EUROPEAN DEVELOPMENTS

The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?

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1. INTRODUCTION

In October 2019, the European Union adopted the Directive on the protection of persons who report breaches of Union law, commonly referred to as protection of whistleblowers (EU Whistleblower Directive).¹ For over a decade, the European Parliament had repeatedly called for a European Union (EU) law on protection of whistleblowers.² Yet, the other EU legislative institutions, the European Commission and the Council, were unwilling to act on these calls. The European Commission was not convinced that it had the legal basis to propose a law.³ The Council had minimal political interest to open debates on whistleblowing, as many Member States (MSs) lack national laws with adequate protections and whistleblowing is often a misunderstood issue in public debates.⁴ Even the term ‘whistleblowing’

¹Directive 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 [2019] OJ L 305/17.
²See Study for European Parliament, C. Bowden, ‘The US Surveillance Programmes and their Impact on EU Citizens’ Fundamental Rights’, Note, PE 474.405, September 2013; European Parliament, ‘Resolution on Organised Crime, Corruption and Money Laundering: Recommendations on Action and Initiatives to be Taken’ (final report), (2013/2107(INI)), 23 October 2013, Strasbourg, point 14; European Parliament, ‘Resolution on Tax Rulings and Other Measures Similar in Nature or Effect’, (2015/2066(INI)), 25 November 2015, point 19; European Parliament, ‘Resolution with Recommendations to the Commission on Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the Union’, (2015/2010(INL)), 16 December 2015.
³N. Nielsen, ‘EU-Wide Whistleblower Protection Law Rejected’, EU Observer, Brussels, 23 October 2013.
⁴See Transparency International, ‘Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU’, 5 November 2013; M. Worth, ‘Gaps in the System: Whistleblower Laws in the EU’, Blueprint for Free Speech, Report Series, 2018.
does not exist in some national languages.\(^5\) Nevertheless, the Commission could not stand idle after a series of revelations by whistleblowers, most notably the ‘LuxLeaks’ scandal, which exposed tax schemes in Luxembourg and involved over 340 companies worldwide. These scandals led to additional public pressure on the then-President of the European Commission, Mr Juncker, to take more seriously calls for a whistleblowing law. After an expansive public consultation process,\(^6\) the Commission proposed the EU Whistleblower Directive in April 2018.

The Directive was presented by Vera Jourova, the Commissioner for Justice, Consumers and Gender Equality as a ‘game changer’.\(^7\) The Commissioner did not (entirely) overstate the importance of the new rules. They indeed draw from best practice in many respects, including in that they contain a broad definition of who can be a whistleblower, cover a wide range of policy areas, and extend to both the public and private sectors.\(^8\) All forms of retaliation against whistleblowers are prohibited and, in the case of an alleged retaliation, the burden of proof falls on the employer. Yet whether the Directive will attain the expected high standards of protection depends, \textit{inter alia}, on the transposition of the rules into national law, the enforcement of the Directive’s protections and the embeddedness of the rules in organisational culture. On all of these challenges, trade unions can assist national legislators to ensure the Directive’s full potential.

This note analyses the Directive. It situates this instrument within existing (EU) rules. It explains the comprehensive character of the protections extended by the Directive and the model of reporting channels it

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\(^5\) V. Abazi, ‘Whistleblowing in Europe: A New Era of Legal Protections’ in P. Czech, L. Heschl, K. Lukas, M. Nowak and G. Oberleitner (eds), \textit{European Yearbook on Human Rights} (Cambridge: Intersentia, 2019) 91–111, 94.

\(^6\) In the open public consultation, the European Commission received 5,707 answers and over 50 position papers. The consultation process included three targeted stakeholder consultations, two workshops with MS experts and one workshop with academic and human rights experts. https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254 (date last accessed 31 August 2020).

\(^7\) European Commission, Press Release, \textit{Whistleblower protection: Commission sets new, EU-wide rules}, 23 April 2018. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3441 (date last accessed 1 September 2020).

\(^8\) But see D. Lewis, ‘The EU Directive on the Protection of Whistleblowers: A Missed Opportunity to Establish International Best Practices’ (2020) \textit{E-Journal of Comparative and International Labour Studies} 9. http://ejcls.adapt.it/index.php/ejcls_adapt/issue/view/73 (date last accessed 31 August 2020).
adopts. The note draws attention to aspects of the Directive that could be problematic for the implementation and effectiveness of whistleblower protection. It concludes that the EU Whistleblower Directive is an important legal development but that it is only in the early stages towards meaningful protection, rather than a ‘game changer’ for whistleblowers in the EU.

2. THE EU WHISTLEBLOWER DIRECTIVE IN CONTEXT OF EXISTING (EU) LAW

The EU Whistleblower Directive fills an important legislative gap. Its adoption was the result of a few decades of incremental change in Europe towards advancing the protection of whistleblowers. Advocacy by civil society was a significant factor in raising public awareness and public pressure for legal changes to take place. At the European level, the most important legal developments came from the Council of Europe (CoE) and the European Court of Human Rights (ECtHR). The CoE adopted a number of Resolutions and reports calling on its MSs to protect whistleblowers and the ECtHR decided in favour of whistleblowers in several decisions on the basis of protection for freedom of expression. All EU MSs are members of the CoE and parties to the European Convention on Human Rights. Hence, for MSs that did not have any legislation on whistleblower protection, or if existing laws did not apply to a particular whistleblower, the affected whistleblowers could seek vindication from the ECtHR on the basis of their right to freedom of expression. The EU Whistleblower Directive

9 Abazi, ‘Whistleblowing in Europe’, (n.5), 92–4.
10 See P. Omtzigt, ‘The Protection of Whistle-Blowers’, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report, Doc. 12006, 14 September 2009. See also Council of Europe, Congress of Local and Regional Authorities 36th Session, The Protection of Whistleblowers: Challenges and Opportunities for Local and Regional Government. Report CG36(2019)14final, 3 April 2019; Resolution 444 (2019), Debated and adopted by the Congress on 3 April 2019, second sitting.
11 See Guja v Moldova, no 1085/10 (no 2), 27 February 2018, a case following a decade after the Mr Guja had been vindicated by the ECtHR, Guja v Moldova, no 14277/04, 12 February 2008. Other relevant cases of the ECtHR on protection of whistleblowers are Marchenko v Ukraine, no 4063/04, 19 February 2009; ECtHR, Kudeshkina v Russia, no 29492/05, 26 February 2009; ECtHR, Heinisch v Germany, no 28274/08, 21 July 2011; ECtHR, Sosinowska v Poland, no 10247/09, 18 October 2011, ECtHR, Bucur and Toma v Romania, no 40238/02, 8 January 2013, ECtHR, Matúž v Hungary, no 73571/10, 21 October 2014; ECtHR, Pasko v Russia, no 69519/01, 22 October 2009.
generally follows the case law of the ECtHR, although the latter extends protection to political whistleblowing, which the Directive explicitly excludes. Political whistleblowing, which is a subset of whistleblowing, refers to the disclosure of information protected by an official secrets regime. The EU Whistleblower Directive does not extend protection to information protected under national security regimes or classified information. The EU could not legislate on these matters as national security is a national competence. Excluding this category of information is a significant shortfall, but one that could be remedied by national legislators if MSs opt to include classified information in national transposition of the Directive.

The EU Whistleblower Directive provides for minimum harmonisation standards that should be adopted at the national level. In this respect, MSs may choose to adopt provisions that strengthen the regime, but cannot adopt rules that do not meet the EU standards. Prior to the EU Whistleblower Directive, only exceptionally was whistleblowing protection foreseen at the national level for employees in all fields of work. Most national laws offered a patchwork of protection: some MSs protected only public employees, others foresaw protection in the private sector, and many covered disclosure only of specific wrongdoings. An important justification for the EU to legislate on whistleblower protection was precisely to avoid this kind of fragmentation and to create harmonised protection across the EU. The two-year transposition period for implementing the Directive is necessary for MSs to adjust their national laws and adequately transpose the EU law into national rules. MSs are not on level ground in this regard as some have more experience with whistleblower protection while others are only beginning to establish rules. Adjustments to national rules are necessary not only in the light of other national laws, but also to take into account other EU rules, as explained below.

12 See V. Abazi and F. Kusari, Comparing the Proposed EU Directive on Protection of Whistleblowers with the Principles of the European Court of Human Rights, Strasbourg Observers, 22 October 2018, for a comparison between the initial legislative proposal of the European Commission and case law of ECtHR. https://strasbourgobservers.com/2018/10/22/comparing-the-proposed-eu-directive-on-protection-of-whistleblowers-with-the-principles-of-the-european-court-of-human-rights/ (date last accessed 1 September 2020).
13 V. Abazi, ‘Political Whistleblowing in Europe: Official Secrets, Freedom of Expression and the Rule of Law’ in Dorota Mokrosinska (ed.), Transparency and Secrecy in European Democracies: Contested Trade-offs (London: Routledge, 2020, forthcoming).
14 See V. Abazi, Official Secrets and Oversight in the European Union (Oxford: OUP, 2019).
15 Article 3(2) and (3) EU Whistleblower Directive.
16 Article 4 TEU.
17 Transparency International (n.3).
Some rules on reporting and disclosure of wrongdoings existed in EU law before the adoption of the Whistleblower Directive. The Directive is now a *lex generalis* on whistleblower protection and it leaves room for other more specialised regimes to apply where such rules exist in the EU, such as money-laundering or competition regimes. Other EU rules refer to reporting in the public interest but do not as such give positive protections to whistleblowers. In particular, the Trade Secrets Directive, adopted in 2016, lists disclosure in the general interest as an exception to the protection of trade secrets. This exception is intended to prevent the prosecution of individuals in cases in which the ‘acquisition, use or disclosure of the trade secret’ is carried out for purposes of whistleblowing. Yet it remains vague as to the specific protections that would be granted to whistleblowers.

The Whistleblower Directive makes clear that whistleblowers cannot be...
prosecuted if the reported information includes trade secrets and provides definitions and procedures, as explained below.\textsuperscript{22}

The application of the Whistleblower Directive, finally, should be in line with EU data protection and privacy regulations. This aspect of the Directive is currently most heatedly debated in Germany, a country in which there are strong privacy concerns and no prior national law on protecting whistleblowers. Recently, the German Labour Court held that an employee may exercise her right of access to data in accordance with EU data protection rules, and the employer cannot simply rely on the confidentiality procedure of whistleblower protection to negate such access.\textsuperscript{23} While there is generally no conflict between laws on whistleblowing and privacy, implementing the Directive will require that companies and public institutions take additional measures to prevent infringement of personal data protection during the reporting process and during the investigation of the whistleblowers’ reports. Furthermore, as explained below, the Whistleblower Directive foresees protection for whistleblowers who report on breaches of data protection and privacy laws.

3. COMPREHENSIVE DEFINITIONS AND PROTECTIONS

The protections provided in the EU Whistleblower Directive are expressed in technical language. In fact, the Directive neither refers to nor offers a definition of ‘whistleblowing’. Rather, the Directive refers to protecting individuals who report breaches of EU Law. Therefore, strictly national policies are not covered but only disclosures pertaining to ‘breaches of Union law’.\textsuperscript{24} The purpose of the Directive, as set out in Article 1, is to enhance the enforcement of Union law and policies in specific areas. The stated objective is not centred on worker protection or freedom of expression but

\textsuperscript{22}Article 21(7) EU Whistleblower Directive.

\textsuperscript{23}Specifically, Article 15 GDPR; see Regional Labour Court (LArbG) Baden-Württemberg, judgement of 20 December 2018, 17 Sa 11/18, available only in German, \url{http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=LArbG+Baden-W%C3%BCrttemberg&Art=en&verfahrensart=Alle+Verfahrensarten&sid=b2b368663380a21d63e63c9a32d7729c&nr=27411&pos=0&anz=1}; currently pending on appeal at the Federal Labour Court (BAG) 5 AZR 66/19; German court ruled that protection of the whistle-blower confidentiality does not generally override the data subject access right, \url{https://www.dataprotectionreport.com/2019/03/german-court-ruled-that-protection-of-the-whistle-blower-confidentiality-does-not-generally-override-the-data-subject-access-right/}.

\textsuperscript{24}Article 1 EU Whistleblower Directive, emphasis added.
on the improvement of EU law enforcement. This could implicitly suggest that the Directive approaches whistleblowing in an instrumental manner, as enforcing EU law rather than as a direct protection for individuals who speak up at the workplace.

The Directive is comprehensive both in its material and personal scope of application. With regard to the material scope, it applies to the private and public sectors. In the private sector, companies with 50 employees or more are required to set up reporting channels. Including both sectors is an important step toward ensuring unity of reporting procedures. Moreover, the Directive applies to 12 policy fields, including public procurement, financial services, products and markets, 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.

Yet the Directive excludes protection for reporting on working conditions and health and safety of workers, issues that—as the COVID-19 pandemic has highlighted—are profoundly serious. While it is not entirely clear why the European Commission curtailed workers’ protection for speaking up on these significant matters, one explanation could be the legal basis of the Directive. Namely, adopting this Directive on basis of Article 114 TFEU means first and foremost protecting internal market interests. Labour law remains largely a national competence, and working conditions find a separate legal basis in EU primary law, namely Article 153 TFEU. Although the EU Whistleblower Directive brings together 11 Treaty provisions as a legal basis for legislation, Article 153 TFEU is not included. It is odd then, perhaps, that the Directive nevertheless obliges the European Commission to consider whether the scope of the Directive should be expanded to include working conditions when the Directive is reviewed in 2023 and to suggest amendments by 2025 at the latest. Bodies such as the Council of European Professional and Managerial Staff (Eurocadres), an organisation associated with the European Trade Union Confederation

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25 See below Section 4.
26 Article 2(1) EU Whistleblower Directive.
27 V. Abazi, ‘Truth Distancing? Whistleblowing as Remedy to Censorship during Covid-19’ (2020) 11 European Journal of Risk Regulation 375.
28 See further discussion on the legal basis below Section 5.
29 Article 27(3) EU Whistleblower Directive.
(ETUC), are already seeking to persuade MSs to include in national laws protections for reporting working conditions. It might be the case therefore that, during the transposition period, some MSs will expand the scope of protection to include working conditions. Aside from the legal aspects, in practice one can ask what should happen in cases when a worker’s working conditions are intrinsically linked to a policy field that is encompassed by the Directive—should protection be granted? To return to the COVID-19 example, a worker’s report on her working conditions would, in this case, be directly linked to public health, a policy area that is encompassed by the Directive. This is not merely a hypothetical example. It is, rather, the reality of the medical workers in Poland who were fired for speaking up about their lack of proper equipment.\(^{30}\) One would hope that, when the Directive is in force, workers would be protected in such instances.

In terms of personal scope, the Directive applies to individuals well beyond the traditional conception of a whistleblower as an employee working at the organisation at the time of the reporting. Instead, the Directive also refers to volunteers, paid or unpaid trainees, contractors, subcontractors and suppliers, as well as individuals who disclose breaches during a recruitment process and former workers.\(^{31}\) Furthermore, the definition includes the self-employed, shareholders, management, and administrative or supervisory bodies.\(^{32}\) While the Directive includes national civil servants, it does not encompass EU officials, as employment rights and obligations of EU staff are regulated by the EU Staff Regulation and do not fall under national legislation.\(^{33}\) Each EU institution, body and agency adopts its own rules on the basis of an internal administrative rule-making processes, which leaves EU staff in a fragmented protection of precisely the kind the Directive seeks to remedy at the national level. A further distinctive feature of the Directive is that it extends protection to ‘facilitators, colleagues or relatives of the reporting person who are also in a work-related connection with the reporting person’s employer or customer or recipient of services’.\(^{34}\) This expansive coverage significantly advances whistleblower protection and raises the bar higher than most existing legislation, such as the UK’s Public Interest

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\(^{30}\) Abazi, ‘Truth Distancing?’, (n.27).

\(^{31}\) Article 4 EU Whistleblower Directive.

\(^{32}\) Ibid.

\(^{33}\) See Regulation No 31 (EEC) 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P045/1385.

\(^{34}\) Recital 41 EU Whistleblower Directive.
Disclosure Act. Establishing this kind of broad personal scope is not a question of enacting a generous legal standard, but rather legally matching the lived experience of whistleblowers and acknowledging that not only they, but also other individuals around them face pressure and other negative consequences. The protection of these individuals is foreseen in situations in which there are retaliatory measures against the whistleblower.

For an individual to be able to invoke the protection granted by the EU Whistleblower Directive, the person must have reasonable grounds to believe that the information reported was true at the time of reporting and that the information on breaches falls within the scope of the Directive. ‘Information on breaches’ is very broadly defined to include reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches.35

If this threshold is met, the whistleblower enjoys complete protection against any harassment.36 The Directive outlaws any act or omission that causes detriment, whether direct, indirect, threatened, taken, recommended or even tolerated.37 The Directive imposes criminal, civil or administrative penalties on those who engage in retaliation. Whistleblowers are protected against termination of employment, negative impacts on promotions or salary, unjustified negative performance assessments, transfers and changes of workplace, and harassment or discrimination.38

One of the crucial aspects of the Whistleblower Directive is the protection it provides to whistleblowers in legal proceedings on disclosure of information. As noted above, the legislative debate on the Directive took place as the case of the French whistleblower Antoine Deltour was unfolding. One of the accusations he faced, for exposing information in the LuxLeaks scandal, was of theft of company information.39 The MEP Rapporteur in charge of the legislative file on the Directive, Virginie Rozière—with strong

35 Article 5(2) EU Whistleblower Directive.
36 T. Devine, ‘Assessment of European Union Whistleblower Directive, Government Accountability Project’, Blog, 17 April 2019. https://whistleblower.org/blog/assessment-of-european-union-whistleblower-directive/ (date last accessed 1 September 2020).
37 Articles 19–20 EU Whistleblower Directive.
38 Article 19 EU Whistleblower Directive.
39 J. Mischke, ‘Court Overturns Verdict against LuxLeaks Whistleblower’, Politico, 11 January 2018.
support from trade unions and NGOs—insisted that a robust provision be included to protect whistleblowers from retaliation and charges when they disclose information that is legally protected, such as trade secrets. This revision during the legislative debate was one of the significant improvements in the final instrument over the proposed text by the Commission.

The reversed burden of proof is another important element of the Directive. Any act that constitutes a form of retaliation in light of the definitions provided in the Directive is prohibited. The whistleblower’s threshold of proof is to show that she has made a disclosure following the Directive and that she faced retaliation without having an additional burden of demonstrating the causation between the reporting and the retaliation. The burden of proof on the employer is to show that measures taken against the employee did not arise as a result of the employee’s disclosure. Lastly, the Directive foresees legal assistance, covering fees and costs for whistleblowers who prevail in their cases.

4. THE THREE-TIERED MODEL OF REPORTING: INTERNAL, EXTERNAL AND PUBLIC CHANNELS

At the core of assessing whether a whistleblower law offers adequate protection lies the question of how the whistleblower is required to disclose the information. The Directive follows what Vandekerckhove has coined the three-tiered whistleblowing model of reporting, which is composed of internal, external and public reporting channels. Put simply, internal reporting refers to the workplace of the whistleblower; external reporting refers to relevant authorities outside of the workplace; and public reporting refers to the media.

During the initial phases of the legislative process, some national governments, led by Germany and France, demanded that internal reporting should be a mandatory first step in the whistleblowing process. For France, this demand was motivated by the fact that French law requires internal

40 Article 21(5) EU Whistleblower Directive.
41 Ibid.
42 Article 20 EU Whistleblower Directive.
43 W. Vandekerckhove, ‘European Whistleblower Protection: Tiers or Tears?’ in D. Lewis (ed.), A Global Approach to Public Interest Disclosure (Cheltenham: Edward Elgar, 2010).
44 L. Kayali, ‘Whistleblower Protection Rules Held up by Reporting Clash’, Politico, 28 February 2019.
mandatory reporting. For Germany, the focus was on the protection of the interests of the employer, in particular loyalty to the employer. In this respect, the German delegation insisted on the principle of ‘escalation’, ie preventing whistleblowers from reporting directly to the media and instead allowing ample room for the employer to deal with the reputational damage by obliging the whistleblower to report internally at the workplace first and foremost.45

The rules about internal reporting impose the most concrete obligations on companies and public institutions. A reporting process may be established internally by a person or department designated for reporting or may be provided externally by a third party. Internal reporting channels must be set up by companies with more than 50 employees.46 Local authorities that have fewer than 50 employees or municipalities with fewer than 10,000 inhabitants are exempt from the obligation to set up internal channels. The authority is obliged to acknowledge to the whistleblower that it has received a report within seven days from the reporting and, most importantly, the employer must follow-up in a period not exceeding three months from the receipt of the report.47 These two concrete deadlines are meant to incentivise employers to follow up on whistleblowers’ reports, as empirical data shows that whistleblowers’ reports often go unexamined.48 The whistleblower can report in any medium, such as in writing and/or orally, by telephone or other voice messaging system, or, upon request of the whistleblower, by means of a physical meeting.

For purposes of the Directive, external reporting refers to reporting made outside of one’s workplace. MSs designate the competent external reporting authorities. These can include law enforcement agencies, judicial authorities, Ombudsmen, or authorities of a more general competence at the central level in the MS. Furthermore, external authorities may include bodies that are focused on administrative oversight, such as anticorruption bodies or regulatory or supervisory bodies competent in the specific policy areas within the remit of the Directive. Whereas follow-up procedures in internal reporting are mandatory, Article 11(2)(b) of the Directive provides the

45 A. Stanger, ‘Whistleblowers Are the Last Defense against Global Corruption’, Opinion Editorial, The Atlantic, 22 October 2019.
46 Article 8(3) EU Whistleblower Directive.
47 Article 9 EU Whistleblower Directive.
48 F. West, C. James and W. Vandekerckhove, Whistleblowing: The Inside Story: A Study of the Experience of 1000 Whistleblowers. Research Project by Public Concern at Work and University of Greenwich, May 2013.
option that an acknowledgment would not be given to the whistleblower if ‘the competent authority reasonably believes that acknowledging receipt of the report would jeopardise the protection of the reporting person’s identity’.

Lastly, a whistleblower can report through public channels such as the media.\(^4\) Public reporting has additional threshold rules that a whistleblower must meet in order for the Directive’s protections to apply.\(^5\) Firstly, a person may publicly report the information only if she has tried other internal and external channels and they did not lead to appropriate action. Secondly, a public channel is permissible only if a whistleblower has grounds to believe that 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, a risk of retaliation, or little prospect of the breach being effectively addressed due to the particular circumstances of the case, such that evidence may be concealed or destroyed or that an authority is in collusion with the perpetrator of the breach or involved in the breach. These additional conditions for public reporting thwart whistleblowers from directly reporting to the media and it remains to be seen how stringently the EU courts will interpret this provision. It can be suggested that a reading in line with freedom of expression and the case law of the ECtHR should guide EU courts in future cases.

5. CHALLENGES AHEAD AND THE POTENTIAL ROLE OF TRADE UNIONS

Late transpositions of EU Directives, or transpositions that deviate from the enacted EU rules, are not uncommon.\(^5\) Delays in the transposition of the EU Whistleblower Directive, hence, would not be a surprise. Moreover, for many MSs, but especially for Italy and Spain, which are the hardest hit by the COVID-19 crisis, most of the legislative period in 2020 has been stalled as priority has been given to managing the pandemic.

\(^4\) Article 15 EU Whistleblower Directive.
\(^5\) Ibid.
\(^5\) For example, see annual reports by the European Commission on the number of late transpositions and the high number of infringement procedures against MS for late transposition, which in 2018 the number of cases was 419 late transposition infringements. See for the latest available annual report, European Commission Staff Working Document, Monitoring the Application of Union Law, 2018 Annual Report. https://ec.europa.eu/info/sites/info/files/report-2018-commission-staff-working-document-monitoring-application-eu-law-general-statistical-overview-part1_0.pdf.
Some specific challenges of transposing the Directive arise due to the nature of whistleblowing protection. While the Directive seeks to level the playing field for protections among different MSs, many need to invest substantial time in consultation and reflection on how national rules will look and fit with existing frameworks. For some, like Spain, the challenge will even be to ensure that the correct language is used. Translating ‘whistleblower’ into ‘denunciator’, for example, not only has a negative connotations of being a snitch, but is also linked with an old statute, still in force, that imposes certain obligations on individuals to report.\textsuperscript{52} Using the same terminology, Spanish whistleblower advocates warn, could misguide workers about their rights and obligations, ie on whether they would be within the scope of the old statute, and therefore obliged to report, but without benefiting from the protections in the new rules that implement the Whistleblower Directive. Other MSs, such as France, Ireland and the Netherlands, face a process of reflection on how existing laws will need to be revised, especially to ensure that aspects of these laws that function well will not be undermined during the transposition.

The EU Whistleblower Directive, further, leaves certain aspects of whistleblower protection at the discretion of MSs to be specified in the transposition process. While such discretion is not negative \textit{per se}, and can be valuable in ensuring that the Directive is functional within each national context, concerns can be expressed that the Directive’s protection could possibly be weakened. For example, the Directive allows national discretion in deciding whether anonymous reporting will be followed up when such reports are made to external channels.\textsuperscript{53} Allowing for diverging national approaches in this respect could harm the overall level of protection for EU whistleblowers. Furthermore, the Directive leaves it to MSs to decide which national procedures should be followed when communicating the final outcome of the investigation to the whistleblower.\textsuperscript{54} MSs are also to determine which breaches can be classified as ‘clearly minor’, in which case the competent authorities can decide that the matter does not require a follow-up and can close the procedure.\textsuperscript{55} In such a case, the authorities are required to

\textsuperscript{52}Royal Decree of 14 September 1882 on the Spanish criminal procedure, see Spanish non-profit organisation Xnet’s letter to the European Commission and the Permanent Delegation of Spain to the European Union, 17 January 2020. https://xnet-x.net/en/xnet-claims-spanish-translation-european-directive-whistleblowers/.

\textsuperscript{53}Article 6(2) EU Whistleblower Directive.

\textsuperscript{54}Article 11(2)(e) EU Whistleblower Directive.

\textsuperscript{55}Article 11(3) EU Whistleblower Directive.
notify the whistleblower that the decision has been taken not to follow-up, and the authorities are required to provide the whistleblower with the reasons for their decision. There are also aspects of the Directive under which national legislators are left with discretion to opt for stronger protections, such as requiring companies with fewer than 50 workers to establish internal reporting channels and procedures.\footnote{Article 8(7) EU Whistleblower Directive.} Importantly, a whistleblower who reports directly to the press may be protected under national law, if such a law exists, on the protection of freedom of expression and freedom of information.\footnote{Article 15(2) EU Whistleblower Directive.} While these elements of the transposition may be a challenge, many stakeholders continue to play an active role. In particular, the mobilisation of civil society could ensure that protections are adequately realised.

Enforcement of the EU Whistleblower Directive is another matter that MSs must further develop in the transposition process, since the Directive does not provide clear enforcement tools. By comparison, the EU rules on data protection leave companies in no doubt as to the importance of compliance, since non-compliance costs are high.\footnote{Companies can be subject to administrative fines up to 20,000,000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher; see Article 83(6) General Data Protection Regulation.} One way in which the EU Whistleblower Directive seeks to ensure effectiveness is by setting requirements for follow-up and feedback procedures, as well as including set time frames for these mechanisms, as explained above. However, effectiveness is not very strongly served, from the enforcement perspective, in that penalties for non-compliance with the Directive are to be set by the MSs individually. Such penalties must be ‘effective, proportionate and dissuasive’.\footnote{Article 23 EU Whistleblower Directive.}

The EU Whistleblower Directive, moreover, is on legal foundations that may become subject to legal challenge. It is worth recalling that the EU legislative powers result not from a general proposition but rather from different Treaty provisions vesting prerogatives for each of the areas of EU law.\footnote{Joined Cases 188–190/80, France, Italy and United Kingdom v Commission [1982] E.C.R. 2545.} As the EU has only those powers assigned to it by the Treaties,\footnote{Article 5 TEU.} all residual powers belong to the MSs. While the Directive protects workers, it is legally based on enhancing the internal market. The Directive is based
primarily on Article 114 TFEU, which gives the EU the option to legislate for the purposes of advancing the EU internal market. Unquestionably, public disclosure plays a critical role in a well-functioning and competitive internal market, as recognised by the Commission in its Inception Impact Assessment.\(^\text{62}\) The Commission combined 11 legal bases for the Directive in order to encompass as many policy fields as possible. Legally, therefore, the Directive stands on multiple thin ropes. While the EU can rely on multiple legal bases to establish legislation, the gist of the case law is, first, that multiple legal bases can only be combined if it is not possible to define one predominant purpose of the measure in question and, second, it is a mandatory requirement that those legal bases are compatible in terms of the prescribed legislative procedure.\(^\text{63}\) The Court of Justice of the European Union (CJEU) will look at the predominant aim and content of the measure to decide on the legal base. The CJEU examines the principles on which a measure is based and its ideological content rather than the effects of the measure.\(^\text{64}\) Should the EU Whistleblower Directive be legally challenged in the future, the multiple legal bases could be a weakness.

Beyond the law, the functionality of whistleblower protection depends on organisational culture.\(^\text{65}\) Effective whistleblower protection has at least two main components: what happens to the whistleblower after she blows the whistle and what measures are taken to address the wrongdoing reported by the whistleblower. For the latter, effectiveness of whistleblowing is only achieved to ‘the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable time frame’.\(^\text{66}\) In organisations in which a culture of secrecy prevails, or where speaking out is penalised rather than encouraged, formal rules such as the Whistleblower Directive can serve as a starting point, but full compliance would require a cultural change.

\(^{62}\) European Commission, Inception Impact Assessment ‘Horizontal or Further Sectorial EU Action on Whistleblower Protection’ 26 January 2017. http://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf.

\(^{63}\) Case C-155/07, Parliament v Council ECLI:EU:C:2008:605.

\(^{64}\) Case C-155/91, Commission v Council (Framework Directive on Waste) [1993] ECR I-939.

\(^{65}\) See K. Kenny, Whistleblowing: Toward a New Theory (Cambridge, MA: Harvard University Press, 2019); see also C. Fred Alford, Whistleblowers: Broken Lives and Organizational Power (Ithaca, NY: Cornell University Press, 2001).

\(^{66}\) J. P. Near and M. P. Miceli, ‘Effective Whistle-Blowing’ (1995) 20 Academy of Management Review 679.
Trade unions could play an important role in influencing work culture. Unions can contribute to improved responsiveness in whistleblowing, as experts in labour law and whistleblowing have demonstrated. During the legislative process that led to the adoption of the Directive, trade unions were active in organising feedback and mobilising. Specifically, Eurocadres played an active part in organising social partners and civil society organisations across the EU. Eurocadres also established a dedicated digital platform to advance discussions among stakeholders and civil society on the EU legislative process (whistleblowerprotection.eu). During the national transposition process, national legislators should engage with unions to ensure not only solid implementation of the law but also its effectiveness in practice when a worker files a report. It must be acknowledged that trade unions can also have the impact of stalling or delaying reporting, as an individual employee’s concerns do not always align with the interests of the trade union. In order to foster a positive role for trade unions, recent research shows the multiple ways in which trade unions can ensure safe and effective disclosure for whistleblowers. In this respect, the EU Whistleblower Directive refers to trade unions as among the authorities that can be designated to receive reports of breaches.

Trade unions should actively encourage national legislators to acknowledge their role in transposition of the Directive and thereafter to ensure that whistleblowers are aware that their reporting options include trade unions. Disclosing information in the public interest in practice often comes at a high cost to the whistleblower’s professional and personal life. By taking an active role in the whistleblowing process, trade unions can amplify the voice of employees and move away from the currently predominant practice in which the whistleblower is the sole voice in raising the alarm in the public interest.

67 D. Lewis and W. Vandekerckhove, ‘Trade Unions and the Whistleblowing Process in the UK: An Opportunity for Strategic Expansion?’ (2018) 148 Journal of Business Ethics 835.
68 Ibid.
69 A. Phillips, ‘How Might Trade Unions Use their Voice to Engage in the Whistleblowing Process?’ in D. Lewis and W. Vandekerckhove (eds), Selected Papers from the International Whistleblowing Research Network Conference, Oslo, June 2017.
70 Preamble para. 54, EU Whistleblower Directive.
6. CONCLUSION

In recent times, whistleblowing has become the predominant manner of instigating accountability for some of the most pressing problems in our societies. Although whistleblowing serves the public interest, too often the individuals behind these disclosures are delegitimised and experience harassment and retaliation. The EU Whistleblower Directive is the first EU law to provide protection to whistleblowers across the EU, covering 12 policy fields, adopting a wide definition of who can be a whistleblower, and including both the public and private sector. In many regards, as this note has shown, the EU Whistleblower Directive builds on global best practice and ensures high standards of protection. In its two-year transposition period, and with a transposition deadline of 17 December 2021, MSs have a chance to build upon these standards and fill some of the legislative gaps that the Directive leaves open. Towards that aim, it is hoped that trade unions will play an active role in empowering whistleblowers’ voices and advancing protection, not only through law but also through organisational culture.

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