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Whistleblowing and labour law: The Whistleblower Directive - development, content and obstacles

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Abstract

While some people consider whistleblowers to be selfless heroes, others tend to see them as snitches and denounciators. One way or another, whistleblowing is a prominent term, whose meaning everyone seems to know, whilst simultaneously remaining significantly vague. With the entry into force of the Whistleblower Directive on 17th December 2019, the subject of whistleblowing is gaining further scientific as well as media attention. This legal act will certainly have, inter alia, an influence on the future design of industrial relations since whistleblowing is closely intertwined with the work environment. Without going into the concrete implementation possibilities of the respective Member States, this article is dedicated to highlighting issues of particular relevance to labour law. Before dealing with these specific aspects, there will be a broad analysis of the thematic area of whistleblowing in terms of the understanding of the concept, the interests at stake and the background of the new Directive.

Keywords: Whistleblowing; Whistleblower Directive; Conflicting interests; Denunciation; Protection from retaliation

1. Introduction.

Whistleblowing is an issue that concerns not only companies worldwide, but also their employees, their representatives and wider politics. Some of the biggest scandals of the last

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decades only were uncovered through whistleblowers.¹ Examples include Edward Snowden, who made the colossal internet surveillance by the USA public, William Mark Felt, initially known as "deep throat", who passed on information about the Watergate affair, or Daniel Ellsberg, who went public with the "Pentagon Papers" and thus exposed lies of the US government. Despite the fact that several prominent cases emerge in the USA, whistleblowing also plays an important role in Europe.² Margit Herbst, who uncovered the BSE scandal in Germany, lost her job and never received compensation, although her accusations turned out to be true.³

These examples show that whistleblowers play a decisive role in ensuring legal compliance by identifying existing infringements to which the public has no access. However, only a few will leak information regardless of negative consequences. Individuals not only fear for the loss of their jobs but also for their livelihood. Therefore, protection of whistleblowers is imperative. Nonetheless, the confidentiality interests of companies should not be neglected. There is a risk that the protection or anonymity may be used to deliberately denounce someone by leaking fraudulent information or valuable trade secrets. Such abuse must be prevented.

Despite the issues connected to whistleblowing and the longstanding conflicts of interest associated with this topic, most European countries have failed to introduce specific regulations.⁴ This should now change. In October 2019 the European Union introduced a Directive on the protection of persons who report breaches of Union Law⁵ (hereinafter Whistleblower Directive). Member States must transpose these requirements into national law by 17th December 2021.

Firstly, this article deals with the understanding of whistleblowing, which serves as a basis for further explanations. Subsequently, an interdisciplinary approach was chosen to examine the conflict of interest in whistleblowing from both a legal and a psychoanalytical point of view. Afterwards, this article provides a brief overview of the European legal situation prior to the entry into force of the Whistleblower Directive and describes the path from a fragmented regime to a common Directive. Additionally, a summary of the Whistleblower Directive's content is given to eventually deal with topics which prove to be particularly exciting for labour law. The overarching aim of this submission is to assess the background of whistleblowing and provide a critical analysis of its current framework.

¹ Rozière V., *Adoption by the co-legislators of the proposal on the protection of persons reporting on breaches of union law ('Whistle-blower protection proposal')*, European Parliament Legislative train, 2020, <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-whistle-blower-protection-proposal> (accessed 28.10.2020).

² FindLaw, *Famous Whistleblowers*, 2017, <https://employment.findlaw.com/whistleblowers/famous-whistleblowers.html> (accessed 28.10.2020).

³ DokZentrum, *Der Fall Dr. Margrit Herbst - eine Chronologie*, 2015, <http://anstageslicht.hauptsache.net/themen/gesundheit/margrit-herbst-kampf-gegen-bse/chronologie-dr-margrit-herbst-im-kampf-gegen-bse/> (accessed 28.10.2020).

⁴ Worth M., *Whistleblowing in Europe – Legal protections for whistleblowers in the EU*, Transparency International, 2013, 24, 30, 42, 57, 77, 83.

⁵ Directive no. 2019/1937 of the European Parliament and of the council of 23 October 2019 on the protection of persons who report breaches of Union law.

2. (No) common understanding of whistleblowing.

The term whistleblowing has been known within the European Union for several decades.⁶ Nevertheless, there is no generally applicable definition of this term present (as of yet), although many scientific contributions deal with this topic.⁷ Differing understandings in various countries can be a problem, particularly if authorities from more than one state are dealing with the same transnational case.⁸ One of the most prominent works regarding the definition of the term whistleblower, which is referred to by numerous other authors, is that of Near/Miceli⁹. Their definition usually serves as a starting point and is subsequently adapted according to the view of the respective author.¹⁰

The Whistleblower Directive does not expressly introduce a legal definition either, but it defines which “reporting persons” enjoy protection.¹¹ A reporting person is “a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities”.¹² These reporting persons are protected, if

- they are persons “working in the private or public sector who acquired information on breaches in a work-related context”¹³;
- who “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”¹⁴;
- and who have reported through the channels provided by the Directive.¹⁵

This is consistent, at least regarding the key points, with most of the common definitions.¹⁶ Thus, the description of protected persons constitutes somehow a definition of whistleblowers, at least a definition of “protected whistleblowers”. Consequently, the Directive contains, even if not expressly, a definition of whistleblowers who are protected

⁶ Hauser P., *Das Bild von Whistleblowing in der österreichischen Versicherungswirtschaft*, in *Zeitschrift für das gesamte Bank- und Börsenwesen*, 7, 09, 2009, 497.

⁷ See for example Berndt T., Hoppler I., *Whistleblowing – ein integraler Bestandteil effektiver Corporate Governance in Betriebs-Berater*, 60, 2005, 2624; Deisenroth D., *Zivilcourage am Arbeitsplatz – „Whistleblowing“*, in Meyer G., Dovermann U., Frech S., Gugel G. (eds.), *Zivilcourage lernen*, 2nd edition, Institut für Friedenspädagogik, Tübingen, 2004, 124; Hauser P., nt. (6), 497 ff; Rohde-Liebenau B., *Whistleblowing: Beitrag der Mitarbeiter zur Risikokommunikation*, edition of the Hans-Böckler-Stiftung, 2005, 10 ff.

⁸ Popescu A., *A critical analysis of whistleblower protection in the European Union*, in *Journal of Public Administration, Finance and Law*, 7, 2015, 136.

⁹ They define whistleblowing “to be the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.” See Near J. P., Miceli M. P., *Organizational Dissidence: The Case of Whistleblowing*, in *Journal of Business Ethics*, 4, 1985, 4.

¹⁰ See for example Aschauer P., *Whistleblowing im Arbeitsrecht*, Linde Verlag, Vienna, 2012, 26; Jalan I., *Treason or Reason? Psychoanalytical Insights on Whistleblowing*, in *International Journal of Management Reviews*, 22, 2020, 251; Lewis D., Brown A. J., Moberly R., *Whistleblowing, its importance and the state of the research*, in Lewis D., Brown A.J., Moberly R., Vandekerckove W., *Internationale Handbook on Whistleblowing Research*, Edward Elgar Publishing, Cheltenham, 2014, 4.

¹¹ Article 4 in connection with Articles 5, 6, 7 and 10 Whistleblower Directive.

¹² Article 5 para. 7 Whistleblower Directive.

¹³ Article 4 Whistleblower Directive.

¹⁴ Article 6 lit. a Whistleblower Directive.

¹⁵ Article 6 lit. b Whistleblower Directive.

¹⁶ Compare to Aschauer P., nt. (10), 28 f; Deisenroth D., nt. (7), 124 or Near J. P., Miceli M. P., nt. (9), 4.

within the European legal framework. As the requirements of the Directive are minimum standards that must be met in each Member State, for the first time there is a common denominator within the European Union regarding the understanding of whistleblowing. It remains uncertain whether Member States will make use of the possibility to protect a wider range of persons than provided for in the Directive.

3. Conflicting interests in whistleblowing – an interdisciplinary approach.

Literature addressing whistleblower protection over the years demonstrated a manifold of arising problems. Nevertheless, there are certain obstacles, which were at the centre of discourse repeatedly. Most discussions revolved around the interests at stake of the parties concerned.¹⁷ Therefore, the present interests are analysed first. These sociological explanations serve as a basis for subsequent legal elaborations.

On the one hand, there is a desire of the state and in further consequence of the community to motivate individuals to report detected legal violations in order to ensure compliance with the law. The Whistleblower Directive states that its purpose is to “enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law”.¹⁸ This desire is closely linked to the whistleblower's need not to suffer negative consequences after a report. It is clear that potential whistleblowers will hesitate to leak information, if they are afraid of negative consequences stemming from their report. In order to meet these requirements, a protection of whistleblowers is necessary. On the other hand, there is always a company or institution whose confidentiality interests are affected when information is disclosed. Accusations usually go hand in hand with loss of reputation and financial damage. In further consequence, companies and institutions have to justify for the accused behaviour to shareholders, employees and the public, regardless of its truth. Companies fear that increased whistleblower protection will pave the way for denunciation. Consequently, the interests in protection when reporting possible infringements are opposed to the confidentiality interests.

Although law in general is characterized by balancing conflicting interests, and the two-sided nature of a problem is nothing new, this balancing is particularly difficult with regard to whistleblowing. If allegations turn out to be true, the person's worthiness of protection is widely undisputed (whistleblowing worthy of protection). However, this is not the case if they prove to be false (denunciation). A study conducted by Rothschild showed that in nearly all cases of whistleblowing she investigated, the whistleblowers said that they were trying to

¹⁷ See for example Jalan I., nt. (10), 250 ff.; Near J. P., Miceli M. P., nt. (9).

¹⁸ Article 1 Whistleblower Directive. The Commission argues that a lack of reports has a negative impact on the freedom of expression and the freedom of the media, can impair the enforcement of EU law and affects the proper function of EU policies in a negative way; Explanatory Memorandum of the European Commission from 23 April 2018 concerning the proposal for a directive of the European parliament and of the council on the protection of persons reporting on breaches of Union law, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218> (accessed 27.10.2020).

do the “right thing”.¹⁹ The problem is that the process of whistleblowing is often an “emotion-laden” moral dilemma connected with anxiety. From a psychological point of view, this anxiety can lead to a modification of memories at an unconscious level.²⁰ Therefore, even people who act with honest intentions may pass on false information. However, good intentions are of little help to the company, which must defend itself against false information.

In summary, the decisive element in distinguishing between whistleblowing worthy of protection and denunciation takes place inside a person and is therefore difficult to objectify. Nevertheless, the law is forced to make this distinction. This background should be taken into account for the following legal explanations.

4. The way to the Whistleblower Directive.

Whilst the literary and scientific analysis of the phenomenon of whistleblowing began in the USA as early as the 1970s²¹, in the European Union this process only started in the late 1990s. The legislation on whistleblower protection remains fragmented and varies significantly within the European Member States.²² Some countries, such as Romania or Slovenia, already had an advanced framework in place early, while other countries, such as Bulgaria and Finland, have introduced none or only very limited regulations to this day. Italy as well as Austria have a partial whistleblower protection in place.²³

These inequalities were not altered by the fact that some governments, intergovernmental organizations or NGOs tried to promote the development of whistleblower protection systems.²⁴ In 2004, the United Nations introduced the UN Convention against Corruption (UNCAC)²⁵, which constitutes a foundation for whistleblower protection imposing the obligation on states to evaluate their own legal systems.²⁶ In 2013, the International Principles for whistleblower legislation were introduced by Transparency International. These rules should “help ensure that whistleblowers are afforded proper protection and disclosure opportunities”²⁷ through providing best practice approaches.

Furthermore, the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption from 2016 included the stipulation to introduce

¹⁹ AAAS, *Whistleblowers' concern about retaliation not without justification*, Public Release about a sociologist study by Rothschild J., 2002, https://www.eurekalert.org/pub_releases/2002-03/vt-wca030702.php (accessed 27.20.2020).

²⁰ Jalan I., nt. (10), 249.

²¹ Aschauer P., nt. (10), 24.

²² Chalocat I., Carrión-Crespo C., Licata M., *Law and practice on protection whistle-blowers in the public and financial services sectors*, ILO working paper 328, 2019, 25.

²³ Worth M., nt. (4), 73, 77.

²⁴ Popescu A., nt. (8), 136.

²⁵ United Nations Convention against corruption, 2004.

²⁶ Popescu A., nt. (8), 135.

²⁷ Transparency International, *International Principles for whistleblower legislation*, 2013, https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf (accessed 28.10.2020).

whistleblower mechanisms and to provide protection for whistleblowers.²⁸ Although the efforts of these institutions certainly served as guidance for further developing whistleblower systems in some countries, they were not able to equalise the large legal differences between the Member States of the European Union since most of them simply ignored these guidelines.²⁹

This situation has been criticised from many sides. In 2016, the Commission stated to support whistleblower-protection, declared to further monitor the legislative activity in the Member States and to point out best practices to improve the protection on a national level. Furthermore, the Commission explicitly announced to take further action at European Union level.³⁰ In 2017, the Parliament adopted two resolutions calling on the Commission to facilitate a horizontal legislative proposal on the role of whistleblowers.³¹ Later that year, the Committee on Legal Affairs adopted its own-initiative report concerning whistleblower-protection, in which it directly calls the Commission to present a legislative proposal.³² From that point on, things went from strength to strength. On 24th April 2018, the Commission introduced its proposal.³³ According to Kafteranis and Brockhaus, the European lawmaker drew inspiration from the ECtHR case law on this topic³⁴ throughout the proposal drafting since it follows a similar approach.³⁵ Moreover, the Council of Europe's recommendations for the protection of whistleblowers³⁶ were drawn upon. This proposal was followed by intensive political discussions in Council and Parliament, as Parliament lobbied for more extensive protection. In the trilogy procedure, the Council renounced its position and

²⁸ OECD, Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption, 2016, <https://www.oecd.org/corruption/anti-bribery/Recommendation-Development-Cooperation-Corruption.pdf> (accessed 28.10.2020).

²⁹ Popescu A., nt. (8), 137.

³⁰ Communication from the Commission of 5 July 2016 to the European Parliament and the Council on further measures to enhance transparency and the fight against tax evasion and avoidance, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52016DC0451> (accessed 28.10.2020).

³¹ European Parliament resolution of 14 February 2017 on the role of whistleblowers in the protection of EU's financial interests, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0022_EN.pdf (accessed 28.10.2020); European Parliament resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.pdf (accessed 28.10.2020).

³² Report of the Committee on Legal Affairs of 10 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies, https://www.europarl.europa.eu/doceo/document/A-8-2017-0295_EN.pdf (accessed 28.10.2020).

³³ Proposal of the European Commission of 23 April 2018 for a directive of the European parliament and of the council on the protection of persons reporting on breaches of Union law, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218> (accessed 28.10.2020).

³⁴ In 2008, the ECtHR introduced six criteria to assess, whether a whistleblower enjoys protection under Article 10 ECHR (the freedom of expression). Thus, attention must be paid to the public interest involved, the authenticity of the information disclosed, the extent of verification of the information disclosed, the motive behind the actions of reporting and the consequences faced by the applicant. See ECHR – Case 14277/04, *Guja v. Moldova* [2008], para 69 ff.

³⁵ Kafteranis D., Brockhaus R., *Time to reconsider Strasbourg's whistleblower case law*, 2020, <https://europeanlawblog.eu/2020/09/21/time-to-reconsider-strasbourgs-whistleblower-case-law/#more-6448> (accessed 28.10.2020).

³⁶ Recommendation of the Council of Europe of 30 April 2014 about the Protection of Whistleblowers, <https://rm.coe.int/16807096c7> (accessed 28.10.2020).

reached agreement with the Parliament.³⁷ The proposal was adopted by the European Parliament on 16th April 2019³⁸ and approved by the Council on 7th October 2019 after a rectification procedure.³⁹ On 16th December 2019, the whistleblower Directive finally entered into force.

So far, no state has fully implemented the requirements of the Whistleblower Directive. However, some countries have already debated this issue.⁴⁰

5. The content of the Whistleblower Directive.

Before dealing with aspects relevant for labour law, a brief overview of the content of the Directive is presented. As the recitals are numerous and detailed, they provide much information on how to understand the provisions of the Directive. Chapter I contains articles about the scope, definitions and conditions for protection. Chapter II concerns internal reporting and follow-up issues. Chapter III is related to external reporting and follow-up questions. Chapter IV contains rules regarding public disclosers, Chapter V contains provisions applicable to internal as well as external reporting. Chapter VI concerns protection measures and Chapter VII some final provisions. Despite the superficial clarity arising from these provisions, it is nonetheless argued that the Directive's scope, terminology and its interpretation create uncertainty, as it will be discussed hereinafter.

5.1. Scope of application.

The Directive relates to reporting persons who pursue an occupation in the public or private sector (Personal Scope).⁴¹ Included are not only employees within the meaning of Article 45 para 1 TFEU since the Whistleblower Directive also encompasses other people as long as they are vulnerable in the context of their work-related activities.⁴² They must have

³⁷ Schmolke K. U., *Die neue Whistleblower-Richtlinie ist da! Und nun? Zur Umsetzung der EU-Richtlinie zum Schutz von Hinweisgebern in das deutsche Recht*, in *Neue Zeitschrift für Gesellschaftsrecht*, 2020, 5 f.

³⁸ European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2019/04-16/0379/P8_TA-PROV\(2019\)0379_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2019/04-16/0379/P8_TA-PROV(2019)0379_EN.pdf) (accessed 28.10.2020).

³⁹ Interinstitutional File of the council of the European Union of 11 October 2019 regarding the voting result for the directive of the European parliament and of the Council on the protection of persons who report breaches of Union law, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13039_2019_INIT&from=EN (accessed 28.10.2020).

⁴⁰ For example, the German Bundestag has already debated the Whistleblower Directive and its implementation in August 2020, <https://dip21.bundestag.de/dip21/btd/19/219/1921941.pdf> (accessed 30.11.2020).

⁴¹ Article 4 para. 1 Whistleblower Directive.

⁴² The Directive also applies to self-employed persons, “shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees” and “any persons working under the supervision and direction of contractors, subcontractors and suppliers.” See Recital 39 and Article 4 Whistleblower Directive.

acquired the information, which they are going to report, in a work-related context.⁴³ The reported information has to concern special areas of law, which are explicitly listed in the Directive (Material Scope).⁴⁴ Notwithstanding, this list covers large fields of Union law.⁴⁵ This is a point of criticism as whistleblower protection was originally intended only to cover financial offences. The Austrian chambers of commerce accuse the European legislator of having exceeded the objective by far.⁴⁶ At the same time, some important areas such as labour law and competition law are not included. Anyway, Recital 5 encourages Member States to extend the protection to reports of infringements of national law.

5.2. Introduction of whistleblower hotlines.

The Directive addresses two key issues. Firstly, it stipulates the introduction of both internal and external reporting channels (Chapter II and III). These channels are often referred to as whistleblower hotlines. Internal reporting concerns the report within the company itself. The instruction to introduce internal reporting channels is primarily aimed at companies.⁴⁷ The Member States are to ensure its implementation.⁴⁸ External reporting refers to the reporting of irregularities to competent authorities.⁴⁹ The obligation to establish external reporting channels and to entrust the respective authorities with this task is primarily addressed to the Member States themselves.⁵⁰ Whilst setting up the whistleblower hotlines, questions arise in particular with regard to data protection. According to Article 17 Whistleblower Directive, the processing of personal data must be carried out in accordance with the GDPR. Brunner and Nagel raise the question of how confidentiality of the non-anonymous whistleblower can be maintained in the context of fulfilling the duty to inform under Article 14 GDPR. It is also unclear how confidentiality can be ensured in the event of a request for information by the person concerned or the accused.⁵¹ Although these aspects require further attention, their examination would go beyond the scope of this paper.

⁴³ With regard to this term, the question arises whether this means that obtaining the information must be work-related or whether the information itself must be work-related. The wording itself indicates the former interpretation.

⁴⁴ Article 2 Whistleblower Directive.

⁴⁵ At the same time, some important areas, such as European labour law, are not covered.

⁴⁶ Austrian chamber of commerce, *Whistleblower-Richtlinie veröffentlicht*, <https://www.wko.at/branchen/stmk/industrie/Metalltechnische-Industrie/whistleblower-richtlinie-veroeffentlicht.html> (accessed 28.10.2020).

⁴⁷ The scope is wide, covering companies with 50 or more employees, legal entities in the financial services sector and all public bodies. *See* Article 8 Whistleblower Directive.

⁴⁸ Article 7 and 8 Whistleblower Directive.

⁴⁹ Aschauer P., nt. (10), 34 ff.

⁵⁰ Article 11 Whistleblower Directive.

⁵¹ *See* continuative Brunner S., Nagel R., *Whistleblowing – Sicherstellung des Hinweisgeberschutzes im Lichte der DSGVO*, in *Dako*, 2, 2020, 32 ff.

5.3. Protection from retaliation.

Secondly, the Directive introduces mandatory protection for whistleblowers (Chapter VI). The aim is to protect reporting persons from retaliatory treatment resulting from whistleblowing.⁵² Article 19 contains a detailed list of all actions, which are retaliatory measures within the meaning of the Directive. This is a demonstrative list as indicated by the words "in particular in the form of". The list includes not only typical employer measures, such as suspension, lay-off or dismissal, but also harm to the individual's reputation or psychiatric referrals. In order to be protected from retaliation, reporting persons must fulfil certain conditions. According to Article 6, reporting persons are only protected if they have "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".⁵³ This attracts criticism due to the assertion that public disclosure should not be protected until it has first been reported internally and/or externally unsuccessfully since an internal report is the least invasive means for the employer.⁵⁴ Furthermore, the person must have "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".⁵⁵ Numerous ambiguities arise concerning the term "reasonable grounds to believe". It is unclear, whether the concrete person must have actually believed in the correctness of the information or whether it is sufficient that reasonable grounds were present. This leads again to the differentiation between whistleblowing and denunciation. Is a person worthy of protection who had reasonable grounds to believe, but actually did not believe at all (lack of good faith)? As previously mentioned, the Directive drew inspiration from the case law of the ECtHR. According to the ECtHR's case law, a person only enjoys protection under Article 10 ECHR to the extent that, inter alia, "the individual acted in good faith and in the belief that the information was true".⁵⁶ Conversely, the Whistleblower Directive does not explicitly include these requirements. However, Recital 32 provides an interpretative aid in this respect. It specifies that persons who "deliberately and knowingly reported wrong or misleading information" are not protected. Anyone who makes an honest mistake, by contrast, should be covered by protection. It is therefore conceivable to require "good faith" also as a prerequisite within the Whistleblower Directive. Nevertheless, many detailed questions remain open, such as whether the protection applies even if the misconception could have been avoided or what degree of negligence excludes protection. It can be assumed that a whistleblower who is subject to an error due to gross negligence is not worth protecting.⁵⁷

Eventually, there is still room for interpretation regarding these uncertainties. It will ultimately be up to the CJEU to give a definitive answer. If the CJEU decides against the

⁵² Fuchs M., Marhold F., Friedrich M., *Europäisches Arbeitsrecht*, 6th edition, Verlag Österreich, Vienna, 2020, 624.

⁵³ Article 6 Whistleblower Directive.

⁵⁴ Schmolke K. U., nt. (37), 9.

⁵⁵ Article 6 Whistleblower Directive.

⁵⁶ See for example ECHR – Case 14277/04, *Guja v Moldova* [2008], para 77.

⁵⁷ Forst G., *Die Richtlinie der Europäischen Union zum Schutz von Personen, die Verstöße gegen Unionsrecht melden (Whistleblower-Richtlinie)*, in *Europäische Zeitschrift für Arbeitsrecht*, 2020, 297 ff, 301.

necessity of the existence of good faith, it remains to be seen to what extent the ECtHR will align its case law with that of the European Union.⁵⁸ In this case, Member States are not allowed to require good faith as an additional requirement for protection, as the minimum level of protection laid down in the Directive must not be undercut.

6. Selected aspects relevant to labour law.

The issue of whistleblowing and the Directive are intrinsically intertwined with labour law. Since the scope of the Directive requires that the reported information must be obtained “in a work-related context”⁵⁹, whistleblowing covered by the Directive *de facto* always takes place in work-related situations. Additionally, many of the prohibited measures listed in the Whistleblower Directive are typical means of the employer to influence the employment relationship: for instance, actions such as suspension, lay-off, transferring duties or the change of location. Consequently, the Whistleblower Directive will influence labour law in a significant way.

Considered holistically, the Directive leaves many questions open. This article addresses two particularly exciting problems. Firstly, it is striking that European labour law is not part of the material scope. As a result, persons who report labour law violations are not protected. This essay attempts to highlight methods of providing protection by other means. Secondly, the protection of whistleblowers faces a tension with professional secrecy obligations. This paper endeavours to highlight the Directive’s requirements in this regard.

6.1. No protection for reporting labour law infringements?

As previously underlined, European labour law is not covered by the material scope of the Whistleblower Directive. Thus, in principle, the Directive does not directly protect persons who report labour law infringements. However, such protection can be achieved in a diversionary way, when labour law problems have a dimension linked to areas of law covered by the Directive.

Furthermore, Recital 21 explicitly states that the “Directive should be without prejudice to the protection granted to workers when reporting breaches of Union employment law.”⁶⁰ This means that the Directive does not affect existing worker protection. Consequently, in the absence of direct protection within the Whistleblower Directive, there can be other European instruments providing such protection.

Primarily, the ban on victimisation is conceivable in this context. In simple terms, this ban prohibits the punishment of persons complaining about an unlawful situation and is mainly

⁵⁸ Kafteranis D., Brockhaus R., *Time to reconsider Strasbourg’s whistleblower case law*, 2020, <https://europeanlawblog.eu/2020/09/21/time-to-reconsider-strasbourgs-whistleblower-case-law/#more-6448> (accessed 29.10.2020).

⁵⁹ Article 4 para 1 Whistleblower Directive.

⁶⁰ Recital 21 Whistleblower Directive.

known within non-discrimination law. In this context, it is important not to equate the prohibition of victimisation with the prohibition of discrimination, because workers are disadvantaged not on the basis of protected characteristics but on the basis of reporting. The ban of victimisation is derived from the general principle that the exercise of rights must never result in discrimination.⁶¹ This prohibition is laid down in several secondary legislation acts, for example in Article 11 Directive 2000/78/EG⁶² (Framework Directive), Article 24 Directive 2006/54/EG⁶³ (Recast Directive) and Article 11 Directive 89/391/EEC⁶⁴ (Safety and Health Directive). The latter is expressly mentioned in Recital 21 Whistleblower Directive. On this basis, workers are already not supposed to face retaliation because they report problems with workplace safety.⁶⁵ However, if the measures to ensure safety and health taken by the employer are inadequate, workers as well as their representatives are entitled to raise issues with the competent authority under the Safety and Health Directive.⁶⁶ Although the system and the structure of whistleblower protection are similar to the ban on victimisation, the latter is not a comprehensive protection comparable to the Directive.

As a result, no direct protection is provided when reporting infringements of European labour law, but it may arise indirectly. However, Member States retain the right to extend protection to labour law because the Directive only provides minimum requirements. Furthermore, other European legal acts protecting employees in the case of a report exist. However, this protection exists exclusively with regard to certain reports and certain retaliatory measures.

6.2. Confidentiality obligations.

Numerous national legal systems have professional secrecy obligations. In Austrian labour law, for example, a general duty of confidentiality exists simultaneously with several particular professional secrecy obligations.⁶⁷ The latter includes, *inter alia*, doctors, lawyers or public

⁶¹ Mohr J., *Article 11 Directive 2000/78/EG*, in Franzen M., Gallner I., Oetker H. (eds), *Kommentar zum europäischen Arbeitsrecht*, 3rd ed., C.H. Beck, Munich, 2020, para 2.

⁶² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=EN> (accessed 29.10.2020).

⁶³ Directive 2006/54/EC of the European Parliament and of the council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&from=EN> (accessed 29.10.2020).

⁶⁴ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN> (accessed 29.10.2020).

⁶⁵ Article 11 Council Directive 89/391/EEC.

⁶⁶ Recital 21 Whistleblower Directive.

⁶⁷ Marhold F., Friedrich M., *Österreichisches Arbeitsrecht*, 3rd edition, Verlag Österreich GmbH, Vienna, 2016, 128 ff.

officials. In light of this, the reconciliation of whistleblower protection and professional confidentiality measures is of particular interest.

Article 3 stipulates that the Directive “shall not affect the application of Union or national law relating to [...] the protection of legal and medical professional privilege”.⁶⁸ In other words, individuals belonging to these professional groups are not protected if they break their duty of confidentiality. First of all, the classification of legal and medical professional groups is questionable. Does it cover only core legal professions or any legal activity? It is equally debatable which specific occupational groups are to be subsumed under “medical”. Whilst the English language version allows for a very broad interpretation, the German version indicates a narrower understanding. The latter expressly refers to attorneys and doctors.⁶⁹

By contrast, members of other professions subject to other confidentiality obligations enjoy the protection of the Whistleblower Directive. Recital 27 states that such whistleblowers are protected if “reporting that information is necessary for the purposes of revealing a breach falling within the scope of this Directive.”⁷⁰

To summarise, if a reporting person breaks an existing obligation of confidentiality, the legal consequences depend on whether he or she is exercising a medical or legal occupation or any other profession. If a person belongs to the medical or legal profession, he or she is not protected by the Directive. If the person is subject to another obligation of confidentiality, he or she is protected only to the extent disclosure of the information was necessary.

7. Conclusion.

This article demonstrates that many factual and legal problems arise in the field of whistleblowing, ultimately starting with the missing definition of the term “whistleblowing”. Although the new Directive does not provide a legal definition either, it can be deduced which reporting persons are protected. This can be understood as an indirect definition of whistleblowers and thus contributes to a uniform understanding within the European Union. It is the task of the domestic legislator to distinguish between whistleblowing worthy of protection and denunciation through balancing conflicting interests and in further consequence, to protect the former. A psychoanalytical analysis shows that this balancing act is particularly challenging in the area of whistleblowing, because an objectification of an inner moral dilemma must be deciphered. This issue may have permeated the highly fragmented European legal approach until the introduction of the Whistleblower Directive. The Directive contains two key elements: the introduction of whistleblower hotlines and the prohibition of retaliatory measures originating from a report. As there are numerous factual and legal connections, the subject of whistleblowing is extremely relevant for labour law.

⁶⁸ Article 3 para. 3 lit. b Whistleblower Directive.

⁶⁹ Art. 3 para. 3 lit. B reads: “den Schutz der anwaltlichen und ärztlichen Verschwiegenheitspflichten”; See Article 3 para. 3 lit. b Whistleblower Directive in the German version.

⁷⁰ Recital 27 Whistleblower Directive.

Reports of labour law infringements are not explicitly protected by the Directive. However, such protection may arise indirectly through a link with one of the acts covered by the Directive or through the prohibition of victimisation in another legal act. The tension between the Whistleblower Directive and professional secrecy obligations is also worth consideration. In this respect, the Directive makes a distinction between persons belonging to the medical and legal professions and other persons.

To date, no state has fully implemented the rules of the Whistleblower Directive. It is eagerly awaited how Member States will transpose the European requirements into national law and whether they will utilise the possibility to grant protection that is more extensive. The transition into national law must be achieved one way or another until 17th December 2021.

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