



# PATFOX GUIDE TO

# WHISTLEBLOWER PROTECTION



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## 1. Introduction

The Anti-SLAPP Guide to Whistleblower Protection is an addition to the PATFox project's anti-SLAPP curriculum ([www.antislapp.eu](http://www.antislapp.eu)) for legal professionals. This module is specifically tailored to trainers conducting sessions for lawyers engaged in combating Strategic Lawsuits Against Public Participation (SLAPP) on behalf of clients, such as NGOs, academics, researchers, journalists, and bloggers. In the contemporary legal landscape, SLAPP techniques are increasingly employed not for seeking justice in the courtroom but as a tool to stifle criticism and suppress difficult questions. In recent years, particularly in Europe there has been an increasing legislative and case-law focus on the need for whistleblowers to be protected from retaliation for raising just such difficult questions – whistleblower protections are therefore a potentially valuable tool for a particular group of SLAPP defendants.

This Guide is crafted to equip legal practitioners defending clients against such tactics with specialized knowledge concerning Europe's current whistleblower protection regime. It aims to provide both background on the formation, makeup and transposition of the relevant EU Directive protecting whistleblowers and its relation with other sources of whistleblower protection in Europe, principally the case law of the European Court of Human Rights (ECtHR). Using this foundation, this Guide then presents several practical defensive approaches, listed in Section 5, that may help legal practitioners and their SLAPP clients.

Particularly, this module references select whistleblower cases, each briefly summarized for utility and relevance to lawyers seeking practical examples. This curriculum material aims to empower legal practitioners with targeted knowledge, enabling them to effectively integrate whistleblower protections into their defense strategies against SLAPP, ultimately fortifying their clients' positions. While not exhaustive, this module serves as a guide, directing learners to further information and highlighting key aspects of significance.

## 2. An overview of whistle-blower protection in Europe

Legal measures for protecting whistle-blowers have improved in the past decade across Europe since 2010 when Resolution 1729 (2010) by the Parliamentary Assembly of the Council of Europe (PACE) emphasized the crucial role of whistle-blowers - concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk - in strengthening accountability, combating corruption. The PACE Resolution stressed the necessity for legislative enhancements for protecting whistle-blowers in member states of the Council of Europe<sup>1</sup>. EU Directive (2019/1937) On the protection of persons who report breaches of Union Law (the EU Whistle-blower Directive) is the pre-eminent statement of today's whistle-blower protection regime. Nevertheless, the evolution of the region's whistle-blower protection landscape is reflected in key International and European documents as well as ECtHR case-law.

EU Directive (2019/1937) on the protection of persons who report breaches of Union Law (the EU Whistleblower Directive) is the pre-eminent statement of today's whistleblower protection regime. Nevertheless, the evolution of the region's whistleblower protection landscape is reflected in key International<sup>2</sup> and European documents<sup>3</sup> as

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<sup>1</sup> Resolution 1729. Council of Europe. Accessed December 27, 2023. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17851&lang=EN>

<sup>2</sup> Inter-American Convention against Corruption (1996), United Nations Convention Against Corruption (2003), iii. Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009)

<sup>3</sup> Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe on the protection of "whistle-blowers": 29 April 2010; Recommendation CM/Rec (2014)7 of the

The legislative journey of the EU Whistleblower Directive was distinctive in that international civil society was closely involved. International CSOs and coalitions focusing on whistleblower protection have played pivotal roles in shaping and advocating for the best standards in whistleblower protection in Europe<sup>5</sup>. The provisions of the EU Whistleblower Directive met these recommendations to varying extents. In addition, the text agreed by the EU institutions leaves certain issues to the discretion of Member States in how they are enacted (“transposed”) into national law, creating more elements of variation between EU jurisdictions.

There is, in fact, something approaching a consensus among these organisations, who recommend that the following principles should be implemented in the national legislation of each European country to create a robust legal landscape for effectively protecting individuals who speak up. Much, but not all of this was included in the text of the EU Directive<sup>6</sup>:

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Committee of Ministers on the protection of whistleblowers: 30 April 2014; European Union Directive "On the protection of persons who report breaches of Union law" (2019/1937)

<sup>4</sup> Guja v. Moldova [GC], 14277/04, 12 February 2008; Martchenko v. Ukraine, 4063/04, 19 February 2009; Uj v. Hungary, 23954/10, 19 July 2011; Heinisch v. Germany, 28274/08, 21 July 2011; Bucur and Toma v. Romania, 40238/02, 8 January 2013; Matúz v. Hungary, 73571/10, 21 October 2014; Görmüş and Other v. Turkey, 49085/07, 19 January 2016; Soares v. Portugal, 79972/12, 21 June 2016; Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], 17224/11, 27 June 2017; Gawlik v. Liechtenstein, 23922/19, 16 February 2021; Wojczuk v. Poland, 52969/13, 9 December 2021; Halet v. Luxembourg [GC], 21884/18, Judgment 14 February 2023 [GC], Article 10

<sup>5</sup> [Blueprint Principles for Whistleblower Protection](#); [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#); [Government Accountability Project: International Best Practices for Whistleblower Policies](#); [Organisation of American States: Text of the Draft Model Law to Facilitate and Encourage the Reporting of Corruption and To Protect Whistleblowers and Witnesses](#).

<sup>6</sup> For an assessment of how far EU Directive (2019/1937) meets these standards, see Blueprint for Free Speech (2019) [Whistleblowing in the European Union: a new Directive to protect citizens, democracy and the rule of law](#).

- a) Broad Coverage of Organizations: Encompassing organizations from both the public and private sectors<sup>7</sup>. See EU Directive (2019/1937) Article 4.
  
- b) Broad definition of whistleblowing: A law must contain a broad definition of reportable wrongdoing that harms or threatens the public interest (including corruption, criminal misconduct, dangers to public health and safety, fraud, financial misconduct, and other legal, regulatory, and ethical breaches, etc.).

The material scope of the EU Directive (Articles 2 and 3) is broad but, due to the nature of EU jurisdiction, applies only to violations of EU law and excludes entirely certain matters reserved to member states (for instance the armed services and national security). The European Commission has encouraged member states to extend the scope of protections to include violations of national law in transposing the Directive. This has been applied to varying extents.<sup>8</sup>

- c) Broad definition of a “whistleblower”: This coverage extends to employees, contractors, volunteers, past or future employees, interns, and other insiders. The protections must also apply to individuals who assist others with a disclosure and to anyone wrongly identified as a whistleblower. The EU Directive has a broad personal scope that fulfils this criterion (Article 4)<sup>9</sup>.
  
- d) Range of internal (organizational) reporting channels: Laws should obligate organizations to adopt various methods for internal issue reporting. This may involve supporting whistleblower policies that establish systems within organizations, such as specific channels, review procedures, and designated

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<sup>7</sup> [Blueprint Principles for Whistleblower Protection](#)

<sup>8</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

<sup>9</sup> [Blueprint Principles for Whistleblower Protection](#)



individuals inside the organization to handle disclosures<sup>10</sup>. The relevant clauses of the EU Directive are Articles 7-9.

- e) Reporting to regulators and authorities regulatory reporting channels: a law must provide for a full range of regulatory reporting channels managed by competent regulatory authorities, including both independent avenues (such as an ombudsman), and channels that are internal to an organization or department<sup>11</sup>. See EU Directive Articles 10-14.
  
- f) Reporting to external parties (third-party / media) reporting channels: legislation should guarantee that protection covers disclosures made publicly, including those to the media, NGOs, labor unions, and members of parliament, provided the circumstances are clearly explained. Additionally, there should be safeguards for external disclosures in situations of immediate threats, such as those affecting the environment, public health and safety, or instances involving serious criminal acts<sup>12</sup>. The EU Directive offers limited protection in this area at Article 15.
  
- g) Threshold for whistleblower protection: “reasonable belief of wrongdoing”, this includes safeguarding against 'honest mistakes.' However, there should be no protection for making false disclosures of information knowingly or recklessly<sup>13</sup>. See EU Directive Article 6.

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<sup>10</sup> [Blueprint Principles for Whistleblower Protection](#)

<sup>11</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

<sup>12</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

<sup>13</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

- h) The motives of the reporting persons in reporting ('good faith') should be irrelevant. See EU Directive recital 32.
- i) Protection of confidentiality: the preservation of confidentiality (ie. protecting the identity of a whistleblower when it is known to at least one party) is essential; the whistleblower's identity may only be disclosed with explicit consent<sup>14</sup>. The EU Directive establishes a duty of confidentiality (Article 16) and enjoins Member States to provide for “effective, proportionate and dissuasive penalties” for breaches of this duty.
- j) Provision and protections for anonymous reporting: protections for whistleblowers must extend to disclosures made anonymously by ensuring that a
- discloser (a) has the opportunity to report anonymously and (b) is protected if later identified. This should include practical requirements such as dedicated and secure letter drop boxes, telephone lines and electronic anonymity<sup>15</sup>. The EU Directive recognises that anonymous disclosures may be made but makes no obligations on member states to implement this. The Directive establishes that whistleblowers who make disclosures anonymously but are identified subsequently and subjected to retaliation can avail themselves of protection. See EU Directive Article 6(2) and (3).
- k) Protection from retribution – individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation and other job sanctions; punitive transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status

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<sup>14</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

<sup>15</sup> [Blueprint Principles for Whistleblower Protection](#)

and benefits; and threats of such actions<sup>16</sup>. The EU Directive includes a comprehensive prohibition of retaliation at Article 19.

- l) Comprehensive remedies for retaliation: a law must have comprehensive and accessible civil and/or employment remedies for a whistleblower who suffers detrimental action. These should include compensation rights, general damages, punitive damages, injunctive relief, and other pre-trial relief including protected status (declaratory) as a ‘whistleblower’. Each remedy should carry a realistic burden on employers or any other person committing reprisal to demonstrate the detrimental action was not related to disclosure. Where whistleblowers or their families are in physical danger, they should be entitled to personal protection measures appropriate to ensure their safety<sup>17</sup>.

Legal safe harbour aside, Article 21 of the EU Directive largely leaves the substance of protections up to member states.

- m) Sanctions for retaliation: any act of reprisal for, or interference with, a whistleblower’s disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties. Article 23 of the EU Directive provides for penalties applicable to natural or legal persons, but again the exact nature of those penalties is left up to member states to determine.
- n) Comprehensive remedies for retaliation: a law must have comprehensive and accessible civil and/or employment remedies for a whistleblower who suffers detrimental action. These should include compensation rights, general damages, punitive damages, injunctive relief, and other pretrial relief including protected

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<sup>16</sup> [Transparency International: International Principles for Whistleblower Legislation Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest](#)

<sup>17</sup> [Blueprint Principles for Whistleblower Protection](#)

status (declaratory) as a ‘whistleblower’. Each remedy should carry a realistic burden on employers or any other person committing reprisal to demonstrate the detrimental action was not related to disclosure. Where whistleblowers or their families are in physical danger, they should be entitled to personal protection measures appropriate to ensure their safety. Articles 20 and 21 of the EU Directive leave much of the content of these measures up to member states.

- o) Full range of remedies: a full range of remedies must cover all direct, indirect, and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present, and future earnings and status; and compensation for pain and suffering. A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered. Again, Article 20 and 21 of the EU Directive give member states a large degree of discretion as to how this is implemented in national law.
  
- p) Fair hearing (genuine “day in court”) – whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum, with full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective.
  
- q) Oversight authority: a law must create appropriate oversight by an independent whistleblower investigation/complaints authority or tribunal. Their functions might include among other things the receipt of disclosures, ensuring compliance with the law, maintenance of data about whistleblowing cases, reporting to the parliament, commencing investigations of their own motion or coordinating with other agencies to investigate wrongdoing. The EU Directive covers some of this territory in its provision for external reporting channels

(“competent authorities”) and review clauses. See Articles 11, 14 and 27.

- r) Burden of proof on the employer: in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower’s disclosure. This reverse burden of proof is included in the EU Directive at Article 21 (5).
  
- s) Whistleblowing and gag orders: The law should provide that the right to make a public interest disclosure shall supersede all other obligations and that no contract of any kind, including a contract of employment, a contract for services or a contract of any legal settlement can limit or exclude the right to make or discuss a public interest disclosure. No other law or legal instrument can be used to silence a whistleblower’s disclosure. See EU Directive Articles 21 and 24.
  
- t) Whistleblower involvement: a law should ensure that a whistleblower who has provided information in the public interest should be kept informed of the status of their disclosure, any investigation arising from the material and the result of that investigation. They should also be able to provide further evidence or clarification where it might be necessary – and can comment on the results of any report or finding. The EU Directive creates obligations on notification for whistleblowers using both internal (Article 9(1)) and external reporting channels (Article 11(2)).

Where, there is substantial agreement within civil society regarding what constitutes adequate standards of whistleblower protection, the legal framework at the European level concerning the protection of individuals accused of fraud is quite heterogeneous and even contradictory.

Whereas the Directive references the incorporation of principles from the Council of Europe's recommendations and legal standards of the ECtHR, there are instances where the Directive's standards diverge from general principles established in the Court's case law<sup>18</sup>:

- (1) the channels used to make the disclosure;
- (2) the authenticity of the disclosed information;
- (3) good faith;
- (4) the public interest in the disclosed information;
- (5) any detriment caused; and
- (6) the severity of the sanction<sup>19</sup>.

In considering the "good faith" principle for granting the defense of whistleblower status, it is important to note this diverse approach. While the EU Directive on whistleblowers explicitly states that the motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection<sup>20</sup>, the Court's case

law on the 'good faith' principle articulates a differing perspective, emphasizing the assessment of the 'good faith' principle as integral to granting the defense of whistleblower status<sup>21</sup>.

### Comparative Analysis: ECtHR Case Law vs. EU Directive

#	Conditions for Granting the Defense of Whistleblower Status	ECtHR Case Law	EU Whistleblower Directive
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<sup>18</sup> [EU Parliament Briefing: Protecting Whistleblowers in the EU](#)

<sup>19</sup> Guja v. Moldova [GC], 14277/04, 12 February 2008

<sup>20</sup> 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, (32)

<sup>21</sup> Halet v. Luxembourg [GC], 21884/18, Judgment 14 February 2023 [GC], Article 10.

1	Good faith	Requirement	Not a requirement
2	A public interest tests	Requirement	Not a requirement
3	A link between the protection of a whistleblower and the harm caused to the employer	Requirement	Not a requirement
4	Use of internal or external reporting before making a public disclosure	Requirement with some exemptions	Requirement with some exemptions
5	Protection for reporting on national security matters	Yes	Not

Additionally, the varying levels of national transposition from country to country, make it crucial for legal practitioners engaging in anti-SLAPP cases to understand national nuances in order to better safeguard their clients. For instance, in Malta's law implementing the Whistleblower Directive, the stipulation about the insignificance of motives in reporting is taken into account. Meanwhile, France maintains the 'good faith' principle in its legal definition of a whistleblower – something that could potentially be challenged in the future. Therefore, despite the generally progressive nature of the EU Directive, the scope for discretion means that the concrete level of legal protection heavily relies on its proper implementation in EU member states. In time, these provisions will



undoubtedly evolve, but the framework will be shaped on a case-by-case basis.

Since 2019, all EU member states been obliged to enact the Whistleblower Directive in national law and therefore implement some level of legal safeguards for whistleblowers. As of January 2024, all EU member states have done so save Estonia and Poland, with the passage of a whistleblowing law being cited as a priority for the incoming Polish government<sup>22</sup>.

However, not many countries have fully implemented the above-mentioned principles of whistleblower protection. Based on the findings of various monitoring reports conducted by international organizations spanning the period from 2010 to 2023, the enforcement of these laws is often inconsistent and ineffective<sup>23</sup>. Only a handful of nations have dedicated agencies to provide guidance, assistance, and protection for whistleblowers. In many countries, employees who have faced retaliation must endure protracted and expensive legal proceedings merely to have a possibility of reinstatement and compensation.

In summary, while Europe has made strides in establishing legal frameworks to shield whistleblowers; harmonization, consistent enforcement, and cultural change remain ongoing focal points for ensuring comprehensive and effective protection in the region, and much effort is still needed to implement comprehensive provisions for

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<sup>22</sup> [New Polish government makes whistleblowing directive a priority](#). 2024.

<sup>23</sup> [EU Parliament Briefing: Protecting Whistleblowers in the EU; Protecting Whistleblowers in Southeast Europe: A Review of Policies, Cases and Initiatives. Southeast Europe Coalition on Whistleblower Protection, Blueprint for Free Speech, Romanian Academic Society; Mark Worth, ed., Whistleblower Protection in Southeast Europe: Moving to the Next Step \(Southeast Europe Coalition on Whistleblower Protection; Colvin, Naomi, and Suelette Colvin. "National Transposition of the EU Whistleblower Protection Directive: How is Europe Progressing on Protecting Whistleblowers." 2021](#)





whistleblower protection in the legal systems of European countries.

### 3. Background on EU Directive and National Transposition

Directive (EU) 2019/1937 of the European Parliament and of the Council, dated 23 October 2019, concerning the protection of individuals reporting breaches of Union law—commonly known as the Whistleblower Protection Directive— was adopted on 23 October 2019 and entered into force on 16 December 2019<sup>24</sup>. Its formal adoption in December 2019 signified a collective commitment to establishing uniform legal protections for whistleblowers across EU member states, promoting transparency, and safeguarding individuals disclosing crucial public interest information.

The EU Whistleblower Directive stands as a significant legal document against SLAPP (Strategic Lawsuits Against Public Participation) by exempting whistleblowers from civil or criminal liability when disclosing public interest information.

The EU Parliament had persistently urged the Commission, starting in 2013, to devise a directive addressing whistleblowers. Despite these pleas, the Commission repeatedly dismissed them, citing the EU's limited authority<sup>25</sup>. However, the Panama Papers, Emissionsgate, and Luxleaks disclosures, which had significant implications for the operation of Europe's Single Market, became turning points that compelled the European Union's bureaucratic system to develop a corresponding directive under public pressure<sup>26</sup>.

<sup>24</sup> European Union. [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](#). PE/78/2019/REV/1

<sup>25</sup> Šepec, Matevž, Janja Stajnko, Kaja Avsec, Tomaž Dugar, Živa Šuta, and Sonja Žilič Fišer. "[The European whistleblowing directive: a legislative barrier between journalists and their sources?](#)" *Media, Culture & Society* 42, no. 7-8 (2020): 1528-1544.

<sup>26</sup> [EU Parliament Briefing: Protecting Whistleblowers in the EU](#)

Overall, the emergence of the Whistleblower Protection Directive was a result of collaborative and concerted efforts among civil society organizations, academics, experts, labor unions, and activists. Their collective objective centered on safeguarding whistleblowers. The genesis of this movement traces back to approximately 2016,

catalyzed by Eurocadres, a prominent union that launched a campaign in April of that year<sup>27</sup>.

In response to this public pressure, the Commission drafted a proposal for a Directive on the protection of individuals reporting breaches of EU law. This April 2018 proposal drew in part from the case law of the ECHR and the Recommendations for the Protection of Whistleblowers issued by the Council of Europe in 2014<sup>28</sup>.

Ultimately, after extensive deliberation and negotiation, the Whistleblower Protection Directive was approved on 23 October 2019 and became effective on 16 December 2019. According to the Directive, Member States were obliged to enact the requisite laws, regulations, and administrative measures to adhere to this Directive by 17 December 2021<sup>29</sup>. However, by the specified deadline, the majority of EU member states had not properly implemented the requirements of the directive into their national legislation.

Notably, by the established deadline, the National Transposition of

<sup>27</sup> [Colvin, Naomi, and Suelette Colvin. "National Transposition of the EU Whistleblower Protection Directive: How is Europe Progressing on Protecting Whistleblowers." 2021](#)

<sup>28</sup> [Evaluation Report on Recommendation CM/Rec\(2014\)7 of the Committee of Ministers to Member States on the Legal Regulation of Lobbying Activities in the Context of Public Service](#) (Strasbourg: Council of Europe, January 2022).

<sup>29</sup> European Union. [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.](#) PE/78/2019/REV/1.

the Whistleblowing Directive had been completed only by Denmark, Lithuania, Malta, Portugal, and Sweden. Consequently, in January 2022, the Commission issued formal notice letters to 24 Member States due to incomplete transposition measures and lack of communication before the deadline. Additionally, reasoned opinions were sent to 15 Member States in July 2022, followed by four Member States in September 2022 for their failure to communicate fully transposed directives<sup>30</sup>.

Finally, on 15 February 2023, the European Commission decided to refer Czechia, Germany, Estonia, Spain, Italy, Luxembourg, Hungary, and Poland to the Court of Justice of the European Union for failing to transpose and notify the national measures incorporating the directive on the protection of persons who report breaches of Union law into their legal frameworks (Directive (EU) 2019/1937)<sup>31</sup>. Despite the commission's measures, as of the beginning of 2024, two EU countries (Poland, Estonia<sup>32</sup>) have still not adopted the law.

It is important to note that the passage of a new law does not necessarily mean that a country has completed the process of transposition. The law may not come into force until a later date, and additional regulations or reform of other areas of the national framework may be required, such as the establishment of new public authorities.

The EU Directive does indeed make some demands of this type on member states. In particular, the EU member states must: ensure appropriate internal and external reporting channels are in place; take the necessary measures to prevent any retaliation against a whistleblower;

<sup>30</sup> European Commission. ["The European Commission decides to refer 8 Member States to the Court of Justice of the European Union over the protection of whistleblowers."](#) Press release, February 15, 2023. Brussels.

<sup>31</sup> European Commission. ["Press release 15 February 2023 Brussels: The European Commission decides to refer 8 Member States to the Court of Justice of the European Union over the protection of whistleblowers."](#)

<sup>32</sup> [Töölasest Euroopa Liidu õiguse rikkumisest teavitaja kaitse seadus](#)



respect the right to an effective remedy, a fair trial, presumption of innocence and rights of defence of persons concerned by the allegations in the reports; provide effective, proportionate and dissuasive penalties for breaches of certain rules of the directive, for instance for persons who hinder reporting or who retaliate against whistleblowers; and to provide the Commission with annual data on numbers of reports received and investigations opened and their outcome, and the financial consequences.

Accordingly, despite the common standard established by the EU Directive there are disparities in the level of protection available to whistleblowers after national transposition among EU members and examination of the relevant national legislation is important to any whistleblower defence.

## **4. Key Points from the Directive for Legal Professionals**

The EU Whistleblower Protection Directive establishes minimum standards at the national level to ensure comprehensive protection for whistleblowers. In the context of the EU Whistleblower Directive, a whistleblower is an individual who reports information they acquired in a work-related context on breaches of EU law in key policy areas. Breaches include both unlawful acts or omissions and abusive practices.

The EU Directive covers reporting breaches of rule related to the following areas: (1) public procurement; (2) financial services, products, and markets; (3) prevention of money laundering and terrorist financing;



(4) product safety and compliance; (5) transport safety in the railway, road, maritime and inland waters sectors; (6) protection of the environment, ranging from waste management to chemicals; (7) radiation protection and nuclear safety; (8) food and feed safety, animal health and welfare; (9) public health, including patients' rights and tobacco controls; (10) consumer protection; (11) protection of privacy and personal data, security and information systems; (12) breaches affecting the EU's financial interests; (13) breaches relating to the internal market, including breaches of EU competition and State aid rules, and breaches of national corporate tax rules.

#### Main Points of the Whistleblower Protection Directive:

- Protected Individuals: Individuals in both private and public sectors are protected, encompassing various roles such as workers, self-employed individuals, shareholders, volunteers, and more.
  
- Protection Measures: the EU Directive safeguards individuals from any form of retaliation, ensuring effective remedies and penalties for hindering or  
  
retaliating against whistleblowers.
  
- Conditions for Protection: to be eligible for protection, the reporting person must report either internally or externally with reasonable grounds to believe the reported matters are true.

- Anonymous Reporting: the EU directive allows for anonymous reporting, providing protection even if the whistleblower is subsequently identified and faces retaliation.
  
- Internal Reporting Channels: member States are encouraged to promote internal reporting where breaches can be effectively addressed internally. Businesses are required to establish channels and procedures for internal reporting.
  
- External Reporting: individuals can make external reports whether or not they have made an internal report. Competent authorities must be designated to receive, follow up, and provide feedback on external reports.
  
- Public Disclosure: whistleblowers making public disclosures are entitled to protection if appropriate action is not taken in response to internal or external reports within a specified timeframe.
  
- Member State Specific Rules: while the directive sets minimum standards, Member States can adopt national provisions that go beyond these standards, allowing for flexibility and harmonization.
  
- Flexibility in Implementation: various aspects, such as the application scope for organizations with fewer than 50 workers, the scope of legal breaches,

the approach to anonymous reporting, and penalties for

retaliation, can be determined by individual Member States.

- Burden of Proof: the EU directive introduces a significant shift in the burden of proof. In cases of alleged retaliation, it is assumed that retaliation has occurred, placing the burden on the organization to demonstrate that it has not retaliated.
- Cancellation of the Good Faith Reporting Principle: The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection.

It is important to note that the EU Whistleblower Protection Directive does not affect: the responsibility of EU governments to protect their national security; EU or national law on protection of classified information, legal and medical professional privilege, secrecy of judicial proceedings or criminal procedural rule; override national rules on rights of employees to consult their representatives or trade unions<sup>33</sup>.

Likewise, the EU Directive applies to EU Member States but does not extend to the EU institutions.

<sup>33</sup> European Union. [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](#). PE/78/2019/REV/1.



## **5. Specific advice on key issues**

### **5.1 The Principle of Direct Effect of EU Directives Amid Non-Implementation**

#### **The Case of Absent National Transposition**

In a crucial case in Poland, the Toruń District Court made a very important decision on July 12, 2023. They emphasized that EU rules for protecting whistleblowers can apply directly, even if Poland hasn't turned these rules into its own laws yet. An employee of Nicolaus Copernicus University in Toruń, faced termination after publicly exposing concerns about COVID-19 exam practices and data privacy breaches involving spyware during tests. Dismissing the university's stated reasons for termination, the court, considering the institution as a public entity, applied the Direct Effect principle established by the European Court of Justice.

Recognizing the University as a public entity engaged in public functions, the court, guided by the Direct Effect principle articulated by the European Court of Justice, permitted the claimant to invoke the provisions of the Directive, specifically those prohibiting retaliation. The court, affirming that the reporting person satisfied all the protective criteria delineated in the Directive, granted protection under Article 21 (1), (2), and (5). Concluding that the defendant violated the prohibition on retaliation (Article 19(a)), the court awarded the whistleblower compensation in accordance with Article 23 of the Directive. Although subject to potential appeal, this initial court ruling establishes a precedent with far-reaching implications for future cases involving the application and enforcement of the Directive's provisions.

## The Torun University whistleblower case (Poland): a brief case overview<sup>34</sup>

While the European directive explicitly dismisses the 'good faith' principle as a condition for obtaining protection, it remains a necessary consideration for granting the defense of whistleblower status according to the case-law of the European Court of Human

Rights (ECtHR). An illustrative case that underscores the complexity of whistleblower protection is *Halet v. Luxembourg*<sup>35</sup>, commonly known as LuxLeaks. In this case, a former employee of PricewaterhouseCoopers (PwC) exposed confidential tax documents revealing favorable tax deals between PwC and the Luxembourg tax authorities. The subsequent media coverage, dubbed 'Luxleaks,' triggered internal investigations at PwC and subjected the whistleblower to both legal challenges and potential repercussions. Despite the Grand Chamber of the European Court of Human Rights referencing the EU directive in its decision-making process, the assessment is concurrently anchored in the 'good faith' principle.

This distinction is crucial, requiring legal practitioners involved in anti-SLAPP cases to understand the varying levels of national transposition across different countries to effectively safeguard their clients. It's essential to take into account that some countries continue to include the 'good faith' principle in their legislation. Legal practitioners navigating anti-SLAPP cases must comprehend jurisdiction-specific distinctions. For instance, while Malta aligns with the EU directive, disregarding motives in reporting, under the new French law on whistleblower protection, a whistleblower in France is a natural person

<sup>34</sup> EU Whistleblowing Monitor. "[Poland Country Profile](#)." EU Whistleblowing Monitor.

<sup>35</sup> European Court of Human Rights. [Halet v. Luxembourg](#), 2023



who reports or discloses... in good faith. Therefore, to enhance their clients' positions in cases where national law considers the 'good faith' principle, applying **the Principle of Direct Effect of the EU Directive would be advisable in national courts.**

Simultaneously, when constructing a strategy for presenting their clients in the European Court of Human Rights (ECtHR), it would be prudent to consider 'good faith.'

**Legal practitioners should also be prepared to provide evidence of their client's 'good faith' if seeking protection in the ECtHR, until a clear position based on the new EU Directive regulation for whistleblower protection is formulated by the ECtHR case law.**

## **5.2 EU Whistleblowing Directive provisions that defeat SLAPP Strategies**

While the most common vehicles for SLAPPs include defamation law, similar provisions on insult or honor, data protection, the protection of intellectual property, and aggressive legal threats, the EU Directive includes provisions that eliminate this threat. Applying the following EU Directive provisions can help strengthen your legal position when representing the client.

**The Reversing the Burden of Proof on the Plaintiff as a Strategy against SLAPP Lawsuits related to defamation, breach of copyright, trade secrets, confidentiality, and personal data protection**



While in a SLAPP Defamation Lawsuit, the burden of proof traditionally rests on the defendant, the directive clearly states that the party initiating the proceedings should bear the responsibility of proving the allegations. At the same time, the crucial information to convey to a client before making a public disclosure, to qualify for EU Directive protection, includes the necessity to report through internal or external channels.

Alternatively, the client can prove that he/she is exempt from a specific requirement of this rule. Specifically, the client must have reasonable grounds to believe that:

- the breach may constitute an imminent or manifest danger to the public interest, such as in emergency situations or when there is a risk of

irreversible damage; or

- in the case of external reporting, there is a risk of retaliation, or 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.

### **Immunity from Liability in Trade Secrets Disclosure under EU Whistleblowing Directive Article 21(2)**

In line with the provisions of Article 21(2) of the EU Whistleblowing Directive, individuals reporting information on violations or disclosing information in accordance with the directive will not be considered a



breach of disclosure restrictions, and individuals performing such actions will not be held liable for such reports or disclosures. However, this applies only if these individuals had reasonable grounds to believe that such actions were necessary to expose a violation in accordance with this directive. Thus, the directive provides specific protective measures for individuals acting in accordance with its provisions.

## **6. Conclusion**

Legal protections for whistleblowers in Europe have been significantly strengthened in recent years - at least on paper - and this presents some viable defense strategies in those instances where a SLAPP is issued in retaliation for an internal, external or public disclosure of information. It is impressive to note the degree to which the recent EU Directive on the protection of whistleblowers reflects the recommendations of civil society in this area.

However, the structure of these protections is more complex than may at first appear. Legal professions should be aware, not simply of the

key elements of the Directive, but its interaction with the case law of the ECtHR and the possible variations in national legislation post-transposition. It may be that the principle of direct effect resolves some of these latter anomalies in time.

Whistleblowers play an invaluable role in combating corruption, enabling the media to fulfill its scrutinising role and strengthening democratic societies. However, the personal costs of whistleblowing can be enormous. A 2016 ESRC research project on Post Disclosure Survival Strategies that interviewed whistleblowers in a number of jurisdictions (including several outside the EU) found that the costs faced by an individual who blows the whistle can be significant, with the average costs to lifetime earnings, retraining and legal costs exceeding 250,000 Euro. Intangible costs on mental health and well-being can also be enormous.<sup>36</sup> It is to be hoped that recent advances in legal protection within the European Union will make a measurable contribution to reducing both categories of costs.

<sup>36</sup> Kenny, K and Fontaki, M. (2016) [Post-disclosure survival strategies: Transforming whistleblower experiences.](#)