EUROPEAN COMMISSION

*Brussels, 28.11.2018*
*C(2018) 7765 final*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law {COM(2018) 218 final}.*

*The Commission appreciates that the Bundesrat generally welcomes the establishment of a framework for effective whistleblower protection at European Union level as a means of strengthening the enforcement of Union law.*

*The introduction of strong whistleblower protection rules at Union level would, amongst others, contribute to a better protection of the Union's financial interests and to ensuring the level-playing field needed for the single market to function properly and for businesses to operate in a fair competitive environment. Strong whistleblower protection at Union level also safeguards the right to freedom of expression and media freedom, as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union. Robust whistleblower protection would thus overall enrich the European Union toolkit for strengthening the correct application of Union law and respect for transparency, good governance, accountability and freedom of expression, which are values and rights on which the European Union is based.*

*The Commission notes the Bundesrat's concerns on the proposal's compliance with the principle of subsidiarity, and would like to provide a number of clarifications.*

*The Commission is of the view that the proposed framework for protection of whistleblowers at Union level fully respects the principle of subsidiarity set out in Article 5(3) of the Treaty on European Union.*

*In that regard, the Commission recalls that the whistleblower protection currently available across the Union is fragmented across Member States and uneven across policy areas. Whilst some Member States have comprehensive legislation in place, others offer only sectoral or very limited protection. Lack of whistleblower protection in a Member State can have a negative impact on the functioning of European Union policies*

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*in that Member State, but also have spill-over impacts in other Member States and the European Union as a whole. At Union level, whistleblower protection is provided only in specific sectors and to varying degrees. This fragmentation and the existing gaps in protection, which detract from the enforcement of European Union rules whose violation can cause serious harm to the public interest, cannot be solved by the Member States acting at national level. In line with the principle of subsidiarity, the Commission believes that ensuring a consistent level of whistleblower protection as a means of strengthening enforcement of Union law can only be effectively achieved at Union level.*

*Moreover, the minimum standards set out in the proposal aim at ensuring a consistent legal framework of whistleblower protection across the Union with a view to strengthening the enforcement of Union rules whose violations can cause serious harm to the public interest. The proposal focuses only on certain areas with a clear European Union dimension and where the impact on enforcement is the strongest. More specifically, it lays down common minimum standards for the protection of whistleblowers reporting breaches only in areas where: i) there is a need to enhance enforcement; ii) under-reporting by whistleblowers is a key factor affecting enforcement and iii) breaches may result in serious harm to the public interest.*

*The Commission also believes that the proposed Directive is a flexible and balanced instrument requiring Member States to achieve a certain result whilst allowing them to choose how to do so, taking into account specificities of their legal systems, traditions and processes.*

*The obligation on all Member States to ensure that legal entities in the private and public sector, as well as competent authorities, have in place reporting channels for receiving and following-up on reports is meant to ensure that information on breaches of Union law reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible. At the same time, this obligation is commensurate with the size of the entities, so as to limit burdens on national authorities and businesses, particularly small and micro companies.*

*The common minimum standards applicable to the internal and external reporting channels are based on the principles outlined in the 2014 Recommendation of the Council of Europe on Protection of Whistleblowers[1] (in particular principles 12 to 20). They are a necessary and proportionate means of ensuring the full effectiveness of the Directive and of achieving a consistently high level of protection across the European Union, and legal certainty for whistleblowers. They aim to ensure i) that potential whistleblowers are sufficiently informed on where to report and what breaches may be reported, (ii) that the confidentiality of the identity of whistleblowers is safeguarded throughout the reporting process and (iii) that reports are diligently followed-up and feedback is given to the whistleblowers within a reasonable timeframe. These requirements are thus carefully calibrated to address the main drivers that currently lead to underreporting by whistleblowers, such as the lack of knowledge of where and how to*

[1] https://rm.coe.int/16807096c7

*report, lack of legal certainty about protection from retaliation, and the lack of confidence in the usefulness of reporting.*

*The Commission believes that the requirements are spelled out in a necessary and proportionate level of detail to ensure the follow up and investigation of reports about breaches of European Union rules falling within the scope of the proposed Directive. Beyond these essential requirements, the specific set up, design and operation of the reporting channels is explicitly left to the public and private entities. This allows large flexibility for taking into account, at the level of each Member State, the organisation of public administration and the set-up of the business environment, the needs of workers and of businesses.*

*All the above being said, the Bundesrat's Opinion has been forwarded to the relevant Commission services and will feed the negotiations between the European Parliament and the Council on the proposal.*

*In response to the more technical comments in the Opinion, the Commission would like to refer to the attached Annex.*

*The Commission hopes that these clarifications address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

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| *Frans Timmermans* | *Věra Jourová* |
| *First Vice-President* | *Member of the Commission* |

*Annex*

*The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.*

*The Bundesrat contends, in the first place, that the Commission proposal infringes Member States' competence to implement Union law under Article 291(1) of the Treaty on the Functioning of the European Union (TFEU).*

*The Commission would like to recall that Article 291(1) of the Treaty creates an obligation for Member States to adopt 'all measures of national law to implement legally binding Union acts', without prejudice, if uniform conditions of implementation are required, to the adoption of implementing acts by the Commission or, exceptionally, by the Council. With its proposal the Commission is proposing to adopt a legislative act (not an implementing act) that, for particular fields and acts of Union law, contributes to improve their enforcement through a harmonised protection of whistleblowers. This can be and has been done in individual legislative acts, and can also be done on a horizontal basis. The Member States remain responsible for the adoption of transposition measures and then of all other administrative measures that would be required to implement the proposed Directive.*

*With regard to the Bundesrat's subsidiarity and proportionality concerns in the State aid area, the Commission would like to note that it appears that most of the Bundesrat's arguments are based on the misinterpretation that the proposal would impose a new reporting obligation from national authorities to the Commission. In reality, the proposal does not create any new reporting channel to the Commission.[2] It rather provides for the obligation for legal entities in the private and public sector and for national competent authorities to put in place secure reporting channels to allow potential whistleblowers (individuals being in a work-based relationship with a private or public legal entity) to report breaches of European Union State aid rules, respectively, within the (private or public) legal entity concerned (internal reporting) or to national competent authorities (external reporting). The proposal would, therefore, not deprive Member States' administrations of their control, but to the contrary, would offer them another tool for obtaining information that can lead to effective detection and investigation of relevant breaches, thus enhancing their enforcement capacity.*

*Moreover, the wording of Article 109 of the Treaty on the Functioning of the European Union[3] does not exclude that it could apply to measures harmonising certain State aid*

[2] The proposed Directive only recalls that any existing reporting requirements to the Commission under the applicable national and Union law provisions need to be respected (Article 6(2)(c)). As the State aid rules do not foresee an obligation for Member States to report any (alleged) infringements of the State aid rules to the Commission, the proposed Directive does not create any new reporting channel to the Commission.

[3] 'The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.'

*control features, but simply refers to the application of Articles 107 and 108 of the Treaty.*

*As also recognised by the Bundesrat, in order to fulfil the requirements of Article 108 of the Treaty, Member States need to have efficient internal procedures in place. In particular, Article 108(1)*[4] *and Article 108(3) of the Treaty*[5] *require Member States to identify potential State aid measures as quickly as possible. A framework enabling confidential reporting by whistleblowers and providing strong protection against retaliation can be an appropriate instrument in this context.*

*Minimum harmonisation standards for whistleblower protection are necessary to ensure effective enforcement of State aid rules and a level playing field across the internal market.*

*The proposed common minimum standards for whistleblower protection require certain reporting channels and procedures to be in place. Neither the internal nor the external reporting channels and procedures are likely to impose a disproportionate burden on national administrations: they can be based on existing reporting channels and procedures within each administration. In particular in State aid matters, there are existing communication channels between local authorities and the central level (e.g. to make notifications) in all Member States, which could be easily adapted to fulfil the obligation in the proposed Directive.*

*The Bundesrat is concerned that the proposal would put excessive burden on legal entities in the public and private sector, and, with regard to the former, that the proposal would not respect Member States' national identities inherent in their political and constitutional structures, inclusive of regional and local self-government under Article 4 (2) first sentence of the Treaty on European Union. The Commission notes in this regard that the proposal does not interfere in any way with the autonomous determination by Member States of their administrative, political and constitutional structures. On the contrary, the wording of Article 4(6) of the proposal aims precisely to ensure that, regardless of their administrative organisation, the obligation to establish internal reporting channels and procedures applies in a uniform manner in all Member States. With regard to the burden on entities in the private and public sector, Article 4(3) and (6) of the proposal translates the principle that the obligation to put in place internal reporting channels should be commensurate with the size of the entities (and in the case of private entities, take into account the level of risk that their activities pose to the public interest). Micro and small companies*[6] *are exempted from the obligation to establish internal channels, with the exception of businesses operating in the area of financial services or vulnerable to money laundering or terrorist financing, as provided under*

[4] 'The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States.'

[5] 'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid […]The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

[6] As defined in Article 2 of the Annex of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36), as amended.

*existing Union legislation. The same exemption applies to municipalities with less than 10,000 inhabitants.*

*The Bundesrat considers that the provisions on penalties (Article 17 of the proposal) are inappropriate. The Commission believes that penalties are necessary to ensure the effectiveness of the proposed framework on whistleblower protection. Leaving unpunished those who take retaliatory actions against whistleblowers would discourage other potential whistleblowers from coming forward. At the same time, penalties against whistleblowers that report or disclose information knowing that such information is false are also necessary to deter malicious reporting. The proportionality of such penalties should ensure that they do not have a dissuasive effect on potential whistleblowers.*

*The Bundesrat also considers that including the judiciary in the scope of application of the proposal (and in particular the obligation to set up external reporting channels) would affect the independence of the judiciary and infringe Article 47 of the Charter of Fundamental Rights of the European Union. In this regard the Commission would like to note that, based on the Council of Europe Recommendation on Protection of Whistleblowers,[7] the personal scope of the proposal encompasses the broadest possible range of categories of persons in the public or private sector, who, by virtue of their work-related activities, and irrespective of the nature of these activities, have privileged access to information about breaches that can cause serious harm to the public interest and who may suffer retaliation if they report (see Article 2 and recital 25 of the proposal). The judiciary is therefore not per se excluded from the personal scope of the proposal. This said, it is only where a person working for the judiciary reports a breach that falls within the material scope of the proposal (see Article 1 and the annex to the proposal, such as, for instance, a breach of the Union public procurement rules) that s/he will be protected from any form of retaliation s/he might suffer as a consequence of her/his reporting.*

*With regard to the Bundesrat's arguments at the basis of its recommendation to exclude the civil service from the scope of the proposal, the Commission would like to note as a preliminary remark, that Article 45(4) of the Treaty on the Functioning of the European Union does not altogether exclude workers in the public sector from the application of the Treaty. According to the case law of the Court of Justice of the European Union, the notion of 'worker' does include employees of a body governed by public law.[8] The exemption of 'employment in the public service' in Article 45(4) of the Treaty, which is interpreted strictly by the Court of Justice, only concerns the obligation for Member States to secure the free movement of workers within the Union,[9] and does not exclude the possibility of adopting measures concerning those workers on the basis of other Treaty provisions. As regards the concerns referring to national rules on professional*

[7] Recommendation CM/Rec(2014)7 on the protection of whistleblowers and explanatory memorandum https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5

[8] See for example of the Court of Justice of the European Union judgment in Case C‑519/09 Dieter May v AOK Rheinland/Hamburg — Die Gesundheitskasse, ECLI:EU:C:2011:221.

[9] The exemption only concerns posts which involve the direct or indirect participation in the exercise of powers conferred by public law and the duties designed to safeguard the general interest of the State or of other public authorities (see CJEU judgment in Case C-270/13, Iraklis Haralambidis v Calogero Casilli, ECLI:EU:C:2014:2185).

*secrecy or on disciplinary measures, the proposal contains a reasonable set of rules that achieve a proper balance between the effective protection of whistleblowers and the requirement of professional secrecy, protecting whistleblowers from eventual disciplinary action. In particular, the strict requirement of confidentiality throughout the process of (internal and) external reporting for the information reported*[10] *should ensure that information covered by professional secrecy is only accessed by authorised staff members of the competent authority on a 'need-to-know basis'.*

*Finally, the Bundesrat considers that the proposal should provide for exceptions for serious violations of company or business confidentiality or allowing the Member States to derogate in this respect. This concern of the Bundesrat seems to refer to the disclosure of trade secrets, i.e. information that (i) is secret, (ii) has commercial value because it is secret, and (iii) has been subject to reasonable steps to keep it secret. The disclosure of such information by a whistleblower is dealt with in Article 5 (b) of Directive (EU) 2016/943*[11] *(the 'Trade Secret Directive'). In cases falling within the scope and meeting the conditions of both the Trade Secret Directive and the proposal at hand, the whistleblowers would also benefit from the protection provided by the proposal.*

[10] See in particulatr article 7(1)(b): 'Dedicated external reporting channels shall be considered independent and autonomous, if they meet all of the following criteria (…) b) they are designed, set up and operated in a manner that ensures the completeness, integrity and confidentiality of the information and prevents access to non-authorised staff members of the competent authority'. See also recital 56: 'It is necessary that dedicated staff of the competent authority and staff members of the competent authority who receive access to the information provided by a reporting person to the competent authority comply with the duty of professional secrecy and the confidentiality when transmitting the data both inside and outside of the competent authority, including where a competent authority opens an investigation or an inquiry or subsequent enforcement activities in connection with the report of infringements'.

[11] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure; OJ L 157, 15.6.2016, p. 1-18.