

## MALICIOUS / ABUSIVE REPORTING

### European Union Draft Directive on Whistleblower Protection

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Amendments 27 and 62 of Rapporteur Virginie Rozière's draft report would delete the requirement in the Proposed Directive's Recital 78 and Article 17, para. 2, that Member States must impose mandatory penalties for malicious or abusive reporting, including a damages remedy. The Rapporteur's recommendation is well-taken. For the reasons summarized below her amendments are essential to eliminate **an unnecessary provision that would cancel basic premises of the Directive**, and substitute worse retaliation with a greater chilling effect than current job-based harassment. For the directive to be functional, merely initiating retaliatory litigation or prosecution should be a violation.

The provision is unnecessary because:

- a. it duplicates existing national law. Every nation already has criminal liability for false statements to the government, and civil liability such as defamation to compensate for knowingly false statements. The provision would not increase accountability.
  - b. other Directive provisions address its objectives. A "reasonable belief" is the prerequisite for protection against all forms of retaliation, and its definition cancels protection for irresponsible speech. As stated in the proposed Directive, "This is an essential safeguard against malicious and frivolous or abusive reports, ensuring that those who deliberately and knowingly report false information do not enjoy protection". Triple liability is unnecessary.
- **The provision creates all-encompassing vulnerability against any whistleblowing disclosure.** The legal definition for "abusive" includes any "insulting" or "harsh" action. For "malicious" it includes "willful... or evil design." These open-ended, subjective concepts literally cover any whistleblowing disclosure, included those supposedly protected by the Directive. Nearly all significant whistleblowing disclosures are "insulting" or "harsh" and employers routinely brand critics as "evil."
  - **The provision is a back door substitute for the ban on a good faith motives test.** A cornerstone for the proposed Directive is rejection of the "good faith" test, because it puts the whistleblower's motives on trial. In terms of public policy, this is an irrelevant distraction. Prosecutors and other competent authorities do not care about a witness' motives, except for credibility concerns. Liability for malicious disclosures inherently substitutes an identical examination of motives.
  - **The provision is a back door substitute for the ban on civil and criminal liability.** The requirement to create liability for malicious or abusive whistleblowing literally and comprehensively cancels the benefits of the proposed Directive's ban on civil and criminal liability, which is the foundation for protection against non-workplace retaliation.
  - **The affirmative defense against retaliatory litigation is inherently inadequate.** Merely initiating civil or criminal prosecutions can silence whistleblowers. They will not know until the trial's completion whether they have survived crushing liability. In the meantime, unemployed whistleblower will be overwhelmed by the vastly superior resources of multilateral corporations or government prosecutors. Many will be destroyed, because they do not have the resources to avoid default judgments.

- **Retaliatory litigation is more threatening than employment retaliation**, so the provision will replace a chilling effect with a freezing effect. The lesson learned from U.S. mistakes is that making it harder to fire but easier to prosecute whistleblowers is a disastrous trade for freedom of speech. It encourages substituting workplace retaliation that threatens whistleblowers' careers with civil and criminal prosecutions that threaten to destroy their lives.

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