
The Civil Liberties Union for Europe's (Liberties) opinion on the proposal for the Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law

By Éva Simon • Advocacy Officer • Civil Liberties Union for Europe • July 2018

Whistleblowers disclose information on activities that they consider illegal or grossly unethical. There are typical wrongdoings people report about. These can be threats to the public interest or national security, fraud, corruption, misuse of personal or public data, or mismanagement of funds. Because whistleblowers are reporting misconduct, they are vulnerable to retaliation from employers, colleagues, or those who are involved in illegal or unethical activity as beneficiaries. Whistleblowers sometimes lose their jobs, are harassed, or sued. Under-regulated whistleblower protection discourages people from taking the risk and reporting systematic problems or exposing illegal or unethical activities.

Proper whistleblower protection is important for whistleblowers as well as the general public. It sends a strong message that lawmakers protect those who reveal illegal activity for the common good.

Liberties supports the idea of EU-level whistleblower protection, and we therefore support the proposal for the Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law¹ (hereafter, 'draft Directive')². The draft Directive can be considered as a first attempt to protect those who disclose serious misconducts and threats to the public interest at EU level. Whistleblower protection is fragmented across the European Union. With an EU-level Directive, proper whistleblower protection would have a more standardized, cross-sector protection.

Liberties has the following suggestions to create a more effective protection for whistleblowers.

1 COM(2018) 218 final

2 This initiation is in line with the Council of Europe's Civil Law Convention on Corruption. Article 9 of the Convention says: "Protection of employees Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

1. Scope of the Directive

Liberties is of the opinion that both the material and the personal scope of the draft Directive should be broadened. There is no justification to limit the personal scope of the Directive to employment status or other work-related status of the whistleblower. Third parties or people in neutral positions can reveal illegal or grossly unethical activities as well.

The definition of the reporting persons consists of the requirement that the reported information is in the context of his or her work-related activities (Article 3 (9)). This limitation should be removed.

As the “European Parliament resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies”³ states, the role of whistleblowers and the need to protect them „considers that individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees, volunteers, student workers, temporary workers and former employees, as well as citizens, 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”⁴.

2. Channels to use

There are different cases and different circumstances, therefore flexibility is important in the field of whistleblower regulation. Persons who report abuses should have the possibility to decide what is the most appropriate channel for them to report abuses. Lawmakers should not require them to use certain channels to report illegal or grossly unethical activities.

2.a Internal channels

The draft Directive restricts the requirement to set up internal channels to help reporting illegal or unethical activities. There is no justification to oblige only mid-size private companies to establish internal channels and procedures for reporting. It is also unjustified that, in the case of the public sector, only those municipalities with more than 10.000 inhabitants are obliged to establish internal channels. There are countries across Europe where there are a significant number of settlements with fewer than 10.000 inhabitants. Internal channels typically take the form of an electronic

3 Resolution, P8_TA(2017)0402

4 Resolution, P8_TA(2017)0402, point 15.

system, and are therefore easy and cheap to set up, even in smaller settlements.

Accessible internal channels are important for effective anti-corruption measures and other misconduct or activities.

2.b External channels: authorities

The draft Directive requires to set up possibilities for external reporting, which means that misconduct is reported to the competent authorities. The draft Directive uses the attribute ‘competent’ but not the ‘independent’. However, independent and competent authorities form a key safeguard for effectively fighting against illegal activities.

Liberties is of the opinion that ‘independence’ should be a requirement, and only independent authorities should receive and handle reports.

2.c Third parties

Non-governmental organisations, such as anti-corruption NGOs, or organisations for investigative journalists, could help whistleblowers to reveal information. In many cases, these are organisations that people view as more trustworthy than any public-sector organisation. The possibility to turn to these organisations should be supported by the

draft Directive, and protection and safeguards should be offered in these cases.

3. Anonymous report

The draft Directive is a step forward in the creation of high-level whistleblower protection. The draft Directive prohibits the retaliation against whistleblowers, but this prohibition itself will not solve the fear of possible negative consequences. The fear of mistreatment or another negative impact dissuades people from reporting unlawful activities.

The possibility for anonymous reporting would encourage people to take a risk and report illegal or unethical activities. The draft Directive should require both internal and external channels to offer anonymous reporting. It is important to preserve the anonymity of private persons and ensure a proper level of protection of their personal data and identity. It is crucial to use the technology accessible to protect whistleblowers properly. As the Resolution of the European Parliament states, “the option to report anonymously could encourage whistleblowers to share information which they would not share otherwise.”⁵

5 Resolution P8_TA(2017)0402, point 49.

4. Using further safeguards

Liberties supports the idea to use further safeguards to protect whistleblowers. Further safeguards include the possibility of anonymous reporting and the possibility to turn to third parties, such as NGOs, as discussed above.

In addition, economic, legal and physical protections are important safeguards.

Economic protection

Liberties is of the opinion that national and EU-level authorities will need specific support both financially and strategically. The EU should create a fund in order to support internal and external channels, to help with strategic planning, to set up proper technology, and effectively monitor and analyse the information reported to authorities.

Independent NGOs and organisations for investigative journalists should be involved in the strategy-making process and other procedures.

Legal protection

Whistleblowers often break laws themselves, either by accessing information or disclosing information, or both. Sometimes they get access to databases they are not supposed to have access to, they download information without authorisation, they make illegal recordings, or they leak confidential information. Therefore,

whistleblowers often risk civil or criminal procedures.

Liberties is of the opinion that the law should explicitly state that whistleblowers should not to be punished for their unlawful acts if these three conjunctive conditions exist:

- S/he reveals new information to the public;
- that there was no other way to have access to the information except by breaking the law;
- and the harm caused by him or her is proportionate to the resulting benefit to the public good.

Physical protection

Within the last year, two journalists were killed in the EU because of their investigative work. Daphne Caruana Galizia and Ján Kuciak worked as investigative journalists, revealing serious crimes. They both worked with whistleblowers. There are situations when physical protection is needed in order to protect those who reveal unlawful activities. The draft Directive should mention physical protection as a possible means for whistleblower protection.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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