PROTECTION FOR WHISTLEBLOWERS

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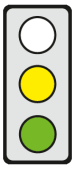
Centrum für Europäische Politik

KEY ISSUES

Objective of the Directive: The implementation of EU law is to be improved by the introduction of minimum standards for protecting whistleblowers against retaliation for reporting on breaches of specific EU law.

Affected parties: In particular, companies, authorities and their employees



Pro: (1) Restricting protection to whistleblowers who obtain information "in the context of their work-related activities" is appropriate.

(2) The fact that whistleblowers must use the internal reporting channel first, in order to be protected, enables breaches to be quickly addressed without any loss of image and may prevent damage to image caused by false reporting.

Contra: (1) Restricting the Directive to specific breaches will deter whistleblowers if they are unable to tell whether a report falls under the protection of the Directive.

(2) The Directive should include legally certain criteria for determining when the whistleblower has "reasonable" grounds for believing there has been a breach and when a report is abusive.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2018) 218 of 23 April 2018 for a **Directive** of the European Parliament and of the Council **on the protection of persons reporting on breaches of Union law**

Brief Summary

Note: Unless otherwise indicated, references to articles relate to Proposal COM(2018) 218.

- **Context and objectives**
  - It is in the public interest that breaches of EU law are exposed. People who could report breaches in their working environment are often deterred by fear of retaliatory measures – such as dismissal, threats, false performance assessments – [Explanatory Memorandum, p. 2]. EU-wide minimum standards are therefore to protect whistleblowers from acts of retaliation.
  - A whistleblower within the meaning of the Directive is someone who [Art. 3, Recitals 1 and 25]
    - in the context of their work-related activities has access to information about breaches of EU law and
    - reports or discloses these breaches in the public interest.
  - This includes, in particular, [Art. 2, Recitals 26 to 28]
    - employees, shareholders, volunteers, trainees and job applicants as well as
    - contractors and suppliers that are "economically dependent" on a company or an administration.
  - Companies and administrations are to create "reporting channels", for reporting breaches of EU law, and protect whistleblowers from acts of retaliation.

- **Area of application**
  - The Directive must be applied by [Art. 4 (3) and (6), Recitals 38 and 39]
    - companies that charge VAT and
      - have 50 or more employees or
      - achieve an annual turnover of more than € 10 million or
      - operate in the financial services sector or
      - are "vulnerable" to money laundering or terrorist financing, as well as
    - legal entities in the public sector (hereinafter "administrations"), in particular
      - national, state and regional administrations and
      - municipalities with more than 10 000 inhabitants.
  - The Directive applies to reports of breaches against specific EU laws that are in the public interest [Art. 1 (1), Annex 1, Recital 5]. These relate to the following areas:
    - consumer and data protection, product safety,
    - public health and environmental protection, traffic safety,
    - nuclear safety,
    - public procurement, financial services, money laundering and terrorist financing,
    - food and feed safety, animal health and welfare,
    - EU competition and state aid law, unfair competition of Member States as concerns corporate tax and

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- protection of the financial interests of the EU, e.g., fraud and corruption in the context of EU revenues and expenditures.

– Breaches within the meaning of the Directive are [Art. 1 (1) in conjunction with Art. 3 No. 1]:
  - actual or potential breaches of EU law and
  - abuse of law, i.e. activities that are contrary to the aims of the relevant EU legislation – e.g. where a company fakes a transaction in order to gain a tax exemption.

► **Internal reporting channel**

– Companies and administrations must designate a person or an office (hereinafter „internal reporting channel") that is responsible for receiving and "following up on" reports [Art. 4, Art. 5 (1) (b) and (c), Recital 45].
– The internal reporting channel must be set up so that [Art. 5]
  - the whistleblower receives feedback about the follow-up measures that are planned or have been taken, within max. three months (hereinafter "feedback deadline") [Art. 5 (1) (d)],
  - the identity of the whistleblower remains confidential [Art. 5 (1) (a)] and
  - reports can be made both personally or in writing and/or by telephone [Art. 5 (2)].
– Where an employee wishes to report a breach by his company or administration, he is obliged to use the internal reporting channel first before approaching an external authority or going public [Art. 4 (2) in conjunction with Art. 13 (2) (c)].

► **External reporting channel**

– Member States must designate an authority (hereinafter "external reporting channel") that is responsible for receiving reports from external third parties and "following up on" the reports [Art. 6 (1) and (3)].
– The requirements for internal reporting channels apply mutatis mutandis [Art. 7]. In addition, the following applies:
  - The feedback deadline may be six months in "in duly justified cases" [Art. 9 (1) (b)].
  - Whistleblowers must be informed when their identity or that of e.g. witnesses is – for legal reasons, like the accused party's right of defence – disclosed [Art. 9 (2)].

► **Measures to protect whistleblowers**

– Member States must protect whistleblowers in particular by
  - ensuring that whistleblowers
    - only have to show reasonable grounds in court for believing that the detriment was in retaliation, so that it is for the accused company or administration to prove that the detriment was based on other grounds [Art. 15 (5)],
    - do not incur any liability for breaching a confidentiality obligation [Art. 15 (4)],
  - have effective – e.g. including provisional – remedies against retaliation [Art. 15 (6)],
  - making it a criminal offence to disclose the whistleblower's identity [Art. 17 (1) (d)] and
  - prohibiting retaliation and imposing criminal penalties upon such actions [Art. 14].

► **Conditions for the protection of whistleblowers**

– Whistleblowers will only be protected where they have at least "reasonable" grounds to believe that [Art. 13 (1), Recitals 30 and 60]
  - the information reported was true at the time of reporting,
  - the report falls within the scope of the Directive.
– Where, contrary to their basic obligation to use the internal channel first, employees use an external channel, protection is only granted where [Art. 13 (2), Recital 52]
  - internal reporting channels were not available or the whistleblower was not aware of them,
  - after using the internal reporting channel, no appropriate action was taken within the feedback deadline,
  - use of the internal reporting channel could jeopardise the effectiveness of investigative actions by the authorities, e.g. because evidence could be destroyed, or
  - there is an imminent and manifest danger to life, safety or the environment.
– Where the whistleblower makes a breach public, e.g. via the media, protection only applies where [Art. 13 (4)]
  - he previously used an internal and/or external reporting channel, but no appropriate action was taken within the feedback deadline [Art. 13 (4) (a)],
  - he has valid reasons to believe that the other channels do not work e.g. due to collusion between the perpetrator of the breach and the competent authority [Art. 13 (4) (b)] or
  - in cases of imminent and manifest danger to public interest [Art. 13 (4) (b)].

► **Measures to protect concerned persons**

– Member States must protect those affected or accused by reports, in particular by ensuring that
  - their identity remains confidential during official investigations [Art. 16 (2)],
  - dissuasive penalties and compensation apply in the event of abusive reports [Art. 17 (2)],
  - they have the right to a fair trial and to a defence [Art. 16 (1)].

Main Changes to the Status Quo

- Until now, there have been no EU-wide minimum standards for protecting whistleblowers.

Statement on Subsidiarity by the Commission

The enforcement of EU law based on information from whistleblowers cannot be adequately achieved where national protection of whistleblowers is "fragmented". In addition, potential cross-border risks and distortions of the internal market arising from breaches of EU law are better dealt with by way of minimum harmonisation.

Policy Context

The Commission follows a Recommendation of the Council of Europe on this subject [Recommendation CM/Rec(2014)7]. Art. 10 of the European Convention on Human Rights (ECHR) and its interpretation by the European Court of Human Rights [in particular ECHR, Judgement of 27 July 2011 – Application No. 28274/08, Heinisch v. Germany] must be taken into account by the Member States and the EU [Art. 52 (3) Charter of Fundamental Rights of the EU (CFREU)].

Legislative Procedure

23 April 2018	Adoption by the Commission
20 November 2018	Adoption by the European Parliament
Open	Adoption by the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: Virginie Rozière (S&D Group)
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 16, 33, 43, 50, 53, 91, 100, 103, 109, 114, 168, 169 TFEU and others
Form of legislative competence:	Exclusive and shared competence [Art. 3, 4 (2) TFEU]
Procedure:	Art. 289, 294 TFEU (consultation and ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Preventing breaches of EU law is necessary to uphold the rule of law, exposing such breaches is therefore essential. Since potential whistleblowers often do not report breaches for fear of retaliation, protecting them is appropriate. EU-wide minimum standards on protection for whistleblowers may also contribute to creating a level playing-field in the EU. The measures proposed by the Commission will, however, give rise to significant costs for companies and administrations which may result in higher prices and taxes.

Restricting protection to whistleblowers who obtain information "in the context of their work-related activities" – in particular employees and suppliers but not consumers – **is appropriate because only they can be** economically dependent on companies or administrations and thus **affected by retaliatory acts.** In addition, only those people are subject to the risk that the disclosure of information could be in breach of contractual or statutory confidentiality obligations.

Restricting the Directive to breaches in specific areas will deter potential **whistleblowers if,** in cases of doubt, **they are unable to tell whether a report falls under the protection of the Directive.**

Those who are under a professional duty of confidentiality – such as accountants, occupational psychologists, doctors and lawyers – are not excluded from the scope of the Directive. The duty of confidentiality of such professionals is thereby lifted.

The three-month feedback deadline for companies and administrations and, where applicable, six months for authorities, is too short because internal and external investigations often take longer. The short deadline is particularly onerous because, where the deadline is not complied with, whistleblowers can inform the authorities or the public. In addition, there is a risk that authorities will jeopardise their own investigations if they have to inform whistleblowers about planned measures such as inspections.

The fact that whistleblowers are generally **only protected if they use the internal reporting channel first,** provides an incentive to try and eliminate the breach internally. This **allows the breach to be eliminated quickly without any loss of public image and may prevent damage to** the **image** of companies and administrations **due to false reporting.** The latter also justifies the basic duty for whistleblowers to use an external reporting channel first before going public.

The fact that, in court, companies and administrations must prove that any detriment to the whistleblower was not in retaliation but arose due to other reasons, on the one hand, provides highly effective protection for whistleblowers. On the other hand, it may mean that employees who are threatened by compulsory redundancy or whose contract is expiring, only make an accusation in order to ensure their continued employment. This risk of abuse is increased by the fact that whistleblowers are protected simply where they have reason to believe that an unlawful practice exists. It is likely to be difficult for companies and administrations to disprove this subjective perception.

Legal Assessment

Legal Competence

The EU does not in fact have any directly relevant competence regarding the protection of whistleblowers. On the contrary, Member States – i.e. not the EU – are supposed to take all "necessary" measures to implement and thus enforce EU law [Art. 291 (1) TFEU]**.** Nevertheless, **the EU does have the competence to bring in this legislation because it can supplement** individual concrete **EU rules by way of provisions intended to guarantee their enforcement** [cf. CJEU, Judgement of 9 March 2010, Commission v. Germany, C-518/07, ECLI:EU:C:2010:125, para. 30, 50; CJEU, Judgement of 13 September 2005, Commission v. Council, C-176/03, ECLI:EU:C:2005:542, para. 48]. Protection for whistleblowers can also be based thereon.

Subsidiarity

The principles of the European Court of Human Rights on the protection of whistleblowers already have to be taken into account by Member States. However, these principles are very vague and not every Member State provides for special procedures to protect whistleblowers. Standard EU provisions for whistleblowers will therefore improve legal certainty.

Proportionality with Respect to Member States

The proposal for a Directive is restricted to legislative areas in which breaches are a particular threat to the public interest and is not generally applicable. It allows Member States a broad scope for discretion, e.g. in setting up and designing internal and external reporting channels. It is appropriate that these reporting channels have to respond within a specific time limit because the whistleblower is then better able to decide whether further steps are required.

Compatibility with EU Law in other respects

The Directive fails to give sufficient consideration to the basic rights of those who are accused in reports by whistleblowers. For the sake of proportionality, these rights – such as the protection of private life (Art. 7 CFR), protection of personal data (Art. 8 CFR) and freedom to conduct a business (Art. 16 CFR) – must be weighed up against the protection of whistleblowers in the proposal for a Directive itself. To guarantee these rights, therefore, and taking account of the case law of the ECHR, **the Directive should include legally certain** and objective **criteria determining when the whistleblower has "reasonable" grounds for believing there has been a breach, when there has been no "appropriate" action in response to a report and when a report is "abusive".** The anonymity of accused persons, including where information is published in the media, must be respected accordingly.

Impact on German Law

Companies and administrations must set up internal reporting channels. The employee's duty of loyalty to his employer [Sections 241 (2) and 242 German Civil Code (BGB)] and the ban on victimisation [Section 612a BGB] will be clarified. The confidentiality requirements for civil servants [Section 37 (2) Civil Servant Status Act (BStG) and Section 67 (2) Federal Civil Servants Act (BBG)] must be amended.

Conclusion

Restricting protection to whistleblowers who obtain information "in the context of their work-related activities" is appropriate because only they can be affected by retaliation. Restricting the Directive to breaches in specific areas will, however, deter whistleblowers if they are unable to tell whether a report falls under the protection of the Directive. The fact that whistleblowers must use the internal reporting channel first, in order to be protected, enables breaches to be addressed quickly without any loss of image and may prevent damage to image caused by false reporting. The EU does have the competence to bring in this legislation because it can supplement EU rules by way of provisions intended to guarantee their enforcement. The Directive should include legally certain criteria for determining when the whistleblower has "reasonable" grounds for believing there has been a breach, when there has been no "appropriate" action in response to a report and when a report is abusive.