EXPLANATORY MEMORANDUM ON A EUROPEAN UNION DOCUMENT

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PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of persons reporting on breaches of Union law


COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law


COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE
Strengthening whistleblower protection at EU level

Submitted by the Department for Business, Energy and Industrial Strategy on 15 June 2018

SUBJECT MATTER

1. The proposal is intended to provide protections against retaliation for people ("whistleblowers") who report breaches of certain European Union laws that they have discovered in a work-related context. It also proposes related requirements on Member States, organisations in the public and private sectors, and public authorities with relevant responsibilities.

2. People who are in contact with an organisation through a work-related activity are often the first to know of threats or harm to the public interest arising through an organisation. The basis for the proposal is that without protections for whistleblowers, the detection, investigation and prosecution of breaches of EU law may be impaired, as whistleblowers are "often discouraged from reporting their concerns for fear of retaliation".

3. The proposal aims to provide mechanisms for whistleblowers to report breaches of European Union laws and provides for protection against retaliation.
4. Its scope covers multiple legislative instruments of the European Union which are contained in an Annex to the proposal. It is intended that this Annex can be updated over time to cover new EU legislation where whistleblower protection is relevant.

5. The material scope of the proposal covers breaches of Union acts (set out in the Annex) as regards the following areas: public procurement; financial services, prevention of money laundering and terrorist financing; product safety; transport safety; protection of the environment; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; and protection of privacy and personal data, and security of network and information systems.

6. The proposal also covers:
   - breaches affecting the financial interests of the Union as defined by Article 325 TFEU and in Directive (EU) 2017/1371 and Regulation (EU, Euratom) No 883/2013
   - breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

7. The scope of the proposal is intended to be broad enough to protect all those with privileged access to information against retaliation. Its policy intent is to protect those who report breaches causing serious harm to the public interest.

8. The framework aims to provide protections to a wide category of people in paid or unpaid work-related activities. It includes workers; the self-employed; those working for contractors; shareholders; volunteers; unpaid trainees; job applicants and members (including non-executive members) of corporate boards.

9. Disclosures covered include reports of: actual or potential unlawful activities; acts or omissions which defeat the purpose of a law; and reasonable suspicions as to potential breaches which have not yet materialised.

10. The person making the disclosure must reasonably believe that it is true and that it falls within the scope of the Directive.

   **Proposed protections for whistleblowers**

11. To be protected, a person reporting a disclosure must first make their report internally to the organisation involved.

12. They may report a disclosure to a "competent authority" if one of six conditions is met. These are that:
   (i) the person first reported internally, but no appropriate action was taken;
   (ii) no internal reporting channels were available or the person could not reasonably be expected to be aware of those channels;
   (iii) the use of internal reporting channels was not mandatory for that person;
   (iv) they could not reasonably be expected to use those channels in light of the
subject matter of their concern;
(v) they had reasonable grounds to believe that using those channels could jeopardise the effectiveness of investigative actions by competent authorities; or
(vi) they were entitled to report directly to a competent authority by virtue of EU law.

13. A competent authority will be a body designated by the Member State to receive and deal with disclosures. Member States shall ensure that competent authorities follow up on the reports by taking the necessary measures and investigate the subject-matter of the reports to an appropriate extent. They shall communicate the final outcome of the investigation to the whistleblower.

14. In addition, reports to EU bodies, offices or agencies attract the same protection as reports to national competent authorities.

15. As a last resort, the person may report a disclosure to the public or the media if one of two conditions is met: (i) the person first reported internally and/or externally but no appropriate action was taken; or (ii) they could not reasonably be expected to have done so, due to imminent or manifest danger for the public interest, or the particular circumstances of the case, or the risk of irreversible damage.

16. Retaliation in any form for raising a whistleblowing concern is prohibited, whether from an employer, colleague, customer, licensing authority or recipient of services. If a whistleblower experiences retaliation, they must be given access to a legal remedy.

17. Remedies against retaliation are not prescribed (other than a requirement that they should include access to interim relief) but should be effective, proportionate and dissuasive. The burden of proof upon the reporting person in proceedings taken to enforce their rights will be reversed, so that it is up to the person taking action against a whistleblower to prove that they are not retaliating against the act of whistleblowing.

18. Member States must put in place 'penalties' to ensure that the Directive is implemented effectively, including penalties against discouraging reporting, penalties for retaliatory actions; and penalties to discourage malicious and abusive whistleblowing. It is not clear whether 'penalties' is intended to extend to criminal penalties.

19. Retaliation includes but is not limited to:
   a. Suspension, lay-off, dismissal or equivalent measures
   b. Demotion or withholding of promotion
   c. Transfer of duties, change of location of place of work, reduction in wages, change in working hours
   d. Withholding of training
   e. Negative performance assessment or employment reference
   f. Imposition or administering of any discipline, reprimand or other penalty, including a financial penalty
   g. Coercion, intimidation, harassment or ostracism at the workplace
   h. Discrimination, disadvantage or unfair treatment
   i. Failure to convert a temporary employment contract into a permanent one
j. Failure to renew or early termination of the temporary employment contract
k. Damage, including to the person's reputation, or financial loss, including loss of business and loss of income
l. Blacklisting on the basis of a sector or industry-wide informal or formal agreement, which entails that the person will not, in the future, find employment in the sector or industry
m. Early termination or cancellation of contract for goods or services
n. Cancellation of a licence or permit

20. The proposal requires Member States and competent authorities to provide measures of assistance and support to whistleblowers.

Measures required of a Member State
21. In addition to the above framework, Member States must take a number of steps to ensure the protection of whistleblowers, including:
   a. Making information and advice accessible to the public on procedures and remedies available against retaliation
   b. Exempting whistleblowers from liability for breach of restrictions on the disclosure of information imposed by contract or by law
   c. Ensuring that whistleblowers can rely on having made a whistleblowing report as a defence to legal actions taken against them outside the work-related context, including proceedings for defamation, breach of copyright or breach of secrecy.

22. Member States must also submit annual reports of statistics (if centrally available) to the Commission on the number of reports received by competent authorities; the number of investigations and proceedings initiated based on the reports, and the outcome of these proceedings; and the estimated financial damage and amounts recovered in proceedings.

Requirements upon reporting channels and competent authorities
23. Member States must ensure that legal entities in the private and public sectors establish appropriate internal reporting channels and procedures for receiving and following up on whistleblowing reports from their employees. Those channels may be made available to non-employees, but this is not mandatory.

24. The obligation to put in place internal reporting channels is intended to be commensurate to the size of the entity and level of risk posed to the public interest. Apart from businesses operating in financial services areas, micro and small companies are exempted from the obligation to establish internal channels.

25. Internal reporting channels must guarantee the confidentiality of a whistleblower and must inform them about follow-up within a reasonable timeframe. They must provide accessible information on internal reporting procedures and how to report externally to competent authorities.

26. Competent authorities must have in place external reporting channels and procedures for receiving and following-up on reports. They must have independent, secure and confidential external reporting channels as well as staff members dedicated to and specifically trained for handling reports.
27. Competent authorities must review their procedures for receiving and following up on reports at least every two years. They must ensure the identity of a reporting person is protected for as long as an investigation is ongoing.

Background

28. European Union law already requires some reporting channels and protections in specific sectors and to varying degrees including financial services, transport safety and environmental protection. The Commission has also committed to ensuring fairer and more transparent taxation and reinforcement of rules on money laundering and terrorist financing.

29. Among EU Member States, whistleblowing protections are fragmented, with inconsistent whistleblowing protections where they are in place.

30. In 2014, the Council of Europe issued a Recommendation on Protection of Whistleblowers (CM/Rec(2014)7), which sets out principles to provide whistleblowing protections to "all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not".

31. The European Parliament has also called on the Commission to present a horizontal legislative proposal to provide comprehensive protection of whistleblowers in the EU, in both the public and private sectors, as well as national and EU institutions.

32. This follows a number of high profile incidents prompting claims that comprehensive whistleblowing protections would better serve the Single Market. In particular, much attention has been focused on the 2014 so-called "LuxLeaks" incident in which Antoine Deltour, a former employee of PricewaterhouseCoopers, was prosecuted for theft and disclosing confidential information after he revealed apparent evidence of systemic tax evasion to journalists.

33. In 2016, the Commission announced that it would assess the scope for horizontal or further sectoral action at EU level, with a view to strengthening the protection of whistleblowers.

34. Also in 2016, in its conclusions on tax transparency, the Council encouraged the Commission to explore the possibility for future action on better whistleblower protection at EU level.

35. In a 2016 report, EU Law: Better Results through Better Application, the Commission committed to putting 'a stronger focus on enforcement in order to serve the general interest'. It noted that 'often when issues come to the fore – car emission testing, water pollution, illegal landfills, transport safety and security – it is not the lack of EU legislation that is the problem but rather the fact that the EU law is not applied effectively.'

36. In 2017, the Commission held a 12 week public consultation on whistleblowing. It found that 85% of respondents believed that workers rarely reported concerns because of fear of legal or financial consequences.
37. In the accompanying Communication (a non-legal text), the Commission states that fragmented protections among Member States justify introducing a comprehensive, proactive framework. The Commission has based much of the coverage and definitions within its whistleblowing proposal upon the Council of Europe’s Recommendation. It states that strong support from individuals and organisations for legally binding minimum standards on whistleblower protection in Union law justifies legislative action.

SCUTINITY HISTORY
38. This is a new proposal and so has previously not been considered for scrutiny.

MINISTERIAL RESPONSIBILITY
39. This is a horizontal proposal which cuts across multiple policy areas of Government and is intended to affect every regulatory body or ombudsman. As a proposal whose legislative effects relate largely to employment and the conduct of business, the matter falls primarily within the responsibility of the Secretary of State for Business, Energy and Industrial Strategy.

40. The Secretary of State for Justice also has a significant interest in relation to the creation of a reversed burden of proof, exemption of liability for whistleblowers, remedial measures against retaliation, the creation of a whistleblowing defence and the provision of new penalties and legal remedies for those who have experienced retaliation.

41. The Chancellor of the Exchequer also has an interest in relation to the proposal’s emphasis on protecting against financial crimes and on firms involved in financial services.

42. Due to the proposal’s cross-cutting nature into multiple policy areas, the Secretary of State for Transport; Secretary of State for Environment, Food and Rural Affairs; Secretary of State for Health; and Secretary of State for Digital, Culture, Media and Sport also all have an interest.

INTEREST OF THE DEVOLVED ADMINISTRATIONS
43. The Devolved Administrations have been consulted in the preparation of this Explanatory Memorandum.

LEGAL AND PROCEDURAL ISSUES
i. Legal basis
The proposal is horizontal and relies upon a number of legal bases in the Treaty on the Functioning of the European Union (TFEU):
- Article 16 (protection of personal data)
- Article 33 (customs cooperation)
- Article 43 (common agricultural policy)
- Articles 50, 53(1) and 62 (right of establishment, mutual recognition of qualifications)
- Articles 91 and 100 (transport)
- Articles 103, 109 (competition and state aid)
- Article 114 (internal market)
- Article 168 (public health)
- Article 169 (consumer protection)
It also relies on Article 31 (health and safety basic standards) of the Treaty establishing the European Atomic Energy Community (the Euratom treaty).

As this proposal relies upon a wide array of legal bases, the Government is considering carefully whether it falls within the boundary of each article.

ii. European Parliament Procedure
Ordinary Legislative Procedure applies (after consulting the Economic and Social Committee, the Committee of the Regions and the Court of Auditors)

iii. Voting procedure
Quality Majority Voting applies

iv. Impact on United Kingdom Law
Amendments would be required to at least the Employment Rights Act 1996 in order to bring the proposed Directive into force.

Various pieces of legislation related to the broad scope of coverage would need to be amended; including legislation on data protection, competition, finance etc. Due to the wide requirements set upon competent authorities, primary or secondary legislation underpinning the powers and functions of multiple regulators, ombudsmen and other oversight bodies will likely need to be amended.

v. Application to Gibraltar
The proposed Directive would apply to Gibraltar.

vi. Fundamental rights analysis
The proposal will impact upon fundamental rights including:
- Freedom of expression and right to information (Article 11)
- The right to fair and just working conditions (Articles 30 and 31)
- The right to respect for private life, protection of personal data, healthcare, environmental protection, consumer protection (Articles 7, 8, 35, 37 and 38)
- The general principle of good administration (Article 41)

The Government is still considering how fundamental rights will be impacted.

APPLICATION TO THE EUROPEAN ECONOMIC AREA
44. The proposal does not state whether it is relevant to the European Economic Area.

SUBSIDIARITY
45. The Commission states that whistleblower protections cannot adequately be achieved by Member States acting alone or in an uncoordinated matter. It
argues its whistleblower provisions will strengthen the proper functioning of the single market and ensure consistent standards of whistleblower protection where relevant rules already exist in sectoral Union instruments.

46. Before the publication of the Commission’s proposal, the Government expressed the view to the Commission that it would be better to use non-legislative means in the first instance to facilitate greater alignment between Member States in relation to legal protection of whistleblowers, partly on grounds of subsidiarity. This view was informed by the wide range of existing practices among Member States.

47. The Commission’s proposal has partly responded to this concern by restricting application to disclosures of breaches of EU law. Some such breaches are inherently cross-border or have some impact on the single market.

48. Despite this legal justification, the Government remains of the view that it would be preferable to proceed with a non-legislative approach, leaving Member States to consider their own legal frameworks.

POLICY IMPLICATIONS

49. On 23 June 2016, the EU referendum was held and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29th March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force.

50. While the UK remains a member of the EU, the Government continues to engage actively on current EU legislative proposals, assessing policies on their merits.

51. Against the backdrop of EU exit, the Government has firmly committed not to roll back workers’ rights, and to extend those rights when that is the right choice for the UK.

52. The transposition deadline for this proposal is May 2021, which falls after Britain’s formal exit from the EU in December 2020. However, as the precise nature of our future economic relationship with the EU is still subject to negotiation, we cannot provide certainty at this stage on whether the UK will be obliged to implement this piece of legislation.

Divergence from UK whistleblowing framework

53. The UK’s legislative framework provides that in certain circumstances, a worker who suffers retaliation at the hands of their employer after ‘blowing the whistle’ can seek redress at an employment tribunal. UK legislation relates to the employment dispute arising from a person blowing the whistle, rather than governing a framework in which concerns are raised.

54. Rather than applying to workers, trainees and some other limited categories (including some self-employed professions in the NHS), the proposal affords protections to a wide range of people connected in a work-related way to a concern, including the self-employed, contractors, shareholders or directors.
55. The Commission proposal places restrictions upon all forms of retaliation, which extend beyond direct employment related actions.

56. The scope of the proposal covers a wide range of non-employment rated retaliatory activities, from termination of a contract for goods and services, to damage to personal reputation, financial loss (including loss of income) or cancellation of licences or permits.

**Additional requirements upon business**

57. The whistleblowing frameworks in both Great Britain and Northern Ireland provide particular protections to workers who have reported a disclosure to a ‘prescribed person’. These bodies are generally regulators, ombudsmen and other public oversight bodies.

58. These prescribed persons or bodies generally fulfil a similar role to those of a “competent authority” under the proposed Directive. The Directive also places requirements upon the way that prescribed persons assess or deal with a whistleblowing concern.

59. The proposed Directive places specific requirements upon private and public sector bodies to establish internal channels and procedures for reporting and following up on reports, by both employees and non-employees. This covers:

   a. Private bodies with 50 or more employees, those with annual business turnover or an annual balance sheet of €10 million or more (approximately £8.8 million at a conversion rate of 0.8821), or private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing.

   b. Public sector entities including state administration, regional administration and departments, municipalities with more than 10,000 inhabitants, and other entities governed by public law.

**Financial services sector**

60. The proposal requires all financial services firms to comply with the obligation to establish internal reporting channels, regardless of their size. A number of EU Directives already impose some specific requirements upon the financial services sector in relation to whistleblowing and wrongdoing.

61. In September 2016, the Financial Conduct Authority and Prudential Regulation Authority introduced new rules to support whistleblowers which require firms to put in place mechanisms that allow employees to raise concerns internally, and to appoint a senior person to take responsibility for these arrangements. However, smaller firms are not covered by this requirement.

**Report handling requirements**

62. The proposal also prescribes procedures for the way that those receiving reports need to deal with them. It sets requirements on ensuring confidentiality, diligent follow up within reasonable timeframes not exceeding three months, and clear and accessible information regarding procedures.

63. In addition to the requirement to give feedback to a reporting person within a reasonable timeframe, competent authorities must also keep a record of reports and review procedures every two years. Member States must ensure competent
authorities follow up on reports by taking necessary measures to investigate reports and communicate the final outcome of investigations to the reporting person. Competent authorities must also have staff members dedicated to handling reports, who must receive specific training for these purposes.

64. The UK framework already requires prescribed persons (with some exceptions) to report in writing annually on whistleblowing disclosures made to them as a prescribed person over the previous 12 months. Each report must cover the number of disclosures made by workers in a 12 month period and the number of disclosures where the prescribed person decided to take further action. It must also include a summary of the type of action taken as well as how disclosures have impacted on the prescribed person's ability to perform its functions and meet its objectives (for example, to improve services in a sector). In this regard, requirements for Member States to report on whistleblowing disclosures available at a central level may be able to be gathered from collated reports.

65. The requirement that business and public sector bodies of a certain size must introduce whistleblowing procedures and reporting mechanisms is likely to result in an impact on business and an extended lead in time.

National Security Concerns
66. The proposal does not appear to provide any exemptions for disclosures connected to a national security or an intelligence agency.

67. The Government would not want the proposal to cover staff in security and intelligence agencies, nor apply to the disclosure of information (whether by UK Intelligence Community staff or others including third party non state actors such as journalists) which is damaging on national security grounds.

68. Any exclusion to these categories should also extend to the private sector who have sensitive relationships with UKIC and knowledge of capabilities and assets.

CONSULTATION
69. The Government intends to conduct discussions with interested parties in relation to this proposed Directive.

IMPACT ASSESSMENT
70. The European Commission has produced an impact assessment which accompanies the proposal. The UK has conducted its own impact assessment checklist, which is annexed to this explanatory memorandum.

FINANCIAL IMPLICATIONS
71. The Commission has stated that the proposal does not require additional resources from the European Union's budget. The Government will assess the potential financial implications of the proposal on the UK as the proposal is further developed.

TIMETABLE
72. The timetable for consideration of this proposal by the Council and European Parliament has not yet been set. Discussions on the proposal are expected to take place in the Working Party on Fundamental Rights, Citizens Rights and
Free Movement of Persons (FREMP). It is expected that Working Groups will commence in early June.

OTHER OBSERVATIONS
73. The Commission recognises the strength of the United Kingdom whistleblowing framework. A question and answer document accompanying the proposal comments on the strength of the UK's system.

74. In answer to the question "Would the new law apply to cases like Cambridge Analytica?", the answer begins by stating that "The UK has one of the most advanced systems of whistleblowing protection in the EU. However, in the majority of Member States, whistleblowers are only protected in very limited situations."

ANDREW GRIFFITHS MP
Parliamentary Under Secretary of State
Department for Business, Energy and Industrial Strategy
What are the potential impacts of the Commission proposal on the UK?

The Commission is proposing to strengthen whistleblowing protection across the EU covering the reporting of breaches of a wide range of EU legislation.

The proposal requires member states to prohibit and sanction all forms of retaliation against genuine whistleblowers, who could include workers (including employees), the self-employed, people working for contractors, sub-contractors or suppliers, people in the management body of an undertaking (shareholders, executives, non-executives etc) and people applying for work with the organisation involved.

A whistleblower who suffers retaliation will have access to free advice and adequate remedies (such as measures to stop workplace harassment or prevent dismissal). The burden of proof will be reversed, so that the undertaking will have to prove it is not acting in retaliation. In legal proceedings (such as for defamation, breach of confidence and so on), whistleblowers will be protected from liability for disclosing information.

The proposed Directive will require in each Member State a three tier reporting system for whistleblowers to report breaches:

a) Internal reporting channels (within the undertaking)
b) Reporting to competent authorities
c) Public/media reporting – if appropriate action has not been taken after reporting through other channels, or if there is imminent or manifest danger to the public interest, or the particular circumstances of the case, or a risk of irreversible damage.

The proposal will require companies with more than 50 employees or with an annual turnover of over €10 million (and all financial services companies) and many public sector organisations (state, regional and large municipal administrations and other entities governed by public law) to set up internal procedures to handle whistleblowers' reports.

Member states will need to nominate competent authorities external to the undertaking involved to receive and handle whistleblowing reports. These competent bodies will need to establish independent and autonomous reporting channels, with staff dedicated and trained in handling reports.

Member states will also need to provide for penalties for taking retaliatory action or attempting to hinder whistleblowing, or for making malicious or abusive disclosures under the guise of whistleblowing.

Member states would need to report to the Commission on the number of whistleblowing reports received by competent bodies, and investigations and procedures resulting from them.
AFFECTED GROUPS:
The proposal will affect large and medium sized businesses, and small and micro businesses in the Financial Services industry.

Individuals in employment and looking for work – Part IVA of the Employment Rights Act 1996 provides for protection against discrimination for whistleblowers when applying for jobs in the NHS and in children’s social care. This proposal will extend this to those applying for work more widely, at least where disclosures relate to breaches of EU law.

Prescribed persons and bodies – The UK already has the option for whistleblowers to use external reporting mechanisms, for instance through prescribed persons or bodies as set out in Part IVA of the Employment Rights Act 1996 (as amended). The Public Interest Disclosure (Prescribed Persons) Order 2014 (as amended) lists more than 60 prescribed persons or bodies and the matters on which whistleblowers can make disclosures to them, which then enjoy the protections in the Act. (These broadly cover the areas of EU law identified by the proposal.) Under the proposal, these organisations ("competent authorities" in the proposed Directive), which are generally either public bodies or operating under contract with the public sector, may have to revise their procedures for receiving and following up on whistleblowing reports.

Sectors affected:
The EU proposal covers whistleblowing on breaches of a wide range of EU law on: public procurement, financial services, prevention of money laundering and terrorist financing, product safety, transport safety, protection of the environment, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data and security of network and information systems. It also applies to breaches of EU competition rules, violation and abuse of corporate tax rules and damage to the EU’s financial interests. This is likely to cover all industries in the economy.

The proposal also covers the public sector (state, regional and municipal governments, and other public bodies). The Commission’s IA or underlying analysis does not indicate that only some sectors would be covered.

Number of organisations affected:
The UK Business Population Estimates produced by BEIS\(^1\) estimates that in 2017 there were 49,985 enterprises (including public sector organisations) with 50 or more employees. Some of these will already have internal whistleblowing procedures in place (for instance there are 40 organisations who have signed up to Public Concern at Work’s whistleblowing code of practice).\(^2\)

The proposal would also require entities ‘of any size’ operating in the financial services industry to have internal whistleblowing reporting procedures. According to ONS figures\(^3\) there are 20,660 micro and small employers in the financial services industry.

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\(^2\) [http://www.pcaw.org.uk/campaigns/the-first-100](http://www.pcaw.org.uk/campaigns/the-first-100)

COSTS & BENEFITS:
The Commission's Impact Assessment is not very clear about the impacts on specific countries. However, it refers to analysis by ICF for the Commission, and these reports go into more detail. (Some of the evidence presented by the Commission and ICF in relation to the UK seems contradictory.)

Businesses:

Transition costs

Familiarisation

We estimate that around 49,985 businesses with 50 or more employees, and an additional 20,660 small and micro financial services businesses, would have to familiarise themselves with the legislation if implemented in the UK.

We estimate that it would take an HR manager or director (or equivalent for small and micro businesses) half an hour at an estimated hourly labour cost of £30 (based on 2017 Annual Survey of Hours and Earnings (ASHE) and Eurostat data on non-wage labour costs) – based on the draft Directive presented in the EU proposal. This would give an average familiarisation cost per business of £15. The total estimated familiarisation cost would be: £1.06 million

Other transition costs – setting up internal procedures for whistleblowing

UK law does not require employers to have internal whistleblowing procedures. There will be some medium sized and large organisations that already have internal whistleblowing procedures in place – as evidenced by the Public Concern at Work website, and other examples such as the Department for Business, Energy and Industrial Strategy, Nationwide and G4S. Financial Services employers will already have to put internal whistleblowing procedures in place under FCA rules and according to the Commission IA, existing EU law. However, there is no quantitative information available about the number of UK organisations that have internal whistleblowing procedures.

Of the 49,985 medium or large businesses in the UK, 9,805 are large and 40,180 are medium sized. The EU evidence suggests that, of these employers in the EU as a whole, it is predominantly medium sized businesses that do not have internal whistleblowing procedures.

The EU estimates that it would take 14 hours of staff time to set up internal procedures. If we assume that this is the time of an HR manager or director (at an hourly labour cost of £30) – this would be a cost per employer of setting up procedures of £420.

The EU analysis also estimates that it would take 35 hours for an employer to develop new training materials – at a labour cost of £30 per hour this would be £1,050. Training of all staff is not a requirement under the Directive, but the Commission suggests it

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5 http://www.g4s.com/en/social-responsibility/safeguarding-our-integrity/whistleblowing
6 https://www.fca.org.uk/firms/whistleblowing
7 The EU estimates of time taken were based on qualitative interviews with some employers.
would be necessary to make staff fully aware of the organisation’s approach to whistleblowing and therefore make the internal procedures effective.

If we assume that between 75% and 100% of large employers and 0% to 50% of medium sized enterprises already have internal whistleblowing procedures that follow the UK’s whistleblowing code of practice⁸ (which is more or less in line with the requirements in the proposed Directive), and training then the estimated costs to UK medium sized and large employers of setting up internal procedures would be:

<table>
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<th>Implementation of internal procedures</th>
<th>low (£8.4 million)</th>
<th>High (£17.9 million)</th>
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<tr>
<td>Developing training materials</td>
<td>£21.1m</td>
<td>£44.8 million</td>
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Although the proposed Directive will require small and micro businesses in the Financial Services industry to put internal whistleblowing procedures in place, the Commission IA⁹ states that existing EU “financial service acquis and the Anti-Money Laundering Directive” already require businesses in this sector “regardless of size or turnover” to have internal whistleblowing procedures.

The Commission’s analysis estimates that the UK employers would face transition costs of €15,386,000 (around £13.5 million) for implementing new whistleblowing policies, and €25,643,000 (around £22.6 million) for developing training materials.¹⁰

**Ongoing costs**

The Commission impact assessment assumes that under their proposed option there will be no added cost to UK businesses from operating internal procedures, based on the “strength of existing legislation”¹¹ and on the assumption that additional whistleblowing reports would not be generated.

As the proposed Directive will require large and medium sized employers to put in place internal whistleblowing procedures (not a requirement under current UK law), many businesses will have to introduce such procedures. This is likely to generate some additional whistleblowing activity (as might the proposed strengthening of protections against retaliation).

The Commission estimates that it would take 1 hour of staff time per report to keep whistleblowing reporting channels open and 14 hours (2 days) on average to investigate and manage a whistleblowing report. Based on an estimate hourly labour cost of £30, this would produce an estimated cost per employer of maintaining internal procedures (including managing whistleblowing reports) of £450 per report.

Based on figures in the Commission’s analysis it is estimated that there are around 9 whistleblowing reports a year per employer covered on average in the UK. Potentially, some whistleblowing takes place in employers without formal procedures, and some whistleblowers in employers without internal procedures will make reports to prescribed

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persons. Therefore we estimate that on average where employers introduce internal procedures it generates an average of between 3 and 6 additional reports.

If we assume (as above) that somewhere between 20,000 and 43,000 employers will be introducing internal whistleblowing procedures, then the estimated cost of maintaining internal procedures and managing whistleblowing reports is:

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<tr>
<td>Cost of maintaining internal procedures and managing reports</td>
<td>£27.1 million</td>
<td>£115.1 million</td>
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The Commission also estimates that it would take each employee around half-an-hour to be trained on the internal whistleblowing procedures. Based on our estimates of employers introducing these procedures, between 2.0 million and 8.1 million employees may receive this training, at an hourly cost of labour cost of £15 (based on ASHE median wage for all employees). Again, training would not be a requirement under the proposed Directive, and the Commission suggest it would not be needed annually to ensure the internal procedures were effective. The estimated costs for ongoing training are:

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<tbody>
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<td>Cost of providing ongoing training to staff on internal whistleblowing procedures</td>
<td>£15.0 million</td>
<td>£60.8 million</td>
</tr>
</tbody>
</table>

Benefits
Businesses can face substantial costs if they are found to have been acting illegally or there are faults in their procedures that lead to individuals being placed at risk.

Although the Commission’s analysis suggests that the UK would not generate new whistleblowing activity, this seems unlikely given that many employers are likely to be required to introduce internal whistleblowing procedures, and the protection for whistleblowers will strengthened under the proposals.

The potential benefit to business could therefore be substantial, though it is not possible to quantify this.

Prescribed persons:
In the UK, over 60 organisations have already been given responsibility for providing external whistleblowing reporting channels for a similar coverage of legal areas as would be required under the proposed Directive.

Costs
It is possible that some of the prescribed organisations would need to re-design their whistleblowing reporting channels to make them independent and secure within their organisation. Based on Commission estimates it could take organisations 21 hours (at a labour cost of £30 an hour) to re-design their systems, a cost per organisation of £630.

The prescribed organisations should already have trained staff responsible for maintaining their whistleblowing channels and will already manage any reports they receive. It is possible that the proposed Directive would lead to fewer reports going to prescribed organisations.
Government

Costs:
There could be costs to the justice system if more employment tribunal cases relating to detriment or dismissal following whistleblowing are generated (there were 1,497 in 2016/17) – due to the potential increase in whistleblowing reports. The Ministry of Justice estimates that the average cost to them of an employment tribunal case is £2,300.

However, it is possible that the proposed strengthening of protection against retaliation may reduce the number of these cases. However, there may be additional jurisdictions, such as employers not having an internal whistleblowing procedure in place (or an adequate internal procedure). Legal protection would also be extended beyond workers under the Directive to cover a wider range of individuals related to an organisation, and to cover a wider range of types of retaliation.

Benefits:
It is possible that the UK government may benefit from improved tax revenues, as the proposed Directive covers whistleblowing relating to breaches of corporate tax rules or arrangements whose purpose is to gain a tax advantage that defeats the purpose or objectives of corporate tax law.

Similarly, the Government may benefit if individuals are encouraged to report fraudulent activity or unsafe practices in public services.

Individuals
The research used to underpin the Commission’s impact assessment states that the UK’s employees already have good legislated whistleblowing protection.\(^{12}\)

Benefits:
Individuals who choose to report wrongdoing may benefit from the proposed strengthening in protection against retaliation.

Individuals in general may benefit if the proposed changes lead to more whistleblowing reports being effectively investigated in the public services – potentially preventing risk of harm to individuals.

ENFORCEMENT:
Current legislation on employment protection for whistleblowers in the UK enables workers who perceive that they have suffered a detriment because of whistleblowing to take their case to the employment tribunal.

As noted above, there were 1,497 employment tribunal complaints related to this right in 2016/17.

Potentially, the UK could use a similar route to redress for some areas introduced under the proposed Directive. However, Employment Tribunals would likely not be able to handle the full range of complaints, including those from shareholders, suppliers or non-executive directors.

LEGAL IMPLEMENTATION/COPY-OUT:
Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 May 2021.

MINISTERIAL SIGN-OFF:
I have read the analysis above of the potential impacts of this proposal and I am satisfied that, given the significance of the proposal, the time and evidence available, and the uncertainty of the outcome of negotiations, it represents a proportionate view of possible impacts.

Signed by the responsible minister: Date: 15/6/2018