



August 11, 2020

Seamus O'Reilly  
Government Reform Unit  
Department of Public Expenditure and Reform  
7-9 Merrion Row  
Dublin 2

Dear Mr. O'Reilly and Members of the Public Expenditure and Reform Department:

On behalf of the [National Whistleblower Center](#), [Whistleblowing International](#), the [European Center for Whistleblower Rights](#), and the international whistleblower law firm [Kohn, Kohn & Colapinto, LLP](#), thank you for your work on behalf of whistleblowers within Ireland.

We are writing today to submit the attached best practices into the public record regarding the implementation of the European Union's [Directive \(EU\) 2019/1937 on the Protection of Persons who report Breaches of Union Law](#) (hereinafter, the "Directive") to ensure that the fundamental right of citizens to report crimes to law enforcement are protected to the maximum extent possible in Ireland.

The authors of these recommendations are recognized international experts in the area of whistleblowing, with over 35 years of experience representing whistleblowers, drafting effective whistleblower laws,<sup>1</sup> teaching whistleblower law classes at accredited law schools,<sup>2</sup> and working extensively overseas with international whistleblowers and government officials interested in implementing effective whistleblower programs in Europe and elsewhere.<sup>3</sup> They have written

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<sup>1</sup> The authors significantly contributed to a number of U.S. whistleblower laws, including the Dodd-Frank Act, the Sarbanes-Oxley Act, the IRS whistleblower law, and the Whistleblower Protection Enhancement Act.

<sup>2</sup> Specifically, Stephen Kohn teaches at Northeastern University School of Law. *See* Northeastern University School of Law Adjunct Faculty Directory, available at: <https://www.northeastern.edu/law/faculty/adjunct.html>.

<sup>3</sup> For example, the National Whistleblower Center won an award from the U.S. Agency for International Development to create a world-wide reporting system for whistleblowers outside the United States to report wildlife trafficking and violations of the CITES convention. And Mark Worth is the UN Expert Group on Whistleblowing; a consultant to the EU, UN and OECD; the author of the first public report on whistleblower protection in EU countries; and founder of the world's first regional whistleblower support organization.

more books and articles on the topic of whistleblower law than any other scholars worldwide.<sup>4</sup> They also have represented (or are currently representing) international whistleblowers on every continent (except Antarctica), including non-U.S. whistleblowers from numerous European countries, such as France, Greece, Germany, Russia, Serbia, Spain, Switzerland, and the United Kingdom. Current cases include representing European whistleblowers in reporting money laundering schemes (in banks located in Estonia, Denmark, and Germany), and Foreign Corrupt Practices Act violations (including the Greek whistleblowers whose disclosures recently triggered a \$300 million sanction against a Swiss company for paying bribes in an EU country).

The debate and final approval of a whistleblower law pursuant to the requirements of the Directive provides a unique opportunity for Ireland to implement a robust and effective whistleblower program that will encourage the disclosure of corrupt activities, environmental violations, and other misconduct that undermines the public interest.<sup>5</sup> Pursuant to this objective we have enclosed herewith a memorandum setting forth specific proposals necessary to ensure that the Directive works in practice. We hope that sharing our expertise will aid in the implementation process.

If you would like additional information or have any questions, please do not hesitate to contact us at [marayabest@kkc.com](mailto:marayabest@kkc.com) and [mworth@whistleblower-rights.org](mailto:mworth@whistleblower-rights.org). We look forward to providing additional assistance or comments as may be appropriate.

Respectfully submitted,

/s/ Maraya Best, Esq.  
Attorney-Advisor for International Human Rights  
Kohn, Kohn & Colapinto, LLP  
Washington, D.C. USA

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<sup>4</sup> In addition to numerous law review articles and other publications, the partners at Kohn, Kohn & Colapinto, LLP have authored or co-authored the following books on whistleblower law: Kohn, *Protecting Environmental & Nuclear Whistleblowers: A Litigation Manual* (1985) (first-ever legal treatise on whistleblower law); Kohn and Kohn, *The Labor Lawyers Guide to the Rights and Responsibilities of Employee Whistleblowers* (1988); *The Whistleblower Litigation Handbook: Environmental, Nuclear, Health and Safety Claims* (1990 and 1991); Kohn, *Concepts and Procedures in Whistleblower Law* (2001); Kohn, Kohn and Colapinto, *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (2004); Kohn, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (2011); Kohn, [\*The New Whistleblower's Handbook\*](#) (2017).

<sup>5</sup> Pursuant to Article 2, the Directive's provisions are the "common *minimum* standards for the protection of persons reporting breaches of [EU] law." (emphasis added). This means that Ireland may include additional protections in its law enacting the Directive to ensure that whistleblowers are adequately protected and incentivized to report violations of law and other corrupt activities to the appropriate authorities.

/s/ Mark Worth  
Executive Director  
Whistleblowing International  
The European Center for Whistleblower Rights  
Berlin, Germany

/s/ Stephen M. Kohn, Esq.<sup>6</sup>  
Chairman of the Board of Directors  
National Whistleblower Center  
Washington, D.C. USA

Encl. Memorandum

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<sup>6</sup> Mr. Kohn and Ms. Best's full biographies are available on Kohn, Kohn & Colapinto, LLP's website at: <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/stephen-m-kohn/> and <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/maraya-best/>. Mr. Worth's full biography can be found at: <https://www.whistleblower-rights.org/who-we-are>.

August 11, 2020

**MEMORANDUM**

**IMPLEMENTATION OF THE EUROPEAN UNION WHISTLEBLOWER  
PROTECTION DIRECTIVE  
(2019/1937)**

**By Stephen M. Kohn<sup>1</sup>  
Founding Partner, Whistleblower Law firm of Kohn, Kohn & Colapinto, LLP  
Chairman of the Board of Directors, National Whistleblower Center  
Adjunct Professor of Law, Northeastern University School of Law**

**INTRODUCTION**

The following Memorandum is submitted in order to provide guidance as to the laws, regulations, and administrative procedures the Member States of the European Union should approve in order to effectively implement [Directive \(EU\) 2019/1937 on the Protection of Persons who report Breaches of Union Law](#) (hereinafter, the “Directive”), created by the European Parliament and the Council, and to otherwise ensure that Member States’ citizens can benefit from whistleblower disclosures.

This memorandum is submitted on behalf of the [National Whistleblower Center](#), [Whistleblowing International](#), [the European Center for Whistleblower Rights](#), and the qui tam and whistleblower rights law firm, [Kohn, Kohn, & Colapinto, LLP](#).

**SUMMARY CONCLUSIONS**

The Directive is based on a whistleblower framework that focuses on protections against retaliation. It shares many of the provisions of modern anti-retaliation laws, such as the United Kingdom’s Public Interest Disclosure Act (“PIDA”). However, as a number of highly respected studies have correctly demonstrated, the PIDA model “does not – and cannot – adequately protect whistleblowers.”<sup>2</sup> It is essential for policy makers in Member States to carefully evaluate the

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<sup>1</sup> Maraya Best, the Attorney-Advisor for International Human Rights at Kohn, Kohn & Colapinto, LLP also contributed to these recommendations. Mr. Kohn and Ms. Best’s full biographies are available on Kohn, Kohn & Colapinto, LLP’s website at: <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/stephen-m-kohn/> and <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/maraya-best/>.

<sup>2</sup> *Protecting Whistleblowers in the UK: A New Blueprint*, Thompson Reuters Foundation and the Blueprint for Free Speech, available at: <https://static1.squarespace.com/static/5e249291de6f0056c7b1099b/t/5ea06ff8d801be771a29d32e/1587572764935/Report-Protecting-Whistleblowers-In-The-UK.pdf>. See also *Whistleblowing; The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it*, All Party Parliamentary Group on Whistleblowing, available at: [https://docs.wixstatic.com/ugd/88d04c\\_9754e54bc641443db902cd963687cb55.pdf](https://docs.wixstatic.com/ugd/88d04c_9754e54bc641443db902cd963687cb55.pdf). This report noted that

weaknesses of PIDA, and implement the Directive in a manner that will successfully incentivize high-quality reporting. It would be a significant error to ignore proven best practices and rely on ineffective models when enacting whistleblower protections.

Additionally, Article 22 of the Directive permits Member States to implement procedures that could allow wrongdoers to learn the identity of whistleblowers and file lawsuits against them.<sup>3</sup> This Article should be narrowly construed in the drafting of national legislation to ensure that the intent behind the Directive is effectuated.

The Directive only mandates “minimum” protections for whistleblowers. It explicitly authorizes Member State to go beyond the minimum safety-net required under the Directive and enact whistleblower law that will further advance the ability of Member States to detect and prosecute corruption, protect the environment, and enhance the rule of law. As explained below, it is imperative that Member States harmonize their domestic whistleblower laws with the requirements or mandates of important international anti-corruption treaties that are binding on most Member States. Additionally, the effectiveness of whistleblower reward laws has been firmly established and needs to be carefully considered by Member States.<sup>4</sup>

The public debates that will surround implementation of the Directive provides a novel occasion for Member States to ensure that whistleblowers are fully protected under Member States’ laws, and that the potential public benefits of effective whistleblower laws are enjoyed by all citizens of the Union.

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shortcomings in PIDA “prevents whistleblowing from producing its beneficial effects and exposes whistleblowers to a wide range of abuse and, as a result, to serious personal and professional. A further study on PIDA supports these harsh conclusions finding that costs included the loss of employment, reductions in salary, irreparable damage to health, ruined reputation, blacklisting, false criticism, and counter accusations. *Making Whistleblowing Work for Society*, All Party Parliamentary Working Group on Whistleblowing (2020), [https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c\\_56b3ca80a07e4f5e8ace79e0488a24ef.pdf](https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf).

<sup>3</sup> Article 22 permits corrupt corporations, criminals or other wrongdoers, whose illegal conduct was reported by a whistleblower to “fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defense, including the right to be heard and the right to access their file.” Even if a lawsuit allowed under this provision is dismissed or found without merit, a whistleblower could be tied up on costly legal proceedings for years, or even bankrupted by such costs. Additionally, in order to avoid the costs of such proceedings, whistleblowers would likely be forced into accepting improper settlement agreements, and also risk having their reputations publicly attacked for years while the legal proceedings drag on. Therefore, Member States should construe this article narrowly and create additional protections to counterbalance this potential unintended consequence of Article 22.

<sup>4</sup> See Nyneröd, Theo; Spagnolo, Giancarlo, *Myths and Numbers on Whistleblower Rewards*, STOCKHOLM INSTITUTE OF TRANSITION ECONOMICS, Working Paper No. 44 (2018), available at: <https://www.econstor.eu/bitstream/10419/204755/1/site-wp0044-2.pdf>; Asher Schechter, *Experts: Financial Rewards and Protections are the Best Way to Incentivize Whistleblowers*, PRO MARKET, the publication of the Stigler Center at the University of Chicago Booth School of Business (April 19, 2017), available at <https://promarket.org/2017/04/19/experts-financial-rewards-protections-best-way-incentivize-whistleblowers/>; Kohn, *Does Whistleblowing Work*, PRO MARKET, the publication of the Stigler Center at the University of Chicago Booth School of Business (May 23, 2017), available at <https://promarket.org/2017/05/23/does-whistleblowing-work/>.

## SUBJECT MATTER EXPERTISE OF THE AUTHORS

The authors of these recommendations are recognized international experts in the area of whistleblowing, with over 35 years of experience representing whistleblowers, drafting effective whistleblower laws,<sup>5</sup> teaching whistleblower law classes at accredited law schools,<sup>6</sup> and working extensively overseas with international whistleblowers and government officials interested in implementing effective whistleblower programs in Europe and elsewhere.<sup>7</sup> They have written more books and articles on the topic of whistleblower law than any other scholars worldwide.<sup>8</sup>

They also have represented (or are currently representing) international whistleblowers on every continent on earth (except Antarctica), including non-U.S. whistleblowers from numerous European countries, such as France, Greece, Germany, Russia, Serbia, Spain, Switzerland, and the United Kingdom. These clients reported frauds that originated in Europe, and in many cases their disclosures have resulted in holding corrupt corporations or actors accountable and returning billions of dollars obtained in fines, restitution payments, and sanctions to taxpayers/governments. As a result of their important contributions to the public interest, clients represented by the authors have already obtained over \$350 million in awards or compensation for whistleblowers who have reported crimes, retaliation against whistleblowers, or violations of regulatory requirements that originated in Europe. Current cases include representing European whistleblowers regarding money laundering schemes in banks located in Estonia, Denmark, and Germany,<sup>9</sup> and Foreign Corrupt Practices Act violations.<sup>10</sup> They even assisted in having the first whistleblower in Bosnia

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<sup>5</sup> The authors significantly contributed to a number of U.S. whistleblower laws, including the Dodd-Frank Act, the Sarbanes-Oxley Act, the IRS whistleblower law, and the Whistleblower Protection Enhancement Act.

<sup>6</sup> Specifically, Stephen Kohn teaches at Northeastern University School of Law. See Northeastern University School of Law Adjunct Faculty Directory, available at: <https://www.northeastern.edu/law/faculty/adjunct.html>.

<sup>7</sup> For example, the authors won an award from the U.S. Agency for International Development to create a world-wide reporting system for whistleblowers outside the United States to report wildlife trafficking and violations of the CITES convention. See *USAID Announces Grand Prize Winners Of The Wildlife Crime Tech Challenge*, USAID Press Release (Sept. 1, 2016) available at: [https://www.whistleblowers.org/wp-content/uploads/2018/09/GrandPrizeWinners\\_PR.pdf](https://www.whistleblowers.org/wp-content/uploads/2018/09/GrandPrizeWinners_PR.pdf).

<sup>8</sup> In addition to numerous law review articles and other publications, the partners at Kohn, Kohn & Colapinto, LLP have authored or co-authored the following books on whistleblower law: Kohn, *Protecting Environmental & Nuclear Whistleblowers: A Litigation Manual* (1985) (first-ever legal treatise on whistleblower law); Kohn and Kohn, *The Labor Lawyers Guide to the Rights and Responsibilities of Employee Whistleblowers* (1988); *The Whistleblower Litigation Handbook: Environmental, Nuclear, Health and Safety Claims* (1990 and 1991); Kohn, *Concepts and Procedures in Whistleblower Law* (2001); Kohn, Kohn and Colapinto, *Whistleblower Law: A Guide to Legal Protections for Corporate Employees* (2004); Kohn, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (2011); Kohn, *The New Whistleblower's Handbook* (2017).

<sup>9</sup> See, e.g., the case of Howard Wilkinson, the Danske Bank whistleblower, information available at: <https://kkc.com/whistleblower-case-archive/howard-wilkinson/>.

<sup>10</sup> See, e.g., the recent case against Novartis in which Greek whistleblowers triggered a \$300 million sanction against a Swiss company for paying bribes in an EU country. Ben Kostyaack, *Whistleblowers Vindicated in Novartis Foreign Corrupt Practices Act Case*, Kohn, Kohn & Colapinto, LLP Whistleblower Blog (June 25, 2020), <https://kkc.com/blog/whistleblowers-vindicated-in-novartis-foreign-corrupt-practices-act-case/>.

reinstated to his position.<sup>11</sup>

## **RECOMMENDATIONS**

The Directive sets forth the “common minimum standards” for whistleblower protection required by each European Union (“EU”) Member State. *See* Directive Articles 1 and 2. The Directive explicitly permits Member States to extend protections beyond these minimum standards. Article 2 ¶ 2. Therefore, when implementing the Directive each Member State has an opportunity to create robust whistleblower programs that protect whistleblowers, incentivize the reporting of crimes or regulatory violations, and enable law enforcement agencies to effectively combat corruption.

Based on our careful review of the Directive, each Member State is highly encouraged to take four steps when enacting domestic whistleblower protections:

- I. Expand whistleblower protections to cover disclosures permitted under international anti-corruption conventions signed by Member States;
- II. Adopt language and procedures that have proven effective in protecting whistleblowers when implementing Articles 6-7, 11, 14-16, 19-21, and 23-24;
- III. Narrowly interpret Article 22 in order to ensure that whistleblowers are not chilled from making disclosures and their confidentiality is maintained;
- IV. Enact whistleblower reward laws to combat specific legal violations, including foreign bribery, money laundering, tax evasion, government procurement fraud, and ocean pollution.

I. **Member States Should Ensure that Domestic Legislation Does Not Simply Duplicate Shortcomings in Existing Anti-Retaliation Whistleblower Laws**

For many years the Public Interest Disclosure Act (“PIDA”) has been erroneously cited to as an example of an effective European whistleblower law. Unfortunately, in reality, the law has not worked. Consequently, as Member States discuss the best practices for protecting whistleblowers, the problems with PIDA must be carefully reviewed.

A detailed 2020 report published by the United Kingdom’s All Party Parliamentary Group on Whistleblowing documented numerous problems with PIDA. These include the following:

- “[A] low success rate for whistleblowing cases;”
- “The low success rate is compounded by the more holistic negative outcomes for whistleblowers including discrimination, damage to their health and wellbeing, employability and financial independence.”

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<sup>11</sup> Mary Jane Wilmoth, *BiH Whistleblower Grateful for Assistance from KKC Partner*, Kohn, Kohn & Colapinto, LLP Whistleblower Blog (Aug. 28, 2015), <https://kkc.com/blog/bih-whistleblower-grateful-for-assistance-from-kkc-partner/>.

- “[W]histleblowers suffer more and longer than before;”
- “[L]ess whistleblowers than before have access to legal representation;”
- “This system is dominated by David v Goliath cases in which the employer has large skilled teams of legal advisors and the whistleblower is alone.”<sup>12</sup>

The failure of the PIDA law was also fully documented in a report by Blueprint For Free Speech, which concluded: “The Public Interest Disclosure Act (PIDA) is broken and no longer able to adequately protect whistleblowers.”<sup>13</sup> This study also correctly noted that traditional anti-retaliation laws can only give protection *after* an employee has suffered from retaliation:

The problem with [traditional anti-retaliation laws] is that a whistleblower has to wait until after they have suffered retaliation before they can obtain ‘protection’ and their right to make a claim crystallizes. By then, the emotional, financial and psychological damage has most likely occurred. A whistleblower can only seek protection once the damage has been done.

These problems, inherent to PIDA, are shared by other nation-states’ laws that predicate whistleblower protections on remedies to address retaliation. In fact, even in the United States, which has some of the most advanced anti-retaliation laws, the percentage of whistleblowers who are able to prevail in retaliation cases is very low. Although the U.S. Department of Labor (“DOL”) Office of Occupational Safety and Health has jurisdiction to investigate and issue initial rulings in on numerous U.S. anti-retaliation whistleblower laws, just like under PIDA, the ability of whistleblowers to prevail in “David v. Goliath” cases, in which an individual whistleblower must legally battle a major corporation with unlimited legal resources, is extremely low as shown by OSHA’s own statistics on the whistleblower cases it investigates.<sup>14</sup> Ultimately, whether under OSHA, PIDA, or another anti-retaliation law, the prospect of prolonged and costly litigation against a very powerful and well-financed employer has a chilling effect on the willingness of employees to report frauds.

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<sup>12</sup> *Making Whistleblowing Work for Society*, All Party Parliamentary Working Group on Whistleblowing (2020), [https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c\\_56b3ca80a07e4f5e8ace79e0488a24ef.pdf](https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf).

<sup>13</sup> *Protecting Whistleblowers in the UK: A New Blueprint*, Thompson Reuters Foundation and the Blueprint for Free Speech, available at: <https://static1.squarespace.com/static/5e249291de6f0056c7b1099b/t/5ea06ff8d801be771a29d32e/1587572764935/Report-Protecting-Whistleblowers-In-The-UK.pdf>.

<sup>14</sup> Whistleblower Docketed Cases Received: FY2014 – FY2019, OSHA, available at: [https://www.osha.gov/sites/default/files/3D\\_Charts-Received\\_Closed.pdf](https://www.osha.gov/sites/default/files/3D_Charts-Received_Closed.pdf). See also Written Statement of Emily A. Spieler, J.D., Before the Subcommittee on Employment and Workplace Safety U.S. Senate Committee on Health, Education, Labor and Pensions (Apr. 29, 2014), <https://www.help.senate.gov/imo/media/doc/Spieler1.pdf>.



Consequently, in order to ensure effective whistleblower protections Member States should explore remedies and procedures beyond the “minimum” protections set forth in the Directive. *See* Article 2 ¶ 2.

## **II. Pursuant to Article 2 and Preamble ¶ 30, Member States Should Protect Whistleblowing Permitted under International Conventions**

Under Article 2 ¶ 2, Member States should adopt whistleblower laws that permit their citizens to fully cooperate in law enforcement investigations conducted by other countries (both within and outside the EU) and be fully protected under domestic law when they do. Such cooperation is mandated under various international anti-corruption treaties. Moreover, by protecting such cooperation, EU citizens can take advantage of whistleblower laws from other countries that may be more effective at prosecuting certain crimes than their home nation.

For example, currently, thousands of whistleblowers who are (or were) citizens of the European Union have filed cases under U.S. whistleblower laws. These U.S. laws are extremely effective, and have resulted in numerous important prosecutions, including major cases against corporations located in EU and other European countries.<sup>15</sup> The U.S. Securities and Exchange Commission (“SEC”) has reported that since the enactment of the Dodd-Frank Act on July 21, 2010 over 1,100 citizens from the United Kingdom and EU Member States have filed whistleblower cases with the SEC under the Dodd-Frank Act (which covers securities frauds and violations of the Foreign Corrupt Practices Act).<sup>16</sup> The IRS offshore compliance program has also had unapparelled success using international whistleblowers, mostly against Swiss banks, to obtain accountability for illegal

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<sup>15</sup> The public record demonstrates that billions of dollars in fines and penalties have been collected from EU countries pursuant to U.S. laws that have whistleblower protection provisions. For example, since Donald Trump has become President of the United States, the U.S. has successfully prosecuted over 150 criminal cases under the FCPA, many concerning European countries or members of the EU. Among some of the European persons that have found liable under various U.S. laws incentivizing whistleblower disclosures are: Société General (French); Commerzbank AG (German); Statoil ASA (Norwegian); JSC VTB Banks (Russian); Fresenius Medical (German); Sanofi (French); Credit Suisse (Swiss); Telia (Swedish); Biomet (Polish); VimpelCom (Dutch); Mobile TeleSystems (Russian); GlaxoSmithKline (British); Allianz SE (German); Total (French); Royal Dutch Shell (Dutch); Deutsche Bank (German); Novartis AG (Swiss); ENI S.p.A. (Italian); Ericsson (Swiss); Barclays (British); Anheuser-Busch InBev (Belgian); Koninklijke Philips Electronics (Dutch); AstraZeneca (British); Royal Bank of Scotland (Scottish); Commerzbank (German); and Tallinex (Estonian). Under the Act to Prevent Pollution from Ships, shipping companies from the following European countries were sanctioned with the aid of whistleblowers (all from countries outside of the USA): Cyprus, Denmark, Germany, Greece, Italy, Malta, Portugal and Sweden. *See Whistleblower Detection Credited in 76% of Last 100 APPS Cases*, FRONT LINE WHISTLEBLOWER NEWS (May 11, 2018) available at: <https://www.whistleblowersblog.org/2018/05/articles/environmental-whistleblowers/whistleblower-detection-credited-in-76-of-last-100-apps-cases/>.

<sup>16</sup> The SEC publishes a list of all countries where whistleblowers have filed Dodd-Frank Act reward claims in their annual reports published at <https://www.sec.gov/whistleblower>. EU countries where whistleblowers were providing information to the SEC as confidential informants under the reward programs include Belgium (34 cases), Bulgaria (22 cases), Finland (11 cases), France (50 cases), Germany (148 cases), Ireland (84 cases), Italy (35 cases), Netherlands (51 cases), Poland (25 cases), Portugal (18 cases), Spain (58 cases), and Sweden (14 cases). While it was a member of the EU that United Kingdom had the largest number of international whistleblowers filing cases with the SEC under the Dodd-Frank Act (567 cases). In total, 26 EU Member States had whistleblowers who filed cases within the United States under the SEC’s confidential program.

undeclared offshore accounts and other tax violations.<sup>17</sup> Additionally, although, there are no comparable statistics under other highly effective U.S. laws, based on direct experience, numerous residents from EU countries also participate in highly effective U.S. whistleblower programs under laws such as the False Claims Act, Commodity Exchange Act, and the Act to Prevent Pollution on Ships.

Why Member States need to encourage and protect whistleblowers working directly with international partners is illustrated by the cases in which the U.S. has used whistleblowers in investigating Foreign Corrupt Practices Act (a U.S. law prohibiting bribing foreign officials) violations. For example, in the recent successful prosecution of the Swiss pharmaceutical company Novartis for paying bribes within the EU (i.e. Greece), whistleblowers played a key role in the detection of the foreign bribery. However, Greek domestic law currently does not directly protect these whistleblowers, and there have been numerous reports that the whistleblowers have suffered, or may suffer, retaliation. Essentially, bribery often crosses borders and the crucial role played by whistleblowers in this context is not surprising, as bribery is designed to be well hidden. Without the assistance of well-placed insiders, bribery is difficult, if not impossible, to detect, yet whistleblowers will be deterred from reporting international bribery if they face retaliation at home.

Thus, given the highly destructive nature of bribery on international development and its corruption of democratic institutions, every nation within the EU has an interest in ensuring that its whistleblower laws encourage citizens to participate in the U.S. Foreign Corrupt Practices Act (“FCPA”) and other foreign whistleblower programs.

This is not only good policy, but is also consistent with treaty obligations under the [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (“OECD Anti-Bribery Convention”). The OECD Anti-Bribery Convention requires all Member States to fully cooperate on bribery investigations initiated by other countries that are part of the OCED. The OECD Anti-Bribery Convention requires “mutual legal assistance.” Article 9 of the Convention states:

Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.

Furthermore, in the [2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business](#), the OECD stated that Member States should guarantee that:

- i) easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law

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<sup>17</sup> Dennis J. Ventry Jr., *Not Just Whistling Dixie: The Case For Tax Whistleblowers in the States*, 59 VILL. L. REV. 425 (2014), available at: <https://digitalcommons.law.villanova.edu/vlr/vol59/iss3/2>.

- enforcement authorities, in accordance with their legal principles;
- ii) appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles;
  - iii) appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

Likewise, as far back as 2008 the OECD recognized that Member States lacked effective protections for whistleblowers and recommended specific domestic state action to protect whistleblowing under the Anti-Bribery Convention. As the OECD Working Group on Bribery in International Business Transactions explained:

In the absence of comprehensive whistleblower protections, public officials are unlikely to report suspicions of the bribery of foreign public officials involving other public officials as well as suspicions involving companies or individuals with close links to the government. Concerns about balancing an obligation to report with the interest of maintaining the confidentiality of companies' operations might also deter reporting. The Mid-Term Study reports that comprehensive whistleblower protections are notably absent in many Parties . . . the Phase 2 reports disclose that for whistle-blowing protections to be effective they should: (a) provide a guarantee of confidentiality (e.g. via a hotline); (b) apply where the whistle-blowing concerns either an act by another public official or an act outside the public administration; and (c) apply where the whistle-blowing follows internal procedures as well as where the whistle-blower goes directly to the law enforcement authorities.<sup>18</sup>

Lastly, in 2013, the OECD published a report<sup>19</sup> discussing the key role that whistleblowers and whistleblower protection can play in the detection of foreign bribery when legal frameworks and appropriate channels are in place to report alleged instances to law enforcement authorities. Almost all EU Member States are signatories of this convention,<sup>20</sup> yet domestic whistleblower

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<sup>18</sup> Consultation Paper Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption, OECD Working Group on Bribery in International Business Transactions (Jan. 2008), <http://www.oecd.org/daf/anti-bribery/39882963.pdf>.

<sup>19</sup> The Detection of Foreign Bribery, Chapter 2: The Role of Whistleblowers and Whistleblower Protection, OECD (2017), [www.oecd.org/corruption/the-detection-of-foreign-bribery.htm](http://www.oecd.org/corruption/the-detection-of-foreign-bribery.htm).

<sup>20</sup> The only Member States not signatories to the OECD Anti-Bribery Convention are Croatia, Cyprus, Malta and Romania. Although not signatories to the Convention, these Member State are signatories to other international anti-corruption conventions that would also cover foreign bribery. See OECD Convention on Combating Bribery of

laws do not currently cover citizens who provide information covered under this convention. This is a dangerous and highly detrimental loophole that should be immediately closed as Member States focus on creating effective whistleblower laws as part of the implementation of the Directive.

The OCED Anti-Bribery Convention is not the only international anti-corruption treaty that is applicable to EU Member States and premised on international cooperation. For example, the [UN Convention Against Transnational Organized Crime](#) (ratified by all EU members) requires parties to provide “mutual legal assistance in investigations, prosecutions and judicial proceedings ... to the fullest extent possible under relevant laws, treaties, agreements.” Article 18. *See also* Articles 13 (cooperation), 16 (extradition), 17 (international transfers), 19 (joint investigations), and 24 (protection of witnesses). Additionally, Article 13 of the [United Nations Convention Against Corruption](#) (also ratified by all EU members) states that member countries must cooperate “in matters relating to civil proceedings in cases of corruption, especially concerning . . . obtaining evidence.” *See also*, [Council of Europe Convention Against Corruption](#) (only ratified by some EU Member States); [Council of Europe Criminal Law Convention on Corruption](#) (ratified by all EU members).

Because Member States of the EU are parties to at least some of these conventions, Member’s domestic whistleblower laws should also require full cooperation between the programs covered under the Directive and law enforcement (both domestic and international) with jurisdiction to investigate the crimes covered under these conventions. This should include recognizing an individual’s right to report specific violations covered under these international law enforcement treaties, and the right of whistleblowers to work with law enforcement agencies from other countries, such as the United States, that have robust and effective anti-corruption programs. In addition, Member States should explicitly include in any anti-retaliation provisions that citizens or residents who are lawfully working within such international programs are fully protected from domestic retaliation.

### **III. Recommendations Directly Related to Specific Provisions Mandated by the Directive**

The following specific recommendations are made concerning how Member States should implement the specific provisions of the Directive.

#### **Article 6.2 (Anonymous Reporting)**

The Directive gives each Member State the discretion to implement rules for anonymous reporting. Anonymous reporting is an essential aspect of any successful whistleblower program for the following reasons.

First, it is critical for promoting the disclosure of wrongdoing. Many employees fear retaliation, and anonymous reporting helps potential whistleblowers overcome those fears.

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Foreign Public Officials in International Business Transactions Ratification Status as of May 2018, <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

Second, anonymous reporting is the best protection against retaliation. If a wrongdoer does not know who reported them, they cannot retaliate.

Third, reporting anonymously allows the whistleblower to potentially remain on-the-job and act as a source of crucial information in ongoing criminal wrongdoing and regulatory violations and better assist law enforcement in ongoing investigations.

Finally, anonymous reporting prevents the “chilling effect” which occurs whenever a whistleblower is retaliated against.

A successful anonymous reporting program permits the whistleblower to remain anonymous, while at the same time (a) incentivizing high quality reporting; (b) permitting whistleblowers to provide ongoing support for law enforcement; and (c) creating a mechanism to screen out frivolous tips. The procedures created by the SEC and the Commodity Futures Trading Commission (“CFTC”) (which have been applied to international whistleblowers in thousands of cases), are simple to implement and highly effective. The following recommendations are based on these rules:

1. In order to submit anonymously, the whistleblower must hire an attorney.
2. The attorney must verify the whistleblower’s identity and review the whistleblower’s allegations to ensure that they are not frivolous or being filed for some improper purpose.<sup>21</sup>
3. The attorney then submits the whistleblower’s tip on behalf of the whistleblower and certifies under oath that information provided is true and complete to the best of the attorney’s knowledge.
4. The whistleblower separately signs a copy of the tip under the pains and penalties of perjury and the attorney retains this copy of the tip in confidence.
5. The attorney then becomes the point of contact for the government in order to facilitate future cooperation.

If these steps are taken, the law must also require the government agency or office receiving the tip to maintain the complete confidentiality and anonymity of the whistleblower. This is achieved through three policies:

1. Any information that could potentially identify the whistleblower is prohibited from being disclosed outside the government.

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<sup>21</sup> The SEC and CFTC reward laws make it relatively easy for whistleblowers with quality information to obtain attorneys free of charge. Private sector attorneys review the potential disclosures of these confidential whistleblowers, and if they determine that the evidence could result in a successful enforcement action, they usually take on the cases on a “contingency fee” basis. The whistleblower pays nothing, and the attorney only gets paid if the information provided by his or her client results in a successful prosecution with significant monetary damages. Thus, the private sector bar both provides free legal services to meritorious whistleblowers, while at the same time screening cases that may be weak, frivolous or based solely on a desire of an employee to “get back” at his or her employer. This process stimulates the high-quality reporting referenced in the previous section.

2. Any documents or other evidence that could identify the whistleblower may not be used without the whistleblower's express permission. Instead it must be "back-sourced" so the target of the investigation does not know where the evidence came from.
3. The identity of the whistleblower and the whistleblower's attorney must remain confidential, and also must be exempt from discovery.

### **Article 7 (Internal Reporting)**

It is extremely important for Member States to recognize that the majority of retaliation cases are triggered by internal reporting. When a whistleblower files an internal complaint, the company or persons engaged in the wrongdoing may have a motive to discredit the whistleblower. This is almost always the case if the whistleblower is correct (i.e. has evidence of criminal or regulatory violations) for which his or her supervisor (or upper management) had permitted or had profited from.

Thus, Member States must require strict rules to prevent retaliation against internal reporting. These rules should include, but are not limited to:

1. Strict confidentiality rules. A violation of confidentiality must be viewed as an adverse employment action, and entitle the employee to significant damages, even if no other adverse action occurs. Indeed, case precedent under the U.S. Sarbanes-Oxley Act permits this.<sup>22</sup>
2. Violations of confidentiality and other procedural rights within an internal reporting program must be viewed as significant regulatory violations, subjecting a company or the offending individual to government sanctions (from which the whistleblower is entitled to receive damages).
3. Internal whistleblower programs cannot be managed or operated by attorneys that represent the company or any other person or organization that may have a conflict of interest with the whistleblower.
4. All whistleblowers who contact an internal compliance program must be provided with written guidelines that explain their rights, including their right to bypass the company's chain of command and report directly to the government.
5. The internal compliance program must have the authority, on behalf of the company, to "self-report" potential violations to the government.
6. All employees involved in the internal compliance programs must be protected against retaliation and have a right to confidentially report any attempt to cover up or hinder their review of a whistleblower's allegations. If a company hires a third-party entity to operate

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<sup>22</sup> See, e.g., *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002-003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), [https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_002.SOXP.PDF](https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_002.SOXP.PDF)

its compliance program, that contractor cannot lose its contract because it was too aggressive in uncovering misconduct.

### **Article 11 (Whistleblower Office)**

In accordance with Article 11 of the Directive, all EU nations must set up an independent and autonomous government-run whistleblower program through which whistleblowers may report securely and confidentially. The following are requirements necessary for a whistleblower office to be effective:

- The existence of the office is widely publicized.
- The office establishes user-friendly procedures for whistleblowers to file anonymous or confidential reports.
- All communications between a whistleblower and the office must be considered completely confidential and not subject to discovery or release without the consent of the whistleblower or unless absolutely necessary to comply with the constitution of the Member State (i.e. discovery under Article 22 would be restricted to these circumstances).
- The office must be able to make referrals to the appropriate government enforcement agencies to investigate violations and ensure that these prosecutors or regulatory comply with the strict confidentiality rules mandated under law, for example:
  - When anonymous, the release of the whistleblower's name outside the office to other law enforcement agencies can only be accomplished with the written consent of the whistleblower and;
  - The information provided by the whistleblower may only be released to other appropriate law enforcement or regulatory agencies if the whistleblower consents to its delivery, or (a) the whistleblower's identity is completely protected; (b) no information that could indirectly identify the whistleblower is produced; and (c) the agency obtaining the information will not disclose at any time the fact that any of its leads or information came from a whistleblower.
- The Member State shall be liable for damages and injunctive relief should a whistleblower need to judicially enforce protections afforded under the Directive and/or if the identity of the whistleblower is released (directly or indirectly).
- Providing information to the office shall be an absolute defense in any lawsuit or claim filed under Article 22 if the whistleblower's only disclosures of information were to the office or to other regulatory or law enforcement agencies based on a referral by the office. *See discussion of Article 22 below.*

- The office has the right to intervene in any legal proceeding on behalf of a whistleblower, with the consent of the whistleblower.
- The office has authority to file claims against persons or companies that retaliate against a whistleblower.
- The office maintains communication with the whistleblower or the whistleblower's attorney.

The SEC Office of the Whistleblower is a good model that Member States should review as they consider the requirements to their domestic Whistleblower Office. The SEC Office's website is located at <https://www.sec.gov/whistleblower>.

#### **Article 14 (Review by Competent Authorities)**

In national whistleblower programs, the performance of the Competent Authorities, and the employees working within these authorities involved in whistleblower matters, must be evaluated based on performance indicators directly tied to the success of the whistleblower programs. Simply cataloging the number of complaints or investigations is not sufficient. The actual success of the program in relation to combatting frauds and other crimes needs to be incentivized. Performance indicators should include the following:

1. Amount of whistleblower disclosures that resulted in a successful enforcement action;
2. Amount of administrative, civil, or criminal fines or sanctions obtained;
3. Number of other corrective actions imposed as part of a successful administrative, civil, or criminal enforcement action, whether obtained by settlement or court order;
4. In award programs, the number and amount of awards paid to whistleblowers;
5. Whether the office was able to provide protection to the whistleblower and prevent any disclosures as to the whistleblower's identity;
6. The success and number of actions taken by the office (including formal intervention in pending legal cases) to protect a whistleblower.

#### **Article 15 (Public Disclosure)**

Article 15 covers specific forms of public whistleblowing but does not uniformly cover whistleblower disclosures to the news media, members of the public, victims of crimes, or nongovernmental organizations (such as environmental or anti-corruption groups). Paragraph 2 of Article 15 states that Member States are to apply existing laws on freedom of speech to these forms



of whistleblowing.<sup>23</sup> Because numerous forms of whistleblowing occur outside of the specific channels set forth in the Directive, Member States should also include provisions in their whistleblower laws that protect public disclosures.

In regard to all public disclosures (whether covered under the Directive or not), Member States must protect whistleblowers from retaliatory libel suits based on the contents of a lawful disclosure. This can be accomplished by incorporating the standards set forth in the U.S. Supreme Court case of *New York Times v. Sullivan*<sup>24</sup> into the whistleblower law, if such a standard is not already recognized. This would be in keeping with the spirit of Article 21 and Preamble ¶ 7.

*The Sullivan* case created reasonable standards for judging the merits of a libel case. For context, this case was decided during the U.S. civil rights movement, when racist southern officials tried to use libel actions to bankrupt and harass civil rights leaders. Under this standard a libel action could be permitted against a whistleblower under Member State law only if the plaintiff in that case could prove “actual malice,” and the fact that the statement of the whistleblower could not be proven (or turned out to be wrong) is not at issue. As explained by the Court in *New York Times*, the reason this higher standard is necessary is because “the threat of damage suits” inhibits freedom of speech.” See also *Linn v. United Plant Guard*<sup>25</sup> (applying this to speech by employees exercising rights protected under law).

This same rationale applies equally, if not more so in the whistleblower context. In fact, in the United States, the leading case on this issue, *Pettway v. American Cast Iron Co.*,<sup>26</sup> held that a complaint filed confidentially with the appropriate government agency was fully protected, and that an employee could not be subject to any discipline even if the complaint contained “maliciously libelous statements.” And, if an employee chooses to publicly release the complaint, the provisions in *New York Times* or *Linn* would apply.

## **Article 16 (Duty of Confidentiality)**

This article permits Member States to create specific exceptions in their legislation to the right of a whistleblower to confidentiality or anonymity. These exceptions should be narrowly drawn and contain the following safeguards:

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<sup>23</sup> Article 15 ¶ 2 states: “This Article *shall not apply* to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information” (emphasis added).

<sup>24</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), available at: <https://kkc.com/wp-content/uploads/2020/03/New-York-Times-Co.-v.-Sullivan-376-U.S.-254-1964.pdf>.

<sup>25</sup> *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), available at: <https://kkc.com/wp-content/uploads/2020/03/Linn-v.-United-Plant-Guard-Workers-383-U.S.-53-1966.pdf>.

<sup>26</sup> *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), available at: <https://casetext.com/case/pettway-v-american-cast-iron-pipe-co-4>.

1. The derogations in this article should be understood to be limited to the whistleblower's identity. Communications between a whistleblower and a Whistleblower Office must remain confidential and privileged. *See* comments on Article 11.
2. Any whistleblower providing information to a law enforcement agency should have their identity protected at a minimum to the same extent as under the laws of each Member State on protecting confidential informants.
3. If the government releases a whistleblower's information to the public (or permits such information to be made publicly available or available to any target of the whistleblower's allegations), the whistleblower must be immunized from any liability based on the government's release of information. Additionally, any retaliation resulting from such a disclosure should be considered an obstruction of justice.
4. Prior to the release of a whistleblower's information, in addition to providing the whistleblower with notice that such information may be released, the whistleblower must be given a reasonable amount of time to seek a protective order or other injunctive relief from a court. Any legal proceeding in which a whistleblower seeks a protective order should be permitted to be filed as a John or Jane Doe matter. The proceeding would be strictly between the government and the whistleblower, and limited to whether or not there is a lawful reason that compels the disclosure of the information, and whether protections need to be judicially ordered in order to protect the whistleblower's rights to confidentiality and/or protect the whistleblower from retaliation.

#### **Article 19 (Prohibition Against Retaliation)**

A nondisclosure agreement ("NDA") that interferes with any person's right to become a whistleblower should not only be prohibited in accordance with Article 24 but should also be an adverse employment action. *See* discussion of Article 24 below.

#### **Article 20 (Measures of Support)**

One way the goals of this article can be achieved is by allowing the whistleblower office or relevant government agency the ability to file lawsuits on behalf of whistleblowers and/or intervene in their cases. Any law permitting the Whistleblower Office or another similar agency to prosecute a case (or intervene in an existing case) should have the following characteristics:

1. The governmental office may only participate in a whistleblower case with the consent of the whistleblower;
2. Even if the government initiates a case, or intervenes in a case, the whistleblower maintains the right to hire his or her own counsel and fully participate as a party to the proceeding;
3. The resources needed for the government to provide such legal assistance to whistleblowers should come from two sources (in addition to general revenue): (a) a percentage of all sanctions obtained from a whistleblower-triggered enforcement action;

(b) should the whistleblower prevail, the defendant should have to pay all fees and costs incurred by the government, at market rates. For an explanation of “market rate” attorney fees see comments to Article 21 below.

Additionally, laws or regulations implementing programs designed to support whistleblowers must make sure that communications between whistleblowers and any government agency offering advice or legal aid are fully privileged, confidential, and not subject to discovery. If a private sector company provides such advice or aid, strict protections must be in place in order to insure that communications between whistleblowers and such aid-givers are considered privileged, and that these types of programs are strictly prohibited from providing any information about the whistleblower (including in response to discovery) without the written consent of the whistleblower.

### **Article 21 (Measures for Protection Against Retaliation)**

This Article requires Member States to ensure that persons who suffer retaliation obtain full compensation and remedies. These remedies should include standard tort remedies and remedies available in employment cases. The U.S. Supreme Court cases of *Albemarle Paper Co. v. Moody*<sup>27</sup> and *Carey v. Phipus*,<sup>28</sup> provide guidance on the types of economic and noneconomic remedies that should be made available to whistleblowers in order to make them whole. An excellent case that sets forth the types of actual damages and equitable relief that should be afforded whistleblowers is *Hobby v. Georgia Power Co.*<sup>29</sup>

These cases, and numerous other legal authorities, support the following remedies for whistleblower who prevail in a retaliation case:

- Reinstatement
- Back pay
- Front pay (if reinstatement is not practical or requested by employee)
- Restoration of all benefits
- Restoration of all privileges of employment
- Compensatory damages for extreme emotional distress or loss of professional reputation
- Exemplary or punitive damages
- Injunctive relief, including a preliminary order of reinstatement
- Attorney fees and costs at market rates (consistent with case precedent under 42 U.S.C. §

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<sup>27</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, (1975) available at: [https://kkc.com/wp-content/uploads/2020/03/Albemarle-Paper-Co.-v.-Moody\\_-422-U.S.-405.pdf](https://kkc.com/wp-content/uploads/2020/03/Albemarle-Paper-Co.-v.-Moody_-422-U.S.-405.pdf).

<sup>28</sup> *Carey v. Phipus*, 435 U.S. 247 (1978), available at: <https://kkc.com/wp-content/uploads/2020/03/Carey-v.-Phipus-435-U.S.-247-1978-1.pdf>.

<sup>29</sup> *Hobby v. Georgia Power Co.*, Case No. 90-ERA-30 (U.S. Dept. of Labor), No. 01-10916 (11th Cir. 2002), available at: <https://kkc.com/wp-content/uploads/2020/04/IN-THE-UNITED-STATES-COURT-OF-APPEALS.pdf>. Other important cases discussing the appropriate damages that should be included in a whistleblower anti-retaliation law are: *Reich v. Cambridgeport Air Systems*, 26 F.3d 1187 (1st Cir. 1994), available at: <https://kkc.com/wp-content/uploads/2020/03/Reich-v.-Cambridgeport-Air-Systems-26-F.3d-1187-1st-Cir.-1994.pdf> and *Smith v. Wade*, 461 U.S. 30 (1983), available at: [https://kkc.com/wp-content/uploads/2020/03/Smith-v.-Wade\\_-461-U.S.-30.pdf](https://kkc.com/wp-content/uploads/2020/03/Smith-v.-Wade_-461-U.S.-30.pdf).

- 1988)
- Affirmative relief (i.e. equitable orders in order to remove any chilling effect caused by the retaliation)

The payment of attorney’s fees and costs should be also carefully considered. If a whistleblower is forced to pay the fees and costs of a defendant if the whistleblower does not prevail in a case, all (or most) of the goals of the Directive will be lost. It would be very difficult for any responsible attorney to recommend that a whistleblower participate in a proceeding in which, if they were to lose, they could go bankrupt or lose thousands of dollars. Thus, the payment of reverse fees should be extremely limited or prohibited. For example, the following U.S. whistleblower laws only permit whistleblowers who win their cases to collect fees. Defendants cannot collect fees. *See* [Energy Reorganization Act](#); [Pipeline Safety Act \(49 U.S.C. § 60129\(b\)\(3\)\(B\)\(iii\)\)](#); [Airline Safety Whistleblower Law](#); [Railway Safety Act](#); [Tax Whistleblower Law](#); [Consumer Financial Protection Act](#); [Consumer Product Safety Act](#); [Sarbanes-Oxley Act \(18 U.S.C. § 1514A\(c\)\)](#); and [Surface Transportation Act](#). The [False Claims Act](#) only permits whistleblowers to be charged with a defendant’s attorney fees if the defendant can meet a high burden of proof.<sup>30</sup>

On the other hand, attorneys who represent whistleblowers need to be compensated at “market rates” if the whistleblower prevails in his or her case. Every major whistleblower anti-retaliation law requires that a company that is found to have engaged in retaliation pay the whistleblower all reasonable fees and costs.<sup>31</sup>

When determining the amount of attorney’s fees a whistleblower’s lawyer can obtain, the terms of a representation agreement should not be controlling. In this way, attorneys can be incentivized to undertake the representation of whistleblowers for free or at reduced hourly rates, but still be paid full market rates if they can demonstrate illegal retaliation. In determining a reasonable market rate, court or agencies must take into consideration the difficulty of proving retaliation and the public interest nature of these proceedings. The correct “market” for setting fees in whistleblower cases should be the same as the fees paid by major corporations to private law firms in cases involving complex civil litigation.

In the United States, an entire body of case law has been created adjudicating attorney fees issues, including what can be compensated, when defendants can obtain fees, and the hourly rate paid to an attorney undertaking a whistleblower or public interest-covered case. These decisions should be carefully considered when drafting the attorney fees rules under the Directive.<sup>32</sup>

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<sup>30</sup> *See* 31 U.S.C. § 3730(d)(4); *United States ex rel. Haycock v. Hughes Aircraft Co.*, No. 94-55620, 94-55826, 1996 App. LEXIS 27664 (9th Cir. Sept. 15, 1995).

<sup>31</sup> *See* *Blum v. Stenson*, 465 U.S. 886 (1984), available at: [https://kkc.com/wp-content/uploads/2020/03/Blum-v.-Stenson\\_-465-U.S.-886.pdf](https://kkc.com/wp-content/uploads/2020/03/Blum-v.-Stenson_-465-U.S.-886.pdf).

<sup>32</sup> *See* *Perdue v. Kenny*, 559 U.S. 542 (2010), available at: [https://kkc.com/wp-content/uploads/2020/03/Perdue-v.-Kenny-A\\_-559-U.-S.-542.pdf](https://kkc.com/wp-content/uploads/2020/03/Perdue-v.-Kenny-A_-559-U.-S.-542.pdf) (fee enhancements); *Hensley v. Eckerhart*, 461 U.S. 429 (1983), available at: [https://kkc.com/wp-content/uploads/2020/03/Hensley-v.-Eckerhart\\_-461-U.S.-424.pdf](https://kkc.com/wp-content/uploads/2020/03/Hensley-v.-Eckerhart_-461-U.S.-424.pdf) (determining fees owed method); *Blum v. Stenson*, 465 U.S. 886 (1984), available at: [https://kkc.com/wp-content/uploads/2020/03/Blum-v.-Stenson\\_-465-U.S.-886.pdf](https://kkc.com/wp-content/uploads/2020/03/Blum-v.-Stenson_-465-U.S.-886.pdf) (determining fee rate); *Missouri v. Jenkins*, 491 U.S. 274 (1989), available at: <https://kkc.com/wp-content/uploads/2020/03/Missouri-v.-Jenkins-491-U.S.-274-1989.pdf> (use of current rates; paralegals); *City of Riverside v. Rivera*, 477 U.S. 561 (1986), available at: <https://kkc.com/wp->

## Article 22 (See Part IV)

## Article 23 (Penalties)

In creating legislation compliant with Article 23, Member States should make retaliation against a whistleblower who provides truthful information concerning a possible commission of a crime to a law enforcement agency a criminal obstruction of justice. This can be done through the adoption of an obstruction statute protecting whistleblowers similar to [18 U.S.C. § 1513\(e\)](#).

## Article 24 (No Waiver of Rights)

The SEC and the U.S. Nuclear Regulatory Commission both prohibit restrictive NDAs (and similar confidentiality clauses) and consider them to be a significant regulatory violation triggering potential liability, including large fines or even debarment.<sup>33</sup>

Simply prohibiting improper NDAs will not prevent companies from widely utilizing NDAs to intimidate whistleblowers. Even if not enforceable in court, NDAs have a chilling effect on the vast majority of employees who sign such agreements, and do not want to risk the possibility of a counterclaim filed by their employer. Without strict sanctions against using these types of agreements, under a cost-benefit analysis, it is to a company's advantage to widely use illegal NDAs, as they will stop or intimidate a large amount of whistleblowing.

Moreover, the failure to provide an employee with a benefit (including a severance payment) because the employee refuses to sign an agreement that contains such an NDA should be considered an adverse employment action and permit the employee to sue for damages.<sup>34</sup> And if an employee is forced to sign a restrictive NDA as part of a settlement, reporting to the government will not be considered a violation of an NDA and the employee will be entitled to keep the settlement.

To combat the chilling effect NDAs have on the vast majority of employees, specific precedents under U.S. law should be followed in drafting national whistleblower legislation. These include:

1. Prohibitions against restrictive NDAs must apply to all agreements executed on behalf of a company, including employment agreements, severance agreements and settlement

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[content/uploads/2020/03/Riverside-v.-Rivera\\_-477-U.S.-561.pdf](#) (no proportionality); *Blanchard v. Bergeron*, 489 U.S. 87 (1989), available at: [https://kkc.com/wp-content/uploads/2020/03/Blanchard-v.-Bergeron\\_-489-U.S.-87.pdf](https://kkc.com/wp-content/uploads/2020/03/Blanchard-v.-Bergeron_-489-U.S.-87.pdf) (fees not controlled by agreement).

<sup>33</sup> See, e.g., *Macktal v. Brown & Root*, 86-ERA-23 (Oct. 13, 1993), available at: <https://kkc.com/wp-content/uploads/2019/08/macktal-v.-brown-root-86-era-23-oct-13-1993.pdf>; In the Matter of BlueLinx Holdings Inc., SEC File No. 3-17371 (Aug. 10, 2016), <https://www.sec.gov/litigation/admin/2016/34-78528.pdf>; In the Matter of KBR, Inc., SEC File No. 3-16466 (Apr. 1, 2015), available at: [https://kkc.com/wp-content/uploads/2019/06/barko\\_sec-order.pdf](https://kkc.com/wp-content/uploads/2019/06/barko_sec-order.pdf).

<sup>34</sup> See *Connecticut Power and Light v. Department of Labor*, 85 F.3d 89 (1996), available at: [https://kkc.com/wp-content/uploads/2020/03/Connecticut-Light-\\_-Power-Co.-v.-Secretary-of-the-United-States-.pdf](https://kkc.com/wp-content/uploads/2020/03/Connecticut-Light-_-Power-Co.-v.-Secretary-of-the-United-States-.pdf).

agreements.

2. The definitions from the SEC of what is an illegal NDA should be adopted into Member State law as a minimum protection against NDAs.
3. An illegal NDA should be considered a regulatory violation, subjecting the company that required the NDA to sanctions. In this way employees can challenge NDAs without having to personally risk violating the NDA to alert the government as to the illegal nature of an NDA.
4. Companies that are found to have employed illegal NDAs should be required to inform their employees that those NDAs are void and not enforceable.
5. An illegal NDA must be viewed as an adverse employment action, permitting an employee to file a whistleblower lawsuit to have the NDA voided, and to collect damages that may have resulted from the NDA.
6. If the NDA is included in a settlement agreement, the standard given under the *Macktal v. Brown and Root*<sup>35</sup> whistleblower decision should be applicable. This includes the following remedies: (a) the entire settlement agreement is voided, not just the part of the agreement that contains the improper NDA; (b) the whistleblower's right to pursue discrimination cases or other legal rights waived by the settlement agreement are lifted, and the whistleblower is free to pursue his or her labor case; (c) the whistleblower can keep any settlement monies paid.

#### **IV. Member States Should Narrowly Interpret Article 22 Consistent with the Intent Behind the Directive**

Article 22 provides “protection of persons concerned.” Concerned persons means both legal and natural persons and therefore includes all corporations, banks, partnerships, or individuals accused by a whistleblower of wrongdoing.<sup>36</sup> This means that the benefits of “persons concerned” is not limited to people who may be personally harmed, but also applies to corporations that may be harmed. Thus, Article 22 essentially permits a corrupt corporation or a criminal whose illegal conduct was reported by a whistleblower to “fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defense, including the right to

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<sup>35</sup> *Macktal v. Brown & Root*, 86-ERA-23 (Sec'y Oct. 13, 1993), available at: <https://kkc.com/wp-content/uploads/2019/08/macktal-v.-brown-root-86-era-23-oct-13-1993.pdf>.

<sup>36</sup> Article 22 preserves significant rights for corporations or individuals who are accused of corruption. This includes “rights” that could result in the identification of otherwise confidential whistleblowers and could subject whistleblowers to long and costly retaliatory lawsuits. Article 22 has the potential to undermine whistleblower protections and create a chilling effect on the willingness of whistleblowers to disclose criminal conduct or regulatory violations. Apparently the authors of the Directive understood this conflict and explicitly provided that whistleblowers who also are confidential informants to law enforcement and/or who may receive compensation or rewards for their information should be protected by other national laws, thus protecting these informants from any identification or retaliation under the reporting procedures of the directive, including Article 22. *See* Preamble ¶ 30.

be heard and the right to access their file.” The plain language of this provision alone might chill an uninformed whistleblower who worries that this article could open him or her up to liability.

In order to adequately protect whistleblowers exceptions or laws Member States enact pursuant to this Article must be drafted narrowly with an eye for guilty corporations that may be inclined to abuse any rights provided to chill whistleblower disclosures. Without strict safeguards in national laws prohibiting abuse, the broad nature of Article 22 has the potential to undermine the intent behind the Directive. Retaliatory lawsuits filed under any broad rights granted by Member States pursuant to this Article could bankrupt honest whistleblowers, or tie whistleblowers up in prolonged and expensive court proceedings for years.

Safeguards must be put into place by Member States that will effectuate the intent behind the Directive and prevent abusive complaints filed by major corporations against individual whistleblowers, including at minimum the following protections:

1. The right of persons to access their file, should not interpreted to include the confidential identity of the whistleblower or materials provided by the whistleblower. If a “concerned person” requests to see their “file,” the identity of the whistleblower must be withheld, unless the whistleblower waives his or her right to confidentiality. This interpretation is in compliance with the Charter of Fundamental Rights of the European Union which states that the right of persons to access their files is subject to the legitimate interests of confidentiality. Charter of Fundamental Rights of the European Union, Article 41 ¶ 2.
2. No lawsuits should be permitted by “persons concerned” in order to discover the identity of a whistleblower.
3. Should the whistleblower’s identity be revealed due the “rights” laid out in Article 22, the standard for finding a whistleblower liable for statements made by the whistleblower in public should be covered under the same standards of proof as discussed above in the comments regarding Article 15. Specifically, the standards of proof set forth in the following cases should apply: *New York Times v. Sullivan*,<sup>37</sup> *Linn v. United Plant Guard*<sup>38</sup> and *Pettway v. American Cast Iron Co.*<sup>39</sup> These cases carefully weigh the public interest in freedom of expression when determining potential liability in the type of proceedings that may arise due to Article 22. The insistence on protections against libel lawsuits as set forth in *New York Times* is absolutely essential in order to ensure that whistleblowers will be protected under the Directive.
4. If a “concerned person” files a lawsuit against a whistleblower and does not prevail, the “concerned person” should be required to pay a significant fine to the whistleblower on top

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<sup>37</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), available at: <https://kkc.com/wp-content/uploads/2020/03/New-York-Times-Co.-v.-Sullivan-376-U.S.-254-1964.pdf>.

<sup>38</sup> *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), available at: <https://kkc.com/wp-content/uploads/2020/03/Linn-v.-United-Plant-Guard-Workers-383-U.S.-53-1966.pdf>.

<sup>39</sup> *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), available at: <https://casetext.com/case/pettway-v-american-cast-iron-pipe-co-4>.

of covering all costs and fees incurred by the whistleblower. The fine should be sufficient to deter retaliatory lawsuits and should have an escalation clause depending on the wealth of the retaliator.

5. If a “concerned person” files a lawsuit against a whistleblower and does not prevail, the “concerned person” should be required to pay all damages suffered by the whistleblower as a result of the filing, including all economic damages, compensatory damages, punitive damages, and the whistleblower’s attorney fees and costs at market levels.
6. Filing a lawsuit against a whistleblower in bad faith, in order to retaliate, should be considered a criminal obstruction of justice. In the United States, the obstruction of justice statute protects whistleblowers who provide information to law enforcement, and subjects those who retaliate economically against a whistleblower to significant criminal penalties (e.g. 10 years in prison).
7. Consistent with the other articles of the Directive, whistleblowers who provide information confidentially to law enforcement should have complete immunity from liability under this provision, including confidential informants, persons paid by the government for information, and/or persons who participate in reward programs. *See* Directive Preamble ¶ 30; Article 21.
8. Consistent with the other articles of the Directive, whistleblowers who testify in courts of law, administrative proceedings, or before governmental/parliamentary bodies may not be sued for such public disclosures. *See* Article 21; Article 15.
9. If a whistleblower’s identity is required to be released due to his or her participation as a witness for the government in a criminal proceeding, that whistleblower must be immune from liability. *See* Article 15; Article 21. This immunity would not cover perjury.
10. Counterclaims against a whistleblower resulting from the disclosure of a whistleblower’s identity should have a cap for damages. In the United States, there are caps on such counterclaims under a number of whistleblower laws. The following laws cap the damages a whistleblower can be charged at \$1,000 USD if they are found guilty of having filed a “bad faith” or “frivolous” complaint: the [Consumer Financial Whistleblower Law](#); the [Food Safety Whistleblower Law](#); the [Pipeline Safety Whistleblower Law](#); and the [Auto Safety Whistleblower Law](#). A cap on damages would permit “persons concerned” the opportunity to clear their names, without creating a chilling effect on whistleblowing in the public interest.

#### V. **Member States Should Implement Whistleblower Reward Laws**

The Directive establishes a framework for Member States to adopt anti-retaliation laws designed to protect whistleblowers. However, the Directive clearly permits Member States to design whistleblower provisions in addition to those set forth in the various Articles. As set forth below, there is a strong record demonstrating that whistleblower reward laws play a crucial role in the detection and successful prosecution of white-collar crimes. The record is absolutely clear that



whistleblower reward laws are highly effective. Moreover, these laws are the only whistleblower laws that have a proven track record of success. Thus, Member States should ensure that their citizens can fully participate in whistleblower reward laws enforced by other nations, such as the United States, Canada, and South Korea. Additionally, Member States should adopt specific reward-based laws in order to ensure that “insiders” can report major crimes, such as illegal offshore accounts, money laundering, environmental crimes, tax evasion, foreign bribery, and frauds in government contracting and procurement. Whistleblower reward laws have proven highly effective in each of these areas.

The reason whistleblower reward laws are so highly successful is because they minimize the downside of whistleblowing, while at the same time maximizing the utility of whistleblower disclosures to law enforcement agencies. These laws promote the public interest by holding fraudsters accountable, while at the same time rewarding honesty and ethical conduct. Reward laws are successful because:

- They incentivize confidential reporting of crimes directly to the relevant law enforcement agencies that are capable of utilizing the evidence to initiate a successful investigation and prosecution.
- They promote the filing of high-quality information. A whistleblower’s compensation is not predicated on obtaining a damage award caused by severe retaliation, but instead is predicated on the quality of information provided. An award is only paid if the whistleblower’s original information results in a successful enforcement action.
- The whistleblower’s identity never needs to be revealed. The whistleblower provides information to law enforcement agencies in a capacity similar to that of a confidential informant. It is the law enforcement agencies that conduct the investigation and bring the cases directly against the criminals. In this manner a whistleblower can maintain confidentiality. If the target of the criminal investigation does not know who the whistleblower is, those working within the criminal enterprise cannot retaliate.
- In a successful whistleblower reward case, the public is the largest beneficiary. A whistleblower’s information is used to obtain a successful enforcement action. The fines and penalties obtained from that prosecution or settlement benefit the taxpayers and/or are used for restitution for the victims of the crimes. Taxpayers do not pay for any whistleblower rewards. These rewards are a percentage of the monies actually obtained by the government from the wrongdoer. Without the original information provided by the whistleblower, the government would not have had the evidence necessary to trigger an investigation and the successful prosecution. Without a successful prosecution, the victims of the crimes would never be able to obtain restitution, the crimes could go on for years, bad actors would not be removed from the market, and the mandatory compliance programs generally required as a result of successful prosecutions would not be implemented.
- Whistleblower rewards are based on a percentage of actual recovery (usually between 10-30%, but sometimes as high as 50%). Thus, the larger the penalty, the larger the reward.

This incentivizes well-placed insiders to take the risk of reporting wrongdoing at the highest levels. It is not uncommon for executive vice presidents or directors of corporations, with information about tax frauds or foreign bribery, to become whistleblowers because of the reward laws. Blowing the whistle becomes a rational economic decision; rewards provide a rational basis for honest executives to take the risk of becoming a whistleblower.

- Because rewards are only predicated on successful enforcement actions, there is little or no incentive to turn in frivolous allegations. Fake whistleblowers will get nothing for their efforts, and law enforcement authorities generally are in a very good position to identify the strong cases deserving of investigation.
- By creating whistleblower programs predicated on anonymous or confidential whistleblowing, most retaliation cases are prevented. It is very difficult (if not impossible) to fire a “whistleblower” if one does not know who the whistleblower is, or even if there is a whistleblower providing information to the government. The chilling effect triggered by firing a whistleblower is avoided.
- In turn, those involved in the underlying criminal activities and/or regulatory violations are chilled, as they do not know who the sources of information are, or what evidence the government has been able to collect. This long-term deterrent effect is best explained by former Assistant Attorney General Stuart Delery:

[The] value of the False Claims Act is not just in allowing the government to respond to fraud after it happens. It is also in preventing fraud from happening in the first place . . . The results have been a tremendous benefit not only to the government and the American public but also to companies that want to do business fairly and honestly, and want to know that they won't be put at a competitive disadvantage as a result because others are not playing by the rules.<sup>40</sup>

- The subject matter of a whistleblower reward case focuses on the quality of evidence related to wrongdoing. These are not employment discrimination cases. Employment cases open whistleblowers up to attacks on their character, reputation, and work performance. This is avoided when the focus of the investigation is on the wrongdoing reported, not the work performance of a whistleblower.

Based on these factors, it is not surprising that the highest-ranking law enforcement officials, with direct responsibility for prosecuting the whistleblower-triggered cases, as well as respected academics and economists, highly praise existing reward laws.

A widely respected study of whistleblower reward laws was conducted by three leading

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<sup>40</sup> Remarks at American Bar Association's 10th Nat'l Inst. on the Civ. False Claims Act and Qui Tam Enf., U.S. Dep't of Just. (June 5, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th>.

economists and published by the University of Chicago's Booth School of Economics.<sup>41</sup> This study looked at both the effectiveness of whistleblowing and the value of such whistleblowing to law enforcement efforts, specifically in the corporate fraud arena. On the basis of an in-depth analysis of "all reported fraud cases in large U.S. companies between 1996 and 2004," Professors Alexander Dyck, Adair Morse, and Luigi Zingales concluded as follows:

- "A strong monetary incentive to blow the whistle does motivate people with information to come forward."
- "[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."
- "Monetary incentives seem to work well, without the negative side effects often attributed to them."
- "Employees clearly have the best access to information."

This study also identified the greatest weakness in purely anti-retaliation-based whistleblower laws. The authors noted as follows: "Not only is honest behavior not rewarded by the market, but it is penalized . . . Given these costs, however, the surprising part is not that most employees do not talk, it is that some talk at all." Because other anti-retaliation laws only come into play after a whistleblower has been harmed, most rational economic actors (the vast majority of any workforce) will not want to engage in such harmful behavior, even when they witness regulatory violations or crimes such as foreign bribery. The Booth School scholars found in their analysis that reward laws were instrumental in having employees overcome their rational reluctance to blow the whistle, by providing a monetary counterpoint to make their beneficial conduct reasonable.

After the publication of the Booth School article, numerous other well-respected academic studies backed up these findings,<sup>42</sup> as did the highest-ranking law enforcement officials with responsibility

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<sup>41</sup> Dyck, I.J. Alexander and Morse, Adair and Zingales, Luigi, *Who Blows the Whistle on Corporate Fraud?* (October 1, 2008), AFA 2007 Chicago Meetings Paper, Chicago GSB Research Paper No. 08-22, CRSP Working Paper No. 618, 1st Annual Conference on Empirical Legal Studies, Forthcoming, ECGI - Finance Working Paper No. 156/2007, available at SSRN: <https://ssrn.com/abstract=891482> or <http://dx.doi.org/10.2139/ssrn.891482>.

<sup>42</sup> See Nyneröd, Theo; Spagnolo, Giancarlo, *Myths and Numbers on Whistleblower Rewards*, STOCKHOLM INSTITUTE OF TRANSITION ECONOMICS, Working Paper No. 44 (2018), available at: <https://www.econstor.eu/bitstream/10419/204755/1/site-wp0044-2.pdf>; Dennis J. Ventry, *Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States*, 59 VILL. L. REV. 425 (Aug. 2015); Niels Johannesen and Tim Stolper, *The Deterrence Effect of Whistleblowing: Evidence from Offshore Banking*, VOXEU (2017), <https://voxeu.org/article/deterrence-effect-whistleblowing>; Christine I. Wiedman and Chunmei Zhu, *Do the SEC Whistleblower Provisions of Dodd-Frank Deter Aggressive Financial Reporting?*, THE CLS BLUE SKY BLOG (2017), <https://clsbluesky.law.columbia.edu/2018/03/05/whistleblower-provisions-of-dodd-frank-deter-aggressive-financial-reporting/>; Jaron H. Wilde, *The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness*, THE ACCOUNTING REVIEW, Vol. 92, No. 5, pp. 247-280. (Sept. 2017), available at: <https://aaapubs.org/doi/abs/10.2308/accr-51661?journalCode=accr>; Philip Berger and Heemin Lee, *Do Corporate Whistleblower Laws Deter Accounting Fraud?*, SSRN (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3059231](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3059231); Jetson Leder-Luis, *Whistleblowers, The False Claims*

over the U.S. reward laws.<sup>43</sup> Former U.S. Attorney General Eric Holder accurately described the beneficial impact of an effective reward laws:

[T]he False Claims Act has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of American taxpayers. Since the day that President Reagan signed these bipartisan amendments into law in 1986, their impact has been nothing short of profound . . . Some of these [False Claims Act cases] may have saved lives. All of them saved money. And – taken as a whole – this remarkable track record represents a wide-ranging effort to eradicate the scourge of fraud from some of government’s most critical programs.<sup>44</sup>

These comments have been echoed by many other responsible Justice Department officials, in both the administration of President Obama and President Trump:

- U.S. Assistant Attorney General Stuart Delery in 2014: “[Whistleblower reward laws are] the most powerful tool the American people have to protect the government from fraud.”<sup>45</sup>

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*Act, and the Behavior of Healthcare Providers*, BOSTON UNIVERSITY QUESTROM SCHOOL OF BUSINESS, DEPARTMENT OF MARKETS, PUBLIC POLICY, AND LAW (2020), <https://economics.mit.edu/files/18187>.

<sup>43</sup> Mary Jo White, “The SEC as the Whistleblower’s Advocate,” (Apr. 30, 2015), available at: [https://kkc.com/wp-content/uploads/2020/03/Mary-Jo-White-The-SEC-as-the-Whistleblower\\_s-Advocate.pdf](https://kkc.com/wp-content/uploads/2020/03/Mary-Jo-White-The-SEC-as-the-Whistleblower-s-Advocate.pdf); Mary Jo White, “Remarks at the Securities Enforcement Forum” (Oct. 9, 2013), <https://www.sec.gov/news/speech/spch100913mjw>; Statement of Attorney General on the False Claims Act: Eric Holder, U.S. Department of Justice, “Attorney General Eric Holder speaks at the 25th Anniversary of the False Claims Act Amendments of 1986” (Jan. 31, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986>; Statement of the Assistant Attorney General on the False Claims Act: Assistant Attorney General, U.S. Department of Justice, “Remarks,” (June 5, 2014); The testimony of the Senate Judiciary Chair in support of the False Claims Act: “Statement for the Record by Senator Chuck Grassley of Iowa Chairman, Senate Judiciary Committee At a House Judiciary Subcommittee on the constitution and Civil Justice Hearing on ‘Oversight of the False Claims Act’” (April 28, 2016), available at: <https://www.grassley.senate.gov/news/news-releases/grassley-false-claims-act-our-most-important-tool-fight-fraud-against-taxpayers>; Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017, Remarks of Acting Assistant General Chad A. Readler (Dec. 21, 2017), available at: <https://kkc.com/wp-content/uploads/2020/03/DOJ-3.7M.pdf>; Charles Grassley – National Whistleblower Day Speech: “Whistleblowers deserve our gratitude” (July 30, 2018), available at: <https://kkc.com/wp-content/uploads/2020/03/Charles-Grassley-National-Whistleblower-Day-Speech.pdf>; Video: University of Toronto Panel on Canada’s Whistleblower Reward Program (2017), available at: <https://kkc.com/blog/video-university-of-toronto-panel-on-canadas-whistleblower-reward-program/>.

<sup>44</sup> Attorney General Eric Holder: Remarks at the 25th Anniversary of the False Claims Act, U.S. Dept’s of Just. (Jan. 31, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986>.

<sup>45</sup> Assistant Attorney General Stuart Delery: Remarks at American Bar Association’s 10th Nat’l Inst. on the Civ. False Claims Act and Qui Tam Encf., U.S. Dep’t of Just. (June 5, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th>.

- U.S. Associate Attorney General Bill Baer in 2016: “The False Claims Act and its [whistleblower] provisions remain the government’s most effective civil tool in protecting vital government programs from fraud schemes.”<sup>46</sup>
- Assistant Attorney General Jody Hunt in 2018: “The taxpayers owe a debt of gratitude to those who often put much on the line to expose such [fraudulent] schemes.”<sup>47</sup>
- Assistant Attorney General Jody Hunt in 2020: “Whistleblowers continue to play a critical role in identifying new and evolving fraud schemes that might otherwise remain undetected.”<sup>48</sup>

The former Chairman of the SEC also explained why the Commission strongly supports whistleblower reward laws under the Dodd-Frank Act (which covers both securities law violations and violations of the Foreign Corrupt Practices Act), identifying the four basic “benefits” of incentivizing employees to become whistleblowers:

They persuade people to step forward.

They put fraudulent conduct on our radar that we may not have found ourselves, or as quickly.

And they deter wrongdoing by making would-be violators ask themselves – who else is watching me?

The program also incentivizes companies to report misconduct before a whistleblower comes to us.<sup>49</sup>

This statement was further confirmed by the Director of the SEC’s Office of the Whistleblower in a June 2020: “Whistleblowers have proven to be a critical tool in the enforcement arsenal to combat fraud and protect investors.”<sup>50</sup>

Most recently a report by the Stockholm Institute of Transition Economics, entitled “Myths and Numbers on Whistleblower Rewards,” conclusively found that the benefits of reward programs far outweigh the costs of such programs. The authors explained that criticisms of reward programs

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<sup>46</sup> Acting Associate Attorney General Bill Baer, Remarks at American Bar Association’s 11th Nat’l Inst. on the Civ. False Claims Act and Qui Tam Enf., U.S. Dep’t of Just. (June 9, 2016), <https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability>.

<sup>47</sup> Assistant Attorney General Jody Hunt: Remarks on the False Claims Act, U.S. Dep’t of Just. (Dec. 21, 2018), <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.

<sup>48</sup> Assistant Attorney General Jody Hunt: Remarks on the False Claims Act, U.S. Dep’t of Just. (Jan. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

<sup>49</sup> Remarks at the Securities Enforcement Forum, Chair Mary Jo White (Oct. 9, 2013), available at: <https://kkc.com/wp-content/uploads/2019/10/Remarks-at-the-Securities-Enforcement-Forum.pdf>.

<sup>50</sup> SEC Press Release, SEC Awards Record Payout of Nearly \$50 Million to Whistleblower (June 4, 2020) <https://www.sec.gov/news/press-release/2020-126>.

were unfounded: “In the case of whistleblower rewards, however, the debate has systematically disregarded available empirical evidence and has put emphasis on claims and potential drawbacks that the US experience has shown that a competently designed program can overcome.”<sup>51</sup>

Additionally, the confirmed results obtained pursuant to the whistleblower reward laws provide objective and irrefutable evidence that these laws work and work remarkably well. The SEC’s Whistleblower Office recently reported to the U.S. Congress that since 2011, due to meritorious whistleblower tips, the SEC has ordered wrongdoers to pay over \$2 billion in sanctions, with around \$500,000 million to be returned to victims of fraud.<sup>52</sup>

The IRS whistleblower reward program is another example of how an effective whistleblower reward program can stop illegal offshore banking and tax evasion.<sup>53</sup> According to the annual reports filed by the IRS Office of the Whistleblower, in the past four years alone the IRS whistleblower law produced the following results:

Fines and Penalties Obtained by Government:	\$2.623 Billion
Number of Claims Paid:	1159
Total Amount of Awards Paid:	\$427.86 Million
Average Award:	\$370,000.00

Of the over 1,000 whistleblower awards paid under the IRS program, the vast majority of claimants have remained completely confidential. They generated significant revenue for the government, held tax evaders accountable, and obtained reasonable compensation.

The oldest of the whistleblower reward laws, the False Claims Act, has also been widely praised as the most successful anti-fraud law in the United States and again, the objective numbers prove this point. In addition to numerous successful criminal prosecutions, billions paid in criminal fines, and driving bad actors out of the market, the U.S. Department of Justice publishes annual statistics on the amount of civil recoveries obtained by the government based on whistleblower disclosures. These numbers demonstrate that whistleblowers are indeed the single most important source for fraud recoveries by the U.S. government:

Between 1987-2019 whistleblower cases resulted in the U.S. collecting over \$44.7 billion in civil

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<sup>51</sup> Nyrreröd, Theo; Spagnolo, Giancarlo, *Myths and Numbers on Whistleblower Rewards*, STOCKHOLM INSTITUTE OF TRANSITION ECONOMICS, Working Paper No. 44 (2018), available at: <https://www.econstor.eu/bitstream/10419/204755/1/site-wp0044-2.pdf>.

<sup>52</sup> Note that SEC whistleblower reward cases are decided confidentially, and there is never any publicity as to the identity of the whistleblower who obtained a reward.

<sup>53</sup> See Mary Jane Wilmoth, *IRS Whistleblower Office Annual Report Confirms Success of Program*, THE NATIONAL LAW REVIEW (Jan 7, 2020), available at: <https://www.natlawreview.com/article/irs-whistleblower-office-annual-report-confirms-success-program>; Dennis J. Ventry Jr., *Not Just Whistling Dixie: The Case For Tax Whistleblowers in the States*, 59 Vill. L. Rev. 425 (2014), available at: <https://digitalcommons.law.villanova.edu/vlr/vol159/iss3/2>; IRS Commissioner John Koskinen Statement on IRS Whistleblower Program (August 2014), available at: [https://www.irs.gov/pub/whistleblower/Koskinen%20whistleblower%20statement%20-%20version%20082014%20\(2\).pdf](https://www.irs.gov/pub/whistleblower/Koskinen%20whistleblower%20statement%20-%20version%20082014%20(2).pdf).

finances and penalties from fraudsters under the False Claims Act *qui tam* whistleblower law. During the same period of time the government was able to recover only \$17.3 billion in civil cases for which there were no whistleblowers.<sup>54</sup> Moreover, the government clearly understood the importance of compensating whistleblowers for the risks they took in bringing forward information for which the prosecutors otherwise could not uncover, paying whistleblowers \$7.3 billion in rewards during this time period. In short, the amount of compensation paid to whistleblowers under the False Claims Act is far larger than all compensation paid to every other whistleblower, from every country in the world combined.

Whistleblower reward laws have also proven highly effective in protecting the environment. The U.S. Act to Prevent Pollution from Ships (“APPS”) implements the MARPOL Protocols, which prohibit pollution on the high seas. Despite the fact that illegal pollution occurs largely outside U.S. territorial waters, and that the ships that dump the oil or other prohibited substances are not “flagged” out of the United States, the United States has used this whistleblower reward law to become the number one enforcer of MARPOL worldwide. The paying of awards is central to this enforcement scheme as explained by the U.S. Department of Justice in multiple successful legal cases brought under this law:

- “The availability of the award aptly reflects the realities of life at sea... A monetary award both rewards the crew member for taking that risk and may provide an incentive for other crew members on other vessels to alert inspectors and investigators regarding similar crimes.”<sup>55</sup>
- “Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are extremely difficult to uncover.”<sup>56</sup>
- “Very few other countries have any track record of prosecuting deliberate MARPOL violations, let alone a legal process that would protect witnesses from obstruction of justice such as occurred in the vast majority of vessel pollution prosecutions.”<sup>57</sup>
- “Information of this nature is otherwise difficult, if not virtually impossible to obtain [without help from the whistleblower].”<sup>58</sup>

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<sup>54</sup> 2019 Civil Fraud Statistics Overview, U.S. Dep’t of Just. (2019), available at: [https://www.kkc.com/wp-content/uploads/2020/01/fca\\_fy\\_19\\_stats.pdf](https://www.kkc.com/wp-content/uploads/2020/01/fca_fy_19_stats.pdf).

<sup>55</sup> Government’s Motion For Whistleblower Award, *U.S. v. Efploia Shipping Co., S.A.*, 1:11-CR-00652 (D. Md. 2012), available at: [https://kkc.com/wp-content/uploads/2020/04/efploia\\_motion-for-reward.pdf](https://kkc.com/wp-content/uploads/2020/04/efploia_motion-for-reward.pdf).

<sup>56</sup> *U.S. v. Noble Drilling Press Release*, Drilling Operator Sentenced for Environmental and Maritime Crimes in Alaska, Dep’t of Just. (December 19, 2014), <https://www.justice.gov/usao-ak/pr/drilling-operator-sentenced-environmental-and-maritime-crimes-alaska>.

<sup>57</sup> Government’s Response to Judge’s Order, *U.S. v. Efploia*, Case 1:11-cr-00652-MJG (Mar. 4, 2016), available at: <https://kkc.com/wp-content/uploads/2020/04/efpholia-gov.-response.pdf>.

<sup>58</sup> Response To Amancio Nuneza’s Application For Award, *U.S. v. Consultores De Navegacion, S.A.*, 1:08-cr-10274 (D. Mass. 2009), available at: <https://kkc.com/wp-content/uploads/2020/01/U.S.-v.-Consultores-De-Navegacion-S.A.-1-08-cr-10274-D.-Mass.-2009.pdf>.

Whistleblower reward laws have been most successful when they are targeted to assist law enforcement in specific areas. One size does not fit all. Specific whistleblower reward laws covering the following areas of the economy have worked extremely well, and can easily be duplicated in European nations: (1) government contracting and procurement; (2) pollution on the high seas/compliance with the MARPOL Protocols; (3) illegal offshore banking and money laundering; (4) tax frauds and underpayments; (5) securities frauds; (6) frauds in the commodity exchange markets (including FX); (7) bribery of foreign officials and related frauds.

Given the overwhelming evidence showing that reward laws are not only highly effective, but that they are necessary to a successful whistleblower program, in order to create truly effective whistleblower laws Member States should incorporate similar provisions in any newly created whistleblower program that results from the implementation of the Directive. In fact, the drafters of the Directive fully envisioned nations crafting specific laws designed to reward or compensate whistleblowers and fully protect their identities as confidential informants.<sup>59</sup> Therefore, such a program is consistent with the intent of the Directive and easily harmonizable with its requirements.

### **CONCLUSION**

Because the Directive was only intended to create the “minimum” protection Member States, Member States should act to craft more comprehensive whistleblower laws designed to advance the intent of the Directive.

Member States have an opportunity to use the debates and discussions over implementation of the Directive to consider the best means to use whistleblowers for effective law enforcement. As part of this process, the additional recommendations discussed herein should be incorporated into executing legislation. Any final whistleblower law needs to ensure that employees who make disclosures protected, encouraged, or referenced in international anti-corruption treaties adopted by Member States within the European Union are covered under each Member States anti-retaliation laws. Furthermore, the highly successful U.S. whistleblower reward laws should be objectively and fairly considered, and widely adopted.

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<sup>59</sup> The drafters of the Directive understood that reward laws or laws designed to protect whistleblowers who become confidential informants to law enforcement would need additional legal protections outside the “minimum” standards required under the Directive. Section 30 of the Preamble to the Directive envisions “specific provisions” outside the four-corners of the Directive:

This Directive should not apply to cases in which persons who, having given their informed consent, have been identified as informants or registered as such in databases managed by authorities appointed at national level, such as customs authorities, and report breaches to enforcement authorities, in return for reward or compensation. Such reports are made pursuant to specific procedures that aim to guarantee the anonymity of such persons in order to protect their physical integrity, and that are distinct from the reporting channels provided for under this Directive.

Pursuant to Section 30, Member States should also design whistleblower protections to ensure that whistleblowers who obtain confidential informant status, or who are being compensated or rewarded for their information, are fully protected.