



Committee on Legal Affairs
The Chair

25.10.2018

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis for the 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)0218 – C8-0159/2018 – 2018/0106(COD))

Dear Mr Chair,

On 24 September 2018, pursuant to Rule 39(5) of the Rules of Procedure, the Committee on Legal Affairs decided of its own motion to provide an opinion on the appropriateness of the additional legal bases introduced by amendments tabled in Committee, which would add provisions of the Treaty on the Functioning of the European Union to the original legal base of the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (“the proposal”).

The Commission based its proposal on several sectorial legal bases. The legal base is expressed as follows:

‘Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 and 325(4) thereof and to the Treaty establishing the European Atomic Energy Community, and in particular Article 31 thereof,’

Five amendments were tabled suggesting to add Articles 19(2), 77(2), 78, 79, 83(1), 153, 154, 157 and 352 TFEU. In respect of Article 153, two amendments propose to add the full article, while one only to add points (a), (b) and (e) of paragraph 1 of that Article, and another to add only points (a) and (b) of paragraph 1 of Article 153.

The proposed amendments to the legal base are accompanied by corresponding amendments to the scope of application of the proposed directive. Therefore, the final assessment of

whether any further legal bases ought to be added to the proposal from the substantive point of view must be assessed on the basis of whether amendments modifying the scope of application are adopted and in the light of aim and content of the proposal as adopted. The current opinion on the legal basis focuses more on the procedural compatibility of the legal bases which are proposed to be added as well as with their compatibility with the measure chosen, i.e. a directive.

I - Background

In its resolution of 24 October 2017 on ‘Legitimate measures to protect whistle-blowers acting in the public interest and its resolution of 20 January 2017 on the role of whistle-blowers in the protection of the EU’s financial interests¹, Parliament called on the Commission to present a horizontal legislative proposal to guarantee a high level of protection for whistle-blowers in the EU, in both the public and private sectors, as well as in national and EU institutions.

Whistle-blower rules exist currently in some areas of Union law, namely in the Staff Regulations and in certain regulations relating to money laundering and financial markets.

The present proposal for a directive follows the sectorial approach in that it provides for whistle-blower rules that are applicable to breaches of Union law in the areas specified in the scope of application and the annex which lists the relevant pieces of Union legislation that are set out directly or by reference.

II - Relevant Treaty articles

Article 19 TFEU reads as follows:

Article 19

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 77 TFEU reads as follows:

¹ 2016/2224(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0402+0+DOC+XML+V0//EN> and (2016/2055(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0004+0+DOC+XML+V0//EN>.

Article 77

1. The Union shall develop a policy with a view to:

- (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;*
- (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;*
- (c) the gradual introduction of an integrated management system for external borders.*

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

- (a) the common policy on visas and other short-stay residence permits;*
- (b) the checks to which persons crossing external borders are subject;*
- (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;*
- (d) any measure necessary for the gradual establishment of an integrated management system for external borders;*
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.*

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78 TFEU reads as follows:

Article 78

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;*
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*

- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;*
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79 TFEU reads as follows:

Article 79

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;*
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;*
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;*
- (d) combating trafficking in persons, in particular women and children.*

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the

Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 83 TFEU reads as follows:

Article 83

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Article 153 TFEU reads as follows:

Article 153

1. With a view to achieving the objectives of Article 151, the Union shall support and

complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;*
- (b) working conditions;*
- (c) social security and social protection of workers;*
- (d) protection of workers where their employment contract is terminated;*
- (e) the information and consultation of workers;*
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;*
- (g) conditions of employment for third-country nationals legally residing in Union territory;*
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;*
- (i) equality between men and women with regard to labour market opportunities and treatment at work;*
- (j) the combating of social exclusion;*
- (k) the modernisation of social protection systems without prejudice to point (c).*

2. To this end, the European Parliament and the Council:

- (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;*
- (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.*

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary

measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,*
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.*

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 154 TFEU reads as follows:

Article 154

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 157 TFEU reads as follows:

Article 157

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt

measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 352 TFEU reads as follows:

Article 352

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

III - General principle for the choice of legal basis

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

In this case, it therefore has to be established whether the proposal either:

1. pursues a multiple purpose or has several components, and one of those is identifiable as the main or predominant purpose or component, whereas the others are merely incidental;
or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the others.

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal bases.¹

Furthermore, following the established case law of the Court of Justice, the combination of several legal bases is possible, if they are indissociably linked, without one being secondary and indirect in relation to the others, but only if they do not entail incompatible decision-making procedures.² The legal bases proposed to be added have to be assessed in this light, that is, whether they do provide for the ordinary legislative procedure or are otherwise compatible with the legal base as proposed by the Commission.

IV - Aim and content of the proposal

As the Commission has constructed the legal base of its proposal, each provision mentioned corresponds to relevant parts in the scope of application and in the annex to the proposal. To the extent certain other areas are added to the scope and consequently to the annex, it would be appropriate to align the legal base by adding also the corresponding articles of the Treaty on the Functioning of the European Union to the legal base of the directive.

V - Analysis and determination of the appropriate legal basis

Article 19(2) TFEU, the EU legislature - acting in the ordinary legislative procedure - “*may adopt the basic principles of Union incentive measures*” to support action taken by Member States in the field of combatting discrimination.

However, such measures cannot entail “*harmonisation of the laws and regulations of the Member States*”. In this regard it should be pointed out that Article 19 of the proposal provides for a minimum harmonisation: “*Member States may introduce or retain provisions more favourable to the rights of the reporting persons than those set out in this Directive*”. Therefore, the addition of Article 19(2) TFEU as a legal basis is not advisable.

Under **Article 77(2) TFEU**, the EU legislature may adopt “*measures*” in the ordinary legislative procedure in the field of border checks, relating to visas and short-stay residence permits; checks at external borders; freedom of travel for third country nationals; integrated management system of the external borders; and the absence of controls at the internal borders.

This new legal basis seems to be compatible with the proposal from a procedural point of view.

Paragraph (1) of **Article 78 TFEU** is a general reference to the common asylum policy. Paragraph (3) concerns the adoption of provisional measures in situations of emergency and foresee only the consultation of the European Parliament.

¹ See the Case C-411/06, cited above, paras 46-47.

² Judgments of 6 November 2008 in *Parliament v Council*, C-155/07, EU:C:2008:605, paragraph 37; and of 3 September 2009 in *Parliament v Council*, C-166/07, EU:C:2009:499, paragraphs 68 and 69.

Paragraph (2) of that Article allows for the adoption of “*measures*” in the ordinary legislative procedure for the common European asylum system, in specific fields such as a uniform status of asylum and subsidiary protection; temporary protection for displaced persons; common procedures for international protection; standards for the conditions of reception; and partnership and cooperation with third countries.

Therefore, it is unnecessary to add Article 78(1) TFEU as a legal basis, while Article 78(3) TFEU is not an appropriate legal basis for the proposal. Adding Article 78(2) TFEU seems to be compatible with the proposal from a procedural point of view.

Article 79 TFEU concerns the common immigration policy. It is important to point out that paragraphs (1) and (5) are not legal bases. Paragraph (3) provides for the conclusion of readmission agreements, so it cannot be the legal basis for the proposed directive. Paragraph (4) concerns the integration of legally residing third-country nationals, but excludes the harmonisation of the laws and regulations of Member States.

Paragraph (2) allows for the adoption of “*measures*” in the ordinary legislative procedure, such as conditions of entry and residence; rights of legally resident third-country nationals; illegal immigration and unauthorised residence; and combatting trafficking in persons.

Therefore, only the inclusion of Article 79(2) TFEU seems to be possible from a procedural point of view.

While **Article 83(1) TFEU** provides for the ordinary legislative procedure, its paragraph (3) contains an “emergency brake” provision, according to which one Member State may refer the file to the European Council. In that case the ordinary legislative procedure shall be suspended.

For this reason, the combination of that provision with the other legal bases of the proposal is not possible.

It ought to be noted, that any measures based on Articles 77, 78, 79 and 83 TFEU will only apply to Ireland and the United Kingdom if those Member States opt in pursuant to Protocol No 21, and that, in accordance with Protocol No 22, no such measure will apply to Denmark. The addition of these Articles to the legal base would have no implication on the legislative procedure in Parliament but may result in a possible split of the proposal for the purpose of the procedure in Council as the number of Member States to which different parts of the Directive applies would be different.

Article 153 TFEU was added by amendments 66, 67, 68 and 69. Amendments 67 and 69 add only parts of that Article, namely points (a), (b) and (e). This Article lists specific areas of social policy, where the EU’s action may “*support and complement the activities of the Member States*”.

The procedure for some categories from this list is not compatible with the proposal, since it requires unanimity. The remaining areas covered by amendments, where the ordinary legislative procedure applies without the unanimity requirement are Article 153(1) TFEU, points a), b), e).

Article 154 TFEU it is not a legal basis for an act of the European Parliament. It contains procedural rules explicitly applicable to the Commission. Thus, it should not be considered to be added.

As regards **Article 157 TFEU** on the principle of equal pay, paragraph (3) of that Article provides for the adoption of “*measures*” in the ordinary legislative procedure to “*ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value*”.

Thus, Article 157(3) TFEU seems to be procedurally compatible with the proposal.

Finally, **Article 352 TFEU**, enables the European Union, and in particular the Council, to act if “*action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties*”, when they do not provide the necessary powers.

The proposal puts together several sectorial legal bases to construct what may seem as a horizontal instrument but in effect is a bundle of sectorial measures. Article 352 TFEU can be used only in cases where the necessary powers are not provided for by the Treaties. As there are already a number of measures in Union law that provides for whistle-blower rules, this cannot be said to be the case here. Thus recourse to Article 352 TFEU is, by definition, incompatible with the approach chosen by the Commission proposal.

Furthermore, the choice to include Article 352 TFEU is procedurally incompatible with the other legal bases since it requires unanimity in the Council and consent of the Parliament. Therefore, Article 352 TFEU is not an appropriate legal basis for the proposal.

VI - Conclusion and recommendation

The following provisions of the TFEU provide for the ordinary legislative procedure in such a way that is compatible with the existing legal base as proposed by the Commission: Articles 77(2), 78(2), 79(2), 153(1) (a), (b) and (e), and 157(3) TFEU.

With regard to Articles 77, 78 and 79 it ought to be noted that although the addition of these articles would not be incompatible with the procedure in Parliament, their inclusion in the legal base may result in a possible split of the proposal for the purpose of the procedure in Council.

Articles 83(1) and 352 TFEU are not compatible with the applicable ordinary legislative procedure and they ought not to be added as new legal bases. Furthermore, Article 352, which can be used only in cases where necessary powers are not provided for by the Treaties is, by definition, incompatible with the approach chosen by the Commission proposal.

With regard to Article 154 TFEU, it refers to rules applicable to the Commission and does not provide for a legal base of an act of the European Parliament and of the Council. It therefore cannot be added to the legal base.

Finally, addition of Article 19(2) TFEU is not advisable, since harmonisation is not allowed under this provision.

The final choice of legal bases identified as possible additions to the legal base as proposed by the Commission should however depend on the adoption of relevant amendments introducing specific policy areas to the scope of application of the proposed Directive.

At its meeting of 22 October 2018 the Committee on Legal Affairs accordingly decided, unanimously¹, by 18 votes in favour, to recommend the lead Committee to take the conclusions above into consideration when assessing the amendments to the scope of the Directive.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Pavel Svoboda (Chair), Mady Delvaux (Vice-Chair) Axel Voss (rapporteur for opinion), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Geoffroy Didier, Pascal Durand, Angel Dzhambazki, Heidi Hautala, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, Evelyn Regner, Tiemo Wölken, Francis Zammit Dimech, Tadeusz Zwiefka, Olle Ludvigsson (for Enrico Gasbarra, pursuant to Rule 200(2)).