



# Why should the European Union protect whistleblowers?



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## Whistleblower Protection and the EU

Whistleblower protection is increasingly recognized as an effective tool to fight corruption, strengthen equality and workers' rights, and promote transparency, accountability as well as an overall culture of trust. For this reason, different national and international bodies have recommended the establishment of thorough mechanisms to shield workers reporting information in the public interest from retaliation, among them the Council of Europe<sup>1</sup>, the OECD<sup>2</sup> as well as the United Nations<sup>3</sup>.

While a number of European countries have acted upon these recommendations in the past years, the European Union remains reluctant. As a result, European citizens reporting misconduct in the public interest continue to be fired, harassed, gagged, and face psychological and financial ruin, or worse.

This document is a practical guide to the question of why the European Union has to become active on the matter of whistleblower protection, and on what legal grounds and precedence this is not only possible but necessary. It will also provide you with a state of the art of the debate in Brussels, and introduce you to the possibilities at hand to strengthen work on the issue.

### Whistleblower Protection: A European issue

The protection of European whistleblowers needs to be regulated on the European instead of just the national level. Here is why:

#### [Whistleblower protection is a cross-border matter](#)

Considering the complexity of the European labor market, whistleblowers can only be effectively protected when all Member States apply the same minimal standards in their legislation. Only legislation modelled according to a European Directive binding for all Member States provides for a simple, unified solution that offers equal protection to all European citizens.

#### [Effective whistleblower protection contributes to overall European integration](#)

In line with the previous argument, whistleblower protection on the European level will contribute to the overall integration of the European Union. As seen in the LuxLeaks<sup>4</sup> affair, differing legal provisions in individual Member States can have a significant impact on the European Community. Enhanced integration of the European Union would contribute to an overall increase in equality among citizens.

### [Whistleblower protection contributes to a change of culture within the Union](#)

Whistleblower protection is an important element to support transparency and accountability. These are values that the European Union has recognized as desirable features of a functioning Community. Thus, granting maximum of protection to whistleblowers constitutes a worthwhile implementation of agreed standards. The recognition of whistleblowers as advocates of the public interest as well as the strengthening thereof directly contributes to the establishment of a more open society, and will increase trust between European citizens and the government.

### [Only standardized legislation can effectively protect the European public interest](#)

Legislation that is defined on national level will be the first line of defense of the public interest in the respective Member States. However, in order to protect the European public interest, a standardized measure is necessary to reflect cross-border challenges which have an impact in several Member States or the Union as a whole.

### [Whistleblowing has significant economic benefits for the entire Union](#)

It is widely recognized that the advantages of whistleblower protection measures clearly outweigh the costs. Secure disclosure channels and the certainty of being heard provide incentives for employees and citizens to come forward to report wrongdoing that would otherwise cause tremendous financial losses to governments, tax payers and companies. According to a recent study<sup>5</sup> commissioned by the European Commission, 5.8 to 9.6 billion Euros could be recovered across the Union every year in the field of public procurement alone.

### [Whistleblower protection receives widespread support among the European public](#)

According to a public consultation<sup>6</sup> launched by the European Commission in 2017, almost all respondents (99 %) agreed that whistleblowing should be protected. A vast majority (85%) believed that workers rarely report misconduct harming the public interest; about 80% of respondents presumed that reports were not being made due to fear of legal or financial consequences. Among the most frequently cited perceived advantages of whistleblower protection measures were the enhancing of compliance with the law, fostering a workplace culture of transparency and accountability, and a strengthening of freedom of expression.

## Blowing the whistle is a human right

In two prominent legal cases, the European Court of Human Rights (ECHR) has applied article 10 of the European Convention of Human Rights in the defense of whistleblowers. As a result, the act of blowing the whistle in the public interest is in practice understood as an exercise of the right to free speech.

### [§ 10 European Convention on Human Rights<sup>7</sup>](#)

The Convention postulates the freedom of expression, “the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. It states that with respect to the duties and responsibilities this right carries, it “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

#### **Precedence 1: Guja vs Moldova, 2008<sup>8</sup>**

Iacob Guja, former head of the press unit in the Prosecutor General’s office in Moldova, lost his job for blowing the whistle on attempts by high ranking political officials to influence the judiciary. After being dismissed for disclosing confidential documents, he filed a lawsuit against his unfair dismissal at the ECHR, which ruled that Moldova had breached Guja’s right to freedom of expression. In this landmark case, the court established six principles to determine whether a whistleblower’s right to freedom of expression should be protected under the European Convention.

#### **Precedence 2: Heinisch vs Germany, 2011<sup>9</sup>**

Based on the principles laid out by the ECHR in the course of the landmark case Guja v. Moldova in 2008, the court three years later recognized that by confirming the lawfulness of Brigitte Heinisch’s dismissal following her blowing the whistle, German courts had violated her right of freedom of expression. The geriatrics nurse had been fired from her job in a Berlin hospital in 2005 after disclosing details about poor standards of care to the public authorities. Heinisch’s case had received widespread national attention.

### [§ 11 Charter of Fundamental Rights of the European Union<sup>10</sup>](#)

The principles set out in article 10 of the European Convention on Human Rights are equally considered in article 11 of the Charter of Fundamental Rights of the European Union. It provides for the freedom of expression and information, and upholds the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

## The EU has a clear mandate to act on the issue

Not only do judicial precedents link whistleblowing to Human Rights recognized by the European Union, European treaties also provide clear legal bases to implement a Directive on the protection of whistleblowers in relation to the safeguarding of universal rights as well as working conditions:

### [§ 2 Treaty on European Union<sup>11</sup>](#)

This Treaty foresees the “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” and states that all Member States are unified by the pursuit of a society “in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Considering that,

- whistleblower protection aims at safeguarding the democratic rights of workers in the European Union in order to shield them from discrimination;
- whistleblowing is recognized as an element of the human fight to freedom of expression and is thus worthwhile to be protected as such; and
- only a European Directive guarantees equality of all citizens of the Member States,
- this article provides a sound legal basis.

### [§ 151 and § 153 Treaty on the Functioning of the European Union<sup>12</sup>](#)

§ 151 provides for the European Member States to have as common objective “the promotion of employment, improved living and working conditions”.

§ 153 designates the improvement of working conditions as one of the fields in which the European Union “shall support and complement the activities of the Member States” (§153(1)(b)). Furthermore, the article postulates that in order to contribute to improvement in these fields, the European Parliament and Council may introduce “by means of directives, minimum requirements for gradual implementation” (§153(2)(b)).

Whistleblowing is first and foremost a workplace issue, and with these articles, the Member States have designated the protection of whistleblowers as an objective of the Union, along with the explicit option to introduce a Directive proposing minimum requirements for Union members.

## [§ 5 Treaty on European Union](#)<sup>13</sup>

Refers to the principles of subsidiarity (§5(3)) and proportionality (§5(4)) and lays out the basic principles under which EU competences overrule national capacities. According to these, the conditions under which the European Union can act in areas that do not fall under its exclusive competences are met:

- when the proposed action cannot be sufficiently achieved by the Member States and
- when the proposed action can thus be better achieved on the Union level, and
- when the proposed action does not exceed what is necessary to achieve the objectives laid out in the treaties.

With regards to whistleblower protection, all principles are met, as only a European Directive can set out minimum standards for crossborder protection of whistleblowers in the European Union. At the same time, in line with the arguments laid out above, whistleblower protection is a European matter according to previously quoted agreements. This interpretation is additionally backed by the recognition of whistleblower protection to be a legitimate aim in protecting freedom of expression and workers' rights by other international institutions, including the OECD and the Council of Europe.

### **Whistleblower Protection and the EU: State of the Art**

Based on the arguments listed in this document, different voices in the European Parliament have called upon the European Commission to introduce a Directive to protect European whistleblowers. Among these are the EP report shadowed by MEP Virginie Rozière "Legitimate measures to protect whistle-blowers acting in the public interest"<sup>14</sup>, the adoption of which in the European Parliament on October 24, 2017 provides a basis for the European Commission to draft a legislative proposal.

Furthermore, the EP "Draft report on the inquiry on money laundering, tax avoidance and tax evasion"<sup>15</sup>, presented in the context of inquiries into information disclosed in the Panama Papers, as well as the "Report on the role of whistle-blowers in the protection of EU's financial interests"<sup>16</sup> recommend the introduction of a directive. Beyond that, the European Greens/EFA have presented a draft Directive on whistleblower protection in the public and private sector in the European Union<sup>17</sup>.

Despite these initiatives, the European Commission has so far failed to present a legislative proposal on the protection of whistleblowers. It is time to act. Whistleblowing is a Human Right, as well as a European matter. We call upon the European Member States to support the introduction of a Directive that fully protects European citizens disclosing information in the public interest, and urge the Commission to become active in advancing this.

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## Endnotes

- 1 Council of Europe Recommendation CM/Rec(2014)7 on the Protection of Whistleblowers:  
<https://rm.coe.int/16807096c7>
- 2 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:  
[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)  
OECD Committing to Effective Whistleblower Protection:  
<http://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>
- 3 United Nations Convention Against Corruption:  
[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)
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<https://euobserver.com/justice/139989>  
Antoine Deltour: LuxLeaks whistleblower's long legal battle continues  
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- 5 Estimating the economic benefits of whistleblower protection in public procurement:  
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- 7 European Convention on Human Rights:  
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- 8 Judgement Case of Guja v. Moldova Application no. 14277/04:  
<http://hudoc.echr.coe.int/eng?i=001-85016>
- 9 Judgement Case of Heinisch v. Germany Application no. 28274/08:  
<http://hudoc.echr.coe.int/eng?i=001-105777>
- 10 Charter of Fundamental Rights of the European Union:  
[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)
- 11 Treaty on European Union:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en>
- 12 Treaty on the Functioning of the European Union:  
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- 13 Treaty on European Union:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en>
- 14 "Legitimate measures to protect whistle-blowers acting in the public interest", adopted on October 24, 2017:  
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0402+0+DOC+PDF+V0//EN>
- 15 Draft report on the inquiry on money laundering, tax avoidance and tax evasion:  
<http://www.europarl.europa.eu/cmsdata/122787/2017-06-30%20Draft%20report.pdf>
- 16 "Report on the role of whistle-blowers in the protection of the EU's financial interests", adopted on January 20, 2017:  
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0004+0+DOC+XML+V0//EN>
- 17 Whistleblower Protection in the Public and Private Sector in the European Union:  
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