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FREE SPEECH

Whistleblowing in the European Union:

A New Directive to Protect Citizens, Democracy and Rule of Law

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Introduction:

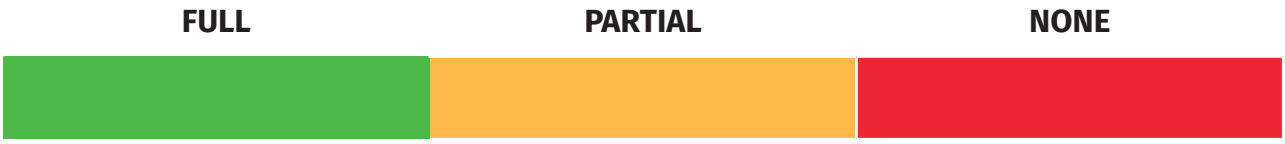
With the introduction of an EU-wide Directive providing minimum standards of whistleblower protection to be enacted in all Member States, European institutions have made an important step in the right direction. By legally strengthening the position of whistleblowers and protecting them from retaliation, the EU recognizes the importance of reporting corruption, negligence and other wrongdoing in the public interest.

The *Directive of the European Parliament and the Council on the protection of persons reporting breaches of Union law* acknowledges the high personal costs that result from whistleblowers' lack of proper legal protections: among them the loss of employment and damage to physical and mental health. On a larger scale, the European Directive paves the way for further cultural change asserting democratic values and rule of law by empowering those who defend these values rather than abandoning them to their fate.

The final text, to be adopted by the European Parliament on April 16, 2019 in Strasbourg, is compatible with a number of international best practice standards for effective whistleblower protection legislation. Measured against the Blueprint Principles For Whistleblower Protection, we think the new Directive covers eleven of them fully. Another eight Principles are partially fulfilled by the Directive text. The remaining four principles are either completely absent from the text, or left to the discretion of Member States.

In this report, we explain how we think the Directive text matches up to those 23 principles. But this is only part of the story. Once the Directive is passed, EU Member States will have two years to pass their own legislation to give effect to the Directive in national law.

What happens in this transposition process could make a real difference in how effective - and how comprehensive - these protections turn out to be in practice. There are several aspects of the Directive text which will require arguments to be made on the national level. In the second half of this report, we provide some recommendations for those who will be making these arguments in individual EU Member States.



Principle 1: Broad coverage of organizations

The Directive's comprehensive coverage of public, private and third sector organisations is one of its strengths. It provides that no worker in a public or private institution in any EU member state, regardless of industry they are involved in, may be retaliated against for making a disclosure in the public interest. With this approach, the European Union ensures equality for employees across all sectors

Principle 2: Broad Definition of reportable wrongdoing

A good definition of reportable wrongdoing is one that takes in many different dimensions of potential harm to the public interest. Reportable wrongdoing within the scope of the Directive is within the scope of the Directive is expansive, but limited by the EU's mandate: it can only apply in areas where Member States have previously agreed on sharing competences. By definition, this excludes important areas like national security and policing.

Within the scope of the EU's mandate, the final text includes a far-reaching definition of reportable wrongdoing, which covers:

1) Breaches of Union law in areas such as public procurement; financial services, products and markets and prevention of money laundering and terrorist financing; product safety; transport safety; protection of the environment; radiation protection and nuclear safety; food safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems
2) Breaches affecting the financial interests of the EU
3) Breaches related to the internal market

Principle 3: Broad definition of a whistleblower

This is another strong point in the Directive, which covers individuals in a very broad range of work-related relationships. These include workers, civil servants and the self-employed. Shareholders and persons belonging to administrative, management and supervisory body of organizations are also covered. Furthermore, the Directive includes protection for volunteers, paid or unpaid trainees, persons working in the context of contractual relationships or with suppliers, as well as future or former employees.

Protection also applies to facilitators or other persons related to a whistleblower and who, as a result of their relationship, might face retaliation.

Principles 4 and 5: Range of internal and regulatory reporting channels

The Directive stipulates that, while internal reports are encouraged, whistleblowers may make a free choice about whether they disclose information internally first, or whether they immediately turn to competent authorities. Both public and private institutions are obliged to provide different internal channels for whistleblowers to make reports. These include electronic channels and phone hotlines as well as designated persons for physical meetings and oral reports. Reporting channels must be designed to protect confidentiality of the report and the person making it, and enable the proper storage of information for further investigation. Staff members who are responsible for making reports have to undergo special training.

Principle 6: Range of external (third-party / media) reporting channels

The Directive offers protection for whistleblowers who make disclosures to the public or third parties under specific, but narrow, circumstances, such as imminent or manifest danger for the public interest.

Whistleblowers may also directly disclose information to the media where they have a reasonable belief to suspect they would be retaliated against if they made a report to public authorities. Public disclosures are also protected when reports were previously made internally or to competent authorities and no appropriate action was taken.

Principle 7: Threshold for protection

A law must include workable thresholds for protection, such as an honest and reasonable belief of wrongdoing, including protection for "honest mistakes." The Directive meets this standard in part.

Whistleblowers are protected under EU law if they make their reports in accordance with procedures outlined in the Directive. There is no test of motives: protection applies where there is a reasonable belief that the information reported was true at the time of reporting. However, the text also stipulates that protection is to be granted only in cases where the acquisition of information did not constitute a self-standing criminal offence.

Principle 8: Provision and protections for confidentiality and anonymous reporting

All reporting channels have to be designed in a manner that it protects the identity of a reporting person. Identities may be disclosed "only when this is a necessary and proportional obligation imposed by Union or national law." Member States are to define penalties for breaches of this duty of confidentiality.

The Directive provides partial protection for anonymous reporting. Anonymous whistleblowers whose identity is later revealed are protected from retaliation. However, there is no obligation for Member States to facilitate or endorse anonymous disclosures. Member States may decide for themselves whether anonymous reports will be accepted or investigated.

Principle 9: Compulsory requirement for internal disclosure procedures

Both private sector institutions as well as public authorities have to establish internal reporting channels, meeting specific requirements outlined in the Directive. Exemptions are made for legal entities with less than 50 employees as well as municipalities with less than 10 000 inhabitants. Small and medium sized businesses with up to 249 employees may share resources with other organizations.

Reporting channels may be operated by external services providers, so long as these comply with specified standards for response times and confidentiality.

Principle 10: Broad retaliation protection

Protection from retaliation is at the core of any piece of whistleblower legislation and the Directive's provisions here are sound. The Directive includes a broad list of specific acts of retaliation that whistleblowers might be exposed to. These include suspension, the withholding of opportunities for professional development, discrimination, coercion, reputational or financial loss, and psychiatric or medical referrals. Possible acts of reprisal are not limited to those listed.

Principle 11: Comprehensive remedies for retaliation

The Directive requires Member States to provide assistance, support and remedies in national law for whistleblowers who have experienced retaliation "as appropriate". What form those measures should be is left to the discretion of Member States. Other elements of the Directive in this area are stronger. In cases where disciplinary measures have been taken against a whistleblower, a reverse burden of proof applies: employers have to prove that these were not related to a disclosure.

Principle 12: Sanctions for retaliation

If whistleblower protection provisions are to have any force, then civil, criminal and/or disciplinary sanctions need to be available for those who do whistleblowers harm. This is another area where the EU institutions have decided to leave decisions about implementation up to governments. Member States shall provide for "effective, proportionate and dissuasive penalties" for hindering reporting and retaliating against whistleblowers and their facilitators. The nature of those penalties is to be determined in national legislation.

Principle 13: Fair hearing

The EU has provided sufficient guarantees to ensure that whistleblowers receive a fair hearing. The Directive states that whistleblowers are entitled to challenge retaliatory measures in court. For these cases, Member States are obliged to ensure that whistleblowers have access to appropriate measures of support, including access to information, legal aid and financial support. Whistleblowers are entitled to challenge retaliatory measures in court. For these cases, Member States are obliged to ensure that whistleblowers have access to appropriate measures of support. These include access to information, legal aid and financial support.

Principle 14: Oversight Authority

The Directive does not mandate the creation of an independent whistleblowing authority or tribunal. The text only suggests that advice and support for whistleblowers "may" be provided by means of an information centre or independent authority. Scrutiny of how reporting arrangements are working is, again, left up to Member States.

Principle 15: Transparent use of legislation

Member States are obliged to report to the European Commission annually. These reports have to include statistics on the number of reports made as well as investigations and proceedings initiated as a result. They need to include an estimate of financial damage reported and amounts recovered.

This is an important provision in the Directive, which will allow the positive effects of whistleblower protection measures to be monitored and assessed in a large transnational context.

Principle 16: Waiver of liability

The waiver of liability is a critical element of whistleblower protection, that allows individuals to report wrongdoing in the public interest, without fear of criminal prosecution or civil penalties. In general, the Directive waives legal liability for reporting persons who follow its procedures correctly. Protection is granted as long as disclosures are made in reference to the material scope of the Directive and when reporting persons had reasonable grounds to believe the information disclosed was true. Particular rules apply for reports made to the media directly.

However, there is one major caveat: protections do not apply under the Directive when the acquisition of the information reported constitutes a 'self-standing criminal offence.' This is a problematic aspect of the Directive, which has the capacity to undermine protections in many cases.

Principle 17: Whistleblowing and Gag Orders

The treatment of non-disclosure agreements and other kinds of contract clauses that might restrict whistleblowers in the Directive is clear and unambiguous. Member States should ensure that rights and remedies provided for under the Directive may not be waived or limited by any agreement.

Principle 18: National Security and Intelligence Whistleblowing

The provisions of the Directive specifically do not include reports related to national security or defence procurement, which fall outside of the EU's usual remit. Matters related to the protection of classified information are explicitly reserved to Member States.

Principle 19: Extradition

The Directive aims to establish a common base level of whistleblower protection within the EU, particularly given the operation of the Single Market across national borders. The Directive is silent on the issue of extradition.

Principle 20: Financial rewards

The Directive makes no provision for financial awards for whistleblowers.

Principle 21: Whistleblower involvement

This is a strong element of the Directive. Public and private institutions are obliged to inform whistleblowers about the status of investigations after a report was made. Following the submission of an internal report, whistleblowers may expect an acknowledgment of receipt within seven days of submission. Feedback about internal investigations is to be given within three months.

Where a report is made to external authorities, the timeframe for feedback may be extended to a maximum of six months in duly justified cases. Competent authorities have to inform a whistleblower about the final outcome of an investigation.

Exemptions to these rules can be made in cases where competent authorities recognize a breach as “clearly minor“ and not requiring further follow-up within the context of the Directive. Repetitive reports which do not include any new meaningful information may be ignored.

Principle 22: Technological anonymity

Anonymity is partially provided for in the Directive. Channels provided both internally as well as externally have to guarantee confidentiality of a reporting person‘s identity. Member States may introduce provisions allowing for anonymous reports, as long as follow-up with a whistleblower is possible.

Principle 23: Legislative review

By the time two years has passed after transposition, the Commission will submit a report to the European Parliament and Council analyzing the implementation and application of the Directive, based on annual statistical reports submitted by the Member States. Four years after transposition, and taking into account its own review as well as additional annual reports from the Member States, the Commission will evaluate the effectiveness of the Directive. Based on this assessment, the Commission may decide to amend and improve EU legislation.

Recommendations for transposition into national law

The Directive agreed by the European institutions is an important step towards ensuring a decent minimum level of protection for whistleblowers across the continent. In those EU countries where protections for public interest reporting do not exist today, the adoption of the Directive will make a significant difference.

Unusually, the EU institutions have made clear that, not only should pre-existing commitments to whistleblower protection be preserved, Member States are welcome to introduce new protections that go over and above what is stipulated in the Directive text. In addition, as we have seen, the Directive explicitly leaves certain issues to the discretion of national governments.

All this means that what happens over the next two years in individual EU Member States is important. We think that Member States should consider the following issues when transposing the Directive into national law. If they do so, they can make sure they provide their citizens with whistleblower protection measures that will be among the most advanced in the world.

Beyond the measures proposed below, Member States may also want to consider extending new protections retrospectively, following the example of Ireland's Protected Disclosures Act 2014. This would enable whistleblowers who suffered retaliation before the introduction of new legal provisions to come forward and claim recognition for what is now considered a legitimate act of public interest disclosure.

1. Extend the scope of reportable wrongdoing

The scope of the Directive is broad, but ultimately it is limited by the EU's mandate. In order to introduce truly comprehensive whistleblower protection, Member States should expand the scope of their whistleblower protections to cover reporting of any wrongdoing that harms or threatens the public interest.

2. Limit exclusions based on the way information was acquired

The Directive's maintenance of legal liability where the acquisition of data is a "self-standing criminal offence" is potentially problematic. If not treated carefully, this provision could mean that whistleblowers are penalised for doing what they need to do in order make their report. It is not hard to find examples where whistleblowers have faced this kind of issue. Whistleblowers who have brought cases to employment tribunals under the UK's Public Interest Disclosure Act 1998 have lost cases after finding themselves in the 'catch 22' situation of being accused of 'stealing' the documentation necessary to prove their case. Given that the example of LuxLeaks whistleblower Antoine Deltour formed one of the key drivers behind the Directive, it is ironic that he found himself in precisely this kind of situation in the Luxembourg courts. Trades secrets, data protection and even computer crimes laws could all be used to undermine protections for valid whistleblowing reports. Member States should be careful to transpose this provision in a way that is consistent with the overall aims of the Directive.

3. Introduce obligations to provide anonymous channels and follow-up on anonymous reports

Member States could improve on the Directive's partial coverage of anonymous reporting and put it on the same level as reports made in any other way. There are many reasons why whistleblowers might prefer to make reports anonymously. Without an obligation to follow-up on anonymous reports, authorities risk missing vital information to protect public health and safety.

4. Provide an extensive list of remedies for whistleblowers who face retaliation

The European institutions have left it up to national lawmakers to define civil and/or employment remedies for whistleblowers or facilitators who are penalised for making reports. They should take this opportunity to implement comprehensive remedies including compensation rights, general and punitive damages, injunctive relief and other pre-trial relief including protected status as a whistleblower. Where whistleblowers, facilitators or their fam-

ilies find themselves in physical danger, they should be entitled to personal protection measures appropriate to ensure their safety.

5. Introduce dissuasive penalties for retaliation

This is another area where national governments should use their discretion in favour of stronger protections. In order to prevent detrimental or retaliatory actions against whistleblowers, Member States should introduce specific civil, criminal, and/or disciplinary sanctions. These should take into account personal as well as corporate or institutional responsibilities in retaliation cases.

6. Limit restrictions on reporting to the media and third parties

The possibility of going to the media forms a public interest safeguard and an important backstop on the effectiveness of whistleblower protections. To ensure legal certainty, Member States should provide guidelines for the circumstances of "imminent or manifest danger" under which the Directive allows whistleblowers to go straight to the media. This might include an indicative list of instances where the threshold would be met.

7. Specific procedures for national security and intelligence whistleblowing

National security whistleblowing falls outside the remit of the Directive but must be provided for. Member States should ensure that they establish safe and independent mechanisms that allow wrongdoing in the public interest to be reported when it occurs in a sensitive environment or where information is classified.

These mechanisms should include the provision of appropriate internal channels, the ability to inform parliament or regulators where the whistleblower deems it necessary, and the effective regulation of public disclosures where the circumstances necessitate that course of action.

For guidance on how to level the playing field between whistleblowing and national security interests, Member States should consider the Tshwane Principles on National Security and the Right to Information.

8. Introduce a dedicated oversight authority

We recommend that Member States create a specific independent public institution responsible for overseeing the implementation of whistleblower legislation. The functions of this institution might include among other things ensuring that whistleblowers are properly informed about the protections available to them, receiving disclosures, ensuring compliance with the law, collecting data about whistleblowing cases, reporting to national legislatures, commencing investigations on their own initiative or coordinating with other agencies to investigate wrongdoing.

9. Shortened timelines

Three months – up to six in duly justified cases – is a considerable time for whistleblowers to wait before they know whether their report qualifies as a protected disclosure or not. To reduce the risk of retaliation, Member States should shorten the timeline for both internal and external reports. Another option would be the introduction of a temporary whistleblower status, making any disciplinary measure illegal until a report is sufficiently investigated.

10. Extraditions

Member States should go over and beyond the Directive's provisions by allowing courts to order that a whistleblower is not to be extradited to another country if the extradition is sought on a basis connected to a public interest disclosure.

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