

## 2<sup>nd</sup> International Press Freedom Seminar: Protecting Whistleblowers and Journalists

27 November 2018, Ghent, Belgium

### REPORT

The aim of the 2<sup>nd</sup> international seminar, organised by Ghent University, Faculty of Law and Criminology and Faculty of Political and Social Sciences, was to bring journalists, academics, organisations that support and monitor the protection of journalists and whistleblowers, and students together to discuss the current state of protection and threats that whistleblowers and journalists face.

The seminar was opened by **Eva Lievens (Ghent University)** stressing the fact that the protection of whistleblowers in Europe is still weak. It was noted that many important public interest matters might have never come into light without whistleblowers. Nevertheless, the 2017 [Media Pluralism Monitor Report](#) confirms that the protection of whistleblowers in Europe is still weak. In terms of whistleblower cooperation with journalists, there is also a strong need for effective protection of journalistic sources which enables and encourages this cooperation in the first place.



**Dirk Voorhoof (Ghent University, [Legal Human Academy](#))** provided the state-of-play overview of the legal protection of whistleblowers and journalists under Article 10 of the European Convention of Human Rights (ECHR). Under this provision, the right to freedom of expression can only be interfered with when such interference is really necessary. In this respect, the European Court of Human Rights (ECtHR) plays a very important role where it makes sure that, firstly, the rules and principles are enforced effectively, and, secondly, that the ECHR is interpreted as a living instrument. This, in turn, allows for democracy to thrive in Europe. In the recent years, the ECtHR has made an important difference in enhancing legal protection in the spheres of (1) public interest debate, investigative journalism and newsgathering, (2) access to information and public documents, (3) journalistic sources and (4) the protection of whistleblowers.

"What is a whistleblower?", professor Dirk Voorhoof asked the audience. There are many different labels whistleblowers are called today, as well as many definitions of who is a whistleblower, depending on which the level of protection afforded to them differs. Whistleblowers can be internal and external, they deserve protection not only when they report illegal activities, such as corruption, but also more general integral violations, certain wrongdoings which may occur in both – public *and* private sectors. Whistleblowers act in the public interest but are nevertheless prosecuted because their reporting may breach a (criminal, labour, computer) law provision, especially in the context of secret, confidential and intelligence information.



The act of whistleblowing comes with a long list of reported risks for the whistleblower, which demonstrates the need for enhanced protection. In fact, action may be sought against whistleblowers pursuant to a number of legal bases, among which legal provisions on theft, trespassing, contempt of court, insubordination, breach of confidence or employment relations. Although the level of protection of whistleblowers in Europe is not yet satisfactory, it is gradually improving.

Most recently – through Panama leaks, Football leaks, Swiss leaks, Lux leaks – more attention and awareness has been awarded to the issues surrounding the conviction of whistleblowers and journalists in high-profile public interest cases. Indeed, the public interest is the cornerstone of the need for effective legal protection for whistleblowers and it was for the first time confirmed by the ECtHR in the 1999 case of *Fressoz and Roire v. France*. Since then, according to a number of judgments, the ECtHR has confirmed that the prosecution of whistleblowers is not considered necessary in a democratic society. Since 1991, a similar level of protection has been also awarded to journalistic sources, which is an important safeguard for whistleblowers to contact journalists in the first place. A revolutionary step in this sense was the introduction by the ECtHR of the *ex-ante* review requirement which must be carried out by a judge or an impartial body, not associated with the prosecution or the police. Notably, however, invoking Article 10 ECHR cannot serve as a tool for providing blind protection to whistleblowers. In *Guja v Moldova (2008)* the ECtHR laid down 6 specific criteria based on which protection pursuant to Article 10 ECHR can be afforded to whistleblowers. In the same vein, the protection of journalistic sources cannot be seen as a shield for protection in defamation cases. Finally, Dirk Voorhoof stressed that, even though the recent ECtHR case-law indicates an enormous step forward towards the protection of whistleblowers, it does not yet suffice as the right to protection takes too long to be enforced and the ECtHR case law is not always applied as daily practice by national institutions. There is a pressing need for additional action and binding legislation. All in all, whistleblowers are neither saints nor traitors. They are servants of the public interest.

The second part of the seminar revolved around a panel discussion on the initiatives and practices regarding the protection of whistleblowers and journalists. The panel was moderated by **Sarah Vantorre (Ossigeno per l'informazione)** and consisted of a representative of the European Commission, **Christel Mercadé-Piqueras (European Commission)**, Belgian journalist **Stef Arends (Apache)**, legal advisor **Charlotte Michils (Flemish Association of Journalists)** and legal officer **Ilaria Fevola (Ossigeno per l'informazione, ARTICLE19)**.



**Christel Mercadé-Piqueras** works for the Directorate-General for Justice and Consumers of the European Commission (EC). She stressed the need for enhanced protection of whistleblowers in the European Union, after a relevant study and public consultation revealed how fragmented the level of legislative protection was across all 28 EU Member States, and how whistleblowers are retaliated against and suffer from severe consequences. The areas which require most extensive protection include fraud and corruption, tax evasion, environmental protection, public safety and public procurement. [The proposed EU Directive on Protection for Whistleblowers](#) on behalf of the EC aims at providing EU-wide minimum standards of protection in sectors which fall under the competence of the EC, while at the same time encourage Member States to extend such protection. The proposed Directive would eventually also positively affect the protection of the right to freedom of expression, media freedom and investigative journalism. Inspired by [the Council of Europe Recommendation on the protection of whistleblowers](#), the Directive aims to adopt clear provisions against whistleblower retaliation.

The proposal includes a three-step reporting mechanism – internal reporting, external reporting and public disclosure – and applies to employees of both private and public sectors. Most importantly, a very strong obligation for the Member States is introduced requiring them to follow up on the whistleblower reports, otherwise, the whistleblower can publicly disclose the information and be protected from retaliation. Protection is, however, provided on three conditions: (1) the whistleblower has reasonable belief that information is true (the ECtHR has set “the good faith” requirement which is not linked to motivation; specific motives are irrelevant as long as the information is true), (2) the whistleblower falls under the scope of application of the Directive and (3) (public) reporting is the whistleblower’s last resort.

As Ms Mercadé-Piqueras explained, this system is flexible and certain steps may be overridden depending on the circumstances of each case – it is for the whistleblower to decide which route is the most suitable in a particular situation. However, in order to strike a fair balance between the right to information of the public and the right to privacy of the employer, the whistleblower should first use the available internal or external channels before going public.

**Ilaria Fevola** worked as a consultant at *Ossigeno per l'Informazione* and has recently joined ARTICLE19 as a legal officer. *Ossigeno per l'Informazione* is an independent observatory that monitors threats and attacks on journalists in Italy, as well as provides actual protection and support to them. Throughout the past 10 years the organisation revealed around 3000 cases of journalists who were threatened and attacked. Ms Fevola explained that the levels of whistleblower reporting are currently on the rise since legislation on the protection of whistleblowers was adopted in Italy in December 2017. According to Transparency International Italy, current reporting is mostly related to the public sector. At the same time, lower level of protection for whistleblowers is granted in the private sector context – smaller companies and state-owned companies. Supranational initiatives that aim at enhancing and harmonising the protection of whistleblowers are, therefore, very welcome. However, in Italy the protection of journalistic sources is equally important as that of whistleblowers.

**Charlotte Michils** stated that the Flemish Association of Journalists welcomes the proposed EU Directive and considers it to be an improvement for the current national situation which is very fragmented in Belgium. While legislation protecting whistleblowers in the public sector exists, the situation is very fragmented in the private sector. Initially, the Flemish Association of Journalists questioned the three conditions for protection, and in particular the fact that a whistleblower is first required to report information internally. Their second concern is associated with the possibility of anonymous reporting which is not mentioned in the proposed Directive.

**Stef Arends** is a journalist working at Apache – a Flemish investigative journalism organisation. He underlined the usefulness of a Belgian NGO that would document incidents in which journalists are being threatened or intimidated as a result for carrying out investigative research. Transparency and visibility demonstrating how widespread the phenomenon of threatening journalists is, especially through lawsuits and emails, could strengthen the position of journalists. Journalists at Apache are in cooperation with whistleblowers, both anonymously and not, and they are often intimidated. According to the journalist, the threats they receive are more time consuming and inconvenient rather than intimidating. In addition to sharing a number of whistleblower stories Apache has covered, the journalist also shared some insights into the ways whistleblowers use to contact them. The organisation receives emails daily, containing tips from people inside different organisations who want to change things that are wrong – these people often want to stay anonymous. An easy way for them to do that is to put anonymous letters into Apache post box. Apache has also established a “Secure drop” system which works through a public Wi-Fi network and hides the IP address of the sender. People are then enabled to upload the information through an encrypted browser which leads to Apache receiving a specific form of the encrypted information – Apache cannot simply read it, they use a separate computer that has never been connected to the internet before and which is equipped with the special decryption technology. People submit information to Apache in this way approximately once per week. The anonymously submitted information is vigorously checked and serves as the first step of the journalistic investigation that follows.

**Inger Høedt-Rasmussen** ([Legal Human Academy](#), [Copenhagen University](#)) formulated concluding remarks. In addition to sharing some stories from her personal (whistleblower) experience, she stated that the important problems we are currently dealing with are not new and the work that journalists, academics and non-governmental organisations are conducting is very welcome. This has also been recently recognised in the national legislation throughout Europe. There have been many cases which would not have seen daylight if not for the work conducted by whistleblowers and collaborative journalism. While we should be careful not to classify whistleblowers either as heroes or villains, it is extremely important to consider and protect all the relevant aspects of a whistleblower's life. Whistleblowers can often be discouraged by the prospect of retaliation. This, however, is where the law stops and the protection ends, raising an important question – how do we *sufficiently* take care of whistleblowers in real life?

**Rapporteurs:** Argyro Chatzinikolaou and Ingrida Milkaite (Ghent University). November 2018.