ECS
Ethics and Compliance Switzerland

# WHITE PAPER

## WHISTLEBLOWER PROTECTION IN THE SWISS PRIVATE SECTOR

*Ethics and Compliance Switzerland (ECS) is an independent not for profit organization promoting ethical leadership and integrity in all organizations. ECS was founded in 2014 in Berne, Switzerland - www.ethics-compliance.ch*

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# Executive Summary

In this White Paper, Ethics and Compliance Switzerland (ECS) analyses the current legislative project on whistleblower protection in the Swiss private sector (Teilrevision des Obligationenrechts: Schutz bei Meldung von Missständen am Arbeitsplatz).

The focus of the White Paper is on the legislative proposal's divergences from international standards and best practice principles as established by the Council of Europe, the International Chamber of Commerce, the International Standardization Organization ISO, the OECD, Transparency International and the United Nations.

ECS found that there are several topics in the legislative proposal that do not comply with international standards and best practice principles. Some of these gaps can pose a challenge, including for internationally-active Swiss companies. ECS therefore recommends to address the following issues and to amend the legislation proposal as follows:

- Anonymous reports by employees shall be admitted and protected.
- Employees reporting in good faith shall be explicitly protected from all forms of retaliation; all and any unlawful retaliation shall be null and void (including termination of the whistleblowers' employment contract). The burden of proof shall be on the employer.
- Employees reporting in good faith shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws (e.g. libel, slander, copyright, data protection).
- Reporting to the public as a last resort shall be admissible if the rectification of a misconduct lies in the interest of the public and if the reported misconduct appears to be severe.
- The admissibility to report to the public shall not depend on a formality but on the severity of the suspected or actual misconduct.
- Reports to the public authorities shall be admissible in the case of an immediate threat to life, health, safety or the environment even if the whistleblower has made a report to the employer first.
- Reports to the public authorities shall be admitted even if the employer has an internal reporting mechanism but only if such reporting mechanism is not designed or operated properly.
- Internal reporting mechanisms shall ensure timely acknowledgment and feedback to the whistle-blower. Incoming reports shall be appropriately recorded, assessed and thoroughly investigated.
- Those who retaliate against whistleblowers shall be subject to adequate disciplinary measures and/or penalties.

# Introduction

In November 2013, the Swiss Federal Council proposed a new piece of legislation on whistleblower protection in the private sector (Teilrevision des Obligationenrechts: Schutz bei Meldung von Missständen am Arbeitsplatz).[1] The law had been instigated by two parliamentary initiatives in 2003, initiating improved legal protection for employees who blow the whistle on suspected or actual misconduct in the private sector in Switzerland.

In September 2014, the Council of States - the upper chamber of Parliament – approved the draft law with few modifications. In the next step of the Swiss legislative process, the Law Commission of the National Council - the lower chamber of Parliament - debated the draft law and issued its recommendation to the National Council to reject the draft legislation. The Law Commission's main concern is the lack of clarity of the proposal.

As a next step of the legislative process, the debate in the National Council is scheduled for May 5th, 2015. If the National Council agrees with the Law Commission, the current version of the legislative proposal will be rejected and the Federal Council will have to present a revised legislative proposal to Parliament.

In the view of ECS, the current legislative proposal needs more clarity in its language in accordance to the Law Commission's recommendation. But more importantly, it also needs significant changes on substance, in particular to comply with the international standards on whistleblower protection by the Council of Europe, the International Chamber of Commerce, the International Standardization Organization ISO, the OECD, Transparency International and the United Nations.

The aim of this White Paper is therefore to elaborate on the specific parts of the draft proposal which deviate from international standards and best practice.

Ethics and Compliance Switzerland (ECS) is an independent not for profit organization promoting ethical leadership and integrity in all organizations and has in place several working groups, including one on Whistleblowing.

[1] All the relevant documentation can be found here: https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/whistleblowing.html.

# Summary of the Draft Proposal[2]

The proposed legislation focuses on the legal framework in the Swiss private sector for reporting irregularities to employers, the competent authorities and the public.

The legislative proposal aims at establishing a three-step process that requires an employee to inform his or her employer before notifying the authorities, and always bring a matter to the attention of the public authorities before reporting to the public. Employees may not take the next step unless certain requirements are met (e.g. the failure of the employer or the authorities to take action within a certain timeframe). After submitting a report to their employer, only in exceptional cases, employees would be eligible to report to the competent authorities.

The proposed legislation does not stipulate specific regulations for the protection of employees using their reporting rights concerning harassment, intimidation, discrimination or any other acts of reprisal by the employer. It merely states that any termination of the employment contract related to the reporting of irregularities by the employee would constitute an abuse of law.

However, the draft proposal encourages companies to introduce internal reporting systems. If a company has implemented an internal reporting system, an employee is very limited to address a report to an external authority. Further, the draft proposal uses the open term “irregularities” which can include a broad range of offences, such as all kind of illicit and forbidden behavior, acts against and violations of internal rules, directives or regulations.

[2] Buhr, Axel and Lötscher, Bernhard; Proposed legislation on whistleblowing – de facto ban on reporting to the public? - International Law Office; http://www.internationallawoffice.com.

# Internal reporting mechanisms

## DRAFT LAW PROVISIONS ON INTERNAL REPORTS TO THE EMPLOYER

The draft law provides an incentive for companies to introduce an internal reporting mechanism. If a company has implemented such a system, an employee is limited in addressing a report to an external authority. According to the proposal, an internal mechanism should

- be independent (in the sense of outside the managerial reporting lines),
- include regulations in the reporting process and the process after a report has been made (whistleblowing policy),
- prohibit dismissal or other disadvantages due to a good faith report.

The internal reports can be made confidential. The employees are permitted to report "irregularities" in a broader sense, including offences, unlawful acts and violations of the employer's internal rules and regulations.

## INTERNATIONAL BEST PRACTICE

Internal reporting mechanisms should allow for and protect reports about suspected or actual misconduct, such as corruption and fraud, in full confidentiality and anonymity.[3] Thereby, any reason for fear of retaliation must be excluded.[4] Different reporting channels should be made available to employees and third parties. Such available reporting tools may include web-based reporting platforms, helplines and ombudspersons. All whistleblowers' reports should be diligently acknowledged, recorded, screened and followed up with investigation and any necessary reforms or corrective action. [5]

[3] Anonymity may be subject to statutory limitations, in particular with regard to principles of due process to protect the rights of accused persons.
[4] According to ISO 19600, Section 10.1.2, an effective compliance management system should include a mechanism for an organization's employees and/or others to report suspected or actual misconduct or violations of the organization's compliance obligations on a confidential basis and without fear of retaliation.
[5] OECD 2012: "Whistleblower protection: encouraging reporting", p. 9.: ICC 2009: "Guidelines on Whistleblowing", Principles 2, 4, 7.

# INTERNAL REPORTING MECHANISMS

## GAP BETWEEN THE DRAFT PROPOSAL AND INTERNATIONAL BEST PRACTICE

According to the best practice principles, the Swiss legislative proposal does not meet international benchmarks on the following points:

- Anonymous reports are not explicitly admissible and protected.
- The proposal does not explicitly forbid and sanction retaliation against good faith reporting by employees. Dismissals of employees who report in good faith remain valid and cannot be challenged by the employee.
- Those who retaliate against whistleblowers are not subject to penalties.
- Employees reporting in good faith are not explicitly immune from liability under criminal, civil and administrative laws (e.g. libel, slander, copyright, data protection).
- The proposal does not state that internal reporting mechanisms need to properly acknowledge the incoming reports and provide timely feedback to the whistleblowers.
- It is not mentioned in the proposal that internal reporting mechanisms shall ensure timely and thorough investigations of whistleblowers 'disclosures, including possible complaints about retaliation. [6]

[6] Transparency International 2013: "International Principles for Whistleblower Legislation", Principle 15.

# Reports to the public authorities

## DRAFT LAW PROVISIONS ON **INDIRECT** REPORTS TO THE PUBLIC AUTHORITIES

According to the proposal, employees may only report to the competent public authority if the employer has not implemented an internal reporting mechanism **and**

- does not initiate sufficient measures to clarify - or if necessary remedy - the situation within a maximum period of 60 days, or
- if the employee has not received an immediate confirmation of receipt of the information and an indication of the designated timeframe set for the clarification and remedy steps by the employer, or
- if the employer does not inform the whistleblower in due course or upon request about the status of proceedings.

## DRAFT LAW PROVISIONS ON **DIRECT** REPORTS TO THE PUBLIC AUTHORITIES

Reporting irregularities directly to the competent authorities without making an internal report to the employer first is permitted in the following cases:

1. If an employee has reason to believe that his or her internal report would not have any effect. The draft law states that this can be assumed if there is no independent reporting mechanism available **and**
    - if an employer has not responded adequately or not at all in previous cases or
    - if there has been a previous case of retaliation against a whistleblower.
2. If there is a danger of collusion if the report be made internally first.
3. If there is an imminent threat to life, health, safety or the environment.

## INTERNATIONAL BEST PRACTICE

There might be cases for which reporting at the workplace is not practical or possible, for example if reporting may lead to retaliation or if there are reasons to believe that the recipient of the report is personally implicated in the reported irregularities. In these situations, a whistleblower should have the possibility to address his or her report to public authorities such as regulatory authorities, law enforcement, investigative agencies or elected officials[7].

[7] Transparency International 2013: "International Principles for Whistleblower Legislation", Principle 16.

# REPORTS TO THE PUBLIC AUTHORITIES

## GAP BETWEEN THE DRAFT PROPOSAL AND INTERNATIONAL BEST PRACTICE

According to the above best practice principles, the Swiss draft law is not meeting the international benchmark on the following points:

- Indirect reports to public authorities are almost impossible if the employer has an internal reporting mechanism in place, even if the internal reporting mechanism is not working properly, i.e. if the whistleblowers' reports are not adequately followed up upon and are not investigated in a timely and thorough manner. The employee bears the burden of proof and the risk of violating the law.
- Direct reports to public authorities are permitted in the case of an immediate threat to life, health, safety or the environment. Indirect reports to the public authorities however are not allowed even in the case of an immediate threat to life, health, safety or the environment if there is an internal reporting system in place. This means that if an employee reports a mortal danger to the internal reporting mechanism and nothing happens, he is not allowed to turn to competent authorities.

# Reports to the Public

## DRAFT LAW PROVISIONS ON **DIRECT** REPORTS TO THE PUBLIC

Direct reports to the public are not permitted, under no circumstances and with no exceptions.

## DRAFT LAW PROVISIONS ON **INDIRECT** REPORTS TO THE PUBLIC

After having informed the public authorities about irregularities, it is under conditions possible to inform the public about a suspected or actual wrongdoing. Informing the public is permitted if the competent authority, upon request of the whistleblower, does not inform him or her about the proceedings' status in a timely manner (exact number of days under discussion, presumably around 30).

It should be noted that the only obligation of the public authority is to provide information about the status of the proceedings, not initiating any proceedings per se. A sufficient message to a whistleblower may be: "We are not opening proceedings, please do not contact us on this closed matter anymore."

It has been explicitly stated that even if the course of action of the public authority is not sufficient or does not show any results, an employee is not allowed to turn to the media once he or she received information about the status of the proceedings in a timely manner.

This means that de facto reporting to the public is not admissible under the draft law.

## INTERNATIONAL BEST PRACTICE

As a last resort, the law shall provide for external disclosure, including, among others, to the media, civil society organisations, legal associations, trade unions or business/professional organisations.[8]

## GAP BETWEEN THE DRAFT PROPOSAL AND INTERNATIONAL BEST PRACTICE

- Even as a last resort, reports to the public, i.e. the media, the public and/or external organizations, are inadmissible.
- The possibility of reporting to the public depends on a formality (responding in a timely manner to the request of information by the whistleblower) and not on the seriousness of the suspected or actual misconduct.
- In cases of grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, it is not possible to directly inform the public without the need to first inform the employer or the public authorities.

[8] Council of Europe 2014: "Protection of Whistleblowers – Recommendation and explanatory memorandum", Principle 14/15. Transparency International 2013: "International Principles for Whistleblower Legislation", Principle 17.

# Legal Protection of Whistleblowers

## DRAFT LAW PROVISIONS ON HOW THE WHISTLEBLOWERS ARE PROTECTED

There are no special provisions in the proposal about protecting whistleblowers from harassment, intimidation, discrimination or acts of reprisal by the employer. Only the general Swiss labor law provisions apply for corporate whistleblowers. The draft law merely states that any termination of the employment contract related to the reporting of irregularities by the employee would constitute an abuse of law. This means that in case of an unfair dismissal based on good faith whistleblowing, the whistleblower receives a pay compensation of a maximum of six months. As there is no general right of reinstatement in the Swiss labor law, the whistleblower cannot keep his employment, even in case of illicit abusive dismissal. The Federal Council has announced that it might propose a revision of the employment law at a later time to ensure better protection of employees in the event of unfair dismissal. This however would be a general revision and not specifically address the protection of whistleblowers.

## INTERNATIONAL BEST PRACTICE

Whistleblowers making a disclosure in the public interest and with a reasonable belief that the reported information is true shall be protected from retaliation, disadvantage or discrimination at the workplace[9]. Reports in good faith are assumed unless the contrary can be proved by the employer[10].

## GAP BETWEEN THE DRAFT PROPOSAL AND INTERNATIONAL BEST PRACTICE

- Whistleblowers are not explicitly protected from all forms of direct, indirect, attempted or threatened retaliation such as harassment, disadvantages or discrimination at the workplace.
- The compensation for unfair dismissal and other forms of retaliation does not reflect the severe personal risks and negative consequences whistleblowers (and their families) may face. There is no right of reinstatement in the case of unfair dismissal.
- Employees making a good faith report are not explicitly immune from liability under criminal, civil and administrative laws (e.g. libel, slander, copyright, data protection).
- Those who retaliate against whistleblowers are not subject to adequate penalties.

[9] Transparency International 2013: "International Principles for Whistleblower Legislation", Principle 6, p. 5.
[10] United Nations 2003: "Convention against Corruption", Article 33, p. 26.

# Conclusion

In order to comply with international standards and best practice principles, ECS recommends that the draft law be amended in order to include the following requirements:

- Anonymous reports by employees shall be admitted and protected.
- Employees reporting in good faith shall be explicitly protected from all forms of retaliation; all and any unlawful retaliation shall be null and void (including termination of the whistleblowers' employment contract). The burden of proof shall be on the employer.
- Employees reporting in good faith shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws (e.g. libel, slander, copyright, data protection).
- Reporting to the public as a last resort shall be admissible if the rectification of a misconduct lies in the interest of the public and if the reported misconduct appears to be severe.
- The admissibility to report to the public shall not depend on a formality but on the severity of the suspected or actual misconduct.
- Reports to the public authorities shall be admissible in the case of an immediate threat to life, health, safety or the environment even if the whistleblower has made a report to the employer first.
- Reports to the public authorities shall be admitted even if the employer has an internal reporting mechanism but only if such reporting mechanism is not designed or operated properly.
- Internal reporting mechanisms shall ensure timely acknowledgment and feedback to the whistle-blower. Incoming reports shall be appropriately recorded, assessed and thoroughly investigated.
- Those who retaliate against whistleblowers shall be subject to adequate disciplinary measures and/or penalties.