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A Response to the Green Paper

"Modernising Labour law to meet the challenges of the 21st century"

COM (2006) 708 final of 22.11.2006

http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=189

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A Response to the Green Paper

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Europe Needs More Whistleblowing!

1. The questions of the Green Book (Questions 1 & 8):

The following statements are intended to answer to questions 1 and 8 of the Green Paper. In our view, an effective Whistleblower Legislation should be one "of the priorities for a meaningful labour law reform" and it belongs to the "`floor of rights´ dealing with the working conditions of all workers regardless of the form of their work contract".

2. Whistleblower (Definition)

A Whistleblower is:

- A person or group of persons who;
- publicizes internally and/or externally to the organization with which s/he is linked
- perceived (real or at least honestly believed) risks, abuses and legal infractions
- whose disclosure is in the public interest

3. The Many Advantages of Whistleblowing

- Whistleblowing increases the risk of discovery for those who employ unfair practices in competition, thus promoting fair competition. At the company level, internal whistleblowing enables effective controlling and efficient early recognition of developing risks. The difference to regulation by public authorities is that it verifies conformity with relevant norms at a much lower cost and that it applies equally to all relevant norms and risks.
- It serves as an early warning system that reveals risks before they turn into damage, abuse or illegality.
- Whistleblowing imposes no burdens on legally operating actors while it is an excellent anti-corruption tool and can discover insider information that would otherwise remain secret. The Commission has used this tool successfully in the realm of competition law for a long time. Now it is time to apply it throughout the Internal Market.

- It supplies information to the public and to public authorities that enable them to perceive risks and stop abuses. Thus it prompts the goals of Articles 2 and 3 of the Treaty to achieve high levels of social, environmental, health and consumer protection.
- Finally, it is a realisation of the rights enshrined in the EU Charter of Fundamental Rights Articles 10 and 11 of freedom of thought, conscience, opinion and information in the world of work, boosting liberty and motivation at work.
- It is closely linked to the rights to petition, to access documents, to all democratic rights because decisions always depend on information.

4. There is Too Little Whistleblowing

Considering all these advantages, it is surprising that only a suboptimal amount of whistleblowing takes place. All over Europe, many serious accidents, distortions of competition, criminal affairs, and environmental hazards could have been prevented, or resolved earlier, if people e.g. those professionally involved had spoken up. There must be circumstances that kept people silent. First scientific studies indicate three possible explanations:

- there is the ethical component of misguided loyalty and the culture of discretion
- the belief that Whistleblowing is a waste of time because it changes nothing
- Fear of individual disadvantages and sanctions.

5. Whistleblowing needs to be explored more thoroughly

Scientific investigation into the advantages, methods, difficulties, protections for, and results of whistleblowing is at its beginning. The EU should commit itself more strongly to this research in order to better realize the untapped potential of whistleblowing in the future. It has to be found out which factors and motives lead or hinder people to blow the whistle and to show civil courage. It is also important to evaluate the experience of whistleblowers with protection and enabling mechanisms and how those can be improved.

A multitude of disciplines will contribute to such research; economics, competition theory, games theory, legal scholarship, political sciences, polling, psychology and social psychology, crime prevention, occupational medicine, media and communication science, philosophy. Technology, informatics for example, can be used to protect anonymous whistleblowers.

6. Breaking through the Barriers of Silence

Member States and the Community should emphasize the advantages and the moral justification of whistleblowing in a publicity campaign. A broad approach is best here, going

beyond labour law to promote those who disclose risks in the interests of the Community and the public at large. Children should be taught the difference between disloyal ratting and morally necessary disclosures in order to change attitudes and cultures in the long term.
Ongoing campaigns and initiatives in public institutions, companies, associations and other social groups should be supported. It is important to find public and private leaders who promote whistleblowing within their organisations and report transparently on their dealings with whistleblowers.

7. The Law's Responsibilities

Law can contribute decisively to breaking through the barriers of silence and promoting whistle blowing. In the mid term there need to be European laws based on best practices as this subject is very relevant to the Internal Market.
This standard should be developed on the back of existing national (UK: PIDA, USA: SOX, Whistleblower-Protection-Acts, False-Claim-Act; rules in force in South Africa, Australia, Japan, Canada, South Korea etc.), international (UN Convention Against Corruption, OECD Recommendations, Council of Europe Recommendations, internal rules of international organisations such as the UN and EU) systems of rules that should be catalogued and critically examined for their practical effect. Practical effect means that more whistleblowing takes place, that the barriers of silence are lower, that reports are followed up, and that whistleblowers receive effective and permanent protection against reprisal.

8. Core Elements of Future Norms

Some essential demands on a future European regulation will be discussed in closing, as a contribution to the development that we demand.

8.1. Wide Area of Application

We have shown that whistleblowing is universally applicable and that it must be understood in its cultural dimension. Rules of limited application cannot do justice to whistleblowing. The limited competences of the EU make it desirable for Member States to take supplementary measures where necessary.

8.1.1. Personal Application

Basically, whistleblowing is a human right that should be enjoyed by individuals and groups everywhere. The hierarchy of competences within the EU and the terms of reference of the present Green Paper place an accent on labour and business law. Within those domains, a wide area of application should be chosen.
The following persons should be covered and protected; all who are employed whether privately or publicly, directly or via an intermediary, paid or volunteer, full or part time.

Coverage should include all those who have been, are presently in, or in the process of entering an economic relation through which pressure on their freedom of expression can be exerted.

8.1.2. Factual Application

The promotion of strictly private interests through disclosures may be excluded from protection. But all kinds of risk and norm-relevant information that at least partially serve the public interest should be covered. If there are internal company regulations (e.g. codes of conduct) blowing the whistle in relation to those is also covered.

8.1.3. Temporal Application

Preparations i.e. the acquisition and collection of information should be covered. Disclosures about abuses that existed before the legislation comes into force should also be protected.

8.1.4. Duty to Blow the Whistle

The duty to report and to provide information does not conflict with whistleblowing. Internal company regulations however must be in line with the laws and should be based on consensus with staff.

But whistleblowing depends very much on the whistleblower's faith in protection. The better alternative to hardly enforceable duties lies in creating an environment that makes whistleblowing easier and respecting the free choice of the whistleblower. Mandatory whistleblowing could also be misused as a justification for police state repression forcing citizens to “talk.”

8.2. Modest Standards for the Whistleblower's Motivation

Excessive demands on the moral purity of the whistleblower's motives will only be dissuasive, what matters is the information’s benefit to the public.

8.2.1. Protection of Good Faith

The whistleblower discloses a possible risk or abuse. It is sufficient that s/he honestly and consciously believes in this possibility and the truth of the facts s/he presents. An error based on mere negligence thus does not exclude protection.

8.2.2. Novelty

Again, the whistleblower's subjective view is decisive. If s/he believes that the primary or secondary addressees of the disclosure are not yet in full possession of the information, there should be complete protection. The same applies if from his/her perspective there is still need for effective reaction in relation to the risk or abuse. In those cases thus a lack of novelty can not lead to a reproach.

8.2.3. Motivation

Limiting whistleblowing protection to cases of pure altruism would prevent it in many situations. It is sufficient if there is no proof that motives were completely egotistical. Reasons of conscience should be covered.

8.3. Clear, simple norms and comprehensive communication

For all of the factual complexity, it is necessary to formulate norms that are clear, simple, and easy to communicate and explain. Rights and duties should be known and understood, potential addressees need to be published and all this information must regularly be publicized in promotional campaigns in order to extend whistleblowing in practice. The statute should include obligations to educate people about its content and to publish statistics on its application.

8.4. Counselling and Support for Whistleblowers

The Member States must ensure that actual and potential whistleblowers can be counselled on their rights and obligations by public or private organisations in confidentiality and without incurring costs. Councillors should be placed under a rule of silence, empowered to give legal advice, they should enjoy the right to protect their clients and to refuse to testify against them.

Recognized whistleblowers organisations with qualified staff should be allowed to defend whistleblowers in court. In order to remove the risks of excessive legal costs, these organisations should be allowed to collect fees only when they win the case.

The establishment of funds to support whistleblowers is encouraged.

8.5. Forms of Whistleblowing

Once again, a wide area of application is indicated. In principle, whistleblowers are well advised to write down their disclosures, but oral communications should be covered as well. The whistleblower should be allowed to choose freely between open, confidential and anonymous disclosures, made directly or via trusted intermediaries. In order to boost whistleblowing, all communication channels should be opened. As confidence is encouraged and the barriers of silence lowered, open whistleblowing will increase and become a self-perpetuating process.

8.6. Efficient Response to Disclosed Content

Whistleblowing will only take place when the disclosed information is perceived, professionally and independently evaluated, analysed, and acted upon with a view to minimizing risks and stopping abuses.

8.6.1. Independent, Professional Evaluation of Disclosures

The content of received disclosures should be completely and professionally evaluated. The independence of the addressees and evaluators should be guaranteed. If from his/her view doubts about these guarantees arise, the whistleblower has the right to turn to other addressees without fear of reprisals.

8.6.2. Transparent Evaluation Process

Criteria for the nature, duration and verification of the evaluation should be established. Verification should be proportional to level of threat that was disclosed, but also to the quality of the information initially available and should in general include a duty to own initiative investigations.

With full respect for the rights of third parties, whistleblowers should receive confirmation of receipt of their disclosure, the opening of an investigation, and its probable duration. As long as the success of the investigation is not endangered, its progress should be reported to the whistleblower. S/he should see the draft final investigation report and be allowed to comment on it (the comments becoming an annex of the official report). S/he should have the right to question the final report on his/her choice through mediation or judicial review. S/he might involve whistleblower organisations in doing this. Should these reviews invalidate the final report, there is the right to recover court and other costs.

8.6.3. Sanctions for Obstructing Investigations

Member States and the Community should provide dissuasive sanctions for obstruction of or omission of investigations, false evidence, delay, or distortion. Possible sanctions include sacking, exclusion from public tenders, obligation to pay damages and criminal penalties. The same should apply to attempts to penetrate behind protections of the whistleblower’s identity or breaches of her/his confidence.

8.6.4. Protection for Third Parties' Rights

All evaluation processes should fully respect the rights of third parties, especially to due process, judicial review and data protection.

8.7. Addressees

8.7.1. Optional Priority of Internal Whistleblowing

The whistleblowing law should leave the choice between internal and external whistleblowing to designated public or governmental addressees to the whistleblower and treat both forms equally.

Insofar as that is essential for protection of third parties' rights (such as the protection of commercial or technical secrets) and as the efficient reaction to disclosures (as described

above) remains assured, Member States may require disclosures must be made inside the organisation initially.
External whistleblowing must remain protected in those cases in which the whistleblower believes that important community interests are at stake or that criminal activity has taken place, when trustworthy internal procedures are lacking or have been exhausted, or where there are reasoned doubts about the efficiency of the reactions.

8.7.2. Designating Public/Governmental Addressees

The Member States designate government bodies to which disclosures may be addressed. At least one agency must be named and must fulfil the duties of information evaluation. Specific criteria for choosing a public addressee may also be promulgated.
The personal, regulatory and financial independence as well as sufficient resources of these addressees have to be assured, even if the whistleblowing concerns public institutions or people active therein.

8.7.3. Criminal Prosecutors and Parliaments

Independently of other rules, whistleblowing to criminal prosecutors and parliamentary petition committees remains assured. They are to protect the rights of third parties.

8.7.4. Public Whistleblowing

A Whistleblower factually can always address the public or the media. This possibility of external whistleblowing can not be legally excluded from whistleblower protection.
Here s/he becomes personally responsible for protecting legitimate secrets and rights of third parties. That responsibility falls on the addressees in the cases of internal and external whistleblowing to designated public or governmental addressees.
Where there are no legitimate secrets to protect (in covering up criminal activities for instance) the whistleblower incurs no responsibility. This is also true when lack of an adequate response drive the whistleblower into the public domain as a last resort. If the whistleblower was unaware of the secrecy of disclosed information, or if it was not in fact secret, there should be no negative repercussions. This remains true as long as the legitimate interest to keep the secrecy does not exceed the interest in avoiding the risk or abuse to which the whistleblowing pointed.
Finally, it is important to remember that in a democratic society all decisions by public and governmental bodies are subject to public review.

8.8. The Right to Blow the Whistle and Supporting Rights

8.8.1. Right to Blow the Whistle

In the cases described there is a right to blow the whistle and a right to an efficient reaction and evaluation.

8.8.2. Right to Refuse Service

The whistleblower may refuse to render services that would make him or her an accomplice to a crime, an act threaten the health of humans or the environment, or an act that is against his or her conscience. The duty to render other services of equal value remains untouched.

8.8.3. Right to Be Informed

It is in everybody's interest to avoid a multitude of unnecessary investigations into ill-founded allegations. Therefore the potential whistleblower should inform himself or herself thoroughly and collect evidence systematically. This applies to information to which they already have legitimate access to the extent to which whistleblowing itself is legitimate. Application to consult public or government records in this connection before or after the whistleblowing should be treated as in the public interest.

8.9. Whistleblower Protection

Along with lowering the barriers of silence and ensuring effective evaluation, protecting whistleblowers from reprisals is important to achieving the goal of increased whistleblowing. This protection must work in everyday life and not just on paper. Only then will potential whistleblowers gain the confidence to reveal their valuable information.

8.9.1. Antidiscrimination Law as a Model

Directives 2000/43/EC, 2000/78/EC, 2002/73/EC und 2004/113/EC provide elements that can be used for the protection of whistleblowers.

8.9.2. Ban on Discrimination

The principle must be that those whistleblowers who follow the legal rules of the statute under consideration must be free of all direct and indirect discrimination and of all other disadvantages in connection with their disclosure. There should be coverage during the pre-whistleblowing phase and for justified refusals to render service. There should be protection for persons supposed to be whistleblowers, and for those who aid and support whistleblowers. All forms of repression should be covered, including threats, mobbing and shortages of career and development perspectives.

8.9.3. Precaution and Protection

Public and private employers have the responsibility to protect whistleblowers against reprisals from third parties (such as colleagues, customers, clients). If they fail their duty to protect the whistleblower, they are liable to compensate him/her for damages.
They must take concerns expressed by him or her seriously and consult on feasible protective measures such as transfers to another department. S/he is to be protected against long term career damage by persons who have a negative attitude towards whistleblowers.

8.9.4. Effective and Dissuasive Sanctions

Discrimination triggers extensive claims for compensation on the whistleblower's part. These claims may be for restoration of the state of affairs before the discrimination began and/or for monetary compensation. The level of monetary compensation should exceed that for unjustified dismissal and be sufficient to offset all damages, including moral damages, to the whistleblower and his/her family.
In addition, those responsible for the repression will be sanctioned in accordance to what was written above about obstruction of investigations.
There should be a right to be protected under preliminary injunctions and the right to respond to unbearable situations by refusing to render service or by terminating one's employment.

8.9.5. Transparent Sanctions

After judicial proceedings have been terminated, whistleblowers and their organisations shall have access to court records. They shall have the right to publicly criticize verdicts.

8.9.6. Legal Aid, Burden of Proof, and Victimization

Articles 9 through 11 of Directive 2000/78/EC should apply to legal aid, burden of proof, and victimization for whistleblowers who have acted in conformity with the legislation.

8.9.7. Support for Research into Occupational Diseases

The Community and the Member States should support research into the adverse effects of repression against whistleblowers and their families, including psychological and psychosomatic problems. This will help to improve protection for whistleblowers and to set levels of compensation correctly.

8.9.8. Partial Immunity for Whistleblowers

Legal whistleblowing has nothing to do with defamation or malicious gossip and cannot be sanctioned as such.
Whistleblowers will enjoy immunity from prosecution by administrative, civil or penal tribunals for obtaining access to documents, making copies, or revealing classified material, provided

that their was the reasonable belief that the material would be destroyed or suppressed during the course of an open investigation or that these actions were necessary in order to end a significant abuse. The right to exploit the material commercially is excluded.
The finding that there has been an obstruction of the investigation or that there have been reprisals against the whistleblower eliminates all civil counter-claims against the whistleblower. If such measures are undertaken by governmental departments or agencies, criminal liability for breach of official secrets or for disloyal statements is also eliminated.
Insult is not legitimated by the fact related protection of whistleblowing. Insult occurring at the occasion of whistleblowing is therefore not covered by the partial immunity rules of the whistleblower protection law.

8.9.9. Compensation Under Insolvency

Whistleblowing may lead to the organisation's insolvency (and thereby to the whistleblower's unemployment) or to other situations in which it is unable to pay due compensation to the whistleblower. In these cases in which public interest has been directly served it is for the government to compensate him or her in place of the organisation, as if s/he had been discriminated because of the whistleblowing. In the other cases, the whistleblower and his/her family retain the claim to the minimum income.

8.9.10. Discriminatory Hiring

Discrimination against ex-whistleblowers while hiring staff is to be prohibited. The same fits for activities supporting such discrimination.

9. Blocking Escape Clauses

Rules and agreements that obstruct the effects of whistleblower legislation, such as special confidentiality clauses, will be void.

10. Rewards for Whistleblowers

Rewards for blowing the whistle will be legal, but offering attractive rewards in advance risks triggering false whistleblowing that ends up in denunciation. On the other hand it is legitimate to materially or immaterially appreciate and compensate the whistleblower after his often difficult undertaking.
The “False Claims Act” in the USA has led to substantial savings in the public sector. The Community and the Member States should investigate if and how such a mechanism could be adapted to the European culture and legal systems. One possible approach might be to combine effective and full compensation for the individual with collective action for the benefit of public whistleblower-support funds.

11. Evaluation

Whistleblowing legislation should be evaluated at regular intervals. Further protective and anti-abusive clauses may be added as necessary. Evaluation should be centred on the question of practical effectiveness. It needs to look for societal and economic consequences but also for effects on motivation and practical experience of whistleblowers.

The facts of life for whistleblower laws is that their initial passage creates a mandate, but technical mistakes, unanticipated scenarios, and ingeniously creative new forms of retaliation mean they must be a work in progress for several generations of refinement, if there is to be any realistic hope of meeting their potential. The worst scenario is a whistleblower law that doesn't work. It creates a false sense of rights, generating a class of reprisal victims who place the final nail in their own professional coffins by seeking to enforce the dysfunctional rights.