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# WHISTLEBLOWER PROTECTION IN THE EUROPEAN UNION

## ANALYSIS OF AND RECOMMENDATIONS ON THE PROPOSED EU DIRECTIVE

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

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

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

On 23 April 2018, the European Commission published a proposal for an EU-wide Whistleblowing Directive. The proposed legislation is aimed at providing better protection to whistleblowers across the EU and should provide both public- and private-sector organisations with greater legal certainty regarding their rights and obligations. Until now, EU countries have had different levels of whistleblower protection in place, with some countries, such as Ireland, having good laws and other countries, such as Cyprus, having practically none. Transparency International has long called for comprehensive EU-wide whistleblower protection and the proposal is a welcome step in the right direction.

The proposed Directive will have to be negotiated between the European Parliament and European Council before being adopted. Transparency International urges these institutions to uphold and reinforce the undertakings in the proposed Directive as it passes through the legislative process, to ensure that it is in line with international standards and best practices.

To provide input, Transparency International has prepared this analysis of the proposal, which provides recommendations aimed at closing loopholes and strengthening the proposed text. These recommendations are based on its *International Principles for Whistleblower Legislation*<sup>1</sup> and its *Best Practice Guide for Whistleblowing Legislation*.<sup>2</sup> Transparency International will also provide proposals for amendments throughout the legislative process.

## POSITIVE ASPECTS OF THE DIRECTIVE

While certain provisions need to be strengthened, the proposed Directive provides strong foundations for the protection of whistleblowers in Europe:

- It covers both the **public and private sectors**.
- Breaches covered include not only **unlawful activities** but also **abuse of law**, defined as acts or omissions which do not appear to be unlawful in formal terms but defeat the object or purpose pursued by the law.
- It covers a **wide range of potential whistleblowers**, including individuals outside the traditional employee-employer relationship, such as consultants, contractors, volunteers and job applicants.<sup>i</sup>
- It provides for **comprehensive protection against retaliation**, including interim relief and protection in legal proceedings.<sup>ii</sup>
- It requires Member States to ensure that **easily accessible and free comprehensive and independent advice** is provided to the public.
- It places an **obligation** on a wide range of public and private entities **to establish internal whistleblowing mechanisms**.<sup>iii</sup>
- It establishes an **obligation to follow up on reports and to keep the whistleblower informed** within a reasonable timeframe.<sup>iv</sup>
- It **allows for public disclosures** in certain circumstances.
- It provides for **penalties** to be applied to persons who hinder or attempt to hinder reporting, take retaliatory measures against reporting persons (including vexatious proceedings) and breach the duty of maintaining the confidentiality of the whistleblowers' identity.
- It foresees **legal and financial assistance** to whistleblowers, which are essential elements for effective whistleblower protection.<sup>v</sup>
- It **allows for stronger national whistleblower protection** as Member States can introduce or maintain more favourable provisions than those set out in the Directive.<sup>vi</sup>

## RECOMMENDATIONS FOR IMPROVEMENTS

Certain provisions of the proposed Directive need to be improved to ensure comprehensive and effective protection to whistleblowers in line with international standards and best practices:

- The motives of a whistleblower in reporting information that they believe to be true should be unequivocally irrelevant to the granting of protection.
- Employees should be able to report breaches of law directly to the competent authorities.
- The whistleblowers' identity should be more effectively protected.
- The Directive should address anonymous reporting.
- Whistleblowers should be entitled to full reparation through financial and non-financial remedies.
- The reversal of the burden of proof should be strengthened.
- National whistleblowing authorities should be responsible for the oversight and enforcement of whistleblowing legislation.
- Penalties should be extended to all situations where obligations under the Directive are not fulfilled.
- The material scope should be extended as much as possible.
- The personal scope should be extended to include former employees and persons associated with a whistleblower or believed to be a whistleblower.
- All public-sector entities should be obliged to establish internal reporting mechanisms.
- Internal reporting mechanisms should include procedures to protect whistleblowers.

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<sup>i</sup> The personal scope should be further extended to include former workers, as well as legal and natural persons who suffer retaliation because they are associated with a whistleblower or believed to be a whistleblower (see recommendation p. 7-8).

<sup>ii</sup> The Directive should be more specific regarding remedies that should be available to whistleblowers and should, *inter alia*, expressly include reinstatement (see recommendation p. 5-6).

<sup>iii</sup> This obligation should be extended to all public entities without exception. In addition, organisations and competent authorities should have an obligation to protect the whistleblower (see recommendations p. 8 and 9 respectively).

<sup>iv</sup> To ensure enforcement, effective, proportionate and dissuasive penalties should be applicable when such obligations are not fulfilled (see recommendation p. 7).

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

<sup>vi</sup> To reinforce this safeguard, the article should clearly state that implementation of the Directive may not constitute valid grounds for reducing the general level of protection already afforded to whistleblowers within Member States.

- The collection and publication of comprehensive data on the functioning of reporting mechanisms should be mandatory.
- Internal reporting procedures should include an obligation to acknowledge receipt of a whistleblower's report.

A detailed explanation of each recommendation is provided below.

## Conditions for the protection of reporting persons<sup>3</sup>

### **The motives of a whistleblower in reporting information that they believe to be true should be unequivocally irrelevant to the granting of protection**

If a person reasonably believes that the information they reported or disclosed points to wrongdoing and that belief was reasonable for someone in their position based on the information available to them, then they should be protected. Their motives for making the disclosure and whether or not any subsequent investigation finds proof of wrongdoing should be irrelevant to the protected status of the whistleblower.

Article 13(1) of the proposed Directive, which states that “a reporting person shall qualify for protection under this Directive provided he or she has reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive”, is thus in line with international standards and best practices.

Some stakeholders have raised the concern that whistleblower protection might be abused by individuals making false reports to defame someone or to protect themselves from disciplinary sanctions. Research and practice suggest that trivial or false reports are uncommon.<sup>4</sup> Nevertheless, false reports can have a negative impact on organisations and people and can discredit whistleblowing mechanisms. Thus, Transparency International considers that individuals who knowingly make false disclosures should not benefit from whistleblower protection and should be subject to possible sanctions and civil liabilities.

While it seems that Article 17(2), which provides for penalties applicable to persons making “malicious or abusive” reports or disclosures, aims to achieve this objective, it does so using language that appears to contradict Article 13(1). Use of the terms “abusive” and “malicious” suggests that the motives of the whistleblower for making a report or a disclosure should be examined; this creates a dangerous loophole in the protection provided to whistleblowers and poses a serious deterrent to potential whistleblowers. This is particularly a concern in view of Article 19 of the proposed Directive, which specifies that Member States may not have national provisions more favourable to the rights of the whistleblower that would weaken Article 17(2).

**Recommendation:** Article 17(2) needs to be amended to make it clear that the whistleblower's motives are not relevant and that a person should only be held liable if they *knowingly* make a false report or disclosure.<sup>5</sup> It can even be argued that Article 17(2) is superfluous and so should be deleted altogether, since Member States, in their defamation or libel laws, already provide for penalties applicable in these circumstances.

### **Employees should be able to report breaches of law directly to the competent authorities**

Whistleblowers should have equal access to and protection for reporting within the workplace and to the authorities. There should be no restrictions or extra burden on whistleblowers who wish to report directly to regulators and the authorities.

The main objective of whistleblowing is to prevent or stop and remedy wrongdoing. It is therefore important that the recipient of the report is in a position to address the reported wrongdoing. This objective is achieved with both internal reporting within the workplace and external reporting to the competent authorities.

Whistleblowers also need to trust the reporting mechanism and feel comfortable using it. There are many valid reasons why a whistleblower might prefer to report a wrongdoing directly to the authorities rather than use internal reporting mechanisms – for example, if they fear or have reason to believe that they would experience unfair treatment, that their identity cannot be protected or that the wrongdoing might be covered up.

The proposed Directive makes it mandatory for employees (but not other categories of whistleblowers) to first use internal reporting channels. It offers four exceptions to that obligation:

- When internal reporting channels are not available, or the whistleblower “could not reasonably be expected to be aware of the availability of such channels”.
- When the whistleblower “could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report”.
- When the whistleblower “had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities”.
- When the whistleblower “was entitled to report directly through the external reporting channels to a competent authority by virtue of Union law”.

This obligation to first report internally raises serious concerns:

- The proposed exceptions do not – and cannot – foresee all situations in which a whistleblower would be reluctant to report internally (for example, if they fear retaliation or that their identity would not be effectively protected).
- The proposed exceptions are subjective and so are open to interpretation. Whistleblowers are forced to speculate as to whether their situation is covered and may only find out when a judge makes a ruling. In some countries, this could mean years of expensive judicial proceedings. Faced with this high degree of uncertainty, many potential whistleblowers who may not feel safe reporting internally will choose to remain silent.
- The proposed text allows for a situation in which an organisation can fire an employee for reporting an offence to the police without first reporting it internally.
- In many Member States, entire categories of employees have an obligation to report breaches of law to the competent authorities.
- An unjustified situation of unequal treatment and protection is created between the reporting persons covered by the Directive – between employees, who have to first use internal channels, and other reporting persons, who can go directly to competent authorities.

As pointed out in the Commission’s impact assessment, many studies have shown that most employees will report internally first, even in countries where it is not mandatory (such as in Ireland, the United Kingdom and the United States).<sup>6</sup> There is thus no need to put in place an obligation for employees to first report internally.

In addition, allowing whistleblowers to use external channels directly will incentivise organisations to set up effective internal whistleblowing mechanisms that employees trust. This will discourage organisations from approaching internal mechanisms as a mere exercise in ticking boxes.

**Recommendation:** The obligation for employees to first report internally should be removed.

## Measures for the protection of reporting persons against retaliation<sup>7</sup>

### The whistleblowers’ identity should be more effectively protected

One of the most efficient ways to prevent retribution against a whistleblower is to ensure that potential retaliators do not know the identity of the whistleblower. If they do not know who has made a report, they cannot take retaliatory action against them. Not knowing the identity of the whistleblower has the additional advantage of shifting the focus from the individual to the concern raised.

Confidentiality is a minimum requirement in any legislation that aims to protect whistleblowers. As a first line of protection it will increase trust in the whistleblowing system. Guaranteeing confidentiality will also incidentally help reduce anonymous disclosures. Confidentiality should apply not only to the name of the whistleblower, but also to “identifying information”. In small organisations, or when some facts are known only to a few, certain information could identify the whistleblower.<sup>8</sup>

Transparency International commends the fact that the Directive provides for penalties in case of breach of the duty of maintaining the confidentiality of the whistleblowers’ identity of reporting persons. However, as it stands, the proposed Directive does not sufficiently guarantee the confidentiality of the whistleblowers’ identity.

- The proposed Directive fails to strictly limit exceptions to the obligation to maintain the confidentiality of the whistleblowers’ identity. Article 9 foresees circumstances in which the confidential data of a reporting person may be disclosed, which “include the exceptional cases in which confidentiality of personal data may not be ensured, including where the disclosure of data is a necessary and proportionate obligation

required under Union or national law in the context of investigations or subsequent judicial proceedings or to safeguard the freedoms of others including the right of defence of the concerned person". The word "include", used twice, implies there may be other exceptions but these are not specified.

- Provisions regarding the confidentiality of a whistleblower's identity are scattered throughout the proposed Directive, making clear understanding of the confidentiality regime difficult.<sup>9</sup>
- Provisions on confidentiality applicable to internal reporting are much less prescriptive and detailed than those applicable to external reporting, even though the risks are greater for the whistleblower if their identity is uncovered in their work place.

**Recommendation:** Given the importance of protecting a whistleblower's identity, the Directive should include an article on the obligation to maintain the confidentiality of the whistleblowers' identity. This article should:

- apply to any identifying information
- apply to any person who learns about a whistleblower's identity;
- clearly and strictly define exceptions to the obligation to maintain confidentiality

### **The Directive should address anonymous reporting**

There are two ways to protect the identity of a whistleblower: by preserving confidentiality and by allowing anonymous reporting. In the first case, only the recipient of the report will know the identity of the whistleblower. Anonymous reporting goes a step further, since no one will know the identity of the whistleblower. Anonymous reporting allows individuals who otherwise might not speak up to make a report or disclosure.

Employers have raised the concern that anonymous reporting might reduce the feeling of personal liability and thus encourage false reporting. However, research and practice suggest that trivial or false reports are uncommon, including when anonymous reporting is allowed.<sup>10</sup>

The proposed Directive makes no mention of whistleblowers making reports or disclosures anonymously. Transparency International welcomes the fact that anonymous reporting is not expressly excluded, but the proposed Directive leaves the possibility for Member States to exclude it when transposing the Directive.

**Recommendation:** The proposed Directive should address at least the following aspects of anonymous reporting:

- A report should not be discarded merely because it was made anonymously. If sufficient information is provided, the recipient of the report should follow up on it.
- Full protection should be granted to whistleblowers who have reported or disclosed information anonymously and who have subsequently been identified.

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

Unfair treatment exposes whistleblowers to loss – financial loss, loss of status or even emotional hardship. Legislation should provide for whistleblowers to have access to suitable remedies and relief that makes sure their position does not worsen as a result of having made a report or disclosure. All losses should be covered, including indirect and future losses and financial and non-financial losses. As per Council of Europe recommendations, the appropriate remedy should be determined by the kind of unfair treatment that has been experienced by the whistleblower.<sup>11</sup> Whenever possible, the whistleblowers should be restored to a situation that would have been theirs had they not suffered unfair treatment. This redress should include both financial compensation of damages and non-financial remedies.

Best practice is to make sure that any unfair treatment is made null and void. This means that if a whistleblower has been dismissed, transferred or demoted, they should be reinstated in either the position they occupied before retaliation or in a similar position with equal salary, status, duties and working conditions. Similarly, whistleblowers should be given fair access to any promotion and training that may have been withheld following their report. Outside the employment context, remedies can involve relaunching a rigged procurement process, the restoration of a cancelled permit, licence or contract, or the withdrawal of litigation against a whistleblower. Any negative records that could constitute a dossier for blacklisting or later retaliation should be deleted.<sup>12</sup>

The proposed Directive states that whistleblowers should have access to remedial measures against retaliation “in accordance with the national framework”. Such a general provision is not sufficient to guarantee full reparation of the damage suffered by whistleblowers, which can be extensive and take many forms.

**Recommendation:** The Directive needs to specify that whistleblowers should have access to a full range of remedial measures covering all direct, indirect and future consequences of any detriment, with the aim to make the reporting person whole. This provision should include a non-exhaustive list of the types of remedial actions that should be available to whistleblowers, expressly including non-financial remedies such as reinstatement, transfer and making unfair treatment void.

### The reversal of the burden of proof should be strengthened

It can be very difficult for whistleblowers to demonstrate that they have suffered negative treatment as a consequence of their disclosure. On the other hand, organisations usually have processes in place to document actions taken against workers and they have better access to witnesses. As organisations have the greater power and resources, the onus should be placed on them to prove that the action taken was not due to the whistleblower raising a concern. This is why Transparency International recommends that, in line with other international standards, whistleblowing legislation reverse the burden of proof onto the employer.

The proposed Directive provides for some reversal of the burden of proof, but in a restrictive way:

- The whistleblower must first provide “reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure”. This leaves a wide scope for interpretation and seems to imply that the whistleblower has to provide some evidence of an intentional link between the report and the detriment (“in retaliation”), which can be very difficult.
- The reversal of the burden of proof only applies to judicial proceedings. It therefore excludes non-judicial proceedings such as internal and administrative proceedings.
- It places the burden of proof on “the person who has taken the retaliatory measure”. This might be interpreted literally as a natural person and allows the organisation to “sacrifice” another employee by making them take responsibility in its place.

**Recommendation:** The Directive should state that, to trigger a reversal of the burden of proof, a whistleblower only needs to establish that (1) they made a disclosure and (2) experienced negative treatment.

## Effective implementation and enforcement

### National whistleblowing authorities should be responsible for the oversight and enforcement of whistleblowing legislation

To ensure effective whistleblower protection, one or several agencies should be responsible for the oversight and enforcement of whistleblowing legislation. A whistleblowing authority should be competent to:

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

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

The proposed Directive does not require Member States to designate national whistleblowing authorities.

**Recommendation:** The Directive should require Member States to designate one or several authorities to be responsible for the oversight and enforcement of the protection of reporting persons. These authorities should be independent and have sufficient power and resources to operate effectively.

## **Penalties should be extended to all situations where obligations under the Directive are not fulfilled<sup>13</sup>**

When retaliation occurs, this can send a message to other potential whistleblowers that they will face the same treatment if they decide to speak up. To deter repeated violations of whistleblower protection, it is important to hold retaliators accountable and to sanction them. Best practice dictates severe sanctions should be applied to those who retaliate against, threaten or in any way violate the protection of whistleblowers.

Transparency International therefore welcomes the fact that the proposed Directive provides for penalties applicable to persons who hinder or attempt to hinder reporting, retaliate against whistleblowers or breach the duty of maintaining the confidentiality of the whistleblowers' identity.

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

**Recommendation:** The Directive should provide for effective, proportionate and dissuasive penalties applicable to legal or natural persons who fail to:

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

## **The scope of the Directive**

An important requirement of any whistleblowing legislation is to make sure that it clearly sets out its scope of application, that is, to whom it applies and which types of wrongdoing are covered. The scope of application should be as wide as possible to cover every possible whistleblowing situation and ensure that all whistleblowers are protected. Loopholes and lack of clarity might lead to situations in which individuals decide to speak up in the mistaken belief that they are protected, making them vulnerable to unfair treatment.

### **The material scope should be extended as much as possible**

International standards recommend that whistleblowing legislation has the widest material scope possible. Sectoral or thematic approaches increase the risk of loopholes and legal incoherence and make it difficult for whistleblowers to understand how to report and whether they are protected. If people are not certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests.

It is understandable that the proposed EU Directive cannot cover areas falling outside the competences of the EU. However, the proposed Directive further limits its material scope to some but not all areas of EU competences.

The material scope of the proposed Directive is otherwise rather broad given that it covers both the public and private sectors and that it is not limited to “unlawful activities” but also covers “abuse of law”, defined as “acts or omissions falling within the scope of Union law which do not appear to be unlawful in formal terms but defeat the object or the purpose pursued by the applicable rules”.

**Recommendation:** The material scope of the Directive should be extended as much as possible to include all areas of EU law, including breaches of workers' rights.

### **The personal scope should be extended<sup>14</sup>**

Whistleblowing legislation should cover all individuals working in both the public or private sector, irrespective of the nature of their working relationship with the organisation and whether they are paid or not.

The proposed Directive uses a broad definition of whistleblower, including employees, self-employed persons, shareholders and persons belonging to the management body of an organisation, volunteers, unpaid trainees, contractors, subcontractors and suppliers as well as job applicants or bidders. It thus covers most categories of persons who might encounter wrongdoing in the context of their work, with the exception of EU staff. It is unclear

whether former workers are included. Indeed, the proposed Directive defines “work-related context” as “current and past work activities”, but that leaves room for interpretation.<sup>15</sup>

Former workers are an important category of potential whistleblowers who can suffer retaliation in the form of black-listing or law suits for example. In addition, EU staff should benefit from the same protection as other workers in Europe.

Protection should not be limited to the individuals who make a report or disclosure, but should be extended to all people at risk of unfair treatment as a consequence of whistleblowing. It should also include:

- Individuals who are about to make a disclosure, since they could suffer discriminatory measures aiming at discouraging them or as a “pre-emptive strike” to circumvent legal protection.<sup>16</sup>
- Individuals who are mistakenly believed to be whistleblowers.
- Individuals associated with whistleblowers, such as people who assist or attempt to assist a whistleblower, relatives or even employers (for example a consultancy firm or supplier who employs a whistleblower who raises a concern about a client).

**Recommendation:** The personal scope of the Directive should be further extended to clearly include former workers and EU staff, as well as legal and natural persons who experience retaliation because they are associated with a whistleblower or because they are mistakenly believed to be a whistleblower.

## Internal and external reporting mechanisms

### All public-sector entities should be obliged to establish internal reporting mechanisms<sup>17</sup>

Various studies have shown that most whistleblowers first use internal reporting mechanisms.<sup>18</sup> In addition, organisations are often best placed to deal with internal wrongdoing. This is why public and private sector organisations should be required to put an effective internal reporting mechanism in place.

The Directive makes it mandatory for all medium-sized and large companies to establish internal procedures for reporting and follow-up of reports. This reflects current best practice. It is understandable that the Directive generally exempts small and micro-companies from the obligation to establish internal reporting procedures, given the potential financial and administrative burden attached to such mechanisms.

The obligation to establish internal reporting mechanisms also applies to most public entities, but does not apply to municipalities with less than 10,000 inhabitants. This is not in line with current best practice. Indeed, in several Member States with national legislation on whistleblower protection, for example in Ireland, Italy and Slovakia, all public entities without exception are required to establish such mechanisms.

The average size of municipalities in the EU is 5,887 inhabitants.<sup>19</sup> Thus, the Directive is exempting the majority of municipalities in Europe from the obligation to establish internal reporting mechanisms. This is of particular concern since such municipalities routinely take decisions in areas such as public procurement, environmental protection and public health, areas identified by the proposed Directive as ones where enforcement needs to be strengthened. In the case of public entities, the administrative and financial burden argument is not very convincing as Member States could consider for example providing internal reporting at a higher level in the administration, such as regionally or centrally, for smaller municipalities.<sup>20</sup>

In addition, EU institutions, agencies and bodies should have the same obligations as national public-sector entities, as described in the Directive.

**Recommendation:** As stated in the recitals of the proposed Directive, the obligation to put in place internal reporting channels should apply to all public legal entities, at local, regional and national level, whilst being commensurate with their size.<sup>21</sup> This should also apply to public legal entities at the European level.

### Internal reporting mechanisms should include procedures to protect whistleblowers<sup>22</sup>

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



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

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

**Recommendation:** The Directive’s obligation to establish internal whistleblowing procedures should include procedures for protecting whistleblowers.

### **Internal reporting procedures should include an obligation to acknowledge receipt of the report<sup>23</sup>**

The obligation to acknowledge receipt of the report made by a whistleblower is good practice and an important element of a reporting channel. In line with best practice, the proposed Directive establishes an obligation to provide feedback to the whistleblower about the follow-up to the report, within a reasonable timeframe of maximum three months. The Directive also includes the obligation to acknowledge receipt of the report for external reporting procedures but not for internal reporting procedures.<sup>24</sup>

The whistleblowers reporting internally should not be left to wonder for three months whether their report was actually received.

**Recommendation:** The Directive should include an obligation to acknowledge receipt of internal reports.

### **The collection and publication of comprehensive data on the functioning of reporting mechanisms should be mandatory<sup>25</sup>**

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

Transparency International therefore welcomes the fact that the proposed Directive provides for data collection. However, the fact that the proposed Directive does not require data to be collected in a comprehensive manner will lead to a very fragmented view of how well the framework functions:

- The proposed Directive does not place an obligation on Member States to collect data. It merely asks for the submission of statistics “if they are available at a central level in the Member State”.
- The proposed Directive only foresees the collection of data on external reports. This is not in line with current best practice. In Ireland for instance, all public bodies must publish annually a report on the number of internal reports received and the action taken in response.<sup>26</sup>

In addition, there is no obligation on Member States to publish this data at national level and in their national language, nor is it clear whether the European Commission will publish the data collected broken down by country.

**Recommendation:** The Directive should require Member States to collect and regularly publish data on both internal and external reporting (at least in the public sector).

<sup>1</sup> Transparency International, *International Principles for Whistleblower Legislation*, 2013, [www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation).

<sup>2</sup> Transparency International, *Best Practice Guide for Whistleblowing Legislation*, [www.transparency.org/whatwedo/publication/best\\_practice\\_guide\\_for\\_whistleblowing\\_legislation](http://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation).

<sup>3</sup> Article 14 of the proposed Directive.

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<sup>4</sup> See, for example: Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p. 14; Transparency International, *The Business Case for “Speaking Up”: How Internal Reporting Mechanisms Strengthen Private-Sector Organisations* (2017), p. 12.

<sup>5</sup> Where action is taken against a person who knowingly made a false disclosure, the burden of proof should fall on the person asserting that the information is false. This person will also need to prove that the whistleblower knew the information to be false at the time of making the disclosure.

<sup>6</sup> European Commission, Impact Assessment accompanying the document *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law* (2018), p.9. See also OECD, *Committing to Effective Whistleblower Protections* (2016), p. 116

<sup>7</sup> Article 15 of the proposed Directive.

<sup>8</sup> Government Accountability Project (GAP), *International Best Practice for Whistleblower Policies*, 2016, Principle 6.

<sup>9</sup> In Article 5(1)(a) on internal channels; in Articles 6(2)(a), 7(1)(b), 9(1)(c), 9(2) and 10(d) on external reporting; and in Article 17(1)(d) on penalties.

<sup>10</sup> See, for example: Trace International, ISIS Management, IBLF, *First to Know – Robust Internal Reporting Programs* (2004), p. 14; Navex Global, *2015 Ethics & Compliance Hotline Benchmark Report*, p. 17; Transparency International (2017), p. 12.

<sup>11</sup> Council of Europe, *Protection of Whistleblowers, Recommendation CM/Rec (2014)7* and Explanatory Memorandum (2014), p. 40.

<sup>12</sup> Blueprint for Free Speech, *Protecting Whistleblowers in the UK: A New Blueprint* (2016), p. 26.

<sup>13</sup> Article 17 of the proposed Directive.

<sup>14</sup> Article 2 of the proposed Directive

<sup>15</sup> Article 3(10) of the proposed Directive

<sup>16</sup> GAP, 2016, Principle 4.

<sup>17</sup> Article 4(6) of the proposed Directive

<sup>18</sup> See Transparency International, *Best practice guide for whistleblowing legislation*, 2018, p.31

<sup>19</sup> OECD, *Subnational governments in OECD Countries: Key Data, 2018 edition*, p. 5-6.

<sup>20</sup> This is suggested in Recital 41 of the proposed Directive.

<sup>21</sup> Recital 41 of the proposed Directive.

<sup>22</sup> Chapter II of the proposed Directive.

<sup>23</sup> Article 5 of the proposed Directive

<sup>24</sup> Article 11(2) of the proposed Directive.

<sup>25</sup> Article 21(2) of the proposed Directive.

<sup>26</sup> Irish Protected Disclosures Act 2014, Section 22.

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