduction of the level of protection already afforded. Hence, the relationship between the two standards within the WDB's scope of application is one of cumulative levels of protection, meaning that a whistleblower can both rely on the WBD as well as resort to the ECtHR's six-factor test, especially if they fail to meet the WBD's conditions for protection. The only (albeit practically important) difference is that whistleblowers can only rely on the WBD's extensive rights and privileges if they meet the Directives own conditions, while the protection afforded by the ECtHR is mostly limited to the role of a shield of last resort against detrimental legal actions taken against the whistleblower.

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130 See e.g. in the case of *Halet* (note 12) §§ 25, 30 et seq. (describing how the Luxembourg Court of Appeal applied the six-factor test).

131 See e.g. in the case of Germany: Federal Labour Court (BAG), judgment of 15 December 2016, 2 AZR 42 16, para. 17 (referencing the ECtHR's *Heinisch* case as a reason to introduce a public interest criterion).

132 This does, however, not exclude the possibility that the ECtHR will align its future case law principles at least in part with the new principles found in the WBD, especially since the court has already recognised the WBD to be a relevant source of law. See *Halet* (note 12) § 58.

133 *Halet* (note 12) § 120.

Outside the scope of the Directive (and its national transposition laws respectively), the ECtHR's test will most likely retain its role as an important factor to influence national whistleblowing laws and practices, although it can be expected that at least some national courts and legislators will increasingly look at the criteria put forth by the Directive as a relevant source of inspiration. Especially in countries which (like most Member States) do not yet have comprehensive whistleblowing statutes of their own and do not chose to expand the scope of their national transposition laws to also cover breaches of national law, the ECtHR's six-factor test will continue to be a vital pillar of whistleblower protection.

4.3.2 Potential future problems

This comparatively simple state of peaceful coexistence and regulatory overlap may, however, be challenged in several ways. Particular problems may occur in cases where a whistleblower reports or discloses a bulk of information relating to matters both inside and outside the scope of the Directive. The regular occurrence of such cases, in which different elements of a larger set of information concern different kinds of breaches which in principle fall under different standards of protection, is anything but unlikely, especially given the relative vastness of digital information and the complexity of both real-world whistleblowing situations and the relationship of national and EU law. One may, for example, think of a case similar to the famous case of Edward Snowden in which illegal surveillance practices are revealed, concerning both breaches of applicable national laws as well as privacy and data protection rules by the European Union.

To the extent that the ECtHR's six-factor test provides a more favourable standard than the WBD's conditions for protection, the solution to such problems should again be rather straight forward in most cases. Since the ECtHR's case law does not know any kind of limiting material scope of application, the court will almost certainly apply a uniform standard of protection, irrespective of whether parts of the information fall under the scope of a national transposition law based on the WBD or not. The only cases which may cause trouble in this regard are cases of public disclosures that do not meet the requirements of Article 15(1) WBD, which again trigger the issues already discussed above under Section 4.1.3.

More problems arise, however, in the many cases where the WBD's standard of protection is the more favourable one, either due to requiring less conditions for protection or by providing more expansive protection to the whistleblower. Strictly differentiating between pieces of information inside and outside the WBD's material scope may then lead to somewhat perplexing results and leave whistleblowers open to retaliation even if they are generally protected by the Directive or their national transposition law respectively. Even if, for example, an employer recognizes that most of the information falls under the scope of the Directive, they may nonetheless choose to terminate the whistleblower based on the part of the information that relates to national breaches of law if the national standard of protection

is lower, if it does not allow for direct external reporting. For the most part, problems like these will have to be solved by applying provisions of the Directive which may not deal specifically with the problem at hand, but do contain rules that seek to realize the WBD's primary goal of enhancing the enforcement of Union law (Article 1 WBD). For example, Article 21(2) WBD protects reporting and/or disclosing all information "necessary for revealing a breach pursuant to this Directive" as part of the Directive's condition [3]. Thus, if part of the information revealed does not fall under the material scope, but it is factually intertwined with other parts in a way that makes it necessary to forward the information as a whole in order for the competent authorities to understand the full factual context, then the entire process is effectively protected under the Directive. Similarly, Article 6(1) WBD, which as part of condition [2] states that whistleblowers are protected if they reasonably believe in a breach falling under the material scope even when in actuality it does not, may serve to protect whistleblowers when releasing a mixed bag of information. Especially cases where large sets of complicated information concern a complicated area of law that is both governed by Union law as well national rules and regulations, it may seem unreasonable to expect whistleblowers to draw a precise line between matters they are allowed to report and/or disclose under their national transposition and those that are not covered by its material scope. While resorting to these and other specific provisions within the Directive may not always be enough to reconcile the general conflict of application between the different standards of protection, a fair reading of the WBD's text in connection with the general Union law principle of "effet utile" will likely provide sufficient answers at least in a relative majority of cases that fall into this kind of twilight zone.

Delimitation problems of a different kind that may also concern the differences between the two standards of protection will likely occur in transnational whistleblowing cases, in particular cases where one Member State has chosen to expand the material scope of its transposition law while another opted for a narrower transposition of the Directive. If, for example, the country from which an employee habitually carries out their work performance for a subsidiary of a multinational company does not protect certain kinds of reports and that employee choses to report a breach to a channel situated at the company's headquarters in another country that does protect reports of that nature, then the question may arise if the protection of such a whistleblower can be regarded as crucial for safeguarding the latter country's public interests.[134] Given that the WBD has by no means completely unified the landscape of whistleblowing laws in the Europe, such international conflict of law questions will likely increase in their importance and may in some cases highlight the various striking differences between the standards of protection afforded by the WBD on the one hand and national laws influenced by the ECtHR's six-factor test on the other.

[134] See Art. 8, Art. 9(1) Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 04.07.2008, p. 6.

5 Summary and Outlook

Up until recently, the legal treatment of whistleblowers and whistleblowing cases in Europe has mostly been dealt with on a national level, with often scattered and rarely codified national legal standards and practices determining the practical outcome of most cases. In recent years, however, the subject of whistleblowing has increasingly gotten into the focus of both legislators and courts on a European level, resulting its gradual recognition as its own area of law in need of specific rules and regulation. This development has led to the formation of two distinct pillars of European whistleblowing law, which together are destined to shape European whistleblowing law in the years to come: The European Union's Whistleblowing Directive and the European Court of Human rights case law on whistleblowing.

The fact that the precise relationship between those two important pillars has largely been overlooked thus far may in part be contributed to the Directive's claim that its legal standards draw upon the ECtHR's existing case law, leading to the assumption that the Directive's conditions for protection are more or less in line with the ECtHR's six-factor test. The analysis in this paper has, however, revealed that both standards of protection do not only display various striking differences, but that these differences are also cause to a number of complex legal issues which may have significant effects on the future of European whistleblowing law. This includes ECtHR's case law's potential role as an invalidating factor that could lead to a partial annulment of certain part of the Directive based on the Commissions current interpretation of some of its provisions, although the overall better arguments speak in favour of keeping the Directive intact. Similarly, the somewhat appealing prospect of the ECtHR's case law serving as an interpretative means to answer some of the legal questions foreseeably arising under the Directive ultimately proves to be less likely that it may seem at first sight.

On the other side, the conceptual differences between the ECtHR's and the Directive's approaches to protection of whistleblowers may very likely be the main reason why the six-factor test will retain its role as the second most important source of whistleblower protection in Europe. While the Directive's law enforcement-based system will be determinative for most whistleblowing situations, the ECtHR's six-factor test's freedom of speech centered framework can serve not only as an additional, but sometimes as the only viable source of protection especially in many high-profile whistleblowing cases. This way, the in some ways remarkably different shape of the two pillars of protection may ultimately provide the architectural stability as well as flexibility necessary to uphold and built upon the newly created structures of European whistleblowing law.

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The “European Whistleblowing Directive” (Directive (EU) 2019/1937) is the most far-reaching piece of whistleblowing legislation in history with an unprecedented impact on countries all across the European Union. To transpose the Directive, all 27 Member States were required to enact their own national whistleblowing laws by 17 December 2021, in many cases leading to the creation of an entirely new field of law previously unknown to many national legal systems. The papers included in this book are the result of the “2nd European Conference on Whistleblowing Legislation”, providing readers with a first in-depth look into the emerging field of research that is European Whistleblowing Law.

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