



23.6.2017

DRAFT REPORT

on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI))

Committee on Legal Affairs

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI))

The European Parliament,

- having regard to the Treaty on European Union, in particular Article 2 thereof,
- having regard to the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof,
- having regard to Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure,
- having regard to its resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect¹,
- having regard to its resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect (TAX 2)²,
- having regard to its resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken³,
- having regard to the Commission communication of 6 June 2011 on fighting corruption in the EU (COM(2011)0308),
- having regard to the Commission communication of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance (COM(2016)0451),
- having regard to the G20 anti-corruption action plan, in particular its guiding principles for legislation on the protection of whistleblowers,
- having regard to the OECD report of March 2016 entitled ‘Committing to Effective Whistleblower Protection’,
- having regard to the Decision of the European Ombudsman closing her own-initiative inquiry OI/1/2014/PMC concerning whistleblowing,
- having regard to the Recommendation CM/Rec(2014)7 of 30 April 2014 of the Committee of Ministers of the Council of Europe on the protection of whistleblowers,
- having regard to Principle 4 of the OECD Recommendation on Improving Ethical Conduct in the Public Service,

¹ Texts adopted on that date, P8_TA(2015)0408.

² Texts adopted on that date, P8_TA(2016)0310.

³ OJ C 208, 10.6.2016, p. 89.

- having regard to Rule 52 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Budgetary Control, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Culture and Education, the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Constitutional Affairs (A8-0000/2017),
- A. whereas the EU set itself the objective of upholding democracy and the rule of law and thus guarantees its citizens freedom of expression;
 - B. whereas transparency and citizen participation are some of the developments and challenges to be addressed by democracies in the 21st century;
 - C. whereas whistleblowers play an important role in reporting unlawful or improper conduct which undermines the public interest;
 - D. whereas a number of publicised whistleblowing cases have shown that whistleblowing brings serious wrongdoing to the attention of the public and of political authorities; whereas such wrongdoings have therefore been subject to corrective measures;
 - E. whereas whistleblowing has proved useful in a number of areas, such as public health, taxation, the environment, consumer protection, combating corruption and upholding social rights;
 - F. whereas, in a number of cases, whistleblowers are subject to retaliatory action, intimidation and pressure with the intention of preventing or deterring them from whistleblowing or punishing them for having done so;
 - G. whereas the protection of whistleblowers is not guaranteed in a number of Member States, while many others have introduced advanced programmes to protect them; whereas the result of that is fragmented protection of whistleblowers in Europe, which makes it difficult for them to find out their rights and how to whistleblow, and creates legal insecurity in cross-border scenarios;
 - H. whereas the Commission has not proposed suitable legislative measures to protect whistleblowers in the EU effectively;
 - I. whereas Parliament has repeatedly called for the protection of whistleblowers in the EU;
 - J. whereas international organisations such as the Council of Europe and the OECD have already laid down principles which are now well established and the case-law of the European Court of Human Rights is consistent on that matter;

Role of whistleblowers and the need to protect them

1. Calls on the Commission to present a horizontal legislative proposal with a view to effectively protecting whistleblowers in the EU before the end of this year; stresses that there are at present a number of possibilities for legal bases enabling the EU to take action on the matter; calls on the Commission to consider all those possibilities with the aim of

proposing a coherent and effective mechanism;

2. Takes 'whistleblower' to mean anybody who reports on or reveals information on an unlawful or wrongful act or an act which undermines the public interest, in the context of his or her working relationship, be it in the public or private sector, of a contractual relationship, or of his or her trade union or association activities;
3. Considers that a breach of the public interest includes, but is not limited to, acts of corruption, conflicts of interest, unlawful use of public funds, threats to the environment, health, public safety, national security and privacy and personal data protection, tax avoidance, attacks on workers' rights and other social rights and attacks on human rights;
4. Stresses that the role of whistleblowers in revealing serious attacks on the public interest has proved its significance on many occasions over a number of years and that whistleblowers have proved to be a crucial resource for investigative journalism and for an independent press;
5. Notes with concern that whistleblowers continue to be subject to civil and criminal proceedings in a number of Member States, while the existing means to defend, support and protect them are absent or ineffective; notes that, in addition, the disparities between Member States lead to legal insecurity and the risk of unequal treatment;
6. States that the protection of whistleblowers is essential for the proper application of the competences of the EU;
7. Encourages the Member States to promote the positive role that whistleblowers play, in particular through awareness-raising campaigns;

Reporting mechanism

8. Notes that one of the barriers to whistleblowers' activities is the absence of clearly identified means of reporting; stresses that the absence of clearly identified means of reporting causes a number of whistleblowers to remain silent; expresses its concern about the retaliation and pressures which whistleblowers face when they address the guilty person or party in their organisation;
9. Stresses that the credibility and validity of a report must be able to be assessed in part on the way in which it was made; believes that it is necessary to establish a coherent system which enables reports to be delivered both inside and outside the organisation;
10. Calls on the Commission to study a tiered system enabling whistleblowing inside and outside the organisation; stresses that, to do so, clear procedures should be established; believes that employers should be encouraged to introduce internal reporting procedures and that one person should be responsible for collecting reports in each organisation; considers that employee representatives should be involved in the assignment of that role;
11. Believes that the whistleblower should give priority to the organisation's internal reporting mechanisms or to the competent authorities; stresses, however, that in the absence of a favourable response from the organisation, or if the whistleblower is at risk or urgently needs to report information, he or she must be able to turn to non-

governmental organisations or the press;

12. Believes that reporting outside the organisation without first going through an internal step is not grounds to invalidate a report, file a lawsuit or refuse to give protection;

Protection given to whistleblowers

13. Expresses its concerns about the risks run by whistleblowers at their place of work, in particular the risks of direct or indirect retaliation by the employer and by those working for or acting on behalf of the employer; stresses that retaliation usually takes the form of suspending, slowing down or stopping career progression or even dismissal, along with psychological harassment; stresses that retaliation is a barrier to whistleblowers' activities; believes that it is necessary to introduce protective measures against destabilising practices; takes the view that retaliation should be penalised and sanctioned effectively; stresses that, once somebody is recognised as a whistleblower, the measures taken against him or her should be brought to an end;
14. Expresses its concern about the practice of gagging orders, which involve filing or threatening to file lawsuits against the whistleblower not in an effort to have him or her convicted, but in an effort to bring about self-censorship or financial, mental or psychological exhaustion;
15. Points out the risk that whistleblowers run of having legal and civil proceedings brought against them; stresses that they are often the weaker party in trials; considers it necessary to provide for a reversal of the burden of proof in respect of retaliation against and pressure on whistleblowers; takes the view that confidentiality should be guaranteed throughout the proceedings;
16. Believes that the option to report anonymously would encourage whistleblowers to share information which they would not share otherwise; stresses, in that regard, that clearly regulated means of reporting anonymously should be introduced;
17. Stresses that nobody should lose the benefit of protection on the sole grounds that he or she has misjudged the facts or that the perceived threat to the public interest did not materialise, provided that, at the time of reporting, he or she had reasonable grounds to believe them to be true;

Supporting whistleblowers

18. Stresses the role that trade unions play in supporting and helping whistleblowers in their dealings within their organisation;
19. Stresses that, in addition to the professional risks, whistleblowers also face psychological and financial risks; believes that psychological support should be provided, that legal aid should be given to whistleblowers who ask for it, that financial aid should be given to those who express a duly justified need for it and that compensation for proven professional damages should be given as a protective measure if civil proceedings are brought against a whistleblower;
20. Calls on the Member States to introduce an independent body responsible for collecting

reports, verifying their credibility and guiding whistleblowers, particularly in the absence of a positive response from their organisation;

21. Calls on the Commission to propose the establishment of a similar body at EU level responsible for coordinating Member State activities, particularly in cross-border cases; believes that that European body should also be able to collect reports, verify their credibility and guide whistleblowers when the response given by the Member State is obviously not appropriate; considers that the European Ombudsman's mandate could be extended to serve that purpose;
22. Instructs its President to forward this resolution to the Council and the Commission.

EXPLANATORY MEMORANDUM

Over a number of years, the crucial role that whistleblowers play in revealing serious breaches of the public interest has been brought to light as a result of a series of scandals, in such varied areas as public-health protection, the environment and tax avoidance. Today, protecting whistleblowers is one of the best ways to safeguard the public interest and bring about responsible and ethical conduct in public and private institutions. However, the protection offered, if at all, is still largely inadequate and is too disjointed to offer a coherent framework in the EU, whose activities are currently limited to sectoral protections.

Your rapporteur believes that the EU should take action by means of a horizontal legislative instrument, in accordance with its objectives regarding democracy, pluralism of opinions and freedom of expression. There are a number of possible legal bases available to the Commission to propose such an instrument, so it should take that route as soon as possible.

A number of international standards to protect whistleblowers have already been developed. Therefore EU legislation should support them. In accordance with those standards, the definition of whistleblower should be broad enough to cover as many scenarios as possible and thus protect private- and public-sector employees, consultants and even the self-employed. Moreover, it should not be limited to reports on unlawful acts, but should also cover disclosures of a breach of the public interest. Clear reporting mechanisms should be introduced in organisations to facilitate internal whistleblowing. That cannot, however, be the only means of reporting, and whistleblowing to an independent institution or to the public should be authorised. At EU level, an agency specifically dedicated to advice, guidance and collection of reports should be established.

To better protect people who decide to whistleblow, they should be guaranteed that their confidentiality is protected, and a reversal of the burden of proof should be introduced. Lastly, financial and psychological support and compensation for damages would complete the measures, and effective sanctions against those who attempt to prevent whistleblowers from speaking out should be introduced.

ANNEX: LIST OF ENTITIES OR PERSONS FROM WHOM THE RAPPORTEUR HAS RECEIVED INPUT

The following list is drawn up on a purely voluntary basis under the exclusive responsibility of the rapporteur. The rapporteur has received input from the following entities or persons in the preparation of the report:

Entity and/or person
UNI Europa
FIRST-CISL
European Federation of Journalists
Eurocadres
Transparency International France
Transparency International
Finnish trade union representation to the EU
CCI Paris-Ile de France
Ascent-EU - Good Governance, Anti-Corruption & Rule of Law Consultant
CADRES CFDT
EBU
Brussels Office of the Swedish Trade Unions
Finnish trade union representation to the EU