

# SEIZING THE OPPORTUNITY FOR ADVANCED WHISTLEBLOWER PROTECTIONS AND REWARDS IN THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

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## ABSTRACT

Corruption has destructive impacts on people and governments worldwide. Through the creation of the European Public Prosecutor's Office, alongside the passage of a Whistleblower Protection Directive, the European Union has signaled its commitment to fighting corruption and encouraging transparency in both the public and private sectors. However, implementation of the Whistleblower Protection Directive by member states has been slow and fragmented, leaving whistleblowers vulnerable to retaliation despite the European Union's efforts to protect them. This Note explores the strengths and weaknesses in the Whistleblower Protection Directive's design and implementation, noting remaining vulnerabilities that might impact whistleblowers in cross-border investigations. It then argues that the European Public Prosecutor's Office, as a cross-border investigative and prosecutorial body, is well-situated to offer its own set of protections and incentives to whistleblowers in international corruption investigations, thus leveling the playing field and contributing to a culture of transparency throughout the European Union.

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## TABLE OF CONTENTS

Introduction.....	315
I. The Role of Whistleblowers in the Fight Against Corruption and Fraud	317
A. The Nature and Impact of Crimes Against the EU's Budget.....	317
B. The Importance of Whistleblowers in Corruption and Fraud Investigations .....	320
C. Best Practices for Whistleblower Protection.....	323
D. The Fragmented Landscape of European Whistleblower Protection Prior to 2019.....	324
II. The Impact of the 2019 Whistleblower Directive on Cross-Border Corruption and Fraud Investigations .....	327
A. The European Public Prosecutor's Office: A Competent Compromise .....	327
1. History and Establishment of the EPPO.....	327
2. Structure and Competence of the EPPO .....	330
B. The 2019 Whistleblower Protection Directive.....	333
1. Individuals and Disclosure Protected.....	333
2. Prohibited Retaliation .....	336
C. Concerns for Cross-Border Whistleblower Protection.....	336
1. Discrepancies in Legislation .....	336
2. Discrepancies in Protections and Penalties .....	337
3. Transposition Delays .....	338
III. Considerations for EPPO Whistleblower Regulations.....	340
A. Internal Protocol for the Protection of Whistleblowers.....	341
1. The EPPO May Establish Internal Rules to Protect Whistleblowers Whose Reports Led EU and National Authorities to Report Information to the EPPO Under Article 24 of the EPPO's Founding Regulation.....	341
2. The EPPO Should Establish Its Own Reporting Channel for Whistleblower Reports of Suspected Violations Within Its Mandate. ....	342
B. Prosecutorial Strategy .....	344
1. The EPPO May Institute Leniency or Amnesty Programs to Encourage Self-Reporting and Motivate Companies to Respond to Internal Whistleblowers. ....	344
a. United States DOJ Antitrust Corporate Leniency.....	345
b. European Commission Cartel Leniency .....	347
2. The EPPO May Consider Prosecuting Severe Violations of the EU's Whistleblower Protection Directive in Cases Where the Underlying Breach Is Within the EPPO's Competence .....	349
C. Whistleblower Reward or Recovery-Sharing Programs.....	351
Conclusion .....	354

## INTRODUCTION

Depending on who you ask, Antoine Deltour is either a hero or a thief. The former PricewaterhouseCoopers employee leaked evidence of tax avoidance schemes, endorsed by Luxembourg's government, to journalists who used it to expose Luxembourg's cooperation in helping companies avoid billions in taxes.<sup>1</sup> The revelation prompted the European Union ("EU") to institute tax probes and increase its efforts to combat corporate tax evasion,<sup>2</sup> while commending Deltour for his promotion of "mutual understanding and European values" through the European Citizens Prize.<sup>3</sup>

However, while he was receiving international praise, the situation in Luxembourg was very different. Prosecutors labeled him an "anti-capitalist" and charged him with theft, breach of confidentiality and business secrecy, computer fraud, laundering, and disclosure of business secrets. Publicly, Luxembourg's finance minister described the leak as "the worst attack" his country had ever experienced.<sup>4</sup> Deltour was convicted and received a twelve-month suspended sentence in June 2016, nearly a year after receiving the European Citizens Prize for his efforts.<sup>5</sup> Deltour's conviction was overturned in 2018 when Luxembourg's highest court ruled that he should have been recognized and protected as a whistleblower.<sup>6</sup> Though Deltour ultimately managed to avoid prison, his story demonstrates the role whistleblowers can play in providing the public with vital information, but also the serious personal risks they may incur by coming forward.

Whistleblowers are essential for facilitating access to information. The United Nations Office of the High Commissioner for Human Rights recognizes access to information as both a fundamental human right and "an essential tool for the public's participation in political affairs, democratic governance and accountability;" thus, whistleblowers "deserve the strongest

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1. Simon Bowers, *LuxLeaks Whistleblower Avoids Jail After Guilty Verdict*, GUARDIAN (June 29, 2016), <https://www.theguardian.com/world/2016/jun/29/luxleaks-pwc-antoine-deltour-avoids-jail-but-is-convicted-of-theft> [https://perma.cc/4KZY-SUFE].

2. *Id.*

3. *Antoine Deltour: LuxLeaks Whistleblower's Long Legal Battle Continues*, TRANSPARENCY INT'L (Nov. 21, 2017), <https://www.transparency.org/en/news/antoine-deltour-luxleaks-whistleblowers-long-legal-battle-continues> [https://perma.cc/2UGM-S57C].

4. See Bowers, *supra* note 1 (describing the backlash against Deltour).

5. *Id.*

6. *Luxleaks Whistleblower Antoine Deltour Has Conviction Quashed*, BBC NEWS (Jan. 11, 2018), <https://www.bbc.com/news/world-europe-42652161> [https://perma.cc/9J2Y-TUBE].

protection in law and practice.”<sup>7</sup> Unfortunately, whistleblowers commonly face retaliation for coming forward, and many nations offer inadequate protections that fail to shield them from risks including firing, harassment, or even criminal liability. The EU has recently taken a major step toward addressing this deficiency by passing a directive setting minimum standards for whistleblower protection.<sup>8</sup>

The Whistleblower Protection Directive (“2019 Directive”), passed in 2019, requires Member States in the EU to incorporate its requirements into national law by the end of 2021.<sup>9</sup> However, omissions within the 2019 Directive, policies left to national discretion, and widespread delays in adapting the 2019 Directive into national law may create inequities between the whistleblower protections of different Member States. Furthermore, a lack of clear implementation and enforcement mechanisms in many Member States may lead to weaker protections in practice than in theory. This is especially concerning in cross-border whistleblower cases, where inadequate protections in one Member State can have ramifications for international investigations and other whistleblowers in Europe.

The European Public Prosecutor’s Office (“EPPO”), an international investigative and prosecutorial body, is likely to rely particularly heavily on whistleblower reports due to its focus on corruption and fraud. In light of the implementation and enforcement gaps in the EU’s current and future whistleblower protection scheme, the EPPO would be well-served to create its own whistleblower protection and reward programs, which would help motivate potential whistleblowers to come forward while shielding them from threats to their livelihood and liberty.

This Note seeks to determine the remaining structural weaknesses in the EU’s whistleblower protection scheme that might affect the rights and options granted to potential whistleblowers in international fraud and corruption cases within the EPPO’s purview. Part I provides background on the role of whistleblowers in combatting corruption and fraud, as well as the fragmented landscape of whistleblower protections available in Europe prior to the 2019 Directive. Part II discusses the EPPO’s mandate, powers, and likely reliance on whistleblower reports; it then both evaluates the provisions of the 2019 Directive as they may affect the EPPO’s operations, and to discuss issues remaining in the Directive’s transposition into national

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7. U.N. Secretary-General, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/70/361 (Sept. 8, 2015).

8. *See generally* Council Directive 2019/1937, 2019 O.J. (L 305) 17 (EU) (setting forth the EU’s whistleblower protection standard) [hereinafter 2019 Whistleblower Protection Directive].

9. *Id.* art. 26.

law. Part III discusses the tools available to the EPPO to protect whistleblowers in its investigations, ultimately arguing for policies that encourage and reward whistleblower participation as a way to more fully insure whistleblowers against the risk of retaliation and to motivate employers and national governments to treat whistleblower reports with the gravity that they deserve.

## I. The Role of Whistleblowers in the Fight Against Corruption and Fraud

This Part provides background on the corruption and fraud offenses targeted by the EPPO and describes the important role that whistleblowers play in bringing these specific offenses to light. It also describes the risks faced by whistleblowers and the often-inadequate protections awarded to them in the EU before the passage of the 2019 Directive.

### A. The Nature and Impact of Crimes Against the EU's Budget

Crimes against the EU budget, such as Value Added Tax (“VAT”) fraud, procurement fraud, and corruption, cost the EU and its Member States millions of euros in lost revenues and misspent allocations every year.<sup>10</sup> VAT fraud is an abuse of the EU's Value Added Tax system to siphon money from Member States and the EU. The VAT is applied at every stage of a supply chain, wherever value is added. For example, a wholesaler purchasing goods from a manufacturer will pay a percentage of the purchase price in VAT to the manufacturer, who in turn will pass the VAT to the government. When the wholesaler sells the goods to a retailer, it will collect a percentage of the new purchase price—which accounts for the amount that the wholesaler paid in VAT—as VAT from the retailer and pass this to the government. The retailer, however, can deduct the tax paid by the wholesaler to the manufacturer from its VAT payment. The chain of payments continues until the consumer ultimately pays VAT on the final purchase price of the good.<sup>11</sup> Parties involved in the transaction may sometimes request refunds from the government for excess VAT paid.<sup>12</sup> Though many forms of VAT fraud exist, one of the most common is “carousel” or “missing-trader” fraud, in which a company imports foreign goods VAT-free, then charges VAT to the domestic

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10. Francisco Guarascio, *EU Budget Lost Nearly Billion Dollars to Fraud Last Year*, REUTERS (May 31, 2016), <https://www.reuters.com/article/us-eu-fraudidUKKCN0YMQ08> [<https://perma.cc/AWU8-QHFB>].

11. *European Value Added Tax (VAT)*, PRAXITY (Oct. 2018), <https://www.bkd.com/sites/default/files/2018-10/european-value-added-tax.pdf> [<https://perma.cc/T82B-67NQ>].

12. Robert Tie, *Tax Fraud Crisis*, FRAUD MAG. (Nov./Dec. 2013), <https://www.fraud-magazine.com/article.aspx?id=4294980282> [<https://perma.cc/5WU9-W32J>].

purchaser and does not remit the payment to the government.<sup>13</sup> Additionally, the companies involved may request refunds from the government for VAT that was never paid, increasing the money siphoned from the government.<sup>14</sup>

VAT fraud and other forms of fraud against the EU budget do not have such obvious impacts in individual lives, but the cumulative costs are great. EU Member States lost an estimated 147.1 billion euros in revenue to VAT fraud in 2016.<sup>15</sup> These resources are critical to the EU's efforts to maintain social services within the EU and to provide foreign aid, especially in light of the global economic damage suffered as a result of the COVID-19 pandemic.<sup>16</sup> Furthermore, VAT fraud is often a means of financing terrorism, human trafficking, and organized crime. For example, a 2017 documentary exposed the systematic use of VAT fraud in Denmark to steer more than eight million euros toward an Al-Qaeda outpost in Spain.<sup>17</sup> Organized crime networks that profit from VAT fraud are likely to use the proceeds to finance other criminal enterprises that directly implicate human rights issues, such as human trafficking.<sup>18</sup>

Subsidy fraud is another form of fraud against the EU's budget that diverts money away from development and aid. This form of fraud appears particularly prominent in the Balkan states, which receive billions in EU subsidies aimed at developing agriculture, infrastructure, and democratic institutions.<sup>19</sup> However, autocratic politicians maintain control of the funds

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13. Reuters Staff, *FACTBOX – How Carousel Fraud Works*, REUTERS (Aug. 20, 2009), <https://www.reuters.com/article/uk-carousel-fraud-britain-factbox-sb/factbox-how-carousel-fraud-works-idUKTRE57J43U20090820> [<https://perma.cc/5HVN-U9RT>].

14. Tie, *supra* note 12.

15. MARIE LAMENSCH & EMANUELE CECI, VAT FRAUD: ECONOMIC IMPACT, CHALLENGES AND POLICY ISSUES 10 (2018).

16. See generally *Recovery Plan for Europe*, EUR. COMM'N (Nov. 2020), [https://ec.europa.eu/info/strategy/recovery-plan-europe\\_en](https://ec.europa.eu/info/strategy/recovery-plan-europe_en) [<https://perma.cc/3YZ7-WU89>] (describing the EU's long-term budget designed to rebuild the European economy post-COVID-19).

17. Aline Robert, *EU Targets Terror Financing with VAT Fraud Crackdown*, EURACTIV (June 12, 2017), <https://www.euractiv.com/section/economy-jobs/news/eu-targets-terror-financing-with-vat-fraud-crackdown> [<https://perma.cc/3YZ7-WU89>]. The potential for VAT fraud to finance terrorism and organized crime was a major factor in convincing reluctant nations, such as Germany, to join the European Public Prosecutor's Office ("EPPO"), and is described in greater detail in Part II of this Note.

18. ORGANIZED CRIME PORTFOLIO, FROM ILLEGAL MARKETS TO LEGITIMATE BUSINESSES: THE PORTFOLIO OF ORGANIZED CRIME IN EUROPE 9 (2015).

19. Tim Gosling, *The Subsidy Paradox: How EU Cash Props Up Populists*, BALKAN INSIGHT (Feb. 27, 2020), <https://balkaninsight.com/2020/02/27/the-subsidy-paradox-how-eu-cash-props-up-populists/> [<https://perma.cc/ZTZ2-4RRW>]. The Czech Republic and Hungary received approximately 46 billion euros in subsidies between 2007 and 2020; Slovakia received approximately 27.5 billion euros in this time.

that flow from the EU into these Member States, and may be able to use these funds to reward their associates and those loyal to them while further concentrating their power.<sup>20</sup> This can have significant impacts on impoverished and otherwise marginalized people. For example, a 2019 *New York Times* report found that farming subsidies from the EU have been funneled to connected individuals in Eastern Europe, particularly to close associates of populist leaders.<sup>21</sup> The *Times* reported that small farmers had been extorted and even beaten, because their land received significant subsidies,<sup>22</sup> and in 2018 a Slovakian journalist investigating an extortion case was murdered along with his fiancée.<sup>23</sup>

Even at lower levels, actual and perceived corruption have an outsized effect on marginalized groups, including people with lower incomes and people who have received less education. A 2013 study commissioned by the European Commission found that 75% of respondents in the EU felt that corruption was widespread in their country, with more than 90% of respondents in ten countries believing that corruption was widespread.<sup>24</sup> Approximately 25% of respondents agreed that they were personally affected by corruption. While respondents were generally less likely to report being affected by corruption than they were in a 2011 version of the survey, the percentage of respondents claiming to be personally affected increased in four countries.<sup>25</sup> People who were unemployed, had left full-time education, or had reported struggling to pay bills were twice as likely to report direct exposure to corruption than people who were employed, had left school after age twenty, or who were not struggling to pay bills.<sup>26</sup>

In addition to the impact on individuals, corruption has serious negative economic and social impacts on the EU and affected Member States. A 2016 study commissioned by the European Parliament found that

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20. See R. Daniel Kelemen, *The European Union's Authoritarian Equilibrium*, 27 J. EUR. PUB. POL'Y 481, 486 (2020).

21. Selam Gebrekidan et al., *The Money Farmers: How Oligarchs and Populists Milk the E.U. for Millions*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/world/europe/eu-farm-subsidy-hungary.html> [<https://perma.cc/22WP-TWZK>].

22. *Id.*

23. Miroslava Germanova, *Slovak Journalist Found Shot to Death at Home*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/world/europe/jan-kuciak-slovakia-journalist-killed.html> [<https://perma.cc/GKZ3-WS84>].

24. EUR. COMM'N, SPECIAL EUROBAROMETER 397: CORRUPTION REPORT 6 (2014) [hereinafter SPECIAL EUROBAROMETER 397]. The ten countries that reported the greatest perception of widespread corruption were Greece, Italy, Lithuania, Spain, the Czech Republic, Croatia, Romania, Slovenia, Portugal, and Slovakia.

25. *Id.* at 32.

26. *Id.* at 98.

corruption annually costs the EU between 179 billion and 990 billion euros in GDP.<sup>27</sup> Additionally, the study found significant social and political costs—corruption is negatively correlated with the rule of law, positively correlated with organized crime, and is more likely to take root in nations with high levels of social inequality.<sup>28</sup> Corruption also suppresses electoral and other democratic participation,<sup>29</sup> and produces an inefficient delivery of public services that erodes the public trust.<sup>30</sup> These ripple effects reinforce structural inequality and discourage participation in government and democracy, further reducing the likelihood that the interests of marginalized people are represented.

### B. The Importance of Whistleblowers in Corruption and Fraud Investigations

Whistleblower protection is critical for the protection of the individual freedom of expression<sup>31</sup> as well as the freedom of access to information.<sup>32</sup> These rights are recognized by the United Nations<sup>33</sup> and the

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27. MARCO HAFNER ET AL., *THE COST OF NON-EUROPE IN THE AREA OF ORGANIZED CRIME AND CORRUPTION* 9 (2016).

28. *Id.* at 47.

29. Aksel Sundström & Daniel Stockemer, *Corruption and Citizens' Satisfaction with Democracy in Europe: What Is the Empirical Linkage?*, 7 ZEITSCHRIFT FÜR VERGLEICHENDE POLITIKWISSENSCHAFT [COMPAR. GOVERNANCE & POL.] (Special Issue 3, Supplement 1) 137, 152 (2013).

30. Daniel Stockemer et al., *Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies*, 34 INT'L POL. SCI. REV. 74, 76 (2013).

31. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

32. *Id.* (“Everyone has the right to freedom of opinion and expression; this right includes freedom to . . . seek, receive and impart information and ideas through any media and regardless of frontiers.”); see also Vigjilence Abazi, *The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?*, 49 INDUS. L.J. 640, 653 (2020) (citing Council Directive 2019/1937, art. 15, 2019 O.J. (L 305), 17 (EU)) (permitting public disclosures of information by whistleblowers in the EU). Though the European Convention on Human Rights does not recognize a specific right to information, the EU has other mechanisms to ensure transparency; Article 15 of the Treaty on the Functioning of the European Union guarantees EU citizens and residents access to documents of the European Parliament, the Council of Europe, and the European Commission. Treaty on the Functioning of the European Union, art. 15, 2012 O.J. (C 326) 1.

33. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 19, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) (recognizing freedom of expression and access to information as human and political rights).



EU.<sup>34</sup> Retaliation against whistleblowers penalizes individuals for exercising or helping others to exercise these rights, which simultaneously chills public speech and increases the likelihood that the underlying offenders are shielded from consequences. Furthermore, the most common acts of retaliation experienced by whistleblowers are, in and of themselves, detrimental to the enjoyment of social and political rights guaranteed within the EU. The Charter of Fundamental Rights of the European Union guarantees the right to protection against unjustified dismissal,<sup>35</sup> as well as the right to fair and just working conditions.<sup>36</sup>

Not only do whistleblower protections safeguard the rights of individuals to speak out but they are also a vital part of investigations into fraud and corruption. A 2017 quantitative study of the costs and benefits of establishing whistleblower protection systems in several EU Member States showed that potential benefits in terms of recovered public funds uniformly exceeded the costs.<sup>37</sup> In countries with high levels of corruption, the potential benefits were extraordinary. For example, in Romania, the potential benefits of implementing a whistleblower protection program outweighed the cost of doing so by a ratio of at least 319:1.<sup>38</sup> The study concluded that although effective implementation is critical for Romania to realize these benefits, implementation of whistleblower measures in the country is historically poor.<sup>39</sup>

Entrenched and effective whistleblower protections, possibly even based outside the nation itself, become all the more critical when the government of a nation is involved or complicit in acts of corruption or fraud. In one illustrative example, a former Hungarian national tax inspector reported that government cooperation enabled millions of euros in VAT avoidance and illegal reimbursements, totaling at least 5% of Hungary's

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34. See, e.g., COUNCIL OF EUR., WHISTLEBLOWERS AND THEIR FREEDOM TO IMPART INFORMATION 1 (2017), <https://rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9> [<https://perma.cc/C99V-U8E9>] (describing cases in which the European Court of Human Rights found that retaliation against whistleblowers was a violation of Article 10 of the European Convention on Human Rights, which guarantees freedom of expression).

35. Charter of Fundamental Rights of the European Union, art. 30, 2012 O.J. (C 326) 391.

36. *Id.* art. 31.

37. EUR. COMM'N, ESTIMATING THE ECONOMIC BENEFITS OF WHISTLEBLOWER PROTECTION IN PUBLIC PROCUREMENT 14 (2017), <https://minhalexander.files.wordpress.com/2018/06/estimating-the-economic-benefits-of-whistleblower-protection-in-public-procurement-0117799enn-en-1.pdf> [<https://perma.cc/68F5-Z9X9>].

38. *Id.*

39. *Id.* at 16.

GDP.<sup>40</sup> The companies responsible for the fraud forged close relationships with the state tax administration, and government officials assisted in carrying out the fraud and preventing investigations into criminal activity.<sup>41</sup> Individuals within the tax administration who tried to push for investigations into tips about fraud, or resisted enabling the fraud, were subject to retaliations such as dismissal or transfer to a less influential position.<sup>42</sup> When the whistleblower attempted to report the fraud to politicians in the leading Fidesz party, the reports were essentially ignored; the whistleblower never received a response and no investigations were launched.<sup>43</sup>

In this instance, the whistleblower ultimately felt he had no choice but to go public with the allegations.<sup>44</sup> This led to severe personal consequences: the tax authority pressed charges for slander,<sup>45</sup> and police raided the whistleblower's home, seizing documents related to the tax fraud and exposing him to a risk of charges for misuse of personal data.<sup>46</sup> The government and leading political party expressed skepticism about his claims, culminating with President Victor Orbán calling for him to bring to the public proof of his allegations even though publishing the sensitive documents would be a crime.<sup>47</sup> These infringements on the whistleblower's rights, including threats to his liberty and invasions of his home, serve not

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40. *Whistleblower Claims Corruption in Government Enables Large-Scale VAT Fraud in Hungary*, ATLATSZO (Aug. 11, 2013), <https://atlatszohu.com/2013/11/08/whistleblower-claims-corruption-in-government-enables-large-scale-vat-fraud-in-hungary/> [<https://perma.cc/R4LR-33ZY>]. This example is relevant as a depiction of government-sanctioned fraud that was only brought to light through the actions of a whistleblower. However, it should be noted that as of the writing of this Note, Hungary has not joined the EPPD and has expressed no intention to do so. As discussed in Part II, Hungary is party to the EU's 2019 Whistleblower Protection Directive ("2019 Directive"), but as of February 2021 it has made no progress toward transposing the Directive into national law.

41. *Id.*

42. *Id.*

43. *Hungary Persecutes Those Who Fight Against Corruption*, EURONEWS (Dec. 23, 2013), <https://www.euronews.com/2013/12/23/hungary-persecutes-those-who-fight-against-corruption-> [<https://perma.cc/624F-Y9NF>].

44. *Id.*

45. *Id.*

46. *Id.* The documents were seized as part of an investigation into misuse of personal data by an "unknown suspect." The whistleblower, András Horváth, was not convicted, but was fired. He has since been appointed as chief of staff to an anti-corruption politician and was in charge of conducting corruption investigations in the Hungarian city of Hódmezővásárhely, BUDAPEST BEACON (Mar. 10, 2018), <https://budapestbeacon.com/i-am-convinced-lazar-has-his-own-meszaros-says-former-nav-whistleblower-andras-horvath/> [<https://perma.cc/2MUU-RFT3>].

47. EURONEWS, *supra* note 43.

only to punish this whistleblower but to dissuade others from exercising their own rights to come forward.

Due in part to weak whistleblower protections, individuals in the EU frequently feel disincentivized to report corruption that they experience or witness. The 2013 Corruption Eurobarometer study found that 74% of respondents who had personally experienced or witnessed corruption did not report it.<sup>48</sup> When asked why people may not report corruption that they have experienced, almost half of respondents said that it would be difficult to prove allegations, while around a third of respondents indicated that reporting was “pointless” because the responsible parties would not be punished.<sup>49</sup> Thirty-one percent of respondents stated that people may be reluctant to report corruption because there is “no protection” for those who do so.<sup>50</sup>

### C. Best Practices for Whistleblower Protection

Whistleblower protection has been understood to be an important component of fraud detection and anti-corruption efforts for many years, but it has risen to further prominence since the 1980s. Throughout the 2010s, the attention paid to whistleblower protection increased, with world leaders, as well as civil society organizations, working to determine “best practices” for whistleblower legislation. One such report, endorsed by the G20 at a 2011 summit,<sup>51</sup> emphasized the need for clear, centralized legislation to protect whistleblowers rather than a “fragmented” approach across multiple areas of law.<sup>52</sup> It recommended that whistleblower protections be broad in scope in terms of who is protected,<sup>53</sup> which disclosures are protected,<sup>54</sup> and what

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48. SPECIAL EUROBAROMETER 397, *supra* note 24, at 100. Though the survey did not distinguish between people who had personally experienced corruption at work or in unrelated contexts, it included asking respondents whether they personally knew someone who had taken a bribe. One in eight respondents reported personally knowing someone who had taken a bribe.

49. *Id.* at 9.

50. *Id.*

51. ORG. FOR ECON. CO-OPERATION & DEV., STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION 2 (2011) [hereinafter G20 Compendium], <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> [<https://perma.cc/3RNB-9JH8>].

52. *Id.* at 30.

53. *Id.* The G20 compendium of best practices suggests that protection be extended to private and public sector employees, as well as volunteers, contractors, and others outside of the formal employee-employer relationship.

54. *Id.* The G20 compendium suggests that protection be afforded to people who disclose a variety of wrongdoing, including violations of law but also dangers to public safety, waste of funds, or other improprieties. While the compendium emphasizes the

sort of retaliation the whistleblower is to be protected from.<sup>55</sup> Additionally, it recommended that anonymous whistleblower complaints be accepted in order to further reduce the possibility of retaliation.<sup>56</sup>

The report noted that in order to empower whistleblowers to come forward and ensure that their claims are properly regarded, it is important that government and private employers alike have mechanisms to receive and process whistleblower reports.<sup>57</sup> Best practices also dictate that there should be a speedy investigation process of whistleblower reports and follow-ups with the whistleblower.<sup>58</sup> This would ensure whistleblower reports are properly utilized and serve as a much-needed incentive for whistleblowers to come forward,<sup>59</sup> especially in light of the chilling effect that inaction and lack of response can have on whistleblower cooperation.<sup>60</sup>

#### D. The Fragmented Landscape of European Whistleblower Protection Prior to 2019

Throughout the late 1990s and the early 2000s, whistleblower laws steadily took hold throughout Europe. The United Kingdom<sup>61</sup> passed Europe's first comprehensive whistleblower protection law in 1998, which protected private- and public-sector employees, contractors, trainees, and workers based overseas.<sup>62</sup> Several nations soon followed suit with laws that

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importance of "internal" disclosures to the employer and "external" disclosures to the government, it also calls for "public disclosures," such as those to the media and civil society organizations, to be allowed. *Id.* at 31.

55. *Id.* The compendium suggests that the definition of "retaliation" should include any negative personnel action, including firing, failure to promote, appoint, or reinstate, and harassment, among others.

56. *Id.*

57. *Id.* at 32.

58. *Id.*

59. *Id.*

60. SPECIAL EUROBAROMETER 397, *supra* note 24, at 9.

61. The Special Eurobarometer corruption report was published in 2014, two years before the United Kingdom voted to leave the EU. The UK withdrew from the EU in 2020, and is thus not participating in the EPPO, nor is it bound by the 2019 Directive. However, the UK's existing whistleblower protection law, the Public Interest Disclosure Act of 1998 ("PIDA"), is regarded to be an advanced set of protections, covering public and private sector employees. ("[PIDA is] one of the most comprehensive whistleblower laws in the world . . . several countries have used PIDA as a template for their own laws and proposals, including Ireland, Japan, and South Africa. MARK WORTH, TRANSPARENCY INT'L, WHISTLEBLOWING IN EUROPE: LEGAL PROTECTIONS FOR WHISTLEBLOWERS IN THE EU 83 (2013), [https://images.transparencycdn.org/images/2013\\_WhistleblowingInEurope\\_EN.pdf](https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf) [<https://perma.cc/M2QK-2HDD>].

62. Public Interest Disclosure Act, 1998 (c. 23) (GB).

protected public servants, if not private-sector employees as well.<sup>63</sup> Some new laws went so far as to give equal protection to public disclosures,<sup>64</sup> while others only protected disclosures made through official channels.

Despite the trend towards increased whistleblower protection, in many European nations these protections are incomplete or ill-enforced. As of 2013, only four then-Member States of the EU had comprehensive or near-comprehensive whistleblower protections, according to Transparency International's evaluation based on its own set of best practices.<sup>65</sup> Sixteen Member States had "partial provisions and procedures for whistleblowers in the public and/or private sectors," while seven Member States had no whistleblower protection laws at all.<sup>66</sup> Transparency International noted that in many cases, a lack of comprehensive regulations left the issue of whether a whistleblower merited protection up to judicial discretion.<sup>67</sup> In other cases, although the right to report wrongdoing was written into law, there was no agency specified to receive these reports and no requirement for formal whistleblower procedures, ultimately leading to reduced whistleblower cooperation and increased risks of retaliation.<sup>68</sup> One reason for the relatively weak protections may be a cultural animus toward whistleblowers. As recently as 2009, a study on whistleblower protection in Europe indicated that "because of the lack of a reporting culture with positive connotations, the whistle-blower is all too often seen as a traitor or likened to a police informer."<sup>69</sup> This is due in part to the legacy of authoritarian or fascist governments in Europe, who relied on informers to maintain control of the population and target dissidents.<sup>70</sup>

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63. WORTH, *supra* note 61, at 10.

64. *Id.* at 10, 12.

65. *Id.* at 8. This list includes the United Kingdom, which, as discussed in note 61, is no longer part of the EU.

66. *Id.*

67. *Id.* at 26.

68. *Id.*

69. EUR. PARL. ASS., *Report by the Committee on Legal Affairs and Human Rights on "The Protection of 'Whistle-blowers'"*, Doc. No. 12006 (Sept. 2009), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12302&lang=en> [<https://perma.cc/N7U3-NA9R>].

70. ASHLEY SAVAGE, *WHISTLEBLOWERS FOR CHANGE: THE SOCIAL AND ECONOMIC COSTS AND BENEFITS OF LEAKING AND WHISTLEBLOWING* 12 (OPEN SOC'Y FOUNDS., 2018), <https://www.opensocietyfoundations.org/uploads/3f0ed83b-1ec2-450f-884b-5ed71d5a4769/20181120-whistleblowers-for-change-report.pdf> [<https://perma.cc/VN9W-QHFV>].

Meanwhile, the EU has attempted to protect and reward whistleblowers, with “paradoxical” results.<sup>71</sup> In the illustrative case of the 2014 LuxLeaks scandal, whistleblower Antoine Deltour received the European Citizens’ Prize from the EU while Luxembourg’s government was prosecuting him for leaking files related to tax evasion schemes.<sup>72</sup> Similarly, other whistleblowers might have their rights upheld by the EU but face retaliation or other harms in their own states. Whistleblowers who were not protected in their own states could appeal to the European Court of Human Rights (“ECtHR”), claiming a violation of their right to freedom of expression and information.<sup>73</sup> However, while the ECtHR decided in favor of whistleblowers on several occasions,<sup>74</sup> this process was insufficient to create a thorough whistleblower protection regime when not complemented by support within Member States.

The Council of Europe has adopted several resolutions and reports calling on Member States to foster whistleblowing and to protect whistleblowers from retaliation. In 2009, the Committee on Legal Affairs and Human Rights issued a report finding that while many whistleblowers feared retaliation, this fear was secondary to the prevalent sense that reports would not be followed up or acted upon.<sup>75</sup> The report issued recommendations to prevent retaliation and ensure proper follow-up, calling for protections for a broad variety of whistleblowers that focus on “a safe alternative to silence.”<sup>76</sup> The Council issued further guidance in 2014, providing principles for states to develop a “normative, institutional and judicial framework to protect [whistleblowers],” covering a broad range of disclosures in the public interest, multiple channels to report information, mechanisms to ensure that reports are acted upon promptly, prohibition of retaliation against whistleblowers who had reasonable grounds to believe their reports accurate, and confidentiality of the whistleblower’s identity subject to fair

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71. Vigilenca Abazi, *New EU Directive on Whistleblower Protection*, EU LAW ANALYSIS (Apr. 23, 2019), <http://eulawanalysis.blogspot.com/2019/04/new-eu-directive-on-whistleblower.html> [<https://perma.cc/T7XM-S292>].

72. *Antoine Deltour: Luxleaks Whistleblower’s Long Legal Battle Continues*, *supra* note 3.

73. Abazi, *supra* note 32, at 642. Deltour’s conviction was overturned in 2018.

74. *Id.*; *see also* COUNCIL OF EUR., WHISTLEBLOWERS AND THEIR FREEDOM TO IMPART INFORMATION (2017), <https://rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9> [<https://perma.cc/KSZ8-ELXU>] (describing ECtHR case law about whistleblower protection, including multiple cases where improper dismissals of whistleblowers were found to be violation of Article 10 of the European Convention on Human Rights, which guarantees the freedom of expression).

75. The Protection of ‘Whistle-blowers’, Exploratory Memorandum, EUR. PARL. DOC. 12006, ¶ 6 (2009), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302> [<https://perma.cc/RG93-ZZVT>].

76. *Id.* res. 6.2.

trial guarantees.<sup>77</sup> The European Parliament has acknowledged the role of whistleblowers in protecting the EU's financial interests (including such interests that will theoretically be defended by the EPPO once active) through a report issued in 2017.<sup>78</sup> However, no comprehensive, enforceable provisions were adopted until the 2019 Directive.

## II. The Impact of the 2019 Whistleblower Directive on Cross-Border Corruption and Fraud Investigations

This Part discusses the application of the 2019 Whistleblower Protection Directive to the cross-border investigations and prosecutions of the EPPO. It begins by providing context on the establishment of the EPPO and the considerations that led to its current “hybrid” structure and limited competence. It goes on to evaluate the strengths and weaknesses of the 2019 Directive and to discuss roadblocks and divergences in its transposition into national law. Ultimately, disparities in how the 2019 Directive translates into national law and a lack of clarity around its enforcement may lead to complications for would-be whistleblowers and may not adequately motivate individuals to come forward.

### A. The European Public Prosecutor's Office: A Competent Compromise

#### 1. History and Establishment of the EPPO

The EPPO was designed to provide a centralized investigation and enforcement structure for crimes affecting the EU's budget, such as corruption and fraud.<sup>79</sup> The initial proposal for EPPO, first issued by the European Parliament in June 2013, expressed concern that, although national authorities are competent to prosecute such crimes, limited law enforcement resources and “fragmented” law enforcement efforts across Member States hindered the investigation and prosecution of cross-border offenses.<sup>80</sup> Citing low prosecution rates for crimes affecting the EU budget,

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77. COUNCIL OF EUR., PROTECTION OF WHISTLEBLOWERS (RECOMMENDATION CM/REC(2014)7 AND EXPLANATORY MEMORANDUM) 19 (2014), <https://rm.coe.int/16807096c7> [<https://perma.cc/FV96-YGGX>].

78. EUR. PARL. DOC. (P8\_TA(2017)0022) (2017), [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0022\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0022_EN.pdf) [<https://perma.cc/DCB9-VMFH>].

79. COUNCIL OF EUR., *Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office*, at ¶ 45, COM (2013) 534 final (Jul. 17, 2013), <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52013PC0534&from=EN> [<https://perma.cc/WQU3-SMFV>].

80. *Id.* at 2.

slow action by national judicial authorities, and “unequal” results achieved in these investigations across different Member States, the proposal claimed that the European Council was obligated to take action to protect the EU’s financial interests and it had the authority to establish an EU-level prosecution system.<sup>81</sup>

The original proposal sparked concerns throughout Europe that the EPPO might violate the EU’s principles of subsidiarity and proportionality.<sup>82</sup> National parliaments questioned whether the conditions satisfied the principle of subsidiarity, namely: whether national authorities were truly inefficient at enforcing the EPPO’s objectives; whether action would be more effective at the European level than at the local or national level; and whether the EPPO was genuinely aimed at cross-border activity within the EU’s competence to regulate.<sup>83</sup> Furthermore, Member States questioned whether the EU was responding to an obligation to act or if, instead, it was merely taking advantage of the power to do so without adequately justifying its action.<sup>84</sup> Some Member States, such as Sweden, argued that their prosecution mechanisms were sufficient and that the EU should only act with regards to Member States whose prosecution efforts were inefficient.<sup>85</sup>

Due to these concerns, the initial proposal was issued a “yellow card” through the Early Warning Mechanism<sup>86</sup> and returned to the European

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81. *Id.*

82. *See, e.g.,* Vanessa Franssen, *National Parliaments Issue Yellow Card Against the European Public Prosecutor’s Office*, EUR. L. BLOG (Nov. 4, 2013), <https://europeanlawblog.eu/2013/11/04/national-parliaments-issue-yellow-card-against-the-european-public-prosecutors-office/> [<https://perma.cc/3PDH-SM7J>]. Subsidiarity, in the EU context, is “the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.” *Subsidiarity*, EUR-LEX, <https://eurlex.europa.eu/summary/glossary/subsidiarity.html> [<https://perma.cc/LP2Y-5LWP>]. Proportionality dictates that “the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties [of the EU].” *Proportionality Principle*, EUR-LEX, <https://eur-lex.europa.eu/summary/glossary/proportionality.html> [<https://perma.cc/LNP2-NQ9Q>].

83. Irene Wiczorek, *The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission’s Hasty Approach to National Parliaments’ Subsidiarity Arguments*, 16 GER. L.J. 1247, 1255 (2015).

84. *Id.* at 1257.

85. *Id.* at 1258.

86. Under the Treaty of Lisbon, the European Commission must relay potential legislation to national parliaments before passing the bill. National parliaments then have the opportunity to raise concerns about the legislation’s adherence to the principles of subsidiarity and proportionality and to require the European Commission to consider their objections through the Early Warning Mechanism. Consolidated Version of the Treaty on European Union – Protocols – Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, 2008 O.J. (115) 206.



Commission for review.<sup>87</sup> After reviewing the objections, the European Commission did not find that the proposal violated the principle of subsidiarity.<sup>88</sup> However, the proposal was ultimately amended to increase the control that Member States have over the EPPO's actions.<sup>89</sup> Despite the modified structure, the EU could not reach a consensus to launch the EPPO. Thus, the EU turned to the rarely-used enhanced cooperation mechanism, which allows a minimum of nine Member States to enact a proposal without requiring other Member States to participate.<sup>90</sup> Sixteen Member States originally agreed to join the proposal; by the time the regulation establishing the EPPO ("founding regulation") entered into force in November 2020, twenty-two Member States had joined.<sup>91</sup> As of this writing, only Hungary, Poland, and Sweden have declined to participate.<sup>92</sup>

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87. Valentin Kreilinger, *National Parliaments' 3rd Yellow Card: A Preliminary Assessment*, EURACTIV (May 12, 2016), <https://www.euractiv.com/section/social-europe-jobs/opinion/national-parliaments-3rd-yellow-card-a-preliminary-assessment/> [<https://perma.cc/WN2G-YC34>].

88. *Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office with Regard to the Principle of Subsidiarity, in Accordance with Protocol No 2*, at 6, COM (2013) 851 final (Nov. 23, 2013), [https://ec.europa.eu/info/sites/default/files/communication-review-of-proposal-establishing-the-european-public-prosecutors-office\\_nov2013\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-review-of-proposal-establishing-the-european-public-prosecutors-office_nov2013_en.pdf) [<https://perma.cc/FCQ8-6EXV>].

89. Alexandre Met-Domestici, *The Hybrid Architecture of the EPPO: From the Commission's Proposal to the Final Act*, 2017 EUCRIM 143, 144. These modifications included creating a college of prosecutors appointed by each Member State, rather than a single office operating in a decentralized manner across the EU. Additionally, candidates for positions such as European Delegated Prosecutors would now be nominated by Member States rather than appointed directly by EU leadership. *Id.* at 145–46.

90. Council Regulation 2017/1939, ¶¶ 7–8, 2017 O.J. (L 283) 1, 1 (EU) <https://eur-lex.europa.eu/eli/reg/2017/1939/oj> [<https://perma.cc/UMM8-HZAR>] [hereinafter 2017 EPPO Regulation]; see also *European Public Prosecutor's Office*, EUR. COUNCIL (Aug. 16, 2021), <https://www.consilium.europa.eu/en/policies/eppo/> [<https://perma.cc/GU7W-UVA3>] (“[A] group of at least nine member states may undertake enhanced cooperation, according to the EU treaties.”).

91. *European Public Prosecutor's Office*, *supra* note 90.

92. *Members*, EUR. PUB. PROSECUTOR'S OFF., <https://www.eppo.europa.eu/en/members> [<https://perma.cc/M42P-Z5EY>]. Denmark and Ireland have opt-outs from the area of freedom, security, and justice, which is the collection of policies that govern entities such as the EPPO. This opt-out means that they do not have to participate in this policy area. *Opting Out*, EUR-LEX, [https://eur-lex.europa.eu/summary/glossary/opting\\_out.html](https://eur-lex.europa.eu/summary/glossary/opting_out.html) [<https://perma.cc/BNA5-5CH7>].

## 2. Structure and Competence of the EPPO

The EPPO is tasked with investigating and prosecuting crimes that affect the financial interests of the EU.<sup>93</sup> These crimes include: fraud, such as VAT fraud; subsidy fraud; procurement fraud; and passive and active corruption offenses.<sup>94</sup> “Active” corruption includes offering or giving bribes; “passive” corruption involves being on the receiving end of bribes or other improper incentives.<sup>95</sup> Directive (EU) 2017/1371 instructs Member States to ensure that certain enumerated offenses are criminalized nationally,<sup>96</sup> and the EPPO may only prosecute offenses “as implemented by national law,” meaning that the offenses must be criminalized in national law and that national law ought to provide the suspect with certain rights and protections to ensure a fair investigation.<sup>97</sup> Furthermore, the EPPO is empowered to prosecute only serious, cross-border crimes. For instance, its VAT fraud prosecutions are limited to offenses involving the territory of at least two Member States with an incurred loss of 10 million euros or greater.<sup>98</sup>

The EPPO is organized as a hybrid model, with a centralized European level and a decentralized national level.<sup>99</sup> At the European level, the EPPO is led by a single European Chief Prosecutor<sup>100</sup> who oversees a

93. 2017 EPPO Regulation, *supra* note 90, arts. 2, 4.

94. See generally Council Directive 2017/1371, 2017 O.J. (L 198) 29 (EU) [hereinafter 2017 Financial Interests Directive], <https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN> [<https://perma.cc/3PTP-TA83>] (defining the crimes listed above).

95. *Active Bribery*, GAN INTEGRITY: COMPLIANCE GLOSSARY, <https://www.ganintegrity.com/compliance-glossary/activebribery> [<https://perma.cc/3K5D-MDPY>].

96. *Id.* ¶ 31.

97. 2017 EPPO Regulation, *supra* note 90, ¶ 85; *id.* art. 4.

98. *Id.* art. 22. More broadly, in almost all cases of any type, the EPPO may not prosecute criminal actions that incur a total damage of less than €10,000. However, in rare circumstances, such as where the criminal offense has “repercussions at Union level which require an investigation to be conducted by the EPPO” or where officials or employees of the EU or its institutions are suspected in the offense, the EPPO may investigate and prosecute regardless of the size of the damage. *Id.* art. 25. This Note considers fraud and corruption offenses involving over €10,000 in damages or implicating EU officials or institutions to be “serious” offenses by definition.

99. Met-Domestici, *supra* note 89, at 144.

100. 2017 EPPO Regulation, *supra* note 90, art. 11. The European Chief Prosecutor’s appointment is designed to be as independent as possible, and the Chief Prosecutor’s independence must be “beyond doubt” as a condition of employment. The Chief Prosecutor is nominated by the Council of Europe and appointed by the European Parliament for a non-renewable seven-year term. *Id.* art. 14. The first Chief Prosecutor, currently serving, is Laura Codruța Kövesi, a Romanian prosecutor who served as the head of Romania’s National Anti-Corruption Directorate from 2013 to 2018. *European Chief Prosecutor*, EUR. PUB. PROSECUTOR’S OFF., <https://www.eppo.europa.eu/en/european-chief-prosecutor> [<https://perma.cc/3G8P-7DLK>].

College of Prosecutors consisting of European Prosecutors nominated by each Member State.<sup>101</sup> The College sets strategic decisions and ensures “consistent and coherent” prosecutorial decisions,<sup>102</sup> while the European Prosecutors independently supervise investigations and monitor the implementation of EPPO tasks within their respective Member States,<sup>103</sup> taking over prosecutions only in exceptional circumstances.<sup>104</sup> The European level also includes the Permanent Chambers, which makes choices about prosecution strategy for individual cases, including the decision to dismiss a case or refer it to national authorities.<sup>105</sup> At the national level, Member States nominate “European Delegated Prosecutors” who carry out investigations and prosecutions with direction from the European Prosecutors.<sup>106</sup>

The EPPO can become responsible for investigations in several ways. First, the EPPO may initiate investigations:<sup>107</sup> European Delegated Prosecutors in Member States with jurisdiction over the offense may initiate investigations on behalf of the EPPO,<sup>108</sup> and, conversely, the EPPO may instruct European Delegated Prosecutors to initiate investigations.<sup>109</sup> National or EU enforcement authorities may report criminal conduct to the EPPO, and the EPPO must inform the authority if it elects to initiate an investigation.<sup>110</sup> The EPPO also has the right of evocation, under which it may overtake an investigation from a national authority.<sup>111</sup> National authorities must inform the EPPO of investigations into offenses that fall within the EPPO’s competence, and the EPPO must register and verify the information provided.<sup>112</sup> If the EPPO declines to investigate, either because the underlying information could not be verified or because the alleged offense does not fall within its competence, it must note the reasons in the case management system and inform the reporting authority of its decision.<sup>113</sup>

While most of the EPPO founding regulation’s provisions about initiating investigations presume that national authorities will perform the

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101. 2017 EPPO Regulation, *supra* note 90, art. 9.

102. *Id.* art. 9(2).

103. *Id.* arts. 12(1), (5).

104. *Id.* art. 28(4).

105. *Id.* art. 10.

106. *Id.* arts. 13(1), 17(1), 26(1), 26(2). European Delegated Prosecutors are required to be members of the judiciary (including prosecutors) and may also operate as national prosecutors to the extent that this does not interfere with their duties to the EPPO.

107. *Id.* art. 26.

108. *Id.* art. 26(1).

109. *Id.* art. 26(3).

110. *Id.* art. 26(2).

111. *Id.* art. 27.

112. *Id.* art. 24.

113. *Id.* art. 25.

initial investigation, the EPPO may also receive information from private individuals and media sources so long as the EPPO verifies the information and determines that the claim falls within its competence.<sup>114</sup> The founding regulation encourages Member States to prove “effective procedures to enable reporting” of offenses within its competence and to “ensure protection of the people who report such offenses.”<sup>115</sup> It also instructs the EPPO to establish its own whistleblower rules if necessary.<sup>116</sup> However, the internal rules and procedures adopted by the EPPO in March 2020 provide very little information about whistleblower protection except to say that the identity and contact details of whistleblowers will not be recorded in the EPPO’s case management system if “rules regarding the protection of informants and whistle-blowers are applicable and provide otherwise.”<sup>117</sup> Neither the founding regulation nor the internal rules establish a centralized system for the EPPO to receive reports from Member States or other parties.<sup>118</sup>

Despite the lack of formal whistleblower support in the EPPO’s infrastructure, the EPPO is likely to rely heavily on whistleblower reports due to the nature of the corruption and fraud that it seeks to target. European Chief Prosecutor Laura Codruța Kövesi, who previously served as the head of the Romanian National Anti-Corruption Directorate, has emphasized the importance of receiving complaints and tips to spark corruption investigations, noting that “[i]n Romania, most of the cases we opened were based on information provided to us from the public.”<sup>119</sup> In order to encourage whistleblower tips, she has asserted the importance of establishing the EPPO as a “strong and independent” institution worthy of public trust.<sup>120</sup> The belief that the government will not adequately respond to whistleblower reports is, indeed, a major contributor to individual reluctance to report corruption.<sup>121</sup> Beyond establishing trust in the

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114. *Id.* ¶ 49.

115. *Id.* ¶ 50.

116. *Id.*

117. EUR. PUB. PROSECUTOR’S OFF., INTERNAL RULES OF PROCEDURE OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE art. 38 (2020), [https://ec.europa.eu/info/sites/info/files/2020.003\\_irp\\_signed\\_0.pdf](https://ec.europa.eu/info/sites/info/files/2020.003_irp_signed_0.pdf) [<https://perma.cc/PW7R-WYU7>].

118. 2017 EPPO Regulation, *supra* note 90, ¶ 52.

119. Rahim Kanani, *Cracking Down on Corruption: The EU’s First Anti-Fraud Prosecutor Reflects on the Challenges of Tackling Transnational Crime*, FIN. & DEV., Dec. 2020, at 52–53, <https://www.imf.org/external/pubs/ft/fandd/2020/12/pdf/interview-with-laura-codruta-kovesi-on-tackling-EU-corruption.pdf> [<https://perma.cc/353A-3UY2>].

120. *Id.*

121. SPECIAL EUROBAROMETER 397, *supra* note 24, at 106. In this 2014 study, when asked why people may decide not to report a case of corruption, 47% of respondents said

competence of institutions to process whistleblower reports,<sup>122</sup> potential whistleblowers must also be reassured that they will not face retaliation for their actions.<sup>123</sup>

## B. The 2019 Whistleblower Protection Directive

On October 1, 2019, the Council of Europe adopted the Resolution and Recommendation on the Protection of Whistleblowers (“2019 Directive”).<sup>124</sup> The 2019 Directive was largely informed by a report issued by a special rapporteur to the Committee on Legal Affairs and Human Rights, which noted that as of August 2019, fewer than twenty Member States had a comprehensive whistleblower protection law. Other Member States only offered partial protection or protection for whistleblowers who reported a limited number of violations.<sup>125</sup> The report further emphasized the importance of whistleblower protection as an issue of fundamental rights, including freedom of expression and information.<sup>126</sup> As a result, the resolution set forth “common minimum standards” for whistleblower protection, while not prohibiting whistleblower protection standards that exceed those minimums.<sup>127</sup>

### 1. Individuals and Disclosure Protected

The 2019 Directive applies to individuals<sup>128</sup> who report violations of EU law in fields such as public procurement, prevention of

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that it would be difficult to prove anything, and 33% said that it would be “pointless” to report because the responsible parties would not be punished.

122. Public willingness to report corruption also likely depends on whether people know where and how to report. In the Eurobarometer study, 21% of respondents said that people may not report corruption because they do not know where to report it. *Id.* at 6.

123. *Id.* at 6. Thirty-one percent of respondents said that people would not report corruption because there is “no protection” for those who do, and 20% responded that people who report corruption “get into trouble with the police or other authorities.” Additionally, societal expectations against whistleblowing are likely to play a role in reluctance to report; 20% of respondents said that people may not report because “everyone knows about these cases and no one reports them,” while 16% said that people may not report because “no one wants to betray anyone.” *Id.* at 6.

124. Michael Plachta, *Council of Europe Adopts Resolution and Recommendation on the Protection of Whistleblowers*, 35 INT’L ENF’T L. REP. 383, 384 (2019).

125. *Id.*

126. *Id.*

127. 2019 Whistleblower Protection Directive, *supra* note 8.

128. In line with commonly-recommended best practices, the Directive extends protection to employees as well as volunteers, trainees, contractors, subcontractors, suppliers, former employees, and prospective employees who observe violations during the recruiting process or pre-contractual negotiations. 2019 Whistleblower Protection

money-laundering and terrorist financing, and products and markets—which in severe, cross-border cases may fall within the jurisdiction of the EPPO.<sup>129</sup> It also includes protections for facilitators of reporting, third parties who could suffer retaliation based on another’s reporting, and legal entities connected to the reporting person.<sup>130</sup> These individuals and entities qualify for protection so long as they report information that they have reasonable grounds to believe is both true and within the scope of the Directive at the time of reporting; the motive of the reporter is irrelevant so long as this reasonable belief exists.<sup>131</sup>

However, in order to receive protection, a prospective whistleblower must report through the proper channels.<sup>132</sup> Whistleblowers are encouraged to make their initial reports internally to their employer.<sup>133</sup> To facilitate this practice, Member States are responsible for requiring that public- and private-sector employers establish channels for receiving and following up on internal reports.<sup>134</sup> These internal channels must be designed to protect the whistleblower’s identity,<sup>135</sup> and qualifying entities must designate an impartial person or department to follow up on the report, maintain communication with the whistleblower, and communicate the outcome of the report back to the whistleblower within a reasonable time frame.<sup>136</sup>

Though internal reporting is preferred as a first measure, whistleblowers who immediately report to the government (referred to as

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Directive, *supra* note 8, art. 4; G20 Compendium, *supra* note 51, at 30; ANDY MCDEVITT & MARIE TERRACOL, TRANSPARENCY INT’L, ASSESSING WHISTLEBLOWER LEGISLATION: METHODOLOGY AND GUIDELINES FOR ASSESSMENT OF THE EU DIRECTIVE AND BEST PRACTICE (2020), [https://images.transparencycdn.org/images/2020\\_Toolkit\\_AssessingWhistleblowingLegislation\\_EN.pdf](https://images.transparencycdn.org/images/2020_Toolkit_AssessingWhistleblowingLegislation_EN.pdf) [<https://perma.cc/HF37-4XX8>].

129. 2019 Whistleblower Protection Directive, *supra* note 8, art. 2.

130. *Id.* art. 4. “Facilitators” in this context are defined as those who assist a reporting person in the reporting process in a work-related context. *Id.* art. 5.

131. *Id.* art. 6. This appears to be in line with the G20’s preferred definition of “good faith” to include any disclosure made based on a reasonable belief, with no further requirements for altruistic motives. G20 Compendium, *supra* note 51, at 31.

132. 2019 Whistleblower Protection Directive, *supra* note 8, art. 6.

133. *Id.* art. 7.

134. *Id.* art. 8. In the private sector, this requirement applies to entities with 50 or more workers, but this threshold does not apply to entities “falling within the scope of Union acts.” Additional rules apply for entities with more than 250 workers, and Member States may require reporting channels for smaller entities which carry out higher-risk activities. In the public sector, the reporting channel requirement applies to all legal entities, though Member States may make exceptions for municipalities with fewer than 10,000 inhabitants or fewer than 50 workers. *Id.* art. 8.

135. *Id.* art. 9.

136. *Id.*

“external reporting”) are also protected under the 2019 Directive.<sup>137</sup> Whistleblowers may also report externally after internal reporting has yielded unsatisfactory results.<sup>138</sup> Member States are required to designate authorities to handle whistleblower reports, which are in turn required to establish “independent and autonomous” reporting channels to process and follow up on reports and to transmit the information within to the appropriate national or EU bodies.<sup>139</sup> Even in the event that the authority determines that the breach is “clearly minor” or that the report is repetitive, the confidentiality and anti-retaliation protections in the 2019 Directive remain intact.<sup>140</sup> Should an authority receive a report of a breach that it is not competent to address, it must transmit it, in a secure manner, to the competent authority within a reasonable time frame.<sup>141</sup> It must also inform the reporting person of the transmission.<sup>142</sup>

“Public” disclosures, including those to the media and civil society organizations, are protected under the 2019 Directive only in limited situations. The 2019 Directive recommends that they are used as a last resort after internal and external disclosures have failed to yield an adequate result.<sup>143</sup> However, public disclosures are also protected when the reporter has reasonable grounds to believe that the breach constitutes an “imminent and manifest danger to public interest,” or that external reporting would be futile or result in retaliation.<sup>144</sup> This protection of public disclosures explicitly includes circumstances where the government may be involved in the breach or in collusion with its perpetrator,<sup>145</sup> which is likely to extend to corruption cases.<sup>146</sup>

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137. *Id.* art. 10.

138. *Id.*

139. *Id.* art. 11

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* art. 15

144. *Id.*

145. *Id.*

146. The limitations on public disclosures were developed through case law in the European Court of Human Rights and seek to balance the interests of employers to “manage their organizations and protect their interests” with the interests of the public to be protected from harm. *Id.* ¶ 2.

## 2. Prohibited Retaliation

The 2019 Directive defines “retaliation” to include both adverse workplace and employment consequences,<sup>147</sup> as well as protection from legal liability for obtaining and disclosing information.<sup>148</sup> Whistleblowers who had reasonable grounds to believe that their disclosure was necessary to reveal a breach are to be shielded from liability for defamation, breach of copyright, breach of secrecy or improper disclosure of information, or other such claims.<sup>149</sup> Bringing “vexatious proceedings” against a whistleblower is considered a form of retaliation and is subject to penalties, as are other forms of retaliation and attempts to hinder reporting.<sup>150</sup> The Directive also requires that remedies and compensation be provided to whistleblowers who have suffered retaliation.<sup>151</sup> While the Directive requests that penalties be “effective, proportionate and dissuasive,” the penalties and forms of compensation are unspecified and thus left to the discretion of Member States.<sup>152</sup>

### C. Concerns for Cross-Border Whistleblower Protection

#### 1. Discrepancies in Legislation

Despite establishing a framework for comprehensive protections to be afforded to whistleblowers, the 2019 Directive leaves many of the practical applications of these definitions to the discretion of Member States. For example, though the 2019 Directive attempts to guarantee confidentiality to anonymous reporters whose identities are later discovered,<sup>153</sup> it does not require that Member States accept or pursue reports that are initially anonymous.<sup>154</sup> As such, many draft proposals and

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147. *Id.* art. 19. The Directive defines these adverse consequences broadly to include firing, demotion or withholding of promotion, negative references, reputational harm, and harassment, among other adverse actions.

148. *Id.* art. 20.

149. *Id.* art. 21. Whistleblowers may still face criminal liability if they committed an illegal action, such as trespassing or hacking, to obtain the information disclosed.

150. *Id.* art. 23.

151. *Id.* art. 21.

152. *Id.* art. 23. The Directive suggests certain remedies based on the retaliation suffered, such as reinstatement in the event of improper dismissal, restoration of cancelled permits, licenses, or contracts, and compensation including intangible damage such as pain and suffering. However, none of these are strictly required for Member States to enforce.

153. *Id.* ¶ 34.

154. *Will the EU Miss Its Chance to Protect Whistleblowers?*, TRANSPARENCY INT’L (Sept. 24, 2020), <https://www.transparency.org/en/news/will-the-eu-miss-its-chance-to-properly-protect-whistleblowers> [<https://perma.cc/9EVV-PG4K>]; *see also* 2019



published laws to date do not account for anonymous reports. For example, Malta's December 2021 "Protection of the Whistleblower Act" states that anonymous whistleblowers are not legally protected, even though their disclosures may be used as the basis of investigations.<sup>155</sup> Other legislation, such as Lithuania's "Law on Protection of Whistleblowers," instructs whistleblowers to report externally, rather than internally, if there are "grounds to believe that reporting . . . through the internal whistleblowing channel may compromise the whistleblower's anonymity."<sup>156</sup>

## 2. Discrepancies in Protections and Penalties

Member States also have the discretion to determine the specific penalties facing violators as well as the remedies available to whistleblowers. The punishment for retaliation against whistleblowers and the degree to which whistleblowers are entitled to recompense determines these laws' ability to effectively deter retaliation and encourage whistleblowing.<sup>157</sup> Many laws implementing the Directive do not comprehensively lay out the compensation available to whistleblowers or the penalties for retaliation.<sup>158</sup> Lithuania, for instance, provides that whistleblowers who have suffered adverse consequences shall have the right to seek compensation and remedies in accordance with Lithuania's administrative and employment law, without defining the remedies available or specifying mechanisms for compensation.<sup>159</sup> Lithuania also does not impose specific penalties for retaliation aside from the vague compensation offered to victims.<sup>160</sup> Perhaps even more concerning, some legislation implementing the 2019 Directive leaves whistleblowing employees vulnerable to retaliation. For example,

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Whistleblower Protection Directive, *supra* note 8, ¶ 34 ("Without prejudice to existing obligations [. . .], it should be possible for Member States to decide whether legal entities in the private and public sector and competent authorities are required to accept and follow up on anonymous reports of breaches which fall within the scope of this Directive.")

155. *Malta—Whistleblowers Have to Flee?*, ETHICONTROL (2021), <https://ethicontrol.com/en/blog/whistleblowing-in-malta> [<https://perma.cc/6A6A-PZH2>].

156. Republic of Lithuania Law on Protection of Whistleblowers, No XIII-804, art 4 (Nov. 28. 2017).

157. See Tim Kurz et al., *A Fine Is a More Effective Financial Deterrent When Framed Retributively and Extracted Publicly*, 54 J. EXPERIMENTAL SOC. PSYCH. 170 (2014) (finding that fines that are framed as punishment rather than as compensation, and which are administered publicly, are less likely to "undermine the perceived immorality of a transgression" than compensatory fines).

158. See, e.g., Republic of Lithuania Law on Protection of Whistleblowers, *supra* note 156, art. 11 (giving whistleblowers the right to claim compensation for adverse consequences, including non-property damages, but not describing specific penalties to be levied against retaliators).

159. *Id.*

160. *Id.*

while Denmark's law prohibits retaliation, it explicitly allows employers to fire a whistleblower if it is "unreasonable" to keep them employed.<sup>161</sup>

### 3. Transposition Delays

The 2019 Directive relies on Member States to transpose the Directive into national law, introducing yet another opportunity for unbalanced application in cross-border cases. The Directive required Member States to bring into force laws to comply with the 2019 Directive by December 17, 2021, and to require qualifying private-sector entities to comply with internal reporting requirements by December 17, 2023.<sup>162</sup> Yet as of March 1, 2022, only six Member States—Denmark, France, Lithuania, Malta, Portugal, and Sweden—had implemented the Directive's requirements.<sup>163</sup> Many Member States have developed draft legislation to transpose the Directive, although a few have yet to begin the process.<sup>164</sup> Many Member States that have not made significant progress in transposing the 2019 Directive into national law are members of the EPPO, adding to the EPPO's difficulty in securing the participation of whistleblowers in these states.

Delays in transposition have several possible explanations. The most obvious is the COVID-19 pandemic, which has likely caused many

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161. Mark Worth, *Broken Law: Denmark Passes Empty Rights for Whistleblowers*, WHISTLEBLOWER NETWORK NEWS (Sept. 28, 2021), <https://whistleblowersblog.org/global-whistleblowers/broken-law-denmark-passes-empty-rights-for-whistleblowers/> [<https://perma.cc/XGK2-B65U>]. The finalized law is not currently available in English.

162. 2019 Whistleblower Protection Directive, *supra* note 8, art. 26.

163. See Lorenzo Trevisol, *Whistleblower Protections Across Europe—the Legal Context*, INTEGRITY LINE (Mar. 3, 2021), <https://www.integrityline.com/expertise/blog/whistleblower-protections-across-europe-legal-context/> [<https://perma.cc/G5EL-3AGH>] (listing the current status of whistleblower protections in European countries).

164. *Status of Transposition*, E.U. WHISTLEBLOWING MONITOR, <https://whistleblowingmonitor.eu/> [<https://perma.cc/66FP-GDFE>] (last updated Feb. 18, 2022). EU Whistleblowing Monitor lists only three Member States as not having started the transposition process. However, it counts any Member State that has even begun discussion of transposition as "in progress." *Id.* (describing Croatia as "in progress" toward transposing the directive because the government scheduled a discussion of whistleblowing on its agenda two days before the December 17, 2021 implementation deadline). Even states that have proposed draft legislation to transpose the directive may be struggling with transposition. Spain's draft law, for example, was rejected by congress in June of 2018 on the basis that the proposal was "opportunistic" and "insufficient." *Spanish Congress Blocks "Insufficient" Whistleblowing Protection Law*, BLUEPRINT FOR FREE SPEECH (June 18, 2020), <https://www.blueprintforfreespeech.net/en/news/338panish-congress-blocks-insufficient-whistleblowing-protection-law> [<https://perma.cc/TU8G-AF9F>].

legislatures to focus on the immediate crisis rather than prioritize transposition of the Directive.<sup>165</sup> However, the COVID-19 crisis has made the need for whistleblower protections in the public health field and as a general means of worker protection even more apparent.<sup>166</sup> Another explanation for disagreements and inadequate transposition is the reluctance of several Member States to include all stakeholders in the conversation. For example, Spain has not included civil society organizations in the working group created to transpose the Directive.<sup>167</sup> As a possible result of this, the resultant draft law was rejected on the basis that the proposal was “opportunistic” and “insufficient.”<sup>168</sup>

The delays in transposition, even if caused by a desire to enact robust protections, have already resulted in unclear boundaries of whistleblower laws and, in some cases, punishments that are arguably precluded by the Directive. In May 2020, a Spanish whistleblower was sentenced to two years in prison under Spanish law for leaking evidence of corruption within his union to the media.<sup>169</sup> The whistleblower, Roberto Macías, downloaded computer files from his workplace at the General Union of Workers that indicated the union was spending money meant for unemployment assistance on unrelated and often frivolous expenditures.<sup>170</sup> After he was laid off, he anonymously leaked the documents to Spanish newspapers.<sup>171</sup> Macías’s allegations led to government investigations into misuse of employment subsidies.<sup>172</sup> However, the union discovered his identity and pressed charges for violating workplace confidentiality laws.<sup>173</sup> Macías is currently appealing under the Directive, arguing that because the union lacked an internal whistleblower report processing system as required

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165. Janina Mackiewicz, *EU Whistleblowing Meter Launched to Monitor Transposition of EU Directive on Whistleblowing*, WHISTLEBLOWER PROTECTION EU BLOG (June 23, 2020), <https://whistleblowerprotection.eu/blog/eu-whistleblowing-meter-launched-to-monitor-transposition-of-eu-directive-on-whistleblowing/> [https://perma.cc/8PFN-JL5P].

166. *Id.* “Whistleblowing saves lives. Individuals are speaking out across Europe and around the world about the lack of protective equipment and systems to protect the health of front-line workers in medical and social care sectors, in transport, food supplies, and critical infrastructure and they are forcing governments to respond.”

167. *Will the EU Miss Its Chance to Protect Whistleblowers?*, *supra* note 154.

168. *Spanish Congress Blocks “Insufficient” Whistleblowing Protection Law*, *supra* note 164.

169. Raphael Minder, *A Spanish Whistle-Blower Appeals to the E.U. for Help*, N.Y. TIMES (Aug. 22, 2020), <https://www.nytimes.com/2020/08/22/world/europe/whistleblower-spain-roberto-macias.html> [https://perma.cc/XK8C-GTW7].

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

by the Directive, his public disclosure should not be considered a violation of confidentiality laws and that the criminal sanctions are retaliatory as defined by the Directive.<sup>174</sup>

While the Directive is a positive step toward baseline whistleblower protections in the EU, discrepancies between national adaptations of the Directive as well as delays in creating the necessary legislation are already proving detrimental to the establishment of consistent protections across the region.<sup>175</sup> The EPPO, and other EU bodies, should thus take care to establish their own forms of whistleblower protection. This would help to ensure that whistleblowers are consistently respected in cross-border cases and create a model for whistleblower protections that nations within the EU could look to when implementing their own programs.

### III. Considerations for EPPO Whistleblower Regulations

Though the EPPO's founding regulation sets forth no specific whistleblower protection rules, it instructs the EPPO to "develop its own internal rules if necessary."<sup>176</sup> Based on possible weaknesses within the Directive, delays in transposing the Directive, and uneven application of the Directive's requirements among Member States, the EPPO may better encourage whistleblower cooperation and prevent retaliation against those who provide vital information by developing its own rules. Certain rules may require amendments to the founding regulation that expand its mandate; other rules may be actionable within the current limits of the EPPO's power. This Part includes a discussion of the factors that the EPPO should consider when creating its own policy, and that the EU should consider when deciding whether to expand the EPPO's competence in this area. This Part further sets forth recommendations for internal rules or amendments to the founding regulation that might encourage, empower, and protect cross-border whistleblowers.

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174. *Id.*

175. Alice Taylor, *EU Countries Miss Deadline to Implement Whistleblower Directive*, EURACTIV (Dec. 20, 2021), <https://www.euractiv.com/section/digital/news/all-eu-countries-miss-deadline-to-implement-whistleblower-directive/> [https://perma.cc/JVQ5-CBNX]; *see, e.g.*, Thomas Gliebe, Thorben Kloppe & Matthias Pallentin, *European Whistleblowing Directive: Many EU Member States Missed the Implementation Deadline – Is Your Company Prepared?*, LITTLER MENDELSON (Dec. 17, 2021), <https://www.littler.com/publication-press/publication/european-whistleblowing-directive-many-eu-member-states-missed> [https://perma.cc/2C8U-7TKH] (noting that there is no cohesion between national laws and the Directive, so employers should be aware of the discrepancies between EU Member States, and comments by the European Commission when creating their whistleblowing protection standards).

176. 2017 EPPO Regulation, *supra* note 90, ¶ 50.

The EPPO is empowered to create internal rules regarding the protection of whistleblowers<sup>177</sup> and to set prosecutorial strategies<sup>178</sup> that might encourage whistleblowers to come forward. Instituting such policies would not only ensure that potential whistleblowers have channels through which to report their knowledge to the EPPO, but it would also serve as an EU-level example of whistleblower protection implementation, which might encourage Member States to establish their own protocols to fully implement the 2019 Directive. Furthermore, through prosecutorial strategy such as lenience for cooperators,<sup>179</sup> the EPPO may encourage companies and national governments to treat whistleblower reports with the gravity they deserve by creating incentives for said companies and governments to transmit whistleblower reports to the EPPO, even if it implicates them in wrongdoing.

#### A. Internal Protocol for the Protection of Whistleblowers

##### 1. The EPPO May Establish Internal Rules to Protect Whistleblowers Whose Reports Led EU and National Authorities to Report Information to the EPPO Under Article 24 of the EPPO's Founding Regulation

As briefly discussed in Part II, the EPPO's internal rules provide only a brief mention of whistleblowers, requiring that the identity of whistleblowers not be included in the registration of reports received from national authorities if "applicable protections" apply.<sup>180</sup> The EPPO should explicitly define the whistleblower protections that would prevent the registration of a whistleblower's name and contact information. This may include explicitly restating the Directive's definition of a whistleblower in its internal rules so that staff may recognize that a source of information is a whistleblower, even if the official report received from a national authority does not recognize the reporter as such.

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177. *Id.*

178. *Id.* art. 9(2).

179. This Part's discussion of potential leniency programs is largely modeled off of the United States Department of Justice's Antitrust Amnesty Program. However, less-formal lenience programs, such as a policy of offering plea bargains and reduced sentences and fines to cooperating defendants, are also a viable strategy through which the EPPO can encourage self-reporting and, as a result, fair treatment of internal whistleblowers.

180. *Internal Rules of Procedure of the European Public Prosecutor's Office*, EUR. PUB. PROSECUTOR'S OFF., art. 38 (2020), [https://ec.europa.eu/info/sites/info/files/2020.003\\_irp\\_signed\\_0.pdf](https://ec.europa.eu/info/sites/info/files/2020.003_irp_signed_0.pdf) [<https://perma.cc/U3RE-8AEF>].

## 2. The EPPO Should Establish Its Own Reporting Channel for Whistleblower Reports of Suspected Violations Within Its Mandate

The easiest method for the EPPO to ensure that whistleblower reports are encouraged and followed up on is to establish its own reporting channel for whistleblower reports. This may be a hotline to call, a website on which to submit tips, or both. Since the EPPO is a governmental body, it may be appropriate for the EPPO to follow and expand upon the 2019 Directive's guidelines for competent authorities to establish "independent and autonomous" external reporting channels.<sup>181</sup> These guidelines include prompt acknowledgement of receipt of a report,<sup>182</sup> diligent follow-up with the reporter,<sup>183</sup> communication with the reporter as to the outcome of the investigation,<sup>184</sup> and transmission of the information contained in the report to relevant EU bodies.<sup>185</sup> When adapting this final guideline, the EPPO should be cognizant of the possibility that those who report directly to them fear retaliation, malicious dismissal, or neglect of the complaint from their own governments,<sup>186</sup> and should thus take care to maintain confidentiality of the whistleblower's identity when transmitting a report back to a national government.

Beyond the provisions of the 2019 Directive, the EPPO may expand upon these protocols in several key ways that would encourage and protect whistleblowers. First, the EPPO could establish a protocol for accepting and following up on anonymous reports. This could be achieved through providing an anonymized report number which reporters can use to trace the progress of the investigation.<sup>187</sup> To fully reflect the requirements of the

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181. 2019 Whistleblower Protection Directive, *supra* note 8, art. 11(2)(a).

182. *Id.* art. 11(2)(b).

183. *Id.* art. 11(2)(c).

184. *Id.* art. 11 (2)(e).

185. *Id.* art. 11(2)(f).

186. The 2019 Directive notes that people who make public disclosures should qualify for protection when they reasonably believe that reporting to the government would yield a risk of retaliation, or when "there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence could be concealed or destroyed or where an authority could be in collusion with the perpetrator of the breach or involved in the breach." *Id.* ¶ 81. In these circumstances, and where the EPPO is competent to address the breach, reporting to the EPPO may be an attractive alternative to a high-risk public disclosure.

187. See, e.g., *Report Fraud*, EUR. ANTI-FRAUD OFF., [https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud\\_en](https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud_en) [<https://perma.cc/Z8UV-XBNN>] (showing OLAF's fraud reporting system includes an online Fraud Notification System, through which individuals can report fraud anonymously, as well as options to report through a non-anonymous web form or through post).

Directive and best empower its investigators to make use of whistleblower reports, the EPPO should accept whistleblower reports of “abusive practices . . . namely acts or omissions which do not appear to be unlawful in formal terms but defeat the object or purpose of the law.”<sup>188</sup>

The EPPO would not be the only EU body to operate an anonymous whistleblower service. The European Anti-Fraud Office (“OLAF”) welcomes reports of fraud impacting EU public funds as well as serious misconduct by EU staff members or officers.<sup>189</sup> It accepts anonymous tips, but requires contact information if the whistleblower wants to learn the result of the investigation.<sup>190</sup> It does not provide routine updates, but reserves the right to contact whistleblowers for more information if contact information is provided.<sup>191</sup>

Accepting anonymous tips may be a double-edged sword. It makes whistleblowers more likely to come forward, but also increases the chance that they do so anonymously, thus sacrificing some of the enforcement agency’s ability to corroborate the information provided. While OLAF receives relatively few non-anonymous tips, it receives a “steady flow” of anonymous information.<sup>192</sup> However, this information may be of “weak or no evidential value” in court and must be corroborated before being used as the basis of a case.<sup>193</sup> Despite the additional difficulties of anonymous whistleblower reports and tips, establishing a mechanism for anonymous whistleblowing has the benefit of encouraging whistleblowers who might otherwise be dissuaded by the threat of retaliation or other adverse consequences.<sup>194</sup>

Because of the potentially overlapping mandates of OLAF and the EPPO to address fraud affecting EU funds, the EPPO and OLAF should ensure that whistleblower reports made to one institution are transmitted to the other as necessary, keeping in mind the need to maintain confidentiality, including whistleblower anonymity.

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188. 2019 Whistleblower Protection Directive, *supra* note 8, ¶ 42.

189. *Report Fraud*, *supra* note 187.

190. *Id.*

191. *Id.*

192. Simone White, *EU Anti-Fraud Enforcement: Overcoming Obstacles*, 17 J. FIN. CRIME 81, 85 (2010).

193. *Id.*

194. See generally Steven E. Kaplan et al., *An Examination of Anonymous and Non-Anonymous Fraud Reporting Channels*, 28 ADVANCES ACCT. 88 (2012) (finding that previous negative outcomes for whistleblowers reduced future non-anonymous whistleblowing but did not reduce anonymous whistleblowing).

## B. Prosecutorial Strategy

### 1. The EPPD May Institute Leniency or Amnesty Programs to Encourage Self-Reporting and Motivate Companies to Respond to Internal Whistleblowers

In addition to direct whistleblower protections, the EPPD may motivate self-reporting companies to take whistleblower reports seriously by instituting a leniency program. Such a program would reward individuals and companies who proactively self-report their own violations and cooperate with the investigation with reduced or eliminated fines or other criminal penalties. Offering leniency in exchange for self-reporting has been shown to encourage disclosure of criminal acts while destabilizing criminal networks by encouraging participants to turn against one another in an effort to gain favorable treatment.<sup>195</sup>

Leniency or immunity has been modeled in the United States and other jurisdictions with notable success,<sup>196</sup> and has been replicated in the European Commission's anti-cartel enforcement scheme.<sup>197</sup> Lessons learned from the successes and setbacks of these programs might inform future leniency programs. In some cases, such as that of the United States' antitrust enforcement regime, enhanced whistleblower protections and leniency offerings work together to both protect and motivate whistleblowers. These layered protections provide a useful framework for the EPPD to expand the protections offered in the Directive.

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195. Klaus Ulrich Schmolke & Verena Utikal, *Whistleblowing: Incentives and Situational Determinants* 20 (FAU Discussion Papers in Econ., Working Paper No. 09/2016, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2820475](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820475) [<https://perma.cc/J2JT-WGP9>]. In a controlled set of experiments, while 33% of participants would blow the whistle on misconduct without any incentive for doing so, fines for participants who did not blow the whistle and rewards for participants who did significantly increase the frequency of whistleblowing, up to between 77% and 94%. Interestingly, the prospect of avoiding fines was more likely to deter whistleblowers than the prospect of receiving rewards, and the inclusion of rewards for reporting misconduct actually appeared to increase the incidence of misconduct.

196. Scott D. Hammond, *Status Report: Corporate Leniency Program*, DOJ (Mar. 7, 2002), <https://www.justice.gov/atr/status-report-corporate-leniency-program> [<https://perma.cc/7QV8-EPCQ>] (noting that the Antitrust Leniency Program is the DOJ's "most successful leniency program," encouraging cooperation yielding "scores" of convictions and "well over \$1.5 billion in fines.").

197. *Cartels: Leniency*, EUR. COMM'N, <https://ec.europa.eu/competition/cartels/leniency/leniency.html> [<https://perma.cc/66RA-5565>].



### a. United States DOJ Antitrust Corporate Leniency

The United States Department of Justice (“DOJ”) Antitrust Division offers leniency, such as avoidance of prosecution and fines, to corporations and individuals who report their cartel activity to the DOJ and cooperate in the investigation.<sup>198</sup> The DOJ’s program only offers full amnesty to the first participant in a scheme to come forward.<sup>199</sup> This may encourage speedy whistleblowing, but might also make it possible for conspirators to deduce the cooperator by determining who did not receive comparable punishment.<sup>200</sup>

The DOJ’s antitrust leniency program has evolved since its inception and changes to the program have had observable effects that might inform future leniency programs. The original corporate leniency program was established in 1978, but was under-publicized and, as a result, under-utilized.<sup>201</sup> It also relied on a “highly discretionary” method of determining who would be awarded leniency, which created uncertain incentives that often did not outweigh the risks of coming forward and facing prosecution.<sup>202</sup>

In 1993, the program underwent significant amendments, including automatic amnesty for the first person in a conspiracy to come forward, a lesser degree of leniency offered to subsequent co-conspirators who self-reported and provided evidence, and an extension of amnesty to cooperating employees, directors, and officers.<sup>203</sup> These changes created clear incentives to come forward in the form of guaranteed leniency and ensured that a company would not be risking the financial and liberty interests of its employees and executives by self-reporting in the corporation’s interest.

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198. *Leniency Program*, U.S. DOJ ANTITRUST DIV. <https://www.justice.gov/atr/leniency-program> [<https://perma.cc/7HMP-7MAP>].

199. *Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters*, U.S. DOJ (Nov. 19, 2008), <https://www.justice.gov/atr/page/file/926521/download> [<https://perma.cc/S7Y3-ZEGQ>].

200. The DOJ leniency program promises to hold applicants’ identities in strict confidence unless required to disclose in connection with litigation. *Id.*

201. Robert Bell & Kristin Millay, *The Antitrust Division’s Corporate Leniency Program*, 34 CRIM. JUST. 14, 15 (2019) (citing Scott D. Hammond, Antitrust Div. Deputy Assistant Att’y Gen., *Address at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download> [<https://perma.cc/CYX6-PV27>]).

202. Bell & Millay, *supra* note 201, at 15.

203. *Id.* (citing Scott D. Hammond, *Cornerstones of an Effective Leniency Programme*, 4 COMPETITION L. INT’L 4, 10 n.1 (2008)).

The creation of a more rigid incentive structure appears to have resulted in greater cooperation through the leniency program. By 2014, leniency applications were the initial source of two-thirds of the DOJ's criminal antitrust investigations.<sup>204</sup> However, from 2016 through 2018, the DOJ reported a drop-off in fines collected through the program, which may be attributed at least in part to policy shifts that increased the DOJ's discretion to deny leniency.<sup>205</sup> For instance, in 2017 the DOJ revised the program's "Frequently Asked Questions" page to warn leniency applicants that they "should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes,"<sup>206</sup> emphasizing the risk of criminal exposure through reporting rather than the potential benefits of leniency. Furthermore, the DOJ has increased its emphasis on the time and resources that applicants need to make in investigating and producing evidence of violations, which may dissuade potential applicants from taking on this burden.<sup>207</sup>

The DOJ Antitrust Leniency Program's varying levels of success based on policy changes demonstrate several valuable lessons. The first is that clear incentives and protections are necessary to ensure that the benefits of self-reporting outweigh the risks, and that the benefits must be compelling enough to override the relatively low probability of detection in the absence of any co-conspirator cooperation with the government. Additionally, the leniency program highlights ways that individual whistleblowers can be protected even in a corporate-oriented policy. Extending protections to cooperating individuals within the companies implicated might make individuals more willing to use their companies' internal whistleblowing protocols, because they will be less worried about criminal penalties for their own accidental or purposeful involvement in the violation reported. Extending this leniency to all cooperating employees, even if the company does not qualify for full immunity, may reduce the risk that whistleblowers will be disproportionately penalized because their company's internal reporting system did not properly respond to their original complaint.

Recent enhancements to U.S. antitrust whistleblower protection laws complement the leniency program. The Criminal Antitrust Anti-Retaliation Act of 2019 prohibits retaliation against employees,

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204. Bell & Millay, *supra* note 201, at 15 (citing Bill J. Baer, Antitrust Div. Assistant Att'y Gen., *Remarks at the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crime* (Sept. 10, 2014), <https://www.justice.gov/atr/file/517741/download> [<https://perma.cc/F9KC-YPPN>]).

205. *Id.* at 20.

206. *Id.* at 7.

207. *Id.* at 20.

contractors, subcontractors, and agents of an employer who report conduct that they reasonably believe constitutes an antitrust violation, so long as they were not complicit in the violation.<sup>208</sup> Protected individuals may report internally or to the government,<sup>209</sup> and may not be fired, demoted, suspended, or harassed because of their decision to report either internally or externally.<sup>210</sup> Because this requirement works in concert with the Antitrust Leniency Program, companies that receive a whistleblower report are encouraged to thoroughly investigate it and possibly submit a leniency application.<sup>211</sup> This leniency program thus provides additional incentives for companies to adequately investigate and respond to whistleblower complaints, lest a whistleblower feel more comfortable reporting to the government and the company loses the option to apply for leniency.<sup>212</sup>

#### b. European Commission Cartel Leniency

In 2002, the European Commission began offering immunity or a reduction in fines to companies that self-report cartel infringements and provide evidence to assist in the investigation.<sup>213</sup> To be eligible for full immunity, companies must disclose their involvement in the cartel, meet a threshold of quantity and quality of evidence linked to the evidence needed to conduct a targeted investigation, and continuously cooperate with the European Commission throughout the investigation.<sup>214</sup> Companies that are

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208. Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. 7a-3(a)(3)(B), 7a-3(a)(2) (2020).

209. *Id.* § 7a-3((a)(1)(A).

210. *Id.* § 7a-3(a)(1).

211. Mark Krotoski & Bernard Archbold, *Double-Check Whistleblower Programs to Prep for Antitrust Anti-Retaliation Act*, BL (Jan. 7, 2021), <https://news.bloomberglaw.com/antitrust/double-check-whistleblower-programs-to-prep-for-antitrust-anti-retaliation-act> [<https://perma.cc/QE6P-PJ4C>] (“Companies can act now to enhance the likelihood that whistleblowers report potential antitrust violations internally so that they can . . . assess and consider the Department of Justice Antitrust Division Leniency Program’s protections and criminal enforcement process.”).

212. *Id.* (“If employees do not feel confident in reporting to the company, they can instead report directly to a federal regulatory or law enforcement agency, member of Congress or congressional committee. Without knowledge about the suspected violation, the company may confront a criminal investigation based on a whistleblower report.”).

213. *Cartels Overview*, EUR. COMM’N, [https://ec.europa.eu/competition-policy/cartels/cartels-overview\\_en](https://ec.europa.eu/competition-policy/cartels/cartels-overview_en) [<https://perma.cc/2S5M-X7MK>] (explaining that cartels receive a 10% reduction in any eventual fine); *see also Competition: Commission Adopts Revised Leniency Notice to Reward Companies that Report Cartels*, EUR. COMM’N (Dec. 7, 2006), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_06\\_1705](https://ec.europa.eu/commission/presscorner/detail/en/IP_06_1705) [<https://perma.cc/6FUL-8AV5>] (announcing commissions adoption of leniency for companies that report cartels).

214. *Cartels Overview*, *supra* note 213.

not eligible for full immunity may still see their fines reduced if they provide evidence that contributes “significant added value” to that already in the Commission’s possession and have terminated their participation in the cartel.<sup>215</sup>

Concerns about multi-jurisdictional criminal exposure may have influenced the decline in European Commission leniency applications, because applying for leniency through the European Commission may reveal a company’s wrongdoing to national authorities who may still prosecute the crime. However, the EPPO’s founding Resolution specifies that if the EPPO decides to exercise its competence, national authorities may not exercise their own competence over the same criminal conduct.<sup>216</sup> Furthermore, grants of amnesty or immunity are permissible grounds for the EPPO to dismiss a case, and while dismissed cases may be referred to OLAF or Member States for administrative follow-up, they are no longer eligible for prosecution, barring the exposure of facts not known to the EPPO at the time of decision.<sup>217</sup>

Another potential complication is that the European Commission’s leniency program raises confidentiality issues that are not present in the DOJ’s leniency program, which may ultimately endanger whistleblower confidentiality if replicated in the EPPO. Corporate statements provided to the European Commission during leniency applications are not privileged and may therefore be discoverable in the United States or other jurisdictions.<sup>218</sup> This increases risks both to corporations applying for leniency and to whistleblower employees whose companies might determine the discovery risk to be a reason not to properly investigate the claim. To reduce discovery risk, the European Commission allows corporate statements to be made orally, with the Commission recording and ultimately transcribing the statements.<sup>219</sup> In addition to this policy, the European

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215. *Id.*

216. 2017 EPPO Regulation, *supra* note 90, art. 25.

217. *Id.* art. 39.

218. See generally Costanza Nicolosi, *No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?*, 31 NW. J. INT’L L. & BUS. 225 (2011) (describing the disadvantages of providing corporate statements that are eligible for discovery, such as increased vulnerability in litigation, and establishing that corporate statements provided for the European Commission cartel leniency program may be discoverable in subsequent U.S. proceedings).

219. *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, 2006 O.J. (C 298) ¶ 32 (using oral statements reduces the risk that the statement will be subject to discovery, because the entity providing the statement does not receive a copy of the transcript; however, the entity retains the right to request a copy, and theoretically a court enforcing could require the transcript to be produced); Robert Grasso,

Commission's reluctance to allow discovery to interfere with and discourage self-disclosure<sup>220</sup> has led to difficulty for U.S. litigants in obtaining these corporate statements.<sup>221</sup> Similar reluctance on the part of the EPPO might continue to safeguard against discovery risk.

Creating an EPPO-specific whistleblower report system or instituting a leniency policy would likely not require any expansion of the EPPO's competence.<sup>222</sup> Additional strategies described below, including prosecution of whistleblower retaliation and monetary rewards for whistleblowers, may require some expansion of the EPPO's authority. While the strategies are potentially permissible within the language of the founding regulation, Member States may resist efforts by the EPPO to take such actions without explicit permissions.

## 2. The EPPO May Consider Prosecuting Severe Violations of the EU's Whistleblower Protection Directive in Cases Where the Underlying Breach Is Within the EPPO's Competence

Currently, the EPPO's competence applies only to offenses affecting the EU as defined in Directive (EU) 2017/1371,<sup>223</sup> which includes tax offenses, corruption, and money laundering, among other offenses.<sup>224</sup> Directive (EU) 2017/1371 does not include any description of whistleblower retaliation or other related crimes.<sup>225</sup> However, as a cross-border prosecutorial body, the EPPO may be well-situated to prosecute violations of whistleblower anti-retaliation laws, as well as government misconduct leading to the improper dismissal of a whistleblower complaint. The EPPO's founding resolution may be read to allow the EPPO to prosecute crimes beyond those in Directive (EU) 2017/1371. Article 22 of Directive (EU) 2017/1939 grants the EPPO competence over "any other criminal offense that is inextricably linked to criminal conduct that falls within the scope of

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*The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight?*, 29 MICH. J. INT'L L. 565, 582 (2008) (describing the Commission's procedure for taking oral statements).

220. *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, *supra* note 219, ¶ 6 ("[V]oluntary presentations . . . have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation.").

221. *Antitrust Plaintiff Can't Discover EU Docs, Magistrate Judge Rules: In Re Rubber Chems Antitrust Litigation*, 15 ANDREWS ANTITRUST LITIG. 2 (2007).

222. 2017 EPPO Regulation, *supra* note 90, arts. 39, 50.

223. 2017 Financial Interests Directive, *supra* note 94, art. 2.

224. *Id.* arts. 1, 3-4.

225. *Id.* art. 2.

[Directive (EU) 2017/1371],”<sup>226</sup> which includes “ancillary” offenses committed for the purpose of “creating the conditions to commit the offense affecting the financial interest of the Union . . . or to ensure the profit or product thereof.”<sup>227</sup> An expansive reading might consider retaliation against whistleblowers to be an offense that creates the conditions for the underlying criminal activity or ensures the profit or product thereof, because it is at least partly intended to reduce the chances of detection and dissuade others from coming forward.

In the United States, enforcement agencies that receive and use whistleblower complaints for prosecutions may also be empowered to prosecute violations of whistleblower retaliation laws. The U.S. Securities and Exchange Commission (“SEC”), for example, relies heavily on whistleblower tips<sup>228</sup> and provides whistleblowers with financial incentives.<sup>229</sup> It is also competent to bring additional enforcement actions for whistleblower retaliation.<sup>230</sup> Though the SEC uses this power infrequently,<sup>231</sup> the penalties issued may be great, and the SEC may use this power to bring a standalone action even when the whistleblower complaint did not lead to a prosecution in and of itself.<sup>232</sup> However, in the European context, the EPPO runs the risk of violating the principles of subsidiarity and proportionality if it chooses to prosecute whistleblower retaliation offenses, especially if national governments prove themselves competent at addressing these violations.<sup>233</sup>

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226. 2017 EPPO Regulation, *supra* note 90, art. 22.

227. *Id.* art. 56.

228. *Welcome*, SEC. EXCH. COMM’N: OFF. OF THE WHISTLEBLOWER, <https://www.sec.gov/whistleblower> [<https://perma.cc/39C2-6SS7>].

229. *See Claim an Award*, SEC. EXCH. COMM’N: OFF. OF THE WHISTLEBLOWER, <https://www.sec.gov/whistleblower/claim-award> [<https://perma.cc/N6CM-ZCT4>] (providing awards for individuals who supply original information, subject to conditions)

230. *Whistleblower Protections*, SEC. EXCH. COMM’N: OFF. OF THE WHISTLEBLOWER, <https://www.sec.gov/whistleblower/retaliation#anti-retaliation> [<https://perma.cc/S7RH-J64T>].

231. Jason Zuckerman, *SEC Orders Company to Pay \$500K for Whistleblower Retaliation*, ZUCKERMAN L. (Nov. 30, 2020), <https://www.zuckermanlaw.com/sec-orders-company-pay-500k-whistleblower-retaliation/> [<https://perma.cc/F2F2-BJ2Y>] (noting that, as of 2016, the SEC had only twice exercised its authority under the Dodd Frank Act to punish retaliation against whistleblowers).

232. *Int’l Game Tech.*, Release No. 34-78991, 115 S.E.C. Docket 790, 2016 WL 5464611 (Sept. 29, 2016). In this case, the whistleblower brought concerns through the company’s internal hotline and to the SEC. The company investigated the matter internally, found no wrongdoing, and terminated the whistleblower despite positive performance reviews. The SEC brought penalties against the company as a standalone action, without bringing charges related to the alleged underlying violation.

233. As discussed in Part II, the EPPO runs the risk of violating the principle of subsidiarity if it intervenes in an area where Member States are fully competent, and if

### C. Whistleblower Reward or Recovery-Sharing Programs

In order to both protect and encourage whistleblowers to come forward, the EU may consider empowering the EPPO to reward whistleblowers in certain circumstances with a portion of the recovery obtained through successful prosecutions that come as a result of the original whistleblower report. This could mirror the *qui tam* provision of the United States' False Claims Act, which allows private individuals to file suit "in the name of the government" for violations of the False Claims Act and recover up to 30% of the government's total recovery.<sup>234</sup> In the United States, the False Claims Act has led to the recovery of over \$59 billion since 1987,<sup>235</sup> due in part to the strong incentives for whistleblowers to come forward.<sup>236</sup>

As an alternative to *qui tam* provisions, which give whistleblowers themselves independent enforcement authority and a private right of action, the EPPO may consider a "cash for information" approach. This would leave the EPPO with the power to decide whether to pursue the claim, refer it to the competent national authority, or decline to move forward.<sup>237</sup> This would more closely reflect the bounty regime of the United States' Dodd Frank Act,

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their intervention to enforce these laws is not strictly necessary for successful enforcement. Irene Wiczorek, *The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments*, 16 GER. L.J. 1247, 1255 (Mar. 6, 2019).

234. LORI L. PINES, UNDERSTANDING THE FALSE CLAIMS ACT, Westlaw Practical Law Practice Note 7-561-1346 (on file with *Columbia Human Rights Law Review*). *Qui tam* plaintiffs may receive up to 30% of the recovery if the government does not intervene and the plaintiff pursues the case themselves. If the government intervenes in the suit, the *qui tam* plaintiff is eligible to receive a maximum of 25% of the proceeds of the action, depending on the extent to which the plaintiff's counsel contributed to the prosecution and the extent to which the action was based on information provided by the plaintiff.

235. *Id.* The 1986 amendments to the False Claims Act strengthened key provisions of the statute, making it easier for the government and whistleblowers to file suit through the act. For example, the 1986 amendments permitted the government to seek treble damages for fraud and increased the portion of the recovery available to *qui tam* plaintiffs.

236. Other provisions that may lead to the significant recoveries include mandatory treble damages for companies that do not self-disclose fraudulent activity, mandatory civil penalties for each individual false claim, and liability for causing the submission of a false claim rather than only for originators of the claim. *Id.*

237. See generally David Freeman Engstrom, *Bounty Regimes*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 334 (Jennifer Arlen ed., 2018) (reviewing whistleblower bounty schemes that pay cash rewards for the exposure of information).

which promises tippers at least 10% and up to 30% of sanctions exceeding one million dollars, but leaves discretion to pursue actions to the SEC.<sup>238</sup>

However, financial incentives beyond compensation for retaliation already suffered may be difficult to adapt to the cultural context of the EU. Neither the 2019 Directive nor the whistleblower laws of most Member States provide rewards for whistleblowers beyond compensation for retaliation suffered.<sup>239</sup> In many European countries, whistleblowers and informants are negatively associated with secret police and civilian reporting in Nazi Germany and Soviet Russia.<sup>240</sup> The term “whistleblowing” does not exist in the languages of many Member States,<sup>241</sup> and in many states the closest term comes with negative connotations, such as “denunciator” or “snitch.”<sup>242</sup> Though the final 2019 Directive does not delineate between whistleblowers with “good-faith” motives and whistleblowers acting with negative motives such as self-interest,<sup>243</sup> offering rewards to whistleblowers may be unpalatable due to the perception that it creates a financial motivation for false accusations or malicious claims.<sup>244</sup>

Despite pervasive negative perceptions of whistleblowers, scandals brought to light by whistleblower action may result in warming of attitudes towards those who come forward. In the United States, where whistleblower protections and rewards have been legally established for decades, negative attitudes toward whistleblowers prevailed for a long time. For example, in 1998 Senator Harry Reid (D-NV) referred to the Internal Revenue Service

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238. *Id.* at 337. The Dodd Frank Act also protects whistleblower confidentiality by allowing whistleblowers to proceed anonymously through counsel, with their identity only disclosed to the SEC in order to receive the award.

239. Marc Raspanti & Pam Brecht, *Why the European Union Whistleblower Laws Are All Doomed to Failure*, L. HEALTH & TECH. BLOG (May 31, 2019), <https://lawhealthtech.com/2019/05/31/why-are-the-european-union-whistleblower-laws-all-doomed-to-failure-by-guest-bloggers-marc-raspanti-and-pam-brecht/> [https://perma.cc/2KFH-XSZG].

240. Theo Nhyreröd & Giancarlo Spagnolo, *Myths and Numbers on Whistleblower Rewards* 19–20 (Stockholm Inst. Transition Econ., Working Paper No. 44, 2018), <https://www.econstor.eu/bitstream/10419/204755/1/site-wp0044-2.pdf> [https://perma.cc/L5BF-UA52].

241. Abazi, *supra* note 32, at 641.

242. *Id.* at 652; *see also* WORTH, *supra* note 61, at 19–21 (describing what “whistleblower” does and does not mean in EU languages).

243. 2019 Whistleblower Protection Directive, *supra* note 8, ¶ 32 (“[R]eporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true.”).

244. Nhyreröd & Spagnolo, *supra* note 240, at 20.



bounty program as the “Snitch Program” and “Reward for Rats Program.”<sup>245</sup> Yet by 2002, the Enron scandal marked a turning point in the U.S. perception of whistleblowers, with Time Magazine naming a trio of whistleblowers “Persons of the Year.”<sup>246</sup> Similarly, the role of whistleblowers in the leak of the Panama Papers, as well as the great personal consequences suffered by whistleblowers of the LuxLeaks scandal and the murders of independent journalists in Malta and Slovakia,<sup>247</sup> galvanized civil society organizations and trade unions to advocate for whistleblower protections and may have shifted public sympathies toward whistleblowers. Furthermore, reward programs can successfully motivate cross-border whistleblowers to come forward; between 2011 and 2019, the SEC received reports from 3,792 whistleblowers outside the U.S., from 122 countries.<sup>248</sup> This indicates that an EPPO whistleblower reward program has the potential to incentivize whistleblowers from outside the EU to come forward about conduct within the EPPO’s competence.

The success of rewards-based whistleblower programs in the United States and other countries<sup>249</sup> suggests that the benefits of whistleblower rewards outweigh any risk of increased false reports,<sup>250</sup> though such rewards may increase the volume of reports which does not necessarily lead to successful investigations or convictions.<sup>251</sup> In addition to serving as additional motivation for whistleblowers to come forward, such rewards may also serve as a form of insurance against retaliation. Despite the Directive and national laws’ provisions for whistleblowers to receive financial compensation for retaliation—as well as reinstatement or other relief<sup>252</sup>—the risk of retaliation and the length of time that may transpire

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245. *Id.* at 29; see also 144 Cong. Rec. S4397–401, (daily ed. May 6, 1998) (statement of Sen. Harry Reid) (advocating against passage of the whistleblower provision he refers to as “Reward for Rats Program”).

246. *Person of the Year: A Photo History; The Whistleblowers: 2002*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,2019712\\_2019710\\_2019677,00.html](http://content.time.com/time/specials/packages/article/0,28804,2019712_2019710_2019677,00.html) [<https://perma.cc/UFL7-DU57>] (last updated 2019).

247. Alison Stranger, *Whistle-Blowers Are the Last Defense Against Global Corruption*, THE ATLANTIC (Oct. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/europes-whistle-blowers-take-global-corruption/600139/> [<https://perma.cc/QC7U-6NDC>].

248. Stephen M. Kohn, *The Rise of International Whistleblowers: Qui Tam Rewards for Non-Citizens*, MONDAQ (Feb. 3, 2020), <https://kcc.com/blog/the-rise-of-international-whistleblowers-qui-tam-rewards-for-non-u-s-citizens/> [<https://perma.cc/XH5Q-3XKS>]. Over 600 of these tips originated in the EU, not including the United Kingdom, which alone generated 567 tips.

249. Nhyreröd & Spagnolo, *supra* note 240, at 20.

250. *Id.* at 19.

251. *Id.* at 12.

252. 2019 Whistleblower Protection Directive, *supra* note 8, art. 21.

between the retaliation and the relief dissuades whistleblowers. Whistleblower rewards offer individuals an opportunity for financial security which may offset this reluctance to come forward.<sup>253</sup> Furthermore, whistleblower retaliation often causes damage that cannot be remedied with reinstatement or compensation for lost salary alone—whistleblowers who experience retaliation frequently experience severe depression and anxiety, feelings of isolation and powerlessness, and difficulty obtaining another job in the field due to reputational harms.<sup>254</sup> Increased financial rewards may provide whistleblowers with the financial security needed to truly compensate for the full extent of the damages they suffer.

#### CONCLUSION

Cross-border fraud and corruption creates unique challenges, both for would-be whistleblowers and for the investigators who rely on their reports. Whistleblower protection should be a priority for any agency that seeks to benefit from anonymous tips, self-reporting, or other forms of whistleblowing. Statutory protections are an important component of any whistleblower protection scheme, but they must be implemented effectively to ensure that whistleblowers are able to receive assistance and that retaliation is remedied consistently. Enforcement agencies such as the EPPO have the opportunity to provide additional incentives for whistleblowers to come forward, which in turn may motivate employers and governments to strengthen their own report-processing systems and improve their treatment of whistleblowers. Such systems would help to overcome stigmas whistleblowers face and build a culture of transparency and respect for those who seek to bring attention to abuses of public trust.

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253. Even in the United States, where whistleblower protection and reward laws have been entrenched for decades, the risk of retaliation is high. The Ethics Resource Center estimates that in 2013, 21% of whistleblowers in the United States experienced retaliation. Nhyreröd & Spagnolo, *supra* note 240, at 5 (citing 2013 NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE, ETHICS RES. CTR. 12 (2014), <https://magazine.ethisphere.com/wp-content/uploads/2013NBESExecSummary.pdf> [<https://perma.cc/BE45-TZWC>]). The 2021 Global Business Ethics Survey is now published, and notes that “[r]etaliations rates have skyrocketed,” with a 79% rate of retaliation reported in 2020 for the United States. ETHICS COMPLIANCE INITIATIVE, 2021 GLOBAL BUSINESS ETHICS SURVEY REPORT 22 (2021) (on file with the *Columbia Human Rights Law Review*).

254. Nhyreröd & Spagnolo, *supra* note 240, at 5 (citing Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107 (1999)).