WIN LEGAL BRIEF - FOCUS

For the European Council Report on Draft Directive

While there are still significant issues to fine tune and challenge, on balance the Council's proposal is more solid that the first draft of the Commission's proposal for Parliament, and reflects many of the changes successfully advocated in the JURI's adopted compromises. An initial assessment is summarised below for:

I. Serious problems or "achilles heels" that still could seriously dilute or undermine the Directive's objectives. These are also "red lines" for the whistleblower protection community.
II. Missing issues that need to be addressed.
III. Those that are sound in principle but need fine tuning

I. SERIOUS ISSUES / ACHILLES HEELS

1. **Mandatory Internal Reporting/tiered reporting**. Unlike the draft text approved by the Legal Affairs Committee (JURI), whistleblowers cannot chose whether to make an internal or external disclosure as a first step. This restores the Directive's vulnerability to obstruction of justice, and all the detailed objections we made to the Parliament (see WIN's set of legal briefs on key issues including mandatory internal reporting). While nearly all whistleblowers stay in-house, those who perceive the need to go straight to law enforcement or regulatory authorities should not, under any circumstances, have to guess whether courts would agree they were reasonable thinking that sharing their evidence with alleged wrongdoers would enable cover-ups. Romania, which in January will take over the EU Council presidency, has eliminated all tiered reporting. Whistleblowers have the choice to make alternative or cumulative reports to supervisors, institutional authorities, law enforcement authorities, the mass media or NGOs. As a minimum, this precedent could be highly persuasive to sustain the EU Parliament's compromise. **The requirement for mandatory internal reports is a fundamental flaw that must be removed.**

   Duty speech/concerns raised in the course of job duties. This must be addressed, because the Council's contradictory treatment means employees will likely be defenceless if they communicate the same information as part of their job responsibilities that would be protected if shared to a designated or "official" internal unit. The Directive's text defines internal disclosures as any communication within the organisation, but then conditions rights on reports to designated whistleblower channels.

   The consequences of failing to protect normal duty speech means:
   a) Protecting only the tip and ignoring the iceberg of information, and thus drastically shrinking the Directive's relevance.

b) Disastrously undermining institutional functions and safeguards. The point of whistleblower protection laws is to assure the free flow of information necessary for responsible exercises of institutional authority. Eliminating protection for normal duty speech would force employees to withhold bad news or controversial findings from the organisational chain of command, and only provide it to the officially designated whistleblowing unit. It would sacrifice and substitute responsible management action with investigations of misconduct. Decision-makers must consistently know the bad news before they exercise authority, not after an investigation.
c) Rendering the officially designated whistleblowing channels dysfunctional, because to avoid sacrificing their rights, employees will have to flood those channels with all the bad news they would normal communicate to be addressed within the organisational chain of command.

This why best practices for whistleblower protection laws ranging from Serbia to Ireland to the US over the last decade provide protection for normal duty speech as well as communications to designated whistleblower channels. Significantly, by protecting disclosures to supervisors, Romania's law protects both duty speech and internal disclosures independent of an official whistleblower channel. **The problem, therefore, can be neatly addressed by making the whistleblower channels an option instead of a prerequisite for protection.**

2. **Limitation of protection to workplace harassment: This restrictive boundary must be removed,** because it contradicts the Directive's goal of banning any direct or indirect activities that could chill responsible whistleblowing. Tactics include: surveillance; following whistleblowers off the job; off-duty physical intimidation; and publicly attacking whistleblowers in civic organisations or other public or professional forums outside work, to illustrate just a few. The Directive's point is to ban any bullying that scares employees into silence, and this is not limited to a workplace context.

II. MISSING ISSUES (4)

1. Security clearances. The JURI draft text wisely outlaws retaliatory denial or revocation of security clearances. The Council proposal is silent. **The loophole could effectively remove any meaningful rights for all national security whistleblowers,** because denying or pulling a clearance is the back door way to fire a national security employee. The loophole routinely is exploited in the U.S., and should be another extremely high priority. Outlawing retaliatory security clearance actions does not undermine the principle to protect classified information, because the law only would ban retaliation, without any relevance to whether the employee is unqualified for a clearance or has engaged in misconduct for which non-whistleblowers would lose their clearances.

2. Mandatory psychiatric examinations. These potential reprisals were specifically included in the JURI's version but inexplicably removed as a prohibited form of reprisal from the Council's. Ordering these exams is one of the ugliest forms of retaliation, a sugar-coated version of

sending dissidents to insane asylums. It is a retaliatory device to justify an employer's "independent" grounds for action, and is particularly dangerous by leading to long term blacklisting beyond the immediate job loss. Before the U.S. closed this loophole in 1994, it was a common tactic to camouflage retaliatory dismissal of all employees, not just national security workers. **There is no justification to exclude it from the explicit list of actions eligible to challenge.** It would not affect professional judgement but rather subject the action to scrutiny as to whether it constitutes retaliation.

3. Psychological support: Unlike the JURI proposal, in its provision for free counselling and advice the Council does not explicitly provide either for psychological support to cope with retaliation, or reimbursement to pay for it as part of relief. This omission could also make a significant, negative difference. Far too many whistleblowers have snatched defeat from the jaws of victory, because they emotionally cracked under the stress of sustained retaliation or multi-year litigation. **This support can make as much difference as legal rights, and should be fully included.**

4. Data to assess law's effectiveness: The proposal calls for nations to track the volume of disclosures and their impact, which is excellent. Inexplicably it skips that same research for retaliation, which is essential for the four-year review of the Directive's effectiveness. **At a minimum, the mandatory data should include the number of retaliation claims filed including:**
   - the range and average length of time for decisions;
   - the track record for granting interim relief compared to the number of requests;
   - the number of cases dismissed on procedural grounds;
   - the win-loss record for decisions on the merits (rulings whether or not determined that the whistleblower's rights were violated);
   - the number of terminations upheld and the number reversed;
   - and the range, average and gross figures for financial relief provided.

III. PROVISIONS SOUND IN PRINCIPLE THAT NEED FINE TUNING TO ACHIEVE STATED OBJECTIVES (8)

1. Protection to challenge misconduct that has not yet occurred. The Directive makes it protected speech both to challenge planned misconduct and cover-ups, which is vital. However, in the former, the whistleblower must demonstrate it is "very likely" the misconduct will occur. This is a subjective and ill-defined standard open to wide interpretation. It will have a chilling effect by forcing whistleblowers to guess whether they have rights. **The "very likely" test should be replaced by "reasonable belief that the misconduct will occur."**

2. Follow-up after initial disclosure. The Directive requires follow-up to the whistleblower on progress, and disclosure of the results after an investigation is completed. This is excellent as far as it goes but is seriously incomplete. **The Directive also needs a requirement to seek the whistleblower's rebuttal of responses denying his/her charges; inclusion in the final report of the whistleblower's comments whether the report is a reasonable response to concerns; and publication of the report on the public record for transparency.**

3. Protection for those associated with whistleblowers. This protects those connected with whistleblowers, including unions that assist disclosures and family members who work for the employer. It is essential to prevent isolation and earn a reasonable belief, but it does not go far enough. NGOs and media both frequently provide significant assistance. A**s they are often very closely associated with whistleblowers, NGOs and media must have the same legal rights as others connected with the whistleblower.** Further, retaliation frequently **extends to family members off the job**, such as following family members, surveillance and harassment of spouses and even children. As discussed separately (see this section, point 7 below), all **designated persons are inherently associated with the whistleblowers whose cases they are working on, so all their duties should be protected activity.**

4. Interim relief. The Council supports interim relief, which is excellent since it is unsurpassed in terms of practical impact. For the same reason, **the provision needs an enforcement standard**. As presented it is a wholly discretionary option for courts or other enforcement bodies. The Directive should make interim relief mandatory when the whistleblower initially demonstrates a substantial likelihood of a prima facie case – s/he engaged in protected activity and is being harmed by a subsequent action. Then the alleged retaliation is halted while the court/enforcement body pins down the facts and considers the employer's reverse burden of proof – a process that can, and does routinely, extend for years.

5. Strong confidentiality provisions. These provisions are essential to any whistleblower protection law and so are very welcome here. The fact that they include the protection of any identifying information and accountability for breaching confidentiality is excellent. However, best practice is **to only reveal a whistleblower's identity with their consent or with a court order**. This reinforces proper, accountable assessments of disclosures and investigations of wrongdoing. If it becomes necessary for a whistleblower's identity to be revealed in furthering an investigation or punishing a wrongdoer, it is important to provide advance warning of the reasons why this is necessary and to address any outstanding concerns of the whistleblower that arise from their named participation. If a whistleblower still does not consent, then, in order to maintain the credibility of the system and the trust in the whistleblowing arrangements, a court order should be sought.

6. Liability only for knowingly false allegations. This text is essential to keep the Directive from being counter-productive. Unfortunately, the recital describes that standard to include "misleading" statements. This open-ended, subjective concept easily could become a back door poison pill that restores vulnerability to retaliatory civil or criminal prosecution. Black's International Law Dictionary defines "misleading" to include information that is intended or could create a "wrong impression" or be "misunderstood." It puts the whistleblower's intentions on trial, rather than his or her knowledge; and effectively cancels protection for mistaken disclosures. **The reference to "misleading" must be removed from the recital,** as it opens the back door to liability far broader than knowingly false statements.

   Although the currently shrunken scope of liability is a major improvement, it will make a difference if the principle can be extended further. **While narrow, the liability provision is still a threat. It is inherently counterproductive and will create a chilling effect in a Directive**

designed to make potential whistleblowers feel safe. The superior way to frame the liability is in found in the Serbian law. **Instead of threatening, it states that individuals will not be protected by the law for knowingly false statements**. This establishes the boundary without an unnecessary threat.

7. Controls connected with designated persons. Designated persons are the human infrastructure essential to gain whistleblowers' trust, and to help them safely make a difference. Their effectiveness is unsurpassed for making the structure work. If they are a weak link, the chain will very likely break. Indeed, in the U.S. experience, officials with these duties typically are either reprisal victims themselves, or Trojan horses who team up with organisational authorities against the whistleblower.

   The key solution is not to require that protected reports be channelled through the Designated Person. If this is an option rather than a requirement, whistleblowers will choose to work with those who are legitimate and retain the protection of anonymous disclosures, duty speech or concerns raised in the course of their work responsibilities (see Section I, number 2 above). This will cancel the risk that the designated person is a mandatory trap, which in a bad faith organization will increase retaliation and facilitate obstruction of justice.

   The Council proposal wisely prohibits conflicts of interest, requires protection of confidentiality, calls for necessary powers to investigate and refer reports to relevant authorities, and requires feedback to the whistleblower. While these principles are sound, intensive training sessions for designated persons in Serbia have illustrated how they are incomplete, and would benefit from the following additional controls:

   - *Dedicated position*. One critical vulnerability is that designated persons often have at least one, and sometimes two other responsibilities. They do not have time to do justice to the significant duties associated with the Directive, so this should be a dedicated, full time position.
   - *Training of designated persons*. Many are not familiar with the concept of whistleblowing and not likely to understand the Directive's principles merely by reading them. There also should be a requirement that they are certified as having completed training in the Directive before they assume their duties.
   - *Designated person training responsibilities*. Subsequently they should be responsible for training of management/staff.
   - *Designated person public outreach and education responsibilities.* Similarly, they should be responsible for proactive public education about the Directive and its provisions through activities such as participating in overseeing a website that provides education on the law and discloses the resolution and any impact from each.
   - *All job duties as protected activity under the Directive*. Since the position inherently is one of the most dangerous in an organization, all their actions to carry out their duties should be legally-protected activity with the same rights against retaliation as a protected whistleblowing disclosure.

- *Reporting directly to institutional/company head.* To reinforce their independence and keep their findings from getting buried, they should report directly to the institutional chief who should be the only official with authority to terminate them.
- *Mandatory access to information and accountability*. It should be clear that they have access to all information necessary to follow through on reports. If an office refuses to provide it, the Designated Person's report findings should be required to make a presumption that the whistleblower was right on that issue and/or that wrongdoing occurred.
- *Institutional commitments on recommendations in final report*. An institution either should be required to make an on-the-record commitment to accept the Designated Person's recommendation as part of the final report, or an on-the-record explanation why it is declining to accept any recommendation.
- *Whistleblower's assessment comments in final report*. The whistleblower's comments on the adequacy of resolution for concerns s/he raised should be included as part of the record in the final report.
- *Transparency.* The Designated Person's final report should be publicly available through the directive website, as well as a Designated Person's Annual Report that has all the Directive's required data on impact for that year, as well as the data on retaliation listed below.

8. Eligibility of unions to be "trusted persons" providing guidance to whistleblowers. This is an excellent provision. It recognises the essential role unions play in supporting their workers. It is equally important to recognise the role that non-governmental organisations have played and continue to play in advising and supporting whistleblowers in all European countries. This is true in all countries where there is robust whistleblowing legislation. Thus, t**his provision should be extended to non-governmental organisations and recognising the importance of advice in ensuring issues are raised in the most appropriate way, access to such guidance should not be discretionary but should be an entitlement.**

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