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News | 29.01.2019

Whistleblower protection around the corner as EU governments agree on their position

New Whistleblower Directive

The European Union is on the verge of enacting new legislation that would change the lives of people who reveal the truth about illegalities, corrupt practices and other dodgy dealings - otherwise known as “whistleblowers”. The first of its kind, the new whistleblower Directive would oblige all 27* EU governments to introduce minimum standards of protection for truth-tellers.

These protections would include, for example, penalties for people that retaliate against whistleblowers or try to shut them up; an obligation for public and private bodies to set up channels for receiving reports and to keep the identity of the whistleblower confidential; and legal shields for whistleblowers so that, if for example they breach a confidentiality agreement, they would not be held liable for it.

Now that the European governments have agreed on their position in the Council, the trilogue negotiations between the Council, Commission and Parliament can begin - and the aim is to conclude the negotiations by mid-March so that the whole Directive can be approved before the European Parliament elections in May 2019. The race is on - and it’s looking good!

That said, EU governments were not as ambitious as either the European Parliament or the Commission in their positioning on the future whistleblower protection directive. Here is our analysis of the Council’s position. Our top priority is to correct the restrictions on the possibility for whistleblowers to report directly to regulators or competent authorities, but we also want to make sure that journalists are protected and that whistleblowers would be able to report on violations of workers’ rights.

The first trilogue will take place today, so watch this space for more!

Analysis of the Council’s position on whistleblowers, compared to the Commission and Parliament

Reduced Material Scope

The Commission's proposal	The Parliament position	The Council position
Financial interests of the Union, public procurement, financial services, prevention of money laundering and terrorist financing, product safety, transport safety, protection of the environment, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network information systems, undertakings and state aid, corporate tax breaches.	Adding the following to the Commission's Proposal: Workers' health and safety, working conditions, worker's rights to information and consultation and also the right to equality between men and women in the workplace (Articles 153(1), (a), (b), and (e) and 157(3).	Reduces the scope of the Commission's proposal by removing: Article 33 on customs cooperation, Article 62 on workers' qualifications, Article 103 and Article 109 on undertakings and state aid, although they are still mentioned under the internal market legal basis (114), Article 207 on common commercial policy. Regarding the Parliament's addition on working conditions (153), the Council mentions that consideration could be given to adding it to the scope during the next revision of the Directive (in around 6 years!)

Expanded Personal Scope

The Commission's proposal	The Parliament position	The Council position
Workers, self-employed, shareholders, persons belong to the management body, volunteers, unpaid trainees, contractors, subcontractors and suppliers. Also extends to those uncovering breaches of the law during a recruitment process.	The Parliament added the following to the Commission's Proposal: facilitators, journalists or intermediaries, civil servants, paid trainees, service providers, ex-workers. The Parliament also added the need to act "in good faith" in order to be considered a whistleblower.	Similarly to the European Parliament, the Council adds: - Civil servants, persons belonging to the administrative or supervisory body, paid trainees, and ex-workers. - On the other hand, the Council also restricts the definition of "reporting person" to specifically exclude legal entities.

Rules on how Whistleblowers can do their Reporting - turning to regulators

The Commission's proposal	The Parliament position	The Council position
Whistleblowers are obliged to report internally or otherwise they will not be protected. They can only report to regulators and competent authorities if: - they first reported internally but no appropriate action was taken (within 3 months) - internal reporting channels were not available - they "could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report" - they had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities; - they were entitled to report to a competent authority under a different law	The Parliament allows a whistleblower to choose whether they report internally or externally to regulators. Conditions are placed only when it comes to public reporting (see below).	Similar to the European Commission, the Council conserve the strict three-tiered system; with two changes that actually make it even stricter: - Removal of the exception regarding the subject-matter of the report - Addition to one of the Commission's exceptions that allow for reporting to regulators where they have "reasonable grounds to believe that **there is a high risk of retaliation or a low prospect of the breach being effectively addressed through the use of internal channels**, including because of the risk that the effectiveness of investigative actions by the authorities could be jeopardised;"

Rules on how Whistleblowers can do their Reporting - turning to the public

The Commission's proposal	The Parliament position	The Council position
Whistleblowers are obliged to report internally or otherwise they will not be protected. They can only report to regulators and competent authorities if they fulfil one of the exceptions above, and they can only be protected for turning to the public if:	The Parliament affords protection to whistleblowers who report to the public by providing a non-exhaustive list of examples including: - imminent or manifest danger for or harm to the public interest, - the particular circumstances of	Similar to the European Commission, the Council conserve the strict three-tiered system, with slight modifications for turning to the public, namely: - they had reasonable grounds to believe that there is a low prospect of the breach being effectively addressed - or that there is a high risk of

- they first reported internally and/or externally and got no reasonable response (within 3-6 months) - they "could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger for the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage."	the case, such as cases where reporting persons have reasonable grounds to believe that there is collusion between the perpetrator of the breach and the competent authority, or that there is direct or indirect participation in the alleged misconduct on the part of the relevant external authorities, or that evidence may be concealed or destroyed, or where there is a situation of urgency or a risk of irreversible damage.	retaliation or that evidence may be concealed or destroyed because an authority is in collusion with the perpetrator of the breach or involved in the breach. However, the Council also takes a stricter stance against whistleblowers: - They removed the Commission's more flexible wording about the "particular circumstances of the case" that would warrant protection for public reporting. - The Council refuses to protect whistleblowers who alert the public after their cases were closed by the competent authorities for being "minor". - The Council adds that whistleblowers threatening "essential national security interests" will not be protected.

Obligations to establish reporting channels

The Commission's proposal	**The Parliament position**	**The Council position**
Reporting Channels should be set up by: **Private sector** - All private companies with more than 50 employees or with a turnover of more than €10 million Private legal entities of any size working in financial services or sectors vulnerable to money laundering or terrorist financing. Member States could also do a risk-assessment to oblige other small enterprises to establish channels.	**Private sector** - The Parliament took a more lax position than the commission in that it included an exception so that Member States can exclude companies with less than 250 employees or with a €50 million annual turnover from the obligation to establish reporting channels. The Parliament added to the Commission's risk-assessment a focus on environmental or public health-related risks which could lead to also small legal entities	**Private sector** - The Council simplified the text to oblige all companies with more than 50 employees to establish reporting channels, although Member States can give companies with less than 250 employees 2 extra years to set up channels. The Commission's risk assessment for smaller companies remains unchanged. **Public sector** - the Council obliges all the branches of State power at all territorial levels to establish channels. It then allows for an

Public sector - state and regional administration, municipalities with more than 10,000 inhabitants, other entities governed by public law.	having to set up channels. **Public sector** - the Parliament made no changes to the Commission's original proposal.	exception to be made for municipalities with less than 10,000 inhabitants or with less than 50 employees. It adds the possibility of municipal authorities to operate the reporting channels jointly. This specifically includes State-owned or controlled entities.

Anonymous Reporting

The Commission's proposal	**The Parliament position**	**The Council position**
Doesn't mention anonymous reporting specifically.	Anonymous reports must be followed up on if made internally. Competent authorities should follow up on anonymous reports in line with national law. If someone reported anonymously but later their identity is revealed, they will still be protected like any other whistleblower.	The Council leaves it to the Member States to decide whether anonymous reports should be accepted and followed up on. However, like the Parliament's position, if an anonymous whistleblowers' identity is later uncovered, they would still qualify for protection.

Protections for Whistleblowers

The Commission's proposal	**The Parliament position**	**The Council position**
The highlight of the Commission's proposal is in the protections that it affords to whistleblowers, which include: **- Protection from legal liability:** Whistleblowers who speak up will not be in breach of	The Parliament expanded the protections available to whistleblowers by adding that: - **Facilitators** (like colleagues) who aid whistleblowers in the reporting process should also be protected.	The Council took a more restrictive stance, notably as regards: - **Protection from legal liability:** this is only granted if there are "reasonable grounds to believe" that reporting information is "**necessary** for revealing a breach".

any restrictions on freedom of information. In other judicial proceedings, including for defamation, breach of copyright, breach of secrecy or when it comes to compensation requests, "reporting persons shall have the right to rely on having made a report or disclosure in accordance with this Directive to seek dismissal."	- Retaliation includes both "**direct and indirect**" acts or omissions - The possibility to seek dismissal should be extended to **members of civil society organisations** that work with whistleblowers	- The **reverse burden of proof:** According to the Council, the whistleblower needs to "establish" that they made a report and suffered a detriment, which once again puts the burden back on the whistleblower. - **Retaliation** is defined by the Council to include unjustified detriment not only to the reporting person, but also to a third person connected with the whistleblower, "in particular a relative or confidential advisor, or to a legal entity connected with the reporting person".
- Penalties: for those that "hinder or attempt to hinder reporting; take retaliatory measures against reporting persons; bring vexatious proceedings against reporting persons; or breach the duty of maintaining the confidentiality of the identity of reporting persons."	- **Remedial Measures for Whistleblowers** are specifically listed to include: reintegration, restoration of cancelled permits or licenses, compensation for actual or future financial losses and compensation for other damages, including non-economic ones.	
- **Access to interim relief**: In accordance with the national framework, whistleblowers should be able to file for interim relief if, for example, they are being retaliated against at work.	- There needs to be an **independent third party** to support whistleblowers, including giving them advice on the procedures to follow, legal advice or psychological support.	
- **Reverse burden of proof:** Once a whistleblower has to provided "reasonable grounds to believe" that they suffered retaliation for their reporting, then the burden of proof is reversed, so that the one doing the retaliation is the one that needs to show that it was not a consequence of the reporting, but that it was based on justified grounds.		
Assistance for whistleblowers: Member States may provide for financial and legal assistance and support for		

whistleblowers during legal proceedings but this is not obligatory.		

The role of Journalists, NGOs and workers' representatives

The European Parliament specifically decided to ensure protection for journalists working with whistleblowers or intermediaries between the whistleblower and whoever transmits the information.

The Parliament also included the right for whistleblowers to be accompanied by a workers' representative at all stages of their reporting procedure, including in any physical meetings they may have with their hierarchy or with regulators or competent authorities.

We will make sure to defend these important stakeholders throughout the trilogues. Without them, many whistleblowers would never have been able to get their story out or receive support following their disclosures.

Trade Secrets

For those of you that are worried about the relationship between the whistle-blower protection Directive and trade secrets, it would appear that there is a consensus between all three institutions that were a whistleblower who falls under the scope of the EU whistleblower directive reveals a trade secret, they would be protected by the whistleblower directive.

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Contact person



Pam Bartlett Quintanilla

Team leader - Outreach and campaigns

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