

Robust whistleblower protection
is a crucial challenge for
the European democracy





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Self-disclosure of secrets rarely happens. Against this background, the role of journalists and whistleblowers is essential to provide the citizens with information on matters that can be of paramount importance.

The aim of this booklet is to deliver a brief analysis of the recent proposed Directive **“on the protection of persons reporting on breaches of the Union law”**¹, adopted by the European Commission on 23rd April 2018, comparing it with the protection standards in force for freedom of expression. The analysis focuses on the assumption of a public disclosure of information by whistleblowers, more particularly through journalists.

After reminding the general principles enforceable in this area (I), the Commission’s proposed text will be reviewed to underline the positive aspects but also what could be improved during the future law-making process (II).

I GENERAL PRINCIPLES

FREEDOM OF EXPRESSION, MEDIA FREEDOM AND PUBLIC’S RIGHT TO INFORMATION

Freedom of expression is **“one of the essential pillars” of a democratic society, “one of the primary requirements for its progress and everyone’s self-fulfilment”, as highlighted by the European Court of Human Rights**². It is hardly surprising that this freedom is enshrined in the main texts protecting fundamental rights both at international and national level in the constitutions of numerous States. In this respect, the UN International Covenant on Civil and Political Rights (Art. 19), the European Convention on Human

Rights (Art. 10) or, more recently, the European Union Charter of Fundamental Rights (Art. 11) are the first legal provisions coming to mind. Even though it is not always clearly laid down in these texts, press freedom is undoubtedly included in the freedom of expression³. Media freedom is explicitly enshrined in the European Union Charter of Fundamental Rights, whose provisions became binding with the Lisbon Treaty’s entry into force on 1st December 2009.

In parallel with the right attributed to the press to communicate information, the European Court of Human Rights case-law, for example, recognised the existence of a correlative right held by the public to receive information on any issues of general interest. Against this background, significant safeguards for the press do not only aim at protecting the journalists’ interests in disclosing information to the public but also at securing the possibility for the public to receive this information.

THE RIGHT OF THE JOURNALISTS TO PROTECT THEIR SOURCES

The right to protect journalistic sources inferred by the European Court of Human Rights from the freedom of expression as early as 1996 is ultimately based on the public right to receive information. The Court of Strasbourg justified its recognition as follows:

*Protection of journalistic sources is one of the corner stones of the press freedom (...). The lack of such a protection could deter journalistic sources from helping the press to inform the public on matters of general interest. Consequently, the press could be less able to play its essential role of “watchdog” and its capability to provide with precise and reliable information could be dwindled (...)*⁴



Needless to say that the public debate would be significantly less meaningful if journalists, i.e. all the persons who carry out journalistic activities, regardless of their professional status or the media they work for, could only rely on sources which would accept to be unveiled. Without securing their anonymity, some information sources could dry up, being unwilling to entrust sometimes crucial information to journalists. More than journalists themselves the public at large would inevitably suffer from the absence of an efficient protection of journalistic sources. Should this happen, there is every reason to believe that many scandals would never be revealed. In this sense, as highlighted again by the Court of Strasbourg, *“the right of journalists to keep their sources secret could not be considered as a mere privilege granted or withdrawn according to the lawfulness or unlawfulness of the source but as a genuine attribute of the right to inform to be tackled with extreme care”*⁵.

Since then, the Strasbourg Court case-law has been enriched with a broad array of rulings and with the caveat of some occasional misguidance⁶, the Court has shown a high degree of determination regarding the safeguard of this essential democratic asset and has been very demanding about the circumstances under which States parties could depart from the European Convention⁷. Already in 2000, the Committee of Ministers of the Council of Europe invited the Member States to adopt legislative measures including and clarifying the principle highlighted by the Court⁸, generating thereby the adoption of national laws in the various European countries.

WHISTLEBLOWER PROTECTION

In 2008, after recognising the right of journalists to protect their sources, which meant protecting them *indirectly* by allowing the journalist not to unveil their identity, the Strasbourg Court inferred a *direct* protection of whistleblowers, defined as persons who may decide to reveal internal information,

potentially classified in a work-related context, when the public opinion can have a legitimate interest to be informed⁹.

Following the recognition by the Court of a whistleblower protection under some conditions, the Committee of Ministers of the Council of Europe invited again the Member States to develop a protective legislative framework at national level¹⁰.

Both areas, the right to protect sources and the right to protect whistleblowers, appear to be now complementary¹¹ and can be concurrently applicable assuming that a whistleblower could decide to use a journalist to publicly disclose breaches, acquiring thereby the quality of a journalistic source. Unless an “overriding public interest” can be clearly demonstrated, an employer could not force a journalist to contribute to identify the author of a leak within his/her enterprise¹². In our view, this conclusion should not be influenced by the journalists’ disclosure of information provided by whistleblowers without waiting and verifying that the latter used possible existing internal procedures to communicate his/her concerns to his/her line and/or other managers¹³.

In the future, attention should continue to be paid to avoid emptying the right to protect journalistic sources from its content, as there would be increased possibilities to identify whistleblowers before they could contact a journalist as part of an internal or external reporting procedure (see the suggestion of a “tier reporting approach” in the proposed Directive).

II THE PROPOSED DIRECTIVE IN COMPARISON WITH EXISTING STANDARDS AND AVENUES FOR IMPROVING THE TEXT

Whistleblower protection is not to date entirely alien to the European Union law. Among existing specific instruments, the European legislator recognised the need not to unduly hinder whistleblowers' activities, more precisely in the Trade Secrets Directive adopted in June 2016, providing for exemptions which however are not free from criticisms¹⁴. After the adoption of a resolution by the European Parliament on 24th October 2017 on "Legitimate measures to protect whistleblowers acting in the public interest when disclosing confidential information of companies and public bodies", and the opening of a public consultation by the Commission, the latter initiated a legislative procedure with a proposed Directive adopted on 23rd April 2018.

Within its scope and without claiming to be exhaustive, the main thrusts of the proposed Directive, both its positive aspects and desirable improvements, are:

1 WHISTLEBLOWERS SUPPORT CERTAIN OBJECTIVES OF THE EUROPEAN UNION

The proposal for a Directive has the merit to opt for a horizontal approach without restricting itself to a specific sector. However, it would be wrong to believe that the current text is likely to encompass all aspects on which a whistleblower could decide to uncover breaches which could endanger the public interest. The scope of the text is limited to some breaches of the European Union law (rules on public procurement; financial services; prevention of money laundering and terrorist financing; product safety; transport safety; environmental protection, nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data and security of network and information systems). Other rules of the Union law could be added to this scope in the future.

The proposal is a translation of a concept of the whistleblower being a means to achieve specific objectives of the European Union. In the text, special emphasis is laid on the need to be able to identify shortcomings in the above-mentioned areas, giving the preference to internal reporting and limiting as much as possible external or public reporting which could harm the reputation of the concerned public or private companies. The text therefore responds more to a "**utilitarian**" than a "**democratic**" design of the whistleblower¹⁵.

Another feature to be underlined is that the definition of a whistleblower in the proposal is connected to the professional or work-related context in a broad sense, i.e. covering any type of relationship established in this context (regardless of the "worker" status), including voluntary work, the hiring phase or the precontractual bargaining period. The Commission considers that outside the work-related context, "ordinary complainants" or citizen bystanders" are not in a position of economic vulnerability that would justify their protection against retaliation (recital 24).

On this point, the option chosen by the Commission can be compared to the one of the Recommendation of the Committee of Ministers of the Council of Europe¹⁶ and the one adopted by the European Court of Human Rights which considered that the protection of whistleblowers should be restricted to hypothetical cases in which a person reveals information disregarding the "duty of loyalty, reserve and discretion"¹⁷.

In the past, the same Court had underlined however that the considerations justifying the protection of whistleblowers "could" apply to users of public services insofar as they know or use the internal operations of the concerned services"¹⁸.

THE RESTRICTED SCOPE OF PROTECTED REPORTING

In addition to the restriction of its scope to some action areas of the European Union (see hereabove), the proposal for a Directive seems to restrict protected reporting to certain categories of very precise acts,

2

namely effective or potential unlawful activities contrary to some rules of the EU law or abuse of law as laid down in such rules. The concept of “*abuse of law*” is defined as “*acts or omissions which do not appear to be unlawful in formal terms but defeat the object or the purpose of the law*”. This definition of the abuse of law seems imprecise, to say the least, and does not enable to secure the necessary predictability for whistleblowers who would wish to reveal acts that are not formally illegal but simply contrary to the public interest. For example, it is not certain that tax optimisation practices, such as reported by whistleblowers in the *Luxleaks* case, could fall within this category.

The explanatory note of the proposal further clarified that only breaches which could “*seriously harm the public interest*” were covered. The Commission confessed its will to raise the threshold of applicability of the Directive instead of the above-mentioned recommendation of the Committee of Ministers of the Council of Europe¹⁹.

Finally, recital 30 of the Directive provides for the non-applicability of the protection of information disclosure if it is already in the public domain. This disqualification can raise a problem insofar as new elements revealed by whistleblowers can contribute to enrich information already known by the public²⁰.

3

A “TIER APPROACH” REDUCES ASSUMPTIONS OF PUBLIC REPORTING ON BREACHES

The proposed Directive opts for a “tier approach” establishing in principle the obligation for the whistleblower to report internally before being allowed to report to an external authority, to choose the public reporting channel through media for example which would be only authorised in the last resort when other channels have proven ineffective. Though Article 13 of the proposal provided for exceptions to the obligation is described as a prerequisite for granting the protection to a whistleblower, it seems difficult for the whistleblower to predict with an adequate degree of certainty whether he/she will be allowed to avail himself/herself

of these exceptions in his/her concrete situation. What does it qualitatively mean, for instance, the absence of “appropriate follow-up” by an internal or external reporting procedure which would authorise the whistleblower to publicise the reported breaches? What cover “imminent or manifest danger for the public interest” or “the particular circumstances of the case”, “a risk of irreversible damage” which could justify that it “could not reasonably be expected” to use internal and/or external reporting channels? On this point, the text of the Commission is also less protective than the recommendation of the Committee of Ministers of the Council of Europe. While setting out the various reporting channels available for whistleblowers (internal reporting, reporting to competent authorities or public disclosure), it is admitted in the text that “the individual situation of each case shall determine the most appropriate channel”²¹.

The European Parliament provided for the same option in its proposed resolution adopted on 24th October 2017. After highlighting the “right of the public to be informed of any wrongdoing that undermines the public interest, the EP underlined that it should always be possible for a whistleblower to publicly disclose information on an unlawful or wrongful act or an act which undermines the public interest”²².

It appears that in some circumstances, a genuine public transparency is the only lasting remedy to the wrongdoings identified by a whistleblower. If there is no publicity, it might be tempting for a public or private enterprise to occasionally and inexpensively settle a problem without necessarily ensuring its long-term solution or ruling out its re-appearance.

A GENERAL PROTECTION FRAMEWORK FOR WHISTLEBLOWERS

4

If he/she is covered by the scope of the Directive and strictly meets the protection requirements, the whistleblower will be able to enjoy a protective framework which he/she could not waive contractually (especially by signing a confidentiality clause).

A LEGAL AND FINANCIAL ASSISTANCE

The great merit of this proposed Directive is to approach the various protection needs of the whistleblower, providing him/her with the possibility to apply for a legal and financial assistance and the adoption of provisional measures (particularly to suspend a dismissal procedure).

A BROAD DEFINITION OF RETALIATORY MEASURES

The broad definition of retaliatory measures from which whistleblowers must be protected, especially with “effective, proportionate and dissuasive penalties” that States are invited to provide, as well as the reversal of the burden of the proof with as a consequence that an unfavourable measure adopted against a whistleblower shall be presumed resulting from his reporting until proved otherwise in the absence of any other convincing explanation²³.

A GOOD FAITH EXEMPTION

Another positive element is the recognition of the good faith exemption which offers a protection to the person who has reasonable motives to believe that the reported information had materialised (even though the belief proves to be erroneous later)²⁴ and that the information was covered by the scope of the Directive.

In parallel with the protection granted to the author of a disclosure, the Commission worries about the lot of the person concerned by the report. If the concern for protecting the rights of the concerned person is commendable, especially the rights to defence that he/she must enjoy, doubts might be expressed concerning the advisability to set out the obligation for the Member States to provide for “**effective, proportionate and dissuasive penalties**” applicable to persons making “**malicious or abusive reports or disclosures**”, in addition to measures for compensating persons who have unjustly been charged.

In this respect, attention should be paid to the potential deterring effect of such penalties, including on the legitimate exercise of whistleblowing. On this point, it is worth underlining that according to a resolution of the Parliamentary Assembly of the Council of Europe,

adopted in 2007, the Member States are invited to progressively decriminalise defamation and to award with moderation civil damages²⁵.

It should also be guaranteed that a person who would not meet all the protection requirements laid down in the Directive could not automatically be imposed penalties for submitting what could be considered as “malicious” or “abusive” reports. According to the resolution of Parliamentary Assembly of the Council of Europe:

*statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.*²⁶

”

Finally, it is worth reminding that the proposed Directive does not prevent the States to further develop the minimum rules of protection of whistleblowers but prohibits the States from dwindling the protection scheme of persons who could be concerned by a report.

III CONCLUSION

The objective announced by the Commission was to allay the fears of whistleblowers who, without appropriate protective measures, could hesitate to report on wrongdoings infringing the public interest.

Even though it contains numerous positive points, in its current version, the proposed Directive only partly achieves this objective, considering both the restriction of its scope to some very specific areas of the European Union and the relatively strict requirements imposed on whistleblowers to be entitled to enjoy its protective framework.

REFERENCE LIST

¹ Proposed Directive and Communication of the European Commission on “Strengthening whistleblower protection at EU level”, adopted on the same day, can be consulted on: http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=620400.

² European Court of HR, plen., ruling *Handyside versus United Kingdom*, 7th December 1976, § 49.

³ See in particular the ruling *Sunday Times versus United Kingdom* (N° 1) of the European Court of HR, plen., 26th April 1979, § 65. On the specificities of press freedom as part of the broader guarantee of freedom of

expression, in particular in the new media ecosystem, see our study: Q. VAN ENIS, *La liberté de la presse à l'ère numérique*, coll. du CRIDS, Brussels, Larcier, 2015, 778 pp.

⁴ European Court of HR, *Goodwin v. United Kingdom* judgment, 27th March 1996, § 39.

⁵ European Court of HR, 2nd sect., *Tillack v. Belgium* judgment, 27th November 2007, § 65.

⁶ See in particular European Court of HR, 2nd sect., *Gormus and others v. Turkey* judgment, 19th January 2016, in which the Court seems to make the journalists' right to protect their sources conditional on their verification that the sources complied with their duty to use first internal reporting procedure (see more especially § 61 of the decision).

⁷ In this respect, see our study Q. VAN ENIS, “Une solide protection des sources journalistiques et des lanceurs d'alerte : une impérieuse nécessité à l'ère dite de la ‘post-vérité’ ?”, in *Le secret*, Limal, Anthemis, 2017, pp. 95-152.

⁸ Recommendation n° R (2000) 7 of the Committee of Ministers to the Member States on journalists' right not to unveil their sources of information, adopted by the Committee of Ministers, on 8th March 2000, at their 701st meeting.

⁹ European Court of HR, Grand Chamber, *Guja v. Moldova* judgment, 12th February 2008.

¹⁰ Recommendation CM/Rec(2014)7 of the Committee of Ministers to the Member States on whistleblower protection, adopted by the Committee of Ministers on 30th April 2014, at its 1198th meeting of Ministers Delegates.

¹¹ D. VOORHOOF, “Freedom of journalistic newsgathering, access to information, and protection of whistleblowers under Article 10 ECHR and the standards of the Council of Europe”, in A. KOLTAY (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest, Kluwer, 2015, p. 300.

¹² This was the assumption in the Goodwin case, when the European Court of Human Rights recognised for the first time the right to protect journalistic sources.

¹³ European Court of HR, 2nd sect., aforementioned *Gormus* judgment, § 61.

¹⁴ See our aforementioned study, Q. VAN ENIS, “Une solide protection des sources journalistiques et des lanceurs d'alerte...”, op. cit., pp. 148-151. See also F. DUBUISSON and J. PIERET, “Société de l'information, médias et liberté d'expression”, *J.E.D.H.*, 2016/3, pp. 350-351.

¹⁵ On this distinction, see especially J.-PH. FOEGLE, “Le lanceur d'alerte dans l'Union européenne : démocratie, management, vulnérabilité(s)”, in M. DISANT et D. POLLET-PANOUSIS (dir.), *Les lanceurs d'alerte – Quelle protection juridique? Quelles limites?*, Issy-les-Moulineaux, Lextenso, LGDJ, 2017, p. 111. For the author, the concept described as “managerial” or “monitoring” of the whistleblower “only allows to exercise the freedom of expression in assumptions where whistleblowing enables to report on facts or behaviours that the public powers try to repress; protects potentially all whistleblowers but give them a very restricted right to whistleblow, thereby endorsing the impoverishment of content of the right to freedom of expression”.

¹⁶ Aforementioned recommendation, §§3 and 4.

¹⁷ European Court of HR, Grand Chamber, *Medžlis Islamske Zajednice Brčko and others v. Bosnia-Herzegovina* judgment, 27th June 2017, §80.

¹⁸ European Court of HR, 2nd sect., *Bargão and Domingos Correia v. Portugal* judgment, 15th November 2012, §35.

¹⁹ Annex 12: Comparative table on the principles of the Council of Europe, p. 1: “Higher threshold used to define the scope of application of the directive: areas where breaches can cause ‘serious’ harm to the public interest”.

²⁰ In the *Luxleaks* case, this motive had led the Appeal Court of the Grand Duchy of Luxembourg to withdraw the protection to one whistleblower.

²¹ § 14.

²² § 35. Underlined by us.

²³ Recently, the European Court of Human Rights condemned for the second time the Republic of Moldova for not providing with a convincing explanation of the reasons warranting the new dismissal of a civil servant who had been recognised in the past as whistleblower by the same Court, which could give the impression that the dismissal was new retaliation caused by his reports (European Court of HR, 2nd sect., *Guja v. Republic of Moldova* (n° 2) judgment, 27th February 2018).

²⁴ Recital 30 provides for “the protection of persons who do not provide evidence but raise reasonable concerns or suspicions” ruling out however unsubstantiated rumours.

²⁵ Resolution 1577 (2007), Towards decriminalisation of defamation, adopted on 4th October 2007.

²⁶ Ibid., § 7.