

**DRAFT FOR DISCUSSION**

# **WHISTLEBLOWER PROTECTION IN THE PUBLIC AND PRIVATE SECTOR IN THE EUROPEAN UNION**

  
**A DRAFT DIRECTIVE**

DRAFT

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The case for EU legislative action on whistleblowing

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## EXECUTIVE SUMMARY

Whistleblowing is one the most effective ways of preventing or uncovering wrongdoing, as demonstrated by recent scandals uncovered by whistle-blowers, such as illegal mass surveillance, industrial scale tax avoidance or the sexual abuse of children by peacekeepers. According to a recent study analysing more than 2400 cases of fraud in 114 countries, about 40 per cent of all detected fraud cases are uncovered by whistle-blowers.<sup>1</sup>

Despite the fact that whistleblowing is essential for protecting the public interest and for maintaining accountability and integrity in both the public and private sectors, whistle-blowers who speak up do so at high personal risk, and often suffer great professional and personal costs. That society owes protection and support to whistle-blowers has been acknowledged by international organisations to which all or most EU countries are parties, including the United Nations Convention against Corruption (entered into force in 2005), the Council of Europe Civil Law Convention (2002) and the Council of Europe Criminal Convention (2002). Whistleblowing is also recognised as a form of protected free speech in the case law of the European Court of Human Rights.

However, recent evaluations of the status of whistle-blower protection in the EU member states reveal a situation that leaves much to be desired. Where protection exists, provisions tend to be scattered across different laws, with some member states having regulated some level of protection in anti-corruption laws, others in public service laws, and again others in labour, criminal and sector-specific laws, leaving significant legal loopholes and gaps. As a consequence, whistle-blowers across EU Member States enjoy uneven levels of protection, or in six countries, no protection at all.

Having recognised the need to act on whistleblowing, in the past decade, the European Parliament has consistently kept calling on the European Commission to propose EU legislation on the subject.

EU legislation on whistleblowing protection may only be adopted if there is a legal basis for such action in the Treaties, and its scope must be consistent with the chosen legal basis. To take the discussion on a possible EU legislation on whistle-blower protection to the next level, we propose a whistle-blower directive that is based on Article 4(2)(b) in conjunction with Articles 151 and 153(2)(b) TFEU, which aim at protecting working conditions.

Noting that we see also other potential lines of legal argument to ground legislative action on whistle-blower protection, we argue that Articles 151 and 153(2)(b) TFEU provide a clear and

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<sup>1</sup> Association of Certified Fraud Examiners, *Global Fraud Study 2016*. Summary available on-line at <http://www.acfe.com/rtn2016/about/executive-summary.aspx#>

unambiguous basis for EU legislative action to empower employees to report wrongdoing in a framework that provides legal certainty and a common minimum level of legal protection for workers throughout the Union. After all, although the hardships a whistle-blower might have to face may be multifaceted, they almost always start at the workplace.

The structure of the rest of the paper is as follows: In Section 1 we elaborate the case for EU legislative action on whistleblowing. We argue that it is necessary, that there is legal basis in the Treaties for such action, and that it would effectively further goals identified in the Treaties as the objectives of the Union. Section 2 is dedicated to the legal elements of the proposal. The chosen legal basis is discussed, alongside arguments to demonstrate that the proposed action is in line with the principles of subsidiarity and proportionality. Finally, in Section 3, we present a complete draft proposal for a directive on whistle-blower protection for both public and private sector workers, based on Articles 151 and 153(2)(b) TFEU.

### **Legal elements of the proposal**

- The personal scope of the proposal extends to both current and former workers, including trainees and apprentices, in all sectors of activity, public or private.
- Protection is given also to whistle-blowers who disclose inaccurate information in honest error.
- Protected disclosures concern harms or threats to the public interest that have occurred, are occurring at the time of the disclosure, or are likely to occur, and can be made, alternatively or cumulatively, internally within the workplace, or externally, to the competent authorities, parliamentarians and oversight agencies, as well as to trade unions and employers' associations, or to the public through the media, including social media, or non-governmental organisations.
- Requirements are set for the independent and timely investigation of whistle-blower reports, for the protection of confidentiality throughout the procedure, for the protection of the identity of whistle-blowers who disclose information anonymously, and for securing the rights of the persons implicated.
- Protections include exemptions from criminal proceedings related to the protected disclosure, including but not limited to prosecution for the disclosure of classified information, trade secrets or otherwise confidential information, exemptions from civil proceedings and disciplinary measures, and prohibitions of other forms of reprisal, including inter alia dismissal, demotion, withholding of promotion, coercion, intimidation, etc.
- The burden of proof to demonstrate that any measure taken against a whistle-blower is not related to a whistle-blower's disclosure is on the employer.

- Action taken against individuals other than the person who made the protected disclosure may also constitute prohibited reprisal.
- The provisions also include a yearly reporting mechanism and the creation of an EU data base on whistleblowing.

With this draft Directive we aim to gather broad cross-party support within the European Parliament so that this work can be used and built upon by the Commission, the only EU institution with the competence to start such a legislative initiative.

DRAFT FOR DISCUSSION

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## 1. THE CASE FOR EU LEGISLATIVE ACTION ON WHISTLE-BLOWER PROTECTION

### *1.1 The significance of whistleblowing and whistle-blower protection*

Whistle-blowers disclose information – to their workplace supervisors, to the relevant authorities, or to the public – that can shed light on corruption, fraud, mismanagement, oppression, discrimination, and other wrongdoing that concerns or threatens the public interest in areas as diverse as ensuring rule of law, respect for human rights, public health and safety, financial integrity, environmental protection, the proper use of public funds, accountability of public governance and services, or promoting a clean business environment.

Whistleblowing is one of the most effective ways of halting and preventing wrongdoing from occurring, or uncovering it if it already took place. Recent and well-known cases uncovered by whistle-blowers, of illegal mass surveillance, industrial scale tax avoidance or the sexual abuse of children by peacekeepers, highlight the significance of the service that whistle-blowers do to the public, whereas cases like the “Dieselgate” scandal point to the difference whistle-blowers could make if they felt safer to speak up in the first place.<sup>2</sup> Indeed, according to a recent study analysing more than 2400 cases of fraud in 114 countries, about 40 per cent of all detected fraud cases are uncovered by whistle-blowers.<sup>3</sup>

The European Commission has estimated that EUR 120 billion is lost in the EU economy annually due to corruption,<sup>4</sup> and there are striking Eurobarometer figures on the perceived extent of corruption in the EU which point to the urgent need for whistle-blower protection. More than three out of every four EU citizens think that corruption is widespread in their country. Although two-thirds of the respondents say they would report corruption, one in three thinks reporting is pointless as those responsible would go unpunished, and 31 per cent think that people might choose not to report corruption because there is no protection for those who blow the whistle. Of those Europeans who have actually witnessed corruption themselves, three out of four said that they did not report it (and there are Member States in which this ratio is above 90 per cent).<sup>5</sup>

Indeed, as a general rule, whistle-blowers who speak up often do so at a high personal risk, and they usually suffer a great professional and personal cost as a result. Despite the fact that

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<sup>2</sup> For a brief summary of the case see: <http://www.ibtimes.com/volkswagen-whistleblower-we-gave-epa-diesel-emissions-data-2014-2114511>. See also: <http://www.economist.com/news/business/21679455-life-getting-better-those-who-expose-wrongdoing-companies-continue-fight>

<sup>3</sup> Association of Certified Fraud Examiners, *Global Fraud Study 2016*. Summary available on-line at <http://www.acfe.com/rtnn2016/about/executive-summary.aspx#>

<sup>4</sup> European Commission, EU Anti-corruption Report, 2014. Available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf)

<sup>5</sup> Special Eurobarometer 397/ Wave EB79.1 – TNS Opinion & Social, pp. 100-106, available online at <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/yearFrom/1973/yearTo/2015/search/corruption/surveyKy/1076>

whistleblowing is essential for protecting the public interest, and for maintaining accountability and integrity in both the public and private sectors; instead of at least being praised and perhaps even rewarded, whistle-blowers often lose their jobs and further career prospects, suffer harassment and legal persecution, lasting financial hardship, and other adverse consequences that propagate into the personal aspects of their lives.<sup>6</sup> Although the hardships a whistle-blower might have to face are multifaceted, they almost always start at the workplace, and are linked to the employees' working conditions: without safe channels of reporting, a worker is not empowered to ensure justice and effect change in their workplace, thus resulting in a negative working environment. The protection of working conditions is a key regulatory area in which EU action is both necessary and possible to ensure that effective protection for whistle-blowers is put in place.

### ***1.2 Whistleblowing in international conventions and recommendations***

A variety of international conventions have recognised the need for protection and support for whistle-blowers. All or most EU Member States are parties to these conventions:

1. Article 9 of the Council of Europe Civil Law Convention on Corruption, having entered into force in 2002, provides for the protection of workers against any unjustified sanction for those who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.<sup>7</sup>
2. Article 22 of the Council of Europe Criminal Law Convention, which entered into force in 2002, stipulates protection for persons who report criminal offences in line with that convention.<sup>8</sup>
3. Article 33 of the United Nations Convention against Corruption (UNCAC), having entered into force in 2005, stipulates that all parties to the Convention shall consider incorporating whistle-blower protection into their domestic legal systems and article 32 of the same convention stresses the need to protect witnesses, experts and victims.<sup>9</sup>
4. In 2009, the Council of the OECD adopted the Recommendation for Further Combatting Bribery of Foreign Public Officials in International Business Transactions, requiring all parties to the Anti-Bribery Convention, including 23 of the 28 EU countries, to adopt whistle-blower protection measures in both the public and private sectors.<sup>10</sup>
5. In 2014 the Council of Europe Committee of Ministers adopted Recommendation CM/Rec (2014)7 on the protection of whistle-blowers. It urges CoE member states to put in place

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<sup>6</sup> For a report on how the life of the whistle-blowers of several less-known cases turned out about a decade after they blew the whistle see: <http://www.theguardian.com/society/2014/nov/22/there-were-hundreds-of-us-crying-out-for-help-afterlife-of-whistleblower>

<sup>7</sup> <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f6>

<sup>8</sup> <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5>

<sup>9</sup> [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>10</sup> <https://www.oecd.org/daf/anti-bribery/44176910.pdf>



comprehensive national frameworks for the protection of whistle-blowers standing in a *de facto* working relationship with a public or private organisation, paid or unpaid, regardless of their legal status.<sup>11</sup>

### **1.3 Whistleblowing as a form of protected free speech in the case law of the European Court of Human Rights (ECtHR)**

The case law of the European Court of Human Rights interprets whistleblowing as a form of freedom of expression protected under Article 10 of the European Convention on Human Rights, to which all EU countries are parties. Notable cases include the following:

- The case *Heinisch v. Germany*, no. 28274/08,<sup>12</sup> where the Court ruled that “signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for in particular where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.”
- The case of *Bucur and Toma v. Romania*, no. 40238/02, where a unanimous Court held that a whistle-blower's conviction for disclosing classified information to the press violated freedom of expression.<sup>13</sup>

### **1.4 International principles and best practice in whistle-blower protection**

International organisations and NGOs have provided guiding principles and compendia of best practices to help countries in designing their legal frameworks for the protection of whistle-blowers. Such guidelines include the following:

- a. Section IV on Protection of Whistle-blowers in *Promotion and protection of the right to freedom of opinion and expression*, Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, September 2015,<sup>14</sup>
- b. The Council of Europe Recommendation CM/Rec(2014)7 on the protection of whistle-blowers (already mentioned in section 1.2), which establishes 29 principles that CoE member states should implement in their national law to provide protection to whistle-blowers and ensure that their disclosures will be acted upon,<sup>15</sup>

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<sup>11</sup> [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

<sup>12</sup> [http://hudoc.echr.coe.int/eng?i=001-105777#{"itemid":\["001-105777"\]}](http://hudoc.echr.coe.int/eng?i=001-105777#{)

<sup>13</sup> <http://www.right2info.org/cases/r2i-bucur-and-toma-v.-romania>

<sup>14</sup> <http://www.refworld.org/docid/5629ed934.html>

<sup>15</sup> [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

- c. The G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistle-blowers,<sup>16</sup> and
- d. Transparency International's International Principles for Whistle-blower Legislation.<sup>17</sup>

### ***1.5 Reports on the state of play in whistle-blower protection and the emerging picture***

Despite the obligations arising from the aforementioned international legal instruments, and the efforts to outline the best international standards and practices readily available, and regardless of the fact that more OECD countries have enacted whistle-blower protection laws in the last five years than in the previous 25,<sup>18</sup> the current situation leaves much to be desired.

Recent evaluations of the status of whistle-blower protection include:

1. OECD's *Committing to Effective Whistle-blower Protection*, of March 2016, providing an analysis of global whistle-blower protection standards in the public and private sectors, with detailed country case studies, involving two EU countries,<sup>19</sup>
2. Transparency International's *Speak up! – Empowering citizens against corruption*, of April 2015, giving a comparative overview of whistle-blower protection legislation and practical aspects of whistleblowing in seven EU member states,<sup>20</sup>
3. Restarting the Future's *Blowing the Whistle on Corruption*, of December 2014, covering EU member states, India, and the United States,<sup>21</sup>
4. *Whistle-blower Protection Laws in G20 Countries – Priorities for Action*, of September 2014, by researchers of Blueprint for Free Speech, TI Australia, and the University of Melbourne, covering G20 countries, including four EU member states,<sup>22</sup> and
5. Transparency International's *Whistleblowing in Europe – Legal Protections for Whistle-blowers in the EU*, from November 2013, covering the 27 (at that time) EU Member States.<sup>23</sup>

With respect to EU Member States, the picture that emerges from these reports is that, where protection for whistle-blowers exists, provisions are scattered across different laws.

<sup>16</sup> <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

<sup>17</sup> [http://www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation)

<sup>18</sup> OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264252639-en>

<sup>19</sup> See the previous footnote

<sup>20</sup> [http://www.transparency.org/whatwedo/publication/speak\\_up\\_empowering\\_citizens\\_against\\_corruption](http://www.transparency.org/whatwedo/publication/speak_up_empowering_citizens_against_corruption)

<sup>21</sup> [http://www.restartingthefuture.eu/assets/files/WhistleblowingReport\\_April2.pdf](http://www.restartingthefuture.eu/assets/files/WhistleblowingReport_April2.pdf)

<sup>22</sup> <https://blueprintforfreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>

<sup>23</sup> [http://www.transparency.org/whatwedo/publication/whistleblowing\\_in\\_europe\\_legal\\_protections\\_for\\_whistleblowers\\_in\\_the\\_eu](http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu)

- Only five EU Member States can be regarded as having dedicated, stand-alone or somewhat advanced whistle-blower protection (Ireland, Luxembourg, Romania, Slovenia, and the UK). Yet, significant legal loopholes and gaps continue to exist. For example, Luxembourg's anti-corruption law does not protect whistle-blowers who contact the media or NGOs, and the recent Luxleaks scandal has made it clear that even workers in EU countries with comparatively advanced legislation still lack the required level of protection, facing criminal charges and legal proceedings.
- Sixteen member states provide only partial legal protection to workers who report wrongdoing, which leads to a greater number of loopholes and exceptions where no protection from retaliation or other personal risks is granted for employees who blew the whistle. Member States have regulated some level of protection in anti-corruption laws (e.g. Estonia, Italy and Slovenia), others in public service laws (e.g. Austria and Portugal), and again others in labour, criminal and sector-specific laws. However, according to TI's 2013 report, "[m]ost whistle-blower laws in the EU ... do not live up to the EU's Charter of Fundamental Rights, three provisions of which form the basis of whistle-blower protection: freedom of expression, protection from unjustified dismissal and a right to effective remedies, [in addition,] a majority of laws also fall short of standards and guidelines issued by the Council of Europe, the Organisation for Economic Co-operation and Development."
- The remaining seven EU countries have either very limited, or no legal protection for whistle-blowers at all.

### ***1.6 Potential benefits of setting EU minimum standards***

Setting common minimum standards for whistleblowing protection within the union could:

1. Help to protect and defend the public interest in the EU and beyond;
2. Help EU citizens to exercise their fundamental right to speak up against wrongdoing, recognised in the European Convention on Human Rights, and in the case law of the European Court of Human Rights, as well as in the EU Charter of Fundamental Rights;
3. Help uphold every citizen's right to know what pertains to the public interest;
4. Create better and safer working conditions for workers throughout the Union, including protection from unjust loss of employment, demotion, harassment, and other types of retaliation, should they disclose information on wrongdoing, etc.;
5. Help prevent the loss of public funds to corruption, of both Member State and EU funds, and facilitate their recovery;
6. Help prevent other harms to the public interest, including practices that threaten public health, public finances, the environment and public safety;

7. Help combat organised crime and transnational cases of corruption and other wrongdoing;
8. Promote a culture of accountability and integrity in the public sector, and help win back trust in the fairness and efficiency of democratic institutions;
9. Contribute to putting in practice the ideal of a Union based on the rule of law, as foreseen in Article 2 TEU;
10. Contribute to the creation and maintenance of a clear business environment, through increasing the probable cost of, and thus preventing, various forms of market abuse;
11. Promote the integrity of the internal market through creating a more even playing field in terms of standards of accountability;
12. Allow for cross-border reporting, in particular of cross-border fraud or other such wrongdoing or potentially harmful activities.
13. Help EU countries to live up to obligations that arise from the relevant international conventions.

### ***1.7 Repeated calls by the European Parliament to act***

Over the past decade, the European Parliament has consistently called on the European Commission to propose EU legislation for the protection of whistle-blowers, some of which are listed below. However, the Commission has not yet responded to these calls.

- In September 2013, the European Parliament study titled “*The US National Security Agency (NSA) surveillance programmes (PRISM) and Foreign Intelligence Surveillance Act (FISA) activities and their impact on EU citizens’ fundamental rights*” outlined the severe consequences of the lack of coherent protection of whistle-blowers at the national level and referred to the need for legislation to address that.
- In October 2013, in the Resolution on “*Organised crime, corruption and money laundering: recommendations on action and initiatives to be taken,*” the Parliament called on the Commission, “by the end of 2013, to submit a legislative proposal establishing an effective and comprehensive European whistle-blower protection programme in the public and in the private sector”.<sup>24</sup>
- In November 2015, prompted by the Luxleaks scandal, in the Resolution on “*Tax Rulings and other Measures similar in Nature or Effect*”, the Parliament condemned the fact that “whistle-blowers, who provide national authorities, in the public interest, with crucial information about misconduct, wrongdoing, fraud or illegal activities or practices, can be subject to legal prosecution, as well as to personal and economic repercussions.” In the same Resolution, the

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<sup>24</sup><http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0444&language=EN&ring=A7-2013-0307>

Parliament called on the Commission to propose, by June 2016, an EU legislative framework for the effective protection of whistle-blowers, which protects them from legal prosecution and job loss.<sup>25</sup>

- In December 2015, in the Resolution on “*Bringing transparency, coordination and convergence to corporate tax policies*” the Parliament repeatedly called for the protection of whistle-blowers, discussed such protection as relevant to ensure the right of freedom of expression and information, and considered that a legislative proposal on whistleblowing protection may take as a basis the Regulation (EU) No 596/2014 of the European Parliament and of the Council on trade secrets and take into account the Council of Europe’s Recommendation CM/Rec(2014)7 on the protection of whistle-blowers.<sup>26</sup>

### **1.8 Is there a legal basis to act?**

EU legislation on whistle-blower protection may only be adopted if there is a legal basis for such action in the Treaties, and its scope must be consistent with the chosen legal basis. We propose a whistle-blower directive that is based on Articles 151 and 153(2)(b) TFEU, noting that we see other potential lines of legal argument to ground legislative action on whistle-blower protection, briefly discussed also in this section.

#### ***Clear legal basis: Articles 151 and 153(2)(b) TFEU***

The choice of Article 4(2)(b) of TFEU, in conjunction with Articles 151 and 153(2)(b) TFEU provides a clear and unambiguous basis for EU legislative action to establish a whistle-blower framework that empowers workers to report wrongdoing by providing legal certainty and a common minimum level of legal protection for workers across the Union.

Article 151 TFEU stipulates that “The Union and the Member States [...] shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained.” According to Article 153(1), “With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: [...] (b) working conditions [...].” Paragraph 2 of the same article stipulates that “To this end, the European Parliament and the Council: [...] (b) may adopt... by means of directives, minimum requirements for gradual implementation [...].” Whistle-blower protection is a safeguard for the worker from unjust

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<sup>25</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN>

<sup>26</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0457+0+DOC+XML+V0//EN&language=EN>

dismissal and aims to ensure fair treatment, hence it provides working conditions that make it possible for the individual to report wrongdoing without fear, personal risk or intimidation.

### ***Other relevant EU laws and policies on whistle-blower protection***

Other EU law provisions and policy documents also support the adoption of whistleblower protection. Whistleblower protection is supported by legal arguments based on the conjunction of *Articles 26 and 114 TFEU*. Article 26(1) stipulates that “The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties”, whereas Article 114(1) foresees that, for the achievement of the objectives set out in Article 26, “The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”

Sectorial and partial EU whistle-blower legislation is already in place based on this legal basis. With a specific scope that extends to the reporting of the infringement of the market abuse regulation, *Regulation (EU) No 596/2014* of the European Parliament and of the Council of 16 April 2014 on market abuse recognises, in *Article 32*, that effective whistle-blower protection is essential to ensure the proper functioning of the internal market. Regulation 596/2014 goes on to acknowledge that “whistleblowing may be deterred for fear of retaliation, or for lack of incentives. Reporting of infringements of this Regulation is necessary to ensure that a competent authority may detect and impose sanctions for market abuse. [...] This Regulation should therefore ensure that adequate arrangements are in place to enable whistle-blowers to alert competent authorities to possible infringements of this Regulation and to protect them from retaliation.”<sup>27</sup>

The argument on which Regulation 596/2014 is based may be extended beyond a situation of pure market abuse. Other instances exist in which information disclosed by whistle-blowers could help to uncover and remedy wrongdoings, as reflected for example in the *Directive on money laundering and terrorist financing*, whose *Articles 26 and 27* require Member States, in very general terms, to put in place protective measures for those who blow the whistle on wrongdoings defined in the directive.<sup>28</sup>

Whistleblowing has also been recognised as an exception in the soon-to-be-adopted Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. According to recital 20 of the text adopted by

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<sup>27</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN>

<sup>28</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0060&from=EN>

the legislative Resolution of the Parliament of 14 April 2016, “The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity”, and Article 5 stipulates that “Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out [...] (b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest.”<sup>29</sup>

Whistleblowing is an essential element of the culture of accountability that is necessary for the proper functioning of the internal market. In turn, significant variations in the ways that different Member States provide protection for whistle-blowers create disparities that are potentially detrimental to the integrity of the internal market. Setting common minimum standards helps to create a level playing field, and prevents the fragmentation of the internal market, whilst at the same time ensuring the principle of the equality of workers across the EU.

Finally, the Commission seems to have considered the possibility of EU action on whistleblowing in the shared competence area regarding freedom, security and justice, in the framework of the 2009 Stockholm programme, which gave the Commission a mandate “to develop a comprehensive anti-corruption policy.”<sup>30</sup>

In the Commission Communication titled “Fighting Corruption in the EU”<sup>31</sup>, the Commission stated, “Effective protection of whistle-blowers against retaliation is a key element of anti-corruption policies. The relevant legal framework in the EU is uneven, creating difficulties in handling cases with a cross-border dimension. The Commission will carry out an assessment of the protection of persons reporting financial crimes that will also cover protection of whistle-blowers, and related data protection issues, as a basis for further action at EU level” (Section 4.1.3). However, Title V of the Treaty on the Functioning of the European Union pertaining to the area of freedom, security and justice does not provide a clear legal basis for the adoption of whistle-blower protection, because it remains limited to issues relating to security, whereas whistleblowing covers a wider span of wrongdoings, some of which can lead to the whistle-blower being sanctioned also under administrative measures (for example a very large fine).

### ***1.9 The purpose of this exercise***

The aim pursued by the publication of the draft directive proposed in this document is to further the ongoing discussion about the need for a legislative framework for common minimum standards

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<sup>29</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0131+0+DOC+PDF+V0//EN>

<sup>30</sup> See page 23 of the Stockholm Programme here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504%2801%29&from=EN>

<sup>31</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Fighting corruption in the EU (COM(2011) 308 final of 6 June 2011) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0308>

that would protect whistle-blowers across the Union. In particular, we hope to achieve the following:

- a. To argue that there is a legal basis in the EU Treaties for action to protect whistle-blowers, and that it can be done in line with principles of subsidiarity and proportionality,
- b. To argue that it would effectively further the goals identified in the Treaties as the objectives of the Union,
- c. To present an example of how the provisions of a directive on whistleblowing, based particularly on Articles 151 and 153(2)(b) TFEU, could be drafted, taking into account the relevant recommendations by international organisations.

We offer this work to be used and built upon by the European Commission, the only EU institution fully endowed with the competence to initiate such a legislative initiative.

DRAFT FOR DISCUSSION



## **2. LEGAL ELEMENTS OF THE PROPOSAL**

### ***2.1 Legal basis***

The legal protection of whistleblowing must reflect the objective pursued by Article 151 TFEU, read in conjunction with Article 153 (1) (b) TFEU: the improvement of working conditions.

In accordance with Article 153 (2) (b) of TFEU, the European legislator may act by means of Directives in field of Article 153 (1) (b) TFEU, i.e. working conditions. Whistle-blower protection is a safeguard for the worker from reprisals including dismissal, and it aims to ensure fair treatment, hence providing adequate working conditions that enable the individual to report wrongdoing without fear, personal risk or intimidation.

Reliance on Article 153 (2) (b) of TFEU is subject to twofold conditions: firstly, it can only set minimum requirements for gradual implementation, having regard to the conditions and technical rules in each of the Member States. Secondly, it should avoid imposing administrative, financial and legal constraints in a way that would hold back the creation and development of small and medium-sized undertakings. The proposed Directive establishing legal protection for whistleblowers is fully in line with these requirements. Contrary to setting constraints to the creation and development of small and medium-sized undertakings, whistle-blower protection ensures that workers have a better working environment that in turn makes SMEs equally competitive in this field by avoiding fraud, corruption, mismanagement and other activities that are detrimental to both workers and the free market.

### ***2.2 Compliance with the principle of subsidiarity***

There are three preconditions for EU action in accordance with the principle of subsidiarity:

- a) the area concerned is a non-exclusive competence,
- b) the objectives of the proposed action cannot be sufficiently achieved by the Member States and
- c) the action can therefore be implemented more successfully by the Union.

This proposed draft directive providing minimum standards of protection for whistle-blowers complies with the principle of subsidiarity for the following reasons. Article 153 (2) (b) relates to an area of non-exclusive competence. In addition, the objective of the proposed action is to provide minimum standards for the protection of public and private sector workers so that they are able to report wrongdoing that they witness as part of their work-based relationship to the competent authorities, including reporting across EU borders. In order to achieve this, there needs to be a common definition of “whistle-blowers” and “whistleblowing” across the Union. For example, currently, a disclosure in Lithuania is not protected unless the individual who came forward with the

information is eligible for witness protection.<sup>32</sup> Ireland, on the other hand, has a broad definition of whistleblowing which protects disclosures comprehensively. In some European countries, the term “whistle-blower” has no legal meaning.

Currently, many Member States provide partial protection to whistle-blowers through specific provisions in different, sectorial laws including labour, criminal and administrative laws. Indeed, EU legislation provides protection for whistle-blowers through the Directive on money laundering and terrorist financing,<sup>33</sup> and the soon-to-be-adopted trade secrets directive provides an exception for disclosures revealing misconduct, wrongdoing or illegal activity, provided the respondent acted to protect the general public interest.<sup>34</sup> The legislative framework is therefore patchy at both levels. According to the OECD, providing protection to whistle-blowers through specific provisions scattered across different pieces of legislation constitutes a fragmented approach and risks protecting a reduced group of whistle-blowers and covering an overly limited kind of wrongdoing, while at the same time contributing to the creation of loopholes, legal uncertainty and ambiguity.<sup>35</sup>

Every worker in the private and the public sector across the Union is entitled to a legally certain and protected working environment. It is submitted that - due to the patchwork of current provisions that exist among European countries - the EU is better placed than its Member States to provide a minimum level of whistle-blower protection for all workers across Europe. In the absence of such protection in the EU, whistle-blowers face a lack of adequate legal safeguards from retaliation, but also from intimidation and isolation. More unified action across the Union is necessary to ensure that workers throughout the EU benefit from the same working conditions, and have the same incentives and legal protections for exposing corruption, abuse of power and other wrongdoing.

It is worth noting that an EU Directive dedicated to whistleblowing which provides legal protection in both the public and private sectors would ensure the same minimum standards of treatment for all whistle-blowers in the EU. This is particularly salient as in essence the nature and function of whistleblowing does not differ drastically whether it is conducted in the public or private sector, or whether it occurs in France or in Latvia; in both cases the interest is in the exposure of corruption, wrongdoing, fraud, abuse of power – and in the protection of the worker who exposed it. In other words, what whistle-blower protection must achieve is that all potential EU

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<sup>32</sup> A good comparative overview of seven EU member states’ whistle-blower legislations can be found in Transparency International’s report, *Speak Up - Empowering citizens against corruption* (2015), pp. 24-29

<sup>33</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0060&from=EN>

<sup>34</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0813&from=EN>

<sup>35</sup> OECD, *CleanGovBiz – Integrity in practice: Whistle-blower protection: encouraging reporting* (2012), available online at <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf>

whistle-blowers would have the same minimum protections, regardless of what country or which sector they work in.

Action to protect whistle-blowers is better achieved by the EU because corruption does not know borders. A comprehensive European whistle-blower protection programme in the public and in the private sector is necessary to protect those who detect inefficient management and irregularities, including cross-border corruption relating to national or EU financial interests and also to protect witnesses, informers, and those who cooperate with the courts, in particular witnesses testifying against mafia-type and other criminal organisations, which may also operate across borders.

Currently, employees who work in a company that operates in more than one Member State face very different legal consequences depending on whether the national system foresees protection for them. This is also a disincentive to report corruption, fraud or other wrongdoings, which raises concerns not only for the potential financial losses for the company, but also because there is a lack of equal or similar working environment and treatment for workers. In turn, this could be even seen as a disincentive for the mobility of workers within the internal market, as clearly employees that work in Member States affording legal protection to whistle-blowers would be in a more favourable situation than their counterparts in other countries.

Furthermore, whistle-blower protection is indispensable considering that institutional processes of accountability rely on exposure of information to identify possible wrongdoing. Action at the Union level is favoured when it is included within the overall EU accountability system and also balanced with other EU regimes such data protection and other protected information including trade secrets.

In light of the above, we conclude that the EU is better placed to ensure that Member States collectively abide by a set of common minimum standards on whistle-blower protection so that workers all across the Union no longer face legal loopholes and uncertainty. The EU can act by providing for minimum Union-wide standards that would effectively protect of whistle-blowers, and this could be achieved through the adoption of a Directive.

### ***2.3 Compliance with the principle of proportionality***

This draft directive providing minimum standards of whistle-blower protection complies with the principle of proportionality in view of the following reasons.

First, the measures envisioned to protect whistle-blowers under EU law are appropriate and necessary in order to attain the objectives foreseen in the Treaties: the setting of minimum requirements for employees' working conditions, as well as implementing the rule of law, ensuring

accountability, deterring fraud, and enabling the right to freedom of expression and protection of personal data to be exercised.

Furthermore, the protection of whistle-blowers has been recognised in and of itself to be a legitimate aim, as evidenced by the UNCAC, the OECD, the Council of Europe Recommendation and the European Parliament resolutions previously discussed.

Moreover, action by the EU to protect whistle-blowers is proportional because various recent cases in which whistle-blowers were involved or could have been involved (Luxleaks, Volkswagen) have shown that the impacts of certain activities go beyond the framework of National Member States and can often concern the public interest on an EU scale. The existence of a “European public interest” which cannot be reduced to the sum of national interests is therefore a major challenge that only EU-wide protection for whistle-blowers can tackle.

In addition, the measures envisioned are appropriate and necessary since, in their absence, there would not be a minimum and uniform level of protection across the EU and hence the playing field would not be even. In the framework of the internal market, Member State economies are highly inter-connected and many EU undertakings conduct activities in several different Member States. Heterogeneous protection for whistle-blowers can therefore lead to dysfunctions in the market, because the chances that information related to the public interest is reported will vary greatly from one Member State to another, even within the same company.

It should be noted that the measures envisioned to protect whistle-blowers under EU law are not unduly onerous and no equally appropriate but less onerous measures can be envisaged. Indeed, contrary to setting constraints to the creation and development of small and medium-sized undertakings, whistle-blower protection ensures that workers have a better working environment that makes SMS equally competitive in this field.

Finally, the proposed measures provide for, in line with Article 153 TFEU, “minimum requirements for gradual implementation,” thus leaving a degree of freedom to the Member States to afford higher protections should they wish. Accordingly, such measures would not be unduly onerous nor would they exhaust member states’ regulatory autonomy. It is not anticipated at this stage that such minimum standards would cause significant burden (either financial, administrative, legal or otherwise).

### 3. PROPOSAL

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Establishing minimum levels of protection for whistle-blowers

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 4(2)(b) in conjunction with Articles 151 and 153(2)(b) thereof,

[Having regard to the proposal from the Commission]

Whereas:

- (1) Whistle-blowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threatens public health, finances and safety, financial integrity, human rights, the environment, and the rule of law.
- (2) Whistle-blowers who act in the public interest in order to expose misconduct, wrongdoing, fraud or illegal activity often take a very high personal risk as they may be dismissed, sued, boycotted, arrested, threatened or victimised and discriminated in a variety of other ways.
- (3) The right of citizens to report wrongdoing is a natural extension of the right of freedom of expression and information as enshrined in Article 11 of the Charter of Fundamental Rights, and it is essential to ensure the principles of transparency and integrity.
- (4) Information related to threats to the public interest may concern different Member States, or may concern the wider European interest. Individuals may report in any Member State.
- (5) In a Resolution of 23 October 2013 on ‘Organised crime, corruption and money laundering: recommendations on action and initiatives to be taken’, the European Parliament particularly called for the Commission, by the end of 2013, to submit a legislative proposal establishing an effective and comprehensive European whistle-blower protection programme in the public and in the private sector to protect those who detect inefficient management and irregularities and report cases of national and cross-border corruption relating to EU financial interests and to protect witnesses, informers, and those who cooperate with the courts, and in particular witnesses testifying against mafia-type and other criminal organisations, with a view to

resolving the difficult conditions under which they have to live (ranging from risks of retaliation to the breakdown of family ties or from being uprooted from their home territory to social and professional exclusion). In this Resolution, the European Parliament calls also on the Member States to put in place appropriate and effective protection for whistle-blowers.<sup>36</sup>

- (6) In a Resolution adopted on 25th November 2015 on ‘Tax Rulings and other measures similar in nature or effect’, the European Parliament called on the European Commission to propose EU legislation to protect whistle-blowers by June 2016 and condemned the fact that citizens and journalists can be subject to legal prosecution rather than legal protection when, acting in the public interest, they disclose information or report suspected misconduct, wrongdoing, fraud or illegal activity.
- (7) In a Resolution adopted on 16th December 2015 aimed at bringing transparency, coordination and convergence to corporate tax policies in the Union to the European Parliament called on the European Commission to bring forward a legislative proposal offering Union-wide protection for whistle-blowers who report suspected misconduct, wrongdoing, fraud or illegal activity to national or European authorities or, in cases of persistently unaddressed misconduct, wrongdoing, fraud or illegal activity that could affect the public interest, to the public as a whole. It recognised that since whistle-blowers helped to mobilise public attention on the issue of unfair taxation, Member States should consider measures that will protect such activity since otherwise those workers who hold vital information will understandably be reluctant to come forward and therefore that information will not be made available.
- (8) It has been specifically recognised that Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC<sup>37</sup> could act a basis for legislation on whistleblowing. The market abuse Regulation highlights the fact that whistle-blowers may bring new information to the attention of competent authorities which assists them in detecting and imposing sanctions in cases of insider dealing and market manipulation. Furthermore, the Regulation notes that Member States should be allowed to provide for financial incentives for those persons who offer relevant information about potential infringements.
- (9) There exists significant variation between the ways in which different Member States provide protection for whistle-blowers and as a result workers both in the public and private sector who hold vital information, which can also be of relevance in another Member State, are

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<sup>36</sup> Point 14, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0444&language=EN&ring=A7-2013-0307>

<sup>37</sup> OJ L 173, 12.6.2014, p. 1

understandably reluctant to come forward and therefore that information will not be made available.

- (10) There is a need to establish a more uniform and stronger framework in order to ensure accountability in the event of attempted manipulation or corruption and to provide more legal certainty.
- (11) This Directive aims towards common minimum standards of protection that shall be coherent with the overall legal system and be effective against unjustified legal prosecutions, economic penalties and discrimination.
- (12) Member States may introduce stronger protection insofar as the national legislation is compatible with EU law.
- (13) This Directive takes into consideration the Council of Europe's "Recommendation CM/Rec(2014)7 on the protection of whistle-blowers" and notably the definition of whistle-blower "as 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".
- (14) This Directive takes into consideration the Directive [NUMBER] of the European Parliament and of the Council of [DATE] on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure which includes an exception for whistle-blowers disclosing trade secrets in the public interest. Where the scope of the application of Directive [NUMBER] and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.
- (15) This Directive is to apply without prejudice to the Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [NUMBER, DATE], which requires Member States to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
- (16) When implementing the measures transposing this Directive, Member States must respect the fundamental rights and observe the principles recognised in particular by the European Charter of Fundamental Rights, notably the right to respect for private and family life, the right to protection of personal data, the rights to freedom of expression and access to documents and information, the freedom to choose an occupation and right to engage in work, the right to good administration, the right to an effective remedy and to a fair trial and the right of defence.

HAVE ADOPTED THIS DIRECTIVE:

## **Chapter I**

### **GENERAL PROVISIONS**

#### Article 1

##### **Purpose**

1. The objective of this Directive is to introduce minimum standards for the legal protection of whistle-blowers so as to encourage the disclosure of information in the public interest.
2. Member States may introduce or maintain provisions which are more favourable to the protection of whistle-blowers than those laid down in this Directive.
3. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection of whistle-blowers already afforded by Member States in the fields covered by this Directive.

#### Article 2

##### **Scope**

1. This Directive shall apply to all workers, in all sectors of activity, both public and private.
2. Member States shall in accordance with this Directive protect any whistle-blower.
3. Protection shall be granted to whistle-blowers for the disclosure of information made in the reasonable belief that the information was true at the time of disclosure.
4. Protection shall be granted to whistle-blowers who disclose inaccurate information made in honest error.

#### Article 3

##### **Definitions**

For the purposes of this Directive, the following definitions shall apply:

- a. 'whistle-blower' means any worker or contractor who discloses, attempts to, or is perceived to disclose information or supporting evidence that is in the public interest or that is related to a threat or prejudice to the public interest, of which he or she has become aware in the context of his or her work-based relationship;
- b. 'protected disclosure' means making information available, by any means at the disposal of the worker, in such a way that it is as factually accurate as possible, to the recipients defined in Article 5 of this Directive;



- c. 'worker' means any person employed by an employer, including trainees and apprentices and former employees, or as otherwise stipulated in EU law;
- d. 'employer' means any natural or legal person who has an employment or other contractual relationship with the worker and has responsibility for the undertaking and/or establishment at which the worker works;
- e. 'reprisal' means any adverse treatment or adverse consequence, such as any act, threat or cover up of an act, or an omission that is to the detriment of the whistle-blower, including but not limited to:
- Suspensions, demotions, lay-offs or dismissals;
  - Withholding of promotions, trainings or other career development opportunities;
  - Loss of benefits or status;
  - Transfer of duties, change of location of the workplace or of working hours;
  - Any disciplinary measure, reprimand or other penalty (including a financial penalty or suspension or revocation of a security clearance);
  - Coercion, intimidation, harassment, or discrimination.

## **Chapter II**

### **PROTECTED DISCLOSURE, RECIPIENT, REVIEW PROCEDURE**

#### Article 4

##### **Protected Disclosure**

1. Member States shall provide for, set up or enhance already existing disclosure mechanisms and procedures with a view to protecting whistle-blowers.
2. Protected disclosure shall be as factually accurately as possible, and may include but is not limited to:
  - a) A criminal offence that has been, is being or is likely to be committed;
  - b) A natural or legal person has failed, is failing or is likely to fail to comply with a legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services;
  - c) A miscarriage of justice has occurred, is occurring or is likely to occur;
  - d) The health or safety of any individual has been, is being or is likely to be endangered;
  - e) The environment, public health, public finance has been, is being or is likely to be endangered or negatively affected or damaged;

- f) An unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur;
  - g) An act or omission by or on behalf of a public body is oppressive, discriminatory, or grossly negligent, or constitutes gross mismanagement;
  - h) Information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.
3. Disclosure shall be made by any means at the disposal of the worker.

#### Article 5

##### **Disclosure Recipients**

1. Member States shall ensure that protection is granted to whistle-blowers who disclose information, alternatively or cumulatively, to:
- a) The respective line-manager, ethics officer, works council, human resources department or the superior of the alleged wrongdoer;
  - b) The head of the authority, institution or budgetary oversight body within the establishment employing the alleged wrongdoer or within which wrongdoing is reported, even if said individual cannot be identified exactly;
  - c) The disciplinary committees or other similar bodies within the authority, institution or other establishment that employs the alleged wrongdoer;
  - d) Law enforcement, including police and prosecution authorities, and oversight agencies;
  - e) Ombudspersons and other competent agencies, including those tasked with establishing and investigating conflicts of interests and irregularities;
  - f) Member of parliaments, parliamentary committees, or other competent parliamentary bodies;
  - g) Trade union and employers' associations;
  - h) The public through media, social media and non-governmental organisations.

#### Article 6

##### **Internal Disclosure at the Workplace**

1. Member States shall ensure that whistle-blower regulations and procedures are available, accessible, visible and well understood by workers. Recipients of disclosed information within the workplace shall include, but not be limited to:
- a. Line-managers, superiors or representatives of the organisation;

- b. Human resources, ethics officers, work councils or other bodies in charge of mediating conflicts at work, including conflicts of interest;
- c. Internal financial oversight bodies within the organisation;
- d. Disciplinary bodies within the organisation.

#### Article 7

##### **External Disclosure to Regulators and Authorities**

1. Member States shall grant protection to whistle-blowers if they disclose or report information to a regulatory body or other competent authority.
2. Regulators and other authorities shall include, but not be limited to, the following:
  - a. Competent agencies;
  - b. Law enforcement, including investigative authorities, such as police and prosecution authorities;
  - c. Oversight agencies;
  - d. Elected officials; or
  - e. Any other specialised agencies established to receive such complaints.
3. Member States may consider the establishment of a whistle-blower protection authority.

#### Article 8

##### **External Disclosure to other Third Parties**

Member States shall provide protection to whistle-blowers, if the information covered by Article 3 (a) of this Directive is disclosed to third parties, including, but not limited to, the following:

- e. Non-governmental organisations;
- f. Media, including social media;
- g. Legal associations, trade unions and other officially recognised worker representations.

#### Article 9

##### **Review procedure for whistle-blower concerns**

Member States shall ensure for independent, timely and thorough investigations of whistle-blower reports, including the following criteria:

- a. The recipient, as stipulated in Articles 6 and 7, of the whistle-blower's concern shall be

required to acknowledge receipt of the information in writing within five working days of being notified about the concern.

- b. The whistle-blower shall be informed within 30 working days of the investigation or other action taken by the competent authority. If the competent authority does not provide this information within the aforementioned timeline, it shall be required to inform the whistle-blower in writing about the reasons for its failure to do so.
- c. This article is without prejudice to the whistle-blowers' right to use other channels of disclosure, as listed in Article 5.

#### Article 10

##### **Anonymity**

1. Protection shall be granted to whistle-blowers who disclose information anonymously.
2. Member State disclosure mechanisms shall provide for safe, secure, confidential or anonymous disclosure.
3. Any person who learns about the identity of a whistle-blower, or any information that might identify a whistle-blower who made, or intends to make, a protected disclosure anonymously, shall not disclose the identity of the whistle-blower, or any information that might identify the whistle-blower, to any other person without the consent of the whistle-blower.
4. Protection shall extend to whistle-blowers who, following their disclosure and despite their anonymous reporting, have been identified without their consent.

#### Article 11

##### **Burden of Proof**

Member States shall require the employer to demonstrate by clear and convincing evidence any claims or statements that the disclosure is purposefully dishonest, or is absent of public interest and that any measures taken against a whistle-blower are not in any way related to the disclosure.

#### Article 12

##### **Rights of Persons Implicated**

1. Any person implicated by reports of irregularities must be notified without delay of the allegations made against them, provided that this notification does not impede the progress of the procedure for establishing the merits of the case.

2. Should any proceedings arise from the protected disclosure, findings referring to a person specifically by name may not be made, unless that person has had the opportunity to put forward their comments.

### **Chapter III**

## **PROTECTION AGAINST REPRISAL FOR MAKING PROTECTED DISCLOSURES OF INFORMATION**

### Article 13

#### **Exemptions from criminal and civil proceedings and disciplinary measures**

Whistle-blowers who have made a protected disclosure, in accordance with Articles 4 to 8 shall not be subject to:

- a. Criminal proceedings related to the protected disclosure, including but not limited to prosecution for the disclosure of classified information, trade secrets or otherwise confidential information; or
- b. Civil proceedings related to the protected disclosure of classified information, trade secrets or otherwise confidential information, including but not limited to attempts to claim damages and defamation proceedings, data protection and intellectual property rights; or
- c. Disciplinary and other administrative measures as a consequence of the protected disclosure.

### Article 14

#### **Prohibition of Other Forms of Reprisal**

1. Member States shall establish and implement the prohibition of other administrative and disciplinary measures taken in retaliation to the disclosure.
2. Prohibited forms of reprisal include any act, threat or cover up of act, or omission as defined in Article 3 of this Directive.
3. Action taken against individuals other than the person making the disclosure may constitute prohibited reprisal.
4. If a public authority takes any action adverse to any person, the authority bears the burden of demonstrating that the action was unrelated to the protected disclosure.

### Article 15

#### **No Waiver of Rights and Remedies**

1. The rights and remedies provided for under this Directive may not be waived or limited by any agreement, policy, form or condition of employment, including by any pre-dispute arbitration agreement.
2. Any attempt to waive or limit these rights and remedies shall be considered void.

#### Article 16

### **Protection of Confidentiality**

1. Member States shall ensure confidentiality throughout the disclosure procedure and ensure that a person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred to in the performance of that person's duties, shall not disclose to another person any information that might identify the person by whom the protected disclosure was made.
2. An exception to the obligation of confidentiality of paragraph (1) applies if the whistle-blower consents to the disclosure to another person.
3. An exception to the obligation of confidentiality of paragraph (1) may apply if a person to whom a protected disclosure is made or referred to receives it in error, solely in order to refer the relevant information to the competent recipient.
4. An exception to the obligation of confidentiality of paragraph (1) may apply if the person to whom the protected disclosure was made or referred to reasonably believes that the disclosure of the information is necessary for:
  - (i) The effective investigation of the relevant wrongdoing concerned;
  - (ii) The prevention of serious risk to the security of the State, public health, public safety or the environment; or
  - (iii) The prevention of a crime or for the prosecution of a criminal offence.
5. A failure to comply with paragraph (1) is actionable by the whistle-blower in case of any loss or damage caused by the failure to comply.

## **Chapter IV**

### **Disclosure of Protected information**

#### Article 17

### **Trade Secrets**

Protected disclosure extends to the disclosure, made in accordance with this Directive, of trade secrets as defined by the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

#### Article 18

### **National security, Official Secrets and other classified information**

1. Where a disclosure concerns matters of national security, official or military secrets, or classified information, disclosure shall be made to an autonomous oversight body that is institutionally and operationally independent from the security sector, and which has the appropriate security clearance.
2. Protection shall be granted to whistle-blowers informing the public only after they have notified the competent authority as defined above.

#### **Chapter V**

### **REPORTING OF DISCLOSURES**

#### Article 19

### **Reporting**

1. Member States shall require the employers to submit to their competent, centralised and independent authorities information on:
  - a. the number of reports lodged by whistle-blowers;
  - b. the measures taken to protect the whistle-blower;
  - c. follow-up taken in response to the content of the protected disclosure;
  - d. Any other information in relation to the effectiveness of the handling of the reports.
2. The competent national authorities shall provide this information to the institutions of the European Union on a yearly basis and in a timely manner.
3. The European Union institutions will establish a central database to gather and make publicly available in an easily accessible, electronic manner the information received by Member States.

#### **Chapter VIII**

### **FINAL PROVISIONS**

#### Article 20

### **Sanctions**

1. Member States may foresee sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and take all necessary measures to ensure applicability of those sanctions.
2. The foreseen sanctions shall be effective, proportionate and dissuasive and may comprise of the payment of compensation to the whistleblower.
3. Member States that provide for sanctions in their national rules shall notify the Commission of those provisions by DATE [12 months after the date of adoption of this Directive] at the latest and notify without delay of any subsequent amendment affecting them.

#### Article 21

##### **Report**

By [DATE] the Commission shall carry out an evaluation of the effects of this Directive and submit a report to the European Parliament and the Council.

#### Article 22

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by DATE [12 months after the date of adoption of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.
2. When Member States adopt those provisions; they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 23

##### **Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



DRAFT FOR DISCUSSION