Background paper 2 for discussion under Agenda Item 7: Proposal for a Directive on the protection of persons reporting on breaches of Union law (‘Whistleblower protection’).

INTRODUCTION

In recent years, whistleblowers have played a key role in revealing serious breaches of the public interest in many occasions: LuxLeaks (2014), Dieselgate (2015), Panama Papers (2015), Paradise Papers (2017) or the Facebook-Cambridge Analytica scandal (2018). As a consequence, whistleblower protection is high on the political agenda.

On 24 April 2018, the European Commission published a new proposal on the protection of persons reporting on breaches of EU law, known as “whistleblowers”.

The proposal defines “Whistleblowers” as individuals reporting or disclosing information to their employers, the competent authorities or the press on violations of EU law which they observe in their work-related activities. Violations of EU law can take various forms but are always detrimental to the public interest (e.g. fraud, corruption, tax evasion, incompliance with public procurement rules, and lack of protection of the environment).

The European Commission has proposed to take action to improve the level of whistleblower protection at EU level. Its proposal comes in the wake of criticism from civil society organisations about the lack of protection granted to whistleblowers. The European Parliament has been calling on the Commission to present a legislative proposal with a view to provide horizontal protection to different forms of whistleblowing in the EU. Recently, the Council also encouraged the Commission to explore such a possibility in the context of taxation.

The European Parliament voted on an internal position on 20 November 2018. The current Austrian Presidency of the EU is aiming at reaching a Council’s internal position by the end of this year. Uncertainty remains as to whether the co-legislators will be able to reach an agreement before the end of the European Parliament’s term in May 2019. If not, adoption of the file would face some delays and depend on the new Parliament.

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1 The notion of work-related activities covers employees but also self-employed people, freelancers, consultants, contractors, suppliers, volunteers, unpaid trainees and job applicants.
2 For example, a violation of EU law can be an act or a failure to act
3 See the EP resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies.
4 See Council conclusions of 11 October 2016 on tax transparency.
THE EUROPEAN COMMISSION’S PROPOSAL

Existing instruments – Since 2014, EU institutions must have internal rules protecting whistleblowers who are EU officials. Besides, whistleblower protection rules have already been introduced in specific EU policy areas like financial services, transport safety and environmental protection. The 2016 Trade Secrets Directive exempts from liability whistleblowers who disclose a trade secret to protect the public interest. The new proposal of the Commission draws on this as well as on the principles developed by the Council of Europe in its “2014 Recommendation on Protection of Whistleblowers” and the case law of the European Court of Human Rights on the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights.

Proposal content – The proposal aims to guarantee a high level of protection for whistleblowers. Minimum standards for whistleblower protection would be established in a horizontal way for a wide range of fields. New obligations are envisioned for (i) all companies with more than 50 employees or with an annual turnover of over €10 million as well as (ii) all state, regional administrations and municipalities with over 10,000 inhabitants. These obligations include the establishment of mechanisms such as fully confidential reporting channels, feedback obligations for companies and authorities, and protective measures for whistleblowers against retaliation or liability. The proposal includes safeguards to discourage malicious or abusive reports and prevent unjustified reputational damage. The Commission envisions a three-tier reporting system, which is composed of: (i) internal reporting channels; (ii) reporting to competent authorities – if internal channels do not work or could not reasonably be expected to work; (iii) public/media reporting – if no appropriate action is taken after reporting through other channels, or in case of imminent danger to the public interest or irreversible damage.

The role of social partners – The Commission stated that social partners will have an essential role to play to ensure whistleblower protection, mentioning that “independent workers' representatives will be vital to promote whistleblowing as a mechanism of good governance. Social dialogue can ensure that effective reporting and protection arrangements are put in place […] Workers and their trade unions should be fully consulted on envisaged internal procedures for facilitating whistleblowing: such procedures can also be negotiated in the framework of collective bargaining agreements. Moreover, unions can act as recipients of whistleblowers' reports or disclosures and have a key function in terms of providing advice and support to (potential) whistleblowers.” The Commission proposal foresees an obligation for Member States to consult social partners if appropriate when it comes to the establishment of internal

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5 Environmental protection, financial services, money laundering and terrorist financing, product safety, transport safety, nuclear safety, food and feed safety, consumer protection, public health, animal health and welfare, privacy, data protection and security of network and information systems, public procurement, EU competition rules, EU finances. Member States are free to apply the rules to additional fields.

reporting channels and procedures. The European Parliament’s rapporteur proposes an obligation for Member States to cooperate with the social partners in that regard.

### RELEVANCE FOR THE EEA EFTA STATES

EEA EFTA States are following the legislative process on the Commission proposal and are in the process of assessing the EEA relevance of the proposal.

The EU Trade Secrets Directive adopted in 2016 is EEA relevant. The EFTA side sent the draft Joint Committee Decision to the EU side in June 2018 and is now waiting for an answer.

### REACTIONS TO THE PROPOSAL

In the European Parliament the rapporteur’s draft report was presented in July 2018 and adopted in November 2018. The compromise adopted by the Parliament aims at expanding the scope of the proposal and of the definitions, as well as strengthening safe reporting mechanisms and protective measures on reporting persons.

In 2017, the European Parliament adopted two resolutions in support of a high level of protection for whistleblowers, respectively on the “role of whistleblowers in the protection of the EU’s financial interests” and on “legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies”.

The European Union’s Committee of the Regions (CoR) has been consulted by the European Commission and the European Parliament on the proposed directive.

During its meeting on 20 September 2018, the CIVEX commission discussed the Proposal, strongly supporting its overall aim to set common minimum standards for protection of whistleblowers. The CIVEX commission says it is in the public interest to ensure that the proposed procedures can contribute to preventing unlawful activities and abuse of Union law and funds across the Union. It is also an important step towards increased transparency, the CIVEX commission says.

However, CoR members noted with concern that the three-layers reporting system, as put forward by the European Commission, risks imposing significant administrative burden on and

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8 See Compromise 42 of the Parliament’s draft report.
9 In order to extend the applicability of an EU act to the EEA EFTA States, an EEA-relevant act is incorporated into the EEA Agreement by means of a Decision by the EEA Joint Committee. This Decision is known as a Joint Committee Decision (JCD).
10 See document C8-0159/2018.
11 The CoR Commission for Citizenship, Governance, Institutional Affairs and External Relations (CIVEX) considered the proposal and noted its significant importance to the local and regional level. However, given the short expected adoption timeframe of the proposal by the co-legislative bodies, the CIVEX commission decided by written procedure, not to issue an opinion, but to reply in the form of letter by the president of CoR, Karl-Heinz Lambertz.
being very costly both for public sector entities, and smaller municipalities in particular, as well as for the private sector. In order to reduce these costs, more flexibility on the reporting mechanisms to be put in place would be recommended. As regards the local level, allowing a number of smaller municipalities to join forces and resources to provide one common reporting system could be an option to increase the flexibility and reduce administrative and financial burdens.

In addition, concern was expressed regarding an apparent lack of attention to the potential misuse of the reporting system by presenting false cases.

The CoR CIVEX Commission highlighted also that the involvement of social partners in the implementation of the directive will be of highest importance, as it is them who are best placed to find the most efficient solutions via the social dialogue. Despite this being declared in the explanatory memorandum of the Proposal, the latter, as currently drafted, does not seem to provide enough space and flexibility for their active involvement.

**RELEVANCE FOR LOCAL AND REGIONAL AUTHORITIES OF THE EFTA STATES**

**Iceland**

There is currently no comprehensive legislation protecting whistle-blowers in Iceland. The matter is touched upon in few legislative acts. This includes the protection of sources in the Icelandic Media Law from 2011, the 2011 legislative act on investigation commissions established by the Parliament, and the 2000 legislative act on the protection of privacy as regards the processing of personal data. A bill on the protection of whistleblowers was submitted in the Icelandic Parliament in 2015, but it was not passed. The bill was mainly criticised for lacking clarity on how it would be linked to other relevant legislative acts, including the ones mentioned above. As of now, no new bill on whistleblowers has been submitted in the Icelandic Parliament. In addition to this, the legislative act on the rights and duties of civil servants includes an article on the protection of employees who inform about unlawful or unethical practices in their workplace. The act does not apply to municipal employees and there is no similar clause in the collective bargaining agreements the Association of Local Authorities concludes on behalf of the municipalities.

**Switzerland**

Apart from some limited exceptions, there are currently no laws protecting whistleblowers in Switzerland. In employment law, employees are generally required to report to their employer internally before reporting any grievances to the authorities and may inform the public of misconduct only as a last resort. Further, the Swiss courts regularly treat disclosing confidential information to the public as a criminal offence, such as breaching manufacturing or business secrecy or banking secrecy.

After a previous bill was sent back by Parliament in 2015 for being too complex, the Federal government - under pressure from transparency NGOs and the OECD - recently submitted a
new proposal giving whistleblowers a better protection. The draft provides a multi-level model: first those involved are to go to their employers, then to the relevant authorities such as the police. After that, the whistleblower should be allowed to go public if officials fail to act.

According to the government, the proposal aims to give clarity, as employees currently don’t know if they can denounce and to whom. It should also help employers on how to react. But, contrary to the EU’s project, the new bill does not bolster the protection for employees whose jobs are terminated after they have blown the whistle. This has been criticised by advocates of transparency. While welcoming the general tenor of the proposal, Transparency International Switzerland said it would remain a “dead letter” until it was accompanied by more protection from being fired (the only obligation for the company today is to pay the employee a compensation equivalent to six months of salary). It is currently unclear when the new law will come into force.

**Norway**

Since 2007 there has been legislation\(^{12}\) regulating the right to notify censurable conditions at the employer’s undertaking as well as protection against retaliation. The provisions were revised and updated in 2017 in order to impose procedures/routines for internal notification as well as a duty of confidentiality for notifications to public authorities.

The Norwegian legislation is included in the Working Environment Act thus notification on work related issues as well as discrimination and harassment at work are covered. This comes in addition to censurable conditions and breach of law as fraud, corruption etc. Whereas the proposed Directive by the Commission does not cover whistleblower protection in a work-related context, as this runs in parallel to the protection that workers and workers’ representatives enjoy under existing EU employment legislation.

The Directive however has a broader personal scope than the Norwegian legislation where only employees and workers hired from temporary-work agencies are entitled to notify. The proposed Directive includes in addition e.g. self-employed, shareholders, board members and employees at sub-contractors.

In order to prevent misuse of the notification procedure the employee shall according to the Norwegian Working Environment Act, proceed responsibly when making a notification.

Since legislation already is in place in Norway as regards internal procedures as well as procedures and obligation for public authorities receiving notification, the proposed Directive will, if implemented into Norwegian law, probably not have a heavy administrative and economic impact on Norwegian undertakings nor local and regional authorities.

It should also be taken into account that the Norwegian Government in 2016 commissioned an expert group to review the “whistleblower” protection in Norway. An official report was

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\(^{12}\) Working Environment Act of 2005, chapter 2A, Notification
presented in March 2018, NOU 2018.6\textsuperscript{13} “Varsling verdier og vern” (“Notification values and protection”). The expert group underlined the value for the society and public interests of notifications and stressed the need for good procedures and the protection of the persons reporting. The expert group proposed some clarification to the procedures included in the Norwegian Act which are very similar to the three-tier reporting system proposed by the Commission; (i) internal reporting channels; (ii) reporting to competent authorities – if internal channels do not work or could not reasonably be expected to work; (iii) public/media reporting.

The report from the expert group is now under consideration by the Government and a proposal for revised legislation is expected in 2019.

\textsuperscript{13} NOU 2018.6