EPSU welcomes EU protection of whistleblowers against retaliation by employers



(Brussels 13 March 2018) Workers exposing breaches or abuses of EU law will be protected from retaliation from their employers across the EU.

“After strong concerns that the directive could be more harmful than helpful, we welcome the EU institutions’ political agreement reached on 11 March. It will protect private and public sector workers, including civil servants, trainees and subcontractors who speak up against public health, tax or environment dodging, misuse of public money, cruelty against animals, amongst others. ” says EPSU General Secretary Jan Willem Goudriaan.

“The new directive will certainly be a helpful tool to fight a culture of secret at work, and foster transparency, responsibility and trust, as well as workers’ right to consult their representatives. As the trade secret directive is kicking in, the new directive brings a necessary counterweight.”

A major flaw, supported by the French, German, Hungarian, Austrian and Swedish governments, that would have obliged whistleblowers to first report internally to their organisation, was eventually lifted from the final text of the directive thanks to public pressure including from OSCE Media Freedom Representative and UN Special Rapporteur and EPSU's French affiliates

"*Whistleblowers will have the right to choose to report internally or externally to public authorities, and the internal reporting procedures should be agreed by social partners. This is a major win*" adds Mr Goudriaan.

"Some aspects still need clarification and there is also some disappointment. For instance, provisions for collective protection by trade unions are weak, yet whistleblowers who often end up in isolation need support and trade union representational rights. Breaches of EU labour laws should have been in the scope of the directive and the general interest and freedom of expression should have prevailed over national security interest. There is also no reason to restrict access to journalists. We urge EU governments to close these gaps when they transpose the directive into domestic law by 2021" concludes Mr Goudriaan.

EPSU is proud to have been part of the coalition of trade unions. led by Eurocadres, NGOs and journalists, established in November 2016 with a view to establish EU minimum standards on the protection of those who speak up. Within a very short time, by EU decision-making standards, the mission has been accomplished. More work remains to be done during the transposition into domestic law.

EPSU thanks the Greens, who put forward their own EU directive in 2016 and Socialist rapporteur Rozière for her determination and skills during the tough negotiations with the Council and Commission.

Vote in Plenary is scheduled for April (tbc)

The final text of the directive will shortly be available, below is a reported summary (to check against final text):

- To qualify as a whistleblower, workers must have reasonable grounds to believe that the information reported was true at the time of reporting and that is in the scope of the Directive.
- The protection for whistleblowers covers workers in the public and private

sector, including civil servants, the self-employed, volunteers and paid or unpaid trainees, people working for contractors, subcontractors and suppliers, recruitment interviewees and ex-workers. Third persons such as colleagues or relatives who may suffer retaliation in work-related context. Facilitators, understood as a natural person who provides confidential advice to whistleblowers, would also be protected from reprisals.

- Protection will kick in for reporting on breaches of law or abusing the spirit of EU laws in a wide range of areas such as public procurement, financial services, prevention of money laundering and terrorist financing, product safety, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data and security of network and information systems, protection of the financial interests of the Union, breaches of internal market rules, including competition and State aid rules or tax avoidance issues. Member States can go beyond these minimum standards when transposing the Directive into national law.
- violations of workers' rights and working conditions are not in the scope, although the European Commission will be obliged to consider expanding the scope of the Directive to those areas when the Directive is reviewed by 2023.
- whistleblowers are protected for reporting internally or for reporting directly to regulators and competent authorities.
- Regarding public reporting (to the press), whistleblowers will be protected
    - if they reported directly to regulators or if they reported internally and externally but no appropriate action was taken in response to the report within 3 months for internal reporting or 3 to 6 months in the case of reporting to regulators;
    - if they had reasonable grounds to believe that there is an imminent or manifest danger for the public interest (emergency or a risk of irreversible damage);
    - if, when reporting to regulators, there is a risk of retaliation or low prospects of the breach being effectively addressed, due to the particular circumstances of the case, for example, where evidence may be concealed or destroyed or where an authority is somehow involved in the breach.
- Companies with more than 50 employees will be obliged to set up channels and procedures for whistleblowers to report safely, the same applies to public bodies except municipalities with less than 10,000 inhabitants or less than 50

employees. Small municipalities can pool resources and share channels or procedures for reporting.

- The channels/procedures for reporting must be established in agreement with social partners, there are provisions for respecting the autonomy of social partners and workers' rights to consult their representatives
- Retaliation against whistleblowers is prohibited such as suspension, dismissal, demotion, harassment, discrimination, wage cuts, etc.
- Effective, proportionate and dissuasive penalties will need to be put in place against natural or legal persons who attempt to hinder reporting, or who retaliate against whistleblowers, or who bring vexatious proceedings or who reveal the identity of the whistleblower. Any threats or attempts to retaliate against whistleblowers are also prohibited.
- Whistleblowers shall not be liable for breaching restrictions regarding the disclosure of information and in judicial proceedings, including for defamation, breach of copyright, of secrecy data protection rules, disclosure of trade secrets, they shall not incur liability of any kind if they reported a breach of law in accordance with the Directive.
- When it comes to the acquisition of information, whistleblowers will not be liable as long as the acquisition did not constitute a "self-standing criminal offence".
- whistleblowers will be able to file for interim relief pending the resolution of legal proceedings.
- Whistleblowers will benefit from a "reversed burden of proof". This means that once it has been established that the whistleblower reported in line with the directive and that they suffered retaliation, the burden of proof would then be on the person who retaliated against the whistleblower to prove that the detriment was not a direct consequence of the report.
- Member States shall take the necessary measures to ensure remedies and full compensation for damages suffered by whistleblowers, in accordance with national law.
- Member States will have to ensure that whistleblowers have access to legal aid as well as to comprehensive and independent information and advice and are encouraged to look into providing financial and psychological support in line with national law.
- A strong non-regression clause will allow for more favourable national protections to prevail

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