



The Greens | European Free Alliance
in the European Parliament

Greens/EFA press briefing European Commission Whistleblower proposals

How does the Commission's whistleblower protection proposal live up to international standards?

The fact that the European Commission has presented a proposal at all is already a victory in and of itself. By drafting our own proposal for a Directive on whistleblower protection, we managed to convince the European Commission that this was in fact legally possible, whereas they had previously consistently denied that there was any way that they could act on this matter.

The coalition building with NGOs, trade unions and journalists, all campaigning together over the last couple of years has proved fruitful. We have not only managed to push the Commission to act but they have actually made a proposal that exceeds our expectations. Although there are always elements that can be improved, our reaction to this proposal is very positive. It is now for the Council to engage constructively and the European Parliament to act swiftly in order to turn this proposal into law as soon as possible.

The European Commission will also call on the Member States, via a Communication, to implement the standards of the Council of Europe Recommendation on Whistleblower Protection, and particularly to address outstanding areas in which there is no EU competence.

Main points of the proposal:

- ✓ **Both public and private sectors are covered:** Plus, obligations to establish reporting channels apply to private legal entities with 50 or more employees and to those with a turnover or balance sheet of over €10 million. In addition, private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing also have to set up whistleblower reporting channels. As for the public sector, State administrations, Regions and Departments and Municipalities with more than 10,000 residents as well as other entities governed by public law need to establish reporting channels.
- ✓ **Workers are covered:** This is likely to attract some criticism from stakeholders who wanted all citizens to be covered, but focussing on workers is in line with the international standards on whistle-blower protection and it is also the angle that we took [in the Greens/EFA Directive](#). It covers workers, the self-employed, shareholders, volunteers, unpaid trainees and contractors, subcontractors and suppliers. It even stretches far enough to cover those going for a job interview and coming across information in that way.
- ✓ **Goes beyond purely illegal acts:** It covers both actual and potentially unlawful activities but also covers abuse of law which includes also acts or omissions that go against the spirit of a law.

- ✓ **Wide scope:** The proposed Directive follows our logic of saying that whistle-blowers are essential to ensure the proper application of EU law. We [published a briefing last year](#) arguing the same thing. the proposal has an annex attached to it which basically lists all the different EU regulations for which whistle-blower protection should apply:
 - financial interests of the Union
 - public procurement
 - financial services, prevention of money laundering and terrorist financing
 - product safety
 - transport safety
 - protection of the environment
 - nuclear safety
 - food and feed safety, animal health and welfare
 - public health
 - consumer protection
 - protection of privacy and personal data, and security of network information systems
 - tax breaches or unfair tax advantages
 - state aid, undertakings

- × **No mention of workers' rights!** However, there is no mention of the rights of workers, because the legal basis to act in this area would have required the Commission to engage with the social partners. While it is true that this might delay the adoption of the Directive, we still believe that it would be desirable to propose legislation that also covers this important area of workers' rights and their working conditions, and will continue to push for this type of protection in the future.

- × **Partial/fragmented:** There is already some EU legislation in force with provisions on whistleblower protection, such as the civil aviation directive or the market abuse regulation. Where these have already established specific rules on the reporting of breaches, these will remain unchanged. This might become a bit confusing for whistleblowers.

- × Of course it also goes without saying that areas where the EU has no competence (e.g. human rights, health services, education), are not covered by the proposal.

- **Reporting Channels:** There is a clear attempt to ensure that whistleblowers first report internally, by making this mandatory. Reports to competent authorities are classified as "external" disclosures and are only permitted if internal reporting was not followed up on, if the person could not be expected to know about the internal reporting channel or if no internal reporting channel existed. This said, it also includes "get-out" clauses that would have covered, for example, the luxleaks case, as it covers those who "could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report". It also covers those who "had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities".

- **Public reporting:** A person publicly disclosing information is protected **only if they first reported internally and/or externally**, and no appropriate action was taken. However, they are also covered if they could "not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger for the public interest, or to the particular circumstances of the case", or if there might be a risk of irreversible damage. Again, one would expect this to cover a case like luxleaks. So, while the freedom to report directly to the public is not as free as we would like, it is still possible.

- ✓ **No "motives test":** This is a fundamental principle behind whistleblower protection, and the Commission has respected it by avoiding a motivation test. Whistleblowers are simply required to have "reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive."

- ✓ **Obligations on companies and public bodies:** They must establish internal channels of reporting, and more importantly, they are obliged to also follow up on reports, to the extent appropriate. They are supposed to keep whistleblowers updated of the follow up

within 3 months of their reporting (or for public bodies this can be extended to 6 months in duly justified cases).

- ✓ **Protection of whistleblowers:** Competent authorities can help whistleblowers by certifying them as such under the Directive. Whistleblowers will not be liable for breaches of legislative, regulatory or administrative provisions on confidentiality if they report according to the Directive. "In judicial proceedings, including for defamation, breach of copyright, breach of secrecy or for compensation requests based on private, public, or on collective labour law, reporting persons shall have the right to rely on having made a report or disclosure in accordance with this Directive to seek dismissal."
- ✓ **Penalties for retaliation:** Retaliation in the work place is prohibited and Member States are obliged to put in place penalties for those that "hinder or attempt to hinder reporting; take retaliatory measures against reporting persons; bring vexatious proceedings against reporting persons; or breach the duty of maintaining the confidentiality of the identity of reporting persons."
- ✓ **Access to interim relief:** In accordance with the national framework, whistleblowers should be able to file for interim relief if, for example, they are being retaliated against at work.
- × **Reverse burden of proof:** First the whistleblower has to provide "reasonable grounds to believe that the detriment [they suffered] was in retaliation for having made the report", but then the burden of proof is reversed, so that the one doing the retaliation would need to show that the detriment was not a consequence of the reporting, but rather was exclusively based on duly justified grounds.
- × **Assistance for whistleblowers:** Member States may provide for financial and legal assistance and support for whistleblowers during legal proceedings but this is not a requirement. Psychological and other similar support is not mentioned.
- × **No anonymous reporting:** the possibility of allowing for anonymous reporting is not mentioned anywhere in the Directive.
- **Confidentiality of reporting should be strengthened:** Currently the proposal leaves open some options for undermining the confidentiality of whistleblowers' reports, "where the disclosure of data is a necessary and proportionate obligation required under Union or national law in the context of investigations or subsequent judicial proceedings", which is reasonable. However, this may become more problematic if confidentiality is undermined in order "to safeguard the freedoms of others including the right of defence of the concerned person, and in each case subject to appropriate safeguards under such laws." While there is a mention of appropriate safeguards also in the latter case, it is not a guarantee that this will always be the case in practice, particularly in countries with traditionally high levels of corruption.
- ✓ **Protection of those accused:** Specific provisions are put in place to protect those that are the subject of a whistleblowers' alert. Their identity should be kept confidential while investigations are ongoing; and they should fully enjoy the right to effective remedy, fair trial, presumption of innocence and the right to defence.
- **Malicious or abusive reports:** The Directive tries to discourage this by including specific measures to compensate those that have suffered damage from malicious or abusive reports or disclosures. While it is of course always desirable to avoid malicious or abusive reports, care should be taken to ensure that these concepts are defined in a restricted manner and that they do not lead to an unnecessary examination of the whistleblowers' motivations. What matters is the information released, not the intentions behind it.
- ✓ **Oversight and Reporting:** Member States are invited to submit statistics on the number of reports received by the competent authorities, the number of investigations and proceedings initiated as a result of such reports and their final outcome and also statistics on the estimated financial damage, and amounts recovered.