



PROTECTING WHISTLEBLOWERS IN THE EUROPEAN UNION – A FIRST STEP ON A LONG AND UNCERTAIN ROAD

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LuxLeaks, Panama Papers, Paradise Papers – the public revelations in recent years of tax avoidance, financial fraud and preferential treatment of companies by institutions and governments are multiple. Recently, news about tremendous schemes of illegal activities against the public interest have been added to those – Diesel Gate, Cambridge Analytica. At the same time, the absence of clear regulation on what constitutes whistleblowing in the benefit of the public and what are the rights of those who uncover irregularities, leads to paradoxes such as for example the court's conviction against Antoine Deltour, a former employee at the international consultancy giant Pricewaterhouse Coopers, who blew the whistle to the media about hundreds of secretive tax agreements between the Grand Duchy of Luxembourg and international corporations, some of which have succeeded to guarantee themselves the

notoriously low tax rate of 1% (as we have already written on the topic in 2017 – see [here](#)).

In the spring of last year, following increased public pressure for action at European level, the European Commission initiated a public consultation about the scope of such potential legislation. A year later, the proposal of the Commission is already available – it was formally presented a few weeks ago. This is still a small step forward but sometimes it is the small steps that are of greatest importance, considering the fact that the effort to make this step was exhaustingly long – civil society organisations in the EU have been lobbying in favour of such legislation for over a decade now, and in recent years over 80 000 Europeans have signed petitions in support of such an initiative. The data of the European Commission shows that citizens who reveal illegal activities usually pay the price and face retribution in the form of job loss, reputational



costs or even their health. A Global Business Ethics study of 2016 points that 36% of employees who have revealed irregularities in their organization have been victim of retribution with the aim of revenge.

So what does the Commission proposal foresee and is it enough?

The European Commission aims to ensure EU-wide protection for blowing the whistle on breaches of EU legislation in the fields of public procurement; financial services, money laundering and terrorist financing; product safety; transport safety; environmental protection; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; privacy, data protection and security of network and information systems. It will also apply to breaches of EU competition rules, violations and abuse of corporate tax rules and damage to the EU's financial interests.

The list is not exhaustive but the Commission encourages Member States to go beyond this minimum standard and establish comprehensive frameworks for whistleblower protection based on the same principles.

One of the key issues with regard to this kind of legislation is the scope of the obligation to create internal procedures, and whether it will encompass all or a specific group of institutions and companies. The issue has been solved in the following way: All companies with more than 50 employees or with an annual turnover of over €10 million will have to set up an internal procedure to handle whistleblowers' reports. All state, regional administrations and municipalities with over 10,000 inhabitants will also be covered by the new law. The principle which the Commission seeks to observe here is proportionality –

limiting excessive administrative burdens and protection of important public interests.

The objective of the EC is to create a multi-tier reporting system, and, thus, for protection of whistleblowers which will have several levels, in order to guarantee against internal institutional covering of signals, which is the main reason why this sphere is so difficult to regulate. Internal reporting channels are provided for and should those fail to work or a compromised, then the next steps are reporting to competent authorities and secondly, public/media reporting (although some organisations of journalists such as the European Federation of Journalists insist that reporting to the media should be admissible by default and not only as a last resort¹).

It should be noted that the choice of legislative instruments by the European Commission is a directive – not a regulation, which would be obligatory in full and directly in the entire Union. In this case the Commission normatively proposes the objectives to be achieved by Member States within a certain timeframe. This choice is understandable if we consider two important preconditions. Firstly, the ambivalence of this rather sensitive issue. Secondly, the fact that currently 10 EU Member States have some legislation which guarantees whistleblowers adequate protection, while the rest of the Member States have partial protection or it is only applied to specific sectors or categories of employees.

The assessment of the civil and expert organisations, working on the subject of anticorruption, for the Commission proposal is high. Many of them see it as a real opportunity for overcoming the drastic imbalances in national legislation among the Member States – from excellent examples such as Ireland, to

¹ Commentary by European Federation of Journalists, <https://www.ebu.ch/news/2018/04/whistleblower->

[directive-european-commission-takes-important-step-but-improvement-on-public-reporting-yet-to-be-made](#)

practically missing legal framework for protection in countries like Cyprus².

What's next?

Work is far from over with the presentation of the long-awaited proposal of the Commission. In a sense, the battle is only just beginning because the file needs to receive the approval of the Council of the EU and the European Parliament and then to be negotiated between the two institutions. There are at least two major risks on this road. From a content point of view, during the negotiation process it is possible that significant amendments can be introduced in the proposal, which could potentially water it down. From a procedural point of view, the work on a legislative proposal usually takes at least one year, and we are at the end of the legislative mandate of the European Parliament (and after the European elections in May 2019 it is rather unclear what the fate of the unfinished legislative dossiers will be and whether there will be any political and institutional interest towards them).

Under such conditions, it is very important what level of priority is attributed to a legislative proposal, presented so close to the end of the European Commission's mandate, especially by the Presidency of the Council of the EU and the European Parliament.

The Bulgarian Presidency did not have any possibility to work on the file in substance, as it was presented by the Commission in late April 2018. In practice, there was only time for its presentation by the EC at working group level in the Council, i.e. the mandatory first step. Moreover, it was not defined as a priority file by the Bulgarian Presidency, as was the case with the

Multiannual Financial Framework package³, which was also presented at the end of the Presidency term but it was prepared to immediately start work on them in full speed. The Austrian Presidency which stated its term on 1 July 2018 has also not prioritized this dossier – it is not explicitly referred to in the Austrian Presidency Programme, although the Council preparatory bodies will undoubtedly discuss it.

The European Parliament on the other hand has direct interest in fast advancement of the negotiations on the file. On 24 October 2017 the EP adopted a Resolution on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies. The Parliament has called to the Commission to present a proposal of horizontal nature for whistleblowers' protection. The EP is also strongly committed to the investigations of the cases of Cambridge Analytica, Panama Papers and other cases of corruption and irregularities by international corporations, including by creating Specialized Committees on the subject – TAX₁, TAX₂, PANA, TAX₃.

As soon as the active election campaign in the eve of the May 2019 elections begins, the topic will probably be exploited for political goals in the pre-election debate.

On the part of the European Commission the file is strongly supported by the First Vice-President Frans Timmermans whose portfolio covers the topics of the "democratic change in the EU". The pressure on his part for speedy advancement on the dossier will probably be strong. At the same time, it should be considered that there are other ongoing negotiation

² Press release of Transparency International – EU Office, https://www.transparency.org/news/pressrelease/new_eu_proposals_for_whistleblower_protection_is_a_bold_step_in_the_right_d

³ Although we do consider the fact that those dossiers are incomparable.

processes in his sector, including two other key citizen-related initiatives – the Inter-institutional Agreement on the Transparency Register and the European Citizens’ Initiative regulation. Both files are at a decisive stage of the triologue negotiations. From this standpoint, as time advances until May next year, an effective negotiation strategy of the Commission could be to prioritize key files of greater political prominence. This could be at the “expense” of other files which are at an earlier stage of negotiations. Then the Register and the Citizens’ Initiative are likely to have precedence.

Of course, each of the abovementioned factors and probably many other unexpected developments could have an influence over the work on this new legislative proposal. Therefore, probably the key factor for success is to preserve citizens’ attention on the topic. Sustainable and even increasing public pressure is needed at European level for the adoption of this crucially important legal framework, which provides standards for due institutional behavior and guarantees for the adherence to these standards – for all Member States and horizontally for all economic sectors.