WIN LEGAL BRIEF

Review of the European Council's proposal of the 29th January 2019 for a directive on whistleblower protection[1]

While the Council's proposal is consistent in principle with the mandate for whistleblower protection, and contains a number of outstanding provisions, it retains and reinforces structural problems that threaten to undermine the very purpose of whistleblower protection in Europe. It does so by -

- **exacerbates the flaws of tiered reporting** and restores vulnerability to obstruction of justice by canceling the clear right to make external disclosures to government authorities immediately;
- **adds an unprecedented, subjective test as a prerequisite for the liability shield**: the whistleblower not only must prove a reasonable belief of misconduct, but also that *his or her specific whistleblowing was necessary to reveal it*; and
- most significant, **effectively cancels the liability shield while adding an unprecedented prerequisite for protected speech** -- that evidence was lawfully *obtained*, not just lawfully *disclosed*. This will put the whistleblower on trial in every case, having to win that battle as a prerequisite for eligibility to challenge retaliation.
- Finally, it **imposes a subjective, unreviewable, open-ended national security loophole** giving each nation the option to cancel the Directive's public freedom of expression rights;

Further, a series of minor repairs or technical clarifications are necessary to preserve significant provisions. In short, while the Council presented its proposal as consistent with the mandate so far. Unfortunately, the devilish details could render it counterproductive to its stated objectives. Supporting analysis and suggested solutions are below.

POSITIVES

To give credit where due, illustrative examples of the proposal's best practice provisions include the following:

- Definition of reasonable belief, the merits test for protected speech -- that the whistleblower genuinely believes the information was true and relevant to listed misconduct -- including protection for reasonable but mistaken reports and an absolute ban on relevance of the whistleblower's motives. (27, 34)[2]

[1] https://data.consilium.europa.eu/doc/document/ST-5747-2019-ADD-1/en/pdf

[2] For simplicity, Proposal references are to page numbers rather than legal citations. Generally if there are two citations the first comes from the recital and the second from the text.

- Reprisal protection for anonymous reporting if discovered. (35)
- Expansive definition of breach that effectively sweeps in abuse of authority -- misconduct that undermines the law but is not technically illegal. (*Id.*)
- Expansive definition of those protected, including those who assist or are associated with the whistleblower. (37)
- Broad prohibition of any direct or indirect retaliation, including threats and attempts, also extending to contracts, licenses and permits. (49)
- State of the art confidentiality protection. (48)
- Penalties for retaliation, including bringing "vexatious proceedings against reporting persons." (52)
- Whistleblowers' right to verify the record of their disclosures. (45-6)

STRUCTURAL POISON PILLS

I. TIERED REPORTING

The proposal rejects the Parliament's clean right to choose between internal and external audiences for an initial disclosure. Before going to government authorities, the whistleblower must report to a specific "internal channel" and wait at least three months. (38)

***Adverse consequences*:**
While the destructive impact has been discussed extensively (see WIN legal briefs here and here), three flaws in particular stand out.

1) By only shielding those who communicate through a specific system, the internal channel shrinks the free flow of protected information to a trickle. Employees communicate the overwhelming bulk of protected information pursuant to job duties.

2) To preserve their rights employees would have to withhold risky whistleblowing information from the chain for command and instead flood the whistleblower office. That would be a lose-lose -- institutionalizing institutional mismanagement by blocking the flow of information for normal checks and balances to operate, while creating a dysfunctional logjam at the whistleblower office.

3) Mandatory internal reports in any form enable obstruction of justice at bad faith organizations, because they lock in a three-month grace period to perfect a cover-up. While the proposal has a relevant exception, there is an inherent chilling effect from barring the clear, free choice of audience. Until the whole case is over, employees would not know whether they waived their rights by going straight to authorities. This is highly uncertain. As the recital explains, at 23, whether the exception applies "will thus depend on the circumstances of each case and of the nature of the rules that have been breached."

***Solution*:**
One core principle is to advocate the Parliament's model for a clean protected speech channel either to internal or external offices. We suggest adhering to: international best practice consensus, including the 2014 Council of Europe Recommendation (Principle 14); the dissenting views by member nations; the example set by Ireland with clarity about going directly outside the employment relationship; as well to the precedent of the current Council's President, Romania, where there is complete freedom of choice between internal, external and public audiences.

Even the Parliament's language, however, does not protect duty speech. As a result, in addition we recommend a new twist on the duty speech provision – expand the scope of protected internal reports to include communications to supervisors. This is a basic minimum even in weak whistleblower laws. It is hardly anti-employer, because it protects the necessary flow of information for informed organisational decisions.

This modification addresses all the problems listed above.

1) Since employees almost always go to their immediate supervisor or supervisory chain of command with duties or problems, it would sweep in nearly all protected information.

2) The internal whistleblower office would have a more functional workload of serious reports.

3) It would start the clock for an external disclosure by putting the organisation on notice, without drawing the attention of formal accusations to the whistleblower office

Language for this suggestion is simple: Add the italicized language to Chapter II, *Art 3 biz,* at 38:
[R]eporting persons shall first provide information on breaches falling within the scope of this Directive *through supervisory channels pursuant to organisational procedures or by* using the channels and procedures provided for in Chapter II.

In addition to widespread precedent and policy benefits, there already are some bases to support this expanded scope of internal reporting. First, the Council proposal, at 36, defines internal reports broadly to include "provision of information on breaches within a public or private legal entity." Without any stated basis, the proposal simply does not protect all internal disclosures. Further, the recital at 19 and text at 41 both already provides protection to those whose duty is to communicate with competent authorities. Finally, para. #24 of the recital, at 13, provides strong reasoning why the normal on-the-job context should be protected:

> *Persons need specific legal protection where they acquire the information they report through their work-related activities and therefore run the risk of work-related retaliation (for instance, for breaching the duty of confidentiality or loyalty). The underlying reason for providing them with protection is their position of economic vulnerability vis-à-vis the person on whom they de facto depend for work. When there is no such work-related power imbalance (for instance in the case of ordinary complainants or citizen bystanders) there is no need for protection against retaliation*.

II. WEAKENED LIABILITY SHIELD

The proposal, at 50[3], adds a precondition for protection against liability from civil and criminal prosecution. There only is immunity if the whistleblower "had reasonable grounds to believe that the reporting or disclosure was necessary for revealing a breach pursuant to this Directive." That means it is not safe to have engaged in "protected" speech. The whistleblower also must properly guess whether there will be a legal ruling that his or her disclosure was necessary to expose the misconduct. Unless that judgement call passes the new second test, the whistleblower will be defenceless against criminal or civil prosecution.

***Adverse consequences*:**
It would be unprecedented in global whistleblower law to impose a second test for protection against retaliation – the importance of the disclosure. It also is irrelevant for the Directive's purposes, and so unreasonable that it would create a severe chilling effect. It could even up causing worse net retaliation by enabling retaliatory civil lawsuits and criminal prosecutions to substitute for workplace harassment.

1) The purpose of whistleblower policies is to create safe channels for the free flow of credible information to exercise authority responsibly. It is not relevant for that goal whether any individual report is necessary to make a difference. Indeed, it would create a constant, subjective loophole to condition protection on guessing right about significance, rather than merit. That is why the Council proposal maintains protection for reports of illegality too trivial to require investigation. That principle should apply to litigation as well, not merely workplace actions.

2) There will be a severe chilling effect on disclosures, because whistleblowers could not possibly know how important their disclosures were until enforcement proceedings were completed. In the meantime, whether they have rights will depend on their ability to guess correctly the view of some future theoretical decision-maker about whether the information was indispensable. Many understandably will choose not to gamble.

3) Protections against retaliatory liability must keep pace with protection against workplace reprisals, or one will replace the other. In the U.S., again as an example, since new laws made employment retaliation more difficult, the harassment of choice has shifted to retaliatory criminal actions and civil lawsuits. Those forms of retaliation can be far uglier, and more frightening, than the threat of getting fired. The Council's proposal bans workplace reprisals, but enables retaliatory litigation with a wild card immunity test. As a result, it could end up substituting a worse form of retaliation compared to today, with a worse chilling effect.

***Solution*:**
The offensive text should be substituted so that there is immunity "for making a report protected by this Directive." The Directive should conform to all other global whistleblower laws by conditioning protection only on the report's merits, not its predicted significance.

[3] Article 15 (4)

III. NEW "LAWFUL METHODS" PREREQUISITE FOR PROTECTED SPEECH

Perhaps the most outlandish fine print is another unprecedented new test, this time for all protected speech. In addition to making a credible disclosure, the whistleblower must prove that the knowledge or evidence was acquired lawfully, at 36[4].

Adverse consequences:
This additional requirement for protection also would be unprecedented in global whistleblower laws. It would have a severe chilling effect, because it would put the whistleblower's methods on trial in every case, a battle the whistleblower would have to win before even being eligible to challenge retaliation. It would come up routinely, because both public and private employers regularly contend that whistleblowers have stolen whatever evidence proves misconduct. Again until after a subsequent trial, no whistleblower could be sure of engaging in legally protected activity, no matter how strong the evidence.

The lawful methods prerequisite also defeats the whole point of having a liability shield, and actually makes even the weakened shield irrelevant. The point of the liability shield is that what normally would be liable is immune when the alleged illegality is blowing the whistle. The freedom to communicate evidence about breaches is more important than contradictory legal restrictions. But this new requirement for protected speech creates a sophistic Catch 22: If the report is "unlawful," there never is any protected speech to start with. That means the whistleblower never gets a chance to prove the report was necessary to expose wrongdoing, and that ensuing retaliation was illegal.

The chilling effect will be even worse, because losing this preliminary battle not only would deprive the whistleblower of protection. It would be a finding of acting illegally. Whistleblowers would have to risk prosecution, not mere defeat, every time they filed a retaliation claim.

***Solution*:**
"[L]awfully acquired" must be deleted from the definition of "reporting person," at 36. Significantly, this would not give whistleblowers a blank check to illegally obtain information. The liability shield covers disclosures of information, not how it was obtained. But a remedial law should not structure in threats. Deleting the prerequisite merely means that every retaliation case will not start by putting the whistleblower's research methods on trial. That would have to be an independent justification from the employer, or independent litigation.

If compromise for irresponsible whistleblowing is necessary, boundaries that limit rights should focus on the disclosure, rather than how evidence was obtained. For example, the U.S. model bans public release of information specifically prohibited by statute. That qualifier could be applied here, with the definition of "reporting person" modified as follows: "(7) '[R]eporting person' means a natural person who reports or *makes disclosures information not specifically prohibited by statute/national law* discloses information on breaches lawfully acquired in the context of his or her work-related activities."

[4] Article 3 (7)

IV. NATIONAL SECURITY LOOPHOLE

Para. 21 of the recital, at 10, makes clear that "[n]ational security remains the sole responsibility of each Member State, in the fields of both defence and security." The text, at 33, reaffirms, "This Directive shall not affect the responsibility of Member States to ensure national security." The same applies to protection of classified information. (*Id.*) The proposal then, at 47, bans any public disclosures "where competent authorities establish that this threatens essential national security interests."

***Adverse consequences*:**
This subjective standard would allow any competent authority, such as an intelligence agency, to gag any public whistleblowing it chooses, based solely on its unreviewable judgment call that the disclosure threatens national security. In the U.S. experience, for example, those agencies have been eager to declare virtually anything that threatens agency self-interest to be a national security threat as well.

***Solution*:**
The subjective standard must be replaced by an objective boundary – such as information that has been designated as classified. That is the boundary to restrict the public's right to know which has passed muster under the rule of law. The loophole above should be modified to read "where the report contains information that has been properly designated as classified." This specific wording is necessary to avoid unmarked or after-the-fact classifications.

MINOR REPAIRS OR TECHNICAL CLARIFICATIONS

1) Scope of protection for legal entities

The proposal is unclear whether protection against retaliation extends to legal entities such as corporations, NGO's or the media. In Article 2, at 34, the proposal specifies that the Directive only applies to reporting persons, and legal entities are not included in the ensuing list. But the definition of "retaliation," Article 3 (10) at 36, includes detriment to "a confidential advisor, or to a legal entity connected with the reporting person." The recital, at 14, also explains that protection should apply to contractors, sub-contractors and suppliers for retaliation such as loss of business. Further, the recital repeatedly references the importance of media freedom. It emphasizes, at 13,

> *Member States should ensure that the need for protection is determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship, so as to cover the whole range of persons connected in a broad sense to the organisation where the breach has occurred.*

The Directive should clarify that it covers any legal entity associated with the whistleblower whether commercially or to provide confidential advice, whether contractor, supplier, NGO or media. This can be done by adding a new item to the coverage list, at 34: "3. "This Directive shall apply to individuals or legal entities associated with the reported person either commercially or to provide confidential advice." The recital could explain that the list includes corporate contractors and suppliers, corporate and individual clients, NGO's and the media.

2) Missing external disclosures exception for public emergencies

The proposal's list of contingencies that would extend protection for immediate public disclosure includes the following, at 47:

> *[T]here is a low prospect of the breach being effectively addressed through the use of internal and/or external channels and the breach may constitute an imminent or manifest danger for the public interest or a risk of irreversible damage*

Inexplicably, the list of contingencies, at 41 to bypass internal channels and make an immediate report to a competent authority (ie. "external report) does not include this contingency. It should be added, both for consistency and as common sense.

3) Clarification for reverse burden of proof

The recital, at 25-26, explains and properly states that –

> *… once the reporting person demonstrates prima facie that he or /she made a report or public disclosure in line with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then demonstrate that the action taken was not linked in any way to the reporting or the public disclosure*.

This is the same standard approved by the Commission and Parliament. However, unlike the Commission and Parliament's language, the Council's proposed text, at 50, describes the employer's burdens of proof in a far less controlled manner: "In such cases, it shall be for the person who has taken the detrimental measure to prove that this measure was based on duly justified grounds."

On its face, the text is inconsistent with the recital burden of proof, as well as with the text used by the Commission and Parliament. "Duly justified" is a far easier basis for employer pretexts than "not linked in any way to the reporting or public disclosure." The burdens of proof are too fundamental for there to be any confusion. The specific, accurate statement in the recital for burdens of proof should be included in the legal text of the directive.

4) Interim relief

While the recital recognizes the importance of interim relief due to lengthy delays, the text, at 51, does not establish any standards for it to be realistic. Instead, it defers entirely to whatever national frameworks exist. Interim relief makes a real difference whether whistleblowers can survive long enough without being ruined by delays alone. To provide a reasonable standard, the text, para. 6, p. 51, should have a new sentence at the end: "Interim relief shall be provided if the person establishes a prima facie case by demonstrating a legally-protected report and subsequent disclosure." This modification not only will make a key difference for desperate whistleblowers, it will reduce the incentive to prolong unnecessary conflict.

5) Clarification on remedies

The recital, at 26, calls for full "makes whole" remedies that eliminate all the direct and indirect, tangible and intangible effects of retaliation. Unfortunately, that entitlement is not memorialized in the text. It should be, to eliminate confusion.

6) Transparency of effectiveness against retaliation

Like the Parliament, the Council proposal limits transparency to gathering and publishing data on the benefits of whistleblowing reports. The public record should extend to the Directive's impact against

retaliation. Article 21 should be expanded to require national data on the annual number of retaliation complaints, time for resolution; won-loss record for “merits” decisions whether rights were violated; number of tines interim relief sought and granted; as well as data on compensation and other relief.

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