

Whistleblowing as a Form of Expression: Comprehensive Overview of the Concept of Whistleblowing and Its Freedom of Expression Aspects, with Particular Reference to the Case Law of the European Court of Human Rights

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Abstract

This study endeavors to examine the phenomenon of whistleblowing within the context of freedom of expression. The paper is organized into three key segments, each addressing distinct aspects. Initially, it delves into the challenges and complexities inherent in conceptualizing whistleblowing. Subsequently, the paper establishes a theoretical foundation for the fundamental rights approach to whistleblowing, laying the groundwork for the final section: an analysis of whistleblowing cases through the lens of the European Court of Human Rights' case law. The research methodology employed comprises secondary analysis (desk research) and legal case studies. The study aims to achieve a dual purpose: firstly, to offer a comprehensive understanding of the legal analysis and interpretation of whistleblowing; and secondly, to elucidate the evolving legal standards and criteria governing whistleblowing in the context of freedom of expression over recent years.

Keywords: whistleblowing, ECtHR, ECHR, freedom of expression, case law.

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1. Introduction

In 1972, following a whistle-blower's report called 'Deep Throat', Bob Woodward and Carl Bernstein of The Washington Post wrote the article⁴ about Richard Nixon that sparked the Watergate scandal.⁵ In 2021, Francesco Zambon, an Italian researcher, is threatened with dismissal for publishing information on the shortcomings of Italian pandemic management and the worrying state of Italian hospitals.⁶ In 2019, the popular German newspaper Der Spiegel publishes a video of the then Vice-Chancellor of Austria, Heinz-Christian Stracher, in what has become known in German as the 'Ibiza-gate', in which the Austrian politician negotiates with 'businessmen' claiming to be Russian to take over the most popular Austrian daily newspaper, Kronen Zeitung, in exchange for political and economic benefits.⁷ One could also mention the leaks with regard to the recent whistleblowing incident regarding the implementation of the 'Pegasus' spyware⁸ on prominent Hungarian journalists and opposition party politicians⁹ or the sports scandal of the decade, the Football Leaks incident, which manifested in the exposure of confidential documents revealing widespread financial irregularities and questionable practices within the football industry, implicating numerous high-profile players, clubs, and agents;¹⁰ whistleblowing is a phenomenon that lives with us, across historical eras, political regimes and situations, borders and ideas. The legal reception of whistleblowing is very diverse; the legal polemic of leaks can be approached from the standpoints of data protection¹¹ or labour law,¹² however, in this paper, we offer a fundamental rights perspective, especially because the treatment of whistleblowing as a matter of disclosure and speech is in its infancy in the legal literature.

Against this background, the main issues of the phenomenon in relation to freedom of expression are examined below. The study is structured around three main segments. First, an attempt is made to conceptualise whistleblowing, presenting its

⁴ Cf. Quinn, Katrina J. 'Postgate: How the Washington Post Betrayed Deep Throat, Covered up Watergate, and Began Today's Partisan Advocacy Journalism.' *American Journalism* 37, no. 2 (April 2020): 267–269.

⁵ Gage, Beverly. 'Deep Throat, Watergate, and the Bureaucratic Politics of the FBI.' *Journal of Policy History* 24, no. 2 (March 2012).

⁶ Transparency.org. 'UN Agencies Are Failing Whistleblowers: The Case of the WHO Whistleblower – Blog,' June 23, 2022. <https://www.transparency.org/en/blog/un-agencies-failing-whistleblowers-who-zambon>.

⁷ Karner, Christian. "'Ibizagate': Capturing a Political Field in Flux.' *Austrian History Yearbook* 52 (April 2021).

⁸ Chawla, Ajay. 'Pegasus Spyware – "A Privacy Killer."' SSRN Electronic Journal, 2021.

⁹ Panyi, Szabolcs. 'The inside Story of How Pegasus Was Brought to Hungary – Direkt36.' September 28, 2022. <https://www.direkt36.hu/en/feltarulnak-a-pegasus-kemsoftver-beszerzesenek-rejtelyei/>.

¹⁰ Fűrész, Diána Ivett, and Gábor Rappai. "Information Leakage in the Football Transfer Market." *European Sport Management Quarterly* 22, no. 3 (July 2020): 420–422.

¹¹ Bincoletto, G. "Italy · Whistleblowing Application: Italian DPA Sanctions Non-Compliance with GDPR Principles." *European Data Protection Law Review* 7, no. 3 (2021): 429–434.

¹² For an early work on the topic, see: Johnson, Diane E., and Gerald Vinten. 'Whistleblowing: Subversion or Corporate Citizenship?' *Industrial and Labor Relations Review* 49, no. 4 (July 1996): 766.

specificities and conceptual divergences,¹³ thus providing a definitional basis for analysing the perception of whistleblowing as freedom of expression. We will then discuss the understanding of whistleblowing as disclosure, examining the complex relationship between speech and information leakage, in particular, in the light of the chilling effect. Finally, the theoretical findings and their application are assessed in the context of the jurisprudence of the European Court of Human Rights (hereinafter 'ECtHR' or 'Court'). This section – through multiple case studies – presents relevant ECtHR jurisprudence, highlights key cases, and succinctly summarizes the main findings of the Court. The ultimate goal is to offer a comprehensive examination of the legal dimensions of whistleblowing, framing it within the broader discourse of freedom of expression, and drawing upon theoretical insights and practical implications derived from legal precedents.

2. The concept of whistleblowing: general conceptual elements and challenges

As István Ambrus and Ádám Farkas point out, 'The whistleblowing phenomenon cannot really be described by a single, precise concept.'¹⁴ It is also clear that the concept of whistleblowing may vary from country to country, from sector to sector, and even from industry to industry or policy areas,¹⁵ in terms of the identity of the whistleblower, the scope of information that can be reported, the level of assurance expected, the identity of the recipients, the level of protection afforded to whistleblowers, or the specific procedures to be followed.¹⁶ With this in mind, an attempt will be made to synthesise the diverse and often contradictory theoretical and practical definitions and to define a single, authoritative concept for the purposes of this study.

In their seminal study, Janet P. Near and Marcia P. Miceli defined whistleblowing as the reporting by members of an organization (past or present) of unlawful, immoral or illegitimate practices under the control of their employer to persons or organizations with the authority to take appropriate action.¹⁷ In contrast, Ruggero Scaturro also identified a jurisprudential position that would protect only whistleblowing to external recipients outside the employer's organization.¹⁸ In the domestic literature, there are also attempts to create a separate concept. According to

¹³ Scaturro, Ruggero. 'Defining Whistleblowing.' *IACA Research Paper Series 5* (May 2018): 1–3.

¹⁴ Ambrus, István, and Farkas Ádám. „Whistleblowing és büntetőjog – szempontok a vállalati visszaélések megítéléséhez.” [Whistleblowing and criminal law – perspectives on corporate misconduct] *Magyar Jog* 64, no. 7–8 (2017): 444.

¹⁵ Ignatowski, Grzegorz. 'Problems with the Concept of Whistleblowing in the Intercultural Perspective and the EU Directive 2019/1937.' *Journal of Intercultural Management* 15, no. 2 (June 2023): 78–103.

¹⁶ Brown, A J, D. Lewis, R. Moberly, and W. Vandekerckhove. *International Handbook on Whistleblowing Research*. Edward Elgar Publishing, 2014:3.

¹⁷ Near, Janet P., and Marcia P. Miceli. 'Organizational Dissidence: The Case of Whistle-Blowing.' *Journal of Business Ethics* 4, no. 1 (February 1985): 4.

¹⁸ Scaturro, 2–3.

Éva Konta, whistleblowers are ‘insider informants’ who take action against abuses and irregularities discovered in the course of their work by reporting either within the employer’s organisation or to a person or body outside the employer.¹⁹ Attila KUN defines whistleblowing as ‘the disclosure of inside information whereby a member, former member, employee (former employee) of an organisation discloses confidential information about activities that he or she has observed in the course of the organisation’s activities that are in breach of the public interest or illegal, or that may cause harm to others, or that may be purely unethical.’²⁰ Overall, based on theoretical approaches, it can be concluded that the conceptual elements of whistleblowing generally include (i) the definition of the relationship between the whistleblower and the entity subject to the whistleblowing (ii) the scope of the information that can be reported, and (iii) the addressee (addressee) of the whistleblowing.²¹

In addition to the jurisprudential works, the concept of whistleblowing is also found in a number of documents published by international organisations, which also warrant a more detailed examination here. The International Labour Organization (ILO) defines whistleblowing as the reporting by employees or former employees of unlawful, irregular, dangerous or unethical practices by employers.²² According to the relevant decision of the Parliamentary Assembly of the Council of Europe (PACE), whistleblowing legislation in the Member States should cover the protection of whistleblowers who report in good faith various types of wrongdoing, whether the whistleblower is in the public or private sector.²³ The Organisation for Economic Co-operation and Development (OECD) defines whistleblowers as ‘employees who, in good faith and on reasonable grounds, disclose to the competent authorities any wrongdoing of any kind in relation to their workplace.’ These three conceptualisations also show striking differences. While the ILO definition does not include a definition of possible recipients, the PACE decision does not seem to require any contact with the notified organisation, and the OECD definition only identifies ‘competent authorities’ as recipients.²⁴

As per the report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (‘Special Rapporteur’), a whistleblower is a person who discloses information which, at the time of disclosure, he or she reasonably believes to be true and which threatens or harms a specific public interest, such as a violation of national or international law, misuse of authority or waste,

¹⁹ Konta, Éva. ‘A whistleblowerok védelme - különös tekintettel az uniós jog megsértését bejelentő személyek védelméről szóló európai uniós irányelvjavaslatra.’ [Protection of whistleblowers – in particular the proposal for an EU directive on the protection of whistleblowers who report breaches of EU law] *Munkajog* 3 (2018): 14.

²⁰ Kun, Attila. ‘A whistleblowerok védelme – különös tekintettel a munkajogi aspektusokra.’ [Protection of whistleblowers – in particular labour law aspects] *Pécsi Munkajogi Közlemények* 4, no. 2. (2011): 113.

²¹ Cf.: Defiantoro, Dwi. ‘The Whistleblowing Diamond: Considering Four Elements of Whistleblowing Intention.’ *Accounting and Finance Studies* 3, no. 1 (February 2023): 340–363.

²² ‘Whistleblowing – ILO Metadata,’ n.d. <https://metadata.ilo.org/thesaurus/648756062.html>.

²³ ‘PACE Website,’ n.d. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851>.

²⁴ OECD. *Committing to Effective Whistleblower Protection*. OECD Publishing, Paris, 2016:18.

fraud, or harm to the environment, public health or safety.²⁵ In particular, the Special Rapporteur stresses that it is not appropriate to limit the scope of the persons protected in the context of a notification to those who, in the course of their work, have obtained the information which is the subject of the notification. By way of an illustrative example, non-workplace whistleblowers could include patients who report abuse in hospitals, parents who report abuse at their child's school, and students themselves.²⁶ Of the international organisations, the definition set by the Special Rapporteur is clearly the broadest, as in practice anyone can be protected if they make a report. The distinction between a whistleblower and a whistleblower who reports outside the employer's organisation, and the implications of this distinction in legislation, are still an active subject of legal scholarship.²⁷

Nonetheless, the most comprehensive definition, which is also the conceptual focal point for this paper, is the relevant recommendation of the Committee of Ministers of the Council of Europe.²⁸ According to the Recommendation, a whistleblower is 'any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector.'²⁹ The concept of 'public interest' is not defined in a precise way in the Recommendation, it is up to the Member States to give it substance. This could include, where appropriate, corruption and crime, conduct that threatens public health or safety, environmental pollution or the misuse of public funds.³⁰ The term 'working relationship' is interpreted broadly in the Recommendation, covering not only employment but also traineeships and contract positions, and also persons whose employment relationship has ended or who has made a declaration during the recruitment procedure or pre-contract negotiation phase.³¹ The whistleblower may be the employer itself, a regulatory or supervisory body, an NGO or a politician, or ultimately the public via the media or the internet.³²

It is striking that the present definition defines both the material and personal scope of whistleblowing broadly. On the one hand, whistleblowing on a 'threat to the public interest or harm to the public interest' is protected, rather than the narrowly defined 'unlawful acts', which is clearly broader. On the other hand, by explicitly mentioning various atypical forms of employment, the Recommendation extends the concept of whistleblower to all persons who may be confronted with acts contrary to the public interest in the workplace or in the course of their work-related activities.

²⁵ A/70/361, United Nations General Assembly, Promotion and protection of the right to freedom of opinion and expression: report of the Secretary-General, 8 September 2015:13.

²⁶ Id.

²⁷ Cf. Miceli, Marcia P. et al. 'Outsider "whistleblowers": Conceptualizing and distinguishing "bell-ringing" behavior.' In Brown, A J, D. Lewis, R. Moberly, and W. Vandekerckhove. *International Handbook on Whistleblowing Research*. Edward Elgar Publishing, 2014:71–94.

²⁸ CM/ Rec (2014)7, Committee of Ministers of the Council of Europe: Protection of whistleblowers. Recommendation (2014).

²⁹ Id., 6.

³⁰ Id., 24.

³¹ Id., 7.

³² Id., 11.

However, it should be noted that, contrary to the Special Rapporteur's report, even this broad definition does not include all persons in general within the scope of protection, i.e. it still requires a link between the whistleblower and his or her daily work.³³ In sum, for the purposes of this paper, whistleblowing is defined, in line with the recommendation of the Committee of Ministers of the Council of Europe, as the reporting of information of public interest relating to work, whether within the employer's organisation or to a person, body or public outside the employer.

3. The relationship between whistleblowing and freedom of expression

Freedom of expression, as part of the freedom of expression protected by Article 10 of the European Convention on Human Rights (hereinafter 'ECHR' or 'the Convention'), is a fundamental pillar of a democratic society and a prerequisite for development and individual fulfilment.³⁴ Accordingly, and subject to Article 10(2) of the Convention, this freedom applies not only to information or ideas which are favourably received or regarded as indifferent, but also to communications which are offensive, shocking or disturbing.³⁵ As stated in Article 10, freedom of expression may, however, be subject to limits, which must be interpreted strictly and the need for them must be demonstrated by convincing evidence.³⁶ Accordingly, the legitimate aims of these restrictions and interferences are exhaustively defined in the second paragraph of Article 10 of the Convention, which includes, inter alia, national security, public safety, the prevention of disorder or crime, the protection of morals, the protection of the reputation or rights of others, the prevention of the disclosure of confidential information and the maintenance of the authority and impartiality of the judiciary.³⁷

All of this suggests that whistleblowing, or the leakage of information itself, is a fundamental aspect of freedom of expression and freedom of conscience, which plays an important role in the fight against corruption and serious abuses in the public and private sectors. In this context, the Council of Europe also recognises the value of whistleblowing in preventing and deterring abuse and strengthening democratic accountability and transparency,³⁸ a position shared by the ECtHR in its decisions reaffirming the importance of whistleblowing as a means of raising awareness of the persons concerned in order to prevent abuses that put their fellow human beings at risk, as a means of strengthening accountability and the fight against corruption, both in the

³³ Scaturro, 7.

³⁴ Uran, Peri. 'Freedom of Expression as the Cornerstone of Democracy.' *International Journal of Arts and Sciences* 15, no. 3 (2010): 483–487.

³⁵ Keane, David. 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights.' *Netherlands Quarterly of Human Rights* 42, no. 4. (2007): 644–645.

³⁶ *Soares v. Portugal* no. 79,972/12, judgment of 21 June 2016 (Soares judgment), para 38; *Pentikäinen v. Finland* [GC], no. 11,882/10, judgment of 20 October 2015, para 87; *Bédat v. Switzerland* [GC], no. 56,925/08, judgment of 29 March 2016, para 48, *Stoll v. Switzerland* [GC], no. 69,698/01, judgment of 10 December 2007, para 101; *Animal Defenders International v. the United Kingdom* [GC], no. 48,876/08, judgment of 22 April 2013, para 100.

³⁷ Article 10(2) of the ECHR.

³⁸ CM/ Rec (2014)7, 11.

public and private sectors.³⁹ In view of the importance of the role of whistleblowing and in order to enable and ensure it, the Committee of Ministers of the Council of Europe also stresses the importance of Member States to have a normative, institutional and legal framework to protect individuals who report or disclose information about threats or harm in the public interest in the context of their employment.⁴⁰ In its practice, the ECtHR therefore refers to principles that reinforce the need to establish clear channels for whistleblowing and disclosure, while ensuring that whistleblowers are protected from retaliation.⁴¹

Fear of retaliation and the potential lack of consequences for whistleblowing often discourage potential whistleblowers, to the detriment of the public interest in public accountability and private business.⁴² Whistleblowing, like the exercise of freedom of expression or opinion, can easily fall victim to the chilling effect. The ‘chilling effect’ is a well-known concept in ECtHR jurisprudence,⁴³ initially applied predominantly to freedom of expression in cases where the applicants were journalists,⁴⁴ but more recently the ECtHR has received an increasing number of applications alleging a chilling effect of threats and/or sanctions against persons,⁴⁵ irrespective of the subject matter.⁴⁶ In the context of whistleblowing, this phenomenon may be exacerbated by the dependent (at least materially vulnerable) position of workers and the duty of loyalty and discretion they owe to their employer, particularly in the case of civil servants,⁴⁷ given the very nature of the public service,⁴⁸ as opposed to the freer role played by journalists in their employment relationship, in the transmission of information and ideas.⁴⁹

In particular, the ECtHR confirms, in the context of freedom of expression and whistleblowing, that the protection of Article 10 ECHR extends to the workplace, both in private and public employment relationships,⁵⁰ including in relation to the reporting of unlawful conduct or wrongdoing by an employee at work. In this context, the case

³⁹ *Heinisch v. Germany*, no. 28,274/08, judgment of 21 July 2011, para 37.

⁴⁰ *Heinisch v. Germany*, paras 37–40.

⁴¹ *Gawlik v. Liechtenstein*, no. 23,922/19, judgment of 16 February 2021, paras 39–40.

⁴² Parliamentary Assembly, Assembly debate on 29 April 2010 (17th Sitting) (see Doc. 12,006, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Omtzigt). <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17851&lang=en>

⁴³ Baumbach, Trine. ‘Chilling Effect as a European Court of Human Rights’ Concept in Media Law Cases.’ *Bergen Journal of Criminal Law & Criminal Justice* 6, no. 1 (May 2018): 92–98.

⁴⁴ *Goodwin v. the United Kingdom*, no. 17,488/90, judgment of 27 March 1996, para 39; *Financial Times Ltd. and Others v. the United Kingdom*, no. 821/03, judgment of 15 December 2009, para 70.

⁴⁵ Pech, Laurent. *Concept of Chilling Effect*. Open Society Publication, 2021:2.

⁴⁶ *Baka v. Hungary*, [GC], no. 20,261/12, judgment of 23 June 2016, para 167.

⁴⁷ Kagiarios, Dimitrios. ‘Reassessing the Framework for the Protection of Civil Servant Whistleblowers in the European Court of Human Rights.’ *Netherlands Quarterly of Human Rights* 39, no. 3 (September 2021): 226–228

⁴⁸ *Ahmed and others v. The United Kingdom*, judgment of 2 September 1998, para 56. *De Diego Nafria v. Spain*, no. 46,833/99, judgment of 14 March 2002, para 37.

⁴⁹ *Wojtas-Kaletka v. Poland*, no. 20,436/02, judgment of 16 July 2009, para 46; *Matúz v. Hungary*, no. 73,571/10, judgment of 21 October 2014, para 39.

⁵⁰ Soares judgment, para 39.

law of the ECtHR emphasises that such protection may be particularly necessary where the worker concerned is the only person, or a member of a small group of persons, who are aware of what is actually happening at his workplace and is therefore best placed to act in the public interest by bringing it to the attention of the employer or the public.⁵¹

Article 10 of the Convention also applies to statements intended to draw attention to unlawful or morally reprehensible conduct, and the case law of the ECtHR provides specific protection for such statements. In this context, two distinct categories can be identified which allow for the definition of specific criteria for protection under Article 10 ECHR, firstly, in relation to whistleblowers and the statements they make, and secondly, in relation to the reporting of irregularities in the conduct of public officials or public servants.⁵² In the case of whistleblowers, the restriction on freedom of expression may be in relation to the prevention of disclosure of confidential information and/or the protection of the rights of others as the legitimate aim pursued, while in the case of the public and public sector, the protection of the reputation and the rights of others predominates in justifying interference rather than the legitimate aim underlying the restriction. However, the status of a whistleblower in the ECtHR practice necessarily presupposes an employment relationship, which raises the issue of the loyalty and discretionary duty of employees towards their employer, in particular since the subject of the whistleblowing mostly concerns the relationship with the employer, an employment relationship,⁵³ whereas this type of relationship is not a necessary condition for the reporting of irregularities in the second case round and the whistleblowing mostly concerns a public/civil servant.⁵⁴ The ECtHR has, however, been similarly recognised in relation to these two categories that whistleblowers should be protected for both private and public sector employees.⁵⁵

4. The case law of the European Court of Human Rights

The ECtHR case law on whistleblowing goes back decades. In this chapter, we present key cases from the ECtHR's dedicated case law summary on whistleblowing, outlining the ECtHR's practice in relation to the relationship between leaks and Article 10 ECHR, underlining the key findings and guiding principles.

⁵¹ *Guja v. Moldova*, no. 14,277/04, judgment of 12 February 2008 (*Guja judgment*), para 72, *Heinisch v. Germany*, para 63.

⁵² *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, [GC], no. 17,224/11, Judgment of 27 June 2017, paras 80–84.

⁵³ *Guja judgment*, para 70.

⁵⁴ *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina*, [GC], no. 17,224/11, Judgment of 27 June 2017, para 80; *Zakharov v. Russia*, no. 14,881/03, Judgment of 5 October 2006, para 26; *Siryk v. Ukraine*, no. 6428/07, Judgment of 31 March 2011, para 42.

⁵⁵ *Guja judgment*, para 8., *Bucur and Toma v. Romania*, no. 40,238/02, judgment of 8 January 2013, para 7; *Langner v. Germany*, no. 14,464/11, judgment of 17 September 2015, para 6.

4.1. *Guja v. Moldova* – the creation of the legitimacy of whistleblowing test

The first key whistleblowing decision dates back to 2008, in *Guja v. Moldova*. Jacob Guja was the head of the press department of the Moldovan Prosecutor General's Office, who was dismissed after he disclosed documents relating to a criminal case that was then under way. The criminal case concerned an election-related crime in which ten suspects were detained by Moldovan police and allegedly ill-treated during their detention. The suspects have opened proceedings against the police officers involved. Following the case against them, the police officers sent a joint letter to senior Moldovan political leaders, including various senior government officials, including then-Prime Minister Vasile Petru Tarlev, then President Vladimir Voronin and Vadim Mișin, former Vice President of the Moldovan Parliament. Mr Mișin forwarded the letter to the Prosecutor General's Office, together with a non-confidential note with an official parliamentary header. In the letter, Mr Mișin questioned the Prosecutor General of the proceedings and asked for personal intervention to 'solve' the case.⁵⁶ The case against the police officers was subsequently dropped at an unclear time and under unclear circumstances.⁵⁷ A few months later, following a speech by President Voronin in which he underlined the importance of fighting corruption and specifically stressed the need to stop officials pressuring law enforcement, Guja sent the police officers' letter, Mișin's note, and another letter from A. Ursacci, deputy minister of the Ministry of Interior, in which he wrote about the dismissal of one of the police officers, to the popular newspaper Jurnal de Chișinău.⁵⁸ The newspaper ran the story under the headline that may be translated to 'Vadim Mișin intimidates prosecutors', attaching extracts of the letters' contents and pictures of the letters. After the article was published, Guja was dismissed on the grounds that he had published confidential letters.⁵⁹ Mr Guja sought his reinstatement before the General Prosecutor's Office, which, after failing to do so, referred him to the ECtHR, alleging a violation of his right to freedom of expression under Article 10 ECHR.

The ECtHR laid down as a premise that Article 10 also covers public employees and the workplace environment,⁶⁰ and also found interference with freedom of expression.⁶¹ The Court based its assessment of the lawfulness of the interference primarily on a detailed analysis of the necessity for it in a democratic society. The Court stressed the importance of context, as Guja had no effective way of highlighting the contradiction in principle and practice between Voronin's anti-corruption allegations and the termination of the case against the police officers other than to leak the letters. The Court stressed that while the role of civil servants is to assist the government in the

⁵⁶ Guja judgment, para 10.

⁵⁷ Guja judgment, para 11.

⁵⁸ Guja judgment, para 14.

⁵⁹ Guja judgment, paras 17–21.

⁶⁰ Guja judgment, para 51., 70. See also *Vogt v. Germany*, no. 17,851/91, judgment of 26 September 1995 and *Ahmed and Others v. the United Kingdom*, no. 22,954/9, judgment of 2 September 1998.

⁶¹ Guja judgment, paras 55–56.

performance of its duties, which entails a stricter duty of confidentiality,⁶² the reporting of unlawful conduct or wrongdoing by a civil servant or public sector employee in the workplace must, in certain circumstances, be protected.⁶³ This protection is particularly important where the public official concerned is the only one, or one of a small group, who knows of the workplace wrongdoing. In such cases, the Court proposes a two-step reporting mechanism. First, the supervisor or competent authority must report the person concerned. If this is clearly impracticable, as a second step, the person concerned may, quasi as an ‘ultima ratio’, communicate it to the public.⁶⁴ In addition to the status of a ‘leaker’, the ECtHR has also made a number of principles in relation to leaked information. The primary consideration for leaked information is that the information must be in the public interest and must be capable of being scrutinised and assessed by the media and the public. The credibility of the information is also of paramount relevance: the leaker must ensure that the information he or she intends to disclose is accurate and reliable as far as the circumstances permit. In addition to the above, in such cases the Court must also assess the intention behind the leak; the disclosure of confidential information can only enjoy enhanced protection if the person concerned ‘acted in good faith and in the belief that the information was true, that the disclosure was in the public interest and that he had no other, more discreet means of remedying the breach.’⁶⁵ Applying the above principles to Guja’s case, the ECtHR found a violation of Article 10 and underlined that the dismissal was a particularly disproportionate interference and was likely to have a chilling effect on other civil servants.

The Guja judgment is perhaps the most outstanding decision in the reception and judgement of whistleblowing in EU law. It was here that the ECtHR first laid down the 6-part ‘Guja test’, a powerful set of criteria that has served as a guide, directly or indirectly, for the Court in all subsequent cases.

I. step	II. step	III. step	IV. step	V. step	VI. step
Was there an alternative way for the reporter to share the information?	Is the disclosure of information in the public interest?	Is the information credible/ realistic?	Has harm been caused by the information being shared?	Did the whistleblower act in good faith?	Was the sanction applied proportionate?

Figure 1: The six-element Guja test

⁶² Guja judgment, para 71.

⁶³ Guja judgment, para 72.

⁶⁴ For comparison, see *Marchenko v. Ukraine*, no. 4063/04, judgment of 19 February 2009, paras 45–47.

⁶⁵ Guja judgment, para 77.

4.2. *Bucur and Toma v. Romania* – fine-tuning the Guja test

The facts of the case, which received international press coverage,⁶⁶ reveal that a Romanian Intelligence Service agent, Constantin Bucur, found irregularities in the tracing of calls. Bucur became aware of several surveillance operations against politicians, journalists and businessmen following high-profile events, and of irregularities in the administration of the surveillance (notes were written in pencil, in several cases there were data discrepancies). Bucur repeatedly reported the irregularities to both his colleagues and his superiors. In the latter case, he was warned by his superiors not to disseminate information about the irregularities. Following a meeting with a member of the Romanian Parliament, Mr. Bucur held a press conference on the irregularities he had detected. At the press conference, Mr Bucur gave a detailed account of the irregularities he had uncovered and presented eleven tapes of surveillance of influential politicians and journalists. The case received a lot of attention in the Romanian and international press. Bucur was dismissed from the Romanian Intelligence Service and prosecuted, at the end of which he was sentenced to two years' suspended imprisonment.

A specific application of the Guja principles was proposed by the ECtHR. As mentioned above, the Guja judgment established that in certain cases, with due diligence, it is lawful to disclose information, but the present case concerns strictly confidential information (unlike the letters and notes in Guja). The ECtHR applied a so-called 'five-step' test. The first element of the test examined whether the public had an interest in knowing the information. On this question, the Court found that the public had a particularly strong interest in the State acting lawfully in the course of the surveillance, inter alia in the light of Romania's historical record. The second element of the test is the 'ultima ratio' test already laid down in the Guja judgment. In this context, the ECtHR found that Bucur had repeatedly reported the irregularities to his colleagues and superiors, to no avail, so that the press conference could be interpreted as a last resort to allow the information to come to light. The third step is to analyse the veracity of the information; here the Court did not engage in a substantive examination for lack of competence, but it did state that Mr Bucur had well-founded suspicions of irregularities. The fourth element of the test is to establish the harmful consequences of the 'leakage'. The ECtHR pointed out that the Romanian Intelligence Service did not suffer any direct damage following the press conference, as Romanian public opinion was generally negative about the surveillance body. Finally, in the fifth point of the test, Bucur's good faith was examined, noting that Bucur's intention was to compel a public institution to comply with Romanian law, in particular the Constitution. In light of the above, the Court found that Romania had violated Article 10 of the ECHR.

⁶⁶ PdpEcho. '*Bucur and Toma v. Romania* – pdpEcho,' n.d. <https://pdpecho.com/tag/bucur-and-toma-v-romania/> and Rasista. 'ECHR Decided against Romania for Violation of Its Obligation to Cooperate with the European Court and breach of Articles 6, 8, 10 and 13 in the Bucur and Toma Case.' APADOR-CH, May 27, 2019. <https://apador.org/en/romania-condamnat-de-cedo-pentru-c-a-inclcat-obligaia-de-a-coope-ra-cu-instana-europeana-dar-i-pentru-violarea-articolelor-6-8-10-i-13-in-cazul-bucur-2/>.

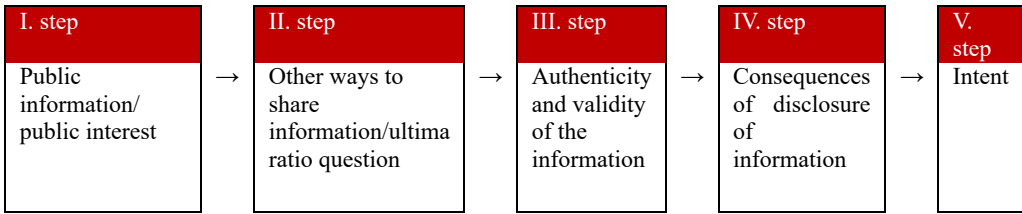


Figure 2: Five-step test under *Bucur and Toma v. Romania*

4.3. *Herbai v. Hungary* – can we talk about lawful whistleblowing if the disclosure of information is not closely related to public policy issues?

In a key ECtHR case, analysed in detail by the relevant literature,⁶⁷ the Court examined a specific case of whistleblowing. According to the facts of the case, Csaba Herbai, an HR expert at a bank in Hungary, whose primary tasks included analysing and calculating salaries, wrote two articles on his blog – with a partner – about the bank’s HR strategy. The bank dismissed Herbai, citing violations of the bank’s code of ethics and economic interests. Herbai challenged the termination. Herbai’s application was dismissed at the first instance and upheld at the second instance, and finally the Curia, agreeing with the first instance court, dismissed Herbai’s application, arguing that the subject matter of the blog and Herbai’s job overlapped and that it could be inferred that Herbai essentially wanted to share his own work experience on the blog. The case was referred to the ECtHR.

The Court of Justice addressed the question of good faith in the context of the above tests in its analysis of the necessity criterion. However, the facts are very different from the above cases, since there is a ‘competition’ between a possible breach of an ethical requirement arising from an employment contract and the employee’s freedom of expression. The ECtHR then applied a four-element test designed to examine the framework of freedom of expression in an employment relationship. The test addresses four issues: (1) the nature of the expression, (2) the author’s intention, (3) the harm caused and (4) the proportionality of the sanction/interference imposed. With regard to the nature of the speech, the Court stressed that professional speech also benefits from the protection of Article 10, whether or not it is part of a public debate. The ECtHR found that Herbai’s blog was not only and exclusively about sharing his personal experiences and work experience, but also functioned as a dissemination website on HR-related issues. It should be noted in this context, and also in relation to the issue of harm referred to as condition (3), that although the content of the articles concerned was closely related to Herbai’s job duties, the Court did not identify any such communication, nor did the national proceedings establish a link between the communications and any potential harm. As regards the level of interference, the Court consistently argued, in the light of the first three points, that Herbai’s dismissal constituted an excessive sanction and consequently found a violation of Article 10.

⁶⁷ Mangan, David. ‘Does an Online Professional Profile Violate an Employer’s Confidentiality?’ *European Labour Law Journal* 12, no. 1 (March 2021): 102–104.

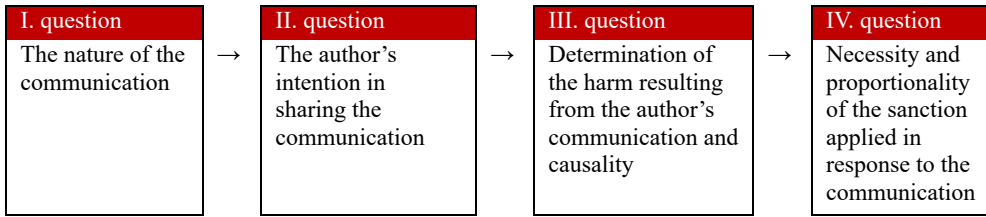


Figure 3: The four-element test used by the Court of Justice as a yardstick for disclosing information on employment relationships

4.4. *Halet v. Luxembourg*⁶⁸ – the newest update of the Guja test and a new evaluation for whistleblowing

Halet v. Luxembourg (the Halet judgment) is the most recent case at the time of writing and serves as a nova for whistleblowing from a freedom of speech perspective. February 14, 2023 judgment was based on the 2014 whistleblowing scandal known as LuxLeaks. The leaks were mainly about documents proving that tax agreements had been made between the Luxembourg tax authorities and large companies, which were unprecedentedly favourable to the companies. The documents on which LuxLeaks is based were leaked by Antoine Deltour and Raphaël Halet (former) employees of the 'Big 4' firm PricewaterhouseCoopers (PwC). Halet was prosecuted and dismissed by the firm and, after exhausting national remedies, sought to pursue his claim before the Third Chamber of the ECtHR, which did not find a violation of Article 10. The case was therefore referred to the Grand Chamber following an application by Mr Halet.

In the Halet judgment, the ECtHR applied the above-mentioned Guja test, a powerful series of questions that can be used to examine whistleblowing in the light of freedom of expression, while at the same time recontextualising the criteria in several places to make them more relevant to the current EU legal context. With regard to alternative options, the ECtHR has stated that, although the preferred option is to report perceived irregularities or wrongdoing internally, this condition is not absolute, i.e. the circumstances of the case may imply that the leaker should share the information directly through an external source outside the organisation. The Court of Justice has substantially relativised the first element of the Guja test by underlining that the question of alternative options must be assessed in the light of the specific circumstances of each individual case. With regard to the credibility and veracity of information, the Court again varied the Guja test by stating that a whistleblower is not obliged to ascertain the veracity of the information disclosed at the time of the disclosure. This means that the person who leaks the information must continue to verify the authenticity of the information as is reasonable in the circumstances, but will be covered by the protection of Article 10 if it is subsequently established that the information leaked was not authentic. In relation to good faith, the ECtHR has not made any substantive changes to the Guja test, i.e. the intention of the whistleblower must go

⁶⁸ *Halet v. Luxembourg* (GC), no. 21,884/18, judgment of 14 February 2023.

beyond personal motivations and the actions of the whistleblower must show that he or she acted with due care (including in verifying the authenticity of the information). On the question of public interest, the Court noted that the scope of public interest information in whistleblowing cases is to be interpreted broadly, i.e. as examples, public interest information may include matters of political debate, national security and intelligence issues, events relating to democratic processes, or ‘controversial’ conduct and practices – whether in the workplace, in the public sector or in the public authorities. As regards the public interest, however, the primary question must be to consider whether or not information disclosed in breach of confidentiality obligations serves a public interest which may entitle it to the special protection afforded to whistleblowers under Article 10 of the Convention. The Court examines this question on a case-by-case basis, that is to say, it does not lay down an abstract set of rules for assessing whether there is a public interest. With regard to the harm caused by whistleblowing, it reiterates, in general terms, the *Guja* test, stating that the Court considers that the conditions for weighing the competing interests must be refined: in addition to the harm suffered by the employer alone, the overall adverse effects likely to be caused by the disclosure in question must be taken into account when assessing the proportionality of the interference with the freedom of expression of whistleblowers protected by Article 10 of the Convention.⁶⁹ Finally, with regard to the proportionality of the sanctions applied, the ECtHR underlined that the sanctions must be assessed in the light of the disparate impact of the sanctions, in addition to the individual disadvantages, and that the cumulative effect of the sanctions applied must also be taken into account when assessing the sanctions.

On the basis of the above – modified – scope test, the Court, in particular in view of the fact that the information was particularly closely linked to the public interest and that Halet did not share the information for personal reasons but because it wanted to draw attention to a tax environment disproportionately favourable to companies, held that Luxembourg had infringed Halet’s rights under Article 10.

5. Conclusions

Whistleblowing as a freedom of expression issue is not a new issue in the field of human rights and EU law, as the above case law shows. The Halet judgment is an important step in modernising the *Guja* test and contextualising it to individual cases, but beyond the changes in case law, there are also emerging trends in whistleblowing both at EU and national level. At the EU level, the Directive on the protection of whistleblowers who report breaches of EU law, published in 2019, provides broad guarantees for the protection of whistleblowers and has established a comprehensive framework for whistleblowing channels, interpretation of confidentiality and retaliation against whistleblowers. The transposition of the Directive, including the legal framework for national whistleblowing systems, was completed in all but two EU Member States (Estonia and Poland) by December 2023.

⁶⁹ *Halet v. Luxembourg (GC)*, no. 21,884/18, judgment of 14 February 2023, para 148.

However, as Gregor Thüsing and Gerrit Forst point out, even in the most advanced legal systems, there is scope for improving the legal perception of whistleblowing, whether it is through the involvement of NGOs and experts in lawmaking and law enforcement or through the effective remediation of the mainly economic damage caused by the abuse of the legal protection of whistleblowing.

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