



# **Study on the need for horizontal or further sectorial action at EU level to strengthen the protection of whistleblowers - Final Report**

**Volume I - Principal Report**

27 November 2017

**Submitted to: DG JUSTICE,  
European Commission**

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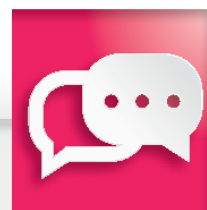
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# Study on the need for horizontal or further sectorial action at EU level to strengthen the protection of whistleblowers - Final Report

## Volume I - Principal Report

A report submitted by **ICF**  
in association with

**Milieu, Blue Print for Free Speech**

Date: 27 November 2017

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ICF Consulting Services Limited  
Watling House  
33 Cannon Street  
London  
EC4M 5SB  
T +44 (0)20 3096 4800  
F +44 (0)20 3368 6960  
[www.icf.com](http://www.icf.com)

## Document Control

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<b>Job No.</b>	30301375
<b>Prepared by</b>	Emanuela Carta, James Kearney, Inès Maillart, Andrew Jarvis
<b>Checked by</b>	Andrew Jarvis
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## Executive summary

This is the final report of a study on the need for action at EU level to strengthen the protection of whistleblowers in the EU. It has been prepared for the Directorate General for Justice, Consumers and Gender Equality of the European Commission by ICF working with the support of Milieu Ltd and Blueprint for Free Speech.

The Council of Europe defined a whistleblower as a person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector. The Commission has highlighted the role of whistleblowers in promoting, amongst others, the fight against corruption, good governance and freedom of expression. It has been shown in many countries and contexts that whistleblowing can be a powerful mechanism for exposing wrongdoing in the workplace which can harm the public interest.

The study has found that potential for whistleblowing to support the public interest is not fully realised because many workers who see or suspect wrongdoing do not report it. Contributory factors include: fear or retaliation; belief that reporting would be futile; culture of employer loyalty and hostility towards whistleblowers; lack of reporting mechanisms and channels and/or lack of knowledge of procedures and reporting channels; lack of confidentiality.

The long term consequence of this under-reporting is that a wide variety of economic, social and environmental issues, from corruption and fraud to practices that threaten public health and safety, persist at higher levels than would otherwise be the case. The scale of these problems and their consequences are substantial. Lives have been lost in incidents in which the underlying problem that triggered the event was either known to workers but not reported or reported but those reports were not followed up. Many of billions of euro each year are lost to corruption, tax evasion and fraudulent use of public funds.

Some of those who do report wrongdoing experience retaliation. This retaliation has direct, and sometimes severe, negative consequences for the whistleblowers. Impacts can include negative effects on mental and physical well-being, loss of employment and income, and loss of career opportunity. Impacts can extend beyond the whistleblowers to their families.

The level of support (in the form of legislation mandating provision of reporting channels and advice) to whistleblowers varies substantially across the EU Member States, as does the level of protection against retaliation that is provided to whistleblowers. Some Member States have domestic legislation that is comprehensive in scope and provides robust protection for those who speak up. Other countries have few or no specific provisions. In one country a worker who reports an unsafe workplace practice may benefit from impartial advice, a reporting channel that preserves their anonymity and full protection in law from retaliation. Another worker in the same situation in a neighbouring country may have access to none of these facilities and rights.

Weak protection for whistleblowers in one Member State can have consequences for citizens, consumers, governments and businesses in another. Unsafe practices by an industrial facility in one country can cause public health risks elsewhere in the EU – air and waste pollution do not respect national borders. Product adulteration by a food manufacturer in one country can lead to consumers in another country being misled, or worse. Tax evasion and avoidance in one Member State can undermine the public finances of others. Non-

compliance with regulations by businesses in one country can give an unfair competitive advantage over other firms in the single market.

Analysis shows that the coverage and strength of laws providing support and protection to whistleblowers across the EU is gradually increasing over time. The same analysis shows, however, that the pace of change is such that it will be many years before effective measures are in place in all countries. The differences in the approach taken might bring better protection but are also bringing greater legal complexity across the EU.

Whistleblower legislation at national level has often followed major disasters, large financial scandals or failures to exercise of duty of care in the delivery of health and care services. This study has considered an alternative approach that makes use of the evidence on good practice in whistleblower support and protection that is now available. This involves adoption of minimum EU standards for whistleblowing support and protection that mandate provision of reporting channels and protection of whistleblowers against retaliation as a means of helping to address the problems of under-reporting of wrongdoing and the harms currently experienced by whistleblowers. Such standards will not eliminate fraud, corruption or other wrongdoings in the workplace but they should help ensure that more of the people who break the law are brought to justice. Also, by increasing the probability that workers will make reports and those reports will be followed up, such standards should help to change the calculated balance of risk and reward for those who commit such acts and discourage them.

The study considered a set of options specified by the Commission. Option 1, a non-legislative option, would see the Commission issue general recommendations to Member States on good practice in whistleblowing support and protection – from legislation approaches through to awareness raising and educational campaigns on reporting procedures and channels; and educational campaigns and better guidance on the concepts of retaliation and wrongdoing. Options 2 to 4 would also mandate provision of reporting channels and, in addition, provide protection in law against retaliation to whistleblowers. The options differ in the scope of the reports that are protected – Option 2 provides comprehensive horizontal protection, Option 3 focuses on the EU financial interests and Option 4 on matters relevant to the internal market.

The analysis suggests that Option 2 offers greater progress in tackling retaliation across a wider range of wrongdoing than the other options, at about the same cost as Options 3 and 4. The expected impacts of Option 1 are much smaller and are less certain.

The costs of the proposed measures are not trivial. Options 2, 3 and 4 would, for employers, trigger one-off adjustment costs implementing new policies and setting up reporting channels estimated at around EUR 440 million. They would also lead to additional expenditure on provision and servicing of reporting channels (including investigating reports) that has been estimated at around EUR 700 million per year. These incremental costs (and the associated benefits) would be concentrated in those countries that do not currently have comprehensive protection for whistleblowers, and would bring employer practices into conformity with those of the leading countries.

The costs are small by comparison to the potential benefits. These potential benefits include:

- Exposure and dissuasion of wrongdoing, in a context where corruption is estimated to cost the European Union more than EUR 179 billion each year. The estimated economic losses to some Member States are in double digits. The 'VAT gap' has been assessed at

€159.5 billion per year. Fraud in public procurement has been estimated at €5.3 billion per year<sup>1</sup>.

- Long term strengthening of public trust in institutions and to the integrity of business practices, in a context where surveys indicate that a large number of citizens and businesses in many Member States believe that corruption is widespread, and that reports of wrong-doing will not be followed up.
- Strengthening of organisational performance as a consequence of the enhanced transparency.

The study research also showed that protection in law is a necessary but not sufficient component of change: socio-cultural influences operating at both the organisational level and in society are also very important. There is strong evidence of positive links between transparency, good governance and long term performance of enterprises, but also of the existence of many working environments in the EU where speaking up about wrongdoing that can harm the public interest is regarded as a breach of the employee's loyalty to the employer. More generally, whistleblowers remain burdened with negative stereotypes and derogatory labels that prevent them from being recognised for taking personal risks to help the common good. This analysis emphasises the importance of awareness-raising and promotion of the positive value, in the individual workplace and in society as a whole, of speaking up about wrongdoing.

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<sup>1</sup> M. Hafner et al., 2016, The Cost of Non-Europe in the area of Organised Crime and Corruption – Annex II- The Cost of Non-Europe in the Area of Corruption, Research paper by RAND Europe, European Parliamentary Research Service – European Added Value Unit, Brussels.

# 1 Introduction

This is the final report of a study on the need for horizontal or future sectorial action at EU level to strengthen the protection of whistleblowers, prepared by ICF for DG Justice of the European Commission (hereinafter ‘the Commission’). ICF has been supported in the conduct of the study by Milieu and Blueprint for Free Speech. The study provides analysis and evidence supporting the proposals developed by the Commission to set minimum standards across Europe for the provision of reporting channels for use by whistleblowers and provide to protection for whistleblowers against retaliation.

**Figure 1.1** The structure of this report is aligned to the steps in the impact assessment process defined by the Commission’s Better Regulation guidelines



*Source: Adapted by ICF from the European Commission Better Regulation guidelines*

This report is structured to follow the steps of the impact assessment process defined in the Commission’s Better Regulation Guidelines:

- Section 2 provides a definition of the problem that the Commission’s proposals are intended to address;
- Section 3 considers the case for the EU to act to address the problem;
- Section 4 defines a set of objectives for EU action;
- Section 5 presents options designed to meet those objectives;
- Section 6 provides an appraisal of the individual options; and
- Section 7 delivers a comparative analysis of the options.

Annexes to this report are bound in two separate volumes. These provide the following supporting information:

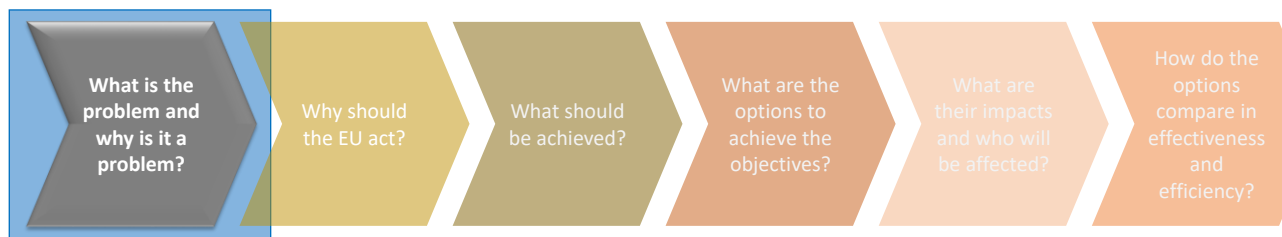
- In Volume II:
  - Annex 1 Methodology;
  - Annex 2 Stakeholder consultations;
  - Annex 3 Impact assessments and evaluations of existing EU legislation relevant to whistleblowing;
  - Annex 4 Mapping of existing EU rules and analysis of national legal frameworks protecting whistleblowers in the 28 Member States;
  - Annex 5 Option specification;

- Annex 6 Assumptions, sources and qualifications to the impact assessment;
  - Annex 7 Option assessment
  - Annex 8 Detailed appraisal of changes vs legal baseline resulting from application of options;
  - Annex 9 analysis on impacts to small and medium companies (SMEs).
- In Volume III:
- Annex 10 Overview of the national legislations on the protection of whistleblowers in the 28 EU Member States
  - Annex 11 Overview of strengths and weaknesses of national legislations on the protection of whistleblowers in the 28 EU Member States
  - Annex 12 Information on the impact of the national legislation, its implementation and the availability of quantitative data in relation to whistleblowing in the 28 EU Member States

Other deliverables provided under this contract that have been supplied under separate cover and approved by the European Commission are:

- A report on the expert workshop conducted under this study;
- A report on the open public consultation conducted by the Commission in connection with the proposals for enhancing whistleblower support and protection;
- A report on the targeted consultation.

## 2 Problem definition



### 2.1 Introduction

There are persistent high levels of wrongdoing, including corruption and fraud, within public and private organisations in the EU that generate costs and harm to the EU and national financial interests, the economy, the environment and the health and wellbeing of citizens. Much of this wrongdoing goes undetected and/or those responsible are not brought to justice. This is because the wrongdoing is often difficult to detect and the evidence needed to convict those responsible difficult to assemble.

Evidence shows that where wrongdoing within organisations has been identified and punished, the action taken was often triggered by reports made by people employed by, or closely associated with, those organisations (so-called ‘whistleblowers’).

The core problems identified by the research are that:

- when wrongdoing is seen or suspected in the workplace it is often not reported. Factors that reduce the likelihood of ‘whistleblowing’ include: belief that reporting would be futile; fear of retaliation; and, the lack of knowledge of procedures and reporting channels; and that
- some of those who make reports subsequently experience retaliation as a consequence.

The results are that:

- the probability of wrongdoing being exposed and addressed is reduced. The incentives not to commit wrongdoing are therefore reduced; and
- harm, which can be very significant, is caused to those who speak up (the so-called ‘whistleblowers’).

This section of the report describes these issues in detail. It is structured as follows:

- section 2.2 explains what whistleblowing is and its role in exposing and addressing wrongdoing;
- section 2.3 deconstructs the component problems and their causes
- section 2.4 discusses examples of wrong-doing that could be challenged by effective whistleblowing arrangements;
- section 2.5 provides a summary and concluding remarks.

Collectively these provide evidence of the scale of the problem, of who is affected and the current understanding of the component causes.



## 2.2 What is whistleblowing and its role in exposing wrongdoing

The reporting of wrongdoing that threatens or harms the public interest by someone who works in the institution where it is perpetrated is an important mechanism for bringing attention to the problem. This kind of reporting is known as whistleblowing. The text below discusses the definition of whistleblowing and the evidence on whistleblowing activity. A number of different sources are used to build up a picture of the current situation.

### 2.2.1 Definitions

There is no common legal definition of what constitutes “whistleblowing” at international level<sup>2</sup>, neither across the Member States that have adopted legislation on this topic. Nevertheless, as all EU Member States are parties to the European Convention on Human Rights (ECHR), a common point of reference can be found in the case law of the European Court of Human Rights (ECtHR) on the right to freedom of expression<sup>3</sup> as reflected in the 2014 Recommendation<sup>4</sup> of the Council of Europe. According to this Recommendation:

1. “whistleblower” means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;
2. “public interest report or disclosure” means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;
3. “report” means reporting, either internally within an organisation or enterprise, or to an outside authority; and
4. “disclosure” means making information public.

A 2012 study for the Council of Europe (CoE)<sup>5</sup> noted that choice of the term used in the legislation is important. The word used should be chosen to convey “*the idea of workers issuing warnings in the public interest*” and avoid “*terms with negative social implications*”.

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<sup>2</sup> For definitions of whistleblowing in the context of international anti-corruption standards, see the study by OECD on G20 whistleblower protection frameworks, including a compendium of best practices and guiding principles for legislation, which was supported by the G20 at the Summit in Cannes, November 2011: G20 Anti-Corruption Action Plan on “Protection of whistleblowers”, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

<sup>3</sup> The right to freedom of expression is enshrined in Article 10 of the European Convention on Human Rights (ECHR) – to which all EU Member States are parties - and in Article 11 of the EU Charter of Fundamental Rights (Charter). According to Article 52(3) of the Charter “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”.

<sup>4</sup> Recommendation CM/Rec(2014)7 on the protection of whistleblowers, adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum.

<sup>5</sup> Council of Europe (2012) The protection of whistleblowers: a study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest, prepared by Paul Stephenson and Michael Levi <https://rm.coe.int/1680700282>

Also of relevance are:

- the United Nations Convention against Corruption (UNCAC)<sup>6</sup>, to which all Member States as well as the EU are parties, and which has provisions directly related to whistleblower protection, and
- the United Nations Resource Guide on Good Practices in the Protection of Reporting Persons, drafted by the UN Office on Drugs and Crime (UNODC (2015), issued in relation to this Convention.

The Convention and the Guide broadly use the term ‘reporting persons’.

Public Services International (PSI, 2016)<sup>7</sup> highlights the importance of distinguishing between whistleblowers and other categories such as aggrieved workers, complainants or bell-ringers who might be clients, customers, citizen bystanders, NGOs, campaigners, or journalists. The distinction is made in the type of wrongdoing (affecting the public versus private interest) and the relationship between the individual and the organisation. According to these criteria, whistleblowers are insiders to organisations (this includes employees, contractors, volunteers and board members) who expose a wrongdoing affecting the public interest or the interests of a group<sup>8</sup>. The urgency of whistleblower protection stems from the power imbalance that people experience when raising a concern about wrongdoing within a working relationship.

Protection of whistleblowers from employment-related retaliation should also be distinguished from protection against threats of physical harm, which are most likely to arise in cases where individuals report information related to organised crime. As outlined in UNODC (2015), there are instances where whistleblowers who have reported a concern in the context of the workplace may give testimony in a court hearing as part of criminal or civil proceedings and if they are worried about their physical safety, protective measures should be available to them, but these should be provided by the police or under witness protection laws relevant for criminal proceedings.

The reference to harm or threat to the public interest makes clear that reports related to individuals' personal grievances or working conditions where there is no wider public interest do not qualify for protection.

In its 2014 Recommendation, the Council of Europe indicates that, throughout Europe, the public interest is understood as the “welfare” or “well-being” of the general public or society. It finds that there will be common ground between most States as to what is considered to be in the public interest in most areas, but that in some areas there may be differences. Principle 2 of the Recommendation states that the scope of information qualifying for protection should include violations of law

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<sup>6</sup> Adopted by the General Assembly resolution 58/4 of 31 October 2003, [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>7</sup> Public Services International (PSI) (2016) Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection [http://www.world-psi.org/sites/default/files/documents/research/en\\_whistleblower\\_protection.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf)

<sup>8</sup> As further explained in PSI (2016), a failure to distinguish someone who discloses wrongdoing as a worker from someone who makes a disclosure as a citizen, client, or customer makes it impossible to provide adequate protection for worker whistleblowers. It also makes it impossible to prescribe disclosure routes and channels that are appropriate for both.

and human rights, as well as risks to public health and safety and to the environment. The Explanatory Memorandum goes on to provide a non-exhaustive list of matters typically considered as falling within the categories of information for which individuals should be protected if they report or disclose: corruption and criminal activity; violations of the law and administrative regulations; abuse of authority or public position; risks to public health, food standards and safety; risks to the environment; gross mismanagement of public bodies (including charitable foundations); gross waste of public funds (including those of charitable foundations); a cover-up of any of the above.

Accordingly, whistleblower legislation adopted by Member States tends either to cite the public interest (leaving interpretation to the courts) or to provide a list of types of wrongdoing that are presumed to result in threats or harm to the public interest.

It appears that an effective protection of the public interest requires that the information reported which qualifies for protection (the so-called "protected disclosures") should be as broad as possible, also covering acts or omissions which may not be strictly illegal but which nevertheless represent a threat or harm to the public interest. In this vein, the International Labour Organization defines whistleblowing as the reporting of "illegal, irregular, dangerous or unethical practices"<sup>9</sup>, whilst the Council of Europe Recommendation mainly refers to "wrongdoing" and "misconduct".

"Whistleblowing" in this study refers to public interest reports or disclosures of wrongdoings within the meaning of the Council of Europe Recommendation, thus encompassing not only illegal but also illicit or unethical acts affecting the public interest.

In the same vein, the standards promoted at international level, and in particular those developed in ECtHR case law<sup>10</sup>, promote *balanced* whistleblower protection regimes which protect whistleblowing which *genuinely* aims to protect the public interest whilst ensuring a balancing of the different interests involved, such as third-party rights to privacy and reputation or the interests of employers or the State in keeping certain information confidential.

To this end, such standards prescribe setting up appropriate reporting channels and a tiered use of these channels, i.e. so that the whistleblowers first use the internal channels, i.e. report to their employer; only if this does not work – or could reasonably not be expected to work - report to the competent authorities and only as a last resort to the public, for instance to the media. In this way they seek to limit to the minimum the need for public disclosures which could damage the reputation and affect the rights of third parties entitled to the presumption of innocence. Another common requirement pursuing the same objective is that whistleblowers are acting in good faith / reasonably believe the information they disclose to be true. This acts as a safeguard against malicious or irresponsible whistleblowing and is ideally complemented by provisions sanctioning malicious disclosures and defamation.

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<sup>9</sup> International Labour Organization Thesaurus (2005).

<sup>10</sup> 2014 CoE Recommendation, UNODC (2015)

## 2.2.2 The role of whistleblowing in exposing wrongdoing

The UNCAC acknowledges that *“corruption is no longer a local matter but a transnational phenomenon that affect all societies and economies ... and a comprehensive multidisciplinary approach is required to prevent and combat corruption”*. The UNCAC contains a range of provisions underlining the importance of providing the right framework for reporting corruption.

There is an increasing body of evidence on the significant role that whistleblowers can play in the detection of fraud and corruption.

The International Chamber of Commerce (ICC) has recognised that fraud is a prominent issue for business globally and that whistleblowing programmes are an effective mechanism for early detection of fraud<sup>11</sup>. Accordingly, in 2008 it issued guidelines on whistleblowing to support the setup of whistleblowers programmes.

According to a study conducted by the Association of Certified Fraud Examiners (ACFE, 2016)<sup>12</sup> that analysed more than 2,400 cases of fraud in 114 countries, about 40% of all detected fraud cases were uncovered by whistle-blowers.

The 2007 Global Economic Crime Survey (PWC, 2007)<sup>13</sup>, based on 5,400 companies worldwide, found that whistleblowers helped to detect more fraud than corporate security, audits, rotation of personnel, fraud risk management and law enforcement combined. Specifically, whistleblowing hotlines were the initial means of detection in 8% of the cases, a tip-off from internal sources in 21% of cases and tip-off from external sources in 14% of cases (Figure 2.1).

The Kroll Global Fraud and Risk Report 2016/17<sup>14</sup> reported the results of an online survey of 545 senior executives worldwide. Twenty five percent of respondents were from Europe. Forty four percent of respondents indicated that recent fraud had been discovered through a whistleblowing system compared to 39% who said it had been detected through an internal audit.

Recent cases of whistleblowing linked to international tax issues (e.g. ‘Lux Leaks’, the ‘Panama Papers’) show that whistleblowers can play an important role in fighting tax evasion by reporting practices to public administrations. Due to the complex legislative frameworks governing areas such as commercial and banking secrecy these are markets where whistleblowers are in particular need of strong protection.

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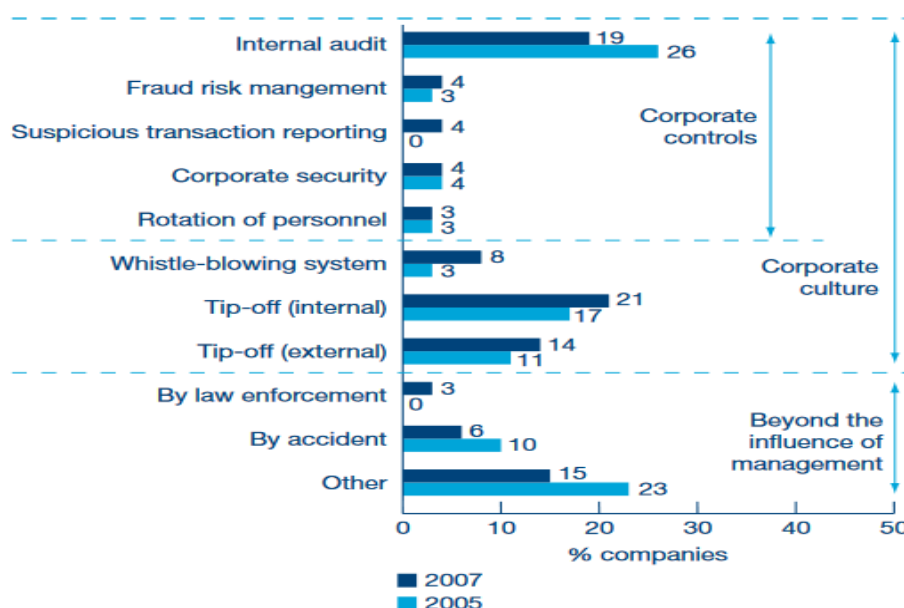
<sup>11</sup> <https://iccwbo.org/media-wall/news-speeches/icc-issues-whistleblowing-guidelines/>

<sup>12</sup> ACFE (2016) Report to the Nations on occupational fraud and abuse, 2016 Global Fraud Report <http://www.acfe.com/rtn2016/about/executive-summary.aspx>

<sup>13</sup> PWC (2007) Economic crime: people culture and controls, the 4<sup>th</sup> biennial Global Economic Crime Survey [http://www.whistleblowers.org/storage/documents/pwc\\_survey.pdf](http://www.whistleblowers.org/storage/documents/pwc_survey.pdf)

<sup>14</sup> Forrester Research for Kroll, 2017.

Figure 2.1 Detection methods in companies



Source: PWC (2007) *Economic crime: people culture and controls, the 4<sup>th</sup> biennial Global Economic Crime Survey*

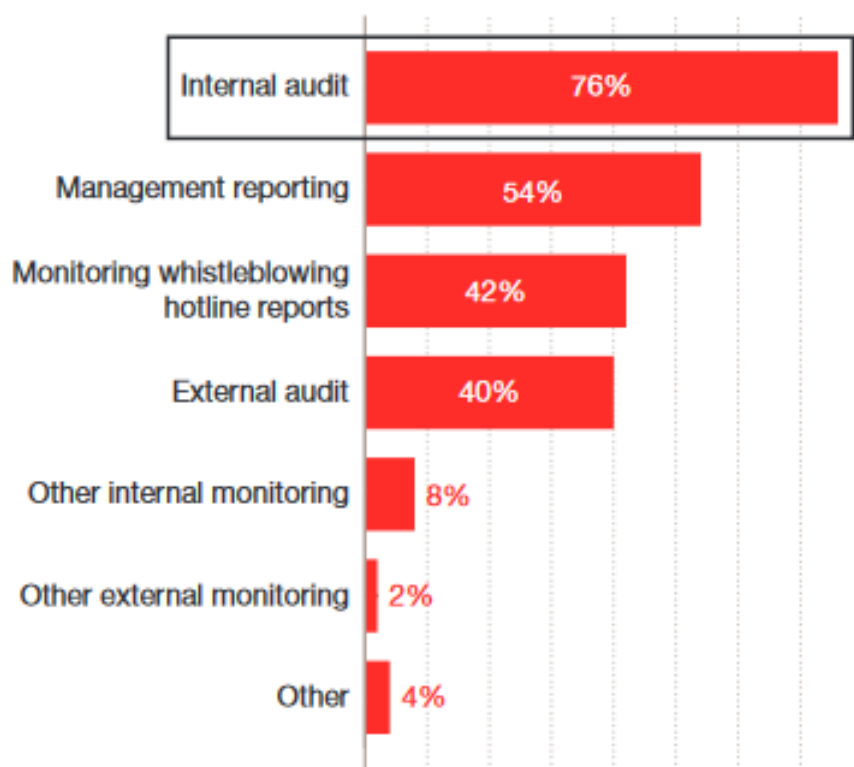
Companies are becoming increasingly aware of the importance of internal whistleblowing systems for effective compliance programmes. The 2016 Global Economic Crime Survey (PWC, 2016)<sup>15</sup> found that 42% of companies used the monitoring of whistleblowing hotline reports to assess the effectiveness of compliance programmes (Figure 2.2).

In the US whistleblowers helped to recover more than \$1 billion in 2003<sup>16</sup>.

<sup>15</sup> PWC (2016) Adjusting the lens on economic crime. Preparation brings opportunity back into focus, Global Crime Survey 2016 <https://www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf>

<sup>16</sup> Carson, T. L., Verdu, M.E. and Wokutch, R.E. (2008) Whistleblowing for profit: an ethical analysis of the Federal Fals Claims Act. *Journal of Business Ethics* 77, pp 361-376 [Reported in PSI, 2016]

Figure 2.2 Methods implemented by organisations to ensure effective business ethics and compliance programmes



Source: PWC (2016) *Adjusting the lens on economic crime. Preparation brings opportunity back into focus, Global Crime Survey 2016*

Research reported in PSI (2016) showed the importance of whistleblowing in the Australian public sector. A majority of the 750 managers and integrity officers from 14 Australian public sector agencies indicated whistleblowing was more effective in exposing wrongdoing than direct observations or investigations<sup>17</sup>.

There are multiple examples of whistleblowers helping to prevent or reduce risks to human health and safety – in Europe and worldwide:

- Irene Frachon is a doctor in France who helped to reveal the problems with Mediator, a weight-loss drug prescribed as an appetite suppressant. According to the French Health Ministry, use of Mediator led to the death of at least 500 people<sup>18</sup>. Thousands more people experienced cardiovascular complications that have impacted on their health and well-being. Although many patients complained, no doctors reported the problem. The scandal led to the resignation of the head of France's public health agency and Mediator was withdrawn in France, years after it was withdrawn in Spain and Italy.

<sup>17</sup> Brown, A.J. (ed.) 2008, Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of internal Witness Management in Public Sector Organisations. Canberra: ANU E-PRESS [Reported in PSI, 2016]

<sup>18</sup> Link to case-law recognising the responsibility of the company (Servier) for putting on the market a defective product (Mediator) knowing its adverse effects on health : <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032450774>

- In 2013, four doctors at the Karolinska Institutet in Stockholm began questioning the work of Paolo Macchiarini, a celebrated surgeon who pioneered the transplantation of artificial windpipes. The doctors told hospital directors that several of Macchiarini's patients had died or fell ill - and were threatened with dismissal. Macchiarini was only dismissed in March 2016, after more allegations against him came to light, including falsifying research findings, conducting experimental surgeries without approval and providing false information to patients.<sup>19</sup>
- Another notable whistleblower case in Sweden had been Sarah Wågnert, who, in 1997 had called attention to poor care in some nursing homes, sparking a nationwide debate. The government subsequently introduced "Lex Sarah," which requires nursing staff to inform authorities about irregularities<sup>20</sup>.
- The public disclosure by Dr. Jiang Yanyong, which revealed the gravity of the Severe Acute Respiratory Syndrome (SARS) virus to the public in 2003, is an example of whistleblowing that potentially saved millions of lives<sup>21</sup>. According to the World Health Organization the SARS outbreak led to 8,098 cases and 774 deaths.
- It was an employee of Eternit, a Swiss manufacturer of roofing and panelling material, who helped launch an investigation into the lack of compliance with health and safety regulations and negligence at Eternit's Italian manufacturing operation in 1970 and 1980s, estimated to have led to more than 2,000 asbestos-related deaths of workers, their families and local residents.<sup>22</sup>.
- There is a history of safety problems at nuclear power plants around the world being exposed by whistleblowers. Some examples include the Crystal River 3 Nuclear Power Plant<sup>23</sup>, Kerr-McGee nuclear fuel plant in 1983<sup>24</sup>, Fernald Feed Materials Production Center<sup>25</sup>.

Whistleblowing can also help to tackle **illegal activity that damages the environment**. An example, described as 'the largest-ever crime involving deliberate vessel pollution', is Princess Cruise Lines Ltd. which was sentenced to pay \$40 million penalty for illegal dumping of oil contaminated waste. The company falsified the official logs to cover the discharges. An engineer employed by the company reported the illegal activity to the British Maritime and Coastguard Agency (MCA) and provided evidence to the U.S. Coast Guard<sup>26</sup>.

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<sup>19</sup><https://www.changeofdirection.eu/assets/briefings/EU%20briefing%20paper%20-%20Sweden%20-%20english.pdf>

<sup>20</sup> Idem

<sup>21</sup> OECD (2016) Committing to Effective Whistleblowers Protection, <http://www.oecd.org/corporate/committing-to-effective-whistleblower-protection-9789264252639-en.htm>

<sup>22</sup> [Court decision, 12 February 2012] Tribunale Ordinario di Torino, N. 24265/04 R.G. n.r. [http://www.distretto.torino.giustizia.it/allegato\\_riservata.aspx?File=5966](http://www.distretto.torino.giustizia.it/allegato_riservata.aspx?File=5966)

<sup>23</sup> Riggs, Stephanie (1997) Florida power and the crystal river nuclear power plant

<sup>24</sup> Rashke, Richard L. (1981). The Killing of Karen Silkwood: The Story Behind the Kerr-McGee Plutonium Case. Houghton Mifflin Company. ISBN 978-0801486678

<sup>25</sup> NIOSH (2013) A study of Former Fernald Workers [https://www.cdc.gov/niosh/pgms/worknotify/pdfs/fernal\\_notification\\_final.pdf](https://www.cdc.gov/niosh/pgms/worknotify/pdfs/fernal_notification_final.pdf)

<sup>26</sup> <https://www.justice.gov/opa/pr/cruise-line-ordered-pay-40-million-illegal-dumping-oil-contaminated-waste-and-falsifying>

There are also examples of whistleblowing having far-reaching impacts on **democratic accountability and governance**.

For example, disclosures made to the media on corruption linked to planning permissions, land rezoning, illegal payments and corruption in the 1990s in Dublin led to the biggest public enquiry in Ireland, the Mahon Inquiry, which lasted from 1997 to 2012<sup>27</sup>.

Conversely, there are examples where failure to ensure adequate follow-up to concerns registered by workers has had tragic consequences. For example, the Herald of Free Enterprise was a ferry that sank on 6 March 1987 soon after leaving the Belgian port of Zeebrugge with the loss of 193 passengers and crew. The official UK inquiry found a “disease of sloppiness” and negligence within the ferry company<sup>28</sup>. A series of further public inquiries revealed that workers knew about the risks and malpractice that contributed to the loss of the vessel but were either too scared to speak up or they had spoken up and were ignored.

In another example, on 4 October 2010, an estimated 800 million litres of caustic red sludge poured out of a reservoir at a Hungarian alumina processing plant. At least seven people died, hundreds were injured or forced from their homes in several villages, and tens of millions of euros in private property was destroyed. Some employees at the plant knew about looming problems with the reservoir, but the company’s director threatened to fire them if they went to the authorities<sup>29</sup>.

Major scandals and disasters which might have been prevented or lessened if employees had felt safe to speak up or if the concerns they had voiced had been followed up have often triggered the adoption of legislation on whistleblower protection<sup>30</sup>.

This was the case in the United Kingdom, where inquiries into incidents in the 1980s and early 1990s, such as the Clapham rail crash, the Piper Alpha disaster, and the collapse of Barings Bank showed that employees knew of the dangers that existed but had either been too scared to raise the issue, or raised it incorrectly or with the wrong person.

In Switzerland, the debate about whistleblower protection began in earnest in the 1990s following various corruption scandals implicating public officials in particular. In one such case, the head of the Zurich water department and his personal assistant, had disclosed in 1992 dubious practices on the part of the company responsible for treating the canton’s sewage sludge, in collusion with a corrupt public official. They lost their jobs before being reinstated in 1997.

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<sup>27</sup> <https://www.oireachtas.ie/parliament/media/committees/archivedcommittees/cnranda/The-Final-Report-Mahon.pdf>

<sup>28</sup> UK Department of Transport, mv Herald of Free Enterprise, Report of Court No. 8074, Formal Investigation, 1987, pp. 13-14, [www.maib.gov.uk/cms\\_resources.cfm?file=/hoffefinal.pdf](http://www.maib.gov.uk/cms_resources.cfm?file=/hoffefinal.pdf); Public Concern at Work, UK Submission to Transparency International Whistleblower Protection Research Project (UK: January 2013), pp. 1, 15.

<sup>29</sup> Transparency International (2013): Whistleblower protection in Europe: legal protections ofr whistleblowers in the EU

<sup>30</sup> OECD (2016) Committing to Effective Whistleblowers protection

The US adopted the Whistleblower Protection Act (WPA) in 1989 followed the Space Shuttle Challenger disaster, and the Sarbanes-Oxley Act (SOX) of 2002 in the wake of the scandals at Enron, WorldCom and other companies.

The Protected Disclosures Act 2014 in Ireland followed major enquiries into corruption of politicians and public servants for planning matters and the Irish banking crisis<sup>31</sup>.

A recent study for DG GROW on costs and benefits of whistleblowers protection on public procurement <sup>32</sup> provides the following illustrative examples of whistleblowing in the area of public procurement:

- In 2009 in France the exposure of bribery and collusion by a worker at a construction company led to investigations and confirmation of the existence of collusion in about 50 contracts<sup>33</sup>.
- In 2015 in Ireland unlawful public procurements practices were exposed by a whistleblower in five hospitals<sup>34</sup>.
- In 2006 in Italy an engineer civil servant in the city of Pavia exposed irregularities in public tenders (e.g. allocation of funds to build bus stops in unpopulated areas)<sup>35</sup>.
- In 2010 in Slovakia an employee of the National Forestry Centre discovered illicit procedures in the allocation of funds to a successful tender and refuse to approve the financing<sup>36</sup>.

### 2.2.3 How whistleblowing works

The available evidence suggests that the majority of workers raise concerns about wrongdoing do so inside the organisation first. Vandekerckhove (2010)<sup>37</sup> reported that the most common pattern in the whistleblowing journey is to blow the whistle outside the organisation only if the workers experience organisational retaliation or the concerns were not acted upon. Vandekerckhove and James (2013)<sup>38</sup> report

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<sup>31</sup> OECD (2016) Committing to Effective Whistleblowers Protection

<sup>32</sup> Milieu (2017), Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, Final Report, 582/PP/GRO/IMA/16/1131/9824

<sup>33</sup> Information based on the communication with the French NGO Anticor, which is a member of the Platform against tax and judicial paradises. Cited in Milieu (2017)

<sup>34</sup> N. O'Connor, R. Nugent and G. Harkin, 18 July 2015, 'Fraud squad probe alleged corruption at seven hospitals', Herald.ie, viewed 5 April 2017 at <http://www.herald.ie/news/fraud-squad-probe-alleged-corruption-at-seven-hospitals-31385781.html>. cited in Milieu (2017)

<sup>35</sup> Riparte il Futuro, Storia di Vito: una verità scomoda caduta in prescrizione, 20 April 2017, viewed 15.05.2017 at <https://www.riparteilfuturo.it/blog/articoli/vito-sabato-whistleblowing-prescrizione>. C. Pracchi, 16 November 2016, 'Pavia, la dura vita del whistleblower: denunciò il malaffare, da nove anni in Comune a far nulla. E il sindaco tace', Il Fatto Quotidiano, viewed 15.05.2017 at <http://www.ilfattoquotidiano.it/>. Cited in Milieu (2017)

<sup>36</sup> Biele vrana, available at <http://bielavrana.sk/oceneni/2014.html#lapinova>. Cited in Milieu (2017)

<sup>37</sup> Vandekerckhove, W. (2010) "European whistleblower protection: tiers or tears?" In D. Lewis (ed) A Global Approach to Public Interest Disclosure, Cheltenham/Northampton MA, Edward Elgar, pp 15-35.

<sup>38</sup> Vandekerckhove, W., James. C., (2013) Submission to the call for evidence on the whistleblowing framework, Department of Business, Innovation and Skills

evidence that in Australia 90% of whistleblowers had reported only internally, 7% went outside after reporting internally and only 3% reported externally<sup>39</sup>.

Research reported in PSI (2016)<sup>40</sup> found that whistleblowers tend to take their report to the line manager first. This research found that in Australia, US and Norway only 10% of whistleblowers raise their concern outside their organisation to regulatory or enforcement agencies and only 1% of whistleblowers report to the media.

A 2015 survey of UK National Health Service (NHS) staff<sup>41</sup> found that 96.6% of staff who raised a concern did so internally. Concerns were raised on more than one occasion, 41.7% of staff raised their concern in 2-3 occasions, 15.7% in 4-8 occasions, 6.7% more than 9 times.

A study for the French Ministry of Labour and representative of employees in France found that 57% of workers who reported a wrongdoing disclosed first the information to a colleague, 48% to a direct manager<sup>42</sup>.

Similar results were found in a PCaW<sup>43</sup> sample of 1,000 callers to the advice line between 2009 and 2010, the first report was made internally in 91% of cases, a proportion that fell to 73% and 60% in the second and third attempt respectively.

The PCaW survey results also illustrate that whistleblowers tend to persevere in reporting directly to their employers. This gives employers multiple opportunities to act upon concerns and reports of wrongdoing. External reporting (i.e. to regulators or independent bodies) increases dramatically at the third attempt, suggesting that reporters are facing forms of resistance within their organisations (Figure 2.3).

This shows that whistleblowing is usually a process with a sequence of events and steps rather than a one-off event at which a worker or a citizen makes a report to someone. PCaW<sup>44</sup> describes whistleblowing as “a journey” which starts with the intention of raising a concern and/or when the whistleblowers raises a concern the first time.

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<sup>39</sup> Brown, A.J. (ed) (2008) Whistleblowing the in Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations, Canberra: ANU E Press

<sup>40</sup> PSI (2016) Checkmate to corruption: making the case for a wide-range initiative on whistleblower protection [http://www.world-psi.org/sites/default/files/documents/research/en\\_whistleblower\\_protection.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf)

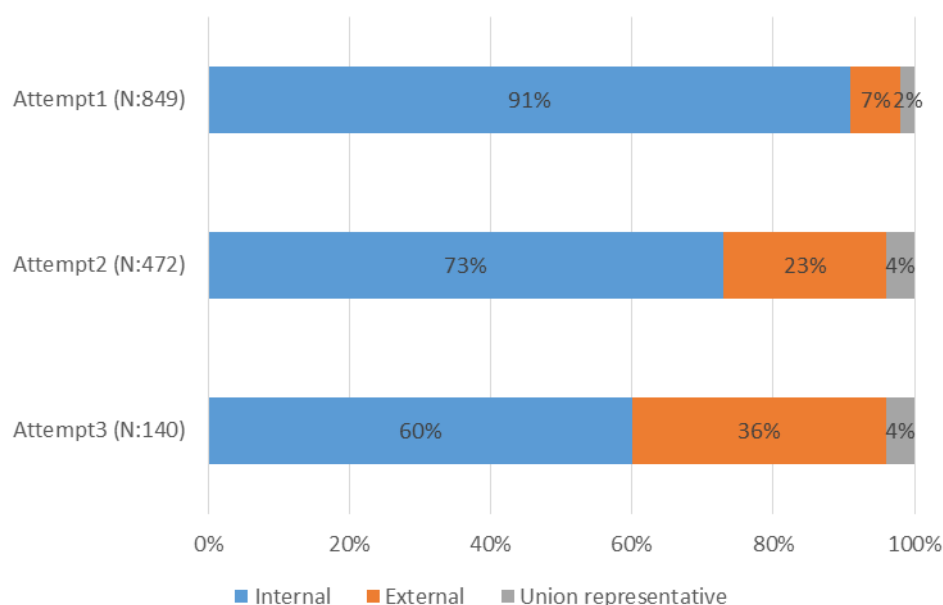
<sup>41</sup> Lewis, D., D'Angelo A., Clarke, L. (2015) The independent review into creating an open and honest reporting culture in the NHS, quantitative research report, Surveys of NHS staff, trusts and stakeholders

<sup>42</sup> Technologia (2015) Fraudes, malversations, lanceurs d'alerte... Comment réagissent les salariés français ? <http://www.technologia.fr/blog/wp-content/uploads/2015/12/LanceursdAlerteDef.pdf>

<sup>43</sup> Public Concern at Work (2013) Whistleblowing: the inside story. A study of the experiences of 1,000 whistleblowers

<sup>44</sup> Public Concern at Work (2013) Whistleblowing: the inside story. A study of the experiences of 1,000 whistleblowers

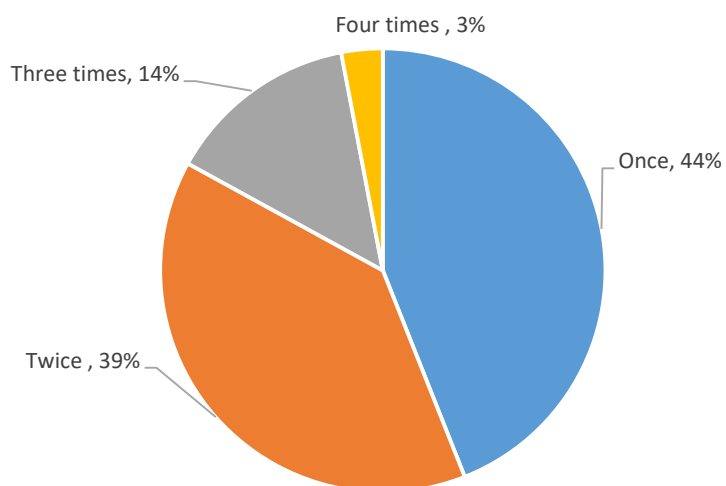
Figure 2.3 Internal and external whistleblowing



Source: PCaW

Whistleblowers will often persevere with their reporting if they do not see action being taken. PCaW found that **56% of whistleblowers report their concern within their organisations on more than one occasion** (Figure 2.4).

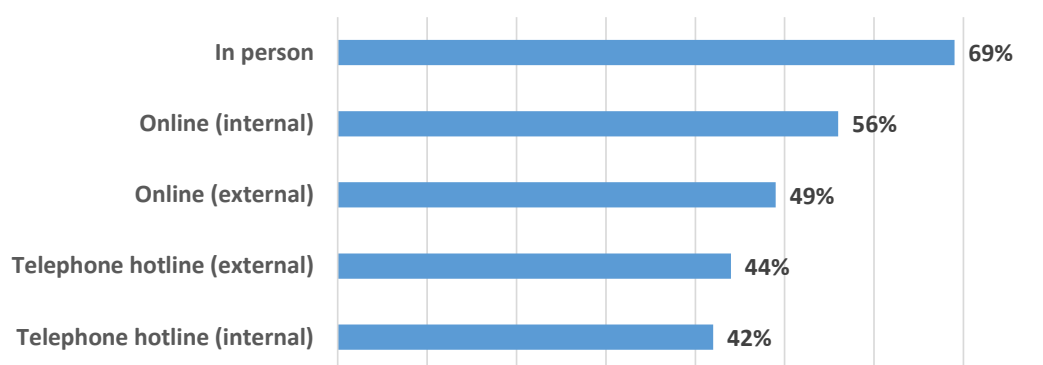
Figure 2.4 Number of times a whistleblower raises a concern



Source: PCaW

OECD (2016), using data collected in the OECD Business Integrity and Corporate Governance survey, shows that misconduct is reported primarily 'in person'. Ensuring adequate protection to whistleblowers is therefore important (Figure 2.5).

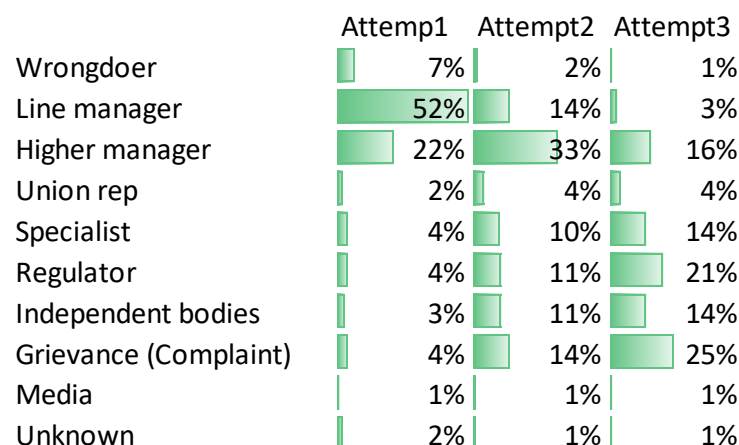
Figure 2.5 Channels to report serious misconduct in companies



Source: OECD Survey on Businesses Integrity & Corporate Governance (59 responses) in OECD (2016)

A survey of 7,543 civil servants in the Netherlands found that 39.5% of employees reported to managers (de Graaf, 2015)<sup>45</sup>. A survey of NHS staff in the UK<sup>46</sup> found that 52.3% of staff raised their concern informally with their line manager and 7.3% in writing, 9.9% with the head of department. Similarly, PCaW, within a sample of 1,000 callers to their advice line, found that line managers and managers in higher position are the first recipients of workers' concerns, in 74% of the cases when the concern is reported the first time, at the second attempt higher managers play a bigger role. When workers raise the concern more than once, external routes become increasingly more important and reporters tend to turn to independent bodies, specialist and regulators (Figure 2.6).

Figure 2.6 Recipients of whistleblowers reports per attempt



Source: PCaW

The support provided for whistleblowers has an impact on the efficacy of whistleblower policies. The ACFE found that organisations with hotlines were more

<sup>45</sup> de Graaf, G. (2015) What works: the role of confidential integrity advisors and effective whistleblowing, International Public Management Journal, 0(0), pages 1-19  
<http://www.tandfonline.com/doi/pdf/10.1080/10967494.2015.1094163?needAccess=true>

<sup>46</sup> Lewis, D., D'Angelo A., Clarke, L. (2015) The independent review into creating an open and honest reporting culture in the NHS, quantitative research report, Surveys of NHS staff, trusts and stakeholders

likely to detect fraud through tips than the others (47.4% vs. 28.2%)<sup>47</sup>. The PSI report notes that the UK's Financial Conduct Authority (FCA) opened 72% more investigations based on information from whistleblowers in its first year than its predecessor, the Financial Services Authority, had opened in the previous year (254 vs. 148). The FCA had established a designated team to receive and follow up reports.

Transparency International (2013) highlights that citizens and governments can work together in fostering accountability and integrity in society through improved protection of whistleblowers if their role in exposing wrongdoing, fraud and corruption is acknowledged<sup>48</sup>. The Transparency International study suggested ways to improve whistleblowers protection through the review process identified in the UN Convention against Corruption (UNODC)<sup>49</sup>.

## 2.2.4 Type of wrongdoing reported by whistleblowers

The OECD (2016)<sup>50</sup> found that the type of corporate misconduct most often reported by whistleblowers via internal company mechanisms was fraud (42%), followed by workplace health and safety issues (27%) and industrial relations and labour issues (24%). Bribery of foreign public officials as well as data protection and privacy issues were reported by well over 20% (Figure 2.7).

The 2016 Global Business Ethics Survey (GBES)<sup>51</sup> is global in its reach but the findings are applicable to the EU, as at EU level the survey covers France, Germany, Italy, Spain and the UK with 1,000 respondents in each country from the private, public and non-for-profit sector<sup>52</sup>. GBES respondents observed different types of wrongdoing, which could be potentially harmful or employees and the public, ranging from abusive behaviour, bribing, anticompetitive behaviour, violation of health and safety roles and human rights. Wrongdoing more likely to occur for more than two years included: abusive behaviour, anti-competitive behaviour, hiding violations before inspections, alteration of documents or records, lying, offering bribes, violations of health and safety regulations. Health violation and lying were defined as 'organisation-wide' misconduct as opposite to wrongdoing committed by employees.

According to Public Concern at Work (PCaW), in the first 10 years of application of the Public Interest Disclosure Act (PIDA)<sup>53</sup> in the UK, there were approximately

<sup>47</sup> Association of Certified Fraud Examiners (2016) 'Global Fraud Study, 2016'

<sup>48</sup> Transparency International (2013) Whistleblowing in Europe: Legal protections for whistleblowers in the EU

<sup>49</sup> UNODC (2015) The United Nations Convention against Corruption Resource, Guide on Good Practices in the Protection of Reporting Persons, [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

<sup>50</sup> OECD (2016) Committing to Effective Whistleblowers Protection <https://www.oecd.org/daf/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>

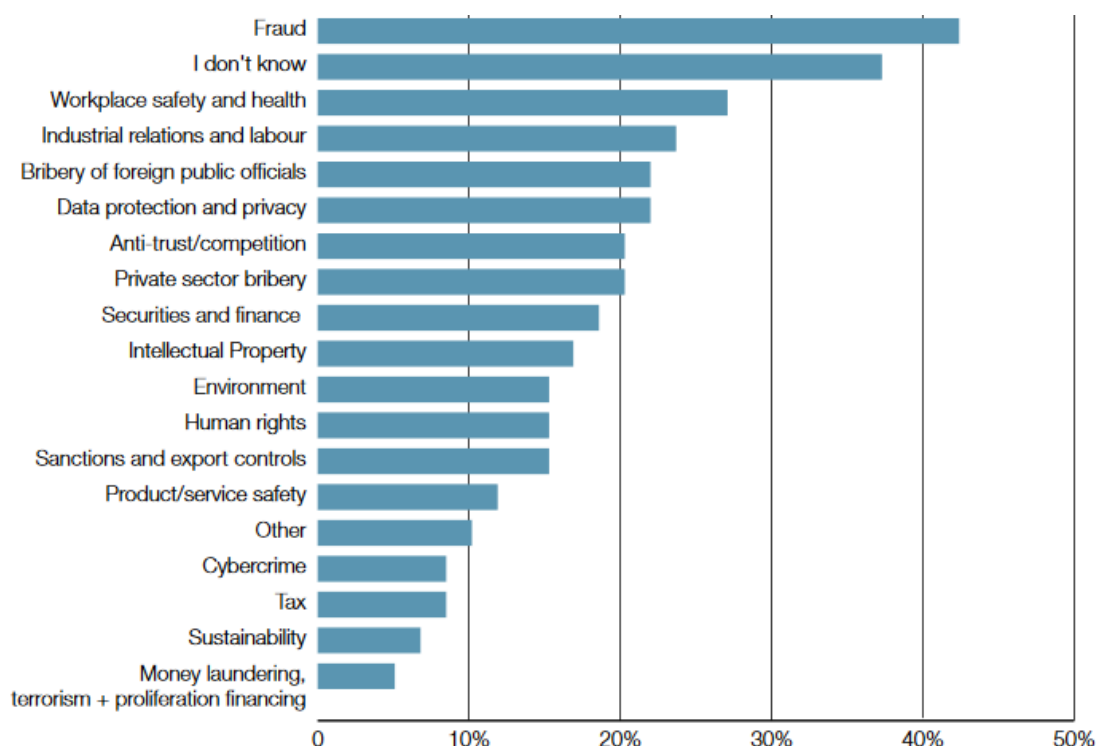
<sup>51</sup> ECI (2016), Global Business Ethic Survey, Measuring Risk and Promoting Workplace Integrity [http://www.boeingssuppliers.com/2016\\_Global\\_Ethics\\_Survey\\_Report.pdf](http://www.boeingssuppliers.com/2016_Global_Ethics_Survey_Report.pdf). The Global Business Ethic Survey is industry-financed.

<sup>52</sup> The other countries covered are Brazil, China, India, Japan, Mexico, Russia, South Korea and the United States

<sup>53</sup> Public Interest Disclosure Act 1998 <http://www.legislation.gov.uk/ukpga/1998/23/contents>

9,000 claims, 3,000 resulted in a written judgement, and only in 500 cases was possible to identify the cause of the public concern<sup>54</sup>.

Figure 2.7 Types of corporate misconduct reported via internal company mechanisms



Source: OECD Survey on Business Integrity and Corporate Governance (59 responses) cited in OECD (2016) *Committing to Effective Whistleblowers Protection*

A survey conducted by PCaW<sup>55</sup> on a sample of 1,000 callers to their confidential advice line, reported the top five concerns being related to ethical behaviour (19%), financial malpractice (19%), work safety (16%), public safety (11%) and patient safety (8%). Other common concerns referred to environment, harassment and discrimination, competition and regulation.

In the majority of cases (57%) callers were concerned about an outsider harm (harm caused to someone external the organisation), 19% of callers raised concerns about insider harm (including also the whistleblower), in 17% of cases both insider and outsider harm and in 7% of cases only insider harm (not including the whistleblower). Therefore, **in 74% of the cases callers were exposing wrongdoing likely to harm the wider public**. In **86% of cases the wrongdoing was recurring** rather than one-off occurrence (14%), thus exposing an on-going risk which, in 47% of cases had been occurring for more than six months.

<sup>54</sup> PCaW (2011) Whistleblowing: beyond the law

<sup>55</sup> Public Concern at Work (2013) Whistleblowing: the inside story. A study of the experiences of 1,000 whistleblowers

A survey of workers in the UK's National Health Service<sup>56</sup> found that in **68.1% of cases a concern was raised because of “a danger to the health and safety of any individual”**, in **33.6% of cases because of “a failure to comply with any legal obligation”**, 14% of cases because of a criminal offence and in 13.8% of cases because of concerns about environmental damage.

According to the Italian National Anticorruption Authority (ANAC, 2017)<sup>57</sup> the types of wrongdoing most commonly reported in 2016 were corruption and maladministration (22% of cases), illegal public procurements (20%) and illegal appointments/nominees (14%).

The targeted consultation conducted in support of this study asked questions about the type of wrong-doing specified in the whistleblower cases that respondents had encountered in the previous year. Thirteen respondents provided information for 5,579 cases, of which:

- 2,778 related to **tax evasion** (50%) – including dddsocial security contributions (1,381 cases) and **tax avoidance** (28 cases; 1%).
- 2,444 related to **fraud and corruption** (44%). Very little additional information was provided by the respondents. One case was reported as relating to bribery and abuse of power in Croatia.
- 121 related to **fraud, irregularities and other illegal activities affecting the financial interests of the EU** (2%).
- 106 cases related to money laundering (2%).
- 19 cases related to the mismanagement of public funds.
- 17 cases related to the misuse of personal data.
- 15 cases involved threats to public health.
- 14 cases involved threats to the environment.
- 10 cases involved serious violations of human rights in general.
- 7 cases involved market abuse or other violation of financial regulations.
- 20 cases related to other types of offence: conflicts of interest (12 cases); awareness of aviation safety (3 cases); recruitment procedures (2 cases); threats to food safety (1 case); anti-competitive practices (1 case); and misuse of employee's position for private gain (1 case).

## 2.2.5 Evidence on whistleblower reporting by sector and seniority

There are comparatively few data on rates of reporting by sector, type of workers, and on the profile of the people referenced in the whistleblowers' reports. The evidence suggests that sectors with high proportion of reporting workers include health, care and education. However, this cannot be considered as evidence of higher or lower incidence of misconduct since incidence of reporting might depends

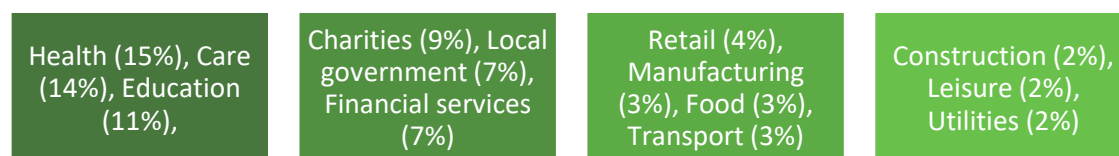
<sup>56</sup> Lewis, D., D'Angelo A., Clarke, L. (2015) The independent review into creating an open and honest reporting culture in the NHS, quantitative research report, Surveys of NHS staff, trusts and stakeholders

<sup>57</sup> [http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2017/WB\\_Corrado.pdf](http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2017/WB_Corrado.pdf)

on a range of factors, such as the availability of reporting channels, culture of workers, composition of workforce and working arrangements. For example, construction is a sector with high levels of self-employment and micro-enterprises, therefore the structure of the sector makes it more difficult to report misconduct.

Among a sample of 1,000 callers to the PCaW advice line in the UK<sup>58</sup>, workers were most commonly located in the health sector, care and education, followed by charities, local government and financial services. Callers to the PCaW advice line were typically skilled workers or professionals who have been working for the organisation for less than two years (Figure 2.8).

Figure 2.8 Top industries of workers calling the PCaW confidential advice line



Source: PCaW (2013)

A review of PIDA claims between 2011 and 2013 by PCaW<sup>59</sup> found 66% of claims involved workers in the private sector. This is similar to the distribution of UK employment, since in 2013 the UK private sector accounted for 76% of the total UK employment<sup>60</sup>. The sectors most heavily represented by whistleblowers were the health sector (12%), care (9%), education (7%) and local government (7%). The top three reasons for calling included multiple-types of wrongdoing (23%), discrimination and harassment (18%), work safety (12%) (Figure 2.9). Although the industry sectors as defined in the PCaW are not entirely comparable with the definition of industries in the official statistics, the distribution of employment by industry sectors in the UK in 2013 was not far from the distribution amongst PIDA claimants, with 13% of workers in human health and social work activities, 10% in education and 4% in financial and insurance activities<sup>61</sup>.

<sup>58</sup> Public Concern at Work (2013) Whistleblowing: the inside story. A study of the experiences of 1,000 whistleblowers <http://www.pcaw.org.uk/about/pcaw-reviews>

<sup>59</sup> Public Concern at Work (2016) Whistleblowing: Time for change [http://www.pcaw.org.uk/content/6-campaigns/2-time-for-change-review/pcaw\\_5yr-review\\_final.pdf?1480418791](http://www.pcaw.org.uk/content/6-campaigns/2-time-for-change-review/pcaw_5yr-review_final.pdf?1480418791)

<sup>60</sup> Office of National Statistics (ONS) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/employmentbyindustryemp13>

<sup>61</sup> Office of National Statistics (ONS) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/employmentbyindustryemp13>

Figure 2.9 PCaW review of PIDA employment tribunal judgements, 2011-2013

Sector	Top 5 industry	Top 5 type of wrongdoing
Private (66%)	Health (12%)	Multiple (23%)
Public (26%)	Care (9%)	Discrimination/harassment (18%)
Voluntary (4%)	Education (7%)	Work safety (12%)
Unknown (4%)	Local Government (7%)	Financial malpractice (9%)
	Financial services (5%)	Private employment rights (9%)

Source: PCaW (2016)

ANAC (2017) presented the results of the first national monitoring of whistleblowing cases in Italy<sup>62</sup>. The project included cases of reports made to ANAC between September 2014 and May 2016 and results of a survey conducted on a sample of 34 public administrations and 6 public companies. The survey collected data on whether whistleblowers protection measures were in place in accordance with legislative requirements and reports which occurred in 2015:

- Between September 2014 and May 2017 a total of 731 reports were received by ANAC from employees in public administrations or public owned companies and 443 investigations were initiated.
- In 2016, the majority of reports (75%) were made by public servants, and 16% by managers. In 2017, 65% of reports were made by public servants, 8% managers, 9% by the Responsible for Prevention of Corruption (RPC) (*Responsabili della Prevenzione della Corruzione (RPC)*)<sup>63</sup>, 8% were anonymous reporters.

According to ANAC (2017) the type of organizations involved in whistleblowing reports in 2016 were in 44.83% of cases regional and local authorities, 17.24% health authorities, 16.67% other administrations, 14.94% educational authorities. In the first five months of 2017, reports from regional and local authorities increased to 49.19%, from other administrations increased to 20.16%.

In Slovakia between 2015 and 2016 the labour inspectorate granted protection to 32 cases of whistleblowers (18 reported criminal activities and 14 administrative offences)<sup>64</sup>.

**The GBES survey found that employees in supplier companies (i.e. companies that supply goods or services to other organisations) were more likely to observe bribery and corruption (20%) than employees in non-supplier (i.e.**

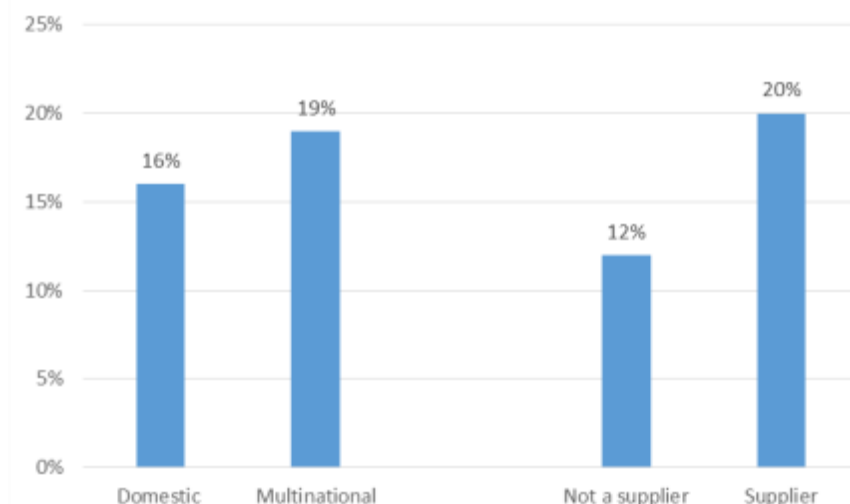
<sup>62</sup> [http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2017/WB\\_Corrado.pdf](http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2017/WB_Corrado.pdf)

<sup>63</sup> The RPC is responsible for overseeing compliance of public administration offices with legal requirements for publication of public information, ensuring the completeness, clarity and updating of published information. The RPC reports cases of non-compliance or delayed publications of the obligation to publish to the Political Affairs Body, the Independent Oversight Body (OIV), the National Anti-Corruption Authority (Anac) and, in the most serious cases, the Disciplinary Office.

<sup>64</sup> <http://www.nip.sk/>

companies that supply goods or services directly to the final client rather than to intermediary companies in the supply chain) companies (12%). Employees in multinational companies (19%) were more likely to observe bribery and corruption-related misconduct than those in domestic companies (16%) (Figure 2.10).

Figure 2.10 Employees who observed bribery & corruption-related misconduct (%)

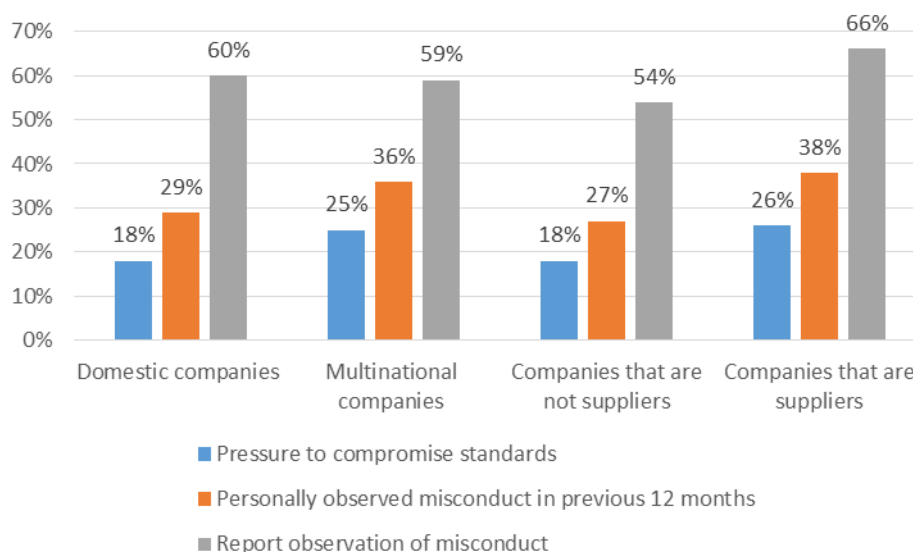


Source: GBES survey, 2016

The GBES survey reported that employees of supplier companies are more likely than employees in non-supplier companies to report to helplines rather than their managers (9% vs. 3%). Employees in supplier companies are also more aware of the existence of hotlines than employees in non-supplier companies (62/% vs. 44%).

The GBES found that employees working in supplier companies (i.e. companies that supply goods or services to other organisations) are more likely to experience pressure to compromise standards, to observe misconduct and report than those in companies that are not suppliers (i.e. companies that supply goods or services directly to the final client rather than to intermediary companies in the supply chain). Workers in multinational companies were more likely to experience pressure and observe misconduct than those in domestic companies (Figure 2.11).

**Figure 2.11 Percentages of employees who experience pressure to compromise standards, observed misconduct and reported misconduct in GBES countries<sup>65</sup> by type of companies**



Source: GBES survey, 2016

The GBES survey did not find significant differences between private and public sector in relation to employees observing misconduct, with a slightly higher proportion in the public sector, 34% versus 32% in the private. Although, according to the GBES in the UK, there is a significant differences of 16 percentage points, with 41% of employees observing misconduct in the public sector.

Respondents<sup>66</sup> to the Public Open Consultation (OPC) conducted by the Commission on whistleblower protection in 2017 indicated that the majority (77%) of whistleblower cases they were aware of occurred in private organisations<sup>67</sup> <sup>68</sup>, organisations with more than 250 employees (56%) and organisations based in one EU country (56%) (Figure 2.12).

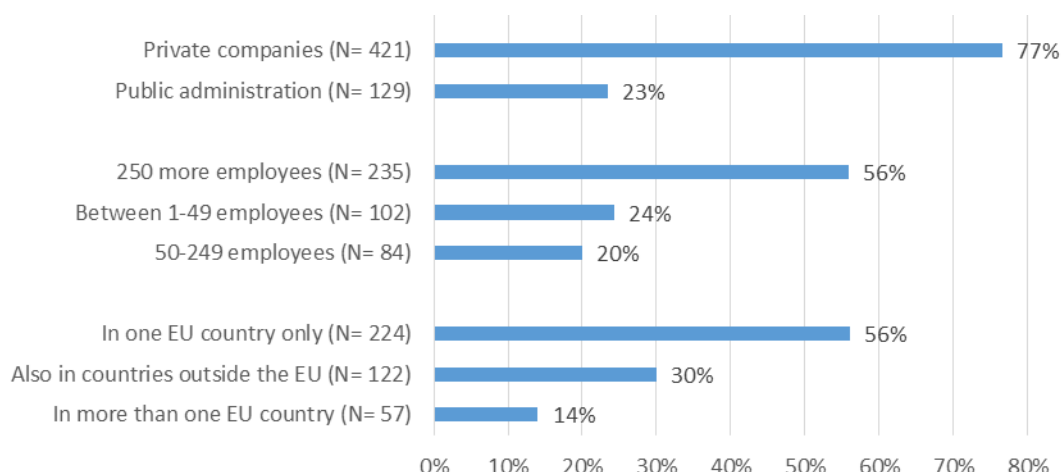
<sup>65</sup> Brazil, China, France, Germany, India, Italy, Japan, Mexico, Russia, South Korea, Spain, United Kingdom, United State

<sup>66</sup> Respondents who reported having knowledge of whistleblower cases

<sup>67</sup> OPC Q: What is the size of the organisation concerned (i.e. where the whistleblower cases occurred), including self-employed workers? 1 – 9 (micro); 10 – 49 (small); 50 – 249 (medium sized); 250 – 999 (large); 1000 or more (large); 5000 or more (large); Non applicable (the organisation concerned was a public administration); No response.

<sup>68</sup> Is the organisation concerned present?:Also in countries outside the EU; In more than one EU country; In one EU country only; Non applicable (public administration)

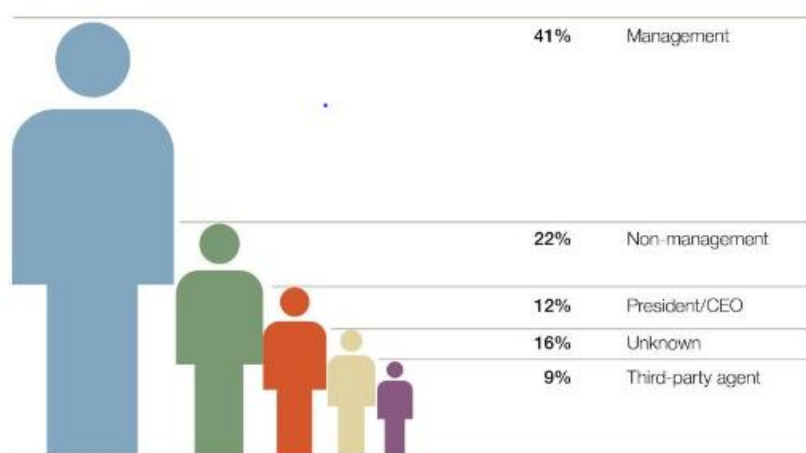
**Figure 2.12 Respondents to the open public consultation provided details of the whistleblower cases they had information on**



Source: ICF from OPC data [Base N: sectors N=550, size of companies N=421, country N=403] [Q: What is the size of the organisation concerned?; Q: Is the organisation concerned present?]

**The GBES study reports that in the private sector the majority of bribery involves management (23% top managers and 32% middle managers).** Within the public sector, top managers were reported as perpetrators of misconduct more often than in the private sector. According to a 2014 OECD analysis of 427 foreign bribery cases, more than half of involved some levels of management (Figure 2.13).

**Figure 2.13 Level of corporate management involved in foreign bribery cases**



Source: OECD Foreign Bribery Report (2014) cited in OECD (2015) Corporate Governance and Business Integrity, A stocktaking of corporate practices

## 2.3 Problems and their causes

Many workers who witness, suspect or experience wrongdoing do not report it. This contributes to wrongdoing going undetected. Supporting the process of whistleblowing could help in reducing wrongdoing of many kinds.

Factors contributing to under-reporting of wrongdoing include: a belief that reporting the wrongdoing would be futile; a culture of employer loyalty and hostility towards whistleblowers; a lack of reporting channels or lack of awareness of reporting process; and fear of retaliation. The evidence suggests that some whistleblowers do suffer harm due to retaliation. The retaliation takes many forms, examples being unfair dismissal, demotion and harassment. Retaliation against whistleblowers can have significant psychological, physical and financial consequences on whistleblowers and their families.

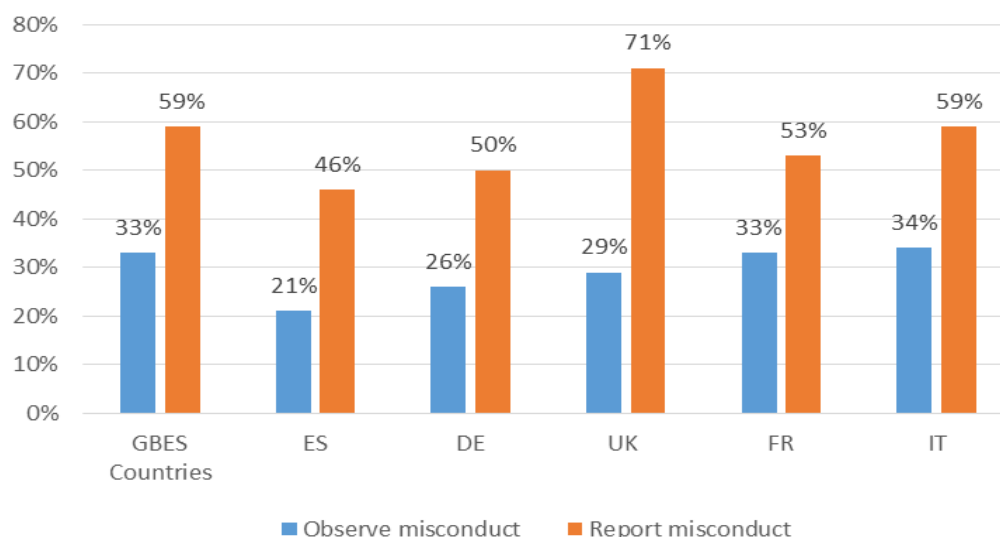
This section provides evidence of under-reporting and the consequences of 'blowing the whistle'.

## 2.3.1 There is evidence to suggest that people who are aware of wrongdoing often do not report it

### 2.3.1.1 Under-reporting of wrongdoing in the workplace is a pervasive problem that if tackled could help to reduce illegal activity and consequential harm

The 2016 GBES found that **41% of those who observed misconduct in the workplace did not report it**. One in five employees felt under pressure to compromise standards, 33% of employees observed misconduct, 59% reported the misconduct. Figure 2.14 shows differences across Member States included in the sample. In Italy and France one third of employees observed misconduct. Employees in the UK, although not necessarily more likely to observe misconduct, are more likely to report wrongdoing.

Figure 2.14 Percentages of employees who observed misconduct and reported misconduct in GBES countries



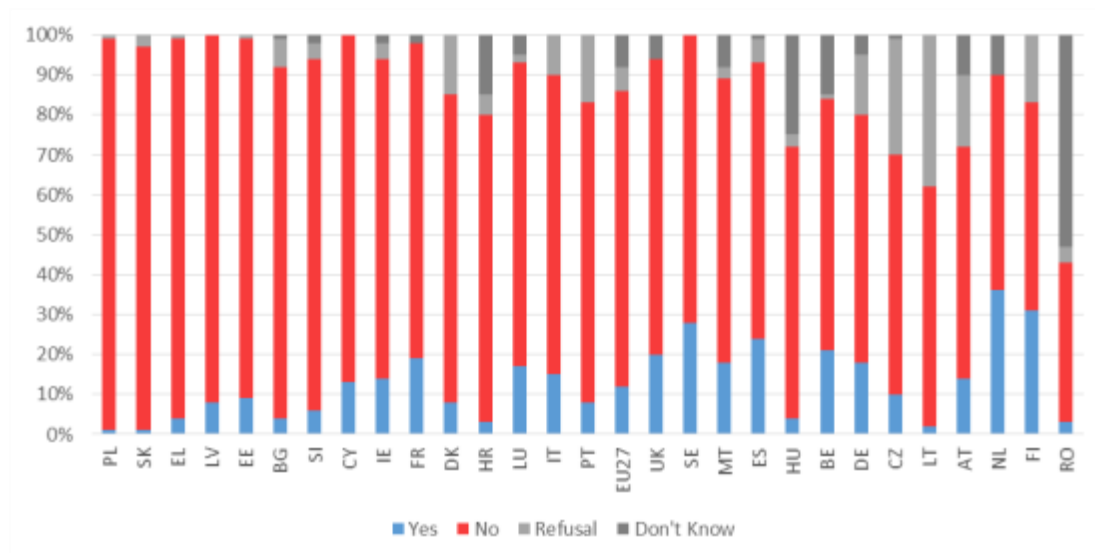
Source: GBES survey, 2016

The Special Eurobarometer 397 found that **three-quarters (74%) of respondents who experienced or witnessed a case of corruption did not make a report**, whilst only 12% of those witnessing or experiencing corruption reported it. 6% refuse

to respond to the question and 8% did not know. Respondents in EU15 countries were much more likely to report than respondents NMS12 countries (19% vs. 3%)<sup>69</sup>.

The countries with the highest proportion of respondents who did not report corruption include Poland (98%), Slovakia (96%) and Greece (95%). In some cases such as Romania, Hungary, Czech Republic and Lithuania there are high percentages of 'don't know' or refused to respond to the question (Figure 2.15).

Figure 2.15 The Special Eurobarometer 397 found very wide variation across the EU in respondents' propensity to report corruption



Source: Special Eurobarometer 397 [QB13 Did you report it to anyone or not?]

There are multiple examples of investigations into major disasters and cases of wrongdoing that have found that workers were aware of the underlying problems but failed to report them. Examples are:

- The official investigating into a rail crash in the UK in 1988 which killed 35 and injured 484 people heard that an inspector had seen the loose wiring but had said nothing because he did not want "to rock the boat"<sup>70</sup>;
- The public inquiry into a series of explosions that in 1988 destroyed the Piper Alpha oil platform in the North Sea with the loss of 167 lives, found that "workers did not want to put their continued employment in jeopardy through raising a safety issue which might embarrass management"<sup>71</sup>.

The majority of respondents (85%) to the Commission's 2017 open public consultation (OPC) on whistleblower protection believed that workers very rarely or rarely report concerns about threat or harm to the public interest<sup>72</sup>. Individual

<sup>69</sup> Special Eurobarometer 397

<sup>70</sup> Investigation into the Clapham Junction railway accident. Anthony Hidden, Q.C. 1989. [http://www.railwaysarchive.co.uk/documents/DoT\\_Hidden001.pdf](http://www.railwaysarchive.co.uk/documents/DoT_Hidden001.pdf) . Accessed 6 July 2017.

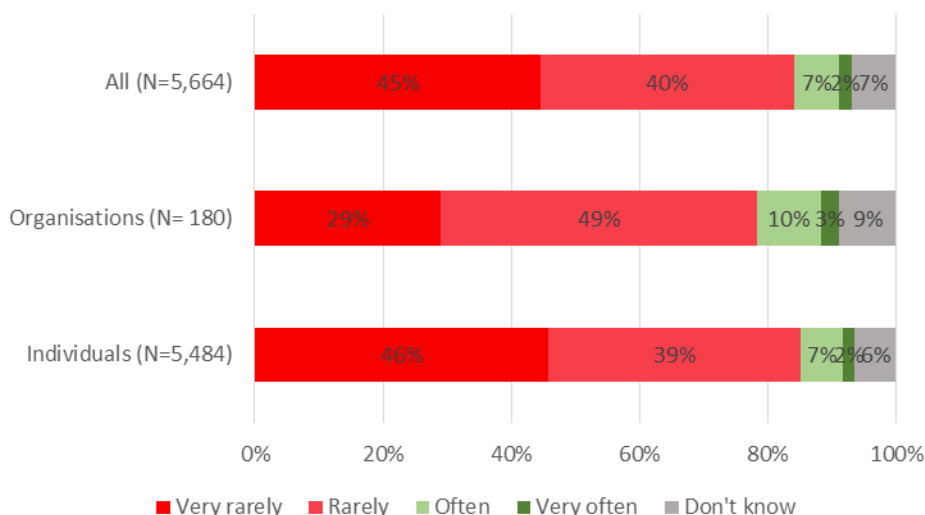
<sup>71</sup> Cullen, The Hon. Lord W. Douglas (1990). The public inquiry into the Piper Alpha disaster. London: H.M. Stationery Office. ISBN 0101113102.

<sup>72</sup> OPC Q: To your mind, how often are workers reporting their concerns about threats or harm to the public interest? [No response Total N=39]

respondents were more likely than those responding on behalf of organisations to believe that concerns were rarely or very rarely reported (85% vs. 78%). Individuals were also more likely to state that workers very rarely reported their concerns (46% against 29%) (Figure 2.16).

**Figure 2.16 Most respondents to the 2017 open public consultation on whistleblower protection indicated that workers are unlikely to report wrongdoing**

*Perceived frequency of reporting about threat or harm to the public interest*



Source: ICF from OPC data [Base N: individuals=5,484, organisations N=180] [Q: To your mind, how often are workers reporting their concerns about threats or harm to the public interest?]

Table 2.1 provides an overview of respondents by type of organisation to the question on how often workers reported their concerns about threats of harm to the public interest.

**Table 2.1 Perceived frequency of reporting about threat or harm to the public interest, by organisation type**

	NGOs	Business associations	Trade unions	Enterprises	Public authorities
Very rarely	16	5	10	8	2
Rarely	29	14	21	10	7
Often	1	11	1	3	0
Very often	2	0	2	0	0
Don't know	2	6	3	3	1
Total	50	36	37	24	10

Source: ICF from OPC data [Base N: individuals=5,484, organisations N=180] [Q: To your mind, how often are workers reporting their concerns about threats or harm to the public interest?] [Q: What is the nature of your organisation?]

### 2.3.1.2 There are diverse reasons for people failing to report wrongdoing

Evidence suggests that reporting of wrongdoing is reduced by factors that include:

- A belief that reporting the wrongdoing would be futile;
- Culture of employer loyalty and hostility to whistleblowers in the wider environment. This includes loyalty to colleagues and/or the employer and a socio-cultural environment in which there are negative connotations attached to whistleblowing;
- Fear of retaliation; and
- Lack of knowledge of procedures and reporting channels.

All these factors are linked to three main underlying causes:

- The power imbalance in employment relationships;
- A lack of sufficient whistleblower protection across Europe; and
- A lack of awareness of existing protection and lack of legal clarity and certainty in whistleblowers' protection; even when legislation exists it is often patchy and unclear on the conditions under which protection is guaranteed to) whistleblowers.

#### ***Some workers believe that reporting the wrongdoing would be futile***

CoE (2012)<sup>73</sup> reports that the primary cause of non-reporting is the belief that the report will not be followed up and the second most significant factor is fear of retaliation. The report suggests that legal frameworks should include in the notion of 'retaliation' the lack of action and failure by the employer to follow up i.e. if the employer does not follow up on reports this can be considered retaliation.

In the Special Eurobarometer 397 the two most common reasons cited by respondents for not reporting corruption were that it would be difficult to prove wrongdoing (47%) and that even if proof was available those responsible would not be punished (33%) (Figure 2.17).

This research looked at corruption in society in general, rather than only employee-employer dynamics and whistleblowing but the same theme – of a lack of trust that institutions will follow up on the report – comes through in more targeted research.

Transparency International France (2015) found that 40% of employees who did not report wrongdoing in France believed that no action would have been taken<sup>74</sup>.

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<sup>73</sup> Council of Europe (2012) The protection of whistleblowers: a study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest, prepared by Paul Stephenson and Michael Levi <https://rm.coe.int/1680700282>

<sup>74</sup> Transparency International (2015) "Lanceurs d'alerte": quelle perception de la part des salariés? <https://transparency-france.org/wp-content/uploads/2016/04/R%C3%A9sultats-sondage-Harris-Interactive.pdf>

Figure 2.17 Difficulty of proof, lack of belief that action would be taken and lack of protection of the whistleblower were the reasons most commonly cited by Special Eurobarometer respondents for not reporting cases of corruption (EU 27)



Source: Special Eurobarometer 397 [QB14 I am going to read out some possible reasons why people may decide not to report a case of corruption. Please tell me those which you think are the most important?]

Callers to PCaW advice line reported that in 60% of cases no response was given when raising the concern. A 2015 survey of **NHS staff**<sup>75</sup> found that **among those who did not raise a concern 17.9% did not report because they “didn’t trust the system” and 14.8% because of fear of being victimised.**

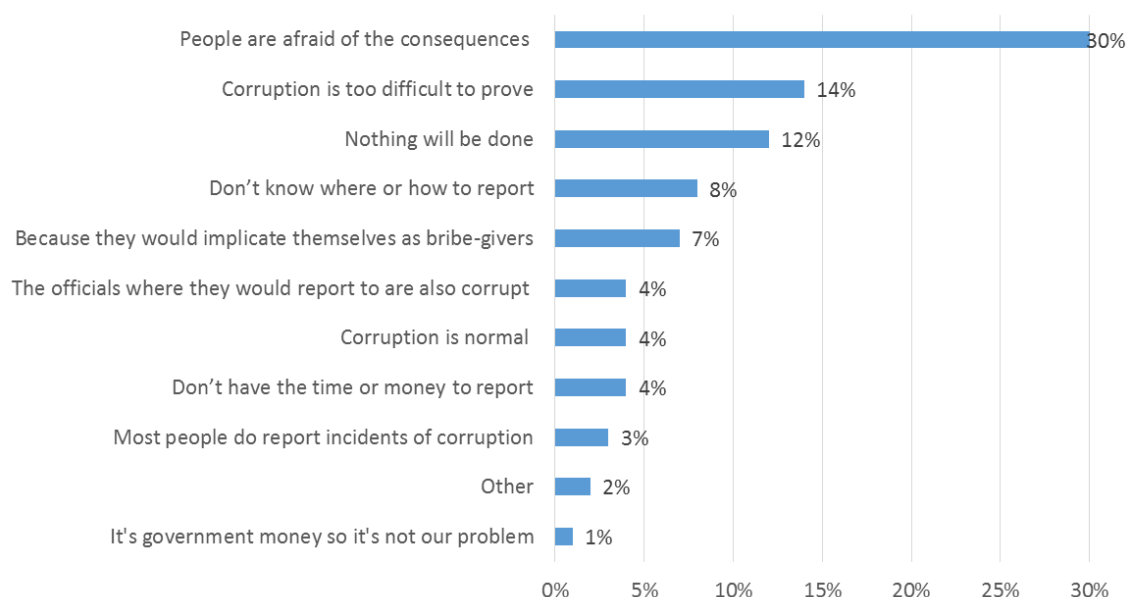
OECD (2016) states that ensuring that employees’ concerns are heard, followed up and acted upon is paramount to the proper functioning of organisations as well as the entire society. To this end organisations can take a number of measures from open organisational culture, better working relationships, improved protection for employees and more awareness of the protection granted as well as proper follow up mechanisms.

The Transparency International Global Corruption Barometer (GCB) (2016)<sup>76</sup> found that the main reason for not reporting was fear of retaliation (30%), followed by the belief that corruption is too difficult to prove (14%) and no action will be taken (12%) (Figure 2.18).

<sup>75</sup> Lewis, D., D’Angelo A., Clarke, L. (2015) The independent review into creating an open and honest reporting culture in the NHS, quantitative research report, Surveys of NHS staff, trusts and stakeholders

<sup>76</sup> Transparency International, Global Corruption Barometer (2016)

Figure 2.18 Perceived main reasons people don't report corruption



Source: Transparency International GCB (2016). [Q. Some people say that many incidents of corruption are never reported. Based on your experience, what do you think is the main reason that many people do not report incidents of corruption when they occur?]

### ***A culture of employer loyalty and hostility to whistleblowers can discourage reporting***

Socio-cultural factors operating at the level of society, the organisation and the individual can discourage whistleblowing.

Loyalty plays a big role in the decision process of reporting wrongdoing, **16% of respondents to the Special Eurobarometer 397 indicated that people may decide not to report corruption because they would not want to betray colleagues, employers, friends, family etc.** Agreement with this proportion ranged from 33% in Denmark to 5% in Bulgaria (Figure 2.19).

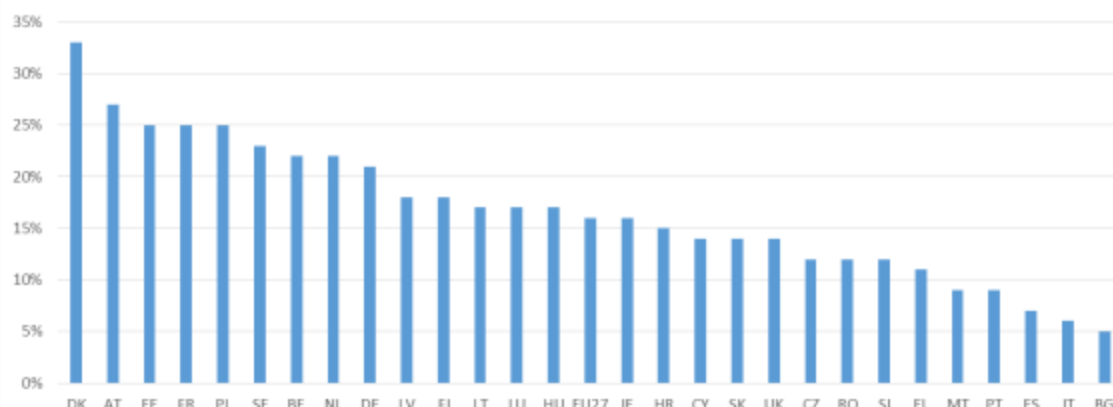
Respondents to the EY Global Fraud Survey<sup>77</sup> reported **loyalty to be one of the main deterrents for not reporting**. Nineteen per cent of respondents reported loyalty to their company and 18% loyalty to their colleagues as reasons for not reporting cases of bribery, fraud or corruption.

Transparency International (2013)<sup>78</sup> points to deep-rooted negative perceptions in society which lead to harassment and ostracism from people in their personal networks. Whistleblowers are still defined with derogatory terms such as “sneak”, “informer” and “snitch”.

<sup>77</sup> EY (2016) Corporate misconduct – individual consequences Global enforcement focuses the spotlight on executive integrity - 14th Global Fraud Survey [http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/\\$FILE/EY-corporate-misconduct-individual-consequences.pdf](http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/$FILE/EY-corporate-misconduct-individual-consequences.pdf)

<sup>78</sup> Transparency International (2013) Whistleblowing in Europe: Legal protections for whistleblowers in the EU

Figure 2.19 Percentage of citizens who believe that people do not report wrongdoing because of loyalty towards the others (“no one wants to betray anyone”)



Source: Special Eurobarometer 397 [QB14 I am going to read out some possible reasons why people may decide not to report a case of corruption. Please tell me those which you think are the most important?]

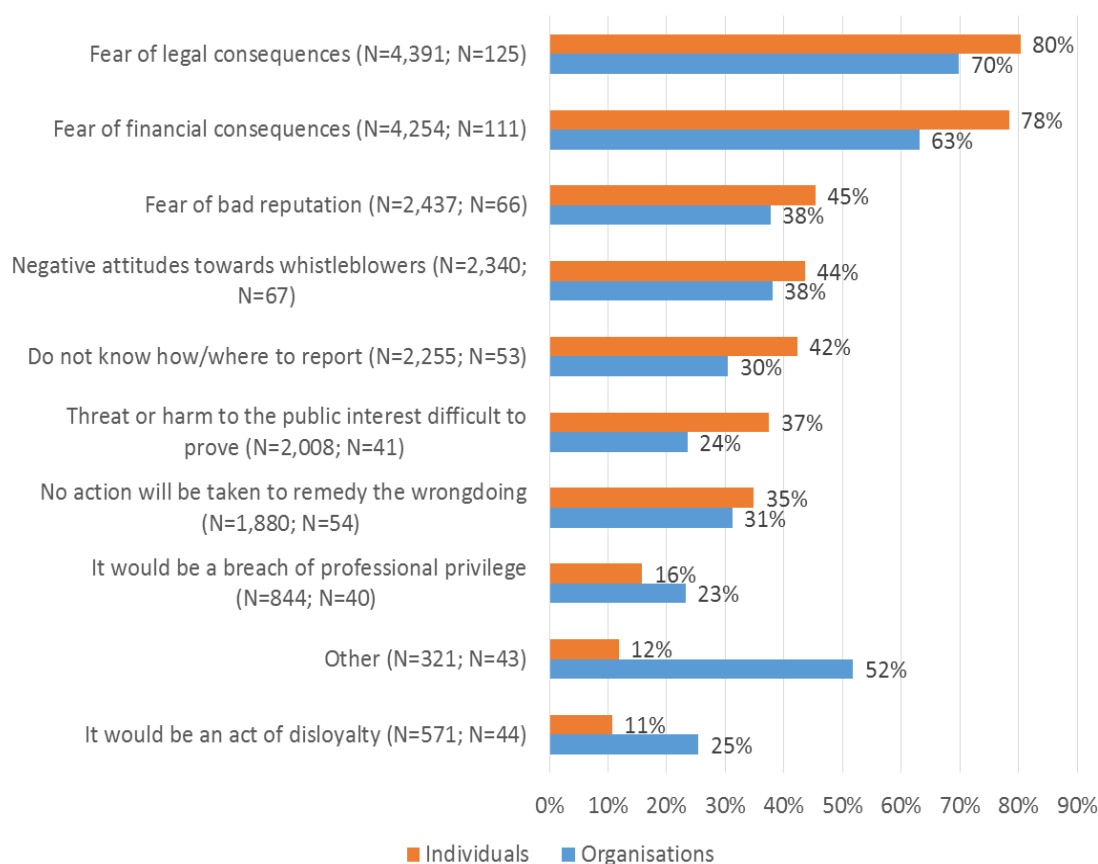
The Nyberg Report (2011)<sup>79</sup>, which investigated the causes of the collapse of the banking sector in Ireland, identified the ostracism that workers and potential whistleblowers faced as contributing to the underlying causes of the crisis: “*there may have been a strong belief in Ireland that contrarians, non-team players, fractious observers and whistleblowers would be informally (though sometimes even publicly) sanctioned or ignored, regardless of the quality of their analysis or their place in organisations*”. The UNODC reports that “*many believe that the collapse of Irish banks in 2008, could have been avoided if information about potential wrongdoing had been disclosed early enough and if those who did so had been offered effective protection.*”

Respondents to the OPC were asked to indicate the reasons why workers do not report wrong-doing<sup>80</sup>. The factors most commonly selected from the list provided **were fear of legal consequences** (80% of individual respondents and 70% of organisations); **fear of financial consequences** (78% of individual respondents and 63% of organisations) and **fear of bad reputation** (45% of individual respondents and 38% of organisations). Organisations were more likely than individual respondents to indicate that workers do not report the wrong-doing because it would be seen as an act of disloyalty (25% of organisations and 11% of individuals) or a breach of professional privilege (23% of organisations and 16% of individuals) (Figure 2.20).

<sup>79</sup> Nyberg Report (2011) Misjudging risks: causes of the systemic banking crisis in Ireland. Report to the Commission of investigation into the banking sector in Ireland  
<http://www.bankinginquiry.gov.ie/Documents/Misjudging%20Risk%20-%20Causes%20of%20the%20Systemic%20Banking%20Crisis%20in%20Ireland.pdf>

<sup>80</sup> OPC Q: To your mind, which of the following are the most important reasons why a person might decide not to blow the whistle?

Figure 2.20 Reasons for not 'blowing the whistle'



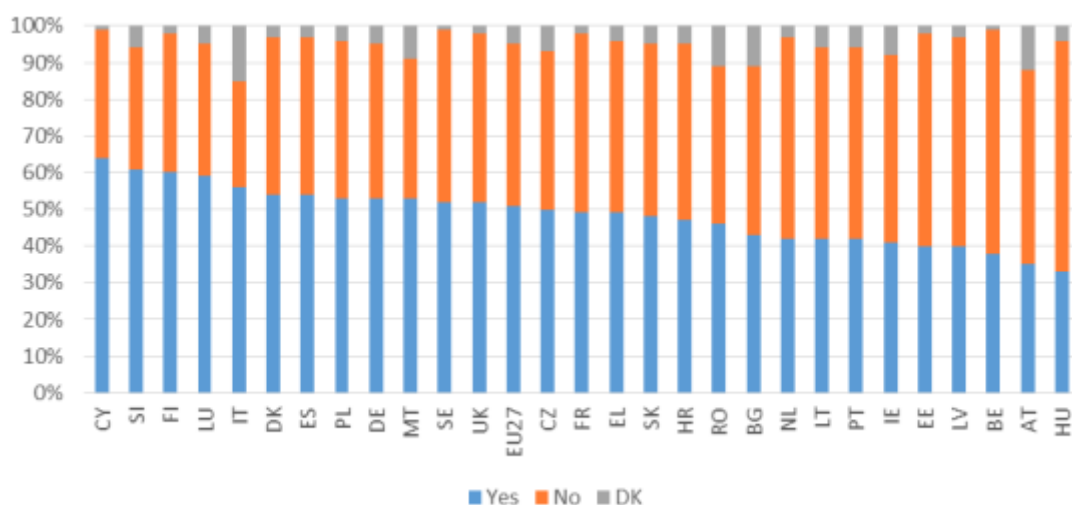
Source: ICF from OPC data [Overall Basel: N=5493 / Individuals: N=5,468 to N=5,324 / Organisations: N=172 to N=179] [Q: To your mind, which of the following are the most important reasons why a person might decide not to blow the whistle?]

### **Some potential whistleblowers do not know where to make their report**

Special Eurobarometer 397 found that **44% of respondents would not know where to report corruption if they were to experience or witness corruption** (Figure 2.21). Hungary, Austria and Belgium had the lowest proportion of citizens who would know where to report a wrongdoing. Respondents from Cyprus, Slovenia, Finland and Luxembourg were most likely to know where to report a wrongdoing.

**Figure 2.21 In many Member States a majority of respondents to the Special Eurobarometer 397 survey did not know where to report corruption**

*Whether Europeans experiencing or witnessing a case of corruption would know where to report it*



Source: Special Eurobarometer 397. [QB10 If you were to experience or witness a case of corruption, would you know where to report it to?]

**On average, 21% of respondents to the Special Eurobarometer 397 indicated that lack of knowledge on where to report** contributes to under-reporting of wrongdoing. The rates vary from a little over 10% in Czech Republic to more than 20% in Sweden (Figure 2.22).

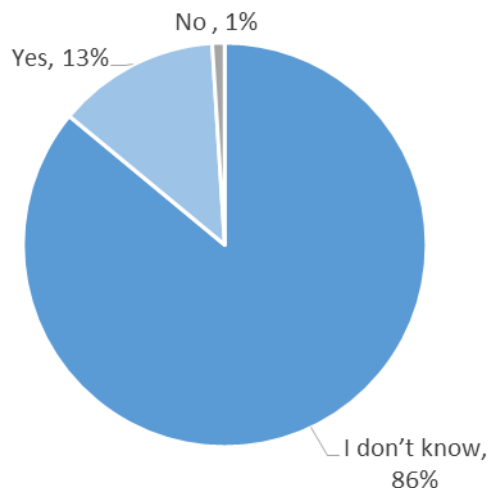
**Figure 2.22 Percentage of citizens who believe that people do not report wrongdoing because of lack of awareness of reporting channels (“do not know where to report it”)**



Source: Special Eurobarometer 397 [QB14 I am going to read out some possible reasons why people may decide not to report a case of corruption. Please tell me those which you think are the most important?]

**The majority of respondents (86%) to an OECD survey on business integrity and corporate governance were unaware of the existence of reporting mechanisms (Figure 2.23).**

Figure 2.23 Whether companies have an existing mechanism for reporting suspected instances of serious corporate misconduct



Source: OECD Survey on Business Integrity and Corporate Governance (69 responses) in OECD (2016)

Transparency International France (2015) found that 32% of employees who did not report wrongdoing did not know where to report<sup>81</sup>.

#### ***Fear of retaliation discourages reporting***

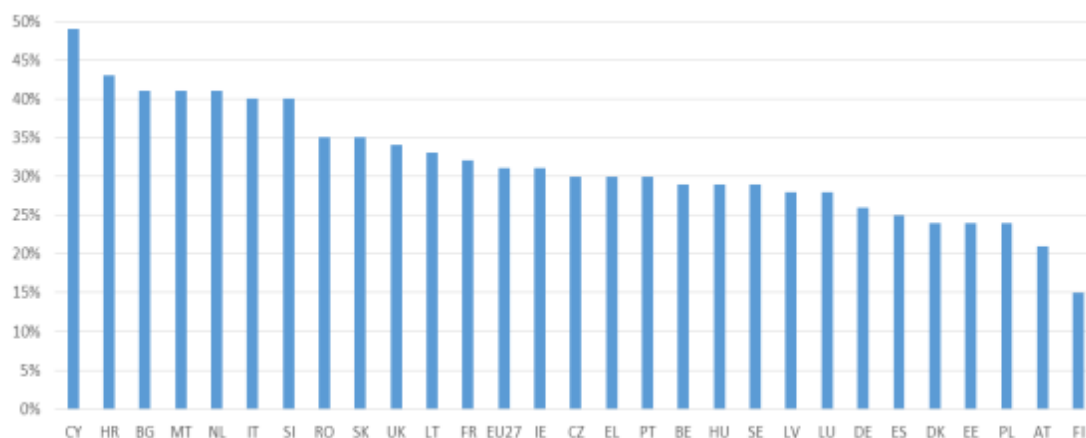
Fear of retaliation is commonly cited as a factor dissuading potential whistleblowers from making a report.

GBES found that across all countries covered **59% of respondents who did not report observed wrongdoing did so for fear of retaliation.**

**Almost one third of the Special Eurobarometer respondents (31%) indicated that people may decide not to report a case of corruption because there is no protection for those reporting corruption.** Almost 50% of respondents in Cyprus supported this proposition compared to only 15% in Finland (Figure 2.24).

<sup>81</sup>Transparency International (2015) "Lanceurs d'alerte": quelle perception de la part des salariés?<https://transparency-france.org/wp-content/uploads/2016/04/R%C3%A9sultats-sondage-Harris-Interactive.pdf>

Figure 2.24 Percentage of citizens who believe that people do not report wrongdoing because of lack of protection (“there is no protection for those who report corruption”)



Source: Special Eurobarometer 397 [QB14 I am going to read out some possible reasons why people may decide not to report a case of corruption. Please tell me those which you think are the most important?]

Transparency International France (2015) found that 39% of employees who did not report wrongdoing did so out of fear of retaliation<sup>82</sup>. Similarly Technologia (2015) found that 36% of employees in France did not report because of a fear of retaliation.

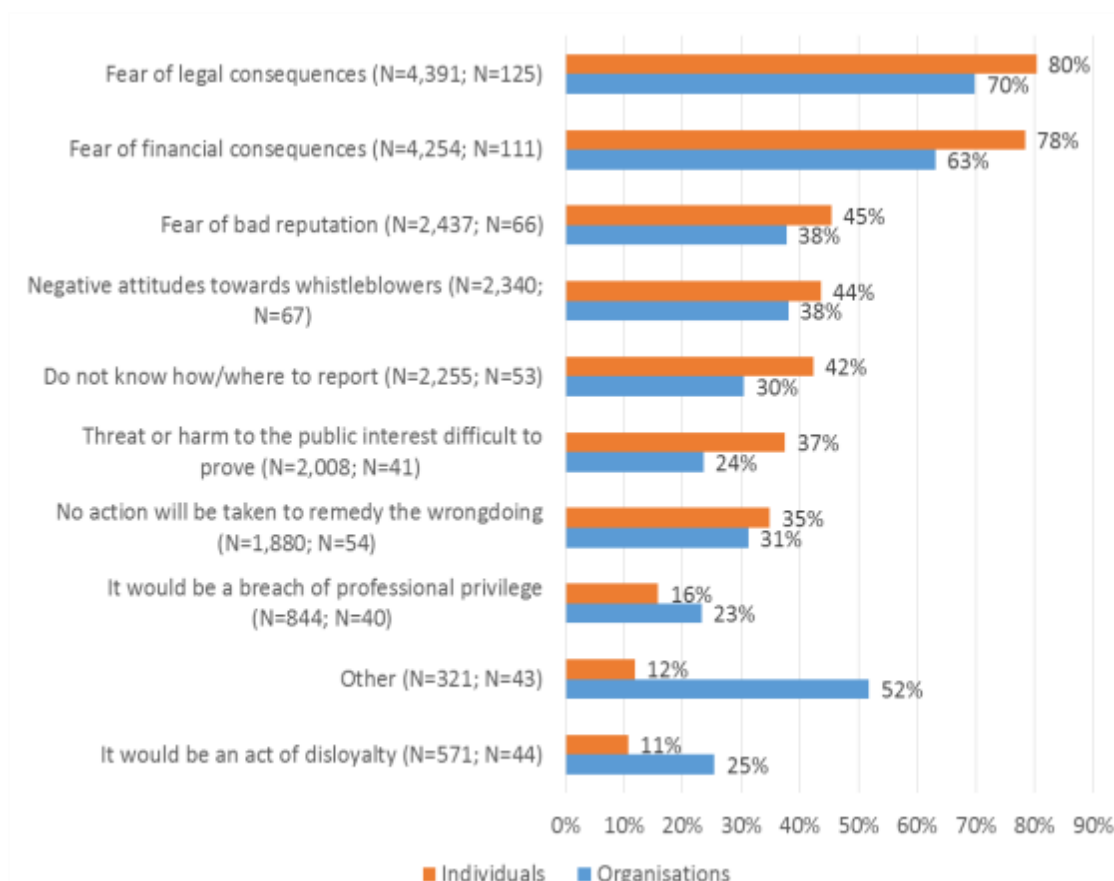
The OECD (2016) remarks how lack of reporting is linked to fear of retaliation and consequences as being a whistleblower can lead to loss of income, jobs, marginalisation, stigma, financial and reputational degradation.

Respondents to the Open Public Consultation conducted by the Commission were asked to indicate the reasons why workers do not report wrongdoing<sup>83</sup>. The factors most commonly selected from the list provided were **fear of legal consequences** (80% of individual respondents and 70% of organisations); **fear of financial consequences** (78% of individual respondents and 63% of organisations) and **fear of bad reputation** (45% of individual respondents and 38% of organisations), as shown in Figure 2.25.

<sup>82</sup>Transparency International (2015) “Lanceurs d’alerte”: quelle perception de la part des salariés? <https://transparency-france.org/wp-content/uploads/2016/04/R%C3%A9sultats-sondage-Harris-Interactive.pdf>

<sup>83</sup> OPC Q: To your mind, which of the following are the most important reasons why a person might decide not to blow the whistle? For each item respondents had to tick 1,2,3,4, don’t know, no answer. Only responses for the rating 1 are provided.

Figure 2.25 Reasons for not 'blowing the whistle'



Source: ICF from OPC data [Overall Basel: N=5493 / Individuals: N=5468 to N=5324 / Organisations: N=172 to N=179] [Q: To your mind, which of the following are the most important reasons why a person might decide not to blow the whistle?]

The issue of retaliation is discussed in more depth in the following section.

### 2.3.2 Many whistleblowers suffer harm due to retaliation

The evidence suggests that the fear of retaliation is often well-founded. Retaliation against whistleblowers is a complex phenomenon and it occurs in many forms.

UNODC (2015)<sup>84</sup> reports that forms of unfair treatment can include: coercion, intimidation or harassment to reporting persons and relatives; discrimination; damage to property; threat of reprisal; suspension, lay off or dismissal; demotion or loss of opportunities and transfer of duties.

OECD (2016) observes that legislation often requires workers to report wrongdoing but does not provide the right protection, thus exposing workers to retaliation, and that the availability of reporting channels is not in itself a protection against retaliation. The different forms of retaliation identified by the United States' Project on Government Oversight, as reported by the OECD study, are:

<sup>84</sup> UNODC (2015) Resource Guide on Good Practices in the Protection of Reporting Persons [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

- Taking away job duties so that the employee is marginalised.
- Taking away an employee's national security clearance so that he or she is effectively fired.
- Blacklisting an employee so that he or she is unable to find gainful employment.
- Conducting retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
- Questioning a whistleblower's mental health, professional competence, or honesty.
- Setting the whistleblower up by giving impossible assignments or seeking to entrap him or her.
- Reassigning an employee geographically so he or she is unable to do the job.

From the analysis of the experience of 1,000 callers to its hotline, PCaW<sup>85</sup> reports a number of responses and actions taken by managers vis-à-vis whistleblowers, including both formal and informal responses:

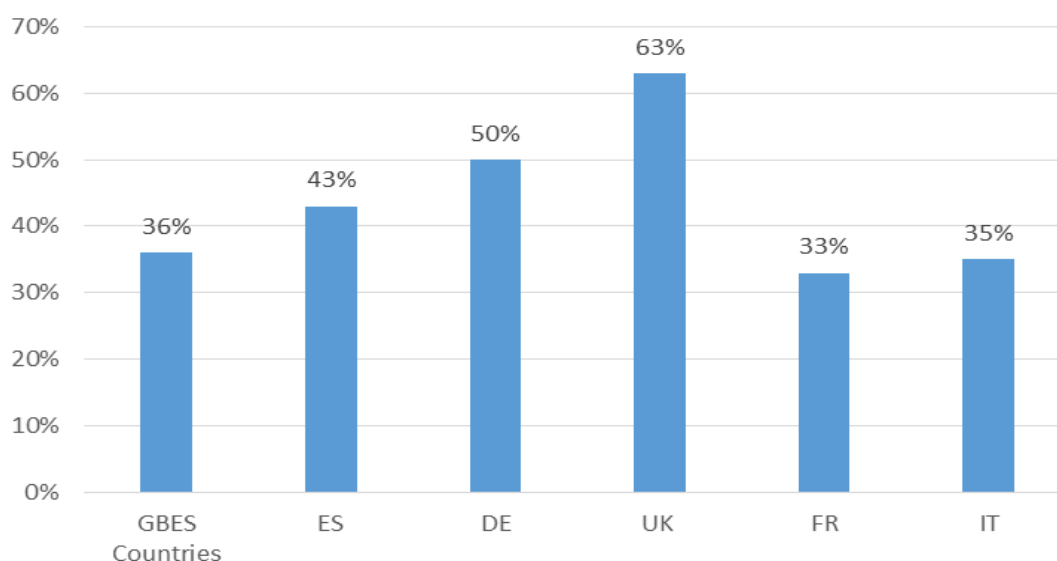
- Informal – closer monitoring, ostracism, bullying, verbal harassment.
- Blocking resources – blocking access to emails, to information, to training.
- Formal – a formal accusation of grievance with subsequent demotion, suspensions, disciplinary measures and relocation.
- Dismissal.

According to the GBES **more than one in three people making a report (36%) experienced retaliation** in 11 out of 13 countries surveyed. The UK was the country with the highest proportion of employees reporting having experienced retaliation (63%), followed by Germany (50%), Spain (43%), Italy (35%) and France (33) (Figure 2.26). The GBES also found that whistleblowers in the **public sector** were more likely to experience retaliation than workers in the private (41% vs. 33%).

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<sup>85</sup> Public Concern at Work (2013) Whistleblowing: the inside story. A study of the experiences of 1,000 whistleblowers

Figure 2.26 Percentages of reporters who experienced retaliation in GBES survey



Source: GBES survey, 2016

Transparency International cites research in Portugal which found that whistleblowers are exposed to various types of reprisals from employers and personal networks. The study also found that whistleblowers from a wide range of sectors (from lawyers to politicians to administrative employees) generally agreed that the government and criminal authorities are indifferent to retribution, such as threats, firing or transfer<sup>86</sup>.

Research reported in PSI (2016) from a 2013 National Business Ethic Survey in the US, taken with a representative sample of private sector employees at all levels, found that **21% of those workers who had reported wrongdoing had experienced retaliation**, thus estimating that 6.2 million American workers in the private sector needed whistleblower protection.

OECD (2016) also suggests that reprisal is often delayed and can occur even months or years after reporting, therefore protection needs to be guaranteed for an appropriate period of time.

For workers in the financial and health sector dismissal was more likely to happen after the first report. In all other sectors the likelihood of dismissal increases when a concern is raised more than once.

PCaW found that workers in high management position tend to be dismissed at early stages of the process while whistleblowers in lower positions are tolerated longer, but face different forms of retaliation. When the wrongdoer is a co-worker and they are aware of the identity of the reporter, the whistleblower is more likely to face informal reprisals (58%) if the concern is raised through line managers or hotlines. Formal reprisal is more likely to occur when the concerns are raised with higher managers (46%).

<sup>86</sup> Interviews of whistleblowers with David Marques, Transparência e Integridade, Associação Cívica, Portugal, 2012. Cited in Transparency International (2013) Whistleblowing in Europe: Legal protections for whistleblowers in the EU

The GBES survey found that retaliation occurs within the first three weeks of reporting and at least 90% of retaliation occurred within the first six months.

Hersh (2002)<sup>87</sup> found that retaliation normally occurs in four stages. First, pressure is put on the whistleblower to desist, for instance by verbal pressure or criticisms of job performance. Next the whistleblower is isolated, their organisational role downgraded and resources restricted. The third stage comprises the defamation of character and may be supported by a fourth stage of expulsion. During all these stages the whistleblower experiences negative psychological and physical effects.

De Maria et al. (1996)<sup>88</sup> make a distinction between official retaliation, in which punishment is covered up by policy and procedures, and unofficial reprisals. In a survey, reported by De Maria et al. (1997)<sup>89</sup>, 71% of respondents experienced official reprisals and 94% unofficial revenge, with multiple acts of reprisal happening in most cases. Formal reprimand was the most common official reprisal, followed by punitive transfer and compulsory psychiatric or other referrals. Dismissal occurred in 8% of cases. Workplace ostracism was the most common form of unofficial reprisal, followed by personal attacks and increased scrutiny.

A 2015 survey of NHS staff<sup>90</sup> found that 20.9% of workers who raised a concern felt unsafe afterwards and 9.6% very unsafe. The research also investigated the treatment by co-workers and management after raising a concern, and found that:

- 19.7% of whistleblowers were ignored by management;
- 15.6% were praised by co-workers;
- 9.1% were ignored by co-workers;
- 8.8% were praised by managers; and
- 8.2% were victimised by co-workers and 17.3% victimised by management.

There is evidence in the literature that whistleblowing is stressful and most whistleblowers need psychological support at some point in the process (Vandekerckhove and Lewis, 2015). Results from fifteen semi-structured interviews conducted with whistleblowers amongst others in the US, Ireland, the UK showed that mental health issues occur at different stages of the whistleblowing process:

- before the disclosure when people are considering reporting;
- during the reporting phase when whistleblower have the made the disclosure, often in this stage whistleblowers make a first disclosure internally and are facing challenges from their organisations;
- when whistleblowers are retaliated by their organisations;
- when whistleblowers go outside their organisation;

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<sup>87</sup> Hersh M.A. "Whistleblowers - Heroes or Traitors?: Individual and Collective Responsibility for Ethical Behaviour," *Annual Reviews in Control* 26 (2002): 243-262.

<sup>88</sup> De Maria, W. and C. Jan (1996). *Crime, Law and Social Change*, 24, 151-166.

<sup>89</sup> DeMaria, W. and C. Jan (1997). *Eating its own*, *Australian J. of Social Issues*, 32(1), 37-59.

<sup>90</sup> Lewis, D., D'Angelo A., Clarke, L. (2015) *The independent review into creating an open and honest reporting culture in the NHS*, quantitative research report, Surveys of NHS staff, trusts and stakeholders

- when the whistleblower identity come known within the professional and personal network.

A number of consequences have been observed: “temptation to give up”, self-censoring caused by the stigma; and, mental health issues that are used by organisations to retaliate and discredit the worker<sup>91</sup>.

PSI (2016) reports that workers are subject to various forms of retaliation including ostracism, demotion, dismissal, destruction of property, assault and even murder.

Fotaki et al. (2015)<sup>92</sup> shows that retaliation takes many forms (from bullying to threatening, demotion, ostracism at the workplace and firing) and has been shown to have severe repercussions on both the mental and the physical health of whistleblowers (e.g. depression and symptoms analogous to post traumatic stress but also physical pain and diseases). The authors interviewed several whistleblowers. The study demonstrates that the participants experienced, among others, severe threatening behaviour by their employers, false claims of mental instability by their institution and requests to undergo medical counselling, panic attacks and other stress-related diseases, insomnia, abdominal diseases, psoriasis and other skin diseases, and cardiovascular diseases. The study concludes that whistleblowers experienced multiple instances of stress, anxiety and fear before and during the process. The retaliation deployed by organisations caused them to suffer from a variety of mental and physical conditions which were eventually used to delegitimise the whistleblower and their disclosures.

Hersh (2002)<sup>93</sup> reviewed the literature on organisational responses, including retaliation, the effectiveness of whistleblowing and the state of legal protection in the US and the UK. Hersh found that surveys (e.g. De Maria et al, 1996<sup>94</sup>, 1997<sup>95</sup>) and qualitative research into whistleblowers’ experience found that most whistleblowers experience retaliation, sometimes of a very severe kind<sup>96</sup>.

Lennane (1993)<sup>97</sup> examined the response of organisations to whistleblowing in Australia and the effects on individual whistleblowers. The survey sample consisted of 25 men and 10 women from various occupations who had exposed corruption or danger to the public, or both. Whistleblowers worked in a variety of sectors and occupations: banking/finance, health, law enforcement, public administration, transport, teaching and the state. All whistleblowers in the sample suffered adverse

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<sup>91</sup> Vandekerckhove, W., Lewis, D. (2015) Developments in whistleblowing research 2015. Whistleblowing and mental health: a new weapon for retaliation?  
[https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0ahUKEwiEYf3N-MbUAhVEaVAKHSAEDzQQFghsMAc&url=http%3A%2F%2Fwww.track.unodc.org%2FAcademia%2FDocuments%2F151110%2520IWRN%2520ebook%25202015.pdf&usq=AFQjCNHrGNjMvxwL5laeVkl-sBml\\_GuMPw&cad=rja](https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0ahUKEwiEYf3N-MbUAhVEaVAKHSAEDzQQFghsMAc&url=http%3A%2F%2Fwww.track.unodc.org%2FAcademia%2FDocuments%2F151110%2520IWRN%2520ebook%25202015.pdf&usq=AFQjCNHrGNjMvxwL5laeVkl-sBml_GuMPw&cad=rja)

<sup>92</sup> Fotaki M., K. Kenny and S. Scriver in Lewis, D. & Vandekerckhove, W. (2015). Developments in whistleblowing research 2015, London: International Whistleblowing Research Network.

<sup>93</sup> Hersh M.A. “Whistleblowers - Heroes or Traitors?: Individual and Collective Responsibility for Ethical Behaviour,” Annual Reviews in Control 26 (2002): 243-262.

<sup>94</sup> De Maria, W. and C. Jan (1996). Crime, Law and Social Change, 24, 151-166.

<sup>95</sup> DeMaria, W. and C. Jan (1997). Eating its own, Australian J. of Social Issues, 32(1), 37-59.

<sup>96</sup> This is not entirely consistent with the survey evidence reported earlier in this section which found that retaliation was experienced by a minority of those making reports.

<sup>97</sup> Lennane K. J. (1993). “Whistleblowing”: a health issue. BMJ (1993) 307:670-3.

consequences as a result of blowing the whistle. In 29 cases victimisation had started immediately after their first, internal, complaint. Only 17 approached the media. Ostracism at the workplace was extensive: dismissal (8), demotion (10), and resignation or early retirement because of ill health related to victimisation (10) took place. Long term relationships broke up in 7 cases, and 60 of the 77 children of the subjects were adversely affected. All subjects reported stress-related symptoms while 15 were prescribed long term treatment with medication which they had never been prescribed before, and in 17 cases there was an attempted suicide. In more than 14 cases there was a reduction in income and a total financial loss for 17 whistleblowers was estimated in hundreds of thousands of Australian dollars. Whistleblowers reported receiving little or no help from statutory authorities and little help from colleagues. In most cases the corruption and malpractice continued unchanged. On that basis, the author of the study concluded that both the whistleblowers themselves and their families suffered severe and long-lasting health, financial, and personal repercussions.

McDonald and Ahern (2002)<sup>98</sup> examined the effects of whistleblowing on nurses in Australia. The survey included 95 nurses out of which 70 were whistleblowers and 25 observed misconduct but did not report. Results indicated that 70% of the whistleblowers experienced stress-induced physical problems against 64% of nurses who observed misconduct but did not report. Physical problems commonly experienced by nurses included restlessness during sleep, insomnia, headaches, fatigues and increased smoking. Stress-related problems were experienced by 94% of whistleblowers and 92% of those who did not report. The most frequent stress related problem included anger, anxiety, and disillusionment. Both groups experienced similar physical health problems, with the same incidence among the two groups. Nurses who did not report the wrongdoing were more likely to experience feelings of guilt, shame, and unworthiness. These findings add to the evidence that whistleblowing and experience of wrongdoing are stressful, whether or not the misconduct is reported.

Greaves and McGlone (2012)<sup>99</sup> observed an increase in drinking, smoking, poor nutrition, giving up fitness routing through interviews with whistleblowers, depression and feelings of being treated “like lepers”. All this eventually led to long term sick leave. The report concluded that the long process and the investigations the whistleblowers had to endure meant that their careers and lives were devastated. It was found that the longer the whistleblowing process was, the more detrimental was the effects on people’s lives. Those who managed to cope were whistleblowers with a short process or those who left the organisation early in the process.

Illustrative examples of the different types of retaliation against workers can further be found in the ECtHR case law assessing whether such retaliation constitutes interference with the individuals' right to freedom of expression. For instance, in the case of *B. Heinisch v. Germany*, retaliation took the form of dismissal; in case *D. Otto v. Germany* retaliation was in the form of restriction and refusal of promotion; in

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<sup>98</sup> McDonald S. and K. Ahern. (2002). Physical and Emotional Effects of Whistle blowing. *Journal of Psychosocial Nursing and Mental Health Services*, 2002, 40 (14-27).

<sup>99</sup> Greaves, R., McGlone, J., K. (2012) The health consequences of speaking out, *Social Medicine*, Volume 6, Number 4, May 2012

the cases *T. Lahr v. Germany*, *Vogt v. Germany*, *Fuentes Bobo v. Spain* there was premature termination of employment or non-renewal of contract<sup>100</sup>.

Transparency International (2013) cites both research and national courts' rulings on cases of retaliation against whistleblowers across Europe. Examples include a case of a Deputy Director of Narva's Property and Economy Department in Narva, Estonia, who after reporting irregularities in public procurement procedures and contracts exposing politicians and business people, was dismissed even though she won a court case to keep her job in 2011 and 2012. A 2012 study in France found that many civil servants who reported wrongdoing were forced into retirement, fired or ostracised.

## 2.4 Types and scale of wrongdoing that whistleblowing can help expose and address

### 2.4.1 Workplace wrongdoing takes many forms

Strong action to support whistleblowing should help to deter wrongdoing that affects the public interest. This section illustrates the shape and scale of the problems arising from weak enforcement of the law by reference to cases of corruption; fraud (EU budget fraud, tax fraud and tax evasion); risks to health and safety; risks to public health and to the environment; threats to freedom of expression; negative impacts on accountability and democratic governance and on trust in institutions. The text describes the estimated scale of these problems by reference to recent studies and surveys. It is in the nature of the activities concerned that the actual scale of the problem cannot be determined with full confidence – information about them normally only comes to light if and when the wrongdoing is discovered.

Respondents to the GBES study identified different types of misconduct (Box 2.1). They also reported that many of these forms of wrongdoing were likely to be committed by top managers or to occur for a protracted period of time.

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<sup>100</sup> F. Dorssemont, K. Lorcher, I. Schomann (2013) *The European Convention on Human Rights and the Employment Relation* (2013), Hart Publishing, Oxford; page 240. *Vogt v. Germany* 17851/91, judgment of 26 September 1995; *Fuentes Bobo v. Spain*, 39293/98, judgment of 29 February 2000; *D. Otto v. Germany*, 27547/02, judgment of 24 November 2005; *T. Lahr v. Germany*, 16912/05, judgment of 1<sup>st</sup> July 2008; *Heinisch v. Germany*, 28274/08, judgment of 11 July 2011

## Box 2.1 Type of misconduct observed in organisations

Type of misconduct observed
<ul style="list-style-type: none"> <li>• <b>Abusive or intimidating behaviour towards employees</b></li> <li>• Accepting bribes</li> <li>• <b>Offering bribes</b></li> <li>• Actions made to benefit the employee/family/friends</li> <li>• <b>Anti-competitive behaviour (e.g. price fixing, bid rigging)</b></li> <li>• <b>Hiding violations before on-site inspections</b></li> <li>• Human rights violation</li> <li>• Improper contracting or violating contract terms</li> <li>• <b>Alteration of documents or records</b></li> <li>• <b>Lying to employees/customers/vendors/public</b></li> <li>• <b>Violation of health and/or safety regulations</b></li> <li>• Delivery of goods/services below specifications</li> <li>• Improper access to personal/private information</li> <li>• Retaliation against reporters</li> <li>• Stealing or theft</li> <li>• Violation of environmental regulations</li> </ul>

Source: GBES survey, 2016. Behaviour shown in bold was likely to occur for two years or more

Thirteen (50%) of the 26 public authorities that responded to the targeted consultation conducted for this study had come across whistleblower cases within the last ten years<sup>101</sup>. Collectively they reported 7,059<sup>102</sup> cases from the previous 10 years. Table 2.2 provides an overview of the number of cases reported by each of the 13 public authorities. The wrong-doing related to tax evasion, tax avoidance, fraud, irregularities or any other illegal activities affecting the financial interests of the EU, money laundering, mismanagement of public funds, misuse of personal data, threats to public health and the environment, violations of human rights in general and violation of financial regulations.

Table 2.2 Number of cases reported by the responding public authorities

Organisation	Country	Number of cases
Public Prosecutor's office for combatting economic crimes and corruption	Austria	5,193
Office of the Commissioner for Fundamental Rights	Hungary	1,121
Ministry of regional development and public works	Bulgaria	574
Center for Prevention and Countering Corruption and Organized	Bulgaria	78

<sup>101</sup> Q: How many whistleblower cases has your organisation come across within the last 10 years?

<sup>102</sup> Q: How many of such whistleblower cases have you come across within the last 10 years?

Organisation	Country	Number of cases
Crime		
Commission for the Prevention of Corruption	Slovenia	53
Ministry of Justice	Croatia	20
Danish Transport-, Building- and Construction Agency - Aviation	Denmark	3
Danish Business Authority	Denmark	2
Bundesministerium fuer Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (BMLFUW)	Austria	1
Government Office of the Slovak Republic	Slovakia	1
Undisclosed	Undisclosed	13
Total		7,059

Source: ICF review of targeted consultation data.

## 2.4.2 Corruption

Undisclosed corruption has a variety of effects on economic performance. It can negatively affect public services by reducing the effectiveness of public institutions and leading to inefficient provision of public services. It can also distort public investments<sup>103</sup>. Corruption can reduce economic performance by increasing the costs of transactions, introducing uncertainty, and by leading to inefficient investments and misallocation of production factors. Additionally, perceived corruption undermines trust in public institutions and can have a negative impact on the investment climate.

Although it is difficult to specify the relationship between corruption and GDP growth, the negative impact of corruption on other aspects and indicators of economic development has been demonstrated extensively. These include investments, entrepreneurship and government efficiency (including expenditures and revenues), indicators such as equity (income distribution), social capital, quality of environment, health and safety; this in turn impacts on the potential development of countries<sup>104</sup>.

The World Bank defines a corrupt practice as “the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party”<sup>105</sup>. In the EY (2016)<sup>106</sup> 14th Global Fraud Survey on corporate misconduct, 39% of all respondents and **21% of respondents in developed markets (such as the EU) believed that bribery and corruption were still**

<sup>103</sup> <https://www.weforum.org/agenda/2015/05/how-does-corruption-affect-economic-growth/>

<sup>104</sup> <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>

<sup>105</sup> <http://www.worldbank.org/en/about/unit/integrity-vice-presidency/what-is-fraud-and-corruption>

<sup>106</sup> EY (2016) Corporate misconduct – individual consequences Global enforcement focuses the spotlight on executive integrity - 14th Global Fraud Survey [http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/\\$FILE/EY-corporate-misconduct-individual-consequences.pdf](http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/$FILE/EY-corporate-misconduct-individual-consequences.pdf)

**perceived to occur widely in their country**, with the situation appearing to have deteriorated in developed markets (17% in the last global survey 2014). As stated in the report *“the worsening view in developed markets may reflect an increased awareness of bribery and corruption in those markets. This may be a result of numerous high-profile corruption cases affecting major U.S. and European corporations”*. Almost one third of respondents (32%) reported that they had personal concerns when asked about bribery and corruption in their workplace. The survey indicates that *“a persistent minority of executives continues to justify certain behaviours, including making corrupt payments, when facing an economic downturn or in an effort to improve the perceived financial performance of their company”*. The study reported that 48% of respondents in Slovakia would make cash payments to retain or win business and 46% of respondents in Hungary had concerns about ethical conduct at work. Overall, 39% of respondents agreed that bribery/corruption happen widely in business in their country. A ranking of countries to this question positioned some European countries within the first 30 top ranking countries: Slovakia (11), Hungary (13), Greece (15), Croatia (16), Italy (18), Check Republic (20), Portugal (21), Spain (22), Slovenia (26), Romania (27) and Poland (30). The study recognises that whistleblowing often exposes wrongdoing such as fraud, bribery and corruption.

The 2014 EU Anticorruption Report (EU ACR, 2014)<sup>107</sup> defines corruption in a broad sense as *“any abuse of power for private gain”* and recognises that corruption is a complex phenomenon affected by political and cultural dimensions, as well as social and economic factors. Using this definition, RAND (2016)<sup>108</sup> estimated that **corruption costs the EU between €179bn and €990bn in GDP terms on an annual basis**<sup>109</sup>. These estimates take into account a broad range of effects of corruption and different assumptions for three scenarios which model the feasibility of Member States reducing corruption in the short, medium and long term. This methodological approach led to higher estimates than the €120bn provided in the

<sup>107</sup> EU ACR (2014), Report from the Commission to the Council and European Parliament, EU Anticorruption report [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf)

<sup>108</sup> RAND (2016) The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II – Corruption [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS\\_STU%282016%29579319\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU%282016%29579319_EN.pdf)

<sup>109</sup> The study assessed the economic, social and political costs of corruption at EU and Member State level (the figures reported include direct and indirect costs of corruption). A combination of different data sources were used, including the Quality of Government (QoG) dataset a comprehensive dataset collecting measures and indicators on quality of government, public economy, private economy, personal economy, education, health, welfare, judicial, political system, conflict, civil society and media; Eurobarometer; ICRG corruption indicator; measures of organised crime from the World Economic Forum; World Bank Development Indicators (WDI). The authors applied an econometric model which included a set of outcome variables representing the level of corruption in any given Member State at a given time. Outcome variables used to estimate the economic costs of corruption included: log GDP per capita (PPP, constant 2005) and growth genuine investment (genuine wealth per capita). Variable used in estimating the social costs of corruption include: inequality (Gini-index; income share 20% highest) Rule of law or organised crime. Variables used to estimate the political costs of corruption include: voter turnout (parliamentary and EU parliament elections), trust in political institutions (EU commission, EU parliament, EU national government). Control variables used in the model included: secondary school enrolment rate; life expectancy at birth; initial log GDP (1985); government expenditure (% GDP); added value manufacturing (% GDP); added value services (% GDP); income share 205 highest; gross capital formation (% GDP); level of democracy; freedom of press score (freedom house); personalism (Johnson & Wallack measurement of electoral rules promoting personal vote seeking as to more party-centred vote seeking); proportion women lower house; presidentialism.

2014 EU ACR. The **costs of corruption risk in EU public procurement** across all sectors **was estimated at €5bn per year**<sup>110</sup>.

For the EU as a whole, the potential benefits of effective whistleblower protection are in the range of EUR 5.8 to 9.6 billion each year in the area of public procurement<sup>111</sup>. This was an estimate of the amount of misused public funds that could be potentially recovered.

Three different scenarios were used by RAND to estimate the costs of corruption in the EU. The first scenario benchmarked to the average level of corruption of the seven best performing countries. In the first scenario the overall costs of corruption in terms of lost GDP to the EU economy were estimated at €817bn - €990bn, corresponding to approximately 4.9% - 6.3% of EU 28 GDP. In the second scenario, which models the convergence of all countries with above the EU-28 average level of corruption converge to the average level of EU corruption, the cost of above-average corruption is estimated at 199bn (€179bn) – \$284bn (€256bn) in lost GDP for the EU-28 (1% - 1.5%).

High levels of corruption are associated with higher level of lost economic output. Bulgaria, Croatia, Romania and Latvia were estimated to lose almost 15% of their annual GDP to corruption. RAND indicated that costs of corruption were likely to be underestimated.

RAND (2016) using three corruption indexes from the World Bank dataset analysed the levels of corruption across

A 28 Member States from 1995 to 2014. The study found a similar pattern over the years with the same countries showing above average levels of corruption (Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia).

The scale of corruption in Europe was investigated in 2014 in the Special Eurobarometer 397. Corruption was defined in a broad sense as the “*offering, giving, requesting and accepting bribes or kickbacks, valuable gifts and important favours, as well as any abuse of power for private gain*”. It explored both perceptions of the prevalence of corruption and actual experience of corruption. It found that **76% of Europeans believe that corruption is a widespread phenomenon in**

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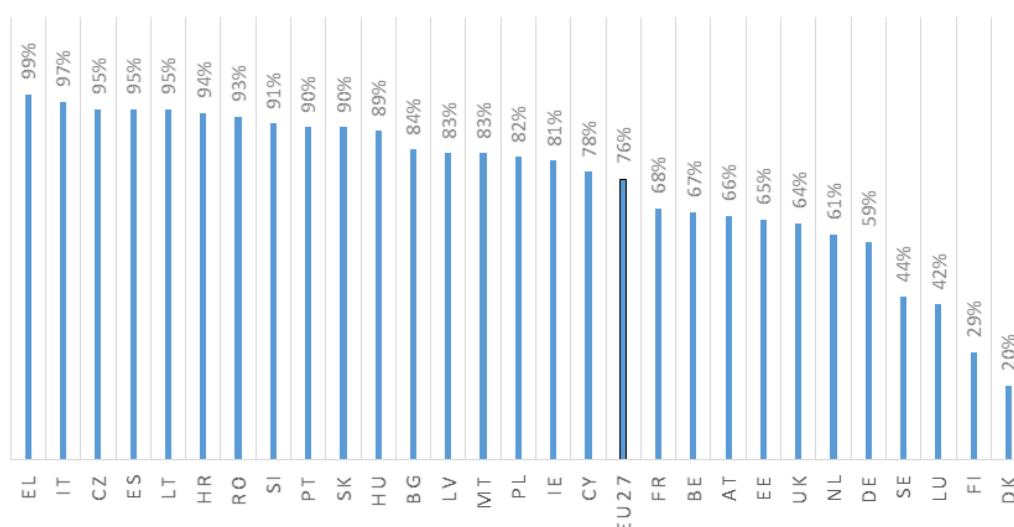
<sup>110</sup> Data used by the authors to measure the cost of corruption in public procurement included a public procurement database (PP database) derived by public procurement announcements between 2009 and 2014 in the EU and Norway. The PP database also includes an indicator on whether EU funds have been used in public procurements. The PP database include a new measure of corruption risk in public procurement, the corruption risk index (CRI) which measures corruption risk the basis of so called ‘red flags’ (i.e. no call for tender publish in official journal, non-open procedures type, length of advertisement period, weight of non-price evaluation criteria, length of decision period. The CRI measures corruption risk and not corruptive practices adopted in the procurement process).

The authors estimated the costs of corruption risk in the EU public procurement through a regression model on the outcome variable relative price (i.e. the ration of actual contract value divided by originally estimated contract value) of contracts in sub-sectors with high levels of corruption risk (i.e. collected and purified water; recreational, cultural and sporting services; public utilities; administration, defence and social security services; education and training services; agricultural and forestry; services related to the oil and gas industry; postal and telecom services ; supporting transport services). The analysis found that one-unit increase of CRI index raises prices on average by about 15%.

<sup>111</sup> Milieu, 2017. Estimating the Economic Benefits of Whistleblower Protection in Public Procurement: Final Report. to DG GROW of the European Commission.

**their country**<sup>112</sup>. Respondents in the twelve new Member States were more likely than those in EU15 to believe that corruption is widespread in their country (87% vs. 73%). There were ten Member States in which 90% or more of respondents believed that corruption was widespread in their country. The lowest perceived levels of corruption were reported by respondents from Denmark, Finland, Luxembourg and Sweden (Figure 2.27).

Figure 2.27 Percentages of individuals who believe that corruption is very or fairly widespread in their country



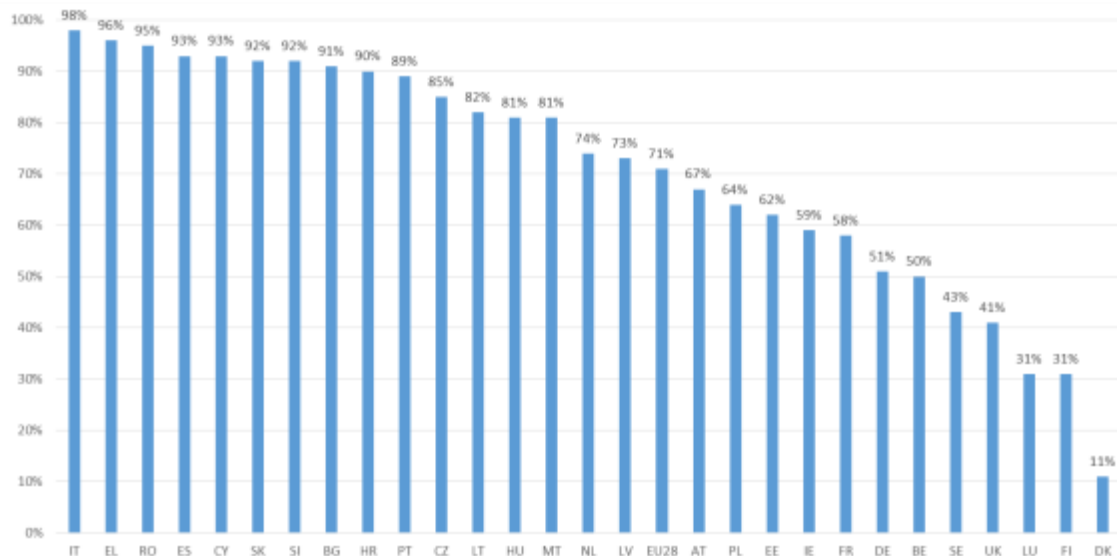
Source: Special Eurobarometer 397

The same pattern on perception of corruption was found among businesses in 2015 by the Flash Eurobarometer 428<sup>113</sup> which investigated business attitudes towards corruption. This found that **71% of respondents believed that corruption was widespread in their country**. In ten Member States more than 90% of businesses believed that corruption was widespread (Italy, Greece, Romania, Spain, Cyprus, Slovakia, Slovenia, Bulgaria, Croatia). Countries with the lowest levels of perceived corruption across Member States include Luxembourg, Finland and Denmark (Figure 2.28).

<sup>112</sup> 41% of EU citizens believed that corruption in their country was fairly widespread and 35% believed it was very widespread.

<sup>113</sup> Flash Eurobarometer 428, Business attitudes towards corruption in the EU

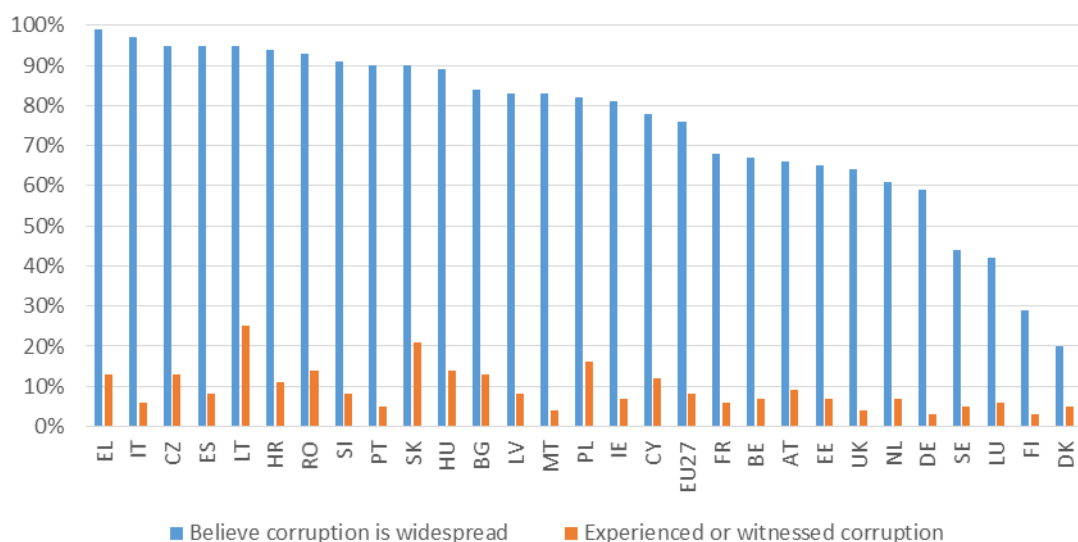
Figure 2.28 Percentage of companies who believe that corruption is very or fairly widespread



Source: Flash Eurobarometer 428 [Q6 How widespread do you think the problem of corruption is in your country?]

Corruption is a complex phenomenon, the perception of which is influenced by social, political and cultural factors. In all countries Special Eurobarometer 397 found that the perception of corruption among the population was much higher than the actual experience of it (Figure 2.29). The research found that **8% of respondents had experienced or witnessed a case of corruption** in the previous year.

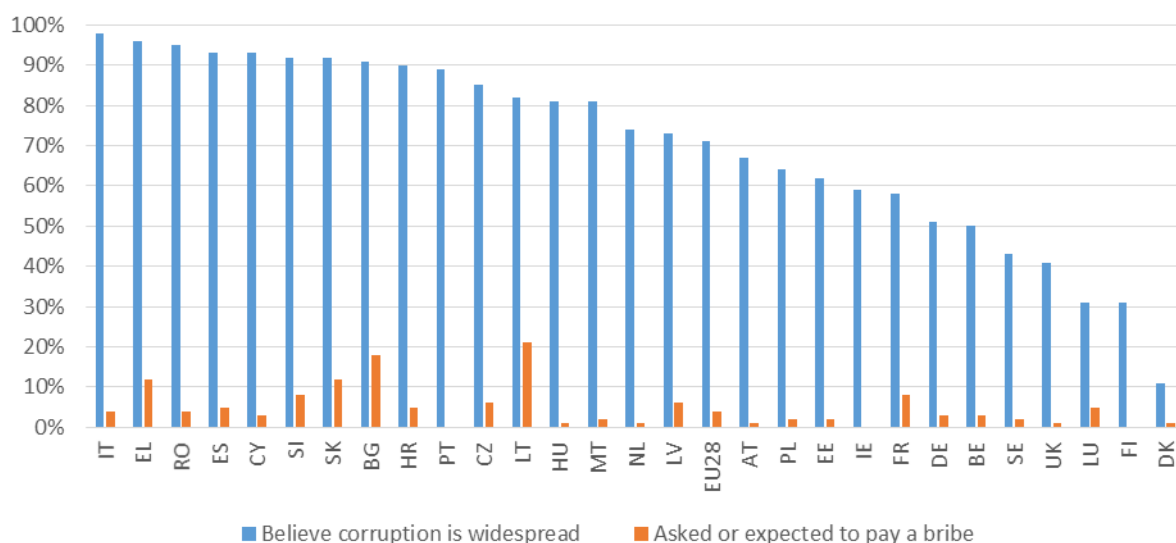
Figure 2.29 Special Eurobarometer 397 found that in all but four Member States a majority of respondents thought that corruption was very or fairly widespread in their country and that 5%-20% had experienced or witnessed corruption



Source: *Special Eurobarometer 397* [QB5 How widespread do you think the problem of corruption is in your country?; QB12 In the last 12 months, have you experienced or witnessed any case of corruption?]

The same patterns of perception of corruption and actual experience were found among businesses by the Flash Eurobarometer 428. The proportion of businesses believing that corruption is widespread in their country was higher than the actual experience. **The research found that 4% of businesses in Europe were asked or expected to pay a bribe** (Figure 2.30).

Figure 2.30 Percentages of respondents (businesses) who believe that corruption is very or fairly widespread in their country and percentages of businesses asked/expected to pay a bribe



Source: *Flash Eurobarometer 428* [Q6 How widespread do you think the problem of corruption is in your country? Q10 And has anyone in your country asked or expected someone from your company to pay a bribe for any of the following permits or services? Percentages refer to those who selected 'at least one']

The Country Specific Recommendations (CSRs) for the European Semester 2017 identify areas where some Member States should take action to reduce corruption. Examples of the commentary provided in the Recommendations are provided below<sup>114</sup>:

- Bulgaria has adopted new measures to improve its public procurement system but there is a need for a more appropriate and efficient implementation of the new-risk based ex-ante control;
- In Croatia the business climate is affected by weak public administrations and slow implementation of anti-corruption strategy;
- In Cyprus the effectiveness of new anti-corruption reforms is hindered by insufficient resourcing of the Coordinating Body against Corruption;

<sup>114</sup>[https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations\\_en](https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en); [https://ec.europa.eu/info/publications/2017-european-semester-country-reports\\_en](https://ec.europa.eu/info/publications/2017-european-semester-country-reports_en)

- In Czech-Republic corruption is not prosecuted systematically;
- In Hungary the economic growth is hampered by high risk of corruption and gaps in the recent measures taken to address the issue;
- In Italy corruption is still a major problem, despite the many reforms adopted;
- In Latvia the rigid system for preventing conflict of interest negatively impacts on business environment;
- In Lithuania provisions against corruption are not always applied in sectors such as healthcare and public procurement. Weak whistleblower arrangements discourage potential reporting on irregularities;
- In Portugal new corruption prevention plans are not complemented by adequate monitoring;
- In Romania the health sector is severely affected by corruption and bribery, progress in the public administration reforms is limited, measures to modernise the public procurement system are still pending, and high levels of corruption affect the economic development;
- In Slovakia public procurement practices still fall short of best practices in many areas, namely conflicts of interest, tailor-made tender specifications and excessive use of the lowest price award criteria remain a concern and result in limited quality-based competition. Anti-corruption policies, including measures on whistleblowing arrangements, are judged to be inadequate;
- In Slovenia perception of corruption is still negative and affect business development;
- In Spain there is still a lack of public procurement policy framework. The lack of specific legislation on protection of whistleblowers, the lack of independence of the Office of Conflicts of Interest and the lack of regulation of lobbying have not been addressed.

### 2.4.3 Fraud

The World Bank defines a fraudulent practice as “*any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation*”<sup>115</sup>.

A 2017 report<sup>116</sup> reviewed 558 loss measurement exercises undertaken during the last 19 years to measure the financial costs resulting from fraud and error, looking across 40 types of expenditure, in 48 organisations from 10 countries (Australia, Belgium, Canada, France, the Netherlands, New Zealand, Ireland, UK, US, Zambia) and considering losses in expenditure with a total value of £13.27 trillion. The losses refer to percentage losses of expenditure<sup>117</sup>. These exercises found **an**

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<sup>115</sup> <http://www.worldbank.org/en/about/unit/integrity-vice-presidency/what-is-fraud-and-corruption>

<sup>116</sup> Crowe Clark Whitehill (2017), The Financial Cost of Fraud, The latest data from around the world <https://www.croweclarkwhitehill.co.uk/wp-content/uploads/sites/2/2017/02/crowe-the-financial-cost-of-fraud-2017.pdf>

<sup>117</sup> The following standards were applied to select different studies: those that have considered a statistically valid sample of income or expenditure, have sought and examined information indicating the presence of fraud, error

**average loss of 5.85% due to fraud and error between 1997 and 2016.** These figures refer to Percentage Loss Rate (PLR) the percentage of expenditure lost to fraud and error. Caveats apply in relation to what has been measures and how in different exercises. In some cases the fraud frequency rates were estimated while in others the percentage of expenditure lost to fraud; in some cases fraud and error were identified separately in other together. The report estimated the average loss of 5.58%, as a proportion of the global Gross Domestic Product (GDP) in 2016 (£60.76 trillion), equates to a total of £3.55 trillion (€4.06 trillion)<sup>118</sup>.

#### 2.4.3.1 EU budget fraud

Fraud targeted at components of the EU budget is an ongoing problem. As the European Anti-Fraud Office (OLAF) notes, *“The European Union budget finances a wide range of programmes and projects which improve the lives of citizens across the EU and beyond. The improper use of funds provided by the EU budget or the evasion of the taxes, duties and levies, which fund the EU budget directly harms European citizens and prejudices the entire European project”*<sup>119</sup>. In its 2016 report<sup>120</sup>, OLAF reported opening 219 investigations in 2016 and the conclusion of 272 investigations that resulted in 346 recommendations. In 2016 it recommended the recovery of €631.1 million.

The level of recovery recommended by OLAF depends on the scope and scale of the investigations concluded in a given year and is not a direct indication of the overall level of fraud in EU spending. Table 2.3 shows the amount recommended for financial recovery has increased from €284 million in 2012 to €631 million in 2016.

**Table 2.3 Amount recommended by OLAF for financial recovery in 2016**

Year	Amount in € million
2012	284.0
2013	402.8
2014	901.0
2015	888.1
2016	631.1

Source: OLAF Report 2016

As shown in Table 2.4, the number of reports about suspicions of fraud and irregularities which have been sent to OLAF in the last eight years is generally increasing, as is the number of investigations.

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correctness in each case within the sample, have been completed and reported, have been externally validated, have a measurable level of statistical confidence, have a measurable level of accuracy

<sup>118</sup> Converted at £1 = €1.142 , 19 June 2017.

<sup>119</sup> [https://ec.europa.eu/anti-fraud/about-us/mission\\_en](https://ec.europa.eu/anti-fraud/about-us/mission_en)

<sup>120</sup> OLAF Report 2016 [https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf\\_report\\_2016\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2016_en.pdf)

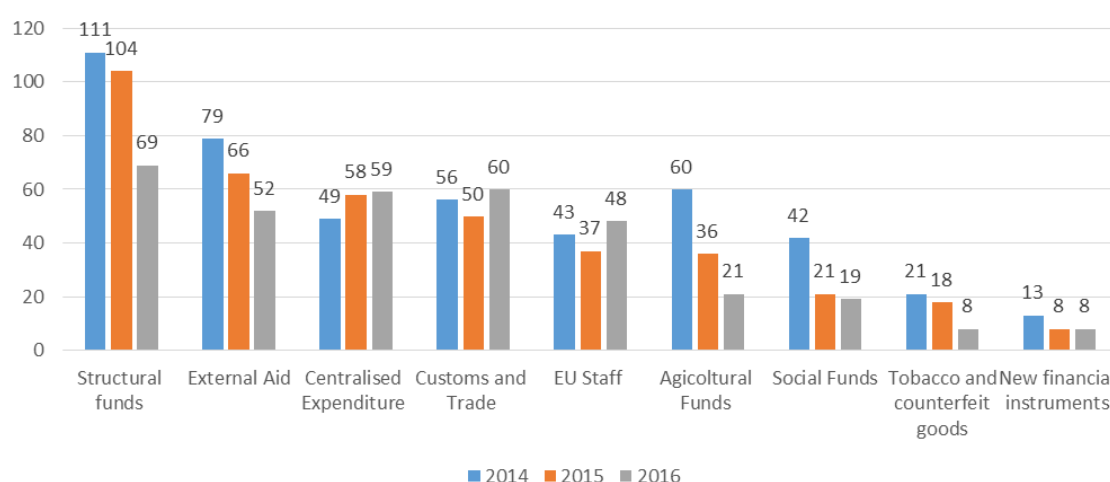
Table 2.4 OLAF's investigative performance

	2009	2010	2011	2012	2013	2014	2015	2016
Incoming information	959	975	1041	1264	1294	1417	1372	1136
Investigations opened	160	152	146	421	253	234	219	219
Investigations concluded	140	136	154	266	293	250	304	272
Recommendations issued	194	172	195	199	353	397	364	346

Source: OLAF Report 2016

A large share of OLAF's investigations relate to fraud in public procurement, mainly in relation to structural funds and external aid (Figure 2.31).

Figure 2.31 Ongoing investigations at the end of 2016, by sectors



Source: OLAF Report 2016

### 2.4.3.2 Tax fraud and evasion

As the European Commission has noted, “*tax fraud and evasion ... illegally deprive public budgets of money. Tax havens which facilitate tax evaders and avoiders by storing money offshore, often unreported and untaxed. Aggressive tax planning by big businesses or individuals, which exploits the limits of the law with the aim of minimising taxes paid*”<sup>121</sup>.

Allain et al. (2016)<sup>122</sup> put tax fraud in its context. There is a need to distinguish between tax avoidance, tax fraud and tax planning. Tax planning is legal and refers to practices applied to reduce the tax liability through planning of allowances, deductions or exemptions. Tax avoidance refers to legal practices implemented to avoid paying taxes such as moving properties across countries. When individual or businesses intentionally falsify information to reduce their tax liability, it is tax fraud.

<sup>121</sup> [http://ec.europa.eu/taxation\\_customs/fight-against-tax-fraud-tax-evasion/a-huge-problem\\_en](http://ec.europa.eu/taxation_customs/fight-against-tax-fraud-tax-evasion/a-huge-problem_en)

<sup>122</sup> Allain, C., Fraudeau J., Martin A-G. (2016) Facing tax fraud in the European Union – Challenges and perspectives [http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/France2\\_TH\\_2016\\_01.pdf](http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/France2_TH_2016_01.pdf)

While tax avoidance is legal it is often difficult to draw a line between tax avoidance and tax fraud. Tax avoidance may be determined to be harmful to the public interest. Various definitions of tax fraud exist across Member States. Tax fraud can be perpetrated by individuals or business entities; the latter is often more difficult to understand and measure due to the complexity of schemes and strategies adopted.

OECD (2013) found **that multinationals pay as little as 5% in corporate taxes thanks to aggressive strategies to reduce tax liability, whilst smaller businesses pay up to 30%**<sup>123</sup>.

A study by the European Parliament estimated the financial and economic impact of tax havens and offshore financial centres on the European Union, focusing on schemes revealed by the leak of the 'Panama Papers'<sup>124</sup>. The study identified three types of negative impact:

- **budgetary impact** – the reduction of tax revenue and public spending;
- **economic impact** – the wider consequence of budgetary impacts resulting from the reduction of funds available to national authorities leading to cuts in budgets for education, health, job creation and other purposes; and
- **financial system impact** - the negative effect on financial markets and stability as a consequence of reputational damage due to money laundering and other illegal activities.

The authors estimated that schemes referenced in the Panama Papers that are used by individuals had a budgetary impact (revenue loss) of approximately €19 billion<sup>125</sup> across eight Member States. The revenue loss for the entire EU28 was estimated at €109-237 billion, with a mid-point of €173 billion<sup>126</sup>. It estimated the volume of **tax base shifted by companies in the eight Member States in 2015 at € 88 billion**. However, these estimates were based on a database which contained only one tenth of the number of individuals<sup>127</sup> identified in the Panama Papers, therefore the amount of money involved is likely to be much higher. The study estimated the corporate tax base erosion of companies<sup>128</sup> which used tax havens to evade taxes and found that shifting of profit occurs in all Member States included in the sample.

The cascade effects of tax losses for Member States include less public money being available to invest in support for economic growth, job creation and public

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<sup>123</sup> OECD (2013) OECD urges stronger international co-operation on corporate tax <http://www.oecd.org/tax/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm>

<sup>124</sup> European Parliament (2017) The impact of schemes revealed by the Panama Papers on the economy and finances of a sample of Member States [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/572717/IPOL\\_STU%282017%29572717\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/572717/IPOL_STU%282017%29572717_EN.pdf)

<sup>125</sup> The report does not specify whether the revenue loss is per year

<sup>126</sup> The study focused on a sample of eight Member States: Cyprus, Czech Republic, Denmark, France, Germany, Poland, Spain and United Kingdom. The study methodology was based on desk research, stakeholder interviews in Member States and microeconomic simulations using the OECD Orbis dataset which contains financial data for over 44 million globally. The study does not estimate the tax revenue impact of the schemes revealed in the Panama Papers but makes estimates on similar schemes.

<sup>127</sup> The schemes analysed in the Panama Papers refer to wealthy individuals who set up shell companies, therefore estimates are provided for companies

<sup>128</sup> with individuals as ultimate owners

services. The European Parliament (2017) report highlighted the complexity of measuring the economic impact but provided a **'conservative' estimate that 1.5 million jobs could have been created with the budget lost by national authorities**<sup>129</sup>. Additional economic impacts identified include losses to the public and private sectors of all Member States arising from the schemes removing money from national economies without any return. Stakeholders consulted for the study argued that effects include distortion of information available in the financial markets and unfair competition. Companies using tax havens are able to retain higher levels of profit than those companies which do not use these type of schemes.

There is also evidence linking use of offshore schemes to criminality. In a public hearing of the European Parliament in 2016, Europol disclosed that it had found 3,469 probable matches to organised crime and other criminal activities in the Panama Papers database. It also found 516 names linked to organised criminal gangs, 388 names connected to VAT fraud operations and 116 names linked to suspicion of terrorist activities in Europe<sup>130</sup>. Many of these schemes are used for money laundering, with a negative impact on the European economy.

At European level the VAT fraud is one of the most widespread types of fraud. It is commonly measured by reference to the 'VAT Gap' - the difference between a government's expected VAT revenues and the VAT actually collected. The VAT Gap is an approximation of the government revenue lost to tax fraud, tax evasion and tax avoidance (but also includes bankruptcies, financial insolvencies and miscalculations)<sup>131</sup>.

The VAT Gap is increased by activities that include fraud and tax evasion, corporate insolvency, corporate bankruptcy, maladministration and legal tax optimisation<sup>132</sup>. **The VAT Gap for the EU in 2014 has been estimated at €159.5 billion, suggesting a total revenue loss of 14% of the total expected VAT revenue, across Europe.** Member States with the largest VAT Gap in 2014 were Romania (37.89%), Lithuania (35.94%) and Malta (35.32%). The countries with the smallest VAT Gap were Sweden (1.24%), Luxembourg (3.80%) and Finland (6.92%).

A high profile case illustrating the need for protection of whistleblowers in cases where the reported information concerns organised crime and corruption is mentioned in UNODC (2015)<sup>133</sup>. Michael Woodford, former Chief Executive Officer (CEO) of Olympus, a Japanese manufacturer, was dismissed and ordered to leave Japan shortly after taking up the CEO post when he questioned a number of very large, irregular payments for acquisitions that were later found to have been used to

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<sup>129</sup> Starting from the average revenue loss of € 173 billion, assuming an average of € 50,000 cost per job and 1:1 basis into government expenditure to create jobs (i.e. all the money would have been spent in job creation) an additional 3.5 million jobs could have been created with the lost revenue .

<sup>130</sup> <https://www.publicintegrity.org/2016/12/01/20500/panama-papers-have-had-historic-global-effects-and-impacts-keep-coming>; <https://www.theguardian.com/news/2016/dec/01/panama-papers-europol-links-3500-names-to-suspected-criminals>; <http://www.europarl.europa.eu/cmsdata/111503/Riondet%20Europol%20QA%20edited.pdf>

<sup>131</sup> [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/vat-gap\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/vat-gap_en)

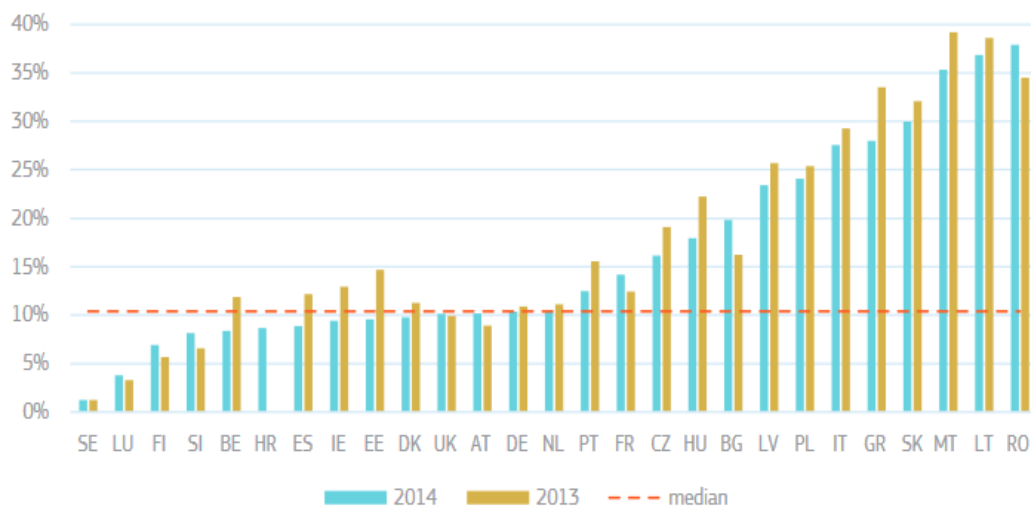
<sup>132</sup> European Commission (2016), VAT Gap Report [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2016\\_vat\\_gap\\_factsheet.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2016_vat_gap_factsheet.pdf)

<sup>133</sup> UNODC (2015) Resource Guide on Good Practices in the Protection of Reporting Persons [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

cover up previous losses by the firm. Potential links between the payments and organised crime groups led Mr Woodford to fear for his safety.

Figure 2.32 There is huge variation in Member States' estimated VAT Gap, from 1% to almost 38%

Estimated VAT Gap by Member State, %



VAT GAP IN 2014 (EUR MILLION)					
Austria	2882	Germany	23489	Netherlands	4956
Belgium	2519	Greece	4926	Poland	9301
Bulgaria	940	Hungary	2134	Portugal	2093
Croatia	510	Ireland	1195	Romania	7107
Czech Republic	2233	Italy	36855	Slovakia	2148
Denmark	2709	Latvia	547	Slovenia	280
Estonia	181	Lithuania	1612	Spain	6214
Finland	1409	Luxembourg	147	Sweden	489
France	24477	Malta	351	United Kingdom	17756
EU-27		159 460			

Source: VAT Gap Report (European Commission, 2016)

## 2.4.4 Risks to public health and to the environment

Public health and environmental quality are put at risk by intentional failure to comply with prescribed standards and through persistent negligence.

An example is VW vehicles sold in the US that were fitted with devices that enabled them to 'cheat' official emissions tests. Under normal driving conditions vehicles emitted higher levels of **air pollution** than were allowed under US law<sup>134</sup>.

**Illegal trafficking and dumping of waste** still occurs despite the tightening of EU and national legislation over recent years. In some parts of Italy, for example, it has

<sup>134</sup> <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement>

become a serious issue and been linked to organised crime and to corruption<sup>135</sup>. Illegal waste dumps damage the environment and pose risks to human health. The 'Land of Fires' in Campania, a Southern Italian region could be mentioned as an example for the illegal dumping of toxic waste perpetrated in 1980s and in 1990s by organised crime. Although it has been demonstrated that several businessmen and firms are also responsible, corruption in the allocation of licences and authorisations is a widespread problem in the waste management market<sup>136</sup>. There is no official consensus on the health effects of the toxic waste but the World Health Organisation (WHO) has demonstrated that cancer rates in the area increased significantly between 1996 and 2002<sup>137</sup>. Violation of waste management legislation account for 20% of EU environmental infringement cases<sup>138</sup>.

There are also examples of intentional failure to comply with legislation on **industrial pollution**. One such case study refers to the ILVA steel plant in the South of Italy, which is one of the largest steel plants in Europe. The plant has not always been fully compliant with health and safety and environmental regulations, leading to action by Italian authorities and the European Commission. The release of pollutants from the plant (dust, nitrogen dioxide, sulphur dioxide, benzene, etc.) has negative environmental impacts on the air, soil and water as well as on the health of workers and people living in the area. Some of the substances released in the environment are carcinogenic and the area has a higher mortality rate related to cancer and respiratory diseases. Additionally, the authorities have often ordered the slaughter of animals where high levels of toxic substances had been found<sup>139</sup>.

Another risk to the public health comes from **food fraud**. Operation OPSON is a joint Europol-INTERPOL operation with the objective of fighting food fraud. Operation OPSON VI seized 9,800 tonnes, 26.4 million litres and 13 million units/items of potentially harmful food and beverage<sup>140</sup>. In operation OPSON IV (2015) the first category of infringements related to food safety (38%), followed by fiscal infringement (27%) and intellectual property rights (16%)<sup>141</sup>.

The EU has battled to tackle illegal wildlife trade, which has been estimated to be worth billions of euros a year on a global basis<sup>142</sup>. Europol has described **the EU**

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<sup>135</sup> [http://efface.eu/sites/default/files/publications/EFFACE\\_synthesis-report\\_final\\_online.pdf](http://efface.eu/sites/default/files/publications/EFFACE_synthesis-report_final_online.pdf)

<sup>136</sup> D'Alisa, G., P.M. Falcone, A.R. Germani, C. Imbriani, P. Morone, F. Reganati (2015). Victims in the "Land of Fires": A case study on the consequences of buried and burnt waste in Campania Italy. A study compiled as part of the EFFACE research project, University of Rome "La Sapienza"

<sup>137</sup> World Health Organisation, Istituto Superiore della Sanita', Consiglio Nazionale delle Ricerche della Regione Campania (Assessorato alla sanita'), 2005, Trattamento dei rifiuti in Campania: impatto sulla salute umana. Studio pilota,

<sup>138</sup> EFFACE (2015) Illegal trafficking of waste: insights from the land of fires, Campania (Italy) Policy Brief <http://efface.eu/sites/default/files/publications/PB%203%20Case%20Study%20Policy%20Brief%20-%20Waste%20-%20UniRoma.pdf>

<sup>139</sup> Lucifora, A., Bianco, F., Vagliasindi, G.M., (2015) Environmental and corporate miscompliance: A case study on the ILVA steel plant in Italy. Study in the framework of EFFACE research project, Catania : University of Catania

<sup>140</sup> <https://www.europol.europa.eu/newsroom/news/eur-230-million-worth-of-fake-food-and-beverages-seized-in-global-opson-operation-targeting-food-fraud>

<sup>141</sup> Interpol (2015) Report Operation OPSON IV

<sup>142</sup> [http://ec.europa.eu/environment/cites/index\\_en.htm](http://ec.europa.eu/environment/cites/index_en.htm). Accessed 6 July 2017.

as, “one of the most important markets for the trafficking in endangered species”<sup>143</sup>.

## 2.4.5 Health and safety risks

Non-compliance with health and safety regulations and/or failure to correctly assess relevant risks in organisations has consequences for workers, organisations and society as whole. According to Eurostat, in 2014 there were approximately 3.2 million non-fatal accidents<sup>144</sup> in Europe. These resulted in at least four days of work absence and 3,739 fatal accidents. Between 2013 and 2014 in EU-28 there was a slight increase in non-fatal accidents and fatal accidents<sup>145</sup>.

The effect of non-compliance with health and safety regulations has been examined in more detail in the field of occupational safety.

The European Agency for Health and Safety at Work (EU OSHA, 2014)<sup>146</sup> identifies five categories of costs associated with breach of health and safety rules:

- productivity costs which relate to decrease in output or production;
- health care costs which related to medical costs (direct and indirect such as caregiver time);
- quality of life losses which relate to the monetary evaluation of decrease in quality of life (physical pain and suffering);
- administration costs (e.g. social security payments); and
- insurance costs (e.g. compensation and insurance premiums).

Estimating the costs of lack of compliance with occupational safety and health legislation is not straightforward. EU OSHA (2014) reports data on costs from calculations made by the UK's Health and Safety Executive (HSE). According to HSE<sup>147</sup> **between 2013/14 and 2015/16 an average of UK 622,000 workers suffered injuries in workplace accidents and 528,000 were reported as new cases of illnesses caused or made worst by work. The estimated economic costs of these cases equalled to £14.1 billion.** This level of costs has been broadly steady since 2009/10 (Figure 2.33). The HSE report states that the majority of costs fall on individuals (£8.0 billion), followed by the Government (£3.3 billion) and employers (£2.8 billion).

<sup>143</sup> [http://ec.europa.eu/environment/cites/traf\\_steps\\_en.htm](http://ec.europa.eu/environment/cites/traf_steps_en.htm) . Accessed 6 July 2017.

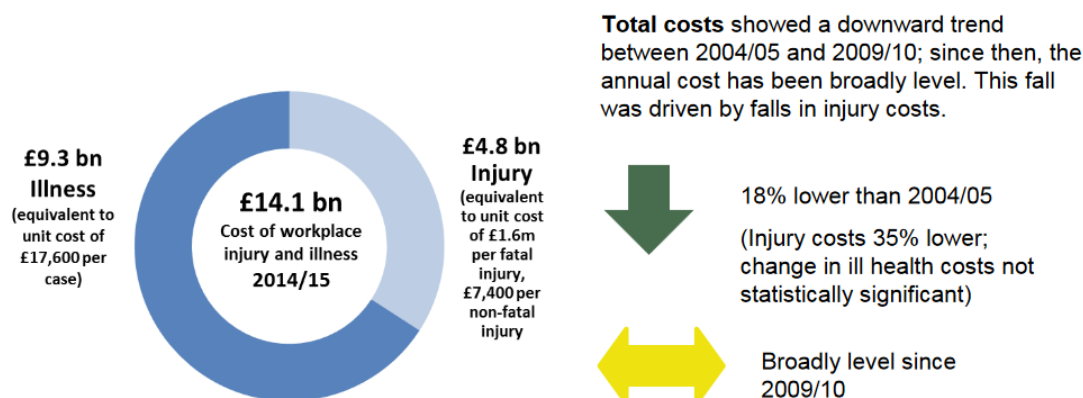
<sup>144</sup> An accident that may result in one or more days of absence from work [http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Non-fatal\\_accident\\_at\\_work](http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Non-fatal_accident_at_work)

<sup>145</sup> Eurostat Accident at work statistics, based on data extracted in November 2016 [http://ec.europa.eu/eurostat/statistics-explained/index.php/Accidents\\_at\\_work\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Accidents_at_work_statistics)

<sup>146</sup> EU OSHA (2014) Estimating the cost of accidents and ill-health at work: a review of methodologies <https://osha.europa.eu/en/tools-and-publications/publications/reports/estimating-the-costs-of-accidents-and-ill-health-at-work>

<sup>147</sup> HSE (2016) Costs to Britain of workplace fatalities and self-reported injuries and ill health, 2014/15 <http://www.hse.gov.uk/statistics/pdf/cost-to-britain.pdf>

Figure 2.33 Estimated economic costs of work-related illnesses and accidents at work in UK between 2013/14 and 2015/14



Source: HSE Costs to Britain Model in HSE (2016) Costs to Britain of workplace fatalities and self-reported injuries and ill health, 2014/15

## 2.4.6 Threats to freedom of expression, accountability and democratic governance

Retaliation against whistleblowers can discourage potential whistleblowers from reporting threats or harm to the public interest (an issue covered in depth in section 2). Inadequate protection of whistleblowers can thus negatively affect freedom of expression and the right to access information, a fundamental right enshrined in Article 11 of the Charter and Article 10 of the ECHR.

In the position papers submitted to the OPC, several stakeholders saw whistleblowers helping the media to perform its public watchdog functions as the media often does not have direct access to the information reported by whistleblowers. One NGO maintained that the protection of whistleblowers is a key facet of media freedom. It argued that without such sources, the media's ability to perform its watchdog function is constrained. Two media organisations noted that whistleblowers and informants often share their information only if their anonymity can be guaranteed. In that context, the media must be able to preserve the anonymity of their sources.

The ECtHR has held that "Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can apply to relations governed by private law [...]" and that "member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals"<sup>148</sup>.

The findings of violations of freedom of expression, and in particular of the right to impart information and of the public's right to know in the case law of the ECtHR<sup>149</sup>

<sup>148</sup> Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000).

<sup>149</sup> See Vogt v. Germany Application No. 17851/91, 26 September 1995; Fuentes Bobo v. Spain Application No. 39293/98, 29 February 2000; D. Otto v. Germany Application No. 27547/02, decision of 24 November 2005 ; E. Erdel v. Germany Application No. 30067/04, decision of 13 February 2007 ; Peev v. Bulgaria Application No. 64209/01, 26 July 2007 ; T. Lahr v. Germany Application No. 16912/05, decision of 1st July 2008 ; Heinisch v.

illustrate the lack, in different EU Member States, of guarantees and protection of employees and civil servants when exercising their right to freedom of expression. Interference with workers' freedom of expression identified by the ECtHR took different forms, such as a refusal of promotion, all kinds of disciplinary measures, non-renewal or termination of an employment contract or an immediate dismissal for serious misconduct and were based on different reasons, for instance, because some expressions or speech were considered defamatory or insulting or because employees had been dishonestly criticising the employer, the management or other employees; in some cases the employer initiated criminal or civil proceedings against the employee, for instance for breach of confidence, defamation, insult or libel<sup>150</sup>.

Inadequate protection of whistleblowers has further negative impacts on freedom of expression to the extent that it affects journalistic freedom and in particular the ability of investigative journalism to fulfil its 'watchdog role'. As acknowledged by the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression<sup>151</sup>, those who wish to call attention to malfeasance may find internal channels blocked and oversight bodies ineffective. This often forces whistle-blowers to become sources for public disclosure, which may make them vulnerable to attack.

This was also one of the main conclusions of the European Commission 2016 Annual Colloquium on Fundamental Rights<sup>152</sup> which brought together national and EU policy-makers, international organisations, NGOs, and media actors to discuss concrete actions to improve the fundamental rights situation in the EU in relation to "Media pluralism and democracy". Participants stressed that whistleblowers who, from their position inside governments and companies provide journalists with information about threats or harm to the public interest need first of all to be able to rely on the confidentiality of their communications with journalists; however, if their identity is revealed – and this happens more and more often in particular as a result of surveillance and metadata analysis - they need protection against retaliation. There was overall agreement that protection of sources should be complemented by strong protection of whistleblowers against retaliation.

A 2016 study on "Protecting sources and whistleblowers in a digital age"<sup>153</sup> reached a similar conclusion, indicating that working investigative journalists and media lawyers, many with several decades of experience, are profoundly concerned about the growing technological and legal vulnerability of confidential sources including whistleblowers, the protection of whom is essential to the pursuit of responsible journalism in the public interest.

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Germany Application No. 28274/08, 11 July 2011 and Palomo Sánchez a.o. v. Spain Application Nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011. Sosinowska v. Poland [no. 10247/09, 18 October 2011, Bucur and Toma v Romania decision of 8 January 2013, Case no 40238/ , Frankovicz v Poland Judgment of 16 December 2008, case no 53025/99, and Matúz v. Hungary, no. 73571/10, 21 October 2014.

<sup>150</sup> F. Dorssemont, K. Lorcher, I. Schomann (2013) The European Convention on Human Rights and the Employment Relation (2013), Hart Publishing, Oxford; page 240

<sup>151</sup> Report of 8 September 2015

<sup>152</sup> [http://ec.europa.eu/information\\_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions\\_40602.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions_40602.pdf)

<sup>153</sup> [https://clip.blogs.sas.ac.uk/files/2017/02/Sources-Report\\_webversion\\_22\\_2\\_17.pdf](https://clip.blogs.sas.ac.uk/files/2017/02/Sources-Report_webversion_22_2_17.pdf)

Illustrative examples of threats to the protection of journalists' sources (including whistleblowers) showing the need for protection of whistleblowers against retaliation if their identity is revealed, can be found in case law of the ECtHR<sup>154</sup>. The Court has repeatedly considered that measures taken by state authorities to uncover journalists' sources were such as to deter potential sources from assisting the press in informing the public on matters of general interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected<sup>155</sup>.

## 2.4.7 Societies and organisations where integrity and trust are low perform less well

Failure to tackle illegal activity undermines the rule of law and contributes to the erosion of trust in institutions. Inadequate whistleblower systems reduce the chances of illegal activity being identified and addressed.

### 2.4.7.1 Trust in institutions and businesses in the EU

According to the Standard Eurobarometer 87 (2017)<sup>156</sup>, more than two thirds (75%) of citizens tend not to trust political parties, **57% of Europeans do not trust their national parliament and 47% do not trust the European Union**. Almost half (43%) of European citizens do not trust their regional or local authorities and 41% mistrust their national legal system (Figure 2.34).

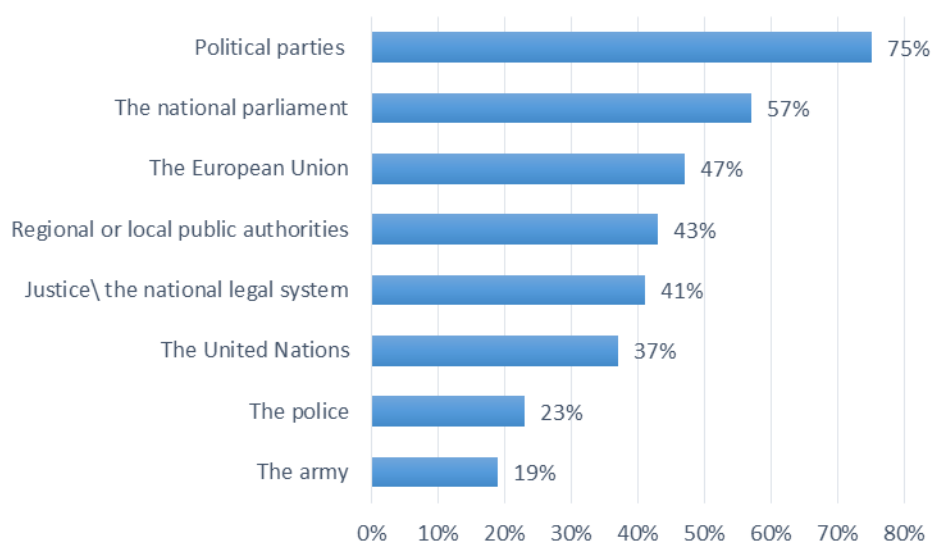
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<sup>154</sup> ECHR (2016) Factsheet Protection of journalistic sources

<sup>155</sup> Cases where interferences with the right to protection of journalistic sources were qualified as violations of Article 10 ECHR include: Nagla v. Latvia - 73469/10, judgment 16.07.2013, where the police searched the home of a journalist following a broadcast where she had informing the public of an information leak from the State Revenue Service database; Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands, 39315/06, judgment 22.11.2012, where the company publishing a newspaper was ordered to surrender documents which could identify journalistic sources; Ressiot and Others v. France - 15054/07, judgment 28.06.2012, where the premises of two newspapers were searched to identify the source of leaks in investigations related to doping in cycle racing; Voskuil v. the Netherlands - 64752/01, judgment 22.02.2008, where a journalist was detained with a view to being compelled to disclose his source of information concerning a criminal investigation into arms trafficking; Sanoma Uitgevers B.V. v. the Netherlands 38224/03, judgment 14.9.2010, where a magazine was ordered to hand photographs on illegal car racing despite the strong objections of the journalist as confidential sources could be identified in the photographs.

<sup>156</sup> Standard Eurobarometer 87, Spring 2017

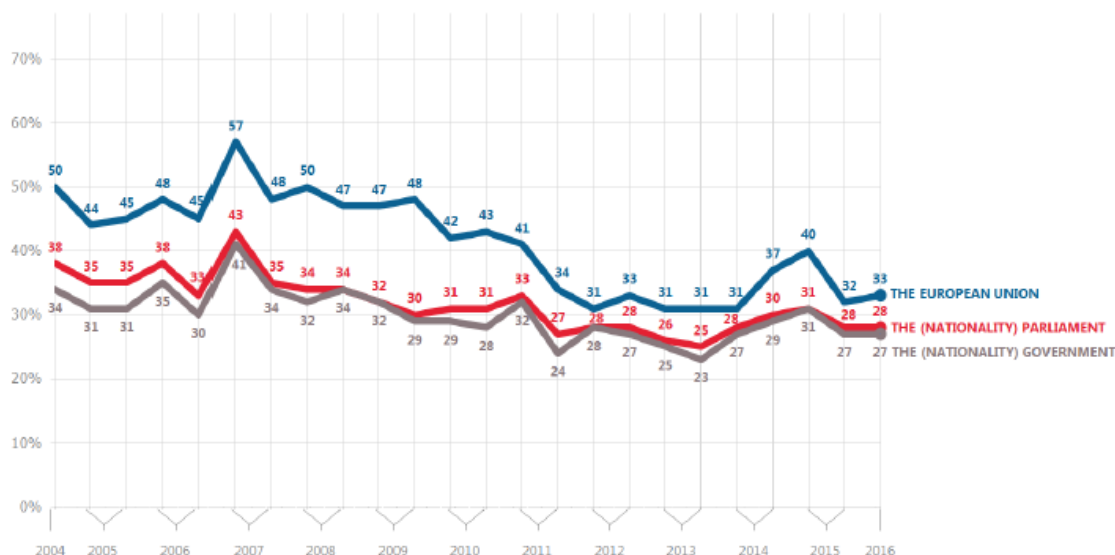
Figure 2.34 Citizen mistrust in public institutions, % (EU 28, 2017)



Source: Standard Eurobarometer 87. [QA8a I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust or tend not to trust it.] Data reported refer to "tend not to trust".

**The percentage of citizens with trust in the European Union had been falling from 57% in 2007 to 33% in 2016<sup>157</sup>. Similar trends are reported for national parliaments and national governments (with declines from 43-41% in 2007 to 28-27% in 2016 (Figure 2.35).**

Figure 2.35 Trends in percentages of citizens who trust European Institutions, national parliaments and national governments

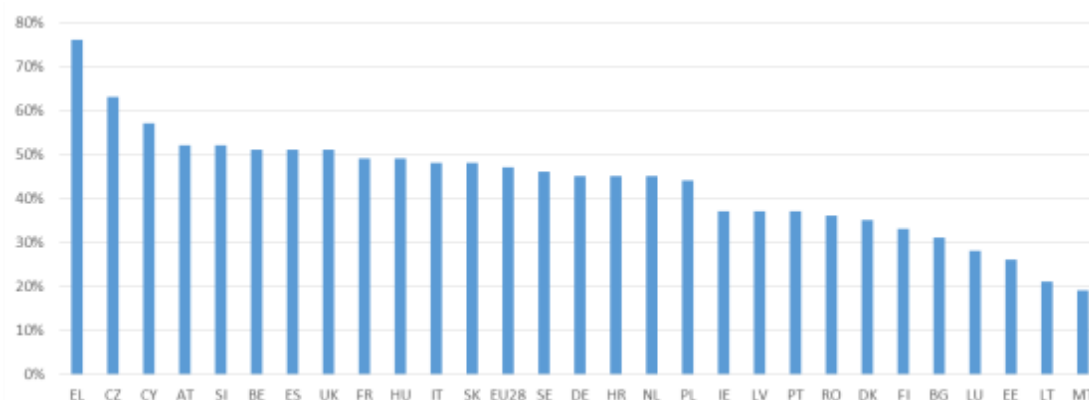


Source: Report: Standard Eurobarometer 85. [QA8a I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust or tend not to trust it.]

<sup>157</sup> Report: Standard Eurobarometer 85, Spring 2016, fieldwork May 2016, publication July 2016

In the Standard Eurobarometer 87 results (for 2017), distrust of EU institutions was highest in Greece (76%), Czech Republic (63%) and Cyprus (57%) (Figure 2.36).

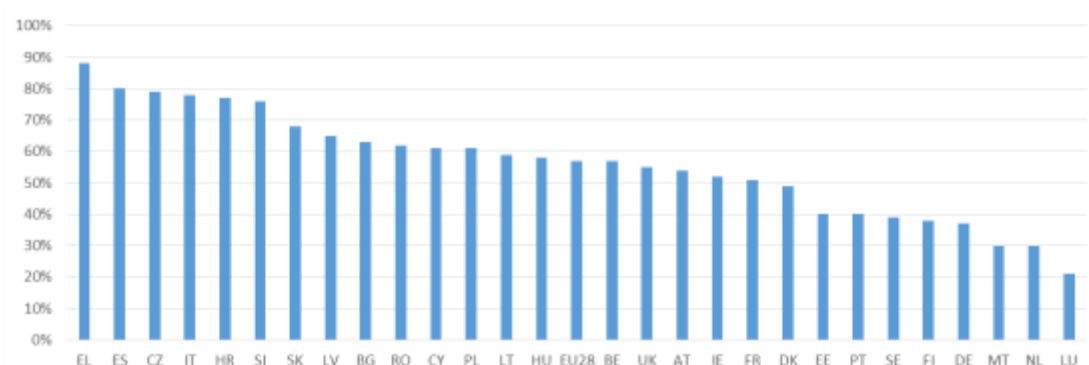
Figure 2.36 Percentages of citizens who do not trust the European Institutions, by country (2017)



Source: Standard Eurobarometer 87. [QA8a I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust or tend not to trust it.]

The same survey<sup>158</sup> found that **57% of European did not trust their national governments**. Countries where mistrust was above the EU average included Greece (88%), Spain (80%), Czech Republic (79%) and Italy (78%) (Figure 2.37).

Figure 2.37 Percentages of citizens who do not trust their national governments, by country (2017)



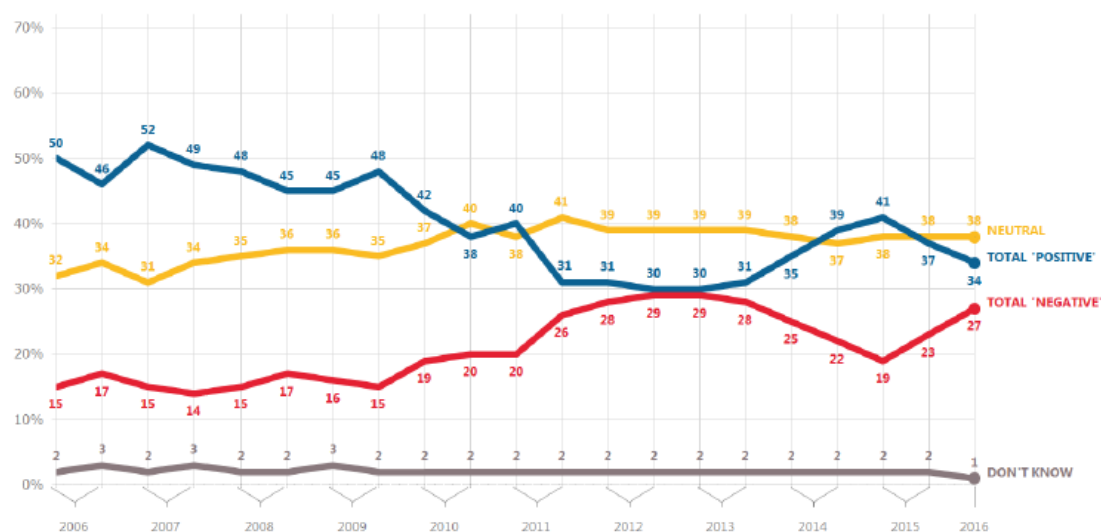
Source: Standard Eurobarometer 87. [QA8a I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust or tend not to trust it.]

Looking at trends over time, results presented in the Standard Eurobarometer 85<sup>159</sup> report show that the **percentage of EU citizens with a positive view of the EU has been steadily decreasing, from 50% in 2006 to 34% in 2016**. The percentage of citizens with a negative view has increased from 15% to 27% (Figure 2.38).

<sup>158</sup> Standard Eurobarometer 87

<sup>159</sup> Report: Standard Eurobarometer 85, Spring 2016, fieldwork May 2016, publication July 2016

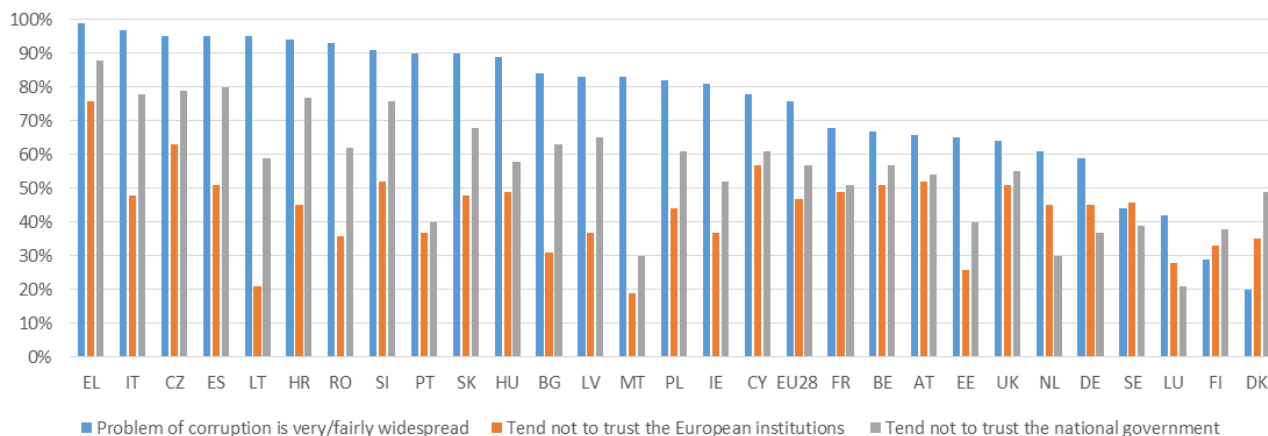
Figure 2.38 Trends in percentage of citizens with positive, negative, neutral view of the EU



Source: Report: Standard Eurobarometer 85. [QA9 In general, does the EU conjure up for you a very positive, fairly positive, neutral, fairly negative or very negative image?]

**High levels of citizen distrust of national and European institutions are seen in countries with the highest perceived levels of corruption.** Greece, Italy, Spain, Romania, Slovenia are among the countries with high perceived levels of corruption and high levels of distrust of national governments (Figure 2.39).

Figure 2.39 Percentages of people who do not trust the European institutions, the national governments and perception of corruption (2017)



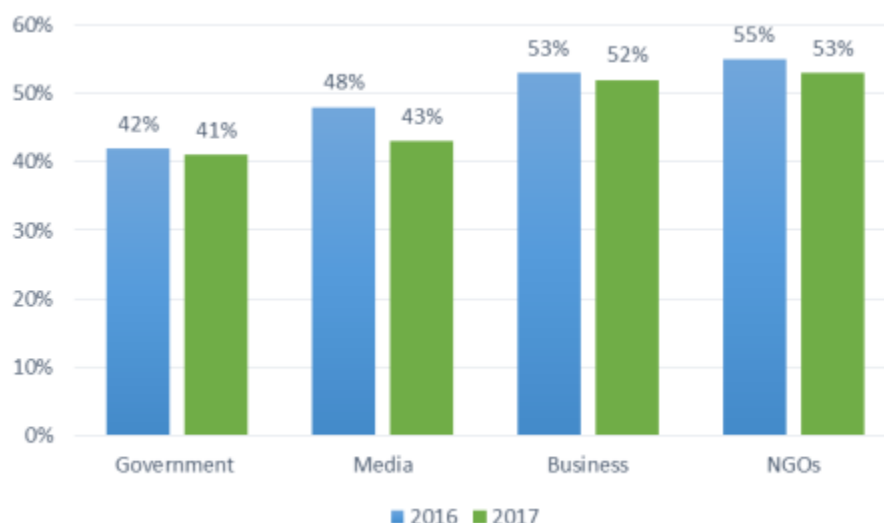
Source: Standard Eurobarometer 87. [QA8a I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust or tend not to trust it.]; Special Eurobarometer 397[QB5 How widespread do you think the problem of corruption is in (country)?]

According to the 2017 Edelman Trust Barometer<sup>160</sup> trust (defined as trust “to do what is right”) in businesses, government, NGOs and media has slightly declined. In

<sup>160</sup>Edelman Trust Barometer 2017 Annual Global Study <http://www.edelman.com/executive-summary/>. This is an online survey conducted in 28 countries around the world with 33,000 respondents in total, representative of 87% of total global population (not including the so called Informed Public which was defined as aged between 25-64

2017, as in 2016, respondents tended to trust more NGOs (53%) and businesses (52%) than media (43%) and government (41%) (Figure 2.40). The report stated that in 2017 two-thirds of countries were defined as “distrusters” with trust levels below 50%. The most critical issues of concern and fear for respondents were corruption, globalisation and erosion of social values, immigration and the pace of innovation. 53% of respondents believed the system was failing them.

Figure 2.40 Percentage of respondents trusting, government, media, business and NGOs (2016, 2017)



Source: Edelman Trust Barometer 2017 Annual Global Study

The 2017 Edelman Trust Barometer<sup>161</sup> provides a trust index summarising the average trust in institutions in the general population. In 2017 a number of European countries were classified as ‘distrusters’, these were Poland, Ireland, Sweden, the UK, France, Germany, Spain and Italy, while the Netherlands was classified as neutral<sup>162</sup>.

Respondents were asked how business can build trust. The majority of people considered a business can build trust if it: treats employees well (62%), offers high quality products/services (59%), listens to customers (58%), pays its fair share of taxes (56%), adopts ethical business practices (56%), has transparent and open business practices (55%), places customers ahead of profits (55%), takes responsible actions to address issues (55%), communicates frequently and honestly (52%), protects and improves the environment (52%) (Figure 2.41).

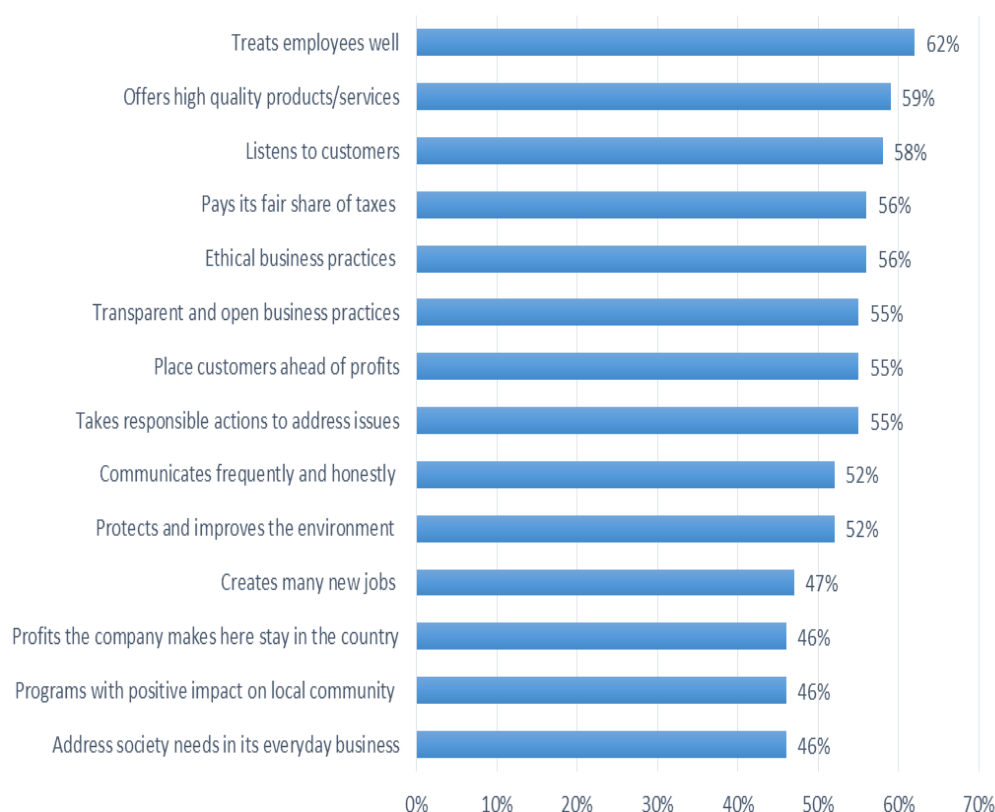
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college educated, in top 25% of household income, with significant media consumption and business news). The survey included the following EU countries: France, Germany, Ireland, Italy, Poland, Spain and Sweden.

<sup>161</sup>Edelman Trust Barometer 2017 Annual Global Study <http://www.edelman.com/executive-summary/>. This is an online survey conducted in 28 countries around the world with 33,000 respondents in total, representative of 87% of total global population (not including the so called Informed Public which was defined as aged between 25-64 college educated, in top 25% of household income, with significant media consumption and business news). The survey included the following EU countries: France, Germany, Ireland, Italy, Poland, Spain and Sweden.

<sup>162</sup> No information is provided on other European countries

**Figure 2.41 Percentage of respondents who rate each factors as important to building trust in company**



Source: Edelman Trust Barometer 2017 Annual Global Study

#### **2.4.7.2 There is evidence suggesting that high levels of organisational integrity are positively associated with higher shareholder returns, business sustainability and competitiveness**

A 2010 survey from the Corporate Executive Board<sup>163</sup> (CEB) conducted amongst 500,000 employees in over 85 countries, found a direct relationship between a culture of integrity in the workplace and lower incidents of misconduct. Moreover, the indicator that most strongly correlated with a higher level of long-term shareholder return (over 10 years), was employee "comfort in speaking up" – and lack of fear of retaliation was identified as a key element in ensuring such comfort. CEB found that corporate cultural integrity improve business performance overall and has a positive impact on organisational risk profile.

Organisational integrity is intrinsically linked to topics such as corporate governance and business sustainability. The 2015 OECD report on Corporate Governance and Business Integrity<sup>164</sup> highlights that corporate governance and compliance mechanisms are paramount to ensure business integrity, which ultimately foster

<sup>163</sup> <https://news.cebglobal.com/press-releases?item=50990>

<sup>164</sup> OECD (2015) report Corporate Governance and Business Integrity, A stocktaking of corporate practices <http://www.oecd.org/daf/ca/Corporate-Governance-Business-Integrity-2015.pdf>

accountability leading to increased investor confidence. Research on a matched sample of 180 US companies and using data collected over 18 years found that, in the long term, “High Sustainability” companies significantly outperformed “Low Sustainability” companies in terms of stock market and accounting performance. High Sustainability companies adopted policies focussed on the companies’ impact on society and environment, while Low Sustainability companies followed the traditional corporate model with little attention to topics such as society and environment<sup>165</sup>.

The GBES survey argues that organisations (in the public and private sectors) which have implemented organisational arrangements to foster and support ethical-decision making, as well as address the raising of concerns, observed multiple benefits. These included reducing the risk of wrongdoing, increased likelihood that wrongdoing is made known, increased likelihood that suspected and substantiated wrongdoing are acted upon, improved integrity in the organisation’s performance and reputation.

In its Guidelines on Whistleblowing<sup>166</sup>, the International Chamber of Commerce (ICC) cites research indicating that companies that use effective guidelines and compliance programs are much less vulnerable to economic crime. It therefore recommends to enterprises to put into place efficient and appropriate internal tools to combat economic fraud, which destroys shareholders’ value, threatens enterprises’ development, endangers employment opportunities and undermines good corporate governance.

## 2.5 Summary

The analysis above shows that there is a nested set of inter-related issues, as illustrated in Figure 2.41. Retaliation against whistleblowers causes direct harm and also contributes to under-reporting of the wrongdoing that takes place in the workplace that is observed or suspected by other workers. Figure 2.42 provides a problem tree that shows the relationships between different aspects of the problem.

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<sup>165</sup> Eccles, R., G., Ioannou I., Serafeim G. (2012) The impact of Corporate Sustainability on Organisation and Performance [http://www.hbs.edu/faculty/Publication%20Files/SSRN-id1964011\\_6791edac-7daa-4603-a220-4a0c6c7a3f7a.pdf](http://www.hbs.edu/faculty/Publication%20Files/SSRN-id1964011_6791edac-7daa-4603-a220-4a0c6c7a3f7a.pdf)

<sup>166</sup> <https://iccwbo.org/publication/icc-guidelines-on-whistleblowing/>

Figure 2.42 The analysis has identified a nested set of issues

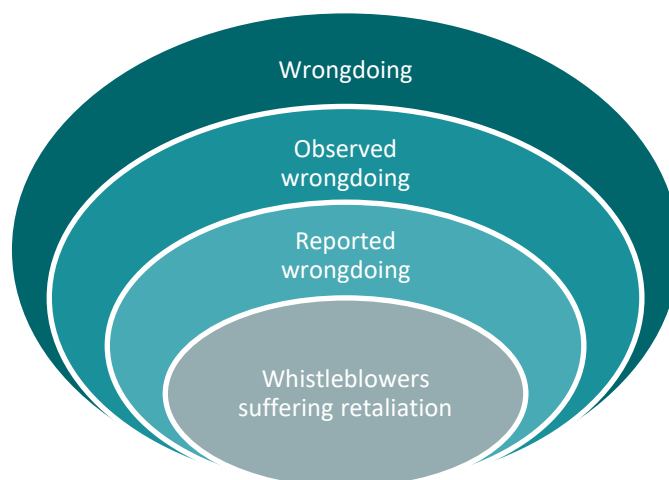
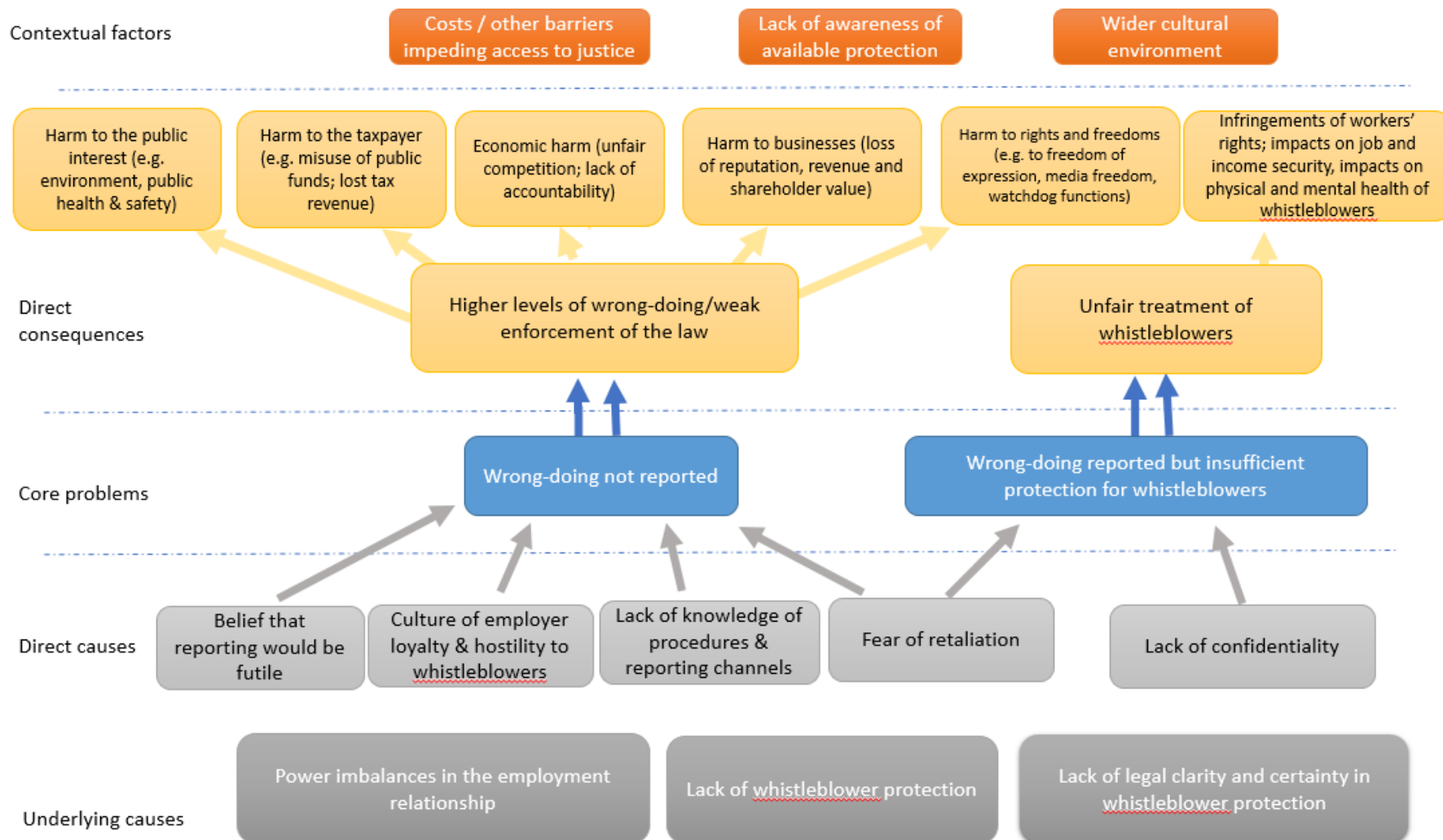


Table 2.5, positioned after the problem tree, provides summary answers to the five dimensions of the problem that the Commission's Better Regulation Toolbox asks to be specified in the problem definition component of an impact assessment.

Figure 2.43 Problem tree for protection of whistleblowers



**Table 2.5 Summary responses to the five issues relevant to the problem definition described by the Better Regulation toolbox**

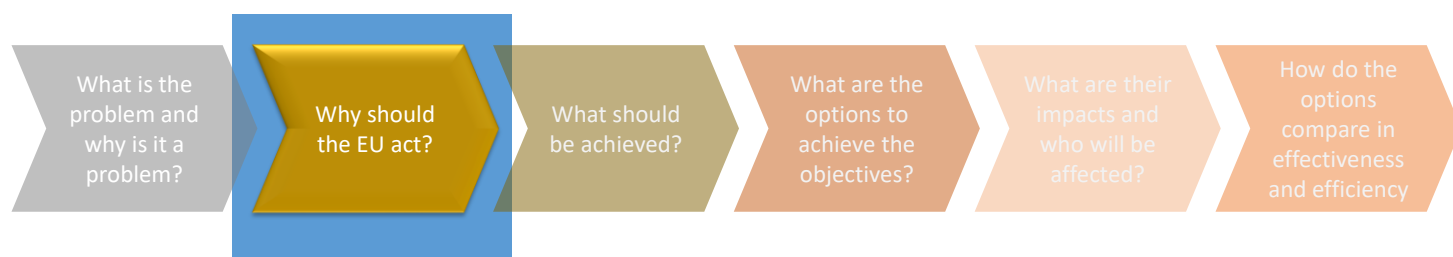
Principal issues	
<p>The problem and why it is problematic</p>	<p>It has been repeatedly shown in many sectors and in many countries that whistleblowers can have a powerful role in protecting the public interest by bringing attention to wrongdoing. The type of wrong-doing exposed by whistleblowers related to tax evasion, tax avoidance, fraud, irregularities or any other illegal activities affecting the financial interests of the EU, money laundering, mismanagement of public funds, misuse of personal data, threats to public health and the environment, violations of human rights in general and violation of financial regulations. Whistleblowers have brought financial misdemeanours into the light; investigations into a number of major transport disasters and industrial disasters that led to substantial loss of life, damage to the environment, etc.</p> <p>Despite the important role of whistleblowers in exposing wrongdoing the evidence suggests that under-reporting is a problem in workplaces and within the wider society. According to the Special Barometer 397, three-quarters (74%) of respondents who experienced or witnessed a case of corruption did not make a report. The 2016 Global Business Ethics Survey (GBES) found that 41% of those who observed misconduct in the workplace did not report it.</p> <p>Under-reporting of wrongdoing which represents a threat or harm to the public interest is still a widespread phenomenon and a major concern. Workers who report wrongdoing in the workplace – whistleblowers – are not sufficiently protected and commonly face retaliation of a kind that damages their mental and physical health, career prospects, livelihoods and family lives.</p> <p>Retaliation against whistleblowers takes many forms, ranging from unfair dismissal, demotion, geographical relocation to harassment and questioning of whistleblowers' mental health, professional competencies and integrity.</p> <p>Concern about possible retaliation is one of a number of factors that contribute to workers who see or suspect wrongdoing being unwilling to report it. Other barriers are a belief that reports will not be followed-up, socio-cultural norms (such as loyalty to the employer but also negative attitudes towards whistleblowers in workplaces and society), as well as lack of reporting channels or little awareness of reporting procedures.</p> <p>Under-provision of whistleblower support and protection makes it less likely that such wrongdoing is identified, investigated and sanctioned. This in turn means that the society is not getting the benefits of the dissuasive effect that comes from the perpetrators of wrongdoing being concerned that fellow workers will registering a report.</p> <p>And at the same time, citizens' trust in public and political institutions is declining in many places. Trust is lowest in many of the countries where problems such as citizens' experience of corruption is highest. At an organisational level, research has shown positive associations between good governance, employee trust in the organisation and business performance.</p>
<p>The magnitude and EU dimension of the problem</p>	<p>Therefore, the problems that whistleblowing can help to tackle – violations of national and EU rules on environmental protection, the fight against tax evasion and tax avoidance, public procurement, product standards, etc. – persist. Many of these issues have a trans-</p>

Principal issues	
	<p>national dimension; wrongdoing in one Member State can easily have consequences for other Member States.</p> <p>Provision of whistleblower support and protection against retaliation is patchy and inconsistent in the EU. Many Member States have little or no effective measures in place. Others have some laws in force but they are partial – covering only a small part of the economy and/or providing highly conditional protection. There are examples of good practice but they are a minority.</p> <p>The legal analysis found that eight Member States (France, Hungary, Ireland, Malta, Netherlands, Sweden, Slovakia and United Kingdom) have advanced whistleblower protection with horizontal protection; twelve Member States (Austria, Belgium, Bulgaria, Croatia, Estonia, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania and Slovenia) have a sectorial / partial protection and eight Member States (Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Latvia and Spain) have no or low protection for whistleblowers.</p> <p>This means that a large number of workers in Europe have little or no protection in law against retaliation if they speak up about wrongdoing. Eurostat statistics show that in 2016 there were almost 67 million workers in the group of countries with partial/sectorial protection and more than 73 million workers in the third group of countries that have low or no protection. This compares with more than 78 million workers in the Member States with horizontal protection for whistleblowers.</p> <p>Lack of adequate whistleblower support and protection weakens societies' protection against wrongdoing by discouraging reporting and failing to address the actual harm that is currently caused to whistleblowers by retaliation action.</p> <p>Therefore, features of the EU dimension of this problem are:</p> <ul style="list-style-type: none"> <li>- Variation across the EU in the level of protection to whistleblowers</li> <li>- Uneven protection across the EU against (i) wrongdoing that compromises the integrity of products and services on the Single Market; (ii) corruption and fraud on the EU budget and (iii) actions that compromise the environment, public health and safety and consumer welfare in other Member States</li> </ul>
The causes ("drivers") and their relative importance	<p>A power imbalance in employment relationships, lack of whistleblowers protection, lack of legal clarity and certainty in whistleblowers protection underpin other factors leading to under-reporting of wrongdoing and retaliation against whistleblowers. The direct causes of these two phenomena are:</p> <ul style="list-style-type: none"> <li>- Fear of retaliation</li> <li>- Belief that reporting would be futile</li> <li>- Culture of employer loyalty and hostility towards whistleblowers</li> <li>- Lack of knowledge of procedures and reporting channels</li> <li>- Lack of confidentiality</li> </ul> <p>Almost one third (31%) of respondents to the Special Eurobarometer 397 indicated that people may decide not to report a case of corruption because there is not protection for those reporting wrongdoing. The study shows that fear of retaliation and perception of not being sufficiently protected might be well-founded. According to the 2016 Global Business Ethics Survey (GBES) more than one in three people</p>

Principal issues	
	<p>making a report (36%) experienced retaliation in 11 out of 13 countries surveyed.</p> <p>In the Special Eurobarometer 397, 47% of respondents believed that corruption was not reported because it would be difficult to report wrongdoing. A survey conducted in 2015 by Transparency International France found that 40% of employees who did not report wrongdoing believed that no action would be taken.</p> <p>The EY Global Fraud Survey reported loyalty as one of the main reasons for not reporting, 19% of respondents reported loyalty to their company and 18% to their colleagues.</p> <p>The study shows that causes of under-reporting are varied, a strong factor seems to be a lack of awareness of reporting channels as well as the effectiveness of internal and external reporting channels. Therefore, whistleblowing is described as a 'journey' rather than a one-off event. The Special Eurobarometer 397 found that 44% of respondents would not know where to report corruption if they were to experience or witness corruption. Research found that the most common pattern is to blow the whistle outside the organisations only if workers experience retaliation of concerns are not acted upon (Vandekerckhove, 2010). The lack of effective reporting channels means that workers raise their concerns within their organisation more than once, Public Concern at Work (PCaW) found that 56% of whistleblowers report their concerns within their organisations on more than one occasion.</p>
The relevant stakeholders	<p>The principal stakeholders in this matter are:</p> <ul style="list-style-type: none"> <li>• Whistleblowers, many of which suffer retaliation;</li> <li>• Workers that would be assured access to reporting channels - many workers do not have access to safe reporting channels; this raises issues of protection of personal data and consequently limitation to freedom of expression.</li> <li>• Private enterprises and public organisations that would (i) be required to provide reporting channels and, under some options, face obligations to raise awareness of those channels, follow-up reports and provide feedback through appropriate channels; (ii) see greater harmonisation of whistleblower protection arrangements across the EU</li> <li>• The EU public, as consumers and citizens, who have an interest in lower levels of fraud and corruption, in the integrity of products and services on the single market, the state of public finances, public health and safety, the environment and other dimensions of the problems.</li> <li>• Governments, which will: (i) face obligations of implementing the legislation, including for public entities, and managing the consequences of the expected increase in reporting and disclosure of wrongdoing that would follow; (ii) stand to benefit from improvements longer term reductions in the damage caused by wrongdoing to public finances, etc., and long term improvements in trust that are expected to follow from comprehensive whistleblower support and protection.</li> </ul>
How the problem is likely to evolve with no new EU	<p>The twin problems of (i) wrongdoing not being reported and (ii) insufficient protection to whistleblowers are expected to slowly reduce over time as more Member States adopt targeted legislation where</p>

Principal issues	
intervention?	<p>they have none, or strengthen legislation where existing laws are weak. The legal research suggested that a number of countries that lack horizontal measures for whistleblower protection are considering adoption of more robust protection. But this process (a) will take many years to lead to robust provision and protection across the EU (b) could exacerbate rather than resolve the existing problem of legal complexity across the EU due to the different scope and specification of measures taken by individual Member States countries.</p> <p>Under-reporting of wrongdoing and levels of retaliation against whistleblowers will persist at higher levels in the baseline scenario than would be the case under EU intervention.</p> <p>The consequences of under-provision of whistleblower support and protection - wrongdoing of various types and unfair treatment of whistleblowers – are expected to be higher under a scenario of no new EU intervention.</p>

## 3 The case for EU action



### 3.1 Introduction

This section considers the case for EU action to support whistleblowers and provide them with protection against retaliation.

It starts by summarising the protection currently provided in Member State and EU law before discussing arguments for an additional EU level intervention.

### 3.2 The current legal situation in Europe

#### 3.2.1 There is significant variation in the level of support and protection provided to whistleblowers by Member State law

There is significant variation in the protection provided in Member State law to whistleblowers and in the obligations placed on organisations to provide reporting channels.

For the purpose of this study information was gathered on the legislation governing whistleblowing in each Member State. To provide a comprehensive picture of Member States' legislation on protection of whistleblowers, national legal frameworks for whistleblower protection were assessed against eight criteria. The criteria refer to aspects of legislation considered essential components of a balanced legal framework, providing strong protection of whistleblowers whilst striking a balance with other rights and interests involved. They were selected from the 29 principles provided in the Council of Europe Recommendation of 30 April 2014<sup>167</sup> which largely draws upon the case law of the European Court of Human Rights (ECtHR) on the right to freedom of expression<sup>168</sup> enshrined in Article 10 of the European Convention on Human Rights and in Article 11 of the EU Charter of Fundamental Rights.<sup>169</sup> The selection was informed by further international

<sup>167</sup> Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. Available at: <https://rm.coe.int/16807096c7>

<sup>168</sup> As indicated above, all EU Member States are parties to the European Convention on Human Rights, which serves as source of inspiration for the interpretation of the EU Charter of Fundamental Rights. In line with Article 52(3) of the Charter "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention". The interpretation of the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights is therefore binding as regards the interpretation of the same right as enshrined in Article 11 of the Charter.

<sup>169</sup> The Council of Europe has not yet assessed the impact of its Recommendation. In a recommendation adopted on 27 June 2017, the Parliamentary Assembly considered in particular that "the Council of Europe should provide stronger support for improvements in national legislation relating to transparency and access to information as well as to the protection of whistle-blowers" and stressed the need for a Council of Europe led assessment of national practices and legal provisions on the matter." Resolution 2171 (2017)<sup>1</sup>

standards<sup>170</sup>, research, and expert input, including a workshop with academics and other experts on whistleblower protection that took place on 7 June 2017.

The criteria are:

- **Sectors and organisations covered.** This considers the scope of the law by reference to the sectors and size of organisations covered, such as the scope being restricted to the financial sectors service.
- **Categories of protected whistleblowers (personal scope).** This clarifies the categories of citizens or workers who are covered by the legislation, including whether the scope covers trainees, volunteers, etc. *Based on Principles 3 and 4 of the CoE Recommendation.*
- **Type of wrongdoings that can be reported.** This addresses the range of wrongdoings that can be reported under the legislation. Countries usually adopt one of two approaches, either (i) an enumerative list of wrongdoings, or (ii) reference to the notion of 'harm or threat to the public interest' which allows for a wider range of wrongdoings to be reported. *Based on Principle 2.*
- **Nature and extent of protection of whistleblowers in the workplace.** This criterion assesses the level and type of protection afforded to the whistleblowers against retaliation and the types of remedies available (i.e. interim relief, right to re-instatement, damages, compensation etc). *Based on Principle 21 and Principle 26 of the CoE Recommendation.*
- **Channels of reporting (tiered approach).** This assesses the availability of appropriate channels to enable the whistleblower to disclose information. A tiered approach seeks reporting through internal channels first while providing additional channels in the event that the disclosure through the internal channel does not elicit a response, e.g. reporting to public regulatory bodies and if unsuccessful disclosing to the public. *Based on Principles 13, 14 and 17 of the CoE Recommendation*
- **Confidentiality of the whistleblower's identity** and penalties for breach of confidentiality. This considers whether the identity of the whistleblower is protected. Confidentiality helps to ensure the whistleblower's protection and removes a disincentive to report wrongdoing. *Based on Principle 18 of the CoE Recommendation.*
- **Reversal of the burden of proof.** This considers whether the whistleblowing legislation provides for the reversal of the burden of proof in prima facie cases of retaliation. It can be very difficult for whistleblowers to prove that the reason for the unfair treatment by the employers is because they reported wrongdoing. Thus, in legal proceedings relating to a detriment suffered, once the whistleblower has shown prima facie that he has made a public interest report, the employer should carry the burden to prove that the detrimental action was fair and not linked in any way to the whistleblowing. *Based on Principle 25 of the CoE Recommendation.*
- **Good faith requirement.** This considers whether the legislation providing protection specifies that the whistleblower's disclosure must be made in good faith or with a reasonable belief that the information is true and in such cases

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<sup>170</sup> These include standards reflected in the UN Convention against Corruption, to which all Member States as well as the EU are parties, and the related UN Resource Guide on Good Practices in the Protection of Reporting Persons (UNODC (2015)), in the G20 Compendium a compendium of best practices and guiding principles for legislation on the protection of whistleblowers and in the OECD (2016) Report Committing to Effective Whistleblowers Protection,

protects the whistleblower also in the event that the information reported was incorrect. *Based on Principles 10 and 22 of the CoE recommendations.*

A detailed description of the approach and results is provided in Annex 4. The findings are summarised below.

Whistleblowers have no protection in two Member States (CY, LV). In the other 26 Member States, the analysis identified the following main gaps:

- **Lack of protection:** Only 8 Member States have a single, horizontal law for the protection of whistleblowers (FR, HU, IE, MT, NL, UK, SE, SK). In 18 other Member States whistleblowers receive protection that is partial, being limited either to certain sectors (e.g. public sector, private sector, the banking / financial sector) (AT, BG, CZ, DE, DK, EE, EL, FI, HR, IT, LT, LU, PL, PT, RO, SI) or to certain parts of their territory (BE, ES).
- **Lack of protection of private employees:** Private sector employees have no protection in six Member States (BE, BG, CZ, EL, LT, RO) and only partial protection in seven Member States (only the financial and/or banking sector is covered in AT, DE, DK, FI, IT, PL, PT).
- **Strict definition of workers who can be protected:** 13 Member States (AT, BE, CZ, DK, EL, HR, IT, LU, PL, PT, RO, SE, SK) limited the scope of the employment relationship that would provide protection (excluding subcontractors, former employees, trainees, etc.).
- **Limits on the types of wrongdoing that can be reported** (“protected disclosures”): in 12 Member States whistleblowers are only protected if they report on corruption (EE, EL, HR, LU, PT, RO SI) or other very limited types of wrongdoing that can harm the public interest (IT, PL, DK, FI, ES).
- **Limited protection:** In two Member States whistleblowers have no legal protection against retaliation (EE, FI), while in 11 Member States (AT, BG, CZ, DE, DK, EL, HR, IT, LT, PT, RO) they are protected only from certain forms of workplace retaliation, such as unfair dismissal or discrimination.
- **Lack of reporting channels:** Laws in seven Member States do not prescribe setting up reporting channels (BG, EE, EL, ES, HR, LU, RO). In some Member States reporting channels are required by law only for certain sectors (PT, SI). In other Member States (HU, IE) the law does not require the establishment of reporting channels but refers to reporting channels such as a possible means of reporting to employers. Six Member States require a tiered use of prescribed channels, i.e. that whistleblowers first report within their organisation and only report externally if internal channels do not or cannot be expected to function properly (FR, IE, MT, NL, UK, PT, SE). Seven Member States do not require a tiered use of channels (SK BE SI AT, LT IT PL).
- **Confidentiality of the whistleblower’s identity is not ensured:** Confidentiality is not guaranteed in four Member States (DE, EL, LU, SE) and only partly guaranteed, e.g. only in some of their sectorial laws, in three other Member States (BG, ES PT).
- **No reverse burden of proof in favour of the whistleblowers:** Nine Member States do not expressly require the reversal of the burden of proof (AT, BG, HU, IT, LT, MT, NL, PL, UK,). Two Member States reverse it only in some sectors (HR, PT) and in two Member States (SE; SK) the burden is not reversed in law, but is in practice.

- **No requirement of good faith:** Five Member States do not require 'good faith' to afford protection to whistleblowers (BG, CZ, DK, FI, ES). Two Member States (AT, DE) require it only based on case law and not in the law. Two Member States (LT, PT) require it only in some of their sectoral laws.

## Implementation

Information on the implementation of national laws was identified for seven Member States. Only a few Member States have horizontal legislation protecting whistleblowers and in most cases, these laws were introduced only recently (FR, IE, MT, NL, SE) so information on impacts is scarce.

In Hungary and Slovakia (which adopted whistleblower laws in 2013 and 2014 respectively), the first findings suggest some challenges in implementation. In Slovakia, the labour inspectorate has been focusing its action on enforcement but progress is hindered by human and financial resource constraints. In Hungary, K-Monitor<sup>171</sup> (a non-governmental organization) has reported issues with the handling of public interest disclosures. The organisation also believes that most whistleblowers reporting potential cases of corruption act anonymously and that these disclosures are typically not investigated. For Belgium, the 2014 annual report of the Federal Ombudsman mentioned implementation support to the federal law involving elections of persons of trust in the Federal Administrations, training of persons of trust and information campaign to inform administrators of the new integrity management system.

In other Member States with sectoral laws on whistleblower protection (AT, LT, SI and RO) various implementation issues have been reported. In Romania, which was one of the first European countries to introduce whistleblower protection legislation (at sectoral level only), success in implementation reportedly varies significantly across institutions. In Lithuania, even though public sector institutions have established reporting channels, they usually do not differentiate reporting channels for whistleblowers from the channels devoted for general complaints. In Slovenia, protection measures for whistleblowers provided by the new law did not lead to a clear increase in the level of reporting of corruption; fear of retaliation was identified as the main reason for individuals not to come forward.<sup>172</sup> In Austria, a 2014 report by UNODC<sup>173</sup> identified implementation issues linked to the possibility for anonymous reporting to the hotline due to issues in the choice of legal basis.

## Trends

All but one of the countries with dedicated, horizontal laws protection introduced these laws after 2013 (the UK legislation dates from 1998 and was amended in 2013). Factors contributing to action were:

- Revelations about malpractice and abuse (e.g. IE);
- Incidents that resulted in significant loss of life (e.g. UK);
- Pressure from civil society and trade unions (FR);

<sup>171</sup> an NGO that deals with whistleblower protection only in relation with fighting corruption,

<sup>172</sup> Transparency Slovenia: *Mednarodni dan boja proti korupciji – zaščita prijaviteljev in žvižgačev ter dostop do javnih informacij* [International day of Fight against Corruption – Protection of Whistleblowers and Access to Public Information], 9 December 2016, available at: <http://www.transparency.si/8-novice/306-mednarodni-dan-boja-proti-korupciji-zascita-prijaviteljev-in-zvizgacev-ter-dostop-do-javnih-informacij>

<sup>173</sup>

[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2014\\_08\\_26\\_Austria\\_Final\\_Country\\_Report.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2014_08_26_Austria_Final_Country_Report.pdf)

- Increased public awareness and call for transparency (HU<sup>174</sup>, SE<sup>175</sup> and SK); and
- Political pressure on governments to amend or introduce protection laws (IE<sup>176</sup>, MT and the UK).

At the time of research of this report, plans to amend existing laws or to adopt new legislation were under discussion in Belgium, Croatia and Lithuania. Some developments could not been taken into account as they occurred between the time of research and the finalisation of this report. In Italy, the legislative proposal on whistleblower protection was approved by both the Lower House of the Parliament and the Senate<sup>[1]</sup>. In Latvia, a draft law on whistleblower protection was submitted to the Parliament for adoption in March 2017. In Cyprus, a draft law to protect whistleblowers was submitted to the House of Representatives in May 2017. Initiatives to launch discussion or adopt legislation at national level have recently been taking place in other countries (CZ; EL; and ES) but it is by no means certain that these initiatives will be adopted. Spain and Cyprus are currently examining proposals put forward in 2017; the likelihood of new legislation being adopted is unclear.

In other EU Member States, past proposals for action on whistleblower protection have failed. An example of this is Denmark where, in 2015, three Members of Parliament proposed the establishment of whistleblower mechanisms for staff in the military and police intelligence services but the proposed legislation was not adopted by the Parliament. In Bulgaria, two proposals to establish a unified anti-corruption agency were considered by the Parliament in 2015 and 2016 but were defeated.

### 3.2.2 EU legislation provides only sectorial protection for whistleblowers

As part of this study a mapping of existing EU legislation that contains provisions relevant to the whistleblowers protection was undertaken. The 15 instruments of EU legislation reviewed are all sectorial, therefore providing only partial coverage e.g. the financial services sector, civil aviation, nuclear safety and offshore gas and oil sectors. Directive (EU) 2016/943 of 8 June 2016 (Trade Secrets Directive)<sup>177</sup>

An assessment of the specific features of these 17 legislative acts shows that they adopt a broad definition of the categories of workers as well of the type of wrongdoings. For instance, the Trade Secret Directive refers to 'any natural or legal person involved in trade secrets' while the Anti-Money Laundering Directive uses a broad definition of employees working in the financial system institutions as it also includes 'employees and persons who are in a comparable position'. In addition, the majority of those EU legal instruments<sup>178</sup> make a reference to breaches and potential breaches of the rules which allows to report a wider scope of wrongdoings.

<sup>174</sup> This legislation was introduced following an incident in which 800 million litres of caustic red sludge was released from an aluminium processing plant.

<sup>175</sup> <https://www.euractiv.com/section/public-affairs/news/sweden-introduces-pro-whistleblowers-law/>

<sup>176</sup> Ireland abandoned its sectoral approach in 2012 and replaced it with a single piece of protected disclosure legislation.

<sup>[1]</sup> Senate Act no. 2208, XVII Legislature

<sup>177</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0943>

<sup>178</sup> Directive 2015/849/EU; Directive 2014/65/EU ; Directive 2013/36/EU ; Directive 2014/91/EU ; Regulation (EU) 2015/2365 ; Regulation (EU) No 909/2014 ; Directive 2016/97/EU ; Regulation (EU) No 1286/2014 and the Staff Regulations of officials and Conditions of Employment of other servants of the European Union

These instruments overall acknowledge that appropriate channels for whistleblowing and measures for the protection of whistleblowers against retaliation are necessary to facilitate detection of violations of the rules set out (e.g. instances of money laundering or terrorist financing, of market abuse, safety and environmental concerns relating to offshore oil and gas operations etc.). They thus generally seek to encourage whistleblowing by essentially requiring Member States to establish:

- effective channels for reporting and investigation of such reports guaranteeing, amongst others, confidentiality for the individuals concerned. However, the Insurance Distribution Directive, the Package Retail and Insurance-based Investment Products Directive and the Nuclear Safety Directive 2014/87/Euratom) do not provide for setting up reporting channels. Moreover, provisions for confidentiality are absent in three pieces of legislation<sup>179</sup>.
- measures for the protection of whistleblowers from employment-related retaliation, usually referred to as “retaliation, discrimination or other types of unfair treatment”. However such provisions for protection are missing in five legislative instruments<sup>180</sup>.

The Trade Secrets Directive follows a different approach: it provides for protection from civil proceedings to the person who acquires, used or discloses a trade secret for revealing misconduct, wrongdoing or illegal activity, provided that this person acted for the purpose of protecting the public interest. In this case, whistleblowers do not enjoy protection as a means to attain the objective of the Directive (which is the protection of trade secrets); rather, they are granted protection as derogation.

Annex 1 of the Technical Annexes provides an overview of the impact assessments and evaluations completed on existing EU sectoral legislation that has relevant provisions on whistleblowing channels and protection. Evidence on the functioning of this sectoral legislation is not available – it is not yet evaluated as most is very recent (some is still being transposed by the Member States).

It is nonetheless clear that, although EU legal provisions for the protection of whistleblowers have grown in scope since 2008, European law does not yet provide comprehensive protection and the current framework is fragmented.

### 3.3 The case for action

There are three main building blocks of the case for action:

- Ensuring a common minimum level of protection of EU workers against the health and well-being consequences of retaliation inflicted upon whistleblowers;
- Tackling the barriers to reporting of wrongdoing in order to strengthen progress towards Treaty goals: safeguard and promote fundamental rights, ensure the proper functioning of the single market and protect the EU financial interests, public health and safety and the environment; and
- Addressing the cross-border effects and risks that impact on citizens, consumers, enterprises, and the EU environment which arise from the uneven level of whistleblower support and protection available across the EU.

<sup>179</sup> Directive 2016/943 of 8 June 2016 (Trade Secrets Directive); Regulation 883/2013 of 11 September 2013 on investigations by OLAF; Directive 2014/87/Euratom (Nuclear Safety Directive).

<sup>180</sup> Directive 2014/91/EU (Undertakings for Collective Investments in Transferable Securities (UCITS V) Directive); Directive 2014/56/EU and Regulation No 537/2014 of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities; Regulation 883/2013 on investigations by OLAF; Directive 2013/30/EU on safety of offshore oil and gas operations; Directive 2014/87 Euratom (Nuclear Safety Directive).

### **3.3.1 Protecting whistleblowers**

As explained in section 2, workers in the EU who report wrongdoing are often subject to retaliation that impacts on many aspects of their lives and those of their families – their health and well-being, income, career and even their personal safety. EU action would help to provide a consistent level of protection to workers' health, including their mental and social well-being.

### **3.3.2 Increasing reporting of wrongdoing**

Increasing the propensity of workers to report, in good faith, the public interest wrongdoing they observe will facilitate detection and prevention or reduction of the threats or harm to the public interest and violations of the law. As well as helping to bring wrong-doers to justice, effective EU action should also have a dissuasive effect on wrongdoing in the future.

This will help address EU-level challenges such as:

- Barriers to the proper operation of the Single Market arising from weak enforcement of relevant rules, to the extent that whistleblower protection can enhance the effective application of these rules;
- Fraud affecting the disbursement of EU funds;
- VAT fraud and other financial fraud that weakens the finances of the Member States and the EU;
- Activities that endanger workers' health and safety across the EU, public health and the environment.

### **3.3.3 Addressing the cross-border effects and risks arising from the variation in the level of support and protection available to whistleblowers across the EU**

As explained in section 2, there is significant variation in the protection provided in law to whistleblowers and in the obligations placed on organisations to provide reporting channels. Variation in whistleblower provisions across the EU creates two types of problems:

- Unequal levels of protection against the consequences of illegal activity;
- Increasing legal complexity and variation in requirements on business and levels of worker protection.

These are discussed further below.

#### **3.3.3.1 The current fragment legal framework for protection of whistleblowers has cross-border consequences**

The problems that whistleblowers can help to tackle often have cross-border dimensions. In that context, weaknesses and gaps in whistleblower protection and reporting support also have cross-border consequences. A Member State that provides a high level of support for, and protection of, whistleblowers may still suffer the consequences of problems arising in another Member State. These problems might have been prevented if that other Member State had a higher level of support and protection for whistleblowers. And, in today's integrated labour market, illegal activities that result in problems in one Member State can have direct impacts on citizens of other EU countries who are workers in that Member State.

Examples of cross-border effects are:

- Products made in one Member State and sold in another - if whistleblower arrangements are weak in the country where the products are designed or manufactured such that wrongdoings in the form of malpractice or negligence are less likely to be disclosed, the consequences are felt by consumers in other countries where the products are used. For instance, in 2010 it emerged that a French company had made implants with substandard, industrial-grade silicone which had double the rupture rate of other implants and could cause medical problems if the implants erupted. Press reports suggested about 300,000 women in as many as 65 countries were affected<sup>181</sup>.
- Trans-national transport services – unsafe operating practices by a national transport operator running services to another Member State can have consequences for the citizens of other Member States. An example is the Herald of Free Enterprise, a ferry operating between Belgium and the UK which capsized in March 1987 with the loss of 193 passengers and crew. The UK public inquiry found that unsafe practices had been reported by employees but were not acted upon.
- Malpractice or negligence at industrial facilities that leads to pollution that crosses national borders, with consequences for human health and environmental quality in other Member States. For example, the actions taken by certain diesel car manufacturers to circumvent vehicle emissions tests had negative impacts on the environment and health. According to a recent study, excess emissions from diesel cars cause about 5,000 premature deaths annually across Europe<sup>182</sup>. Disclosure resulted in significant negative economic and reputational impacts on the companies involved.

Such examples illustrate how weaknesses and variations in the strength of whistleblower support and protection across the EU Member States can have implications for competition and efficiency in the single market. Companies in Member States with robust systems for exposing wrong-doing may face unfair competition from companies elsewhere that are operating in environments where laws supporting the reporting of corruption and other wrong-doing are weaker. Markets, such as for public procurement, may be less competitive as a consequence of firms being discouraged from bidding by a belief that local markets are not fair and transparent. It is widely recognised that jurisdictions with reputation for strong governance, high transparency and low corruption are more likely to attract inward investment.

Whistleblower protection can contribute to the efforts to combat fraud and corruption, serious organised crime and strengthen enforcement of EU law and notably internal market rules. This is why strong EU rules on whistleblower protection have already been introduced in certain sectors (e.g. laws to prevent money laundering and market abuse or other unlawful activities in the financial services sector). The existing rules are, however, sectorial and limited in scope.

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<sup>181</sup> <http://www.bbc.com/news/health-16391522>

<sup>182</sup> <http://www.iiasa.ac.at/web/home/about/news/170918-diesel-nox.html>

### 3.3.3.2 There is increasing legal complexity and variation in requirements on business and levels of worker protection

The level of provision of whistleblower channels and whistleblower protection provided in law varies significantly around the European Union. This creates challenges for both businesses and for workers.

Countries provide different levels, type and quality of protection and support to whistleblowers. The complexity of the legal landscape can pose challenges for companies operating in multiple countries, and risks to whistleblowers. Multinational companies operating in different countries tend to apply a standard practice without assessing the divergences of national contexts across Member States (i.e. the same practices may not be as effective in a different context). Company practices may reference legislation from outside the EU. An example is companies that are subject to US legislation applying those US requirements to their EU operations.

#### Summary of US federal standards on protection of whistleblowers

The U.S. has 59 whistleblower protection laws at the federal level alone. Forty-nine target corporate employees, three address employees of government corporations, and the rest apply to various federal employees. There are six main categories:

1. Whistleblower Protection Act of 1989 (WPA)<sup>183</sup> This is the nation's primary whistleblower law, covering employees in the federal civil service. It provides for informal investigations by the U.S. Office of Special Counsel. Whistleblowers can also pursue their own administrative due process hearing, but do not have judicial access except for appellate review.

2. Laws administered by the U.S. Department of Labour (DOL)<sup>184</sup>. The DOL enforces 22 laws that protect whistleblowers that challenge violations of particular statutes. There are four generations of DOL-enforced laws, with different burdens of proof and levels of due process:

- The Occupational Safety and Health Act which provides no due process remedy.
- Transportation safety and environmental laws which provides an administrative due process remedy.
- Several laws that limit due process to an administrative remedy, but include a modern, more pro-employee version of the reverse burden of proof.
- A fourth group of 12 laws that not only provide administrative due process and modern burdens of proof, but also allow whistleblowers to move their cases to U.S. District Court for a jury trial if there has not been a timely administrative ruling.

3. Contractor whistleblower laws with administrative remedies through U.S. Offices of Inspector General. This gives all federal contractor employees access to U.S. District Court for jury trials. Under these statutes, the administrative remedy is an investigation by the relevant agency Office of Inspector General, which can also consider any alleged underlying misconduct. The whistleblower can go before federal court with a jury, if sufficient relief has not been obtained within 210 days.

4. The False Claims Act private attorney general law: This statute allows whistleblowers to file "private attorney general" *qui tam* lawsuits in federal court to challenge fraud in government contracts. The U.S. Department of Justice can

<sup>183</sup> As amended by the Whistleblower Protection Enhancement Act of 2012. (WPEA)

<sup>184</sup> [https://www.whistleblowers.gov/statutes\\_page.html](https://www.whistleblowers.gov/statutes_page.html).

intervene in the case and the Act has an anti-retaliation provision for whistleblower protection, allowing whistleblowers to include that charge with the *qui tam* suit<sup>185</sup> and seek relief in federal court.

5. Bounty statutes. In 2010 the Dodd Frank Act<sup>186</sup> dramatically expanded the bounty statute. It established special whistleblower offices at the Securities and Exchange Commission and the Commodities Futures Trading Commission to administer payments. The Dodd Frank bounty provisions include anti-retaliation claims directly, and only, to U.S. District Court. In the Tax Relief and Health Care act of 2006, Congress revived a little-used Civil War era bounty statute for evidence of tax fraud. Numerous other U.S. laws have bounties, but are largely dormant in practice.

6. National security whistleblowers: Military Service members have limited whistleblower rights under the Military Whistleblower Protection Act of 1988. In 2012, the presidential Policy Directive 19 (PPD 19)<sup>187</sup> created rights for intelligence community employees and since has been codified by Congress. However, it does not public freedom of expression nor provides any due process to enforce rights. Enforcement is limited to investigations by the Office of Inspector General and recommendations.

The divergences in national legislation on whistleblower protection mean that this is another area where companies that choose to operate across multiple Member States face additional complexity and need to undertake research and/or take professional advice. Consultations suggest that the larger suppliers of hotline services sell advice on national legislation and its requirements to their clients. It was not possible to establish an estimate of the total spending by companies on such advice.

The variation in legal protection for whistleblowers has the potential to create risks for workers as well as companies. For example, multinational companies that apply international best practices to their operations in countries that have weak legal protection might inadvertently expose their workers in those countries: the workers may not be protected under the national legislation applicable in their Member State.

Similarly workers who have worked in a jurisdiction with strong whistleblower legislation may not know that they do not enjoy the same level of protection when moving to a country with weaker protection.

There is a market for provision of advice on whistleblower legislation and how it varies across Europe, i.e. companies are spending money on such services. There does not appear to have been extensive independent research specifically on the impact of legal complexity variation in whistleblower protection across EU countries on worker decisions about employment and on reporting wrong-doing, and the impacts on variation on company decisions on cross-border investment and trade.

<sup>185</sup> In a *qui tam* action, a private party called a relator brings an action on the government's behalf. The government, not the relator, is considered the real plaintiff. If the government succeeds, the relator receives a share of the award. Also called a popular action.

<sup>186</sup> <https://www.law.cornell.edu/wex/dodd-frank>

<sup>187</sup> [https://www.va.gov/ABOUT\\_VA/docs/President-Policy-Directive-PPD-19.pdf](https://www.va.gov/ABOUT_VA/docs/President-Policy-Directive-PPD-19.pdf).

### **3.3.4 There is little sign that deficiencies of the existing legal framework at national level will be addressed by other means**

The legal analysis identified a number of Member States where proposals for legislation on whistleblower support and protection have been presented to the relevant national parliament. The prospects of these measures being adopted appear to be mixed at best.

All EU Member States have ratified the UNCAC, which contains non-binding provisions on whistleblower protection<sup>188</sup>. Implementation is subject to peer review<sup>189</sup>. In 2012, the UN Office on Drugs and Crime published a thematic review that covered Article 33 (CAC/COSP/IRG/2012/7/Add.1). While not specific to EU Member States, the review concluded that implementation was uneven and noted a wide range of shortcomings. The report noted that overall there is "an absence of specific regulations and systems" and that where protective regulations do exist, they often do not apply to private-sector employees.

While this is an evolving area of law, based on the state of implementation of UNCAC, there is no reason to expect that, in the absence of an EU initiative, whistleblower protection in all EU countries would necessarily improve.

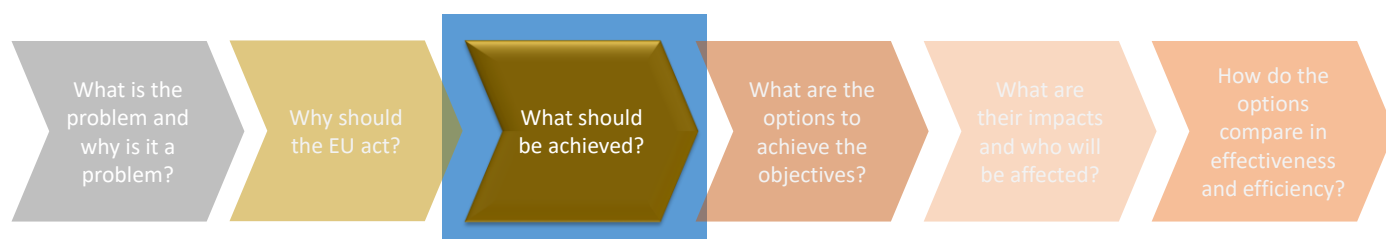
In any event, even possible additional Member State laws, which would further enhance whistleblower support and protection at national level, do not seem likely to remedy the problems associated with legal divergence and complexity across the EU, indeed they may very well increase it. Countries are adopting many different approaches to matters such as the personal scope of the law, what kind of reporting is protected, and whether confidentiality is assured. Where sectorial approaches are adopted, the various exclusions leave gaps that can have indirect cross-border consequences.

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<sup>188</sup> According to Article 33 UNCAC: "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention". A range of other UNCAC articles also underline the importance of providing the right framework for reporting corruption. These include Article 8(4) on facilitating reporting by public officials; and Article 13(2) on anonymous reporting to anti-corruption bodies. They also include three other articles in Chapter III currently under review, namely Article 32 on protection of witnesses, experts and victims; Article 37 on measures to encourage reporting by persons implicated; and Article 39(2) on encouraging reporting to law-enforcement authorities.

<sup>189</sup> Reports are available at <http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>. An analysis of these with respect to whistleblower protection was carried out by the UNCAC coalition in 2015: [http://uncaccoalition.org/en\\_US/learn-more/whistleblowing/](http://uncaccoalition.org/en_US/learn-more/whistleblowing/)

## 4 Objectives



### 4.1 Introduction

This section considers the objectives of a potential EU intervention, considering the analysis of the problem (section 2), the case for EU action (section 3) and potential avenues for action without prejudice to the final assessment by the Commission about the legal feasibility of the options, with regard to the limits of the Union's competences and to the rules relating to their exercise (subsidiarity and proportionality).

### 4.2 Objectives for EU action on whistleblower support and protection

Clarity and coherence of objectives is scrutinised closely in the review of legislative proposals. The Commission's Better Regulation Toolbox defines objectives as follows:

*Objectives link the analysis of the problem (and its drivers) to the options for the policy response. They set the level of policy ambition, fix the yardsticks for comparing policy options and determine the criteria for monitoring and evaluating the achievements of implemented policy.*

*Better Regulation Toolbox, Tool #16. page 100.*

It notes that general, specific and operational objectives will generally be needed for a legislative initiative. These are defined as shown in Table 4.1.

Table 4.1 Objective definitions

Type of goal	Explanation
General	These are the Treaty-based goals which the policy aims to contribute to.
Specific	These set out concretely what the policy intervention is meant to achieve. They should be broad enough to allow consideration of all relevant policy alternatives without prejudging a particular solution i.e. the specific objectives are part of the intervention logic: problem-drivers-specific objectives-policy options.
Operational	These are defined in terms of the deliverables of specific policy actions. As such, they are typically option-specific. These should not, therefore, be reported in the same place in the impact assessment report as the general and specific objectives but reported in the section referring to the preferred policy option and in relation to monitoring and evaluation.

Source: *Better Regulation Toolbox, Tool #16.*

Operational objectives are generally set after the identification of the preferred option.

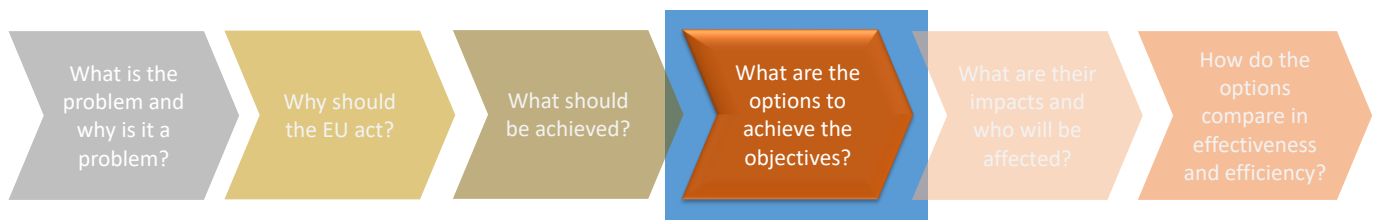
Table 4.2 provides general, specific and (provisional) operational objectives for EU action to support and protect whistleblowers.

**Table 4.2 Objectives for EU action to support and protect whistleblowers.**

Category	Definition
General objective <i>(leading to the achievement of impacts)</i>	<p>The general objective of EU action is to:</p> <ul style="list-style-type: none"> <li>■ contribute to the reduction of harm from wrongdoings by ensuring that whistleblowers can report such instances without fear of retaliation and to reduce the personal cost of retaliation for the whistleblowers;</li> <li>■ support good governance, transparency and enforcement of the law; and to</li> <li>■ enhance the functioning of the internal market by strengthening protection against wrongdoing such as corruption, fraud, tax evasion and wilful non-compliance with standards for products and services.</li> </ul>
	<p>The achievement of this general policy objective will be manifest in, an increase in the reporting rate of wrongdoings via reporting channels, in the reduction of the personal cost of retaliation to whistleblowers (including their improved welfare and fewer infringements of workers' rights).</p> <p>An impact expected in the medium to long term is to strengthen the deterrence against wrongdoing, based on increased risk of exposure by whistleblowers who will be protected from retaliation. This is expected to lead to a reduction, as compared to the baseline, of the level of harm to the public interest through more wrongdoing being prevented, reported and remedied.</p> <p>It will also safeguard and promote freedom of expression and information, including the freedom of the media.</p>
Specific objective <i>(leading to the achievement of results)</i>	<p>The specific objectives of EU action are to:</p> <ul style="list-style-type: none"> <li>■ increase the reporting rate of wrongdoing and to reduce the number of whistleblowers affected by retaliation;</li> <li>■ provide legal clarity and certainty for whistleblowers over their protection in the whistleblowing process, a level playing field for whistleblowers and businesses across the EU, and a consistent level of protection for whistleblowers.</li> </ul>
Operational objective <i>(leading to the achievement of outputs)</i>	<p>To implement the relevant measures to ensure effective whistleblower support and protection.</p>

Category	Definition
	<p>The operational objective will be achieved when the following outputs are delivered:</p> <ul style="list-style-type: none"> <li>■ Organisations in scope of the legislation are aware of their obligations for whistleblower support and protection.</li> <li>■ All workers in the scope of the legislation have access to an effective reporting channel.</li> <li>■ Workers are aware of the reporting channels and any supplementary sources of advice.</li> <li>■ Employers have appropriate policies, procedures and capabilities in place to manage suspected cases of retaliation against whistleblowers.</li> </ul> <p>Tiered system of reporting is functioning as intended.</p> <p>Progress towards the operational objective is also indicated by:</p> <ul style="list-style-type: none"> <li>■ Workers who suspect wrongdoing being willing to report it.</li> <li>■ Reports made through recognised channels being properly assessed and, where appropriate, investigated.</li> </ul> <p>The proportion of whistleblowers who experience retaliation declining.</p>

## 5 Options



The purpose of this section is to:

- Specify the baseline scenario that is the reference against which policy options are compared; and
- Provide a detailed specification of the options for EU action considered in this appraisal, including an intervention logic and the theory of change for each one.

This section does not seek to quantify impacts. Impacts are addressed in section 6.

### 5.1 Baseline Scenario

#### 5.1.1 Introduction

The baseline scenario is the reference scenario against which the ‘with policy’ options are compared. The baseline scenario should describe the evolution of the relevant issues and situation in the absence of additional EU level action: it is not a ‘status quo’ or ‘no change’ proposition but instead should be dynamic. This means that it should consider any economic and legislative changes anticipated in the period analysed. A dynamic baseline scenario has been used for this analysis.

In considering the definition of the baseline scenario the following types of change versus current status were considered:

- Change in the size and distribution of the population of affected stakeholders, principally employers and workers (broadly defined).
- The existing legal baseline at national and EU level and how that is expected to change, taking into account legislative action that is already approved by Member States Governments and will be introduced prior to 2026.
- Changes in the scale of retaliation against whistleblowers or to under-reporting of wrongdoing that will occur in the absence of further EU action (changes in the scale of impacts in the baseline related to the size of the population, economic growth projections and other effects, such as a lagged response to legislation recently introduced).

The determinations made for each of these in the specification are described below.

## 5.1.2 Specification

### 5.1.2.1 Socio-economic baseline

In the baseline scenario changes in the size and distribution of the EU workforce are taken from Cedefop skill demand and supply forecasts<sup>190</sup>. Labour force data are taken from Eurostat (Labour Force Survey<sup>191</sup>). The size of the workforce was estimated by Member State and sector of the economy up to 2024. The size of the workforce is assumed to remain constant after 2024.

Labour costs were taken from Eurostat schedules of hourly labour cost for each Member State<sup>192</sup>. The cost of labour is expected to change over the period of analysis, as the level of output and productivity increases. The labour costs have been assumed to rise in line with the growth rate of GDP based on projections from the World Bank.

Data on the assumed size of the labour force in the baseline scenario are provided in Annex 7.

### 5.1.2.2 Legal baseline

The analysis of the current situation conducted for this study identified numerous legislative acts adopted at Member State level that are directly relevant to the current study. The relevant laws in each Member State and the legal obligations for the provision of channels, procedures and protection for whistleblowers as of the end of 2016 are described in detail in Annexes 10 and 11. The current legal (baseline) situation is summarised in section 3.2 of this document and is not repeated here.

In the baseline scenario the protection provided in law to whistleblowers is not consistent across Europe. In some Member States the law provides horizontal protection to whistleblowers against retaliation while in others there is little or no protection and may be limited to specific sectors. The same situation applies to the extent of current obligation of employers to provide reporting channels for whistleblowers. Some protection to whistleblowers is provided by certain instruments of EU law (Annex 4), but again it is partial.

The stock of national legislation applicable to whistleblowers has grown. It is expected to continue to increase as Member States act to address different aspects of the problem, in different ways, for different sectors whilst adopting different definitions of whistleblowing. However, although a number of EU Member States are currently drafting, or discussing at political level, new forms of protection for whistleblowers in terms of legislation, the prospect of such legislation being finally adopted remains uncertain. It has thus not been included in the baseline.

To the extent that Member States do strengthen and extend their national legislation in the absence of EU action, then compliance costs and impacts on most dimensions of the problem attributed to EU action that are provided in this assessment will be over-stated.

The baseline also takes implementation issues into account. Those Member States that have comprehensive legislation may experience incomplete implementation that

<sup>190</sup> Cedefop – skills forecasts: <http://www.cedefop.europa.eu/en/events-and-projects/projects/forecasting-skill-demand-and-supply/data-visualisations> .

<sup>191</sup> Eurostat, Labour Force Survey: <http://ec.europa.eu/eurostat/data/database> . (Ifsa\_egan22d), 2015

<sup>192</sup> Eurostat, Labour costs: <http://ec.europa.eu/eurostat/data/database> . [lc\_lci\_lev]

reduces the level of effective protection provided to whistleblowers. Reports<sup>193</sup> from stakeholders suggest that certain countries that have comprehensive legislation do indeed have problems with achieving an effective implementation of the legal requirements for whistleblower support and protection. Though there may be protection in national law, it is not necessarily the case that there is effective protection against retaliation in reality, or that effective, secure reporting channels are available to employees in all the circumstances that the law requires them to be. As discussed in section 2, the efficacy of whistleblower regimes is affected by workplace and wider societal attitudes to reporting of wrongdoing. The socio-cultural change required may be significant and require more than legislative action. An important aspect of the baseline situation are the statistics on worker and citizen surveys on matters such as willingness to report wrong-doing and attitudes to whistleblowers.

The baseline scenario also includes an assumption about the number of employers in the EU that provide whistleblower protection to their employees when they are not obliged to do so by EU or national law. Employers may have whistleblower support and protection arrangements because they are required to do so by third country legislation (e.g. certain US firms<sup>194</sup>) or have chosen to develop such policies on a voluntary basis. There is uncertainty about the scale of this 'additional' whistleblower protection and how many workers might benefit from it.

ICF has assumed that, in addition to obligated employers, an additional 10% of employers provide support for whistleblowers (including reporting channels). This equates to 28,000 employers in 2022.<sup>195</sup> An alternative assumption of 5% voluntary provision yields an estimate of 14,000 employers providing whistleblower support and protection in 2022. An assumption of 15% yields a figure of 41,000 employers.

As a general proposition, the higher the level of 'voluntary' whistleblower support by employers, the lower the additional costs of EU action.

### 5.1.2.3 Operational costs in the baseline scenario

In the baseline scenario, in 2022 the cost to employers of providing reporting channels is estimated to be over €720 million.

Research suggests that most firms in the EU that providing reporting channels use internal channels rather outsourcing this function to a third party provider.<sup>196</sup> The cost to employers to provide an internal reporting channel is typically lower than for an outsourced reporting service, though this is not readily verifiable. The greater popularity of internal channels means that, despite the lower cost per employee, the

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<sup>193</sup> One such example is <http://transparency.sk/sk/english-governments-protection-of-whistleblowers-is-insufficient/>; others were reported in confidence during consultations.

<sup>194</sup> US Government statistics suggest that US majority-owned affiliates employed around 5 million people in Europe in 2014. The share of these employees subject to US law on whistleblower protection is undetermined. Source: Bureau of Economic Analysis, US Department of Commerce. Worldwide Activities of U.S. Multinational Enterprises: Preliminary Results From the 2014 Benchmark Survey. U.S. MNE Activities: Preliminary 2014 Statistics, [https://www.bea.gov/international/pdf/usdia\\_2014p/Group%20I%20G1%20to%20G5.pdf](https://www.bea.gov/international/pdf/usdia_2014p/Group%20I%20G1%20to%20G5.pdf)

<sup>195</sup> No third party data were located on current voluntary provision of reporting channels in Europe. The assumption is based on consultations with compliance and legal professionals and businesses providing hotline services. The interviews found that only a small proportion of businesses were willing to offer whistleblowing protection when this was not required by legislation. For this purpose of this analysis the proportion of businesses providing voluntary protection includes businesses required to provide protection by third country (e.g. USA) legislation.

<sup>196</sup> This information was collected from consultations with businesses that provide hotlines, whistleblowing services and compliance / legal professionals.

total value of projected expenditure on internal reporting channels is slightly higher than that on outsourced reporting channels (slightly over half the total cost of reporting channels in most policy options).

#### 5.1.2.4 Retaliation and reporting of wrongdoing in the baseline scenario

The current scale of the two principal dimensions of the problem – retaliation against whistleblowers and under-reporting of wrongdoing – is explained in detail in section 2 of this report and not repeated here. Section 2.4 provides estimates of the scale of fraud and other wrongdoing that could be reduced through dissuasion and prosecution with effective whistleblowing systems in place.

The problem definition presented in section 2 suggests that the under-reporting of fraud, corruption, environmental crime, violations of health and safety legislation, and other wrongdoings perpetrated in the workplace is likely to continue.

The variety of laws protecting whistleblowers in the EU increase operational complexity for employers operating in multiple Member States<sup>197</sup>. Employers have to be aware of multiple laws and potentially have different systems in place as a consequence of the different laws. The complexity of the legal situation creates an additional cost to these employers.

The baseline scenario is therefore characterised by a continuation of the problems<sup>198</sup>, explained in section 2, which could be solved by an increased EU whistleblower protection. These include:

- Increased risk to the operation of the Single Market as a consequence of Member States adopting different definitions and solutions. The lack of consistency risks creating:
  - additional costs for companies that operate in Member States that have different rules.
  - uneven levels of defence against wrongdoings whose consequences (for product safety, public safety, the environment, etc.) spill over national borders;

Other aspects of the baseline scenario are:

- An assumption that the current 'socio-cultural' conditions that contribute to wrongdoing and hinder whistleblowing will continue where there is no specific action.
- An assumption that some employers provide reporting channels and protection from retaliation above those required by national legislation (for example multinational companies complying with the legislation of other Member States or the US).
- An assumption that the scale of wrongdoing and the proportion of wrongdoing that is reported remains constant in the absence of specific additional action.

Robust, comparable official data for the EU as a whole on the number of reports of wrongdoing and cases of retaliation and other relevant aspects of the problem (e.g. incremental costs to business arising from regulatory complexity) are not available.

<sup>197</sup> Verified in one-to-one telephone consultations with legal and compliance professionals and hotline providers.

<sup>198</sup> The problem definition presented in section 2 suggests that the current rates of fraud, corruption, environmental crime, violations of health and safety legislation, and other wrongdoings perpetrated in the workplace are likely to continue.

Accordingly, estimates have been developed as part of the impact assessment and are described in section 6.

## 5.2 Intervention logic

This study explores the expected impacts of defined horizontal or further sectorial action at EU level to strengthen the protection of whistleblowers. A horizontal initiative would aim to cover the broadest possible range of persons and situations / whistleblower reports and provide the most comprehensive protection possible, along the lines of the 2014 Council of Europe Recommendation. Sectorial initiatives would seek to provide protection in connection to specific Union interests or rules, or in specific policy sectors.

An overarching intervention logic for EU action to provide protection for whistleblowers is presented in Figure 5.1. It presents the inputs and activities which are required for any intervention to make the desired impact, and the outputs and outcomes which are the stepping stones towards achieving the impact. An overarching intervention logic has been presented as each of the policy options considered here aims to achieve similar outcomes using similar approaches. However, some policy options are focussed on specific sectors and/or activities. Therefore some activities and outputs and outcomes only relate to specific policy options. These are highlighted with a (\*) in Figure 5.1 and the activities and scope of each option are discussed in more detail in subsequent sections.

The options were provided to ICF by the European Commission. Summaries are provided in Table 5.1. Table 5.2 shows what specific elements are included in the specification of each legislative option<sup>199</sup>. Annex 5 gives further details.

Table 5.1 Option summary

No.	Working title	Summary
1	<b>Non-legislative approach to providing horizontal general protection in all areas</b>	This is a non-legislative option that comprises a 'soft law' measure intended to support the construction of more robust national whistleblower systems, specifically release by the Commission of general recommendations to the Member States on good practice in whistleblower legislation and associated communications and implementing systems.
2	<b>Horizontal general protection in all areas</b>	A legislative initiative obliging Member States to introduce a full set of safeguards to protect whistleblowers both in the public and private sector without the protection being limited to a specific sector of activities intended to support the construction of more robust national whistleblower systems to fight the power imbalance that people experience when raising a concern about wrongdoing within a working relationship.
3	<b>Protecting the financial interests of the Union</b>	An initiative obliging Member States to provide reporting channels and to protect, as a minimum, from employment related retaliation whistleblowers both in the public and private sector who report violations of national/EU rules on safeguards for the protection of the financial interests of the Union <sup>200</sup> .
4	<b>Enhancing the good</b>	An initiative obliging Member States to provide reporting channels

<sup>199</sup> The table covers option specification only, it does not show the specific or comparative scale of impact of the options.

<sup>200</sup> For the purposes of the analysis the financial interests of the Union are understood to cover (a) EU expenditure / disbursement of EU funds and (b) activities relevant to EU income, which would include the collection of VAT (and so VAT fraud).

No.	Working title	Summary
	<b>functioning of the internal market</b>	and to protect whistleblowers both in the public and the private sector who report about wrongdoings in relation to all EU policy areas crucial for the proper functioning of the internal market, including tax evasion and avoidance, competition law, public health and food safety, environmental protection, consumer protection, transport, energy and public procurement.

The intervention logic shows that each policy option requires inputs from different actors, notably the European Commission; Member State governments and employers. These inputs will fund the activities required to achieve the outputs, outcomes and impacts. Their roles are summarised as follows:

■ **European Commission:**

- In a non-regulatory scenario, the Commission addresses general recommendations on whistleblower protection to Member States. The recommendations on minimum standards and best practice in whistleblower protection and support are presented with a view to encourage uptake of this model by the EU Member States and to encourage greater harmonisation of the approaches adopted in the EU.
- The Commission will develop legislation (for options where legislation is required). This will involve transposing the policy options into legislation.
- In some policy options (2, 3 and 4), there is a need for EU institutions to act as a reporting channel – in that cases of wrongdoing will be reported to the EU institution by workers, employers or third parties who receive reports of wrongdoing. Where this is the case, the EU will have to use additional resources to provide training and ensure that those in scope have appropriate reporting channels available and can respond (and potentially investigate) cases of wrongdoing.

■ **Member States:**

- Where new legislation is introduced in a policy option, Member States will be required to transpose the EU legislation into national law. In order to do this, Member States must invest resources to update national legislation.
- Where general recommendations are issued to Member States, the Member States will consider the information and may use it to inform the design of national legislation and/or to inform the specification of information and guidance provided to employers and other relevant organisations.
- The policy options either extend the scope of the reporting of wrongdoing or increase the protection of whistleblowers. In all options, it is likely that the number of reported cases and investigations of wrongdoing will increase. Therefore, Member State governments need to provide resources for staff to be trained to investigate wrongdoing and to investigate the additional reported cases. This will help to reinforce the legislation and promote behaviour change.

Figure 5.1 Overarching intervention logic

**Problem:** There are two main components: (1) many whistleblowers suffer retaliation for speaking up and (2) many workers who suspect or observe wrong-doing in the workplace do not report it. The retaliation suffered by whistleblowers can harm their physical and mental well-being, income, career, safety, etc... The under-reporting means that wrong-doing such as corruption, fraud, tax evasion, negligence and actions that threaten the environment and public health and safety is less likely to be exposed, undermining the rule of law.

**Solution:** The Commission introduces legislation / guidance that obliges / encourages Member States to introduce independent reporting channels and to protect workers in the public and private sector who speak up about wrong-doing. The measures will affect the number of cases of wrongdoing, which will then impact upon a series of socio-economic indicators.

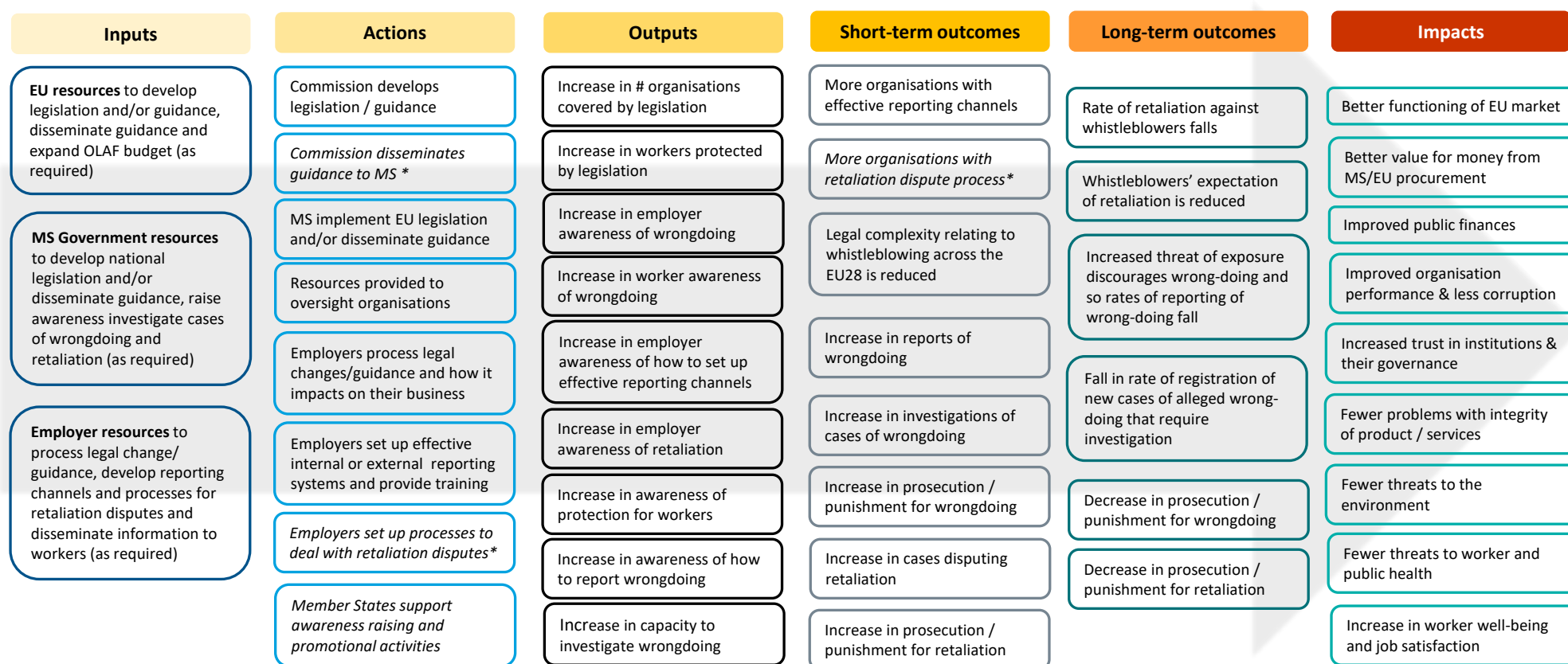


Table 5.2 Specification of legislation options

Legal basis	Option specification		
	Option 2	Option 3	Option 4
<b>OBLIGATIONS</b>			
Establish appropriate reporting procedures	Yes	Yes	Yes
Ensure protection against employment-related retaliation	Yes	Yes	Yes
Provide that compliance with rules on whistleblowing constitutes defence in criminal proceedings against whistleblowers for defamation, breach of professional secrecy etc.	Yes	Yes	Yes
Provide that retaliation by employer can be criminally prosecuted	Yes	Yes	Yes
Private sector in scope	Yes	Yes	Yes
Public sector in scope	Yes	Yes	Yes
<b>SCOPE OF PROTECTED DISCLOSURES</b>			
Misconduct, wrongdoing, or illegal activity of which workers become aware in the context of their work-based relationship to protect the public interest			
Misconduct, wrongdoing, or illegal activity affecting the financial interests of the Union		Yes	
Misconduct, wrongdoing, or illegal activity or violation of EU rules and national implementing rules in all EU policy areas crucial for the proper functioning of the internal market			Yes
Misconduct, wrongdoing or illegal activity in relation to ALL national and ALL EU rules	Yes		
<b>PROTECTION SUBJECT TO THE FOLLOWING TESTS</b>			
Public interest	Yes		
Good faith	Yes	Yes	Yes
Tiered approach	Yes	Yes	Yes
<b>INTERNAL REPORTING CHANNELS</b>			
Appropriate procedures for the employees to report internally through specific independent (and possibly also anonymous) channels	Yes	Yes	Yes
Proportionate to the nature and size of the entity	Yes	Yes	Yes
<b>EXTERNAL REPORTING CHANNEL</b>			
To national authorities / EU authority	Yes	Yes	Yes

Legal basis	Option specification		
	Option 2	Option 3	Option 4
To OLAF		Yes*	
<b>PROCEDURAL GUARANTEES</b>			
Confidentiality of the data of the reporting person	Yes	See note 1	Yes
Protection of the data of both the reporting and the reported person	Yes		Yes
Obligation of national authorities to follow up on the reports within a certain timeframe and give feedback to the whistleblowers	Yes		Yes
Rights of defence of the reported persons (incl. right to access to the file, to be heard and to seek effective remedy)	Yes		Yes
Further guarantees can be similar to those provided in Directive 2015/2392 on market abuse	Yes	Yes	Yes
Publicising information on available channels and protection	Yes	Yes	Yes
Providing for dedicated communication channels and for record-keeping of reports received	Yes	Yes	Yes
<b>FORMS OF PROTECTION</b>			
Reversal of burden of proof in employment disputes	Yes	Yes	Yes
Remedial measures: actions for reinstatement; for compensation; for award of damages; interim relief for suspension of dismissal	Yes	Yes	Yes
Ensure whistleblowers' access to comprehensive information and independent advice on remedies and procedures available (for instance to ombudsman/specific helpline). Whistleblowers to have a right to be certified as such by competent authorities for the purpose of employment disputes and criminal and civil proceedings	Yes	Yes	Yes
<b>OBLIGATIONS ON COMPETENT NATIONAL AUTHORITIES</b>			
To regularly review their procedures	Yes	Yes	Yes

*The table shows only what is included in the specification of each option. It does not indicate specific or relative impact of options.*

#### Notes

*Note 1: Further guarantees can be similar to those provided in Directive 2015/2392 on market abuse, e.g. related to handling of reports by dedicated staff, allowing for anonymous reporting, publicising information on available channels and protection, and providing for dedicated communication channels and for record-keeping of reports received.*

*Note 2: Option 1 is a non-legislative option and so not shown in this table.*

*Note 3: See Table A3.1 in Annex 3 for detailed option specification.*

■ Employers:

- In all the policy options involving legislation, responsibility is assigned for assessing how change in legislation would affect the organisation. This would include examining what changes needed to be made to their policies and procedures in order to comply with the new legislation or guidance. This would be an administrative cost, but is necessary for employers to understand the legislation and put procedures in place to promote behaviour change.
- Where this is provided by the guidance and/or legislation, employers will be responsible for setting up reporting channels, either using internal systems or through engaging a third party. This will incur a cost to employers as systems will need to be put in place which comply with the legislation or guidance. The reporting channels are needed to comply with the legislation but also to promote behaviour change.
- In options 2, 3 and 4, additional protection (i.e. legal protection from retaliation) for whistleblowers is provided. Employers will need to make changes to their procedures (and potentially data collection) so that they can provide employees with the correct information and mitigate against a claim of retaliation. This activity will help to deter employers from retaliating (as they will be more aware of losing legal disputes for retaliation) and therefore promote behaviour change within an organisation which will reduce the number of cases of retaliation in the longer term.
- Employers will need to disseminate all changes in the legal framework, changes to their policies and procedures to their workers. This could be through mandatory training or other forms of awareness raising. This is an important activity in achieving the aims of the policies, because if workers do not become aware of the law and the changes in policy then nothing will change from the current situation.

These activities will lead to changes in skills and knowledge, which are categorised as outputs in the intervention logic. These are:

- Changes in the number of employers covered by legislation and changes in the number of workers protected by legislation, both of which are caused by the introduction of EU and national legislation in options 2, 3 and 4.
- Employers become more aware of wrongdoing covered by the legislation, how they should set up reporting channels (and what is required of them), what constitutes retaliation and how the legal process treats cases of retaliation.
- The dissemination of information by employers to workers leads to changes in awareness and knowledge among the workforce. Workers will become more aware of the legislation, reporting channels, their rights regarding whistleblowing and what constitutes wrongdoing and retaliation.
- The increase in resources and provision of training by Member State governments and the European Commission means that more staff are trained and available to investigate reports of wrongdoing.

The changes in skills and knowledge are expected to lead, over time, to changes in behaviour. These changes generate the outcomes detailed in the intervention logic. These can be split into short term and long term outcomes, as the pattern of some changes in behaviour is expected to evolve over time.

The change in the legislation and provision and dissemination of recommendations at EU and Member State level leads to an increased awareness among employers of the requirement for reporting channels, which in turn translates into more employers providing reporting channels. As employers will be required to provide reporting channels in the long term, some increases in employment in employers providing reporting channels will be sustained. Changes in technology may lead to changes in the labour intensity of such services.

In the short term, the increase in awareness and knowledge of wrongdoing and how to report wrongdoing, alongside increased knowledge of the protection afforded to whistleblowers, is expected to lead to an increase in the number of reported cases of wrongdoing. This increase in the reporting of wrongdoing, alongside the increase in the number of trained individuals who can investigate cases of wrongdoing, will lead to an increase in the number of investigations and prosecutions/actions against wrongdoing. The increase in the number of reports of wrongdoing is also likely to increase the number of whistleblowers who enter a dispute with their employer over retaliation actions, and the number of employers punished for taking retaliation actions.

The situation is expected to evolve further over time. As workers and employers observe prosecutions and punishments for wrongdoing and retaliation taking place there is expected to be a dissuasive effect on wrongdoing and retaliation against whistleblowers. The incidence of both will decline as individuals and employers will increasingly fear detection and prosecution. This will ultimately lead to a relative decrease in the number of reported cases and investigations and prosecutions/punishment for wrongdoing and retaliation.

It is therefore important to understand what is needed beyond legislation to ensure that the benefits are realised. Consultations with providers provide some evidence that a large share of corporate ethics hotlines are not used because either people do not know about them or employees do not trust that reports will be confidential and acted upon.<sup>201</sup> Maintenance of reporting infrastructure that is not used even as wrongdoing persists is a deadweight cost on firms and on the economy at large.

The changes in behaviour described above will, according to the core theory, reduce the scale and impact of wrongdoing. The reduction in the volume of wrongdoing will benefit Member States through a reduction in the amount of tax evasion, improvement in the value for money of public procurement, and reductions in the level of public expenditure on public health risks. Expenditure on judicial proceedings relating to wrongdoing (and retaliation against whistleblowers) should decline as compared to the baseline. Changes in behaviour could also reduce environmental crimes and threats (which could also have a positive impact on public health) and improve individual well-being. Finally, there are expected benefits to employers in improved productivity and lower rates of staff turnover. Additionally, as there will be fewer cases of wrongdoing and retaliation, the legal costs for employers will also be reduced as compared to the baseline.

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<sup>201</sup> ICF consultations with businesses offering whistleblowing services and hotline providers.

## 5.3 Option 1 - Non-legislative approach to promoting horizontal general protection in all areas

### 5.3.1 Specification

This is a non-legislative option that comprises a 'soft law' measure intended to support the construction of more robust national whistleblower systems. The problem definition identified fear of retaliation (due also to lack of confidentiality) and lack of awareness of reporting channels and procedures as two main factors which may reduce the propensity to report wrongdoing and thus contribute to low levels of reporting. Additionally, the analysis of national legislation shows a large degree of inconsistency in definitions of 'wrongdoing' and 'retaliation' that are provided in the legislation. Interviews with stakeholders, experts and the literature review also show that what is reported to hotlines varies (in many cases hotlines receive reports about relations with colleagues that do not qualify as matters of public interest). Concepts of retaliation and wrongdoing are affected by culture and values deeply rooted in society; what may be considered as retaliation, misconduct or wrongdoing in one country might not be necessarily perceived as such in another.

Any non-legislative action should focus on providing guidance to Member States which would then need to cascade it down to interested actors at national and organisational levels.

The EU action would therefore take the form of general recommendations addressed to Member States on:

- Good practice on designing normative, institutional and judicial frameworks to support and protect whistleblowers;
- Awareness raising and educational campaigns on the availability and use of reporting procedures and on the protection provided to whistleblowers (its scope and conditions);
- Educational campaigns and guidance on the concept of whistleblowing to protect the public interest.

These recommendations would draw upon international standards developed, in particular, by the Council of Europe and the UNCAC Convention. They would cover the most essential elements of well-structured whistleblower protection regimes.

### 5.3.2 Theory of change

The theory of change for Option 1 is that recommendations produced by the European Commission will have an impact on the consequences of retaliation against whistleblowers and under-reporting of wrongdoing by:

- Influencing the specification of new national legislation by Member States so as to encourage uptake of good practice frameworks for whistleblower support and protection, especially in those countries that are actively seeking to extend and improve their legislation in this area;
- Helping, via promotion of the good practice model, to establish more consistent legislative norms in this area that reduce variation among Member States;
- Influencing Member States' own communication actions so as to increase the accessibility and impact of guidance to employers and other relevant stakeholders on how to support and protect whistleblowers;

- Leading to change in institutional and individual behaviours such that the current problems and their consequences are reduced.

The impact of recommendations is reduced where, for example, the information is not sufficient condition for change (e.g. where the target audience understand what to do but lack the capacity to effect change). Similar information may already be in the public domain but if the problem is perpetuated by factors other than an information failure then recommendations will not resolve it.

The recommendations would provide advice that ranges from specification of legislation through to observations on good practice in setting up and maintaining appropriate and independent reporting channels, on reducing risk of retaliation and raising awareness of how to ensure workers are aware of reporting channels and their rights. Additionally, the recommendations should include some information on the costs and benefits of introducing these measures so that stakeholders can make informed decisions about the measures they should put in place (even if they are not required to by legislation).

If the recommendations meets the criteria described above, then this option will have an impact on the knowledge and awareness of Member State governments and from there to organisations and workers, which will then lead to changes in behaviour and then on the socio-economic indicators impacts.

## 5.4 Option 2 – Horizontal general protection in all areas

### 5.4.1 Specification

This option introduces new 'horizontal' legislation to oblige Member States to introduce a full set of safeguards to protect whistleblowers both in the public and private sector. The protection will not be limited to a specific sector of activities. It will support the construction of consistently robust national whistleblower support systems.

The protection of whistleblowers at employers within the scope of the legislation will be universal. Employers with fewer than 50 employees will be exempt from the obligation to provide reporting channels.

### 5.4.2 Theory of change

The legislation will have effect where:

- It provides an additional legal mandate for provision of independent whistleblowing channels at national level.
- Employers are aware of changes in the legislation and their implications.
- Employers change behaviour to comply with the legislation, ensuring that they have effective reporting channels.
- Information is disseminated among workers about the newly set up reporting channels.
- Employers and workers change their behaviour and decisions as a result of the new reporting channels.
- These changes lead to mitigation of the problem.

It will also have an effect where it obliges Member States to introduce legal changes related to protection of whistleblowers (i.e. in cases where current national legislation does not satisfy the legal obligations to protect whistle-blowers introduced under this option).

In Member States that already provide comprehensive protection to whistleblowers and have obligations for employers to provide reporting channels, the incremental effects of Option 2 will be limited.

If the legislation meets the criteria described above, then it will impact on the knowledge and awareness of organisations and workers, which will then lead to changes in behaviour and then the socio-economic impacts presented in section 6. Failure to meet those conditions will reduce the impact. For example, if employers deploy reporting systems that are not effective and lack credibility for their workers and Member States fail to enforce the legislation, it will have little effect on the problem. Similarly, if workers decide not to use the newly set up reporting channels (because, for example, they fear retaliation), the costs will be incurred but there will be little impact on wrongdoing.

Option 2 is broader in scope than Option 3 and Option 4. It covers whistleblowing related to misconduct, wrongdoing or illegal activity in relation to all national and EU rules rather than just to the activities affecting the financial interests of the Union or EU rules and national implementing rules in all EU policy areas crucial for the proper functioning of the internal market.

## 5.5 Option 3 – Protecting the financial interests of the EU

### 5.5.1 Specification

This option introduces new legislation to oblige Member States to provide reporting channels and to protect whistleblowers from employment-related retaliation. This protection would apply to whistleblowers, both in the public and private sector, who report violations of national/EU rules on safeguards for the protection of the financial interests of the Union<sup>202</sup>. The legislation will be developed by the Commission and implemented by Member States within their national legal frameworks.

Employers with fewer than 50 employees will be exempt from the obligation to provide reporting channels.

### 5.5.2 Theory of change

The legislation will have an effect under a very similar set of conditions as Option 2, which is where:

- It requires legislative changes at national level to comply with the EU rules.
- Employers are made aware of changes in the legislation and their implications.
- Employers comply with the legislation.
- Information is disseminated among workers about these changes and their implications.

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<sup>202</sup> For the purposes of the analysis the financial interests of the Union are understood to cover (a) EU expenditure / disbursement of EU funds and (b) activities relevant to EU income, which would include the collection of VAT (and so VAT fraud). The inclusion of VAT means that enterprises registered for VAT are assumed to be in scope. This would include enterprises with more than 50 employees.

- Employers and workers change their behaviour and decisions as a result.
- These changes lead to mitigation of the addressed problem.

It will also have an effect where it obliges Member States to introduce legal changes related to protection of whistleblowers (i.e. in cases where current national legislation does not satisfy the legal obligations to protect whistle-blowers introduced under this option).

The effects of the Option 3 are expected to be smaller than for the Option 2, because Option 2 has a broader range of protected disclosures. Option 2 covers whistleblowing related to wrongdoing in all policy areas whereas Option 3 only covers national/EU financial interests (EU funds are usually mixed with national funds in order to achieve a particular aim), which narrows its scope and therefore its effects. It is understood that this scope would include matters relating EU expenditure and revenues, including VAT.

If the legislation meets the criteria described above, then it will impact on the knowledge and awareness of organisations and workers, which will then lead to changes in behaviour and then on the socio-economic indicators impacts related to protecting national/EU financial interests. The costs and benefits of the legislation are presented below.

A risk associated with this option is the potential lack of clarity about what disclosures (about what types of wrongdoing) are protected. For example, it may be difficult for workers to know whether the wrongdoing they observe concerns meets the test of affecting the EU financial interest. This uncertainty may lead to wrongdoing not being reported.

## **5.6 Option 4 – Enhancing the good functioning of the internal market**

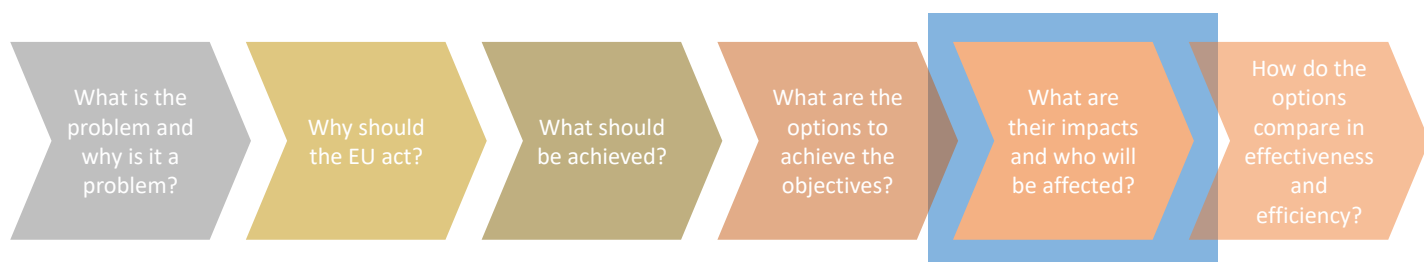
### **5.6.1 Specification**

This option introduces new legislation to facilitate whistleblowing with a view to enhancing the good functioning of the internal market. The legislation obliges Member States to introduce appropriate reporting channels and to protect workers in the private and the public sector who blow the whistle in cases of wrongdoing in policy areas crucial for the proper functioning of the internal market, including tax evasion, public health and food safety, environmental protection, consumer protection, transport safety and public procurement. The legislation will be developed by the Commission and implemented by Member States within their national legal frameworks. Employers with fewer than 50 employees will be exempt from the obligation to provide effective reporting channels.

### **5.6.2 Theory of change**

The conditions for the legislation to have an effect are similar as for Option 3. The legislation under Option 4 has a broader scope than that under Option 3 – it covers whistleblowing related to wrongdoing or violation of EU rules and national implementing rules in EU policy areas crucial for the proper functioning of the internal market, rather than just the financial interests of the EU.

## 6 Assessment of impacts



### 6.1 Introduction

This section explains the impacts of the given set of EU interventions. It is structured as follows:

- Section 6.2 describes the preliminary screening of impacts and the basis for excluding certain options from further consideration;
- Section 6.3 provides a reminder of the options for ease of reference;
- Section 6.4 to 6.6, provide an appraisal of the each type of impact (economic, social, environmental) under each intervention option.

The impact assessment is required to give special consideration to potential impacts on small and medium sized enterprises (SMEs). The specification of the options (to include firms with more than 50 employees) means that some organisations classified as SMEs will fall within scope. Impacts on SMEs are discussed in section 6.7. Private companies with fewer than 50 employees are out of scope of the legislative options.

The assessment considers:

- The short term impacts that arise as an immediate consequence of the EU intervention;
- The long term position;
- The likely transition ‘pathway’ to the long term position – as noted above the introduction of new whistleblower legislation is typically expected to stimulate a process of change that can lead to an increase in reporting of wrongdoing before rates then decline, and it can take a period of time for the socio-cultural changes that help to reduce risk of retaliation to occur.

The research on the problem has shown that legislation is often necessary, but not sufficient, to engender the desired changes in reporting behaviours and in preventing retaliation. Accompanying measures to raise awareness and support a change in attitudes to whistleblowing are also needed. This is addressed in the analysis and commentary.

Costs are in 2017 terms. The operational costs that are presented below are annual costs for the year 2022. This year has been selected to allow for:

- time for legislation to be adopted and then transposed into Member State law; and
- time for reporting channels to be set up, publicised and established.

Many of the implementation and operational costs are based on estimates of the duration of time that workers will spend undertaking tasks related to the changes in the legislation and dealing with reports of wrongdoing. The assessment of time has been converted into monetary values using average labour costs. The labour cost factors used include wages and salaries plus social security costs and other labour costs paid by the employer.

The implementation and operational costs presented are valued using the estimates of the number of employers and workers falling within the scope of the proposed option. This valuation assumes that all employers fully comply with the legal protection defined in the baseline and in each policy option. However, research has shown that some Member States have experienced problems in achieving full compliance with existing legislation on whistleblower support and protection. We note that:

- The baseline scenario is calibrated to the current legal situation in each Member State. If there is non-compliance with existing national laws, the analysis will over-state the level of protection actually being provided against retaliation (as distinct from protection in law) to whistleblowers in the baseline scenario.
- If there is non-compliance with the proposed EU legislative policy options once they are transposed into national law and come into force, the estimates presented in the analysis that follows will over-state the cost of the policy options and the benefits.

The analysis has been conducted using employment data<sup>203</sup>. As described in section 2, whistleblowing channels and protected disclosures are not necessarily restricted to employees but may instead be open to 'workers' as broadly defined to include contractors, volunteers, etc. (Member State whistleblower legislation varies in the scope of the employment relationship governing protected disclosures). The approach taken may result in some under-reporting of costs and benefits insofar as self-employed contractors and SME suppliers that will have access to whistleblower channels of larger firms are excluded from the calculations. In some countries the share of the workforce that is registered as self-employed and works on a contract basis with one or more organisations is growing. These individuals would not be counted in the official data on employees of the firms that use their services.

The analysis of the costs of each policy option is based on an assessment of the current national legislation in each Member State against nine criteria.<sup>204</sup> The differences between the existing legislation in each Member State and the requirements of each policy option influences the calculation of the costs in each policy option. Therefore, in some policy options the new requirements impose no additional costs because existing law already matches or exceeds the specific requirements of the policy option.

The proportion of employers providing support and protection where it is not required by Member State law is assumed to be unaffected by the application of the legislative policy options (Options 2, 3, 4).

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<sup>203</sup> Eurostat baseline data and CEDEFOP skills forecast. Sources are specified in detail in Annex 6.

<sup>204</sup> These are: the types of worker covered; the type of wrongdoing covered; the type of reporting channels required; whether whistleblowers are guaranteed confidentiality; whether whistleblowers are protected from retaliation; whether the burden of proof is reversed (employers have to prove that no retaliation took place); whether the report of wrongdoing had to be made in good faith; whether a tiered approach is required; and whether employers face sanctions.

The estimates of impact of Option 1, as the non-regulatory measure, on the core problems are illustrative and associated with a significant level of uncertainty. There are various pathways through which Commission Recommendations might lead to changes in the obligations imposed on employers and to voluntary actions by business.

## 6.2 Impact screening

This sub-section provides the results of the preliminary screening of impacts. The potential for impact is considered by reference to the following general stakeholder groups: workers, citizens, consumers, enterprises, public authorities and third countries.

Table 6.1, Table 6.2 and Table 6.3 show the screening results and rationale, indicating which impacts were carried forward to detailed assessment and the rationale for deselecting others.

Table 6.1 Impact screening: economic effects

Economic	Commentary	Carry forward to assessment?
Macroeconomic environment	No significant impact foreseen	
Operation / conduct of SMEs	SMEs with >50 employees are in the scope of application of some of the options and , when affected by the policy option, employers would face additional obligations	✓
Regulatory burdens on business	Legislative options place additional requirements on firms with >50 employees	✓
Increased innovation and research	No significant impact foreseen	✗
Technological development / digital economy	No significant impact foreseen	✗
Third countries and international relations	Minor impact foreseen	✓
Functioning of the internal market and competition	Options potentially address the internal market impacts of the baseline scenario, e.g. in product and service markets, and variation in obligations across the EU in relation to whistleblower support and protection, affecting corruption, tax evasion, public procurement, fraud, public health and food safety, environmental protection, consumer protection and transport safety	✓
Energy independence	No significant impact foreseen	✗
Deeper and fairer economic and monetary union	No significant impact foreseen	✗
Consumers and households	Options potentially address the issues in EU product and service markets arising indirectly from gaps in whistleblower support and protection in the EU	✓
Property rights	No significant impact foreseen	✗

Economic	Commentary	Carry forward to assessment?
Public authorities (and budgets)	Options potentially affect public authorities through various routes, e.g.: <ul style="list-style-type: none"> <li>Over time, reducing the propensity for fraudulent use of public funds (by increasing the expected risk of exposure)</li> <li>Imposing additional obligations on public authorities in some countries to provide reporting channels</li> <li>Imposing additional obligations to support whistleblower hotlines and advisory services</li> </ul>	✓
Economic & social cohesion	No significant impact foreseen	✗
Impact in developing countries	No significant impact foreseen	✗
Sustainable development	No significant impact foreseen	✗

Table 6.2 Impact screening: social effects

Social impacts	Commentary	Carry forward to assessment?
Employment	No significant direct impacts on employment are foreseen, though some growth in the sector that provides outsourced internal reporting channels ('hotlines') is expected.	✗
Income distribution, social protection, social inclusion	No significant impact foreseen	✗
Public health and safety and health systems	Options potentially reduce risks to public health and safety by strengthening enforcement of health & safety and environmental protection legislation (by contributing to reducing the under-reporting of violations)	✓
Job standards and quality	Options aim to address retaliation against whistleblowers. Options potentially also offer improvements to the working environment by aiming to reduce under-reporting of wrongdoing that threatens worker health and safety.	✓
Education and training, education and training systems	No significant impact foreseen	✗
Crime, terrorism and security	Options potentially reduce risks relating to crime, terrorism and security by reducing the under-reporting of violations and increasing the prospect of wrongdoing being exposed	✓
Preserving the cultural heritage	No significant impact foreseen	✗

Social impacts	Commentary	Carry forward to assessment?
Governance and good administration	Options aim to support the application of the rule of law and build trust in institutions in the long term by promoting transparency and reducing the under-reporting of corruption, fraud and other wrongdoing	✓
Fundamental rights	Options aim to safeguard and promote freedom of expression	✓

Table 6.3 Impact screening: environmental effects

Environmental impacts	Commentary	Carry forward to assessment?
The climate	No significant impact foreseen	✗
Biodiversity, ecosystems and ecosystem services	Options potentially tackle under-reporting of non-compliance with environmental and animal welfare legislation of the kind reported in the problem definition, including practices that increase risk of severe pollution incidents that may have cross-border effects	✓
Quality of natural resources, fighting pollution		
Reducing and managing waste		
Minimising environmental risks		
Protecting animal welfare		
International environmental impacts	No significant impact foreseen	✗

## 6.3 Option summary

For ease of reference in the analysis that follows the option titles are reproduced in 6.4. Shorthand titles used in the text are shown in bold. Full details of the options' scope are specified in Annex 5.

Table 6.4 Option titles and summaries

No.	Working title	Summary
1	<b>Non-legislative approach to providing horizontal general protection in all areas</b>	This is a non-legislative option that comprises a 'soft law' measure intended to support the construction of more robust national whistleblower systems, specifically release by the Commission of general recommendations to the Member States on good practice in whistleblower legislation and associated communications and implementing systems.
2	<b>Horizontal general protection in all areas</b>	An initiative addressed to EU Member States to introduce a full set of safeguards to protect whistleblowers both in the public and private sector without the protection being limited to a specific sector of activities intended to support the construction of more robust national whistleblower systems to fight the power imbalance that people experience when raising a concern about wrongdoing within a working relationship.
3	<b>Protecting the financial interests of the Union</b>	An initiative obliging Member States to provide reporting channels and to protect, as a minimum, from employment related retaliation whistleblowers both in the public and private sector who report violations of national/EU rules on safeguards for the protection of

No.	Working title	Summary
		the financial interests of the Union <sup>205</sup> .
4	<b>Enhancing the good functioning of the internal market</b>	An initiative obliging Member States to provide reporting channels and to protect, as a minimum, from employment related retaliation whistleblowers both in the public and the private sector who report about wrongdoings in relation to all EU policy areas crucial for the proper functioning of the internal market, including tax evasion, public health and food safety, environmental protection, consumer protection, transport, energy and public procurement.

## 6.4 Economic impacts

### 6.4.1 Costs to obligated organisations (private and public employers)

The following categories of cost to obligated organisations are considered:

- The one-off costs of implementation of new corporate policies, procedures and systems prompted by the legislation;
- The operational costs to obligated organisations;

The analysis starts by considering the number of organisations falling with the scope of the different options.

#### 6.4.1.1 The number of organisations that are required to make changes as a consequence of the options

The introduction of each of the policy options leads to a change in the number of organisations that provide protection for whistleblowers, and the level of protection they provide. The proportions of organisations in each category under each option and in the baseline are shown in Figure 6.1.<sup>206</sup> The data on the change versus the baseline for each option in each Member State are provided in Annex 8.

The principal results are that:

- Policy options 2, 3 and 4 do most to increase the number of entities providing strong protection. Policy option 1 has the potential to increase in the number of entities providing strong protection voluntarily but the impact is expected to be modest.
- Policy options 2, 3 and 4 cause over a quarter of a million employers to move from having no protection measures in place to providing a strong protection for whistleblowers. They also cause an additional 150,000 employers that already provide some protection to enhance it further.
- The largest decreases in the number of employers with no protection are in Germany, Poland, Spain<sup>207</sup> and Italy. This is due to the large number of

<sup>205</sup> For the purposes of the analysis the financial interests of the Union are understood to cover (a) EU expenditure / disbursement of EU funds and (b) activities relevant to EU income, which would include the collection of VAT (and so VAT fraud).

<sup>206</sup> The number of organisations with each level of protection has been estimated by summing the number of employers with each level of protection. This has been estimated separately for the public, financial and environmental sectors, with a fourth category of all other employers (as the legislation in the baseline differentiates between these four sectors). A description of these four sectors is provided in Annex 6.

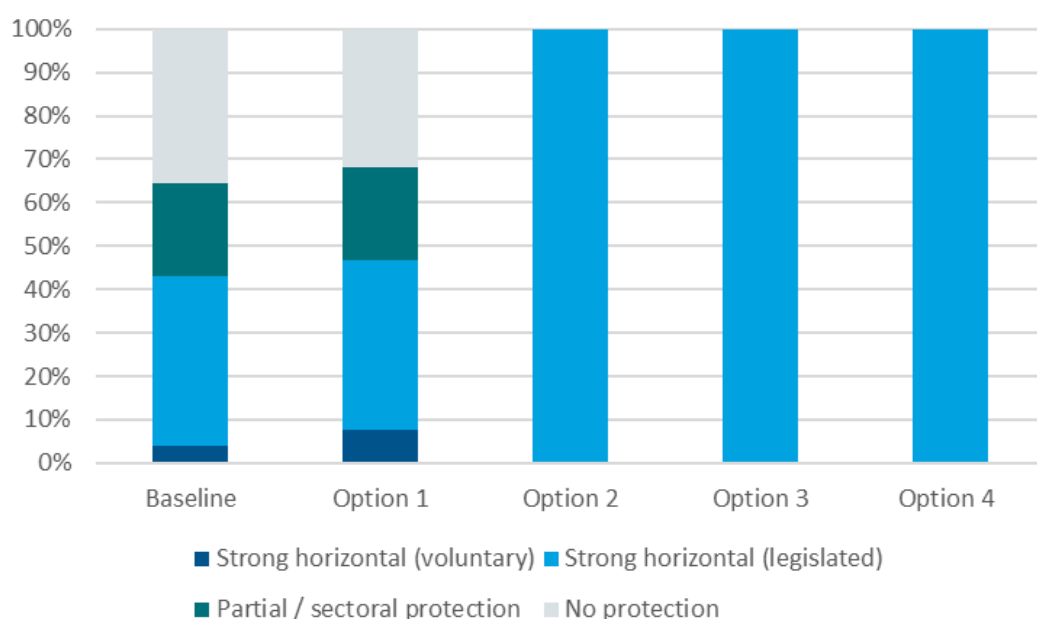
<sup>207</sup> The costs to employers in Spain are based on a legal assessment of national legislation. It does not include an assessment of any sub-national whistleblower protection. To the extent that sub-national legislation provides

employers in these countries and the lack of coverage of the national legislation in the baseline scenario.

- Most (75%) of the employers that move from providing no protection to being obligated to provide high levels of protection under options 2, 3 and 4 are medium-sized employers (private and voluntary organisations with 50 to 250 employees). 18% of the employers that would, under policy options 2, 3, and 4, enhance the level of protection provided (i.e. move from some obligate to protect to a stronger or more extensive obligation) are medium sized businesses. The majority of employers which provided partial protection in the baseline scenario are public sector employers (in some countries there is no protection in law for workers in the private sector employers whereas laws impose some requirements on public sector employers).
- The coverage of employers (i.e. number of employers that fall within the scope of the policy option) achieved by Option 3 is the same as in Option 4, since the former includes all VAT-registered organisations. It is expected that all businesses with more than 50 employees would be VAT-registered.

There are estimated to be 33 million employers in the EU in 2022 with fewer than 50 employees (i.e. overall number of small and micro companies in the EU)<sup>208</sup>. These employers are not covered in the analysis of costs provided below or the number of businesses affected by the scope of the policy option. The exclusion of small and micro businesses links and is made in accordance with the European Commission's better regulation rules.<sup>209</sup>

Figure 6.1 Percentage of employers (both public and private<sup>210</sup>) that would provide different levels of protection after implementation of the EU intervention



ICF analysis

greater protection than that delivered through national law, the number of employers affected in Spain may be over-stated.

<sup>208</sup> Eurostat, Structural Business Statistics. See Annex 6 for details.

<sup>209</sup> [https://ec.europa.eu/info/sites/info/files/file\\_import/better-regulation-toolbox-1\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-1_en_0.pdf)

<sup>210</sup> 'Private' as used here includes voluntary sector organisations.

#### 6.4.1.2 Implementation costs

The costs to employers of implementing the new policies, procedures and systems that result from the additional action to support and protect whistleblowers have been estimated. These are assumed to be one-off costs incurred by employers (both public and private sector) in the first year of the change in legislation. The implementation costs estimated in this research are:

- The cost to employers to interpret the new legislation and develop workplace policies which align with the legislation;
- The cost to employers to set-up or purchase reporting channels to comply with the legislation – either setting up an internal reporting channel within the company, or purchasing a reporting channel from a third party provider (both the time taken for staff to research and commission the provider, and the providers fee); and
- The cost to develop or amend training materials to ensure staff are aware of reporting channels and what constitutes wrongdoing.

The implementation costs will mostly fall to private enterprises, with a small impact on public sector employers. This differential is due to the level of existing protection in the baseline scenario being higher in the public sector than in the private sector. There will be a much smaller implementation cost in subsequent years incurred by organisations that grow to the point that they will fall within the scope of application of the legislation. The regulatory burden on business is assumed to have a negligible effect on workers, citizens and consumers.

The implementation costs to obligated organisations have four main components<sup>211, 212</sup>:

- The cost of interpreting the changes in legislation and implementing these into employment practices where necessary. The model assumes an average of 21 hours of staff time being consumed by this activity per organisation. This level of effort is reduced by 50% if there are few differences between the current legislation (for employers of the given size and sector in the relevant Member State) and the approach proposed in the policy option;
- The cost of researching and implementing new reporting channels where necessary. The model assumes an average level of effort of 14 hours staff time per enterprise for a reporting channel provided using internal resources and, as the alternative, 35 hours for a reporting channel provided by a third part supplier (outsourced reporting channel<sup>213</sup>);
- The cost of purchasing a new outsourced internal reporting channel for those that do so (assumed to be €500 per entity); and
- The cost of developing new training materials where necessary (assumed to be the monetary equivalent of 35 hours labour per entity). The cost is assumed to be reduced by 50% if there are few differences between the legislation applying

<sup>211</sup> The same assumptions have been used for public and private entities.

<sup>212</sup> The number of hours required to complete these tasks has been estimated using findings from the review of evidence and qualitative research with stakeholders in the whistleblowers sector.

<sup>213</sup> These are alternative options - individual firms are assumed to select one or the other.

to the entity in the baseline scenario and the approach proposed in the policy option)<sup>214</sup>.

The options specify that reporting channels should be ‘appropriate’ and ‘proportionate to the nature and size of the entity’ but they do not explicitly specify that training be provided. Consultations with businesses involved in providing reporting hotlines and whistleblowing suggest that training and awareness raising are very important parts of making a reporting channel (and the system that the channel contributes to) effective. Yet some research on corporate ethics hotlines suggests that many firms do not provide training (and also that many hotlines are not used). Details of potential training costs are included to inform discussion of this aspect of the option appraisal.

The monetary value of the implementation costs has been assessed by multiplying the number of employers affected by a change in the legislation by the labour cost and number of hours of work required. This shows that the regulatory burden on obligated organisations is the highest in policy option 2, and the lowest in policy option 1. This is because the changes introduced in policy option 2 affect more employers<sup>215</sup> than those of the other options.

The difference in regulatory burden between options 2, 3 and 4 is small. This is because all three policy options lead to all workers in organisations with more than 50 workers being given a high level of support and protection against retaliation. These three options require the same number of employers to change policies, develop new training modules and introduce reporting channels.

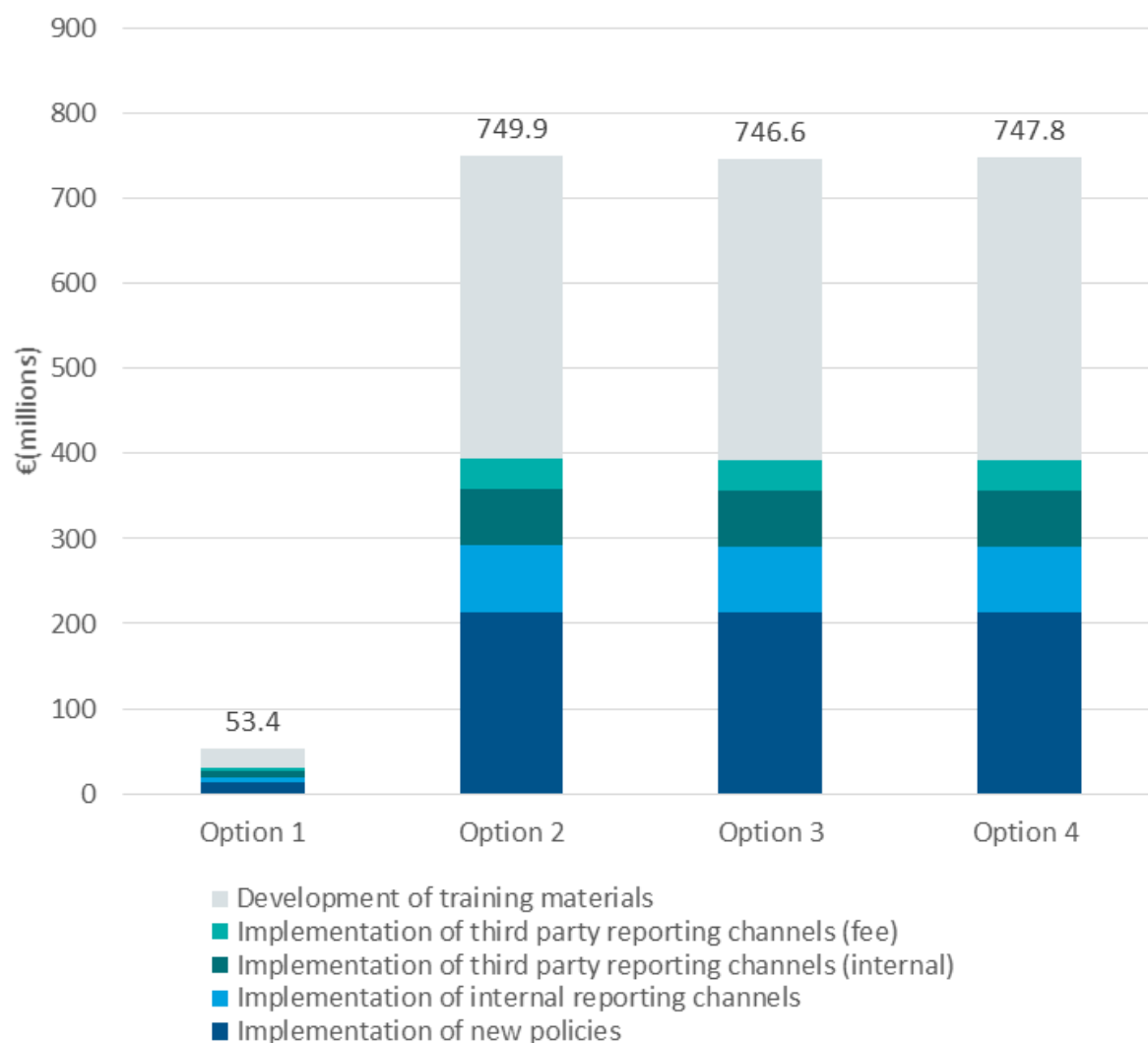
Details of implementation costs per Member State are provided in Annex 7. The results are shown in Figure 6.2, Table 6.5, Figure 6.3 and Table 6.6.

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<sup>214</sup> This is an optional cost, which is not obliged by the policy options. However, in order to promote a culture change within an organisation and good governance it has been recommended as an important success factor.

<sup>215</sup> ‘Employer’ is used here as a shorthand for the organisation that the worker making the whistleblower report has a working relationship with. Whistleblower reporting and protection is not necessarily limited to workers that have a direct contractual employment relationship with the organisation, it may also encompass contractors, volunteers, and others – a matter discussed elsewhere in this report.

Figure 6.2 Implementation costs of policy options



Source: ICF analysis.

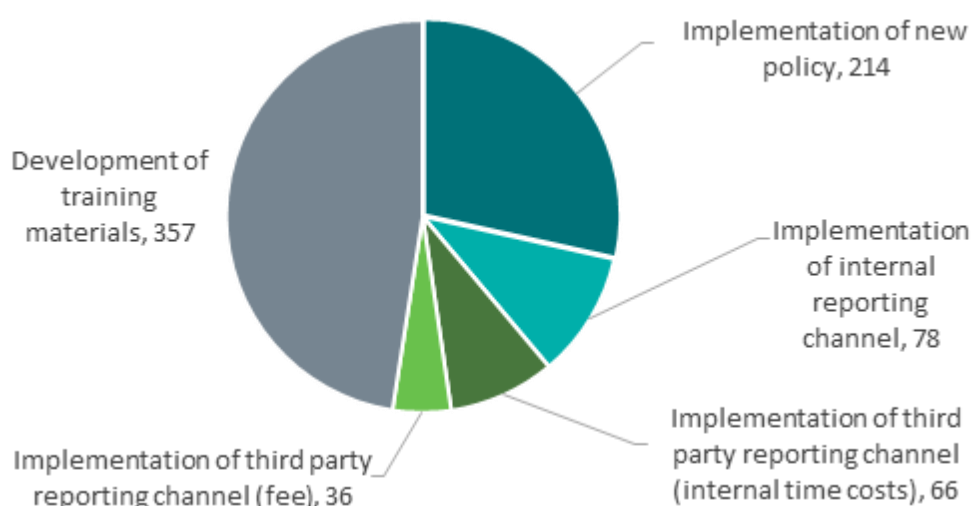
Note: costs are expressed in 2017 €million. Costs are assumed to occur in 2022.

**Table 6.5 Total (one-off) implementation costs by option (€m)**

Option:	1	2	3	4
Implementation of new policy (internal time costs)	14	214	213	213
Implementation of internal reporting channel (internal time costs)	6	78	78	78
Implementation of third party (outsourced) reporting channel (internal time costs)	7	66	66	66
Implementation of third party reporting channel (vendors' set-up fees)	4	36	36	36
Development of training materials (internal time costs)	23	357	355	355
Total:	53	750	747	748

Source: ICF analysis. Note: costs are expressed in 2017 €million. Costs are assumed to occur in 2022. See text for assumptions and caveats. In the table the components do not always sum exactly to the total because of rounding errors on the component totals.

**Figure 6.3 Representation of one-off implementation costs by type, Option 2**



Source: ICF analysis

**Table 6.6 Total one-off implementation costs by size of employer**

Option:	1	2	3	4
Public sector	2.6	207.0	204.7	204.9
Large (private*) employer	10.0	104.1	103.9	104.1
Medium (private*) employer	40.8	438.8	438.1	438.8
Total:	53.4	749.9	746.7	747.8

Source: ICF analysis. Note: costs are expressed in 2017 €million. Costs are assumed to occur in 2022  
Note: \*'private' includes voluntary sector organisations. Variance compared to Figure 6.2 is due to rounding.

Headline results are provided below:

- The implementation of reporting channels is estimated to cost an additional €180 million (as compared to the baseline) in options 2, 3 and 4.
- The cost of developing and implementing new policies to protect whistleblowers is estimated to be over €210 million in options 2, 3 and 4.
- The cost of development of training materials is over €350 million in options 2, 3 and 4. As noted above, training is not an explicit requirement of the options.
- The very close alignment of the proposed EU options with the specification of French national legislation means that the new EU law does not impose additional implementation costs on French employers. Other Member States which already provide a high level of whistleblower support and protection will have to modify their legislation in some way to accommodate the new EU law, and will incur some additional implementation costs in doing so.
- Implementation costs under options 2, 3 and 4 are largest in Germany and Italy due to the number of employers operating in these countries and the scope and characteristics of their national legislation in the baseline scenario.
- The majority of private sector firms affected by the policy option changes are medium sized businesses. The average one-off cost of the implementation of policy options 2, 3 and 4 is estimated at a little over €1370 in Options 2 to 4. This is 0.01% or less of the average annual turnover of a medium sized business (50 to 250 employee) for all Member States.

The assumptions used in the development of the cost estimates are based on the triangulation of the evidence collected during the research for this assignment. There is residual uncertainty about the time requirements and costs. The implications of alternative assumptions have been explored in a limited sensitivity analysis. If the duration of time taken to interpret the new legislation increased to 48 hours (eight working days) and the cost of purchasing an outsourced internal reporting channel were doubled (to €1,000), then the costs of implementation would increase to €74 million in option 1, and over €1.1 billion in options 2, 3 and 4.

#### 6.4.1.3 Operational costs to obligated organisations

The policy options will result in additional operating costs to employers. These will be recurrent costs incurred each year by employers in providing and supporting reporting channels, and investigating reports. In this analysis such costs are expressed as annual expenditure. The categories of operational costs to employers of the EU intervention estimated are the costs of:<sup>216</sup>

- Providing internal reporting channels for workers to report cases of wrongdoing (estimated to cost one hour of staff time per report of wrongdoing; the number of reports of wrongdoing per worker is assumed to increase as the strength of protection increases);
- Providing outsourced internal reporting channels for workers to report cases of wrongdoing (estimated to cost €1.5 per employee per year, based on consultations with hotline providers and other experts);

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<sup>216</sup> The number of hours and costs required to complete these tasks has been estimated using findings from the review of evidence and qualitative research with stakeholders from businesses that provide whistleblowing and hotline services and legal / compliance professionals. Full details of sources for each parameter are provided in Annex 5.

- Investigating and managing cases of wrongdoing (estimated to take an average of two days of staff time per report of wrongdoing for both internal and outsourced internal reporting channels); and
- Providing training that ensures that workers are aware of how to report wrongdoing and are confident that they will not be retaliated against for making reports (estimated at half an hour of training per employee per year). The proportion of workers who receive training to ensure they are aware of wrongdoing and reporting channels is assumed to vary by the strength of protection available in a Member State.

The costs have been estimated for private employers and public sector employers by multiplying the number of employers affected by the legislation by the cost factors described above (time is costed at the labour cost of the amount of time taken for each activity).

Training is not specified explicitly in the options and consultations suggest that some employers with reporting channels do not provide training. However, employee training is regarded as a core element of a best practice model for making reporting channels effective – raising awareness of their existence, purpose and how they can be used. Without the training the expenditure on reporting channels will have less impact.

It is assumed that the annual employee training has a duration of 30 minutes per worker per year. It is assumed that the number of employees currently receiving training is dependent on the strength of provision in the Member State. Where there is limited sectorial protection in national law, it is assumed that 25% of workers receive training; where protection is stronger 50% of workers receive training; and where there is robust horizontal protection 75% of workers receive training. The assumptions are based on consultations with stakeholders in the whistleblowers sector.

Staff appointed to investigate reports will require additional training and support. This will have a higher cost per employee but has not been calculated separately on the basis that few staff will be involved, training requirements will vary by firm and the cost will be within the margin of error of the overall estimate of worker training costs.

The key results are summarised as follows:

- Total costs paid by employers are expected to increase under all policy options. This is because the number of employers providing reporting channels is expected to increase.
- The largest increase in cost occurs under policy option 2. The impact under option 2 is slightly higher than under option 4, as the expected number of reports is higher, reflecting its wider scope. In 2022, the cost under option 2 increases from the baseline by €750 million/year. Option 1 leads to a marginal increase in costs (€33 million).
- The majority of these additional costs will be incurred by private enterprises.
- The largest increase in costs for providing reporting channels under options 2, 3 and 4 are seen in Germany, Italy and Spain<sup>217</sup>. This is due to the size of the

<sup>217</sup> The costs to employers in Spain are based on a legal assessment of national legislation. It does not include an assessment of any sub-national whistleblower protection. Therefore the number of employers affected in Spain may be an over-estimate of the true number.

workforce in these Member States and the scale of the change in reporting support triggered by these options as compared to the baseline scenario.

- No additional costs relating to providing reporting channels are expected in four Member States (France, Malta, Sweden and the UK) due to the strength of legislation already in place in these countries<sup>218</sup>.

**Table 6.7 Additional annual operational costs, 2022**

Option:	1	2	3	4
Providing internal reporting channels plus review & investigation of reports (internal time costs)	16	420	260	340
Internal time on review & investigation of reports from outsourced internal reporting channels (internal time costs)	12	283	171	227
Providing outsourced internal reporting channels (providers' annual service charge/fee)	5	47	47	47
Total (reporting channels)	33	750	478	614
Delivery of annual training (cost of employee time)	65	722	722	722
Total (all incremental costs)	98	1472	1200	1336

Source: ICF analysis. Note: costs are expressed in 2017 €million.

**Table 6.8 Additional annual operational costs by size of employer, 2022**

	1	2	3	4
Public sector	9.6	355.3	284.4	319.9
Large (private*) employer	59.5	732.2	605.2	668.7
Medium (private*) employer	29.7	384.7	311.3	348.0

Source: ICF analysis. Note: costs are expressed in 2017 €million

Note: \*'private' includes voluntary sector organisations.

- The cost of providing training in 2022 increases by €722 million for options 2, 3 and 4 (as compared to the baseline). Asking each employee to spend 30 minutes per year on training about what to do when wrongdoing is observed or suspected has a substantial aggregate cost at the level of the EU economy because of the number of people within the scope of the options.
- The change in cost for training is higher for policy options 2, 3 and 4 than for option 1 as the level of protection and the number of employers affected by the options is greater.
- The largest increase in costs for the provision of training under options 2, 3 and 4 are seen in Germany, Italy and Spain<sup>219</sup>. This is due to the size of the workforce in these Member States and the strength of the legislation in the baseline scenario.

<sup>218</sup> There is a difference between implementation and operational costs in this result: whereas France incurs no implementation costs, the UK, Malta and Sweden will incur some implementation costs but none of the four countries are expected to see material changes in operational costs.

<sup>219</sup> Ibid.

- There will be no additional costs relating to providing training provision in six Member States (Ireland, France, Hungary, Malta, Sweden and the UK) due to the strength of legislation already in place in these countries.

Under the terms of the options as specified, medium-sized businesses have the option to implement proportionate solutions to the obligation to provide a reporting channel. This may include internal reporting channels, which tend to be cheaper than use of outsourced reporting service providers<sup>220</sup>. Under option 2, the most burdensome of policy options, annual operational costs of SMEs with between 50 and 250 employees are estimated to increase by €385 million from 2022 due to costs associated with the provision of reporting channels and training. The cost increment equates to approximately €1166 per employer. This is less than 0.01% of average turnover for medium sized employer in all Member States.

There is also likely to be a change in the costs relating to employment disputes relating to cases of retaliation against whistleblowers. These cost changes have not been quantified because (i) the baseline scenario expenditure on such cases has not been established and (ii) the annual rate of change in such expenditure following introduction of legislation is also undetermined. In the medium-long term such expenditure should decline as retaliation becomes less common.

The estimates above have been made by triangulating the evidence that has been collected, but there is a degree of uncertainty in the assumptions. The sensitivity of the results to changes in input factors can be tested. To illustrate, if

- the whistleblower training is assumed to take one hour (rather than 30 minutes); and
- the number of reports of wrongdoing in the baseline scenario is set at
  - 3% of workers for countries with strong horizontal protection, and
  - 2% or 1% for employers with partial / sectoral protection (depending on the specification of the legislation), then

in 2022 the cost of training would be €1.9 billion (€0.6 billion public, €1.3 enterprises). The training cost would increase by €0.1 billion in option 1, and by €1.5 billion in options 2, 3 and 4 (€0.3 billion increase in the public sector, €1.2 billion in enterprises). The cost of reporting would be €1.1 billion in the baseline scenario (€0.3 billion public sector, €0.8 billion enterprises). This would increase by €0.05 billion in option 1, €1.1 billion in option 2 (€0.3 billion public sector, €0.8 billion enterprises), €0.7 billion in option 3 and €0.9 billion in option 4.

#### 6.4.1.4 Number of reports of wrongdoing

The number of reports of wrongdoing is expected to change under each policy option. These reports will need to be assessed and, where appropriate, investigated. There are no reliable data on the number of reports of wrongdoing. However, the following information was gathered from qualitative interviews and desk research:

- The higher the level of whistleblower protection, the higher the number of reports;
- The more types of wrongdoing included in the legislation, the higher the number of reports;

<sup>220</sup> Based on industry consultations. The appropriate approach to reporting also varies by sector and working environment. Some consultations suggest that technological innovations such as secure, online reporting tools that facilitate anonymous reporting, could further cut the cost of providing reporting facilities in the future.

- Under strong regulations, approximately 2% of workers will provide a report each year.<sup>221</sup>

Using this information, the following approach has been used to estimate the number of reports of wrongdoing:

- Where the legislation has been assessed to provide strong, horizontal protection, the number of employees providing reports is assumed to be 2% multiplied by a factor that reflects the scope of the option in terms of the types of wrongdoing covered (a value between zero and one); and
- Where the legislation has been assessed to be partial / sectoral, the number of employees providing reports is assumed to be either 1% or 0.5% (depending on the exact specification of the legislation) multiplied by the same scope adjustment factor that reflects the scope of wrongdoings covered (a value between zero and one).

Figure 6.4 shows the estimate of the number of reports of wrongdoing in 2022<sup>222</sup> developed from the application of this approach. It shows that in the baseline scenario there are estimated to be over one million reports of wrongdoing in public sector organisations and enterprises with more than 50 workers. It is important to note that it is reporting activity that is being measured here – not proven cases of wrongdoing. The research for this study suggests that only a minority of reports made through reporting channels ultimately result in wrongdoing being demonstrated.<sup>223</sup>

In the assessment, the number of reports increases under each option, with moderate increases in options 1 and 2 (below 30%), with much larger increases in options 3, 4 and 5 (up to a 140% increase in option 5). The increases in options 3, 4 and 5 are due to all workers being protected by high levels of whistleblower protection. There is uncertainty about the number of reports.

Figure 6.4 shows the situation in 2022. It is anticipated that the number of reports of wrongdoing will increase as a result of stronger whistleblowing protection. However, if whistleblowers are protected from retaliation and there are more reports, this could lead to a change in behaviour from people who commit wrongdoing, as the probability of being prosecuted increases. Therefore, the number of cases of wrongdoing may – in time – decrease.

The largest increase in the number of reports in policy options 3, 4 and 5 are estimated to be in Germany, Spain and Poland. This is due to the size of the workforce and the strength of the legislation in place in the baseline scenario in these countries. The model shows no change in the number of reports of wrongdoing in four Member States (France, Malta, Sweden and the UK) due to the strength of the legislation in place in the baseline scenario. The majority of reports are estimated to originate from large employers (over 250 employees) and public sector organisations.

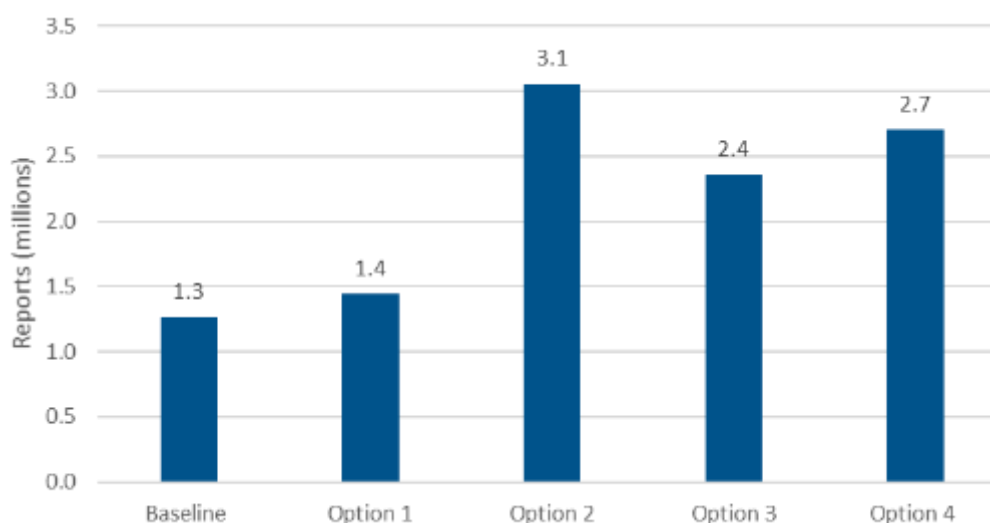
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<sup>221</sup> Source: stakeholder consultations with businesses providing hotlines

<sup>222</sup> 2022 is selected to allow for (a) time for legislation to be adopted and then transposed into Member State law and (b) time for reporting channels to be set up, publicised and established.

<sup>223</sup> Source: stakeholder consultations with businesses providing hotlines.

Figure 6.4 Illustration of how extension of reporting and protection is likely to affect the number of reports of wrongdoing registered each year across Europe



ICF analysis

## 6.4.2 Functioning of the internal market and competition

The impact of the policy options on the functioning of the internal market has been assessed qualitatively, using findings from qualitative interviews with stakeholders from employers that provide hotlines, whistleblowing services and compliance / legal professionals.

### 6.4.2.1 Integrity of product and services markets and consistency of enforcement

Under the baseline scenario, there is significant variation in the protection provided to whistleblowers across Member States. This varies from no or limited protection (in, for example, Spain and Latvia) to comprehensive protection (in, for example, France).

Insofar as:

- Whistleblowing can be a powerful mechanism for exposing wrongdoing affecting the public interest (and can help to discourage it); and
- Whistleblowing regimes in some countries are much weaker than in others, there is the potential for unequal competition within the single market by virtue of some firms operating under a weaker enforcement regime (an issue explored in the problem definition, section 2)<sup>224</sup>. Whistleblowing systems are only one component of the overall compliance environment, but examples of product adulteration and persistent breaches of standards by firms in one country that spill-over into markets in other EU countries through trade in their products illustrate the potential for problems.

<sup>224</sup> No specific, concrete examples were identified in consultations within the single market in which the competition differences could be tied to whistleblowing protection law.

Qualitative appraisal of the options suggests that options 2 and 4 offer the greatest potential to address the issue. In option 3 the wrongdoing in scope is restricted to financial interest of the EU, which limits its impact on competition issues.

Impact	Option			
	1	2	3	4
Integrity of product and services markets and consistency of enforcement	0	++	+	++

*Note: '0' indicates no significant impact, '(+)' indicates small positive impact, '+' indicates moderate positive impact, '++' indicates significant positive impact.*

#### 6.4.2.2 Legal complexity and divergences in protection across the EU

The variation in legislative protection among Member States has consequences for employers that have operations in more than one country.<sup>225</sup>

- The employers need to be aware of legal differences in each country, even if they have an overarching corporate policy that goes beyond the legislative requirements in some Member States. For example, requirements for negotiations with works councils or the need to accommodate variation in national legislation's acceptance of the confidentiality of whistleblowers can cause additional costs to employers operating in multiple countries.
- For employers who would like to expand into a different Member State than the one they already operate in, there is an additional cost to research the legal requirements in the new country, and potentially alter policies and training materials, which would lead to additional costs<sup>226</sup>.

Employers therefore incur an additional cost to operate in multiple Member States as a consequence of the legal complexity. *In extremis* they might choose not to operate in multiple Member States (or specific Member States) because of the complexity of the legal situation on whistleblower legislation or concern about the risk, though no specific instances of this occurring were identified in the research and it is regarded as unlikely. Multi-national firms have to manage many differences in operating conditions, including employment law, when working in different countries. In that context whistleblowing legislation is one variable among many.

To the extent that a multi-national business fails to understand and to adjust to differences in national whistleblower legislation there is a potential risk both to the firm and to its workers arising from inappropriate policies and systems being applied.

Some multi-national firms will need to manage the national legislation of the EU countries in which they operate alongside corporate policies that stem from other ex-EU jurisdictions (e.g. US firms subject to US whistleblower legislation) or have been adopted on a voluntary basis.

Respondents to the open public consultation conducted by the Commission on whistleblower protection were invited to select from a list of possible impacts of intra-EU variation in whistleblower protection. Though public interest and the financial

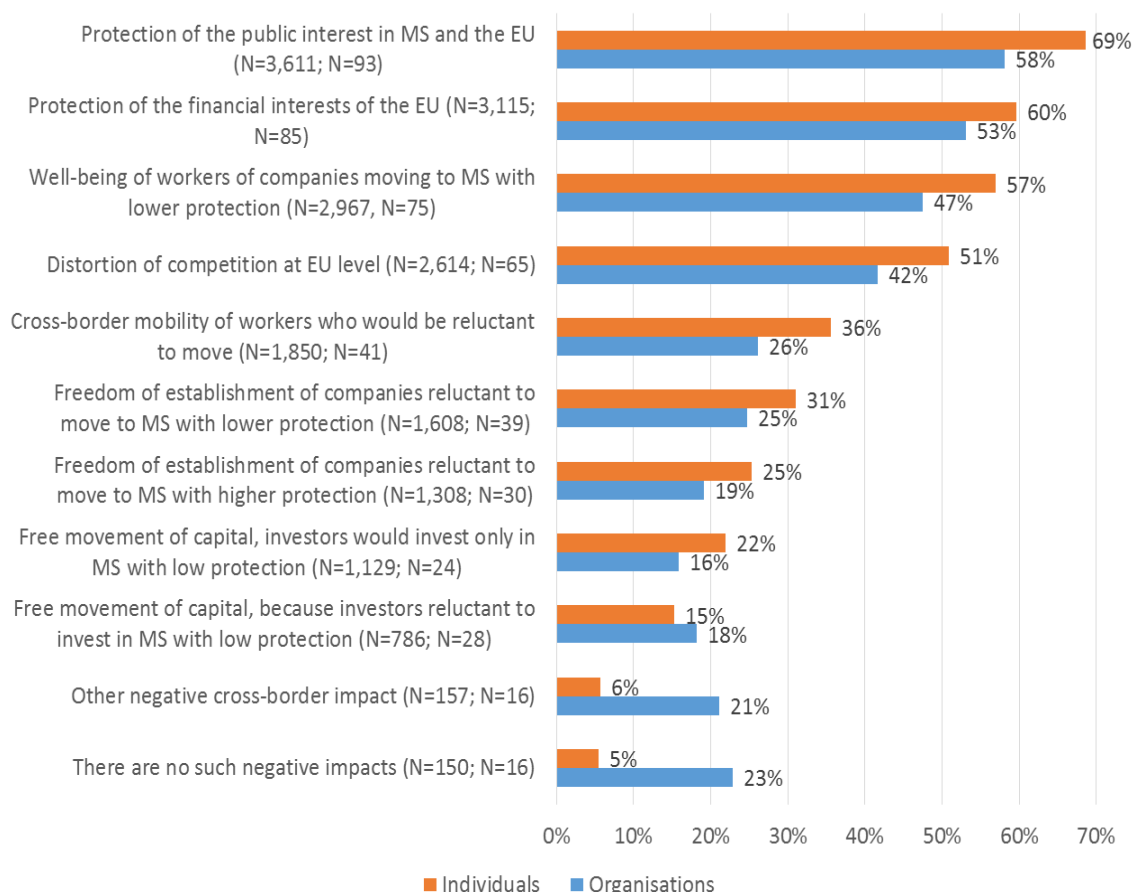
<sup>225</sup> If companies follow the regulations from the USA, or have implemented high levels of whistleblower protection, then cross-border issues should be less complicated, although there may be issues surrounding confidentiality and the exact nature of reporting channels.

<sup>226</sup> This was confirmed in interviews with legal and compliance professionals.

interest of the EU were ranked first, issues of competition, worker mobility and corporate cross-border investment were also flagged (Figure 6.5).

**Figure 6.5** Issues of competition, worker welfare and barriers to corporate investment were identified by OPC respondents as impacts of intra-EU variation in whistleblower protection

*Negative impact associated to different levels of whistleblower protection across the EU Member States*



Source: ICF from OPC data [Base: individuals N=2,734 to N=5,264; organisations N=70 to N=160] [Q: Whistleblowers enjoy very different levels of protection across the various EU countries, and in some EU countries they enjoy limited or no protection at all. In your opinion, what are the negative impacts likely to result from the absence of - or the insufficient - whistleblower protection in some EU countries for other EU countries and the EU as a whole?]

Policy option 2 is expected to have the largest impact on (i.e. benefit to) the functioning of the internal market. This is because it is the policy option which would lead to all Member States having the same legislation applicable across all types of wrongdoing. Policy option 1 offers the potential of a small effect in increasing alignment of approaches across Member States if the model promulgated in the Commission Recommendation is adopted. Policies 3 and 4 will have a positive effect on alignment, as they will move towards a more standardised approach to legislating for whistleblower protection, albeit on a more restricted set of issues than under option 2. Option 4 targets a wide range of single market issues and is expected to have a larger simplification effect than option 3.

Impact	Option			
	1	2	3	4
Removing legal complexity	0	++	+	(++)
Aligning compliance regimes	0	++	+	+

*Note: '0' indicates no significant impact, '(+)' indicates small positive impact, '+' indicates moderate positive impact, '++' indicates significant positive impact. (++) = is significant impact with some qualifications.*

#### 6.4.2.3 Productivity and performance

As discussed in section 2 there is evidence of positive links between good governance and long term organisation performance. The legislative options ought to have a positive impact in the long run on organisational performance in those locations where they act to raise the level of protection provided to whistleblowers in law.

One fifth (20%) of organisations responding to the open public consultation cited improvements to companies' economic performance as a benefit of rules obliging public and private organisations to protect whistleblowers.

Quantifying these benefits is infeasible with the available data. Qualitative scores are provided below.

Impact	Option			
	1	2	3	4
Productivity and performance	0	+	(+)	+

*Note: '0' indicates no significant impact, '(+)' indicates small positive impact, '+' indicates moderate positive impact, '++' indicates significant positive impact. '(++)' indicates is significant impact with some qualifications.*

#### 6.4.3 Public authorities (and budgets)

This section considers impacts on public authorities in their capacity as regulators and in relation to public finance.

The options are expected to have the following direct impacts on public authorities and budgets:

- Costs, in the form of increased expenditure:
  - Provision of guidance and education to obligated entities on the new legislation and its implications;
  - Creating/support regulatory and advisory bodies that monitor and report on whistleblowing, working within the model of a tiered reporting. These organisations become involved where a whistleblower's concerns have not been sufficiently dealt with by their employer. This includes services that provide free advice on whistleblowing, recognising that advice may be provided via third parties contracted to provide this service rather than by regulators directly;
  - Increased judicial expenditure.
- Benefits, in the form of increased income/reduced losses

- Reduction in public procurement fraud;
- Reduction in VAT fraud and other tax losses.

These are considered in turn in the text below.

#### 6.4.3.1 Cost to Member States of introducing new legislation

Once the EU legislation is transposed into Member State law, there will be costs to Member States associated with ensuring that employers are aware of the new legislation and how it may influence their organisation. This would most likely be done through producing guidance documents that are then made available to employers, explaining the new legislation in plain language so that it can easily be understood by employers.

The policy options do not oblige Member States to produce guidance. However, the research conducted for this assessment showed that it would be advisable to provide employers with information. This would help to ensure that the legislation is properly implemented, and have a greater chance of achieving the desired objectives. The cost to Member States to produce guidance documents is estimated to be small by comparison with other impacts, and therefore has not been assessed quantitatively.

Impact	Option			
	1	2	3	4
Guidance, dissemination, awareness-raising	0	-	-	-

*Note: '0' indicates no significant impact. '-' indicates moderate negative impact*

#### 6.4.3.2 Cost of enhancing regulatory and advisory bodies

There is a cost to Member State public authorities:

- to provide or enhance regulatory bodies which receive and investigate cases of wrongdoing;
- to support services that provide impartial advice to potential whistleblowers.

In most Member States it will not be necessary to set up a new regulatory body to monitor whistleblower support and protection by obligated entities, and (where needed) to investigate cases of wrongdoing referred under the tier system of reporting. This is because there is an existing body dealing with the issue in most Member States. Instead, the institution's function will need to be expanded as the level of whistleblowing protection improves and where the scope of protected disclosures covered by legislation is expanded.

The cost of this impact has been assessed quantitatively. Information was collected for the cost to regulatory bodies for Member States with different levels of whistleblower protection. For strong protection, a tiered approach is needed, and a regulatory body can provide an additional reporting channel and investigatory function. This would be used when a whistleblower does not feel that their concerns have been adequately dealt with by their employer. Advisory services may be provided by the regulatory or by a third party that receives some public support.

Data were obtained on annual costs to provide all the functions needed to collect and investigate cases of wrongdoing. A cost per person protected by whistleblower legislation in the Member States has been calculated where information is available.

This cost factor was used for Member States where equivalent information was not available<sup>227</sup>. This was then multiplied by the number of workers protected in each Member State to estimate the overall cost.

The cost of regulatory bodies providing these services in the baseline scenario is estimated to be €15 million in 2022. The largest costs are estimated to be in the UK and France, given the strength of the legislation and the size of their economies. Public authorities in three Member States (Spain<sup>228</sup>, Latvia and Cyprus) incur no costs in the baseline scenario due to the legislation in place.

In policy option 1, the cost to public authorities to provide regulatory and advisory functions is assumed to remain the same as in the baseline. In all other policy options, the cost is estimated to increase. Policy options 2, 3 and 4 result in additional costs. This is because all these policy options lead to all workers for employers with more than 50 workers enjoying a high level of whistleblower protection. The cost to public authorities in options 2, 3 and 4 is estimated to be €33 million in 2022, which is nearly €19 million higher than in the baseline scenario.

The largest increase in costs to public authorities is seen in Germany, Spain<sup>229</sup> and Italy. In six Member States (Ireland, France, Hungary, Malta, Sweden and the UK) no increase in costs to public authorities is foreseen in any of the policy options.

Impact	Option			
	1	2	3	4
Cost of enhancing regulatory and advisory bodies?	0	19	19	19

*Note: costs are expressed in 2017 €million.*

#### 6.4.3.3 Investigative and judicial activity

Government expenditure on police services, law courts and prisons could also be affected by the introduction of the policy options. The extension of reporting channels and provision of additional protection to whistleblowers means that the number of reports of wrongdoing is expected to increase. Expenditure on proceedings relating to whistleblowing cases may therefore rise. Alternative outcomes are that budget constraints instead lead to delays or that investigations and prosecutions prompted as a result of whistleblowing consume resources that would otherwise have been used on other investigations and prosecution.<sup>230</sup> Impacts seem likely to vary according the legal processes applying in each Member State, the financing mechanism and operational flexibility. In the longer term, the dissuasive effect of effective whistleblower regimes ought to reduce then reduce demand for such services.

<sup>227</sup> The cost per person protected has been adjusted to the costs in each Member States by using the labour costs in each Member State.

<sup>228</sup> The costs to employers in Spain are based on a legal assessment of national legislation. It does not include an assessment of any sub-national whistleblower protection. Therefore the number of employers affected in Spain may be an over-estimate of the true number.

<sup>229</sup> The costs to employers in Spain are based on a legal assessment of national legislation. It does not include an assessment of any sub-national whistleblower protection. Therefore the number of employers affected in Spain may be an over-estimate of the true number.

<sup>230</sup> This would be an opportunity cost. The increase in investigations and prosecutions as a result of whistleblowing would replace other investigations and prosecutions. There would be no change in the overall expenditure, just a change in the cases individual members of staff were working on.

The policy options are not expected to make a measureable difference to overall expenditure on the overall justice system. This does not negate the possibility that reports from whistleblowers will raise issues that lead to special judicial inquiries and other similar investigations, which can be very expensive, or that pressure on the judicial system will increase and that expenditure on mechanisms such as tribunals dealing with employment disputes will rise.

Public authorities are also likely to experience changes in expenditure on compensations payments due to whistleblowers that experience retaliation. These would be expected to decline over time in response to changes in workplace behaviours. The box below provides an estimate of historic costs for the UK. Scaling these to EU level, projecting them forward and then quantifying the benefit of falling public sector whistleblower compensation costs is difficult without data on process and compensation regimes from a representative set of Member States and evidence on the likely change in retaliation-related cases brought by public sector workers resulting from the EU legislation. There is, however, the prospect of positive benefit.

#### Box 6.1 Examples of the legal costs of whistleblower legislation: the case of the UK

In research for DG GROW, Milieu gathered evidence from Member States on judicial costs relating to whistleblowing protection. (page 74-75). An extract of the report describing costs in the UK is provided below. PIDA is the Public Interest Disclosure Act, 1998, the principal UK legislation governing whistleblowing during the period covered by the research

*“...The main costs incurred by the UK public sector seem to relate to the judicial costs of handling whistleblowers’ claims under PIDA and the relative cases. More specifically, it was estimated that the Employment Tribunal spent from 2009–2010 until 2014–2015 an annual weighted average of EUR 867,948 for handling claims under PIDA and an annual weighted average of EUR 93,895 for handling tribunal cases related to PIDA. ....The relatively high judicial costs can be explained by the high number of claims made by whistleblowers to ask for protection under PIDA.*

*Whistleblowers were awarded a median amount of GBP 17,422 by Employment Tribunals during the period 2007–2014. Based on this estimate, we calculated that the Employment Tribunals from 2009–2010 to 2014–2015 paid an annual average of EUR 1,715,130 to whistleblowers.”*

*Extract from Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, Milieu for DG GROW (page 74-75).*

Impact	Option			
	1	2	3	4
Investigative and judicial activity	0	(-)	(-)	(-)

Note: ‘0’ indicates no significant impact, (-) indicates some impact on expenditure (i.e. greater costs)

#### 6.4.3.4 Reduction in public procurement fraud

The problem definition (section 2) explains that public procurement fraud is a significant cost to the EU and Member States in the EU.

The policy options are expected to have a positive impact but it is not possible to predict the scale of the effect each policy option would have on these values. Policy option 2 is expected to have the largest impact as this will cover all procurement.

Option 3 covers fraud relevant to EU expenditure; the much larger volume of public procurement using Member State funds will be out of scope. Option 4 would cover national public procurement only where cases had a single market dimension.

It has previously been noted that research has suggested that around 40% of identified corporate fraud is exposed by whistleblowing. This figure was used in a study for DG GROW to model a scenario in which whistleblowing support and protection results in full exposure of 40% of all public procurement fraud. In this scenario the benefit of whistleblower legislation is very large<sup>231</sup>, and many multiples of the costs of supporting whistleblowers. For the EU as a whole, the potential benefits of effective whistleblower protection according to this method are in the range of EUR 5.8 to 9.6 billion each year in the area of public procurement<sup>232</sup>. It is deemed unlikely that introduction of stronger whistleblowing support and protection will result in 40% of all public procurement fraud being exposed. As such, the benefits will be less than the figure quoted above. There is nonetheless the potential for significant positive impact.

Actual benefits will be realised in the form of:

- Recovered funds – where fraud in public procurement is uncovered and some fraction of the funds secured by public authorities
- Avoided losses – where the costs of fraud and corruption in public procurement are avoided as a consequence of the dissuasive effect of the whistleblower regime. These might be observed as public tenders resulting in contract being awarded for lower values than previously.

The full extent of such benefits will not emerge in full immediately – it will take time for confidence in whistleblowing reporting channels and protection to build. As noted elsewhere, accompanying measures are likely to be needed to build that confidence.

Impact	Option			
	1	2	3	4
Reduction in public procurement fraud	0	++	+	+

*\*EU funds only*

*Note: '0' indicates no significant impact, '+' indicates moderate positive impact, '++' indicates significant positive impact.*

#### 6.4.3.5 Tax evasion

The problem definition presents an estimate of the value of the 'VAT gap' by Member State in Europe. The total value is estimated to be €175 billion in 2017, and is estimated to rise to €217 billion by 2027 in the absence of any other policies being introduced to target it.

Tax evasion (illegally avoiding paying tax) contributes to the VAT gap. Each of the policy options, if successfully implemented, could contribute to the reduction in tax

<sup>231</sup> The figures presented in the report *Estimating the Economic Benefits of Whistleblower Protection in Public Procurement* (Milieu for DG GROW, 2017) as potential benefits of extending whistleblower protection generate an expected value of corrupt procurement for each Member State and then assume that 44% is exposed by whistleblowers. This is equivalent to assuming that all corrupt procurement is exposed and whistleblowing contributes 44% of this exposure. The research conducted by ICF for the current study suggests that this potential is unlikely to be realised in most circumstances.

<sup>232</sup> Malta is excluded from this estimate.

evasion through increasing the reporting of wrongdoing. It is not possible to estimate the effect each policy option would have on these values. However, policy options 2, 3 and 4 should have the largest impact on reducing the VAT gap, as they affect the highest number of Member States and cover financial wrongdoing.

Again, for illustration, if putting in place a robust whistleblower regime prevents one in a thousand incidents of VAT fraud the benefit could be €1.75 billion over 10 years<sup>233</sup>.

As above, there will be a time lag before benefits emerge in full because of the need for awareness and confidence to increase.

Impact	Option			
	1	2	3	4
Reduction in VAT fraud	0	+	+	(+)
Other tax evasion	0	+	(+)	+

*Note: '0' indicates no significant impact, '(+)' indicates small positive impact, '+' indicates moderate positive impact.*

#### 6.4.4 Consumers and households

The problem definition and section 3 on the case for EU action noted the risks associated with the baseline scenario for consumers and households. These principally arise from the increased risk to the integrity of products and services available on the single market as compared to a scenario in which there is a consistently high propensity to report wrongdoing relevant to product and service markets across the EU, and for those reports to trigger appropriate action. The closer that options move behaviour to that situation from the *status quo*, the greater their benefits to consumers and households.

Option 1 is assessed as having negligible impact, for the reasons commented on above. Option 3 is expected to be less useful than option 2 for consumers and households because its focus (and the protection provided) relates to the EU financial interest rather than the consumer interest.

Options 2 and 4 are expected to be the most effective in addressing the problem for consumers and households and equally effective in doing so: both cover matters relevant to the internal market and both would provide protection in the context of wrongdoing that harms the consumer interest.

This item overlaps with the impact 'functioning of the internal market and competition / Integrity of product and services markets and consistency of enforcement' discussed above but is included here to be consistent with the Better Regulation Toolbox guidance to consider both (i) single market issues and (ii) the consumer perspective.

Impact	Option			
	1	2	3	4
Consumers and households	0	++	0	++

*Note: '0' indicates no significant impact, '++' indicates significant positive impact.*

<sup>233</sup> 0.1% of the 2016 estimate, multiplied by 10.

## 6.4.5 Wider economic impacts

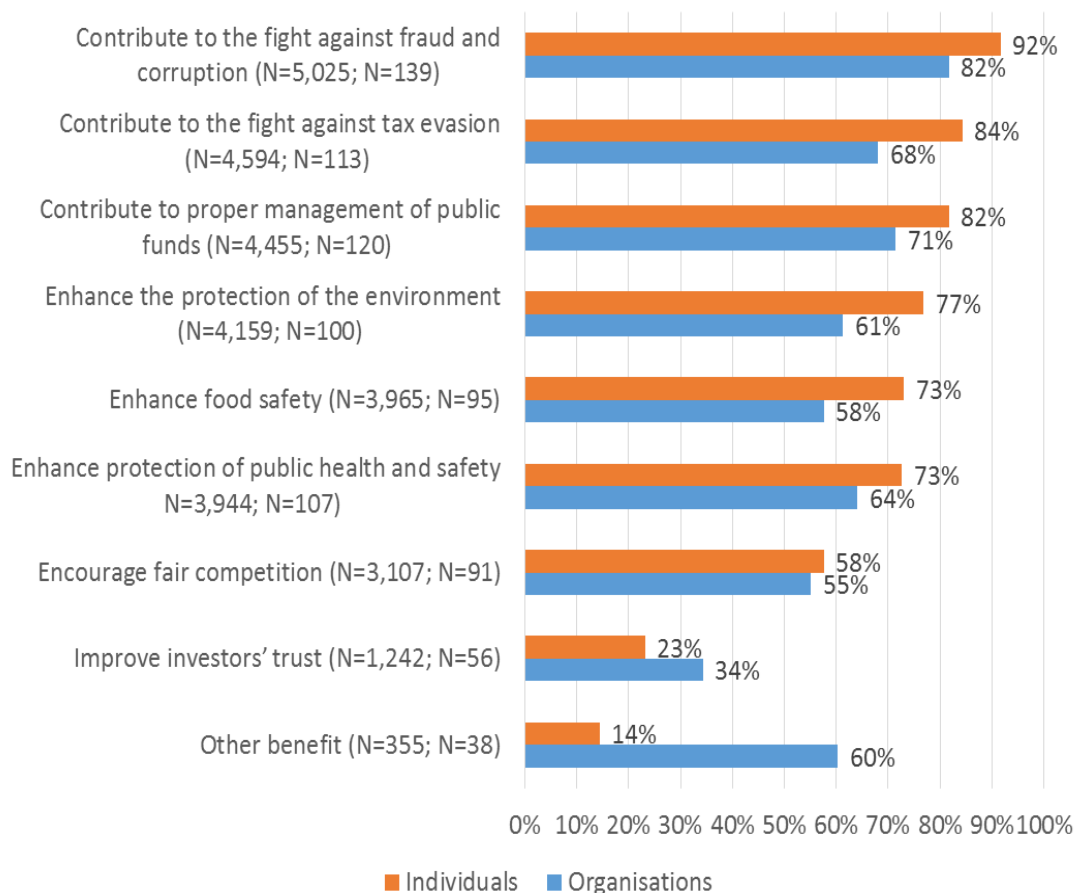
### 6.4.5.1 Reductions in corruption

Section 6.4.3.4 considered fraud in public procurement. Strong support and protection for whistleblowers is a component of efforts to tackle wider problems of corruption. The potential gains are substantially larger than those from savings in public procurement fraud alone.

More respondents to the open public consultation conducted in 2017 on whistleblower protection identified contribution to the fight against fraud and corruption as a benefit than any other impact (Figure 6.6).

**Figure 6.6 Whistleblower protection was identified as beneficial in tackling wrongdoing in corruption, fraud and tax evasion and other financial crimes**

*Areas in which rules on whistleblower protection are beneficial*



Source: ICF from OPC data [Bases: individuals: N=5,482 to N=2,458; organisations: N=170 to N=63] [Q: To your mind, in which areas are rules on whistleblower protection beneficial?]

As well as the monetary gains, concerted action against corruption can also help to address some of the factors that contribute to the low levels of public trust in institutions and politics that were discussed in section 2, and concerns about inequality. As RAND note in their report on corruption in the EU:

*“It is well documented in the literature that corruption negatively affects the good functioning of public institutions and diverts public action from its intended purpose. For instance, Herzfeld and Weiss (2003) find a strong negative relationship between corruption and the rule of law. What is more,*

*a number of studies highlight that corruption and organised crime are not an isolated criminal phenomenon, but that these two activities reinforce each other (e.g.. Buscaglia 2003; Van Dijk 2007).... Corruption can corrode the institutions and foundations of democracy by producing inefficient delivery of public services, while grafts and bribes erode the fundamental principles of democracy and once taken root is likely to spread among institutions (Stockemer, LaMontagne and Scruggs 2013)."*

RAND (2016) The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II – Corruption.

The potential gains here are very substantial. RAND developed an approach to modelling costs of corruption in terms of lost economic output. The total cost of corruption in the EU was estimated at €817 billion - €990 billion, which is 4.9% – 6.3% of GDP. In scenario in which the EU countries with higher rates of corruption improved to the point where they achieved the EU average rate of corruption, the corruption risk was estimated at €179 billion - €256 billion.

More robust whistleblower legislation is not predicted to lead to the end of corruption in the EU. It has, however, been shown to have a place in the anti-corruption toolkit as a mechanism for disclosure and dissuasion (as well as for its direct welfare benefits to whistleblowers).

A logical argument can be made that the economic returns to investment in reporting channels and protection are potentially significant. Research for this impact assessment has, however, determined that there is little robust research on the economic returns to whistleblower protection that is grounded in empirical data on benefits. This reflects the intrinsic challenges of the task:

- Much fraud and corruption goes undetected;
- If dissuasion is effective there is nothing to observe;
- There are many other confounding factors that may obscure the impact of the whistleblower legislation.

RAND note that the issue goes wider than whistleblowing laws, observing a general *"lack of evidence on the degree of effectiveness of individual anticorruption measures and almost no evidence of their quantified impact on corruption levels"*.<sup>234</sup>

In that context, quantification in monetary terms of the impacts of Options 1 – 4 on overall corruption in the EU is judged infeasible. Option 2, as mandatory horizontal measure with the largest reach, seems most likely to have a positive impact on reducing corruption. Option 3 is focused on financial matters, albeit limit to the EU financial interest. All the legislative options have a substantial 'footprint' in terms of the number of employers falling within scope.

Impact	Option			
	1	2	3	4
Corruption reduction	0	++	(++)	(++)

Note: '0' indicates no significant impact, '++' indicates significant positive impact. '(++)' indicates significant impact with some qualifications.

<sup>234</sup> RAND, 2016. Ibid.

#### 6.4.5.2 Impacts on third countries

Impacts on third countries have been considered in qualitative terms. Mechanisms by which more robust EU action to support whistleblowers include:

- Improving international standards of governance – robust EU action to support whistleblowers sends a signal that helps, together with action by other leading nations, establish stronger international legislative norms.
- Disclosures may also identify wrong-doing that extends to third countries and so help law enforcement efforts in those other jurisdictions and well as in the EU. Examples would illegal tax arrangements involving non-EU jurisdictions, illegal trade in waste or wildlife, and sub-standard products.
- Improving standards of governance in the EU (including lower rates of corruption) that then encourage greater trade and investment between the EU and third countries.

Impact	Option			
	1	2	3	4
Third countries	0	+	(+)	(+)

*Note: '0' indicates no significant impact, (+) indicates small positive impact, '+' indicates moderate positive impact.*

## 6.5 Social impacts

### 6.5.1 Public health and safety

As noted above, some of the proposed interventions potentially reduce risks to public health and safety by supporting greater compliance with health and safety legislation and with environmental protection legislation that is also relevant to public health (e.g. regulation of emissions to air from industrial installations). Where options provide effective reporting channels and protection for reporting of wrongdoing relevant to such matters then there is a potential benefit to public health and safety. These criteria suggest that the strongest positive effect would be expected from options 2 and 4 because:

- they cover both reporting channels and whistleblower protection;
- they cover the private and public sector; and
- the public interest definition that circumscribes the scope of protected reporting of both option would cover reports relevant to public health and safety.

Option 3 is assumed to have no material benefit because reporting and protection is constrained to matters relevant to the financial interest of the Union, so public health issues would be out of scope unless the wrongdoing that compromised the financial interests of the EU also happened to have a public health impact. Option 2 provides for reporting channels only and confidence in use of those channels is expected to be constrained by the lack of additional whistleblower protection. Option 1 is not expected to have an effect on reporting practice. As with other impacts, the positive outcome is conditional on accompanying measures – awareness-raising, promotion, training - being deployed and effective.

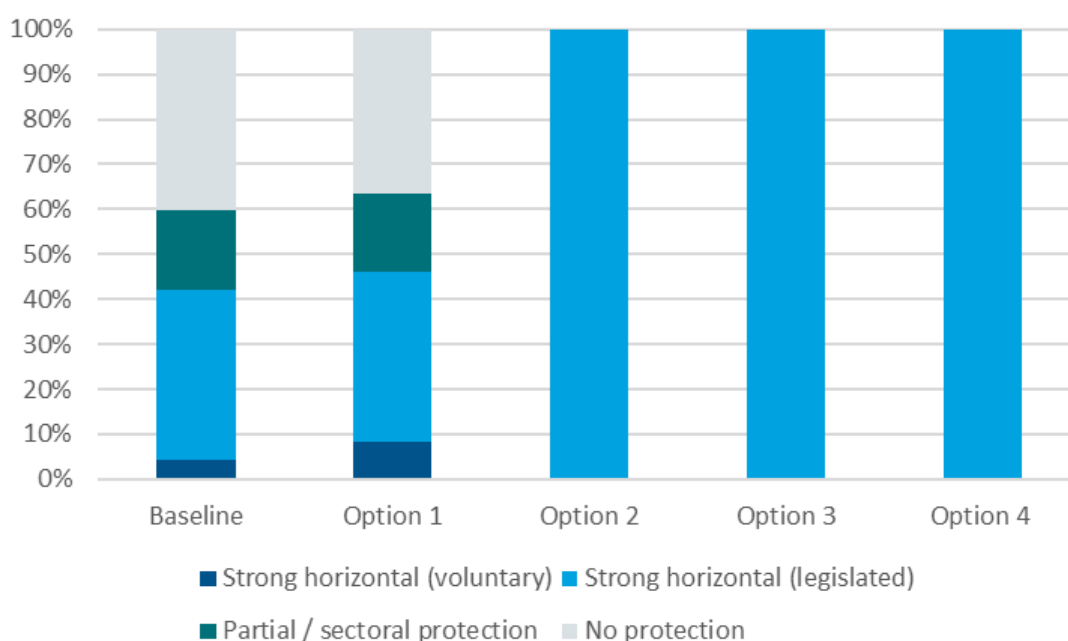
Impact	Option			
	1	2	3	4
Public health and safety	0	++	0	++

Note: '0' indicates no significant impact, '++' indicates significant positive impact.

## 6.5.2 Number of workers protected by legislation

The number of workers in the public sector and enterprises with 50 or more workers protected by legislation in each policy option follows a similar pattern to the number of employers protected. This is shown in Figure 6.7. In the baseline scenario, over 40% of workers enjoy strong horizontal protection, either from legislation or voluntary measures. A similar proportion of workers have no protection. The introduction of policy options 2, 3 and 4 provide strong protection to 40% of the workforce (around 60 million workers) who were previously unprotected, and improves the level of protection for nearly 20% of the workforce (26 million workers).

Figure 6.7 Number of workers in the public sector and enterprises with 50 or more workers protected by legislation



### ICF analysis

There is a level of uncertainty around the number of workers who would be protected by voluntary whistleblower protection measures. The discussion above uses an assumption of 10% of employers providing voluntary whistleblower protection. However, if this assumption is varied to 5% of employers and 15% of employers with more than 50 employees, the number of workers in Europe with voluntary whistleblower protection would range from 2.8 million to 8.4 million in 2022 (a central estimate of 5.6 million workers) in the baseline scenario.

There are estimated to be another 100 million workers in the EU in 2022 employed in businesses with fewer than 50 employees. These are not covered in the analysis of costs or reports of wrongdoing and retaliation provided. However, some form of protection from whistleblower protection could apply to these workers. This could be

through protection through larger organisation supply chains, or the policy options being extended to workers in smaller employers but with less stringent reporting requirements being in place for smaller companies.

### 6.5.3 Physical health and safety of workers

In 2017 there are expected to be nearly 2.5 million severe workplace accidents in the EU<sup>235</sup>. Holding all factors constant (except for the number of people employed) this would rise to over 2.5 million by 2027. A proportion of the accidents are expected to be preventable if individuals feel able to report wrongdoing.

Policy options 2 and 4 are expected to have the largest impact on the number of workplace accidents. This is because these options provide all workers in employers where there are more than 50 workers and cover wrongdoing related to worker health and safety. Options 2 and 4 would extend a high level of protection to an additional 85 million EU workers (60 million workers who previously had no protection and 25 million who have further levels of protection).

As with the public health and safety impact, Options 1 and 3 are not expected to have a measurable impact.

Impact	Option			
	1	2	3	4
Physical health and safety of workers	0	++	0	++

*Note: '0' indicates no significant impact, '++' indicates significant positive impact.*

### 6.5.4 Mental health and well-being, and job quality

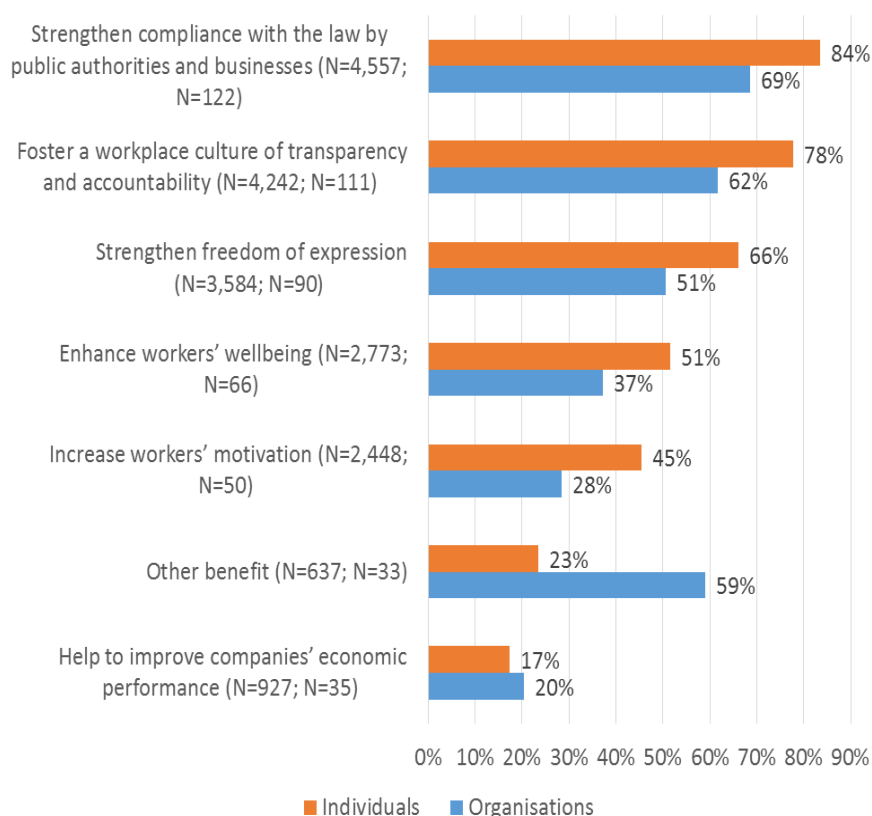
The problem definition described the various negative effects experienced by whistleblowers as a consequence of retaliation, and also provided evidence of stress-related problems experienced by workers who were aware of wrongdoing but not prepared to report it for fear of the consequences.

Analysis suggests two mechanisms by which the proposed EU intervention might impact on job standards and quality. The primary mechanism is by helping to create conditions in which retaliation is a much lesser concern and workers feel safe to speak up about wrongdoing without suffering negative consequences on their health and well-being. This is a form of improvement in job quality. The second potential mechanism is the contribution that effective reporting channels can make to transparency and good organisational governance; features that have been linked to improved performance and generally making an organisation a 'better place to work'.

In the responses to the open public consultation conducted in 2017 by the Commission on whistleblower protection, cited issues of well-being, motivation and workplace culture as benefits of rules obliging public and private organisations to protect whistleblowers (Figure 6.8).

<sup>235</sup> These are accidents which require more than four days of absence from work, so are severe accidents. Estimates are based on ESAW data on accidents, and LFS employment estimates for 2017.

**Figure 6.8 Respondents to the open public consultation cited issues of well-being, motivation and workplace culture as benefits of rules obliging public and private organisations to protect whistleblowers**



Source: ICF from OPC data [Bases: individuals N=5,532 to 5,468; organisations N=177 to 180] [Q: To your mind, what are the benefits of rules obliging public and private sector organisations to protect whistleblowers?]

A qualitative appraisal of the options suggests that Options 2 and 4 have the greater potential to help secure these outcomes (recognising that accompanying measures are likely to be needed). Option 3 will provide some of the same benefits, albeit for a narrower scope of wrongdoing (i.e. matters of financial interest to the Union). Option 1 is not expected to have a significant impact though, as for the other parameters there is the potential for it to influence future Member State legislative action.

Impact	Option			
	1	2	3	4
Job standards and quality	0	++	+	++

Note: '0' indicates no significant impact, '+' indicates moderate positive impact, '++' indicates significant positive impact.

## 6.5.5 Avoided retaliation

### 6.5.5.1 Number of cases of retaliation

The number of cases of retaliation against whistleblowers is expected to change under each policy option. The evidence of the number of cases of retaliation is presented in the problem definition. This shows that there is not a clear relationship

between the strength of the legislation and the number of cases of retaliation. It also suggests a lagged responses – it takes times for the full benefits to be realised (even in favourable conditions) because of the time required to build trust in the efficacy of reporting channels, and change the attitudes that contribute to retaliation against whistleblowers. The findings from the qualitative research showed that for a policy to protect whistleblowers to be successful, employers and national authorities have to be seen to take cases of retaliation seriously (the perpetrators have to be seen to be caught and punished for retaliation).

Under a scenario of full compliance there are ultimately no cases of retaliation in options 2, 3 and 4 for matters within their individual scope. In practice, the data that suggest retaliation still occurs in countries that have had robust protection for whistleblowers for some years. This suggests that it will take a significant period of time for retaliation rates to decline to the point where it is no longer a concern, and points to the significance of the socio-cultural environment established in the workplace and society in general.

If reporting rates (driven by the increased coverage of reporting channels in some Member States) do increase, as projected above, without employers implementing the procedural and cultural changes required to prevent retaliation then it is possible that total retaliation rates could increase in the short term. Equally, fear of retaliation might discourage reporting – much rests on how the legislation is implemented and the accompanying messages disseminated at national and organisational levels.

### 6.5.6 Job satisfaction

The level of job satisfaction among workers in each Member State was analysed in relation to the quality of whistleblower protection in each country. No relationship was identified between the level of job satisfaction from available sources and the strength of whistleblower protection in the baseline scenario.

However, findings presented in the problem definition and from the qualitative research suggest that stronger whistleblowing protection can lead to an increase in job satisfaction. This is because workers feel less likely to be retaliated against, and the working environment is more open and improved. Indicators of job satisfaction were cited by OPC respondents among the benefits of whistleblower protection (Figure 6.5, e.g. increased motivation, increased well-being).

If increasing whistleblower protection does have an effect on job satisfaction, then all of the legislative policy options would have a positive impact. Policy options 2 and 4 would have the largest impact, as these increase the level of protection among all workers for the widest set of issues.

Impact	Option			
	1	2	3	4
Job satisfaction	0	++	+	++

*Note: '0' indicates that no significant impact is expected. '+' indicates moderate positive impact, '++' indicates significant positive impact.*

### 6.5.7 Staff turnover

The level of staff turnover is related to the level of job satisfaction among workers, which can be affected by the strength of whistleblower protection. If workers are dissatisfied, they are more likely to leave their current employment.

The cost of staff turnover in the baseline scenario has been estimated using data on the rate of involuntary staff turnover in each Member State. The cost of staff turnover is estimated to be 25%<sup>236</sup> of the annual earnings of each staff member who leaves their job. The total cost of staff turnover is estimated to be nearly €60 billion in 2017. This rises to over €70 billion in 2027, mainly because of projected growth in the number of workers.

By introducing whistleblower protection, the level of job quality should increase, which will have a positive impact on staff turnover. Policy options 2 and 4 are expected to have the largest impact, as these options provide a good level of whistleblower protection to all workers.

Impact	Option			
	1	2	3	4
Staff turnover	0	++	+	++

*Note: '0' indicates that no significant impact is expected, '+' indicates moderate positive impact, '++' indicates significant positive impact.*

### 6.5.8 Crime, terrorism and security

The legislative options potentially reduce risks relating to crime, terrorism and security by reducing the under-reporting of violations and increasing the prospect of wrongdoing being exposed. Information disclosures such as the 'Panama Papers' indicate the important role that whistleblowers can have in exposing criminal activities. This includes activities that could prejudice national security, such as the financing of terrorism.

The power of the options to generate positive impacts in this area is assumed to increase with scope (covering more of the relevant types of wrongdoing) and power (to protect whistleblowers from retaliation). As such, options 2 and 4 emerge as the strongest.

In all cases, their impact or absence of impact would depend on whether areas such as national security and defence would be excluded or not from the scope of the options.

Impact	Option			
	1	2	3	4
Crime, terrorism and security	0	++	+	++

*Note: '0' indicates that no significant impact is expected. '+' indicates moderate positive impact, '++' indicates significant positive impact.*

### 6.5.9 Governance and good administration

All options aim to support the application of the rule of law and build trust in institutions in the long term by promoting transparency and reducing the under-reporting of corruption, fraud and other wrongdoing.

The provision of reporting channels and whistleblower protection help give workers a stronger voice in the governance of the organisations they work for. The tiered

<sup>236</sup> Assumption based on Centre for American Progress (2012) There Are Significant Business Costs to Replacing Employees

approach and the role of the regulators in tracking progress should help to support public access to information and help to publicise the issues raised by whistleblowers.

As with the other impacts, options 2 and 4 have the greatest potential for impact.

Impact	Option			
	1	2	3	4
Governance and good administration	(+)	++	+	++

*Note: '0' indicates that no significant impact is expected, (+) indicates small positive impact, '+' indicates moderate positive impact, '++' indicates significant positive impact.*

## 6.5.10 Fundamental rights

The purpose of the policy options is to increase the reporting rate of wrongdoing and to decrease the retaliation suffered by whistleblowers. They also aim to provide a level playing field for whistleblowers and employers across the EU by establishing a consistent level of protection and legal certainty for whistleblowers over their protection in the due process.

The options consequently need to be read, interpreted and implemented in full compliance with the Charter of Fundamental Rights of the EU ('The Charter') and safeguard fundamental rights that may be affected by the relevant measure. In accordance with the Communication from the Commission on the Strategy for the effective implementation of the Charter by the European Union<sup>237</sup>, the impacts on fundamental rights are examined, in particular in light of the Fundamental Rights "Check List" as provided for in the Communication.

### 6.5.10.1 Impacts

#### Article 11 of the Charter

The protection of freedom of expression in the employment relationship is required inasmuch it forms part of the fundamentals of democratic societies in general and the enjoyment of those rights also at the workplace in particular. Any measure proposed has **overall a positive impact of the fundamental right to freedom of expression and information (Article 11 of the Charter)**.

Whistleblowing is a manifestation of freedom of expression. Insufficient protection of whistleblowers against retaliation may discourage potential whistleblowers from disclosing information out of fear of the possible future consequences and lack of protection.

Insufficient protection of whistleblowers against retaliation results in restrictions of the public's right to access information. Journalists depend on others to provide the information they report to the public. They often rely upon sources that, from their position inside companies and public administrations, have information about threats or harm to the public interest and who risk retaliation if exposed. Even if public disclosures (including whistleblower reports to the media) are not directly regulated at EU level, strengthening the protection of whistleblowers from retaliation and providing clear conditions under which whistleblowers can enjoy such protection (for instance subject to the condition of going through the tiered reporting system)

<sup>237</sup> COM (2010)573 of 19 October 2010.

should increase the legal certainty for whistleblowers and incentivise whistleblowing also to the media and journalists.

Any of the proposed options will safeguard protection against retaliation of any sort (employment-related, civil or criminal) and encourage reporting, which in turn increases the protection and renders more effective whistleblowers' right to freedom of expression in line with the caselaw of the European Court of Human Rights.

Hence, all the options will – to varying degrees – enhance **the right of freedom of expression** of the whistleblower as well as the general **right to information** of journalists and the public in general, **Article 11 of the Charter**.

#### **Article 30 and 31 of the Charter**

Articles 30 and 31 of the Charter assert protection against unfair dismissal and underline the right to working conditions which respect employee's health, safety and dignity.

Stronger whistleblower protection in the workplace and harsher consequences for employers in cases of unjustified dismissal would protect potential whistleblowers and act as a deterrent to retaliation for employers. With the establishment of clear reporting channels and the improvement of protection against retaliation at the work place, the fundamental right to fair and just working conditions should be significantly improved.

The options should therefore have a positive impact on the right to **fair and just working conditions of employees** that report wrongdoings (Article 30 and 31 of the Charter).

#### **Other areas enhancing protection**

The options may, depending on their scope, have general positive impacts on principles listed in the Charter such as those of **health care (Article 35 of the Charter)**, **environmental protection (Article 37 of the Charter)** and **consumer protection (Article 38 of the Charter)** as well as the **general principle to good administration**. To the extent that they will increase reporting and possibly prevent, remedy or deter wrongdoings in these areas they should improve the protection of the public from relevant risks.

#### **Balanced impact**

The options proposed may have an adverse impact on certain fundamental rights insofar as a higher protection of whistleblowers entails imposing certain obligations on employers and may lead to public disclosure of personal data and changes in the legal procedural measures such as the burden of proof. While an overall positive impact on fundamental rights is observed the analysis of all options (which increase the protection of whistleblowers) there are as well certain restrictive measures to be considered.

In this regard, some of the measures derived from an increased whistleblowers' protection may promote certain fundamental rights of some individuals, while, at the same time, interfere with fundamental rights of others. For those cases a balanced approach is necessary. The relevant fundamental rights are:

- The right to private life and to the protection of personal data as recognised by **Articles 7 and 8 of the Charter** of whistleblowers as well as individuals implicated by whistleblowing reports (equally protected by Article 16 of the Treaty on the Functioning of the European Union).
- The freedom to conduct a business as protected by **Article 16 of the Charter**

- The presumption of innocence and the rights of defence of persons implicated by whistleblower reports **as protected by Article 47 and 48 of the Charter**

#### 6.5.10.2 General conditions for restrictions of fundamental rights

None of the above-mentioned fundamental rights are absolute. Thus, as regards any potential negative impacts of the envisaged options, it needs to be recalled that **Article 51 (1) of the Charter** allows interferences with those rights under certain conditions. The provision requires that any limitations of fundamental rights

- i. are provided for by law,
- ii. respect the essence of those rights and freedoms,
- iii. meet **objectives of general interest** recognised by the Union or the need to protect the rights and freedoms of others and
- iv. comply with the **principle of proportionality**, i.e. they must be appropriate and necessary to meet the objective.

Consequently all envisaged options need to be assessed against these criteria. As regards criteria *i-iii* all options can be assessed together, whereas the principle of proportionality is assessed in more detail within each option.

#### 6.5.10.3 Legal basis

To the extent that the different elements of the options will be provided for in a legal instrument (recommendation, directive or regulation) they - in so far as they restricting fundamental rights - fulfil the condition of being provided for by law.

#### 6.5.10.4 Respecting the essence of rights affected

Respecting the essence of rights affected requires that any limitation leaves intact the core of the fundamental right. This means parts of exercising such a right may be restricted without negating the right as a whole.

While some of the options do interfere with fundamental rights, none of them render those rights *de facto* ineffective. For instance, the right to personal data and privacy (Articles 7, 8 of the Charter) of persons implicated in whistleblower reports will be affected by the fact that whistleblowers will be better protected. This will entail reporting of personal data inside organisations or externally.

Yet, the right to protection of personal data is not stripped of its core, as the right to protection of personal data is only interfered with in the context of internal business relations or *vis-à-vis* investigations by public authorities, while none of the typical safeguards (competences of data protection authorities, Article 8 (2) of the Charter, rights to defence Article 48 of the Charter) are abolished. Its restrictions can furthermore be counterbalanced by additional safeguards that will be discussed in context with the proportionality principle. Similarly, the freedom to conduct a business (Article 16 of the Charter) may be affected by legislation that obliges companies to establish certain internal reporting mechanisms or procedures and trainings. This, however, hardly renders their right to conduct a business ineffective as business activities as such are not forced to cease.

#### 6.5.10.5 Objectives of general interest recognised by the Union/protection of rights and freedoms by others

The general objectives of the options envisaged are to increase the reporting rate of wrongdoing and to eliminate whistleblower retaliation as well as to support principles of good governance, transparency and the rule of law and to enhance the functioning of the market.

Of these objectives principles of good governance, transparency and the rule of law as well as the functioning of the internal market are explicitly recognised by the Union in the TFEU.

Hence, all of the options comply with the first three requirements of Article 52 (1) of the Charter as regards limitations of fundamental rights. As regards the fourth requirement of proportionality, the different building blocks of the options have different impacts on different fundamental rights. Therefore, their impacts as regards proportionality will be considered in turn.

#### 6.5.10.6 Impact on the right to private life and protection of personal data (Articles 7 and 8 of the Charter)

All the proposed options are linked with the establishment of reporting channels. While this measure will increase the reporting of wrongdoings, the number of persons implicated, whose personal data and possibly information about their private life will be processed, will also be increased.

Furthermore, providing for the disclosure of the wrongdoing and related personal data through such channels will make such processing of personal data legal. Thus, persons implicated will not be able to categorically claim a breach of protection of personal data, where the latter are processed due to whistleblower reports. The option, thus, have a **negative impact** on the **right to a private life and protection of personal data** of persons implicated in the reports.

Certain **safeguards that can limit this negative impact**:

- The requirement to set up systems that ensure the data protection principles developed by the EU data protection acquis, i.e. any processing of these data need to be compatible with the requirements of the data protection regulation (Regulation 2016/679).
- Protection of the confidentiality of the whistleblowers' identity can also reduce the negative impacts on their rights to private life and data protection.
- The establishment of internal channels dedicated to whistleblower reports and/or external channels to prescribed authorities will also allow sensitive information to be distributed to only a select number of persons tasked with receiving and investigating the reports.
- The requirement of a tiered use of channels allows for filtering out a substantial number of cases where personal data could be made available externally. Reference can be made to the findings of the study showing that only a small percentage of whistleblowers report wrongdoings externally.

The limitations arising from the establishment of reporting channels for the rights to a private life and protection of personal data appear therefore appropriate to achieve the specific objective of increasing reporting.

At the same time, provided they are accompanied with data protection safeguards, they comply with the proportionality principle. In fact, requirement to set up systems

that ensure respect of the EU data protection acquis will have a **positive impact** on the right to private life and protection of personal data of the whistleblowers as it would envisage clear obligations for Member States to ensure that the whistleblowers' data are protected.

Moreover, clarifying the procedures in terms of safeguards on data protection will improve legal certainty, especially as regards the challenges of EU subsidiaries of large corporations that face in some cases a dual system of data sharing due to discrepancies between their country of origin and the obligations imposed by the country of establishment.

#### **6.5.10.7 Impact on freedom to conduct a business (Article 16 of the Charter)**

The establishment of reporting channels for whistleblowers and related arrangements can affect companies' freedom to conduct a business. First of all, any of the proposed measures entails costs – albeit to a different degree - for undertakings. These measures also restrict a company's scope of strategic and financial decisions and the protection of confidentiality of sensitive business information/trade secrets.

The setting up of external channels in particular may lead to an increase of reports to authorities that may harm the interests/the reputation of the company.

**Safeguards** that can limit the impact these negative impacts:

- the establishment of dedicated internal and/or external reporting channels will allow the sensitive information to be distributed to only a select number of persons tasked with receiving and investigating the reports
- the requirement of tiered reporting ensures that external channels are only used if the internal channels have proved to be unsuccessful
- the requirement of good faith and the possibility for the employer to provide disciplinary sanctions for malicious whistleblowing serves to exclude malicious reporting and thus to limit reporting to actual wrongdoings, without causing unjustified harm to the interests and the reputation of the company.

Also, requirements made to small and medium sized enterprises need to be adjusted to what is proportionally feasible. Hence, any obligation to set up internal reporting mechanisms may need to be balanced by alleviating measures when addressed to micro, small and medium companies as compared to large enterprises. Replacing internal reporting mechanisms with secure access to external hotlines is also conceivable in this case.

Moreover, certain procedural measures also restrict freedom to conduct a business. Such measures range from the establishment of a reversal burden of proof in employment proceedings to prevent retaliatory measures, accompanied by criminalisation –in certain of the proposed options - of retaliatory acts performed by employers, limitation of criminal and civil liability of whistleblowers when passing on internal business information to external channels, non-criminalised breach of duty of loyalty restrict a company's scope of strategic and day to day personnel as well as financial decisions and the protection of confidentiality of sensitive business information - in other words its.

This is furthermore complemented by employment related remedial measures benefiting to whistleblowers who experience retaliation, such as actions for reinstatement; for compensation; for award of damages; interim relief for suspension of dismissal etc.

Safeguards for employers should thus be also put in place to mitigate these impacts, such as strong rights of defence for companies in the form of right to access the file, to be heard and to seek effective remedy.

At the same time, increasing protection for whistleblowers also benefits employers and have **positive impacts on the freedom to conduct a business**. It will enable companies to detect internal wrongdoings and malpractices in a timely manner and to implement a remedy so as to avoid reputational and/or financial damages. It will also increase competitiveness in the internal market and, in the long term, it can increase legal certainty on reporting about wrongdoing.

#### 6.5.10.8 Presumption of innocence and rights of defence (Article 47 and 48 of the Charter)

Article 47 states that everyone whose rights and freedoms guaranteed by the EU law are violated has the right to an effective remedy before a tribunal [...]. Article 48 of the Charter states that everyone who has been charged shall be presumed innocent until proved guilty according to law. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Any obligation to establish internal/external reporting channels and disclosure of information **needs to be accompanied by appropriate safeguards** to ensure that all rights of defence remain available to persons involved (rights to access to the file, to be heard and to seek effective remedy).

The fact that the number of persons implicated in whistleblowing reports will be increased may lead to a higher number of investigations as a higher number of suspects being charged in criminal proceedings. This fact hence does not alter, decrease or impact suspect's procedural rights - but merely increases probabilities of being subject to an investigation.

Moreover, the applicability of the principle of presumption of innocence is limited to criminal procedures. Any national legislative changes establishing a reversal of burden of proof in civil or administrative or other law procedures (i.e. labour law) would not impede or affect this principle.

In so far as a defence is envisaged for whistleblowers accused in criminal proceedings for breach of confidentiality obligations, such a defence would hinge upon the whistleblower fulfilling certain requirements, such as being in good faith and using the tiered reporting system. Both elements serve to protect confidentiality of personal data and business information as much as possible.

Furthermore this option does not envisage limiting rights of defence by legislative changes. The fact that the number of persons implicated in whistleblowing reports will increase, and therefore may render more likely their being charged in criminal proceedings does not change their procedural rights but merely increases probabilities of being subject to an investigation. To this effect it needs to be ensured that all rights of defence remain available to persons implicated in such proceedings.

Overall, as with other impacts, options 2 and 4 have the greatest potential for impact.

Impact	Option			
	1	2	3	4
Fundamental rights	0	++	+	++

*Note: '0' indicates that no significant impact is expected. '+' indicates modest positive impact. '++' indicates significant positive impact.*

## 6.6 Environment impacts

Effective whistleblowing channels and protection that increase the probability of wrongdoing being reported are expected to have a positive environmental impact by, for example:

- Reducing the risk of specific events that result in environmental damage, such as negligence leading to equipment failure that causes large scale pollution of water, air or soil;
- Reducing the loss of habitat, impact on wildlife protection, and other environmental damage caused by corruption and other wrongdoing related to the protection of the natural environment, management of waste, protection of animal welfare, illegal trade in wildlife, etc.

Options 2 and 4 are expected to have similar positive impacts – they have the same scope in terms of workers / organisations affected, and the environment-related wrongdoing above are compatible with their respective definitions of the public interest. Options 1 and 3 are not expected to have an impact;

	Option			
Impact	1	2	3	4
Environmental impacts and risks	0	++	0	++

*Note: '0' indicates that no significant impact is expected. '++' indicates significant positive impact.*

## 6.7 Impacts on SMEs

Medium-sized enterprises with between 50 and 249 employees<sup>238</sup> will fall within the scope of the legislative options and so will be affected by the related benefits and costs. This section summarises what are the impacts, benefits and costs. Tables showing the modelled impacts of the options on private employers with more than 50 workers are provided in Annex 9 (in Volume II of this report).

The decision to place medium sized businesses with more than 49 employees in the scope of the options flows from the problem definition – these employers employ a sizeable proportion of the overall workforce. Their omission would leave a significant fraction of the working population (and so the problem) outside the scope of the remedies proposed.

Small and micro business employers that are not directly obligated may be impacted by the options even though they are out of scope. An example is where a larger businesses requires its suppliers, which may include representatives of small and micro businesses (including sole traders), to take additional training or to participate in meetings relating to whistleblower protection.

<sup>238</sup> Private employers with fewer than 50 employees are out of scope of the legislative options. For very small businesses, formal whistleblower support and protection systems may not always be appropriate mechanisms for addressing wrongdoing. Headcount rather than turnover has been used to define SMEs in this analysis due to data availability.

## 6.7.1 Impacts

Some 328,000 medium-sized employers with 50-249 workers would be affected by the legislative options. 20.8 million workers would receive additional protection in option 2 versus the baseline<sup>239</sup>. The costs carried by these type of businesses on the basis of the assumptions under each policy option are summarised in Table 6.9 below.

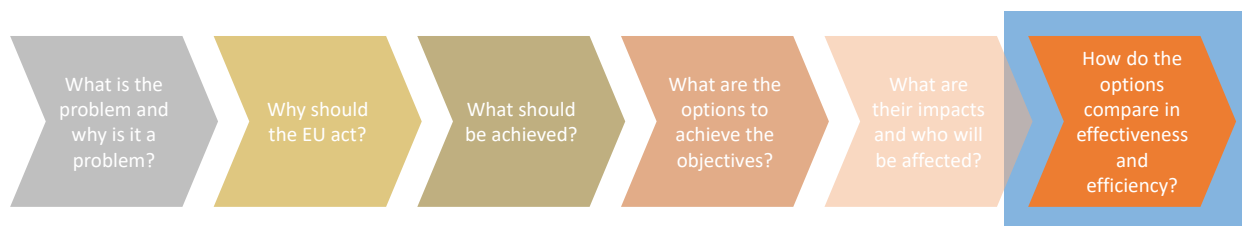
While overall costs appear significant, the individual cost per business does not appear to be highly burdensome in economic terms for the typical medium sized business (with incremental annual costs estimated at less than 0.01% for the average medium-sized enterprise in all Member States). The employers would benefit from improved disclosure of wrongdoing and the long-run performance and productivity gains associated with good governance, where such standards are lacking. Their inclusion also contributes to the societal benefits described above, and to the extension of rights and freedoms on an equitable basis across the workforce.

Table 6.9 Impacts on SMEs – summary cost data

	1	2	3	4
<b>Total one-off implementation costs (€ million), 2022</b>	<b>40.8</b>	<b>438.8</b>	<b>438.1</b>	<b>438.8</b>
- One-off cost of interpreting new legislation	10.7	122.0	121.7	122
- One-off cost of establishing reporting channels	12.3	113.6	113.6	113.6
- One-off cost of development training	17.8	203.3	202.8	203.3
<b>Additional annual operational costs (€ million)</b>	<b>29.7</b>	<b>384.7</b>	<b>311.3</b>	<b>348.0</b>
- Additional recurring cost of training, €/yr, 2022	20.7	199.1	199.1	199.1
- Additional recurring cost of reporting channel provision and support, €/yr, 2022	8.9	185.6	112.2	148.9
<b>Average costs per medium sized enterprise (€/employer)</b>				
<i>Average implementation cost per medium sized business in the EU (€/employer)</i>	127.8	1,374.0	1,371.5	1,374.0
<i>Additional average annual operational cost per medium sized business in the EU, €/employer/yr, 2022</i>	89.9	1,165.8	943.5	1,054.6

<sup>239</sup> Data reference projected 2022 situation.

## 7 Comparative assessment of the options



This section considers the

- How the options compare in the expected performance against the stated general and specific objectives;
- How the options compare in effectiveness, efficiency, coherence and with reference to the proportionality principle

### 7.1 Impact summary

The table consolidates the appraisals of each option against each impact. These provide indicators of the relative performance of each option against the baseline. Where monetary values are provided in the text above these are reproduced here. Costs of training development and annual deployment are included as explained above, though they are not directly mandated by the options as currently specified. A ranking of options by reference to their aggregate performance against the parameters detailed in the assessed is provided at the end of the table.

Table 7.1 Aggregated appraisals of impacts

	Option 1	Option 2	Option 3	Option 4
<b>Economic</b>				
Operational costs to obligated entities				
One-off costs to employers to implement new policies	€14m	€214m	€213m	€213m
One-off cost to employers to set up reporting channels (internal and outsourced internal reporting channels)	€17m	€179m	€179m	€179m
One-off cost to develop training*	€23m	€357m	€355m	€355m
Recurrent cost to employers to provide reporting channels and to appraise & follow-up reports	€33m	€750m	€478m	€614m
Annual cost of training to employers above the level of baseline expenditure (2022)*	€65m	€722m	€722m	€722m
Functioning of the internal market and competition				
Integrity of product and services markets and consistency of enforcement	0	++	+	++
Removing legal complexity	0	++	+	(++)
Aligning compliance regimes	0	++	+	+
Productivity and performance	0	+	(+)	+
Public authorities (and budgets)				

	Option 1	Option 2	Option 3	Option 4
Guidance, dissemination, awareness-raising	0	-	-	-
Cost of enhanced regulatory and advisory bodies	0	€19m	€19m	€19m
Investigative and judicial activity	0	(-)	(-)	(-)
Reduction in public procurement fraud	0	++	+**	+
Reduction in VAT fraud	0	+	+	(+)
Other tax evasion	0	+	(+)	+
Consumers and households	0	++	0	++
Other economic impacts				
Reductions in corruption	0	++	(++)	(++)
Third countries	0	+	(+)	(+)
<b>Social</b>				
Public health and safety	0	++	0	++
Physical health and safety of workers	0	++	0	++
Job standards and quality	0	++	+	++
Job satisfaction	0	++	+	++
Staff turnover	0	++	+	++
Crime, terrorism and security	0	++	+	++
Governance and good administration	(+)	++	+	++
Fundamental rights	0	++	+	++
<b>Environmental</b>				
Environmental impacts and risks	0	++	0	++
<b>Ranking by aggregate performance (A = top , D = bottom) in marks*</b>	<b>D</b>	<b>A</b>	<b>C</b>	<b>B</b>

\*+/- 1 mark is award for each +/-, +/- 0.5 marks for each (+)/(-).

\* Training is not mandated by option specifications. Costs for annual training on whistleblower procedures have been estimated.

\*\* EU funds only

## 7.2 Effectiveness

Effectiveness is measured by the extent to which options are expected to achieve the target objectives. We recall at this point that the general objective of EU action is to:

- contribute to the reduction of harm from wrongdoings by ensuring that whistleblowers can report such instances without fear of retaliation and to reduce the personal cost of retaliation for the whistleblowers;
- support principles of good governance, transparency and enforcement of the law; and to
- enhance the functioning of the internal market – facilitating the mobility of labour, goods, services and capital by tackling the issues caused by inconsistent whistleblowing support and protection currently observed across the EU.

The effectiveness of the options in achieving this objective is determined primarily by the scope of the wrongdoing they cover and by whether they provide protection in addition to provision of reporting channels. This perspective on their specification is summarised in Table 7.2. The text below provides a narrative appraisal of their performance.

Table 7.2 Options by scope of wrongdoing and availability of protection

		Variety of wrongdoings in scope		
		Narrow	Intermediate	Comprehensive
Reporting protection	and	3	4	2

**Option 1** is a non-legislative option. The research for the assignment did not suggest that progress towards tackling the problems of wrongdoing not being reported and of retaliation against whistleblowers was inhibited by information failures at organisational or governmental level (e.g. through lack of guidance). Providers in the market service demand for advice and provision of reporting channels for organisations uncertain about how to deploy them. There is information available from Council of Europe and other sources, and Member State legislation provides a number of models for other countries to review and, as appropriate, adopt.

Official EU recommendations could help improve the alignment of Member State measures and so reduce the diversity of legal approaches adopted across the EU. A significant number of Member States currently have live proposals for whistleblower legislation under consideration in their parliaments. Guidelines issued by the Commission could potentially help to steer the EU towards a common model based on recognised good practice.

This option has a very low cost but seems unlikely to make a measurable difference to the problem in the short to medium term.

**Option 2** provides the most comprehensive response to the challenge set by the general objective as measured by reference to the organisations and activities in scope and the specification of the terms of reporting channels and protection.

**Option 3** combines reporting and protection but the scope of eligible wrongdoing is limited to the financial interest of the EU. It provides no protection for reporting on the many other types of wrongdoing that are of concern, including all issues relating to the functioning of the single market, public and worker safety and environmental protection. This is a significant constraint on its effectiveness in tackling the problem as a whole.

On the understanding that the 'financial interests of the EU' includes VAT collection, the number of obligated parties and the obligations imposed are very similar to those seen for Options 2 and 4.

**Option 4** provides, alongside a requirement for reporting channels, protection for public interest reports relating to all policy areas crucial for the proper functioning of the internal market. This provides a broad coverage of wrongdoing but is assumed to exclude matters of EU financial interest and some financial misconduct.

Option 4 is expected to be effective within its defined scope. Insofar as it is less comprehensive in scope than Option 2, which is otherwise very similar in specification, it will be less effective. The two options have very similar expected

costs because their 'footprint' (as measured by the number of obligated parties and the direct obligations imposed) are essentially identical.

Several of the consultees working on provision of reporting channels highlighted the importance of any new legislation not specifying the exact reporting mechanism to be used. They emphasised that the different reporting channels (e.g. online, telephone), suit different occupations (e.g. professional drivers vs officer workers). They also noted the continuing improvements in the technologies available to support reporting and the importance of not intentionally excluding such developments from use by inopportune drafting of legislation. It is enough for the reporting channel to be required to be effective.

## 7.3 Efficiency

Efficiency considers the relationship between benefits (here the expected progress towards the stated objectives) and costs.

Option 2 is, overall, expected to be more effective than option 4, and option 4 more effective than option 3 as a means of achieving the general objective as a consequence of their broader scope (the range of wrongdoings that are protected). Option 1 costs little compared to the other options but is also not expected to have a significant impact on the problem<sup>240</sup>.

Options 2, 4 and 3 have near identical costs because they impose similar obligations on the same set of organisations (all cover public and private organisations, all exclude organisations with fewer than 50 employees). As Option 2 'achieves more' at essentially the same cost, it is the more efficient option.

## 7.4 Coherence

The consultations conducted for this assessment did not raise any major concerns about the coherence of the proposed interventions against existing EU legislation, including sectorial laws with whistleblower provisions. Few of the current EU laws that provide whistleblower protection have yet been evaluated and evidence on any implementation issues is not readily available.

The research has identified the potential for friction with existing national legislation. One example is the interface of the proposed whistleblower provision with national legislation setting the powers of works councils, which in some Member States have decision-making powers on reporting channels.

Coherence is not a significant concern for Option 1, a non-legislative measure. Options 2 – 4 that mandate reporting measures potentially create interface issues with national specifications on reporting, such as anonymity, in those Member States that have existing legislation.

<sup>240</sup> The research programme for this assessment did not include direct consultations with Member State governments on the utility of EU guidance on whistleblower support and protection. There were some responses from Member State authorities to the open public consultation conducted by the Commission but too few to determine whether there is demand for such advice.

## 7.5 Uncertainty

There are a number of uncertainties in the estimation of benefits and costs. These relate to particular aspects of the interventions' theory of change, as explained below.

### 7.5.1 Uncertainty in determination of the impact of legislation on the problem

The appraisal at section 6 provides, in various places, a range of estimates of the impacts of the EU intervention. The evidence gathered for the assessment suggests that legislation providing protection and mandating reporting channels is not always sufficient in itself to deliver the expected benefits. For the benefits to be realised workers need to have confidence that the channels are effective. Also, survey evidence suggests that retaliation against whistleblowers can persist in countries that have strong protection in law and relatively strong enforcement mechanisms. This points to the importance of socio-cultural and other factors (including access to justice).

Overall the evidence suggests that a system-based approach is needed. The legislation is an important component but, to increase the prospects of the benefits being realised, needs to be accompanied by supporting measures such as:

- Awareness raising within organisations and at societal level of reporting channels, support and protection;
- Training of workers;
- Championing and giving explicit recognition to those who 'speak up';
- Full use of the tiered approach to reporting to ensure that pressure is applied from society to regulators to organisations (i.e. organisational performance is scrutinised by regulators and regulator performance is scrutinised by the public, providing accountability and transparency).

It is also clear that significant change does not follow immediately behind the adoption of a new law – the period of transition may be significant.

There may also be a period in which the rate of reporting of wrongdoing, the number of investigations and the apparent scale of the related problems in society will increase. The increased visibility of corruption, wrongdoing, etc., may erode trust in the relevant institutions. In time, as the working environment is 'cleaned up', the rate of wrongdoing would be expected to fall and indicators of trust gradually improve. In the expert workshop conducted by ICF to support analysis under this assessment, a number of the experts on development of whistleblower protection and support spoke of the need for strong leadership during that transition period.

### 7.5.2 Uncertainty in the determination of costs

The principal costs quantified in the analysis are the costs to employers of introducing and operating reporting mechanisms. The basis of those estimates is specified in the analysis and summarised in the annexes to this report.

An example of the cost uncertainty relates to training. In some organisations training relating to the availability of a whistleblowing 'hotline' may be integrated into wider training on issues of compliance and good governance. Small variations in the

average cost of training development and delivery at the employer level have a large impact when aggregated to the level of the EU.

There are uncertainties about the scale of use of internal reporting channels and policies on whistleblowing that go beyond the prevailing national legislation in the EU.

### 7.5.3 Co-benefits

An additional aspect not fully factored into the analysis is the potential for the mandated interventions to have additional 'co-benefits'. Examples are the contribution of the whistleblower-related channels and training on organisations' overall performance – noting the evidence linking good governance to strong long term performance of businesses.

## 7.6 Summary conclusions

The assessment has considered the impacts of potential EU interventions to support and protect whistleblowers.

All three legislative options would trigger one-off adjustment costs to implement new policies (over €210m in options 2, 3, and 4) and set up reporting channels (over €180m in options 2, 3, and 4). They would also lead to additional recurrent expenditure on provision and servicing of reporting channels, including investigating reports, of €478m – €750m per year (depending on the option). There would also be costs to governments in strengthening regulatory capacity and, potentially, providing advisory services. All these incremental costs would be concentrated in those countries that currently have either low or medium levels of whistleblower protection, and would bring employer practices into conformity with those of the leading countries that already have strong whistleblower protection.

Setting up employee training programmes on whistleblowing and use of the reporting channel would cost a further €375m. The cost of deploying a short training programme on an annual basis to workers has been estimated at an additional €750m. These training costs are not explicitly mandated by the policy options as currently specified but may well be taken up by employers in order to help demonstrate that they have effective systems and to get value from investment in the reporting channels.

The costs estimated are substantial but they are very small by comparison with the costs and consequences of the wrongdoing that effective whistleblower systems, backed by public support, can help to tackle. Surveys indicate that a large number of citizens and businesses in many Member States believe that corruption is widespread. It has been estimated that corruption costs Europe more than €179bn each year. The estimated economic losses to some Member States are in double digits. The 'VAT gap' has been assessed at €159.5 billion per year. A study for DG GROW identified potential benefits of effective whistleblower protection in the area of public procurement in the range of EUR 5.8 to 9.6 billion, though the actual achieved benefits area likely to be smaller than this.

Whistleblower mechanisms already have an important role in the detection of wrongdoing in the workplace in some EU states and around the world. Adoption of consistent, robust support and protection for whistleblowers only has to facilitate a very small reduction in the wrongdoing of concern (from financial corruption to wilful environmental damage) for the benefits to far exceed the costs of the intervention.

Option 2, as the most comprehensive of the options, is the most effective. With the options given, costs do not change significantly across the options as the scope of wrongdoing covered changes. This means that option 2 is also most efficient.

Recommendations provided under option 1 can help to steer Member States together with a good practice approach to system design and deployment. This would add value if done in combination with the other options; and could inform political debates and legislative processes in Member States that are considering adopting new future national whistleblower legislation.

Option 1 also flags a further benefit to EU action – the application of a harmonised approach that addresses some of the issues arising in terms of the increasing complexity of the legal landscape across the EU28 as different countries adopt different definitions, system models, boundaries and requirements.