

Opinion of the European Economic and Social Committee on ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level’

(COM(2018) 214 final)

and on ‘Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law’

(COM(2018) 218 final)

(2019/C 62/26)

Rapporteur: **Franca SALIS-MADINIER**

Consultation	European Parliament, 28.5.2018 Council of the European Union, 29.5.2018 European Commission, 18.6.2018
Legal basis	Article 43(2) of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	26.9.2018
Adopted at plenary	18.10.2018
Plenary session No	538
Outcome of vote (for/against/abstentions)	158/77/15

1. Conclusions and recommendations

1.1 The EESC considers that whistleblower protection apart from protecting whistleblowers, is an important tool to help companies to better address unlawful and unethical acts.

1.2 The EESC appreciates that some companies have introduced procedures aimed at protecting whistleblowers and that 10 out of 28 Member States have already in place comprehensive frameworks to cover whistleblower protection.

1.3 The EESC considers that the directive’s scope should be assessed on the basis of the evaluation of its implementation, and that it should be broad enough to safeguard the general interest.

1.4 The EESC calls on the Commission to review the legal basis for the directive so as to include workers’ rights under Article 153 of the Treaty on the Functioning of the EU (TFEU).

1.5 Former employees, trade union representatives and legal persons as defined in article 3 are able to report wrongdoing and benefit from the same protection; they must be clearly listed in Article 2 of the directive.

1.6 The Committee recommends (Article 13) a two-stage reporting procedure initially giving the whistleblower access to internal channels or to the competent authorities (whichever is preferred); and subsequently, if necessary, to civil society/the media, in the interests of fairness and legal certainty.

1.7 The EESC recommends that at any stage of the reporting process whistleblowers have access to trade union representatives, who should be empowered to represent them and to provide advice and support.

1.8 The directive should more clearly encourage the negotiation of internal reporting channels with trade union representatives, in the context of the social dialogue, as called for in the 2014 Council of Europe recommendation and the 2017 European Parliament report.

1.9 The Committee recommends that a whistleblower who initially acted anonymously and whose identity is subsequently revealed should benefit from the protection afforded by the directive.

1.10 The EESC recommends that the text of Article 15(5) relating to the *prima facie* burden of proof be amended. It is sufficient that the whistleblower 'provides evidence that he or she made a report'.

1.11 The EESC recommends that, under Article 15(6), compensation should not be referred to national law (variable), and that the directive should provide for full compensation for damages, without any ceiling, on the model of the United Kingdom legislation.

1.12 The EESC calls for the deletion of Article 17(2), which is superfluous (penalties for defamation and false accusation already being provided for in national law).

1.13 The EESC calls on the Commission to include an explicit non-regression clause in Article 19, in order to ensure that implementation of the directive in no way diminishes more favourable rights granted to whistleblowers prior to this directive in the Member States and in those areas to which the directive applies.

1.14 The EESC recommends that the publication of periodic reports by public bodies and the Member States be made mandatory.

1.15 The EESC calls on the Commission to make provision in the directive for awareness-raising campaigns at European and national level, including campaigns aimed at young people, to change the public perception of whistleblowers.

2. Background

2.1 Unlawful activities and abuse of law may occur in any organisation, whether private or public. They may take a variety of forms, such as corruption or fraud, professional misconduct, tax avoidance, or negligence, and if they are not addressed they can cause serious harm to the public interest and well-being of citizens in one or more EU Member States.

2.2 Being able to anticipate, remedy or end a risk situation (death or injury, prosecution, financial loss, reputational risk) is beneficial for businesses, the public and workers. Whistleblowing, which the Commission aims to protect with this directive, is an action carried out in the public interest, which benefits society as a whole.

2.3 People working for an organisation or connected with it through their work are often the first to become aware of wrongdoing. People who report (within the organisation concerned or in communication with an external authority) or bring to light such acts — whistleblowers — can therefore play an important role in putting an end to wrongdoing. However, many people fail to act. According to international studies, the main reasons for remaining silent are: fear of retaliation, believing that speaking out is pointless and not knowing who to turn to. 85 % of respondents to the 2017 public consultation carried out by the Commission believed that workers rarely or very rarely reported threats or harm to the public interest out of fear of legal or financial consequences, but also because of a negative perception of whistleblowers. In some countries, there is still a conflation of whistleblowers with traitors or informers. However, whistleblowing is an act of courage, unlike denunciation, which is an act of cowardice.

2.4 For all these reasons, it is important to ensure effective whistleblower protection. Instruments already exist at international level as well as in different Member States. The Council of Europe, the European Parliament, the Council of the EU, as well as civil society organisations and trade unions have already called for EU-wide legislation on the protection of whistleblowers acting in the public interest. Some European companies have introduced procedures aimed at protecting whistleblowers. The Commission proposal is based on the assumption that currently whistleblower protection in the EU is inadequate, fragmented between Member States and uneven across sectors.

2.5 The Commission is therefore proposing a directive introducing whistleblower protection in targeted areas, complemented by a communication setting out a policy framework at EU level, including measures to support national authorities.

2.6 The proposal sets out common minimum standards offering protection against retaliation to whistleblowers reporting breaches of Union law in the areas of: (i) public procurement; (ii) financial services; (iii) money laundering and terrorist financing; (iv) product safety; (v) transport safety; (vi) environmental protection; (vii) nuclear safety; (viii) food and feed safety; (ix) animal health and welfare; (x) public health; (xi) consumer protection; (xii) protection of privacy and personal data and security of network and information systems.

2.7 The proposal also covers infringements of EU competition rules, violations and abuses of the rules on corporate taxation and harm to the EU's financial interests.

2.8 In accordance with the proposal, Member States will have to ensure that companies with 50 or more employees (or an annual business turnover of EUR 10 million or more) and public entities put in place internal reporting channels and procedures for receiving and following-up on reports. They will also have to ensure that competent authorities have in place external reporting channels. These channels must guarantee the confidentiality of identities and information. Small and micro-companies are exempted from the obligation to have an internal reporting channel (except in the area of financial services or in sensitive sectors).

2.9 The proposal prohibits retaliation, either direct or indirect, against whistleblowers, and sets out the measures to be taken by Member States to ensure their protection.

2.10 Finally, it provides for effective, proportionate and dissuasive sanctions which are necessary to discourage: (i) the hindering of reporting, retaliatory actions, vexatious proceedings against reporting persons and breaches of the duty of maintaining the confidentiality of their identity, and (ii) malicious and abusive whistleblowing.

3. General comments

3.1 So far, only 10 out of 28 EU Member States already have comprehensive legislation on the protection of whistleblowers. In Europe, fragmentation and loopholes in this protection are damaging to the public interest and they might hinder reporting. A whistleblower reporting cross-border offences or those committed in multinationals does not benefit from the same protection, depending on the applicable national legislation and case law.

3.2 The EESC welcomes the aim of promoting voluntary responsible whistleblowing, in the defence of the public interest.

3.3 In 2016⁽¹⁾, the Commission noted that applying EU law remained a challenge and called for a 'stronger focus on enforcement in order to serve the general interest'. The objective is proactive and non-reactive legislation which is a 'systemic part of enforcement of Union law'.

3.4 The EESC notes that the proposal for a directive is consistent with previous European initiatives (Council of Europe, Parliament, Commission) in terms of standards and objectives, e.g. Council of Europe Recommendation CM/Rec(2014)7 of 30 April 2014, and to a great extent complies with international standards. The proposal is complementary to existing EU sectoral arrangements (financial services, transport, environment) and with EU policies (anti-corruption, sustainable finance, fairer taxation).

3.5 In line with the principle of subsidiarity, the material scope has been limited to infringements of EU law (unlawful activities and abuse of law) and specific areas where:

1. there is a need to strengthen enforcement of the law;
2. the virtual absence of reporting of breaches is a key factor;
3. breaches may result in serious harm to the public interest.

3.6 However, the EESC believes that the relationship between EU law and national law, which could lead to disputes and difficulties in applying the principles enshrined in the directive, will need to be clarified.

3.7 The EESC underlines the positive aspect of the directive, which encourages states to put in place comprehensive, broad and consistent national laws based on the principles set out in the Council of Europe recommendation and the case law of the European Court of Human Rights (ECHR). At the same time, it would be important to ensure the smooth functioning of well-established frameworks in Member States, as far as they respect the principles of the directive.

3.8 Similarly, the reference to the adoption of more favourable provisions in the Member States is positive. However, the EESC considers it essential that a non-regression clause be added, as the directive must not abrogate or undermine more favourable national provisions.

⁽¹⁾ OJ C 18, 19.1.2017, p. 10.

3.9 Lastly, the EESC recommends that the directive should be assessed in the light of evidence that may become available in the future and on the basis of the evaluation of the implementation of the directive. It endorses the reference to a possible future extension of the material scope of the directive, in the light of such an assessment.

3.10 The EESC reiterates the importance of the implementation of this directive in the Member States with a view to the more effective operation of democracy in order to tackle present and future challenges, and the strengthening of the rule of law, freedoms and public integrity, since the freedom to tell the truth (or 'parrhesia') has been considered an essential element of democracy.

3.11 The EESC supports the creation of a European Alert Agency or a European Ombudsman, which would be responsible for coordinating national alert authorities and monitoring alert lines.

4. Specific comments

4.1 The EESC considers it unacceptable that it was not possible to consult the social partners on the proposal for the directive, as provided for in Article 154 TFEU. The Commission must not repeat this practice.

4.2 The Committee recommends that the social domain also be covered by the directive by adding Article 153 TFEU to the 16 legal citations of the directive. The EESC points out that in Article 1 (material scope), the protection of workers is omitted from the list of kinds of abuse of law which a whistleblower may report. Nor does the proposal include discrimination, harassment or violence in the workplace etc. The Committee therefore calls for these subjects to be included in the directive.

5. Personal scope

5.1 The EESC notes the very broad range of persons to whom the directive applies: any public or private-sector worker who has acquired information in a work-related context. The concept of worker is broad: any employed worker within the meaning of Article 45 TFEU or self-employed worker within the meaning of Article 49 TFEU, but also volunteers, unpaid trainees, consultants, suppliers, subcontractors, shareholders and persons belonging to the management body. This directive should contribute to reducing the risk of reputational damage that companies might face.

5.2 Former employees, trade union representatives and legal persons as defined in article 3 are able to report wrongdoing and benefit from the same protection; they must be clearly listed in Article 2 of the directive.

5.3 The EESC notes that EU officials should enjoy equal protection to employees in the Member States.

6. Reporting procedures

6.1 The EESC recommends that workers and their trade union representatives be actively involved in the design and implementation of internal reporting channels.

6.2 The EESC considers that the principle of graduated reporting (internal, competent authorities, public) is in line with the principle of responsible whistleblowing. However, the EESC believes that a whistleblower must have a free choice between access to internal channels and to the competent authorities, and therefore recommends a two- rather than three-stage procedure, in the interests of fairness and legal certainty. On the one hand, international studies, even in countries that have no requirement to use internal reporting channels (United Kingdom, Ireland), show that employees resort first to internal procedures out of loyalty; there is therefore no danger of the internal channels being bypassed on a large scale. Furthermore, where use of internal channels is required, it is difficult to provide for all the necessary exceptions. On the other hand, national laws provide for direct involvement of the authorities (e.g. for criminal offences). Finally, this obligation only applies to employees, other workers being exempt. This leads to a breach of the principle of equality and to legal uncertainty.

6.3 The EESC considers that, in the workplace, the whistleblower must be able to contact and be represented by the trade unions at any stage of the whistleblowing procedure. Trade union representatives, being close to workers, can play a key role in advice and protection.

6.4 The Committee recommends that the follow-up guarantees applicable to external reporting should also apply to internal reporting: acknowledgement of receipt of the report and feedback on the action taken.

6.5 Studies show that the most vulnerable whistleblowers, or those in possession of information that could endanger their lives or those of their families, are forced to remain anonymous. If the identity of a whistleblower who has made an anonymous report is revealed, the EESC considers that he or she should benefit from the protection afforded by the directive. Finally, the fact that a report is made anonymously must not be an excuse for not acting on it.

7. Protection of whistleblowers: burden of proof and compensation

7.1 According to the proposal for a directive, a whistleblower who is subject to retaliation must provide *prima facie* evidence that the retaliation is the consequence of the report (double test) in order to benefit from the burden of proof. However, in accordance with the principle of reversal of the burden of proof (see the directive on discrimination), it is up to the employer to prove that the retaliatory measures are not the consequence of the whistleblower's report.

7.2 The directive must provide for compensatory measures in the event of retaliation (Article 15(6)) and not refer the matter to the national legal framework which, as we have seen, varies from country to country or may even be non-existent. In order to protect whistleblowers effectively from any kind of direct or indirect penalty, the directive must provide for full compensation for damages, without any ceiling (including loss of pension contributions in the event of dismissal), on the model of the 1998 Public Interest Disclosure Act.

8. Penalties

8.1 The EESC considers that the aim of the directive is to facilitate whistleblowing and to protect whistleblowers. In this connection, Article 17(2) should be dropped, as it creates confusion between responsible whistleblowing and defamation and false accusation, which are offences already covered by national law.

9. More favourable clause and non-regression clause

9.1 The EESC welcomes the option provided by the directive for Member States to adopt legislation that is more favourable to whistleblowers' rights. However, an explicit non-regression clause must be added in order to preserve more favourable legislation and provisions already existing in some states.

10. Reporting, evaluation and review

10.1 A review of the implementation of the directive should be made mandatory, through annual reports (using anonymised data and statistics) published by public entities and the Member States to feed into the Commission report scheduled for 2027 and to keep the public informed.

Brussels, 18 October 2018.

The President
of the European Economic and Social Committee
Luca JAHIER

ANNEX

The following amendments, which received at least a quarter of the votes cast, were rejected during the discussion:

Point 3.11

Add a new point:

3.11. The EESC recommends addressing more fully the issue of preventing downside risks for public and private enterprises concerning undue use or unlawful disclosure of sensitive information. The reputation of enterprises and organisations should be sufficiently safeguarded in the event of malicious conduct.

Reason

The reputation of any organisation is crucial for all stakeholders, not at least for the employees.

Outcome of the vote

In favour 84

Against 130

Abstentions 15

Point 4.1

Delete:

~~4.1 The EESC considers it unacceptable that it was not possible to consult the social partners on the proposal for the directive, as provided for in Article 154 TFEU. The Commission must not repeat this practice.~~

Reason

Since the proposal is not based on Article 153 TFEU the consultation of social partners is not required.

Outcome of the vote

In favour 79

Against 133

Abstentions 18

Point 4.2

Amend as follows:

4.2. The Committee recognises that the legal basis for the directive is broad enough to ensure an adequate protection of whistleblowers. However, for the sake of legal certainty, the EESC calls for clarification regarding the legal basis applicable to workers' rights, recommends that the social domain also be covered by the directive by adding Article 153 TFEU to the 16 legal citations of the directive. The EESC points out that in Article 1 (material scope), the protection of workers is omitted from the list of kinds of abuse of law which a whistleblower may report. Nor does the proposal include discrimination, harassment or violence in the workplace etc. The Committee therefore calls for these subjects to be included in the directive.

Reason

Since there are divergent views about the legal basis for the directive the issue needs to be clarified by the Commission as regards the question of workers' rights (Article 153 TFEU).

Outcome of the vote

In favour 82

Against 139

Abstentions 14

Point 6.2

Amend as follows:

~~6.2. The EESC considers that the principle of graduated reporting (internal, competent authorities, public) is in line with the principle of responsible whistleblowing, especially with a view to identifying and stopping infringements quickly and effectively at the source, and thus mitigating internal or external risks. However, the EESC believes that a whistleblower must have a free choice between access to internal channels and to the competent authorities, and therefore recommends a two – rather than three – stage procedure, in the interests of fairness and legal certainty. On the one hand, international studies, even in countries that have no requirement to use internal reporting channels (United Kingdom, Ireland), show that employees resort first to internal procedures out of loyalty; there is therefore no danger of the internal channels being bypassed on a large scale. Furthermore, where use of internal channels is required, it is difficult to provide for all the necessary exceptions. On the other hand, national laws provide for direct involvement of the authorities (e.g. for criminal offences). Finally, this obligation only applies to employees, other workers being exempt. This leads to a breach of the principle of equality and to legal uncertainty.~~

Reason

It is important that the company has the opportunity to first solve the issue internally before the whistleblower goes to the public. The two-stage reporting procedure facilitates identifying and stopping infringements quickly and effectively at the source.

Outcome of the vote

In favour 78

Against 145

Abstentions 11

Point 7.2

Amend as follows:

~~7.2. The directive must provides for compensatory measures in the event of retaliation (Article 15(6)) and not refers the matter to the national legal framework which, as we have seen, varies from country to country or may even be non-existent. In order to effectively protect whistleblowers from any kind of direct or indirect penalty, the implementation of the directive should be carefully monitored and assessed as to the effectiveness of the national frameworks, must provide for full compensation for damages, without any ceiling (including loss of pension contributions in the event of dismissal), on the model of the 1998 Public Interest Disclosure Act.~~

Reason

It is important that the sanction and compensation systems based on national frameworks fulfil the basic objectives of the directive as regards the protection of the whistleblower while respecting the principles of the national legal systems. This is one of the key issues to be monitored regarding the implementation of the directive.

Outcome of the vote

In favour 82
Against 144
Abstentions 10

Point 8.1

Amend as follows:

8.1. *The EESC considers that the aim of the directive is to facilitate whistleblowing and to protect whistleblowers. In this connection, Article 17(2) should be clarified ~~dropped~~, as it might creates confusion between responsible whistleblowing and defamation and false accusation, which are offences already covered by national law.*

Reason

While there is a need to address the consequences for false, misleading and unjustified disclosures by providing effective, proportionate and dissuasive penalties, the scope of these sanctions in Member States should be properly clarified.

Outcome of the vote

In favour 87
Against 147
Abstentions 6

Point 1.4

Amend as follows:

1.4. *The EESC recognises that calls on the Commission to review the legal basis for the directive is broad enough for ensuring an adequate protection of whistleblowers, so as to include workers' rights under Article 153 of the Treaty on the Functioning of the EU (TFEU). However, for the sake of legal certainty, the EESC calls for clarification regarding the legal scope applicable to workers' rights.*

Reason

The articles determined by the EC as a legal basis can fully guarantee an enhancing of the enforcement of Union law by introducing new provisions on whistleblower protection to strengthen the proper functioning of the single market and the correct implementation of Union policies and at the same time to ensure consistent high standards of whistleblower protection in sectorial Union instruments where relevant rules already exist. However, to avoid confusion about the legal basis related to workers' rights some clarification is needed.

Outcome of the vote

In favour 84
Against 133
Abstentions 6

Point 1.4

Introduce new point after current point 1.4:

The EESC is convinced that a legal framework for the protection of whistleblowers should be constructed in such a way as to enable a distinction to be drawn between information that is only suitable to be disclosed within the company and information that is suitable to be disclosed to the authorities or even to the general public. This is particularly important when it comes to trade secrets.

Reason

The proposal should make it clear that whistleblowers must always report information that contains trade secrets internally to the company, because once this information has been made public the harm done to the company is irreversible.

Outcome of the vote

In favour 89

Against 149

Abstentions 7

Point 1.6

Amend as follows:

1.6. *The Committee recommends (Article 13) a two-stage reporting procedure initially giving the whistleblower access to internal channels with a view to identifying and stopping infringements quickly and effectively or to the competent authorities (whichever is preferred); and subsequently, if necessary, to the competent public authorities, and, if appropriate to civil society/the media, in the interests of fairness and legal certainty.*

Reason

It is important that the company has the opportunity to first solve the issue internally before the whistleblower goes to the public. The two-stage reporting procedure facilitates identifying and stopping infringements quickly and effectively at the source.

Outcome of the vote

In favour 89

Against 144

Abstentions 8

Point 1.10

Delete:

~~1.10. The EESC recommends that the text of Article 15(5) relating to the prima facie burden of proof be amended. It is sufficient that the whistleblower provides evidence that he or she made a report.~~

Reason

This recommendation is not based on the text of the draft opinion (7.1). While it could be contested, the principle of reversal of the proof has been neutrally stated in the text.

Outcome of the vote

In favour 93

Against 148

Abstentions 7

Point 1.11

Amend as follows:

1.11. In order to protect whistleblowers effectively from any kind of direct or indirect penalty, the implementation of the directive should be carefully monitored and assessed as to the effectiveness of the national frameworks. The EESC recommends that, under Article 15(6), compensation should not be referred to national law (variable), and that the directive should provide for full compensation for damages, without any ceiling, on the model of the United Kingdom legislation.

Reason

It is important that the sanction and compensation systems based on national frameworks fulfil the basic objectives of the directive as regards the protection of the whistleblower while respecting the principles of the national legal systems. This is one of the key issues to be monitored regarding the implementation of the directive.

Outcome of the vote

In favour 95

Against 143

Abstentions 9

Point 1.12

Amend as follows:

1.12. The EESC calls for clarification ~~the deletion~~ of Article 17(2), as it might create confusion between responsible whistleblowing ~~and which is superfluous (penalties for defamation and false accusations, already being provided for in national law).~~

Reason

See point 8.1.

Outcome of the vote

In favour 96

Against 147

Abstentions 7
