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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	23 April 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law
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Delegations will find attached document SWD(2018) 117 final.

Encl.: SWD(2018) 117 final



Brussels, 23.4.2018
SWD(2018) 117 final

COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

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

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

Executive Summary Sheet
Impact assessment on a proposal for a Directive of the European Parliament and of the Council establishing common minimum standards for the protection of persons reporting on breaches in specific areas of EU law
A. Need for action
Why? What is the problem being addressed?
The lack of effective whistleblower protection within the EU impairs the effective enforcement of EU law. While EU and national monitoring mechanisms and enforcement bodies are being reinforced through specific EU action (i.e. creation of EU agencies, support of national judicial systems, etc.), the effective detection, investigation and prosecution of breaches of EU law remains a challenge. In certain areas, breaches of EU law that can harm the public interest are difficult to unmask since evidence is difficult to collect. Reports by whistleblowers with insider access to such evidence can be crucial in those cases. Consequently, ensuring that whistleblowers feel safe to report breaches can feed enforcement action and enhance its effectiveness. In recent years, the EU legislator has acknowledged the need for whistleblower protection as a part of the enforcement of EU law and has introduced some elements of protection and reporting channels in a few sector-specific Union acts. However, protection is still very limited and sectorial and does not cover all the key areas where insufficient whistleblower protection leads to under-reporting of breaches of EU law that may result in serious harm to the public interest. Similarly, most Member States offer protection only in a piecemeal way and the level of protection varies. The lack of sufficient and consistent protection at EU and national level results in underreporting by whistleblowers which in turn translates into ‘missed opportunities’ in detecting and preventing breaches of EU law and weakens the effectiveness of its enforcement.
What is this initiative expected to achieve?
The general objective is to address underreporting of breaches of EU law leading to serious harm to the public interest in areas where strong whistleblower protection can significantly contribute to expose, prevent and deter such harm. The specific objectives are to: (i) Strengthen the protection of whistleblowers and avoid retaliation against them; (ii) provide legal clarity and certainty; and (iii) support awareness-raising and fight against socio-cultural factors leading to underreporting.
What is the added value of action at EU level (subsidiarity)
EU action to introduce whistleblower protection is needed in those areas where i) there is a need to strengthen enforcement, ii) underreporting by whistleblowers is a key factor affecting enforcement, and iii) breaches of EU law may cause serious harm to the public interest. Based on these criteria, whistleblower protection is needed to reinforce the enforcement of rules on: (i) public procurement; (ii) financial services, prevention of money laundering and terrorist financing; (iii) product safety; (iv) transport safety; (v) environmental protection; (vi) nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data and security of network and information systems. It also applies to breaches relating to Union competition rules, breaches harming the EU’s financial interests and, in view of their negative impact on the proper functioning of the internal market, and to corporate tax avoidance. Providing insufficient protection for whistleblowers in a given Member State can have negative impacts not only on the functioning of EU policies in that Member State, but also spill-over impacts in other Member States and the EU as a whole. Unequal protection of whistleblowers across the EU undermines the level playing field needed for the single market to properly function and for business to operate in a healthy competitive environment. Notably corruption and fraud in public procurement that remain undetected increases costs for doing business, distorts competition and lowers attractiveness for investment. Undetected aggressive tax planning schemes by companies that manage to avoid paying their fair share of taxes distort the level playing field between and result in loss of tax revenue for individual Member States and for the EU as a whole (ex. “Luxleaks”). Further spill-over impacts are cross-border risks resulting from acts that distort competition, unsafe products, food and feed products, placed on the single market, pollution of the environment or risks for nuclear safety, public health, animal health and welfare, consumer protection, protection of privacy and personal data, security of network and information systems and transport safety in one Member State that spill-over to other Member States, and gaps in the protection of whistleblowers in cross-border situations, who risk ‘falling through the cracks’. Only EU action can address the imbalance in the level of protection, ensuring a consistent high level of protection across the EU, by providing minimum standards of harmonisation. Moreover, only EU action can align the existing rules on whistleblower protection in sector-specific Union acts.

B. Solutions
What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?
• Option 1: Maintaining the status quo. • Option 2: A Commission Recommendation providing guidance to Member States on key elements of whistleblower protection complemented by flanking measures to support national authorities. • Option 3: A Directive introducing whistleblower protection in the area of the financial interests of the Union, complemented by a Communication setting a policy framework at EU level, including flanking measures to support national authorities; • Option 4: A Directive introducing whistleblower protection in certain areas of EU law. • Option 4 sub-option 1: A Directive under policy option 4 complemented by a Communication setting a policy framework at EU level, including flanking measures to support national authorities. This is the preferred option.
Who supports which option?
Only a few of the stakeholders consulted (national authorities) consider that a non-regulatory option would fully address the problem definition and its drivers. Among business associations, half of the respondents to the Commission's public consultation support EU binding minimum standards while the remaining would be satisfied with national standards or the status quo. The overwhelming majority of respondents as well as civil society, trade unions and the European Parliament (Resolution of October 2017) consider that a broad EU legislative framework on whistleblower protection would be the preferred option.
C. Impacts of the preferred option
What are the benefits of the preferred option (if any, otherwise main ones)?
The preferred option will bring economic, societal and environmental benefits. It will help to unmask and deter fraud and corruption on the EU budget (current risk in loss of revenue is estimated to be between €179 and €256 billion). In the area of public procurement, the benefit of effective whistleblower protection in the EU is estimated to be between € 5.8 and € 9.6 bn each year. The preferred option will also help the fight against tax avoidance. Profit-shifting accounts for a loss in tax revenues for Member States and the EU is estimated at about €50-70 bn. Also broad social impacts are expected to positively affect people and businesses. Introducing strong whistleblower protection will improve the working conditions of 40 % of the EU workforce which would otherwise be unprotected (around 60 million workers). It will enhance the integrity and transparency of the private and the public sector, and contribute to fair competition in the single market. Although the benefits cannot be quantified, evidence shows that whistleblowers would enable preventing negligence and malpractice with severe impacts, <i>i.a.</i>, on environmental protection, product, food and transport safety, consumer protection and public health.
What are the costs of the preferred option (if any, otherwise main ones)?
The implementation costs (<i>i.e.</i> compliance with the obligation to establish internal reporting channels and related costs) are summarised as follows: • For the public sector total cost amounts to 204.9 million as one-off cost and annual € 319.9 million costs. • For the private sector (medium-sized and large companies) the projected total cost is € (€ 542.9 million as a one-off cost and €1 016.7 million of annual costs). • The total costs for both the public and private sector are € 1 312.4 million.
How will businesses, SMEs and micro-enterprises be affected?
The preferred option will only cover the mid-sized and large businesses and will not have significant costs – <i>i.e.</i> approx. implementation cost (one-off) amounting estimated at EUR 1,374 and average annual operational cost estimated at EUR 1,054.6 (this includes the costs for annual training to employees, which may not be needed). The preferred option will exempt small and micro businesses from the obligation to set up internal reporting channels (except for those in the area of financial services or vulnerable to money laundering or terrorist financing, and in case Member States so require following a risk assessment based on the nature of activities of the entities and ensuing level of risks).
Will there be significant impacts on national budgets and administrations?
The expected cost increase for the expenditure on implementing the legal requirements for the preferred option would amount to € 34 million (around € 15 million higher than in the baseline scenario).

Will there be other significant impacts?
The option will promote fundamental rights, in particular freedom of expression and fair working conditions, increase reporting requirements and deter fundamental rights breaches in the implementation of EU law.
D. Follow up
When will the policy be reviewed?
The Commission will submit to the European Parliament and the Council an implementation report and evaluation report, respectively, two and six years (at the latest) after the deadline for transposition expires.