



INSIGHT

TOWARDS COMMON MINIMUM STANDARDS FOR WHISTLEBLOWER PROTECTION ACROSS THE EU

EMANUELA ANDREIS *

ABSTRACT: This *Insight* describes the content of the *Proposal for a Directive on the protection of persons reporting on breaches of Union law*, approved with amendments by the European Parliament and formally adopted by the Council on 7th October 2019. The Directive, which will now be formally signed and published in the Official Journal, aims to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards to protect whistleblowers. This is pursued primarily through a broad definition of them, covering those who, by virtue of work-related activities, both in public and private sector, have privileged access to information about breaches that could cause serious harm to public interest and who may suffer retaliation if they report them. Furthermore, by ensuring clear and confidential reporting channels, available to report both internally and externally the work-place and, under certain conditions, the opportunity of public disclosure. The Proposal provides for a high level of protection: any form of retaliation, whether direct or indirect, is prohibited and punished. If despite this, whistleblowers do suffer retaliation, some measures of protection are envisaged, such as free advice and legal assistance, adequate remedies, the reversal of the burden of proof, immunity for liability, financial and psychological support. Although the legislative proposal represents an essential step towards the protection of whistleblowers, some critical issues persist and are examined in the final considerations.

KEYWORDS: whistleblower – proposal for a Directive - breaches of Union law – reporting channels – protection measures – penalties.

I. INTRODUCTION

On 16th April 2019, the European Parliament¹ voted in an overwhelming majority to adopt at first reading the Proposal for a Directive on the protection of whistleblowers. The new rules, formally adopted by the Council on 7 October 2019, come after a long

* Research Assistant, University of Turin, emanuela.andreis@gmail.com. This publication was funded by the European Union's Internal Security Fund – Police. The content of this *Insight* represents the views of the Author only and is her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

¹ European Parliament Resolution P8_TA(2019)0366 of 16 April 2019 on the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.

decision-making process promoted by civil society organizations,² trade unions, and international organizations.³

The European Parliament demanded action at the EU level on several occasions,⁴ and in its Resolution of October 2017,⁵ it called on the Commission to present a “horizontal legislative proposal” establishing a comprehensive common regulatory framework covering all sectors, both public and private, by the end of the year.

In 2016⁶ the Commission announced that it would have assessed the scope for horizontal or further sectorial instruments to increase the protection of whistleblowers. After carrying out an open public consultation⁷ and an impact assessment, on 23 April 2018, the Commission issued its Proposal for a Directive⁸ accompanied by a Communication⁹ setting out a policy framework at EU level, including measures in support of national authorities. The Directive will now be formally signed and published in the Official Journal of the EU. After that, the Member States will have to implement it within two years.

This *Insight* aims to analyse the content of the Proposal of the Directive given the lack of attention of the existing legal literature on the issue,¹⁰ examining the amendments made during the legislative process and some open questions.

II. THE NEED FOR WHISTLEBLOWERS PROTECTION

Whistleblowing can be an essential mechanism to detect and prevent violations and abuse of law harming the public interest that may otherwise remain hidden. In fact, whistleblowers are often the first to know about such occurrences and are in a privileged position to inform law enforcement authorities or other competent bodies. However, fear of

² Among them, Transparency International, Eurocadres and some NGOs.

³ Such as the OECD, the United Nations and the Council of Europe.

⁴ European Parliament Resolution P7_TA(2013)0444 of 23 October 2013 on organised crime, corruption and money laundering; Resolution P8_TA(2015)0408 of 25 November 2015 on tax rulings and other measures similar in nature or effect; Resolution P8_TA(2015)0457 of 16 December 2015 on bringing transparency, coordination and convergence to corporate tax policies; Resolution P8_TA(2017)0022 of 14 February 2017 on the role of whistleblowers in the protection of EU's financial interests.

⁵ European Parliament Resolution P8_TA(2017)0402 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.

⁶ Communication COM(2016)451 final of 5 July 2016 from the Commission on further measures to enhance transparency and the fight against tax evasion and avoidance.

⁷ See ec.europa.eu.

⁸ Commission COM(2018)218 final of 23 April 2018 from the Commission, *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law*.

⁹ Communication COM(2018)214 final of 23 April 2018 from the Commission on strengthening whistleblower protection at EU level.

¹⁰ Among the papers which have analyzed the proposed Directive, see G. GEORGIAIDOU, *The European Commission's Proposal for Strengthening Whistleblower Protection*, in *Eucrim*, 2018, p. 166 *et seq.*; S. WHITE, *A Matter of Life and Death. Whistleblowing Legislation in the EU*, in *Eucrim*, 2018, p. 170 *et seq.*

retaliation, belief that reports will not be followed-up, the culture of employer loyalty and hostility towards whistleblowers, as well as lack of reporting channels and lack of knowledge of procedures and reporting channels dissuade people from coming forward.

Adequate protection of whistleblowers is essential to safeguard the public interest, to protect freedom of expression and to promote transparency, accountability and democratic governance in general. Furthermore, it is a key tool in enhancing the enforcement of EU law and policies as they provide information that allows for effective identification, investigation and prosecution of breaches of Union law. Notwithstanding this, whistleblowers protection currently available across Europe is fragmented. At the EU level, it is provided only in specific sectors such as financial services, transport safety and environmental protection, and at diversified degree and intensity.¹¹ Several Member States introduced measures to protect whistleblowers, but the level of support and protection varies sharply among them.¹² Currently, only ten EU Member States have comprehensive legislation in place, covering both the public and the private sectors in all areas of national law;¹³ in the others, the protection is either granted in specific sectors or completely absent.

Recent scandals with cross-border implications unveiled by whistleblowers, such as LuxLeaks, Panama Papers and Cambridge Analytica, have demonstrated that a lack of protection in a Member State can have remarkable spill-over effects for others and for the EU as a whole. In fact, the infringements of EU law reported are typically of a cross-border nature or have a cross-border impact.

The Proposal aims to strengthen the enforcement of Union law and policies in areas where violations can seriously harm the public interest. The areas covered include public procurement, financial services, money laundering, product and transport safety, nuclear safety, public health, consumer protection, protection of privacy and personal data, protection of the financial interests of the Union, breaches of internal market rules, including competition and State aid rules or tax avoidance issues. However, the Member States are encouraged, when transposing it, to consider extending its scope of application.

III. THE LEGAL BASIS

In its last Resolution on the issue,¹⁴ the European Parliament stressed that several available legal bases could have enabled the EU to present a horizontal legislative proposal.¹⁵

¹¹ See Annex 5 to COM(2018)218 final, cit.

¹² See Annex 6 to COM(2018)218 final, cit.

¹³ France, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Sweden, Slovakia and the United Kingdom.

¹⁴ European Parliament Resolution P8_TA(2017)0402, cit.

¹⁵ However, the Resolution did not provide examples. Only the Opinion of the Committee on Constitutional Affairs of the European Parliament of 11 September 2017 (2016/2224(INI)) on the Resolution men-

The Commission's Impact Assessment found that the EU Treaties do not provide for a specific legal basis neither for the adoption of general rules on whistleblowers protection, nor in relation to the fight against fraud and corruption, other violations of EU law causing harm to the public interest in key policy areas and hampering the proper functioning of the internal market. Notwithstanding, the Commission stated that certain Treaties Arts. could serve as a legal bases for instruments aimed at strengthening whistleblower protection as a means of improving the enforcement of EU law,¹⁶ and that these could be combined with Treaties provisions relating to other policy domains, depending on the scope of the initiative.

Therefore, instead of a horizontal initiative able to protect whistleblowers in every sector, as recommended by the European Parliament, the Commission chose a sectorial approach covering various aspects of the Single Market and the protection of the financial interests of the EU. The Proposal drafted by the Commission was based, respectively, on Arts 114 and 325 TFEU, combined with Arts 16, 33, 43, 50, 53, para. 1, 62, 91, 100, 103, 109, 168, 169, 192, and 207 of the TFEU and on Art. 31 of the Euratom Treaty.

During the legislative process some amendments were suggested,¹⁷ accompanied by respective changes to the scope of application of the Directive. In particular, the Economic and Social Committee¹⁸ called on the Commission to include the protection of workers' rights under Art. 153 TFEU. However, this option had already been examined by the Commission in its impact assessment and discarded for several reasons. In particular, it stated that a legislative initiative under Art. 153, para. 1, let a) and b), TFEU would have had a very limited personal scope of application, covering only employees, which would not have been compensated by a more comprehensive protection. Indeed, the protection accorded pursuant to Art. 153 TFEU could have been even more limited, as the rules for the protection of whistleblowers could only be granted if required to protect the safety and health of employees in the workplace. Furthermore, such an initiative would have had limited effectiveness in terms of improving the enforcement of EU law, since the focus on the protection of workers' health and safety and their working conditions could entail an increase of the number of reports on work-related individual grievances, and therefore to situations with no cross-border dimension or other spill-over impact.

tioned, as examples, Art.114 TFEU on the approximation of national legislation regarding the functioning of the internal market and Art. 153, paragraph 2, letter b), on the protection of working conditions.

¹⁶ In particular, Arts. 292 (which, however, covers only non-regulatory initiatives), 50, 114, 325 and 153 TFEU.

¹⁷ Five amendments suggested to add Arts 19, para. 2, 77, para. 2, 78, 79, 83, para. 1, 153, 154, 157 and 352 TFEU.

¹⁸ European Economic and Social Committee Opinion of 18 October 2018 on strengthening whistleblower protection at EU level.

The Committee on Legal Affairs of the EU Parliament adopted an Opinion¹⁹ on the appropriateness of the proposed amendments on the legal bases, focused on their procedural compatibility as well as on their compatibility with the measure chosen, i.e. a Directive.

In the final agreement, the co-legislators agreed to delete Arts 33 (related to the strengthening of customs cooperation within the Union), 62 (which sets out the procedure to adopt measures relating to services), 103 (referred to competition issues) and 109 (which stipulates the procedure for state aid measures) from the list of legal bases. In fact, these policy areas could be well covered by Art. 114 TFEU, which is the primary reference point for the approximation of Member States' laws to improve the functioning of the internal market. Art. 207 TFEU was deleted too for its procedural incompatibility with a Directive, as it solely allows the adoption of Regulations.

In its second opinion on the legal basis of 25 March 2019,²⁰ the Committee on Legal Affairs of the EU Parliament stated that the legal bases established in the Directive as recently approved is appropriate, given the policy areas and measures covered by its text.

However, the Parliament left the possibility to assess, at the time of the review following the implementation of the Directive, the extension of the scope of this instrument to further Union acts or areas, in particular to improve the working environment, to protect workers' health and safety and working conditions. This would entail including Arts 153 and 157 TFEU in the list of legal bases.

IV. CONTENT OF THE PROPOSAL

IV.1. WHISTLEBLOWERS AND THEIR REPORTS

The Proposal concerns the broadest range of categories of persons possible.

Whistleblowers are defined as people who report or disclose information on breaches acquired by virtue of their work-related activities, regardless of their nature, whether they are paid or not and whether the work-relationship has already ended or is yet to begin, both in the private or public sector. More specifically, the definition refers to employees -including civil servants-, self-employees, shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, in-

¹⁹ Opinion of the Committee on Legal Affairs of EU Parliament JURI_AL(2018)629554 of 25 October 2018 on the legal basis for the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law. The Committee identified as possible additions only Arts 77, para. 2, 78, para. 2, 79, para. 2, 153, para. 1, let. a), b) and e), and 157, para. 3, TFEU, as they provide for the ordinary legislative procedure and so were compatible with it.

²⁰ Opinion of the Committee on Legal Affairs of EU Parliament JURI_AL(2019)637335 of 25 March 2019 on legal basis of the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.

cluding non-executive members, volunteers, trainees and any persons working under the supervision and direction of contractors, subcontractors and suppliers.

The Proposal guarantees protection to all of them who report both actual and potentially unlawful activities or abuse of law related to the Union acts and areas falling within the scope of the Directive.

The new rules lay down certain conditions for access to such protection. First of all, only reports intended to safeguard the public interest are allowed. For this reason, the Directive does not cover interpersonal grievances and requires that whistleblowers have reasonable grounds to believe that the information reported was accurate at the time of reporting and that the information fell within the scope of the Directive. This is an essential safeguard against malicious and frivolous or abusive reports, ensuring that those who deliberately and knowingly report wrong or misleading information do not enjoy protection. Conversely, whistleblowers should be entitled to protection if they made an inaccurate report in honest error or if they do not provide positive evidence but raise reasonable concerns or suspicions. The new rules do not in any way take into account the whistleblowers' motive for reporting. Secondly, to benefit from the protection, whistleblowers must necessarily report breaches through the channel provided by the Directive.

Anonymous whistleblowers do not benefit from the protection granted by the Directive. The Commission Proposal did not even take into consideration anonymous reports, the inclusion of which was instead strongly recommended by the European Court of Auditors and the European Social and Economic Committee. The European Parliament amended the draft, by including the possibility for the Member States to decide whether or not to follow them up and stating that anonymous whistleblowers subsequently identified shall nonetheless qualify for protection.

IV.2. REPORTING CHANNELS

Whistleblowers can report internally to their work-place, externally or directly to the public.

One of the most controversial points of the Commission Proposal was the three-tier reporting process: they were generally required to use internal channels first; if these channels did not work or could not reasonably be expected to work, they could have reported to the competent authorities, and, as a last resort, to the public. The European Parliament succeeded in changing this provision, leaving whistleblowers free to choose the most appropriate reporting channel, although public disclosure is still subject to certain conditions.

All legal entities in the private sector with at least 50 employees and all public legal entities must establish internal reporting channels and designate a person or a department responsible for following up on the reports. The text approved by the Parlia-

ment provides for some exceptions to this general rule,²¹ and for the possibility to share internal reporting channels between municipalities or legal entities in the private sector with less than 250 employees.

Whistleblowers can report violations to authorities identified by the Member States, such as judicial authorities, regulatory, supervisory or anti-corruption bodies, or to the competent EU institutions, bodies, offices and agencies. These authorities should put in place independent and autonomous reporting channels and provide for dedicated staff members trained for receiving and following up on reports.

Both internal and external reporting channels must be designed, set up and operate securely to ensure confidentiality and must enable the storage of durable information to allow for further investigations. Any information from which the identity of the whistleblower may be deduced has to be held confidential and must not be disclosed without his/her explicit consent to anyone beyond the authorised staff members. It may only be revealed in the case of a necessary and proportionate obligation required by Union or national law, in the context of investigations by national authorities or judicial proceedings, by informing the reporting person.

The Proposal acknowledges the importance of whistleblowers involvement after their reports to build trust in the effectiveness of the overall system. Regardless of the reporting channel used, they must receive an acknowledgment of receipt of the report within no more than seven days and a feedback about the follow-up to the report within three months. These time frames may be derogated in some specific cases of external reports.²² Meanwhile, the competent person or department shall maintain communication with and, where necessary, ask for further information from the whistleblower, albeit with no obligation to do so.

One of the factors that have a dissuasive effect on potential informants is the lack of knowledge on whether, how and where to report breaches and what protection is available.²³ To overcome this, the Proposal aims to provide all the elements useful for making an informed report through the appropriate channels, imposing information obligations on all entities and authorities obliged to set up reporting channels. Furthermore, the Member

²¹ All financial services firms and firms vulnerable to money laundering or terrorist financing, irrespective of their size, must establish internal reporting channels. The Member States may further extend the rules to micro and small companies and may exempt public entities with less than 50 employees or municipalities with less than 10.000 inhabitants.

²² The seven-days deadline may be derogated by an explicit different request by the reporting person or by an assessment by the competent authority that reasonably believes that acknowledging the report would jeopardise the protection of the reporting person's identity. The three-month timeframe could be extended to six months in duly justified cases which may require a lengthy investigation.

²³ The 2017 Special Eurobarometer on corruption found that 49% of respondents would not know where to report corruption if they were to experience or witness corruption. Only 15% of all respondents to the Commission's Open Public Consultation had knowledge of existing rules on whistleblower protection in their country of residence or establishment.

States must ensure that every person has access to comprehensive, impartial and easily accessible information and free advice on the procedures and remedies available.

The Proposal also provides protection to those who publicly disclose information in some specific cases. These are when, despite the internal and/or external report made, the breach remains unaddressed or when whistleblowers have reasonable grounds to believe that there is an imminent or manifest danger for the public interest or a risk of irreversible damage, or, in case of external reporting, there is a risk of retaliation or low prospect of the breach being adequately addressed.

IV.3. PROTECTION MEASURES

Fear of retaliation is what deters potential whistleblowers from reporting most. The Proposal overcomes this by prohibiting and sanctioning any form of retaliation, including threats and attempts of it, whether direct or indirect, that causes or may cause unjustified damage, such as dismissal, demotion, coercion, harassment, discrimination, damage or financial loss, blacklisting or early termination or cancellation of a contract for goods or services. The Parliament amendment specifically emphasizes situations of damage to reputation caused “particularly in social media” and “psychiatric or medical referrals”.

The Proposal provides for several measures of support in favour of reporting persons who suffered retaliation, including free access to comprehensive and independent information and advice on available procedures and remedies, as well as access to legal aid. The Member States may provide also for financial and psychological support. Furthermore, whistleblowers should have access to legal remedies as appropriate, including interim relief pending the resolution of legal proceedings, and full compensation for actual and future financial losses and other economic damages.

Retaliatory measures may be formally adopted on grounds other than the reporting, and it can be complicated for whistleblowers to prove the link between the retaliatory measures and the reporting. Therefore, the adopted text provides for the reversal of the burden of proof in judicial proceedings: once the whistleblower has demonstrated that he/she made a report or public disclosure and suffered a detriment, it is up to the person who took the detrimental action to prove that it was based on duly justified grounds not connected with the report or disclosure.

As a further protection measure for whistleblowers, reporting persons should not incur any liability in case of violation of legal or contractual obligations, such as loyalty clauses in contracts or confidentiality/non-disclosure agreements, providing that their reporting or disclosure was necessary to reveal a breach according to the Directive. Conversely, it does not protect the disclosure of information subject to medical and legal professional privilege.

In judicial proceedings, including for defamation or breach of copyright, trade secrets, confidentiality and protection of personal data, whistleblowers have the right to rely on reporting or disclosure according to the Proposal to seek dismissal of the case,

provided that they had reasonable grounds to believe that the reporting or disclosure was necessary to reveal the breach.

The amendments to the proposal clarify that whistleblowers are immune from the liability for acquiring or accessing relevant information as long as it does not constitute a self-standing criminal offence.

Following the amendment of the Parliament, the measures for the protection of reporting persons shall also apply to facilitators and to 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.

IV.4. PENALTIES

The Proposal provides for an obligation to adopt effective, proportionate and dissuasive penalties to discourage individuals or legal entities from hindering reporting, taking retaliatory measures or starting vexatious proceedings against whistleblowers, or breaching the confidentiality of their identity. This provision will oblige the Member States that have not yet envisaged any form of sanction in their legislation to do so.²⁴

According to Recital no. 104, the nature of penalties could be criminal, civil or administrative. However, the adopted text does not specify which types of sanctions correspond to the different action taken against whistleblowers.

In several Member States those who take retaliatory measures against whistleblowers are subject to criminal sanctions,²⁵ disciplinary procedure²⁶ or mixed administrative penalties and compensation.²⁷ Those who breach the confidentiality of the identity of whistleblowers in some Member States are sanctioned alternatively with imprisonment or with a fine;²⁸ in others only with a pecuniary penalty,²⁹ or even not sanctioned at all.³⁰ Even for those who hinder reporting, several Member States already provide for criminal and pecuniary sanctions.³¹

²⁴ Such as Austria, Denmark, Estonia, Germany, Greece, Spain and Sweden.

²⁵ E.g. in Croatia, in the private sector, unfair dismissal based on the ground of a corruption report is punished up to a three-year prison sentence. In Ireland penalties for retaliators are determined according to the criminal code.

²⁶ In Belgium, for the author of the act of retaliation.

²⁷ In Slovenia who take retaliatory measures against a whistleblower have to pay fines from € 400 to € 4.000 and compensation.

²⁸ In France any breach of confidentiality can lead to a two years prison sentence and a €30.000 fine. In Portugal, in relation to reporting money laundering and the financing of terrorism it can lead up to three years of imprisonment, or a fine.

²⁹ In Bulgaria those examining the report who disclose the identity or make public any facts in connection with the report are subject to a fine from BGN 1.000 to 3.000.

³⁰ E.g. in Austria, Germany, Netherlands, Romania, Spain, Czech Republic.

³¹ E.g. in France those actions are sanctioned with up to one year imprisonment and €15.000 fine.

The adopted text provides also for full compensation of damage suffered by whistleblowers in accordance to national law as a dissuasive measure, including compensation for actual and future financial losses, compensation for other economic damages such as legal expenses and costs of medical treatment, and for intangible damage.

Although the European Social and Economic Committee suggested the repeal of penalties for those who deliberately and knowingly make false or misleading reports or public disclosures, as defamation and false accusation are crimes already punished in the Member States, the final text confirms this forecast to deter malicious reporting further and preserve the credibility of the system.

IV.5. PROTECTION OF THE CONCERNED PERSONS AND LEGAL ENTITIES

The proposed Directive focuses on the protection of whistleblowers while also trying to protect the persons affected by reports, whether individuals or entities, that can suffer severe damage from malicious or abusive reports. Only a concise article deals with their protection, stating that the Member States shall ensure that they fully enjoy the rights to an effective remedy and to a fair trial, the presumption of innocence and the rights of defence, including the right to be heard and to access their file. Their identity should be kept confidential for as long as the investigation is ongoing and they should be entitled to compensation following national law where a deliberately and knowingly inaccurate or misleading report or public disclosure caused them direct or indirect prejudice.

However, the Proposal repeatedly discourages malicious or abusive reports by providing for specific conditions for access to protection as well as penalties. Especially in this case it is essential that the sanctions are proportionate so as to guarantee that they do not have a dissuasive effect on potential whistleblowers. They are likely to be criminal or civil, as in several Member States defamation and false accusation are punished according to the criminal code and obliges those who made knowingly false declarations to compensate for the damages.

V. FINAL CONSIDERATIONS

The Proposal under consideration represents an essential step towards strengthening the protection of whistleblowers: for the first time, the EU will adopt minimum standards aimed at guaranteeing a high and common level of protection across the Member States. All this through a delicate balance between the rights of whistleblowers and those of the concerned persons, trying to encourage reports but at the same time discouraging malicious whistleblowing, and preventing unjustified reputational damage. However, even if the text approved by the European Parliament adds further guarantees compared to the Commission's Proposal, still some critical issues can be detected.

First of all, although very broad, the scope of application does not include all areas of EU law, but only those explicitly identified in the draft Directive and its annexes. This could

create problems in the implementation phase. As observed by the European Court of Auditors,³² it could be difficult for a potential whistleblower to make a complex assessment as to whether a particular “report” or “disclosure” would justify protection against retaliation. This is only partly mitigated by the possibility to access free information, advice and assistance, whereas the chance given to the Member States to extend the scope to other areas is rather weak. However, the Commission found that there were no conditions for a different approach, such as the adoption of a horizontal initiative.³³

In particular, the Directive does not apply to whistleblowing concerning labour rights and working conditions. The Commission had thoroughly examined the issue in the Impact Assessment not considering a legislative initiative based on Art. 153 TFEU possible; we will see if, at the time of revising the Directive, the opportunity foreseen by Parliament to extend the scope to cover these areas these sectors is allowed.

The Proposal amended by Parliament has tried to limit the impact for public and private entities that must introduce internal reporting channels through the provision of thresholds for the applicability of this obligation, the possibility of sharing resources, and of using channels provided externally by third parties. However, no penalties have been envisaged if the entities neither set up internal channels and reporting procedures, nor follow up on the reports, nor comply with the other obligations provided by the Directive. Several Member States already have such penalties in place³⁴.

Another issue is that the Proposal³⁵ does not provide financial rewards for whistleblowers.³⁶ Conversely, e.g. in the US, financial award systems date back to the False Claims Act,³⁷ adopted in 1863, concerning fraud against the government. The Internal

³² European Court of Auditors Opinion no. 4/2018 of 9 November 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.

³³ See *supra*, section III.

³⁴ E.g. in Slovakia the penalty for not setting up the internal reporting channel or not dealing with the whistleblower report can be up to € 20.000. In Italy the National Anti-Corruption Authority applies the pecuniary administrative sanction from €10,000 to €50,000 euro to the supervisor if there are no procedures for forwarding and managing reports or do not comply with the law.

³⁵ Instead, in its EU Market Abuse Regulation, the European Commission allowed the use of financial incentives to incentivize more employees to reveal breaches of the Market Abuse Regulation. It provided the possibility for the Member States to offer financial incentives to who provide information for infringements of the Regulation in accordance with national law, provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of the Regulation. Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, Art. 32, para. 4.

³⁶ On this issue, D. KAFTERANIS, *Rethinking financial rewards for whistleblowers under the Proposal for a Directive on the protection of whistleblowers reporting breaches of EU law*, in *Nordic Journal of European Law*, 2019, p. 38 *et seq.*

³⁷ False Claims Act, para. 3729-3733.

Revenue Service rewards those who provide information related to tax concerns,³⁸ and the 2010 Dodd-Frank Act³⁹ allows the Securities and Exchange Commission to offer financial rewards to whistleblowers in the financial sector. Reward programs in the US allow whistleblowers to receive a percentage of the fine imposed on the company or person who commits wrongdoing. The range is usually between 15-30% of the sanctions against the company and of the money recovered, and it is determined by the centrality of the whistleblowers' information in discovering and sanctioning infringements.

Several studies have analyzed the effectiveness of whistleblowing reward programs,⁴⁰ showing that such measures increase the amount of disclosure, internal compliance and public awareness. A research on the behaviour of managers and employees induced by the US bounty scheme⁴¹ under the Dodd-Frank Act highlighted that, to increase reporting, the rewards must be high enough to compensate for the retaliation charges. Another research⁴² showed the benefits on reducing public spending, as using a whistleblower and a reward programme is cheaper than relying on police officers. Conversely, others suggest that such rewards can lead to negative consequences which may outweigh the benefits, as they could incentive false or opportunistic reports and may cause distrust amongst employees.⁴³ Evidence from the US, however, suggests that this has not been a significant issue. A recent study highlighted that an appropriate balance between rewards for whistleblowers, sanctions for fraudulent reporting and Court's standards of proof is essential for whistleblower policies to succeed.⁴⁴

The European Commission discussed the issue in its Impact Assessment stating that such systems have not been adopted in the majority of the Member States, except Slovakia,⁴⁵ because they would divert the purpose of reporting in the public interest to the personal gain of whistleblowers, thus making whistleblowing appear as a commercial transaction. Additionally, the introduction of such rewards might be considered in

³⁸ Internal Revenue Code of 1986, amended by the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922.

³⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, para. 922.

⁴⁰ For a recent overview, T. NYRERÖD, G. SPAGNOLO, *Myths and Numbers on Whistleblower Rewards*, in *Stockholm Institute of Transition Economics Working Paper*, no. 44, 2017, ssrn.com.

⁴¹ B. FRANKE, H. MOSER, D. SIMONS, *A Carrot Without a Stick - Whistleblowing Rewards Under the Dodd-Frank Act*, 2018, available at ssrn.com.

⁴² Y. GIVATI, *A Theory of Whistleblower Rewards*, 2015, available at ssrn.com.

⁴³ R. HOWSE, R.J. DANIELS, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy*, 1995, available at repository.upenn.edu.

⁴⁴ P. BUCCIROSSI, G. IMMORDINO, G. SPAGNOLO, *Whistleblower Rewards, False Reports, and Corporate Fraud*, 2017, available at ssrn.com.

⁴⁵ The recently adopted Act No. 54/2019 establishes the Office for Whistleblowers' Protection which may provide the whistleblower, who has performed a qualified notice, a reward up to the amount of 50 times the minimum wage. Other reward measures were already provided by law n. 151/2014 which amends law no. 136/2001.

conflict with European Court of Human Rights case-law.⁴⁶ These measures must be balanced with the different socio-cultural context. The different propensity of the EU is determined by a legal tradition in which the reporting person does not necessarily have positive connotations.

Financial rewards may discredit whistleblowers in general, encourage inappropriate disclosures and undermine attempts to implement a considered and balanced whistleblowing regime. However, other forms of compensation could be useful to foster the development of a culture of openness and transparency. These could include professional or social recognition - if agreeable to the whistleblower - for having prevented harm to the organization or society or awards.

Another difference with the US⁴⁷ is that the proposed Directive does not protect whistleblowers who report anonymously, even if recommended by the EU Parliament. Introducing such safeguard could contribute to spread whistleblowing in the current cultural context in which individuals are reluctant to report. However, anonymity raises some issues. Anonymous reports are sometimes considered to be less credible and can be much more difficult to investigate as the entity cannot maintain contact with the unidentified reporter. Otherwise, an intermediate solution could be to foresee, among the various reporting channels, the use of technological tools with identification codes assigned to the reporting persons that does not allow those who receive the report to know the identity of the whistleblower but at the same time enable the recipient of the reports to interact with him/her.

It will be of outmost importance that the Member States transpose the Directive in its full spirit and even push higher the protection where possible, ensuring a comprehensive and coherent framework at the national level. This must be accompanied by the acknowledgement of the important role played by whistleblowers in society, e.g. through awareness-raising campaigns, fostering an ethical culture in the public sector and workplaces focused on trust, honesty, decency, accountability and fairness. Training days and information documents should be available to let employees and those coming into contact with the legal entity know in advance exactly how their report is going to be handled. Furthermore, companies should effectively sanction transgressions and give periodic nameless communication of how many violations of the rules have occurred and the consequences they have had, to make employees sure that the company is taking reports and violations seriously which in this way are also discouraged.

The Commission will receive from the Member States an implementation report and will present it to the European Parliament and the Council two years after the dead-

⁴⁶ According to which whistleblowing "motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection". European Court of Human Rights: judgment of 21 July 2011, no. 28274/08, *Heinisch v. Germany*, para. 69; judgment of 12 February 2008, no. 14277/04, *Guja v. Moldova*, para. 77.

⁴⁷ Sarbanes-Oxley Act, Pub. L. 107-204, Section 301, para. 4; Dodd-Frank Act, cit., para. 922.

line of transposition. An additional report evaluating the effectiveness, efficiency and overall coherence in enforcing EU law would be submitted six years after that deadline. That will be an opportunity to assess the need for additional measures, including, where appropriate, amendments to extend whistleblower protections to further areas or Union acts and to provide even higher minimum standards.