

## WIN EU MEMORANDUM 2: 12 September 2018

### Response to the Draft Report by the EU Committee on Legal Affairs to Amend the Proposal for an EU whistleblower protection directive



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European Union (EU) Rapporteur Virginia Rozière's recommendations on the draft EU whistleblower protection directive provide a foundation to transform the European Commission's (EC) proposal into a best practices gold standard for public interest whistleblowing and freedom of expression in Europe. While the Draft Directive is impressive in principle, it contains a number of serious Achilles heels and land mines that could seriously undermine or even make its impact counterproductive (see WIN Memo 1). Overall, Ms. Rozière's recommendations systematically remove or disarm the traps. Her suggested amendments to edit the draft directive's Recital reinforce the mandate of her proposed amendments to the directive itself. The Report's Explanatory Statement provides a clear, persuasive basis for her impressive recommendations.

Ms. Rozière proposed 32 amendments to the Draft Directive, some technical or duplicative. Out of WIN's 19 recommendations, Ms. Rozière's amendments included 16 in whole or part. The proposals in which she cleanly proposed our recommendations include those most fundamental to us.

- First**, the report recommends eliminating requirements for in-house or government disclosures before going public. This would give the whistleblower complete freedom to choose between in-house, government or public audiences (see WIN Memo 1: .
- Second**, the report recommends removing all references to intent as a barrier for protection. This includes removal of provisions requiring liability for malicious or abusive disclosures.

Below we match the recommendations in our first review (WIN Memo 1) with Ms. Rozière’s proposed amendments, to identify:

1. those in which she has completely addressed our concerns;
2. those where she rejected our concerns, and further advocacy is needed;
3. those where she supports our concerns in principle, but clarification or minor repairs are necessary.

Finally, we include some further amendments that are now necessary.

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**I. WIN RECOMMENDATIONS ACCEPTED IN RAPPORTEUR PROPOSED AMENDMENTS**

1. Objections to restrictions on audiences, such as mandatory internal reporting and criteria for public freedom of expression.

The whistleblower has complete freedom of choice. (Amendments (“A”) 17-20, 49, 51-53)

*WIN welcomes and fully supports these amendments for the reasons set out in WIN Memo 1: pp. 5- 8, but also, importantly, because they fulfil the EU’s commitment to building on existing foundations of European law, namely the Council of Europe’s Recommendation on the protection of whistleblowers<sup>1</sup>.*

2. Liability for malicious or abusive whistleblowing.

The provision was eliminated. The Explanatory Notes also make clear that intent is irrelevant in determining whistleblower rights, and the amendments specify there are no loopholes to the anti-retaliation shield where speech is protected. (A 21, 50, 62)

*WIN welcomes and fully supports removing this provision in its entirety for all the reasons set out in WIN Memo 1: pp. 9-12.*

3. Protection for disclosing gross waste, mismanagement, public health and safety threats, and human rights violations.

The amendments would create such a broad mandate that specific categories are unnecessary, by making clear that any infringement of the public interest, whether or not serious, is protected without exception. (A 2, 3, 5, 11, 29 and 33)

*This makes sense and is in keeping with many existing EU jurisdiction laws as well as CoE Recommendation. Practically, this ensures the flexibility needed to address public interest issues that arise with new sectors, new cross border issues etc.*

4. Protection for disclosing any illegality, not just an employer’s wrongdoing.

The amendments protect disclosures of any European Union violation, not just the employer’s misconduct. (A 31, 37)

*This is important as those in work can come across wrongdoing that is perpetrated by those other than their employer.*

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<sup>1</sup> Council of Europe Committee of Ministers Recommendation on the protection of whistleblowers (CM/Rec(2014)7). See also [Explanatory Memorandum](#).

5. Protection for former employees.

The amendments would protect them. (A 36)

Directive rights that are additive, not substitutive for pre-existing protections. The proposed amendments make clear that the standards are minimum requirements which do not cancel stronger, pre-existing protections. (A 14, 31, 63)

*This is in keeping with international best practices.*

6. Protection for anonymous whistleblowers who are exposed.

The Rapporteur's recommended amendment would provide those who initially remain anonymous with equal rights with those whose identity are known. (A 16, 54)

*However WIN does recommend adding the phrase "or becomes known" after "revealed" to cover those circumstances when it is unclear how the individual's identity has become known and where the identity of the whistleblower is guessed.*

7. Protection against forms of harassment not listed.

The amendments would make clear that the list is illustrative, not exhaustive. The proposed recital language recognizes that the forms of retaliation are limited only by the imagination, and that any direct or indirect retaliation due to whistleblowing is illegal. (A 13, 55).

*Important amendment that clarifies that each case may be different.*

8. National security loophole.

The amendments cancel all employment sector loopholes, including military. The amendments also clarify that all EU staff are covered. (A 7, 9, 35)

*This is very important and WIN fully supports these amendments that make it clear that the focus should be on the information disclosed rather than the type of employment held by the individual who discloses it.*

## II. WIN RECOMMENDATIONS REJECTED BY THE RAPPORTEUR

### 9. Protection for disclosure to any “responsible official” and “duty speech”.

We have grouped these two recommendations, because the latter (communications during job duties) largely is a subset of the former (communications to those with associated responsibilities, also a key for protected cross border communications).

The amendments do not address this issue. That would mean whistleblowers are protected for disclosures through specified internal channels, government audiences and the public, but not when turning in assignments or acting routinely as public servants who communicate the same information without branding themselves as dissidents filing allegations. The amendment that allows initial disclosures to EU officials helps here, but is not all inclusive.

Duty speech is a major loophole that must be closed, as it is the context for the vast majority of communications based on protected disclosures / speech. This should be a realistic goal, as it would be irrational for amendments to protect media disclosures but not the same information when disclosed as part of job duties. **Our recommendation for protected disclosures to any “responsible official” neatly solves the problem.**

### 10. Extra protection for those staffing organizational whistleblower disclosure and counseling channels.

The amendments do not address this issue, which is necessary because these jobs translate rights from paper into practice but are very vulnerable both to pressure and retaliation.

### 11. Protection for all citizens.

The amendments do not address the Digital Rights recommendation, a group that reported 15% of its disclosures come from persons outside the workplace. WIN supports the rights of all citizens, not just workers to speak up and report wrongdoing, risk of harm and other matters of public interest, whether to an organisation, a government agency or law enforcement. An amendment reinforcing this right would ensure that citizens who suffer from unfair treatment for raising a public interest concern can seek appropriate redress from those responsible. It should be noted that Serbia’s Whistleblower Protection Law (2014) has a partial precedent by protecting corporations, NGO’s, and those victimized by an institution’s misconduct.

### III. PARTIALLY ADOPTED WIN RECOMMENDATIONS

Important repairs through modifications are necessary on the following issues.

#### 12. Support services.

The amendments propose vital safeguards here, specifying active roles for unions and civil society non-profit organizations, as well as assistance for legal and even psychological support. (A 26, 42, 46, 57, 60).

However there is a serious concern that new Article 14a (2) of the draft Directive as seriously risks access to the full range and choice of independent advice and support that individual whistleblowers should have. This could be because they fail to meet unnecessarily stringent or unfair accreditation requirements imposed by Member States or because a Member State refuses to designate a body that otherwise fulfils the criteria as set out in the Article. It should be noted that public interest lawyers provide early free independent advice on whether or how to raise a concern that helps avoid legal disputes and ensures the information is directed to the appropriate person or body to address.

**Thus we support Transparency International's suggestion to amend the wording by adding "or other legal entity" and removing "an accredited body designated by the Member State."** See also Explanatory Memorandum to the Recommendation re. Principle 28.

#### 13. Protection for those associated with whistleblowers.

The proposed amendments would create equal protection for all "facilitators" who assist whistleblowers. This is very significant, as it protects the rest of the supporting "village" necessary for responsible, effective whistleblowing disclosures, including journalists.

However, the **definition of associates needs to be expanded** to cover all vulnerable harassment targets relevant to a chilling effect, such as the whistleblower's family. (A 10, 22, 34, 40). This can be amended in Article 34 with the addition of "or anyone associated with the making of a protected disclosure". See also WIN Memo 1: Section III (3) (attached) for more explanation and Section 13, Ireland's Whistleblower Protection Act 2014 for an example.

#### 14. Burden of proof.

The amendments further strengthen the language for a prima facie case, and would create a presumption of retaliation if detrimental action were to follow protected speech.

This is very welcome but the proposed amendment eliminates important language for the employer's reverse burden of proof, namely that **"the action was taken entirely due to independent reasons, without whistleblowing affecting it in any way"**. This is confusing and highly problematic. The Explanatory Statement emphasizes the value of the reverse burden of proof and asserts the amendment would strengthen rights in the Draft Directive. However, a presumption is not a final decision and therefore the **reverse burden of proof language must be restored.** (A 25, 58)

15. Banning conflicts of interest for action on disclosures.

The proposed amendments do not address this issue, although they provide for the participation by unions or other worker organizations in crafting internal whistleblower channels. This criterion must be added to the mandatory standards for internal channels, or those disclosures could serve as advance warning that create opportunities for cover-ups. (A 42).

See WIN Memo 1: p. 17, Point 9: the directive should **require that whistleblowing disclosures are investigated by an entity without more than unavoidable institutional conflict of interest.**

16. Enfranchising whistleblowers in corrective action.

Unions can help craft the structure and procedure of internal channels, but there is no guarantee whistleblowers will have a voice in corrective action by the right to comment on its adequacy as part of the final record. Nor is there a requirement that the results be published. (A 42)

WIN set out in Memo 1: p. 17, Point 10 the importance of requiring an opportunity for the whistleblower to a) rebut the often predictable denials of those implicated by the substance of their disclosure, and b) to provide comment on the reasonableness and completeness of draft investigative reports on their disclosure. Far too often the whistleblower, who is the most valuable witness to the wrongdoing, is not included in the investigation. This is to the detriment of the quality of the investigation and to the credibility of the system. **Enfranchising whistleblowers is a significant criterion for the legitimacy of any whistleblowing arrangement.**

17. Transparency.

While the amendments call for member states to provide all relevant information on implementation, and periodic review of the law's effectiveness, it does not specify the issues that must be monitored or provide for a public record so that whistleblowers and activists are fully informed for effective participation. (A 64, 65)

WIN set out in Memo 1: p. 17/18, Point 11 the minimum information the public record should disclose:

### III NEW RECOMMENDED AMENDMENT

#### 18. DUTY TO SUPPORT AND PROTECT

There is strong research and numerous cases that show that the types of detriment commonly experienced by whistleblowers include those that result through lack of support rather than deliberate acts.<sup>2</sup> It is important that the standard set by an EU Directive ensures that redress can be obtained for an employer's failure to provide a safe environment, or for the common adverse impacts which are foreseeable and typically within the power of employers to manage. This is vital if the Article 4 of the proposed directive, that employers implement whistleblowing arrangements, is to be effective. An EU directive on whistleblower protection is above all a transparency and accountability initiative. The goal is to ensure that information about wrongdoing, risk or harm, or otherwise in the public interest, is reported to those who can first a) stop the harm or risk or address the information and b) protect those who communicate that information. **It is important that organisations are not only responsible for implementing whistleblowing arrangements but are responsible for the quality of protection they provide.** Otherwise, the processes too can become part of the problem and not the solution.

For these reasons, WIN recommends including two amendments.

- The first to include a **duty to prevent** violations:

Insert at the end of Article 4.1: "Individuals and entities that directly or indirectly implement these internal channels and procedures shall have a duty to prevent, refrain from, and take reasonable steps to ensure other persons refrain from violating the provisions of this Directive."

*"directly and indirectly" will ensure that the duty is on the organisation as well as any individuals in charge of a whistleblowing arrangement*

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<sup>2</sup> See Professor AJ Brown, "What have we learned from whistleblowing research? Operationalising the duty to support and protect. Whistling While They Work 2: Work-in-progress" Presentation to the International Whistleblowing Research Network Conference 20 Years of the Public Interest Disclosure Act, Middlesex University London, 22 June 2018. Available on request.



- The second is to include **liability for passive retaliation**:

Insert a new provision Article 14(o): “violation of the duty to prevent retaliation, as required by Article 4.1.”

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