WIN LEGAL BRIEF - FOCUS

MANDATORY INTERNAL & EXTERNAL DISCLOSURES

European Union Draft Directive on Whistleblower Protection

Proposed recital amendments 35, 63 and 64, and text amendments 41, 51 and 53 in Rapporteur Virginie Rozière's draft report recommend removing the requirement for whistleblowers to make prior internal and external reports as a prerequisite for protection. Instead, they would have discretion to pick their audiences when lawfully disclosing information protected by the Directive. **The Rapporteur's recommendations should be supported.**

This brief summarises why the unnecessary provision for mandatory preliminary reports would produce a chilling effect that could thwart essential warnings to law enforcement, regulatory authorities and the public. At the same time, mandatory internal reporting would undermine the Directive's goal by increasing the opportunities for retaliation and enabling obstruction of justice. It would be contrary to many established justice systems for a whistleblower to lack the certainty that they are able to turn to competent authorities without reprisal.

- **Mandatory prior reports are unnecessary, because concerns about abuse have flunked the reality test.** Since the first U.S. national whistleblower law in 1970, no U.S. law has required prior internal or external disclosures unless the information is classified or specifically banned from public release by statute. In the US, which has a well-established whistleblower protection system, abuses have been insignificant. In fact, public whistleblowing has been credited with benefits such as preventing a more ambitious rerun of 9/11 that also targeted Europe; and the removal of a prescription drug that had caused over 40,000 U.S. fatalities. Similarly in the UK, which has a "tiered" disclosure system under the Public Interest Disclosure Act 1998 (PIDA), there is no requirement to report internally prior to making a disclosure to a regulator, or more widely. It is only where information is disclosed more widely, typically via the media, that the fact of having raised it internally or with a competent authority comes into play as one of the triggers for protection. See PIDA, s.43G (2)(a).

- **Mandatory internal reports would chill communications with law enforcement and subvert the Directive's goals by enabling obstruction of justice.** Given the risks and stress, many employees will only blow the whistle once. If all must engage in mandatory internal reporting, many justifiably will feel that they have done their duty and are finished. This would create a structure that institutionalizes obstruction of justice. At a corrupt enterprise, the mandatory internal requirement gives an advantage to those responsible for misconduct, who will be given a monopoly of knowledge about incriminating evidence, plus ample time for a cover-up. This includes time to destroy documents, intimidate witnesses, and generally make the crime unrealistic to prosecute. This would also lock in ignorance for competent authorities, which will be at a further disadvantage vis-à-vis the organizations that should be their targets.

- **Mandatory prior reports would create second class free speech rights for whistleblowers.** Unless later blocked in court by an exception, the Directive would allow retaliation with impunity against employees who communicate with government authorities. But a basic tenet of the rule of law is the right to communicate with government authorities about illegality or other breaches of public trust. Ordinary citizens have no obligation to share the evidence with suspected wrongdoers before going to law

enforcement. It is universally unlawful to retaliate against citizens who report crimes to the government, but the Directive would allow wrongdoers to fire them.

- **Mandatory prior reports are unnecessary, because employees rarely break ranks**. All studies have confirmed that whistleblowers nearly always report through the chain of command or institutional channels. Since in general, this is the level at which most misconduct can be fixed, the range is between 90-97%.[1] The data shows that whistleblowers only break ranks and go to the government in extreme circumstances. It is even rarer for a whistleblower to turn to the press, and for their story to be of high enough interest to be reported on. In those emergencies, there should not be a chilling effect on reports that may nip crimes in the bud or prevent high stakes consequences.

- **The exceptions for mandatory prior reports are subjective.** Unless covered by an exception, the Directive's current structure requires up to a three month delay after an internal report to safely communicate with authorities, and another three to six months before protection for public whistleblowing. While the limited exceptions are reasonable, they are subjective. Whistleblowers must guess whether they have free speech rights by going to the government or media. They will not know until the trial is over, after a ruling, whether their decision to alert the authorities or press was safe or an act of professional suicide. This unnecessary barrier will chill external or public whistleblowing in the 3-10% of cases when it is needed most.

- **There is no valid concerns of bogging down law enforcement with trivialities.** The track record of America's most effective corruption law calls this bluff. The False Claims Act enfranchises whistleblowers to team up with the Justice Department to challenge fraud in government contracts. By law, the whistleblower is banned from communicating with an employer about the case until the government decides whether to prosecute civilly or criminally, and can go to jail for contempt of court for alerting the potential defendant. Before whistleblowers were enfranchised through this limited channel, the government averaged $10 million annually in civil fraud recoveries. In the 32 years since, over $56 billion has been recovered with 80% from whistleblower reports, or roughly $1.4 billion annually. [2]

- **Mandatory reports would subvert the Directive's goals by increasing retaliation.** Contrary to the Directive's goals, mandatory internal reporting will increase retaliation by requiring whistleblowers to expose themselves as threats to bad faith or corrupt organizations. The first law of retaliation is to discredit the whistleblower, through a retaliatory investigation or anything else that will distract from the message. Mandatory internal reporting creates a three to six month window to attack and discredit whistleblowers before they can even contact authorities.

- **Mandatory prior reports would isolate the media from timely public oversight.** The recital recognizes the essential role of media and the public in fighting corruption or other illegality. Unfortunately, the Directive severely undermines whistleblower communications with the media and the public affected by illegality or abuses of power. Unless they are willing to guess right about winning two court exceptions to prior internal and external reports to regulators, it takes up to nine months of prior reporting before they are fully protected for public freedom of expression.

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[1] See, for example, Ethics Resource Center, "Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey," p. 13 (2012) http://www.corporatecomplianceinsights.com/wp-content/uploads/2012/05/inside-the-mind-of-a-whistleblower-NBES.pdf.

[2] See https://taf.org/top-false-claims-act-cases-by-civil-award-amount/.