

# Whistleblowing policies of the EU and the Council of Europe

## Comparison and assessment

Whistleblowers e Justiça Negociada

Seminário Internacional da Associação Internacional de Direito Penal

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# Structure

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## summary overview of whistleblowing policies of the

- Council of Europe (CoE)
  - context | ECtHR's jurisprudence | specific whistleblowing instruments
- European Union (EU)

## thematic comparison CoE-EU main whistleblowing instruments

- material scope
- personal scope
- three-channel reporting-disclosure system
- follow-up and feedback
- protection measures
- support measures

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# CoE policy | context

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whistleblowing rules as part of an organisational ethos of integrity, embedded in the context of transparency and accountability

- right to private life & data protection
  - Article 8 ECHR
  - (Modernised) Data Protection Convention (ETS 108)
- anti-corruption framework
  - Criminal and Civil Law Conventions on Corruption (ETS 173 and ETS 174)
  - GRECO
- freedom of expression
  - including source protection for journalists and access to official documents
  - Article 10 ECHR
  - related ECtHR jurisprudence

# CoE policy | ECtHR | 1

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## Guja v. Moldova (GC, 2008)

- six principles to help determine whether an interference with the right to freedom of expression as laid down in Article 10 ECHR in relation to the actions of a whistleblower who makes disclosures in the public domain was “necessary in a democratic society”
  - whether the disclosing person had alternative disclosure channels
  - public interest in the disclosed information
  - authenticity of the disclosed information
  - detriment to the employer
  - whether the disclosure is made in good faith
  - severity of the sanction imposed on the disclosing person
- reiterated in Heinisch v. Germany (2011) and Bucur and Toma v. Romania (2013) and confirmed inter alia in Matúz v. Hungary (2014)

# CoE policy | ECtHR | 2

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also: right of journalists to shield their sources shows in many cases the need to protect the leaking of information by whistle-blowers

- illustrated in: *Goodwin v. the UK* (GC, 1996), *Roemen and Schmit v. Luxembourg* (2003), *Voskuil v. the Netherlands* (2007), *Tillack v. Belgium* (2007), *Financial Times Ltd. v. the United Kingdom* (2009), *Nagla v. Latvia* (2013), *Gormuş and others v. Turkey* (2016)

ECtHR in some cases took a differential position, accepting sanctions for and far-reaching interference with the rights of whistleblowers because of leaking public interest information

- *Pasko v. Russia* (2009) [military journalist, classified info, treason]
- *Langner v. Germany* (2015) [civil servant disclosing alleged 'perversion of justice' by deputy mayor, which turned out to be unfounded]
- *Karapetyan and others v. Armenia* (2016, not referred to GC 2017) [dismissal civil servants having disclosed alleged fraud of the election process no violation of Article 10 ECHR, even if a clear interference with freedom of expression]

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# CoE policy | specific legal instruments | 1

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PACE [Res 1729 \(2010\)](#) and [Rec 1916 \(2010\)](#)

PACE [Res 1954 \(2013\)](#) on national security & access to information

[CM/Rec\(2014\)7](#) on the protection of whistleblowers [The 29 principles]

[CM/Rec\(2015\)5](#) on data protection in the context of employment

- provides that where employers implement internal reporting mechanisms the confidentiality of whistle-blowers should be ensured as well as the protection of personal data of all parties involved, with exceptionally scope for anonymous reporting and investigations based thereon

# CoE policy | specific legal instruments | 2

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PACE [Res 2060 \(2015\)](#) improving the protection of whistle-blowers

- call upon CoE MS to grant asylum to whistle-blowers (also in government agencies or private contractors), whose disclosures are otherwise in line with PACE [Res 1729 \(2010\)](#), [CM/Rec\(2014\)7](#) or the 2013 [Tshwane Principles](#) (50 Global Principles on National Security and the Right to Information) (summarized in [15 points](#)) as supported by PACE [Res 1954 \(2013\)](#)
  - calls for protection of public servants (including in the military and contractors for intelligence agencies – disclosing information to the public if 4 conditions are met (if not: no sanctioning, at least proportionate)

PACE [Rec 2073 \(2015\)](#) improving the protection of whistle-blowers

- called on CM to initiate the drafting of a convention, open to non-MS, covering also disclosures of wrongdoings by persons employed in the field of national security and intelligence

CM reticence in its [reply](#) to the above PACE Recommendation

- referring to [CM/Rec\(2014\)7](#), which it stressed was inclusive of a principle on information relating to national security, defence, intelligence, public order or international relations of the State

# EU policy

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## links in with

- CoE acquis re Art. 10 ECHR (mirrored in Art. 11 Charter of Fundamental Rights)
- relevant ECtHR's jurisprudence
- CM/Rec(2014)7
- Articles 7-8 Charter (Privacy and Data protection)

EC 2016 [communication](#) on the fight against tax evasion and avoidance, confirmed in 2017 [work programme](#)

- full support for the protection of whistle-blowers
- indicated that it was assessing the scope for horizontal or further sectoral action at EU level, while upholding the principle of subsidiarity

EP 2017 [resolution](#) on the role of whistle-blowers in PIF

EP 2017 JURI [report](#) calling for horizontal legislative proposal before end 2017



# EU policy

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## EC 2018 [proposal for a directive on whistleblowing](#) [binding]

- common minimum standards to provide protection against retaliation for whistle-blowers reporting on breaches in specific policy areas
  - < need to strengthen enforcement, under-reporting, potential serious harm
- broadened sectoral approach, but no full horizontal scheme (criticized)

## EP 2018 JURI [report](#) on the proposed directive

- inter alia: anonymous reporting, protection for journalists and NGOs

15 March 2019: EP-MS reached [provisional agreement](#)

16 April 2019: [formal agreement EP](#) (591, 29, 33)

25 September 2019: [final text](#) **directive** released

**mandatory transposition** by MS within 2y following OJ publication

# Material scope: general | CoE recommendation

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## explanatory memorandum

- para 37: long ‘shopping list’ of potentially relevant legislation, professional codes and internal rules
- para 43: non-exhaustive list of categories of information for which it is typically considered that a whistleblower should be protected

## recommendation

- deliberate choice not to define the scope of information that falls within the definition of ‘public interest’
  - Former King of Greece and Others v. Greece (GC, 2000)
- yet requiring (in I.2, in fine) that the scope of national frameworks would at least include: violations of law **and human rights**, as well as risks to public health and safety and to the environment
  - UN resolutions on human rights defenders + SR mandated
  - ICDPPC resolution on human rights defenders and data protection

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# Material scope: general | EU directive (Article 2)

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- breaches within the scope of the Union acts (Annex) regarding
  - public procurement, financial services, products and markets, prevention of money laundering and terrorist financing
  - product safety and compliance
  - transport safety
  - protection of the environment, radiation protection and nuclear safety
  - food and feed safety, animal health and welfare, public health
  - consumer protection
  - protection of **privacy and personal data**, and security of network and information systems
  - **nothing on other HR, nor on racism or (gender) discrimination**
- breaches affecting PIF
- breaches relating to the internal market, including re competition, state aid and corporate tax (arrangements)

# Material scope: national security

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## CoE recommendation

- a special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State
  - erroneously under personal scope
  - explanatory memorandum: deliberate reference to “information”, meaning the special scheme may apply as soon as such info is concerned, and not only for the personnel of security or intelligence services, i.e. also when citizens would disclose such information

## EU directive

- national security remains the sole competence of the MS
  - recital 24 + Art. 3: including procurement rules involving defence or security aspects unless they are covered by the relevant acts of the Union
- exemption for (EU) classified info
  - recital 25 + Article 3 (a)

# Personal scope | public and private sectors

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## CoE recommendation

- all individuals working in either the public or private sector, irrespective of the nature of their working relationship and whether they are paid or not

## EU directive (preciser, harder, broader)

- Article 4.1: persons working in the private or public sector, including at least: workers, civil servants at national/local level, self-employed persons, members of administrative-management-supervisory bodies, including volunteers and trainees, non-executive members or shareholders, persons under supervision/direction of contractors, subcontractors and suppliers
- Article 4.4: extension of the measures for the protection of reporting persons to: facilitators, third persons, such as colleagues or relatives, and legal entities that the reporting persons own, work for or are otherwise professionally connected with

# Personal scope | before-during-after & privilege

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## before-during-after

- CoE recommendation: inclusive of situations where the working relationship has ended or where it is yet to begin (i.e. during the recruitment process or other precontractual negotiation stage)
- EU directive: idem (Articles 4.2 and 4.3)

## privilege

- CoE recommendation: without prejudice to the well-established and recognised rules for the protection of legal and other professional privilege (lawyer-client privilege etc, even e.g. confessions before a priest)
- EU directive (recital 26 + Article 3): exemption for lawyer-client privilege + medical professional privilege for health care providers etc, including for patient/client records

# Three-channel reporting-disclosure system

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## CoE recommendation

- 3-tiered model + channels for reporting should be (put) in place

EU directive: binding obligations to set up (internal and external) reporting mechanisms (oral, in writing, on request physical meeting) for both public and private sector legal entities

- Article 8: binding for private entities as from 50+ staff, sometimes (the case being: notification due to EC) less than 50 staff after risk assessment in e.g. sphere of environmental or health risks; between 50-249 staff allowance to share resources for reporting and investigation procedures
- Article 8.9: binding for all public entities, irrespective of number of staff, with possible exceptions for municipalities -10.000 inhabitants or -50 staff or other public entities – 50 staff
- + Article 18: recording duty of reports in a durable and retrievable form

# Channel hierarchy?

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## CoE recommendation: **implicit hierarchy**

- most appropriate channel determined based on individual circumstances
- public disclosure without resorting to an internal reporting system may be taken into consideration when deciding on remedies or level of protection
  - see Gormuş and others v. Turkey [journalists' duties may imply non-publication if whistle-blowers have not first internally informed superiors]

## EU directive: **scope for direct external reporting or public disclosure**

- Art. 7 ff: internal reporting only encouraged as first step; not required
- Art. 10 ff: external reporting possible, either after internal reporting, or directly, without prior internal reporting
- Art. 15: public disclosure (media, journalists etc) explicitly allowed
  - based on domestic protection relating to freedom of expression/information
  - or under conditions (non-cumulative: no appropriate action within time limits following internal or external reporting, external reporting inopportune, imminent or manifest danger to the public interest)



# Follow-up and feedback

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## Coe recommendation

- prompt investigation and action upon its results + feedback about action taken following an internal report
- of primary importance, the potentially strongest reason for silence being the belief that nothing will be done

## EU directive: **hard duties and time-lines**

- Articles 9 (private entities) and 11 (public entities)
- follow-up
  - acknowledgement of receipt within 7d
  - diligent follow-up
- feedback to reporting person
  - within 3m (max 6m) after acknowledgment or lapse 7d period

# Confidentiality v rights of person(s) concerned

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## confidentiality of whistleblowers' ID

- CoE recommendation
  - confidentiality ID, subject to fair trial guarantees (sic)
- EU directive (Article 16)
  - no disclosure of ID or identifying information beyond authorised reporting or follow-up staff (including in the context of documentation duties in Articles 12, 17 and 18), except (cumulative)
  - where necessary and proportionate for investigations or proceedings, including with a view to safeguarding the rights of defence of the person concerned
  - subject to appropriate safeguards, including prior notification and written, reasoned explanation

## rights of persons concerned (prejudiced, affected, etc)

- CoE recommendation
  - ordinary protection and remedies of general law (sic), only for natural persons
- EU directive (Article 22): **much stronger** protection
  - effective remedy, fair trial, presumption of innocence, rights of defence, including right to be heard and the right to access their file
  - also ID protection (including in documentation context)

# Protection against retaliation

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## CoE recommendation

- direct or indirect retaliation of any form [list]
- by employer and persons working for or acting on behalf of the employer
- prima facie case that retaliation was underlying detriment suffered, makes burden of proof shift to employer

## EU directive

- Article 19
  - same + even more detailed and inclusive list of possible forms of retaliation
  - extending to **outside the work context**
  - moreover expressly **inclusive of threats or attempts** (preventative)
  - whether taken, **encouraged or tolerated** by them (recital 87)
- Article 21.5 (also recital 93): shifted burden of proof (duly justified grounds)
- Article 23
  - **penalties** (civil, administrative or penal) to natural or legal persons
  - **not only for retaliation**, but also for (attempted) hindering of reporting, bringing vexatious proceedings or breaching ID confidentiality

# Protection | bona/mala fide reporting-disclosure?

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## CoE recommendation

- protection not lost solely if the report-disclosure was mistaken as to its import or if the perceived threat to public interest has not materialised, provided presence of **reasonable grounds** to believe in its accuracy

## EU directive: **stronger protection, unless knowingly false**

- recitals: motive is irrelevant, but exemption for reports based solely on personal grievances (recital 22) + irrelevance of confidentiality clauses etc, except when offences (recital 92)
- Article 21.2: whistleblowers shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind provided that they had reasonable grounds to believe that reporting-disclosure was necessary for revealing a breach
- 21.3: no liability for information acquisition or access, except where **self-standing criminal offence** (remaining governed by applicable law)
- Article 21.4: same for possible liability for **unlinked acts or omissions**
- Article 23.2: **sanctions + damage compensation in case of knowingly false reporting or disclosure**

# Protection | secrecy obligations?

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## CoE recommendation

- no reliance by employers on legal or contractual obligations to prevent whistleblowing or to penalise whistleblowing

## EU directive: **more precise and stronger**

- Article 21.7: lawful + no liability in and right to seek dismissal of legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law
- Article 24: no waiver or limitation of rights and remedies by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement
- + indirectly also Article 16.4: competent authorities that receive information on breaches that includes trade secrets do not use or disclose those trade secrets for purposes going beyond what is necessary for proper follow-up

# Compensation and interim relief

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## CoE recommendation

- pending civil proceedings, particularly in case of loss of employment

## EU directive

- recital 94: compensation, restoration, damages
- recital 96: interim measures and relief pending procedure
- Article 21.6: access to remedial measures against retaliation, including interim relief pending legal proceedings, in accordance with national law
- Article 21.8: MS shall take measures to ensure that remedies and full compensation are provided for damage suffered by reporting persons
  - compare: Albania provides for possible payment of rewards
  - EU directive, recital 30: not: informers (protected, anonymity + rewarded)

# Additional support measures [EU directive only]

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## range of additional (mandatory) support measures (Article 20)

- comprehensive and independent information and advice, easily accessible to the public and free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned
- effective assistance from competent authorities before any relevant authority involved in their protection against retaliation, including, where provided under national law, certification that they qualify for protection
- legal aid in criminal, civil or other proceedings + legal counselling or other legal assistance
- MS may provide for financial assistance and support measures, including psychological support
  - compare: Albania also provides possibility of physical protection

# Q&A

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