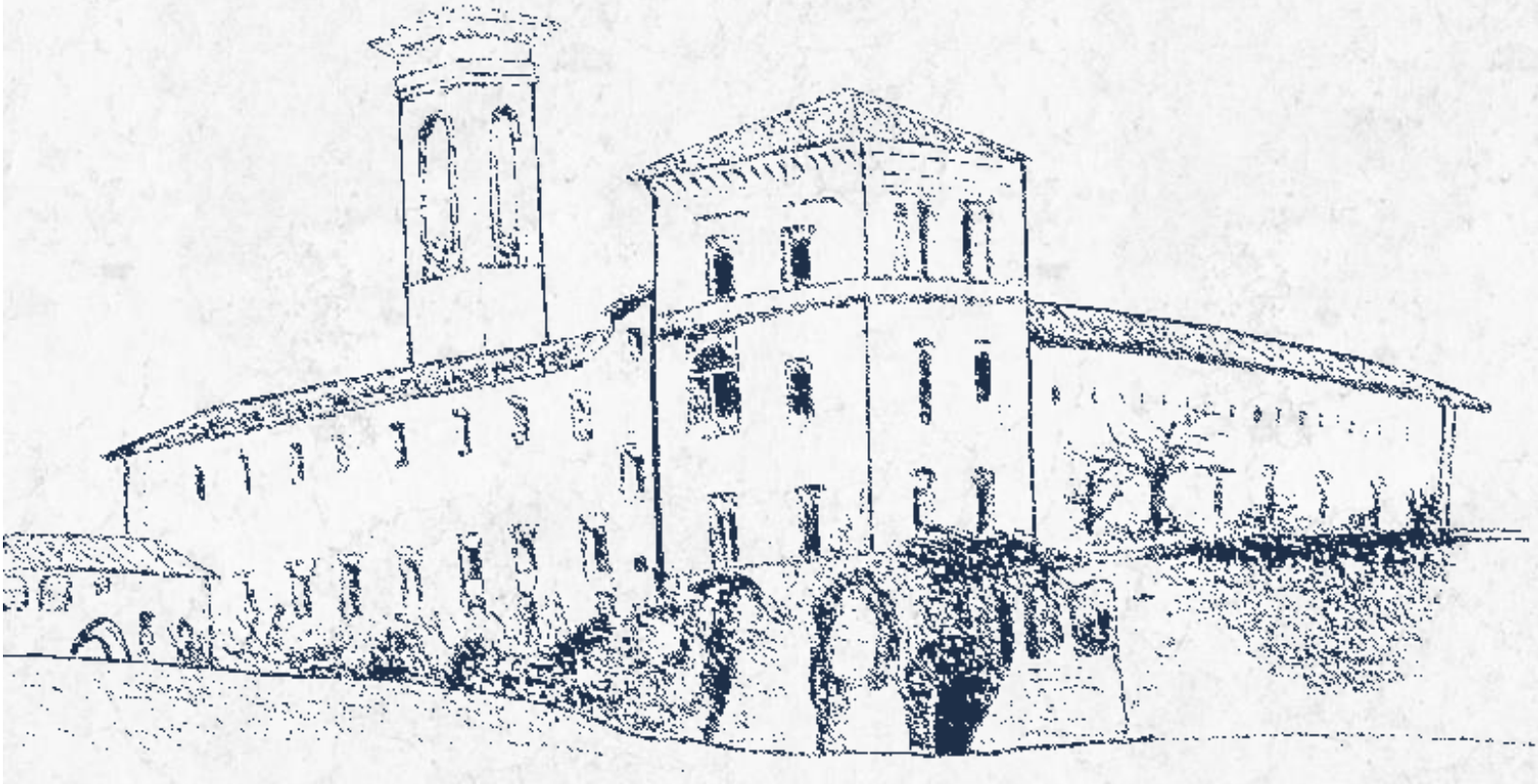
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Volume 14 No. 03/2025



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E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

LABOUR STUDIES

Volume 14 No. 03/2025

ADAPT
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Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

Public Interest as a Parameter for Whistleblowing

Esra Özen [*]

Abstract. Whistleblowing is protected because it serves the public interest. In some regulations on whistleblowing protection such as the British Public Interest Disclosure Act, as well as the case law of European Court of Human Rights see the public interest, among others, as a condition for the protection of whistleblowers. The European Whistleblowing Directive does not require explicitly that information given by a whistleblower should be in public interest. A whistleblower is protected, if the information relates to one of the matters regulated by Article 2 of the Directive, among other protection requirements foreseen by Article 6 of the Directive. If the information, however, is not covered by Article 2 of the Directive, a reasonable belief of whistleblower that the information is in the public interest is to be questioned by courts in charge. In that context, it must be clear what a public interest in terms of whistleblowing is, and how it can be differentiated from personal interests. Otherwise, the legal whistleblowing protection, which is supposed to protect public interests, might be invoked for an opportunistic use, namely for creating an artificial protection against purely employment related disadvantages.

Keywords: *Public Interest, Whistleblowing, European Whistleblowing Directive 2019/1937, European Court of Human Rights, and Public Interest Disclosure Act.*

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1. Introduction

Whistleblowing is an act of civil courage that serves public interest by reporting misconduct that threatens public interests, such as health and safety, democracy, and monetary interests of State and of persons.[1] The main reason for whistleblowing protection is safeguarding public interest by enforcing the laws in question.[2] Therefore, the British whistleblower protection law, known as the Public Interest Disclosure Act (PIDA), has introduced public interest as a reason to protect whistleblowers.[3] Conversely, the European Directive of Protection of Whistleblowers 2019/1937 (Directive), which also aims to enhance the efficiency of existing laws, does not involve such a condition.[4] There are some reasons for that, such as the difficulty to determine what "public interest" means due to its vague nature.[5] Nevertheless, reporting to serve public interest is also important for the Union law legislator who made it clear in their

[1] J. P Near, M. P Miceli, *Whistle-Blowers in Organizations: Dissidents or Reformers?*, in *Research in Organizational Behavior,* 1987, vol. 9, p. 327. M. Skivenes, S. C. Trygstad, *Wrongdoing: Definitions, identification and categorizations*, in A. J. Brown et al. (eds.), International Handbook on Whistleblowing Research, Edward Elgar, Cheltenham et al., 2014, p. 95. P. B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, in *Journal of Business Ethics,* 1999, vol. 21, no. 1, p. 7.

[2] K. Pabel, *The ECtHR Case Law on Whistleblowing: A Fundamental Rights Benchmark for the European and National Legislator*, in *International Journal of Comparative Labour Law and Industrial Relations, 2025* vol. 41, no. 1, p. 10. E. R. Boot, *The Feasibility of a Public Interest Defense for Whistleblowing*, in *Law and Philosophy* 2020, vol. 39, no. 1, p. 7, https://doi.org/10.1007/s10982-019-09359-1. J. Asthon, *When Is Whistleblowing in the Public Interest ? Chesterton Global Ltd. & Another v Nurmohamed Leaves This Question Open*, in *Industrial Law Journal*, 2015, vol. 44, no. 3, p. 458. A. J. Brown, *Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience*, in *E-Journal of International and Comparative Labour Studies*, 2013, vol. 2, no. 3, p. 13. R. Groneberg, *Whistleblowing: eine rechtsvergleichende Untersuchung des US-amerikanischen, englischen und deutschen Rechts unter besonderer Berücksichtigung des Entwurfs eines neuen § 612a BGB*, Schriften zum Sozial- und Arbeitsrecht, Duncker & Humblot, Berlin, 2011, p. 45.

[3] See the "protected disclosures", https://www.legislation.gov.uk/ukpga/1998/23/contents (accessed October 10, 2025); J. Lewis et al., *Whistleblowing: law and practice*, Oxford University Press, Oxford, 2017), marginal no. 4.07. J. Gobert, M. Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, in *The Modem Law Review,* 2000, vol. 63, no. 1, p. 25.

[4] See Article 1 of the Directive, Official Journal of the European Union, published 26.11.2019, L 305/17, http://data.europa.eu/eli/dir/2019/1937/oj (accessed October 10, 2025).

[5] S. Gerdemann, N. Colneric, *The EU Whistleblower Directive and Its Transposition: Part 2*, in *European Labour Law Journal*, 2021, vol. 12, no. 3, p. 263, https://doi.org/10.1177/2031952520969096.

impact assessment that states a whistleblower must be distinguished from an "aggrieved worker".[6] Moreover, the European Court of Human Rights (Court/ECtHR) established a whistleblower protection that requires protection for the public interest as well.[7] The last important ruling of the Court to mention, *Halét v. Luxemburg* 2023, has illustrated a problem zone: First, the Court rejected the whistleblower's complaint regarding the violation of his freedom of expression under Art. 10 European Convention of Human Rights (ECHR) because the information he disclosed about tax avoidance practices of certain companies was not of sufficient public interest.[8] The ruling was later reversed by the Grand Senate with an affirmation of public interest in the report.[9] How public interest can be identified in a whistleblowing case and how it differs from private interests, however, has not been discussed yet.

Accordingly, this article examines public interest as a parameter for whistleblowing. First, the regulatory concept of the Directive is outlined, including the positioning of public interest in the normative framework of protection. This study then addresses how to distinguish public interest from private interests in whistleblowing, which includes a discussion about the significance of and possible criteria for differentiating between public and private interests. Finally, conclusions about the interests

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[6] „It is important to make a distinction between whistleblowers – who report violations which affect the public interest – and other categories of complainants, such as aggrieved workers, whose reports relate to personal grievances or breaches of individual working conditions (public v. private interest)." impact assessment- SWD (2018)116/973421, S. 8, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1721-EU-Whistleblower-protection_en (accessed June 29, 2025).

[7] ECtHR, Judgement of 12. February 2008– Case 14277/04 (*Guja v. Moldova*), marginal no. 85, https://hudoc.echr.coe.int/eng?i=001-85016, ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), https://hudoc.echr.coe.int/fre?i=002-446 (accessed October 10, 2025).

[8] ECtHR Judgement of 11. May 2021 – Case 21884/ 18 (Halet v. Luxemburg), https://hudoc.echr.coe.int/fre?i=002-13266. H. Yurttagül, *LuxLeaks Whistleblower Not Protected by Article 10 ECHR – Case Analysis of "Halet v. Luxembourg" (ECtHR, Appl. no. 21884/18)*, in *Jean-Monnet-Saar Europarecht Online* (blog), 2. June 2021, https://jean-monnet-saar.eu/?page_id=61634 (accessed October 10, 2025).

[9] ECtHR, Judgement of 14. February 2023 – Case 21884/ 18 (Halet v. Luxembourg), marginal no. 180, https://hudoc.echr.coe.int/eng?i=002-14005. S. Andreadakis, D. Kafteranis, *Halet v Luxembourg: The Final Act of the Luxleaks Saga*, in *Oxford Business Law Blog* (blog), 21. February 2023, https://blogs.law.ox.ac.uk/blog-post/2023/02/halet-v-luxembourg-final-act-luxleaks-saga. H. Yurttagül, *ECtHR GC Judgment in Halet v. Luxembourg: Did Halet Win the Battle But Whistleblowers Lose the War in Strasbourg?,* in *Saar Expert Papers*, 7. May 2024, https://intr2dok.vifa-recht.de/receive/mir_mods_00017258, https://doi.org/10.17176/20240507-144902-0 (accessed October 10, 2025).

involved – namely employers, whistleblowers, and jurisdiction on whistleblowing – are presented. This article gives priority to the Directive and the case law of the ECtHR. The German implementation of the Directive and German case law on whistleblowing, as well as British whistleblowing law are also taken up to contribute additional information to the discussion.

2. Regulatory Concept of the European Whistleblower Directive

2.1. Public Interest as a Precondition for Whistleblowing Protection

Every legal regulation has a motivation, namely serving the public interest. Public interest is defined differently depending on the legal context in which it exists. In the realm of the European Whistleblower Directive, the term means a public interest that justifiably promotes the efficiency of Union law by encouraging potential whistleblowers to report relevant wrongdoings.[10] Recital No. 1 from the Directive makes it clear that the protection of whistleblowers should promote the enforcement of Union law in areas and insufficient reporting of wrongdoings seriously harms public interest. They are listed in Article 2 of the Directive, which constitutes the material scope of protection. Reports on violations against those laws listed in Article 2 are in the public interest.[11] The wording of public interest is not expressed in the Directive, except in the Article 15, in which the disclosure of wrongdoings is stipulated as a last resort.[12] According to Article 15 (1)(b)(i)(a), disclosure is protected "if the wrongdoing may constitute a direct or clear threat to the public interest, such as in an urgent matter or if there is a risk of irreversible damage". The public's interest may be considered as a condition to protect whistleblowers, especially when Article 15 (1)(b)(i) is a catch all clause that aims to extend the material scope of protection to other case

[10] Art. 1 of the Directive „The purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law. ".

[11] W. Vandekerckhove, *Is It Freedom? : The Coming about of the EU Directive on Whistleblower Protection,* in *Journal of Business Ethics,* 2022, vol. 179, no. 1, p. 4, https://doi.org/10.1007/s10551-021-04771-x. see public interest reasoning for defining of the material scope of protection, in Recitals No. 10 in terms of environment protection, No.13 regarding consumer protection, No. 14 regarding data protection.

[12] S. Gerdemann, N. Colneric, *The EU Whistleblower Directive and Its Transposition: Part 1,* in *European Labour Law Journal,* 2021, vol. 12, no. 2, p. 204, https://doi.org/10.1177/2031952520969093.

constellations that were not covered by Article 2 at the time of the legislation. The disclosure of which would also be in the public interest.[13] In contrast, Art. 15(1)(b)(i) of the Directive does not recognize public interest as a precondition to protection if the norm is being assessed in terms of reporting channels instead of the material scope of the Directive.[14] In fact, Article 15 regulates reporting channels and does not exceed matters regarding public interest. Public interest is not at risk because of a violation, but because of its disclosure. This would be the case, for example, if a potential whistleblower's life is threatened due to an intended disclosure. In accordance with Art. 15 of the Directive, the whistleblower may speak out in public to use public attention as a shield.[15]
In conclusion, public interest in the Directive appears simply as a motivation to strengthen the enforcement of Union law where the European legislator has identified the deficiency of law enforcement. Public interest as a precondition to protect whistleblowers has not been found in the wording of the European Directive except with the vague objective in Article 15. For the protection of whistleblowers in accordance with Article 6 (1) of the Directive, it is only required that the whistleblower "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive, and whistleblower reported either internally Accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15."
The reason for the lack of requisition for public interest in European whistleblowing protection is the fact that potential whistleblowers are not legal professionals and they might not be able to determine what is in the public interest.[16] Requisition of public interest might otherwise deter whistleblowers from reporting wrongdoings due to a fear of failed protection if the nature of the information is misidentified. This is why the introduction of the public interest in the British whistleblower law as a

[13] See a comparable British regulation on whistleblowing and related explanations, E. Özen, *op. cit.*, p. 340 f.
[14] E. Özen, *op. cit.,* p. 340.
[15] E. Özen, *op. cit.,* p. 343.
[16] N. Colneric, S. Gerdemann, *Die Umsetzung der Whistleblower-Richtlinie in deutsches Recht Rechtsfragen und rechtspolitische Überlegungen*, Bund Verlag, HSI-Schriftenreihe, Band 34, Frankfurt am Main, 2020, p. 154-155.

condition for protection has been strongly criticised as well.[17] If the whistleblower acts with reasonable belief that the report is in the public interest, and the whistleblower has followed the reporting procedure instructed in sec. 43C to 43H, they are protected according to sec. 43B of *Employment Rights Act* (ERA) 1996, which PIDA refers to. Whistleblowing is protected if a wrongdoing has been reported, which is listed in sec. 43B (1) ERA.[18] The public interest clause introduced in 2013 and discussed under section 3.1.1 of this paper has the specific objective of safeguarding what whistleblower protection means.[19] Otherwise, a public interest in reporting violations of the areas listed by the whistleblower protection law is assumed.[20]

It is not surprising that public interest is required for protection in UK. Unlike the Directive, the motivation of whistleblowers – specifically, why they report – is considered in British whistleblower law.[21] It has been reported that workers in UK have a duty of loyalty not only to employers, but also to the public.[22] Hence, it makes sense that whistleblowers who seek personal gain from a report are not protected, according to sec. 43G (1)(c) and 43H (1)(c).

2.2. Differentiation from the General Information Interest of Public

Public interest in effective enforcement of law is not equal to public interest in feeding the public with information to provide public opinion on a subject. The case law of the ECtHR on freedom of expression is primarily concerned with the latter, namely with the significance of

[17] D. Lewis, *Is a Public Interest Test for Workplace Whistleblowing in Society's Interest?*, in *International Journal of Law and Management,* 2014, vol. 57, no. 2, p. 143-145, https://doi.org/10.1108/IJLMA-10-2014-0056.

[18] The regulations are available online, https://www.legislation.gov.uk/ukpga/1996/18/section/43B (accessed October 10, 2025).

[19] J. Lewis et al., *op.cit.*, marginal no. 4.01.

[20] J. Düsel, *Gespaltene Loyalität: Whistleblowing und Kündigungsschutz in Deutschland, Grossbritannien und Frankreich*, Nomos, Baden-Baden, 2009, p. 270.

[21] E. S. Callahan, T. M. Dworkin, D. Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, in *Virginia Journal of International Law,* 2004, vol. 44, no. 3, p. 895.

[22] U. Beyer, *Whistleblowing in Deutschland und Großbritannien: ein Vergleich anhand der Umsetzung von Art. 11 Abs. 1 und 6 RL 89/391 EWG*, 1., Europäische Hochschulschriften PL Acad. Research, Frankfurt am Main, 2013, p. 237.

disclosed information for the public.[23] One example of this could be public interest in information about political figures, such as information about their private life or criminal accusations. The public has a justified interest in that information because it would have an influence on the public's opinion about the politician. When this kind of public interest is important, national law has less of a scope to restrict freedom of expression.[24] A disclosure of that type of information does not need to protect public interest in law enforcement. Similarly, the ECtHR is also aware of what makes a whistleblowing case: it points out that employees' freedom of expression deserves special protection because they are a part of a small group who have a unique opportunity in workplaces to report wrongdoings that undermine public interest.[25] This jurisprudence implies that for the protection of freedom of speech, one does not need to serve public interest. If this is the case, however, the whistleblower should especially be protected. Either way, the disclosure of information is not an end in itself; it is just a way to report.[26]

Nonetheless, the difference between the public interest in effective law enforcement and the public interest in building a public opinion through information can be vague under a cases' circumstances. This is illustrated by the ECtHR decision made in the *Halét v. Luxembourg* proceedings in 2023; after whistleblower *Deltour* disclosed a number of multinational companies committing tax fraud in Luxembourg to the public, his colleague *Halét* gave further information to journalists about the companies involved.[27] The Court, in its 2021 ruling, decided that the information delivered by *Halét* was not new and did not serve public interest as much as Deltour´s disclosure. In 2023, however, the Grand

[23] ECtHR, Judgement of 7. February 2012 – Case 39954/08 (Axel Springer AG v. Germany), marginal no. 96. ECtHR, Judgement of 10. December 2007 – Case 69698/01 (Stoll v. Switzerland) marginal no. 113 -115.

[24] ECtHR, Judgement of 10. December 2007 – Case 69698/01 (Stoll v. Switzerland) marginal no. 106.

[25] ECtHR, Judgement of 21. July 2011 – Case 28274/08, (Heinisch v. Germany), marginal no. 63. ECtHR, Judgement of 16. February 2021 – Case 23922/ 19, (Gawlik v. Liechtenstein), marginal no. 65. ECtHR, Judgement of 12. February 2008 – Case 14277/ 04 (Guja v. Moldau), marginal no. 72, http:// hudoc.echr.coe.int/ eng?i=001- 85016; ECtHR, Judgement of 14. February 2023 – Case 21884/18 – (Halet v. Luxembourg) marginal no. 113.

[26] Recital no. 90- 95 of the Directive; ECtHR, Judgement of 12. February 2008 – Case 14277/ 04 (Guja v. Moldau), marginal no. 80- 85.

[27] ECtHR, Judgement of 11. May 2021 – Case 21884/18 (Halet v. Luxembourg), marginal no. 109, https://hudoc.echr.coe.int/eng?i=001-210131 (accessed October 10, 2025).

Chamber of the ECtHR found a public interest in the disclosure because *Halét´*s information helps the public gain perspective about involved tax law and fraud in the case, which could be a highly complicated subject for non-professionals.[28] While the Court, in 2021, evaluated the contribution of the information given by *Halét* to the effective enforcement of tax law, the Chamber gave importance to the right of information for the public to have an idea about the issue. In any case, there is an interest in information about the disclosure of a violation of the law; everyone would want to know that violations of the law are being investigated. Wrongdoing, however, does not necessarily have to be "publicly disclosed" to take legal action; for example, the information about alleged wrongdoings had already been passed on by *Deltour* to the government for investigation. Conversely, the Chamber interpreted the public's interest in the case to be so wide that the information of interest to the public could constitute a public interest in the disclosure in terms of whistleblowing protection. As the information disclosed by *Halét* was considered merely additional, it is true that this information did not contribute to the legal proceedings; put simply, it satisfies the public´s curiosity about relevant tax violation. Should the information, however, support the legal prosecution, it should be disclosed to a competent state authority through discreet means in accordance with Article 10 of the Directive – there is no need for it to be disclosed directly to the public.

2.3. Structure of Whistleblowing Directive

2.3.1. Enumeration of the Subjects of Disclosure

When it came time to identify the public interest in the legislative process, the European Commission referred to examples from whistleblower protection laws around the world. British and US-American whistleblowing regulations have defined legal areas and violations revealed through whistleblowing are effectively prosecuted; furthermore, the disclosure of wrongdoings relating to those legal areas are supposed to be in the public interest.[29] This internationally well-known method is called

[28] ECtHR, Judgement of 14. February 2023 – Case 21884/18 (Halet v. Luxembourg), marginal no. 184.

[29] Recommendation CM/Rec(2014)7 and explanatory memorandum, Principle 2, marginal no. 42: "While what is in the public interest will in many areas be common ground between member States, in other areas there may well be a difference of appreciation. What constitutes the public interest is, therefore, intentionally not defined

"*objective list approach*".[30] The European legislator has a similar method, in which the enforcement of law is needed to be backed by whistleblowing, listed in Article 2 of the Directive and also in legal fields.[31]
Article 2 of the Directive covers money laundering, terrorist financing, product safety and compliance, road safety, environmental protection, food and feed safety, animal health and welfare, public health, consumer protection, and the protection of privacy and personal data. The material scope of the protection, however, does not cover wrongdoings relating to employee protection.[32] The legislature justifies this due to a limited legal foundation.[33] Moreover, the legal basis of the Directive is not a labor law norm, as seen in Article 153 of the Treaty on the Functioning of the European Union (TFEU).[34] Currently, there lacks a comparable enforcement deficiency in employee protection. The enforcement of employee protection law is already ensured by the implementation of the EU legal requirements of the Employee Protection Directive 89/391. That ensures, among other things, an employees' rights and obligations to report and prohibits disciplinary measures.[35] Still, the Directive considers it possible that the material scope regulated in Article 2 of the Directive may be extended to areas including employee protection if the future developments justify it, according to Article 27 (3) of the Directive.
The European Directive left the definition of the public interest in terms of whistleblowing to Member States.[36] They may extend the material scope of the protection to other areas including employee protection if they see this necessary and proportionate, like the German legislator did. Sec. 2 (1)(2) of German whistleblower law "Hinweisgeberschutzgesetz" (HinSchG) protects disclosures of breached employee protection law.[37] As

in the recommendation. This is left to each member State, a position reflected by the European Court of Human Rights in its case law.", see https://rm.coe.int/16807096c7 (accessed June 29, 2025).

[30] E.R. Boot, *op. cit.* p. 20.

[31] S. Gerdemann, *Revolution des Whistleblowing-Rechts oder Pfeifen im Walde?,* in *Recht der Arbeit*, 2019, vol. 1, p. 19.

[32] G. Thüsing, S. Rombey, *Nachdenken über den Richtlinienvorschlag der EU-Kommission zum Schutz von Whistleblowern,* in *Neue Zeitschrift für Gesellschaftsrecht*, 2018, vol. 26, p. 1001.

[33] N. Colneric, S. Gerdemann, *op. cit.,* p. 23.

[34] impact assessment–SWD (2018)116/973421, p. 30, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218_en (accessed October 10, 2025).

[35] Recital no. 21 of the Directive.

[36] Art. 25 of the Directive. S. Gerdemann, N. Colneric, *op. cit.*, p. 196-197.

[37] Reasoning for sec. 2 (1) (2) of the HinSchG, https://dserver.bundestag.de/btd/20/034/2003442.pdf#page=23.83, p. 58 (accessed

long as it does not fall short of the minimum standards of protection set by the Directive, Member States can freely shape the scope of whistleblower protection; as a result, national authority defines what the public interest is in whistleblowing law. While doing that, they can apply different regulatory approaches like those defined by *Vaughn*.[38] To be employed is an "*employment perspective,"* which means whistleblower protection aims primarily to enforce employment rights so that wrongdoings reported relate to specific matters in a work relationship; one example of such matters is safety and health risks in workplaces.[39] An "*open-government perspective,"* conversely, recognizes whistleblowing as a means to enhance democratic accountability; thus, most protected disclosures are about serious government misconduct such as corruption and abuse of power that undermines the democratic legal order.[40] If whistleblower protection follows the "*market regulation perspective,"* like *Sarbanes Oxley Act* of 2002, the focused-on subject is market efficiency. In that system, only wrongdoings that violate investor confidence in reliable information on the market are reported because the open market perspective is based on transparency of how the open market is regulated.[41] Lastly, a "*human rights perspective"* can be chosen, which encourages a broad access to information of all kinds. The Swedish freedom of information law, which works within a "*human rights perspective"* framework, is recognised as one of the world's most comprehensive rights for the protection of freedom of information.[42] Adopting this perspective into whistleblowing law may, however, dismantle the difference between the public interest in an effective law enforcement and a public interest in information.[43]

The European Directive, like the "*market regulation perspective,"* protects reports about violations that harm the effective functioning of the single

October 10, 2025); see also the assessments of the proportionality of extending protection too far to other areas, E. Özen, *op. cit.*, p. 115 -120.

[38] It cannot be ruled out that these perspectives influence each other and that elements from several perspectives can be found in whistleblowing regulations, see R. G. Vaughn, *The Successes and Failures of Whistleblower Laws,* Elgar, Cheltenham, UK et al., 2012, p. 286. see also a matrix of perspectives on the nature of whistleblowing provisions, A. J. Brown, *op. cit.*, p. 9.

[39] R. G. Vaughn, *op. cit.*, p. 288.

[40] R. G. Vaughn, *op. cit.*, p. 292.

[41] R. G. Vaughn, *op. cit.*, p. 294.

[42] R. G. Vaughn, *op. cit.*, p. 297.

[43] See 2.2.

market.[44] Refences to the Union's financial interests being violated due to underreporting of wrongdoings and the stated need for strengthening fair competition in the market suggests that the Directive was inspired by the "*market regulation perspective*".[45] However, it is not completely true that the European Directive falls within this regulatory approach. Rather, the Directive includes aspects from all the approaches described above and is a mosaic created from the pieces of the regulatory models selected by the European Commission. For instance, the Directive reflects elements of the "*employment perspective*" by emphasizing the protection of employees since they witness and report wrongdoings at workplace the most.[46] It differs from that perspective, however, since reports about employment-related issues such as wrongdoings against occupational safety and health regulations are not covered (yet) by the scope of protection under Article 2 of the Directive.[47] Similarly, considering that the personal scope of the Directive covers not only potential whistleblowers working in private sectors, but also those employed by public authorities, it is like the "*open-government perspective*" in the sense it promotes the accountability of public institutions. Nevertheless, the Directive differs because it excludes reports about abuses of state power under the concept of protection of "national security" from the material scope of protection under Article 2 and in relation with Article 3. Unlike the "*open government*" approach, the Directive imposes serious restrictions on public disclosure of wrongdoings

[44] In many places in the Directive, whistleblower protection is justified by the contribution of whistleblowing to maintaining the well-functioning of the Single Market, see, for example, Recital nr. 12, 14, 16, 18, and 105 of the Directive.

[45] The Proposal of the Commission for a whistleblower protection directive highlights that according to a study carried out for the Commission in 2017, the loss of potential benefits due to a lack of whistleblower protection, in public procurement alone, is in the range of EUR 5.8 to EUR 9.6 billion each year for the EU. It has been also see the Proposal, Brussels, 23.4.2018 COM(2018) 218 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218 (accessed October 10, 2025); see also the protection of EU Budget as one of arguments for introducing a whistleblower protection in the Commission Staff Working Document "impact assessment", Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, Brussels 23.4.2018, COM(2018) 218 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0116#page=18.22, p. 12 (accessed October 10, 2025).

[46] See for example the Recital nr. 2, 9, 10 and 12 of the Directive.

[47] According to Art. 27 (3) of the Directive, the Commission will consider the need for additional measures such as including further areas of the Union law such as protection of worker´s health and safety and working conditions; see also the dynamic nature of the references to the Union acts set out in the Annex of the Directive, Recital nr. 19.

according to Article 15. Finally, the Directive reflects the "*human rights perspective"* by referencing the ECtHR's case law on freedom of expression as an argument for regulating European whistleblower protection, which is enshrined in Article 10 of the European Convention on the Human Rights.[48] Despite this, the Directive primarily focuses on promoting effective enforcement of Union law rather than promoting freedom of expression.

Member States within the EU that have implemented the Directive have also created various regulatory approaches. For instance, some Member States extended the material scope to reports about employment-related wrongdoings such as violations of health and safety regulations, bullying, harassment, and discrimination,[49] which reflects the *employment perspective* more than other regulatory approaches. Others have been limited to transposing the content of the Directive, which seems to be the case according to the Commission´s 2024 report on the implementation of the Directive in the Member States.[50]

2.3.2. Public Interest as a Motivation of Whistleblower

Some whistleblower laws, like the British PIDA, include a prerequisite that a whistleblower should aim to protect public interest. That requirement is explained – beside solely preserving the spirit of the whistleblower protection[51]– by the premise that employees in British society have an obligation of loyalty not only to employers, but also to the public.[52] Nevertheless, a whistleblower's motivation is not important to

[48] See the Recital nr. 31.

[49] As it is recommended by the European Economic and Social Committee in 2018, see the Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level' (COM(2018) 214 final) and on 'Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law' (COM(2018) 218 final) (2019/C 62/26), Nr. 4.2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018AE2855 (accessed October 10, 2025).

[50] See the Report from the Commission to the European Parliament and the Council on the implementation and application of the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Brussels, 3.7.2024, COM(2024) 269 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52024DC0269 (accessed October 10, 2025).

[51] See 3.1.1.

[52] U. Beyer, *op. cit.,* p. 237.

the Directive.[53] A whistleblower might have acted in the public interest, for self-interest, or for other reasons,[54] but Art. 6 presumes that they have a reasonable belief that the information is true and that it falls within the material scope of the Directive, which is defined in Art. 2. Information is not protected if it is clearly false.

The Directive also does not require that a whistleblower believes that their information falls within the material scope of protection. If the information passed on by a whistleblower relates to at least one of the matters stipulated by Art. 2, the whistleblower is protected without any research on their motivation. Thus, pursuing public interest as a reason for disclosure is not required.

The irrelevance of a whistleblower's motivation to European whistleblower protection is based on some reasonable explanations. First, it is known that no research has found evidence about a whistleblower's actual motivations.[55] Furthermore, research shows that examining the motivations of whistleblowers can have negative impact on encouraging potential whistleblowers to report wrongdoings.[56] Indeed, whistleblowers find out about the relevance of their information and their legal status as a whistleblower when they are sanctioned and when they seek legal advice and/or involve government bodies such as the courts to protect themselves.[57]

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[53] Recital no. 32 of the Directive. S. Gerdemann, *Whistleblower als Agenten des Europarechts,* in *Neue Zeitschrift für Arbeitsrecht NZA-Beilage*, 2023, vol. 3, p. 48; V. Abazi, *Whistleblowing in the European Union*, in *Common Market Law Review,* 2021*,* vol. 58, no. 3, p. 813, https://doi.org/10.54648/COLA2021051.

[54] P. Roberts, *Motivations for whistleblowing: personal, private and public interests,* in A. J. Brown et al. (eds.), International Handbook on Whistleblowing Research, Edward Elgar, Cheltenham et al., 2014, p. 216- 220. J. Düsel, *op.cit.*, p. 52.

[55] see the "Harm-Test", M. Kumar, D. Santoro, *A Justification of Whistleblowing*, in *Philosophy & Social Criticism*, 2017, vol. 43, no. 7, p. 678, https://doi.org/10.1177/0191453717708469. see also a summary of findings from English, German and Turkish studies on the motive of whistleblowers, E. Özen, *op. cit.,* p. 57-60.

[56] S. Gerdemann, N. Colneric, *op. cit.*, p. 204. R. Kölbel, N. Herold, *Wirtschaftskontrolle durch Whistleblowing? Empirische Befunde zu Entscheidungsprozessen von Hinweisgebern*, in *Neue Kriminalpolitik, 2015, vol.* 16, no. 4, p. 376, https://doi.org/10.5771/0934-9200-2015-4-375. U. Beyer, *op. cit.,* p.104.

[57] T. Byers, *Theranos Whistleblower Erika Cheung on Incentivizing Ethics* | Podcast, in *Stanford eCorner* (blog), accessed on 9. June 2024, https://ecorner.stanford.edu/podcasts/theranos-whistleblower-erika-cheung-on-incentivizing-ethics/ (accessed October 10, 2025).

If the information does not relate any of the matters regulated by Art. 2, a whistleblower is examined for whether their relevant belief in the information's importance is covered by the material scope of the application of protection. The relevant belief of the whistleblower should not be subject to strict scrutiny. Along with the fact that whistleblowers do not have to know about the importance of the information for the public at the time of disclosure, it would be just as difficult for a non-legal professional whistleblower to assume that the information is covered by a whistleblower protection law as it would be hard to assess whether the information is in the public interest. It is hardly possible that they would already know at the time of reporting that the report is legally protected and encouraged. The relevant belief should instead be assessed based on objective factors of whether a whistleblower is likely to assume that the information is relevant. These factors could be fact-based such as whistleblower´s specific knowledge about existing laws or practices as it is demonstrated by the German legislator during the transposing of the Directive. When applying German whistleblower protection law (the HinSchG) the national court will examine, in accordance with sec. 33(1)(2) HinSchG, whether a whistleblower has a reasonable assumption that the information is relevant to law enforcement, considering the individual case and the whistleblower's job-specific knowledge.[58]

In case of doubt, it is recommended to apply a broad understanding and accept the reasonable belief of a whistleblower regarding the importance of the information within public interest. This would promote the efficiency of the law enforcement and of whistleblower protection law itself.

Given this context, one might expect that the ECtHR would abandon its motive test, which the Court had systematically involved to balance interests within the framework of the criteria for assessing a whistleblowers' freedom of expression.[59] Indeed, it is possible that in a whistleblowing case from a country in which the motive test has been abolished, the Court considers removing motive tests by national law, which is appropriate measure under the Art. 10 of the ECHR. Nevertheless, a perpetuation of motive research via national law would also be conventional and acceptable for effective protection of whistleblowers. So far, it has been observed in case law that the Court has never deprived a whistleblower of protection in a typical whistleblowing

[58] Reasoning for sec. 33 (1)(3) of the HinSchG, *op. cit.,* p. 107.
[59] V. Abazi, *op. cit.*, p. 847.

case merely on the grounds of them having allegedly questionable motives.[60] For an adequate balance between the interests involved, a motive test would be conceivable if the information falls outside the scope of the national whistleblower protection law. In that case, the Court would examine all the usual elements for protection, namely public interest in the report, the motivation of the whistleblower, the choice of a discreet means of reporting, and the severity of the disadvantages and sanctions.

3. Distinction between Public Interest and Private Interests

In 2015, the Irish Department of Jobs, Enterprise, and Innovation published a code of practice in the Irish Protected Disclosure Act 2014 (PDA).[61] In the code, the Ministry explains the difference between a personal grievance and a protected disclosure. A personal grievance is a matter that affects the employee, i.e. the employee's position in relation to their duties, terms of employment, working procedures, or working conditions – such as a complaint about the selection criteria for a promotion, which should be dealt with through the organization's normal grievance procedure. A protected disclosure, in comparison, concerns misconduct such as the misuse of funds, bribery and fraud, or violation of occupational safety measures in a dangerous work situation. Nonetheless, the code provides no criteria for differentiation.

According to the opinion expressed in this article, the objective of the Directive states the public interest in a whistleblowing case is aligned to its ability to enhance the efficiency of law enforcement. That public interest differs from private interests, which are mainly rooted in the protection of employees' contractual interests. Besides legislation and jurisdiction, the case law of the ECtHR has used the public interest test in whistleblowing cases for a long time. Despite this, there still has been no clear, maintained criteria developed to identify public interest in a whistleblowing case.[62]

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[60] See ECtHR, Judgement of 17. September 2015 – Case 14464/11 (Langner v. Germany), marginal no. 47.

[61] S.I. No. 464/2015 - Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, Nr. 30, 31, https://www.irishstatutebook.ie/eli/2015/si/464/made/en/print (accessed June 29, 2025).

[62] F. Meyer, *LuxLeaks, Cum-Ex & Co - Neue Leitlinien des EGMR für Whistleblowing in transnationalen Kontexten und gesetzgeberischer Handlungsbedarf*, in *Juristenzeitung* 2023, vol. 78, no. 7, p. 265. R. Brockhaus, *Zwei problematische Aspekte beim Whistleblowing: Abwägungen und der Begriff des öffentlichen Interesses*, in: J. C. Joerden, R. Schmücker, E. Ortland, (eds.),

This distinction is important to the discussion on identifying public interest and its differentiation from other interests.

3.1. Relevance of the Differentiation

3.1.1. Preserving the Spirit of Whistleblower Protection

The British whistleblower law illustrates how specific protection might be inappropriately used for personal interests. In the case *Parkins v. Sodexho* 2002, the Employment Appeal Tribunal (EAT) ruled that an employee is granted whistleblower protection even if their disclosure relates mainly to their contractual interests.[63] The British legislature confronted that case law by introducing a public interest test into the law in 2013. The test requires examination on whether a whistleblower has an objectively justified belief that the disclosure is in the public interest.[64] The introduction of the public interest test is explained by the aim to counteract "*opportunistic use of the legislation for private purposes*".[65]
As it was explained before, the European Directive does not have "public interest test" itself. It is present in the impact assessment of the Directive proposal however, where the European legislator highlights that the

Themenschwerpunkt: Recht und Ethik des Kopierens: = Law and ethics of copying, Jahrbuch für Recht und Ethik, Duncker & Humblot, Berlin, 2018, p. 447.

[63] As a result of the court's broad interpretation of the existence of a breach of contractual obligations within the meaning of sec. 43B(1) ERA, the employee enjoyed protection as a whistleblower, which led to the inclusion of the reporting of all types of breaches of contractual obligations in the protection, see Employment Appeal Tribunal, Judgement of 22. June 2001– Case 1239_00_2206 (Parkins v. Sodexho Ltd.), Industrial Relations Law Reports (IRLR), 2021, p. 109.

[64] O. Nwoha, *Whistleblower Protection in the UK: A Case for Reform,* in *Business Law Review* 2021, vol. 42, no. 5, p. 244, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\BULA\BULA2021034.pdf.

[65] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015] IRLR 614, 616, marginal no. 18, „the sole purpose of the amendment to section 43B (1) by section 17 of the 2013 Act was to reverse the effect of Parkins v. Sodexho Ltd. The words 'in public interest' were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications ", Chesterton Global Ltd. vs. Nurmohamed, *op. cit.*, marginal no. 17-36.

whistleblower should be differentiated from "*aggrieved workers*".[66] Indeed, whistleblowers are protected because they shed light on conducts that threat not private interests but public interests (such as health and safety of the public, monetary interests of state, and more.) It is a voluntary act from individuals, who, despite legal and interpersonal reprisals report wrongdoings for public health and safety.
It is national law's responsibility to formulate the scope of application in accordance with the purpose of whistleblower protection so that the disclosure of relevant violations serves to an effective law enforcement. Legislative actors may have not foreseen this at the time of the legislation. Thus, there can still be other areas where law enforcement is deficient. The courts can identify further areas where the reports are in public interest in future cases. They can detect the public interest, as it was indicated above, with the help of some fact-based evidence like a whistleblower´s specific knowledge about existing laws or practices.

3.1.2. Avoiding an Inappropriate Protection against Dismissals

While transposing the Directive into German law, legal scholars expressed that new whistleblower law should not promote employees to obtain de facto protection against dismissal by playing the "whistleblower card" – "*Whistleblower-Karte*".[67] The use of whistleblower protection to safeguard oneself in private matters, such as an individual's protection against dismissal, would have a negative impact on the whistleblowing's reputation; this combats using whistleblowing as "a weapon" – "*Kampfmittel*".[68] The risk of exploiting whistleblower protection cannot be countered by the fact that to be protected under Article 6 of the Directive, the whistleblower must report a wrongdoing covered by law and must do so in advance of any disciplinary action such as dismissal.[69] This is because protection applies not only when such misconduct actually exists, but also when a whistleblower has a reasonable belief that this is the case. A competent court must still answer whether the report is in the public

[66] impact assessment- SWD (2018)116/973421, p. 8, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218en (accessed October 10, 2025).
[67] K. U. Schmolke, *Der Vorschlag für eine europäische Whistleblower-Richtlinie*, in *Die Aktiengesellschaft*, 2018, p. 779.
[68] K. U. Schmolke, *Die neue Whistleblower-Richtlinie ist da! Und nun?,* in *Neue Zeitschrift für Gesellschaftsrecht*, 2020, vol. 1, p. 10.
[69] Dissenting opinion, F. Bayreuther, *Whistleblowing und das neue Hinweisgeberschutzgesetz,* in *Neue Zeitschrift für Arbeitsrecht NZA-Beilage*, 2022, vol. 1, p. 28.

interest. In addition, it seems unlikely that an employee would learn of an upcoming dismissal and seek out misconduct to report to prevent it.[70] Whistleblowing is not a single act; rather, it is a process.[71] In that process, a whistleblower searches for sources, evidence, etc. on the company to prepare a report.[72] During that research, the employer may learn of an upcoming report by the employee and dismiss him or her before the report is made. In a case like this, the fact that the dismissal took place before the report was made does not necessarily mean that it was not made because of the report.

Moreover, whistleblower protection in that case would be disproportionate because the employer's interest would not have been sufficiently considered. This point was made clear by the European legislator as well. While searching for a convenient legal basis for the Directive, the legislator has pointed out that Art. 153 TFEU, which concerns regulating employment-relates issues, would be far-reaching and costly, contrary to the principle of proportionality. On the one hand, opting for Art. 153 TFEU would only have a limited effect on enhancing the enforcement of Union law in this area because there are already sufficient instruments in that area to support the enforcement of employment laws, such as Employee Protection Directive 89/391.[73] On the other hand, it would result in an increased number of reports on employment-related and private matters and thus following up on these reports would generate a high cost.[74] Therefore, the European legislator has refrained from opting for Article 153 TFEU.

Still, national legislators are entitled to extend the scope of the application, so far as it is proportionate, or in other words, so far as it creates a balance between the interests of employee, employer and the public.

[70] N. Colneric, S. Gerdemann, *op.cit.,* p. 76. see however, F. M. Teichmann, *Das Hinweisgeberschutzgesetz (HinSchG) im Kontext generativer künstlicher Intelligenz – eine experimentelle Untersuchung möglicher Missbrauchsmöglichkeiten und ihre dogmatischen Implikationen*, in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2023, vol. 8, p. 296.

[71] J. P. Near, M. P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, in *Journal of Business Ethics,* 1985, vol. 4, p. 2.

[72] E. Özen, *op. cit.,* p. 260- 265.

[73] Mentioned above, Recital no. 21 of the Directive.

[74] Impact assessment- SWD (2018)116/ 973421, p. 38, https:// ec.europa.eu/ info/ law/ better- regulation/ initiatives/ com- 2018- 218en (accessed October 10, 2025).

3.1.3. Providing the Efficiency of Internal Reporting Channels

Most whistleblowing cases made public relate to public interests like health and safety, which is seen in disclosures like *Alte-Apotheker* and *Wirecard* in Germany.[75] The wrongdoings reported through internal channel of companies, however, often concern the interpersonal or contractual interests of employees. Studies show that more than half of reported cases relate to personal grievances, i.e. complaints by employees that relate specifically to their contractual interests.[76] This fact presents a challenge for employers who are responsible for adequate processing of whistleblowing reports in accordance with Art. 8 and 9 of the Directive. Companies of a certain size described in Art. 8 of the Directive are obliged to first set up internal reporting channels and reports must be documented and treated confidentially (Art. 9 of the Directive.)[77] If an employer falsely regards a report about misconduct as a personal grievance, the employer would be accused of violating of whistleblowing related obligations in Art. 8 and 9 of the Directive.[78] That's why employers should know what type of report they are dealing with. Differentiating reports in the public interest from those relating mainly to interpersonal conflicts at one's workplace would help employers to ensure that reports of public interest comply with the requirements in the internal reporting procedure and are processed by the internal channels established under Article 8 of the Directive.

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[75] R. Bender et al., *Bilanzskandal: Der Betrug bei Wirecard soll schon vor 15 Jahren begonnen haben,* in Handelsblatt, 28. July 2020, https://www.handelsblatt.com/finanzen/bilanzskandal-der-betrug-bei-wirecard-soll-schon-vor-15-jahren-begonnen-haben/26040098.html (accessed October 10, 2025). ndcompliance-Redaktion, 'Ndcompliance-Redaktion: Kündigungsschutzprozess Um Whistleblowing Im „Bottroper Apotheker-Skandal" Durch Vergleich Beendet' [2018] Newsdienst Compliance 21003.

[76] A. J. Brown et al., *Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government. Key findings and actions of Whistling While They Work 2*, Griffith University, Brisbane, 2019, p. 12, siehe figure 7.

[77] see employer´s obligation to documentation, in accordance with sec. 11 of the HinSchG, J. Dilling, *HinSchG § 11 Dokumentation der Meldungen",* in S. Gerdemann, N. Colneric (eds.), BeckOK HinSchG, C.H. Beck, München, 2025, marginal no. 10-12. see also obligation to process reports confidentially within the framework of sec., 8 of the HinSchG, N. Colneric, S. Gerdemann, *HinSchG § 8 Vertraulichkeitsgebot*, in S. Gerdemann, N. Colneric (eds.), BeckOK HinSchG, C.H. Beck, München, 2025, marginal no.11-27.

[78] S. Reuter, *Das Hinweisgeberschutzgesetz ist da – Was Unternehmen jetzt tun müssen*, in *Betriebs-Berater*, 2023, p. 1540.

Furthermore, Recital No. 22 of the Directive calls for interpersonal conflicts to be forwarded to other competent authorities in the companies—if that differentiation can be made. That also helps prevent excessively overworking internal channels, which are supposed to primarily handle whistleblowing cases.[79]
Overall, this framework helps employers avoid liability risks due to inadequate processing of reports. Employers would be able to defend themselves against possible accusations—such as a case in which a whistleblower was disadvantaged due to the disclosure of information of public interest and/or that the report was not processed properly.

3.2. Differentiation Criterion: Existence of a Law Enforcement Deficiency

The opinion of this study is that the main differentiation criterion of public interest in whistleblowing law is a law enforcement deficiency, which can be seen throughout the previous explanations about the nature of public interest in whistleblowing. Public interest in whistleblowing is located by a cases connection to effective law enforcement. Thus, public interests can be distinguished from private interests in a reporting case by applying the following criterion: Is there a law enforcement deficit for what and where a report concerns? If so, there is a public interest in the report. The need to enhance the effectiveness of law enforcement may vary depending on national circumstances, time, legal system, etc. It is appropriate, in this respect, that the Directive identifies where it considers this need to exist, and leaves it open for Member States to include other areas.[80]
How can one determine where there is a lack of law enforcement? This decision is first and foremost at the discretion of legislators. Besides the Recitals, the Directive provides some guidance by characterizing offenses that would be prosecuted through whistleblowing. The characteristics of those offenses can help national legislators and judges to detect public interest in further areas than those stipulated in Article 2 of the Directive. It has been observed that the European legislator picked out special cases in which violations have no victims or unlimited numbers of identified victims so the prosecution of committed violations through the victim´s

[79] Recital no. 22 of the Directive regarding the forwarding of information to the competent authority. A. J. Brown et al., *Clean as a whistle, op. cit.*, p. 21.
[80] Art. 25 of the Directive.

report is hardly possible.[81] Another characteristic of the selected offenses is that the consequences of the violations committed in those areas are difficult to calculate and it is difficult to gather evidence.[82] All those factors make the cases so complex to solve that reporting insiders is of public interest – making it an effective enforcement of law.[83]
The punishable offenses based off the established elements can be illustrated as follows:[84] first, economic offenses – which are typically the subject of whistleblowing – are only pursued to a limited extent by state authorities. Economic offense cases are usually complex in nature, the victims of these offenses are usually not identifiable, and the relationship between the victim and the offender is usually unknown.[85] Consequently, it would not be possible to prosecute the offense with a victim's report. Second, environmental offenses – with consequences difficult to calculate – fit within the Directive. These offenses, such as radioactive waste, can have a negative impact on different interests, such as life, health, or the security of a country and the world, regardless of time and place. Finally, violations of tax law are characterised by the fact that they are hard to prove because the area of corporate taxation is not sufficiently transparent, which encourages criminals to commit offenses.[86] For that reason, insider knowledge is vital.

3.3. Other Criteria

So far, public interest has been invoked as a condition for protection or a factor to be considered in case law of the ECtHR on whistleblowing. For this reason, legal scholarship has also attempted to define public interest precisely to establish a legal certainty regarding its scope. Several criteria can be derived from existing legal research. Although the feasibility of these criteria is questionable, they could help identify further areas of law

[81] See so called "*spill-over effect*" of violations, which should be prosecuted via whistleblower´s reports, impact assessment- SWD (2018)116/ 973421, p. 3, 20, 30. https:// ec.europa.eu/ info/ law/ better- regulation/ initiatives/ com- 2018- 218en (accessed October 10, 2025).
[82] Recital No. 10, 105 of the Directive.
[83] Recital No. 67 of the Directive.
[84] See for more detail, E. Özen, *op. cit.,* p. 130- 134.
[85] A. Aytekin İnceoğlu, *Ekonomik Suclar*, in *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi,* 2020, vol. 1, p. 129- 130.
[86] A. Deltour, *Whistleblowing on Luxembourg's Tax Practices*, in R. Krøvel, M. Thowsen (eds.) Making Transparency Possible: An Interdisciplinary Dialogue, Cappelen Damm Akademisk, Oslo, 2019, p. 81- 83, https://doi.org/10.23865/noasp.64.ch0.

where whistleblowing would contribute to effective law enforcement. These criteria can be grouped as follows: Quantity of people affected, nature of the wrongdoing, and the instrument of law used to enforce whistleblower rights.

3.3.1. Quantity of People affected

The case law of the ECtHR and the British EAT on whistleblowing prompts a question on whether large numbers of people affected by misconduct justify public interest in a report. In the case of *Heinisch v. Germany*, the ECtHR validates a public interest of reporting staff shortages in a nursing home for the elderly as follows: "The information disclosed by the applicant is clearly of public interest. In societies with an ever-increasing proportion of elderly people in nursing homes and given the vulnerability of the patients concerned, who may often be unable to raise concerns about inadequate care, the disclosure of information about the quality or shortcomings of care by the employee is urgently needed to prevent misconduct."[87] Similarly in the case of *Chesterton Global v. Nurmohamed*, the EAT justified public interest in the disclosure of wage manipulation at a real estate company that affected meaningful amount of people. Said misconduct affected the interests of the employee who reported it and the interests of hundreds of other employees, which was a sufficient number of affected parties to classify the case as being of public interest.[88] The size of the company also played a role because – apart from its employees – the misconduct also affected other interested and active parties in the market.[89]

The quantity of people affected by a wrongdoing, however, is not always a reliable criterion for defining what constitutes the public interest in a disclosure. Legal scholarship in British case law raises a question about how large the circle of affected people must be to qualify information as in the public interest.[90] This is a question which cannot be completely answered. There are violations that are absolutely in the public interest yet lack any identified victims from the violation because of its abstract nature

[87] ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), marginal no. 71.

[88] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op.cit.,* marginal no. 14- 35.

[89] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op.cit.,* marginal no. 36.

[90] D. Lewis, *op. cit.*, p. 151. J. Asthon, *op. cit.*, p. 458.

– such as if a country had an impaired democratic electoral system. At first glance, there are no affected individuals to report abuses in the system; in reality, the whole society is affected – albeit only indirectly. Moreover, the use of such a criterion for defining public interest can deter potential whistleblowers from disclosure. For example, they may not want to make a report if they do not believe there is enough victims related to the wrongdoing. It is not possible for a whistleblower to examine how wide the circle of victims is; only State officials can do such an examination. As the EAT also stated, how public interest is determined in a disclosure requires a fact-sensitive analysis that calls for comprehensive consideration of the circumstances of each case.[91]

3.3.2. Nature of Wrongdoing

Another suggested criterion might be the wrongdoing's nature, but this may also not be reliable. Using the nature of the wrongdoing as a criterion for determining public interest comes from the case law of German Court of Constitution "Bundesverfassungsgericht" (BVerfG). The Court decided in 2001 to make employees testify against their employer accused of committing crime and to safeguard against employee dismissal. The Court stated the dismissal of an employee because of their testimony is not justified since there is a public interest in prosecuting criminal offenses.[92] An employee serves the public interest with a testimony. In the context of whistleblowing, this case law has been widely cited for grounding public interest in a disclosure.[93] Furthermore, another tendency has emerged where just a disclosure of criminal offenses are considered to be of public interest.[94] A public interest in reporting civil law violations – such as discrimination in workplaces – was denied in a case in 2014.[95] This understanding of public interest in disclosure could have been influenced by how the German legislator transposed the Directive. While protection

[91] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op. cit.,* marginal no. 25.
[92] German Court of Constitution, Judgement of 2. July 2001 – Case 1 BvR 2049/00, in *Neue Zeitschrift für Arbeitsrecht*, 2001, p. 888.
[93] G. Forst, *Strafanzeige gegen den Arbeitgeber – Grund zur Kündigung des Arbeitsvertrags?*, in *Neue Juristische Wochenschrift*, 2011, vol. 48, p. 3477–3482; S. Sasse, *Hilfspolizist Arbeitnehmer – oder sinnvolle Neuregelung?*, in *Neue Zeitschrift für Arbeitsrecht*, 2008, vol. 17, p. 990–993.
[94] German Federal Court of Labour, Judgement of 3. July 2003 – Case 2 AZR 235/02, in *Neue Zeitschrift für Arbeitsrecht*, 2004, p. 427.
[95] Higher Regonal Court (Oberlandsgericht) Frankfurt a. M., judgement of 8. May 2014 – Case 16 U 175/ 13, in *Neue Zeitschrift für Arbeitsrecht Rechtsprechungsreport*, 2004, p. 439.

for disclosing criminal and administrative offenses is included in the material scope of the German HinSchG, these are not covered by the Directive.[96]
It is evident the criterion on the nature of the wrongdoing is unsuitable. The inclusion of disclosures of criminal offences in the public interest could prove unproportional. There is no clear answer to which types of criminal offenses are suitable to disclose within the scope of the public interest. It would be disproportionate that an employee uses any kind of offense – such as illegal parking – to protect his personal interest against an employer by relying on statutory whistleblower protection by reporting it.[97] Whistleblowing is protected because of its contribution to effective law enforcement, and a lack of law enforcement emerges independent of the nature of wrongdoing. That is why the European legislation does not make any difference between offenses in criminal and civil law while shaping the material scope of the protection. Accordingly, violations of personal data protection will also be prosecuted through whistleblowing (besides terrorist financing), and reporting such violations is in the public interest according to European whistleblower protection.[98]

3.3.3. Type of the Instrument used to enforce the Law

Similarly, the instrument of choice for law enforcement might not work well for identifying a public interest in disclosure. To explain, take the following case as an example: a wrongdoing is reported using means provided by the legal system in question. If it is a criminal offense one should file a criminal complaint. If the violated law is civil in nature, such as data protection law, one would contact authorities other than public prosecutors. This could be an external government agency such as a data protection authority or an internal organizational body if the employer has established one, e.g. through an ethics guideline. It would be inconceivable to claim that there is a public interest in a disclosure just because it concerns a criminal complaint or a civil lawsuit. The means used to enforce the law does not determine which interest is enforced; rather, the interest to be protected determines which means should be used to enforce the law. The legislature decides how interests are enforced considering certain aspects such as the nature of the interest or the

[96] Sec. 2 (1) (1 and 2) of the HinSchG, reasoning for sec. 2 (1) (1 and 2) of the HinSchG, *op. cit.,* p. 56 f.
[97] See risks for a utilizing the whistleblowing as a "*Kampfmittel*", above 3.1.2.
[98] Art. 2 of the Directive, see also Appendix Part I of the Directive, L 305/47.

constitutional status of the legal interest concerned, e.g. human life and the extent and severity of the danger of impairment of the interest.[99] It then seems reasonable to stipulate a duty to report a crime. For example, sec. 138 of the German Criminal Code "Strafgesetzbuch" (StGB) states that if one witnesses a case of murder or manslaughter, they have a duty not only to the authorities but also to the person threatened.[100] By reporting the crime to the authorities or warning the person under threat, it would be possible to protect a person's life. Such reporting is in the public interest but not specifically in terms of improving law enforcement through reports. In conclusion, the involvement of a state body, such as an authority, or a private individual in law enforcement does not necessarily determine the nature of the interest pursued.

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[99] German Court of Constitution, Judgement of 8. August 1978 – Case 2 BvL 8/77, in *Neue Juristische Wochenschrift* 1979, p. 362. German Court of Constitution, Judgement of 26. February 2020 – Case 2 BvR 2347/15 et al., in *Neue Juristische Wochenschrift*, 2020, 905, marginal no. 268. German Court of Constitution, Judgement of 24. March 2014 – Case 1 BvR 160/14, in *Beck-Rechtsprechung (BeckRS),* 2014, 49403, marginal no. 28-29.

[100] Sec. 138 StGB-Failure to report planned criminal offences "(1) Anyone who is aware of the intention or execution of 1. (omitted) 2. high treason in the cases referred to in Sections 81 to 83 (1), 3. treason or a threat to external security in the cases referred to in Sections 94 to 96, 97a or 100, 4. counterfeiting of money or securities in the cases referred to in Sections 146, 151, 152 or counterfeiting of payment cards with a guarantee function in the cases referred to in Section 152b (1) to (3), 5. murder (Section 211) or manslaughter (Section 212) or genocide (Section 6 of the International Criminal Code) or a crime against humanity (Section 7 of the International Criminal Code) or a war crime (Sections 8, 9, 10, 11 or 12 of the International Criminal Code) or a crime of aggression (Section 13 of the International Criminal Code), 6. a criminal offence against personal freedom in the cases of Section 232 (3) sentence 2, Section 232a (3), (4) or (5), Section 232b (3) or (4), Section 233a (3) or (4), in each case insofar as these are crimes, Sections 234 to 234b, 239a or 239b, 7. robbery or extortion (§§ 249 to 251 or 255) or 8. a crime dangerous to the public in the cases of Sections 306 to 306c or 307 (1) to (3), Section 308 (1) to (4), Section 309 (1) to (5), Sections 310, 313, 314 or 315 (3), Section 315b (3) or Sections 316a or 316c at a time when the execution or success can still be averted, and fails to report this to the authorities or the threatened party in good time, shall be punished with imprisonment of up to five years or a fine. (2) The same punishment shall apply to anyone who 1. of the execution of a criminal offence under Section 89a or 2. of the intention or execution of a criminal offence under Section 129a, also in conjunction with Section 129b (1) sentences 1 and 2, at a time when the execution can still be prevented and fails to report this to the authorities without delay. Section 129b (1) sentences 3 to 5 shall apply mutatis mutandis in the case of number 2. (3) Anyone who recklessly fails to report the offence, even though they have credible knowledge of the plan or commission of the unlawful act, shall be punished with imprisonment of up to one year or a fine.", translated by DeepL (free version).

3.3.3. Grey Area between Public and Private Interest

Despite attempts to draw distinctions, a case in the Irish court in 2022 confirmed an employee's complaint constituted a protected disclosure even though it concerned breaches of the employer's obligations under labour law – namely the duty to ensure health and safety in the workplace.[101] Even though the criterion proposed in this article, namely "Existence of a Law Enforcement Deficiency," can help identify public interest in further cases not (yet) covered by legislative protection, there might be cases in which a clear distinction between public and private interests cannot be made.

An adequate distinction between these interests might be difficult especially in technical occupational safety.[102] Misconducts in that area have far-reaching results such as endangering the safety and health of the public or pollution of the environment and water. The disclosure of misconducts in such cases serve the contractual interests of the employee being protected against safety risks in the workplace and the public. In those cases, a disclosure can be assessed as a public interest in whistleblowing protection law. A justification of public interest in technical occupational safety would also be of European interest considering the violations against technical occupational safety have negative impacts on the functioning of the internal market. Violations, for example, can have a negative impact on competition between Member States.[103]

By raising concerns on private matters such as irregular or inadequate remuneration of workers, serious violations can be brought to light, such

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[101] Supreme Court of Ireland, Judgement of 1. December 2021– Case S:AP:IE:2021:000027 (Baranya v. Rosderra Irish Meats Group Ltd.), [2021] IESC 77, available online, https://www.courts.ie/view/Judgments/6c2c35a8-7f6d-4cf6-ba12-5fde40dcf113/4b7cab2e-7e78-48e2-a630-284bf315389a/2021_IESC_77_Charleton%20J.pdf/pdf (accessed October 10, 2025). L. Kierans, *The New Whistleblowing Laws of Ireland,* in S. Gerdemann (ed.), Europe's New Whistleblowing Laws: Research Papers from the 2nd European Conference on Whistleblowing Legislation, Göttingen University Press, Göttingen, 2023, p. 77-79, https://doi.org/10.17875/gup2023-2354.

[102] An argument in favour of protecting whistleblowers is that, R. Krause, *Zwischen Treuepflichtverletzung und Rechtsdurchsetzungsinstrument – Externes Whistleblowing im Wandel der Zeiten*, in *Soziales Recht,* 2019, vol. 9, no. 3, p. 150.

[103] See an argument for extension of protection to technical occupational safety due to the functioning internal market, G. Forst, *Die Richtlinie der Europäischen Union zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden (Whistleblowing-Richtlinie),* in *Europäische Zeitschrift für Arbeitsrecht*, 2020, vol. 3, p. 286.

as social security fraud, wage manipulation, and unregistered employment.[104] This was also case in the *Heinisch* ruling. The ECtHR validated a public interest in the disclosure even though the information was about an employer putting an excess workload on employee's, thus breaching the employee contract.[105] Empirical studies have also shown that private workplace issues can reach such a volume that they also affect the public interest – a so-called "mixed type of wrongdoings."[106]

Finally, some criminal offenses cannot be assessed as merely private matters, such as sexual harassment of children and young people in educational institutions, aid organisations or clinics[107] and gender-specific corruption – so-called *sextortion*.[108] Those are offenses that are brought into light by insider information. If one applied the "Existence of a Law Enforcement Deficiency" theory, one might consider there to be no lack of law enforcement because the victims of these offenses are identifiable and they must be able to file a complaint – or invoke other means of law enforcement to protect their interests. Nonetheless, an insider's disclosure can be qualified as whistleblowing and in the public interest for other reasons, such as hesitation for a report. In relation to that, a report by Transparency International states that underreporting of gender-based corruption is attributed to the fact that women affected believe they will be delegitimized and experience their reports not being taken seriously.[109]

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[104] This type of violation is appropriately covered by the sec. 2 (1) (2) of the HinSchG, see also the reasoning for that, *op. cit.,* p. 57.

[105] ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), marginal no. 71.

[106] P. Roberts, J. Olsen, A. J. Brown, *Whistling While They Work: A Good-Practice Guide for Managing Internal Reporting of Wrongdoing in Public Sector Organisations,* ANU E Press, Australia, 2011, p. 20. A. J. Brown et al., Clean as a whistle op. cit., p. 15. See also a diagram showing, how private and public interests are intertwined, A. J. Brown, *op. cit.*, p. 13.

[107] According to a press release issued by the Federal Criminal Police Office on 8 July 2024, the number of reported cases of child sexual abuse rose by 5.5 per cent in 2023, while the number of reported cases of abuse of adolescents rose by 5.7 per cent, see the report, https://www.bka.de/DE/Presse/Listenseite_Pressemitteilungen/2024/Presse2024/240708_PM_PK_SexualdeliktezNvKinderuJugendlichen.html (accessed 29 June, 2025).

[108] A. Rychlíková, S*extortion: Why We Need a New Generation of Whistleblowers,* in *Southeast Europe Coalition on Whistleblower Protection (blog),* 8. January 2024, https://see-whistleblowing.org/sextortion-why-we-need-a-new-generation-of-whistleblowers/ (accessed October 10, 2025).

[109] N. Zúñiga, *Gender sensitivity in corruption reporting and whistleblowing*, in *U4 Helpdesk Answer 2020:10 (Transparency International Anti-Corruption Research Cente*r (blog), 20. June 2020, p. 4,

Other reasons mentioned within the framework for the proposed criterion of distinction are a difficulty proving the case and lack of witnesses, among others.[110] Under those circumstances, whistleblowing comes up as an effective means to enforce the law and the interests of victims who could not otherwise achieve remedies through traditional means of law enforcement.

4. Conclusions for Employees, Employers, and the Courts

It may not always be possible to make a clear distinction between public and private interests in a disclosure case, regardless of the criteria one uses to make a distinction between them. Still, if the application of the criterion proposed in this article, namely the "Existence of a Law Enforcement Deficiency," provides a degree of clarity between the two, this study achieved its objective.

This study also reached some conclusions for employees (as potential whistleblowers), courts (which must assess the application of protection), and employers, who are subject to some legal liabilities within the framework of whistleblowing protection law. Firstly, a non-legal professional whistleblower does not have to assess what information disclosed to the public means. If one thinks that a witnessed wrongdoing also affects the public, their main motivation as whistleblower is to eliminate said wrongdoing, whether or not they are pursuing both public and private interests – such as proper remuneration, relief from excessive overtime, etc. In any case, the regulatory concept of the Directive does not establish investigations of whistleblower's motives. The examination of a whistleblower's reasonable belief stated in Article 6 of the Directive applies only if their given information does not relate to any of the areas covered by Article 2 of the Directive.

Secondly, courts dealing with an alleged whistleblowing case can assess reasonable belief of whistleblowers if the information falls within the material scope of protection; in other words, they can assess the special circumstances of each case to see if the information such as a whistleblower's specific knowledge about wrongdoing. In doubt, an affirmation of reasonable belief of whistleblowers is of public interest to

https://www.u4.no/publications/gender-sensitivity-in-corruption-reporting-and-whistleblowing.pdf (accessed October 10, 2025).

[110] H. Feigenblatt, *Breaking the Silence around Sextortion: The Links between Power, Sex and Corruption*, Transparency International, Berlin, 2020, p. 2, see also the economic and social consequences of gender-based corruption, p. 24.

encourage whistleblowing and effective law enforcement. By doing that, the courts could identify further matters of public interest that had not been considered at the time of legislation and fill the gaps in the material scope of protection.

Lastly, considering the difficulties in distinguishing between public and private interests, employers who operate an internal reporting office are recommended to expand the scope of matters to those reported beyond legal protection. One example would be sexual offenses in the workplace, the disclosure of which through whistleblowing has been increasingly advocated in public. The expansion would avoid the risk of not having properly handled a report that would be classified as whistleblowing by a court or government agency. The improper handling of such reports might be tolerated to a certain extent because the legislation does not (clearly) cover the matter to which certain reports relate. However, this could not protect the employer from further consequences such as a loss of reputation in case of a public disclosure of that misconduct and an accusation by the reporting employee that they were victimized.

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