European Commission: Proposed Directive on protection of whistleblowers

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On 23 April 2018, the European Commission published a proposed Directive on the protection of persons reporting on breaches of Union law. The purpose of the Directive is to lay down common minimum standards for the protection of whistleblowers - i.e. persons who report (within the organisation concerned or to an outside authority) or disclose (to the public) information on a wrongdoing obtained within a work-related context.

The Directive's Explanatory Memorandum states that whistleblowers are often discouraged from reporting their concerns for fear of retaliation; the importance of providing effective whistleblower protection for safeguarding the public interest is increasingly acknowledged both at European and international level (the Explanatory Memorandum cites the Council of Europe's Committee of Ministers' Recommendation CM/Rec(2014)7 on the protection of whistleblowers) (see IRIS 2014-7/3). Furthermore, the absence of effective whistleblower protection raises further concerns regarding the negative impact of that absence on freedom of the media. Discussions at the second Annual Colloquium on Fundamental Rights on "Media pluralism and Democracy" highlighted the fact that protecting whistleblowers as sources of information for journalists is essential in order for investigative journalism to be able to fulfil its "watchdog" role (see IRIS 2016-7/5).

The Directive totals 30 pages, divided into five chapters, 23 articles, and 86 recitals. Article 2 of the Directive applies to persons working in the private or public sector who acquired information on "actual or potential unlawful activities or abuse of law" relating to a number of areas, including public health, consumer protection, financial services, corporate taxation, and protection of privacy. "Abuse of law" is defined as acts or omissions falling within the scope of Union law which do not appear to be unlawful in formal terms but defeat the object or the purpose pursued by the applicable rules. The Directive also applies to persons whose work-based relationship is yet to begin in cases where information has been acquired during the recruitment process or other pre-contractual negotiation.

Chapter 2 then sets out rules for internal whistleblower reporting and the following-up of reporting. Member states are required to ensure that legal entities in the private and public sector establish internal channels and procedures for

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reporting and following up on reports regarding actual or potential unlawful activities or abuse of law. Such channels and procedures shall allow for reporting by employees of such entities. Article 5 sets out the procedures for internal reporting and following up on reports. Furthermore, Chapter 3 sets out obligations regarding external reporting and following up on such reports, with member states being required to designate which bodies have authority to receive and handle reports; those bodies must establish independent and autonomous external reporting channels (which should be both secure and ensure confidentiality) for receiving and handling information provided by whistleblowers.

Notably, Chapter 4 of the Directive concerns the protection of whistleblowers. In this regard, Article 13(1) provides that a person shall qualify for protection under the Directive, provided that they had reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of the Directive. Crucially, under Article 13 (4) a person publicly disclosing information regarding breaches falling within the scope of the Directive shall qualify for protection under the Directive where: he or she first reported internally and/or externally, in accordance with Chapters II and III, but no appropriate action was taken in response to the report within a certain timeframe; or he or she could not reasonably have been expected to use internal and/or external reporting channels owing to (i) an imminent or manifest danger to the public interest, or (ii) the particular circumstances of the case; or (iii) the existence of a risk of irreversible damage. Article 14 provides that member states shall take the necessary measures to prohibit any form of retaliation, whether direct or indirect, against whistleblowers who meet the conditions set out in Article 13.

European Commission, 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, 23 April 2018

https://ec.europa.eu/info/sites/info/files/placeholder_8.pdf

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