
BUILDING ON THE EU DIRECTIVE FOR WHISTLEBLOWER PROTECTION

ANALYSIS AND RECOMMENDATIONS

Whistleblowers play an essential role in exposing corruption and other wrongdoing that threaten the public interest. By disclosing information about such misdeeds, whistleblowers have helped save countless lives and billions of euros in public funds.

Whistleblowers often put themselves at high personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed.

Protecting whistleblowers from such retaliation will promote the efficient exposure of corruption, while also enhancing openness and accountability in government and corporate workplaces.

Protecting whistleblowers from unfair treatment, including retaliation, discrimination or disadvantage, can embolden people to report wrongdoing, which increases the likelihood that wrongdoing is prevented, uncovered and penalised. Whistleblower protection is therefore a key means of enhancing effective enforcement of legislation.

On 7 October 2019, the European Union adopted a Directive on the “Protection of persons reporting on breaches of Union law” (Whistleblower Protection Directive). The EU Member States have two years to implement the Directive into national law. Until now, EU countries have had different levels of whistleblower protection in place, with a few countries, such as Ireland, having relatively strong laws and other countries, such as Cyprus, having practically none. Transparency International has long called for comprehensive EU-wide whistleblower protection and the Directive provides a strong foundation for such protection across the EU. It sets minimum standards of protection for whistleblowers reporting breaches of EU law in defined areas.

EU Member States have until October 2021 to transpose the Directive. This is an opportunity for all EU countries to bring their national legal framework on whistleblower protection in line with international standards and best practice. Transparency International urges EU countries not only to uphold, but also to reinforce, the undertakings in the Directive, to ensure that their national legislation provides robust protection to all whistleblowers reporting breaches of law – whether EU or national law.

To support effective implementation of the Directive, Transparency International has prepared this analysis, which provides recommendations aimed at closing loopholes and strengthening whistleblower protection in the transposition process. Through our national chapters, Transparency International will also provide context-specific recommendations at national level.

POSITIVE ASPECTS OF THE DIRECTIVE

While certain provisions need to be strengthened, the Directive provides strong common minimum standards for the protection of whistleblowers in Europe. Member States should transpose those provisions in line with the spirit of the directive, which is to provide a high level of protection for whistleblowers.

- It covers both the **public and private sectors**.¹
- It covers a **wide range of potential whistleblowers**, including individuals outside the traditional employee-employer relationship, such as consultants, contractors, volunteers, board members, former workers and job applicants (Article 4).
- It also protects **individuals who assist whistleblowers**, as well as **individuals and legal entities connected with whistleblowers** (Article 4(4)).
- Breaches of law are defined as acts or omissions that are either **unlawful** or that **defeat the object or the purpose of the rules** (Article 5(1)).
- In granting protection, it does **not in any way take into account the whistleblowers' motive** for reporting.²
- It protects the identity of whistleblowers in most circumstances, with clear and limited exceptions to confidentiality, and advance notice to the whistleblower when their identity needs to be disclosed (Article 16).
- It grants protection to whistleblowers who have reported or disclosed information **anonymously** and who have subsequently been identified (Article 6(3)).
- It allows whistleblowers to report breaches of law **internally or directly to the competent authorities** (Article 10).³
- It **allows for public disclosures** in certain circumstances (Article 15).
- It prohibits **"any form of retaliation"**, including threats of retaliation and attempts at retaliation, and provides a long, diverse and non-exhaustive list of examples (Article 19).
- It provides for **penalties** to be applied to persons who hinder or attempt to hinder reporting, retaliate against reporting persons (including by bringing vexatious proceedings) and breach the duty of maintaining the confidentiality of the whistleblowers' identity (Article 23).
- It provides for **interim relief**, without which a whistleblower might be unable to maintain professional and financial status until legal proceedings end (Article 21(6)).⁴
- It requires Member States to ensure that **easily accessible and free, comprehensive and independent advice** is provided to the public (Article 20(1)(a)).
- It foresees **legal and financial assistance** to whistleblowers, which are essential elements of effective whistleblower protection (Article 20(2)).⁵
- It provides that whistleblowers cannot be held liable for breaching restrictions on the acquisition or disclosure of information, including for breaches of trade or other secrets (Article 21(2)(3)(7)). It also excludes the possibility of contracting out of the right to blow the whistle, through, for example, loyalty clauses or confidentiality or non-disclosure agreements (Article 24).⁶
- It places an **obligation** on a wide range of public and private entities **to establish internal whistleblowing mechanisms** (Article 8).
- It establishes an **obligation to follow up on reports and to keep the whistleblower informed** within a reasonable timeframe (Articles 9 and 11(2)).
- It **allows for stronger national whistleblower protection**, as Member States can introduce or maintain more favourable provisions than those set out in the Directive. It also states that implementation of the Directive shall "under no circumstances" constitute grounds for reducing the level of protection already afforded to whistleblowers within Member States (Article 25)

¹ This should be understood as including all sectors, including the non-profit sector, which may be considered a separate "third" sector in some countries.

² National legislation should avoid terms such as "good faith" and "abusive or malicious reports" when transposing the Directive.

³ Article 7(2), which provides that Member States shall encourage reporting through internal reporting channels before external reporting channels, should not be interpreted as allowing restrictions to reporting directly externally.

⁴ To be effective in practice, the conditions for being granted interim relief should not be too difficult to meet (e.g. Schedule 1 of the Irish Protected Disclosure Act 2014). See Transparency International, *Best Practice Guide for Whistleblowing Legislation* (2018), p.51-54.

⁵ The fact that the Directive addresses legal and financial assistance is very positive, even though it does not make such assistance mandatory. Transparency International strongly encourages all Member States to provide for legal and financial assistance measures.

⁶ However, the Directive requires an additional condition in order for whistleblowers to benefit from this protection (see recommendation p. 6)

RECOMMENDATIONS FOR IMPROVEMENTS

When transposing the Directive into national legislation, Member States should take the opportunity to close loopholes and strengthen weaknesses of the Directive, ensuring comprehensive and effective protection to all whistleblowers, in line with international standards and best practice. National whistleblowing legislation should:

- have a **broader material scope** covering all breaches of law (whether national or EU law) and threats or harm to the public interest
- not exclude **matters relating to defence, security and classified information**, but rather provide for specific reporting schemes
- extend protection measures to persons who are **believed or suspected to be whistleblowers** (even mistakenly), to persons who **intended** to make a whistleblowing report and to civil society organisations assisting whistleblowers
- strengthen the **protection of whistleblowers in legal proceedings**. No additional conditions should be required to gain this protection, and the person initiating the proceedings should carry the burden of proving that the reporting person does not meet the conditions for protection
- not introduce special or additional penalties for persons making knowingly false declarations using whistleblowing channels
- strengthen the **reversal of the burden of proof**: the person who has taken a detrimental measure against a whistleblower should prove that it was *not linked in any way* to the reporting or the public disclosure, and would therefore have happened anyway.
- provide for the **full reparation of damages** suffered by whistleblowers, **through financial compensation and non-financial remedies**
- require private or public entities and competent authorities to accept and follow up on **anonymous reports** of breaches
- require all public-sector entities without exception, and not-for-profit entities with 50 or more workers, to establish **internal reporting mechanisms**
- stipulate that internal reporting mechanisms should include **procedures to protect whistleblowers**
- foresee **penalties** for natural or legal persons who fail to fulfil their obligations under the Directive
- require that the **explicit consent** of a reporting person be obtained, where possible, before their report is transmitted to another authority
- designate an **independent whistleblowing authority** responsible for the oversight and enforcement of whistleblowing legislation
- require the **collection and publication of data** on the functioning of the law.

A detailed explanation of each recommendation is provided below.

DEFINING “REASONABLE GROUND TO BELIEVE”

The expression “reasonable ground to believe” is used throughout the Directive in key provisions relating to conditions whistleblowers must fulfil if they are to benefit from protection. It is therefore essential that the transposition of this legal concept into the national legislation of EU countries does not create obstacles to the effective protection of whistleblowers. Whistleblowers are rarely in a position to know the full picture, so the law should not require the whistleblower’s belief to be accurate. The test should be whether someone with equivalent knowledge, education and experience (a peer) could agree with such a belief.

Scope

An important requirement of any whistleblowing legislation is to make sure that it clearly sets out its scope of application, that is, to whom it applies and which types of wrongdoing are covered. **The scope of application should be as wide as possible, to cover every possible whistleblowing situation and ensure that all whistleblowers are protected.**

The material scope should be as broad as possible

Because of the limited competences of the EU, the material scope of the Directive is fragmented, rather complex and limited. It only protects whistleblowers who report breaches of EU law in defined areas.⁷ Whistleblowers reporting breaches of EU law in other areas, or breaches of “mere” national law are not protected by the Directive. This creates many loopholes and much legal uncertainty, making it difficult for whistleblowers to understand whether they are protected.⁸ Maintaining this approach at national level would leave many whistleblowers unprotected and lead to situations in which individuals decide not to speak up, or do so in the mistaken belief that they are protected, making them vulnerable to retaliation.

An example of the legal uncertainty created by the limited material scope is provided by the Directive itself. Article 21(7) clarifies the relationship between the Whistleblower Protection Directive and the Trade Secret Directive.⁹ For breaches falling within the scope of the Whistleblower Protection Directive, whistleblowers reporting or publicly disclosing information that includes trade secrets need to meet the conditions of the Whistleblower Protection Directive to be granted protection. Unless provided otherwise by national law, for breaches falling outside the scope of the Whistleblower Protection Directive, the Trade Secret Directive applies to whistleblowers revealing trade secrets, requiring them to have “acted for the purpose of protecting the general public interest” to be granted protection.¹⁰

International standards recommend that whistleblowing legislation should have a broad and clear material scope that covers as wide a range of wrongdoing as possible.¹¹ Limiting the scope of information for which individuals will be protected hinders whistleblowing. If people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests.¹²

The good news is that EU countries are not limited by EU competencies. The Directive acknowledges “the power of Member States to extend protection under national law as regards areas or acts” with a view to ensuring that there is a comprehensive and coherent whistleblower protection framework at national level.¹³ The European Commission encourages them to do so, acknowledging that “a comprehensive approach is indispensable in order to recognise the whistleblowers’ significant contribution to preventing and tackling unlawful conducts harming the public interest, and to ensure they are properly protected across the EU.”¹⁴ There is no reason why national law should not benefit from the same whistleblower protection as European law, as once the necessary framework has been put in place to comply with the EU Directive, widening the scope would not require additional efforts.

The two main approaches used to define the material scope of whistleblowing legislation are adopting a detailed definition listing all the categories covered, or using a broad general term such as “threat or harm to the public interest”. Best practice is to use a mixed approach to clearly include any matter of wrongdoing and potential harm to the public interest. Exclusive or exhaustive lists should be avoided.¹⁵

⁷ Article 2 defines the material scope using abstract concepts such as the financial interests of the EU and the internal market, and referring to an annex containing a long list of EU acts.

⁸ This is especially worrisome as Article 6(1)(a) requires whistleblowers to have reasonable ground to believe that the information they are reporting falls within the scope of the Directive if they are to qualify for protection.

⁹ EU Directive 2016/943 on the protection of trade secrets.

¹⁰ Article 5(b) of EU Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

¹¹ Transparency International, *International Principles for Whistleblower Legislation* (2013), Principle 3; Blueprint for Free Speech, *Blueprint Principles for Whistleblower Protection*, Principle 2; Government Accountability Project (GAP), *International Best Practice for Whistleblower Policies* (2016), Principle 2.

¹² United Nations Office on Drugs and Crime (UNODC), *Resource Guide on Good Practice in the Protection of Reporting Persons* (2015), p.22.

¹³ Article 2(2) and Recital (5).

¹⁴ 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.

¹⁵ See Transparency International, 2018, pp.7-10.

Recommendation: National legislation should have a broad material scope covering all breaches of law (whether national or EU law) and threats or harm to the public interest, such as corruption, miscarriages of justice, specific dangers to public health, safety or the environment, abuse of authority, unauthorised use of public funds or property, gross waste or mismanagement, conflicts of interest and human rights violations.

Reports and disclosures on matters relating to defence, security and classified information should be covered

The Directive expressly excludes reports and disclosures of breaches of procurement rules involving defence or security aspects. This is puzzling, given the high amount of public funds involved – about €200 billion per year in the EU¹⁶. The Directive also allows EU countries to exclude reports relating to classified information.¹⁷ This is worrisome, as national security whistleblowers often suffer the most severe retaliation. Not only do they lose their jobs, but they face criminal investigations, prosecution and harsh sentencing.¹⁸

Most international instruments recognise that the right to freedom of expression can be subject to certain restrictions for the protection of national security or public order. However, these restrictions should not be so overly broad as to prevent effective public scrutiny and debate about government decision making and activities, and to make it much more difficult to detect and address wrongdoing. As stressed by the United Nations Office on Drugs and Crime, reporting information that shows wrongdoing or is a matter of significant public interest should be considered “protected”, regardless of whether or not the information is classified, and there should be effective channels for reporting such information.¹⁹ The Council of Europe recognises that a special scheme or rules may apply to information relating to national security, defence, intelligence, public order or international relations.²⁰ If a whistleblower makes a disclosure in accordance with those rules, they should receive full protection.

Recommendation: National legislation on whistleblower protection should not exclude matters relating to defence, security and classified information, but rather provide for specific reporting schemes, in line with the Global Principles on National Security and the Right to Information (“Tshwane Principles”).

Protection measures should be extended to all individuals and entities at risk of unfair treatment as a consequence of whistleblowing

Protection should not be limited to the individuals who have made a report using the dedicated internal and external channels, but should be extended to all natural and legal persons at risk of retaliation as a consequence of whistleblowing. It is therefore welcome that the Directive affords protection to natural and legal persons connected with whistleblowers, such as colleagues, relatives and employers.²¹ However, several categories of persons exposed to risks of retaliation are not covered by the Directive.

Firstly, the Directive offers protection to facilitators, but narrowly defines a facilitator as a natural person who assists a reporting person in the reporting process in a work-related context. It excludes civil society organisations (CSOs), such as Transparency International, that provide advice and support to whistleblowers.²² This exposes CSOs to retaliation and pressures to reveal a whistleblower’s identity, threatening the essential work done by CSOs to protect whistleblowers and help them reveal wrongdoings that need to be addressed to safeguard the public interest.

Secondly, the Directive does not expressly protect individuals who have not (yet) used the dedicated channels to make a report, but have talked to colleagues, managers or Human Resources, even though they could suffer unfair

¹⁶ European Parliament, DEFENCE: Member States’ Spending, Briefing, May 2018, [www.europarl.europa.eu/RegData/etudes/BRIE/2018/621784/IPOL_BRI\(2018\)621784_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621784/IPOL_BRI(2018)621784_EN.pdf)

¹⁷ Article 3

¹⁸ United Nations, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression* (2015), p.18.

¹⁹ UNODC, 2015, pp.27-28.

²⁰ Council of Europe, 2014, Principle 5.

²¹ Article 4(4).

²² Article 5(8)

treatment aimed at discouraging them from making a “formal” report, or as a “pre-emptive strike” to circumvent legal protection.²³

It is quite common for workers to report issues to their line manager or HR, rather than use dedicated reporting channels. This might be because the individuals only have partial information and do not realise they are reporting a wrongdoing falling within the scope of whistleblowing legislation. This could also happen if individuals are not (well) informed about the existence of the dedicated reporting channels and how or when to use them. In addition, when individuals are considering making or preparing a report, it is not unusual for them to ask advice from co-workers or managers, to ask questions that divulge their knowledge of a potential wrongdoing, or even to indicate that they intend to make a report. In order to cover these situations, Transparency International recommends that protection is extended to attempted and perceived whistleblowers.²⁴

Recommendation: National legislation on whistleblower protection should extend protection measures to:

- persons who are believed or suspected to be a whistleblower, even mistakenly
- persons who intended to make a whistleblowing report
- civil society organisations assisting whistleblowers

Protection measures

The protection of whistleblowers in legal proceedings should be strengthened

As numerous high-profile whistleblowing cases have shown, whistleblowers can suffer legal consequences from making a disclosure, facing criminal charges and civil claims for breaking the legislation on, for example, defamation, professional secrecy or data protection, or for breach of contractual obligations. The threat and fear of such legal consequences can be serious deterrents to speaking up. This is why best practice dictates that whistleblower reports should be immune from liability under criminal, civil and administrative laws, and that the burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law.²⁵

The Directive provides for the protection of whistleblowers regarding contractual liability in articles 21(2) and 24, and regarding legal proceedings in Article 21(7), but places an extra condition to granting that protection, in addition to the ones listed in Article 6, “Conditions for protection of reporting persons”. It states that whistleblowers should not incur liability of any kind as a result of reports or public disclosures, “provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach”.

This could create an anomalous situation whereby, for the same report, whistleblowers would be protected against reprisal at their workplace (against, for example, dismissal or bullying), but could be subject to legal action brought by their employer or co-workers. This could deter whistleblowers from coming forward.

Recommendations: National whistleblowing legislation should not require whistleblowers to fulfil conditions other than the ones listed in Article 6 (“Conditions for the protection of reporting persons”) in order to be protected in legal proceedings. It also should make clear that “the person initiating the proceedings should carry the burden of proving that the reporting person does not meet [those] conditions”.²⁶

There should be no special or additional penalties for knowingly false reports or disclosures

Some stakeholders have raised the concern that whistleblower protection might be abused by individuals knowingly making false reports to protect themselves from disciplinary sanctions or to undermine the good name of their employer or colleagues. In an attempt to address those concerns, the Directive requires Member States to provide for

²³ GAP, 2016, Principle 4.

²⁴ Transparency International, 2013, Principle 4, in footnote.

²⁵ Transparency International, 2013, Principle 10.

²⁶ Recital (97).

“effective, proportionate and dissuasive penalties” against persons who knowingly reported or publicly disclosed false information.²⁷

However, this provision can act as a powerful deterrent to whistleblowing, especially if the sanctions are considered too severe. It will give whistleblowers who are hesitant and afraid of retaliation an additional reason not to make a report. Whistleblowers decide to raise a concern based on the information they have. This is often partial information, such as a conversation overheard or a document seen but which they do not have in their possession. It is possible that investigation of the disclosure will not find any evidence of wrongdoing; there may have been another, legitimate explanation for the act reported. When that happens, organisations could feel entitled by this provision to investigate the motives of whistleblowers who reported the false information, to try to show that they knew it was false and justify retaliatory measures.

It should be noted that such provision is unnecessary, especially given that Member States, in their defamation or criminal laws, already provide for penalties applicable to individuals making knowingly false declarations. Research and practice also suggest that trivial or false reports are uncommon.²⁸

In all cases, where action is taken against a person who knowingly made a false disclosure, the burden of proof should fall on the person asserting that the information was misleading, untrue or fabricated. They will need to prove that the whistleblower knew it to be false at the time of making the report or public disclosure.

Recommendation: National whistleblowing legislation should not introduce special or additional penalties for persons making knowingly false declarations using whistleblowing channels. Member States, in their defamation or criminal laws, already provide for penalties applicable in these circumstances.

The reversal of the burden of proof should be strengthened

It can be very difficult for whistleblowers to demonstrate that they have suffered retaliation as a consequence of their report or disclosure. On the other hand, organisations usually have processes in place to document actions taken against workers and they have better access to witnesses. As organisations have greater power and resources, the onus should be placed on them to prove that the action taken was not due to the whistleblower making a report or a disclosure.

The Directive does create a presumption of retaliation when a whistleblower suffers a detriment. However, the retaliator can still prevail by proving that “that measure was based on duly justified grounds”.²⁹ Such formulation does not fully reverse the burden of proof, and is dangerous as it might legitimise investigations of a whistleblower, the sole purpose of which is to justify retaliation measures. This would defeat the purpose of the presumption.³⁰

Recommendation: National whistleblowing legislation should clearly place on the person who has taken a detrimental measure against a whistleblower the burden of proving that this measure “was not linked in any way to the reporting or the public disclosure”³¹ and would therefore have happened anyway.

Whistleblowers should be entitled to full reparation through financial and non-financial remedies

Unfair treatment exposes whistleblowers to loss – financial loss, loss of status or even emotional hardship. Legislation should provide for whistleblowers to have access to suitable remedies, relief and compensation that makes sure their position does not worsen as a result of having made a report or a disclosure. All losses should be covered, including indirect and future losses and financial and non-financial losses. As stressed by Recital 94, “the appropriate remedy in each case should be determined by the kind of retaliation suffered, and the damage caused in such cases should be compensated **in full** in accordance with national law.” Whenever possible, whistleblowers

²⁷ Article 23(2).

²⁸ See, for example, Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p.14; Transparency International, *The Business Case for “Speaking Up”: How Internal Reporting Mechanisms Strengthen Private-Sector Organisations* (2017), p.12.

²⁹ Article 21(5).

³⁰ Tom Devine, Assessment of European Union Whistleblower Directive, *Government Accountability Project*, 17 April 2019.

³¹ Recital (93).

should be restored to a situation that would have been theirs had they not suffered unfair treatment. This redress should include both financial compensation for damages and non-financial remedies.

Best practice is to ensure that any unfair treatment is made null and void. This means that if a whistleblower has been dismissed, transferred or demoted, they should be reinstated to either the position they occupied before retaliation or to a similar position with equal salary, status, duties and working conditions. Similarly, whistleblowers should be given fair access to any promotion and training that may have been withheld following their report. Outside the employment context, remedies can involve relaunching a procurement process, the restoration of a cancelled permit, licence or contract, or the withdrawal of litigation against a whistleblower. Any records that could constitute a dossier for blacklisting or later retaliation should be deleted.

Whistleblowers should also have access to "compensation for actual and future financial losses, for example, for lost past wages, but also for future loss of income, costs linked to a change of occupation, [as well as] compensation for other economic damage such as legal expenses and costs of medical treatment, and for intangible damage such as pain and suffering."³²

Article 21(6) of the Directive states that whistleblowers should have access to remedial measures against retaliation "in accordance with national law". Such a general provision is not sufficient to guarantee full reparation for the damage suffered by whistleblowers, which can be extensive and take many forms.

Recommendation: National whistleblowing legislation should specify that whistleblowers should have access to a full range of remedial measures covering all direct, indirect and future consequences of any detriment, with the aim of making the reporting person whole. Such provision should include a non-exhaustive list of the types of remedial actions that should be available to whistleblowers, expressly including financial compensation and non-financial remedies such as reinstatement, transfer to a new department or supervisor, and restoration of a cancelled contract.

Internal and external reporting mechanisms

Anonymous reports should be accepted

Anonymous reporting provides a reporting mechanism for individuals who fear negative consequences or assume that insufficient care will be taken to protect their identity and who would not otherwise speak up.³³ Provision for anonymous reporting should especially be considered where the physical safety of whistleblowers is a concern.

Employers have expressed anxiety that anonymous reporting might reduce the feeling of personal liability, therefore encouraging false reporting. However, research and practice suggest that trivial or false reports are uncommon, including when anonymous reporting is allowed.³⁴

Opponents of anonymous reporting have also argued that it is impossible to ask the whistleblower for clarification or further information or to provide them with feedback about the response to their report. However, there are many ways to maintain dialogue with anonymous whistleblowers, including anonymous emails, online platforms or through third parties such as an ombudsman or a civil society organisation.

The Directive lets Member States decide whether organisations and competent authorities are required to accept and follow up on anonymous reports.³⁵ This is not in line with current best practice. While anonymous disclosures can make it harder to investigate a concern, this should not prevent a concern being taken seriously.

³² Recital 94

³³ Paul Latimer and AJ Brown, 2008, p.774; UNODC, 2015, p.50. See also, for example, a French survey that found that 20 per cent of workers would blow the whistle only anonymously (Harris Interactive, "*Lanceurs d'alerte*": *quelle perception de la part des salariés?* 2015, p.9).

³⁴ See, for example, Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p.14; Navex Global, *2015 Ethics & Compliance Hotline Benchmark Report*, p.17; Transparency International, 2017, p.12.

³⁵ Article 6(2).

Recommendation: National whistleblowing legislation should provide for anonymous reporting. A report should not be discarded merely because it was made anonymously. If sufficient information is provided, the recipient of the report should follow up on it.

All public-sector entities without exception, and not-for-profit entities with 50 or more workers, should be obligated to establish internal reporting mechanisms

Various studies have shown that most whistleblowers first use internal reporting mechanisms.³⁶ In addition, organisations are often best placed to deal with internal wrongdoing. This is why organisations should have an effective internal reporting mechanism in place.

The Directive makes it mandatory for all medium-sized and large private entities to establish internal procedures for reporting and for the follow up of reports, which reflects current best practice.³⁷ The Directive recommends applying this obligation to companies “based on their obligation to collect VAT.”³⁸ In some EU countries, this definition might exclude not-for-profit entities. Such exemption would not be in line with best practice.

The obligation to establish internal reporting mechanisms also applies to all public entities, but Member States can decide not to apply this obligation to municipalities with fewer than 10,000 inhabitants or fewer than 50 workers, and to other public entities with fewer than 50 workers.³⁹ This would also not be in line with current best practice, as it could result in exempting the majority of municipalities and local government entities in Europe from the obligation to establish internal reporting mechanisms. It is of particular concern as such public entities routinely take decisions in areas such as public procurement, environmental protection and public health, which are identified by the Directive as those where enforcement needs to be strengthened. Member States should follow the example of countries such as Ireland, Italy and Slovakia, which require all public entities without exception to establish internal reporting mechanisms.

Recommendation: National whistleblowing legislation should place an obligation to establish internal reporting channels on:

- all public legal entities, at local, regional and national level, without exception
- non-for-profit entities with 50 or more workers

Internal reporting mechanisms should include procedures to protect whistleblowers

To ensure effective whistleblower protection, internal whistleblowing mechanisms should provide for transparent, enforceable and timely procedures to follow up on whistleblowers’ complaints of unfair treatment. These should include procedures to sanction those responsible for retaliation and to restore to their previous position and status whistleblowers who have faced unfair treatment.

Unfair treatment can occur not only due to deliberate retaliation, but also through negligence in dealing with whistleblowing. This could occur if an organisation failed to support a whistleblower and simply allowed stress, fear and negative impact on their performance to destroy their health or career, or if it did not take sufficient steps to protect their identity, thereby damaging their reputation and career prospects. Managers may allow damage to occur simply by “turning a blind eye” to retaliation or harassment they know will be carried out by others.

The Directive does not clearly place an obligation on organisations to protect whistleblowers. This is a serious omission, as receiving and following up on reports should not be carried out in a way that is detrimental to the reporting persons. In this sense, there is an imbalance between the two objectives of the Directive: enforcement of EU law seems to take precedence over the protection of whistleblowers.

³⁶ See Transparency International, 2018, p.31.

³⁷ Article 8(3).

³⁸ Recital (45).

³⁹ Article 8(9).

Internationally, best practice legislation now recognises that organisations have a duty to support and protect whistleblowers, and prevent detrimental acts or impacts – and that they may be liable if they fail to fulfil that duty, not only if they have undertaken active retaliation themselves.⁴⁰ National legislation in the EU should follow this lead.

Recommendation: National whistleblowing legislation should require internal and external reporting procedures to include procedures for protecting whistleblowers.

Penalties should apply when obligations under the Directive are not fulfilled

The Directive follows best practice by requiring public- and private-sector organisations, as well as competent authorities, to establish whistleblowing mechanisms, to follow up on reports received and to provide feedback to the reporting person. However, to ensure that obligations are met, penalties should be applied when organisations or individuals fail to fulfil those obligations.⁴¹

Recommendation: National legislation should provide for effective, proportionate and dissuasive penalties applicable to legal or natural persons who, despite their obligation, fail to:

- establish internal channels and procedures for reporting, following up on reports and protecting reporting persons
- follow up on reports
- provide feedback on the follow-up to the whistleblower within a reasonable timeframe
- support and protect whistleblowers.

Consent of the whistleblower should be required to transmit their report

It might be difficult for a whistleblower to understand which is the proper channel to use to make a report to a competent authority, or even which is the appropriate competent authority. A lack of referral mechanisms might place the obligation on the whistleblower to keep making the disclosure until they reach the correct responsible person. The fact that the Directive foresees referral systems is therefore positive.⁴²

However, whistleblowers might have had reasons for addressing their report to a specific authority or for using a specific channel rather than another (such as lack of trust). A report should therefore not be transmitted without the explicit consent of the whistleblower; informing them is not sufficient.

In such a case, the staff member who received the report should either wait for explicit consent from the whistleblower before transmitting it, or simply direct the whistleblower to the right channel or authority, or to the information centre⁴³, letting them decide whether to send their report through via this alternative route.

Where it is not practical or reasonable to seek consent from the whistleblower (for example, if no contact details have been shared with the recipient, or where the nature of the concern raised requires that it be referred to the appropriate authority without delay), the recipient should record an official note of the reasons for referring the disclosure and inform the whistleblower of this decision.

Recommendation: National whistleblowing legislation should require that the explicit consent of a reporting person be obtained, where possible, before their report is transmitted.

⁴⁰ Australia Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019.

⁴¹ For example, in Italy, the National Anti-Corruption Authority can pronounce sanctions against the anti-corruption officers of public institutions that have not put in place the appropriate internal mechanisms or if they failed to follow up on a report. (Article 1(6) of Italian Provisions for the protection of individuals reporting crimes or irregularities that have come to light in the context of a public or private employment relationship).

⁴² Articles 11(6) and 12(3).

⁴³ Provided for in Article 20(3).

Effective implementation and enforcement

A national whistleblowing authority should be responsible for the oversight and enforcement of whistleblowing legislation

National whistleblowing authorities are essential to ensure effective whistleblower protection. In each EU country, an independent agency should be responsible for the oversight and enforcement of whistleblowing legislation. The whistleblowing authority should be competent to:

- provide free advice and support to whistleblowers
- ensure that whistleblower reports are referred to the right authorities for action
- receive, investigate and address complaints about unfair treatment and about improper investigation of whistleblower reports⁴⁴
- monitor and review the functioning of whistleblowing laws and frameworks, including via the collection and publication of data and information
- raise public awareness so as to encourage the use of whistleblower provisions and enhance cultural acceptance of whistleblowing.

Countries can decide to create a new dedicated whistleblowing authority or to extend the competencies of an existing authority, such as an ombudsman. Whatever the chosen approach, best practice dictates that such agencies must be independent and have sufficient power and resources to operate effectively.

Unfortunately, the Directive does not require Member States to designate a national whistleblowing authority. It only indicates that support measures – including information and advice, legal aid, and potentially financial assistance and psychological support – may be provided by “a single and clearly identified independent administrative authority”.⁴⁵

Recommendation: Member States should designate one authority as responsible for the oversight and enforcement of the protection of reporting persons. This authority should be independent and have sufficient power and resources to operate effectively.

The collection and publication of data on the functioning of whistleblowing laws and reporting mechanisms should be required

Collecting and publishing information on how a law is being used can provide a measure of its effectiveness. Data on the functioning of whistleblowing frameworks (such as number of cases received, outcomes of cases, remedies) is a primary source of information for evaluating both the implementation and the effectiveness of the legislative and institutional framework for whistleblowing. Publishing this data can provide whistleblowers, organisations and other stakeholders with a sense of how much they can trust their country's framework on whistleblowing. It allows public scrutiny and can boost public demand for better protection for whistleblowers and enforcement of legislation.

The Directive foresees data collection on external reports, but does not actually place an obligation on Member States to collect or publish such data.⁴⁶ In addition, data collection on internal reporting to public institutions is not mentioned. This is not in line with current best practice.⁴⁷

Recommendation: National legislation should require public entities and competent authorities to collect and publish data annually on internal and external reporting, and on whistleblowers' complaints of retaliation.

⁴⁴ Whistleblowing authorities should not be in charge of following up on whistleblowers' reports (e.g. investigating breaches). They should be distinct from the competent authorities responsible for external reporting and follow-up mentioned in Chapter III of the Directive.

⁴⁵ Article 20(3)

⁴⁶ Article 27.

⁴⁷ In Ireland, for instance, all public bodies must publish annually a report on the number of internal reports received and the action taken in response (Irish Protected Disclosures Act 2014, Section 22).

RESOURCES

Transparency International, *International Principles for Whistleblower Legislation* (2013), www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation.

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Transparency International, *The Business Case for Speaking Up: How Internal Reporting Mechanisms Strengthen Private-Sector Organisations* (2017), www.transparency.org/whatwedo/publication/business_case_for_speaking_up

Author: Marie Terracol

Reviewed by: John Devitt (TI Ireland), Giorgio Frascini (TI Italy), Lotte Rooijendijk (TI Netherlands), AJ Brown, Adam Foldes

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Transparency International
International Secretariat
Alt-Moabit 96
10559 Berlin
Germany

Phone: +49 - 30 - 34 38 200
Fax: +49 - 30 - 34 70 39 12

ti@transparency.org
www.transparency.org

Blog: voices.transparency.org
Facebook: /transparencyinternational
Twitter: @anticorruption