

Implementing the new EU Whistleblower Directive: ____ A Transposition Guide for Journalists





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Implementing the new EU Whistleblower Directive: A Transposition Guide for Journalists¹

Introduction

The Directive on the protection of persons who report breaches of Union Law (“EU Whistleblower Directive” or “Directive”) was approved by the EU Parliament on 16 April 2019 and by the Council on 25 September 2019.² Member States now have until December 2021 to implement and comply with its terms, a process commonly referred to as transposition into national law. The EU Whistleblower Directive lays down “common minimum standards” for the protection of whistleblowers reporting certain violations of EU law, thereby seeking to minimize inconsistent application of laws at a national level. However, it is important to note that the Directive adopts a sectoral approach, which means it affords protection to persons reporting on breaches of certain areas of EU law and where there is already sector-specific whistleblower protections in place, its provisions do not apply. For instance, EU employment law does not fall under the scope of this Directive.

The EU Whistleblower Directive takes a more expansive view of the type of people who may be protected. In addition to reporting persons (whistleblowers), the Directive protects from retaliation “facilitators” or individuals who assist the reporting person. While on its face this seems positive for journalists who appear to be covered by the term facilitator, use of this term could be problematic given the negative connotations it has under the national legislations of many Member States, where, broadly defined, a “facilitator” can be deemed as an accomplice to potential wrongdoing - criminally or otherwise. In the Luxleaks case, for example, French investigative journalist Edouard Perrin was charged as an accomplice of whistleblower Raphael Halet in his alleged violation of trade secrets and professional secrecy regulations under Lux-

embourgish law, even though the disclosures dealt with a breach of EU law (adoption of secretive tax advantage agreements defeating the object and purpose of corporate tax laws). Although Perrin was ultimately acquitted, the Luxleaks case displayed the existing discrepancy among Member States on whistleblower protections and spurred the adoption of the Directive.

The adoption of the Directive in its current form is a testament to considerable outreach efforts by various public interest groups, including journalist organizations, that sought to highlight the essential role whistleblowers and journalists play in disclosing information on matters of paramount importance to the public. The Luxleaks, Panama Papers, and Football Leaks scandals are telling examples of why protecting whistleblowers is crucial for European democracy. Indeed, in Recital 46, the Directive recognizes the importance of whistleblowers as journalistic sources, noting: “Whistleblowers are, in particular, important sources for investigative journalists. Providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers and thereby encourages whistleblowing also through the media. In this respect, protection of whistleblowers as journalistic sources is crucial for safeguarding the ‘watch-dog’ role of investigative journalism in democratic societies.”

This transposition guide aims to provide journalists with information on how the Directive may affect their profession and how protections against retaliation apply to them and their sources. It also highlights areas where journalists may seek to undertake further outreach efforts at the national level to improve how the directive is transposed, including, for instance, the interplay between the

Whistleblower Directive and the Trade Secrets Directive. As one of the key public interest groups who successfully advocated for the adoption of the EU Whistleblower Directive, journalists now have an equally important role to play in advocating for further improvements as the Directive is transposed into the national laws of 27 Member States.

This guide provides analysis and recommendations for journalists summarized as follows:

- + **Reporting persons (whistleblowers) are protected provided their disclosures pertain to breaches of certain areas of EU law;**
- + **The Directive does not override the application of certain laws of Member States (i.e., national security);**
- + **The Directive protects against retaliation facilitators who assist reporting persons, and the term “facilitator” is broad enough to include journalists. However, the term “facilitator” might carry potential negative connotations according to the national legislation of Member States if understood as an accomplice to wrongdoing;**
- + **Although internal reporting is no longer mandatory, public disclosure to the media is not outright as whistleblowers still need to show compliance with what could be deemed as burdensome and labyrinthine conditions; and**
- + **The Directive ensures confidentiality but does not contemplate anonymous reporting.**

Overall, journalist organizations should consider engaging in targeted outreach efforts at the national level aimed at surpassing the common minimum standards set out by the Directive while addressing certain problematic provisions we explain below.

Background

The Directive’s legislative history³ demonstrates how a lack of uniform whistleblower protection among Member States has negatively impacted the functioning of EU policies, amounting to billions of euros in yearly losses, and led to negative spill-over effects between Member States. In its current

form, the Directive is meant to combat whistleblower vulnerability and respond to existing deterrents preventing whistleblowers from coming forward to report cases of fraud and corruption involving breaches of EU law. Other related concerns include the connection between whistleblower protection and fundamental rights and the role of the media in providing the public with necessary information.

Freedom of the press and freedom of expression are fundamental rights recognized by the European Court of Human Rights (ECHR) and the European Charter of Fundamental Rights. A responsible media is therefore a linchpin of democratic societies. A core pillar of journalism is the protection of sources, as without anonymity and confidentiality, most people would be reluctant to come forward with information. In the case of whistleblowers, there is an added fear of retaliation and even industry blacklisting. The Directive recognizes the key role whistleblowers play in exposing and alerting stakeholders about threats or harm to the public interest and seeks to incentivise whistleblowers by protecting them from retaliation.

Whistleblowers are in a privileged position to uncover breaches of EU law through their work-related activities. However, current legislation on the subject is fragmented across Member States. Germany and Spain, for example, provide whistleblowing protection through employment legislation. Other countries like the United Kingdom and, more recently, France offer broad protection. The common minimum standards established by the Directive attempt to level the playing field by protecting whistleblowers and their “facilitators” from retaliation.

Journalists must be aware of the potential gaps and limitations present in the Directive, which need to be addressed at the national level when transposition takes place before the December 2021 deadline.

The following section analyses the most relevant articles of the Directive for journalistic practice (Articles 2, 3, 4, 5, 6, 15, 16, 19, 21, 22 & 25) and provides some recommendations.



Analysis

Article 2:

Only breaches of certain areas of EU law are covered by the Directive.

Material scope

1. This Directive lays down common minimum standards for the protection of persons reporting the following breaches of Union law:
 - a. Breaches falling within the scope of the Union acts set out in the Annex that concern the following areas:
 - i. public procurement;
 - ii. financial services, products and markets, and prevention of money laundering and terrorist financing;
 - iii. product safety and compliance;
 - iv. transport safety;
 - v. protection of the environment;
 - vi. radiation protection and nuclear safety;
 - vii. food and feed safety, animal health and welfare;
 - viii. public health;
 - ix. consumer protection;
 - x. protection of privacy and personal data, and security of network and information systems;
 - b. Breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures;
 - c. Breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.
2. This Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1.

In lieu of comprehensive coverage, the Directive opted for a sector-specific approach in which only select areas of EU law are covered, as evidenced by the Directive's reference to an Annex that contains a list of several legal instruments the Directive would expressly cover. This sectoral approach, which encompasses a limited range of wrongdoing, has the potential to create uncertainty for would-be whistleblowers, ultimately resulting in under-reporting or no reporting at all. According to Transparency International, if whistleblowers feel that they do not meet the legal criteria, they will remain silent, leaving governments and the public unaware of misconduct that can harm their interests.⁴

The Directive provides a base threshold, which means that Member States are free to implement national laws offering greater protection for whistleblowers, such as expanding the spectrum of concerns whistleblowers may raise and rejecting the Directive's sector-specific approach. For instance, in France, until 2016, whistleblower protection was only afforded in the context of conflicts of interest, fighting corruption, or the protection of health and the environment.⁵ Since the passing of the "Sapin II" Law in December 2016, whistleblowing status and protections in France have been substantially broadened under a general law.⁶ Spain is looking to make similar strides in this area through the introduction of a proposed transposition law to the Parliament in November 2019, which includes (in Article 4 thereto) a more comprehensive list of the types of information on breaches that a whistleblower may disclose.⁷

Recommendation:

Journalists should consider engaging in targeted efforts intended to minimize sectoral approaches and instead advocate for protections at the national level to echo legislation such as Sapin II and Spain's newly proposed transposition law, which, while imperfect, broaden the types of concerns a whistleblower can safely raise. In so doing, the national law should minimize uncertainty and thereby promote whistleblowing across a broad range of areas.

Article 3:

The Directive does not prevent the application of certain national laws, including the protection of “classified information.”

Relationship with other Union acts and national provisions

1. Where specific rules on the reporting of breaches are provided for in the sector-specific Union acts listed in Part II of the Annex, those rules shall apply. The provisions of this Directive shall be applicable to the extent that a matter is not mandatorily regulated in those sector-specific Union acts.
2. This Directive shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests. In particular, it shall not apply to reports of breaches of the procurement rules involving defence or security aspects unless they are covered by the relevant acts of the Union.
3. This Directive shall not affect the application of Union or national law relating to any of the following:
 - a. The protection of classified information;
 - b. The protection of legal and medical professional privilege;
 - c. The secrecy of judicial deliberations;
 - d. Rules on criminal procedure.
4. This Directive shall not affect national rules on the exercise by workers of their rights to consult their representatives or trade unions, and on protection against any unjustified detrimental measure prompted by such consultations as well as on the autonomy of the social partners and their right to enter into collective agreements. This is without prejudice to the level of protection granted by this Directive.

Journalists should be aware the Directive does not shield them from liability for disclosures where information deemed classified is concerned. As Section 3.a. makes clear, the EU Whistleblower

Directive does not affect the application of national security laws, opting instead to allow Member States to retain their vested interest in determining how to prevent the release of classified information and sanction those responsible for making it public.

While the EU Whistleblower Directive sought to dodge the issue, the balance between national security and the right to information has been tackled in other settings. In 2013, facilitated by the Open Society Justice Initiative, 22 organisations and academic centres in consultation with over 500 experts from across the globe drafted the Global Principles on National Security and the Right to Information, known as the Tshwane Principles.⁸ Principles 40, 41 and 43 state that “public personnel” whistleblowers should be protected from retaliation if the public interest in having the information disclosed outweighs any harm to the public interest that would result from disclosure.⁹ Principle 41 expressly provides for immunity from civil and criminal liability for disclosures of classified or otherwise confidential information, whereas Principle 46 states that “public personnel” whistleblowers should not be subject to criminal penalties even if their disclosures are unauthorized.¹⁰

Of particular relevance to journalists are Tshwane Principles 47, 48 and 49. Principle 47 protects non-“public personnel” whistleblowers – including journalists – from “sanctions” for possession and dissemination of classified information, including charges for conspiracy or other related crimes based upon seeking or obtaining classified information.¹¹ Principle 48 prohibits laws and regulations designed to compel non-“public personnel” whistleblowers to reveal confidential sources and “unpublished materials in an investigation concerning unauthorized disclosure of information to the press or public.” Principle 49 also prohibits “orders by judicial or other state bodies” against publication of information “already in the possession” of non-“public personnel” whistleblowers. Furthermore, if the information has been made generally available to the public – even if by unlawful means – efforts to halt further publication are presumptively invalid.

Recommendation:

The Tshwane Principles can serve as a valuable guide to journalists when considering national level transposition proposals of the EU Whistleblower Directive. Points to consider should include:

- + Express recognition of the precedence of certain fundamental rights (i.e., freedom of expression, information and access to information) over non-disclosure of information. That is, outright prohibitions or limitations of disclosure of information (even unauthorized disclosures) should be the exception, not the rule.

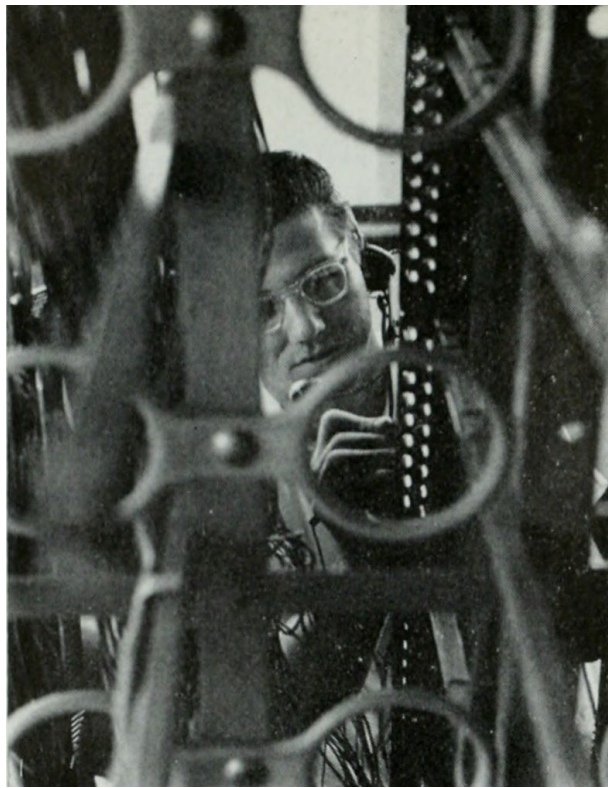
- + Reduce Member States' discretion in exempting certain areas from the application of whistleblower protection. For instance, national security grounds should not be used indiscriminately as a shield to undermine the fundamental right of public access to information.

- + Introduce clear and unambiguous provisions establishing immunity from both criminal and civil proceedings, including defamation proceedings. At a minimum, immunity should apply to protected disclosures. For non-protected disclosures, any potential criminal penalty should be exceptional, and conditions specifically laid out in the law in question. In the case of classified information, for example, the type of information should be directly related to its impact on national security (e.g., disclosing specific technological data about nuclear weapons or codes or disclosing the identities of covert intelligence agents). Moreover, the disclosure should pose a significant, imminent and identifiable risk, whereas any penalty should be proportional to the harm caused. More importantly, the law should establish effective procedural remedies, such as defences that can be articulated in court.¹² Finally, it is advisable to establish a cumulative factor list for prosecutors and judges to consider when evaluating whether a disclosure outweighs any public interest in non-disclosure.¹³

- + Prohibit criminal, civil, and even administrative penalties or sanctions against third parties (most notably journalists) for possessing and disseminating information provided by whistleblowers. Such a prohibition should also extend to ancillary offences such as conspiracy or other related offences such as hacking, photocopying or reproducing documents

in massive information distribution channels like social media. Such a prohibition should further specify that procedural remedies such as court injunctions are not to be used to halt further publication of information already made available to the public even when such information was made public by unlawful means. Again, fundamental rights of access to information and freedom of information should take precedence, and this should be clearly articulated in the law.

ECHR case law should also be considered for proposed legislation in order to ensure harmonisation between the legislative and judicial branches of Member States.¹⁴ In particular, journalists merit a heightened level of protection as they serve as communication channels for whistleblowers. For this reason, national laws should provide for effective remedies such as the responsible journalism justification - a defence articulated by journalist Edouard Perrin in the Luxleaks case to mitigate accusations of criminal conduct - particularly if those jurisdictions charge journalists as accomplices to whistleblowers. In the meantime, journalists must consider the timing of their sources' disclosures as well as related acts (copying files, reaching out, etc). Journalists should also be aware of applicable laws on hacking and cybercrimes, since they may be used to intimidate journalists by charging them as accomplices to a whistleblower's unauthorized access and transfer of protected data.



Article 4:

The Directive protects “facilitators” from retaliation.

Personal scope

1. This Directive shall apply to reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following:
 - a. persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants;
 - b. persons having self-employed status, within the meaning of Article 49 TFEU;
 - c. shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and unpaid trainees;
 - d. any persons working under the supervision and direction of contractors, subcontractors and suppliers.
2. This Directive shall also apply to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended.
3. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations.
4. The measures for the protection of reporting persons set out in Chapter VI shall also apply, where relevant, to:
 - a. facilitators;
 - b. third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and
 - c. legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.

Before commenting on the protection from retaliation granted to “facilitators”, it should be noted that by tying the application of the Directive only to persons reporting wrongdoing that are in some way related to their work activities. In so doing, the Directive has inevitably opted to not only condition protection to work-related conduct, but has also excluded non-insider/outsider whistleblowers. In other words, disclosures concerning conduct of persons other than the reporting person’s employer as well as persons with information about wrongdoing detected in a non-work-related capacity (i.e., outside the work environment) are not covered by the Directive. Consequently, journalists themselves would be excluded as well as individuals at NGOs/civil society organizations (unless, of course, the wrongdoing disclosed related to their workplaces). In addition, whistleblowers personally affected by wrongdoing (except for shareholders of companies engaged in wrongdoing, who are covered under Article 4, paragraph 1.c.) and even researchers and industry experts would also be excluded.

This limited approach is undesirable, and journalists should work to advocate for an approach which prioritises freedom of expression and access to information, recognizing whistleblowers as valuable enforcement tools to ensure corporate and social accountability. For instance, the United Kingdom’s Public Interest Act (PIDA) specifically protects disclosures made in the public interest even if they are unrelated to the workplace.¹⁵

With respect to anti-retaliation protections, the Directive covers whistleblowers (i.e. “reporting persons” with the caveat explained above) as well as third parties who are either related to

whistleblowers (relatives or work colleagues) or have “assisted” them in reporting breaches of EU law. Retaliation provisions are discussed below in the analysis of Arts. 19 and 21.

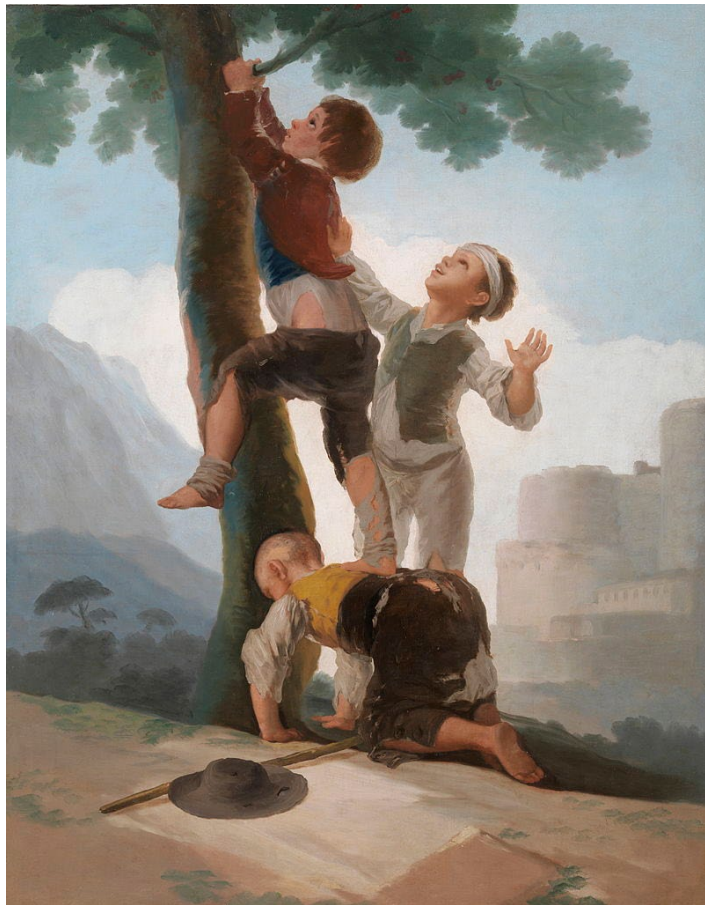
Journalists should be aware that although they are neither mentioned by name in Article 4 nor in the definition of “facilitator” (see Article 5 below), the term facilitator is defined broadly enough to encompass journalists. The use of the term facilitator can be particularly problematic for journalists because of the negative consequences it carries under the

national criminal laws of certain Member States. For instance, under these laws, as a facilitator, a journalist may be construed as endorsing a crime, serving as an accomplice to illegal acts, or even implicated as a participant rather than an intermediary between a whistleblower and the public. This can result in significant problems and fragmentation within and among Member States, with journalists facing the risk of liability under national criminal laws for conduct that is protected by the EU Whistleblower Directive.¹⁶

New whistleblower legislation recently introduced as part of the transposition process for the EU Whistleblower Directive in Spain includes provisions regarding facilitators that are a more protective of journalists. Under the recently proposed Spanish law,¹⁷ “facilitators” are defined as any natural or legal person who “contributes, assists or aids the whistleblower to reveal or make public information on breaches, including, but not limited to the following: civil society organizations, professional bodies or associations, unions, journalists, journalist organizations and lawyers.”¹⁸ Moreover, whistleblowers and facilitators are entitled to safety, anonymity and confidentiality, even against those in charge of processing reports and tips.¹⁹ The proposed Spanish legislation also imposes tough sanctions for reporting channels that do not protect reporters’ identities despite claiming to do so, including, for instance, those that trace a complaint’s IP address.²⁰ Facilitators are additionally entitled to police protection if they are in danger or receive threats.²¹

Recommendation:

Journalists should strongly consider a transposition proposal that seeks to clarify and expand the term “facilitator” and include wording specifically designed to exclude the negative connotations stated above. In other words, journalists should not be viewed as accomplices to wrongdoing, but rather as intermediaries fulfilling a vital role in democratic societies. In addition, best practice indicates the term facilitator as defined should include a non-exhaustive list of who would be considered a “facilitator” and specifically mention journalists and journalist organizations. If whistleblowers merit protection, and they are the ones who obtain and disclose protected/confidential information in the first instance, journalists and their organizations should merit the same amount of protection for channelling the information and making it public. Legislation widening the definition of disclosures to allow for non-work-related wrongdoing is also desirable. This would encourage non-insider/outside whistleblowers to come forward, thereby increasing the number of whistleblowers who can report information on wrongdoing.



Article 5:

Although not specifically included in the definition, journalists (not their organizations) could be characterized as “facilitators” and would be protected against retaliation for reporting activities under the scope of the Directive.

Definitions

For the purposes of this Directive, the following definitions apply:

[...]

(3) “report” or “to report” means, the oral or written communication of information on breaches;

(4) “internal reporting” means the oral or written communication of information on breaches within a legal entity in the private or public sector;

(5) “external reporting” means the oral or written communication of information on breaches to the competent authorities;

(6) “public disclosure” or “to publicly disclose” means the making of information on breaches available in the public domain;

(7) “reporting person” means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities;

(8) “facilitator” means a natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential.

[...]

(11) “retaliation” means any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person.

The EU Whistleblower Directive adopted a restrictive definition of “facilitator,” limiting its coverage to only natural persons and thereby excluding legal

persons such as journalist organisations and civil society organisations that support whistleblowers. By contrast, Spain’s newly proposed whistleblowing law expands the definition of facilitator to include legal entities including civil society organizations, unions, and journalist organisations, among others. Scientific research demonstrates that the act of speaking up can exact a large personal toll on whistleblowers, isolating them from work colleagues and other support systems and leading to higher incidences of depression, substance abuse and marital strife.²² As a result, whistleblowers frequently turn to their unions, professional associations or whistleblower protection organizations to discuss their concerns and navigate the treacherous waters of making a whistleblower disclosure, and said organizations are instrumental in advising and supporting whistleblowers and helping them make the information public. However, under the Directive, arguably only the individual journalist, not the larger media organizations in which he or she sits, would be protected from retaliation. Because of this omission, media organizations can fall prey to retaliatory lawsuits for defamation or breach of protected data (to name a few examples) for publishing information whistleblowers provided to their individual journalists. Without the backing of the media outlets they work for, individual journalists may be less likely to incur the risk of assisting whistleblowers in making information public.

Recommendation:

Journalists should consider clarifying/expanding the term “facilitator” along the lines discussed above (i.e., to include journalists among the natural persons encompassed under the term facilitator as well as the inclusion of legal persons such as media organizations, unions and whistleblower support groups) or replacing “facilitator” with a less charged term, such as “intermediary,” while including specific wording and examples of actions deemed as supporting the reporting of wrongdoing by whistleblowers as well as persons and legal entities considered to be intermediaries/supporters. Legal uncertainty surrounding core terms like facilitator may discourage whistleblowers from coming forward altogether and journalists and their publications from helping whistleblowers bring information about wrongdoing to the public’s attention.

Article 6:

The Directive protects reporting persons provided they (i) reasonably believe information was true at the time of disclosure and (ii) use either one of the reporting channels, including sharing information with journalists.

Conditions for protection of reporting persons

1. Reporting persons shall qualify for protection under this Directive provided that:
 - a. They 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; and
 - b. They reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15 (emphasis added).
2. Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.
3. Persons who reported or publicly disclosed information on breaches anonymously, but who are subsequently identified and suffer retaliation, shall nonetheless qualify for the protection provided for under Chapter VI, provided that they meet the conditions laid down in paragraph 1.
4. Persons reporting to relevant institutions, bodies, offices or agencies of the Union breaches falling within the scope of this Directive shall qualify for protection as laid down in this Directive under the same conditions as persons who report externally.

The Directive establishes three reporting channels through which whistleblowers may report wrongdoing and receive protection: internal, external, and public disclosure. See Articles 5.4, 5.5 and 15. Internal reporting refers to disclosures within a legal entity in the private or public sector where the conduct reported by the whistleblower is presumably taking place, whereas external reporting refers to disclosures made to competent law enforcement authorities. Public disclosures are reports made to the media.

Although the EU Whistleblower Directive does not make internal reporting mandatory for whistleblowers, it is strongly encouraged as the whistleblower's first port of call, where feasible, under the logic, expressed in Recital 47, that the relevant information should first be brought to those closest to the source of the problem and who are most able to investigate and fix it; i.e., those inside the organization where it occurs.²³ Article 7.2 reinforces this preference for internal reporting as a first resort but notes that it can only be required if two preconditions are met: (1) "where the breach can be addressed effectively internally" and (2) "where the reporting person considers that there is no risk of retaliation." In so doing, the Directive effectively permits external reporting in the first instance (i.e., skipping internal reporting channels and going straight to the authorities) in situations where reporting internally would be ineffective and creates a risk that the whistleblower will be retaliated against. Since they are likely to suffer retaliation for speaking up internally, whistleblowers are allowed to bypass internal reporting under the Directive and make external reports to authorities in the first instance if the breach is unlikely to be remedied effectively via internal means. For instance, in organizations in which the alleged wrongdoing was orchestrated by many of the top executives, whistleblowers can report directly to authorities because their concern is unlikely to be addressed effectively within the organization and the likelihood of retaliation is high.

To facilitate internal reporting, the Directive requires Member States to establish internal reporting channels in the private and public sectors (Article 8.1), which can be operated by either a person or department within an organization designated for that purpose or through a third party (Article 8.5).

This requirement applies to private sector organizations with 50 or more employees and all public sector entities (Article 8.3). Individuals or bodies in charge of internal channel reporting are obliged to provide diligent follow-up to those persons who made the internal report and provide feedback within a reasonable time frame, which is not to exceed three months after acknowledgement of receipt of the complaint (Article 9.1).

The requirements for external reporting to authorities are covered by Articles 10 through 12. The emphasis on having clearly designated reporting channels and keeping whistleblowers informed about the status of their report extends from internal reporting to external reporting as well. Under Articles 11.1 and 11.2(a), Member States must establish competent authorities to receive, give feedback and follow up on reports of breaches and ensure that these authorities establish independent and autonomous external reporting channels to receive and handle information on breaches. Feedback must be provided to the reporting person within three months, or six months in justified cases (Article 11.2(d)). Authorities receiving reports that do not have the necessary competence to address the potential breach shall transmit them to the competent authority within a reasonable time frame and in a secure manner, informing the reporting person without delay (Article 11.6).



After internal and external reporting, the third reporting channel to be protected under the Directive is a public disclosure to the press. The conditions that must be met for a public disclosure to be protected are discussed more fully in the analysis of Article 15 below. However, it follows from the requirements of internal and external reporting discussed above that the Directive only allows a reporting person to go to the press and be protected if he or she reported internally, externally, or both and did not receive feedback after the required time period (i.e., a period of three to six months) - unless the reporting person has reasonable grounds to believe the breach may cause an imminent or manifest danger to the public interest or if the external reporting authority has been compromised. Therefore, when working with whistleblower sources, journalists should pay attention to whether internal or external channels were indeed in place when the report was made, and if the reporting person availed him- or herself of these mechanisms. The time frame is also important, as the internal or external reporting channels have a minimum of three months to provide feedback.

To qualify for protection under the Directive, the reporting person must have 'reasonable grounds to believe that the information [he or she reports] is true.' However, the Directive does not specify whether the test for reasonableness is a subjective or objective one. What does it mean to have 'reasonable grounds to believe that the information is true'? Ideally, the reasonableness of the belief will be judged in comparison to what a person in a similar situation and with similar knowledge might believe, i.e., under an objective standard. However, this can also be linked to the concept of good faith, which has a different interpretation according to each legal system. Because no specific legal standard governing such principles is identified, there is potential for differing results and legal uncertainty, thus increasing the risk of further fragmentation at a national level.

Recital 32 of the Directive correctly states that "[t]he motives of reporting persons in reporting should be irrelevant in deciding whether they should receive protection." So long as the reporting person genuinely believes the information he/she is bringing forward is true, it is irrelevant if, for

instance, the whistleblower was partly motivated by malice against his/her supervisor. Motive does matter in the case of “malicious or abusive reports” under the Directive, however, where the reporting

person deliberately and knowingly reported wrong or misleading information, in which case the reporting person is not protected and may be fined.²⁴ Given the retaliation whistleblowers frequently face in disclosing information, however, such instances are not as common as the Directive seems to imply. In any event, in any transposition proposal, there should be clear wording defining what is deemed as malicious or abusive reporting so as not to discourage whistleblowers with truthful information to report. Disclosing knowingly false information would be an obvious example.

Recital 31 recognizes that the right to freedom of expression and information encompasses the right to receive and impart information as well as the freedom and pluralism of the media. Democratic principles of transparency and accountability also underpin the right to speak out. The Directive attempts to balance these freedoms with the interest of employers to manage their organisations and protect their own interests with the interest of the public to be protected from harm.²⁵

Recommendation:

Journalists should support a transposition proposal that makes clear the following key points. First, the “reasonableness” requirement in Article 6.1(a) should be clearly defined as an objective test in which it must have been objectively reasonable for the whistleblower to have held such a belief. Guiding principles can also be included for a court or tribunal to use if the whistleblower is forced to defend the reasonableness of his or her belief. Second, the objective and purpose of the Directive is to encourage whistleblowers to come forward in order to investigate breaches of EU law. As such, a whistleblower’s motive should be utterly irrelevant in this context. The focus should be on the message, not the messenger. As long as the information is true or the reporting person reasonably believes that it is true, the whistleblower and intermediaries (including journalists) should be protected. Third, whistleblowers should be entitled to evaluate and determine which of the three reporting channels is most appropriate for them according to their particular circumstances. Although the Directive no longer provides for mandatory internal reporting, it still contains language conditioning direct recourse to the authorities and the media on the exhaustion of certain labyrinthine requirements, such as receiving feedback from internal and/or external channels (see analysis of Article 15 below).

Article 15:

Sharing information with journalists is characterized as “public disclosure” and requires the reporting person to first meet certain conditions.

Public disclosures

1. A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:
 - a. the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or
 - b. the person has reasonable grounds to believe that:
 - i. the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
 - ii. in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.
2. This Article shall not apply to 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.

Whistleblower protection for public disclosures to the press or through media channels is not automatic under the Directive. Article 15.1 provides two primary routes through which whistleblowers may report wrongdoing to the media and receive protection. First, whistleblowers may report to the media where either a serial internal and external report or a direct external report was made that was not attended to within the specified time frame (i.e., three months, or six months for external channels).

Article 15.1(a). Second, whistleblowers may report to the media where they reasonably believe there is imminent danger to the public or there is a slim chance that the authorities will address the report in a satisfactory manner when it is reported to them externally. Article 15.1(b).

For the protection afforded by the second route (Article 15.1(b)) to apply, the whistleblower must have “reasonable grounds” to believe that there is an emergency situation capable of endangering the public interest or that the external channel of reporting to authorities has been compromised. In the transposition process, clarity and guidance are required concerning the extent and meaning of the concept “reasonable grounds” and whether a good faith defence would apply. The Directive notes that even if the information disclosed by whistleblowers is incorrect or otherwise inaccurate, the whistleblowers would still be protected as long as they believed the information to be true or accurate at the time of reporting or disclosing.²⁶ A presumption of protection under the Directive applies unless it is shown the whistleblower knowingly disclosed false information.

Under Article 15.1(b)(i) (which protects whistleblowers who disclose to the media wrongdoing that is likely to imminently endanger the public), it is not entirely clear whether Luxleaks whistleblower Antoine Deltour would have qualified for protection, as it is uncertain whether reporting on tax avoidance or aggressive tax optimisation schemes constitutes an “imminent or manifest danger to the public interest” in the strict sense of the term. Article 15.1(b)(ii) provides even less certainty, given that it depends on circumstances outside the whistleblower’s control, such as concealment or destruction of evidence by a competent authority or collusion by the latter with the perpetrator of the breach reported by the whistleblower. As written, Article 15.1 may serve to discourage potential whistleblowers from coming forward which, in turn, may hinder journalistic reporting and the right of the public to be informed.

The conditions laid out above would not apply if the disclosure to the press is made pursuant to “specific national provisions establishing a system of protection relating to freedom of expression and infor-

mation,” as per Article 15.2. This type of exception applicable in countries such as Sweden is certainly useful, and journalists should be aware of its existence, but it would seem to prejudice whistleblowers and journalists located in European countries with limited rights of freedom of expression and information. Also, it is unclear whether the law to be applied is that of the country where the disclosure takes place or that of the whistleblower’s nationality, or even the journalist’s nationality or where the publication is located.

How whistleblowers can report wrongdoing, and through which channels, was a point of tension and contention in the drafting of the EU Whistleblower Directive. In the original proposal for the Directive,²⁷ the use of tiered reporting channels was explained in the background to this section as necessary to ensure that the information reaches the parties who are in the best position to resolve a breach as well as “to prevent unjustified reputational damage from public disclosure.” However, the success of the recent press disclosures coordinated via ICIJ (International Consortium of Investigative Journalists), such as the Panama and Paradise Papers, Bahama, Mauritius and Luanda Leaks, in addressing breaches of EU law contradicts the assumption underlying tiered reporting channels that internal channels are most efficient.

While the reference to reputational damage was removed from the final version of the Directive, Recital 33 identifies the interests the Directive seeks to balance with the use of tiered reporting channels as follows: “...it is necessary to protect public disclosures taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organisations and to protect their interests, on the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR.”²⁸ The referenced ECHR case law, which serves as a touchstone regarding the balancing of the competing interests, takes into account whether viable national legislation and/or internal or external reporting channels were in place at the time of the disclosure when determining a whistleblower’s eligibility for protection against retaliation.

In the case of *Guja v. Moldova*,²⁹ the European Court of Human Rights (ECHR) examined whether a whistleblower was entitled to protection from retaliation after leaking official documents from the Prosecutor General’s Office to a newspaper, which then published the information. The leaked documents showed that the Deputy Speaker of Parliament had pressured the Prosecutor General to intervene in the case of four policeman who had been charged with the use of force during unlawful arrests. The whistleblower stated that he had acted in compliance with several national laws by disclosing the documents, including the Access to Information Act, and was following the President’s exhortation decrying acts of corruption in the government. Neither the Prosecutor’s Office nor the Deputy Speaker questioned the truthfulness of the leaked documents, but the government argued that there had been no interference with the whistleblower’s right to freedom of expression because he was not the author of the articles. Furthermore, the whistleblower was allegedly dismissed for breaching the internal regulations of the Prosecutor General’s Office and not for making the relevant disclosures.

The court ruled that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms³⁰ applied to the case since the whistleblower’s dismissal for making the documents public amounted to an interference by a public authority with his right to freedom of expression. In order for the interference to be permissible, it must be prescribed by law, have one or more legitimate aims, and be necessary in a democratic society to achieve those aims. Since there was no applicable whistleblowing legislation in Moldova, employees had no procedure for disclosing wrongdoing at their place of work. The whistleblower thus had grounds to believe that the evidence would be concealed or destroyed if he reported internally, and that he had no alternative but to go to the press. The court ultimately ruled in favour of the whistleblower: “Being mindful of the importance of the right to freedom of expression on matters of general interest, the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers, and the right of employers to manage their staff – and having weighed up the other different interests involved in the present case – the Court comes to the conclusion that the

interference with the applicant's right to freedom of expression, in particular his right to impart information, was not 'necessary in a democratic society.'"³¹

Although freedom of expression has been recognized as a fundamental right, its application is not always uniform across the EU. Legislative and judicial bodies, both at national and EU levels, appear hesitant to give whistleblowers who disclose internal documents to the press the benefit of the doubt, as reflected by the emphasis ECHR placed on employees' duty of loyalty in *Guja*. Thus, the potential reputational damage to employers from information provided by whistleblowers to the press weighs heavily against the lack of national reporting channels. Even if reporting channels or national remedies exist, these could be functionally useless; for instance, if the system is corrupt.

The Directive recognizes that non-governmental organisations have an important role to play in encouraging and safeguarding whistleblowers. It also considers that social media and digital channels are increasingly used by both whistleblowers and journalists to disseminate information. These are considered public disclosures that fall under the Directive's scope if the provisions of Article 15 are met.³²

However, whistleblowers should be free to determine which reporting channel, if any, is the most appropriate venue for disclosing information. The use of non-internal and independent channels should be encouraged further, as they are often the most effective means to draw attention to and address wrongdoings, as the experience of the Panama and Paradise Papers as well as Bahamas, Mauritius and Luanda Leaks shows. Disclosures made through these channels fall under the rights of freedom of expression, the press, and information, and should not be qualified.



Recommendation:

Journalists should work closely with relevant stakeholders (e.g. non-profit organizations focusing on whistleblowing protection as well as organizations focusing on transparency and accountability) to convey that unnecessary burdens and hurdles to accessing reporting channels, including legal uncertainty regarding reporting requirements, will only serve to discourage whistleblowers. Overall, efforts should be directed at the national level to surpass the Directive's minimum standards and provide whistleblowers with the freedom to determine the most appropriate channel for their respective disclosures as well as the timetable for accessing such channels and making disclosures.

Articles 19 and 21: Facilitators are protected from direct and indirect forms of retaliation as well as legal liability.

Article 19:

Prohibition of retaliation

Article 19 prohibits any form of retaliation against reporting persons, and facilitators where applicable, including without limitation: suspension, dismissal, demotion, transfer of duties, negative performance assessments or employment references, disciplinary measures, coercion, intimidation, harassment, discrimination or unfair treatment, reputational harm (particularly through social media), financial loss, blacklisting, and cancellation of a licence or permit. Member States must take the necessary measures to ensure that persons referred to in Article 4, which includes facilitators, are protected against retaliation (Article 21.1). The Directive, thus, explicitly recognizes that third parties who assist whistleblowers qualify for protection from both direct and indirect forms of retaliation.

By including social media as a platform for retaliation, the Directive aptly recognizes the "informal" mechanisms that can nonetheless have a great negative impact on the whistleblower's or facilitator's reputation, job, and ability to secure future employment. Also, these activities do not take place strictly within the employment sphere, which reflects the blurring of public and private boundaries that characterize modern society.

Article 21:

Measures for protection against retaliation

1. Member States shall take the necessary measures to ensure that persons referred to in Article 4 are protected against retaliation. Such measures shall include, in particular, those set out in paragraphs 2 to 8 of this Article.
2. Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive.
3. Reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law.
4. Any other possible liability of reporting persons arising from acts or omissions which are unrelated to the reporting or public disclosure or which are not necessary for revealing a breach pursuant to this Directive shall continue to be governed by applicable Union or national law.
5. In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that the measure was based on duly justified grounds.
6. Persons referred to in Article 4 shall have access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law.
7. In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public or on collective labour law, persons referred to in Article 4 shall not incur liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive. Where a person reports or publicly discloses information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3(2) of the Directive (EU) 2016/943.
8. 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.

Facilitators (who, as defined in Article 5, arguably include journalists but not their organisations) qualify for protection against retaliation under Article 21, since they are among the covered persons identified in Article 4 to whom the Directive's protections apply. This has clear implications for attributions of liability. Persons who report information on breaches or make public disclosures shall not be considered in breach of restrictions on disclosure of information and shall not incur liability of any kind so long as they had reasonable grounds to believe that the reporting or public disclosure was necessary to reveal a breach of EU law pursuant to the Directive (Article 21.2). This is a clear defence to contractual liability, as many corporations and employers utilise

non-disclosure and confidentiality agreements to gag potential whistleblowers and their supporters.

Neither shall reporting persons incur liability in respect to the acquisition of or access to the information except if it constitutes a self-standing criminal offence. In that case, criminal liability shall be governed by national law (Article 21.3). This could have repercussions for journalists if they come into contact with information that arguably may have been obtained illegally under domestic law through their source or in the course of their investigation, such as in the case of journalist Martin Bright (then a reporter at The Observer) who published a leaked memo collected by GCHQ whistleblower Katharine Gun or the accusation against journalist Edouard Perrin in the Luxleaks case of being an accomplice to the alleged violation of professional secrecy, mentioned above.

Regarding defamation (Article 21.7), the ECHR has stated that protection of reputation can act as a limit to the freedom of expression if certain circumstances are met. In *Margulev v. Russia*³³, the Moscow City Council sued the head of a non-governmental organisation for defamation. The applicant, Margulev, had been quoted in a newspaper criticising the city's restoration of an architectural complex and suggesting that these works had adversely affected the grounds' landscape garden. The council claimed that Margulev's statement that they were depriving the public of its historical and cultural heritage had tarnished their commercial reputation and sought a retraction.

The court held that Margulev took on a "social watchdog function" by making remarks concerning a matter of public interest. Therefore, an analysis of the European Convention on Human Rights Article 10 (freedom of expression) was warranted. The ECHR applied the same standards of protection awarded to the press. These are:

1. Whether there was an interference with a party's freedom of expression (including the use of the press/media and contribution to a debate on general interest);
2. Whether this interference was prescribed by law and pursued a legitimate aim; and

3. Whether it was necessary in a democratic society.

In particular, the court noted at ¶148: "By virtue of the essential function the press fulfils in a democracy... Art. 10 of the Convention affords journalists protection, subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism."

When analysing a defamation matter, a careful distinction must be drawn between facts and value judgments. Value judgments can prove excessive if they do not possess a reasonable factual basis.³⁴ A court must strike a fair balance and determine whether the measures taken to interfere with the freedom of expression were relevant and sufficient. The ECHR also noted that a mere institutional interest of a governmental body (here, a city council) in protecting its reputation does not necessarily attract the same level of guarantees as those awarded to the protection of private individuals' reputations. Additionally, the right to private life is more important for individuals as opposed to organisations.

Margulev, therefore, demonstrates that journalists can overcome defamation allegations by making a showing of good faith and that the information provided was accurate and reliable.

Recommendation:

Journalists should be aware of ECHR case law on defamation, as well as applicable national provisions, when publishing information provided by whistleblowers. Both of these sources as well as the Directive require good faith; i.e., reasonable grounds for believing that the information is true at the time of the disclosure. Journalists must, therefore, be prepared to conduct due diligence into the allegations and check the facts to the best of their ability, which is already part of responsible journalism practice. Contractual liability is not grounds for challenging a public disclosure, but criminal liability remains a problem, as it continues to be governed by national law.

Articles 16 and 22:

The identity of sources should be kept confidential, and facilitators cannot be compelled to reveal whistleblowers while investigations are ongoing.

Article 16:

Duty of confidentiality

1. Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorised staff members competent to receive or follow up on reports, without the explicit consent of that person. This shall also apply to any other information from which the identity of the reporting person may be directly or indirectly deduced.
2. By way of derogation from paragraph 1, the identity of the reporting person and any other information referred to in paragraph 1 may be disclosed only where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned.

Article 22:

Measures for the protection of persons concerned

1. Member States shall ensure, in accordance with the Charter, that persons concerned fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file.
2. Competent authorities shall ensure, in accordance with national law, that the identity of persons concerned is protected for as long as investigations triggered by the report or the public disclosure are ongoing.
3. The rules set out in Articles 12, 17 and 18 as regards the protection of the identity of reporting persons shall also apply to the protection of the identity of persons concerned.

The Directive only addresses the duty of confidentiality and thereby overlooks the possibility of anonymous reporting, also running afoul of additional EU legislation and resolutions. For instance, the EU Parliament's Resolution of 24 October 2017 on legitimate measures to protect whistleblowers recognizes the importance of ensuring anonymity as it "could encourage whistleblowers to share information which they would not share otherwise; (...) stresses that the identity of the whistleblower and any information allowing his or her identification should not be revealed without his or her consent; considers that any breach of anonymity should be subject to sanctions."³⁵ Another two examples allowing for anonymous reporting are the EU Anti-Money Laundering Directive and national legislation such as the German Banking Act (Kreditwesengesetz – KWG).

Article 22.2 provides that reporting persons shall have their identities protected as long as the investigations triggered by the public disclosure are ongoing. This means that journalists cannot be pressured to reveal the identity of their source for purposes of the Directive. Furthermore, the rights and remedies provided by the Directive cannot be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement (Article 24). This is extremely important, as journalists can be pressured in some instances by law enforcement agencies or other interested parties to disclose the identity of a source.

Recommendation:

Journalists work regularly with anonymous sources. Experience shows that where anonymity is ensured, whistleblowers are more likely to report wrongdoing. Therefore, journalists should focus on a transposition proposal that ensures anonymous reporting if the ultimate objective is to bring into the public's attention breaches of EU law that are of public interest. Again, proposals should emphasize the importance of the message and not the identity of the messenger. Aside from the Directive and its protection of the confidentiality of sources, journalists can also rely on pre-existing national and international legislation to protect the identity of their sources.

Article 25:

Member States are permitted to adopt provisions that are more favourable to reporting persons and cannot reduce the level of existing protection at a national level.

More favourable treatment and non-regression clause

1. Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive, without prejudice to Article 22 and Article 23(2).
2. 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.

The Directive seeks to create a floor, not a ceiling, for the amount of protections and rights afforded to whistleblowers. The Directive establishes common minimum standards for Member States on whistleblowers and does not prevent them from increasing and expanding upon these protections. It is unclear whether facilitators are included in this provision, as it does not mention Article 4, but there should be no legal impediment for Member States to extend protection to journalists who work with whistleblowers. The Directive corresponds to a public policy interest in protecting whistleblowers and related third parties from retaliation connected to their reporting of EU law breaches. It would be counterproductive to censure Member States for encouraging journalists exposing matters of importance to the public through information gathered by whistleblowers.

The Directive also makes clear that its implementation does not constitute grounds for reducing protection already afforded to whistleblowers at the national level. Journalists can, therefore, look to national whistleblower legislation for an added measure of protection to complement the Directive, as well as both EU and national provisions regarding freedom of expression, the press, and confidentiality.

Although Member States have two years to implement the Directive (until December 2021), the approval of a proposed law currently registered in the Spanish Parliament would make Spain the first country to transpose the Directive into national law. One key component of this draft law is the use of designated digital mailboxes which whistleblowers can use to disclose information anonymously and safely. “Warning Mailboxes” have been used previously at governmental institutions (the first one in Barcelona’s City Hall) and are currently being reproduced all over the country. The success of these measures can serve to encourage other national legislatures to adopt broader measures of protection for both whistleblowers and journalists.



Recommendation:

Journalists should familiarize themselves with the draft transposition law introduced in Spain and work closely with relevant stakeholders, such as Xnet and WIN, who helped draft the proposed Spanish whistleblower law. The legislative strategy should aim at (i) surpassing the minimum standards at the national level and (ii) reducing the gaps, loopholes or even conflicts present in the Directive and other EU Directives (e.g., Trade Secrets Directive). The Spanish whistleblowing law proposal also demonstrates how national laws can expand protection for facilitators (which was specifically defined to include journalists and media organisations). Journalists should encourage the development and adoption of similar laws as well as the inclusion of journalists within the text for more specific provisions and harmonized application.

Careful attention must be given to Recitals 92 and 98 as they could be used by Member States to undermine the object and purpose of the Directive.

Journalists must be vigilant about attempts by Member States to condition protection for obtaining information on breaches of EU law to compliance with “lawful acquisition.” Although recitals are not mandatory provisions, they provide valuable insight into Member States’ policies and are a predictor of how Member States might transpose the Directive. Attention should be given to Recital 92 as it reflects the underlying tension between Member States’ criminal laws and EU whistleblower protection. It reads:

“Where reporting persons lawfully acquire or obtain access to the information on breaches reported or the documents containing that information, they should enjoy immunity from liability. This should apply both in cases where reporting persons reveal the content of documents to which they have lawful access as well as in cases where they make copies of such documents or remove them from the premises of the organisation where they are employed, in breach of contractual or other clauses stipulating that the relevant documents are the property of the organisation... Where the reporting persons acquired or obtained access to the relevant information or documents by committing a criminal offence, such as physical trespassing or hacking, their criminal liability should remain governed by the applicable national law, without prejudice to the protection granted under Article 21(7) of this Directive. Similarly, any other possible liability of the reporting persons arising from acts or omissions which are unrelated to the reporting or are not necessary for revealing a breach pursuant to this Directive should remain governed by the applicable Union or national law. In those cases, it should be for the national courts to assess the liability of the reporting persons in the light of all factual information and taking into account the individual circumstances of the case, including the necessity and proportionality of the act or omission in relation to the report or public disclosure.”

According to this recital, it appears that the Directive distinguishes between “good” and “bad” whistleblowers regarding the manner in which information was obtained. The cases discussed below exemplify why the ambiguity as to what constitutes a “lawful acquisition” and focusing on the motivation behind a whistleblower’s behaviour are problematic.

The reference to the removal of documents from the premises of an organisation in breach of contract in Recital 92 arguably may refer to the Luxleaks case where Antoine Deltour would be an example of a “good” whistleblower, as he copied internal files prior to leaving the company where he worked. Conversely, Football Leaks would seem to present the case of a “bad” whistleblower who used hacking to uncover the information he later disclosed to the press. Here, Rui Pinto did not possess the proper mindset to qualify for protection under the Directive, as he allegedly used the information to attempt extortion before making the information public. However, both Deltour and Pinto were treated the same under their respective national law provisions and charged with criminal offences. The Directive’s text does not fully address this issue or provide for uniformity. By basing its protection scheme on subjective circumstances rather than an objective search for the truth, the Directive can disincentivise whistleblowers.

Recital 92 also shifts the decision-making power to national courts, which will likely produce differing results. Standards of reasonableness and good faith might vary between Member States. In Luxleaks, for instance, two whistleblowers (Antoine Deltour and Raphael Halet) were originally indicted in the Criminal Court of Luxembourg and sentenced to both imprisonment and fines; the investigative journalist responsible for publishing the information (Edouard Perrin) was acquitted. The Court of Appeal upheld the decision, but the Court of Cassation exonerated one of the whistleblowers by recognizing his status under the case law of the European Court of Human Rights (ECHR) interpreting Article 10 of the European Convention on Human Rights.

Such case law provides that disclosures are protected if they meet the following criteria:

- The disclosure should correspond to a strong public interest;
- There should be no other effective means of remedying the wrongdoing;
- The public interest should be sufficiently strong to overcome the duty of confidence;
- The resulting damage should not be outweighed by the public interest;
- The disclosure should not be motivated by personal grievance or pecuniary gain; and
- The whistleblower should act in good faith and believe that the information is true, and that its disclosure is made in the public interest.

The Luxembourgish Court of Appeal stated that in a matter of general interest concerning tax evasion, the freedom of expression of a whistleblower can under certain conditions prevail and be invoked as justification against national criminal offences: “The justification of the status of whistleblower will hence neutralise the illegality of the violation of the law, under the condition that the violation was committed in good faith and in a proportionate and adequate manner, to reveal information of general interest.”

The Court of Appeal granted Deltour whistleblower status and upheld Perrin’s prior acquittal. Perrin was originally charged as an accomplice to Halet for the violation of trade secrets and professional secrets. However, since Perrin suggested the use of a “dead drop” mailbox to receive the relevant documents while protecting his source and did not instruct nor guide Halet in how to procure the documents, he was able to raise the defence of legal justification. Specifically, the modality of responsible journalism, which applies when investigative journalists act in good faith and deliver exact and credible information. In cases where confidentiality is invoked, the court will utilize a proportionality test to evaluate a journalist’s conduct.

Interestingly, the Court of Appeal found that Deltour was unable to invoke legal justification on the grounds of state of necessity as there was no “real and imminent danger” or crisis situation. It cited that this defendant waited eight months to release the information after appropriating the relevant documents and therefore, the danger he alleged could not have been imminent. At the moment Deltour transferred the documents to Perrin, any possible danger had already passed. It should be noted that Deltour downloaded 20,000 pages concerning 538 companies and containing technical fiscal information. Deltour’s delay could be interpreted as prudence, since he had no professional knowledge of fiscal matters and consulted an investigative journalist specialized in tax matters before making his findings public. But without a bright-line standard for imminent danger, national and EU whistleblower law might continue to be fragmented.

By analysing the case using ECHR case law, the Court of Appeal found that Deltour did not know that the documents would be leaked in their entirety by the press. Neither did he act to harm his employer or to receive personal gain. These circumstances weighed in favour of a finding of good faith and public interest, which led to Deltour being granted the status of whistleblower and acquitted. However, Halet remained guilty and his appeal to the ECHR is currently pending.³⁶

After five years in the courts and multiple ongoing investigations, Luxleaks has had a major impact on EU whistleblowing policy. In addition to approving the Directive, the EU Commission announced its intention to investigate the secret tax deals at the heart of Luxleaks in March 2019. MEP Sven Giegold, the EU Parliament’s rapporteur for transparency, accountability and integrity in the EU institutions, stated: “Courageous action for the common good must enjoy the best possible legal protection.”³⁷ But that is not always the case, especially if the whistleblower does not conform to accepted social mores. Someone like Rui Pinto may be motivated by indignation, which leads them to break the law. If a whistleblower has no working relationship to the company they are exposing (i.e., non-insider whistleblower), they will likely be exposed to national criminal sanctions, since the Directive will not apply to them.

Regarding hacking, certain countries have national laws penalizing individuals who gain unauthorized access to information on computers. For example, the US has a federal law (Computer Fraud and Abuse Act, CFAA) often used by the government to charge individuals in cases involving national security data. It forbids the unauthorized access, use or distribution of any information related to national security, records of financial institutions, US government departments or agencies, related to foreign or interstate communications and commerce with an intent to defraud. This distinction is crucial, as is the requirement of intentionally accessing a protected computer without authorization. The Electronic Communications Privacy Act (ECPA) protects data stored on and transferred from computer systems, including stored messages (i.e., emails) in server archives by penalizing those who access it without authorization. As a result, journalists should consider the manner by which their whistleblower sources obtain information, how it was accessed, and if they were authorized to do so.

Under the CFAA and ECPA, it is likely that Rui Pinto would still have been charged with committing a criminal offence, but the fact that his intent changed after obtaining the information could weigh towards a lighter sentence if the presiding court decides to consider all the facts. The nature of the information and public interest concerns must also be considered. Pinto released a variety of documents, including contracts, emails, and spreadsheets. While the documents did not have national security implications, these contained many sensitive financial details, such as bank account information, and he accessed the data without permission. If the Portuguese court does not find that Pinto acted in good faith, he could be sentenced to a longer prison term. No journalists have been charged for leaking the information gathered by Pinto yet, but the possibility cannot be discounted.

Qualifying information as “lawfully obtained” versus “unlawfully obtained” needlessly complicates the Directive’s protective measures. Restriction of whistleblower protection against retaliation should be the exception, not the rule. It also leads to further legal fragmentation between the EU and Member States which is what the Directive is meant to prevent and implicates journalists as well. As Xnet and European Digital Rights (EDRi) state, “[T]he aim of this Directive must be to facilitate the discovery of

serious acts against the general interest. For the purposes of this objective, it is irrelevant whether the person who uncovers them does so with good or bad intentions as long as they correspond to the truth.”³⁸

In light of Recital 92, journalists should be aware of the Tshwane Principles and, most notably, the principle concerning immunity from criminal and civil proceedings as well as the prohibition of sanctions against people possessing or disseminating the information provided by the whistleblower. Moreover, ECHR case law should also be considered for proposed legislation in order to ensure harmonisation between the legislative and judicial branches. In particular, journalists merit a heightened level of protection when the information is of public interest, despite alleged national security concerns. As noted above, national security should not be used indiscriminately as a shield to undermine the fundamental right of public access to information.

Recital 98 refers to the application of the Trade Secrets Directive to EU provisions on whistleblower protection. It reads:

“Directive (EU) 2016/943 of the European Parliament and of the Council lays down rules to ensure a sufficient and consistent level of civil redress in the event of unlawful acquisition, use or disclosure of a trade secret. However, it also provides that the acquisition, use or disclosure of a trade secret is to be considered lawful to the extent that it is allowed by Union law. Persons who disclose trade secrets acquired in a work-related context should only benefit from the protection granted by this Directive, including in terms of not incurring civil liability, provided that they meet the conditions laid down by this Directive, including that the disclosure was necessary to reveal a breach falling within the material scope of this Directive. Where those conditions are met, disclosures of trade secrets are to be considered allowed by Union law within the meaning of Article 3(2) of Directive (EU) 2016/943. Moreover, both Directives should be considered as being complementary ... Competent authorities that receive information on breaches that include trade secrets should ensure that they are not used or disclosed for purposes going beyond what is necessary for proper follow-up of the reports.”

The Trade Secrets Directive can impact the duty of confidentiality espoused in Article 16. However, the European Commission has clarified that journalists remain free to investigate and publish news on companies' practices and business affairs and are protected even if a trade secret was misappropriated. It is whistleblowers who are primarily subject to this directive's terms. They will be protected if the trade secret was disclosed in order to reveal a breach of Union law covered by the Whistleblowing Directive. Nonetheless, since whistleblowers are often the only available sources to detect corporate wrongdoing, the fact that they can use a good faith defence to rebut the Trade Secret Directive's burden of proof is a double-edged sword. On one hand, whistleblowers are not automatically punished for divulging a trade secret. On the other, "good faith" requires evaluation by a judge. The result could likely be differing court decisions among Member States, leaving whistleblowers potentially open to intimidation lawsuits.

For instance, a recent French Decree implementing the Trade Secrets Directive³⁹ introduces a mechanism allowing judges to order provisional or protective measures to prevent or end a trade secret breach. A judge can also impose the requirement of a financial guarantee (bond) in order to indemnify the trade secret holder if a defendant wishes to use the trade secret or if the proceeding is not resolved in their favour. Although these are civil remedies and the Decree does not criminalise any breach or the use and disclosure of trade secrets, the guarantee essentially operates as a penalty for the person who disclosed the information. Companies can use this Decree to discourage whistleblowers from disclosing information on EU law breaches that may involve trade secrets.

Recommendation:

Journalists should consider the previous transposition of the Trade Secrets Directive and the effectiveness of its implementation in practice regarding whistleblowers, journalists, and related concepts (protection of sources, freedom of expression, etc.). This could be a good indicator of the EU Whistleblowing Directive's weak points and suggestions for improvement, especially considering the French Decree's provisions. Journalists could also use the EU Whistleblowing Directive as a shield to protect their sources, in addition to other national and international legislation.



Case Studies

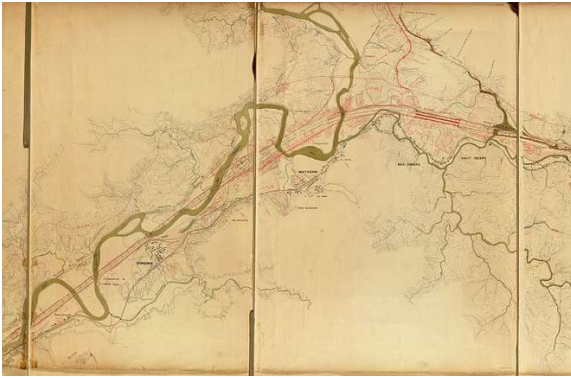


Luxleaks

In 2014, the International Consortium of Investigative Journalists published an investigation detailing how some of the world's largest corporations moved billions of dollars through Luxembourg in a widespread tax avoidance scheme. The investigation implicated over 300 secret tax deals between Luxembourg and businesses like Disney, Skype, and GlaxoSmithKline. These deals, called "tax rulings," allowed firms to pay less than 1% tax in Luxembourg. The main source, a Frenchman called Antoine Deltour, worked for Pricewaterhouse Coopers (PWC) and copied thousands of internal files documenting related tax rulings before leaving the firm. Deltour gave this information to journalist Edouard Perrin. Deltour and Raphael Halet, another PWC employee who helped disclose the information, were charged with theft and disclosure of confidential information and trade secrets. Perrin was arrested and charged for publishing the information. After two years and a verdict declaring the whistleblowers guilty, Deltour was granted whistleblower status and exonerated in 2018, while Halet's case is still pending before the European Court of Human Rights. Perrin was also acquitted.

Martin Bright/Katharine Gun

In 2003, Katharine Gun worked at a government surveillance center and came across information that the US government was planning to spy on the United Nations in order to secure approval for sending troops into Iraq. Ms. Gun disclosed this information to The Observer; Martin Bright was the journalist who broke the story. As a result of her actions, Ms. Gun was terminated from her job, arrested, and charged for violating the Official Secrets Act. While she made this disclosure in the public interest to prevent widespread casualties, the government only dropped the charges shortly before trial. The leading prosecutor offered no evidence and refused to comment on the reasons for desisting from criminal proceedings. This story was made into a recent Hollywood film starring Keira Knightley as real-life whistleblower Katharine Gun and Matt Smith as journalist Martin Bright called Official Secrets.



Panama Papers

In 2016, a German newspaper received 11.5 million files from the database of the world's fourth biggest offshore law firm, Mossack Fonseca, from an anonymous source. The newspaper shared this information with the International Consortium of Investigative Journalists, who then shared it with several international outlets, such as the BBC. These documents linked hundreds of individuals, including national leaders and politicians, to the use of offshore tax havens. This was one of the biggest leaks of information in history – nearly 60 times the amount of the LuxLeaks documents. The source remains anonymous, even to the journalists who reported on the story, but has been praised for his courageous efforts in making the public aware of this large-scale tax avoidance. To date, 23 countries have been able to recover at least \$1.2 billion in taxes, politicians involved have either resigned or faced prosecution, and at least 82 countries have carried out related investigations.

Football Leaks

Whistleblowers do not operate solely within political or financial institutions, however. In 2016, Rui Pinto began sharing information revealing wrongdoings and shortcomings by a Portuguese football club and sporting agency with the press, including the same German newspaper as in the Panama Papers case. This information revealed murky financial transactions and corruption in the world of European professional football. Mr. Pinto was imprisoned in Portugal after being taken into custody in Hungary and extradited, four years after the disclosures were made. He was accused of cybercrimes and attempted blackmail, among other acts, totaling 147 crimes. Mr. Pinto's attorney has criticized the Portuguese authorities and believes that his client would not have been arrested in Germany, France, England or Italy. However, the information led to the conviction of dozens of top players for tax evasion and increased scrutiny for the sport as a business.

Conclusion

The EU Whistleblower Directive is an important step for whistleblowers and journalists, whose efforts in reporting serious breaches of EU law are being recognized at a supranational level. The indirect inclusion of journalists in retaliation protection via the term “facilitator” is especially welcome, since there have been cases where journalists have been accused and prosecuted for assisting whistleblowers. The Directive’s prohibition of both direct and indirect reprisals is likewise commendable.

However, it must be noted that the Directive is not a “catch-all” instrument and several areas can still expose journalists to liability. For instance, Article 2 illustrates how only certain areas of EU law qualify for protection, and where sector-specific legislation is already in place, the Directive will not apply. Employment law is a prime example of such legislation. Article 15, concerning “public disclosures,” is another provision that must be examined with care. Although national law can protect a journalist if the Directive does not, there is still the possibility for a conflicts of law question to arise, especially if the whistleblower has a different nationality from where the breach or reporting occurred or where the breach or reporting has taken place.

Further potential instances for liability are found in Articles 3 and 21, which deal with the disclosure of information. Reporting persons and facilitators can be charged under national law if the information is classified/concerns national security and if releasing it can be characterised as a criminal offence. This area is particularly favoured by governmental/public entities and can also have a chilling effect for whistleblowers. However, the draft bill before the Spanish Parliament is an example of how national legislation can aid whistleblowers and include journalists specifically in the definition of “facilitators” without negative connotations. National law can thus be an additional means of support if political groups are made aware of why protecting whistleblowers and journalists is important and are given the means to do so. NGOs and public interest groups are crucial for these efforts to succeed, and journalists can marshal the needed support through diverse channels and connections.

Overall, the EU Whistleblower Directive provides a road map for whistleblower and facilitator/journalist protection complemented by existing national legislation. It is possible that the Directive will spur national governments to adopt greater measures of protection as a matter of public policy, but until concrete results materialise, journalists should be made aware of the existing limitations within the Directive. The vital role of investigative journalists should not be limited to understanding the Directive but should also encompass considerable outreach efforts to educate stakeholders and impress upon them the importance of the whistleblower-journalist partnership in protecting democracy and the public welfare.

Endnotes

- 1 Written by Mary Inman, Carolina González, and Claudia Quiñones of Constantine-Cannon LLP.
- 2 Copy of the EU Directive available at <https://data.consilium.europa.eu/doc/document/PE-78-2019-INIT/en/pdf>
- 3 Proposal for a Directive of the European Parliament and of the Council, 2018/0106 (COD).
- 4 Transparency International, A Best Practice Guide for Whistleblowing Legislation, available at https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation.
- 5 See Law No. 2013-907 of 11 October 2013 on transparency in public life; Law No. 2077-1598 establishing Article L1161-1 of the Labour Code, and Law No. 2013-316 of 16 April 2013 on the independence of expertise in relation to health and the environment and on the protection of whistleblowers.
- 6 Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption measures and the modernisation of economic life (herein Sapin II Law).
- 7 Introduced in November 2019, the bill was registered on December 11, 2019 with the support of sixteen members of Parliament. It is known as "Proposed Text of the Draft Law on Protection of Whistleblowers" (Proposición de Ley de Protección Integral de los Alertadores) and was introduced by Xnet, a non-profit activist project working in different fields related to digital rights, networked democracy and freedom of expression. Xnet is a member of the Whistleblowing International Network (WIN). See Xnet registers the first transposition of the European Union Whistleblower Protection Directive, available at <https://xnet-x.net/en/xnet-primera-transposicion-ley-alertadores-whistleblowers-denunciantes/>. English translation of the proposed law can be found at <https://xnet-x.net/en/template-law-full-protection-whistleblowers/>
- 8 Open Society Justice Initiative. The Global Principles on National Security and the Right to Information (herein The Tshwane Principles) available at <https://www.justiceinitiative.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>
- 9 "Public personnel" or "public servant" is defined as "current and former public employees, contractors, and sub-contractors of public authorities, including in the security sector. "Public personnel" or "public servant" also include persons employed by non-state bodies that are owned or controlled by the government or that serve as agents of the government; and employees of private or other entities that perform public functions or services or operate with substantial public funds or benefits, but only in regard to the performance of those functions, provision of services, or use of public funds or benefits." It should be noted that Principle 47 does not cover other crimes such as "burglary or blackmail, committed in the course of seeking or obtaining the information."
- 10 Criminal penalties are, therefore, subject to limited circumstances: (i) narrow categories specifically determined in the applicable law; (ii) the disclosure should pose a "real and identifiable risk of causing significant harm;" (iii) they must be proportionate to the harm caused; and (iv) a "public interest defence" must be available to "public personnel" whistleblowers (Principle 43).
- 11 When used as a noun, "sanction" refers to "any form of penalty or detriment, including criminal, civil and administrative measures. When used as a verb, [it] means to bring into effect such form of penalty or detriment.
- 12 See Principle 43(a) of the Tshwane Principles (providing for a "public interest defence").
- 13 Principle 43(b) reads: "In deciding whether the public interest in disclosure outweighs the public interest in non-disclosure, prosecutorial and judicial authorities should consider (i) whether the extent of the disclosure was reasonably necessary to disclose the information of public interest; (ii) the extent and risk of harm to the public interest caused by the disclosure; (iii) whether the person had reasonable grounds to believe that the disclosure would be in the public interest; (iv) whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public... and (v) the existence of exigent circumstances justifying the disclosure."
- 14 See, e.g., M & Co. v. Federal Republic of Germany, 13258/87, 9 February 1990; Observer and Guardian v. the United Kingdom, [1991] 14 EHRR 153, ECHR 49 [1991], [1991] ECHR 1385, 26 November 1991; Youth Initiative for Human Rights v. Serbia, 48315/06, 25 June 2013; Haldimann v. Switzerland, 21830/09, 24 February 2015.
- 15 Section 43C which refers to disclosures to employers or "other responsible person" reads:
 - (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—
 - (a) to his employer, or
 - (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
 - (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."
- 16 Discussed in greater detail below in the analysis of Article 21: Measures for protection against retaliation.
- 17 Proposed Text of the Draft Law on Protection of Whistleblowers, available at <https://xnet-x.net/en/template-law-full-protection-whistleblowers/>.
- 18 Article 3(b).
- 19 Article 5 reads: "The rights to security, anonymity and confidentiality, even against the people receiving and managing the process resulting from the communication of the information on breaches, access to case files and procedural action, legal advice and indemnity, are guaranteed to whistleblowers and facilitators. In any case, the rights and remedies provided in this Law may not be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."
- 20 See Article 7.2 recognizing the whistleblower's right to "confidentiality and anonymity" while imposing obligations on "facilitators" to "respect this confidentiality and not to reveal the whistleblower's identity under any circumstances" provided the whistleblower has "clearly indicat[ed] the desire that [his or her identity] remain confidential." See also, Article 14 concerning the protection of confidentiality or anonymity through "disclosing channels"; Article 37 which classifies violations of the proposed law into "very serious, serious, or minor" where anonymity and confidentiality violations are regarded as very serious carrying fines of between 100,001 and 300,000 euros, as per Article 38.
- 21 Article 6.2 reads: "Whistleblowers and facilitators will be given police protection when they report that their lives, bodily integrity or property are in danger, or are threatened as a consequence of communicating or disclosing the information. In this case, all measures of preventive protection stipulated in the Law on Protection of Witnesses and Experts in Criminal Cases (Title IV) and in the Victim's Statute must be applied to stop and avoid threats and retaliation against the whistleblower and/or the facilitator."
- 22 Aaron S. Kesselheim, M.D., J.D., M.Ph.H. et al, Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies, New England Journal of Medicine, May 13, 2010. Available at <https://www.nejm.org/doi/full/10.1056/NEJMs0912039>.
- 23 Recital 47: "For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible. As a principle, therefore, reporting persons should be encouraged to first use internal reporting channels and report to their employer, if such channels are available to them and can reasonably be expected to work."
- 24 See Recital 32 ("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 reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection.") and Article 23.2 "Member states shall provide for ... penalties applicable in respect of reporting persons where it is established that they knowingly reported or publicly disclosed false information."
- 25 Recital 33: "Moreover, it is necessary to protect public disclosures taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organisations and to protect their interests, on the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR."
- 26 Recital 32: "... At the same time, the requirement [that reporting persons should have reasonable grounds to believe the matters reported by them are true] ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake."
- 27 Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD), 23 April 2018 (herein "Proposal"), Recital 61.
- 28 Recital 33 of the EU Whistleblower Directive.
- 29 No. 14277/04, 17 February 2008.
- 30 Available at https://www.echr.coe.int/Documents/Collection_Convention_1950_ENG.pdf
- 31 Guja v. Moldova ¶197.
- 32 Recital 45 reads: "Protection against retaliation as a means of safeguarding freedom of expression and the freedom and pluralism of the media should be provided both to persons who report information about acts or omission within an organisation ('internal reporting') or to an outside authority ('external reporting') and to persons who make such information available in the public domain, for instance, directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions, or professional and business organisations."
- 33 ECHR 388, 8 October 2019.
- 34 See GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland, ECHR 006, 9 January 2018.
- 35 ¶149. Available at http://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.html.
- 36 The Court of Appeal held that the information obtained and disclosed by Halet was not as secret or difficult to come by as Deltour's information and revealed nothing new on the company's fiscal practices. There was no 'real imperious reason of general interest' for making the disclosure.
- 37 See Naomi Fowler "European Commission to Investigate Secret #LuxLeaks Tax Deal", Tax Justice Network (March 13, 2019), available at <https://www.taxjustice.net/2019/03/13/european-commission-to-investigate-secret-luxleaks-tax-deal/>.
- 38 See Analysis and proposals for necessary modifications of the draft EC Directive for the Protection of Whistle-blowers in collaboration with Christiana Mauro (Nuclear Transparency Watch) and Naomi Colvin (Courage Foundation), with the endorsement of (in progress) Expose Facts, Institut de Drets Humans (IDHC) and Loïc Dachary. Available at https://ec.europa.eu/info/law/better-regulation/feedback/11913/attachment/090166e5bb53eea6_en.
- 39 Law No 2018-670 issued on 30 July 2018 and passed by Decree No 2018-1126 on 11 December 2018.

