



Danish Ministry of Justice
The Constitutional and Human Rights Law Division
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HEHJ

Consultation on the European Commission's proposal for a directive of the European Parliament and of the Council on the protection of persons reporting violations of Union legislation.

The Confederation of Professionals in Denmark (FTF), the Danish Confederation of Trade Unions (LO) and the Danish Confederation of Professional Associations (Akademikerne) received the above consultation dated 28 May 2018, and have the following remarks:

The proposed directive should be seen in light of numerous scandals in several EU Member States where employees played an important role in revealing activities that damage the public interest. The aim of the proposed directive is to improve legislative protection of employees who report such activities.

FTF, LO and Akademikerne are, overall, very satisfied with the present proposal. We are strong supporters of increased protection of the legal rights of employees in connection with their legitimate reports of unlawful activities, abuse of rights and other irregularities to disclose activities that can damage public interests and the welfare of society.

We are pleased to note that this is a minimum directive with a horizontal scope, and that the directive thereby covers employees in both the public and private sector. We are also pleased to note that the proposal envisages a high degree of protection for a very broad range of individuals.

However, FTF, LO and Akademikerne would also like to take this opportunity to suggest that the Danish



Government work towards the following adjustments to the text of the directive:

1. Initially, we encourage the inclusion of a reference to Article 153 of the TFEU in the directive text in order to underline the central role of the social partners with regard to EU labour market regulation.
2. We find it problematic that the whistleblower protection only applies to the violations of EU law that are comprehensively listed in Article 1 of the proposal. It will often be quite unclear and difficult for an employee to assess beforehand whether a specific regulatory framework is covered by the directive and thereby by the protection. For this reason alone, it is likely that the proposed model will result in considerable reluctance to report on the part of employees, which is not consistent with the fundamental intentions of the proposal. FTF, LO and Akademikerne therefore suggest that the protection is expanded to include reports on violations of Union legislation in general as well as violations of national legislation in general.
3. Furthermore, Article 1 of the proposal should be clarified to state that there will be legal protection of whistleblowers who report very serious and/or unlawful breaches within the areas of workplace health and safety, healthcare and welfare, cf. recital 20 of the preamble to the directive.
4. We also believe that it would be appropriate that self-employed persons are explicitly covered by the personal scope laid down in Article 2 of the proposed directive, cf. recital 26 of the preamble. In addition to this, it should be stated in Article 2(1)(d) that contractors may in some cases be covered by the scope of the directive and thereby the protection provided by the directive, cf. recital 27 of the preamble.
5. With regard to Article 4(3), recital 40 of preamble should clarify that it “shall” (Danish *skal*) be clear that in the case of private legal entities which do not provide for internal reporting channels, reporting persons “shall” (*skal*) be able to report directly to external competent authorities and such reporting persons “shall” (*skal*) enjoy protection against retaliation and other harmful actions as stipulated by the proposed directive.
6. If the directive is to achieve its intended effect and ensure a high degree of legal protection of whistleblowers, it is crucial that the reporting person be given the opportunity to remain anonymous. Therefore, it must be explicitly clarified in Article 5(1) of the proposed directive that reporting can be anonymous.
7. The proposed directive states that the social partners have an essential and multifaceted role to

play in the implementation of whistleblower protection rules. Among other things, the social partners will contribute to the promotion of whistleblowing as a mechanism of good governance. The directive also states that workers and their trade unions must be fully consulted on envisaged internal procedures for whistleblowers, and that such procedures can be negotiated within the framework of collective bargaining agreements. This central role should be explicitly stated in Article 5, which should include that the employee representative and/or trade union of a reporting employee must be consulted in connection with the establishment and implementation of an effective internal reporting channel and follow-up procedure on reports. Furthermore, Article 5 should explicitly state that internal reporting procedures and follow-up can be agreed within the framework of collective bargaining.

8. FTF, LO and Akademikerne are also of the opinion that Article 13(1) of the proposal should specify that a reporting person “shall” (*skal*) qualify for protection under this Directive under the conditions stated in the provision. The Danish translation states that a reporting person “can” be protected, contrary to the English version that states “A reporting person *shall* (my italics) qualify for protection...”.

9. We presuppose that cases regarding retaliation and other harmful actions as a consequence of legitimate reports will be heard by industrial arbitration to the same extent as present, and that there will be no requirement for length of service/employment for reviewing such cases.

10. Article 15(3) states that reporting persons shall have access to effective assistance where provided for under national law. It is unclear what is meant by “where provided for under national law”. FTF, LO and Akademikerne therefore call for clarification.

11. Article 15(5) of the proposal entails a more rigorous burden of proof in the form of shared burden of proof. However, this is not in line with the European Commission’s press release of 23 April 2018. The section “Prevention of retaliation and effective protection” states that “*Der vil være omvendt bevisbyrde i sådanne tilfælde, således at det vil være den pågældende person eller organisation, som skal bevise, at de ikke straffer whistlebloweren*”. In the English version of the press release, the sentence reads “The burden of proof will be reversed in such cases...”. FTF, LO and Akademikerne recommend, in accordance with the aim of the proposed directive to ensure a high degree of protection of whistleblowers, that a reverse burden of proof rule be adopted in cases regarding retaliation in connection with legitimate reports of unlawful activities.

12. Legal remedies are necessary in order to ensure the effectiveness of regulation on the



protection of whistleblowers. It is also presumed that effective remedies also have a preventative effect with regard to deterring others from carrying out retaliation or other harmful activities against reporting persons. It is therefore crucial that the directive include clear access to compensation assessed independently of loss suffered for reporting persons who are exposed to retaliation or other harmful activities.

13. In conclusion, an editorial comment: In Article 16(3) of the Danish translation of the proposal, there is a reference to paragraphs 9 and 11. However, these paragraphs do not exist. The reference is actually to Article 9 and 11, cf. the English version of the proposal.

The above is subject to reservation pending final approval by the competent bodies in LO.

Yours faithfully

FTF

LO

Akademikerne

Bente Sorgenfrey

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