



EUROPEAN COMMISSION

Brussels, 23.4.2018
SEC(2018) 198 final

REGULATORY SCRUTINY BOARD OPINION

**Proposal for a Directive of the Parliament and of the Council on the
protection of persons reporting on breaches of Union law**

{COM(2018)218final}
{SWD(2018)116final}
{SWD(2018)117final}



Brussels,
Ares(2018)

Opinion

Title: Impact Assessment / Whistleblower Protection

Overall 2nd opinion: POSITIVE

(A) Context

Whistleblowers report information they come across in the context of their work about a threat or harm to the public interest. Whistleblowing involves risks of retaliation and harm to reputation. A whistleblower's employers, supervisors or colleagues may object to disclosures and retaliate in different ways. Fear of such retaliation could prevent potential whistleblowers from acting in the public interest.

In the wake of recent scandals, the European Parliament and the Council have called for stronger protection of whistleblowers. The Commission announced in 2016 that it would assess the scope for EU action to strengthen whistleblower protections.

This impact assessment considers ways to better protect whistleblowers against retaliation.

(B) Main considerations

The Board finds that the revised report adequately addresses its earlier concerns.

The Board gives a positive opinion but considers that the report could still be improved further with respect to the following key aspects:

- (1) Who is covered by the “whistleblower” initiative is still ambiguously defined.**
- (2) The report does not explain well the review process that is to ensure that whistleblower protections remain effective and proportionate.**

(C) Further considerations and recommendations

(1) Provisions to protect whistleblowers mostly mirror the Council of Europe's 2014 Recommendation on the Protection of Whistleblowers. But the report is sometimes ambiguous: the summary of the policy options only refers to employees on one side and contractors, suppliers or other self-employed persons providing services on the other, even though its description of the minimum level of protection of all policy options refers to Principles 3 and 4 of the 2014 Recommendation. These provide for a broad scope and go beyond the definition of employees as all individuals working in either public or private sectors, irrespective of the nature of their working relationship, and whether they are paid or not, whether the working relationship has ended or not, or during recruitment process or pre-contractual negotiation stage. Additional deviations from the 2014 Recommendation could also be better explained. Such deviations include omitting the consultation of

workers and their representatives on proposals to set up internal reporting procedures (Principle 16) and the possibility to disclose information to the public, e.g. to a journalist or a Member of Parliament (Principle 14).

(2) The preferred option provides for a review process to ensure that the scope of the initiative remains in line with evolving evidence of needs. The report proposes benchmarks against which to assess progress. It is not clear how some of these benchmarks would provide useful points of comparison. Not all benchmarks relate directly to the data that the Directive obliges Member States to gather, and some of the required data lack meaningful benchmarks. The report might add goals for e.g. timeliness of responding to whistleblower allegations, and investigations of such allegations. It might also establish goals with regard to ensuring reasonable awareness of whistleblowing protections and how to file complaints if protections are not respected. It might institute reporting requirements with regard to reprisal cases and mechanisms for investigating alleged reprisals. The report could usefully estimate the administrative costs these information requirements could potentially generate for Member States and, if relevant, companies.

The Board takes note of the quantification of the various costs and benefits associated to the preferred option of this initiative, as assessed in the report considered by the Board and summarised in the attached quantification tables.

(D) RSB scrutiny process

The lead DG is advised to ensure that these recommendations are taken into account in the report prior to launching the interservice consultation.

The attached quantification tables may need to be adjusted to reflect any changes in the choice or the design of the preferred option in the final version of the report.

Full title	Whistleblower Protection
Reference number	PLAN/2016/271
Date of RSB meeting	Written procedure

ANNEX: Quantification tables extracted from the draft impact assessment report submitted to the Board on 15/02/2018

(N.B. The following tables present information on the costs and benefits of the initiative in question. These tables have been extracted from the draft impact assessment report submitted to the Regulatory Scrutiny Board on which the Board has given the opinion presented above. It is possible, therefore, that the content of the tables presented below are different from those in the final version of the impact assessment report published by the Commission as the draft report may have been revised in line with the Board's recommendations.)

<i>I. Overview of Benefits (total for all provisions) – Preferred Option</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Increasing number of reports of wrongdoings	+ 87,700	Reports of wrongdoing, annual outcomes for 2022, see Annex 14, Table A7.29.
Decreasing number of measures of retaliation	- 46,600	Cases of retaliation, 2022, See annex 14, table A7.30
Recovery of funds	EUR 1.75 billion over 10 years	Putting in place a robust whistleblower regime prevents one in a thousand incidents of VAT fraud (see annex XIII, sect. 6.4.3.5, p. 126)
Sectorial benefits in the field of public procurement	Range of EUR 32.3 to 53.8 billion each year	Amount of corrupted funds in public procurement that can potentially be identified thanks to whistleblower disclosures (for details see Milieu (2017) Section. 3.1, p. 38)
	Range of EUR 5.8 to 9.6 billion each year	Amount of misused public funds that could be potentially recovered from the corrupted funds previously identified (for details see Milieu (2017) Section 3.1., p. 38).
<i>Indirect benefits</i>		
Encouragement of the reporting of misconduct, fraud and corruption	N/A	The dedicated study found impacts being moderate positive.(see Annex 12 Sections 6.4.5 AND 6.5.)
Creation of an environment of trust and tolerance and enhances	N/A	
Enhancement the capacity for countries to respond to wrongdoing and matters of public concern	N/A	
Sectorial benefits in the field of public procurement		Reduction of corruption and increase of transparency, protection of democratic principles such as free speech, as well as the decrease of corrupt practices and increase in overall transparency in the area of public procurement, see Milieu (2017)

II. Overview of costs – Preferred option*							
				Businesses**		Administrations***	
				One-off	Recurrent***	One-off	Recurrent
Implementation of new policy	Direct costs			213		204.9****	319.9****
Implementation of internal reporting channel	Direct costs			78	340		
Implementation of third party reporting channel(internal time costs)	Direct costs			66	227		
Implementation of third party reporting channel (fee)	Direct costs			36	47		
Development of training materials	Direct costs			355			
Delivery of annual training (cost of employee time)	Direct costs				722		

Source: ICF analysis. Note: costs are expressed in 2017 €million. Costs are assumed to occur in 2022.

* Costs reported are for obligated employers. There are no costs on citizens expected.

** Costs reported are for obligated employers. Detailed information is given in tables 3.2, 3.3 and 3.4. and annex XIV (breakdown per MS).

*** Costs reported are for obligated employers. These operational costs will be incurred each year in providing and supporting reporting channels and investigating reports. It is not possible to further split down the estimates obtained. The costs to Member States in their capacity of regulators are indicated in Section 2.2.



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2018)

Opinion

Title: Impact Assessment / Whistleblower Protection

Overall opinion: NEGATIVE

(A) Context

Whistleblowers report information they come across in the context of their work about a threat or harm to the public interest. Whistleblowing often involves some risk. A whistleblower's employers, supervisors or colleagues may object to disclosures and retaliate in different ways. Fear of such retaliation could prevent potential whistleblowers from acting in the public interest.

In the wake of recent scandals, the European Parliament and the Council have called for stronger protection of whistleblowers. The Commission announced in 2016 that it would assess the scope for EU action to strengthen whistleblower protections.

This impact assessment considers ways to better protect whistleblowers against retaliation.

(B) Main considerations

The Board notes that this initiative mainly aims at improving enforcement of EU law. It acknowledges that the report relies on significant efforts to collect evidence and estimate impacts.

The Board gives a negative opinion, because the report contains important shortcomings that need to be addressed, particularly with respect to the following key aspects:

- (1) The report does not explain why it does not explore an umbrella whistleblower protection. It does not adequately address the issue of subsidiarity. It does not provide either sufficient rationale for the EU law enforcement perspective and for the selective sectoral approach to whistleblower protection that it proposes.**
- (2) The report does not provide sufficient information on how whistleblowers would in fact be protected. In particular, the report does not specify provisions for workers' protection, despite large evidence of their exposure to retaliation in the context of their employment relationships.**
- (3) The report does not demonstrate that the preferred option will provide an effective and future-proof enforcement tool and whistleblower protection.**

(C) Further considerations and adjustment requirements

(1) The arguments for approaching EU whistleblowing from the perspective of the enforcement of EU law needs to be better substantiated and strengthened. The report should clearly explain how it responds to Council calls for action, and why it proposes a selective sectoral approach rather than the horizontal approach that a large number of stakeholders, including the European Parliament, advocate. It needs to explain any trade-offs between subsidiarity and effectiveness, such as whether additional action at the Member State level only would be less effective in achieving the objectives, and it should demonstrate that the preferred option strikes a good balance.

(2) The report should better demonstrate the need for a precise sectoral scope of this initiative, as well as the overall rationale behind the choice of specific sectors. The report should explain how the choice of sectors would make the initiative both effective and reasonably future-proof. It should discuss the effectiveness of the sectoral approach, taking into account that it will need to be complemented by national initiatives for other sectors, which might result in varying approaches between Member States. In the same vein, the report should also better justify its limited approach to the scope of protected disclosure.

(3) The report should be more specific with regard to concrete provisions to ensure the protection of the whistleblowers, including workers, but also contractors and suppliers. The report could explain why it discards the possibility of establishing a status of whistleblower or public interest witness. It should explain for example how the new legislation would translate concretely the various elements contained in the 2014 Council of Europe recommendation.

The report should build the options on the basis of the evidence it provides in the annexes and the study that show retaliation largely taking place in the context of workplace relationships. The report should more convincingly substantiate why it discards Article 153 (1) b TFEU as a legal base, given the clear evidence of social policy relevance of the issue (possibly in combination with Art. 4 (2) b and 151 TFEU). If the report still discards Article 153 (1) b TFEU as legal base, it needs to explain better how the proposed approach and the (preferred) options would effectively and comprehensively protect workers from the many types of possible reprisals, irrespective of the nature of their work relations.

(4) The analysis of the impacts needs to be clarified both in terms of benefits and costs. It should detail how the high benefit values have been calculated, and why its range is so large. In particular, the report should better explain uncertainties and risks related to the estimates.

(5) The report should explain better what success of this initiative would look like. The monitoring and evaluation framework should reflect the logic of intervention, propose benchmarks for success and discuss how the necessary data will realistically be collected.

Some more technical comments have been transmitted directly to the author DG.

(D) RSB scrutiny process

The lead DG shall ensure that the report is revised in accordance with the above-mentioned requirements and resubmitted to the Board for its final opinion.

Full title	Impact assessment on a proposal for a Directive of the
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	European Parliament and the Council establishing minimum common standards for the protection of whistleblowers to enhance enforcement of EU law.
Reference number	PLAN/2016/271
Date of RSB meeting	24/01/2018