

European Union Draft Directive on Whistleblower Protection

Duty to support and protect

There is strong research and numerous cases to show that the types of detriment commonly experienced by whistleblowers include those that result through lack of support rather than deliberate acts.¹ It is important that the standard set by an EU Directive ensures that redress can be obtained for an employer's failure to provide a safe environment, or for the common adverse impacts which are foreseeable and typically within the power of employers to manage. This is vital if the Article 4 of the proposed directive, that employers implement whistleblowing arrangements, is to be effective.

An EU directive on whistleblower protection is above all a transparency and accountability initiative. The goal is to ensure that information about wrongdoing, risk or harm, or otherwise in the public interest, is reported to those who can first a) stop the harm or risk or address the information and b) protect those who communicate that information. **It is important that organisations are not only responsible for implementing whistleblowing arrangements but are responsible for the quality of protection they provide.** Otherwise, the processes too can become part of the problem and not the solution.

For these reasons, WIN recommends including two amendments.

1. The first to include **a duty to prevent** violations.
Insert at the end of Article 4.1: "Individuals and entities that directly or indirectly implement these internal channels and procedures shall have a duty to prevent, refrain from, and take reasonable steps to ensure other persons refrain from violating the provisions of this Directive."

"directly and indirectly" will ensure that the duty is on the organisation as well as any individuals in charge of a whistleblowing arrangement

2. The second is to include **liability for passive retaliation**.
Insert a new provision Article 14(o): "violation of the duty to prevent retaliation, as required by Article 4.1."

Reporting

Article 21 of the Directive on "Reporting, evaluation and review" states that:

1. Member States shall provide the Commission with all relevant information regarding the implementation and application of this Directive. On the basis of the information provided, the Commission shall, by 15,

¹ See Professor AJ Brown, "What have we learned from whistleblowing research? Operationalising the duty to support and protect. Whistling While They Work 2: Work-in-progress" Presentation to the International Whistleblowing Research Network Conference 20 Years of the Public Interest Disclosure Act, Middlesex University London, 22 June 2018. Available on request.

May 2023, submit a report to the European Parliament and the Council on the implementation and application of this Directive.

2. Without prejudice to reporting obligations laid down in other Union legal acts, Member States shall, on an annual basis, submit the following statistics on the reports referred to in Chapter II to the Commission, if they are available at a central level in the Member State concerned:
 - a. The number of reports received by the competent authorities;
 - b. The number of investigations and proceedings initiated as a result of such reports and their final outcome;
 - c. The estimated financial damage, if ascertained and the amounts recovered following investigations and proceedings related to the breaches reported.
3. The Commission shall, by 15 May 2027, taking in to account its report submitted pursuant to paragraph 1 and the Member States' statistics submitted pursuant to paragraph 2, submit a report to the European Parliament and to the Council assessing the impact of national law transposing this Directive. The report shall evaluate the way in which this Directive has operated and consider the need for additional measures, including, where appropriate, amendments with a view to extending the scope of this Directive to further areas or Union acts.

The Directive's purpose is to protect whistleblowers against retaliation. Therefore the reporting of Member States should also reflect how those protections are working. From preliminary research at the Government Accountability Project, almost no country is keeping track of how the protections are working. This hole must be filled for meaningful review of the new Directive's effectiveness against retaliation. The Directive does an excellent job covering the right to access to information about legal rights and processes for making disclosures.² However, government transparency also should be applied to how well the protections are working in practice. We suggest that language be added requiring Member States not only to submit their monitoring reports to the Commission, but to also make the reports publicly available online for public monitoring and oversight.

Training

Another important factor to consider is training. The Directive provides that Member States shall ensure that competent authorities have staff members dedicated to handling reports and that they shall receive specific training for the purposes of handling reports. Those persons shall have the function of providing any interested person with information on the procedures for reporting.

However, this language does not go far enough. Employees should be trained on their rights and employers should be trained on their responsibilities. Most significant, Judges and decision makers should be trained on the law's purpose and provisions. The Serbian whistleblower law requires judges to complete a training course and receive a certification before they can hear a whistleblower case.³ This provision demonstrates the best

² "Persons who are considering reporting breaches of Union law should be able to make an informed decision on whether, how and when to report. Private and public entities having in place internal reporting procedures shall provide information on these procedures as well as on procedures to report externally to relevant competent authorities. Such information must be easily understandable and easily accessible, including, to any extent possible, also to other persons, beyond employees, who come in contact with the entity through their work-related activities, such as service-providers, distributors, suppliers and business partners. For instance, such information may be posted at a visible location accessible to all these persons and to the web of the entity and may *also be included in courses and trainings on ethics and integrity.*" (emphasis added)

³ Serbia's Whistleblower Protection Act 2014, Article 25. "A judge acting upon a lawsuit in connection with whistleblowing or acting in special circumstances referred to in Article 27 hereof shall be a person who possesses special knowledge in protection of whistleblowers. Acquiring special knowledge and personal development of persons acting in cases in

practice for ensuring a competent judiciary. We therefore suggest that language is adopted to provide these three critical trainings.

Preemptive strikes against the usual suspects

It takes a lot of advance work to prepare an effective, responsible whistleblowing disclosure, and the chilling effect can become paralyzing if there is no protection for preemptive strikes. As a result, many laws explicitly outlaw retaliation taken because an employee is “about to” blow the whistle. Serbia’s law gives equal protection for those fired for conducting research the employer suspects will lead to a whistleblowing report.⁴ Serbia, like nearly all modern laws, also protects those who are mistakenly perceived to be whistleblowers.⁵

The proposed Directive does not explicitly address these scenarios. That means there is no defense against those forms of retaliation that are designed to prevent a disclosure from ever being made, and often serve to isolate the whistleblower. If it is too late for explicit protection in the Directive’s text, maybe some explanatory documents fleshing out the provisions could sweep in these principles.

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connection with protection of whistleblowers shall be conducted by the Judicial Academy in cooperation with the Ministry competent for judicial affairs”.

⁴ *Id.*, Article 7.

⁵ *Id.*, Article 9.