

PAOLA Project

Report concerning the EU Whistleblowing Directive and relative regime for Academia

University Bocconi

Gianluigi M. Riva, Mariateresa Maggiolino, Enrico Basile

1. Introduction

The European Whistleblowing Directive (Directive (EU) 2019/1937) was adopted by the European Union in October 2019 and aims to provide robust protection for individuals who report breaches of EU law in various sectors, including the public and private spheres. The Directive is designed to harmonize whistleblower protections across member states, ensuring that whistleblowers can report misconduct without fear of retaliation. The roots of the Directive ground on the reporting obligations regarding the financial realm (white collars' crimes) and its goal is to protect adequately those individuals who choose to report illicit activities, in particular workers (according to Article 45(1) of the Treaty for the Functioning of the EU (TFEU)) and individuals somehow in relationship with the entity reported, as they are considered vulnerable subjects.

As per the general EU Law, Directives are not self-executive, meaning that they establish a minimum regulation to harmonize the EU Member States' (MB) national law in a particular field. This implies that each MB will receive and implement the Directive and could provide for stricter rules or specific regimes for particular cases.

This report examines the Directive's key elements, its applicability to the academic environment, and the potential grey areas and challenges it presents for academia.

2. Key elements of the Directive

a) Scope and coverage (Article 1):

- The Directive covers a wide range of violations, including breaches of EU law related to public procurement, financial services, product and transport safety, environmental protection, and public health.
- It applies to both private and public sectors, encompassing a broad spectrum of organizations and activities.

b) Protection measures:

- The Directive mandates that MB establish secure reporting channels, both internal (within organizations) and external (to competent authorities).
- Article 19: the Directive prohibits retaliation against whistleblowers. Retaliation includes any direct or indirect act or omission that causes detriment to the whistleblower in their employment context, such as suspension, layoff, demotion, or discrimination.
- Article 20: MB must provide measures to support whistleblowers, including:

- Free access to comprehensive and independent information and advice.
- Effective assistance from competent authorities.
- Legal aid in criminal and cross-border civil proceedings, as well as financial and psychological support.

c) Reporting mechanisms:

- Article 8: organizations with 50 or more employees must implement internal reporting channels.
- Reporting can be done internally, externally, or publicly if internal and external reporting does not result in appropriate action.
- Article 9: Internal reporting procedures must include:
 - Channels for receiving reports that are designed, established, and operated in a secure manner.
 - Acknowledgment of receipt of the report within seven days.
 - Designation of an impartial person or department to follow up on reports.
 - Feedback to the whistleblower on the actions taken or planned within three months.
- Article 10: external reporting channels must be established by member states, allowing whistleblowers to report directly to competent authorities if internal reporting is not feasible or effective.

d) Follow-up and feedback:

- Article 11: whistleblowers are entitled to receive feedback within a stipulated time frame, ensuring transparency and accountability in the handling of their reports.

e) Penalties:

- The Directive requires member states to impose effective, proportionate, and dissuasive penalties for retaliatory actions against whistleblowers and for obstructing reporting channels.
- Article 23: Member States must establish penalties for:
 - Retaliation against whistleblowers.
 - Attempts to hinder reporting.
 - Breaches of confidentiality.
 - False reporting.
- These penalties must be effective, proportionate, and dissuasive.

3. Application to the academic environment

It must be taken into account that, according to the scope of the Directive, the reports concern only those fields expressly provided by the law. This means that any personal issue concerning the worker cannot be reported via the WB channel and must be enforced through other means provided by the law or by internal policies.

In other words, issues related with individual complaints, such as mobbing, harassment, misconduct, IPR issues, cannot enter the WB regime and must follow other paths. For instance, issues concerning mobbing fall into the labour law regime and must follow the normal legal enforcement through courts. On the other hand, issues concerning misconduct and ethics are enforceable only and to the extent to which they are considered and provided by the internal policies of the entity.

Finally, it must be borne in mind that not all misconducts fall into Ethics code of conducts: usually, elements that concern impoliteness, arrogance, personal preferences (if do not imply mobbing), or arbitrary decisions do not fall within this scope and do not find protection under these tools. They might be relevant from a civil law perspective with a scrutiny, however, that depends on a case-by-case analysis.

Thus, in general, within academia, the Directive's provisions translate into specific obligations and protections:

a) Internal reporting channels:

- Universities must establish secure and confidential channels for reporting misconduct, such as research fraud or ethical violations.
- Ethics infringements must follow other procedures that Universities individually set up with their internal policies and procedures.

b) Protection from retaliation:

- Academic staff and researchers, together with their relatives or colleagues – if circumstances objectively require it - are protected from adverse consequences when they report misconduct. This is crucial in environments where hierarchical dynamics might discourage reporting.

c) Feedback and transparency:

- Institutions must ensure timely follow-up and feedback, promoting trust in the system.

4. Challenges and grey areas

a) Ambiguities:

- What constitutes a breach of EU law in academia can be unclear. While research fraud is straightforward, other issues like ethical violations or IPR infringements (such as stealing authorship or patents' paternity) might be more ambiguous.
- The requirement for timely feedback is particularly relevant in academia, where whistleblowers might otherwise be left in uncertainty about the status of their reports. Ensuring transparency can build trust in the reporting process and enhance the credibility of academic institutions.
- It remains unclear if students should be considered protected by the Directive. While they are not formally employed, health and safety regulations on the workplace consider them as "employees" for insurance purposes.

b) Support measures:

- Universities should provide access to independent advice and support services for whistleblowers, addressing both legal and psychological needs.

c) Hierarchical barriers:

- The hierarchical and often close-knit nature of academic institutions can create a culture of silence, making it difficult for whistleblowers to come forward.
- Junior researchers or staff may feel intimidated to report misconduct against senior colleagues or supervisors.

d) Balancing academic freedom:

- Ensuring whistleblower protection without impeding academic freedom and innovation is a delicate balance.
- Overzealous reporting mechanisms could potentially stifle innovative research or controversial viewpoints that are nonetheless valuable to academic discourse.
- Employees' duty of loyalty must be balanced carefully with the duty of care.

e) Transparency:

- Universities should implement the Directive with internal procedures that ensure transparency at any stage of the WB disclosure process:
 - People involved in the internal reporting process (WB procedures and channel) should be identified in advance and this information must be publicly available;
 - Ex-ante procedures for conflict of interest must be implemented for those cases in which the report involves people related with the WB procedure or channel management;
 - People involved in the internal process should not cover other relevant positions within the entity;
 - Those conducts that do not fall into the WB Directive should be listed and there must be information about how to proceed in these cases (e.g. abuse, harassment, mobbing) and on which legal basis (labour law, civil law, internal code of conduct).
- Public disclosure from whistleblowers in case of no reply should be managed carefully not to infringe personal data protection, crime of slander, or duty of care.
- The internal channel must be deployed and implemented according to the GDPR provisions and data protection and security best practices.

5. Cases and relevant literature:

- Studies such as those by Kenny et al. (2019) highlight the complexity of whistleblowing in academia, emphasizing the need for tailored approaches that consider the unique characteristics of academic institutions.

- High-profile cases, such as those involving research fraud at major universities, underscore the importance of robust reporting and protection mechanisms. The case of the Erasmus University Medical Center whistleblower (Netherlands) who exposed research misconduct in 2018 is a pertinent example (van der Kolk, B. (2018). The crooked truth about a fraudster researcher. *NRC Handelsblad*, 10 November 2018).

6. Conclusions

The European Whistleblowing Directive represents a significant step forward in protecting individuals who report misconduct. Its application in the academic environment holds promise for enhancing transparency and accountability in research and educational institutions. However, addressing the cultural, institutional, and legal ambiguities specific to academia will be crucial for its effective implementation. Further research and case studies will be vital in refining these mechanisms and ensuring that the Directive fulfills its potential in promoting ethical conduct and safeguarding whistleblowers in academia.

7. References

- Gaia de Lisi, Il Whistleblowing nelle Università pubbliche italiane: nuovi canali per irriducibili silenzi. Wanna be, gonna be or let it be?, in *Federalismi.it*, 2024
- Kenny, K., Vandekerckhove, W., & Fotaki, M. (2019). Whistleblower subjectivities: Organization and passionate attachment. *Organization Studies*, 40(5), 705-724. doi:10.1177/0170840618765571.
- van der Kolk, B. (2018). The crooked truth about a fraudster researcher. *NRC Handelsblad*, 10 November 2018.
- European Parliament and Council of the European Union. (2019). 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. *Official Journal of the European Union*. Retrieved from <https://eur-lex.europa.eu/eli/dir/2019/1937/oj>