

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

Courage welcomes the publication of a draft directive on the protection of whistleblowers by the European Commission. Whistleblowing is a key mechanism for public understanding and accountability and it is our view that the proposals represent a significant step forward in a number of areas.

In particular, we welcome the inclusion of “the protection of privacy and personal data, and the security of network and information systems” within the scope of reports that should be protected. This group of whistleblowers is particularly ill-served at present, with little assured recourse to external reporting channels and the threat of criminal liability should they attempt to disclose responsibly.<sup>1</sup> Put together with the broad personal scope in the proposal, this promises to make a significant contribution to resolving a long-standing anomaly that clearly stands against the public interest in making the internet more secure.

We have a few suggestions to make about the scope and language of the proposal.

### National security

While we recognise that national security lies outside of the EU’s competencies, it is beyond question that whistleblowers in this area face enormous obstacles. The growth in the use of the Espionage Act against whistleblowers like Chelsea Manning, John Kiriakou, Thomas Drake, Edward Snowden and Reality Winner in the United States is well known. In the wake of the Snowden revelations, criminal sanctions against the disclosure of national security information have been tightened in many English-speaking countries.<sup>2</sup>

European Court of Human Rights case law and repeated resolutions from the Council of Europe (see Resolutions 1954 (2013), 2060 (2015) and 2073 (2015)) recommend that member states provide some form of reporting channel for employees working in the security and intelligence services. We think it would be useful for the EU to reiterate this call, even if it cannot make binding obligations in this area.

- 1 For the situation in the US, see: <https://www.zdnet.com/article/chilling-effect-lawsuits-threaten-security-research-need-it-most/> For Europe, see: <https://journals.winchesteruniversitypress.org/index.php/jirpp/article/view/36>
- 2 See for instance ongoing legislative deliberations in Australia and proposals for a new British Espionage Act unveiled by the Law Commission in 2017. New Zealand tightened its legal regime in 2016: [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11694279](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11694279)

## Anonymous reporting

The ability to make reports anonymously is an important dimension of whistleblower protection yet it is not mentioned at all in the proposal. The development of privacy enhancing technologies has seen anonymity grow in importance over the past decade, as has been recognised by international human rights bodies. UNESCO and UN Special Rapporteur on Freedom of Expression David Kaye have affirmed the importance of encryption and anonymising technologies for the protection of human rights.<sup>3</sup>

The use of anonymity is sufficiently important in this area that it should be mentioned directly in the proposal. A multiplicity of civil society organisations, media organisations and increasingly government institutions now operate their own dropboxes to facilitate anonymous disclosures.<sup>4</sup> Digital activist group Xnet have recently launched a whistleblowing platform in cooperation with the municipal government of Barcelona, acknowledging that existing channels for reporting fraud and corruption are themselves compromised.<sup>5</sup> A dropbox was also, of course, launched by the European Commission for reporting antitrust violations.<sup>6</sup>

We think the proposal needs to respond to this in two ways. Firstly, we see a clear need to ensure that the obligations for internal and external channels to record and react to reports apply equally to reports that are made anonymously as to those made through more conventional channels. Furthermore, we think it should be explicit in the text of the proposal that, should the anonymity of a reporting person be compromised, for whatever reason, then the confidentiality of the reporting person be respected in all the ways mandated in the proposal.

## Mandatory internal reporting

- 3 See: <http://unesdoc.unesco.org/images/0024/002465/246527e.pdf> and <https://www.documentcloud.org/documents/2089684-un-encryption-report-special-rapporteur-on.html>
- 4 For examples of current use cases, see GlobalLeaks: <https://www.globaleaks.org/who-uses-it/>, SecureDrop: <https://securedrop.org/directory> and Associated Whistleblowing Press: <https://awp.is/about/>
- 5 Xnet. (2017) A whistleblowing platform against corruption for the City Council of Barcelona. OpenDemocracy. Found at: <https://www.opendemocracy.net/digitaliberties/xnet/whistleblowing-platform-against-corruption-for-city-council-of-barcelona>
- 6 European Commission. (2017) Antitrust: Commission introduces new anonymous whistleblower tool. Found at: [http://europa.eu/rapid/press-release\\_IP-17-591\\_en.htm](http://europa.eu/rapid/press-release_IP-17-591_en.htm)

The proposals contain a tiered approach to disclosure in which certain categories of employee are obliged to report internally and be subject to a 3-6 month wait for a response before being able to go elsewhere, to either an external body or the media. We do not think this is justified.

Existing whistleblower protection laws in Ireland, the UK and Serbia do not take this approach and many external regulators are sufficiently accessible that they receive reports from the general public. Decades of experience with the UK's Public Interest Disclosure Act regime shows that, given the choice, over 90% of whistleblowers will report their concerns internally and that the predictable consequence of failure to receive a constructive response internally is not that complaints get taken further, it is that they are abandoned.<sup>7</sup>

We recommend that the language of the proposal be amended to put reporting internally and to an external regulator on an equal footing.

#### Journalistic sources

Comments from Commissioners at the launch of these proposals vouched that the intention of the legislation was that journalistic sources would be protected:

today's proposals also protect those who act as sources for investigative journalists, helping to ensure that freedom of expression and freedom of the media are defended in Europe.<sup>8</sup>

Unfortunately, we feel that this is not reflected in the language of the current proposal A13(4)(b) which is extremely restrictive:

he or she could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger for the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage

The relevant Council of Europe recommendations state that "The individual circumstances of each case will determine the most appropriate channel."<sup>9</sup> However, the way this is framed in Article 13,

7 Public Concern at Work (2013), Whistleblowing: the Inside Story, p 12. Found at:

<http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

8 First Vice President Hans Timmermans, quoted at: [http://europa.eu/rapid/press-release\\_IP-18-3441\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3441_en.htm)

9 Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5ea5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5)

between two extremely high bars (manifest danger or the risk of irreversible damage) means that this is in practice likely to be interpreted in a restrictive way that gives insufficient protection for journalistic sources. We would encourage reframing of this article so that the particular circumstances of a case are given their proper weight.

#### Protection of concerned persons

We recognise that the fundamental rights of concerned persons need to be respected. Nevertheless, Article 16(2) on measures for protecting the identities of the subjects of whistleblowing disclosures seems very broad:

Where the identity of the concerned persons is not known to the public, competent authorities shall ensure that their identity is protected for as long as the investigation is ongoing.

Given that standard duties charged to external regulators for confidentiality and reporting are specifically referenced in Article 16(3), 16(2) creates a special duty of confidentiality towards concerned persons that goes beyond what reporting persons enjoy. We are concerned that this creates an imbalance and, potentially, a cause for privacy actions in the courts that will prevent the publication of journalism in the public interest. We suggest that the article is reframed in order to forestall this possibility.

#### Malicious reporting

Finally, we have concerns about the provision of specific penalties for malicious reporting in Article 17(2). This appears to be redundant in at least two respects, and potentially highly counterproductive to the aims of the proposals as a whole.

Not only does national legislation in most countries already establish criminal sanctions for lying to investigatory authorities or civil penalties for defamation, the requirement for a reporting person to have a “reasonable belief” in the veracity of their report is already included in the proposals as a check on malicious reporting:

To enjoy protection, the reporting persons should reasonably believe, in light of the circumstances and the information available to them at the time of the reporting, that the

matters reported by them are true. This reasonable belief should be presumed unless and until proven otherwise. This is an essential safeguard against malicious and frivolous or abusive reports, ensuring that those who deliberately and knowingly report wrong or misleading information do not enjoy protection. At the same time, it ensures that protection is not lost where the reporting person made an inaccurate report in honest error. In a similar vein, reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported falls within its scope. (recital 60)

As such, the proposals already include an in-built disincentive towards making a malicious report – that the protections against retaliation, civil and criminal liability not be available. Going further than this, as Article 17 appears to do, changes this balance and creates an adverse incentive against making any report. We find it easy to see how this could create a chilling effect that could easily undermine the entire purpose of the Directive.

Courage Foundation  
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