



05/09/2018

AMENDMENTS: 21

Virginie Rozière

Protection of persons reporting on breaches of Union law

Proposal for a directive COM(2018)0218 - C8-0159/2018 – 2018/0106(COD)

Amendments created with

at4am

Go to <http://www.at4am.ep.parl.union.eu>

Amendments per language:

EN: 21

Amendment 1

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 1 – paragraph 1 – introductory part

Text proposed by the Commission

1. With a view to enhancing the enforcement of Union law and policies in specific areas, this Directive lays down common minimum standards for the protection of persons reporting on the following unlawful activities **or abuse of law**:

Amendment

1. With a view to enhancing the enforcement of Union law and policies in specific areas, this Directive lays down common minimum standards for the protection of persons reporting on the following unlawful activities:

Or. en

Justification

It is important to limit the scope on unlawful activities. "Abuses of law" or "wrongdoings" are too vague and would broaden the scope too much (see Art 3). Those wordings are also completely overstepping the objective of the Commission proposal to secure the adherence of European law. The result of those wordings would be that each doubtful behaviour - although legal - could allow the public disclosure of information. The result would be legal uncertainty accros the European Union. Based on the ECtHR key decision 28274/08 headnote 5 (21 July 2011), the AM 2, 3, 4 and 29 proposed by the rapporteur are also very worrying as they are extending the scope and creating a situation, in which the 'public interest' has not be really affected anymore. A public interest would be present in almost every case. This situation reduces the balance of interest between 'public interest' and the 'interest of the affected persons' to absurdity - although the ECtHR strictly demanded to always find this balance in its key ruling.

Amendment 2

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 1 – paragraph 1 – point d

Text proposed by the Commission

d) breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax **or arrangements**

Amendment

d) breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax law.

whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

Or. en

Justification

The protection for whistle blower should be limited on clear violations against the standing tax law.

Amendment 3

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 2 – paragraph 1 – point c

Text proposed by the Commission

Amendment

c) *shareholders and persons belonging to the management body of an undertaking, including non-executive members, as well as* volunteers and unpaid trainees;

c) volunteers and unpaid trainees;

Or. en

Justification

Not covered by the purpose of the regulation as those are normally not employers of the company, who are afraid of reprisals.

Amendment 4

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 2 – paragraph 1 – point d

Text proposed by the Commission

Amendment

d) *any persons working under the supervision and direction of contractors, subcontractors and suppliers.*

deleted

Or. en

Justification

Violates the principle of prior report within the company as this staff is not bound to the internal rules, which causes the risk of abuses. For instances, other companies could use it to damage the reputation of a competitor.

Amendment 5

Axel Voss, Markus Pieper, Angelika Niebler, Markus Ferber, Sven Schulze

Proposal for a directive

Article 2 – paragraph 2

Text proposed by the Commission

Amendment

2. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information concerning a breach has been acquired during the recruitment process or other pre-contractual negotiation. **deleted**

Or. en

Justification

The extension to applicants or even to former employees (as proposed by the rapporteur) would increase the chances of abuses immensely.

Amendment 6

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze, Geoffroy Didier

Proposal for a directive

Article 2 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2 a. However, this Directive should not affect the protection of legal and other professional privilege as provided for under national law.

Or. en

Justification

Although this is the last sentence of recital 69, it should be repeated in Article 2 in order to make sure that the obligation of confidentiality (e.g. lawyer -> client) is taken into account.

Amendment 7

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze, Geoffroy Didier

Proposal for a directive

Article 3 – paragraph 1 – point 1

Text proposed by the Commission

(1) ‘breaches’ means actual or ***potential*** unlawful activities ***or abuse of law*** relating to the Union acts and areas falling within the scope referred to in Article 1 and in the Annex;

Amendment

(1) ‘breaches’ means actual or ***likely*** unlawful activities relating to the Union acts and areas falling within the scope referred to in Article 1 and in the Annex;

Or. en

Justification

It is important to limit the scope on actual or likely (=Art 3 (5)) unlawful activities and not extend it to all "wrongdoings". Otherwise, each doubtful behaviour - although legal - could allow the public disclosure of information. The result would be legal uncertainty accross the European Union. Based on the ECtHR key decision 28274/08 headnote 5 (21 July 2011), I also see AM 2, 3, 4 and 29 proposed by the rapporteur as very worrying as they extend the scope and create a situation, in which the 'public interest' has not be really affected anymore. A public interest would be present in almost every case. This reduce the balance of interest between 'public interest' and the 'interest of the affected persons' to absurdity - although the ECtHR strictly demanded this balance in its key ruling.

Amendment 8

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 3 – paragraph 1 – point 3

Text proposed by the Commission

(3) ‘***abuse of law***’ means acts or omissions falling within the scope of Union law which do not appear to be

Amendment

deleted

unlawful in formal terms but defeat the object or the purpose pursued by the applicable rules;

Or. en

Justification

See comments for Artikel 1(1) and 3(1) of this directive.

Amendment 9

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

**Proposal for a directive
Article 4 – paragraph 2**

Text proposed by the Commission

2. Such channels and procedures shall allow for reporting by employees of the entity. They *may* allow for reporting by other persons who are in contact with the entity in the context of their work-related activities, referred to in Article 2(1)(b),(c) *and (d), but the use of internal channels for reporting shall not be mandatory for these categories of persons.*

Amendment

2. Such channels and procedures shall allow for reporting by employees of the entity. They *must* allow for reporting by other persons who are in contact with the entity in the context of their work-related activities, referred to in Article 2(1)(b) *and (c).*

Or. en

Justification

The disclosure of information via internal channels and procedures should also be possible for those persons mentioned in (b) and (c).

Amendment 10

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze, Geoffroy Didier

**Proposal for a directive
Article 5 – paragraph 1 – point d**

Text proposed by the Commission

d) a reasonable timeframe, not

Amendment

d) a reasonable timeframe, not

exceeding three months following the report, to provide feedback to the reporting person about the follow-up to the report;

exceeding three months *or six months in duly justified cases* following the report, to provide feedback to the reporting person about the follow-up to the report;

Or. en

Justification

In order to make it coherent with Art 6(2b) and Art 9(1b), which gives in cases of external reporting and duly justified cases 6 month. This is necessary for companies as the cases are often very complex and they need time and flexibility to evaluate the allegations. Therefore, they should be able to extent the timeframe as it is allowed for the competent authorities.

Amendment 11

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze, Geoffroy Didier

Proposal for a directive

Article 5 – paragraph 2 – subparagraph 1 – introductory part

Text proposed by the Commission

The channels provided for in point (a) of paragraph 1 shall allow for reporting *in all* of the following ways:

Amendment

The channels provided for in point (a) of paragraph 1 shall allow for reporting of the following ways:

Or. en

Amendment 12

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 5 – paragraph 2 – subparagraph 1 – point a

Text proposed by the Commission

(a) written reports in electronic or paper format *and/or* oral report through telephone lines, whether recorded or unrecorded;

Amendment

(a) written reports in electronic or paper format *or* oral report through telephone lines, whether recorded or unrecorded, *or*;

Or. en

Justification

To make it clear that both ways of reporting are possible (alternatively, not cumulatively).

Amendment 13
Axel Voss, Geoffroy Didier

Proposal for a directive
Article 6 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1 a. The Member States are creating a new information centre, which the informant can contact in order to get help in evaluating his/her suspicion.

Or. en

Justification

According to Art 13 of the proposal, the only basis for deciding if the suspicion falls under the scope of this regulation or if the internal steps can be skipped (Art 13(2)) is the subjective assessment of the informant. As this assessment is often rather complicated - both on actual and on legal accounts - and as the results of an unjustified disclosure are quite severe for the company and the affected individual(s), Member States should help the information at the earliest stage. They should be able to contact a centre, where they can describe/explain their suspicion, without naming the company or the affected persons. The centre should then - on basis of their information - make a first assessment if the suspicion seems reasonable, if it is within the scope of this directive and which agency is responsible if the internal ways are not sufficient.

Amendment 14
Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive
Article 7 – paragraph 1 – point a

Text proposed by the Commission

Amendment

a) they are separated from general communication channels of the competent authority, including those through which the competent authority communicates internally and with third parties in its ordinary course of business; ***deleted***

Or. en

Justification

Deletion is necessary in order to avoid duplicating structures.

Amendment 15

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 13 – paragraph 2 – point c

Text proposed by the Commission

Amendment

c) *the use of internal reporting channels was not mandatory for the reporting person, in accordance with Article 4(2);* ***deleted***

Or. en

Justification

Due to the proposed changes in 4(2), this has to be deleted, too.

Amendment 16

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 13 – paragraph 4 – introductory part

Text proposed by the Commission

Amendment

4. A person publicly disclosing information on breaches falling within the scope of this Directive shall qualify for protection under this Directive where:

4. A person publicly disclosing information on breaches falling within the scope of this Directive shall qualify for protection under this Directive where ***he or she first reported internally and/or externally in accordance with Chapters II and III and paragraph 2 of this Article, but: a) no appropriate action was taken in response to the report within the timeframe referred to in Articles 6(2)(b) and 9(1)(b); b) and there is immediate danger to life and health of individuals.***

Or. en

Justification

This is a crucial paragraph for the Directive as a public disclosure of information should be the ultima ratio based on a genuine balancing of interest. This requirement is also backed by the ECtHR in its key decision 28274/08 headnote 4 (21 July 2011) and its created 'three-stage notification procedure'. Otherwise, the businesses would not have the possibility to fix the shortcomings and the the new rules would violate the presumption of innocence and encourage denunciation. Nevertheless, one should delete point b) as 'public interest' is not clearly defined within this Directive and this point would therefore lead to legal uncertainty. A layman would not be able to determine whether all conditions are being met and could eventually make a unjustified disclosure. Subsequently, the presumption of innocence could not be guaranteed due to the interest of the media for the (alleged but not factual appropriate) accusation. So far paragraph 4 leads to the risk that a whistle blower does not accept the assessment of an authority and takes matters into his/her own hands.

Amendment 17

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 13 – paragraph 4 – point a

Text proposed by the Commission

Amendment

a) he or she first reported internally and/or externally in accordance with Chapters II and III and paragraph 2 of this Article, but no appropriate action was taken in response to the report within the timeframe referred to in Articles 6(2)(b) and 9(1)(b); or **deleted**

Or. en

Justification

Due to changes in Article 13(4).

Amendment 18

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive

Article 13 – paragraph 4 – point b

Text proposed by the Commission

Amendment

b) *he or she could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger for the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage.* **deleted**

Or. en

Justification

Due to changes in Article 13(4).

Amendment 19

Axel Voss, Angelika Niebler, Markus Pieper, Markus Ferber, Sven Schulze

Proposal for a directive Article 15 – paragraph 5

Text proposed by the Commission

Amendment

5. *In judicial proceedings relating to a detriment suffered by the reporting person, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it shall be for the person who has taken the retaliatory measure to prove that the detriment was not a consequence of the report but was exclusively based on duly justified grounds.* **deleted**

Or. en

Justification

This paragraph stands for a shift in the burden of proof, which would causes many new duties of documentation for businesses as well as many new obligations to produce proof. The employer should be at least able to provide information afterwards. One other consequence in the employment law would be that each employee could get a special life-long protection against dismissals by bringing forward an unjustified claim and/or by making false claims (which cannot be disproved)!

Amendment 20
Axel Voss, Geoffroy Didier

Proposal for a directive
Article 16 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3 a. The protection of personal data of the concerned person is crucial in order to avoid unfair treatment or reputational damages due to the disclosure of personal data, in particular data revealing the identity of a person concerned. Hence, in line with the requirements of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), competent authorities should establish adequate data protection procedures specifically geared to the protection of the reporting person, the concerned person and any third person referred to in the report that should include a secure system within the competent authority with restricted access rights for authorised staff only.

Or. en

Justification

This content is already in Recital 58 but should be in the operational text in order to underline this important aspect.

Amendment 21
Axel Voss, Angelika Niebler, Markus Ferber, Markus Pieper, Sven Schulze, Geoffroy Didier

Proposal for a directive
Article 17 – paragraph 2

Text proposed by the Commission

2. Member States shall provide for effective, proportionate and dissuasive penalties applicable to persons making malicious or abusive reports or disclosures, including measures for compensating persons who have suffered damage from malicious or abusive reports or disclosures.

Amendment

2. Member States shall provide for effective, proportionate and dissuasive penalties applicable to ***the reporting and other*** persons making malicious or abusive reports or disclosures, including measures for compensating persons who have suffered damage from malicious or abusive reports or disclosures.

Or. en

Justification

This paragraph is a crucial provision in order to prevent false allegations by a whistle blower or at least to be able to sanction such a behaviour. Otherwise, the person could publicise the allegations without even checking if the content is truth. In its key decision 28274/08 headnote 7 (21 July 2011), the ECtHR underlines that each allegation needs to be based on "factual circumstances" and may not be reported non-knowingly or frivolously as only a righteous claim is covered by Article 10(1) and (2) ECHR. Consequently, the deletion of this paragraph would only encourage denunciation - instead of amending the wrong, it fosters it.