

**OPEN LETTER SENT BY EMAIL TO:**

**Les Conseillers nationales de la Commission des affaires juridiques**

Laurence Fehlmann Rielle  
Conseillère nationale  
Présidente, Commission des affaires juridiques CN (CAJ-CN)  
Conseil Nationale  
La Suisse

28 January 2020

Dear Madam Rielle,

**We, the undersigned Trustees of the Whistleblowing International Network, urge the Swiss Parliament to adopt a law that properly protects whistleblowers in Switzerland on the basis that the current proposals to amend the Code of Obligations do not provide any positive protections and will not serve the public interest.**

As legal experts in the field of whistleblowing law and practice (see brief background to WIN at the end of this letter), we have had the honour of working with jurists across Europe and around the world over many years. We have advised policy makers and legislatures on how best to transpose international and regional legal principles into different national laws to protect whistleblowers. We advocated for a strong EU Directive to protect reporting persons and provided the legal reasoning and the practical contexts to the European Commission, the Permanent Representations, and Parliamentarians for why such protections are necessary.

Whistleblowing laws are meant to increase the flow of information where needed for accountability and as you are already aware, the EU has just adopted a Directive to protect whistleblowers that meets most international standards and supports freedom of expression and democratic accountability in Europe.

In view of the global importance of Swiss-based multinational companies operating in food retail, pharmaceutical and chemical manufacturing and financial services, the protection of whistleblowers in Switzerland is of international concern as well as of national importance.

While we are delighted that the Swiss Parliament continues to work towards legislating in this area, the current proposal in Switzerland to amend the Code of Obligations **does not offer any positive protection to whistleblowers**. Instead, the amendments serve to

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regulate how workers must report information – i.e. sets out when it is lawful for a worker to report irregularities even to his or her own employer - and leaves the employer in full control of how to respond both to the information and to the person who reported it, provided they implement internal systems and policies.

The Bill is explained on the Swiss government website as follows:

*The main lines of the project remain unchanged: reporting will in principle **only be accepted if it is first sent to the employer**. The worker may, **under certain conditions, subsequently forward his report to the competent authority or to the public without failing to fulfil his duty of loyalty**. In its revised and corrected version, the project regulates the conditions in detail and removes uncertainties. It also defines in particular in which cases anonymous reporting will be authorised<sup>1</sup>.*

[emphasis added]

The Bill purports to “clarify” when workers will be considered not to have breached their duty of loyalty to their employer. This is a negative right that does not provide any positive remedy or protection against harassment or detriment in the workplace, or indeed from being pursued by employers through the courts. The proposals do not offer any legal remedies to workers whose employer takes action against them for reporting wrongdoing nor any indication as to what a court would need to specifically consider, leaving it up to what is currently available in Swiss labour law. It is essential, for example, that once a worker shows they have disclosed information relating to “irregularities” that the burden shifts to the employer to prove that any action they have taken in relation to the worker is wholly unrelated to the whistleblowing and is independently fair. This is essential to making access to legal protections real in practice.

We refer by way of important example to the case of Dr. Motarjemi v. Nestlé and the recent Appeal Court decision in the canton of Vaud<sup>2</sup>. It has taken 10 years for the Swiss courts to recognise that the severe harassment and unfair treatment Dr. Motarjemi experienced at the hands of the management of large multi-national company based in Switzerland was, in fact, illegal. The Appeal Court found that the harassment included failing to conduct a food safety audit of Dr. Motarjemi’s department, despite her repeated requests, and in contravention of the company’s own whistleblowing policy. Further, the Court found management’s “investigation” of the harassment three years after it was first brought to their attention to be a “sham.” In attempting to work with the company, the Court determined that Dr. Motarjemi’s “brilliant career in food safety” was destroyed. Dr.

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<sup>1</sup> Unofficial translation of: <https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2018/2018-09-210.html>

<sup>2</sup> See WIN’s Press Release of 23 January 2020 as well as the Statement from Dr. Motarjemi in English and in French - [here](#).

Motarjemi faced numerous different lawsuits from Nestlé as she tried to take a case against them for their retaliation against her. Not only did she lose her job, her career and her well-being, she was under continuous judicial harassment. The cost of pursuing her former employer, Nestlé, has been extremely high and has drained her financial, psychological and moral resources. This should not be acceptable under Swiss law and unfortunately, the current proposals will not help anyone in Dr. Motarjemi's position in future to seek redress for the wrongs done to them.

While we welcome the fact that more organisations around the world are taking their obligations to address wrongdoing seriously and are making good efforts to protect the well-being of their workers, we also recognise that organisations take such obligations much more seriously when they know they will be held publicly accountable for their actions. Robust protections for whistleblowers is an important element in fulfilling good governance arrangements and promoting democratic accountability.

We urge you, as law makers, to consider whether the current proposals will reassure Swiss workers that the *system* will protect them if they raise potentially serious health, financial or environmental issues in their workplace and, for whatever reason, their employer does not.

The Bill makes internal reporting mandatory. It is only in limited circumstances that it will be "lawful" for a worker to report wrongdoing to a competent authority. Similarly, reporting publicly is only allowed if the worker has already reported it to a competent authority (which, as mentioned, will only be lawful in limited circumstances) or if the worker's employment has been terminated, or suffered other detrimental treatment. Mandatory internal reporting was rejected by both the European Parliament and the European Council during their deliberations on the new Directive to protect reporting persons; the Directive makes it clear that workers can go directly to competent authorities without having to raise it internally first. The EU Directive builds on the Council of Europe's Recommendation on the protection of whistleblowers (CM/Rec (2014)) which provides workers a choice of channels to report wrongdoing, including going public. The Swiss proposals do not meet minimum international best practice nor, in our opinion, do they address the recommendation made by the OECD to Switzerland to introduce whistleblower protection, particularly with respect to the criminal law<sup>3</sup>.

As legal experts in the field, we would welcome the opportunity to assist Swiss lawmakers to address public interest whistleblowing in a positive way that builds on the strengths of the

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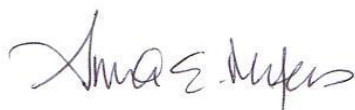
<sup>3</sup> See the recommendation from the OECD Working Group on Bribery and related press release from the 27/03/2018 - <https://www.oecd.org/corruption/switzerlands-significant-foreign-bribery-enforcement-should-be-accompanied-by-harsher-penalties-and-private-sector-whistleblower-protection.htm>.

Swiss legal system. In the meantime, we attach one of the first legal briefings we provided to the European Parliament to help the Committee on Legal Affairs consider how best to fashion a law that promotes good governance and better regulation without undermining democratic accountability and freedom of expression. We specifically refer you to pages 5 - 9, Section II on Structural Flaws, subsection 1 on *Restrictions on audiences for protected disclosures*. This explains in detail the unintended and potentially dangerous consequences of what is essentially the mandatory internal reporting obligation currently set out in the Swiss proposal. This section also provides examples of international best practices.

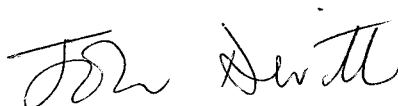
Notwithstanding our comments on the substance of the proposed procedures for reporting or disclosing information on “irregularities”, we cannot in good conscience support any amendments to the Bill in its current form as it not a law to protect whistleblowers.

We therefore recommend that the National Council rejects these proposals on the basis that they will only serve to further undermine the already precarious position of Swiss whistleblowers. We urge the Swiss Parliament to promote speaking up about wrongdoing as a positive act for good governance and democratic accountability - and therefore accepted as an act of loyalty to one’s employer and to one’s society - by adopting a law which provides robust and affirmative protections for workplace whistleblowers.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Anna Myers".

**Anna Myers**, Executive Director of WIN

A handwritten signature in black ink, appearing to read "John Devitt".

**John Devitt**, Chair of WIN, Chief Executive of [Transparency International Ireland](#)

On behalf of the Trustees:

**Tom Devine**, Legal Director, [Government Accountability Project](#), USA

**Annegret Falter**, Chair, [Whistleblowers-Netzwerk](#), Germany

**David Hutton**, Senior Fellow, [Centre for Free Expression Whistleblowing Initiative](#), Canada

**Cathy James**, Lawyer and Independent Expert on Whistleblowing Law and Practice, UK

**Vladimir Radomirović**, Editor-in-Chief, [Pištaljka](#), Serbia

Cc: Transparency International Switzerland

## Briefly about WIN

The Whistleblowing International Network (WIN), is an international network to connect and support the technical expertise and capacity of civil society organisations in 35+ countries around the world that advise, support and work with whistleblowers. See [www.whistleblowingnetwork.org](http://www.whistleblowingnetwork.org).

### **John Devitt – Chair of WIN Board of Trustees, Chief Executive of Transparency International Ireland.**

WIN's Chair, John Devitt has over a decade's experience in supporting whistleblowers in Ireland and established the country's only free helpline and independent law centre offering advice to whistleblowers. TI Ireland's Speak Up Helpline has supported over 1000 people reporting wrongdoing since it was established in 2011. John was instrumental in bringing about the Protected Disclosures Act 2014 and advised the Irish Government on the legislation. He has also advised and delivered training on behalf of international organisations, including the UN, IMF, OECD, Council of Europe and European Commission on whistleblower protection laws and procedures.

### **Tom Devine is Legal Director at the Government Accountability Project in Washington DC**

Since 1979, Tom has assisted over 7000 whistleblowers in defending themselves against retaliation and in making a real difference on behalf of the public. He has not lost a case since 2006, and has prevailed at numerous U.S. courts of appeals as well as the Supreme Court. Tom has led campaigns to pass or defend 34+ national or international whistleblower laws, including nearly all U.S. federal enacted laws over the last two decades. He has written and co-authored numerous books, articles and op-eds.

### **Annegret Falter (Dipl.-Pol.) is Chair of the non-profit organisation Whistleblower-Netzwerk, Berlin, Germany.**

Whistleblower-Netzwerk has promoted whistleblower protection and supported individual whistleblowers since it was founded in 2005. For 15 years, Annegret was a member of the jury bestowing the German Whistleblower Award on behalf of the Association of German Scientists (VDW) and International Association of Lawyers Against Nuclear Arms (IALANA) (1999 – 2014). Annegret has written and edited numerous publications about whistleblowers, and on the political, social and legal importance of whistleblowing. She analyses whistleblowing in the context of the protecting the public interest and human rights, namely advancing the freedom of expression and the public's right to information. Annegret appears regularly in German press and media as an expert in the field

### **David Hutton, Senior Fellow, Centre for Free Expression Whistleblowing Initiative, Ryerson University, Canada**

David has advocated for whistleblower protection since 2005. He worked with Federal Accountability Initiative for Reform (FAIR), a charity devoted to whistleblower protection, for ten years, serving as Chair of the Board and Executive Director for six years. He ran a free confidential help line and was contacted by more than 400 whistleblowers. David has spoken and written extensively about whistleblowing, published in-depth analyses of Canadian whistleblowing laws and their implementation, and created original guidance material for whistleblowers. He also initiated with the Canadian Standards Association the development of a guideline on the implementation of whistleblowing systems, published in 2016.

### **Cathy James, Legal Expert on Whistleblowing**

Cathy is a practising solicitor with extensive knowledge of whistleblowing in the public interest. She was Chief Executive of the UK whistleblowing charity and legal advice centre Protect (formerly Public Concern at Work) for six years and prior to that worked 5 years as Legal Officer. For more than a decade, Cathy advised thousands of whistleblowers on how to raise their concerns effectively. She also provided expert advice to organisations of all sizes and sectors on the best practice principles of whistleblowing arrangements. Cathy has worked closely with boards, regulators, central and local government to effect change in this vital policy area, both in the UK and internationally. In 2019, Cathy was appointed as a part-time member of the Employment Tribunal panel for England and Wales.

### **Vladimir Radomirović, Editor-in-Chief of Pištaljka,**

Vladimir has worked as a journalist for more than 20 years in Serbia and Bosnia-Herzegovina. In 2010, he founded Pištaljka, a whistleblowing investigative journalist platform and safe haven for whistleblowers. Pištaljka's work investigating whistleblowing tips and supporting whistleblowers was instrumental to Serbia's adoption of a Whistleblower Law in 2014. Vladimir was a key advisor to the Ministry of Justice on the detail of the new law and Pištaljka has worked extensively since training judges and prosecutors on how the law should work in practice. Pištaljka also provides independent legal advice and representation service to whistleblowers. Vladimir is the President of the Journalist's Association of Serbia (UNS) and a founding member of the European Centre for Press and Media Freedom (ECPMF) in Leipzig.

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**WIN's Executive Director, Anna Myers,** is a lawyer with 20 years' experience in the field. She was Deputy Director of Public Concern at Work, now called Protect, a non-profit legal advice organisation set up in the UK in 1993 and on which the Netherlands government modelled the Adviespunt Klokkenluiders, the predecessor to the House for Whistleblowers. Ms. Myers was adviser to the Council of Europe's Committee on Legal Co-operation in the preparation of CM/Rec(2014)7 on the protection of whistleblowers and drafted the Explanatory Memorandum; and consultant the UNODC and drafted the Resource Guide on Good Practices in the Protection of Reporting Persons (2015).