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Working Paper
Emerging criminal and human rights issues related to whistleblowing

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I. Introduction

The mechanisms and procedures for reporting in the public and private sectors, aimed at preventing and detecting unlawful activities—particularly in cases with serious implications for society (e.g., corruption, environmental protection, public health, taxation, unfair competition)—have a long historical tradition.[1]

The practice of reporting breaches in the public interest, as well as the systematic collection of such reports by competent public or private entities to prevent and address unlawful (or irregular) behavior, is widely referred to in international literature under the term "whistleblowing." Whistleblowing serves as a vital instrument of criminal justice policy, showcasing the growing cooperation between investigative and enforcement authorities and private entities in uncovering breaches and gathering essential evidence.

However, the concept and regulatory framework of "whistleblowing" extend beyond these dimensions. It also encompasses a range of measures and specific legislative provisions in various areas of law, such as labor law, public sector law, capital market law, competition law, and others. It is, therefore, a particularly complex issue that transcends the boundaries of substantive and procedural criminal law.

II. The Concept of Whistleblowing

i. Overview

The definition of the term "whistleblower" is not uniform across various national legal systems.[2] This is because each national legislator has made different choices regarding the treatment of individuals who, in the public interest, report criminal acts. According to a widely accepted definition in the literature, whistleblowing refers the disclosure by organization members (former or current)[3] (typically a business, enterprise, or service), of illegal, immoral or illegitimate practices under the control of the employers, to persons or organizations that may be able to effect action.[4]

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[1] For a concise historical overview of the development of whistleblowing in the public interest, see Tsilikis, *Protected Whistleblowers and Public Interest Witnesses: The Issues Surrounding Whistleblowers in the International Context*, *The Art of Crime*, May 2018 edition.

[2] Regarding the effort to delineate the concept of "whistleblowing" (and correspondingly that of the "whistleblower"), see Herold, *Whistleblower*, 2016, p. 34 et seq., and Vandekerckhove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment*, 2006, p. 21 et seq.

[3] However, individuals who are not members of the organizational structure in question but are connected to it in some other capacity—such as customers, consumers, suppliers, or administrative subjects—may also be characterized as "whistleblowers." According to another perspective, these individuals constitute "bell-ringers" and should be treated differently from "whistleblowers." See, for example, M.P. Miceli/S. Dreyfus/J.P. Near, *Outsider 'whistleblowers': Conceptualizing and distinguishing 'bell-ringing' behavior*, p. 71 et seq., in: A.J. Brown/D. Lewis/R. Moberly/W. Vandekerckhove (Eds.), *International Handbook on Whistleblowing Research*, 2014.

[4] See J.P. Near, M.P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, *Journal of Business Ethics* 4 (1985), p. 4.

A frequent question arises as to whether the motive of the reporting person is critical for their classification as a "whistleblower." Specifically, the issue is whether the term "whistleblower" should be reserved for those who, driven by moral and conscientious reasons, act to protect the legal interest that is harmed or threatened, or whether the same status should also apply to those who report wrongdoing for self-serving motives (e.g., financial gain or revenge).

In contrast, the concept of a "whistleblower" should be distinguished from that of a "crown witness" (e.g., "King's evidence" or "Kronzeuge"). The latter refers to a person involved in the disclosed act, either as a principal or as an accomplice, who cooperates with the authorities to avoid a threatened penalty or to receive more favorable treatment (see, for example, Articles 263A and 187C of the Greek Penal Code)[5]. Therefore, a whistleblower should not face criminal or disciplinary liability for the reported act.

ii. The Distinction Between Internal and External Whistleblowing

Whistleblowing may occur either within the organized structure where the illegal or irregular behaviour takes place, through the use of an internal reporting channel (internal whistleblowing), or outside of it (external whistleblowing), via available external reporting channels. This may include submitting a report to the competent police or judicial authorities or even making the report public.[6]

III. The risk of retaliation against the whistleblower

The risk of retaliation against whistleblowers is a significant deterrent to the submission of reports regarding illegal or improper conduct within both public and private sector organizations. Such retaliation typically manifests in the workplace (e.g., termination of employment, detrimental alterations to the terms of employment, disciplinary actions, or psychological pressure). However, it may also extend beyond the workplace, including criminal charges (e.g., defamation, violation of professional or official secrecy, or breach of professional confidentiality) and corresponding civil claims for damages[7]. The threat of retaliation, particularly against the whistleblower or their relatives, remains the most substantial disincentive to filing such reports[8].

IV. Protective Measures for Whistleblowers

The need to protect and encourage individuals to report illegal conduct, even when it implicates their employers, has been recognized for decades[9]. In the United States, the

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[5] Tsilikis, *op. cit.*, para. 10; Androulakis, *Measures of Leniency for Those Responsible for Corruption Acts Cooperating with the Authorities*, pp. 179-180, in: D. Ziouva (ed.), *Law & Politics Against Corruption*, 2016; N. Livos, *The Contribution of Whistleblowers in the Fight Against Corruption*, p. 471 et seq., in: *The Criminal Management of Bribery – Possibilities and Limits*, Minutes from the 6th Conference of the Hellenic Criminal Bar Association, 2013.

[6] Cf. Tsilikis, *op. cit.*, para. 13.

[7] See Tsilikis, op. cit., par. 15 et seq., who emphasizes that in certain extreme cases, the whistleblower or their relatives may face threats or even attacks against their life and physical and/or mental health.

[8] Tsilikis, op. cit., par. 16.

[9] See Article 5, paragraph (c) of the International Labour Organization (ILO) Convention on the Termination of Employment (22.6.1982), which stipulates that the submission of a complaint or participation in proceedings against an employer regarding an alleged violation of laws or regulations does not constitute a valid reason for the termination of the employment relationship.

"Whistleblower Protection Act" (WPA) was enacted in 1989. It prohibits retaliation against federal employees who disclose violations, abuse of power, or risks to public health, safety, and more. The Act also provides for the initiation of disciplinary proceedings against any federal employee who retaliates against a protected whistleblower[10]. This protective framework was expanded further in 2012 with the "Whistleblower Protection Enhancement Act" (WPEA)[11]. Moreover, protections against retaliation were extended to employees in the private sector, particularly those working in publicly traded companies, under the Sarbanes-Oxley Act (SOX) of 2002[12]. The Dodd-Frank Act of 2010 enhanced these protections by offering substantial financial incentives to whistleblowers, in addition to further strengthening protection from retaliatory actions.[13]

In the European context, the development of national regulations encouraging whistleblowing and protecting whistleblowers has been influenced by supranational legal frameworks, particularly international agreements focused on combating corruption.[14]

National legal provisions protecting whistleblowers have existed in various European legal systems for years. In the United Kingdom, the "Public Interest Disclosure Act" (PIDA)[15], introduced in 1998, provides protection for employees who disclose information in the public interest.[16] However, in many cases, there was no unified framework for protecting whistleblowers, and the protection provided was fragmented, depending on the type and nature of the misconduct reported.[17]

V. The Role of Whistleblowing in Public Corporate Oversight and Internal Corporate Governance

[10] See Vaughn/Devine/Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Revolution Protecting Whistleblowers*, 35 The Geo. Wash. Int'l. L. Rev. 857 (2003), pp. 874-875.

[11] See Peffer/Bocheko/Del Valle/Osmani/Peyton/Roman, *Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Federal Whistleblower Enhancement Act of 2012*, Review of Public Personnel Administration 2015, Vol. 35 (1), p. 70 et seq.

[12] See Section 806 regarding the protection for employees of publicly traded companies who provide evidence of fraud (Protection for employees of publicly traded companies who provide evidence of fraud). Compare also with 18 U.S.C. § 1513(e), which provides criminal sanctions against individuals who retaliate against persons offering truthful information to law enforcement authorities regarding the commission or possible commission of any federal offense.

[13] See Section 922 (Whistleblower Protection)

[14] See Article 22 of the Criminal Law Convention on Corruption of the Council of Europe, Article 9 of the Civil Law Convention on Corruption of the Council of Europe, Article 8(4) and Article 33 of the UN Convention against Corruption, Recommendation CM/Rec (2014)7 adopted by the Committee of Ministers of the Council of Europe on the protection of whistleblowers, and relevant OECD recommendations [OECD (2016), *Committing to effective whistleblowing*].

[15] By which the Employment Rights Act of 1996 was amended. Indeed, with the *Enterprise and Regulatory Reform Act* of 2013, the PIDA was modified, and it is no longer required for the employee-whistleblower to act in good faith to be protected. Instead, it suffices that the employee has a reasonable belief that their disclosure is made in the public interest. However, the employee must act in good faith if they make a disclosure outside the prescribed channels (e.g., to the employer or to regulatory authorities), but to third parties, such as the media (see Section 43G of the Employment Rights Act).

[16] For the legislative framework protecting whistleblowers in France prior to the implementation of Directive (EU) 2019/1937 into national law, see Tsilikis, op. cit., para. 22.

[17] For example, in Germany, see Tsilikis, op. cit., para. 23, and also in Switzerland, see Tsilikis, op. cit., para. 24, where the Swiss Federal Court's case law on the possibility of lifting the unlawfulness of a potential breach of confidentiality by the whistleblower in light of safeguarding legitimate interests is discussed.

However, whistleblowing should be distinguished from other traditional forms of reporting crimes to the police or prosecution authorities, as well as from in-company reporting of complaints, such as those directed to the HR department.

Whistleblowing systems have a dual effect: On one hand, they serve as a valuable tool for enforcing criminal law and exercising criminal justice policy functions (traditionally handled by state bodies) by company insiders who are tasked with reporting misconduct, particularly as detecting corporate crime presents significant challenges and a low success rate. On the other hand, these systems enhance self-regulation mechanisms within organizations, becoming a key element of a corporate compliance strategy. This can yield substantial benefits not only in detecting and deterring misconduct but also for the organization itself, which gains from having an effective internal whistleblowing system.

In recent decades, there has been a tentative rediscovery of the use of criminal law as a response to serious corporate crime and instability in financial markets. In this context, there is an increasing trend towards cooperation between public and private institutions to address financial crime, as well as the various forms of crime arising from the operations of large companies. Consequently, public investigative authorities are working to expand the pool of potential witnesses-whistleblowers by establishing (external) reporting systems, thereby facilitating the public prosecution of such crimes.[18]

Furthermore, organizations are being encouraged to ensure their own compliance through internal self-regulation. Legislators, both at the national and EU levels, are progressively imposing more legal obligations on private organizations, particularly large companies, to prevent violations. At the same time, they are offering more favorable treatment to those able to demonstrate the prior implementation of effective compliance programs. These programs provide tools that enable organizations to address past or ongoing violations, including damages to the organization itself and non-compliance issues that harm third parties or even collective legal interests (e.g., public health, the environment).

An integral part of a corporate compliance program is the establishment of a functional whistleblower disclosure system[19], which ensures the protection of the whistleblower's identity when submitting a named report and possibly allows for anonymous reporting as well.

In this context, internal whistleblowing systems function as information channels that offer employees, and to some extent customers, subcontractors, and others, easily accessible and risk-free means to disclose information. Through these channels, detection units can increasingly receive reports of wrongdoing, which are essential for initiating internal investigation and handling processes[20]. Companies may choose to investigate the substance of the submitted reports internally (by delegating responsibility to the compliance

[18] Dugan and Gibbs, *The Role of Organizational Structure in the Control of Corporate Crime and Terrorism*, p. 121, in: Simpson and Weisburd (eds), *The Criminology of White-Collar Crime*, 2009.
[19] Pemberton et al., *Whistleblowing, Organisational Harm and the Self-Regulating Organisation*, *Policy & Politics*, 40 (2), 2012, pp. 263-264.
[20] Berry, *Organizational Culture: A Framework and Strategies for Facilitating Employee Whistleblowing*, *Employee Responsibility and Rights Journal*, 16 (1), 2004, pp. 1-2.

department or in-house legal team) or to outsource the investigation to specialized external professional service providers, typically law firms or consulting firms.

The introduction of an internal whistleblower system offers multiple benefits for the company. It allows for the early detection of breaches that may pose significant risks to the company's reputation and/or assets, triggering an internal investigation to examine the submitted report. This enables the company to address the issue promptly and avoid external communication. A functional, secure, and easily accessible internal reporting system encourages whistleblowers to report concerns internally rather than externally (e.g., to the press or authorities). If the report proves to be unfounded, the company's reputation remains intact, as premature publicity of a groundless complaint is avoided. Conversely, if the complaint is substantiated, investigating it and taking the necessary actions will ultimately lead to favorable treatment of the company. Moreover, an internal whistleblowing system fosters a climate of accountability and transparency within the organization.

It can be observed that in most countries, efforts are being made to enhance the effectiveness of legal actions against corporate crime, while simultaneously encouraging greater self-monitoring by legal entities. In this context, both internal and external whistleblowing systems seem to coexist. However, there appears to be a structural incompatibility between public and private whistleblowing systems, i.e., between external and internal whistleblowing. When serious irregularities are identified internally, authorities are generally not involved. The state is only approached in highly selective instances—specifically, in rare cases where doing so provides tactical advantages aligned with the organization's economic interests. In most other cases, official procedures, guided by non-economic criteria and largely beyond the organization's control, impose significant disadvantages, such as fines or reputational harm.[21] As a result, companies often maintain a culture of secrecy, addressing violations and concerns privately as internal matters. In this context, the internal whistleblowing system is often seen by the company as a tool for liability avoidance. Its primary function is the management of penal and other liability risks in pursuit of the organization's economic interests, while its role in ensuring the private entity's compliance with legal obligations tends to be viewed as secondary.

Therefore, companies often attempt to prevent external whistleblowing, as it represents a threat to their business interests,[22] which could result in adverse economic consequences. To counter this, they establish internal whistleblowing systems and strongly encourage employees to report any kind of wrongdoing internally—often incorporating relevant provisions into the organization's code of conduct. This approach ensures that any potential willingness on the part of employees to report wrongdoing within the company is channeled through internal mechanisms, allowing the issue to be addressed internally as well. In this

[21] Kölbel, (2019). Whistleblowing in Europe: Regulatory Frameworks and Empirical Research, in: van Erp, Huisman, & Vande Walle (Eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe,* pp. 418, 424.

[22] Schmidt (2005). "Whistle blowing" regulation and accounting standards enforcement in Germany and Europe. *International Review of Law and Economics*, 25(2), pp. 143-150; Williams, C. (2005). Reflections on the private versus public policing of economic crime. *The British Journal of Criminology*, p. 328.

way, the internal reporting system effectively transforms any potential external whistleblowing into internal information.[23]

In light of these observations, it can be argued that the objective of internal corporate whistleblowing systems— in terms of regulatory compliance—is partially undermined by corporate interests.[24] These systems are often utilized to control information and manage the consequences of malpractices in ways that align with the organization's interests, rather than strictly ensuring adherence to the law. In other words, by actively encouraging and mandating internal whistleblowing systems, the government may inadvertently weaken its own enforcement authority.[25]

VI. Freedom of expression and protection of whistleblowers under ECtHR case law

The issue of protecting whistleblowers has also been addressed by the case law of the European Court of Human Rights (ECtHR), which holds that the submission of a whistleblowing report constitutes an exercise of the right to freedom of expression and, therefore, is protected under Article 10 of the European Convention on Human Rights (ECHR). The conditions for providing this protection, which entails a prohibition on retaliation against the whistleblower, particularly when the whistleblower is an employee, are—according to the ECtHR[26]—the following:

a) The whistleblower must have exhausted other, less intrusive means before making a public disclosure (principle of subsidiarity), due to the employee's duty of confidentiality towards the employer (duty to discretion)[27];
b) The reported acts must concern the public interest[28];

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[23] Berry (2004). Organizational culture: A framework and strategies for facilitating employee whistleblowing. *Employee Responsibility and Rights Journal, 16*(1), pp. 1, 10-11; Schmidt (2005). "Whistle blowing" regulation and accounting standards enforcement in Germany and Europe. *International Review of Law and Economics, 25*(2), pp. 143, 162; Miceli, Near, & Dworkin, T. (2009). A word to the wise. *Journal of Business Ethics, 86*(3), pp. 379, 381, 385-386; Kölbel (2017). Whistleblowing in Europe, Regulatory Frameworks and empirical research, pp. 418, 424, in: van Erp, Huisman, & Vande Walle (Eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*.

[24] Kölbel (2017). Whistleblowing in Europe, Regulatory Frameworks and empirical research, p. 418, 424 in: van Erp, Huisman & Vande Walle (Eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*.

[25] Kölbel, in "Whistleblowing in Europe, Regulatory Frameworks and Empirical Research," p. 424: in: van Erp, Huisman, & Vande Walle (Eds.), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, highlights that the assertion of internal whistleblowing systems as a "win-win" approach for prevention, and their claimed ability to ensure higher levels of corporate norm compliance, overlooks the potential for the misuse of information from a regulatory perspective. This critique emphasizes the risks associated with internal systems, which may be manipulated for corporate interests, rather than serving their intended purpose of legal compliance and transparency.

[26] As the conditions were outlined in the judgment of the Grand Chamber of the ECtHR in *Guja v. Moldova* (application no. 14277/04) of February 12, 2008, §70 et seq; see also ECtHR, *Guja v. Moldova* (No. 2) (application no. 1085/10) of February 27, 2018, in which Moldova was condemned for a second time for failing to restore the applicant's position, see also ECtHR, *Heinisch v. Germany* (application no. 28274/08) of July 21, 2011.

[27] Grand Chamber ECtHR, *Guja v. Moldova* (application no. 14277/04) of February 12, 2008, §73; cf. also Grand Chamber ECtHR, *MEDŽLIS ISLAMSKE ZAJEDNICE BRČKO et al. v. Bosnia and Herzegovina* (application no. 17224/11) of June 27, 2017, §80.

[28] Grand Chamber ECtHR, Guja v. Moldova (Application No. 14277/04), Judgment of 12 February 2008, §74.

c) The information disclosed must be reliable[29];
d) The public interest in disclosing the information must outweigh the harm caused to the reported employer or public service by the disclosure[30];
e) The whistleblower must act in good faith or have other legitimate motives[31];
f) The sanctions imposed on the whistleblower and their consequences must be severe[32].

Particularly relevant to the present discussion is the recent judgment *Halet v. Luxembourg* delivered by the Grand Chamber of the ECtHR[33]. In this case, the Court examined whether the application of criminal sanctions against an employee who publicly disclosed confidential information obtained in the course of their duties constitutes a violation of Article 10 of the ECHR (freedom of expression).[34]

The ECtHR, taking into account its earlier case law[35], first held that the protection of freedom of expression extends to private employment relationships. It then analyzed the case based on the criteria previously developed in *Guja v. Moldova[36],* namely:

a) the manner in which the information was disclosed,
b) the authenticity of the information,
c) the good faith of the public interest informant,
d) the significance of the information to public discourse,

[29] Grand Chamber ECtHR, Guja v. Moldova (Application No. 14277/04), Judgment of 12 February 2008, §75.
[30] Grand Chamber ECtHR, Guja v. Moldova (Application No. 14277/04), Judgment of 12 February 2008, §76.
[31] Grand Chamber ECtHR, Guja v. Moldova (Application No. 14277/04), Judgment of 12 February 2008, §77; cf. also ECtHR, *Soares v. Portugal* (Application No. 79972/12), Judgment of 21 June 2016, §46; ECtHR, *Aurelian Oprea v. Romania* (Application No. 12138/08), Judgment of 19 January 2016, §61, 71; ECtHR, *Langner v. Germany* (Application No. 14464/11), Judgment of 17 September 2015, §45.
[32] Grand Chamber ECtHR, Guja v. Moldova (Application No. 14277/04), Judgment of 12 February 2008, §78; cf. also ECtHR, *Görmüş and Others v. Turkey* (Application No. 49085/07), Judgment of 19 January 2016, §74; and ECtHR, *Heinisch v. Germany* (Application No. 28274/08), Judgment of 21 July 2011, §91, where it is noted that restrictions on the whistleblower's freedom of expression may have a chilling effect on other whistleblowers or journalists.
[33] Grand Chamber ECtHR, *Halet v. Luxembourg* (application no. 21884/18) of 14 February 2023. It should be noted that the case was referred to the Grand Chamber at the request of the applicant after a (contrary) decision had been issued by the Third Section of the ECtHR [ECtHR, *Halet v. Luxembourg* (application no. 21884/18) of 11 May 2021], which held, albeit with a strong dissenting opinion, that the imposition of a criminal fine of €1,000 on an employee for leaking confidential employer documents to the press did not constitute a violation of Article 10 of the ECHR. The Third Section had reasoned that the documents in question did not present sufficient public interest to outweigh the harm caused, and therefore the domestic court managed to strike a fair balance between the public interest in information and the need to protect the confidentiality of the employer's information.
[34] According to the facts of the case, Halet disclosed tax returns and correspondence to a journalist, revealing the tax practices of multinational corporations (*LuxLeaks* case). The applicant was convicted at both first and second instance by the courts of Luxembourg for disclosing the documents in question to the journalist, resulting in the imposition of a criminal fine of €1,000. An appeal filed by the applicant was also rejected. Before the courts of Luxembourg, the applicant argued that he should be recognized as a "whistleblower" and that his actions were protected under Article 10 of the ECHR.
[35] ECtHR, Heinisch v. Germany (Application no. 28274/08), 21 July 2011.
[36] Grand Chamber of the ECtHR, Guja v. Moldova (Application no. 14277/04), 12 February 2008.

e) the harm caused to the employer by the disclosure of the information, and
f) the severity of the penalty imposed on the whistleblower.[37]

Regarding the application of the first criterion, the Grand Chamber clarified that priority should be given to internal reporting channels, i.e., within the organization. However, this presumption can be rebutted when such channels are proven to be unreliable or ineffective. In the specific case, the Court found that only the public disclosure of the tax practices at issue would be effective, as these practices were lawful and, consequently, reporting them internally would not have yielded any results.[38]

The Court's reasoning concerning the criterion of public interest in the disclosed information is also noteworthy. The ECtHR ruled that the published tax documents were of public interest because they revealed to the general public the tax benefits enjoyed by well-known multinational corporations and Luxembourg's legislative choices regarding its national tax policy.[39]

Based on the *Guja* criteria, the ECtHR proceeded to balance the interests involved and held that the public interest in the policies pursued at the European level for the taxation of multinational corporations was particularly significant and outweighed the harm suffered by the employer. On this basis, the Court found that the criminal conviction of the applicant constituted a violation of Article 10 of the ECHR.

The ECtHR case law affirms that whistleblowing is deeply rooted in the right to freedom of expression. Nonetheless, whistleblowers often encounter significant legal and societal repercussions, including criminal charges under domestic laws. Existing protective frameworks frequently prove inadequate, exposing whistleblowers to retaliation such as dismissal, harassment, or financial and professional difficulties.

Furthermore, while the primary focus of most provisions of the ECHR is to shield individuals from arbitrary interference by state authorities, the ECtHR has consistently recognized that effective protection of certain rights—including freedom of expression[40]—necessitates the imposition of positive obligations on the State. These obligations, intrinsic to the substantive guarantees of the rights themselves, require the State not only to abstain from interference but also to adopt affirmative measures to ensure protection, even in private party interactions (e.g., employer-employee relationships).

Consequently, ECtHR jurisprudence underscores the State's duty to safeguard freedom of expression within private employment contexts, provided this duty aligns with the conditions and criteria articulated in the Court's case law.

[37] Grand Chamber of the ECtHR, Halet v. Luxembourg (Application no. 21884/18), 14 February 2023, particularly §120–153.
[38] See §171–172.
[39] See §185-192.
[40] The ECtHR has acknowledged that positive obligations also arise from the protection of Articles 2 (right to life), 3 (prohibition of torture), 8 (protection of private and family life), and 11 (freedom of assembly and association).

VII. Reporting for the Public Interest within the EU

At the EU level, a series of legislative acts have been adopted over the past decade, which include provisions for the protection of whistleblowers against retaliation. Firstly, a comprehensive framework of protection is provided for EU staff who engage in whistleblowing.[41]

Furthermore, Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure emphasizes, on the one hand, that the measures, procedures, and remedies provided for in the Directive "should not restrict whistleblowing activities", and that "the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed".[42] On the other hand, the Directive provides for exceptions, and thus a limitation to the protection of trade secrets, when the latter is affected, inter alia, for the exercise of the right to freedom of expression and information or for the purpose of revealing misconduct, wrongdoing, or illegal activity, provided that the whistleblower has "acted for the purpose of protecting the general public interest".[43]

Particularly noteworthy provisions are also included in Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the Market Abuse Regulation), which aims to protect financial markets against insider trading and market manipulation. Specifically, Article 32 of the Regulation obliges EU Member States to:

(a) adopt specific procedures for receiving and following up on reports in both the public and private sectors, including the establishment of secure communication channels for such reports;
(b) provide appropriate protection for whistleblowing employees[44] against retaliation, discrimination, or other forms of unfair treatment; and
(c) implement measures to protect personal data concerning both the reporting person and the natural person allegedly responsible for the breach, including safeguarding the confidentiality of their identities.[45]

Moreover, the Market Abuse Regulation allows Member States to provide financial incentives to whistleblowers for reporting breaches of the applicable provisions concerning market protection. Specifically, Article 32(4) of Regulation (EU) No 596/2014 states that: "Member States may provide for financial incentives, in accordance with national law, to persons who offer relevant information about potential breaches of this Regulation, provided that such persons are not already under a pre-existing legal or contractual obligation to report such information, and provided that the information is new and results in the imposition of an

[41] Mainly based on Articles 22a and 22b of the Staff Regulations of Officials of the European Union.
[42] See Recital 20 of Directive (EU) 2016/943.
[43] See Article 5(a) and (b) of Directive (EU) 2016/943.
[44] Even if they are employed on the basis of a service contract rather than an employment contract.
[45] Without prejudice, however, to the disclosure requirements of the relevant information pursuant to national law in the context of investigations or subsequent judicial proceedings.

administrative or criminal sanction or in the taking of another administrative measure for the breach of this Regulation."[46]

However, the Union legislator acknowledges the necessity to also provide safeguards for the person accused of certain unlawful or even criminal conduct. Thus, recital 74 of Regulation (EU) 596/2014 on market abuse clarifies that: "Member States should also ensure that reporting mechanisms implemented provide appropriate protection for a person accused, in particular as regards the right to protection of personal data and procedures to ensure the right of defense and the right to be heard before a decision concerning that person is taken, as well as the right to seek an effective remedy before a court against a decision concerning that person."

VIII. Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law

i. Introduction

Directive (EU) 2019/1937[47] represents an initial effort to adopt a unified institutional framework, in contrast to the scattered Union regulations in place, which will provide protection for those who make reports by providing information regarding breaches that they have obtained in the context of their professional activities.[48]

ii. Material scope

The directive lays down common minimum standards for the protection of persons reporting breaches of EU law[49] that concern the areas of public procurement, financial services, products and markets, and prevention of money laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems[50]; breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures; 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

[46] This is a provision clearly influenced by the relevant U.S. legislation, particularly the recent Dodd-Frank Act. See, in this regard, *Fleischer*/*Schmolke*, "Financial Incentives for Whistleblowers in European Capital Markets Law," European Company Law 9 (2012), p. 250 et seq.

[47] 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.

[48] The personal scope of the Directive, as defined in Article 4, is particularly broad to ensure that protection is extended to the widest possible range of individuals who acquire information in a work-related context and subsequently report it. According to the article 5(9) of the Directive (EU) 2019/1937, 'work-related context' means current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information.

[49] Article 2 (1) of the Directive (EU) 2019/1937.

[50] To be precise, breaches falling within the scope of EU acts regulating these areas, as outlined in the Annex of the Directive.

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.

It is further clarified in Article 2(2) that the Directive does not affect the power of Member States to extend protection under national law to areas or acts not covered by Article 2, paragraph 1. Several EU Member States, such as Spain and France, have already exercised this possibility by providing a similar level of protection against retaliation for persons reporting violations of domestic law.

iii. Internal Reporting, External Reporting, and Public Disclosure

The Directive has as its central focus the provision of protection to whistleblowers, as well as the obligation of Member States to establish internal reporting channels and procedures both in the public sector and for legal entities in the private sector.

The Directive prioritizes, at first level, the use of internal reporting channels (internal reporting)[51], as well as the submission of external reports (external reporting)[52]. In contrast, the provision of protection to a person making a "public disclosure",[53] meaning the direct release of information to the public concerning breaches of Union law, is not automatic and is only allowed under specific conditions.[54]

Reporting persons shall disclose information on breaches using external reporting channels after first utilizing internal reporting channels or by reporting directly through external reporting channels.[55]

However, in the case of a public disclosure, protection under the Directive is not granted by default. Instead, it is granted only if one of the following conditions is met:[56]

1. the person first reported internally and externally, or directly externally, 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) of the directive; or
2. 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.

iv. Conditions for protection of reporting persons

[51] Article 5(4) of Directive (EU) 2019/1937: 'internal reporting' means the oral or written communication of information on breaches within a legal entity in the private or public sector.
[52] Article 5(5) of Directive (EU) 2019/1937: 'external reporting' means the oral or written communication of information on breaches to the competent authorities.
[53] Article 5(6) of Directive (EU) 2019/1937: 'public disclosure' or 'to publicly disclose' means the making of information on breaches available in the public domain.
[54] Article 15 of Directive (EU) 2019/1937.
[55] Article 10 of Directive (EU) 2019/1937.
[56] Article 15(1) of Directive (EU) 2019/1937.

According to Article 6 of the Directive, 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, in accordance with the provisions of the Directive, either internally or externally or made a public disclosure.
The crucial element for protection is that the reporting person had, at the time of reporting, reasonable grounds to believe that the information about the reported infringements was true and fell within the scope of the Directive. Consequently, the fact that the reporting person may also have other potentially self-serving interests in making the report is not decisive for granting protection, as long as they had reasonable grounds to believe the content of their report was true.

v. Duty of Confidentiality Regarding the Identity of the Reporting Person

Furthermore, the competent authorities responsible for receiving and following up on reports are required to ensure the confidentiality of the identity of the whistleblower, whether the report is internal or external. Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorized staff members competent to receive or follow up on reports. This obligation is lifted only when the reporting person explicitly consents to the disclosure of their identity.[57] It should be noted that the obligation of confidentiality covers not only the reporting person's identity but also any information from which their identity may be directly or indirectly inferred.[58] Furthermore, reporting persons shall be informed before their identity is disclosed, unless such information would jeopardize the related investigations or judicial proceedings. When informing the reporting persons, the competent authority shall send them an explanation in writing of the reasons for the disclosure of the confidential data concerned.[59]

Moreover, under the Directive, Member States are required to impose effective, proportionate, and dissuasive penalties on natural or legal persons who hinder or attempt to hinder the submission of a report, retaliate against whistleblowers, or violate the confidentiality of the identity of the person making the report.[60]

vi. Measures for the protection of persons concerned

However, under the Directive, Member States are not only required to take measures to protect the reporting person but also for the protection of the person concerned, i.e. the natural or legal person who is referred to in the report of public disclosure as the person to whom the breach is attributed or with whom that person is associated.[61]

The Directive refers to the obligation of Member States to ensure that the identity of the reported person is protected throughout the course of investigations initiated by the report or by the public disclosure.[62] Furthermore, Member States must ensure that reported persons, in accordance with the provisions of the Charter of Fundamental Rights of the EU,

[57] Article 16(1)(a) of the Directive (EU) 2019/1937.
[58] Article 16(1)(b) of the Directive (EU) 2019/1937.
[59] Article 16(3) of Directive (EU) 2019/1937.
[60] Article 23(1) of Directive (EU) 2019/1937.
[61] Article 5(10) of Directive (EU) 2019/1937.
[62] Article 22(2)(3) of Directive (EU) 2019/1937.

enjoy the right to an effective remedy and a fair trial, as well as the presumption of innocence and the rights of the defense, including the right to a hearing and the right of access to their case file.[63]

Aiming to protect reported persons from malicious and abusive reports, the Directive provides for the obligation of Member States to impose effective, proportionate, and dissuasive sanctions against persons when it is proven that they have knowingly made false reports or false public disclosures, as well as compensation measures in accordance with national law.[64]

vii. Restriction of certain Data Protection Rights

As indicated in Directive (EU) 2019/1937[65], the effective implementation of its provisions may, in certain cases, require restricting the exercise of specific data protection rights of the persons concerned [in accordance with Articles 23(1)(e)(i) and 23(2) of Regulation (EU) 2016/679].[66] Such restrictions should apply only to the extent, and for as long as, necessary to prevent and address attempts to hinder reporting, impede follow-up (including investigations), or uncover the identity of reporting persons.

The rationale behind this provision of the Directive, as adopted in many transposing national laws[67], is based on a balancing of two conflicting interests: on the one hand, the protection of personal data, as enshrined in Regulation (EU) 2016/679 (GDPR), which constitutes a fundamental right under Article 8 of the Charter of Fundamental Rights of the EU. This includes a range of rights granted to natural persons, such as, among others, the rights of access, erasure, and rectification of their data. On the other hand, there is the need to protect reporting persons who disclose breaches of Union law from retaliation and to ensure the effectiveness of investigations following a report or a public disclosure. This balance is necessary because, if the right of access or other GDPR requirements were fully applied, there is a risk that the identity of the reporting person could be disclosed.

Therefore, the European legislator considered that, in certain exceptional cases, the protection of personal data must be restricted in order to ensure a higher public interest, namely the enhancement of transparency and accountability through the encouragement of reports on unlawful acts, as well as ensuring the effectiveness of investigations following a report and the administration of justice. However, these restrictions must be proportionate and apply only for as long as necessary to achieve their objective, as also provided for in Article 23 of the GDPR. In this way, a fair balance is achieved between safeguarding privacy and protecting reporting persons in accordance with Directive (EU) 2019/1937.

viii. Safeguarding the Right of Defense of the Person Concerned

[63] Article 22(1) of Directive (EU) 2019/1937.
[64] Article 23(2) of Directive (EU) 2019/1937.
[65] Recital 84 of Directive (EU) 2019/1937.
[66] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[67] See, e.g., Articles 15(5)-(6) of Greek Law 4990/2022, which transposes the Directive.

While whistleblowing plays a crucial role in uncovering unlawful activities, it must be balanced with the fundamental rights of individuals concerned, particularly the right to a fair trial, the rights of defense, and the presumption of innocence, as enshrined in the EU Charter of Fundamental Rights. Directive (EU) 2019/1937 addresses these concerns in Article 22 by ensuring that individuals affected by whistleblowing reports fully enjoy these rights. It seeks to balance responsible whistleblowing, intended to safeguard the public interest, with the fundamental rights of the individuals concerned, thereby maintaining the integrity of legal proceedings and the justice system.

The Directive emphasizes that persons concerned by a whistleblowing report must have access to an effective remedy and a fair trial. This includes the right to be heard and the right to access their file, enabling individuals to defend themselves adequately against any allegations. Furthermore, the Directive ensures that individuals affected by whistleblowing reports are presumed innocent until proven guilty, protecting them from undue prejudice.

IX. Conclusion

In conclusion, it is widely accepted that the development of operational internal and external whistleblowing systems is crucial for uncovering and investigating illegal conduct that would otherwise remain in obscurity. Protecting whistleblowers from retaliation, along with providing support and remedial measures, will encourage potential whistleblowers. As insiders, they can contribute both to combating crime within organized structures and to strengthening self-monitoring within companies. Therefore, despite the drawbacks and structural challenges that institutionalized whistleblowing systems have shown, the establishment of a binding, homogeneous minimum standard across Europe, though limited in scope, provides a solid foundation for whistleblowing. However, these systems also pose challenges for the fundamental rights of the individuals concerned, particularly their right to an effective remedy and a fair trial, as well as the presumption of innocence and the rights of defense. Whistleblowing reports can potentially lead to reputational damage or premature judgments before the accused has had an opportunity to defend themselves, which may jeopardize their right to be heard and to access their file. These concerns underline the need for careful balance between the public interest of encouraging whistleblowing and safeguarding the rights of those involved in the process.