D2.1 – WHISTLEBLOWER PROTECTION

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WHISTLEBLOWER PROTECTION

SUMMARY

Whistleblowers, persons who report, within the organisation concerned or to an outside authority, or disclose, to the public, information on wrongdoings[1] carried out in a work-related context, whether private or public, big or small, are essential players in national and global efforts to detect and prevent corruption and other malpractices that may otherwise remain hidden. They are often the first to know about such occurrences and are in a privileged position to inform those who can address the problem. By disclosing malpractices within an organisation, as they work for that organisation or are in contact with it in their work, whistleblowers can prevent harm, protect human rights, safeguard the rule of law, and help to avoid misuse of public funds and disasters that can also cause damage to health and the environment.

However, they are often discouraged from reporting their concerns for fear of retaliation: they may lose their jobs, harm their career prospects, and even put their own lives at risk.

Whistleblower protection currently available across Europe is fragmented:

1. **At EU level**, whistleblower protection is provided only in specific sectors (mostly just in the financial services area), and to varying degrees[2]. This fragmentation and these gaps mean that whistleblowers are not adequately protected against retaliation in many situations. If potential whistleblowers do not feel safe in coming forward with the information they possess, this results in underreporting[3] and therefore 'missed opportunities' for preventing and detecting breaches of Union law which may cause serious harm to the public interest. To address this fragmentation of protection across the EU, EU institutions[4] and many stakeholders[5] have been calling for action at EU level.
2. **Across the Member States with uneven policy areas**: most Member States do not have dedicated legislation in this regard; the few countries with dedicated legislation present major loopholes and fall short of good practice. The absence of whistleblower protection in a

[1] Unlawful activities and abuse of law which may take many forms, such as corruption, fraud, malpractice or negligence.
[2] In many policy areas and instruments, the EU legislator has already acknowledged the value of whistleblower protection as an enforcement tool. Rules envisaging — in varying levels of detail — reporting channels and the protection of individuals reporting on breaches of the regulations concerned exist in different instruments, regarding, for instance, financial services, transport safety and environmental protection.
[3] 81% of Europeans indicated that they did not report corruption that they experienced or witnessed. [2017 Special Eurobarometer on corruption]. 85% of respondents to the 2017 public consultation carried out by the Commission believe that workers very rarely or rarely report concerns about threat or harm to the public because of fear of legal and financial consequences.
[4] The European Parliament, in its resolution of 24 October 2017 on "*Legitimate measures to protect whistleblowers acting in the public interest*" and its resolution of 20 January 2017 on the role of whistleblowers in protecting the EU's financial interests, called on the Commission to present a horizontal legislative proposal to provide a high level of protection for whistleblowers in the EU, in both the public and private sectors, as well as in national and EU institutions. The Council encouraged the Commission to explore the possibility of future action at EU level in its Conclusions on tax transparency of 11 October 2016.
[5] Such as Transparency International, Eurocadres, the European Public Service Union and the European Federation of Journalists.

Member State not only negatively affects the functioning of EU policies in that Member State but can also have spill-over impacts into the EU as a whole.

- Cyprus and Latvia do not have any form of protection for whistleblowers;
- Austria, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Greece, Finland, Croatia, Lithuania, Luxembourg, Poland, Portugal, Romania and Slovenia restrict protection to specific sectors (for example, public, private, banking/financial, etc.); Belgium and Spain limit it to part of the territory;
- France, Hungary, Ireland, Italy, Malta, the Netherlands, the United Kingdom, Sweden and Slovakia have a single horizontal law for protecting whistleblowers;
- Belgium, Bulgaria, Czech Republic, Greece, Lithuania and Romania have no provision for protection for private sector employees who report. Only partial protection is guaranteed - being provided only to employees in the financial and banking sectors - in Austria, Germany, Denmark, Finland and Poland
- in Estonia and Finland there are no legal safeguards against retaliatory measures, while in Austria, Bulgaria, Czech Republic, Germany, Denmark, Greece, Croatia, Italy, Lithuania, Portugal and Romania whistleblowers are protected only against specific retaliatory measures adopted in a working environment (dismissal or discrimination);
- the protection of confidentiality of the informant's identity is not guaranteed in Germany, Greece, Luxembourg and Sweden, while Bulgaria, Spain and Portugal limit this protection to specific sectors.

The objective of strengthening the enforcement of Union law through whistleblower protection cannot be adequately achieved by the Member States acting alone or in an uncoordinated manner. Only legislative action at Union level can improve the enforcement of EU law by ensuring minimum standards of harmonisation on whistleblower protection. Moreover, only EU action can provide coherence and align the existing Union sectoral rules on whistleblower protection.

Lack of effective whistleblower protection could have negative impacts:

- on the freedom of expression and the freedom of the media, enshrined in Article 11 of the EU Charter of Fundamental Rights;
- on the application of EU law: whistleblowing is a means of providing national and EU enforcement systems with information, leading to effective detection, investigation and prosecution of breaches of Union rules;
- on the proper functioning of the single market[6].

Robust whistleblower protection would enrich the EU toolkit for strengthening the correct application of EU law and respect for transparency, good governance, accountability and freedom of expression, which are values and rights on which the EU is based.

[6] As noted below, a 2017 study for the Commission estimated the loss of potential benefits due to a lack of whistleblower protection in public procurement in the range of €5.8 to €9.6 billion each year for the EU as a whole.

For these reasons, the importance of providing effective whistleblower protection to safeguard the public interest is increasingly acknowledged both at European and international level.

INTERNATIONAL INSTRUMENTS AND GUIDELINES

International institutions such as the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe have repeatedly pointed out that adequate protection of whistleblowers is a critical tool for addressing corruption and malpractice and for protecting the financial interests of the European Union. There have been several interventions aimed at urging States to adopt specific regulatory provisions on whistleblowing, and some protection standards have been included in international instruments and guidelines:

- the OECD's "Recommendation on Improving Ethical Conduct in the Public Service, including Principles for Managing Ethics in the Public Service", of 1998 (article 4)
- the Civil Law Convention on Corruption issued by the Council of Europe on November 4, 1999, which required the Member States to introduce adequate protection mechanisms for employees who, in good faith, report corruption (article 9)
- the United Nations Convention against Corruption of 31 October 2003, which requires the Member States to provide protection mechanisms for people who report facts of corruption (article 32 and 33)
- the OECD "Recommendation of the Council on Guidelines for managing conflict of interest in the public service" of 28 May 2003, which includes general principles to encourage the adoption by States of WB procedures that provide, on the one hand, the protection of whistleblowers from retaliation and, on the other, rules to prevent any abuses of the reporting mechanisms.
- Council of Europe Civil (ETS No. 174) and Criminal Law (ETS No. 173) Conventions on Corruption of 2003
- 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions
- 2011 OECD Guidelines for Multinational Enterprises
- the **Council of Europe Recommendation** [CM/Rec(2014)7] **of 30 April 2014, on the protection of Whistleblowers**[7]
- 2015 United Nations Convention against corruption (article 33)[8]
- the OECD report of March 2016: 'Committing to Effective Whistleblower Protection'.
- The Council of Europe "Protection of Whistleblowers: a Brief Guide for Implementing a National Framework" of August 2016, which identifies three different categories: "open whistleblower", whose identity is known; "confidential whistleblower", known only by a small circle of subjects with control duties; "anonymous informants", whose identity is unknown or covered by anonymity.

[7] The Council of Europe recommended to its Member States to "have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work based relationship, report or disclose information on threats or harm to the public interest", a notion "which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment".

[8] Article 33: "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".

Some NGOs and international organisations have developed guidelines and best practices for the creation of a comprehensive national framework for protecting whistleblowers:

- Transparency International: International Principles for Whistleblower Legislation
- Government Accountability Project: International Best Practices for Whistleblower Policies
- Open Society Justice Initiative: Global Principles on National Security and the Right to Information ("Tshwane Principles")
- Organisation of American States: Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses
- OECD for G20: Study on G20 Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation
- 2015 United Nations resource guide on "Good Practices in the Protection of Reporting Persons."
- Council of Europe: Recommendation on the Protection of Whistleblowers adopted by the Committee of Ministers in April 2014 CM/Rec(2014)7

EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights has established that the protection of freedom of expression (article 10 ECHR) also extends to those persons (whistleblowers) who report to the dedicated authorities illegal behaviours occurring in the workplace, whether they are public or private employees.

In the judgment *Guja vs. Moldavia*[9], the Court ruled on the case of a whistleblower who, after sending some letters that contained evidence of corrupt acts, was fired, charged and sentenced, along with the newspaper that published them, for having disclosed secret documents.

The Court stated that the employee should first contact his immediate superior or internal control authorities, then address the public (in particular, the judicial power) only if there are no forms of internal audit or if these are impractical. On this point, the Commission's proposal for a Directive is more rigorous, forcing the whistleblower to contact primarily the authorities able to examine and manage the complaint; they may disseminate the information to the public, through the newspapers, only in exceptional cases (when there is an imminent danger to a public interest, or if irreversible damage is about to materialise).

The Court then analyses the position of the whistleblower, considering the reliability of the information disseminated and its good faith. On the first point, the burden of assessing the information received or acquired rests with the individual as well as the dedicated authorities who must determine the existence of "reasonable grounds" regarding the truthfulness of the elements collected.

As to good faith, there may be a possible conflict between personal interest and public interest, but, in the opinion of the Court, this is not relevant. Therefore protection could still be offered under art.

[9] ECHR, Guja vs. Moldavia, no. 14277/04, sentence 12 February 2008.

10 also to the whistleblower in "bad faith", provided that other elements exist (such as truthfulness of the report and the protection of the public interest).

In the case *Bucur vs. Romania* (2013) the ECHR ruled that the arrest of a whistleblower based on the disclosure of confidential information violated the right to freedom of expression, although the case involved national security and secret services.

In the case *Matùz vs. Hungary* (2014) the ECHR found that a journalist who had revealed government censorship of the public broadcaster had acted in "good faith" and therefore could not be fired, as this would violate his freedom of expression.

EU INITIATIVES

In its **5.7.2016 Communication, the Commission** underlined that protecting whistleblowers in the public and private sector contributes to addressing mismanagement and irregularities, including cross-border corruption relating to national or EU financial interests. It stressed the need for effective measures to protect those who report or disclose information on threats or harm to the public interest, thus contributing to increased detection of fraud and tax evasion. The Commission announced that it would continue to monitor the Member States' provisions and to facilitate research and the exchange of best practices to encourage improved protection at national level. It also indicated that it was assessing the scope for horizontal or further sectoral action at EU level while respecting the principle of subsidiarity.

President Juncker affirmed the commitment to assess the scope for further action to strengthen the protection of whistleblowers in EU law in the Letter of Intent complementing his **2016 State of the Union speech** and in the **2017 Commission Work Programme**.

DG Justice prepared a roadmap in January 2017[10] for an Impact Assessment Study to identify and assess options for EU action to strengthen whistleblower protection.

European Parliament resolution of 14 February 2017 on the role of whistleblowers in the protection of EU's financial interests (2016/2055(INI))

The European Parliament:

[10] European Commission, DG JUST, 2017, Inception Impact Assessment – Horizontal or further sectoral EU action on whistleblower protection: http://ec.europa.eu/smart-regulation/roadmaps/docs/plan_2016_241_whistleblower_protection_en.pdf.

- calls on the Commission **to submit a legislative proposal before the end of 2017** protecting whistleblowers "as part of the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union, with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies".
- calls on the Commission **to carry out a public consultation** to seek the view of stakeholders on the reporting mechanisms and the potential shortcomings of the procedures at national level.
- recognises that whistleblowers play an essential role in helping Member States, EU institutions and bodies to prevent and tackle any breaches of the principle of integrity and misuse of power that threaten or violate fundamental sectors, such as public health and safety, financial integrity, economy, human rights and the environment.
- calls on those Member States that have not yet adopted principles to protect whistleblowers in their domestic law to do so as soon as possible. It also calls on the other Member States to properly implement European and international standards and guidelines on whistleblower protection in their national laws.
- emphasises that whistleblowing relating to the financial interests of the Union is **the disclosure or reporting of wrongdoing**, including, but not limited to, corruption, fraud, conflicts of interest, tax evasion and tax avoidance, money laundering, infiltration by organised crime and acts covering up any of these. Protection is granted to those who disclose information in the **reasonable belief that the information is correct at the time it is revealed,** including those who make inaccurate disclosures by genuine error;
- expresses the need to ensure that **reporting mechanisms** are accessible, safe and secure and that whistleblowers' claims are professionally investigated.
    - expresses "the need to establish an independent **information-gathering, advisory and referral EU body,** with offices in Member States which are in a position to receive reports of irregularities, with sufficient budgetary resources, adequate competences and appropriate specialists, in order to help internal and external whistleblowers in using the right channels to disclose their information on possible irregularities affecting the financial interests of the Union, while protecting their confidentiality and offering needed support and advice".
    - until an independent EU institution has been established, requests "the establishment of **a special unit with a reporting line** as well as dedicated facilities (e.g. hotlines, websites, contact points) within Parliament for receiving information from whistleblowers relating to the financial interests of the Union, which will also provide

them with advice and help in protecting them against any possible retaliatory measures".

- calls for a website to be launched on which complaints can be submitted; it should be accessible to the public and should keep their data anonymous.

- calls on the Commission, and on the European Public Prosecutor's Office, insofar as it is within its mandate upon its establishment, to set up **effective communication channels** between the parties concerned and, likewise, to establish **procedures for receiving and protecting whistleblowers** who provide information on irregularities relating to the financial interests of the Union, and to establish a single working protocol for whistleblowers;
- emphasises the **need to protect the confidentiality** of the information sources to prevent any discriminatory actions or threats; therefore, it asks the EU institutions, in cooperation with all relevant national authorities, to introduce and take all the necessary measures;
- considers it necessary **to foster an ethical culture** helping to ensure that whistleblowers will not suffer retaliation or face internal conflicts; it calls for the Commission to provide a clear legal framework that guarantees that those exposing illegal or unethical activities are **protected from retaliation or prosecution** and to present concrete proposals for the full protection of those who disclose illegalities and irregularities;
- invites the EU agencies to provide a written policy on protecting those who report from reprisals;
- stresses the role of investigative journalism and calls on the Commission to ensure that its proposal affords the same protection to investigative journalists as it does to whistleblowers;
- draws attention to the fact that some existing schemes provide **financial rewards to whistleblowers** (such as a percentage of the sanctions ordered); considers that although this needs to be managed carefully to prevent potential abuse, such awards could provide significant income to persons who have lost their jobs as a result of whistleblowing.

European Commission - Public Consultation (March 2017)

Between 3 March and 29 May 2017, the European Commission carried out an open public consultation (OPC) to collect views on the issue of whistleblower protection at national and EU level. The Commission received 5,707 replies[11].

[11] Of these, 97% (5,516) were from respondents taking part as private individuals. 34% of those respondents identified themselves as employees, 18% as self-employed, 12% unemployed, 12% civil servants, 4% managers and 1% contractors. A total of 1,024 individual respondents (19%) did not provide any information on their professional status and are classified as "other".
The remaining 3% originated from respondents acting on behalf of an organisation (NGOs, business associations; trade unions; enterprises, public authorities) (191 replies). Two-thirds of all respondents (individuals and organisations) came from Germany and France (43% and 23% respectively), responses from Spain accounted for

The results are as follows:

- Organisations were more likely than individuals to state that they had direct knowledge of whistleblowers cases (46% vs. 9%).
- Almost all participants agreed on the need to protect whistleblowers (99.4%).
- 96% were in favour of introducing legally binding minimum standards on whistleblower protection in Union law.
- The main areas where whistleblower protection is needed, according to the respondents, are: the fight against fraud and corruption, the fight against tax evasion and tax avoidance, the protection of the environment, and the protection of public health and safety.
- The majority of respondents (85%) believed that workers very rarely or rarely report concerns about threat or harm to the public interest.
- Fear of legal (80% of individual respondents and 70% of organisations) and financial consequences[12] (78% of individual respondents and 63% of organisations) and fear of a bad reputation (45% of individual respondents and 38% of organisations) were the reasons most widely cited as to why workers do not report wrongdoings.
- The perceived benefits of protecting whistleblowers are to enhance compliance with the law (84% of individuals and 69% of organisations) and to improve transparency and accountability in the workplace (78% of individuals and 62% of organisations). In addition, the respondents identified as benefits fairer competition and improved consumer confidence, supporting the fight against terrorism, improving public trust in companies, incentives to speak up against wrongdoing, the fight against corruption, a stronger feeling of belonging to a community, benefits for patients, improving self-esteem, strengthening democracy.
- The perceived drawbacks in encouraging private and public organisations to protect whistleblowers were, for organisations, supporting the leaking of confidential business information (16%), and undermining mutual trust in the workplace (14%). The drawback most commonly identified by individuals was damage to business reputation and trust in public institutions (7%). Other perceived disadvantages for both were 'encourage false and over-reporting' and 'significant administrative burdens'.

7% of the total, Italy and Belgium 5% each and Austria 6%. The remaining answers were spread across the other Member States.

[12] The fear of retaliation is often well-founded. Up to the 2016 Global Business Ethics Survey, more than 10,000 workers in the private, public and not-for-profit sectors in 13 countries showed that 33% of workers observed misconduct; 59% reported it, with 36% of them experiencing retaliation. http://www.boeingsuppliers.com/2016_Global_Ethics_Survey_Report.pdf.

"Estimating the Economic Benefits of Whistleblower Protection in Public Procurement" – Study published in July 2017

The study carried out by Mileu Ltd. for the European Commission[13] focuses on the public procurement sector, a significant component of the economy and an attractive hotspot for corruption. In this context, whistleblower protection can encourage the reporting of corrupt practices, resulting in reduced misuse of public funds.

The study involved a detailed investigation into the costs faced by the public sector to set up and maintain whistleblower protection in seven European countries where whistleblower provisions are in place (France, Ireland, Italy, the Netherlands, Romania, the Slovak Republic, and the United Kingdom). The potential for misused public funds to be recovered thanks to whistleblower disclosures was estimated through an economic analysis of existing data and statistics. The quantitative analysis was complemented by a qualitative assessment of factors that may contribute to the effectiveness and efficiency of whistleblower protection, including good practices.

A **cost-benefit analysis** approach was taken in which the costs of the whistleblower protection system were assessed against the benefits in terms of the potential for reducing corruption and the misuse of public funds.

A detailed investigation into the **costs** of setting up and maintaining whistleblower protection systems was guided by a framework that centred on the development of legislation, internal channels, external channels, legal costs and free legal advice. Information on these costs was gathered through interviews, primarily with focal points from the national governments as well as through published studies and reports.

The study reveals that "corruption in the EU is estimated to cost €120 billion per year, which represents approximately 1% of the EU's total GDP. Public procurement is one of the government activities that is most vulnerable to corruption. In this area alone, the risk of corruption is estimated to cost the EU €5.3 billion annually. The protection of whistleblowers, who report or disclose information on threats to the public interest that they witnessed during their work, can contribute to the fight against corruption and the safeguarding of fundamental rights in the EU".

For several reasons, it was not possible to calculate the actual **benefits** of whistleblower protection in the area of public procurement, based on funds recovered through past successful cases. Thus, the

[13] It was commissioned by the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG Growth) to understand the economic case for introducing legislation to define and to protect the rights of whistleblowers in the EU.

approach taken was to estimate the potential benefits that an effective whistleblower protection system could generate in the area of public procurement in each selected country. For the EU as a whole, the potential benefits of effective whistleblower protection are **in the range of €5.8 to 9.6 billion each year** exclusively in the area of public procurement.

The overall costs of setting up and maintaining whistleblower protection are quite low in comparison with the potential benefits: in the Netherlands, for example, the ratio of potential benefits to costs ranged from 22:1 to 37:1, depending upon the scenario considered. While in all cases the potential benefits exceeded the values, a significant degree of variation was observed.

EU Parliament Resolution (2016/2224, 24 October 2017) on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies

The European Parliament:

- "calls on the Commission (…) **to present before the end of this year a horizontal legislative proposal** establishing a comprehensive common regulatory framework which will guarantee a high level of protection across the board, in both the public and private sectors as well as in national and European institutions, including relevant national and European bodies, offices and agencies, for whistleblowers in the EU, taking into account the national context and without limiting the possibility for the Member States to take further measures";
- points out that relevant EU legislation should establish a **clear procedure** for properly handling disclosures and effectively protecting whistleblowers;
- deplores the fact that only a few Member States have introduced sufficiently advanced whistleblower protection systems; calls on those Member States that have not yet adopted such methods, or relevant principles in national law, to do so as soon as possible. Encourages the Member States to develop benchmarks and indicators on whistleblower policies in both the public and the private sector;
- takes '**whistleblower' to mean** anybody who reports on or reveals information in the public interest, including the European public interest, such as an unlawful or wrongful act or an act which represents a threat or involves harm, which undermines or endangers the public interest, usually but not only in the context of his or her working relationship, be it in the public or private sector, of a contractual relationship, or of his or her trade union or association activities". This includes individuals who are extraneous to the traditional employee-employer relationship, such as consultants, contractors, trainees, volunteers, student workers, temporary workers and former

employees, who have evidence of such acts with reasonable grounds to believe that the information reported is correct: they should also be given access to reporting channels and appropriate protection when they reveal information on an unlawful or wrongful act or an act which undermines the public interest;

- Calls on the Commission to study a system which would enable whistleblowing **inside and outside the organisation;**
    - each organisation should set up **clear reporting channels**; underlines that each employee should be informed of the relevant reporting procedure, which should guarantee **confidentiality** and the management of the alert within a reasonable timeframe; emphasises that the whistleblower must be able to turn to the appropriate public authorities, non-governmental organisations or the media, especially in the absence of a favourable response from the organisation, or if reporting internally or to the competent authorities would obviously compromise the efficiency of the alert, if the whistleblower is at risk or urgently needs to report information; it should always be possible for a whistleblower to disclose information publicly on an unlawful or wrongful act or an act that undermines the public interest;
    - according to its resolution of 14 February 2017, it calls for the creation of a controlled website on which complaints can be submitted in a strictly confidential manner;
    - protection should be granted **independently of the chosen reporting channel** and on the grounds of the information revealed and the fact that the whistleblower had **reasonable grounds to believe that it was true;**
    - calls on the Member States to establish **independent bodies**, with sufficient budgetary resources, adequate competence and appropriate specialists, responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistleblowers, particularly in the absence of a positive response from their organisation, as well as orienting them towards appropriate financial help, especially in cross-border situations or in cases directly involving Member States or the EU institutions.
- believes that it is necessary to introduce **protective measures against retaliation**. It stresses that, once someone is recognised as a whistleblower, steps should be taken to protect him or her, to bring to an end any retaliation measures taken against him or her, and to grant the whistleblower full compensation for the prejudice and damage incurred. Whistleblowers should not be liable for prosecution, civil legal action or administrative or disciplinary penalties due to making the report;

- considers that whistleblowers should have the option of applying for **interim relief** to prevent retaliation, such as dismissal, until there is an official outcome of any administrative, judicial or other proceedings;
- **inversion of the burden of proof:** "Considers that in the case of alleged retaliatory actions taken against the whistleblower, the employer shall provide evidence that these actions are unrelated to the report made by the whistle-blower";
- takes the view that **confidentiality** should be guaranteed throughout the proceedings and that the identity of the whistleblower shall not be revealed without his or her consent; underlines that a breach of the confidentiality of identity without the whistleblower's consent should be subject to criminal penalties and sanctions;
- stresses that clearly regulated means of **reporting anonymously**, to the national or European independent body responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistleblowers, including in the digital environment, should be introduced, setting out precisely the cases in which the means of reporting anonymously apply. It also stresses that the identity of the whistleblower and any information enabling his or her identification should not be revealed without his or her consent; it considers that any breach of **anonymity** should be subject to sanctions;
- in the event of false accusations, those responsible should be held accountable and not benefit from the protection granted to whistleblowers; any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should be afforded the right to seek effective remedies against malicious or abusive reporting.

– in relation to **whistleblower protection**, it believes that, where applicable, psychological support should be provided, that **specialised legal aid** should be given to whistleblowers who request it and lack sufficient resources, that social and financial assistance should be given to those who express a duly justified need for it and as a protective measure if civil or judicial proceedings are brought against a whistleblower, in accordance with national law and practices. It adds that **compensation** should be granted, irrespective of the nature of the damage suffered by the whistleblower as a result of making a report. It emphasises that whistleblowers must be guaranteed **proper reception arrangements, accommodation and safety in a Member State** which does not have an extradition agreement with the country that committed the acts in question;
– calls on the Member States and EU institutions, in cooperation with all relevant authorities, to introduce and take all possible necessary measures to **protect the confidentiality of the**

information sources in order to prevent any discriminatory actions or threats, as well as to establish **transparent channels for information disclosure**, to set up independent national and EU authorities to protect whistleblowers, and to consider providing those authorities with specific support funds. It also calls for the establishment of a centralised European authority for the adequate protection of whistleblowers and people who assist their acts based on the model of national privacy watchdogs. It calls on the Commission, for these measures to be effective, to develop instruments focusing on protecting against unjustified legal prosecutions, economic sanctions and discrimination.

European Commission - Proposal for a Directive (23 April 2018)

The Commission's proposal for a Directive sets out minimum standards for whistleblower protection in areas with a clear EU dimension and where the impact on enforcement is the strongest. More precisely, effective whistleblower protection can have positive effects on the application of EU law: their reports are a means of feeding national and EU enforcement systems with information leading to effective detection, investigation and prosecution in breaches of Union rules. The proposal introduces solid protection for whistleblowers who report violations in sectors where violations of EU law may cause serious harm to the public interest, a need to strengthen enforcement has been identified, and whistleblowers are in a privileged position to disclose infraction.

The proposal, therefore, focuses on the **areas** of public procurement; financial services; prevention of money laundering and terrorist financing; product safety; transport safety; environmental protection; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems. It also applies to breaches relating to Union competition rules, breaches harming the EU's financial interests and, in view of their negative impact on the proper functioning of the internal market, to breaches of corporate tax rules or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

In several of them (such as financial services[14], aviation safety[15]and maritime transport safety[16], in one sectoral instrument on environmental protection[17]) the EU legislator has already set up specific channels for reporting a violation and protecting those who make such a report[18]. Where already offered, the proposed Directive supplements this protection with additional provisions and safeguards. This Directive draws upon the case law of the European Court of Human Rights on the right to freedom of expression, and the principles developed on this basis by the Council of Europe in its 2014 Recommendation on Protection of Whistleblowers[19] .

The Commission will pay particular attention to the possible need to include provisions amending the Annex in any future Union law in which whistleblower protection is relevant and can contribute to more effective enforcement, to ensure that the scope of the Directive remains up to date. Moreover, the possible extension of the scope of the Directive to further areas or Union acts will also be considered when the Commission reports on the implementation of the Directive.

The minimum standards in the proposed Directive aim for consistently high whistleblower protection across the EU. They strive to ensure that:

- potential whistleblowers have clear reporting channels available to report both internally (within an organisation) and externally (to an outside authority);
- when such channels are not available or cannot reasonably be expected to work correctly, potential whistleblowers can resort to public disclosure;
- the competent authorities are obliged to follow up diligently on reports received and to give feedback to whistleblowers;
- retaliation in its various forms is prohibited and punished;

[14] Measures for the protection of whistleblowers were introduced in a significant number of legislative instruments in the area of financial services, such as: Communication of 8.12.2010 "*Reinforcing sanctioning regimes in the financial services sector*"; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; Regulation (EU) No 596/2014 on market abuse (OJ L 173, p. 1) and the Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 adopted on the basis of that Regulation (OJ L 332, p. 126).

[15] Regulation (EU) No 376/2014 of the European Parliament and of the Council, of 3 April 2014, on the reporting, analysis and follow-up of occurrences in civil aviation (OJ L 122, p. 18)

[16] Directive 2013/54/EU, of the European Parliament and of the Council, of 20 November 2013, concerning specific flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention (OJ L 329, p. 1), Directive 2009/16/EC of the European Parliament and of the Council, of 23 April 2009, on port State control (OJ L 131, p. 57).

[17] Directive 2013/30/EU of the European Parliament and of the Council, of 12 June 2013, on the safety of offshore oil and gas operations (OJ L 178, p. 66).

[18] Some bodies, offices and agencies of the Union, such as the European Anti-Fraud Office (OLAF), the European Maritime Safety Agency (EMSA), the European Aviation Safety Agency (EASA) and the European Medicines Agency (EMA), have in place external channels and procedures for receiving reports on breaches falling within the scope of this Directive, which mainly provide for confidentiality of the identity of the reporting persons.

[19] CM/Rec(2014)7.

- if whistleblowers do suffer retaliation, they have easily accessible advice free of charge; they have adequate remedies at their disposal (e.g. interim remedies to halt ongoing retaliation such as workplace harassment or to prevent dismissal pending the resolution of potentially protracted legal proceedings);
- reversal of the burden of proof, so that the person taking action against a whistleblower must prove that it is not retaliating against the whistleblowing act.

These minimum standards also envisage safeguards to:

- protect responsible whistleblowing genuinely intended to safeguard the public interest;
- proactively discourage malicious whistleblowing and prevent unjustified reputational damage;
- fully respect the rights of defence of those involved in the reports.

In particular,

- whistleblowers qualify for protection if they had reasonable grounds to believe that the information reported was true at the time of reporting;
- whistleblowers are generally required to use internal channels first; if these channels do not work or could not reasonably be expected to work, for instance where the use of internal channels could jeopardise the effectiveness of the investigative actions by the competent authorities, they may report to these authorities, and then to the public/media, if no appropriate action is taken or in particular circumstances, such as imminent or manifest danger for the public interest;
- the Member States shall implement proportionate sanctions to dissuade malicious or abusive reports or disclosures;
- those involved in the reports thoroughly enjoy the presumption of innocence, the right to an effective remedy and a fair trial, and the rights of defence.

Point 6 of Recitals of the proposed Directive states: *"Whistleblower protection is necessary to enhance the enforcement of Union law on public procurement. In addition to the need of preventing and detecting fraud and corruption in the context of the implementation of the EU budget, including procurement, it is necessary to tackle insufficient enforcement of rules on public procurement by national public authorities and certain public utility operators when purchasing goods, works and services. Breaches of such rules create distortions of competition, increase costs for doing business, violate the interests of investors and shareholders and, overall, lower attractiveness for investment and create an uneven level playing field for all businesses across Europe, thus affecting the proper functioning of the internal market".*

EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL.

1) **Chapter I (Articles 1-3**): circumscribes the **scope of the Directive and outlines the definitions**.

- Article 1 purports to protect persons reporting **breaches in four main categories**:
  - breaches falling within the scope of Union acts in a limited number of areas, such as public procurement; financial services, prevention of money laundering and terrorist financing; product safety; transport safety; protection of the environment; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems;
  - breaches of competition rules;
  - breaches affecting the financial interests of the Union as defined in Article 325 TFEU;
  - breaches relating to the internal market, regarding acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage defeating the purpose or object of the applicable corporate tax law.
- Article 2 sets forth the **personal scope of the Directive.** Based on the Council of Europe Recommendation on Protection of Whistleblowers, it encompasses the broadest possible range of **categories of persons**, who, by virtue of work-related activities (irrespective of the nature of these activities and whether or not they are paid), both in the private or public sector, have privileged access to information on breaches that may cause serious harm to the public interest and who may suffer retaliation if they report; including both persons having the status of worker (with the meaning of Article 45 TFEU) and persons having the status of self-employed (with the meaning of Article 49 TFEU). Other categories of persons who can be assimilated to them under the Directive, such as shareholders, volunteers, unpaid trainees and job applicants are also included.
- Article 3: **definitions** (based on the principles of the Council of Europe Recommendation on Protection of Whistleblowers). In particular, the notions of reporting persons, breaches and retaliation are defined in the broadest possible manner, to ensure adequate protection of whistleblowers as a means of enhancing the enforcement of Union law.

2) **Chapter II (Articles 4-5)** sets out the obligation for Member States to ensure that legal entities in private[20] and public[21] sectors establish appropriate **internal reporting channels[22] and procedures** for receiving and following-up on reports.

   - Article 4 provides that the obligation to put in place **internal reporting channels** should be commensurate to the size of the entities, and in the case of private entities, take into account the level of risk that their activities pose to the public interest. Except for businesses operating in the area of financial services, as provided under Union legislation, micro and small companies are exempted from the obligation to establish internal channels; reporting persons working in such businesses may report directly to the external competent national authorities. However, following an appropriate risk assessment, Member States may require small undertakings to establish internal reporting channels in specific cases (e.g. due to the significant risks that may result from their activities). It also provides that the use of internal reporting channels is mandatory only for employees of the legal entity and optional for other persons in contact with the entity in the context of their professional activity.
   - Article 5 sets out that **internal reporting procedures** should enable private legal entities to receive and investigate in full confidentiality reports by employees of the entity and its subsidiaries or affiliates (the group), but also, to any extent possible, by any of the group's agents and suppliers and by any person who acquires information through his/her work-related activities with the entity and the group. It also requires the person or department competent to receive the report[23] to follow it up diligently and to inform the reporting person within a reasonable timeframe, not exceeding three months after the report, of that follow-up, insofar as such information does not prejudice the enquiry or investigation or affect the

[20] According to article 3, the legal entities in the private sector which must establish internal channels and procedures for reporting and follow up on reports are: (1) private legal entities with 50 or more employees; (2) private legal entities with an annual business turnover or annual balance sheet total of EUR 10 million or more; (3) private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing, as regulated under the Union acts referred to in the Annex.

[21] With regard to the public sector, article 3 refers to (1) state administration; (2) regional administration and departments; (3) municipalities with more than 10,000 inhabitants; (4) other entities governed by public law.

[22] Recitals 42 and 43 provide that: "it is up to each private and public legal entity to define the kind of reporting channels to set up, such as in person, by post, by physical complaint box(es), by telephone hotline or through an online platform (intranet or internet). However, reporting channels should not be limited to those amongst the tools, such as in-person reporting and complaint box(es), which do not guarantee the confidentiality of the identity of the reporting person. Third parties may also be authorised to receive reports on behalf of private and public entities, provided they offer appropriate guarantees of respect for independence, confidentiality, data protection and secrecy. These can be external reporting platform providers, external counsel or auditors or trade union representatives".

[23] Recital 45 provides that: "the most appropriate persons or departments within a private legal entity to be designated as competent to receive and follow up on reports depend on the structure of the entity, but, in any case, their function should ensure absence of conflict of interest and independence. In smaller entities, this function could be a dual function held by a company officer well placed to report directly to the organisational head, such as chief compliance or human resources officer, a legal or privacy officer, a chief financial officer, a chief audit executive or a member of the board".

rights of the concerned person. Moreover, entities having internal reporting procedures in place are required to provide easily understandable and widely accessible information on these procedures as well as on procedures for reporting externally to the relevant competent authorities. The article also explains how reports can be made: written reports in electronic or paper format and/or oral reports through telephone lines, whether recorded or unrecorded; physical meetings with the person or department designated to receive reports.

3) **Chapter III (Articles 6-12)** obliges the Member States to ensure that the competent authorities have in place **external reporting channels and procedures** for receiving and following up on reports and sets out the minimum standards applicable to such channels and procedures.
   - Article 6 provides that the authorities[24] to be designated as competent by the Member States should establish **independent and autonomous external reporting channels**, which are both secure and ensure confidentiality; follow up on the reports and provide feedback to the reporting person within a reasonable timeframe not exceeding three months or six months in duly justified cases; transmit the information contained in the report to the competent bodies, offices or agencies of the Union[25], as appropriate, for further investigation, where envisaged under national or Union law. They shall have the necessary capacities and powers to assess the accuracy of the allegations made in the report and to address the breaches reported, including by launching an investigation, prosecution or action for recovery of funds, or other appropriate remedial action, in accordance with their mandate. If the authority that has received a report does not have the competence to address the breach reported, it should transmit it to the competent authority, notifying the reporting person.
   - Article 7 sets out the minimum requirements for the **design of external reporting channels**. In order to be considered independent and autonomous, they must be: separate from the general communication channels of the competent authority; designed, set up and operated in a manner that ensures the completeness, integrity and confidentiality of the information and prevents access to unauthorised staff members of the competent authority; enable the storage of durable information to allow for further investigations. The report may be made in different ways: written statement in electronic or paper format; oral report through telephone lines, whether recorded or unrecorded; physical meeting with dedicated staff members of the competent authority.
   - Article 8 requires that competent authorities have **staff members dedicated** to and explicitly trained in handling reports and outlines the functions to be exercised by such staff members:

[24] These may be regulatory or supervisory bodies in the areas concerned, law enforcement agencies, anti-corruption bodies and ombudsmen.
[25] For instance, the European Anti-Fraud Office (OLAF) and the European Public Prosecutor Office (EPPO).

provide any interested person with information on the reporting procedures; receive and follow-up reports; maintain contact with the reporting person for the purpose of informing the reporting person on the progress and outcome of the investigation.

- Article 9 identifies the requirements to be met by **procedures applicable to external reporting** (e.g. as regards further communications with the reporting person, the timeframe for giving feedback to the reporting person and the appropriate confidentiality regime, including a detailed description of the circumstances in which the confidential data of the reporting person can be communicated). In particular, these procedures should ensure the protection of the personal data of both the reporting and concerned persons.
- Article 10 provides that the competent authorities should publicly disclose and make easily accessible **user-friendly information** on the available reporting channels and the applicable procedures for receiving reports and for following them up. All information regarding reports should be transparent, easily understandable and able to promote and not deter reporting.
- Article 11 provides that Member States should ensure the **adequate record-keeping** of all reports of infringement and that every report must be retrievable within the competent authority and that information received through reports could be used as evidence in enforcement actions, where appropriate. It also provides that the competent authorities must **promptly confirm receipt** of the written reports, except if the whistleblower has explicitly stated its intention not to receive such confirmation or the competent authority reasonably believes that confirming receipt puts at risk the protection of the identity of the reporting person.
- Article 12 provides for a regular review (at least once every two years) by the competent national authorities of their procedures for receiving and following up on reports.

4) **Chapter IV (Article 13-18)** sets out the minimum standards on the **protection of reporting persons and of persons concerned by the reports.**

- Article 13 outlines the conditions under which a reporting person shall qualify for protection under the Directive. It requires that the reporting person had **reasonable grounds to believe that the information reported was accurate at the time of reporting and that this information falls within the scope of the Directive**. This article regulates the cases in which the reporting person can make use of the different reporting channels. Reporting persons are generally required to use internal channels first; if their report is not followed up within a reasonable timeframe or these channels do not work or could not reasonably be expected to work, they may report to the competent authorities, and, as a last resort, to the public/the media[26].

[26] Recital 61: "the requirement of a tiered use of reporting channels, as a general rule, is necessary to ensure that the information gets to the persons who can contribute to the early and effective resolution of risks to the public

Moreover, it allows for the protection of public disclosures taking account of democratic principles, such as transparency and accountability, and fundamental rights, such as freedom of expression and media freedom.

- Article 14 provides a non-exhaustive list of the **many different forms that retaliation can take** and requires the Member States to take the necessary measures to prohibit any kind of retaliation[27].
- Article 15 requires that **retaliation in any form should be prohibited** and sets out further measures that Member States should take to ensure the protection of reporting persons, including: making easily accessible to the public and free of charge independent information and advice on procedures and remedies available on protection against retaliation; exempting reporting persons from liability for breach of restrictions on disclosure of information imposed by contract or by law; providing for the reversal of the burden of proof in legal proceedings so that, in prima facie cases of retaliation, it is up to the person taking action against a whistleblower to prove that it is not retaliating against the whistleblowing act; putting at the disposal of reporting persons remedial measures against retaliation as appropriate[28], including interim relief pending the resolution of legal proceedings[29], in accordance with the national framework; ensuring that, in legal actions taken against them outside the work-related context, such as proceedings for defamation, breach of copyright or breach of secrecy, whistleblowers can rely on having made a report or disclosure following the Directive as a defence.

interest as well as to prevent unjustified reputational damage from public disclosure. At the same time, some exceptions to its application are necessary, allowing the reporting person to choose the most appropriate channel depending on the individual circumstances of the case".

[27] Recital 65: "reporting persons should be protected against any form of retaliation, whether direct or indirect, taken by their employer or customer/recipient of services and by persons working for or acting on behalf of the latter, including co-workers and managers in the same organisation or in other organisations with which the reporting person is in contact in the context of his/her work-related activities, where retaliation is recommended or tolerated by the concerned person. Protection should be provided against retaliatory measures taken vis-à-vis the reporting person him/herself but also those that may be taken vis-à-vis the legal entity he/she represents, such as denial of the provision of services, blacklisting or business boycotting. Indirect retaliation also includes actions taken against relatives of the reporting person who are also in a work-related connection with the latter's employer or customer/recipient of services and workers' representatives who have provided support to the reporting person".

[28] In relation to legal remedies, recital 71 provides that they will be determined by the kind of retaliation suffered. "It may take the form of actions for reinstatement (for instance, in case of dismissal, transfer or demotion, or of withholding of training or promotion) or for restoration of a cancelled permit, licence or contract; compensation for actual and future financial losses (for lost past wages, but also for future loss of income, costs linked to a change of occupation); compensation for other economic damage such as legal expenses and costs of medical treatment, and for intangible damage (pain and suffering)". The types of legal action may vary between legal systems, but they should ensure as full and effective a remedy as possible.

[29] They may, in particular, be necessary in order to stop threats, attempts or continuing acts of retaliation, such as harassment in the workplace, or to prevent forms of retaliation such as dismissal, which might be difficult to reverse after the elapse of lengthy periods and which can ruin the individual financially.

- Article 16 makes clear that **those concerned by the reports** shall fully enjoy their rights under the EU Charter of Fundamental Rights, including the right to an effective remedy and to a fair trial, the presumption of innocence and their rights of defence, the right to be heard, to access their file and to protection of identity.
- Article 17 provides for effective, proportionate and dissuasive **penalties** which are necessary to ensure the effectiveness of the rules on the protection of reporting persons, so as to punish and proactively discourage actions aimed at hindering reporting, retaliatory actions, vexatious proceedings against reporting persons and breaches of the duty of maintaining the confidentiality of their identity, and, on the other hand, to discourage malicious and abusive whistleblowing which harms the effectiveness and credibility of the whole whistleblower protection system, and to prevent unjustified reputational damage for the concerned persons.
- Article 18 refers to the application of the EU rules on **protection of personal data** to any processing of personal data carried out pursuant to the Directive. In this regard, any processing of personal data, including the exchange or transmission of such data, shall comply with the rules established by Regulation (EU) 2016/679, Directive (EU) 2016/680 and Regulation (EC) 45/2001.

5) **Chapter V (Article 19-22): final provisions.**

- Article 19 specifies that Member States retain the possibility of introducing or maintaining **more favourable provisions** to the reporting person, provided that such provisions do not interfere with the measures for the protection of the concerned persons.
- Article 20 relates to the **transposition** of the Directive.
- Article 21 requires the Member States to provide the Commission with information regarding the **implementation and application of this Directive,** on the basis of which the Commission shall submit a report to the Parliament and the Council within two years after transposition. This provision further requires the Member States to submit annually to the Commission, if they are available at a central level in the Member State concerned, statistics on, inter alia, the number of reports received by the competent authorities; the number of proceedings initiated based on the reports and the outcome of such proceedings. It also provides that the Commission shall, within six years after transposition, submit a report to the Parliament and to the Council assessing the impact of national law transposing this Directive and consider the need for additional measures, including, where appropriate, amendments with a view to extending whistleblower protection to further areas or Union acts.
- Article 22 and 23 establish the **entry into force** of the Directive on the twentieth day following its publication in the *Official Journal of the European Union* and indicate the Member States as addressees of this Directive.

Aspects to be improved according to Transparency International 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 [articles 13 and 17 of the proposed Directive] → they recommend the amendment of article 17 (2) to make it clear that the whistleblower's motives are not relevant and that a person should only be held liable if he/she knowingly makes a false report or disclosure. This article could also be deleted, since the Member States, in their defamation or libel laws, already provide for penalties to be applied in these circumstances.
- Employees should be able to report breaches of law directly to the competent authorities → they suggest removing the obligation for the employee to report internally first.
- The whistleblower's identity should be more effectively protected [articles 5, 6, 7, 9, 10, 17]→ Given the importance of protecting a whistleblower's identity, the Directive should include an article on the obligation to maintain the confidentiality of the whistleblower's 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 → According to the Proposal, anonymous reporting is not expressly excluded, but Member States are free to exclude it when transposing the Directive. The proposal should address at least the following aspects of anonymous reporting: (1) 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. (2) 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 → The Directive needs to specify that whistleblowers should have access to a full range of remedial measures covering all direct, indirect and future detrimental consequences. 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 → The proposed Directive provides for some reversal of the burden of proof, but in a restrictive way: (1) the whistleblower must first provide "reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure". (2) The reversal of the burden of proof only applies to judicial proceedings; therefore it excludes non-judicial proceedings such as internal and administrative processes. (3) 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. The Directive should state that, to trigger a reversal of the burden of proof, a whistleblower only needs to establish that they made a disclosure and experienced negative treatment.
- National whistleblowing authorities should be responsible for the supervision and enforcement of whistleblowing legislation → The Directive should require the Member States to designate one or several authorities to be accountable for the supervision 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 [article 17]→ The Directive should lay down effective, proportionate and dissuasive penalties applicable to legal or natural persons who fail to: establish internal channels and procedures for reporting, follow up on reports and protect reporting persons; follow up on reports; provide feedback on the follow-up to the whistleblower within a reasonable timeframe

- The material scope should be extended as much as possible → 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 to include former employees, EU staff and persons associated with a whistleblower or believed to be a whistleblower [article 2].
- All public-sector entities should be obliged to establish internal reporting mechanisms [article 4].
- Internal reporting mechanisms should provide for transparent, enforceable and timely procedures to follow up on whistleblowers' complaints of unfair treatment [Chapter II of the proposed Directive] → 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 [articles 5 and 11] → The Directive includes the obligation to acknowledge receipt of the report for external reporting procedures but not for internal reporting procedures.
- The collection and publication of comprehensive data on the functioning of reporting mechanisms should be mandatory for both internal and external reporting (at least in the public sector) [article 21] → The proposed Directive does not obligate the 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". It 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 on the action taken in response.

SUMMING UP: WHISTLEBLOWER PROTECTION ACCORDING TO THE DIRECTIVE

WHO?	Reporting persons working in the private or public sector who have acquired information on breaches in a work-related context including, at least, the following: 1. persons having the status of worker, with the meaning of Article 45 TFEU, as interpreted by the European Union Court of Justice: persons who, for a certain period, perform services for and under the direction of another person, in return for which they receive remuneration. According to that definition, protection should thus also be granted to workers in non-standard employment relationships, including part-time workers and fixed-term contract workers, as well as persons with a contract of employment or employment relationship with a temporary agency. 2. persons having self-employed status, with the meaning of Article 49 TFEU who can play a key role in exposing breaches of the law and may find themselves in a position of economic vulnerability[30] in the context of their work-related activities. 3. shareholders and persons belonging to the management body of an undertaking, including non-executive members, as well as volunteers and unpaid trainees who may suffer retaliation in the form of no longer making use of their services, or of giving a negative reference for future employment or otherwise damaging their reputation. 4. any persons working under the supervision and direction of contractors, subcontractors and suppliers. 5. candidates for employment or for providing services to an organisation who acquired the information on breaches of law during the recruitment process or other pre-contractual negotiation stage (they may suffer retaliation in the form of negative employment references or blacklisting/business boycotting).

[30] They are typically subject to retaliation in the form of early termination or cancellation of contract of services, licence or permit, loss of business, loss of income, coercion, intimidation or harassment, blacklisting/business boycotting or damage to their reputation.

WHAT?	1. The information reported which qualifies for protection covers not only unlawful activities but also abuse of law, namely acts or omissions which do not appear to be unlawful in formal terms but which defeat the object or purpose of the law. 2. Potential violations that have not yet materialised, but are likely to be committed. 3. Protection is also warranted for persons who do not provide positive evidence but raise reasonable concerns or suspicions. 4. Protection should not apply to the reporting of information which is already in the public domain or of unsubstantiated rumours and hearsay. The reporting persons must have reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of the Directive.
WHEN?	They acquire the information through their work-related activities and therefore run the risk of work-related retaliation. The underlying reason for providing them with protection is their position of economic vulnerability towards the person on whom they de facto depend for work; this is why when there is no such work-related power imbalance (for instance, in the case of ordinary complainants or citizen bystanders), there is no need for protection against retaliation.
WHY?	Effective enforcement of Union law. For that reason, protection should be granted to the broadest possible range of categories of persons, who, irrespective of whether they are EU citizens or third-country nationals, by virtue of work-related activities (irrespective of the nature of these activities and whether or not they are paid), have privileged access to information on breaches that would be in the public's interest to report and who may suffer retaliation if they report them.
HOW?	Protection from retaliation (in a broad sense in terms of any act or omission occurring in the work-related context which has a detrimental effect) should be provided both with internal and external reporting channels and also in the public domain (for instance, directly to the public via web platforms or social media, or to the media, elected officials, civil society organisations, trade unions or professional/business organisations).

Impact assessment accompanying the Proposal for a Directive

Four policy options have been assessed[31] and two options have been discarded[32]. The preferred option is a Directive with a broad scope, particularly apt for addressing the current fragmentation and for

[31] The policy options examined were:
1. a Commission Recommendation guiding the Member States on the critical elements of whistleblower protection complemented by flanking measures to support national authorities;
2. a Directive introducing whistleblower protection in the area of the financial interests of the Union complemented by a Communication setting out a policy framework at EU level, including measures to support national authorities;
3. a Directive introducing whistleblower protection in specific areas (including the financial interests of the Union) where it is necessary to address whistleblowers' underreporting to enhance the enforcement of Union law, as breaches would lead to serious harm to the public interest;
4. a Directive as indicated in point iii) complemented by a Communication as indicated in point ii). This is the chosen option.

[32] The two options that were discarded are: a legislative initiative based on Article 50(2)(g) TFEU on enhancing the integrity of the private sector by introducing minimum standards for setting up reporting channels, and a legislative initiative based on Article 153(1)(a) and (b) TFEU on improving the working environment to protect workers' health and safety and on working conditions. In the first case, the legal basis would not have covered the public sector, while the availability and design of external reporting channels and the availability and forms of whistleblower protection against retaliation would have been left to the discretion of Member States laws. In the second case, the personal scope of the Directive would have been limited to employees, leaving unprotected

enhancing legal certainty so as to address effectively underreporting and to enhance the enforcement of Union law in all areas identified, where breaches can cause serious harm to the public interest. The legislative initiative is complemented by a Communication setting out a policy framework at EU level, including measures to support national authorities.

The benefits of the Directive:

- It will support national authorities in their efforts to detect and deter fraud and corruption in detriment to the EU budget (the current risk of loss revenue is estimated to be between EUR 179 billion and EUR 256 billion per annum).
- In other areas of the single market, such as in public procurement, the benefits are estimated to be in the range of EUR 5.8 to EUR 9.6 billion each year for the EU as a whole.
- It will also effectively support the fight against tax avoidance resulting in loss of tax revenues from profit-shifting for the Member States and the EU, estimated to be about EUR 50-70 billion per annum.
- The introduction of robust whistleblower protection will improve working conditions for 40% of the EU workforce who are currently unprotected from retaliation measures and will increase the level of protection for nearly 20% of the EU workforce.
- It will enhance the integrity and transparency of the private and public sector, contributing to fair competition and creating a level playing field in the single market.

Implementation costs:

- for the public sector they are expected to amount to €204.9 million as one-off costs and €319.9 million as annual operational costs.
- for the private sector (medium-sized and large companies) the projected total costs are expected to amount to €542.9 million as one-off costs and €1016.6 million as annual operational costs.
- the total costs for both the public and private sector are €747.8 million as one-off costs and €1336.6 million as annual operational costs.
- costs for companies. Micro and small companies are not obliged to put in place internal reporting channels. The general exemption of small and micro-companies does not apply to companies active in the area of financial services or vulnerable to money laundering or terrorist financing. Small and micro companies operating in the area of financial services are not exempted from the obligation; the cost for those companies is minimal (sunk costs) since they are already obliged to establish internal reporting channels under existing Union rules.

other types of potential whistleblowers, such as self-employed people, contractors etc., who can be key in exposing threats or harm to the public interest and also require protection against retaliation.

With regard to costs for medium-sized business obliged to establish internal reporting channels, they are not significant. The average costs for a medium-sized enterprise will amount to: average one-off implementation cost estimated at EUR 1,374 and average annual operational price estimated at EUR 1,054.6 per year.

Opinion no. 4/2018 of the European Court of Auditors (26 September 2018) concerning the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (2018/C 405/01)

The European Court of Auditors, pursuant to Article 325(4) TFEU, warmly welcomes the proposal as "the introduction or extension of whistleblowing systems in all Member States, as envisaged by the proposal, would help improve the management of EU policies from the bottom up through the actions of citizens and employees, as a complement to top-down enforcement such as actions for infringement initiated by the Commission against Member States under Article 258 TFEU. In this sense, the Directive could increase citizens' awareness of their legal rights and the fact that they can play a crucial role in applying EU law. Where a specific breach highlights a more systemic problem, reporting it could help the Commission to put together a case against a Member State".

The Court takes into consideration and suggests changes to some articles of the proposed Directive:

- Article 1 (***material scope***): the Court appreciates the Commission's intention to ensure the Directive covers many areas of Union activity, but is concerned about the complexity of the material scope and the implications this might have in practice for the effective protection of whistleblowers. The complexity of the scope is only partially mitigated by the various provisions of the proposal to assist potential whistleblowers, providing clear and easily accessible information, advice and assistance, and by the fact that it would be sufficient to have reasonable grounds to believe that a report fell within the scope.
- Article 2 (***personal scope***): the Court appreciates the breadth of this provision, particularly the fact that it takes account of breaches affecting the EU's financial interests in complex projects involving a variety of players (contractors, sub-contractors, consultants, volunteers, etc.) who are all potential whistleblowers.
- Article 4 (***Obligation to establish internal channels and procedures for reporting and follow-up of reports***): the Court considers that the exemption of certain municipalities (under 10,000 inhabitants) from the obligation to establish internal reporting channels could significantly reduce the protection afforded to whistleblowers, since the average size of municipalities in the EU is 5,887 inhabitants, with wide variations between the Member States. The Court understands that the proposed threshold is already being used in a number of Member States (Belgium, France, Spain) to define smaller municipalities but, nevertheless, it considers that

the Commission should provide its reasons for the threshold to the Parliament and the Council, explaining to what extent it mirrors the employee and turnover limits which would be suitable for exempting entities in the private sector.

- Article 5 (***Procedures for internal reporting and follow-up of reports***): the Court insists on the importance, in both the public and private sector, of fostering a positive and trusting environment in which whistleblowing is an accepted part of the corporate culture. For these reasons the Court considers the awareness-raising and training of staff to be fundamental.
- Article 13 *(**Conditions for the protection of reporting persons***): the Court proposes the elimination of the requirement of existence of reasonable grounds to believe that the information reported was true at the time of reporting as a condition for access by the informant to the protections provided by the Directive proposal, as it is believed that the determining factor should be the public interest of the information revealed by whistle-blowing. Member States should, therefore, be prevented from enacting any exclusion of protection based on a whistleblower's subjective intentions or specific motivations.

  The Court observes that exceptions to the general rule requiring the prior use of internal channels would demand further interpretation in order not to create uncertainty among potential reporting parties. Moreover, it highlights that the proposed cascade system could create obstacles, due to the accumulation of the last terms, to preventing a violation.

  With regard to the exceptions that allow for the bypassing of internal reporting channels, the Court hopes that this possibility will be granted to whistleblowers who have reasonable grounds to believe that internal reporting would put their safety or legitimate interests at risk. Finally, the Court believes that persons who have reported anonymously should not be denied whistleblower protection if their identity is subsequently revealed.
- Article 15 *(**Measures for the protection of reporting persons against retaliation***): the Court welcomes the extensive list of examples of measures against retaliation, which does not, however, prevent employers from taking duly justified employment-related decisions, even against whistleblowers. It notes that the Directive is silent on the question of time limits, meaning that Member States cannot introduce or maintain such limits on whistleblower protection and proposes the specification of time limits of the safeguards against direct or indirect retaliation.
- Article 21 (***Reporting, evaluation and review***): the Court notes that the fact that the sending of statistics would be optional for certain Member States (those without statistics already available centrally), and that the statistics would not be broken down by policy area, would reduce the effectiveness of this provision. Furthermore, it would be necessary to wait six years from the transposition deadline and eight years from the entry into force of the Directive to

benefit publicly from any information contained in the statistics. This period appears to be disproportionately long and in contradiction with the Article 21(2) obligation on the Member States to provide the Commission with 'all relevant information' regarding their implementation and application of the Directive. It believes that statistical information on whistleblowing in the Member States needs to be of the highest possible quality, and, in particular, it should be available by country, by legal act and by subject area and should include the final outcomes of civil and criminal cases.

Opinion of the European Social and Economic Committee (18 October 2018)

The EESC welcomes the aim of promoting voluntary responsible whistleblowing defence of the public interest and suggests some changes to the text of the proposed directive:

- calls on the Commission to review the legal basis for the directive to include workers' rights under Article 153 of the Treaty on the Functioning of the EU;
- points out that in Article 1 (***material scope***), the protection of workers is omitted from the list of kinds of abuse of law that a whistleblower may report: the proposal also does not include discrimination, harassment or violence in the workplace, etc.; the Committee, therefore, calls for these subjects to be included in the directive;
- with regard to the ***personal scope***, the EESC notes that former employees, trade union representatives and legal persons as defined in article 3 can report wrongdoing and benefit from the same protection; they must be clearly listed in Article 2 of the directive; EU officials should also enjoy equal protection to employees in the Member States;
- recommends that workers and their trade union representatives be actively involved in the design and implementation of ***internal reporting channels***. It believes that a whistleblower must have a free choice between access to internal channels and to the competent authorities, and therefore recommends a two, rather than three, stage reporting procedure, initially giving the whistleblower access to internal channels or to the competent authorities (whichever is preferred); and subsequently, if necessary, to civil society/the media, in the interests of fairness and legal certainty. The Committee recommends that the follow-up guarantees applicable to external reporting, such as acknowledgement of receipt of the report and feedback on the action taken, should also apply to internal reporting;
- considers that, in the workplace, the whistleblower must be able to contact and be represented by the trade unions at any stage of the whistleblowing procedure;
- recommends that a whistleblower who initially acted ***anonymously*** and whose identity is subsequently revealed should benefit from the protection afforded by the directive;

- recommends that the text of Article 15(5) relating to the prima facie ***burden of proof*** be amended so that it is sufficient that the whistleblower "provides evidence that he or she made a report";
- recommends that, under Article 15(6), the directive should provide for ***full compensation for damages, without any ceiling*** (including loss of pension contributions in the event of dismissal), on the model of the 1998 Public Interest Disclosure Act;
- calls for the deletion of Article 17(2), which is superfluous and creates confusion between responsible whistleblowing and defamation and false accusation, which are offences already covered by national law;
- calls on the Commission to include an explicit ***non-regression clause*** in article 19 to ensure that the implementation of the directive in no way diminishes more favourable rights granted to whistleblowers prior to this directive in the Member States and in those areas to which the directive applies;
- recommends that the publication of periodic reports by public bodies and the Member States be made mandatory.

European Parliament's Committee on Legal Affairs amendments (20 November 2018)

The Committee's amendments would increase protection for whistleblowers throughout the European Union and would reinforce their right to go straight to the media with information.

The most effective improvements approved by the Committee are:

- reports on working conditions are also included in the protection;
- protection is provided not only to whistleblowers but also to colleagues who help them and to journalists and facilitators, including persons working in the organisation supporting those who decide to report. More specifically, the protections for the facilitators now cover areas such as defamation, copyright violations and trade secrets, providing compensation for damages suffered;
- reporting avenues should ensure that the reporting person is notified that its report has been received within a week, while follow-up on the report should be received no later than two months after the report was received;
- removal from the approved text of the concept of *malicious and abusive reports* in favour of a softer concept, which mainly refers to *reports that were known to be false*;
- internal and external reports are placed on the same level: it should be up to the reporting person to choose the most appropriate channel through which to report, whether internal or external, depending on the circumstances;

- the threshold for the obligation to issue internal reporting procedures has been raised (from 50 to 250 employees in the final version, both in the public and private sectors);
- whistleblowers would be allowed to go directly to the media if they had reasonable grounds to believe they could not use internal or external reporting channels because of, for example, a manifest or imminent danger, a threat to the public interest, or special circumstances such as collusion, the implication of the relevant authorities or the danger of destruction of evidence. Furthermore, the list of circumstances in which whistleblowers could go straight to the media is open-ended;
- the obligation to take into consideration anonymous reports, if well detailed. Furthermore, the protection is also extended to the anonymous reporter whose identity is discovered at a later time;
- the timing for the verification of the reports: it is shortened in the final text, reducing from 3 to 2 months for internal reports to the institution and from 6 to 4 months for external reports to regulatory bodies or authorities;
- bon-regression clause: if a national law provides for greater protection than that in the directive, the former cannot be reduced in the transposition phase of the latter.

Text of the Whistleblowers Directive adopted by the European Parliament (16 April 2019)

On 16 April 2019, the European Parliament voted in an overwhelming majority to adopt the Directive. It has now been presented to the Council for approval, after which it will be published in the Official Journal of the European Union. The EU Member States will then have two years to comply and put in place national rules that are in line with the Directive.

The adopted text marks a step forward compared to the proposal, introducing additional guarantees for whistleblowers. Below are the most relevant:

- "breaches of Union law" are intended in the broadest sense, regardless of their qualification under national law as administrative, criminal or other types of breaches (recital 3);
- the boundaries of the term "retaliation" are better defined as "any direct or indirect act or omission which occurs in a work-related context prompted by the internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person" (article 6);
- the Directive shall not affect the responsibility of the Member States to ensure national security and their power to protect their essential security interests. In particular, it shall not apply to reports on breaches of the procurement rules involving defence or security aspects unless they are covered by the relevant instruments of the Union (article 3);

- the Directive shall not affect the application of Union or national law on the protection of classified information or legal and medical professional privilege, the secrecy of judicial deliberations and rules on criminal procedure. It shall also not affect national rules on the exercise of the workers' right to consult their representatives or trade unions and on the protection against any unjustified detrimental measure prompted by such consultations as well as on the autonomy of the social partners and their right to enter into collective agreements;
- the **personal scope** (article 4) is extended to include also civil servants in the status of 'workers' whose protection should be granted, shareholders and persons belonging to the administrative or supervisory body of an undertaking, paid trainees and persons whose work-based relationship ended. Protective measures of reporting persons who publicly disclose information on breaches falling within the scope of this Directive also apply to facilitators (persons who assist the whistleblower in the reporting process in a work-related context), third persons connected with the reporting persons and who may suffer retaliation in a work-related context, such as colleagues or relatives of the reporting person, and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context;
- the motives of the whistleblower in making the report are irrelevant as to whether or not they should receive protection (recital 33);
- the decision to accept and follow up on **anonymous reports** of breaches falling within the scope of the Directive is left to the Member States, but full protection is granted to whistleblowers who have reported or made public disclosures anonymously and who have subsequently been identified and suffer retaliation (article 5);
- the reporting person can choose **the most appropriate channel** depending on the individual circumstances of the case. Even if the use of internal channels before external reporting is encouraged where the breach can be effectively addressed internally and where the reporting person considers that there is no risk of retaliation, persons shall provide information on breaches falling within the scope of this Directive externally or directly to relevant institutions, bodies, offices or agencies.
- **INTERNAL REPORTING (Chapter II):**
    - The obligation to introduce internal channels and procedures for reporting and following up reports, including protecting their confidentiality and providing feedback, concerns (art. 8):

- all legal entities in the private sector with more than 50 employees (regardless of the annual business turnover, the annual balance sheet or the sector in which they operate);
- all public sector bodies, including any entity owned or controlled by a public legal entity. Member States may exempt municipalities with less than 10,000 inhabitants, or less than 50 employees, or other entities with less than 50 employees.

- The adopted text regulates the possibility of sharing resources
  - in the private sector: legal entities with 50 to 249 employees may share resources as regards the receipt and possibly also the investigations of reports, without prejudice to their obligations to maintain confidentiality, to give feedback and to address the reported breach;
  - in the public sector: the Member States may provide that internal reporting channels are shared between municipalities, or operated by joint municipal authorities following national law.
- The internal reporting procedure is integrated with further guarantees:
  - channels set up and work in a secure manner that ensures not only the confidentiality of the identity of the reporting person but also of any third party mentioned in the report;
  - an acknowledgement of receipt of the report must be sent to the reporting person within no more than seven days of that receipt;
  - in all cases, the reporting person should be informed of the investigation's progress and outcome. He or she may be asked to provide further information during the course of the inquiry, albeit with no obligation to do so (recital 58);
  - reporting may take place through a physical meeting only at the request of the reporting person.

– **EXTERNAL REPORTING (Chapter III).** The adopted text integrates with further guarantees also the external reporting procedure:
  - the competent authorities shall promptly acknowledge, within seven days, the receipt of the reports unless the reporting person has explicitly requested otherwise or the competent authority reasonably believes that acknowledging the report would jeopardise the protection of the reporting person's identity;
  - the competent authorities shall communicate to the reporting person the outcome of the investigations. They shall also give him or her feedback about the action envisaged or taken as follow-up (for instance, referral to another authority, closure based on lack

of sufficient evidence or other grounds or launch of an investigation and possibly its findings and/or measures taken to address the issue raised), as well as on the grounds justifying the follow-up;

- reporting may take place through a physical meeting only upon request by the reporting person;
- the competent authorities shall publish on their websites in a separate, easily identifiable and accessible section the procedures applicable to the reporting of breaches, including the manner in which the competent authority may ask the reporting person to clarify the information reported or to provide additional information, the timeframe for giving feedback to the reporting person and the type and content of this feedback;
- the Member States may provide that competent authorities may decide that a reported breach is minor or that it is a repetitive report whose substance does not include any new meaningful information compared to a past report that has already been closed, and that therefore it does not require any follow-up. In all cases, they shall inform the reporting person of the grounds for their decision. Furthermore, the Member States may allow the competent authorities to prioritise the treatment of reports on serious breaches or breaches of essential provisions falling within the scope of this Directive in the case of high inflows of reports.

- **PUBLIC DISCLOSURES** (article 15): if no appropriate action is taken in response to the internal and/or external report within the set timeframe or if the whistleblower believes that there is an imminent danger to the public interest or a risk of retaliation, the reporting person will still be protected if he/she discloses the information to the public (i.e. through web platforms, the press, and social media)
- Article 16 extends the **duty of confidentiality**: any information from which the identity of the reporting person may be directly or indirectly deduced shall not be disclosed to anyone beyond the authorised staff members competent to receive and/or follow-up on reports without the explicit consent of this person. It may only be revealed when this is a necessary and proportionate obligation required by Union or national law in the context of investigations by national authorities or judicial proceedings, in particular, to safeguard the rights of defence of the concerned person. In that case, the reporting person shall be informed (with a written justification explaining the reasons for the disclosure of the confidential data concerned) before his or her identity is disclosed, unless such information would jeopardise the investigations or judicial proceedings.

- Article 18 states that the Member States shall ensure that the competent authorities and the private and public legal entities **keep records of every report received**. The reports shall be stored for no longer than is necessary and proportionate given the requirement imposed on the competent authorities and the private and public legal entities according to this Directive. Personal data which are manifestly not relevant for the handling of a specific case shall not be collected or, if accidentally collected, shall be deleted without undue delay.

- **PROTECTION MEASURES (Chapter VI)**
    - any form of retaliation is prohibited, including threats and attempts of retaliation, whether direct or indirect (article 19);
    - listing the particular forms that retaliation measures can take, the adopted text specifies that the failure to convert a temporary employment contract into a permanent one is relevant only if the worker had legitimate expectations that he or she would be offered permanent employment. It also adds psychiatric or medical references among the forms of retaliation;
    - Article 20 states that during legal proceedings whistleblowers may receive financial and psychological support and that supporting measures may be provided, as appropriate, by an information centre or a single and identified independent administrative authority;
    - Article 21 specifies that persons making a report or a public disclosure in accordance with this Directive shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such reporting or disclosure provided that they had reasonable grounds to believe that the reporting or disclosure of such information was necessary for revealing a breach according to this Directive. This protection should not extend to superfluous information that the person revealed without having such reasonable grounds;
    - in cases where the reporting persons lawfully acquired or obtained access to the information reported or the documents containing this information, they should enjoy **immunity from liability**. The reporting persons should also enjoy immunity from liability in cases where the acquisition of or access to the relevant information or documents raises an issue of civil, administrative or labour-related liability (i.e. where the reporting persons acquired the information by accessing the emails of a co-worker or files which they usually do not use within the scope of their work, by taking pictures of the premises of the organisation or by accessing locations to which they do not

usually have access). If the reporting persons acquired or obtained access to the relevant information or documents by committing a criminal offence, their criminal liability should remain governed by applicable national law. Similarly, any other possible liability of the reporting persons arising from acts or omissions which are unrelated to the reporting or are not necessary for revealing a breach according to this Directive should remain governed by applicable Union or national law;

- in relation to the **burden of proof**, article 21 states that in proceedings before a Court or other Authority relating to a detriment suffered by the reporting person, and subject to him or her establishing that he or she made a report or public disclosure and suffered a damage, it shall be presumed that the detriment was made in retaliation for the report or disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that this measure was based on duly justified grounds;
- the safeguards also apply to persons assisting the whistleblower, such as facilitators, relatives or colleagues;
- the Member States shall take the necessary measures to ensure not only remedies but also full compensation for damages suffered by reporting persons at the conditions set in the Directive;
- appropriate remedies may take the form of actions for reinstatement (for instance, in case of dismissal, transfer or demotion, or of withholding of training or promotion) or for restoration of a cancelled permit, licence or contract; compensation for actual and future financial losses (for lost past wages, but also for future loss of income, costs linked to a change of occupation); compensation for other economic damages such as legal expenses and costs of medical treatment, and for intangible damage (pain and suffering).

- Article 24 introduces a **no waiver of right and remedies clause**: the Member States shall ensure that 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 a pre-dispute arbitration agreement;
- Article 25 adds a **no regression clause:** The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by the Member States in the fields covered by the Directive.