

Establishing effective whistleblowing systems and whistleblower protection in Europe

Submission of the UNCAC Coalition's Europe Regional Network to the
13th Session of the UNCAC Implementation Review Group

May 26, 2022

The UNCAC Coalition and its member civil society organizations from the European region submit this statement to the 13th session of the Implementation Review Group (IRG). This statement was developed through an open consultation process with civil society organizations (CSOs) in our regional network and outlines the challenges to establishing effective whistleblowing systems and whistleblower protection in Europe, good practices on this topic within the region and recommendations for actions.

Whistleblowers, along with investigative journalists and civil society activists, play an essential role in exposing and tackling financial crimes and corruption. Not only do they safeguard and sometimes help recover misused public funds, but they also raise awareness about the devastating societal impacts of corruption, and contribute to bringing about policy reforms and a shift towards a culture of public accountability and integrity.

However, in Europe the landscape of whistleblowing laws and the effective protection of persons who report corruption-related offenses remains uneven and overall unsatisfactory. In the majority of countries in the region, laws are not in place or institutional frameworks do not provide sufficient guarantees for whistleblowers to safely report. Where legislation exists, there is poor enforcement and inadequate support to those who have risked their job or their position, their reputation and even their life for the public interest.

The United Nations Convention against Corruption (UNCAC) recognizes the importance of reporting persons and provides a basis for national legal frameworks. The Convention encourages States Parties to establish effective reporting systems in the public sector (Article 8 - Codes of conduct for public officials) as well as to protect people who report corruption-related offenses from retaliation (Article 33 - Protection of reporting persons).¹

In 2019, the European Union took a promising step with the adoption of the Whistleblower Protection Directive.² Through ground-breaking provisions, the Directive obliges a wide range of public and private entities to establish internal and external reporting channels, follow up on reports and keep the whistleblower informed of the status of their report. Any person reporting wrongdoing in the

¹ United Nations Convention against Corruption (UNCAC):

https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

² Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblower Protection Directive): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1937>.

context of work-related activities shall be guaranteed legal protection and support, irrespective of their motives.

Nevertheless, the Directive has significant shortcomings. In particular, its material scope is limited as it only recognizes and protects whistleblowers who report violations of European Union community law in defined areas. Several categories of persons at risk of retaliation are not covered, such as those reporting serious misconduct that does not violate applicable law. The Directive does not extend protection to information falling under national security regimes or classified information for which disclosure is only permissible in exceptional circumstances. Additionally, civil society organizations that stand by the side of whistleblowers and give them advice remain unprotected.

Given these shortcomings, the likelihood of poor implementation of the EU Whistleblowing Directive is worrying and might further discourage potential whistleblowers from speaking up. In some EU Member States, the bills currently tabled to implement the Directive may result in a step backwards by weakening existing protections for whistleblowers. If these bills are passed, countries would not be respecting the final provisions of the Directive which establish that its transposition shall not reduce the level of protection already afforded by Member States.³ Besides, most EU Member States are seriously lagging behind in the transposition of the Directive.

Outside the European Union, there have been positive developments over the past years in terms of adopting whistleblower protection legislation and creating systems to investigate crimes, which include the strong involvement of activists, journalists, civil society as well as international organizations. However, the laws are inadequately enforced, court rulings on retaliation claims are often ignored and whistleblowers continue to face intimidation, their names exposed and their own integrity questioned publicly. It seems that political will for the fight against corruption and the protection of whistleblowers fades away after initial strong commitments.⁴

Therefore, the UNCAC Coalition members in Europe urge States Parties to strengthen whistleblowing systems as an essential pillar of corruption prevention and to pass and effectively implement whistleblower protection legislation that resists political alternation. We urge governments to take action to build the appropriate legal and institutional framework that will achieve the following:

1. Guarantee a high coverage of offenses related to corruption and facilitate disclosure of public interest matters

- Whistleblowing can be about any issue. States in the European Union should go beyond the minimal standards required by the EU Directive (breaches of EU law in areas listed in the directive) to offer protection to all whistleblowers speaking up in the public interest. In particular, they should allow whistleblowing reporting for offenses related to national law, on any policy area, and including all corruption-related offenses covered by the UNCAC, as well as confidential matters and classified documents under certain circumstances.

³ Article 25 (2) of the Whistleblower Protection Directive.

⁴ See “CPI 2021 for Eastern Europe and Central Asia: Democratic Hopes in the Shadow of Growing Authoritarianism”, Transparency International, 25 January 2022: <https://www.transparency.org/en/news/cpi-2021-eastern-europe-central-asia-democratic-hopes-growing-authoritarianism>.

- Reporting of serious misconduct, such as ethically questionable actions or significant wrongdoings below the threshold of clear legal violations, should also be protected. There should not be exemptions to whistleblower protection for information falling under national security regimes or classified information; instead, special contact points for whistleblowers reporting on such matters could be established. Legislation should facilitate direct disclosure when it is in the public interest.
- 2. Guarantee that all whistleblowers and those supporting them are protected**
- Legislation should keep a broad definition of whistleblowers and should not only cover those who blow the whistle in the working environment, but any citizen witnessing acts contrary to the general interest, including anonymous reporting. Maintaining a restrictive definition of “whistleblower” deprives many persons of both protection against reprisals and of the possibility that their report is taken into consideration and processed.
 - In some countries, immunity is provided to any person revealing a secret by blowing the whistle, but this immunity does not apply to acts prior to the report (such as recovering documents or breaking into a computer system). However, persons who access confidential data or store them in order to exercise their right to report should not be held criminally liable, in line with jurisprudence of the European Court of Human Rights.
 - Moreover, protection should be extended to facilitating persons who assist whistleblowers in various ways such as legal advice or psychological support, and also consider legal persons, for instance a lawyer advising a whistleblower, a colleague, a trade union representative, a journalist who reports on a whistleblower's disclosure or a civil society organization that supports whistleblowers. These actors play an important role and should be protected if they face reprisals.
- 3. Ensure effective protection mechanisms and accompaniment of whistleblowers**
- Governments should adopt the highest level of protection, and in the case of EU Member States, go beyond the minimum standards established in the Directive.
 - Protection for whistleblowers should include legal, financial and psychological measures, as whistleblowers are often placed under extreme social and financial pressure. States should consider creating a fund for the support of whistleblowers.
 - Given the complexity of many cases, it is essential that whistleblowers are adequately supported and protected to enable them to report cases.
- 4. Ensure accountability and sanctions for those who retaliate against whistleblowers**
- Review, investigate, punish and prosecute threats and reprisals committed against any citizen who reports corruption practices.
 - In some jurisdictions, certain hostile acts intended to directly harm whistleblowers do not qualify as offenses. It is important to ensure criminal and other sanctions against those who adopt reprisal measures against a whistleblower. Incrimination of obstructing a whistleblower may be an appropriate means to dissuade those who would be tempted to obstruct someone in blowing the whistle upstream.

5. Ensure monitoring and constant improvement of whistleblower protection mechanisms

- Engage in a process of improvement through constant monitoring and transparency on the number of whistleblower reports filed and on how they were followed up, which could be published in an annual report.
- Authorities must follow-up and explain to whistleblowers what has been done to follow up on their report.
- Take into account the insights of civil society organizations that have experience in assisting whistleblowers, expertise to advocate for high-quality legislation and who work to change negative cultural perceptions of whistleblowing. Their collaborative efforts contribute to creating change, promoting integrity in organizations and valuing those who help to achieve it.