Protecting Whistleblowers

Yves Lador, Earthjustice

Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

6th Meeting of the Task Force on Access to Information - Geneva, 3-4 October 2019
An example nearby but outside the Aarhus Parties:

Academic Bülent Şık sentenced for exposing public health risk

Istambul September 27, 2019 (last week !)

An academic and columnist specialised in public health, Bülent Şık was sentenced on 26 September to 1 year and 3 months in prison for revealing public health risks in a Cumhuriyet newspaper article published in 2018.

The Istanbul 2nd Penal Court of First Instance condemned him for ‘disclosing official secrets’. He had been also indicted for ‘holding’ and ‘disclosing information for political or military purposes’ for which he was acquitted at the third and final hearing. The court did not defer the prison sentence on grounds that ‘he did not show remorse’.

The Cumhuriyet article entitled “Report Hidden From the Public” with the subtitles: “This Is How We Are Poisoned” revealed the results of a study carried out by Şık and other scientists for Turkey’s Ministry of Health between 2011 and 2015. The study linked contamination of water and soil with toxic materials in the Western Thrace region of Turkey with high cancer rates in the area.

Comment: Matters raising public health and environmental issues, are matters of public interest, which means they are subject to higher protections in law.

Source: Article 19
Protecting Whistleblowers

Aarhus Convention

Article 3.8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

2014 - Maastricht Declaration on Transparency as a driving force for environmental democracy - MOP5 - Maastricht, September 2014

I. Information in the Age of Knowledge

5. We recognize close links between the effective implementation of the Convention and its Protocol and the importance of protecting environmental activists and whistle-blowers, freedom of speech and the safe participation of citizens in decision-making affecting their lives. In any case, Governments should recognize the important role played, as well as the risks faced, by such activists and whistle-blowers, and ensure that they enjoy adequate protection. On the other hand, to reduce the need for whistle-blowers, Governments must ensure transparency as well as remove barriers and overcome challenges to accessing justice.

2017 - Budva Declaration - MOP6 - Budva, September 2017

5. We are particularly alarmed by the increase in the harassment, silencing and even murder of environmental activists around the world. To this end, we recall our commitment made through the Maastricht Declaration on Transparency as a Driving Force for Environmental Democracy (Maastricht Declaration) to protect the rights of environmental activists and whistle-blowers. We also recall the resolution of the Human Rights Council on protecting human rights defenders, including those addressing environmental issues.

6. We call upon Parties to ensure due protection of environmental activists, whistle-blowers and NGOs so that they can exercise their rights under the Aarhus Convention and its Protocol on Protocol on Pollutant Release and Transfer Registers without being threatened in any way.
Environmental Defenders
Human Rights, Whistleblower Protections - Laws and Best Practices

David Banisar
ARTICLE 19

February 2017
Whistleblowing can make the Headlines

New revelations deepen scandal whistleblower complaint

NATIONAL REVIEW

The Washington Post

The New York Times

FOX NEWS @NIGHT
Questions over whistleblower contact with House Intelligence Committee

The Whistleblowing Industry
The Office of Special Counsel (OSC) handles claims of retaliation within the executive branch of the federal government from current federal employees, former employees, and applicants for federal employment.

Occupational Safety and Health Administration
OSHA’s Whistleblower Protection Program enforces protections for employees who suffer retaliation for engaging in protected activities under more than 20 federal laws. The investigation of complaints of retaliation against employees is conducted by investigators in OSHA’s regions. OSHA’s investigators are neutral fact finders; they do not work for either the complainant or respondent (employer).

The U.S. Equal Employment Opportunity Commission (EEOC) enforces laws that prohibit discrimination against employees because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information, and retaliation against employees for opposing such discrimination.

The Wage and Hour Division (WHD) of the U.S. Department of Labor enforces Federal laws on the minimum wage, overtime pay, wage and hour standards, and child labor.

The National Labor Relations Board (NLRB) protects the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions. To learn more about NLRBs laws, or to file a charge, visit www.nlrb.gov or call 1-866-667-NLRB (6572).
President Trump signed on June 25, 2018 the **Whistleblower Protection Coordination Act** (S. 1869) into law, permanently reauthorizing the Whistleblower Protection Coordinator position in all federal agencies’ Office of the Inspector General (OIG).

“This an important step to ensure whistleblowers who disclose waste, fraud, and abuse know their rights and are protected.”

The position, previously called the Whistleblower Protection Ombudsman, is charged with educating federal employees about their rights and pathways to reporting, and in assisting the OIG after a whistleblower complaint has been filed by coordinating with the relevant agencies.
Protecting Whistleblowers in the Aarhus Parties

The following Parties (at least) have passed laws to protect whistleblowers either generally or at least in certain fields:

- Albania,
- Croatia,
- Czech Republic,
- Estonia,
- Finland,
- France,
- Georgia,
- Hungary,
- Latvia,
- Lithuania,
- Montenegro,
- North Macedonia,
- Poland,
- Republic of Moldova,
- Romania,
- Serbia,
- Slovakia,
- Spain,
- Sweden,
- Switzerland
- the United Kingdom
Whistleblower Protection in the EU
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the protection of persons reporting on breaches of Union law

Whistleblower Protection in the EU

EU: European Parliament approved on 17 April 2019 a draft directive aimed at improving the situation of whistleblowers in all of its Member States.

Will enter into force on the 20th day following its publication in the Official Journal of the European Union.

A broad definition of the group of individuals protected, including those involved in pre- and post- contractual and non-remunerated professional activities, shareholders and self-employed people (such as suppliers and consultants);

Clear reporting procedures and obligations for employers (private or public), who must create safe reporting channels, normally in two stages:

• firstly, at the whistleblower’s choice, an internal report (via a specially created reporting channel) or an external report to the competent authorities (specialised regulatory authorities, judicial authorities, professional supervisory body);

• secondly, a public report, including in the media, if no appropriate measure is taken within a period of three months from the initial report or in the event of an imminent threat to the public interest, or if a report to the authorities would not be likely to be effective;
Whistleblower Protection in the EU

- **a ban on retaliation** against whistleblowers, with no let-out clause and involving the effective protection of whistleblowers acting in good faith against criminal and civil proceedings, including “SLAPP” (gagging) proceedings; the confidentiality of the whistleblower's identity and also the protection of an anonymous whistleblower when his or her identity is discovered;

- **criminal and civil immunity** for acts undertaken for the acquisition of the information reported, provided that these acts do not themselves constitute offences in their own right;

- **effective legal remedies** (compensation, reinstatement, interim measures), with a reversal of the burden of proof concerning the link between prejudicial measures taken against the whistleblower and the reporting of information;

- **financial penalties against those who try to prevent whistleblowing** (“whistleblowing inhibitors”), carry out retaliation against a whistleblower or disclose his or her identity;

- **effective follow-up** within a reasonable period (three months as a rule) with feedback to the whistleblower for all whistleblower reports;
  - legal and psychological support for whistleblowers;
  - the gathering and dissemination of information on the impact of reporting by whistleblowers.
Who are protected by the directive?

The directive protects persons who report in a work-related context in both the private and public sector. The list of who are protected is open but includes more than employees, such as for example self-employed, unpaid volunteers, shareholders and subcontractors. Protection is granted also when in a recruiting process for a new job or after a job has ended. Third persons, such as relatives and colleagues and ‘facilitators’ who give confidential assistance to the whistleblower are protected as well.

What can you blow the whistle on and be protected?

The reporting person must have reasonable grounds to believe that the information reported was true at the time of reporting and that the information falls within the scope of the Directive.

The scope includes breaches in public procurement, financial services, prevention of money laundering and terrorist financing, product safety, 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, protection of the financial interests of the Union, breaches of internal market rules, including competition and State aid rules and corporate taxation.

Not only unlawful acts are included in the scope but also acts and omissions that go against the objective of a Union law.
Take Away for Parties - EU Member States

Be prepared for transposition (2021 at the latest)

The scope
The Material scope of the Directive must not be a limitation to only a list of EU related issues, but viewed as an enhancement of the rule of law in general. It must
• cover breaches in all areas by a horizontal protection.
• include national legislation, not only EU law.

The internal reporting
Reporting internally to a line manager, supervisor, or the HR department must grant protection and not only using the dedicated internal reporting channel. This is not clear enough in the directive.

The criminal-offence trap
National law determines if reporting persons are liable for “selfstanding criminal offences”. It must be safe to use documents at the work-place for a report without risking criminal liability.
Take Away for All Parties

Resolution and Recommendation unanimously adopted by the Committee of Ministers on 24 June 2019.

Committee on Legal Affairs and Human Rights

Improving the protection of whistleblowers all over Europe

Report
Rapporteur: Mr Sylvain Waserman, France, Alliance of Liberals and Democrats for Europe

Resolution and Recommendation unanimously adopted by the Committee of Ministers on 24 June 2019.
Take Away for All Parties

Basic Measures to Protect Whistleblowers

- A broad definition,
- Clear reporting procedures and obligations for employers (private or public),
- Ban any retaliation against whistleblowers,
- Provide criminal and civil immunity for acts undertaken for the acquisition of the information reported (provided that these acts do not themselves constitute offences in their own right),
- Effective legal remedies (compensation, reinstatement, interim measures), with a reversal of the burden of proof,
- Financial penalties against those who try to prevent whistleblowing
- Effective follow-up within a reasonable period (three months as a rule)
  - support for whistleblowers;
  - impact of reporting by whistleblowers.
Thank you for your attention

Yves Lador, Earthjustice
y.lador@bluewin.ch