



Brussels, 25 February 2019
(OR. en)

6631/19

Interinstitutional File:
2018/0106(COD)

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NOTE

From: Presidency

To: Permanent Representatives Committee

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of persons reporting on breaches of Union law : Progress report

Introduction

1. At the FREMP Working Party meeting on 12-13 June 2018, the Commission presented its proposal for a Directive on the protection of persons reporting on breaches of Union law ("Whistleblowers Directive").
2. The proposal has been discussed at FREMP meetings on 12-13 July, 10-11 and 19 September, 19 October, 5, 15-16 and 26 November, 3, 12 and 17 December 2018, 10 January, 13 February 2019 and by JHA Counsellors on 8, 14 January, 6, 19, 21 and 26 February 2019. Intensive work has been carried out until now at technical level and good progress has been achieved so far.

3. At its meeting on 25 January 2019, Coreper agreed on the text of the above mentioned proposal as set out in the Annex to doc. 5747/19 as a basis for negotiations with the European Parliament. The Austrian, Belgian, Bulgarian and Hungarian delegations entered declarations in the minutes of Coreper (5747/19 ADD 1).
4. Negotiations with the European Parliament started on 29 January 2019 with a view to reaching a first reading agreement on this file before the European Parliament elections next May. In order to achieve this goal, negotiations should be finished by mid-March, so the European Parliament could vote the text as agreed at its last Plenary on 15-18 April 2019.

Proceedings within the Council

5. Since the start of the legislative procedure, delegations have welcomed the Commission proposal and expressed support for this initiative. Discussions in the competent Working Party led to an agreement on numerous amendments to the Commission proposal which were aimed at guaranteeing a high level of protection for the reporting persons.
6. The main modifications introduced in the proposal by the Council aimed at simplifying the legal basis, clarifying the conditions for the protection of reporting persons, including the use of internal and external channels and the conditions for public disclosures. Further amendments clarified the relationship of this instrument with other applicable sectoral Union legislation, simplified the obligations incumbent on competent authorities and provided for clearer rules on confidentiality.

Main issues in negotiations with the European Parliament

7. During the negotiations with the European Parliament, the following key issues have been identified: material scope, personal scope and the use of reporting channels.

A. Material scope

Under this heading, there are several related issues which still need to be resolved. The main outstanding issue concerns the European Parliament's request to add to the material scope of the proposal the protection of workers (Articles 153 and 157 TFEU). In addition, an agreement should be found on the status of the Annex which includes the list of the legislative acts falling within the scope of the proposal. The European Parliament asked for the Annex to be indicative and not exhaustive as in the Commission proposal and Council text. The European Parliament position raised legal concerns for the Council Legal Service. Therefore, Member States agreed on having the legal basis as broad as possible while keeping the text legally sound.

B. Personal scope

The categories of persons to be protected under this Directive as initially proposed by the Commission were acceptable both for the Council and the European Parliament. The European Parliament has extended the personal scope further to cover facilitators and has broadly assimilated them to reporting persons. This raises the question of extending the system of protection to this group of persons given that they are not required to fulfil the conditions for protection laid down in the draft Directive. By contrast, the Council text provides for the protection against retaliation of the so-called confidential advisors who have assisted or given advice to the reporting person and for this reason they have suffered retaliation from their employer. Here an agreement could be reached since the Council and European Parliament positions are quite convergent on the substance.

C. The use of reporting channels

The Council approach follows the approach initially proposed by the Commission in that it keeps as a general rule the obligation for the reporting person to report first to the internal channel. The Council text provides for derogations to this rule where internal reporting would not be possible nor advisable for the reporting person. Against this background, the European Parliament wishes to leave the choice to the reporting person of deciding whether he/she wishes to use the internal channel or address the report directly to the external channel. In the Parliament's view, the reporting person is the best placed to make that assessment. This would be the main political issue on which a balanced approach should be found in order to be acceptable for both co-legislators.

On other issues, work is progressing at technical level in order to find the most suitable compromise solutions, as for example: lawfully acquired information/ criminal liability; minor cases and cases affecting individual rights.

Conclusion

8. Given the limited time to reaching an agreement with the current European Parliament, all parties to the negotiations need to show flexibility, including on the key issues mentioned above.
9. Coreper/Council are invited to take note of this progress report.