The Greens | European Free Alliance
in the European Parliament

Summary of feedback received during Greens/EFA public consultation on their draft EU Directive for the protection of whisteblowers

On 4 May 2016, the Greens/EFA group in the European Parliament presented a draft Directive to ensure minimum standards of protection for whistleblowers across the European Union. The Directive, drafted with the help of legal experts, was designed to be a catalyst that would push forward the debate on whistleblower protection in Europe, namely by overcoming the oft-cited argument that was "no legal basis" for the EU Commission to bring forward whistleblower legislation.

The draft Directive was opened to public consultation from 16 May 2016 to 12 September. The majority of participants responded via an online platform called discuto.io, which allowed for public voting and commenting on each paragraph of the draft. Others chose to send their feedback in writing via email or orally. Feedback was received from around 40 organisation and individuals, with 210 comments contributed via discuto.io as well as 833 votes on individual paragraphs.

The main comments received related to the scope of the Directive and who it should apply to, with many regretting the fact that the Directive was limited to "workers". Others suggested two or three step reporting channels instead of allowing whistleblowers who go straight to the media or even use social media to denounce wrongdoing to be automatically protected.

This summary aims to provide both an overview of the main feedback received and also some initial responses from the Greens/EFA group on how this feedback has been taken into consideration.

Update: What's happening now on whistleblower protection?

A few months after presenting our draft Directive, the European Commission announced that they would assess the possibility for further action at the EU level, and the European Parliament decided that it would draft two own-initiative reports on whistleblower protection: one in the Budgetary Control Committee and one in the Legal Affairs Committee. These processes are currently ongoing.

Shortly after, a coalition of trade unions, NGOs, and journalist organisations launched the campaign platform known as whistleblowerprotection.eu to call for a European Directive. And not long after that, the Council of the European Union (composed of the EU Member States) made a public call on the Commission to act on the matter. The Commission then promised that it would undertake an Impact Assessment on whistleblower protection, which is a precondition for proposing legislation.

The campaign to protect whistleblowers is clearly gathering momentum. Thanks to the mobilisation so far, an ever-larger number of actors are pushing forward on the issue. So, we plan to use the feedback received during this public consultation to feed into the ongoing mapping and impact assessment processes within the European Commission and also the whistleblower protection reports being drafted by the European Parliament.

For more information:
- See http://www.greens-efa.eu/whistle-blowers-directive-15498.html
- Visit the whistleblowerprotection.eu platform

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1. Scope: who is covered by whistleblower protection?

Feedback received:

The majority of respondents expressed concern that the proposal – because of the legal basis it is built upon – only covers "workers". Questions were raised about the self-employed, entrepreneurs, free-lancers, consultants, temporary workers, interns, lawyers, board members, and volunteers. Reference was also made to the protection of potential future employees who may acquire information during a recruitment process. Some also raised the example of a bystander witnessing a criminal offence or they highlighted situations in which students, consumers or patients might come across wrongdoing.

Response from Greens/EFA:

The definition of "worker" and "whistleblower" in the draft Directive is relatively wide, including contractors, trainees, apprentices and past employees as well as short-term contract workers and part-time workers, in line with EU law and case-law. Nevertheless, we will amend the definition to explicitly include more categories of workers.

The reason the proposal is based on "workers" is because it is based on the EU competence for protecting "working conditions". This legal basis was chosen in order to definitively cover both the private and the public sectors, which other legal bases such as protection of "the internal market" would not have been able to achieve sufficiently.

The European Parliament legal services have suggested an alternative legal basis: using the principle of "implied powers". Bearing in mind the need to have the widest scope possible, in line with the feedback received, we will analyse the extent to which the principle of implied powers could have a wider scope than legal basis chosen for this proposal.

2. Honest Errors and the need to ensure Factual Accuracy of Disclosures

Feedback received:

Only one respondent argued that there was too much subjectivity involved in the concept of "honest error". However, a number of others recommended that there should not be an obligation for whistle-blowers that "protected disclosures should be as factually accurate as possible". They argued that this sort of obligation was far too onerous and that it could have the effect of requiring the whistleblower to work to prove the truth of their information/disclosure, which is not their job and which could even undermine the integrity of the evidence brought forward.

In addition, three respondents alluded to the fact that sometimes the whistleblower may be seeking to extend a working relationship that they should not be entitled to. For example, in the case that a health practitioner is actually involved in wrongdoing themselves, they should not be allowed to blow the whistle in order to avoid dismissal or other legitimate prosecution.

Response from Greens/EFA:

Based on this feedback, we will remove the reference to the factual accuracy of disclosures in the definition of protected disclosures (in Articles 3(b) and 4), and replace it with a provision that protects whistleblowers who are acting in the "reasonable belief that the information was true at the time of disclosure" as is already mentioned elsewhere in the text.

As for cases in which the whistleblower is involved in wrongdoing themselves, under this Directive they are only exempted from liabilities related to the act of disclosing the information, not from liabilities arising from their own wrongdoing.

3. Definition of "public interest"

Feedback received:

Some respondents suggested that the "public interest" test should be entirely removed from the text, and that the focus should be placed on the wrongdoing that is uncovered. In addition, the point was raised that whistleblowers who reveal information that is in the interests of the company or of a third party, but not necessarily related to a wider public interest, should also be protected (provided it reveals wrongdoing).

Others requested a specific definition of public interest in the text itself, or a fuller list of examples of information that could be considered to relate to the public interest. In this list, currently found in Article 4, it was suggested that we should add specific references to violations of human rights, corruption and fraud, specific abuses of public authority, unauthorised use of public property, specific conflicts of interest, public safety, and national safety.

Response from Greens/EFA:

In response to this feedback and following the example set in the Irish Protected Disclosures Act, we will further clarify that – regardless of the intention of the whisleblower – it is the information that must either **reveal wrongdoing** or **be in the public interest** in order to be considered a protected disclosure. Though not exhaustive, the list in Article 4 on the types of protected disclosures will be expanded in line with the feedback received.

4. Channels for disclosure: structured tiers or complete freedom?

The draft Directive leaves the choice open for the whistleblower to disclose information either internally, externally to regulators and authorities or externally to the media, NGOs, trade unions and even via social media. In general, respondents empathised with the idea of leaving the choice up to the whistleblower, but various organisations also recommended a tiered approach in the reporting channels, similar to the systems already in place in the UK for example.

In addition, the idea of reporting directly via social media was not warmly welcomed by many of those who commented on this provision, including journalists' organisations, some of whom defended the idea of reporting to professional media outlets rather than directly using social media.

Those recommending a tiered approach suggested that each tier should have a different set of conditions or tests for protected disclosures, starting with a low bar for internal disclosures and progressively increasing the conditions that must be fulfilled by the whistleblower in order to qualify for protection:

a) Internal reporting: Evidence was presented to show that the majority of whistleblowers prefer to raise their concerns internally in both their first and second attempts to raise concerns. It was felt that in many cases, it is the internal recipients of disclosures that are best placed to take swift corrective action. A specific suggestion was made that there should be only a requirement of a 'reasonable suspicion', if whistleblowers disclose information to their employer based only on initial concerns or suspicions, as that would enable wrongdoing to be dealt with at the earliest opportunity.

b) External disclosures, to regulators and authorities: Here it was suggested to maintain our current provision that the individual should reasonably believe that 'the information is substantially true".

c) External disclosures, via media and social media: In line with this tiered approach, some respondents proposed that it should not be possible to, inter alia, exempt a whistleblower from civil charges if they decide to report directly to the media or use social media. One media organisation suggested that reporting to established media outlets should be a sign of good faith, as opposed to reporting via social media.

Reference was made to the UK Public Interest Disclosure Act, which contains a number of conditions for external reporting, including that the disclosure should not be made for personal gain, that the disclosure is reasonable given the circumstances and that, at the time of making the disclosure, the worker must either reasonably believe that they will be subjected to a detriment by their employer, or, in case there is no regulator, that it is likely that evidence relating to the relevant failure will be concealed or destroyed. Otherwise or if they have previously made a disclosure of substantially the same information to their employer or to a regulator.

Response from Greens/EFA:

We believe that whistleblowers should still be entitled to decide which is the best channel of disclosure to pursue in their specific circumstances. We believe that, as in the Irish legislation, the intention of the whistleblower should not be relevant, so we do not propose to include a requirement that the disclosure not be made for personal gain.

It should be remembered that the disclosure must fit in within the definitions in the regulation if the whistleblower is to be protected from reprisals anyway. Therefore, we propose to maintain the possibility to report via social media, but, in line with the feedback received, to clarify that this channel is to be used where the other channels of disclosure are less effective.

5. Recipients of protected disclosures: who should receive complaints?

Some respondents also raised concerns about the way in which Article 5 on "Disclosure Recipients" was drafted, particularly because, since it is a list, inevitably key persons may be omitted (such as legal advisors, auditors, compliance officers). Others suggested that there was an unnecessary overlap between Article 5 on disclosure recipients and the following Articles (Article 6 on internal disclosures, 7 on external disclosures to regulators and authorities and 8 on external disclosures).

As for trade unions acting as recipients of protected disclosures, there was a lack of consensus, though it was suggested that a distinction should be made between trade union representatives inside the firm and external trade union organisations.

The majority of trade unions felt that reports should be made to the internal trade union representatives who know the procedures, culture and practices inside the firm. However, others felt that it was probably not appropriate to consider that trade unions should act as a formal channel for reporting.

A point was also made that conflating other workers' grievances with acts of whistleblowing might be inappropriate.

Response from Greens/EFA:

For the sake of simplicity, we agree with the proposal to remove the full list of channels of disclosure in Article 5 since it is later repeated in Articles 6 on internal disclosures, 7 on external disclosures to regulators and authorities and 8 on external disclosures.

As for the question of trade unions, since the majority of trade unions that gave feedback were in favour of being mentioned as a reporting channel, we have included them also as internal disclosure recipients (in Article 6), though we think that more consultation to specify the specific role that trade unions should play is necessary.

6. Anonymity and confidential reporting

Most respondents supported the possibility of whistleblowers being able to submit alerts anonymously. Others argued that anonymity may have drawbacks because the information provided cannot be easily controlled, or they suggested that confidentiality should be preferred because it is rare that in court proceedings anonymous indications could be used to start legal action.

Some respondents insisted on the need to make a distinction between anonymity and confidentiality. While acknowledging the need to allow for anonymous reporting, some respondents raised the point that it is impossible to keep a whistleblower informed of the status of investigations or other results of their complaint if they report anonymously. It is also impossible to protect them if you don't know who they are in the first place.

A couple of respondents also questioned the need to provide exceptions that would allow for the revelation of the whistleblower's identity (in other words, a deviation from confidentiality) where this might be necessary to ensure an effective investigation or prevent serious risk to State security or to prevent crime. It was specifically recommended that the reference to investigations be removed from this exception.

Response from Greens/EFA:

If a whistleblower wants to be kept informed they could still submit an alert in writing using a pseudonym or email address that doesn't contain their real name, hence their report is anonymous. This said, the text was clarified in order to make clear the distinction between anonymous and confidential reporting; and to guarantee adequate levels of protection for both cases.

The exceptions on the obligation of confidentiality will be reworded to make clear that they should only apply in very exceptional circumstances, and we will remove the exception relating to investigations, in line with the feedback received.

5. Trade Secrets and National Security

Some respondents suggested that there should be an exception to the stricter provisions in our draft for whistleblowers revealing information related to national security (they are required to report to a special body with adequate security clearance). Others also added that there should be a more explicit reference to the need to ensure proper reporting on whistleblower disclosures, at the same time as avoiding any revelations of sensitive information. The inclusion of a specific mention to trade secrets was

welcomed, but greater clarity in the drafting was requested. A number of other respondents highlighted that, in their opinion, there should be no special trade secrets or national security protection in cases in which the information released reveals illegalities.

Response from Greens/EFA:

We will add an exception to the stricter provisions on national security, which applies in cases of imminent and urgent threats to public health, safety or the environment; or where reporting to the independent oversight body (with security clearance) would be ineffective or counter-productive. We agree that illegal acts should not be covered by special secrecy provisions, but do not feel that this requires further clarification in the text of the Directive itself.

7. Additional proposals

A number of respondents also made additional proposals for provisions that they felt should be included in the draft Directive.

a) Personal protection and support for whistleblowers:

Some respondents suggested that we should specify the actual mechanisms that should be put in place to protect whistleblowers, including:

- Right to security, including protection measures for whistleblowers and family members, similar to witness protection measures
- Psychological support
- Medical care
- Advice lines and legal support
- Education, retraining and other occupational/professional support
- Transfer to a new department or supervisor, without diminishing salary, status, duties and working conditions
- Paid leave, with no negative repercussions

b) Interim relief:

Others proposed that, like the Irish law, we should include provisions that would allow whistleblowers to file for interim and injunctive relief - for example to prevent them from being dismissed as a result of blowing the whistle – until there is an official outcome of any administrative, judicial or other proceedings that might arise.

Compensation:

Some respondents suggested that there should be monetary compensation for lost past, present and future earnings and status, as well as compensation for pain and suffering caused to whistleblowers. It was also suggested that support should be given when it comes to paying attorney and mediation fees as well as medical expenses. It was recommended that a fund to provide assistance for legal procedures and to support whistleblowers in serious financial need should be established.

c) Review procedures and due process rights for whistleblowers:

A few respondents suggested that there should be explicit reference to authorities, tribunals and courts which they felt should have power to sanction those found to have taken unfair action and

harassment against a whistleblower or who have failed to properly examine the disclosure. Some respondents suggested that we should expand Article 9 on the review of whistleblowers concerns to explicitly state that whistleblowers who believe their rights have been violated should be entitled to a fair hearing before an impartial forum, with full rights of appeal.

It was also suggested that, as informed and interested stakeholders, whistleblowers should have a meaningful opportunity to provide input to subsequent investigations or inquiries; or indeed, that whistleblowers should be allowed to clarify their complaint and provide additional information or evidence during the investigation. A couple of organisations suggested that whistleblowers should also have the right to review and comment on the outcome of the investigation related to their disclosure. One organisation proposed that whistleblowers should also be able to confront accusers and cross-examine witnesses.

d) Remedying the wrongdoing or threat to the public interest:

A couple of respondents recommended the inclusion of specific provisions to make clear that immediate action should be taken to remedy the specific wrongdoing that is reported, particularly where necessary to prevent loss of human life and/or financial costs from continuing to occur. Linked to this, it was also proposed that the whistleblower should have recourse to an appeals mechanism if nothing was done by the competent authorities to follow up on the substance of their complaint.

e) Whistleblower complaints authorities:

Some respondents suggested that Member States should be oblged to ensure that an independent agency receives and investigates complaints of retaliation against whistleblowers or improper investigations of whistleblower disclosures. It was suggested that this agency should issue binding recommendations and forward relevant information to regulatory, investigative or prosecutorial authorities for follow-up.

Others suggested a more general kind of « ombudsperson » that could be the first point of contact for people who intend to blow the whistle, providing them with advice and support, monitoring and reviewing whistleblower frameworks, raising public awareness to encourage the use of whistleblower provisions, and enhancing cultural acceptance of whistleblowing, as well as acting as a mediator between the whistleblower and the concerned entity.

However, these proposals were not entirely consensual, with yet others, notably trade unions, arguing that it was up to the Member States and public authorities to decide whether or not they needed dedicated authorities, and whether these authorities should be centralised authorities and/or authorities set up within each relevant organisation.

Response from Greens/EFA:

We fully agree with the vast majority of these proposals and will assess the extent to which they can be included in this proposal without overstepping the competences of the European Union.