

UNI Europa response to the EU public consultation on Whistleblower Protection

UNI Europa, the European trade union federation for services sector workers, represents seven million workers in 13 sectors that constitute the backbone of economic and social life in Europe. Within UNI Europa, our Professionals & Managers (P&M) group represents approximately 970,000 P&M members across Europe, whilst UNI Europa's Finance sector represents 1.7 million employees in the banking and insurance industry.

UNI Europa has been a key player in the platform set up in 2016 by Eurocadres (the European Council of Professional and Managerial Staff). The platform consists of different European and national trade union organisations and confederations, as well as NGOs, calling for EU-wide whistleblower protection. A web site (<https://whistleblowerprotection.eu/>) was set up to collect signatures and it has, to date, got the back of 82 organisations and more than 5,100 individuals.

UNI Europa believes that EU-wide whistleblower protection can save lives, money and the environment. EU protection should cover all fields of horizontal competence as well as unlawful acts and wrongdoings (it should not just be limited to illegal acts). Any reports on wrongdoings should also be treated anonymously and efficiently.

European businesses increasingly have cross-border or multinational operations and therefore EU-wide whistleblower legislation would ensure that workers are treated equally across borders. Whistleblowing is, in most cases, related to the protection of workers. Usually the person who blows the whistle detects a wrongdoing related to their work organisation. According to a report by Public Services International, the number of workers who have needed whistleblower protection during their career is as high as seven per cent.¹ The same report also shows that most whistleblowers try several times to report the same issue using their internal enterprise channels. It is only when this approach does not work that whistleblowers seek to report externally. Going to the media is usually the last resort.

The European Commission's own Special Eurobarometer on Corruption² has reported that 31 per cent of respondents state the lack of protection as a reason for not reporting corruption. One way to ensure whistleblowers are deterred from reporting is to make it unclear if there would be appropriate protection. This is not an acceptable situation. Another deterrence often manifests itself in cross-border and cross-sectoral activities, where a lack of minimum protection across sectoral and geographical borders is a barrier to reporting, making it difficult for potential whistleblowers to assess the legal situation.

UNI Europa would like to see an EU Directive on whistleblower protection that covers both standard and non-standard forms of employment (i.e. freelancers, temporary agents, interns, contractors etc.) covering all stages of an employment process (starting from the recruitment process). It is important to add that European Works Council representatives also need protection so that they are appropriately excluded.

Clear rules and safeguards are needed in whistleblower legislation. Malicious or abusive reporting should be prevented at all costs: all disclosures must be made in good faith. Reversed burden of proof is a key provision in any whistleblower legislation. An employer would be required to present proof of motive when a whistleblower has lawfully shown that

¹ http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf

² Special Eurobarometer 397 (2014), p.106
http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf

reprisals were an issue. Furthermore, the right to remain anonymous is vital both when disclosing information internally as well as externally. When disclosing externally to the media, journalists need to guarantee that they will not reveal their source.

Public and private bodies would benefit from legislation on whistleblower protection. Tax evasion, fraud, misuse of funding in public and private procurement processes are big enough economic reasons for going forward with legislation. The risk to Member States includes being deprived of potential tax income, or the opportunity to apply the rule of law or to undertake its regulatory responsibilities unimpeded. It is also important to note the benefit arising from whistleblowers about undisclosed detail of environmental damage, public health concerns, or human rights violations. Equally, it is not always self-evident which practice, now or in the past, might have consequential impact on public health in the future.

The status quo is that many potential whistleblowers are afraid to report a wrongdoing because of numerous concerns, including: prejudicial risk to their career prospects, a risk to the stability of their income, facing retaliatory mistreatment, discrimination or harassment. As we have witnessed in some highly publicised whistleblower cases, insufficient legal aid and limited help, if any, to cover legal costs make it unbearable for the individual who blows the whistle. Harassment of whistleblowers and their families must also be taken extremely seriously.

We urge the Commission to go forward with an EU Directive on whistleblower protection. There is no good reason not to have legislation in place. Most EU Member States do not have explicit legislation in place and tackling cross-border cases can prove to be extremely complicated (e.g. the Dieselgate scandal, LuxLeaks, etc.). The legal provisions could build on the Council of Europe recommendation³ and should, most importantly, cover both the public and private sectors. To find the right legal basis is a concern, as it should be horizontal in nature and not be narrowed down to only sectoral level.

Furthermore, a European public awareness campaign to highlight benefits of whistleblowing for public and private interest would be crucial. Whistleblowers are unfortunately still seen as disloyal or traitorous in some countries. This misconception needs to change. The public has shown an increasing awareness and concern because of recent global tax-related wrongdoings, which would not have been revealed without whistleblowers. The public sees it as a matter of justice and equality before the law that steps are taken to ensure that wrongdoing can be identified and stopped.

I. Perceptions and opinions on whistleblower protection

Do you think that whistleblowing should be protected?

- Yes
- No
- Don't know

To your mind, how often are workers reporting their concerns about threats or harm to the public interest?

- Very often

³ <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnRvcveG1sL1hSZWYvWVDJILURXLWV4dHluYXNwP2ZpbGVpZD0xNzg1MSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJIZi1XRC1BVC1YUWYUERGLnhzbA==&xslparams=ZmlsZWlkPTE3ODUx>

- Often
- Rarely
- Very rarely
- Don't know

To your mind, which of the following are the most important reasons why a person might decide not to blow the whistle?

Please rate importance, 1: very important, 2: important, 3: somewhat important, 4 not important.

- Do not know how/where to report – 1
- Threat or harm to the public interest difficult to prove – 1
- No action will be taken to remedy the wrongdoing – *don't know*
- Fear of legal consequences – 1
- Fear of financial consequences – 1
- It would be an act of disloyalty – 2
- It would be a breach of professional privilege – 2
- Negative attitudes towards whistleblowers – 1
- Fear of bad reputation – 1
- Other – 1

Please specify

Being unaware/unsure of procedure and potential ramifications (decrease in pay/promotion, exclusion from peer groups, considered a 'snitch', psychologic/physical harm) leads all but the most ardent whistleblowers not to report wrongdoing. Figures show a majority of Danish financial sector whistleblowers, even with relatively strong protection, chose to report problems only under promise of complete anonymity –making investigations more difficult. We need channels allowing all types of reporting.

To your mind, what are the BENEFITS of rules obliging public and private sector organisations to protect whistleblowers?

Please rate importance: 1: very important, 2: important, 3: somewhat important, 4 not important.

- Strengthen compliance with the law by public authorities and businesses – 1
- Strengthen freedom of expression – 1
- Help to improve companies' economic performance – *don't know*
- Foster a workplace culture of transparency and accountability – 1
- Increase workers' motivation – 1
- Enhance workers' wellbeing – 1
- Other benefit (please specify)

Please use the space below if you have further comments

Using financial sector experiences as a benchmark, the biggest revelations since the crisis have come thanks to whistleblowers. Journalists / regulators simply do not have the insight to catch all transgressions. This is the case in both public and private enterprises and having rules in place to protect whistleblowers is one of the only ways to ensure some threat of accountability that can lead to the wrong-doers reconsidering. Prevent the crime before it happens should ultimately be the goal.

To your mind, in which areas are rules on whistleblower protection beneficial?

Please rate importance: 1: very important, 2: important, 3: somewhat important, 4 not important.

- Contribute to the fight against fraud and corruption – 1
- Contribute to the proper management of public (national and EU) funds – 1
- Improve investors' trust – *don't know*
- Contribute to the fight against tax evasion and tax avoidance – 1
- Enhance protection of public health and safety – 1
- Enhance food safety – 1
- Enhance the protection of the environment – 1
- Encourage fair competition – 1
- Other benefit (please specify)

Please use the space below if you have further comments

Protection concerns public interest, employees, employers, and health and safety. Market inefficiencies/fraud can be easily resolved. Minimum protection levels make cross-border company / worker mobility smoother. Some disclosures can lead to safer public health standards. Following the principles laid out in MiFID II, CRD IV, IDD II, MAR/MAD legislation have proven beneficial for the financial sector. Applying the same general principles to other sectors should prove just as beneficial.

To your mind, what are the DRAWBACKS of rules obliging public and private sector organisations to protect whistleblowers?

Please rate importance, 1: very important, 2: important, 3: somewhat important, 4 not important.

- Encourage false reporting or over reporting – 4
- Undermine the general public's confidence in public institutions if information considered secret or protected is divulged by civil servants (e.g. personal tax information) – 4
- Undermine mutual trust in the workplace – 4
- Imply significant administrative burdens / costs for the private sector – 4
- Imply significant administrative burdens / costs for the public sector – 4
- Undermine trust between companies / business partners – 4
- Undermine trust between clients and service-providers (e.g. legal advisors, tax advisors, accountants, consultants) – 4
- Damage business reputation/trust in public institutions – 4

- Encourage the leaking of confidential know-how and business information (trade secrets) – 4
- Other drawback (please specify)

Please use the space below if you have further comments

With verification procedures and reporting tools that eliminate mis-reporting, negative consequences to society are very limited. After all, employees are interested in the survival and thriving of their workplace, so their incentive to whistleblow only to cause problems is very limited and will by far outbalance the benefit to society.

We need clear rules and regulations on what is allowed / burden of proof for malicious intent. Bad business practices must not lead to competitive advantages.

In your opinion, which of the following aspects that raise awareness of whistleblower rights and procedures are important for effective whistleblower protection?

Please rate importance, 1: very important, 2: important, 3: somewhat important, 4 not important

- Clear definition in law of the threats to the public interest covered by whistleblower protection – 3
- Clear general information and awareness raising policies by the state (e.g. information campaigns) concerning rights of whistleblowers (including on advice and assistance) and applicable procedures – 1
- Clear information by private or public sector organisations to their employees concerning rights of whistleblowers (including on advice and assistance) and relevant internal procedures – 1
- Clear information and awareness raising by trade unions concerning rights of whistleblowers (including on advice and assistance) and applicable procedures – 1
- Other (please specify)

Please use the space below if you have further comments

While potential whistleblowers will ask trade unions for advice on how to report, information about procedures should always be widely available, provided by neutral parties. Listing different sectors / categories risks excluding others. Definitions must be broad to cover all fields e.g. all workers irrespective of working or contractual relationship. Whistleblowing needs awareness-raising by governments, workplaces, trade unions and civil society, with resources and training on procedures.

In your opinion, which of the following aspects are important for effective whistleblower protection?

Please rate importance: 1: very important, 2: important, 3: somewhat important, 4 not important

- Channels in organisations/businesses for internal reporting of wrongdoings – 1
- Channels for reporting of wrongdoings to oversight institutions – 1
- Protection in case of disclosure to the public (e.g. media, web platforms, etc) where channels for internal reporting and for reporting to oversight institutions are not

available, not functioning properly (or cannot reasonably be expected to function properly) – 1

- Proper investigation of the whistleblower reports or disclosures – 1
- Protection against retaliation at work – 1
- Protection of whistleblowers in administrative proceedings – 1
- Exemption of whistleblowers from criminal liability – 1
- Immunity from civil action for damages – 1
- Financial support covering the costs of legal proceedings – 1
- Psychological support – 1
- Other (please specify)

Please use the space below if you have further comments

Both public and internal company channels must be available, allowing the whistleblower to choose which they find appropriate based on the severity of the claim. Guaranteed anonymity should also be ensured to avoid reprisals and rescinded statements. Rules and procedures must be clear. In case of disclosure to media, usually the last resort, protection of journalists' sources is vital. An economic safety net for the whistleblower and funding for covering legal costs should exist.

In your opinion, which of the following aspects of protection against retaliation at work are important for effective whistleblower protection?

Please rate importance: 1: very important, 2: important, 3: somewhat important, 4 not important.

- Protection of confidentiality of whistleblower's data, including where latter is anonymous but identifiable – 1
- Protection against dismissal, e.g. interim relief to suspend dismissal, right to reinstatement in the work place, etc. – 1
- Protection against suspension – 1
- Protection against demotion – 1
- Protection against loss of promotion opportunities – 1
- Protection against punitive transfers – 1
- Protection against reductions in or deductions of wages – 1
- Protection against harassment by superiors and/or colleagues – 1
- Reversing the burden of proof so that, in a prima facie case of retaliation, the employer carries the burden to demonstrate that any measure taken against a whistleblower is not related to a whistle-blower's disclosure – 1
- Protection against blacklisting – 1
- Financial support to cover costs of legal proceedings – 1
- Compensation for dismissal or financial loss – 1
- Other (please specify)

Please use the space below if you have further comments

Most of the listed measures are important but can sometimes be difficult to prove, e.g. that someone is not promoted because of an alert, or in cases of harassment. Therefore, the burden of proof must be reversed. Trade union representation at the workplace is a key element in protecting against employers' retaliation.

In your opinion, which of the following protection measures for third parties are important in the context of whistleblowing?

Please rate importance: 1: very important, 2: important, 3: somewhat important, 4 not important

- Requirement that the whistleblowers reasonably believe the information they disclose to be true – 2
- Requirement that the whistleblowers act in a disinterested way – *don't know*
- Requirement that the disclosure concerns a matter of public interest – 3
- Protection of the rights of the person/business affected by the report (e.g. rights of dignity, personal data, business secrets and respect of the rights of defence) including protection against abusive/malicious reports – 1
- Rules aimed at balancing the interest of employers to manage their organisations and to protect their interests with the right of the public to know when their interests are at risk – 4
- Rules aimed at balancing professional secrecy obligations with the right of the public to know when their interests are at risk – 4
- Other (please specify)

Please use the space below if you have further comments

In public interest disclosures, the public interest cannot be defined too narrowly. Disclosing occupational health and safety violations in a workplace to the competent authority is not only a matter of interest to the workers in the establishment but has a wider scope when an employer constantly disobeys rules, avoids taxes or does not act in cases of serious wrongdoings at work. Companies' interests, particularly 'business secrets', cannot outweigh public interest in clear cases.

II. Existing rules and their impacts

Do you know of rules in place in your country of residence (private citizens) or establishment (for organisations) on the protection of whistleblowers?

Yes

No

Whistleblowers enjoy very different levels of protection across the various EU countries, and in some EU countries they enjoy limited or no protection at all. In your opinion, what are the negative impacts likely to result from the absence of - or the insufficient - whistleblower protection in some EU countries for other EU countries and the EU as a whole?

Please rate likelihood, 1: very likely, 2: likely, 3: somewhat likely; 4 unlikely.

- Negative impact on the protection of the public interest also of those Member States providing stronger whistleblower protection or of the public interest of the EU as a whole (in areas such as the fight against fraud and corruption, tax evasion and tax avoidance, misuse of personal data and market abuse, protection of public health and safety, food safety and the environment, protection of fair competition) – 1
- Negative impact on the protection of the financial interests of the EU (both as regards EU expenditures, for example fraud to EU grants, as well as EU revenues, for example fraud to customs duties) – 1
- Negative impact on the well-being of workers whose companies move from a Member State offering a higher level of whistleblower protection to a Member State with lower or no protection – 1
- Negative impact on the cross-border mobility of workers who would be reluctant to move from a Member State with a higher level of whistleblower protection to one with lower or no protection – 1
- Negative impact on the freedom of establishment of companies which would be reluctant to move from a Member State offering a higher level of whistleblower protection to a Member State with lower or no protection (resulting in a weaker culture of integrity and accountability and lower investors' trust) – 1
- Negative impact on the freedom of establishment of companies which would be reluctant to move to a Member State offering a higher level of protection of whistleblowers (e.g. where the introduction of relevant arrangements may imply significant administrative costs due to necessary changes in the business model) – 2
- Negative impact on the free movement of capital, because investors would be reluctant to invest in companies established in a Member State with low or no protection – *don't know*
- Negative impact on the free movement of capital, because investors would only invest in companies established in a Member State with low or no whistleblower protection (e.g. where the introduction of relevant arrangements may imply significant administrative costs) – *don't know*
- Distortion of competition at EU level resulting from the lower level of legal compliance with relevant rules, and of integrity and accountability in Member States where there is lower or no whistleblower protection – 1
- Other negative cross-border impact (please specify)
- There are no such negative impacts – 4

Please use the space below if you have further comments

Horizontal EU legislation on whistleblower protection is crucial. Without it, detecting wrongdoing is not as efficient as it could be. In cross-border cases, it is difficult for the potential whistleblower to identify different national laws. There are broad differences in legal certainty and equal treatment of whistleblowers in countries with/without protection. There are not enough measures in place to detect corruption, tax fraud/deals etc. Litigation costs and reputational risks also exist.

In your opinion, what are the positive impacts likely to result from the absence of whistleblower protection in some EU countries for other EU countries and the EU as a whole?

Please rate the likelihood: 1. very likely, 2. likely; 3. somewhat likely; 4. Unlikely

- Positive impact on the protection of the public interest also of those Member States providing weaker or no whistleblower protection or of the public interest of the EU as a whole (because of spill-over effects, .e.g. incentive for Member States to compete) – 4
- Positive impact on the well-being of workers whose companies move from a Member State offering a lower level of whistleblower protection to a Member State with higher level of protection – 4
- Positive impact on the cross-border mobility of workers who would be incentivised to move from a Member State with a lower level of whistleblower protection to one with higher level of protection – 4
- Positive impact on the freedom of establishment of companies which would be incentivised to move from a Member State offering a higher level of whistleblower protection to a Member State with lower or no protection (e.g. due to administrative burden and costs). – *don't know*
- Positive impact on the free movement of capital, because investors would invest in companies established in a Member State with low or no protection (e.g. less administrative burden or costs) – *don't know*
- Other positive cross-border impact (please specify)
- There are no such positive impacts – 1

III. Need for minimum standards

Considering what you have indicated as important aspects for effective whistleblower protection, in your opinion who should establish legally binding minimum standards on these aspects?

- No legal obligation needed
- Solely national legislation
- EU legislation (in conjunction with national legislation)
- No opinion

In which area should the EU offer (more) support to the Member States to provide whistleblower protection:

- Protection of public health and safety – *strongly agree*
- Protection of food safety – *strongly agree*
- Protection of environment – *strongly agree*
- Protection of energy supply – *strongly agree*
- Fight against tax evasion and tax avoidance – *strongly agree*
- Fight against anticompetitive practices (cartels etc.) – *strongly agree*
- Increase of accountability and transparency in industry and business – *strongly agree*
- Fight against fraud and corruption – *strongly agree*
- Good management of public (national and EU) funds – *strongly agree*
- Other (please specify) – *strongly agree*

Please use the space below if you have further comments

The areas are all relevant. EU legislation should not differentiate between sectors and activities, especially as companies and workers are nowadays active all over the internal market. EU-wide horizontal whistleblower protection should be established through a directive, providing a minimum level of protection throughout all Member States and sectors.

Please indicate, for which of the minimum standards within any potential *EU legislation* you would consider horizontal, generally applicable, whistleblower protection and/or sectorial legal provisions more effective. EU sectorial legal provisions refer to the areas in which the EU should offer support to the Member States, as indicated in the previous question.

- Channels in an organisation/business for reporting of wrongdoing – *a combination of EU and national legal provisions*
- Channels for reporting to relevant public regulatory bodies (i.e. regulatory agencies in specific sector) – *a combination of EU and national legal provisions*
- Channels for reporting to horizontal independent body (e.g. ombudsman) – *a combination of EU and national legal provisions*
- Channels for reporting to sectorial independent body (e.g. concerning financial services, energy, taxation, etc.) – *a combination of EU and national legal provisions*
- Channels for reporting to law enforcement (e.g. police, prosecution) – *a combination of EU and national legal provisions*
- Protection in case of disclosure to the public (media, web platforms, etc) where internal reporting and reporting to oversight institutions are not available, not functioning properly or cannot reasonably be expected to function properly. – *no opinion*
- Right of workers to be informed on the whistleblowing provisions and procedures applicable at the specific workplace – *a combination of EU and national legal provisions*
- Procedure that grants whistleblowers an official status (with rights of information) – *a combination of EU and national legal provisions*
- Procedure to inform whistleblowers on regular basis about the status of the follow-up to their report – *a combination of EU and national legal provisions*
- Rules for contact of whistleblowers with the investigation authority before, during and after an investigation – *a combination of EU and national legal provisions*
- Rules on whistleblowers' access to the file or to documents in the file – *a combination of EU and national legal provisions*
- Proper investigation of the relevant reports and disclosures – *a combination of EU and national legal provisions*
- Protection of the confidentiality of the whistleblower's data – *a combination of EU and national legal provisions*
- Protection of the rights and interests of third parties implicated – *a combination of EU and national legal provisions*
- Protection of whistleblowers against retaliation at work – *a combination of EU and national legal provisions*

- Protection of whistleblowers in administrative proceedings – *a combination of EU and national legal provisions*
- Immunity from civil action for damages – *a combination of EU and national legal provisions*
- Exemption of whistleblowers from criminal liability – *a combination of EU and national legal provisions*
- Financial support covering the costs of legal proceedings – *no opinion*
- Financial or other types of rewards – *no opinion*
- Psychological support – *no opinion*
- Other minimum standard (please specify)

Please use the space below if you have further comments

A combination of national and EU legal provisions will work in practice. EU-wide horizontal whistleblower protection should be established through a directive, with minimum protection throughout all Member States without sectoral boundaries. The EU provisions can be transposed into national laws. Some aspects will work better at the national level, especially when exhausting internal channels. However, a European “whistleblower house” could be an option or reporting to the European Ombudsman.