BUSINESSEUROPE

POSITION PAPER

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Position paper on whistleblower protection in the EU

I. Introduction:

- European **companies are very much committed in preventing infringements of laws and codes of conduct**. Being compliant with rules and maintaining a strong reputation are fundamental matters for every enterprise. **Markets also benefit from a stronger compliance culture**.

- **Whistleblower protection is an important tool** to help companies to better address unlawful or unethical conducts.

- **Companies have introduced well-functioning procedures** aimed at protecting whistleblowers and dealing with the other persons concerned in a fair and effective way.

II. EU intervention in this area?

- **Most Member States already have in place frameworks which cover whistleblowing** protection which have proven to be effective and cater for the necessary balance between public interest and protection of companies' interests.

- **One-size-fits-all regulation should be avoided in this area** where national systems are carefully tailored to the national legal traditions and approaches, for example, on the way reports of infringements should be brought forward.

- There is **not enough evidence that lack of harmonisation of these systems has led to substantial barriers** to doing business in the internal market.

- Recent **EU sectoral legislation** (most of it enacted in response to the 2008 the financial crisis) already contains rules protecting whistleblowers from many forms of retaliation in different areas, ranging from audit, money laundering, market abuse, trade secrets and other instruments regulating the financial services industry. Before adopting a horizontal EU instrument on whistleblowing protection, it should be carefully analysed how this new sectoral legislation has affected the markets and business practices as well as the interaction with public authorities' enforcement competences.

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- Action in this field should not **undermine and dilute the positive development in which more and more companies are voluntarily implementing whistleblowing practices** and channels into their businesses in order to mitigate risks.

- Therefore, BusinessEurope believes **that further EU harmonisation in this area is not necessary**.

III. General messages on whistleblower protection:

- For a compliance system to work properly within a company, it is **essential that employees are able to communicate openly** (without fear of retaliation) and report unlawful or unethical conducts.

- **However, there are fundamental interests that need to be balanced** given the important reputational and economic repercussions of disclosures.

- **Trade secrets, professional secrecy and personal data** must be protected.

- The **confidentiality** should be guaranteed to the whistleblowers as well as to the persons concerned. Anonymous reports should be treated if possible under the same conditions.

- As long as an infringement is not proven, persons concerned must be regarded as innocent. They should have the possibility to answer the credible accusations, if they wish to do so.

- Employees should not be allowed to **act in a disloyal way, trigger unfounded alarms** or proceed to leaks as **a pure retaliation behavior.** Such behaviours invalidate the right to protection.

- There should be **no financial reward for whistleblowers**.

- It is key that arrangements on this matter do not inspire **false incentives, promote the misuse** of whistleblower protection nor lead to building a **climate of accusation and mistrust at the workplace**.

- Whistleblower frameworks should take into account whether the disclosed information is only suitable to be disclosed within the company or whether it can be object of disclosure to authorities or even to the public. Protection in the latter case can only occur where **interests of vital societal significance** are at stake through the disclosed infringement. Right **balance between public disclosure and disclosure to authorities versus disclosure 'only' within a company** is very important.

- **We strongly believe reporting must first be made internally/within the organisation** rather than involving directly a third party. The employer must have the opportunity to address the issue before any external disclosure. It is a

matter of the company's discretion how to deal with identified infringements of internal compliance rules that do not constitute a criminal offence and which of those they report to the authorities.

- **Company internal procedures and channels are preferable because they:**

  i. Allow companies to **identify and stop infringements quickly** and effectively;

  ii. **Help mitigating all kind of risks** faced internally or externally;

  iii. Are **better tailored to the company size** (large listed or an SME), **organisational structure, sector and functioning** (e.g. use of sub-contractors);

  iv. Can **help determine whether certain disclosure leads to further harm being committed** (e.g. violation of company secrets or the privacy of employees).

- The assessment on whether protection is awarded needs to be **based on the circumstances of the individual case.** For example:

  i. **Employee's reasons to act** (e.g. report on legal infringements or report on dissatisfaction with superiors, colleagues, salary, incompetence or absenteeism);

  ii. If there were **alternative channels (e.g. within the company)** for disclosure that could have been used before informing a third party;

  iii. **The accuracy of the disclosure**.

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