2nd European Conference on Whistleblowing Legislation

Europe's New Whistleblowing Laws – Commonalities, Differences, and Expected Impact

10-11 September 2022, University of Göttingen, Germany

The 'European Whistleblowing Directive' (Directive (EU) 2019/1937) is the most far-reaching piece of whistleblowing legislation in history with an unprecedented impact on countries all across the European Union. To transpose the Directive, all 27 Member States were required to enact their own national whistleblowing laws by 17 December 2021, in many cases leading to the creation of an entirely new field of law previously unknown to many national legal systems.

The 2nd European Conference on Whistleblowing Legislation seeks to provide a forum for a thorough analysis of Europe's new whistleblowing laws, their commonalities, differences, and expected impact. It will include presentations by and discussions with renowned experts in the field from across Europe. The conference format will give researchers, policy makers, and practitioners an opportunity to discuss both national whistleblowing laws that have already been passed as well as current developments and the most pressing questions for countries which are yet to transpose the Directive.

The conference will be held as a hybrid conference at the University of Göttingen from 10-11 September 2022. Presentations and discussions will simultaneously be streamed online to allow for active participation from all over Europe.

Reservations for participation both in person and online
can be made via the contact information below.

Organization and Primary Contact

Dr. Simon Gerdemann, LL.M. (Berkeley)
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Steering Committee:

Prof. Dr. Ninon Colneric (Hamburg)
Prof. Dr. Rüdiger Krause (Göttingen)
Prof. Dr. Gerald Spindler (Göttingen)

Supported by

National German Research Foundation (DFG)
** Göttingen Institute for Business and Media Law * Göttingen Institute for Employment Law*

Conference Schedule

Saturday, 10 September 2022:

09:00-9:30: Arrival and Registration / Technical Check for Online Participants

09:30-10:00: Welcoming
Prof. Dr. Hans Michael Heinig (University of Göttingen, Dean Faculty of Law)
Dr. Simon Gerdemann (University of Göttingen)

10:00-10:45: The Current State of Transposition Across Europe – An Overview
Ida Nowers (Whistleblower International Network)

10:45-11:45: Legal Consequences of Non-Transposition of EU Directives
Prof. Dr. Ninon Colneric (Hamburg, Former Judge at the ECJ)

11:45-12:45: The New Whistleblowing Laws of Luxembourg
Ass. Prof. Dr. Dimitrios Kafteranis (University of Coventry)

12:45-13:30: Lunch Break

13:30-14:30: The New Whistleblowing Laws of Denmark
Prof. Lars Lindencrone Petersen (Bech-Bruun / University of Copenhagen)

14:30-15:30: The New Whistleblowing Laws of France
Christina Koumpli (Maître de Conférences, Avignon University)

15:30-16:00: Coffee Break

16:00-17:00: The New Whistleblowing Laws of Ireland
Dr. Lauren Kierans (Maynooth University)

17:00-18:00: The Post-Transposition Phase – A Policy Perspective
Prof. Dr. Wim Vandekerckhove (EDHEC Business School, France)
Ass. Prof. Dr. Vigjilenca Abazi (Maastricht University)

19:00-19:30: Open Discussion, End of Day 1

20:30: Dinner
Restaurant INTUU, Berliner Str. 30, Göttingen

Sunday, 11 September 2022:

09:00-10:00: The European Court of Human Rights' Effects on the Transposition
Dr. Simon Gerdemann (University of Göttingen)

10:00-11:00: The New Whistleblowing Laws of Portugal
Ass. Prof. Dr. Milena Rouxinol (University of Porto)

11:00-12:00: The New Whistleblowing Laws of Poland
Marta Kozak-Maśnicka (University of Warsaw)

12:00-13:00: The New Whistleblowing Laws of Sweden
Ass. Prof. Katarina Fast Lappalainen (Stockholm University)

13:00-13:30: Open Discussion, End of Day 2

Accommodation and Venue

• All participants joining us in person have the option to book a room at **FREIgeist Hotel** using the booking code "whistleblowing" (info@freigeist-goettingen.de). The hotel is located at **Berliner Straße 30**, less than 5-minutes walk from Göttingen's central train station

• The conference itself will be held at Göttingen's **Historische Sternwarte** (Historical Observatory), located at **Geismar Landstraße 11**, about 17-minutes walk from the hotel

• Participants may either walk to the observatory themselves, join us at the reception of the FREIgeist Hotel (8:45am on September 10th / 8:30am on September 11th), or be driven to the observatory upon request (contact: alina.kanaan@jura.uni-goettingen.de)

Zoom Information and Netiquette

• Online participants will receive a Zoom link email before the start of the conference.

• Please download and use the Zoom desktop app and check your connection. Make sure your full name is visible.

• Access the conference via the official link.

• Each presentation will take about 30-45 minutes, followed by a discussion. During the presentation and whenever you are not speaking, kindly keep your microphone muted.

• If you wish to make a comment before or during the discussion, please use the chat function.

• If you wish to ask a question, please type in '@host' in the chat function, followed by either
- a request to ask the question in person, followed by brief description of your question's topic, or
- the full question if you wish to ask it via the chat function.

The host will inform the presenter about your question and get back to you as soon as possible.

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Legal Consequences of Non-Transposition of EU Directives

Prof. Dr. Ninon Colneric

1. Preliminary remarks
2. The obligation to transpose directives
3. Interpretation of EU law
4. Infringement proceedings
5. Interpretation in conformity with EU law
6. Direct effect of directives?
    - 6.1. Vertical relationships
    - 6.2. Horizontal relationships
    - 6.3. Consequences for national law that does not comply with a directive
    - 6.4. Directives overlaid by primary law
    - 6.5. Consequences for the protection of whistleblowers
    - 6.6. Effects of provisions of a directive not conferring rights on individuals
7. State liability for damage caused to individuals by infringements of Union law
8. Preliminary ruling procedure
9. Outlook

Art. 288, subpara. 2 and 3 TFEU

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Art. 291(1) TFEU

Member States shall adopt all measures of national law necessary to implement legally binding Unions acts.

Art. 258 TFEU

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Art. 260(1) TFEU

If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

Art. 4(3) TEU

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Art. 171 EC-Treaty (Version Maastricht Treaty)

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 170.

Art. 260(2) and (3) TFEU

(2) If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Art. 259 TFEU

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Art. 280 TFEU

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Art. 299 TFEU

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

The European Court of Human Rights' Effects on the Transposition of the Whistleblowing Directive

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Dr. Simon Gerdemann, LL.M. (Berkeley)

Presentation Overview

I. Introduction

II. The ECtHR's Case Law on Whistleblowing

III. The ECtHR's Six Factor Test vis-à-vis the Whistleblowing Directive

IV. Consequences of Differences between the Two Systems of Protection

V. Summary of Results

I. Introduction

- The Two Pillars of Whistleblowing Law in Europe
  - Since 17 December 2021: Directive 2019/1937 („Whistleblowing Directive; WBD“)
  - Since 12 February 2008: European Court of Human Rights (ECtHR)
  - Recital 31 WBD:
    - *“Persons who report information about threats or harm to the public interest obtained in the context of their work-related activities make use of their right to freedom of expression. The right to freedom of expression and information, enshrined in Article 11 of the Charter and in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, encompasses the right to receive and impart information as well as the freedom and pluralism of the media. Accordingly, this Directive draws upon the case law of the European Court of Human Rights (ECHR) on the right to freedom of expression, and the principles developed on this basis by the Council of Europe in its Recommendation on the Protection of Whistleblowers adopted by its Committee of Ministers on 30 April 2014.“*

II. The ECtHR's Case Law on Whistleblowing

- Origins and Background The ECtHR's Six Factor Test under Art. 10 ECHR
  - Seminal Decision: Guja v. Moldova (Grand Chamber, 2008)
  - Facts: Head of the the press department of the Prosecutor General's Office in Moldova forwarded letters to the press as evidence of undue influence on ongoing criminal investigations by high ranking officials and got dismissed
  - Standard of review: Can this interference with the freedom of expression guaranteed by Art. 10 ECHR still be considered "necessary in a democratic society"? (Art. 10(2) WBD)
  - ECtHR's response: Establishment of what came to be known as the "Six Factor Test" to determine whether whistleblowers are protected under Art. 10 WBD

- Later important descisions by the ECtHR's sections
  - Heinisch v. Germany (2011)
  - Bucur and Toma v. Romania (2013)
  - Gawlik v. Liechtenstein (2021)
  - Halet v. Luxembourg (2021) (Grand Chamber decision pending)

II. The ECtHR's Case Law on Whistleblowing

The ECtHR's Six Factor Test

(1) Public interest in the disclosed information

- Arguably the most determinative factor
- Rationale: Whistleblowing as a phenomenon „essential to a democracy"
- Broad Scope: General public interest in revealing and discussing matters of importance

(2) Authenticity of that information

- Meaning: Whether the whistleblower had reasons to assume the information was true at the time of a report or disclosure
- Various case law on the application of this standard, inter alia regarding a whistleblower's potential duty to personally investigate a matter beforehand

(3) Availability of alternative reporting channels or remedies

- Checks whether the whistleblower had any other effective means of remedying the wrongdoing

II. The ECtHR's Case Law on Whistleblowing

(4) Good faith motives of the whistleblower

- Looks at a whistleblower's individual motivation

(5) Detriments to the employer

- Takes into account
  - public employers' interests to maintain confidence in state intuitions
  - private employers' commercial interests in their business reputation
  - personal and professional reputation of the individual person concerned

(6) Severity of the sanction taken against the whistleblower

- Dismissals as the heaviest sanction possible under labour law are in need of particular justification
- Takes into account potential chilling effects for other potential whistleblowers aswell

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The WBD's Conditions for Protection

[1] Applicability of the personal scope of application

[2] Reasonable grounds to believe in a breach of Union law within the WBD's material scope

[3] Forwarding information believed to be necessary to reveal a breach either
- *through an internal reporting channel, or*
- *through an external reporting channel, or*
- *by disclosing it to the public*

[4] In case of public disclosures, either
- *prior external reporting without appropriate action*
- *reasonable believe in an imminent or manifest danger to the public interest*
- *r.b. in a risk of retaliation in case of external reporting*
- *r.b. in a low prospect of breach being effectively addressed*

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IV. Consequences of Differences between the Two Systems of Protection

- Iterim Result
  - Rectial 31 WBD‘s statetment that the Directive „draws“ upon the ECtHR‘s case law is not to be read as a statement of fact, but rather as a statement of (limited) intent
  - Main Background: statutory whistleblower protection vs. judicial rule making

- Legal Consequences

  1. The Six Factor Test as an invalidating factor
     - Art. 6(1), (3) TEU: Potential (partial) annulment of the WBD due to the ECtHR‘s case law‘s function as a minimum standard for fundamental rights protection under primary EU law (see Art. 52(3) CFR)

  2. The Six Factor Test as an interpretive factor
     - Potential influence on the interpretation of secondary EU law based on the ECJ‘s respective case law: Legislative history as a source for interpreting a provision‘s purpose and scope

  3. The Six Factor Test as an independent factor for the protection of whistleblowers
     - Continued influence on national whistleblower protection rules and pratices

1. The Six Factor Test as an invalidating factor

Potential annulment of Art. 15 WBD with respect to public interest disclosures

- Potential reasoning:
  - According to the Commission's current interpretation of Art. 15 WBD, the list of reasons for disclosures in Art. 15(1) WBD is exhaustive, because Art. 15(2) WBD's narrow exception is designed to generally prohibit Member States to provide for a more favourable treatment of whistleblowers
    - Art. 15(2) WBD: „*This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.*"
  - Unlike Art. 15(1) WBD, the ECtHR's factor (1) also allows for public disclosures in the general public interest, because the court considers whistleblowing to be „essential to a democracy" by informing the public about matters that „fall within the scope of political debate" (*Guja*, §§ 88, 91)
  - Art. 15 WBD thus violates Art. 6(1),(3) TEU and must therefore be annulled

1. The Six Factor Test as an invalidating factor

- Contra:
  - Art 15(2) WBD, which is known as the „Swedish exception", was not intended to prohibit Member States from granting a higher level of protection for whistleblowers (see Art. 25 WBD: More favourable treatment and non-regression clause)
  - Even if one assumes that Art. 15(2) WBD was designed to implicitly limit public disclosures, the EU legislator would have no competence to interfer with the Member States' sovereign right to regulate matters that touch the very core of a state's fundamental structure as a democracy (see Art. 4(2) sent. 1 TEU)
  - Also: Possible interpretation of Art. 15 WBD in accordance with primary EU law; parallel application of the Six Factor Test if the dominant reason for disclosure is not to reveal breaches of Union law

- Result:
  - (Arguably) no partial annulment of Art. 15 WBD

2. The Six Factor Test as an interpretive factor

Potential interpretation of the reasonable believe standard based on the ECtHR's factor (2)

- Potential reasoning:
  - When drafting the "reasonable grounds to believe"-standard in the WBD's condition [2], the Union legislator was aware that under the ECtHR's factor (2) decisions, a whistleblower may be expected to personally investigate a matter beforehand, i.e. to "verify that [the information] is accurate and reliable" (see Guja, Heinisch, Gawlik)

- Contra:
  - Recital 32 WBD: The reasonable believe standard was designed to „ safeguard against malicious and frivolous or abusive reports", i.e. intentionally false reports
  - WBD's main goal: Effective enforcement of Union law by motivating whistleblowers to forward their information directly to internal and external addressees competent to investigate the matter (see Art. 9(1)(d), 11(1)(c) WBD)
  - Generally limited reliability of the ECtHR's Six Factor Test as a source of inspiration for the WBD's provisions

- Result:
  - No duty for whistleblowers under the WBD to privately investigate a matter in accordance with the ECtHR's factor (2)

3. The Six Factor Test as an independent factor

- Continued relevance outside the Directive's material scope of application
  - Both as district source of protection for whistleblowers and as a source of influence for national laws (effect may be reduced depending on the scope of transposition laws)
- Additional source of protection inside the Directive's material scope of application
  - Six Factor Test may generally be applied in parallel to the Directive's protection (see Art. 25 WBD); especially useful if the WBD's condtitions are no met (problem: Art. 15 WBD)
- Potential Future Problems
  - Especially: Cases in which a bulk of information comprised of issues both inside and outside the WBD's scope of application is reported and/or disclosed

V. Summary of Results

1. The ECtHR's Six Factor Test will continue to be the second most important pillar of whistleblower protection in Europe next to the Whistleblowing Directive

2. Contrary to statements in Directive's recitals, the ECtHR's factors and the WBD's conditions share little similarities, but display various striking differences

3. Under the Commission's current interpretation of Art. 15 WBD, the Six Factor Test may become the cause of a partial annulment of the Directive, though it is more likely and legally convincing that the WBD will stay fully intact

4. The Six Factor Test has only limited utility in interpreting the Directive's provisions

5. The Six Factor Test's most important function in the future will be that of an additional source of protection and a source of influence for national whistleblowing laws both outside and inside the WBD's scope of application

Thank you very much for your attention

Questions?

Research Centre
Financial and
Corporate Integrity

Coventry University

The transposition of the Whistleblowers Directive in Luxembourg

Dimitrios Kafteranis

Outline

- Introduction
- The situation prior to the Directive
- The draft law transposing the Directive
  - The definition
  - Channels for disclosure
  - Protection
- Concluding remarks

Introduction

- Luxleaks scandal: how Luxembourg became famous for whistleblowers' protection

- Poor laws could not protect Deltour and Halet – case for the latter still pending at the European Court of Human Rights

- Following Luxleaks, the government was reluctant to change the legal landscape but the adoption of the Directive will soon change Luxembourg law

The situation prior to the Directive

- The first comprehensive law which had provisions on whistleblowing was the Law of 13 February 2011 related to the fight against corruption

- The adoption of this Law was motivated by the international and European obligations of Luxembourg to tackle corruption

- Several articles were added to the Labour Code but the provisions on whistleblowing were not widely used – lack of basic elements such as the definition of whistleblower

The situation prior to the Directive

- Several sectoral provisions exist in the banking and financial sector legislation due to EU law
- For instance, the Law of 23 December 2016 on market abuse has whistleblowing provisions
- Apart from Luxleaks, there are not many cases on whistleblowing in Luxembourg

The draft law transposing the Directive

- The draft law was presented after the expiration of the two years transposition period (December 2021)
- The law is not yet adopted
- The Luxembourg Minister of Justice presented the draft law on 12 January 2022
- The draft law adopts the wording of the Directive in its majority

The definition

- Work-based relation either in the public or private sector (reactions were made to extent this to other related persons with no working relations)

- Covers public servants, employees, contractors, sub-contractors, facilitators, interns (finished, existing or about to start the job) – for public servants the situation is complicated as they already have the duty to report wrongdoings

- Exclusion of legal persons – reaction and proposal to entail legal persons as facilitators (such as syndicates which can assist the whistleblower)

The definition

- Reasonable grounds to believe that a wrongdoings occurs or is about to happen

- Even suspicions can do – reactions were raised to this point

- Reporting on illegalities or something that goes against the spirit of the law – vague term which raises concerns

The definition

- Restrictions exist on what the whistleblower can report
  - Information or documents that are classified as well as those related to national security
  - Facts, information or documents covered by the medical secrecy and the secrecy between lawyers and their client
  - Rules related to criminal procedure

  - There is an exception: the whistleblower can be protected if their reporting is proportional and is necessary to the public interest

  - Several authorities reacted on this point

The definition

- The following public authorities highlighted their duty of secrecy between them and their clients:
  - Order for accountants
  - Notaries Chamber
  - Institute of Statutory Auditors

  - The violation of professional secrecy is punished under criminal law in Luxembourg
  - The protection of professional secrecy is of public order and only a law can create exceptions to this rule
  - The government has to consider these recommendations

Channels for disclosure

- The Luxembourg proposed law respects the requirements of the Directive
- The whistleblower can choose between internal reporting or reporting to the authorities
- Doubts were raised on this point: In Article 5, para 2 of the proposed law, it is stated that “the reporting persons have, at first, the possibility to report internally […]”. The use of “at first (en premier lieu)” has brought reactions from public authorities which gave their opinion on the draft law .

Channels for disclosure

- It is argued that the use of “at first” does not comply with the spirit of the Directive and the free choice of internal or external for the whistleblower.

- In addition, Article 7 of the proposed law uses the term “encourage” which, combined with “at first”, should not give the impression of an obligation to the whistleblower to report internally. It should be clear that it is a free choice for the whistleblower not an obligation.

Channels for disclosure

- Coming to the obligation to establish internal reporting channels, the reactions from the public authorities were mixed.

- Certain authorities have argued that the obligation for small and medium size businesses to establish internal reporting channels will have negative financial consequences to these businesses

- The main argument is that most of these businesses have already established internal reporting procedures such as for money laundering and they now have to add more. The point raised is that the legislation is not clear but complex. The existing sectoral provisions become a *lex specialis* and the new law will be another level not the main point of reference. They argue that this complex situation and the financial cost will be a burden for small and medium businesses

Channels for disclosure

- Other public authorities have argued that when a business has more than 15 employees should be obliged to establish internal reporting channels (and not the over 50 rule of the Directive)

- Also, it is argued that every business should have a risk assessment in order to examine whether internal reporting channels should be established when they are small and medium size businesses

Channels for disclosure

- The proposed law establishes a list of 22 competent authorities to receive reports about wrongdoings
- The majority of the public authorities commented on this.

  - The first argument is that it is not clear which authority should be preferred or have priority over an issue which can be reported to several authorities
  - Second, the powers of the authorities are not clear; consequently, it is asked from the government to amend their respective laws, establishing these authorities, in order to have the legitimacy to receive, control, investigate and sanction when necessary
  - Finally, the proposed law is not clear when it comes to the cooperation of these authorities

Channels for disclosure

- The Luxembourg government made an innovation in its proposed law with the aim to establish a special office, under the Ministry of Justice, which will have certain responsibilities for whistleblowing

- The proposed law analyses this new institution which should inform and help the whistleblowers when they want to report by precising which steps should be made, should inform the public about the protection of whistleblowers, inform the competent authorities when they have not respected their internal reporting obligations and elaborate recommendation on every question related to the application of the proposed law

Channels for disclosure

- In addition, this new authority will have the obligation to report all the statistics on whistleblowing, as required by the Directive, and a progress report to be sent to the European Commission about Luxembourg

- The proposal for this new authority had mixed reactions by the authorities which gave their opinion, until now, on the proposed law
  - Some of them argued that this new authority is a positive step towards a better protection for whistleblowers and it should be of great help to them
  - Others have raised the point that the tendency to create authorities cannot solve the problem; they proposed that the existing governmental authorities should be responsible for the above and there is no need for a new one
  - Independence? Need for a law to establish the authority

Channels for disclosure

- Public disclosures - fully restricted
- Not a first choice; only on eminent danger or harm to the public interest
- Vague notions – reactions as to why to restrict public disclosures as a last resort

Protection

- The proposed law adopts all the protective measures as dictated by the Directive

- Protection against any type of retaliation – the Employees Chamber proposed to include these provisions to the Labour Code

- Civil, administrative and criminal liability – the criminal liability provision is laconic and no explanations are given
  - The way the provision is written does not really explain under which circumstances can the criminal liability be availed and this may be a weak point for whistleblower.

Protection

- Confidentiality - Certain authorities argued against it as it would undermine whistleblowing and will provide shelter to bad faith whistleblowers who aim to provoke harm

- Finally, an interesting point was raised by the Luxembourg Competition Authority (Conseil de la Concurrence)
  - The authority, given the experiences of other states on financial rewards in relation to competition cases, argued that financial rewards should become available to whistleblowers

Concluding remarks

- The proposed law is a “victory” for whistleblowers in Luxembourg
- After years of inaction, the government will provide a comprehensive legal framework which will protect whistleblowers
- The government should check the points raised by the consultation on the proposed law


Research Centre
Financial and
Corporate Integrity
Coventry University
Thank you.
Ranked No.15
UK University
Guardian University
Guide 2020
University of the Year
for Student Experience
The Times and Sunday Times
Good University Guide 2019
Queen's Award
for Enterprise
International Trade 2015

The New Whistleblowing Laws of Ireland

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Overview

1. Introduction
2. Personal Scope
3. Definition of a Protected Disclosure
4. Protections
5. Confidentiality & Anonymity
6. Stepped Disclosures Regime
7. Penalties

1. Introduction

Protected Disclosures Act 2014 ('2014 Act'):

Fulfilled commitment in the programme for Government.

Aimed to remedy sectoral approach deficiencies.

Ireland's main workplace whistleblowing law.

1. Introduction: EU Whistleblowing Directive

12 May 2021: General Scheme of the Protected Disclosures (Amendment) Bill 2021

26 May 2021: Pre-legislative scrutiny commenced by Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach

16 December 2021 : Report published by Joint Committee

8 February 2022: Protected Disclosures (Amendment) Bill 2022

21 July 2022: Protected Disclosures (Amendment) Act 2022 (‘2022 Act’) signed into law by the President of Ireland

2. Personal Scope: 2014 Act

Definition of ‘worker’ (s 3(1) and (2)):

- Employees (inc. temporary and former)
- Contractors
- Consultants
- Agency staff
- Trainees/Interns
- Members of Defence Force & Reserve Defence Force

2. Personal Scope: 2022 Act

Section 4

- Definition of ‘worker’ under s 3 2014 Act broadened to include:
- Shareholders
- Members of the administrative, management or supervisory body of an undertaking, including non-executive members;
- Volunteers;
- Acquires information on a relevant wrongdoing during a recruitment process or other pre-contractual process.
- Work experience

3(a). Definition of a ‘protected disclosure’ under the PDA 2014

- Disclosure of ‘relevant **information**’ (s.5(2)):
  - (i) in the **reasonable belief** of the worker, it **tends to show** one or more **relevant wrongdoings**, and
  - (ii) it came to the attention of the worker **in connection with the worker’s employment**.
  - 2022 Act: substitution of “**in a work-related context**” for “in connection with the worker’s employment”

3(b). What constitutes a ‘relevant wrongdoing’ under the 2014 Act?

(a) that an **offence** has been, is being or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any **legal obligation**, other than one arising under the worker’s contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services;

(c) that a **miscarriage of justice** has occurred, is occurring or is likely to occur;

(d) that the **health or safety** of any individual has been, is being or is likely to be endangered;

(e) that the **environment** has been, is being or is likely to be damaged;

(f) that an **unlawful or otherwise improper use of funds or resources of a public body, or of other public money**, has occurred, is occurring or is likely to occur;

(g) that an act or omission by or on behalf of a public body is **oppressive, discriminatory or grossly negligent or constitutes gross mismanagement**; or

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be **concealed or destroyed**.

- Protected Disclosures Act 2014, s 5(3)(a)-(h)

3(b). 2022 Act: ‘Relevant wrongdoing’

- Section 6(c)(iii) inserting s 5(i) into he 2014 Act:
  - “that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed or **an attempt** has been, is being or is likely to be made to conceal or destroy such information.”

- Section 6(c)(ii) substituting s 5(h) in the 2014 Act with:
  - “that a **breach** has occurred, is occurring or is likely to occur, or”

(iv) by the insertion of the following definitions:

“ ‘Annex’ means the Annex to the Directive, the text of which for ease of reference is set out in Schedule 6

‘breach’ means an act or omission—

(a) that is unlawful and to which one or more of the following subparagraphs applies:

(i) the act or omission **falls within the scope of the Union acts set out in the Annex** that concern the following areas:

(I) public procurement;

(II) financial services, products and markets, and prevention of money laundering and terrorist financing;

(III) product safety and compliance;

(IV) transport safety;

(V) protection of the environment;

(VI) radiation protection and nuclear safety;

(VII) food and feed safety, animal health and welfare;

(VIII) public health;

(IX) consumer protection;

(X) protection of privacy and personal data, and security of network and information systems;

3(b). 2022 Act: ‘Relevant wrongdoing’

3(b). 2022 Act: ‘Relevant wrongdoing’

(ii) the act or omission affects the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures, or

(iii) the act or omission relates 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 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.

(b) That **defeats the object or purpose of the rules in the Union acts and areas** referred to in paragraph (a)

3(c). Personal grievance v protected disclosure

- Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464:

What is the difference between a grievance and a protected disclosure?

[30] A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation's Grievance Procedure.

A protected disclosure is where a worker has information about a relevant wrongdoing.

3(c). Personal grievance v protected disclosure

[31] It is important that a worker understands the distinction between a protected disclosure and a grievance. The organisation's Whistleblowing Policy (see below) should make this distinction clear.

Examples of a grievance

Complaint around selection criteria for a promotional post;

Complaint around allocation of overtime.

Example of a whistleblowing disclosure

In a hazardous work situation information regarding a failure to provide or wear protective clothing and adhere to health and safety guidelines;

Information about the improper use of funds, bribery and fraud.

- Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464

3(c). *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77

- 35. While on this basis the Labour Court was thus clearly empowered by s. 42(4) of the 1990 Act to have regard to the terms of the 2015 Code of Practice, the difficulty in the present case is that **the 2015 Code does not accurately reflect the terms of what the 2014 Act actually says. Specifically, the 2015 Code introduces a distinction between "a grievance" and "a protected disclosure", even though no such distinction is drawn by the 2014 Act itself, which makes no reference at all to the concept of a personal grievance.** Just as importantly, the 2015 Code states that complaints specific to the worker in relation to 14 "duties, terms and conditions of employment, working procedures or working conditions" are personal grievances which cannot amount to protected disclosures.

3(c). *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77

- 36. I cannot avoid observing that in these two respects **the 2015 Code has thereby erroneously misstated the law**. For all the reasons I have already ventured to explain, **it is clear that purely personal complaints in relation to the issues of workplace health or safety can in fact be regarded as coming within the rubric of protected disclosures** for the purposes of s.5(2) and s. 5(3) of the 2014 Act.

3(c). 2022 Act, s 6(d)

- "(5A) A matter concerning interpersonal grievances **exclusively affecting a reporting person**, namely, grievances about **interpersonal conflicts between the reporting person and another worker**, or a matter concerning a complaint by a **reporting person to, or about, his or her employer which concerns the worker exclusively**, shall not be a relevant wrongdoing for the purposes of this Act and may be dealt with through any agreed procedures applicable to such grievances or complaint to which the reporting person has access or such other procedures, provided in accordance with any rule of law or enactment (other than this Act), to which the reporting person has access."

4(a). Introduction Protections: 2014 Act, Part 3

Section 11: Protection of EEs from **dismissal** for having made PD

Section 12: Other protections of EEs from **penalisation** for having made PD

Section 13: **Tort** action for suffering detriment because of making PD

Section 14: Immunity from **civil liability** for making PD

Section 15: Making PD not to constitute a **criminal offence**

Section 16: Protection of **identity** of maker of PD

4(b). 2014 Act, s 3(1) & its proposed substitution (in red) under 2022 Act, s 4: Definition of ‘Penalisation’

“ ‘penalisation’ means any direct or indirect act or omission which occurs in a work-related context, is prompted by the making of a report and causes or may cause unjustified detriment to a worker, and, in particular, includes—

(a) suspension, lay-off or dismissal,

(b) demotion, loss of opportunity for promotion or withholding of promotion,

(c) transfer of duties, change of location of place of work, reduction in wages or change in working hours,

(d) the imposition or administering of any discipline, reprimand or other penalty (including financial penalty,

(e) coercion, intimidation, harassment or ostracism,

(f) discrimination, disadvantage or unfair treatment,

(g) injury, damage or loss,

(h) threat of reprisal,

4(b). 2014 Act, s 3(1) & its proposed substitution (in red) under 2022 Act, s 4

(i) withholding of training,

(j) a negative performance assessment or employment reference,

(k) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment,

(l) failure to renew or early termination of a temporary employment contract;

(m) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;

(n) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;

(o) early termination or cancellation of a contract for goods and services;

(p) cancellation of a licence or permit; and

(q) psychiatric or medical referrals.

4(c): Tort claim- Definition of ‘detriment’, s 22(b) substitutes s 13(3)

- (a) coercion, intimidation or harassment,

  (b) discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment),

  (c) injury, damage or loss, and

  (d) threat of reprisal.

- **an act or omission referred to in any of paragraphs (a) to (q) of the definition of ‘penalisation’** in section 3, subject to the modification that references in any of the said paragraphs to a worker shall be read as a reference to the person to whom the detriment is caused.”

S5(8) PDA 2014

- In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is.

Unfair dismissal (s 11): on the ER

Penalisation (s 12): on the EE

Detriment (s 13) and Breach of Identity (s 16): on the EE

4(d) Burden of proof in PD claims (2014 Act)

4(d) Reversal of Burden of Proof: 2022 Act

- **Section 21 inserts s 12(7C) re. penalisation claims**
- In any proceedings by an employee under the Workplace Relations Act 2015 in respect of an alleged contravention of subsection (1), the penalisation shall be deemed, for the purposes of this section, to have been as a result of the employee having made a protected disclosure, unless the employer proves that the act or omission concerned was based on **duly justified grounds**."
- Also applies to **s 13 Tort** claims (s 22(a), 2022 Act inserts s 13(2B))

4(e) Interim Relief: 2022 Act

- S 21, inserts section 12(7A)
- An employee who claims to have suffered penalisation wholly or mainly for having made a protected disclosure may apply to the Circuit Court for interim relief within 21 days immediately following **the date of the last instance of penalisation** or such longer period as the Court may allow.

4(f) Confidentiality: new s 16

- s16(1)A person to whom a report is made or transmitted, shall not, **without the explicit consent of the reporting person**, disclose any information that might identify the discloser (direct/indirect)

Exceptions:

- s16(1) Excludes any persons to whom a protected disclosure is referred for the **purposes of receipt, transmission or follow-up**
- s16(2)(a)Where the disclosure is a necessary and proportionate obligation in the context of investigations or judicial proceedings, including with a view to **safeguarding the rights of defence of the person concerned**

4(f) Confidentiality: new s 16

Exceptions contd.

- s16(b)(i) Recipient shows that they took all reasonable steps to avoid disclosing such information
- s16(b)(ii) Recipient reasonably believes that disclosing the identity of the reporting person or any such information is necessary for the prevention of serious risk to the security of the State, public health, public safety or the environment
- s16(c) Where the disclosure is otherwise required by law

4(f) Confidentiality: new s 16

- s16(3)(a) Where the identity of the reporting person is disclosed to another person, **the reporting person shall be informed in writing before their identity is disclosed** unless such information would jeopardise related investigations or judicial proceedings.

- S16(3)(b) Such a notification must include the **reasons** for the disclosure of their identity

- 16A.(1) The **identity of any person concerned** must be protected by a **prescribed person or the Commissioner**, to whom a report is made or transmitted, or an **other suitable person** for as long as any investigation triggered by the report is ongoing, save where the disclosure of the identity of such a person concerned is required by law.

4(f) Confidentiality: new s 16

2022 Act: s16(5) A reporting person shall have a **right of action in tort** against a person who fails to comply with subsection (1).

2014 Act: s16(3) A failure to comply with *subsection (1)* is actionable by the person by whom the protected disclosure was made if that person **suffers any loss** by reason of the failure to comply.

5. Anonymous disclosures

2022 Act inserts section 5A.(1) into the 2014 Act

- Internal disclosures: No obligation to accept and follow-up on anonymous reports unless the recipient considers it appropriate to do so
- External disclosures: same procedures apply as to identified disclosures
- Workers who make anonymous disclosures, and are subsequently penalised, qualify for protections under the Act

6(a).Introduction: Stepped Disclosure Regime

To whom must a protected disclosure be made under the 2014 Act?	
First step:	• Employer or other responsible person (s6) • Minister (s8) • Legal advisor (s9)
Second step:	• Prescribed person (s7)
Third step:	• Other cases (s10)

6(b). First Step Disclosure (2): Minister

- Section 12, 2022 Act substitutes a new s 8:
- s8(2)(a)the worker is or was **employed in a public body**; and
- s8(2)(b) one or more than one of the following conditions are met:
  - (i) the worker has previously made a report of **substantially the same information** in the manner specified in section 6, 7 or 8, as the case may be, but **no feedback** has been provided to the worker in response to the report within the period specified in section 6A(1)(e), 7A(1)(c), 10C(7)(b), 10D(7)(b) or 10E(1)(c), as the case may be, or, where **feedback has been provided, the worker reasonably believes that there has been no follow-up or that there has been inadequate follow-up**;
  - (ii) the worker reasonably believes the **head of the public body concerned is complicit** in the relevant wrongdoing concerned;
  - (iii) the worker reasonably believes that the relevant wrongdoing concerned 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.

6(b). First Step Disclosure (2): Minister

- s8(3)(a) Minister shall, **without having considered** the report or the information or any allegation contained therein, as soon as practicable but **not later than 10 days** after receipt of a report, **transmit it to the Protected Disclosures Commissioner**

- s8(4) Ministers required to **present information on their website**

6(c). Second Step Disclosures (External Disclosures)

Prescribed person (s7, 2014 Act)

Regulatory bodies & local authorities

S.I. No. 367/2020

(S.I. No. 339/2014, S.I. 448/2015, S.I. 490/2016, S.I. 367/2020: Repealed)

https://www.gov.ie/en/collection/41798-protected-disclosures-whistleblowing-list-of-prescribed-persons/

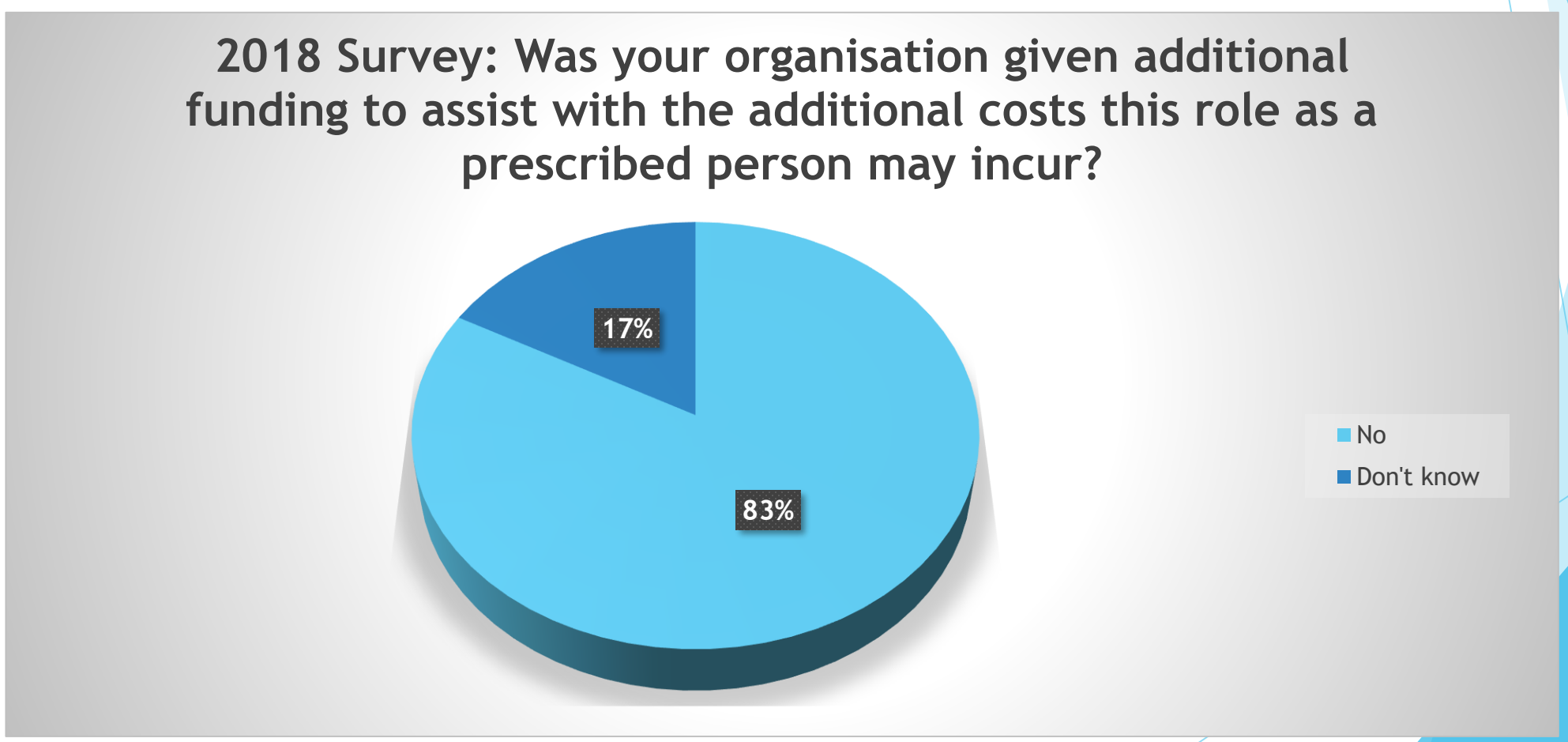
Requirements:

Reasonable belief that the information disclosed and any allegation contained in it are substantially true.

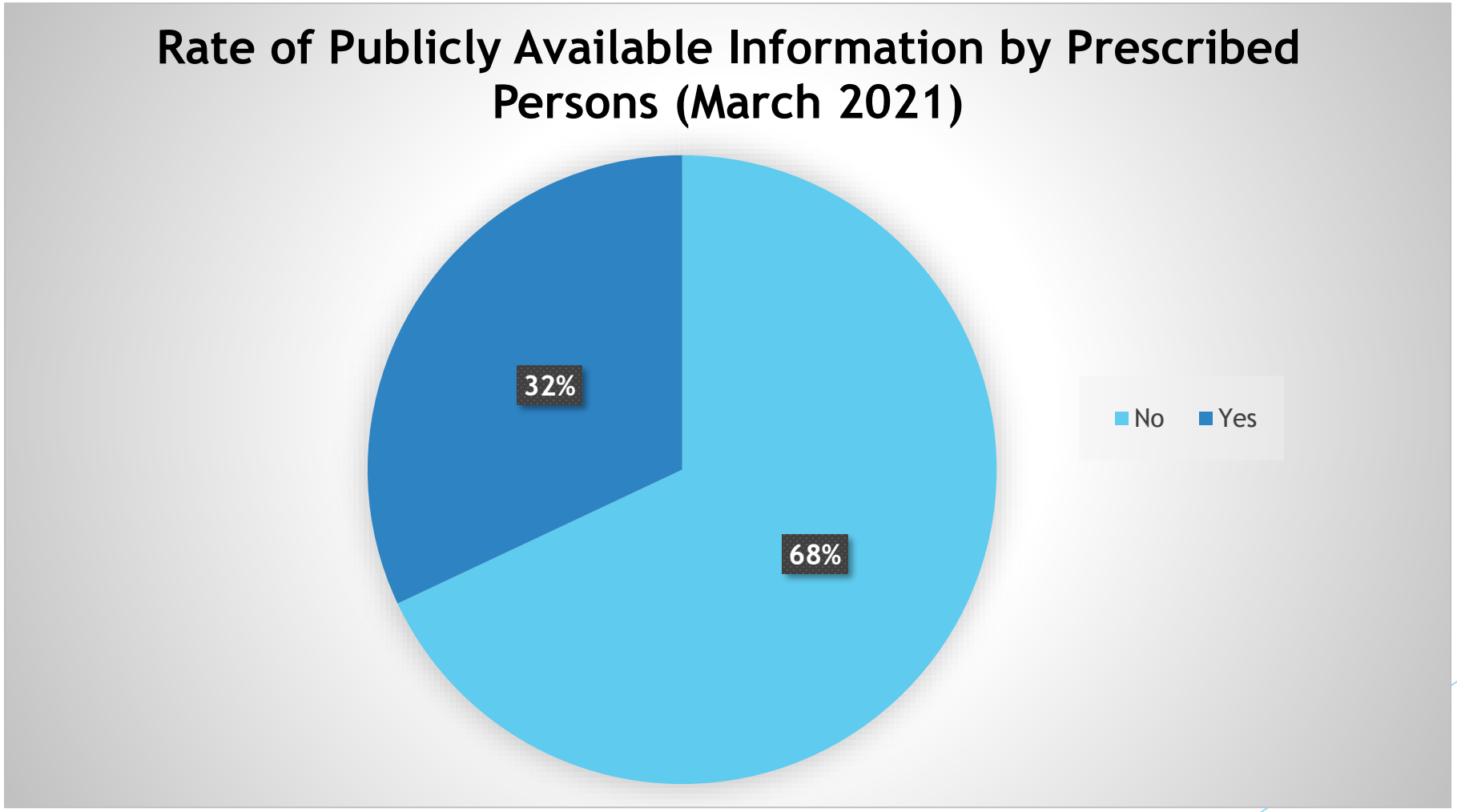
Must fall within their remit.

6(c). Have prescribed persons received training? (n=19)

6(c). Have prescribed persons been adequately resourced? (n=18)



6(c). Are prescribed persons making information publicly available about their role on their website? (n=107)



3. Are protected disclosures being made to prescribed persons? (2021 Research) Annual reports: (n=93)

No. of disclosures received	No. of prescribed persons	Overall Percentage
0	46	49.5%
1	19	20.4%
2	4	4.3%
3	2	2.2%
4	5	5.4%
5	3	3.2%
6	1	1.1%
10	1	1.1%
11	1	1.1%
20	1	1.1%
22	2	2.2%
24	1	1.1%
27	1	1.1%
31	1	1.1%
60	1	1.1%
71	1	1.1%
88	1	1.1%
438	1	1.1%
3361	1	1.1%

6(c). 2022 Act

- **Threshold** for protection for disclosures to prescribed persons **unchanged** by 2022 Act
- Section 11 inserts s 7A re **external reporting channels and procedures**
- Section 10 amends s 7 of the 2014 Act and inserts '**or the Commissioner**'
- Chapter 3, 2022 Act, ss 14 & 15: **Office of the Protected Disclosures Commissioner**
- Schedule 1 inserts Sch 5 into the 2014 Act: The Protected Disclosures Commissioner

6(c). Protected Disclosures Commissioner ('PDC')

PDC established within Office of the Ombudsman and will be a prescribed person ('PP') under s 7 of the 2014 Act

Main functions:

- **Transmit** within 7 days any disclosures received under s 7 of the 2014 Act to a 'suitable person' for follow up
- If PP/suitable authority cannot be identified, Director of PDC must **follow-up diligently**
- **Support** the receipt and follow-up of disclosures made under **s 8** of the 2014 Act to Government Ministers

6(d). Third Step Disclosures

Other cases (s10, 2014 Act)

- S10(1) deals with the evidence and motive;
- S10(2) sets out four preconditions, one of which must be met;
- S10(3) deals with the reasonableness of the disclosure.

6(d). Third Step Disclosures

Evidence and motive

Section 10(1) provides that the worker must reasonably believe that:

the information disclosed, and any allegation contained in it, are substantially true;

the disclosure must not be made for personal gain; and

in all the circumstances of the case, it must be reasonable for the worker to have made the disclosure.

6(d). Third Step Disclosures

Preconditions

s 10(2) requires that one or more of the following must be satisfied:

- the worker reasonably believes that he will be subjected to penalisation by his employer if he makes the disclosure to his employer, to a prescribed person, or to a Minister;
- if there is no prescribed person, that the evidence relating to the relevant wrongdoing will be concealed or destroyed if the worker makes the disclosure to his employer;
- that the worker previously made a disclosure of substantially the same information to his employer, to a prescribed person or to a Minister in compliance with the 2014 Act; or
- the relevant wrongdoing is of an exceptionally serious nature.

4. Third Step Disclosures

- **Reasonableness of the disclosure**
- s 10(3) provides that regard must be had in particular to the following:

(i) the identity of the person to whom the disclosure is made;

(ii) the seriousness of the relevant wrongdoing in specific circumstances;

(iii) whether the relevant wrongdoing is continuing or is likely to occur in the future in specific circumstances;

(iv) if a disclosure of substantially the same information was made to specific persons and any action which that person has taken or might reasonably be expected to have taken as a result of the previous disclosure;

(v) if a disclosure of substantially the same information was made to the worker's employer or responsible person, whether in making the disclosure to the employer the worker complied with any procedure the use of which by the worker was authorised by the employer.

6(d). 2022 Act, s 13 substitutes new s 10

- (a) the worker has **previously made a disclosure of substantially the same information** in the manner specified in section 6, 7 or 8, as the case may be, but no appropriate action was taken in response to the 24 5 10 15 20 25 30 35 report within the period specified in section 6A(1)(e), 7A(1)(c), 10C(7)(b), 10D(7)(b) or 10E(1)(c), as the case may be, or
- (b) the worker reasonably believes that—
- (i) the relevant wrongdoing concerned 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) if he or she were to make a report in the manner specified in section 7 or 8, as the case may be—
- (I) there is a risk of **penalisation**, or
- (II) there is a **low prospect of the relevant wrongdoing being effectively addressed**, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where a prescribed person may be in collusion with the perpetrator of the wrongdoing or involved in the wrongdoing.".

7. Penalties, s 24 inserting s 14A.

- A person who:
  - **Hinders** or attempts to hinder a worker making a report
  - Brings **vexatious proceedings**
  - **Penalises** or threatens to penalise a reporting person or facilitator; any third person connected to the reporting person any legal entity that the person owns, works for, is connected to
  - Fails to establish, maintain and operate **internal reporting channels**

- *Summary conviction*: Class A fine or imprisonment up to 12 months
- *Indictment*: Fine not exceeding **€250,000** and/or imprisonment up to 2 yrs

7. Penalties, s 24 inserting s 14A

- A person who breaches the **duty of confidentiality** regarding the identity of reporting persons
  - *Summary conviction*: Class A fine or imprisonment up to 12 months
  - *Indictment*: Fine not exceeding **€75,000** and/or imprisonment up to 2 yrs

- A reporting person who makes a report containing any information that he or she **knows to be false** commits an offence.
  - *Summary conviction*: Class A fine or imprisonment up to 12 months
  - *Indictment*: Fine not exceeding **€100,000** and/or imprisonment up to 2 yrs

7. Penalties, s 24 inserting s 14A

- Personal liability for anyone (being a director, manager, secretary or any other officer of the body corporate) for an offence committed with their consent or connivance of or to be attributable to any neglect on their part.

2nd European Conference on Whistleblowing Legislation

10-11 September 2022, University of Göttingen, Germany

The New Whistleblowing Laws of France

Christina KOUMPLI, Maître de conférence en droit public

Avignon Université, LBNC

The New Whistleblowing Laws of France, transposing EU Directive 1937/2019

- Organic law no. 2022-400 of 21 March 2022 aimed at **strengthening** the role of the Human Rights Defender in the field of whistleblowing (*LOI organique n° 2022-400 du 21 mars 2022 visant à renforcer le rôle du Défenseur des droits en matière de signalement d'alerte*)
- LAW No. 2022-401 of 21 March 2022 aimed at **improving** the protection of whistleblowers *(LOI n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte)*
- Into force since 01/09/2022

to what extent this new legal framework really improves the protection of whistleblowers in France ?

Answering by…

Amendements of the protection BEFORE the report

1. the broadening of the definition of whistleblower (WB)
2. the extension of the protection to other persons
3. simplification of reporting channels
4. qualification of the WB by the Defender of Rights

Amendements of the protection AFTER the report

1. *Stricto sensu* protection – novelties
2. Legal obligation to *treat* the internal report

THE FRENCH LEGAL FRAMEWORK BEFORE DIRECTIVE 2019/1937/EU

Progressive, scattered, sectoral protection 1980-2016

- Act of 13 November 2007 protecting private sector employees who report acts of corruption observed in the course of their duties ;
- the law of 29 December 2011 concerning the reporting of facts relating to the safety of medicines and health products ;
- the law of 16 April 2013 concerning the reporting of facts relating to a serious risk to public health or the environment;
- the law of 6 December 2013 protecting a person, from the public or private sector, who has reported or testified to facts constituting an offence or a crime.
- Act No. 2005-843 of 26 July 2005 amended article 6 bis of the Act of 13 July 1983 on the rights and obligations of civil servants by providing for the protection of civil servants who report acts constituting discrimination on grounds of sex (L. 131-12 of the CGFP);
- the law of 29 June 2016 creating protection for public officials (as well as military personnel) reporting conflicts of interest;

SAPIN 2 LAW (No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life)

- Creation of a General WB STATUS composed by
  1. **A commun definition**
  2. **A *stricto sensu* protection :**

- Any action taken against the whistleblower is null and void
- Criminal liability in case of violation of a professional secret (except medical secret, secret between client and lawyer, national defence secret)
- Guarantee of confidentiality (of identities and of information)
- Civil and criminal sanctions against the employer who acted retaliatory measures
- Protection against all retaliation forms, direct or indirect, in the context of work with shifting of the burden of proof
- Suspensive appeal following dismissal - including in the case of a short-term contract.

"the status of whistleblowers faces a contradiction: while the Sapin 2 law encourages whistleblowing by affirming the existence of high guarantees for whistleblowers, the protection and support for whistleblowers remain weak in practice, sometimes exposing whistleblowers to great difficulties".

French National Assembly, *Evaluation report*, *7 July 2021*

Assemblée Nationale, Rapport d'information n°4325 sur l'évaluation de l'impact de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite « loi Sapin 2 »

I. The amendements to the protection of the reporting person BEFORE the report

Broadening the definition of whistleblower
rationae personae and *rationae materiae* remarks

2016 Sapin 2 – art. 6

"A person who discloses or reports, in a ~~disinterested way~~ and in good faith, a crime or offence, a ~~serious and manifest violation~~ of an international commitment regularly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law or of regulations, or a threat or harm of which ~~he or she has personal knowledge~~.

2022 – Sapin 2 – art. 6

"A whistleblower is a natural person who reports or discloses, without direct **financial consideration** and in good faith, **information** concerning a crime, an offence, a threat or harm to the general interest, a violation **or an attempt to conceal a violation** of an international commitment duly ratified or approved by France, of a unilateral act of an international organisation taken on the basis of such a commitment, of the law of the European Union, or of the law or regulations. **When the information was not obtained in the context of the professional activities mentioned in Article 8(I), the whistleblower must have had personal knowledge of it.**"

The extension of the protection to other persons

- **facilitators**, defined as any natural or legal person under private law with “not for profit purpose” who assists a whistleblower in making a report or disclosure;
- **natural persons in contact with a whistleblower** who are at risk of retaliation in the context of their professional activities by their employer, their client or the recipient of their services **(colleagues or relatives);**
- **legal entities controlled by the whistleblower**, for which he or she works or with which he or she is in contact in a professional context

Art. 6-1 Sapin 2 Law

"Where an alert or public disclosure has been made **anonymously**, the whistleblower whose identity is subsequently revealed shall enjoy the same protection.
Art. 7-1 Sapin 2 Law

INTERNAL CHANNEL from now on open to

- staff members and external and occasional collaborators (Sapin 2 -2016), but also to
- persons whose employment relationship has ended, where the information was obtained in the course of that relationship,
- and to persons who have applied for employment with the entity concerned, where the information was obtained as part of that application;
- To shareholders, partners and holders of voting rights in the general assembly of the organization;
- To the members of the governing body of the entity;
- To the co-contractors of the entity concerned, their subcontractors or, in the case of legal persons, to the members of the administrative, management or supervisory bodies of such co-contractors and subcontractors and to the members of their staff.

Simplification of reporting channels - art. 8 Sapin 2 Law

"Any whistleblower, as defined in Article 6(I), may also report, either after having sent an internal report under the conditions provided for in Article 6(I), **or directly** ..." to (art. 8-I)

EXTERNAL AUTHORITIES (art. 8-II)

- certain authorities designated by a decree of the Council of State, or
- the Defender of Rights, who will refer the reporting person to the authority or authorities best placed to deal with it,
- or to the judicial authority
- or to an institution, body or agency of the European Union competent to collect information on violations falling within the scope of the Directive of 23 October.

Public disclosure can only be made

- either following an external or internal report
- or by the existence of a serious *and* imminent danger that needs to be proven
- or because reporting to the external authorities would entail a risk of retaliation or would not allow the illegal facts of the disclosure to be effectively stopped.

Art.8 –III Sapin 2 Law

Simplification of channels' hierarchy : YES
Absence of any hierarchy : NO

The internal channel is not compulsory but highly recommanded

- Art. 33 and 47 Directive
- Art.8-I Sapin 2 Law

recommends the use of the internal channel, in particular,

"where reporting persons believe that the breach can be effectively addressed within the relevant organization, and that there is no risk of retaliation"

The amendements on Human Rights Defender's role

2016

- **Creation of a specific "mission of orientation and protection of whistleblowers"**
- Limits :
- Is the HRD an external authority ?
- Impossibility to follow up on the report
- Paradox : **unable to grant the status of whistleblower but obliged, as the institution in charge of orientation, to qualify the reporting person in order to be able to advise him or her**

2022

- Not an external authority but a pivotal one
- External authority only on matters like descrimination and children abuse (proper competences)
- expressly **informational and advice role**
- no longer only to "watch over" the rights and freedoms of whistleblowers, but **to "defend" them**
- **assistant in charge of support for whistleblowers designated by the Prime Minister**

Advisory opinion on reporting person's qualification as a WB in termes of art. 6, Sapin 2 Law

II. The amendements to the protection of the WB AFTER the report

Stricto sensu protection - Sapin 2 Law - *improvements*

- Nullity of retaliation, Article 10-1-II
- Exemption from civil or criminal liability for obtaining and storing confidential information, Article 10-1
- Confidentiality and protection of personal data (of identities and of information), Article 9
- Civil and criminal sanctions against perpetrators of retaliation
- Suspensive summary proceedings following a dismissal (fixed-term contract too), Article. 12
- reversal of the burden of proof, Article 10-1-III
- exemption from (civil) liability for reporting or disclosure, Article 10-1
- assistance for criminal legal proceeding costs, Article 10-1-III-A.2
- temporary financial assistance Article 14-1
- possibility of requesting psychological support Article 14-1
- topping up the personal training account. Article 12 §2
- Detailed definition of retaliation, Article 10-1-II
- Reputational sanction against those obstructing reporting , Article 13-1
- nullity of any renunciation or other de jure or de facto limitation of the protection Article. 12-1

Internal ***treatment*** of alerts : a ***legal*** obligation from now on ?

- Internal whistleblowing channel becomes a subsidiary channel for whistleblowers after the transposition of the directive, but its implementation by public and private entities now becomes a priority.
- No more a *collecting* procedure but also a *treatment* one : is that new?
- The decree of 2017 seems having integrated the law + the new decree about internal channel is much awaited
- Novelties:
  1. Also compalsory for small and medium sized compagnies (less thant 250 employees)
  2. Possibility to share the mechanism among several bodies
  3. Municipalities and their public establishements can also share the internal treatment mechanism

Is there a real strengthening of whistleblowers protection in France after transposition of EU Directive ?

- substantial improvements (ex. HRD advisory opinion on WB qualification, legal remedies to cover the financial impact of reporting)
- symbolic improvements (ex. report without financial consideration vs desinterested manner)
- risky improvements (ex. without personal knowledge)

It is important to ensure that the proceduralization of WB protection does not annihilate the essence of this protection, which is, after all, the freedom of expression, a fundamental freedom

Thank you for your attention !

Christina Koumpli 10/09/2022 ©

UNIWERSYTET WARSZAWSKI

The New Whistleblowing Laws of Poland

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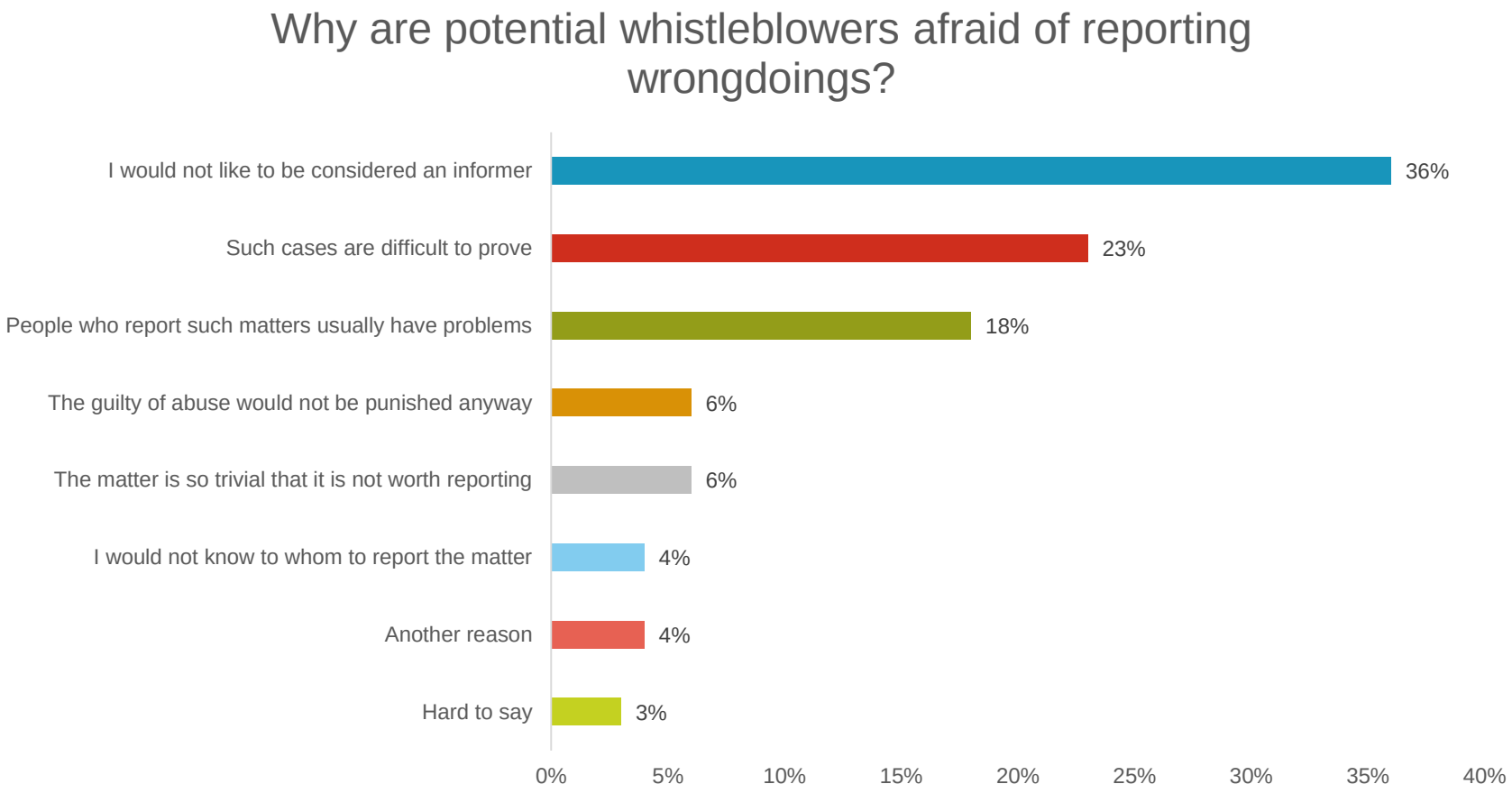
UNIWERSYTET WARSZAWSKI

Socio-cultural context

- In the Polish culture, whistleblower is associated with the informer (Polish word “donosiciel”) that is understood in the historical context as a man who, intending to harm someone, provided the authorities with information (foreign authorities or communist authorities).
- The social standard, which is stigmatizing informers is a characteristic element of the Polish national culture in the sphere of ethics and attitudes.

Socio-cultural context



Batory Fundation research: Makowski, G., Waszak, M., Gnębieni, podziwiani i… zasługujący na ochronę. Polacy o sygnalistach, Warszawa 2019.

UNIWERSYTET WARSZAWSKI

Whistleblowing law in Poland – general context

- There is no specific legislation on whistleblowing in Poland.
- Labour law provisions are applied.
- Current Polish regulations applicable to whistleblowing are ineffective as whistleblowers may not expect adequate legal protection.
- Draft act on the transparency of public life (2018) and the draft act on the liability of collective entities (2019, IX 2022).

The new draft act transposing the Directive

- Last version from July – Law on the protecion od persons reporting breaches of law/
- General assesment: the draft law does not go beyond the minimum standards.
- The Directive has been transposed mainly literally.
- 2 months vacatio legis
  - Implementation of the obligation to establish an internal procedure by private entities with at least 50 and less than 250 workers shall take place by 17 December 2023.

Material scope

- Material scope extended to:
  - violations of national law within the areas of law listed by the Directive;
  - financial interests of the state treasury;
  - financial interests of local government unit.
- Legal entities may extend the material scope of their internal whistleblowing procedures on breaches of internal regulation and ethical code.
- Exemptions from the material scope:
  - national security;
  - classified information.

Material scope – potential improvements

Potential improvements:

- extend to all violations of law (national, UE) and information about threat and damage to the public interest;
- include reports of labour law breaches;
- establish a channel for reporting defence and security irregularities.

Personal scope

Definition: the Act applies to a natural person who reports or publicly discloses information about a violation of the law obtained in a work-related context

Open catalog of reporting persons - additionally protected are:

- temporary workers;
- persons providing work on a basis other than employment contract, including civil law contract;
- interns;
- public officers (e.g. officers of the Police, the Internal Security Agency, the Intelligence Agency, Border Guard);
- soldiers.

Personal scope

- **Protection of third parties:** protection is granted additionaly to legal persons and organisational units assisting the whistleblower, which includes non-governmental organisations providing support to whistleblowers.
- **Conditions for protection of reporting persons:** no explicit requirement to act in accordance with the provisions on internal and external reporting channel;
- **Recomendations:** extend protection measures to persons who are believed or suspected to be a reporting person, and who suffered retaliation, as well as to persons who are about to, or intend to, make a whistleblowing report.

Protection measures

- **General prohibition of retaliation:** two exemplary lists of retaliatory actions separately for employees and for persons working on other basis.
- **Full compensation for whistleblower against whom retaliation has been committed (art. 14)** no minimum amount specified.
- *A person who has suffered damage due to the deliberate reporting or public disclosure of false information (..) shall be entitled to compensation from the reporter who made the deliberate reporting or public disclosure of at least the average monthly salary in the business sector in force on the date of the reporting (art. 15).*

Protection measures

Procedural measures:

- shifted the burden of proof on employer;

Article 12(3) of the Polish Draft Law*: The employer bears the burden of proof that the action taken, as referred to in paragraphs 1 and 2 , is not retaliatory.*

- no dedicated interim relief.

Supportive measures:

- free information and advice from Ombudsman;
- no specific psychological support or compensation funds.

Internal whistleblowing

- Obligation for legal entities with 50 or more workers except municipalities with fewer than 10 000 inhabitants.
  - Legal entity with fewer than 50 workers and municipalities with fewer than 10 000 inhabitants, **may establish** internal procedure.
- Internal procedure may indicate wrongdoings that may be additionally reported (regarding internal regulations or ethics).
- A whistleblower is informed of the receipt of the notification and feedback only if he/she has provided a contact address.
- Internal procedure should specify system of incentives to be used.

External whistleblowing

An external notification can be made **to the Ombudsman or a public authority.**

- Feedback contact with the whistleblower only if he/she provided contact address.
- No obligation to receive and follow up anonymous report.
- Public authority shall transmit the external notification without delay, but no later than 14 days after the date of notification (in justified cases no later than 30 days), to the public authority competent to follow up the notification (reasonable time?).
- Competent authorities can decide to close procedures regarding repetitive reports which do not contain any meaningful new information on breaches compared to a past report.

Ombudsman as a whistleblowing authority

- receive external reports;
- carry out an initial review of them and forward them to the public authorities competent for follow-up;
- ensure public access to information on the rights and remedies of whistleblowers, third person (connected to whistleblowers or facilitators) and person concerned;
- provide advice for abovementioned persons;
- provide information on the authorities competent to protect reporting persons from reprisals and, to assist them in contacting such authorities.

Sanctions

- Person who hinder reporting shall be subject to a fine or the penalty of restriction of liberty.
- Person who retaliate against whistleblower (third persons..) shall be subject to a fine or the penalty of restriction of liberty or deprivation of liberty for up to 2 years
  - if applies more than 2 retaliatory actions - penalty of deprivation of liberty for up to 3 years.
- Person who breach the duty of confidentiality shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.
- Whoever knowingly made a report or public disclosure of false information or assisted in making a report of false information, shall be subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 3 years.
- **Whoever, has not established a procedure for internal reporting or the established procedure for internal reporting shall be subject to a fine.**

Conclusions

Advantages of the draft act	Disadvantages of the draft act
wide catalog of reporting persons	narrow material scope
internal procedure may include reports of infringements regarding internal regulations or ethics	no obligation to receive annonymous reports
sanction for not establishing a whistleblowing channel	no dedicated interim relief
Ombudsman as a special whistleblowing authority	2 months vacatio legis

Conclusions

- The draft act meets the minimum requirements of the Directive.
- Differentiation of protection employees and other working people.
- Potential improvements
  - extending the scope of material application to violations law
  - allow the anonymous reporting
  - interim relief – eg. remuneration until the legal claim has been adjudicated
- Education campaign

Thank you for your attention!

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The New Whistleblowing Laws of Sweden

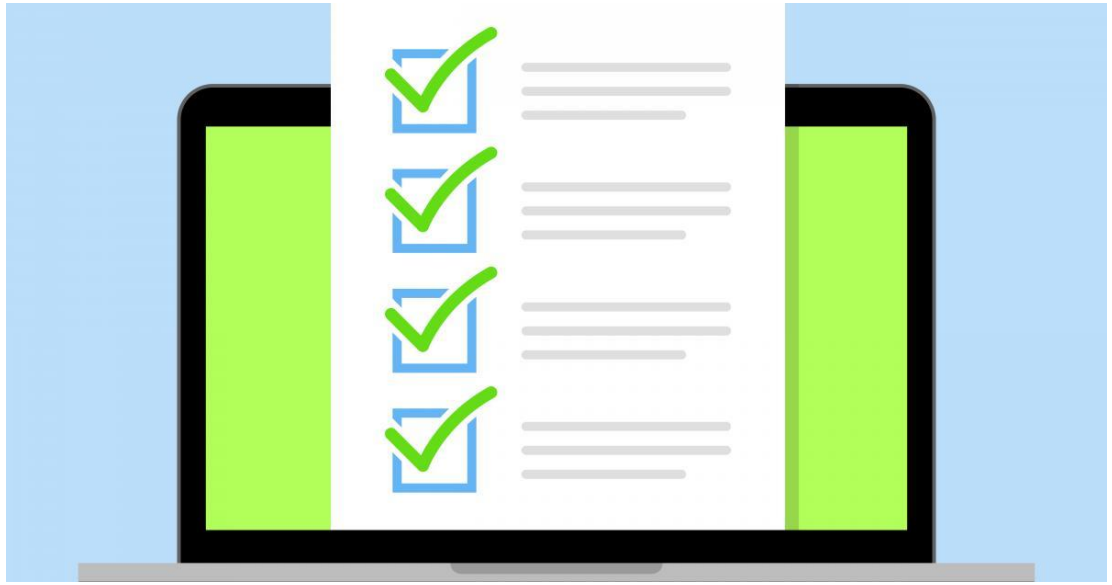
2nd European Conference on Whistleblowing Legislation – Europe's New Whistleblowing Laws – Commonalities, Differences and Expected Impact

20-22 September 2022, University of Göttingen

Katarina Fast Lappalainen,

Assistant Professor, Department of Law, Stockholm University

Disposition



1. Introduction
2. The evolution of whistleblower protection in the Swedish legal system
3. The significance of constitutional and legal culture
4. The implementation of the EU Whistleblower Directive in Swedish Law.
5. The new Swedish Whistleblower Act of 2021.
6. Practical implementation
7. Concluding remarks.

Corruption in Sweden

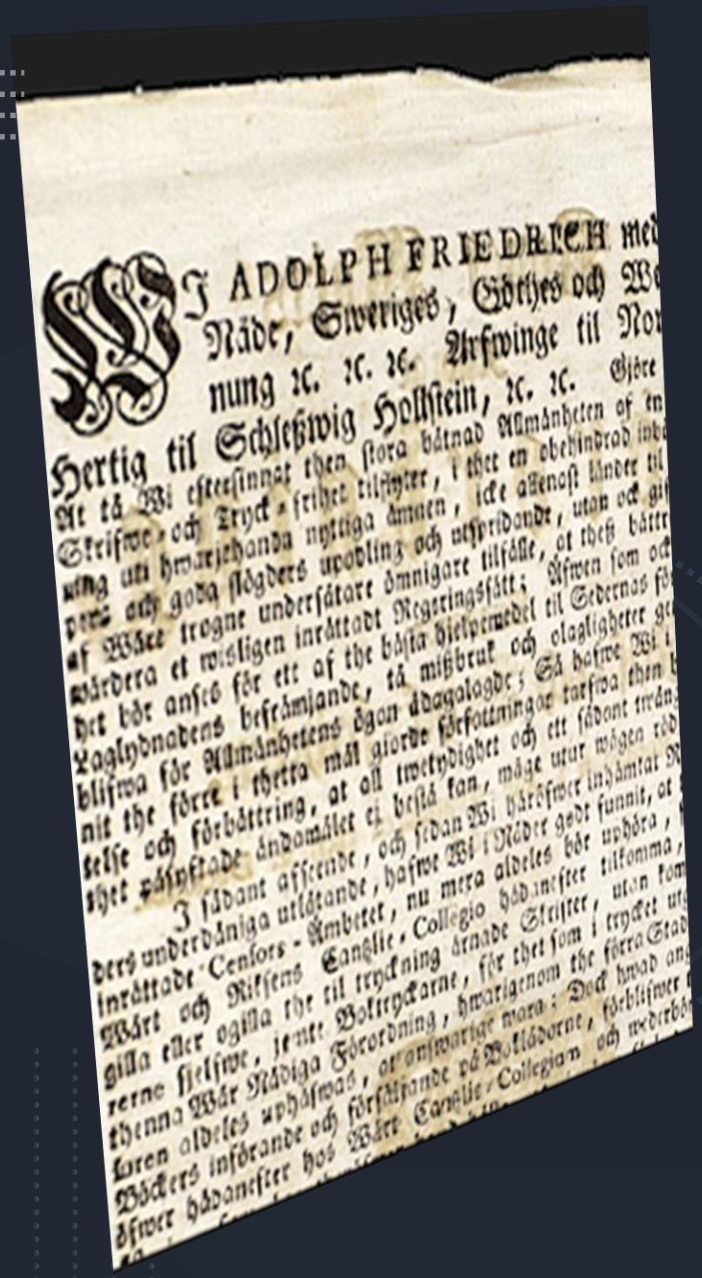
- Corruption Perceptions Index Score 85/100, ranking 4/180.
- Clear trend towards lower scores and ranking over the past decade.
  - Decentralization of the public sector (welfare sector in.p.).
  - Reactive approach to provision of information (Open Knowledge)
- Corporate corruption.
  - Court cases regarding bribery – value of bribes increased 600 % from 2020 to 2021 (Institutet mot mutor).

The importance of whistleblowers…

- The decentralization and ”privatization” of the public sector has changed the legal landscape.
- Introduction of specific and general whistleblower laws.

The evolution of whistleblowing laws and provisions in Sweden – an overview

- Constitutional protection of informants, Freedom of the Press Act (1766, 1949).
  - Link to ideals of transparency of government and anti-corruption efforts.
- Reporting duties, e.g. healthcare and social services (1938, 1998), money laundering and terrorism (2017).
- Increased protection of informants (2017)
  - Extension of the scope to employees in taxpayer funded private companies in the welfare sector.
- First Whistleblower Act 2017 (both public and private sector).
- Implementation of the EU Whistleblower Directive, December 2021.



Constitutional law and culture

Freedom of the Press Act of 1949:

- **Freedom of informants (meddelarfrihet).**
- **Rights to anonymity (criminal liabilities):**
  - Source confidentiality.
  - Prohibition to make inquiries into informant's identity
  - Prohibition of retaliation (criminal liabilities).
- **Special criminal procedure.**
  - Few court cases. Few convictions.
  - Opinions by the Chancellor of Justice and the Justice Ombudsmen.

Not always effective…

- A medical secretary wrote a letter to the editor regarding mishandling of covid by her employer, was redeployed.
- The employer (a regional municipality) had breached the prohibition of retaliation.
- The Chancellor of Justice decided to close the preliminary investigation (15 Dec 2021).
- Unlawful, but not serious enough. However, the employer received a critical opinion of its conduct.
  - Shortly hereafter the employer introduced a whistleblower function.

Decentralization of the welfare sector

- Taxpayer funded private companies provide welfare services such as schools, healthcare and social services, to a large extent.
- The FPA does not apply to employees in these companies. Citizen control regarding the use of public funds limited.
- Several scandals ocurred. Abuse, mishandling of funds, tax evasion etc.
- **Law concerning freedom of informants in certain private businesses** (*lag (2017:151) om meddelarsskydd i vissa enskilda verksamheter*) 2017:
  - An equivalent protection of informants now apply to these companies.

The first whistleblower law in brief

- A labour law re both private and public organizations.
- Permanent and temporary employees.
- Reporting of ”serious wrongdoings”:
  - conduct which reasonably can be believed to constitute a crime with a prescribed imprisonment penalty. Can also be breaches of fundamental human rights; breaches of public policy; corrupt conduct; threats to life, security and health; threats and damages to the environment; misuse of public funds; breaches of financial market regulation; breaches of an organization’s internal regulation; and more serious unethical conduct. (SOU 2014:31, p. 31).
- Protection against retaliatory tactics.
- Requirement of internal routines etc to facilitate reporting.

The implementation of the directive: A new Whistleblower Act

- Government investigation, SOU 2020:38 *Enhanced Security for Whistleblowers, Ökad trygghet för visselblåsare,* Summary in English p. 33-40. June 2020.
- Referral procedure (+ 100 referrals).
- Government proposal, Proposition 2020/21:193, *Implementing the Whistleblower Directive*, *Genomförande av visselblåsardirektivet*. May 2021.
- Adopted by the Riksdag. September 2021.
- Entry into force 17 December 2021. Transitional provisions - private companies.
- Whistleblower Ordinance (2021:949).
  - Ordinance regarding state aid regarding information and consultation to whistleblowers (2021:950).

News

- From 11 provisions to 60. No longer just a labour law.
- The requirement of ”serious” wrongdoing abolished.
- More categories of persons included.
- Freedom from liability.
- Requirement of safe reporting channels.
- Limited access to whistleblower protection systems:
  - Independent personnel covered by professional secrecy.
- Increased protection for anonymity and against retaliatory tactics.

The Whistleblower Act

- Lagen (2021:890) om skydd för den som rapporterar om missförhållanden

Ch. 1 Introductory provisions (scope of application, definitions etc.)

Ch. 2 Protection in the form of freedom from liability

Ch. 3 Protection against discouraging and retaliatory tactics

Ch. 4 Requirements in order to receive protection

Ch. 5 Internal disclosure channels and procedures for reporting and the investigation of reports

Ch. 6 External disclosure channels and procedures for reporting and the investigation of reports

Ch. 7 Processing of personal data

Ch. 8 Documentation preservation and destruction

Ch. 9 Duty of confidentiality

Ch. 10 Supervision

Scope – Ch. 1§ 2

- Wide scope.
  - Based on the assessment that it is necessary in order to implement the EU directive.
- Reporting in a ”work-related context”.
- Both Private and Public. Civil society included.

Scope: What kind of information?

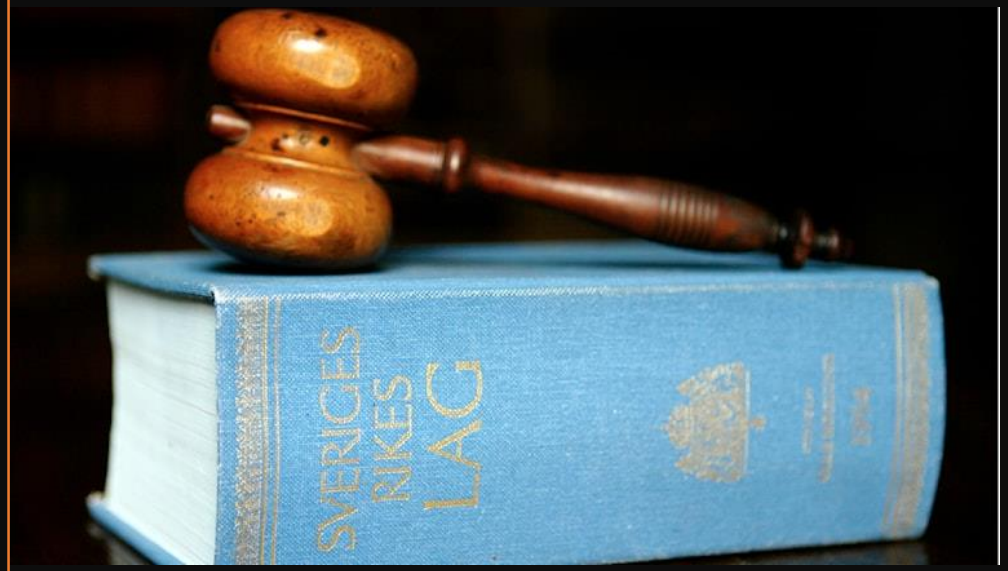
- ”Wrongdoing of public interest” (*missförhållanden*), e.g. environmental protection, mishandling of public funds or breach of a code of conduct.
- Other situations, such as the personal situation, if ”serious wrongdoing” (”breach”) is at hand (contrary to national and EU law), e.g. slave-like working-conditions.

Interpretation of ”wrongdoing of public interest”

- The individual will no longer have to make assessments regarding the severity of the wrongdoings.
- Even so, the concepts of ”wrongdoing” and ”in the public interest” are vague.
- Supportive measures will be put into in line with the directive (art. 20).

Exceptions – Ch. 1 § 3

- Information regarding the **national interest** kept within agencies within the area of defence and security (listed in the Whistleblower Ordinance (2021:949)).
- Information in the private sector, with relevance to the national interest (*säkerhetsskydd*), e.g. defence industry.



The relationship to other laws Ch. 1§§ 4-5

Subsidiary in relation to the FPA, the Public Access and Secrecy Act as well as the GDPR.

Who is entitled to blow the whistle?
”*Reporting person*”, Ch. 1 § 8

- Employee
- Job seeker
- Volunteer
- Trainee
- Other, who is or is available for conducting work, e.g. via a staffing agency.
- Sole proprietor
- Person in a leading, administrative or supervisory body.
- Shareholder
- A person who used to belong to one of the different categories and received the information in the line of work.

Freedom from liability, Ch. 2

- A breach of duty of confidentiality can be accepted if the reporting person had a reasonable ground to believe that the reporting of the information in question was **necessary to reveal the misconduct**.

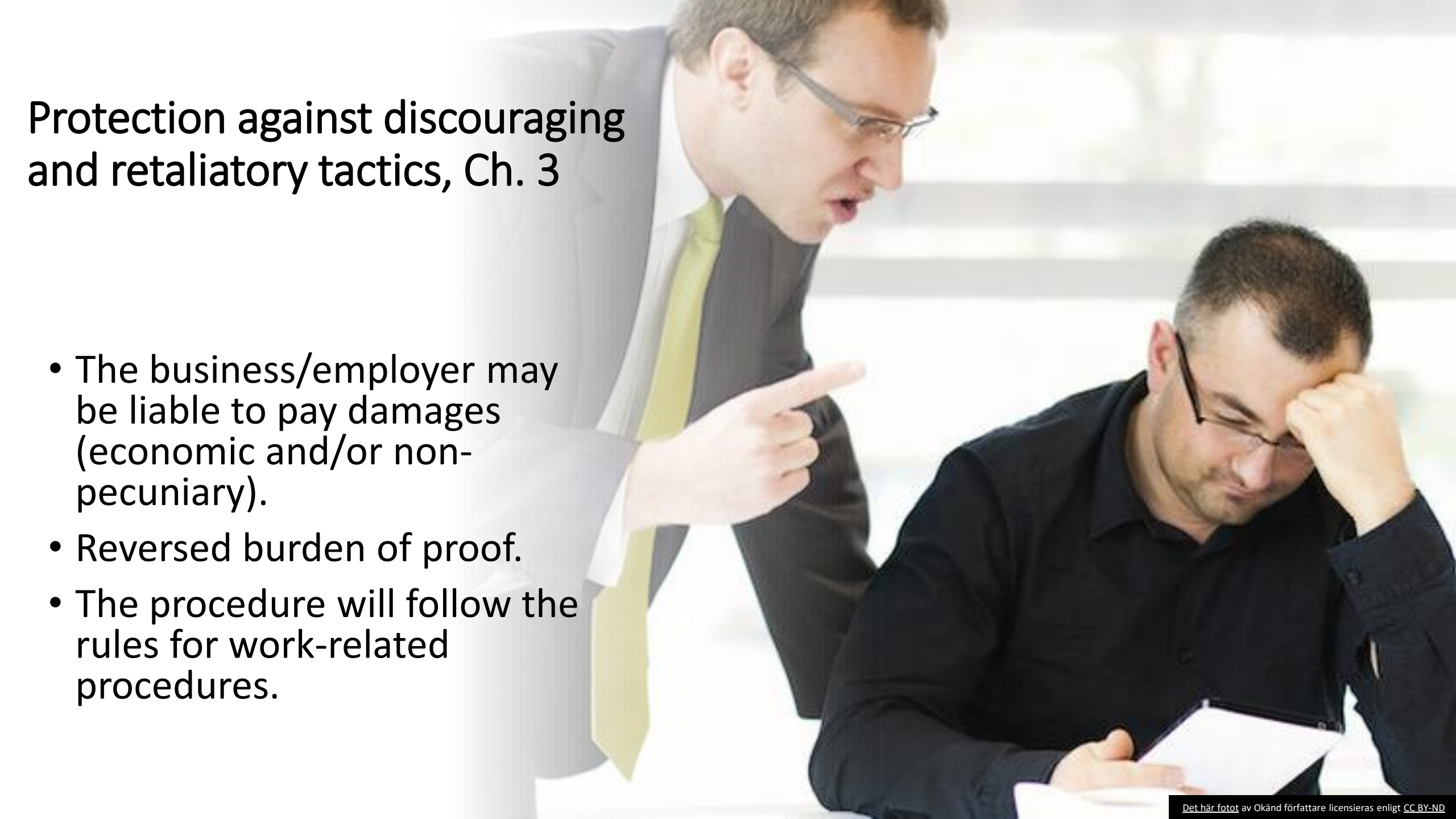
- The provisions do not cover any intentional breaches of the duty of confidentiality nor any other crimes committed in relation to the revelation of the misconduct.

Protection against discouraging and retaliatory tactics, Ch. 3

- Prohibition against preventing or trying to prevent reporting.
- Prohibition against retaliatory tactics due to reporting towards:
  - A reporting person,
  - A person assisting the reporting person, such as a safety representative.
  - Another person, such as a family member or a colleague.
  - A legal person that the reporting person owns, works for or otherwise has a connection to.
- Specific protection applies when a person considers reporting and consults his or her trade union.

Protection against discouraging and retaliatory tactics, Ch. 3

- The business/employer may be liable to pay damages (economic and/or non-pecuniary).
- Reversed burden of proof.
- The procedure will follow the rules for work-related procedures.



Requirements in order to receive protection
Ch. 4

- The wrongdoings take place or can with high degree of certainty be predicted to take place within the particular business.
- The reporting person is linked to the business according to the legal requirements in ch. 1 § 8.
- The reporting person has a reasonable ground to believe that the information is true.
- Internal/external reporting or public disclosure. Public disclosure – last resort.

Internal reporting channels, ch. 5

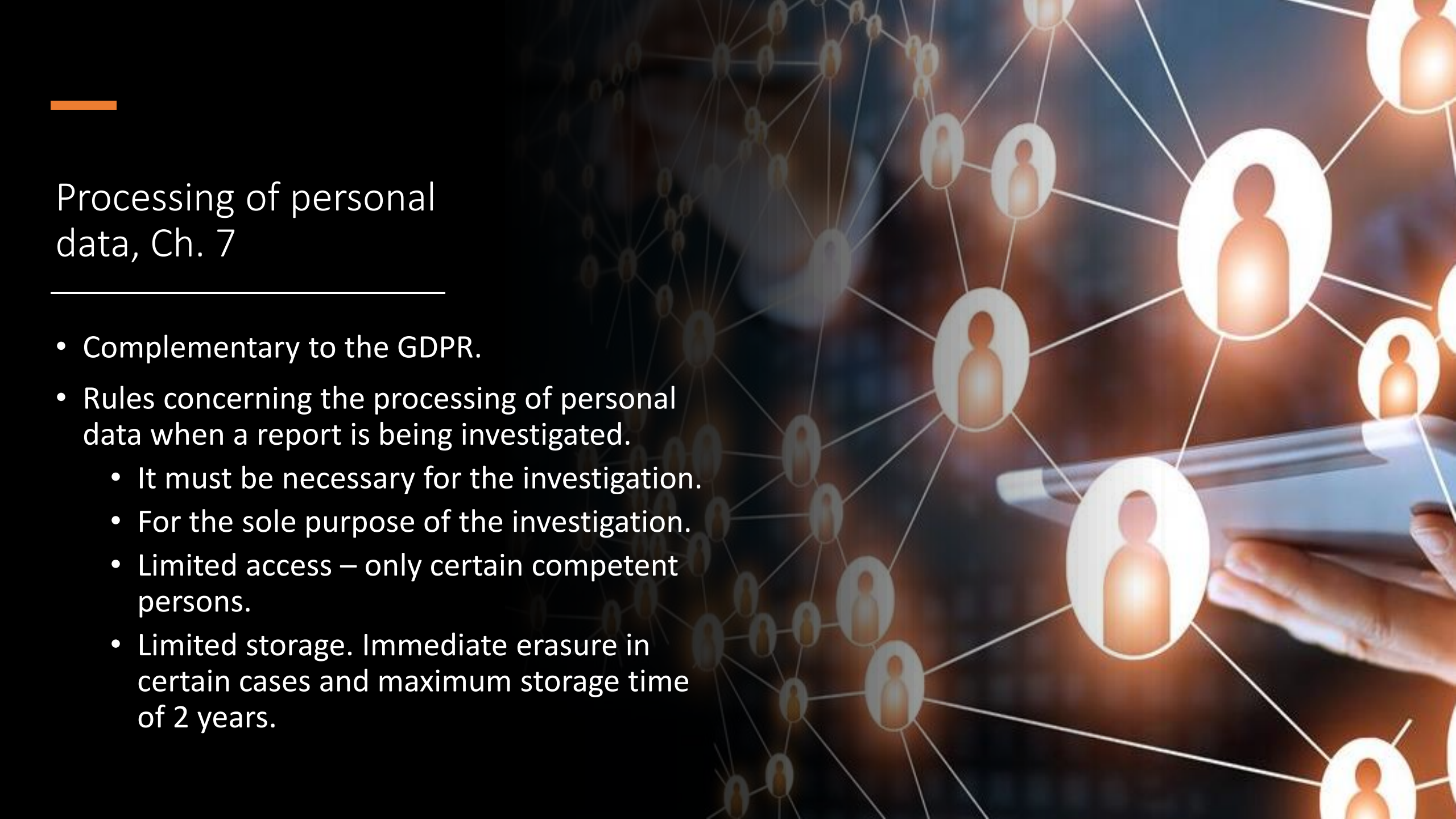
- Obligation to establish reporting channels:
  - Employers with + 50 workers.
  - Available to reporting persons under the supervision and direction of the employer.
  - Employers are obliged to choose an impartial person or department for handling the reporting channel and executing the follow-up of the reporting.
  - Employers with 50-249 workers and local authorities and regions are able to share reporting channels.

External reporting channels, ch. 6.

- Certain public authorities have been designated as competent authorities (30)
- External reporting channels and procedures for feedback and following up reports on breaches of law within the areas of material scope of the Directive.
- The Swedish Work Environment Authority has the responsibilty to coordinate the work regarding external reporting channels.

Processing of personal data, Ch. 7

- Complementary to the GDPR.
- Rules concerning the processing of personal data when a report is being investigated.
  - It must be necessary for the investigation.
  - For the sole purpose of the investigation.
  - Limited access – only certain competent persons.
  - Limited storage. Immediate erasure in certain cases and maximum storage time of 2 years.



Duty of confidentiality, Ch. 9

- Appointed impartial persons who are handling reports are covered by professional secrecy.
- In the public sector professional secrecy is regulated in the Public Access and Secrecy Act of 2009.
- Criminal liability (Ch. 20 § 3 Penal Code, breach of duty of confidentiality.
  - Fine or Imprisonment for one year.

Record keeping: documentation, preservation and destruction, Ch. 8

- Obligation to keep records.
- Obligation to protect information that can identify the reporting person or other individuals.

Supervision, Ch. 10

- The Swedish Work Environment Authority (*Arbetsmiljöverket*) has the reponsibility to supervise that employers meet the obligations in regard to establishing internal reporting channels and procedures.
- Special competent authority – 30 + competent authorities.

Powers of the supervisory authority

- Duty of the business to provide the information needed for the investigation.
- The Supervisory Authority can order the business to provide the information if it is not complying.
- The decisions of the Supervisory Authority can be contested in court.

Implementation in practice – Municipal level

- A report regarding the implementation in Swedish Municipalities (Swedish Civil Contingencies Agency, February 2021).
- Slow. A majority of municipalities had not introduced whistleblowing systems by February 2021 (date of final implementation June 2021).
- Where implementation has taken place, it varies.
  - Some have only internal functions,
  - Others also have external functions with the help of for example a law firm or a firm specializing in whistleblower protection.
  - Information to employees and the public varies. More or less encouraging.
- A need for harmonization and standards.
- Follow-ups and guidelines by the Swedish Association of Local Authorities and Regions (SALAR). Best practise.

Debate and critique

- Limited public debate – mainly focused on practical **issues.**
- Limited academic debate.

Recurring topics:

- Rule of law, legal uncertainty.
- Issues regarding the interpretation of the law.
- Complexity.

Debate and critique

Journalists:

- The freedom of informants in the FPA is more robust and the public needs to be made more aware of it.
- A risk that whistleblowers will turn to internal disclosure channels with strict secrecy rules instead of the media.

Unions:

- The law makes it too complicated for whistleblowers to assess what it takes to be protected, such as the interpretation of the public interest.

Employers:

- Secret information and trade secrets.
- Large companies need to have disclosure channels at both ”local” and group levels. Costly and deemed to be detrimental to the whistleblower.
- Less risk for damaging press leaks (organizations).
- Increased risk for false or malicious reporting.

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EU Directive on Whistleblowing

10 September 2022

WHISTLEBLOWING INTERNATIONAL NETWORK

NGOs FOR WHISTLEBLOWING

The current state of the **transposition** across Europe

Ida Nowers Law and Policy Coordinator, WIN

Overview

PROGRESS UPDATE

IMPLEMENTAION DEBATES

WHAT NEXT

WIN & the whistleblower protection **community**

WIN

32 Countries
14 Members
29 Associates
International board experts
Non-profits & practitioners

MEMBERS

Independent legal advice
Secure reporting platforms
Triage & articulation
Support services
Learning informs standards

ASSOCIATES

Investigations
Academics & research
Campaigning reforms & implementation

MOBILIZE

Resource hub
Collaboration – civil society law & policy making
<u>Cross-border protections:</u>
support groups

.

Legal Context

EU Dir 2019/1937

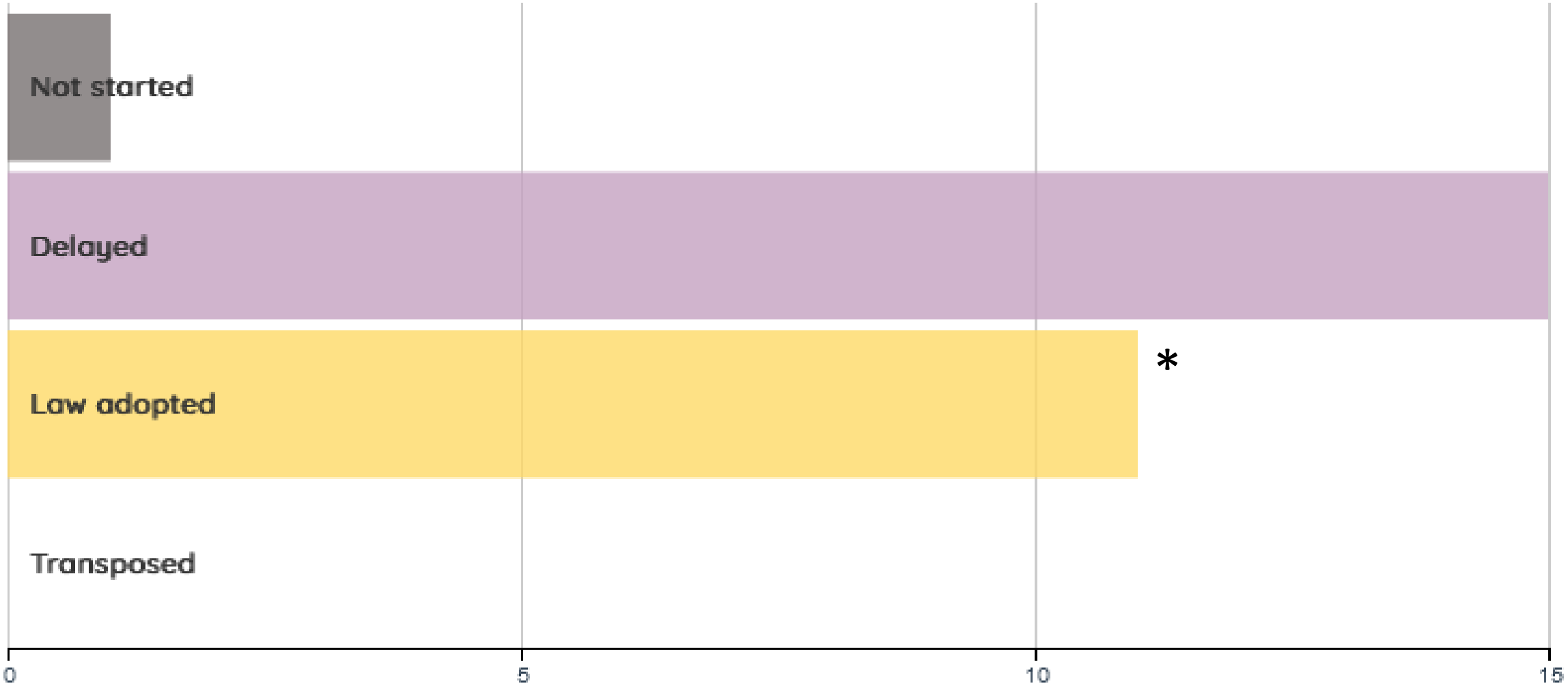
- **81%** who witness corruption do not report
- **€5.8 - 9.6 billion** p.a. public procurement
- **11** MS w. comprehensive legislation
- **17** EU mandatory reporting laws
- **Art. 10** ECHR freedom expression & media
- '*… no legal basis*' to ***'legal revolution**…'*

Source: EU (COM) 2018 Impact Assessment (116)

EU Whistleblowing Monitor

visit: www.whistleblowingmonitor.eu

STATUS OF TRANSPOSITION

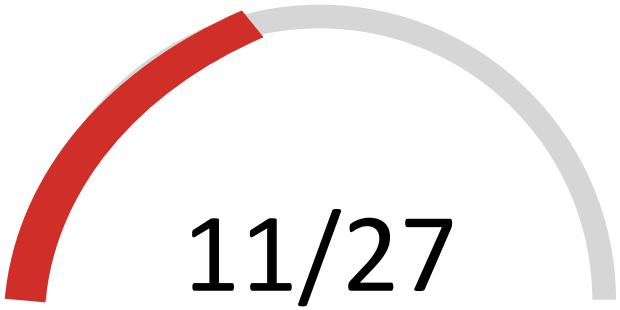


as of 09 September 2022

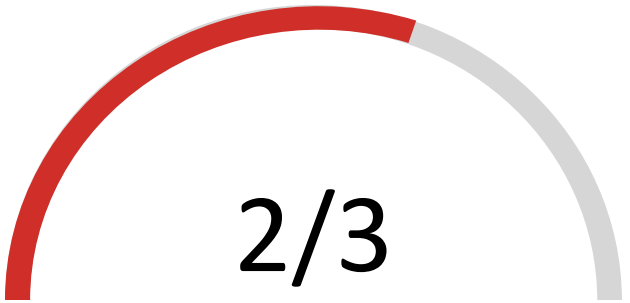
* Romania

Current status transposition

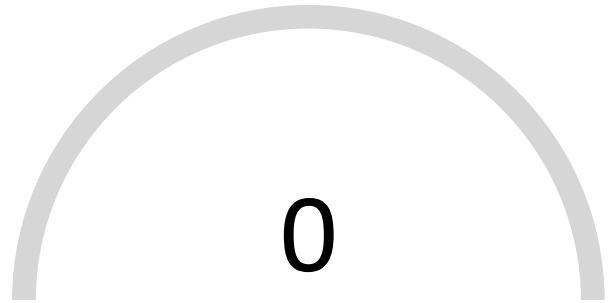
Snapshot 27 member States progress



ELEVEN LAWS ADOPTED*



16 DELAYED PROGRESS



NONE FULLY TRANSPOSED

Delayed progress

- **Nine** months, 1 days since deadline
- **Eleven** new transposition laws*
- **Twelve +** further proposals issued
- **One-year** average delay

Legislative Reforms

11 LAW ADOPTED

Croatia
Cyprus
Denmark
France
Ireland
Latvia
Lithuania
Malta
Portugal*
Romania
Sweden

10 PROPOSAL ISSUED

Austria
Belgium
Bulgaria
Czech Republic
Estonia
Germany
Luxembourg
Poland
Slovakia
Slovenia
Spain
Netherlands

CSO ‘DIY’ LAW-DRAFING

France - ‘Waserman’ Bill
Spain - Xnet template

DENMARK

‘Lov om beskyttelse af whistleblowere’

- Adopted 24 June 2021

- In force 17 December 2021

SWEDEN

’Lagen om skydd för personer som rapporterar om missförhållanden’

- Adopted 29 September 2021

- In force 17 December 2021

PORTUGAL

‘Proposta de Lei n.º 91/XIV and others’

- Adopted 26 November 2021

- In force June 2022

LITHUANIA

‘Pranešėjų Apsaugos Įstatymas’

- Adopted 16 December 2021

- In force 15 February 2022

MALTA

‘ATT sabiex jemenda l-Att dwar il-Protezzjoni ta’ Informatur, Kap. 527’

- Adopted 14 December 2021

- Published 18 December 2021

CYRPUS

‘Ο περι της προστασιασ προσωπων που αναφερουν παραβιασεισ του ενωσιακου και εθνικου δικαιου και αφορουν το δημοσιο συμφερον νομοσ’

- Adopted 20 January 2022

- Published 4 February 2022

LATVIA

‘Trauksmes celšanas likums’

- Adopted 20 January 2022

- In force 16 February.2022

FRANCE

‘’Proposition de Loi visant à améliorer la protection des lanceurs d’alert’

- Adopted 15 February 2022

- In force 01 September 2022

CROATIA

'O Proglašenju Zakona O Zašiti Prijavitelja Nepravilnosti’

- Adopted 15 April 2022

- In force 23 April 2022

ROMANIA

'PL-x nr. 219/2022 Proiect de Lege privind protecţia avertizorilor în interes public’

- Adopted 29 June 2022 – but -

- Sent back to Parliament 28 July 2022

IRELAND

‘Protected Disclosures (Amendment) Bill 2022’

- Adopted 21 July 2022

- In force TBC - likely November 2022

Transparency & Inclusiveness

- Overall opacity but some good practice examples:
- Multi-stakeholder working groups – sharing early ‘intentions’
- Stakeholder consultation: CSOs underrepresented
- Online dedicated webpages, opinions published
- Publicizing process raises awareness and shifts cultural perception

“When those in power listen only to a few narrow interests, policy decisions are likely to benefit the few over the many. By allowing all groups affected to participate in the policy debate, decision-makers gain access to different points of view and can better assess where the public interest lies.”

TRANSPARENCY INTERNATIONAL

Hitting the mark? Cause for celebration & concern

Debates in approach

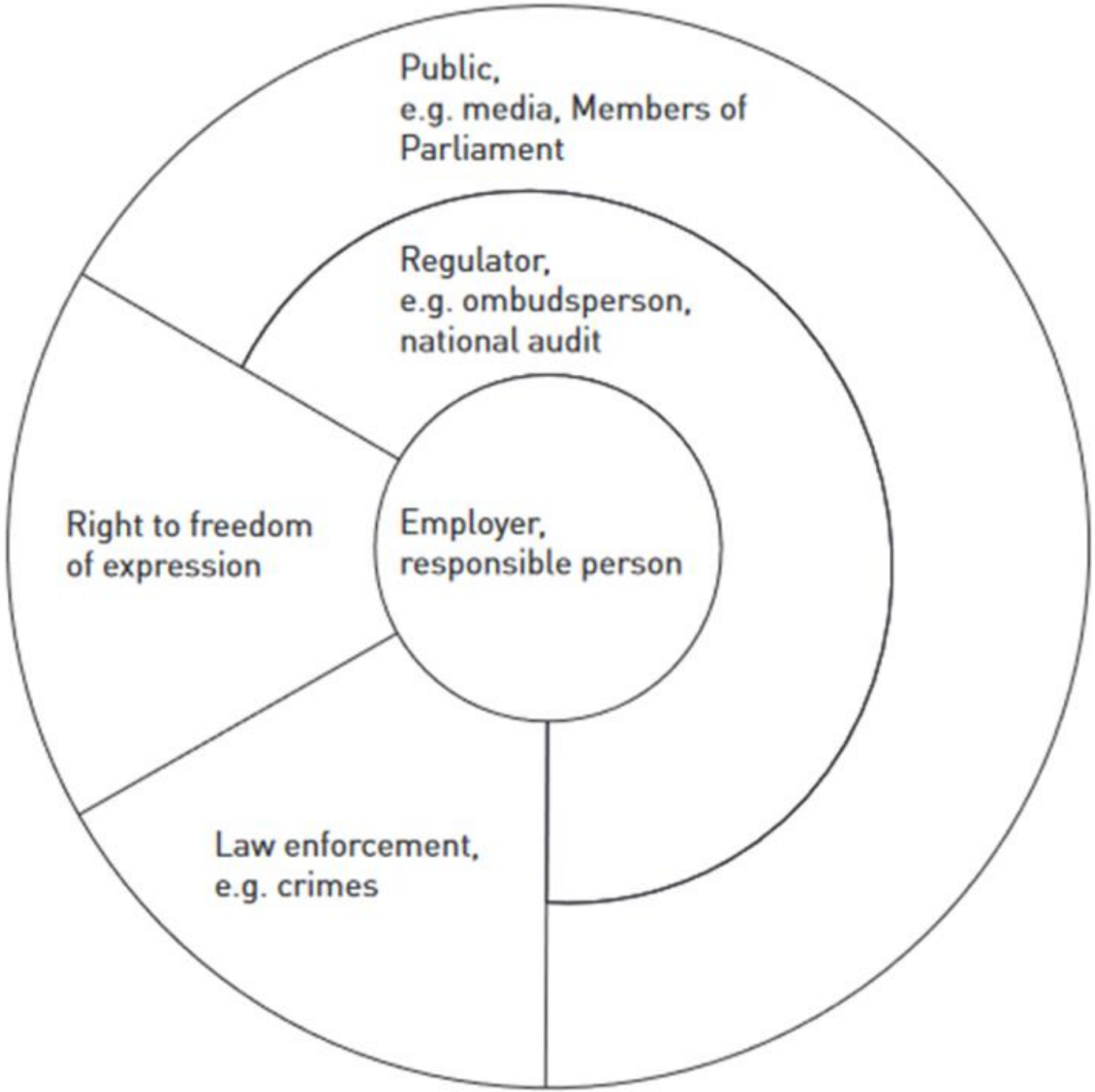
- Minimal or progressive?
- Expand material scope?
- Single v multiple competent authority?
- Anonymous reporting? Rewards?
- Restrict protection to established channels?
- Independent authority?
  (NEIWA – 28 members from 20 MS)
- E03709 EU COM Group (7th meeting)

WIN

Figure 2.2 – Source: European Commission - The role of whistleblowing in the enforcement chain

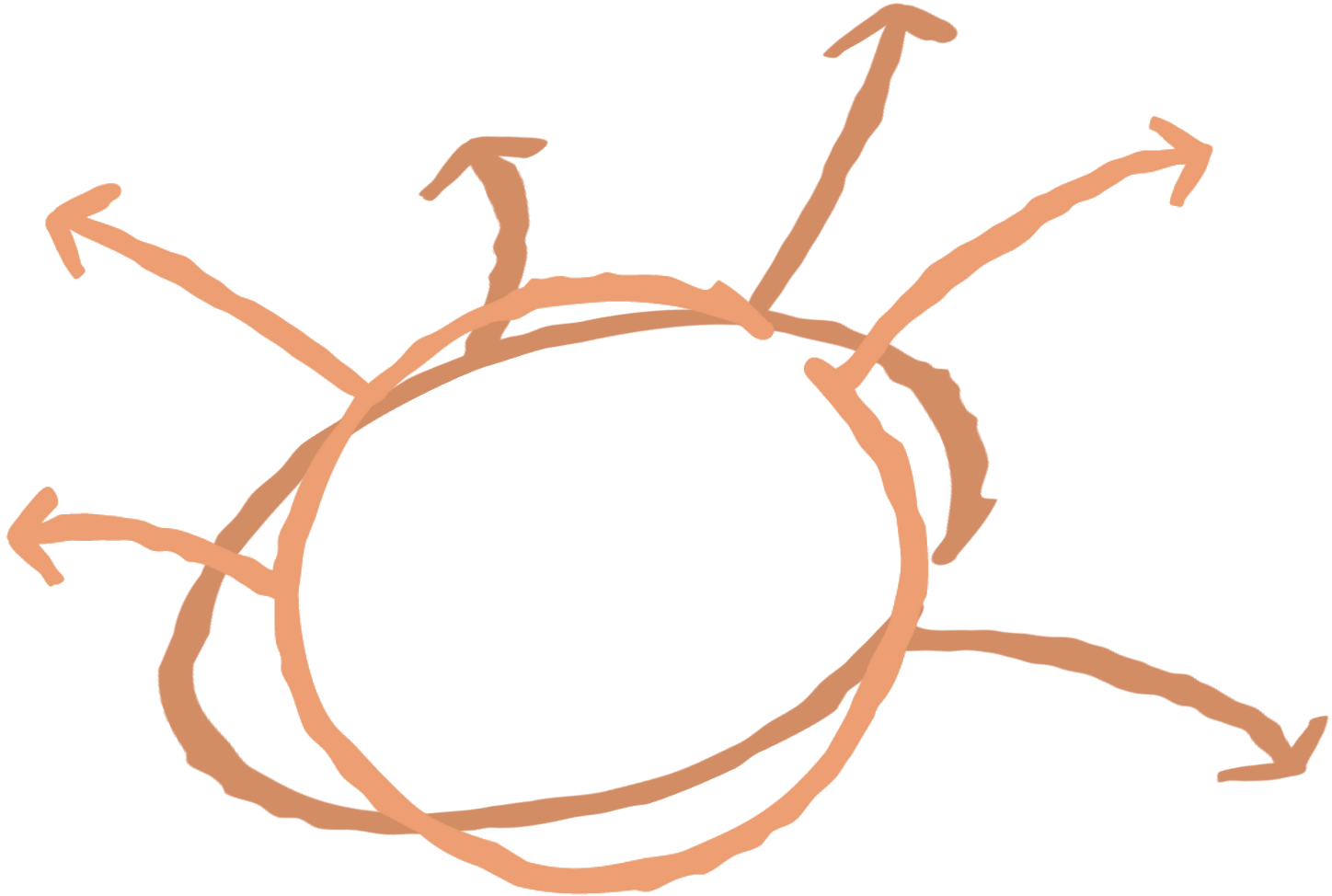
Source: EU (COM) 2018 Impact Assessment (116)

Accountability **Ecosystem**



Source: CM/Rec (2014)7

The whistleblowers **dilemma**



Example:
Concerns

PACE Rapporteur on whistleblower protection: Malta law *"not fit for purpose"*

- Formal whistleblowing units - *restrictive?*
- Structural independence - *guaranteed?*
- Burdens of proof - *'justifiable' retaliation?*

Example: Progressive

FRANCE

- Civil society initiative
- Scope: Breach law **or** *threat to public interest*
- Facilitators inc. CSOs
- Anonymous reporting accepted
- Wider **immunities** inc. acquisition
- **Sanctions** €45,000 fine / 3 yr prison
- Anti-SLAPP - legal & living costs & €60,000 fine
- **Support**: Financial & psychological inc. training costs
- DDD power inc. investigation
- Military protected (if no *harm* to national security)

Implementation considerations

ECtHR JURISPRUDENCE

Art. 10 ECHR
Halet v Luxembourg

IINTERGOV INSTRUMENTS

CM Rec 2014/7
UNCAC Conventions
OECD inc. ABR 2021

INSTITUTIONAL STANDARDS

ISO 37002
ICC 2022
ESG - PRI 2021 Report

Reporting 'wrongdoing'' = risk of harm

OTHER

Non-regression / / more favorable
Art. 19 UDHR & ICCPR
Tshwane Principles

Cross-border collaboration?

.

Global ‘legal revolution’ but are laws working?

- Emerging international best practice consensus e.g.

  UNCAC, EU (Dir) 2019/1937, OECD - Revised ABR 2021

- In 1978 no countries had whistleblowing legislation – 63 once EU Dir fully transposed

- 20 GAP principles to measure effectiveness
  - EU Dir, US & Australia: 16/20
  - Canada, Lebanon & Norway: 1/20

“…However, too often rights that look impressive on paper are only a ***mirage of protection*** *in practice. Either they do not make a difference, or in some cases, make whistleblowing more dangerous…”*

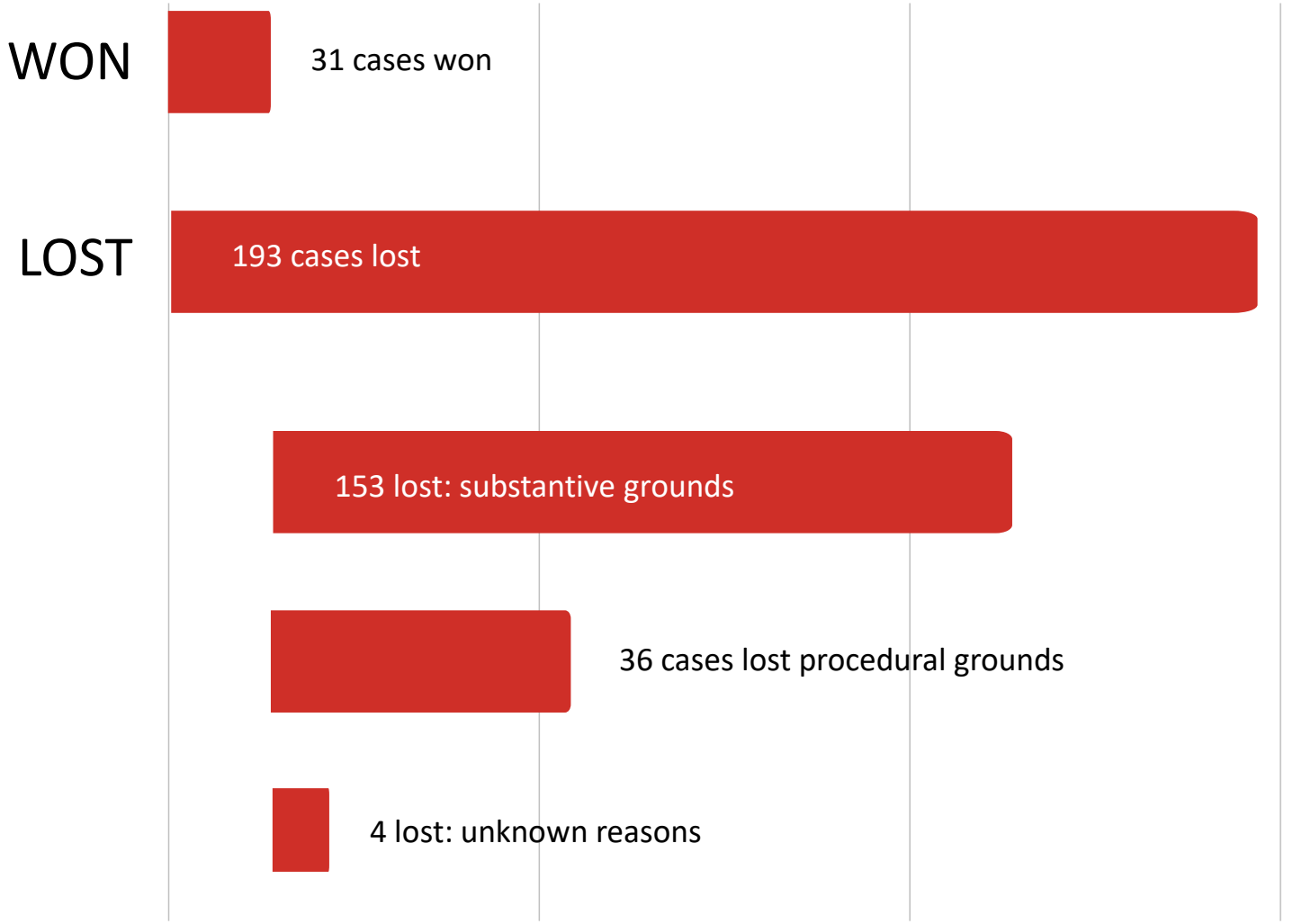
Source: IBA 2021 Global Study of Whistleblower Protection Litigation

Example:

Are laws working?

PIDA 1998 (UK) claims

Breakdown: win / lose



total cases: **224**

WIN

Source: IBA GAP 2021 Report

Understanding the whistleblowers **dilemma**

- Cost: $284,585 (4 % over 1 million)
- 67 % reported income reduction - $634,936 per whistleblower
- 63 % dismissed, 28 % resigned, 62 % demoted
- Time: 40 % spent over 1000 hours on disclosure
- 2/3 decline in mental & physical health

“Even when whistleblowers officially prevail, they often ‘lose by winning’ because of small financial awards, high costs & lengthy procedures for resolving retaliation cases” (IBA Report)

Source: Transforming whistleblower experiences report (2021)

What’s next?

Infringement Proceedings

Initiated & progressed

Direct Vertical Effect

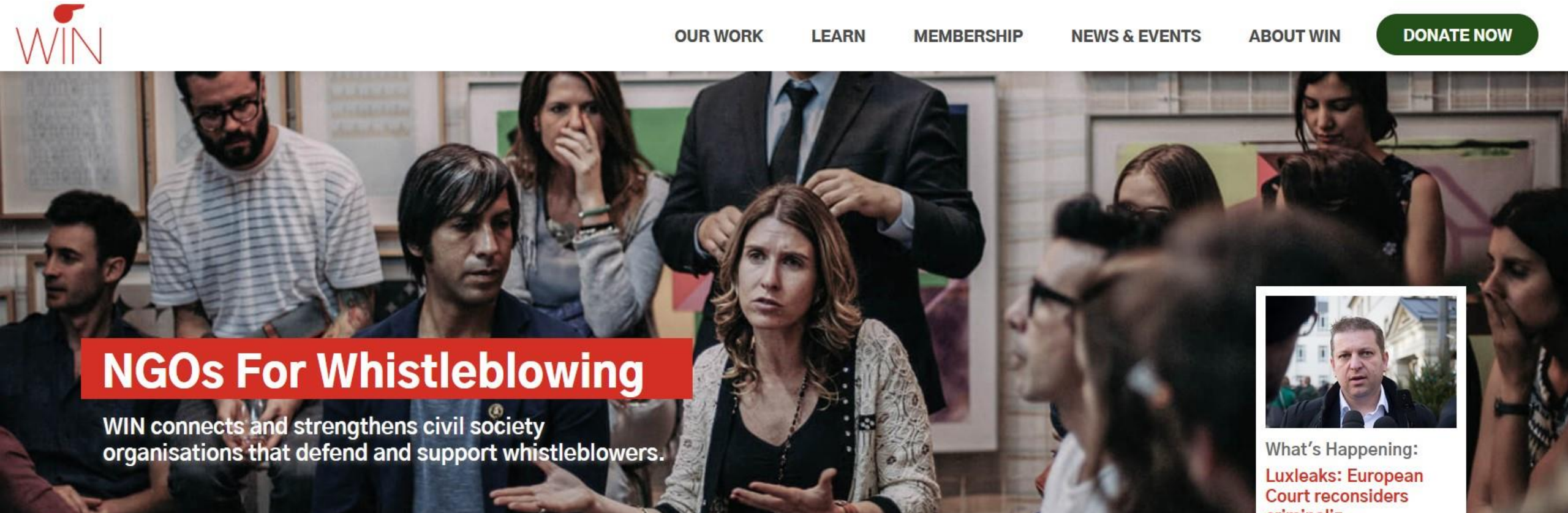
Certain provisions applicable

Implementation Evaluation

Compliance & best practice

Discussion

Contact ida.nowers@whistleblowingnetwork.org



Focus : International Cooperation on *protection* measures

Whistleblower Jonathan Taylor with his family

Cross-border considerations

- Increasing transnational nature of work globally
- Collaboration in protection or just investigation?
- Safeguard from SLAPPs & extradition - right to asylum?
- Civil society support groups insulating whistleblowers
- Networking (e.g. NEIWA) - share learnings & best practices
- Protection challenges in multi-jurisdictional cases requires policy reform

Source: Cross-border workers at Risk EUROCADRES 2018 Report & PACE Res 2300 (2019) Report

2nd European Conference on Whistleblowing Legislation

Göttingen, 10 and 11 September, 2022

Bech·Bruun

The Danish legislation process

- The draft Act proposed to Parliament on 14 April, 2021 after a phase of public hearing
- Passed after 3rd hearing 24 June, 2021
- The Parliament committee posed 61 questions to the minister of justice – an unusually high number
- Most of them centered around the possibility of protecting a whistleblower in real life

The Danish Act on Protection of Whistleblowers

- Chapter 1 (sec. 1-4) – Scope of application, definitions, no waiver or limitation of the rights and remedies of the Directive by agreement
- Chapter 2 (sec. 5-8) – Conditions for and material content of the protection of a whistleblower
- Chapter 3 (sec. 9-16) – Internal reporting channels
- Chapter 4 (sec. 17-21) – External reporting channels
- Chapter 5 (sec. 22-27) – Procedural rules for internal and external reporting channels, duty of confidentiality
- Chapter 6 (sec. 28-30) - Compensation and penalties

Entry into force

- 17 Dcember, 2021 for employers with 250+ employees
- 17 December, 2023 for4 employers with 50-249 employees

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2nd European Conference on Whistleblowing Legislation

Europe's New Whistleblowing Laws – Commonalities, Differences, and Expected Impact

The Portuguese case

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Sequence of contents

- The whistleblowing in Portugal – a short story
- Introductory comments – a global view of the Directive
- Analysis of some (of the most importante) subjects of the Directive and their transposition into the Portuguese legal system
  - Especially, the cases in which the transposition seems to be unsatisfactory

- Perspective of analysis: Labour Law

The whistleblowing in Portugal – a short story

- Despite the whistleblowing and the protection of the whistleblower is a subject that has become increasingly important in the past decade, that did not occur in Portugal
  - Scarce literature; even in the criminal field
  - Inexistence of case law: a few cases related to employees' freedom of speech have never been analyzed from the point of view of the protection of public interest, but only as reflecting a conflict between employees' personal rights and employers' economic interests/employees' contractual duties
  - Lack of awareness of such question and the composition of interests behind
  - The Directive and its transposition finally brought the subject to light; the shock of the enterprises

Introductory comments – a global view of the Directive (I)

- Directive's motivations: facilitate whistleblowing, by fighting the two main factors of deterrence – fear of retaliation; sense of uselessness
  - Large prohibition of retaliation
  - Imposition of duties of information concerning the treatment of denouncements;
- Inspiration: ECtHR's case law (some of which concerning employment relationships, both public and private)
  - Obvious points of contact
  - But also points of divergence

Introductory comments – a global view of the Directive (II)

- Points of divergence:
  - Limited material scope

The exclusion of subjects such as health and safety at work or equality/non discrimination is very questionable

- Recital 21 is not convincing: suggestions ≠ whistleblowing
- In any case, the violation of health and safety prescriptions may lead to offend the values protected under the whisteblowing Directive (v. g., safety of products)
- It is a fact that, in the field of equality and discrimination, a prohibition of discrimination stems from the Directives and national laws, but in less large terms

  - Irrelevance of the whistleblower's motivations

The approach of the Directive is pragmatic, while the ECtHR's case law reflects ethical motivations; that approach is in line with the objective of facilitating whistleblowing

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (I)

- Transposition:
  - Statute 93/2021, of 20/12 (small delay; the Directive establishes a period of transposition ending on 17/december/2021)
  - But the Statute only entered into force 180 days after its publication – 18/june/2022
  - Municipalities with fewer than 10 000 inhabitants (even with more than 50 employees) are exempt: article 8.º/6 (see article 8/9 of the Directive)

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (II)

- Material scope: article 2 – reference to the Union acts set out in the Annex
  - Dynamic reference (recital 19: "if a Union act in the Annex has been or is amended, the reference relates to the act as amended; if a Union act in the Annex has been or is replaced, the reference relates to the new act")
  - It is not easy, especially for a layperson, to identify whether or not a matter falls within the scope of matters covered by the directive
    - This problem is, however, mitigated, since the whistleblower is protected if he/she has reasonable grounds to believe that the information is true *and falls within that material scope* (article 6/1-a)
    - The Portuguese Law does not mention this, but the principle of interpretation in conformity with European law leads to that conclusion: being reasonably convinced that the subject falls within the scope of the Directive is enough
    - The Portuguese legislator followed the material scope defined in the Directive, instead of establishing a similar system for the violation of national prescriptions (which could include health and safety employment conditions and/or equality and non discrimination); some literature mentions the lack of coherence of such a system

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (III)

- Relevant violations: actual or potential breaches… (article 5/2 Directive)
  - Potential breaches: “very likely to occur”
  - The Portuguese legislator seems to have been more generous regarding potential breaches: instead of the expression “very likely to occur”, Statute 93/2021 uses the expression “breaches which *is reasonable to foresee* will be committed” (article 4.º)

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (IV)

- Personal convincement:
  - The reporting person shall have reasonable grounds to believe the information to be reported is true and falls within the scope of the Directive (article 6/1-a)
    - This excludes the cases in which the person knows the information is false (article 23/2)
    - But there is a gray zone: what about the cases in which there is an effective possibility of confirming is an information is true, but the person does not make that effort; is there a burden of confirmation? (that is, apparently, the ECtHR's position…)
    - The Portuguese legislator chose a wording that seems to be more exigent: the whistleblower only benefits from legal protection if he/she *acts in good faith* and has *serious grounds* for believing the information is true (article 6.º/1-a)
      - The exigence of serious grounds must be read as reasonable grounds;
      - The requirement of good faith seems to mean nothing more than the person shall not know the information is false

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (V)

- The Portuguese legislator sets forth that the whistleblower is responsible, in case of violation of the legal conditions for the report to be made, for damages caused to the person concerned (article 25.º) – which seems to be in conformity with the Directive
- But the national legislator extends this liability to the facilitator – joint liability (article 25.º/3); this brings doubts and difficulties:
  - It is possible that the whistleblower knows the information is false but the facilitator does not have any reason to be aware of that; and the opposite…

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (VI)

- Despite the preference for internal denoucement (recital 47; article 7/2), apparently the Directive does not seem to have embraced the stepping-stone system, according to which external denouncements would only be viable if the internal reporting route is exhausted (articles 11 and 12; recital 33)
- But the Portuguese legislator has, apparently, gone further than this mere preference of the Directive and has created a true mandatory precedence in favor of internal reporting (although with exceptions) – which is likely to violate the Directive…

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (VII)

- Article 7.º/2The whistleblower *may only resort to external reporting channels* when:

(a) there is no internal whistleblowing channel;

b) The internal whistleblowing channel only accepts the submission of complaints by employees and the whistleblower is not an employee

Apparently, even if the whistleblower is not an employee, that mandatory precedence applies

(c) Has reasonable grounds to believe that the breach cannot be effectively known; or has reasonable grounds to believe that the breach cannot be effectively disclosed or resolved internally or that there is a risk of retaliation

(e) Has initially lodged an internal complaint without having been informed of the measures envisaged or taken following the complaint within the time limits set out in Article 11; or

(e) The breach is a criminal offence or an administrative offence punishable by a fine of more than EUR 50 000

- Article 6.º/3: A whistleblower who submits an external complaint without observing the precedence rules provided for in paragraphs a) to e) of Article 7(2) shall benefit from the protection conferred by this Statute if, *at the time of submission, he/she was unknowingly, without fault, of such rules*.
    - This makes the previous information very important

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (VIII)

- The Directive presents a very wide notion of acts of retaliation (article 19)
- The Portuguese legislator has adopted a large notion: according to article 21.º/2, an act or omission is *considered* an act of retaliation if, directly or indirectly, occurring in a professional context and motivated by an internal or external accusation or public disclosure, it causes or may cause the accuser, in an unjustified manner, material or non-material damage
- But article 21.º/6 adds that an act or omission is *presumed* to be a retaliation if occurring in two years after the reporting took place
  - Is that sufficient? In the case of Cuja (ECtHR), the retaliation occurred 10 years after the disclosure of information
  - In any case, the regime is more favorable than the one that already existed in the Labour Code (article 331) on abusive sanctions (sanctions are presumed abusive if they are applied in six months after some facts (v. g., the employee refuses to comply with an unlawful order), or a year after the employee reacts to a discriminatory act, or harassment

Analysis of some subjects of the Directive and their transposition into the Portuguese legal system (IX)

- The Portuguese system is very protective in the field of job security (Portuguese Constitution, article 53);
- This way, an unlawful dismissal gives employees the right to reinstatement (articles 389.º, 391.º, 392.º)
  - Although, the employer may refuse this reinstatement (paying a higher compensation) when the enterprise has less than 10 employees (micro-company) or the employee occupied a high position (directive, or similar) (article 392.º/1);
  - **But** this right to refuse reinstatement does not exist if the dismissal has been discriminatory (article 392.º/2)
  - According to recital 95, *in fine*, and having in mind this protective nature of the Portuguese system, it is not clear why the legislator did not provide that a dismissal occurred in retaliation of a reporting always gives place to reinstatement, without exceptions.

Conclusions

- In a few points, it is quite dubious that the Portuguese legislator has fully transposed the Directive into the national legal system;
- It is true that some of those situations may be surpassed by means of the principle of interpretation of national prescriptions in accordance with European law; but, in other cases, this principle might not be enough, because it has limits
- Maybe this lack of accuracy was, to some extent, justified by the lack of literature and social awareness of the whistleblowing…

Thank you for your attention!

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The Post-Transposition Phase
A Policy Perspective

Wim Vandekerckhove & Vigjilenca Abazi

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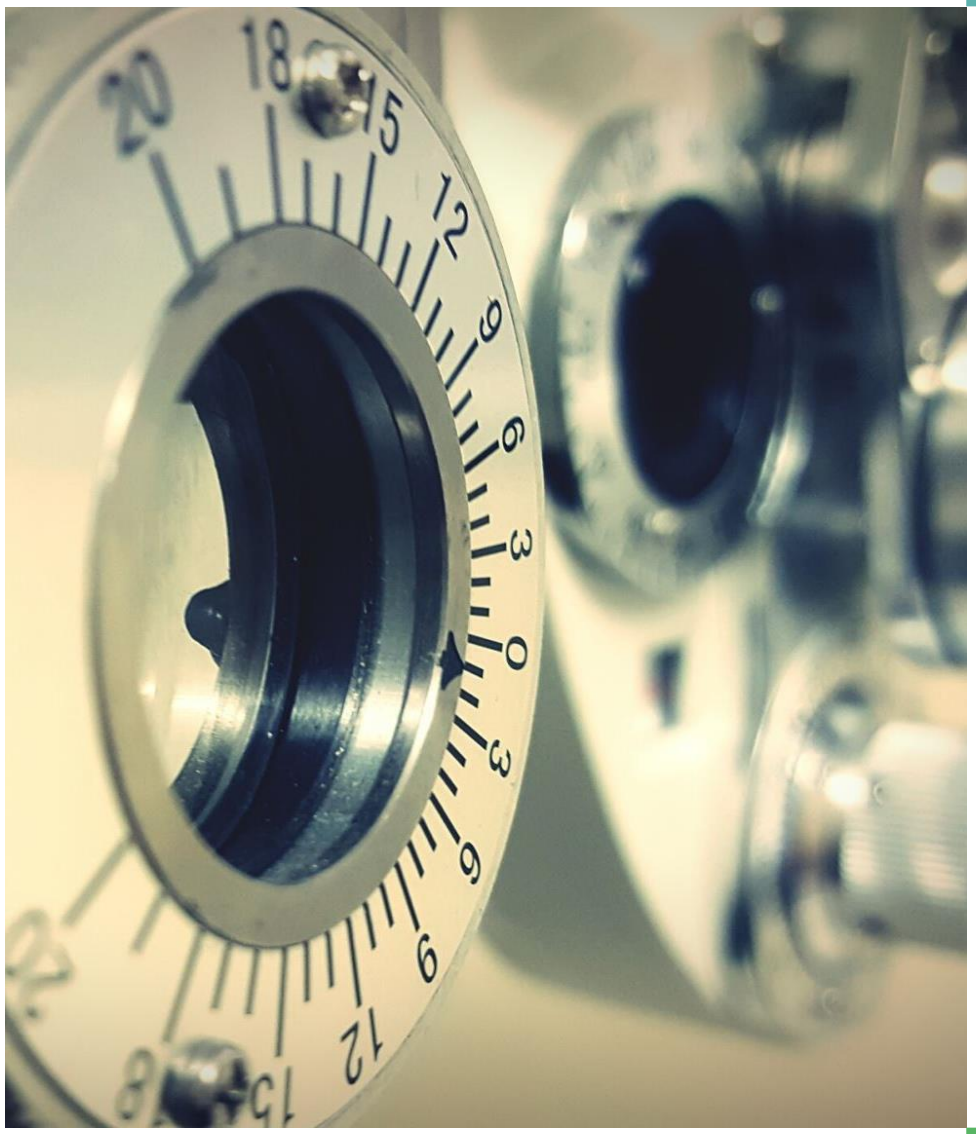

Monitoring Framework

+ Focused on 5 key pillars
+ User Viewpoint
+ Integrated Approach

Reporting Channels

How have reporting channels been implemented in organisations?

To what extent have organisations succeeded in developing speaking-up and listening-up competencies?

To what extent have differences in implementation between different sectors and industries evened out?

Is there SME-specific good practice and is it readily available?

Are organisations recognising the benefits to culture and governance of having internal reporting channels and processes for follow-up?

Competent Authorities

How comprehensive is the mandate of the competent authorities to investigate a report, support a whistleblower, and sanction both wrongdoers as well as those who retaliate against whistleblowers?

How coherent is the approach taken by the different competent authorities, and how is this coherence ensured?

Are competent authorities successful in securing a legitimate whistleblower status for individuals who make qualifying reports?

Secrecy Exceptions

To what extent do national rules provide clarity and legal certainty in delineating information that is not protected under the reported breach?

Has the national law provided for alternatives for disclosure of classified information?

To what extent do national rules provide for clear follow-up procedure when trade secrets are involved?

To what extent do national rules protect professional secrecy privilege in the legal and medical profession, and if there are existing national laws, to what extent are there avenues in specialised reporting mechanism?

Information, Awareness, Advice

1

Are available information structures known to the public?

2

What is the quality of the available information and advice?

3

How accessible is the information and advice?

4

Is there enough awareness of the public interest of whistleblowing?

Access to Justice

To what extent do national rules provide clear, accessible legal actions and remedies, and do these avenues meet the requirements of the burden of proof and other stipulations of the Directive?

To what extent do national remedies meet the sufficient compensation that does not deter future reporting?

To what extent are existing national rules on cause of action and remedies in alignment with access to judicial remedies for individuals reporting on breaches?

To what extent do national rules ensure the rights of defence including the right of access to the file, the right to be heard and the right to seek effective remedy against a decision concerning the person concerned under the applicable procedures set out in national law in the context of investigations or subsequent judicial proceedings?

To what extent may the penalties stipulated by the national authority be deemed effective, proportionate, and dissuasive?

What measures for compensation of damages have there been adopted?

What penalties are foreseen for employers in case of waiver of rights as condition for employment?

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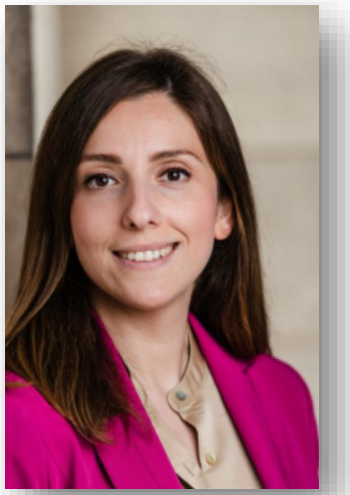

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