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Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

We have the honor to address you in our capacity as the United Nations Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression and the OSCE Representative on Freedom of the Media.

We would like to bring to the attention of the European Commission; the European Parliament and the Council of the European Union our concerns regarding **the European Union draft directive on the protections of whistleblowers and persons reporting on breaches of Union law (“the proposed Directive” dated 25 January 2019, 2018/0106 (COD)) and its potential implications for the right to freedom of expression in European Union (“EU”) member states.**

There is much that we wish to commend about the proposed Directive and the initiative behind it. We strongly support the recognition, in the opening recitations, that whistleblowers “play a key role in exposing and preventing breaches of the law harmful to the public interest and in safeguarding the welfare of society.” Moreover, the proposed Directive recognizes that “potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation.” As the proposed Directive appropriately recognizes, individuals who report alleged wrongdoing are often subjected to harassment, intimidation, investigation, prosecution and other forms of retaliation. All too often, States and organizations implement the protections only in part or fail to hold accountable those who retaliate against whistleblowers. Efforts to ensure whistleblower protections require careful and rigorous attention to the experience of whistleblowing, the pressures whistleblowers face, and the consequences they may be subjected to once they report to authorities or to the public.

We further commend the intention to legislate whistleblower protection. We strongly support several elements of the proposed Directive and applaud the Commission’s work in these areas. For instance, we welcome Article 17’s provision for penalties on those who retaliate against reporting persons. The general protections for

confidential reporting should be a model for other States considering whistleblower protection legislation.

An EU Directive that strengthens these principles as a matter of European law, in the context of public and private institutions, and ensures protection of the public's right to know would be a valuable step for right to information guarantees across Europe. We are heartened to see that, in much of the proposed Directive, there is strong recognition of these values and rights.

Nonetheless, we have identified a number of areas of potential concern where the language of the proposed Directive, inadvertently or by design, may undermine the overall object and purpose of the initiative. We are sharing with you a non-exhaustive assessment of those issues. Given the late state of negotiations among relevant actors, it is our intention here only to focus on a small set of key issues.

Please find our assessment of those concerns in the attached Annex I. We would also like to refer you, for background, to the full report of the UN Special Rapporteur on the issue of protection of journalist sources and whistleblowers, published in 2015 and presented to the UN General Assembly (A/70/361).

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of
opinion and expression

Harlem Desir
OSCE Representative on Freedom of the Media

Annex I

Selected Concerns with Proposed Whistleblower Directive

According to the information we have received, on 23 April 2018, the European Commission proposed a draft directive on the protections of whistleblowers and persons reporting on breaches of Union law (“proposed Directive”). The proposed Directive has been the subject of ongoing discussion and negotiations among EU member States in the Council of the European Union and European Parliament. On 20 November 2018, the European Parliament Legal Affairs Committee approved the draft Directive, preparing its negotiating position for debate with the Council of the European Union. On 25 January 2019, the Council of the European Union, at the ambassador level, adopted a modified version of the proposed Directive as its negotiating position.

It is the 25 January version of the proposed Directive to which these comments are related.

Before sharing a select number of our concerns, we wish to note that whistleblower protections rest upon a core right to freedom of expression, guaranteed under international law, in particular the International Covenant on Civil and Political Rights and the European Convention on Human Rights, to which all Member States of the European Union are bound. In 2015, the UN Special Rapporteur reported to the UN General Assembly on the topic of protection of whistleblowers under international human rights law (UN Doc. A/70/361). These comments draw substantially from that report, attached as Annex II.

Article 19 of the Covenant, like Article 10 of the European Convention, guarantees the right to seek, receive and impart information and ideas through any media and regardless of frontiers. The Covenant emphasizes that the freedom applies to information and ideas of all kinds. Whistleblowers enjoy the right to impart information, but their legal protection when publicly disclosing information rests especially on the public’s right to receive it. Under Article 19(3) of the Covenant, restrictions on the right to freedom of expression must be “provided by law” and necessary “for respect of the rights or reputations of others” or “for the protection of national security or of public order (*ordre public*), or of public health or morals.” We understand that any restrictions on whistleblowers or regulation of whistleblowing must comply with the provisions of Article 19(3), including how it has been interpreted by established mechanisms of human rights such as the Human Rights Committee.

Because article 19 promotes so strongly a right to information of all kinds, States bear the burden of justifying any withholding of information as an exception to that right. Limitations must be applied strictly so that they do “not put in jeopardy the right itself” (see Human Rights Committee, general comment No. 34, para. 21), a point that the Human Rights Council emphasized when it urged States not to restrict the free flow of information and ideas (see Council resolution 12/16).

Under the well-accepted proportionality element of the necessity test under Article 19(3), disclosure must be shown to impose *a specific risk of harm to a legitimate State interest that outweighs the public's interest in the information to be disclosed*. If a disclosure does not harm a legitimate State interest, there is no basis for its suppression or withholding (see general comment No. 34 of the Human Rights Committee, para. 30). Some matters should be considered presumptively in the public interest, such as criminal offences and human rights or international humanitarian law violations, corruption, public safety and environmental harm and abuse of public office.

Much of the proposed Directive meets these international standards. However, based on them, we are also concerned that the proposed Directive would not adequately and effectively protect whistleblowers and persons reporting on breaches of Union law. While again, this is not an exhaustive examination of the proposed Directive, in particular the following elements raise serious concerns about the ability of the proposed Directive to ensure the protection of whistleblowers and advance – rather than undermine – the public's right to information. We fear that these provisions could not only lead to harming individual whistleblowers but also the public's right, particularly through the media, to access knowledge about matters of public interest.

Concerns Regarding Tiered Reporting System: We understand that Article 3bis of the proposed Directive would establish a strong preference for internal reporting for breaches of Union law, mandating internal reporting over external reporting or public disclosure, unless narrow exceptions are met. Persons reporting internally would be mandated to use designated channels that are to be established by employers under Article 4. This system would evidently eliminate the widely-used option of reporting issues to immediate supervisors, while potentially overloading established reporting channels.

Article 5(1)(d) of the proposed Directive, reinforced by Article 5bis1(a) and Article 6(2)(b), would establish as mandatory “a reasonable timeframe, not exceeding three months following the report, to provide feedback to the reporting person”. This provision has the potential to enable obstruction of justice, where an organization could improperly use the three-month period to handle the issue, whether by cover up or neglect to resolve it. A reporting person could not then report to external authorities during that time period without violating the Directive and risking loss of whistleblower protections.

Requiring persons to report internally may deter them from reporting wrongdoing, contrary to the aims of whistleblower protection mechanisms. Reporting persons may not trust internal reporting channels, due to a fear of retaliation – even subtle forms of retaliation that may not be easy to penalize under the proposed Directives welcomed scheme of sanctioning retaliation. This is especially concerning because the recitations of the proposed Directive recognize, appropriately, this essential fear common to the vast majority of whistleblower cases. Reporting persons would be placed in a likely quagmire: (a) to report breaches to external authorities or publicly disclose through the media, therefore losing the protection of the Directive; or (b) not to report breaches at all. As many persons aware of breaches may fear retaliation, harassment, or intimidation by

employers, it is possible that breaches will not be reported, harming the public's interest in such information.

We understand that there are a number of proposals to remove this burden on whistleblowers, which could undermine the entire scheme of protection. We strongly urge the Commission to identify an appropriate approach that avoids the three-month delay and *encourages* whistleblowing as a mechanism of good public and corporate governance.

Concerns Regarding National Security Exceptions: Articles 1bis (*Ibis*) and 12bis(3) combine to allow authorities to prevent public disclosures of national security information. We are concerned that this exception has the potential to be misused, with national authorities able to prevent public disclosure under the guise of national security, when the restriction would not meet the requirement that restrictions meet necessity and proportionality standards. The power delegated to national authorities is overbroad. Categories of prohibited disclosures should be narrowly defined, and potential harms to national security should be clearly identified.

In the Special Rapporteurs 2015 report, he noted that “[i]nstitutions that operate in national security, such as institutions of defence, diplomacy, internal security and law enforcement, and intelligence, may have a greater claim not to disclose information than other public bodies, but they have no greater claim to hide instances of wrongdoing or other information where the value of disclosure outweighs the harm to the institution.” (A/70/361, para 43). We would strongly urge the Council to reconsider this exception for national security and apply, instead, the same fundamental norms that favor the right to information in the public interest. We would commend to the drafters the framework adopted by a wide coalition of civil society organizations in 2013. The Global Principles on National Security and the Right to Information, known as the Tshwane Principles, provide guidance for States seeking to balance their interests in protecting information and ensuring the public's right to know. The principles and their detailed explanatory discussions deserve study and implementation, and we would hope that the proposed Directive could be a leader in establishing common-sense approaches to national security information.

Concerns Regarding Standard for Protection: We were pleased to see that the proposed Directive, in Article 2bis1(a), would provide protection to reporting persons who “had reasonable grounds to believe that the information reported was true at the time of reporting and that the information fell within the scope of this Directive.” Especially important in this context is the statement in the recitations, at page 11, noting, “The motives of the reporting person in making the report should be irrelevant as to whether or not they should receive protection.”

Nonetheless, Article 15(4) of the proposed Directive provides that whistleblowers would only receive protection if they “had reasonable grounds to believe that the reporting or disclosure of such information was *necessary for revealing a breach* pursuant to this Directive.” This provision adds a layer of evaluation that would be

difficult, if not impossible, to sustain in connection with the protections found in Article 2*bis*1. It would evidently require examining the necessity – that is, the importance – of disclosing the information before protection is granted to reporting persons. This is entirely inconsistent with the experience of whistleblowers and would likely undermine the public interest and right in having access to information. Many whistleblowers will be uncertain as to the extent that the disclosure is important, harming the chances that credible information will be reported. Many simply do not have access to the full range of information that may be available to their institution or others. They cannot be expected to make an evaluation of “necessity” at the time of reporting. Indeed, a necessity requirement is plainly inconsistent with the reasonable belief standards in the identification and reporting of wrongdoing. Put simply, a subjective test of the significance of the disclosure would pose unacceptable risks of deterring reporting of wrongdoing, thus undermining the object and purpose of the proposed Directive.

As noted, these are simply a selected set of concerns and do not reflect a full evaluation of the proposed Directive. We again commend the Commission for its work to protect whistleblowers. We urge that any measure the EU adopts in striving to protect and regulate the protection of whistleblowers addresses these concerns and is consistent with Article 19 of the ICCPR and related human rights obligations shared across Europe. The Directive should promote disclosure, motivate remedial actions, and focus on alleged wrongdoings, while maintaining broad protections for whistleblowers.