

PITFALLS IN IMPLEMENTING THE EU WHISTLEBLOWER DIRECTIVE

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ABSTRACT

In this paper, we focus on two conceptual problems associated with the EU Whistleblower Directive and point out issues that may undermine or even frustrate the successful implementation of the Directive in a national context. While fully acknowledging strong arguments for, and undeniable benefits of, speaking in favour of EU whistleblower protection, it has to be noted that a specific form of forced gold-plating calling for the extension of the material scope of protection may complicate the interpretation of the autonomous part of legislation and lead to legal insecurity. Moreover, new elements of whistleblower protection as introduced by the Directive diverge from the case law of the European Court of Human Rights. The introduction of higher standards of protection in favour of whistleblowers does not raise problems in relations between the state and the individual, but some EU rules may cause problems in horizontal relations between private individuals, since fair balancing of interests as required by Strasbourg jurisprudence may be not always guaranteed.

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I. INTRODUCTION

The adoption of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (hereinafter the ‘Whistleblower Directive’) marks a milestone for whistleblowing in Europe.¹ This comprehensive piece of legislation includes, inter alia, the obligation for employers with more than 50 employees to establish ‘internal reporting channels’, the obligation for Member States to establish ‘external reporting channels,’ and specific instruments of protection for whistleblowers against retaliation.

While most of the attention in academic literature and in professional practice has been devoted to issues related to the correct transposition of the Whistleblower Directive,² in this paper we would like to highlight some conceptual problems associated with the application of the transposing law. The aim of the article is not to criticise EU legislation per se, but to discuss how specific conceptual issues can undermine or even frustrate the successful implementation of the Whistleblower Directive in a national context.

In the first part of this paper, we address the issue of gold-plating and explain why the Whistleblower Directive can be seen as a new, particularly problematic form of gold-plating. We will further focus on the problem of the correct application of the ‘autonomous’ part of a transposing norm that is *de facto* enforced by the directive. The second part of the paper discusses the link between the Directive and the human-rights dimensions of whistleblowing. It is necessary to ask to what extent the EU model of protection is consistent with the standard formulated by the European Court of Human Rights, or to what extent it deviates from this standard. Under specific circumstances, such deviations might cause human rights violations when the Whistleblowing Directive is applied by national bodies.

In this article we will deal with the relevant elements of the legal concept of whistleblowing from an analytical perspective. Academic legal literature will be used, as well as references to relevant human rights case law.

¹ Julia Kaufmann, Katja Häferer and Kerstin Grimhardt, ‘The new EU Whistleblowing Directive’ (2020) 21 *Computer Law Review International* 14.

² See e.g., Simon Gerdemann, and Ninon Colneric, ‘The EU Whistleblower Directive and its Transposition: Part 1’ (2021) 12 *European labour law journal* 193; Jan Skrabka. ‘The EU Whistleblowing Directive and its implementation in the Czech Republic: Pandemic and Post-Pandemic Challenges in Whistleblower Protection’ (2021) 7 *European Data Protection Law Review* 270

II. THE WHISTLEBLOWER DIRECTIVE AND THE ISSUE OF GOLD-PLATING

The first conceptual problem of the Whistleblower Directive relates to the phenomenon of so-called gold-plating. Generally speaking, gold-plating refers to exceeding the requirements of EU law in various ways when transposing directives into national law.³ Quite often, Member States in their national laws extend the material or personal scope of a directive, and thus apply EU legislation to situations not covered by the directive. The academic literature refers to such cases as ‘non-minimalist transposition.’⁴

We may note that the phenomenon of gold-plating is almost naturally associated with the process of transposing EU directives into national law, since transposing legislation very often exceeds the scope of a directive and imposes extra burdens on norm addressees. Such an approach is sometimes supported by arguments pointing to the systematic and logical structure of national law. As a result of the principle of conferred powers, EU law is typically sectoral in nature and often does not take into account the broader context of national law. It is therefore up to the national authorities to ensure that transposing national legislation is logically consistent and complies in particular with the constitutional principles and international obligations of the Member State. In other words, the task of transposing national legislation is to compensate for a lack of consistency in EU directives. It should be added that such an approach is not prohibited by EU law.

Under standard conditions, gold-plating is based on a political decision by the competent national authorities. It is certainly desirable that all cases of gold-plating are well-founded and that the addressees of transposing legislation are not unduly burdened. However, such a solution presupposes that national legislative authorities have a choice between several options when transposing directives, and that they may choose between more- or less-minimalist options.

In contrast, the transposition of the Whistleblower Directive constitutes a special case of gold-plating, since in this case the extension of the material scope is *de facto* enforced by the very concept of the Directive. If the national authorities decided in favour of a so-called one-to-one transposition, i.e., a minimalist approach, such national legislation would be hardly defensible from a substantive point of view.

³ For a detailed analysis, see Richard Král, Hans Christian Scheu, et al., *Zbytečně zatěžující transpozice – neodůvodněný gold-plating směrnic EU v České republice* (Univerzita Karlova – Právnická fakulta, 2014)

⁴ See, e.g., Richard Král. ‘K zamezování regulatorně zcela bezpředmětné nebo zbytečně zatěžující transpozice směrnic EU v České republice’ (2017) 9 *Správní právo* (Legislativní příloha) 66.

According to recital 4 of the directive, whistleblower protection currently provided in the European Union is fragmented across Member States and uneven across different policy areas. As a consequence, insufficient protection in one Member State negatively impacts the functioning of Union policies, not only in that Member State, but also in other Member States and in the Union as a whole. This finding is probably correct. The question remains, however, whether the problem of fragmentation and inconsistency of national regulations can be solved by the minimum harmonisation directive.

In this sense, the objective of the Whistleblower Directive, i.e., the introduction of ‘common minimum standards ensuring that whistleblowers are protected effectively,’⁵ seems somewhat contradictory, since minimum standards cannot provide effective protection in this area. Indeed, truly effective protection would call for a maximalist solution, for which the EU as such does not have sufficient powers. Therefore, recital 5 of the Directive openly suggests that ‘Member States could decide to extend the application of national provisions to other areas with a view to ensuring that there is a comprehensive and coherent whistleblower protection framework at national level.’

At first sight, this proposal seems innocent and harmless. However, in the context of national legislation, the consequences become much clearer.⁶ In the explanatory memorandum to the draft Whistleblower Protection Act, the author of the draft, i.e., the Czech Ministry of Justice, notes that a minimalist transposition of the Directive would not only be substantively illogical, but would also create unjustified inequality between whistleblowers. One cannot but agree with this assessment.⁷ From a systemic point of view, indeed, it would not make sense to place under the protection of the law, for example, persons who report relatively minor infringements of EU law, while at the same time excluding from protection persons who report serious infringements of national law – for example, at the level of criminal law. In the academic literature we find examples in the incorrect personal data processing under the GDPR,⁸ which falls under the Whistleblower

⁵ Recital 5.

⁶ For an overview of the discussion in the Czech Republic, see Jana Ranglová, Lenka Scheu, Lenka Ježková, Šárka Zvěřina Trunkátová, ‘Whistleblowing: jak se v České republice a ve vybraných členských státech EU vyvíjela oblast ochrany oznamovatelů nezákonné činnosti probíhající v organizaci’ (2022) 15 *Časopis výzkumu a aplikací v profesionální bezpečnosti* <<https://www.bozpinfo.cz/josra/whistleblowing-jak-se-v-ceske-republice-ve-vybraných-členských-státech-eu-vyvíjela-oblast>>

⁷ We believe that such different treatment would not be directly connected to constitutionally prohibited grounds of distinction such as gender, ethnicity, or political bias. Nevertheless, it is questionable whether the narrow sectoral approach of the Whistleblower Directive justifies the more or less favourable treatment of certain whistleblowers solely on the basis of whether they reported a violation of EU law or of a national norm.

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the

Directive, and in the trafficking in human beings, which is not covered by the Directive.⁹ The issue is not only the seriousness of the reported breach of law, but also the personal risks a whistleblower must undergo when uncovering an illegal activity.

In view of possible inequalities and logical inconsistencies caused by a minimalist transposition, the extension of the material scope of the Whistleblower Directive seems to be justified. Reference can be made to a number of expert studies confirming that uniform and transparent regulation is a prerequisite for the success of whistleblower legislation.¹⁰ For these substantive reasons, the national authorities ultimately have no practical choice but to extend the scope of the Whistleblower Directive and to apply the relevant EU rules to situations not covered by the Directive.

The question must be asked: how could it come to the adoption of such an EU norm? The answer lies in the division of powers between the EU and its Member States. As the EU does not have the power to regulate all forms of reporting an illegal activity, the Whistleblower Directive regulates the protection of whistleblowers only in relation to certain fields of EU law. The Directive cites several provisions of the founding Treaties as its legal basis.¹¹ In Article 2(1) of the Directive, the material scope is defined by reference to the Annex, which lists dozens of secondary EU legal acts. According to recital 19 of the Directive, this reference should be understood as including all national and Union implementing or delegated measures adopted pursuant to those acts. This legislative technique necessarily leads to the drafting of sectoral regulation.

It is clear that such a sectoral regulation of whistleblowing cannot ensure the desired uniformity of legal standards across Member States. On the contrary, the Directive may at least partly increase the current legal uncertainty among potential whistleblowers, since answering the question of whether or not a reported breach

free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁹ Ninon Colneric, and Simon Gerdemann, 'Die Umsetzung der Whistleblower-Richtlinie in deutsches Recht – Rechtsfragen und rechtspolitische Überlegungen' (34 HSI-Schriftenreihe 2020), p. 155.

¹⁰ Simon Gerdemann, 'Transatlantic Whistleblowing. 'Rechtliche Entwicklung, Funktionsweise und Status quo des Whistleblowings in den USA und seine Bedeutung für Deutschland,' (Studien zum ausländischen und Internationalen Privatrecht 2018), p. 117-119.

¹¹ The non-exhaustive list includes Article 16 (protection of personal data), Article 43(2) (Common Agricultural Policy and Common Fisheries Policy), Article 50 (right of establishment), Article 53(1) (self-employed activities), Article 91 (Common Transport Policy), Article 100 (transport safety), Article 114 (harmonisation of legislation), Article 168(4) (public health), Article 169 (consumer protection), Article 192(1) (environmental protection), Article 325(4) TFEU (combating fraud and other illegal activities affecting the financial interests of the Union), and Article 31 of the Treaty establishing the European Atomic Energy Community (basic standards for the protection of the health of the workers and the general public against the dangers arising from ionising radiation).

of law falls within the scope of the Directive is in many cases difficult, not only for ordinary citizens but also for legal professionals. However, in the current state of EU law, which is based on the principles of conferral, subsidiarity and proportionality, there are only few ways to ensure uniform and effective protection of whistleblowers in all Member States.

One possible solution would be to apply the flexibility clause under Article 352 TFEU, which allows the EU to adopt appropriate measures if action by the Union proves necessary and the Treaties do not provide the necessary powers. In this regard, an interesting suggestion came out of the discussion in the European Parliament's legal committee.¹² In line with one of the many proposed amendments, Article 352 TFEU should have been included in the first recital of the Whistleblower Directive. According to the authors of the proposal, such flexibility could make the directive more comprehensive, facilitating a global rather than sectoral approach and ensuring a high level of general protection for all whistleblowers. The amendment was ultimately not adopted, and therefore the final text of the Whistleblower Directive does not refer to the flexibility clause.

Moreover, in light of the division of powers between the EU and its Member States, it is clear that the mere reference to Article 352 TFEU in the preamble of the Directive would not have been sufficient. Comprehensive and general regulation of whistleblowing would require a reworking of the current definition of the material scope in Article 2 of the Directive and the introduction of a definition of whistleblowing that would include notifications relating to all breaches of EU and national law – e.g., with a view to the severity of the violation, or in relation to a broad concept of public interest. In any case, a flexibility clause would be necessary to bridge the lack of EU competence in the area of substantive criminal law. If the EU legislature does decide to regulate whistleblowing generally, it should also consider choosing a different form of legislation, i.e., a regulation instead of a directive. It seems that from a political perspective, such considerations now seem highly unrealistic. It might also be problematic to invoke the flexibility clause of Article 352 TFEU in relation to criminal law matters when Article 83 (2) TFEU contains a *lex specialis* provision on criminal-law harmonisation.¹³

This leaves only the second solution, which is formally based upon the concept of minimum harmonisation of selected areas of whistleblowing but

¹² Committee on Legal Affairs (Rapporteur: Virginie Rozière), Draft report, 'Protection of persons reporting on breaches of Union law' (procedure 2018/0106/COD), 11.9.2018.

¹³ On the problematic relationship between Article 83 (2) and 352 TFEU, see Öberg, J. *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law*, Oxford: Hart Publishing, 2017. According to Öberg, the exercise of criminal law competences under Article 352 TFEU cannot be excluded with reference to Article 83 (2) TFEU. However, if Article 352 TFEU is to be employed for criminal law harmonization, it can only be used in conjunction with Article 83 TFEU, which provides the material criminal law competence.

indirectly forces Member States into significant gold-plating. One of the main problems of transposing the Whistleblower Directive, concerning the correct definition of the material scope of national regulation, is therefore predetermined by the Directive itself. By the way, this is very often the case when a legislative act on the surface appears to be something it is not.

With some exaggeration, we may pose the problem as follows: EU legislation presents an act that formally respects the basic rules of the Treaties, but at the same time it requires Member States to adopt a complex national regulation that goes beyond the Whistleblower Directive. The maximalist goal formulated as effective whistleblower protection could not be reconciled with the instrument of minimum harmonisation. Politically speaking, it is not entirely understandable why the EU Council has agreed to such an approach.

Whatever form the non-minimalist transposition of the Whistleblower Directive will take, it should be noted that serious issues may arise in its application. Mainly, national courts will have to decide how to interpret the part of the transposing legislation that goes beyond the scope of the Directive. In prior case law, the CJEU has made it clear that the interpretation of an autonomous part of transposing legislation may be the subject of a preliminary ruling. It has accepted the respective preliminary questions despite their hypothetical character. At the same time, however, the Court has held that its interpretation is not binding on national courts in relation to non-minimalist transposition.¹⁴

While it is for the legislative authorities to decide whether and, if so, to what extent the material scope of the Whistleblower Directive should be extended, it will be for the national courts to decide on the correct application of the autonomous part. As long as their interpretation does not compromise the primacy, unity and effectiveness of EU law,¹⁵ national courts have a relatively wide margin of discretion and can interpret some issues differently from the CJEU – for example, the work-related context in which information on breaches of law have been acquired.¹⁶ Likewise, the concept of retaliation, including coercion, intimidation, harassment or ostracism,¹⁷ leaves space for different interpretations by national courts.

At present, it is not possible to anticipate how courts in the Member States will approach this issue and whether they will be ready to also apply the CJEU's interpretation to the autonomous part of the national transposition. In any case, it is clear that this open question does not contribute to a sense of legal certainty on the part of whistleblowers.

¹⁴ C-28/95 *Leur-Bloem* (Judgment of 17 July 1997).

¹⁵ Opinion 2/13 of the Court (18 December 2014), para. 188-189.

¹⁶ Article 4 of the Whistleblower Directive.

¹⁷ Article 19 of the Whistleblower Directive.

III. THE HUMAN RIGHTS BASIS OF THE WHISTLEBLOWER DIRECTIVE

The second conceptual issue we want to highlight in this paper is that of the relationship between whistleblower protection under the Directive and international human rights law. Since whistleblowing is a very complex issue involving issues as diverse as, for example, the fight against corruption and the prevention of other crimes; public procurement and the functioning of EU competition law; product safety and consumer protection; and environmental protection and public health, it is appropriate to consider whether human rights protection could act as a common basis for a sectoral directive.

The Whistleblower Directive indeed refers in several places to its human rights basis. Recital 14 of the Directive mentions respect for privacy and the protection of personal data under Articles 7 and 8 of the EU Charter of Fundamental Rights. The connection is made between the Directive and the ECHR by Recital 31, which states that persons who report information about threats or harm to the public interest make use of their right to freedom of expression enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Moreover, the Recital points at the relevant case law of the European Court of Human Rights (ECtHR) on the right to freedom of expression. According to Recital 33 of the Directive, it is necessary to balance the interest of employers in managing their organisations and to protecting their own interests on the one hand with the public's interest in being protected from harm on the other. This is in line with the criteria developed in the case law of the ECtHR.

In this context, it should be recalled that freedom of expression within the meaning of Article 10(1), the ECHR includes the freedom to hold opinions and to receive and impart information or ideas without interference by public authorities, and regardless of frontiers. The second paragraph of that provision lists the conditions under which a Contracting State may restrict freedom of expression, specifically on the basis of law, in accordance with the principle of proportionality,¹⁸ and in the interests of national security; territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation or rights of others; preventing the disclosure of information received in confidence; or for maintaining the authority and impartiality of the judiciary. Article 10 ECHR, on the one hand, covers a wide range of expressions, including public speech by employees, and on the other hand, provides contracting states with a relatively broad margin of discretion to impose restrictive measures in order to protect legitimate interests, including those of employers.

¹⁸ According to Article 10(2) ECHR, the interference is necessary in a democratic society.

When the European Court of Human Rights considered the impact of Article 10 ECHR on the protection of whistleblowers for the first time in *Guja v Moldova*,¹⁹ it realised the importance of the issue. As the Chamber considered that the case raised a serious question affecting the interpretation of the Convention within the meaning of Article 30 ECHR, it relinquished jurisdiction in favour of the Grand Chamber. In its 2008 judgment, the Grand Chamber sought to define a comprehensive model of whistleblower protection, based on a total of six criteria:

1. the priority of internal channels over external reporting to the media;
2. the public interest in the disclosed information, i.e., that the public has a legitimate interest in being informed;
3. the authenticity of the disclosed information, which the whistleblower shall verify in a reasonable manner;
4. the detriment to the employer;
5. whether the whistleblower acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it, and that no other, more discreet, means of remedying the wrongdoing was available to him; and
6. the severity of the sanction applied by the employer (e.g., termination of the employment contract).

When the Grand Chamber of the ECtHR applied these criteria to the *Guja* case, in which protection was sought by a press department employee in the Moldovan Prosecutor General's Office, it concluded that the complainant's freedom of expression had been violated.

In subsequent cases, the ECtHR addressed the protection of both private²⁰ and public employees.²¹ In terms of substance, the disclosures concerned, for example, illegal practices of the Romanian intelligence service,²² undue pressure on a judge,²³ deficiencies in the care for the elderly,²⁴ inappropriate medical

¹⁹ ECtHR (Grand Chamber), *Guja v. Moldova*, Appl. No. 14277/04, Judgment of 12 February 2008.

²⁰ ECtHR, *Heinisch v. Germany* (Application no. 28274/08, Judgment of 21 July 2011), *Sosinowska v. Poland* (Application no. 10247/09, Judgment of 18 October 2011), *Balenovic v. Croatia* (Application no. 28369/07, Judgment of 30 September 2010), *Bathellier v. France* (Application no. 49001/07, Judgment of 12 October 2010), *Bargao a Domingos Correia v. Portugal* (Applications no. 53579/09 a 53582/09, Judgment of 15 November 2012).

²¹ ECtHR, *Bucur a Toma v. Romania* (Application no. 40238/02, Judgment of 8 January 2013), *Kudeshkina v. Russia* (Application no. 29492/05, Judgment of 26 February 2009).

²² ECtHR, *Bucur a Toma v. Romania* (Application no. 40238/02, Judgment of 8 January 2013).

²³ ECtHR, *Kudeshkina v. Russia* (Application no. 29492/05, Judgment of 26 February 2009).

²⁴ ECtHR, *Heinisch v. Germany* (Application no. 28274/08, Judgment of 21 July 2011).

treatment,²⁵ problems in the procurement of goods transport,²⁶ serious concerns about the safety of the electricity grid²⁷ and deficiencies in the management of a public health facility.²⁸

Further developments in the ECtHR's case law, however, have shown that the circumstances of a particular reporting can be very different and often do not fit into a simple solution model. While each of the six criteria set out in *Guja* is reasonable, in the light of practical application, there may be a number of other relevant circumstances that need to be given due consideration. These circumstances have a major impact on the weight of each criterion.

Considering that the motivation of a whistleblower and the authenticity of the information can be very questionable, it is quite understandable that the ECtHR has several times deviated from its own model. In the *Balenovic* case, the ECtHR compromised the Croatian government, which had based its legal arguments on the *Guja* model. In this case, the ECtHR instead used only three criteria, namely the authenticity of the information disclosed, the nature of the channels used in disclosing the information, and the situation of the whistleblower as an employee. Generally speaking, rather than following a systemic solution, the ECtHR's case law is inspired by an *ad hoc* balancing approach, resulting in decisions that are applicable only to the individual cases.²⁹

The case of *Halet v Luxembourg*³⁰ has the potential to become one of the Court's leading cases that could clarify the conceptual approach to whistleblowing. In this case, an employee of one of the worldwide largest auditing and tax-advice companies provided information to the media about a number of problematic advance tax rulings and tax returns prepared by the company between 2002 and 2012. A Chamber of the Court ruled in 2021 that the criminal proceedings in which the whistleblower was convicted had been carried out in line with the standards of Article 10 ECHR. However, in their dissenting opinion, two judges criticised that the 'fifth *Guja* criterion,' which aims at a fair balance between the public interest in obtaining the information and the harm caused by the disclosure to the employer, had not been applied correctly. In their view, 'the *Guja* criteria are not to be viewed as mere boxes to be checked, but as principles guiding a

²⁵ ECtHR, *Sosinowska v. Poland* (Application no. 10247/09, Judgment of 18 October 2011).

²⁶ ECtHR, *Balenovic v. Croatia* (Application no. č. 28369/07, Judgment of 30 September 2010).

²⁷ ECtHR, *Bathellier v. France* (Application no. 49001/07, Judgment of 12 October 2010).

²⁸ ECtHR, *Bargao a Domingos Correia v. Portugal* (Application no. 53579/09 a 53582/09, Judgment of 15 November 2012).

²⁹ Harald Christian Scheu, 'Whistleblowing z pohledu evropské ochrany lidských práv' (*Právní proctor*, 23 March 2016) < <https://www.pravniprostor.cz/clanky/ostatni-pravo/whistleblowing-z-pohledu-evropske-ochrany-lidskych-prav>>

³⁰ ECtHR, *Halet v. Luxembourg* (Application no. 21884/18, Judgment of 11 May 2021).

comprehensive review by the national courts.³¹ It is worth noting that the dissenting judges also explicitly pointed at the EU Whistleblower Directive when they noted that EU legislation strengthened the status of whistleblowers by not making protection ‘conditional on any considerations related to the harm caused to the employer.’ The case is currently pending before the Grand Chamber.

From the perspective of legislative authorities, it is crucial to determine to what extent relevant legal acts can be based on the model used by the ECtHR. Although the preamble of the EU Directive refers not only to the ECHR but also to Strasbourg case law, we may point at some differences between the protection of whistleblowers under the ECHR and the Directive.

While the ECtHR case law implies the subsidiarity of external disclosure in relation to internal reporting channels, the Directive provides for the equal status of internal and external whistleblowing. In the *Guja* case, the Grand Chamber of the ECtHR emphasised that the whistleblower may disclose the information to the public only when reporting to the superior or other competent persons and bodies within the organisation is clearly impracticable. The ECtHR explicitly stated that such external reporting constitutes ‘a last resort.’³²

This principle was confirmed by ECtHR in its judgment in *Matúz v Hungary* in October 2014.³³ In that case, the ECtHR ruled in favour of a whistleblower who was a journalist at a state television station, taking into account, *inter alia*, that the complainant disclosed information about alleged censorship at the television station only after he first had unsuccessfully approached the company’s president. According to the ECtHR, the television company had not offered the whistleblower any effective alternative channel.³⁴

Actually, the original proposal for a Whistleblower Directive was conceived in line with this requirement. The whistleblower was to be protected only if he had used internal tools before disclosing the information to the public. Such prioritisation seemed logical, as one of the major objectives of the Directive was to ensure that effective internal reporting mechanisms were set up. However, following a proposal from the European Parliament, an amendment was incorporated into the final version of the Directive in March 2019 that now treats internal and external reporting as essentially equivalent.

Such a difference can be very relevant in practice. In the light of Strasbourg case law, the whistleblower, before making information public, should carefully consider whether effective internal reporting channels are available. However,

³¹ Joint dissenting opinion of Judges Lemmens and Pavli.

³² *Guja v. Moldova*, para. 73.

³³ ECtHR, *Matúz v. Hungary* (Application no. 73571/10, Judgment of 21 October 2014).

³⁴ *Matúz v. Hungary*, para. 47.

under the Directive, he does not need to exhaust internal mechanisms, not even those that have been established in accordance with the Directive.³⁵

Another difference between the Strasbourg and the Directive standards of protection is related to the whistleblower's motivation. While the ECtHR emphasised that the motive behind the whistleblower's actions is a 'determinant factor in deciding whether a particular disclosure should be protected or not',³⁶ the Directive does not include such a condition of protection. In its judgment in *Guja*, the Grand Chamber found that an act motivated by a personal grievance or a personal antagonism, or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection.³⁷

Therefore, in *Langner v. Germany*,³⁸ the ECtHR denied protection under Article 10 ECHR to a whistleblower whose motivation was questionable. In that case, which concerned a dispute between a civil servant and a deputy mayor in Dresden, the ECtHR took into account the findings of the competent German court (Federal Labour Court) that the applicant's statement about an alleged perversion of the course of justice was not aimed at uncovering an unacceptable situation within the city's Housing Office, but was rather motivated by the applicant's personal misgivings about the Deputy Mayor and fear of losing his job.³⁹

Also, in *Aurelian Oprea v Romania*,⁴⁰ the ECtHR took note of the Romanian government's argument that the disclosure was partly motivated by the applicant's frustration as a result of not being promoted to a university professor position. However, the ECtHR found that even assuming that there might have been such a motive, there was no reason to doubt that the applicant acted in good faith and in the belief that it was in the public interest to disclose the alleged shortcomings – corruption at his university – to the public. Moreover, according to the ECtHR, his allegations were not entirely devoid of factual grounds and did not amount to a gratuitous personal attack on the university's representatives.⁴¹ Therefore, the ECtHR concluded that the rights of applicant under Article 10 ECHR had been violated.

³⁵ See Articles 7-9 on internal reporting channels and Articles 10-14 on external reporting channels. Public disclosures are dealt with by Article 15 of the Whistleblower Directive.

³⁶ *Guja v. Moldova*, para. 77.

³⁷ *Ibidem*.

³⁸ ECtHR, *Langner v. Germany* (Application no. 14464/11, Judgment of 17 September 2015).

³⁹ *Langner v. Germany*, para. 47.

⁴⁰ ECtHR, *Aurelian Oprea v. Romania* (Application no. 12138/08, Judgment of 19 January 2016).

⁴¹ *Aurelian Oprea v. Romania*, para. 71.

The approach of the Whistleblower Directive to the issue of motivation is summarised in its recital 32, according to which 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 they report are true. Thus, a safeguard against malicious, frivolous or abusive reports is introduced. At the same time, however, recital 32 of the Directive explicitly states that the motives of the reporting persons should be irrelevant in deciding whether they should receive protection. In other words, protection is not excluded even in cases where the whistleblower is motivated by personal antagonism or personal advantage.

The divergent approaches of the ECtHR and the EU institutions are partly understandable in light of their different priorities. The Strasbourg standard is primarily based on balancing conflicting interests, since, from a human-rights perspective, it must be borne in mind that on both sides of a conflict between an employee and his employer (or his supervisor), there are human beings whose rights are involved. In contrast, the Whistleblowing Directive clearly favours the effectiveness of whistleblowing. Obviously, the efficiency of the fight against fraud and other illegal actions does not depend on a particular motivation of the whistleblower, or whether he reported a breach of law internally or publicly. The objective value of the disclosure is decisive.

From an ECHR perspective, the prevention and punishment of unlawful conduct is certainly a legitimate aim. At the same time, however, the ECtHR conducts a thorough proportionality test, in which relevant aspects such as the choice between internal reporting and external disclosure and the motivation of the whistleblower need be taken into account. A certain relevance should also be attributed to the question of whether the employer or a superior has committed a criminal offence or minor misconduct. In other words, even a legitimate aim does not justify all means.

In view of the above-mentioned differences between the Strasbourg and the EU standards, it is not entirely impossible that the Directive will conflict with the case law of the ECtHR. On the face of it, this risk appears to be relatively low, as the protection under the ECHR represents a minimum standard, and this does not preclude the introduction of a higher level of protection. Thus, if the EU Directive and subsequent national transpositions introduce stronger protection for whistleblowers, for example, by introducing more favourable conditions for internal and external reporting, such a solution is not necessarily contrary to Article 10 ECHR. Generally speaking, an increase in the standard of protection of individuals against interference by public authorities is in line with the ECHR.

More complicated, however, is the strengthening of legal protection for one party in horizontal relationships between private actors. The ECtHR has already dealt with cases in which employers and employees have alleged a violation of

their rights. One may recall the case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*,⁴² in which the Grand Chamber of the ECtHR concluded that the reputation of a candidate for the post of director of a public radio station had been damaged by allegations provided by four NGOs. In doing so, the ECtHR highlighted how important it is to strike a fair balance between the interests of the whistleblowers under Article 10 ECHR, and the interests of a journalist under Article 8 ECHR.⁴³

In the aforementioned case of *Halet v. Luxembourg*, a Chamber of the ECtHR dealt with a whistleblower's right to the protection of freedom of expression and a commercial company's right to the protection of its reputation. The Chamber clarified that there is a difference between the reputation of an individual, which might have repercussions on his dignity, and the commercial reputational interests of a company, which lack such a moral dimension. Regardless, as the interest in protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good, is legitimate in the light of the ECHR,⁴⁴ due attention must be paid to the reputations of both individuals and commercial companies.

IV. FINAL CONSIDERATIONS

There are certainly a number of arguments in favour of EU whistleblower protection. Although this paper focuses mainly on the conceptual problems associated with the Whistleblower Directive, we do not wish to deny its strengths. In addition to specific elements of protection, such as the introduction of internal and external reporting channels, the explicit prohibition of certain forms of retaliation and the reversal of the burden of proof, we may also point at general legal-policy reasons in support of the Directive. Particularly in times of crisis, such as the current one, it is evident that the stability and quality of the democratic order depends not only on the proper functioning of state institutions and public administration, but also on the courage of citizens. The principle of rule of law depends on the initiative of addressees of norms who are willing and able to invoke their rights, and to confront those who violate or abuse the law.

⁴² ECtHR (Grand Chamber), *Medžlis Islamske Zajednice Brčko v. proti Bosnia and Herzegovina* (Application no. 17224/11, Judgment of 27 June 2017). In October 2015, a Chamber of the ECtHR also concluded that the whistleblowers' rights under Article 10 ECHR had not been violated.

⁴³ *Ibidem*, para. 74.

⁴⁴ *Halet v. Luxembourg*, para. 94, 95 and 97.

However, besides some undeniable benefits of EU whistleblower protection, it is important to highlight some of the risks, not in order to undermine the protection itself, but to avoid unwanted side effects. The development of Strasbourg case law has clearly shown that the complex phenomenon of whistleblowing does not fit into a rigid scheme. In light of Strasbourg case law, the necessary room must be left for balancing the interests involved, as is quite common in the context of so-called horizontal relations. In this respect, it will be up to the national courts in particular to apply the established principles of Strasbourg jurisprudence correctly.

Another risk lies in the strong emphasis on the moral dimension of whistleblowing. In 2002, the Canadian professor of religious studies Colin Grant had already described whistleblowers as ‘saints of secular culture.’ After a careful study of the motivations of specific whistleblowers, Colin concluded that their actions represented one of the clearest instances ‘of depths of devotion and dedication that are rare even in explicitly religious cultures.’⁴⁵

While there is little doubt about the heroism of many whistleblowers, and their invaluable contribution to our societies is to be greatly appreciated, we believe that a certain amount of sobriety and restraint would be appropriate with a view to the reality of professional and private relationships in the workplace. Many cases concerning the legitimacy of a whistleblower’s actions and motives in relation to his employer, supervisors and colleagues will take place in a kind of moral grey area, rather than in terms of good and evil. The unfortunate experience of the COVID crisis has shown how a culture of denunciation can be built on moral high ground.

In principle, the protection of whistleblowers is inspired by the idea that hierarchical power shall not be abused in the context of working relationships or, in EU terminology, in a work-related context. This conception of power is reflected, for example, in the prohibition of retaliation against whistleblowers and the reversal of the burden of proof. In recent decades, the ECtHR has become increasingly involved with the field of labour law repeatedly granting protection to the employee as the weaker party to an employment contract, e.g., in cases related to the exercise of the employee’s right to respect for private and family life under Article 8 ECHR,⁴⁶ or their right to freedom of religion under Article 9 ECHR.⁴⁷ However, in the context of whistleblowing, it is not always so easy to

⁴⁵ Colin Grant, ‘Whistle Blowers: Saints of Secular Culture’ (2002) 39 *Journal of Business Ethics* 391.

⁴⁶ See Harald Christian Scheu, ‘Autonomie církve v pracovněprávních záležitostech jako součást ochrany náboženských menšin. In: Scheu, Harald Christian (et alii) *Právní postavení náboženských menšin* (Praha, 2013), 73

⁴⁷ Harald Christian Scheu, ‘Evropský soud pro lidská práva a islámský šátek. Náboženská svoboda versus sekularismus,’ (2010) 56 *Acta Universitatis Carolinae. Iuridica* 7.

determine which party deserves protection as the weaker party. This is true where a particular whistleblower affects the interests of a person who, although formally in a superior position in relation to the whistleblower, does not have the power to substantially influence events within the organisation.

Therefore, it can be concluded that the EU legislation has brought a welcome strengthening to the position of whistleblowers in employment disputes. However, the interpretation of some legal provisions remains complex and only the interplay of national, EU and Strasbourg case law can improve the state of legal certainty. In particular, it will be up to the national courts to apply the autonomous part of national law, which is based on a *de facto* enforced gold-plating, correctly and consistently. It will also be up to the CJEU to interpret the Directive in a unifying way.

Finally, we may not overlook the fact that, in some cases, the ECtHR will overturn the decisions of national courts when, although the principles of EU law are correctly applied, the criteria of Strasbourg case law have not been sufficiently taken into account. We expect that legal certainty on the part of whistleblowers will be greater once the Directive is transposed into national law, but for some of them it may not be great enough.

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