BUSINESSEUROPE

COMMENTS

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# Comments paper on EU Whistleblower Protection Proposal

## KEY MESSAGES

- European companies are committed in preventing infringements of laws and codes of conduct. Being compliant with rules and maintaining a strong reputation are fundamental matters for every enterprise. Markets also benefit from a stronger compliance culture.

- Whistleblower protection is an important tool to help companies to better address unlawful or unethical conducts. Companies have themselves been introducing well-functioning procedures aimed at protecting whistleblowers and dealing with the persons concerned by the claims in a fair and effective way.

- Member States also have authorities and bodies designed to overlook, control and sanction unlawful behaviour, to whom individuals and companies can report wrongdoing. Furthermore, in many areas, there are already special reporting and whistleblower procedures resulting from EU law requirements.

- BusinessEurope has reservations about the need for a *quasi-horizontal* EU legislative initiative in the field of whistleblower protection.

- The proposal is a one size fits all regulation, which should be avoided in this area where national systems are carefully tailored to the national legal traditions and approaches, for example, on the way reports of infringements should be brought forward. Therefore, this proposal will potentially disrupt existing national solutions and create confusion at national level.

- EU action in this field should also not dilute the positive effects of existing national rules and of self-regulatory initiatives. Furthermore, there are international standards that also cover ethical and responsible conduct – for example OECD rules on corporate governance.

- There is not enough evidence that a lack of harmonisation of these systems has led to substantial barriers to doing business in the internal market. In any case, the proposal allows Member States to go beyond the standards proposed, which means that harmonisation will not be achieved in practise.

- The Commission proposal does not ensure a fair balance between protecting whistleblowers and the need for safeguards against misuse and disclosure of company sensitive information to competitors. Unlawful, unsubstantiated or

irrelevant disclosures potentially lead to disastrous reputational and economic consequences for companies.

- BusinessEurope agrees that internal reporting must be the very first principal rule, but we regret that the proposal includes too many exemptions to this principle. Only if the company has failed to take action without valid reasons should external reports be considered, but not in every case.

- Trade secrets, professional secrecy and personal data are rights of companies and other involved persons which deserve effective protection. Therefore, any legislative initiative shall be balanced.

## COMMENTS on main elements

### Material scope: Which legal acts (Article 1)

We believe the scope of the proposal is too broad. We question the need to make this proposal a quasi-horizontal whistleblower protection EU framework. For example, its annex includes legal acts in areas where we do not see a need to prioritise whistleblower protection (e.g. ship recycling, training of seafarers, etc.)

### Personal scope: Definition of whistleblower (Article 2)

We question the wide definition of a whistleblower.

Extension to staff of contractors, subcontractors, suppliers and job applicants undermines the principle of reporting within the company first, because these subjects fall out of any internal compliance system. This could potentially lead to misuse. For example, competitors who own subcontractors and suppliers of the concerned company will get an instrument to harm the company's reputation. Another example could be unfounded claims by disgruntled job candidates who failed to obtain employment within a company. No safeguards are foreseen against these risks.

It is also hard to see how shareholders who normally supervise the company from outside could become whistleblowers. Shareholders may use other instruments (i.e. company law) to protect their rights and interests.

### Material scope: Abuse of law (Article 3, point 3)

In its Recital 29 and Article 3, the proposal establishes that protection can be awarded not only for reporting unlawful activities, but also reporting of abuse of law which is defined as an act or omission which do not appear to be unlawful in formal terms but defeat the object or the purpose of the law.

When associated with the wide material scope of the proposal, these provisions could lead to great legal uncertainty. More clarity is needed around this concept as it could open the door to further unjustified disclosures with irreversible negative reputational and economic consequences for companies and concerned individuals. The protection

measures for concerned individuals in Article 16 cannot repair all the damage caused by the very low threshold for reporting in Article 3.

### Obligation to establish internal channels and procedures (Article 4, 5 and 6)

These provisions represent an obvious increase of red tape for companies of all sizes. Despite of the exceptions proposed, this obligation will require a very large number of companies to adopt new structures and procedures in a time where companies are already overburdened by legislation stemming from many other areas (e.g. recently in force data protection EU rules, accounting, geo-blocking, non-financial reporting etc). In addition, the procedure seems far too detailed without giving much needed flexibility regarding size and characteristics of the company.

The prescriptive nature of the procedures set out in these articles risks breaching the principles of subsidiarity and proportionality.

According to estimations from our members, the cost to implement internal reporting channels extend far beyond the estimation of the Commission. Depending on the company, our members calculate that implementing the system will require a one-off implementation cost between 5,600-30,000 Euros and an annual operational cost between 4,800-50,000 Euros per year. Thus, contrary to the Commission's assessment the costs for businesses are very significant.

One difficulty for smaller companies will be to ascertain, whether they fall within the 50-employee threshold in special cases such as in sectors that depend on seasonal workers. This leaves companies in legal uncertainty.

As a part of the process, the company must provide feedback to the reporting person about the follow-up on the report, cf. Article 5(1)(d). This feedback must be given no later than 3 months after the whistleblower report. Authorities are also obliged to give feedback to whistleblowers within 3 months, however this time limit can be extended to 6 months in duly justified cases, cf. Article 6(2)(b). We question, why private companies should not have the same possibility to extend the time limit.

Also, the proposal does not clearly state, what type of feedback the company should give the whistleblower. In this regard, it should be taken into account that companies are subject to privacy laws, including the General Data Protection Regulation, which set strict limits for sharing personal data. Thus, a company cannot share personal information about other employees with the whistleblower. In the proposal it should therefore be specified that the feedback should not contain any personal or confidential data.

The Commission highlights that the proposal supplements any existing reporting mechanism. We fear that this will lead to overlapping reporting mechanisms.

## Reporting channels: not every disclosure is relevant for the public

In BusinessEurope's view, a whistleblower protection legal framework should be built in a way that allows to distinguish between information only suitable to be disclosed within the company and information suitable to be disclosed to authorities or even to the public.

This is clearly missing in this proposal. Public disclosures should only occur in exceptional circumstances:

- where interests of vital societal significance are at stake through the disclosed infringement,
- as a last resort against a substantial, irreversible and imminent danger.

In these cases, if the authorities decide to act upon the disclosure, the company should be informed in order to be able to remedy the situation if necessary.

Obtaining the right balance between public disclosure and disclosure to authorities versus disclosure 'only' within a company is very important.

This is particularly important when it comes to trade secrets. Therefore, the proposal should make clear that a whistleblower should always report internally to the company, if the report contains trade secrets, because once this information is public the harm to the company is irreversible. Furthermore, it should be specified that external reporting of trade secrets constitutes a revelation of trade secrets *per se*, and therefore should only be allowed in very exceptional cases.

Also, we question why for certain disclosures that have been dismissed by a public authority, these could still afford protection to whistleblowers if they decide to go public. If a public authority does not identify an illegal behaviour through the disclosure, it is probably safe to conclude that the behaviour described in the disclosure does not affect fundamental interests – and so it will not be relevant to the public.

Furthermore, the actual phrasing of the proposal can lead to great legal uncertainty, since it contains indefinite, subjective legal terms such as "no appropriate action was taken" and "could not reasonably be expected", cf. Article 13(4)(a) and (b).

## Reporting channels: disclosure within the company first principle

BusinessEurope strongly believes that reporting must first be made within the organisation rather than involving directly a third party. Therefore, internal reporting must be the very first principal rule.

Company internal procedures and channels are preferable because they:

i. Allow companies to identify and stop infringements quickly and effectively;

ii. Help mitigating all kind of risks faced internally or externally;

iii. Are better tailored to the company size (large listed company or a smaller 50-employee company), organisational structure, sector and functioning (e.g. use of subcontractors);

iv. Can help determine whether certain disclosure leads to further harm being committed (e.g. violation of company secrets or the privacy of employees).

In the proposal, the use of internal reporting is not mandatory for self-employed, shareholders, volunteers, unpaid trainees, (sub)contractors, and suppliers which can be problematic. This is a contradiction to the principle of company (internal) first disclosure. If the company makes a reporting channel available to these categories of whistleblowers, it should equally be mandatory for them to use this channel first.

It is essential that the company has the opportunity to first solve the issue internally before the whistleblower goes to the public. Even if the whistleblower only mentions specific persons within the company, automatically the whole organisation comes under scrutiny for at least two reasons: being associated to illegal behaviour; not being able to handle it internally via its compliance structures.

It is a matter of the company's discretion how to deal with identified infringements of internal compliance rules that do not constitute a criminal offence and which of those they report to the authorities.

## Grounds to qualify for protection of whistleblowers (Article 13)

Article 13(2) provides the criteria to be met by reporting persons in order to be able to qualify for protection in the case of external disclosures. We believe these criteria are insufficient.

Accuracy of the reporting, which proves seriousness/substantiation of the disclosure, a direct knowledge of the facts reported in good faith and the reasons for the employee to act (e.g. report on legal infringements versus report on dissatisfaction with superiors, colleagues, salary, incompetence or absenteeism) should have been considered.

It is concerning that although reference is made in Recital 60 to the importance of safeguarding against malicious, frivolous or abusive reports, there is no requirement for whistleblowers to act in good faith, or even for them not to act in bad faith. The rudimentary requirement that whistleblowers have reasonable grounds to believe information to be true does not in any way reduce the risk of malicious, frivolous or abusive reports being made.

Also, it is not clear for BusinessEurope how the proposed rules interplay with professional secrecy rules and legal privilege for lawyers.

## Prohibition of retaliation against reporting persons (Article 14)

The list is too broad. An extensive whistleblower protection should not lead to building a climate of accusation and mistrust at the workplace.

This proposal should not enable employees to proceed to leaks as pure retaliation behaviour against his employer, or to pre-empt disciplinary or other action that may be coming down the line.

The very broad definition of a whistleblower in Article 2 also gives room for a very wide range of motives for reporting. A potential risk of abuse of the protection in Article 14 by the whistleblower should therefore be minimised.

Provisions are missing regarding the consequences for false, misleading and unjustified disclosures. The provision in Article 17(2) for penalties against malicious or abusive reports is not sufficient.

## Reversal of the burden of proof (Article 15)

According to Article 15(5), the burden of proof can be reversed in judicial proceedings, leaving companies to prove that a measure applied against the reporting person is not related to the whistleblowing. BusinessEurope is not in favour of this provision, especially considering the broad list in Article 14 as mentioned above.

In addition, there is no time limit for this reversal of burden of proof, unlike in other areas of EU law. In practice this gives a lifelong protection to whistleblowers, which is not proportionate.

## Measures for the protection of concerned persons (Article 16)

As long as an infringement is not proven, persons concerned must be regarded as innocent. They should have the possibility to answer the credible accusations, if they wish to do so. This is in line with fundamental rights.

There are examples of situations where an unlawful or unjustified disclosure not only affected a company but destroyed the careers of employees concerned by the claims. This is to be avoided.

The confidentiality should be guaranteed to the whistleblowers as well as to the persons concerned.

At the same time safeguards should be implemented to protect the concerned companies, in particular the protection of trade secrets, professional secrecy, solicitor-client privilege and data protection.

## Compatibility with EU sectoral regulation with whistleblower protection provisions

Recent EU sectoral legislation, most of it enacted in response to the 2008 financial crisis, already contains rules protecting whistleblowers from many forms of retaliation in different areas and they range from audit, money laundering, market abuse, trade secrets and other instruments regulating the financial services industry.

It is important to avoid contradiction or overlap with existing regulation.

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