ECS
Ethics and Compliance
Switzerland

White Paper
Whistleblower protection in the Swiss Private Sector

Ethics and Compliance Switzerland (ECS)
Working Group Whistleblowing

State of discussions of the Working Group as of end of March 2019

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Table of Contents

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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 ("Zusatzbotschaft und Entwurf zur Teilrevision des Obligationenrechts: Schutz bei Meldung von Unregelmässigkeiten am Arbeitsplatz vom 21. September 2018, BBI 2019 1409 und BBI 2019 1433", hereinafter called "Zusatzbotschaft").

The aim of this White Paper is to independently assess the legislative proposal of the Swiss Government in terms of its effectiveness in protecting whistleblowers and its concordance with key international standards and recent legislation, such as the French Loi Sapin II and the planned EU directive on whistleblower protection (Proposal for a Directive of the European Parliament and of the council on the protection of persons reporting on breaches of Union law).

The three-step process proposed in the Swiss legislative project is similar to the one envisaged in the EU directive on whistleblower protection. However, the EU proposal is not finalised and still under discussion in the EU Parliament.

Effective whistleblower protection is a core element of organizational ethics and compliance. Given this ECS intends to provide fair and constructive feedback on the Swiss legislative proposal and to facilitate the parliamentary debate for a modern and effective protection of whistleblowers in Switzerland.

ECS found the proposed legislation to be a step in the right direction toward the regulation of whistleblowing in the private sector. However, important enhancements are required to bring the proposed legislation up to internationally accepted standards. ECS, as an independent not for profit organization, considers the present draft legislation to be insufficient in its protection of whistleblowers in Switzerland. Unless the gaps identified by ECS are addressed, the proposed legislation could cause some challenges, especially for internationally active Swiss companies.

In summary, from the point of view of ECS, a modern and effective regulation on whistleblowing in the private sector must contain the following points. We note that while some of these points are included in the current legislative project, other points are missing and should be considered in the upcoming parliamentary consultation process:

- Anonymous reports by employees should be explicitly allowed and protected.
- Employees reporting in good faith should be explicitly protected from all forms of retaliation, including termination.
- Internal reporting mechanisms should ensure timely acknowledgment and feedback to the whistleblower.
- The requirements for the appropriate handling of whistleblower reports by the employer should be specified. In particular, incoming reports should be properly recorded (recording duties), assessed and investigated (assessment and investigation standards).
- Immediate reports to public authorities should be allowed in case of an immediate threat to life, health, safety or the environment.
- Reports to public authorities should be permitted even if the employer has an internal reporting mechanism if the employee has reason to believe such reporting mechanism will not work properly.
- If public authorities have not informed the whistleblower about the status of the investigation within 14 days, he/she should be free to contact the public authorities without any further notification.
- Information provided by the public authorities to the whistleblower should state whether proceedings have been closed or actions have been initiated. Nevertheless, it remains that special laws that already exist need to be considered. Also, we acknowledge that the Code of Obligations is probably not the appropriate law for such an obligation.
- The whistleblower must be given the opportunity to appeal against the decision taken by the public authority.
- Reporting directly to the public as a last resort shall be allowed if the rectification of a misconduct is in the public interest 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.
- The employer must prove that any disciplinary sanction against a whistleblower is based on objective reasons and unrelated to the whistleblower alert. The burden of proof shall be on the employer.

- Redress should be possible for any retaliatory action including termination of the whistleblower's employment contract.
- The employer should be subjected to sanctions if the employer retaliates against a whistleblower.
- The reporting employee should be immune from disciplinary proceedings and liability under criminal, civil and administrative laws (e.g., libel, slander, copyright, data protection), in particular in the case of the violation of legally protected secrets (e.g., trade or banking secret). This is partially covered by the current proposals.
- The reporting rights and the protection of whistleblowers who are not direct employees, but work through temporary agencies, for suppliers or customers, should be considered as part of this legislation.

Introduction

In November 2013, the Swiss Federal Council – the Swiss Government – proposed new legislation in relation to whistleblower protection in the private sector ("Botschaft und Entwurf über die Teilrevision des Obligationenrechts: Schutz bei Meldung von Missständen am Arbeitsplatz BBI 2013 9513 and BBI 2013 9589")[1]. The law was initiated by two parliamentary motions, both in 2003, initiating improved legal protection for employees who blow the whistle on suspected or actual misconduct in the private sector in Switzerland.[2]

In September 2014, the Council of States – the upper chamber of Parliament – approved the draft law with few modifications. Subsequently, 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, mainly due to the lack of clarity of the proposal.

In September 2015, the National Council followed this recommendation and rejected the draft legislation. The proposal was sent back to the Federal Council with the request to propose a more "comprehensible and simple" wording. Three years later – in September 2018 – the Federal Council released a revised proposal, responding to the requests of the Parliament. The wording and structure of the proposal was simplified, in particular with regard to the notification procedure. The substance of the proposal however remained unaffected. Thus, the inherent complexity of the procedure persists in material terms (different requirements and conditions to move from one procedural stage to the next). Starting in spring 2019, the revised proposal ("Zusatzbotschaft") will be debated in both chambers of the Parliament.

With regard to major developments outside Switzerland, the European Commission presented a new proposal for an EU Guideline on Whistleblower Protection in April 2018, requiring smaller companies (with more than 50 employees), municipalities and all financial institutions, to implement reporting mechanisms.

The OECD's Phase 4 Report of 2018 on Switzerland's effort to implement the OECD Anti-Bribery Convention was critical regarding the missing implementation of whistleblower protection.[3] It highlighted the inadequate legal framework for reporting and the limited legislative proposal and made recommendations to improve the legal framework and broaden its scope to better protect whistleblowers.

In January 2019, upon presenting its Corruption Perception Index[4], the Swiss chapter of Transparency International pointed out that Switzerland still lags behind other developed countries in whistleblower protection.

Despite this under Swiss law, protection for whistleblowers is not completely new. Art. 22a section 5 Bundespersonalgesetz (BPG) establishes protection for whistleblowers in the public sector. The Whistleblowing Report implemented 2018 by the University of Applied Sciences HTW Chur shows that 11 percent of Swiss companies have implemented a whistleblowing reporting mechanism. The report noted, however, that there are considerable differences depending on the size of the company: while 70 percent of large companies with more than 249 employees have a reporting mechanism, SMEs with a reporting mechanism are in the minority (10 percent).[5]

Against this background this White Paper aims to independently assess the legislative proposal of the Swiss Government in terms of its prospective effectiveness in protecting whistleblowers and its concordance with international standards and recent legislation.

Effective whistleblower protection is a core element of organizational ethics and compliance. ECS intends to provide fair and constructive feedback on the Swiss legislative proposal and to facilitate the parliamentary debate for a modern and effective protection of whistleblowers in Switzerland.

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

2 In addition, a parliamentary initiative of 2012 proposed to add whistleblowing as a statutory defence in the Swiss Criminal Code. The discussions in the Swiss Parliament have, however, been suspended until the Swiss Federal Council published its revised draft on whistleblowing protection since the two legislative proposals are closely linked.

3 Implementing the OECD Anti-Bribery Convention, phase 4 report: Switzerland, p. 13, www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf

4 Transparency International - Corruption Perception Index 2018: https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2018

5 Blumer, Helene; Dahinden, Urs; Francolino, Vincenzo; Hauser, Christian; Nieffer, Ruth (2017): Whistleblowing Report 2018: Meldestellen in Schweizer Unternehmen; HTW Chur Verlag: Chur. https://whistleblowingreport.ch

Examples of international standards and practices

We set out below selected examples of international standards and practices on the protection of whistleblowers.

EU-wide Whistleblowing Directive

On 23 April 2018, the European Commission published a proposal for an EU-wide Whistleblowing Directive[6]. The new law's main goal is to establish safe reporting channels both within an organization and to public authorities in order to protect whistleblowers against dismissal, demotion and other forms of retaliation, to ensure citizens are informed by the national authorities and finally to provide training for public authorities on how to deal with whistleblowers. However, it also aims to discourage abusive reports.

All companies with more than 50 employees or an annual turnover of over €10 million would be required to institute internal systems to handle whistleblower reports.

The protection mechanisms will have to include:[7]

- Clear and confidential reporting channels, within and outside the organization;
- A three-tier reporting system of 1) internal reporting channels 2) reporting to the competent authorities if 1) fails, and 3) public reporting if no action is taken after steps 1) and 2);
- Feedback obligations of companies and authorities;
- Prevention of retaliation and effective protection of reporting persons, in particular in the form of:
  - Suspension, lay-off, dismissal or equivalent measures;
  - Demotion or withholding of promotion;
  - Negative performance assessment or employment reference;
  - Transfer of duties, change of location of place of work, reduction in wages, change in working hours;
  - Intimidation or harassment at the workplace;
  - Discrimination or unfair treatment; and
  - Early termination or cancellation of contract for goods and services;
- Protection from retaliation does not only applies to employees, but also to part-time and fixed term contract workers, persons with a contract of employment with a temporary agency, contractors, sub-contractors, suppliers, freelancers, and consultants;
- Sanctions against persons that:
  - take retaliatory measures against whistleblowers; and
  - breach the duty of maintaining the confidentiality of the identity of reporting persons.

On March 15, 2019, the EU member states' ambassadors confirmed that an agreement on the Directive was reached on March 11, 2019.

The main elements of the compromise include:[8]

- **Reporting system:** whistleblowers will be strongly encouraged to first utilize internal channels within their organization before calling on external ones set up by public authorities. In any event, whistleblowers will not lose their protection in scenarios where they decide to turn directly to external channels;
- **Persons protected by the new rules:** the position of the Council was preserved;
- **Scope of application:** the compromise forsees a wide scope in line with the Council's position. For legal certainty, a list of all EU legislative instruments covered is included in the annex of the directive. Member states may exceed this list when implementing these rules;

6 The new law's main goal is to establish safe channels for reporting both within an organisation and to public authorities; protect whistleblowers against dismissal, demotion and other forms of retaliation; ensure information of citizens by the national authorities and provide training for public authorities on how to deal with whistleblowers. However, it also aims to discourage malicious/abusive reports.

7 European Commission, Press release, available at: http://europa.eu/rapid/press-release_IP-18-3441_en.htm

8 https://www.consilium.europa.eu/en/press/press-releases/2019/03/15/better-protection-of-whistleblowers-council-confirms-agreement-with-parliament/

- **Support and protection measures for whistleblowers:** both institutions have agreed on a list of what qualifies as a form of retaliation which also covers, as requested by the Council, attempts or threats of retaliation;
- **Feedback obligations for authorities and companies:** the timeline for feedback remains three months with the possibility to extend to 6 months for external channels in duly justified cases;
- **Public disclosures:** the position of the Council is retained with an article setting out the conditions to be fulfilled for a person to be protected by the new rules.

Once the EU Parliament has confirmed the proposal, the text will first be reviewed by the Legal Affairs Committee before being formally adopted by both Parliament and Council.[9] As soon as it has been adopted and published in the official journal, it will enter into force twenty days after its publication, at which point member states will have 2 years to implement the new rules in their national legal system.[10]

OECD

According to the OECD CleanGovBiz Guidance on Whistleblowing Protection, policymakers should consider the following questions:[11]

- Is there comprehensive and clear legislation in place to protect employees from retaliatory, discriminatory or disciplinary action, when disclosing in good faith and on reasonable grounds suspected acts of wrongdoing or corruption to competent authorities?
- Are there effective institutional frameworks and clear procedures and channels in place for facilitating the reporting of wrongdoing and corruption?
- Are protected disclosures and persons afforded protection clearly defined?
- Are retaliatory actions clearly defined and the protection afforded robust and comprehensive?
- Are remedies and sanctions for retaliation clearly outlined?
- Is there regular effort to raise awareness and encourage the reporting of wrongdoing and corruption and to disseminate existing information on the protection of whistleblowers?
- Is the effectiveness of the whistleblower protection framework periodically evaluated and reviewed?

According to the OECD guideline mentioned above:

- Whistleblower protection is strengthened by a mechanism that provides anonymity/confidentiality while also ensuring robust protection and sanctions for disclosing the whistleblower's identity;
- One or more channels of disclosure should be included, whereby internal reporting should be encouraged and external reporting channels seen as a last resort; and
- Monetary rewards could be included as an encouragement towards whistleblowing.[12]

France

According to the Sapin II Act and decree n°2017-564, companies employing more than 50 individuals were required to implement an appropriate whistleblowing program by 1 January 2018. The aforementioned decree specified the following requirements for whistleblowing systems:

- Companies should define the conditions and modalities under which a whistleblower may report a case;
- Companies should inform the whistleblower of the receipt of their report, the reasonable timeline to examine its admissibility and conditions under which they will be informed of the consequences;
- Typically, the first recipient of a report is the whistleblowers' direct or indirect supervisor, designated functions within the company or an external person/entity appointed by the company that possesses the skills, the authority and sufficient power and means to follow up;

9 http://www.europarl.europa.eu/news/en/press-room/20190311IPR31055/first-eu-wide-protection-for-whistleblowers-agreed

10 https://www.consilium.europa.eu/en/press/press-releases/2019/03/15/better-protection-of-whistleblowers-council-confirms-agreement-with-parliament

11 OECD CleanGovBiz Guidance on Whistleblowing Protection, p. 5, available at: http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm

12 OECD CleanGovBiz Guidance on Whistleblowing Protection, pp. 9, 13

- Should the first recipient fail to verify the report's admissibility within a reasonable timeframe, the whistleblower may file the report with judicial or administrative authorities and, if those authorities have not dealt with the report within three months, may make the report public;
- In the event of a serious and imminent danger or of a risk of irreversible damage, the report can be directly filed to judicial or administrative authorities;
- The recipient of the report shall keep the report, the communicated information, the identity of the whistleblowers and the identity of the targeted individuals confidential. The whistleblower's identity should only be communicated to judicial authorities with the whistleblower's consent;
- Pieces of evidence identifying the whistleblower and individuals involved in the event no action was taken upon the receipt of a report should be destroyed;
- Breach of such confidentially obligations is punishable by up to 2 years imprisonment and a criminal fine of up to € 30,000 for individuals and € 150,000 for legal entities;
- Whistleblowers will not be criminally liable for disclosure of legally protected secrets such as trade or banking secrets (excluding information or documents protected by medical secrecy, national defence or attorney-client privilege), provided such disclosure is necessary and proportionate to the interests involved; and
- Employees must not be subject to any sanction or discrimination from their employer as the result of such reporting. Employees also benefit from the protection of the Labour code and its favourable burden of proof regime: the employer must prove that the disciplinary sanction was based on objective reasons unrelated to the whistleblower alert.

We also note that a whistleblowing mechanism can only take effect in France after approval by the French data privacy authority (CNIL).

United States of America

A key feature of the US approach is the monetary encouragement of whistleblowers:

- Under the False Claims Act, whistleblowers can file a claim against the part of the federal government being defrauded, and receive some of the money recovered;[13]
- The Dodd Frank Act of 2010 introduced measures to reward whistleblowers (e.g. The SEC Whistleblower Program), to encourage reports to the SEC: Under the SEC Whistleblower Program, the employee is eligible for a reward of 10-30 percent of the monetary sanctions collected, based on the amount of money collected and the quality of the information provided;
- Awards are only triggered if the SEC actions result in monetary sanctions in excess of US $1m based on the whistleblower's information;
- Whistleblowers may submit information anonymously, but may only receive an award if they are represented by and provide contact information for an attorney; and
- Retaliation against employees who provide the SEC with `original information' is prohibited, otherwise legal action can be brought in an enforcement proceeding against the employer.

13 Interestingly, this rewards system has recovered around US $10bn for the state in the last four years, even though the resulting cases are hard to prove and few claims are successful.

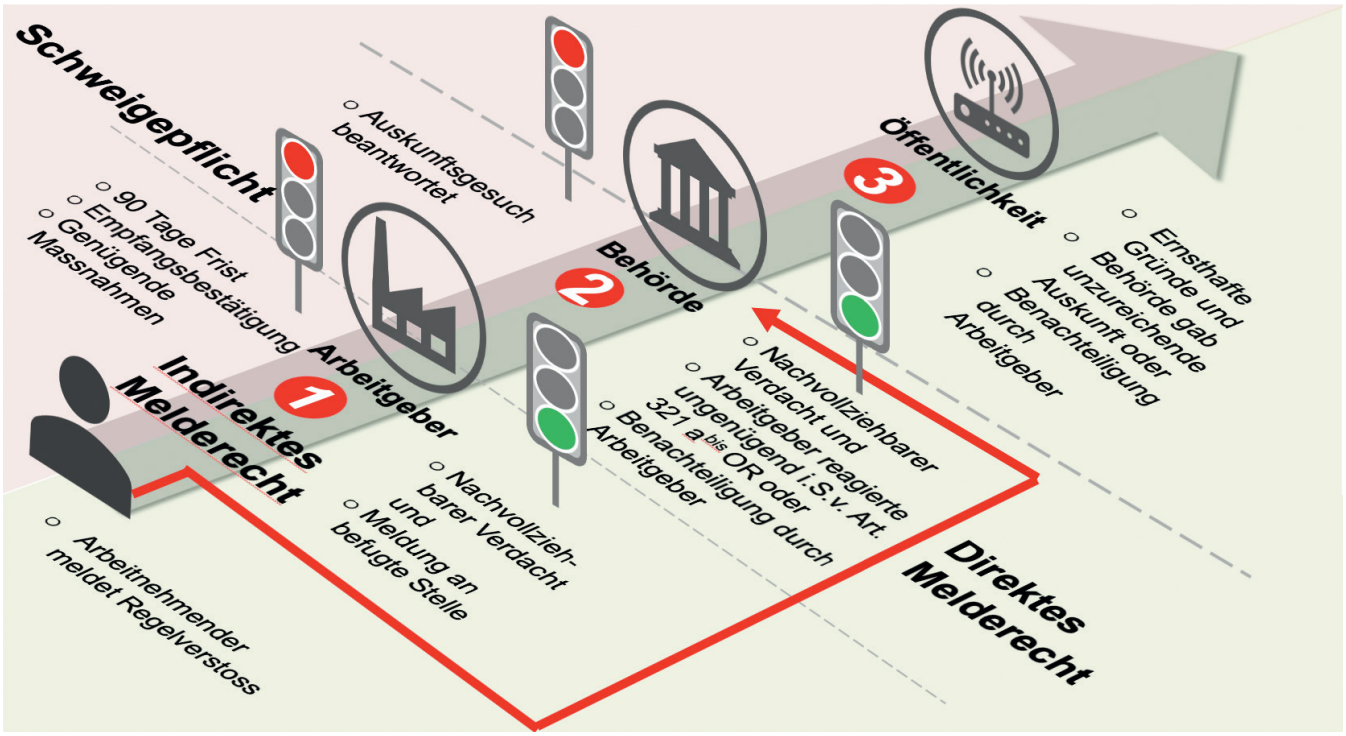
Summary of the Swiss Draft Proposal

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

It aims to establish a three-step process that requires an employee to inform its employer before notifying the authorities and always to bring a matter to the attention of the public authorities before reporting to the public. Employees must not report to the public unless certain requirements have been 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, the employee would only be permitted to report to the competent authorities in exceptional circumstances.

The proposed legislation does not stipulate specific regulations for the protection of employees who blow the whistle on suspected or actual misconduct. It merely states that any termination of the employment contract related to the reporting of irregularities by the employee would be abusive. At its core, the proposed law fails to fully protect whistleblowers.



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, then an employee is limited in filing a report to an external authority. According to the proposal, an internal mechanism should:

- be independent (i.e. independent of the managerial reporting lines);
- include regulations on the reporting process and the process after a report has been made (whistleblowing policy);
- exclude dismissal or other disadvantages due to a good faith report; and
- enable the anonymity of internal reports. 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.

Gap between the draft proposal and international standards and practices

The Swiss legislative proposal falls short of international benchmarks of whistleblowing standards and practices in the following areas:

- 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 definition of whistleblower focuses on employees and fails to include contractors, volunteers, temporary workers, consultants and suppliers;[14]
- The EU whistleblowing draft proposal would apply whistleblowing protection to private legal entities with 50 or more employees; private legal entities with an annual turnover or annual balance sheet total of € 10 million or more; or private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing. The Swiss draft proposal does not consider such thresholds;[15]
- The proposal does not explicitly forbid and sanction retaliation against good faith reporting by employees. Instead, the whistleblower must prove that the employer took retaliatory action. The international standard and practice instead places the burden of proof on the employer, who must prove that any demotions, withholding of promotions, suspensions, lay-offs, dismissals, negative performance assessments or employee references etc. are not a consequence of a whistleblower report but based on duly justified grounds;[16]
- Those who retaliate against whistleblowers are not subject to penalties; considering that the Code of Obligations is not the correct place for such a regulation;
- The Swiss proposal does not explicitly penalize those who breach the confidentiality of the whistleblower;
- The proposal does not mention that the whistleblower's identity should only be communicated to judicial authorities with the whistleblower's consent;
- The proposal says that the company must give feedback to the reporting person ("whistleblower") within 90 days on the necessary actions taken to investigate the report- ed matter. Whilst it is possible for a company to provide a whistleblower with acknowledgement of receipt and can inform him/her of initial actions taken within 90 days, it is not realistic to assume that the allegations reported would necessarily have been fully investigated and sufficient remedial actions planned within the allotted 90-day period, [17] and
- The whistleblower can seek advice from persons with an obligation of professional secrecy. In some countries (e.g., The Netherlands), in addition to the employer, the authorities and the media, it is suggested that whistleblowers can address their issue with an independent special party (e.g., "House for whistleblowers").[18] In addition, the Group of States against Corruption (GRECO) suggests that confidential advisers be provided to assist staff who want to make whistleblower reports.

14 Cp. e.g. Annex 1 of the European Commission, Board recommendations, p.62; cp. further Annex 6, legislation in Malta, p. 165, Recommendation and Explanatory Memorandum of the European Commission on the Protection of Whistleblowers, pp. 25, 38, available at: https://rm.coe.int/16807096c7

15 Chapter II, article 4 para. 3 of the Explanatory Memorandum to the Directive of the European Parliament and of the Council, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0218

16 Cp. Chapter IV, article 15 of the Explanatory Memorandum to the Directive of the Parliament and of the Council, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0218; principle 25 of the Recommendation and Explanatory Memorandum on the Protection of Whistleblowers, p. 40, available at: https://rm.coe.int/16807096c7

17 Cp. Principle 7 of the ICC Guidelines on Whistleblowing, available at: https://cdn.iccwbo.org/content/uploads/sites/3/2008/06/ICC-Whistleblowing-Guidelines.pdf

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:

- he/she did not receive feedback from the employer (receipt and appropriate measures taken) within 90 days of submission of the report; or
- Retaliatory measures (dismissal or other actions) have been taken against the employee as a consequence of the reported allegations.

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 circumstances:

1. If there is no internal reporting mechanism in place; or
2. If an employee has reason to believe that his or her internal report would not have any effect. The draft law states this can be assumed if there is:
   a. No independent whistleblowing reporting management function;
   b. No policy regarding handling of whistleblowing reports;
   c. No non-retaliation policy; and
   d. No anonymous whistleblowing reporting is possible;
3. The designated public authority would be impeded in its function without direct reporting; or
4. There is a direct and serious risk to the life, health and safety of the whistleblower or for the environment or a direct risk of substantial damage to property.

Gap between the draft proposal and international standards and practices

According to the international standards and practices outlined above, the Swiss draft law does not meet the international benchmark in relation to the following areas:

- Direct reports to public authorities are almost impossible if the employer has an internal reporting mechanism in place, even if the internal reporting mechanism is ineffective (e.g., if whistleblower reports are not adequately followed up and are not investigated in a timely and thorough manner). Here the employee bears the burden of proof and the risk of violating the law.
- There might be cases in which the whistleblower is reluctant to report at the workplace, for example if reporting could 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 directly to public authorities, such as regulatory authorities, law enforcement, investigative agencies or elected officials.

18 https://huisvoorklokkenluiders.nl/wp-content/uploads/2018/01/20160803_Wet-_English version_BZK116131.pdf

Reports to the Public

Draft law provisions on direct reports to the public

Direct reports to the public are not permitted under any circumstance and without exception.

Draft law provisions on indirect reports to the public

After having informed the public authorities about irregularities, it is, under certain conditions, possible for the whistleblower to directly inform the public about them if serious grounds exist to do so. Informing the public is permitted if the competent authority, upon request of the whistle- blower, does not inform him or her about the status of the proceedings in a timely manner (14 days is the time period currently being discussed).

It should be noted that the public authority is only obligated to provide information about the status of the proceedings, but has no obligation to initiate proceedings. 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 whistleblowers cannot raise these irregularities to the media even if the course of action by the public authority is not sufficient in the eye of the whistleblower or does not show any results.

This means that de facto reporting to the public is restricted under the draft law, which runs contrary to the purpose of protecting the whistleblower.

Gap between the draft proposal and international standards and practices

- Even as a last resort, direct reports to the public (e.g., media, civil society organizations, legal associations, trade unions or business/professional organizations), are not permitted. Even if all other options fail, the preconditions for direct reports to the public are very restrictive;
- 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 severe public or personal danger or persistently unaddressed wrongdoing that could affect the public interest, it is not possible to directly inform the public without first informing the employer or the public authorities;
- Cases where the reporter disagrees with the authorities' decision are not considered in the draft proposal.

Conclusion

The legislative process currently under discussion in Switzerland (the "Zustazbotschaft") is a promising step in the right direction to regulate whistleblowing in the private sector.

However, ECS finds that important enhancements to the proposed regulation are required to ensure protection of whistleblowers and align Swiss legislation with international standards. As an overall assessment, ECS, as an independent not for profit organization, considers the present draft legislation to be insufficient in its protection of whistleblowers in Switzerland.

The proposed legislation should effectively and credibly protect whistleblowers from retaliation, including termination, any disadvantage or discrimination at the workplace when they make a disclosure to the public authorities that is in the public interest and with a reasonable belief that the reported information is true[19]. Good faith reports should be the statutory assumption, unless the contrary can be proven by the employer[20]. Current Swiss labor laws allow the employer to dismiss employees without any major limitations, making it straightforward and even legitimate to lay-off a whistleblower subsequent to her/his reporting in full compliance with the law.

Redress must be available in the event of any retaliatory measures being taken against a whistleblower who makes a report based on a reasonable suspicion. The compensation, if any, for unfair dismissal and other forms of retaliation does not reflect the significant personal risks and negative consequences that whistleblowers (and their families) typically face. Furthermore, the proposed legislation does not include the right of reinstatement in the case of unfair dismissal. As a consequence, whistleblowers in Switzerland remain unprotected, even under the new law, while those who retaliate against whistleblowers remain free from any sanctions.

19 Transparency International 2013: "International Principles for Whistleblower Legislation", Principle 6, p. 5

20 United Nations 2003: "Convention against Corruption", Article 33, p. 26