

DRAFT

Initial EU research:

Avenues for TI to advocate for whistle blower protection at EU-level

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Enhancing whistleblower protection in the EU

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Executive summary of the research findings

The European Union (hereinafter EU) undergoes significant changes following the entry into force of the recently adopted Lisbon Treaty amending all previous treaties. The changes that are relevant for the protection of whistleblowers required a detailed analysis of the new legal basis of the EU. As to the issue of whistle blowing, it can be concluded that the EU does not gain additional competence but will rather have to adjust its structures and its policy- as well as decision-making. For future advocacy steps, it is of utmost importance to clearly differentiate between the protection of those who blow the whistle as officials of the three EU institutions and those who blow the whistle in national bodies, as the level of protection varies quite significantly. While the EU implemented a comprehensive set of whistle blowing measures for the former category, protection at EU member state level appears to be rather a patchwork with a wide variety of pieces of legislation, if it exists at all.

The assessment produced the results that the EU is currently only in the position to act on the policy rather than the legislative level. At the EU institution level, advocacy would be useful regarding the enforcement and thus the actual effective application of the measure in place that is reportedly lacking in some instances. With respect to the promotion of whistleblower measures at the EU level that carry the potential to impact on the enhancement of whistleblower protection at the national level, the EU is not in the position to enact legislative acts that could lead to the harmonisation of the domestic law of the 27 EU Member States given its limited competence. Promising appear however awareness raising actions of EU and national stakeholders as to the highly important role of whistleblowers in detecting corruption, the training of national authorities (beneficiaries, law enforcement personnel) as well as the introduction of whistle blowing as part of the EU's fight against organised crime.

Notably, to ultimately achieve the goal of an enhanced protection within and beyond the EU, the research study illustrates that the Lisbon Treaty offers not only new and strengthened advocacy targets but also new instruments that could serve useful in developing a new, follow-up approach.

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A. Introduction & Methodology

Why should TI identify advocacy avenues for whistle blower protection?

In practice, corruption cases are difficult to detect and investigate, as they typically occur in the dark. Whistleblowers can play a vital role in revealing fraud and corruption and, thus, in protecting the public good. Despite their important function to protect those who actually blow the whistle regarding mismanagement and corruption. This is an area which is often scarcely regulated in EU Member States.

With the aim to promote effective protection mechanisms, TI ran a 1-year project funded by the European Commission's Directorate-General Justice, Freedom and Security (DG JLS) assessing related legislation and practice in 10 EU Member States. The project's findings indicate the need to raise awareness among key national and regional stakeholders about the importance of the concept of whistleblowers that is often seen to have a negative connotation.

As a follow-up to this thorough assessment of legislation and practices in EU Member States, the following research conducted by the Transparency International Liaison Office to the EU (hereinafter referred to as TI-EU) is meant to feed into the OSI-funded Whistle blowing project run by the TI International Secretariat. Length of the research paper is supposed to be 15-20 pages.

The purpose of the study undertaken at the European Union's level is to identify and assess potential EU advocacy avenues aiming to promote EU policies and, if feasible, even legislation. This would, ideally, contribute to an increased protection of whistleblowers both at the EU level and at the national level of the 27 EU Member States through the setting of regional standards by the EU. Therefore, this assessment is divided into the subsequent four parts:

1. Identify EU's (supranational) competence in areas relevant to whistle blowing protection
2. Identify EU instruments and measures relevant to whistle blowing
3. Political feasibility assessment of EU action
4. Proposed future EU advocacy action

For the identification of potential advocacy avenues that would help promote and advocate for the betterment of whistle blowers' protection, TI-EU obtained input from EU experts and other stakeholders, e.g. the European Commission's DG Home Affairs, Members of the European Parliament, TI-EU Senior Advisor Dieter Frisch and Jana Mittermaier, Head of the TI-EU Liaison Office to the EU.

Reference is made to the Lisbon Treaty¹ and the consolidated versions of the Treaty on the European Union (TEU (consolidated version)) and the Treaty on the Functioning of the European Union (TFEU (consolidated version))² containing the relevant provisions regulating the new EU competences; the Charter of Fundamental Rights of the European Union³ that has become a legally binding instrument following the entry into force of the Lisbon Treaty and the European Convention on Human Rights⁴ which the EU is called to sign in the near future.

¹ Lisbon Treaty (2007/C 306/01), OJ C306, 17. December 2007.

² Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union (2008/C 115/01), OJ C115, 9 May 2008.

³ Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ C346, 18 December 2000.

⁴ Convention on the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950.

B. Assessment of the state of affairs on the EU-level

1. Current changes in the European Union relevant to whistle blowing

Following the entry into force of the Lisbon Treaty on 1 December 2009⁵, the European Union (EU) is currently undergoing significant changes as to the EU's structure and its policy areas that bear new opportunities for an EU advocacy towards an increased protection of whistleblowers.

a. Current structural changes in the European Union relevant for whistleblower

Major structural changes relevant for WB:

- Consolidated legal personality of the EU
- Basic structure of the EU changed (merger of three pillars)
- New decision-making procedures (double-majority)
- Extended co-decision power for the European Parliament
- Long-term European Council presidency
- Right of citizens' initiative

➤ **Consolidated legal personality of the EU:**

As a consequence of the Lisbon Treaty, the EU has become a legal entity, which implies that the regional organisation may now enter contracts in all policy areas (not only in those of the former first pillar). This is particularly important with regards to closing international conventions or becoming a member to international organisations (e.g. Council of Europe; OECD).

➤ **Basic structure of the EU changed (merger of three pillars):**

Until December 2009, the EU was legally based on the three pillars - a concept that was introduced by the Treaty of Maastricht in 1993 (and amended by the Treaty of Amsterdam).⁶ The changes for each new policy area relevant to whistle blowing following the entry into force of the Lisbon Treaty will subsequently be scrutinised in more detail.⁷

⁵ Lisbon Treaty (2007/C 306/01), amending the Treaty on the European Union (TEU) and the Treaty Establishing the European Community (TEC).

⁶ While the first pillar (the only with a legal personality) consisted of policy areas such as economic, social and environmental policies, the second dealt with foreign policy and military matters and the third pillar with police and judicial cooperation in criminal matters (formerly justice and home affairs).

⁷ See further below in this text at "b. Current changes in EU policy areas relevant to whistleblower protection"

➤ **New decision-making procedures (double-majority):**

A new system of qualified majority voting known as “double majority” for it recognizes the majority of EU Member States and the majority of the population of the EU (at least 55% of the EU Council members representing at least 65% of the EU citizens) was introduced. This form of voting will apply to almost all policy areas starting in 2014.⁸

➤ **Extended co-decision power for the European Parliament**

The legislative co-decision power shared by the Council of the European Union and the European Parliament was extended by the Lisbon Treaty to nearly 40 new areas, including for instance the policy area of criminal law measures that may open important advocacy avenues for the enhancement of WB protection.⁹ The now called “ordinary legislative procedure provides the European Parliament with the power to enact legislative acts jointly with the Council of the European Union. As a consequence, the European Parliament legislative powers are now comparable to those of the Council of Ministers.

The changes in the policy area of criminal law and its potential impact for TI’s future advocacy will be highlighted in more concrete terms further below (see the “Criminal law” section in this first chapter).

➤ **Long-term European Council Presidency**

While the President of the European Council¹⁰ is responsible for preparing and chairing the Council meetings (no executive power), the European Council as a whole (heads of states or government) is in charge of setting the general political guidelines and priorities of the EU (no formal legislative power). Apart from the overall EU policy, European Council summits also serve the purpose to solve subject-matter issues¹¹ that could not be settled at ministerial level in the Council of the European Union. The set-up of the new long-term Presidency of the European Council replacing the 6-months rotating system of Presidencies has the potential to increase coherence in the development of long-term EU priorities, potentially including in the future, for instance, the fight against corruption and thus the protection of whistleblowers.

⁸ Previously, different decision-making procedures applied to different policy areas. In the first pillar (economic, social and environmental policies) – the only with a legal personality – only the European Commission could submit proposals to the EU Council and European Parliament. For the adoption of an EU Council act, only qualified majority was required. Both for the second (foreign policy and military matters) and third pillar (police and judicial cooperation in criminal matters, formerly justice and home affairs), the right of initiative were shared between the European Commission and the 27 EU Member States, while unanimity in the EU Council was generally sufficient.

⁹ Notably, the following policy areas that are also relevant for WB protection will continue to be governed by the ordinary legislative procedure, as was already the case under the Treaty of Nice: Art. 15 (3) TFEU – Regulations relating to general principles and limits of the right to access to documents of the Union institutions, offices or agencies; Art. 16 (2) TFEU – Rules relating to the protection of individuals with regard to the processing of personal data.

¹⁰ President of the European Council (currently hold by Belgian Herman Van Rompuy) is elected for a once-renewable term of two and a half years.

¹¹ There are nine different Council areas: Economic and Financial Affairs (ECOFIN); Justice and Home Affairs (JHA); Employment, Social Policy, Health and Consumer Affairs; Competitiveness; General Affairs and External Relations (currently under revision due to the set-up of the new European External Action Service); Transport, Telecommunication and Energy; Agriculture and Fisheries; Environment; and Education, Youth and Culture.

➤ **New right of to bring a citizens' initiative:**

Another major innovation introduced by the Lisbon Treaty that could play a vital role in a future EU-wide whistle blowing strategy is the European Citizens' Initiative (ECI) pursuant to which EU citizens will be able to directly influence EU policy.¹² Before citizens can exercise this new right, the practical arrangements, conditions and procedures will have to be laid down in an EU Regulation.¹³ According to the proposed and currently debated procedures¹⁴, within one year at least a million EU citizens who represent one third of the EU Member States (including a minimum number of citizens in each Member State¹⁵) would have to sign an online draft law on whistle blowing to call directly on the European Commission to bring forward a legislative initiative.¹⁶

Final agreement between the Council and European Parliament is expected by the end of the year 2010, so that the first citizens' initiative can be brought forward in 2011.

Conclusion on the EU's structural changes relevant for WB:

The discussed changes introduced by the Lisbon Treaty clearly have the potential for new advocacy channels both at EU- and Member State level that could ideally contribute to an enhanced protection of whistle blowers: the EU may become a more active player on the international level, where several whistle blowing instruments already exist; the EU has gained additional powers in policy areas relevant to whistle blowing; new and strengthened advocacy targets come into play, and citizens will be better represented in decisions and even able to table draft laws.

¹² Legal basis of the ECI is stipulated in Art. 11 (4) TEU and Art. 24 (1) TFEU.

¹³ For the European Commission's Green Paper of 11 November 2009, see Green Paper on a European Citizens' Initiative, COM(2009) 622 final, available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0622:FIN:EN:PDF> on which basis a public consultation was launched until end of January 2010. On 31 March 2010, the European Commission adopted the proposal for a Regulation on the ECI, see COM(2010) 119 final, online available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2010_119_en.pdf taking into account the European Parliament resolution of 7 May 2009 (2008/2169(INI)), available online at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0389&language=EN&ring=A6-2009-0043>

¹⁴ See latest discussion between the European Parliament (Constitutional Affairs Committee) and European Commissioner Maros Sefcovic (DG Inter-institutional Relations and Administration), 20/04/2010, online available at http://www.europarl.europa.eu/news/expert/infopress_page/016-73036-109-04-17-902-20100419IPR73035-19-04-2010-2010-false/default_en.htm

¹⁵ A threshold would be fixed for each Member State which is digressively proportional to each Member State's population. For instance, the minimum limit could be 4.500 signatures for small countries like Malta, Estonia or Cyprus. Bigger countries, such as Germany, could for example require 72.000 signatures.

¹⁶ The subject of the citizens' initiative must function within the boundaries of the existing European Treaties and the powers of the European Commission. Once a proposal is signed by 300.000 EU citizens, the European Commission will decide on its admissibility (whether it falls in the EU's competence and complies with the treaties). Upon this approval and the required one million signatures, the European Commission will examine the proposed initiative a second time and rules within four months on its approval or disapproval.

b. Current changes in EU policy areas relevant for whistleblowers

Following to the Lisbon Treaty, the powers of the three EU institutions are newly distributed. The Lisbon Treaty strengthens the responsibilities at various levels of competence by clarifying the distribution of power between the European Union and the EU Member States - a decisive element in the democratisation of the EU.

Article 5 TEU consolidated version (ex Article 5 TEC):

(1) The limits of Union competences are governed by the **principle of conferral**. The use of Union competences is governed by the principles of subsidiarity and proportionality.

(2) Under the principle of conferral, the Union shall act only within the limits of the competence conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

(3) Under the **principle of subsidiarity**, in areas which do not fall within the exclusive competence, the Union shall act only if an objective which cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

This implies that generally the 27 sovereign EU Member States have competence in all policy areas.¹⁷ Only in those areas where there is common concern, Member States have conferred competence to the supranational European level. The application of the subsidiarity and proportionality principle is governed by Protocol 30.¹⁸ A detailed analysis of the subsidiary competence in the context of whistle blowing can also be found in the research paper of TI-Romania.¹⁹

The EU is called to pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.²⁰ Notably, the distribution of competences varies from policy area to policy area.

¹⁷ See also Art. 4 TEU (consolidated version) where this is reiterated.

¹⁸ See Protocol (No. 30) on the application of the principle of subsidiarity and proportionality (12006E/PRO/30), Official Journal C 321 E, 29/12/2006 P. 0308 -0311, also online available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12006E/PRO/30:EN:HTML>

¹⁹ Transparency International Romania, Whistleblowing in the EU community legislation report – How and why must we use the subsidiarity principle to implement European’s whistleblowing protection legislation and to enhance this practice? (2009), see Annex.

²⁰ Cf. Art. 3 (6) TEU (consolidated version).

Major changes in the EU's policy areas relevant for WB:

- Changes in the EU's policy area relating to public law
- Changes in the EU's policy area relating to criminal law
- Changes in the EU's policy area relating to labour law

➤ **Changes in the EU's policy areas relating to public law:**

The EU has no explicit **exclusive competence** in areas that are relevant for whistleblowers, unless in those cases where the new Art. 3 (2) TFE (consolidated version) applies:

Art. 3 (2) TFEU (consolidated version):

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Exclusive competence generally allows the EU to launch directives and to conclude international agreements, when its conclusion is provided for in a legislative act, is necessary to enable the Union to exercise its internal competences, or in so far as its conclusion may affect common rules or alter their scope.

The new ability to close international agreements is mainly due to the fact that the EU has obtained the status of a legal personality for all policy areas, as outlined above in this study.

In addition, by entry into force of the Lisbon Treaty the Charter of Fundamental Rights has become a legally binding instrument and the EU is also expected to accede to the European Convention on Human Rights.

Article 6 consolidated version (ex Article 6 TEU):

(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

(3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Both human rights instruments contain or refer to several provisions relevant to the protection of whistleblowers²¹, to which reference in this study will be made in the subsequent policy areas.

➤ **Changes in the EU's policy areas relating to criminal law:**

In turn, the EU has the power to legislate on the basis of its **shared competence** with EU Member States in the policy area of freedom, security and justice.

Article 4 (2) (j) TFEU (consolidated version):

Shared competence between the Union and the Member States applies in the [...] the area of freedom, security and justice.

Where the EU and Member States share competence, the latter cannot exercise competence in areas where the EU has done so. However, in those areas, which do not fall within the EU's exclusive competence, the EU is pursuant to Article 5 (3) of the Lisbon Treaty still called to act, if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member

²¹ For more details on specific human rights relevant to whistleblowers, refer also to Transparency International Liaison Office to the EU, Corruption and human rights as protected under the European human rights regime (2010).

States but better at Union level.²² This could play a particular role in advocating for the right of whistleblowers to be protected against any form of retaliation, threats, violent acts and harassment, given the fact, however, that such crimes may be regulated in general terms (not specifically addressed to whistleblowers) in most domestic criminal codes of EU Member States.

Article 2 TFEU (consolidated version):

(2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area.

The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

As part of the security and justice area, the EU is also mandated to offer protection both in terms of prevention and fighting crimes.

Article 3 TEU consolidated version (ex Article 2 TEU):

(2) The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to [...] the prevention and combating of crime.

Importantly, to all acts and measures undertaken by the EU, the new co-decision procedure (Council and European Parliament) applies. In detail, the following provisions may be relevant for the protection of whistleblowers:

²² Yet, according to Protocol (No. 25) on the exercise of shared competence, the scope of the Union's exercise of shared competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

Article 82 TFEU (consolidated version):

(1) Judicial cooperation in criminal matters [...] shall include the **approximation of the laws** and regulations of Member States in the areas referred to in paragraph 2 and Art. 83.

(2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of **directives** [...] establish minimum rules. [...].

They shall concern the [...]

(c) **rights of victims of crime** [...].

Art. 83 TFEU (consolidated version):

(1) The European Parliament and the Council may, by means of **directives** [...], establish **minimum rules** concerning the **definition of criminal offences** and sanctions in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

(2) These areas of crime are [...] money laundering, corruption, [...] and organised crime.

On the basis of developments in crime, the Council may adopt a **decision** identifying other areas of crime that meet the criteria specified in this paragraph.

Art. 84 (1) TFEU (consolidated version):

The European Parliament and the Council [...] may establish **measures** to promote and support the **action of Member States in the field of crime prevention**, excluding any harmonisation of the laws [...] of Member States.

Art. 85 TFEU (consolidated version):

(1) Eurojust's mission shall be to support and strengthen coordination between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring prosecution on common bases, on the basis of operations conducted and information supplied by the Member State's authorities and by Europol.

In this context, the European Parliament and the Council, by means of **regulations** [...], shall determine **Eurojust's** structure, operation, **field of action and tasks** [as enumerated subsequently!]

Art. 86 TFEU (consolidated version):

(1) In order to combat crimes affecting the financial interests of the Union, the Council, by means of **regulation** [...], may establish a **European Public Prosecutor's Office** from Eurojust.

Art. 87 TFEU (consolidated version):

(2) [...] the European Parliament and the Council, [...] may establish **measures** concerning: (b) support for the **training of [police] staff**, and cooperation on the exchange of staff, [...] on research into crime-detection; (c) common **investigative techniques** in relation to the detection of serious forms of organised crime.

Art. 88 (2) TFEU (consolidated version):

(1) Europol's mission shall be to support and strengthen action by the Member States' police authorities [...] and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, [...] forms of crime which affect a common interest covered by a Union policy.

(2) The European Parliament and the Council, by means of **regulations** [...], shall determine **Europol's** structure, operation, **field of action and tasks** [as enumerated subsequently!]

Notably, the EU is only competent to foster approximation of national whistle blowing legislation in as much as it concerns the rights of victims.

Note also that to define criminal offences (Art. 83) as well as for the establishment of a European Public Prosecutor's Office (Art. 86), if proposals are suspended due to lack of consensus of the 27 Member States in the Council, at least nine Member States can still go ahead and establish enhanced cooperation on the basis of the respective draft directive.

➤ **Changes in the EU's policy areas relating to labour law:**

For employment policies, the treaty stipulates **coordinating competence** (formerly known as "complementary competence") of the EU.

Article 5 (2) TFEU (consolidated version):

The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

Thus, in the area of employment, the EU will have competence to promote and carry out actions to coordinate actions of the EU Member States, without thereby superseding their competence in this area. Legally binding acts adopted by the EU in this connection, for instance in relation to the protection against unfair dismissal from work, may not entail harmonisation of EU Member States' laws or regulations.

Along with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became a legally binding instrument and thus the following rights relevant to whistleblowers:

Charter of Fundamental Rights:

- Freedom to choose an occupation and right to engage in work (Art. 15)
- Equality before the law (Art. 20)
- Freedom to non-discrimination (on the ground of political or any other opinion) (Art. 21)
- Workers' right to information and consultation within the undertaking (Art.27)
- Protection in the event of unjustified dismissal (Art. 30)

Conclusion to changes in EU policy areas:

Particularly the EU's competence with regards to the criminal justice area has experienced alterations. Yet, criminal law may not be the exclusive domain providing for whistle blower rights and protections. As displayed in the TI 2009 report "Alternative to Silence"²³, in most countries,

²³ The Report is accessible online at http://www.transparency.org/publications/publications/alternative_to_silence_whistleblower

labour law affords protection against unfair dismissal from work, while criminal procedural law may provide witness protection in legal trial and, along with administrative law, mandate the right to report wrongdoings. Note, however, that action at EU-level must respect EU Member States' competence in all fields, particularly in criminal and labour law, as well as the principles of subsidiarity and proportionality.

2. EU instruments and measures relevant to whistle blowing

a. Legislative instruments of the European Union

The EU can implement its policies with a wide variety of legal instruments, some of which have a binding effect on EU Member State level without requiring implementing legislation, while others invite, *inter alia*, civil society such as TI to comment and share expertise. With due respect to the subsidiarity principle, the EU can carry out their tasks pursuant to the consolidated Treaty on the Functioning of the European Union.

REGULATIONS

Regulations are self-executing and thus immediately binding upon all EU Member States without requiring further national implementing legislation at the domestic government level.

DIRECTIVES

A Directive is a legislative act of the EU that requires EU Member States to achieve a particular result leaving national states a certain extent of leeway in how to adopt exact measures. Directives are used at EU level to direct the governments of EU Member States in a particular policy area. Results to achieve are therefore specified in Directives. Although the form and methods of implementation are left to the discretion of EU Member States, Directives foresee a deadline for adoption. Notably, Directives are only binding on those Member States to whom they are addressed, which can be just one member state or a group of them. In practice however, Directives are addressed to all the 27 EU Member States.¹

DECISIONS

Decisions, a legal instrument that can be used by the Council or the European Commission, apply specifically to one or more EU Member States and are also directly binding.

RECOMMENDATIONS

Similar in structure as Directives, Recommendations are often described as EU soft law, as they do not carry any legal obligation for EU Member States. Recommendations appear at times to be used by the European Commission to circumvent politically sensitive and lengthy consultation.

The legal basis for the described acts is Art. 288 TFEU (consolidated version), which reads as follows:

Art. 288 TFEU consolidated version (ex Article 249 TEC):

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

In addition, practice has led to the development of another set of *sui generis* documents²⁴:

COMMUNICATIONS

Communications usually set out an Action Plan of the European Commission action that may include concrete proposals for legislation.

GREEN PAPERS

Green Papers present policy orientations of the European Commission that are directed to interested parties to comment. Thus, they are usually used to launch a consultation process. Subsequent to this, the European Commission will generally prepare a proposal.

WHITE PAPERS

White Papers may follow Green Papers to communicate a decided European Commission policy or approach on a particular issue. Chiefly, they are intended as statements of European Commission policy, rather than a consultation or starting point for debate.

²⁴ Prior to the Lisbon Treaty that led to the merger of the three pillars, specific instruments were used for the second and third pillar. In the Common Foreign and Security Policy (CFSP) area instruments such as strategies, joint actions and common positions were drawn up, while in the Justice and Home Affairs (JHA) area, decisions, framework decisions, joint positions and conventions were used.

b. Legislative measures applied by the European Union relating to whistle blowing

On different political levels, the EU has already contributed to the adoption of provisions that specifically deal with corruption but are at the same time fundamentally important for the protection of whistleblowers.

For instance, the EU is the only regional organisation that is State Party to the **United Nations** Convention on corruption. As a legal effect, its provisions are binding upon the EU.

Art. 33 of the UN Convention against corruption (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.

At the level of the **Organisation for Economic Co-operation and Development** (OECD), the European Commission also participates along with all EU Member States that are OECD member states in the work of the OECD. Under the auspices of the OECD, a Convention was adopted including legally binding standards to criminalise bribery committed by foreign public officials in international business transactions. Note that the EU as a regional organisation is other than EU Member States not (yet) a state party.

Art. 14 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

(1) Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(2) Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

(3) The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

(4) For the purpose of this Convention:

(a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

(b) "foreign country" includes all levels and subdivisions of government, from national to local;

(c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Since Council of Europe (CoE) and the EU are based on the same values and since they pursue common aims with regard to the protection of democracy, respect for human rights and fundamental freedoms and the rule of law, also these two intergovernmental bodies cooperate closely together. Not only does the European Commission participate to meet CoE activities, the EU also acceded to CoE Conventions.

Art. 9 CoE Civil Law Convention on Corruption

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

Art. 11 CoE Civil Law Convention on Corruption

Each Party shall provide in its internal law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption.

Art. 22 CoE Criminal Law Convention on Corruption

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

- (a) those who report the criminal offence established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
- (b) witnesses who give testimony concerning these offences.

Art. 23 CoE Criminal Law Convention on Corruption

(1) Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.

(2) Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in paragraph 1 of this article.

(3) Bank secrecy shall not be an obstacle to measures provided for in paragraph 1 and 2 of this article.

Note that on 30 April 2010, the Parliamentary Assembly of the Council of Europe (PACE) is expected to vote on a whistle blowing resolution. The proposed resolution stresses the relevance of whistle blowing and calls on the CoE Committee of Ministers to draw up a set of guidelines for the protection of whistleblowers and to consider drafting a framework convention on the protection of whistleblowers.²⁵

²⁵ The full text is available online at

<http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc09/edoc12006.htm>

There have also been multilateral thematic joint programmes between the EU and the CoE, open to Central and Eastern European countries, regarding, *inter alia*, the fight against organised crime and corruption.

Among other issues, cooperation between the EU and the CoE has recently also been reinforced with respect to the international enforcement of justice and human rights.

In the context of human rights, there will soon be further important steps undertaken, since the EU is expected to accede to the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Both Protocol No.14 of the Convention is designed to allow the EU to accede to it and the EU Treaty of Lisbon contains a protocol binding the EU to join. As a consequence, the EU would be subject to its human rights law and external monitoring just in the same manner as its member states currently are.

CoE European Convention on Human Rights (ECHR):

- Right to life (Art. 2)
- Right to liberty and personal security (Art. 5)
- Right to respect for privacy, family life, home, correspondence (Art. 8)
- Right to freedom of expression, to hold opinions, to receive and impart information and ideas without interference (Art. 10)

This accession can be seen as the EU's firm commitment to the respect for human rights and will to provide for additional guarantees and effective protection.²⁶

Fundamental freedoms are also guaranteed under the **Charter of Fundamental Rights** (Charter). The Treaty of Lisbon incorporates the Charter, establishing its legally binding nature. Like the ECHR, the Charter reasserts the rights, freedoms and principles acknowledged by the EU containing relevant provisions for the protection of whistleblowers.

Charter of Fundamental Rights:

- Right to liberty and personal security (Art. 6)
- Right to privacy (Art. 7)
- Right to respect for private and family life (Art. 8)
- Right to freedom of expression (Art. 11)
- Prohibition of discrimination (Art. 14)

Note, however, that other than the ECHR that is applicable to all EU Member States, only 25 EU Member States are bound to the obligations arising from the Charter (justiciability in the UK and Poland is limited according to the protocols the states attached).

In the context of whistle blowing protection at EU institution level, the EU has also been active in bringing several initiatives forward, directly and indirectly relating to whistleblowers. Due to the limited scope of this research paper, the subsequent list of legislative acts is not intended to represent an exhaustive enumeration²⁷:

Legislative acts by the EU

- Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties (OJ 1994 L 113)
- Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ 1999 L136)
- Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests (OJ L 149)
- Commission, Consultative document on "Raising concerns about serious wrongdoings" (SEC(2000) 2078/6)
- Commission Decision of 4 April 2002 on raising concerns about serious wrongdoings (2002/C 229 E/084)
- Follow-up Report on the Green Paper on the criminal-law protection of the financial interest of the Community and the establishment of a European Prosecutor (COM(2003) 128 final)
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (Art. 2)
- Commission communication of 6 February 2004 on how to enhance effective application of the whistleblowing rules and protection of whistleblowers (SEC (2004) 151/2)
- Committee of the Regions Decision No 26/2004 of 10 February 2004 relating to the conditions and procedures for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests
- Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, (Art. 9)
- Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff regulations of officials of the European Communities and the conditions of employment of other servants of the European Communities (OJ L 124), (Art. 22a and 22b)
- Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA
- Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol)

A number of cases also prove that whistle blowing at EU institution level is no longer an uncommon procedure.

²⁷ In addition, legislation on the protection of financial interests of the European Union as well as regulations on procedural rules on internal investigations of OLAF can, for instance be found online at http://ec.europa.eu/dgs/olaf/legal/index_en.html#3

Whistle blowing cases at EU institution level:

➤	Court of Auditors	Bart Nijs case
➤	Court of Auditors	Dougal Watt case
➤	Committee of the Regions:	Robert McCoy case
➤	Commission, DG Joint Research Centre	Christine Sauer case
➤	Commission, DG Budget	Marta Andreasen case
➤	Commission, DG Eurostat	Dorte Schmidt-Brown case
➤	Commission, DG Financial Control	Paul van Buitenen case
➤	Commission, DG Official Publication Office	Guido Strack case

C. Feasibility assessment: what EU action is politically possible and what is not?

The research findings regarding the EU's competence and the shift in power after Lisbon indicate that advocacy action towards an enhanced whistleblower protection is rather feasible on the policy than on the legislative level.

a. Whistleblower protection at the EU institution level

Unrealistic at present seems the closing of a specific International Convention on whistle blowing, to which the EU could with its new legal personality theoretically sign up to. Even if the EU were to consider becoming a Member State to the Council of Europe or the Organisation of Economic and Cooperation Development, given the recent entry into force of the Lisbon Treaty, this cannot be expected in the near future. As to this author's knowledge, this proposal is not on the EU's agenda.

In addition, whistleblowers at EU institution level are already quite comprehensively protected, as the updated Staff Regulations applicable to all EU officials allow for reporting (Art. 22 (a) and Art. 22 (b)) and a number of watchdog bodies were created to prevent, investigate and challenge decisions on wrongdoings and maladministration within the EU institutions, such as the European Court of Auditors, the European Court of Justice, the European Commissions' Anti-Fraud Office (OLAF). They may also turn to the European Ombudsman, a position that was created by the 1992 Maastricht treaty.²⁸ Acting as an independent and impartial intermediary between the citizens and the EU authorities, the European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union.²⁹ Whistleblowers thus have a number of

²⁸ In January 2010, Nikiforos Diamandouros was re-elected for another five-year term.

²⁹ See, for instance, Action brought on 4 January 2005 by Guido Strack against the Commission of the European Communities (Case T-4/05), (2005/C 57/65) to annul both decisions of 5 February 2004 to close the OLAF investigation OF/2002/0356 and the final case report on which that decision was based (NT/sr D(2003)-AC-19723-01 687 of 5 February 2004) and to order the Commission to reopen the investigation, draw up a new final case report and pay all the costs of the judicial proceedings and all other expenses. See also the Decision of the European Ombudsman on complaint 144/2005/PB against the European Commission, including the complaint and the European Commission's opinion, available online at <http://www.ombudsman.europa.eu/cases/decision.faces/en/2450/html.bookmark>

procedures to report wrongdoings and challenge decisions. Given this comprehensive set of whistle blowing legislation at EU level and the set up of specific bodies investigating maladministration at EU institution level to which whistleblowers can turn to and lodge complaints, **at this point, it appears rather unlikely to win support for additional legislative measures relating to EU civil servants who blow the whistle.**

Advocacy action seems, however, highly essential, when it comes to the enforcement of the already existing comprehensive set of measures. This is, for example, of particular importance with regards to EU civil servants working in EU missions and delegations abroad who are in the position to obtain first hand experience on the ground in the actual spending of EU funds. Apparently, there are a number of reported cases, where EU money vanishes, but internal reporting fails.

b. Whistleblower protection at EU Member State level by EU action

Since EU Member States have not conferred competence in all areas affecting whistleblower protection, the **EU is not in the position to harmonise the horizontal issue of whistle blowing by one particular legislative acts**, such as through the adoption of, for instance, a Resolution or Directive that would bind the 27 EU Member States to implement a specific legislation on whistleblowers. Feasible in terms of competence and currently prevalent political will is rather the promotion vis-à-vis the EU institutions of an increased whistleblower protection as part and element of the fight against organised crime and corruption.

Still, looking at whistle blowing from the angle of organised crime and corruption, there is great potential for numerous promising policy advocacy steps at the EU level that could lead to the enhancement of whistle blowing protection. Of particular interest in this context should, for instance, be the EU's next follow-up steps in relation to the Stockholm Programme containing, *inter alia*, an explicit mandate for periodic evaluation of EU Member States' legislation with view to corruption. As a result of increased advocacy vis-à-vis the competent Directorate-General, whistle blowing could become a separate prominent issue against which EU Member States would have to report.

Due to the restructuring of the EU following the entry into force of the Lisbon Treaty, TI also gains **new additional and also strengthened advocacy targets**, such as Members of the European Parliament whose decision-making power has significantly increased following to Lisbon. In addition, TI will have new advocacy tools at hands that could serve useful in promoting the role of those who blow the whistle. For example, if adopted, primarily the right to citizens' initiative as well as the Written Declaration of the European Parliament may open new possibilities to influence policy- and decision-making.

D. Proposed future EU advocacy action

The following proposed advocacy steps should serve as a handy and practical guideline and overview of politically feasible steps of the three EU institutions that will ideally contribute to a broader and more comprehensive protection of whistleblowers both at the EU Member State and the EU institution level. Where possible and already foreseeable at the time of the drafting of this study, the competent Directorate-Generals (DG) and timelines are indicated. As a result of an initial research, the proposed actions are not intended to be exhaustive. Given the limited scope of this paper, the proposed steps would also need further defining in detail, which could be undertaken in the future.

ADVOCACY ACTIONS

vis-à-vis the European Parliament

- Due to the new co-decision rule and thus the increased importance of the European Parliament in the EU's decision-making process, TI should increasingly advocate Members of the European Parliament (MEPs) support policies on an enhanced protection for whistleblowers
- Written Declaration on the Union's efforts in combating corruption (0002/2010) should be used as an additional advocacy instrument raising awareness about the role of whistleblower in detecting corruption

Timeline: adoption expected on 5 May 2010

- TI may consider lodging a petition in the form of a request or observation concerning the application of EU law or concerning an appeal to the Parliament to adopt a position on whistle blowing. Such a petition give the European Parliament the opportunity of calling attention to any infringement of a European citizen's rights by an EU Member State or local authority or other institutions.

Admissibility requirement: TI must prove to be directly affected and that the subject comes within the European Union's fields of activity.

ADVOCACY ACTIONS

vis-à-vis the European Council/ Council of Ministers

- A new target for advocacy is the permanent European Council Presidency: Concerted advocacy action at the political level within EU Member States combined with advocacy at EU level may bear the potential to bring anti-corruption on the Council's agenda (concrete action has to be defined)
- In a long-term, collective action jointly together with national chapters, TI-EU will continue its advocacy for the set-up of a European Public Prosecutor's Office (EPPO) and for an extended mandate including serious crimes having cross-border dimension and not only offences that directly but also those indirectly affecting the EU's financial interest

Competent: Justice and Home Affairs (JAI) Council

ADVOCACY ACTIONS

vis-à-vis the European Commission

- TI-EU will advocate for the introduction of an explicit corruption and whistle blowing reference into the Communication currently drafted on the basis of the commonly called Stockholm Programme, i.e. the EU's five year roadmap in the area of justice and home affairs (2009-2014)

Competent DG: Home Affairs

Timeline: TI-EU input into expert consultation by mid-May 2010; publication of Communication expected by the end of 2010/ early 2011

- Given the current priority of the Barroso II Commission regarding “witness protection”, as set out in the Stockholm Programme, TI-EU can raise awareness among EU stakeholders that whistleblowers a part of this category, particularly if they are facing harassment, retaliation or even threats to life

Competent DG: Home Affairs

- By a concerted action with TI-NCs in the EU, TI can make use of the new right to citizens' initiative by, for instance, tabling a draft law on WB

Competent DG: Inter-institutional relations and administration (Commissioner Maros Sefcovic)

Envisaged requirements: signatures of at least 1 million EU citizens from one third of the EU Member States, including a minimum number of citizens in each EU Member State

Timeline: first initiatives may be accepted by 2011

- TI should encourage the European Commission to provide financial assistance for the training of police and law enforcement personnel to share experiences about the role of whistleblowers in investigating and prosecuting cross-border crimes, such as organised crime and corruption

Competent DG: OLAF

- TI-NCs can promote awareness raising trainings for EU civil servants in EU Missions and Delegations and beneficiaries round the world to protect EU funds that are under shared management, particularly with respect to the new existing whistle blowing hotline

Competent DG: RELEX, REGIO and OLAF

- TI can advocate for a soon accession to the European Convention on Human Rights. The EU would thus be subject to its human rights law and external monitoring as its member states currently are. This will enable whistleblowers to claim before the European Court of Human Rights, for instance, their right to protection following unjustified dismissal from work as well as the right to fair and just working conditions

Competent DG: Justice, Fundamental Rights and Citizenship