



JUSTICE FOR JUSTICE: PROTECTING WHISTLEBLOWERS IN THE EU

Protection of whistleblowers - the why and the how

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INTRODUCTION

In the past, whistle-blowers have provided a valuable source for tracking and reporting wrongdoing. Incentive structures and protection once they "blow the whistle" can therefore play a crucial role in preventing corruption in the private and the public sector and can be of great help for authorities to detect and discourage violations.

Protecting whistle-blowers in the public sector facilitates the detection of misuse of public funds, waste, passive bribery, fraud and other corruption forms. Protecting them in the private sector facilitates authorities to identify active bribery, corruption activities committed by businesses and helps companies detect and therefore prevent corruption in commercial transactions. Protection of whistle-blowers also occurs to be fundamental for the preservation of the public interest and the generalisation of a culture of transparency and integrity. Despite the importance of protecting whistleblowers, legislation on their protection remains the exception rather than the rule in the EU.

The majority of Member States do not have legislation on whistleblowers protection and the few countries that actually do, have confusing laws that are not always applied. Result being that citizens remain largely unprotected if they decide to report wrongdoing, facing the risk of being fired, jailed or risking judicial proceedings. The potential of fighting practices such as fraud, corruption and other wrongdoings is therefore lost.

Furthermore, the emergence of a daily digital culture as well as the growing use by state actors of legal instruments aiming to gather and access communications data, led to increasing concern on protection of whistleblowers and journalistic sources. It is in fact much easier identifying whistleblowers and investigative journalists in the digital era, making it even harder to speak up against wrongdoing and corruption. This was backed by a report 'Protecting Sources and Whistleblowers in a Digital Age' published by the Institute of Advanced Legal Studies of London that showed that it is increasingly difficult to safeguard anonymity of sources today. Transparency International (TI) who also aims in fighting against these practices cooperates with countries governments, companies as well as civil society in order to stop corruption.

After having realised the relevance of this topic today and the importance of having efficient legislation that protects whistleblowers, this paper aims to draw the attention on the cruciality of adopting whistleblower protection.

In order to do so, this paper firstly views the current situation country by country (I), secondly analyses the level of protection in the EU and the status of procedure for the awaited proposal on whistleblowers (II), thirdly emphasizes the benefits of adopting common protective legislation on whistleblowers (III) and fourthly aims to give recommendations that the Commission should take into account when producing the proposal (IV)

1. CURRENT SITUATION COUNTRY BY COUNTRY

The necessity of improvement is driven not only by the complete absence of legislation, but also by the difficulties of implementation. EU countries are still having trouble even when it comes to finding a common definition of "whistleblowers" and with the view of the means of whistleblower protection.

In order to describe the current situation, it would be important to focus on the European Commissions work so far. Research on the basis of reports made by Transparency International and adjusted via research groups and independent consultants have led to the division of the countries into three groups according to their legislation on whistleblower protection:

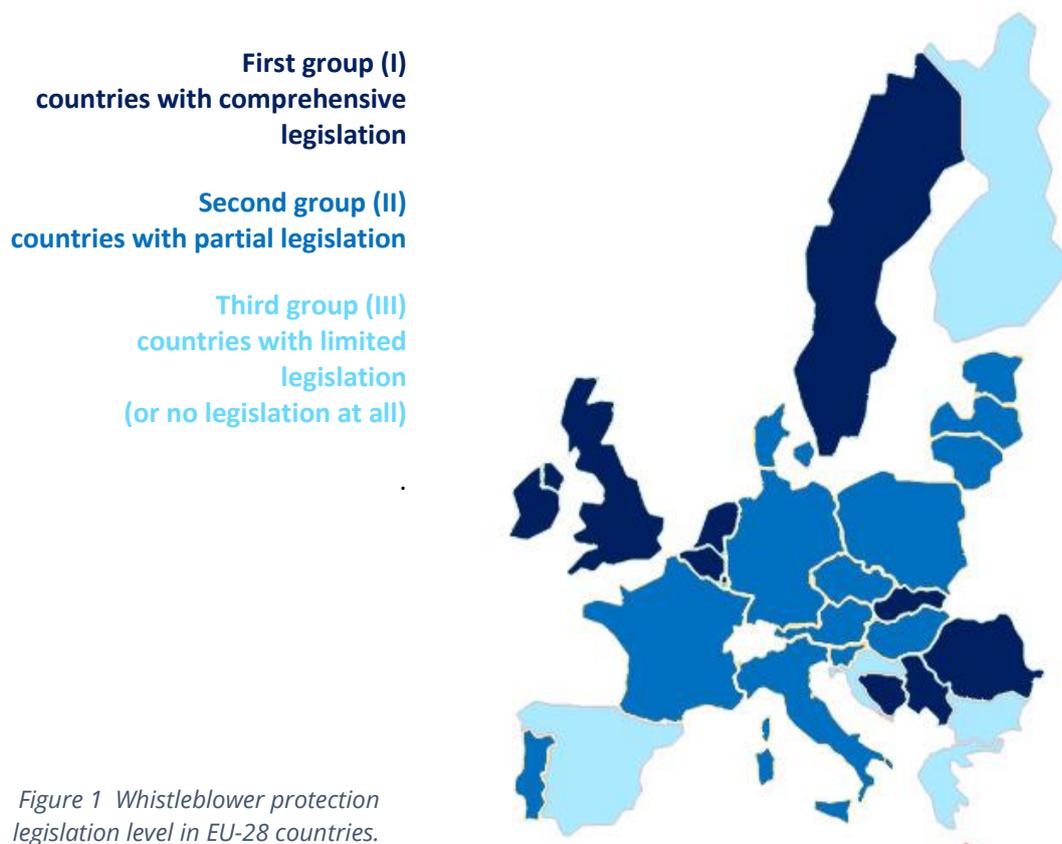


Figure 1 Whistleblower protection legislation level in EU-28 countries.

In Figure 1, we can see the outcome of the research. Dark blue are countries belonging to Group I, blue countries belonging to Group II, and turquoise countries belonging to Group III.

As you can see, the map is dominated with countries of Group II and Group III.

To conduct further research, the Commission excluded the Group III, for the absence of legislation. This action excluded from the research big EU countries such as Greece and Spain.

The table below shows the state of whistleblower protective legislation in some countries from Group I and II:

Country	Law	Level of protection	Year of latest provision	Sectors covered
France	Loi Sapin II – 2016 – 1691	Partial	2016	Public & Private
Ireland	Protected Disclosures Act	Comprehensive	2014	Public & Private
Italy	Legislative Decree 30 Marc 2001, n. 165, art. 54bis	Partial	2012	Public
Netherlands	The Whistleblowers' Center Act (34105/7)	Comprehensive	2016	Public & Private
Romania	Law no. 571/2004	Comprehensive	2004	Public & Private
Slovakia	Act No. 307/2017	Partial	2015	Public & Private
UK	Public interest Disclosures Act	Comprehensive	1998	Public & Private

The disparity of protective whistleblower legislation across the EU can be problematic on many levels. An example: the UK was one of the dominating countries which advanced in development of whistleblowers legislation, but it hosted a lot of workers from Eastern European countries, where protection is much lower, hence, the workers often feared reporting injustice.

Today, most companies have cross border activities and workers are very mobile. It is therefore impossible to have a situation where protection, if there is any, is different from one country to another. EU legislation is therefore necessary.

2. LOW PROTECTION IN THE EU AND CURRENT STATUS OF PROCEDURE FOR LEGISLATION

It has been repeated by international institutions such as the Organisation for Economic Cooperation and Development (OECD), the Council of Europe and the European Parliament, that efficient protection of whistleblowers is a serious tool to help tackle corruption and mismanagement as well as to protect the European Union's financial interests. Transparency International is demanding comprehensive whistleblower protection legislation in EU member States, on EU as well as on international level ensuring that those speaking up to reveal wrongdoing are not punished for it.

It is an essential step to fight corruption and therefore for the betterment of the society in general in the public as well as the private working sphere. It can be qualified as being shameful, that the EU, who values fundamental rights and controls their respect in its Member States does not yet provide such protection. Corruption is still very high in Europe and people do not feel secure to report wrong doing according to the last Eurobarometer of 2017. 68% of Europeans consider corruption being widespread in their country of origin, 73% believe that measures against corruption are inadequate while 79% believe that links between politics and business lead to corruption. In Romania, two out of three people interviewed said that corruption affects them in their everyday life. The Eurobarometer

underlines the outrageously low protection of whistleblowers. 81% of Europeans interviewed responded that they did not report corruption when they witnessed it. Almost half of Europeans are not aware of where they can report corruption and one third of them consider there is a severe lack of protection for those who dare to report wrong-doing and corruption.

The European Commission did a public consultation on the issue pointing out the problematic situation of individuals wanting to report corruption. 85% of the consultations respondents think that people in a working environment rarely report threat to public interest, fearing financial and legal consequences that could follow. The Eurobarometer as well as the public consultation serves as a strong reminder of why this lack of protection needs to be addressed and handled immediately.

The European Commission is finally considering the possibility for introducing horizontal legislation as opposed to vertical legislation on whistleblower protection. The inception impact assessment analysing the impact of the lack of protection of whistleblowers on the EU market, the environment but also on human rights, was published by the Commission and showed that there was extremely solid support (96%) for an - at least - minimum standard of EU law codification for whistleblower protection. It is therefore time for the European Commission to prove its will to drastically reduce corruption in Europe by inserting strong and comprehensive EU horizontal legislation protecting whistleblowers.

In October 2017, the European Parliaments Legal Affairs Committee also called on the Commission to propose legislation on protective whistleblowers legislation across Europe. The legislative proposal is supposed to be made in early 2018

3. BENEFITS OF LEGISLATION PROTECTING WHISTLEBLOWERS

Despite the progressive establishment of a culture of transparency, legislation on whistleblowers can be beneficial on countless levels. Some examples:

- Whistleblowing is beneficial for businesses. World Economics published a study in 2012 showing that on average over 25% of a company's market value is directly related to its reputation. Good company reputation attracts investors and new customers and creates loyalty among current customers while keeping high-performing employees.
- Whistleblowing is essential for the proper functioning of the common market as it promotes the culture of accountability which is necessary for a fair competition
- Whistleblowing intrinsically helps to protect workers' rights as it empowers them to report injustice and contribute to the betterment of their workplace. It also helps them to feel invested in their company. In fact, research documented by David Lewis in "The health, safety and welfare case for requiring an EU Directive on whistleblowing" showed that people who live with wrongdoing but fear raising a concern suffer from physical and psychological damage while being more likely to disengage or leave their jobs.
- Whistleblowing can prevent tax evasion and therefore contribute to the public interest. It is in fact thanks to whistleblowers and investigative journalists that leaked the "LuxLeaks" scandal that changed the momentum of the debate on corporate taxation in Europe
- A report "The role of whistleblowers in the protection of EU's financial interests" adopted in February 2017 also showed that whistleblowers defend EU's financial interests by speaking up
- Whistleblowing is an exceptional mean to unveil corruption. The European Commission's anti-corruption report of 2014 estimated that 120 billion euros is lost annually due to corruption in the EU

In line with preventing the spread of unethical behavior and legal protection, the potential benefits of the protection of whistleblower can be measured empirically. Recent report done by the European Commission focused on counting potential costs and benefits of the potential legislations.

In order to maintain the research, several data sources specializing on this issue has been used: Public procurement data (published by DIGIWHIST, an EU Horizon 2020), Corruption Risk Index, Global Fraud Report, Identifying and Reducing Corruption in Public Procurement in the EU (Study published by PwC and Ecorys, with the support of Utrecht University).

The data was grouped in a way to count both the potential costs of developing the legislation and the potential gains. The costs of developing the legislation has been grouped into categories:

- Development of legislation
- Internal channels
- External channels
- Judicial costs
- Free legal advice

Results for the cost approximation were significantly different for different member states but generally showed that **benefits were much higher than costs**.

In order to count potential benefits two measures have been introduced. First measure was aiming to count the amount of corruption that can be prevented via the 'blow' (meaning, the 'blow' done before the fraud or unethical behaviour has been conducted). But unfortunately, the majority of the reports are received already after the action. The second measure has been introduced in order to incorporate amounts of public money already spent.

In all the observed countries, positive effects of whistleblower protection have been detected. For example, the approximate ratio counted for the Netherlands is 22:1. It means that every euro spent in whistleblower protection can bring the gain of 22 euros. The amplitude of this ratio is different and varies from 1.4:1 in Ireland to 532:1 in Romania.

RECOMMENDATIONS FOR THE UPCOMING PROPOSAL

In October 2017, the European Parliament conducted an own initiative report calling on the Commission to present a horizontal legislative proposal that establishes a comprehensive and common regulatory framework that guarantees a high level of protection for whistleblowers in the EU, in the public and private sectors, in national and European institutions, including related national and European bodies, agencies and offices, and taking into account the national context, without limiting Member States from taking further measures;

As the Commission is now supposed to come up with a proposal as soon as possible, we would like to emphasize the importance of ensuring:

- Broad scope protection: including public and private workers
- Guarantee for protection against severe consequences for those reporting wrongdoings. *This is essential and is not guaranteed currently and prevents people from blowing the whistle.*
- Burden of proof should be on the employer: he should prove that measures taken against his employee were not linked to any divulgation; *Not on the employee as it is currently.*
- Existence of clearly and defined reporting channels available for whistleblowers, giving the possibility to report in cases of emergency or grave attack against public interest;
- Provision of clear remedies available for the whistleblower for any possible consequences of the disclosure, including compensation for lost wages, medical support and legal assistance;

- Anonymity: should be allowed. *This is essential as it is even harder in the digital era we live in.*
- Guarantee confidentiality for whistleblowers. Identity of whistleblowers should only be revealed with his explicit consent.

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