

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Horizontal or further sectorial EU action on whistleblower protection		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG JUST – C2	DATE OF ROADMAP	26/01/2017
LIKELY TYPE OF INITIATIVE	Legislative and/or non-legislative		
INDICATIVE PLANNING	4th quarter 2017		
ADDITIONAL INFORMATION	-		
A. Context, Problem definition and Subsidiarity Check			
<b>Context</b>			
<p>Protection of whistleblowers who expose wrongdoing can contribute to safeguarding the public interest by reinforcing guarantees of integrity, transparency and accountability in both public and private institutions. The EU plays an important role in helping Member States to protect the licit economy against organised crime<sup>1</sup>, financial and tax fraud, money laundering and corruption, which hamper economic development and competitiveness and damage social justice and the rule of law.</p> <p>In its <a href="#">2014 Recommendation on Protection of Whistleblowers</a>, the Council of Europe recommended to its member States to "have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work based relationship, report or disclose information on threats or harm to the public interest", a notion "which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment".</p> <p>The European Parliament has been calling for a horizontal instrument providing comprehensive protection of whistle-blowers at EU level, as well as for further sectorial rules, in particular related to the protection of the financial interests of the Union. The matter is being pursued in different EP committees – ECON/TAXE/PANAMA, JURI, CONT and LIBE. In its <a href="#">Conclusions on tax transparency</a> of 11.10.2016, the Council encouraged the Commission to explore the possibility for future action at EU level.</p> <p>Leading a coalition of 48 trade unions and NGOs, the trade union Eurocadres also launched in October 2016 a <a href="#">platform</a> calling on the Commission to propose an EU-wide protection of whistleblowers.</p> <p>The Commission has repeatedly stressed the essential role of whistle-blowers for promoting, amongst others, the fight against corruption, good governance and freedom of expression.</p> <p>The 2014 <a href="#">EU Anti-corruption report</a> noted that creating effective protection mechanisms that would give confidence to potential whistleblowers can help overcome detection problems inherent to corruption. It also underlined that whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation and that creating effective protection mechanisms that would give confidence to potential whistleblowers are key.</p> <p>In its 5.7.2016 <a href="#">Communication</a>, the Commission underlined that protection of whistle-blowers in the public and the private sector contributes to addressing mismanagement and irregularities, including cross-border corruption relating to national or EU financial interests, and stressed the need for effective measures to protect those who report or disclose information on threats or harm to the public interest, thus contributing to increased detection of fraud and tax evasion. As protection of whistleblowers can be indispensable to safeguard freedom of expression, enshrined in the EU Charter of Fundamental Rights, the issue is part of the focus of the <a href="#">2016 Annual Colloquium on Fundamental Rights</a> on "Media pluralism and Democracy".</p> <p>EU law contains rules protecting whistleblowers from retaliation in different areas<sup>2</sup>, ranging from audit and money laundering to trade secrets, market abuse, capital requirements and other instruments regulating financial</p>			

<sup>1</sup> Overall corruption remains a serious threat as a means for organised crime groups to infiltrate public and private sectors, as stated by Europol's 2013 [EU serious and organised crime threat assessment](#)

<sup>2</sup> Indicatively: Regulation No 537/2014 and Directive 2014/56/EU governing statutory audit in the EU; Directive 2015/849, on Anti-money Laundering; Directive 2016/943 on protection of Trade Secrets; Regulation No 596/2014 and Commission Implementing Directive 2015/2392 on Market Abuse; Directive 2009/65 on Undertakings for Collective Investments in Transferable Securities (UCITS); Regulation 575/2013 and Directive 2013/36 on Capital Requirements; Directive 2013/30/EU on safety of offshore oil and gas operations.

services, to areas such as the safety of offshore oil and gas operations. The Commission has also funded research and projects to support exchange of best practices on the protection of whistleblowers.

In its [Communication](#) of 5.7.2016, the Commission expressed its full support for the protection of whistleblowers, and announced that it will continue to monitor Member States' provisions and facilitate research and exchange of best practice to encourage improved protection at national level. It also indicated that it is assessing the scope for horizontal or further sectorial action at EU level, while respecting the principle of subsidiarity.

The commitment to assess the scope for further action to strengthen the protection of whistleblowers in EU law was affirmed by President Juncker in the Letter of Intent complementing his [2016 State of the Union speech](#) and in the [2017 Commission Work Programme](#).

#### **Problem the initiative aims to tackle**

Individuals who report or disclose information on threats or harm to the public interest make use of their freedom of expression, whilst also giving effect to the public's right to access information. The [2016 Annual Colloquium on Fundamental Rights](#) revealed strong concerns about the lack of effective whistleblower protection across the different Member States and its negative impacts on these rights, enshrined in Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights.

At the same time, lack of adequate whistleblower protection may discourage the disclosure of wrongdoing and illegal activities. It can thus have a negative impact on the functioning of various EU policies. This includes, for instance, negative effects on compliance with rules on procurement, state aid, implementation of structural funds, environmental protection, and competition and investment - and ultimately on the proper functioning of the internal market. Moreover, the lack of effective whistleblower protection in one EU country can more broadly negatively affect also the interests of other Member States and the EU interest as a whole; for instance, it can dissuade employees of a multinational company from reporting wrongdoings taking place in a branch of the company in another EU country or which concern the public interest on an EU scale.

The importance of whistleblowers for detecting fraud and corruption is confirmed by available global data. According to a 2016 [study](#) analysing more than 2400 cases of fraud in 114 countries, about 40% of all detected fraud cases are uncovered by whistle-blowers. In a 2016 [report](#), the OECD found that the type of corporate misconduct most often reported by whistleblowers via internal company mechanisms was fraud (42%). A 2007 [survey](#) of 5,400 companies worldwide found that whistle-blowers help detect more fraud than corporate security, audits, rotation of personnel, fraud risk management and law enforcement combined.

Data further confirm that the existence of effective protection mechanisms encourages the disclosure of misconduct, wrongdoing and illegal activities. Indicatively, according to [2014 statistics](#), in Hungary, where a comprehensive law on whistleblower protection was introduced in 2013, the number of reports by whistleblowers grew by 143% in a year. In the UK, there is [evidence](#) that the relevant law adopted in 2000 increased the willingness to report cases of suspected fraud, bribery or corruption: while 54% of surveyed senior executives in the rest of Europe said they would report such a case, in the UK, the figure was significantly higher (86%).

The unevenness of protection in the EU Member States has been [documented](#) by Transparency International.

At present, only a few Member States have comprehensive - or at least substantial - whistleblower protection. The majority of Member States tend to have provisions scattered across different laws, leaving significant gaps, as whistleblowers may face a range of potential problems. Thus, for instance, in a number of Member States there is no protection against retaliation for employees in the private sector; in others, whistleblowers are protected against dismissal or other, work-related, unfair treatment but are not immune from criminal or civil liability. Moreover, where protection is fragmented, potential whistleblowers cannot be certain that they will enjoy the protection of the law. At the other end of the spectrum, a few Member States have extremely limited, or practically no legal protection for whistleblowers.

#### **Subsidiarity check (and legal basis)**

Action at EU level would broadly aim to ensure an overall effective level of whistleblower protection across the EU, either horizontally or on a sector-specific basis enabling individuals to report threats or harm to the public interest which they have come across without fear of retaliation, and would thus protect fundamental rights.

While some of the illegal conduct uncovered may be limited in scope, other occurrences may have cross-border implications, affecting competition and investment flows, reducing public finances or directly affect the financial interests of the Union, and/or undermine compliance with specific areas of EU law.

In general, adequate whistleblower protection would contribute to preventing and tackling corruption, enhancing corporate social responsibility and legal compliance, ensuring healthier competition and greater investor confidence in the internal market.

Some of these aims may not be satisfactorily achieved by Member States acting alone.

Given the broad range of areas of EU interest potentially affected, as well as the broad range of potential problems faced by whistleblowers, any EU initiative would need to consider whether horizontal and/or sectoral approaches are most appropriate in each case; where there exists an appropriate legal basis for EU action; and which action can deliver most EU added value.

The Treaty provisions whose potential to provide a legal basis for EU action could be explored include Article 153 (social policy), Articles 114 and 115 TFEU (internal market), Article 50 (freedom of establishment), and Article 325 (protecting the financial interests of the Union). In addition, with respect to the compliance with and effective implementation of various EU policies, the feasibility of using (separately or in conjunction) the different legal bases in the Treaty for the various policies potentially concerned will need to be thoroughly analysed.

## B. Objectives and Policy

EU action would aim to ensure overall effective whistleblower protection across the EU.

Maintaining the status quo could mean that individuals may be discouraged from exposing wrongdoings. This is due to the significant legal gaps and weaknesses in the protection afforded within most Member States and the current uneven level of protection across the EU. This would mean missing significant opportunities to effectively tackle corruption, promote the fair operation of the internal market and the correct implementation of its various policies in a more cost-effective way. This would apply even more so in instances of corruption and wrongdoing with a cross-border dimension or which affect the public interest on an EU scale. Even if a number of Member States unilaterally improve the level and scope of protection of whistleblowers, the national rules are likely to remain divergent. This would cause legal uncertainty for potential whistleblowers in cases with cross-border effects or which affect the broader EU public interest.

The identified problems could be addressed through a wide range of options: legislative action (horizontal or sectorial), non-legislative action or a combination of the two. This requires the gathering of evidence in the context of a comprehensive Impact Assessment where the full range of options would be addressed, also taking into account analysis of the possible legal basis for action.

An instrument on whistleblowing could oblige or encourage Member States i) to put in place effective channels for reporting (within the organisation) and disclosing (to external oversight institutions and the public) information about misconduct, wrongdoing or illegal activities; ii) to properly investigate the reports and disclosures, whilst ensuring the confidentiality of the identity of the whistleblower as well as the protection of dignity, personal data and respect of the rights of defence of the persons implicated, (including business rights where applicable), and iii) to protect whistleblowers against retaliation at work and possibly also in criminal, civil or administrative proceedings.

Alternatively, it could be envisaged to fill gaps by introducing rules on whistleblower protection in areas of EU law where no such protection is currently afforded.

Finally, a soft law approach – pursued on its own or as a complement to legislative action – could seek to promote high standards of whistleblower protection in all Member States through e.g. recommendations, guidance, exchanges of best practices, peer review, specific monitoring in the context of the European Semester, promotion of self-regulation.

## C. Preliminary Assessment of Expected Impacts

### Likely economic impacts

Enhancing the integrity of the internal market by providing effective protection to whistleblowers - possibly both in the private and the public sector - would have an overall beneficial impact on economic growth and cross-border investment in the EU and on the EU's competitiveness by reducing corruption ([estimated](#) to cost the EU economy EUR 120 billion per year, i.e. the equivalent of 1 % of EU GDP) and making it a more attractive place to invest.

For private companies, implementing internal whistleblowing arrangements can help them avert or address reputational and economic risks and damages, deliver high standards of public and customer service and gain consumer – and investor – trust. A 2010 [survey](#) amongst 500 000 employees in over 85 countries, found a direct relationship between a culture of integrity in the workplace and lower incidents of misconduct. Moreover, the indicator that most strongly correlated with a higher level of long-term shareholder return (over 10 years), was employee "comfort in speaking up" – and lack of fear of retaliation was identified as a key element in ensuring such comfort.

### Likely social impacts

Providing effective protection against retaliation (in the form of harassment, dismissal or other punitive or discriminatory treatment) to employees who, in the context of their work-based relationship, report or disclose wrongdoings and illegal activities would have a significant positive impact on workers in the private and/or public sector (depending on the scope of the protection that would be provided).

According to a 2014 Council of Europe [Recommendation](#) based on the principles developed in the case-law of the European Court of Human Rights, the interests of employers to manage information and the activities of their personnel must be balanced with the right of the public to know when their interests are at risk, or when the law is being broken. In the case of the public sector, access to information is a fundamental right which allows for

increased democratic participation, sound policy formulation and public scrutiny of State action. In the private sector, information about how business is conducted is important for consumer protection, fair market competition and the appropriate regulation of financial and other business activities.
<b>Likely environmental impacts</b>
Enhancing whistleblower protection - either overall or specifically in the area of environmental protection- would have positive environmental impacts as it would incentivise the disclosure of dangers to the environment.
<b>Likely impacts on fundamental rights</b>
Enhancing whistleblower protection would have a positive impact in terms of promoting the right to freedom of expression and information, including the freedom and pluralism of the media (Article 11 of the Charter of Fundamental Rights of the EU), the right to protection against unjustified dismissal (Article 30) and the right to an effective remedy and a fair trial (Article 47). Depending on the scope of the measures to be adopted, these could have further positive impacts, for instance as regards consumer protection (Article 38). As regards individuals, who are the object of whistleblower reporting, the instrument needs to ensure a sufficient protection of the latter's rights to dignity (Article 1 of the Charter) and a private life (Article 7 of the Charter). To the extent that certain aspects would involve processing of personal data (such as the receipt and processing of reports), these would need to be compliant with the right to protection of personal data (Art. 8 of the Charter) and relevant EU rules.
<b>Likely impacts on simplification and/or administrative burden</b>
In case (horizontal or further sectorial) legislation is warranted, adaptation to it would imply initial costs for businesses which would need to implement dedicated internal whistleblowing arrangements. These costs would be compensated in the longer-term by the gains in terms of better risk management and consumer and investor trust. More generally, businesses would gain from an increase of the overall integrity of the market. The adoption of EU horizontal or further sectorial legislation would also imply administrative burdens for the public administrations that would be concerned. On the other hand, better whistleblower protection would promote a more cost-effective means of uncovering illicit behaviour.
<b>D. Data Collection and Better Regulation Instruments</b>
<b>Impact assessment</b>
An impact assessment is being prepared to support the preparation of this initiative and to inform the Commission's decision.
<b>Data collection</b>
<ul style="list-style-type: none"> <li>• Data on corruption in EU countries can be found in the <a href="#">2014 EU Anti-corruption report</a>, in a 2014 <a href="#">Special Eurobarometer</a> survey on perceptions of corruption and in a 2015 <a href="#">Flash survey</a> on business attitudes to corruption.</li> <li>• The Council of Europe has published in <a href="#">2014</a> a recommendation on whistleblower protection.</li> <li>• Perceptions of the level of corruption in the public sector are aggregated in the Corruption Perception Index published every year by Transparency International, most recently in <a href="#">2015</a>.</li> <li>• Relevant recent research conducted at the international level includes the OECD <a href="#">Study</a> on "Whistleblower protection frameworks, compendium of best practices and guiding principles for legislation on the Protection of Whistleblowers" and the OECD March 2016 <a href="#">report</a> "Committing to Effective Whistleblower Protection".</li> <li>• Transparency International conducted, under an EU co-funded project, a <a href="#">comparative analysis</a> of the legal framework on whistleblowers' protection across the EU.</li> <li>• Relevant data related to the investigative activities of OLAF can be found in the <a href="#">Annual OLAF Reports</a>.</li> <li>• The public consultation organised by the Commission between 19 May and 21 July 2016 in preparation for the 2016 Annual Colloquium on Fundamental Rights 'Media Pluralism &amp; Democracy' allowed gathering <a href="#">respondents' views</a> on the protection of whistleblowers as journalistic sources.</li> <li>• An impact assessment study is foreseen. It will aim to collect quantitative and qualitative data on any gaps and problems resulting from the lack of adequate whistleblower protection across the EU, which could not be satisfactorily addressed by individual Member State action and which therefore warrant a further EU intervention. It will also aim to collect quantitative data and qualitative data on the added value of rules on whistleblower protection in terms of detection and deterrence of fraud and corruption, such as data on increase of reported whistleblower cases and disclosures following the setting up of mechanisms for whistleblower protection and on their outcomes (follow up, investigation, validation, prosecution, recovery of funds etc).</li> <li>• An external study is foreseen to gather evidence on economic costs/benefits that are a direct result of developing whistleblower protection measures, with a specific focus on the economic impact of whistleblower protection on savings and recoveries of public funds in public procurement.</li> </ul>
<b>Consultation strategy</b>
The consultation strategy comprises the following elements: <ul style="list-style-type: none"> <li>• The role of whistleblowers as journalistic sources was addressed in the second Annual Colloquium on</li> </ul>

Fundamental Rights, on "Media pluralism and Democracy, in November 2016, enabling an in-depth discussion amongst key stakeholders with a view to determine avenues for enhancing their protection.

- A 12-week open public consultation is envisaged in the first semester 2017. The consultation will be addressed to the broadest public possible in order to obtain views and input from all interested parties, including business organisations, trade unions, public authorities, legal practitioners, academics, and the general public.
- The impact assessment study will collect input in a targeted manner from the most relevant stakeholders, including main non-governmental organisations active in the field, trade unions, legal professionals and business.

**Will an Implementation plan be established?**

If necessary, subject to the outcome of the impact assessment.