

## **ETUC position on the EU Commission Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law – Whistleblowing**

Adopted at the executive committee meeting of 25-26 June Sofia

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### **Introduction**

Trade unions have long called for strong EU wide protection for those who blow the whistle on wrongdoing. Workers in the public and private sector need to know that if they raise concerns within the workplace or externally they will be protected from reprisals. Recent scandals such show that whistleblowers can play an important role in uncovering unlawful activities. But workers are often afraid to speak up because of fear being demoted, victimised, dismissed, blacklisted, sued, fined and even imprisoned. Often in the wake of a disaster workers report that they have raised concerns, but they were ignored or covered up.

### **Urgent need for EU wide protection for those who blow the whistle**

On 17th April 2018 the EU Commission adopted a draft proposal for a Directive to give workers protection when they come forward and blow the whistle. The European Commission states that the “proposal will guarantee a high level of protection for whistleblowers who report breaches of EU law by setting new, EU-wide standards. The new law will establish safe channels for reporting both within an organisation and externally...’ Recognising that protection of whistleblowers is fragmented across the EU and uneven across policy areas, the Commission highlighted that only ten EU countries (France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and United Kingdom) have a comprehensive law protecting whistleblowers. In the remaining EU countries, the protection granted is partial: it covers only public servants or only specific sectors (e.g. financial services) or only specific types of wrongdoings (e.g. corruption). The Commission stressed an urgent need for EU level protection as ‘insufficient protection in one country not only negatively impacts the functioning of EU policies there but can also spill over into other countries and into the EU as a whole’.

### **Significant Difficulties with the Proposed Directive**

For the ETUC the publication of the Directive gives rise to a number of difficult decisions. On the one hand trade unions are calling for protection for those who blow the whistle but there are serious issues of concern that have implications for our support for the Directive:

- a) The Commission did not refer the proposal for a Directive to the Social Partners for consultation in accordance with Article 154 TFEU.
- b) The proposed Directive provides less protection for workers, rights safety, health and welfare than it does for animals’ rights, safety health and welfare. It creates a two-tier system of law in which EU employment law is of a lower order.
- c) The proposed Directive creates a mandatory workplace whistleblowing procedure that does not guarantee the right to be represented by the union nor that whistleblowing is voluntary. Mandatory procedures for internal reporting make workers less likely to come forward. It is of grave concern that the procedures do not give the right to the worker to meet, discuss, get advice from, be accompanied by, or be represented by their trade union at any stage. Thus, the proposed Directive denies the worker the most basic and obvious

protection. Worse still there is no non-regression clause to protect existing workplace procedures that include union representation.

There are other significant and serious problems related to how the Directive is drafted and these also influence the trade unions analysis of the proposals. For example, the proposed Directive only applies to EU law and this will make it very difficult for workers to operate in practice as separating out EU from Member State law will in some cases be impossible.

This position focusses on the three major concerns that must be resolved to secure trade union support or the Directive to move forward.

### **Addressing the flawed procedure used by the Commission.**

The ETUC cannot ignore the Commission's failure to refer this legislation to the social partners for consultation. It is clear that the proposed Directive covers a number of the matters set out in Article 153 TFEU, namely the prevention of dismissal of workers and working conditions. Although the ETUC has written to Vice President Timmermans to ask why the Directive was not referred to the Social Partners in line with the role given to them under Article 154 TFEU. He has not replied, and we are unaware of the reasons why the Commission failed to refer the proposal to us.

The failure to reply is unacceptable and is wasteful of the time available to find a solution. The Commission has initiated instead a public consultation and this time should be used to find a solution.

The ETUC rejects this bogus argument that seems to be spreading that Article 154 only applies when Article 153 is the legal base for a Directive. This is not the case. Article 154 states clearly that 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action' It is worth pointing out in addition that the proposed Directive deals with matters explicitly referred to in Article 153 e.g. the 'protection of workers', 'working conditions' and 'termination of employment'. Likewise, it is worth mentioning here that excluding Article 153 TFEU as legal base is contrary to Article 20 Charter of Fundamental Rights of the European Union because there is no justification for a different treatment in relation to the other legal bases mentioned in the Commission's Proposal.

### **Legal Action to prevent the legislation progressing?**

A legal course of action is available to the ETUC, i.e to injunct the legislation from proceeding because of the failure to consult with the Social Partners. There are strong arguments in favour of the ETUC taking this step, not only the problematic treatment of workers rights in the Directive but more generally the way that some parts of the EU Commission are increasingly attempting to undermine the role of the social partners in the EU Treaty.

### **Urge the Commission to launch a formal consultation under Article 154 TFEU**

The ETUC strongly criticises the Commission for not fulfilling its obligation to launch a formal consultation under Article 154 TFEU with the European Social Partners However, the ETUC is not proposing to launch a legal injunction to prevent the legislation going ahead. The ETUC will take the opportunity to raise all the deficiencies, legal unclarities and loopholes of the text and have it amended so that it can be supported by trade unions. We stress it is not a precedent, ignoring Article 154 TFEU cannot become a norm.

### **Amendments that are necessary to secure trade union support for the proposed Directive**

#### **1. Make Article 153 to the legal basis of the Directive and add Workers Rights to the Material Scope of the Directive**

A major issue of concern is the material scope of the Directive set out in Article 1. The Directive protects people working in the private and public-sector when they are reporting on breaches of EU law relating to (i) public procurement; (ii) financial services, (iii) money laundering and terrorist financing; (iv) product safety; (v) transport safety; (vi) environmental protection; (vii) nuclear safety; (viii) food and feed safety, (ix) animal health and welfare; (x) public health; (xi) consumer protection; (xii) privacy, (xiii) data protection and security of network and information systems (xiv) breaches of EU competition rules, (xv) violations and abuse of corporate tax rules and (xvi) damage to the EU's financial interests.

The choice made by the European Commission to opt for 16 different legal bases covering many areas of EU law is unprecedented and it inexplicably does not include Article 1531 thus excluding all workers rights and making the purpose of the directive the enforcement of law rather than the protection of workers.

Refusing to provide protection for workers to blow the whistle about failures by employers and others to protect workers employment, welfare, health, safety, equality and human rights is unacceptable. It is made all the more objectionable by the Directive providing protection so that the same concerns can be raised on animal rights health and welfare. The exclusion is unacceptable and contrary to Article 20 Charter Fundamental Rights of the European Union as there is no justification for a different treatment. Moreover, the problem can't be kicked down the road to be solved at Member State level as the list in Article 1 of the Directive is a so called 'closed list' - 'breaches falling within the scope of the Union acts set out in the Annex (Part I and Part II) as regards the following areas' (Article 1 (a)). What this means is that only the matters listed in the Directive can be provided for. It must be an open list, so that extra matters be added by Member States, the provision needs to be framed in terms of 'including but not limited to the following areas'.

By omitting EU employment, equality and labour rights, the Commission has created a two-tier system of law with the idea that labour law is another – lesser protected – category of law in the EU. This is a dangerous concept and has no place in the EU reframed by the European Pillar of Social Rights and one in which the EU Charter of Fundamental Rights is to be accorded the same value as the Treaties.

Trade unions and NGOs have been calling for a horizontal Directive and against a sectoral approach. In order to ensure such a horizontal approach, trade unions have advocated for the legal basis to be unified under Article 153 TFEU. Considering the unprecedented use of 16 legal bases for one Directive the ETUC calls for the social field to be included in the legal scope as well. In this respect we are also calling for the Directive to be amended to guarantee that whistleblowing is not mandatory (except in certain established limited fields). The purpose of the Directive should be the protection of workers not law enforcement.

## **2. Amend the mandatory workplace whistleblowing procedure to guarantee workers the right to be represented by the union and protect more favourable existing regimes**

The Directive sets out in Chapter II (Articles 4 and 5) an obligation on organisations with more than 50 employees or a turn over more than 10 million euro and certain public-sector organisations 'to establish internal channels and procedures for reporting and follow-up of report'. There are two difficulties with this, firstly as the European Federation of Journalists have highlighted this will make it less likely for people to come forward; it

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<sup>1</sup> 114 TFEU concerning the functioning of the internal market is the legal basis in addition to that the Directive has other specific legal bases in order to cover the fields that rely on Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 168, 169 and 207 TFEU and Article 31 of the Euratom Treaty and as an explicit aim of the Directive is better protecting the financial interests of the Union, Article 325(4) TFEU has also been added as a legal basis (recital 81)

needs to be made much easier for the whistle-blower to turn directly to media and journalist's sources need to be protected.

An additional problem is that the internal procedure fails to give the worker the right to meet, discuss, get advice from, be accompanied by, or even be represented at any stage by their trade union. Thus, the proposed Directive denies the worker the most basic and obvious protection. Taking into consideration the difficulties that will be faced by workers in determining if they are covered by the protections it is counterproductive not to afford workers this basic right. The absence is made all the more worrying as the Directive does not provide an adequate non-regression clause to safeguard existing workplace procedures that do provide for trade union representation.

The Directive goes on to unhelpfully provide that when establishing the internal channels Member States shall "consult social partners, if appropriate". It needs to be avoided that employers can decide unilaterally on the internal channels in the company. It must be obligatory that the development of the reporting channels is done in consultation and through negotiation with the worker representatives and/or the trade unions and the right to be represented must be ensured.

The internal reporting procedure must be amended to specifically prohibit gagging clauses in employment contracts and provide a clear and certain right for the worker or group of workers to discuss with their union at an early stage, ie in contemplation of making a disclosure, furthermore discussing with a trade union whether or not to make a report should not be seen as a breach of confidentiality and even if a decision is made not make a report the workers should be able to avail of the protection under the Directive. The right to be accompanied by and represented by the trade union in all the different stages of the internal procedure is essential.

### **3. provide a more favourable treatment/non-regression clause (Article 19)**

Article 19 does not give adequate protection for existing whistleblowing protection regimes It will not ensure that workers will continue to enjoy the more protective national legislation in place today. The way it is drafted may encourage the CJEU to turn this provision into a maximum rule, as done in the Laval jurisprudence. In addition, this article is limited to the "rights of the reporting persons", this might only cover those whistle-blowers falling under the scope of this Directive in Article 1.

A better non-regression clause is needed to ensure that already existing legal standards are not lowered and that existing internal procedures that include the trade union are protected and improved rather than worsened.

Additional amendments are required to address the following problems:

#### **EU law and Member State law are not easy to distinguish**

The proposed Directive only applies to EU law and this will make it very difficult if not impossible for workers to operate in practice as separating out EU from Member State law will not be easy or in some cases not even possible. The Directive attempts to deal with this uncertainty by providing, in Article 13 that is the 'reporting person shall qualify for protection under this Directive provided he or she has reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive'. It is unclear how this will play out in practice, it will largely depend on if the court believes the testimony of the worker and how much leeway is provided in the interpretation. It would be preferable to guarantee that the worker is covered when they raise concerns about matters under national law implementing EU law.

### **Improvement needed to the reversal of the burden of proof (Article 15 (5))**

The reversal of the burden of proof is not sufficient. The reporting person needs to provide reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, only than it is up to the person who took the retaliatory measure to prove that the detriment was not a consequence of the report but based on duly justified grounds. Instead the proposal should only put the burden of proof on the person who took the retaliatory measure.

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