

REMEDIES

European Union Draft Directive on Whistleblower Protection

These provisions in the draft directive and Rapporteur Virginie Rozière's (see below) are well-taken. Without them, there is no guarantee the Directive will have more than token impact, or even be a net advance. However, they are incomplete.

Remedies are the bottom line whether the Directive will achieve its desired objective -- minimizing the chilling effect from fear, and maximizing the flow of information needed for accountability. Unfortunately, remedies in many laws are so weak that the whistleblower "loses by winning," after years of emotionally painful, financially draining litigation. When the winners still lose, whistleblower laws cause cynicism, alienation and despair. Their net result is to increase the chilling effect, and secrecy that shields abuses of power.

The proposed Directive properly recognises this principle. Recitals 71, 72, and 85, and Article 16 call for effective remedies that will not discourage future whistleblowers, including compensation for the tangible and intangible consequences of retaliation. Rapporteur Virginie Rozière's proposed Recital and Amendment 64a further specifies that relief should be available for all the direct and indirect forms of retaliation. Recital 73 recognizes the importance of interim remedies, and includes them as mandatory provisions in Article 15 #6.

- **An effective remedy must make the whistleblower whole.** A remedy will only have legitimacy if a premise for remedies is that prevailing whistleblowers will be no worse off than if they had remained silent. The proposed Directive provides the supporting arguments about types of compensation that must be included, but skips the bottom line conclusion: whistleblower who prevail should be "made whole."
- **Interim relief must be available whenever whistleblowers satisfy their burden of proof.** Nothing in whistleblower laws has more impact than interim relief. If it is granted, the employer is losing until the case is over, and has every incentive promptly to "stop the bleeding" through a settlement the whistleblower can accept. If interim relief is denied or unavailable, the employer is winning until the case is over. There is every incentive to drag the case out as long as possible, and none to voluntarily settle the dispute. The delays alone can be fatal even for an unemployed whistleblower who wins. It is too late to prevent bankruptcy, loss of home, professional ruin and often loss of family from the strain. The solution is for whistleblowers to have a right to freeze retaliation through interim relief when they satisfy their burden by proving a protected activity followed by discrimination. With that threshold, the law only will work if the reprisal is halted until the case has been decided. These proceedings also should priority and expedited, as in Serbia's effective statute.
- **An effective remedy must provide for accountability.** Otherwise there will be no deterrent effect from the law. The worst that will happen for institutional bullies is that they will not succeed, and almost certainly they will be promoted or rewarded for proving they were willing to carry out retaliation. There are a wide variety of provisions that are effective. These include personal liability for damages, discipline as a direct remedy, and fines. The Directive will be incomplete without a mandatory requirement for accountability in remedies.