EUROPEAN MANAGERS

October 2018

POSITION PAPER

Proposal on the directive on the protection of persons reporting on breaches of Union law (whistleblowers'), presented in April 2018

Our key messages

a. **Because of their role, managers are particularly concerned by whistleblowing: they are more likely to be aware of specific wrongdoings within the company they work for and must at the same time act as "collectors" of claims issued by ordinary workers.**

b. **We are in favor of a EU-wide legislative initiative on regulating the issue of whistleblowers' protection, as the one presented by the European Commission. But we criticize the decision not to follow the provisions of art. 154 TFEU and call for a social partners' consultation.**

c. **Any effective solution in this field must ensure a fair balance of the various interests at stake: the whistleblowers', the general one but also the interest of the company and any possible third party that might be concerned by the reporting activity.**

d. **Focusing on internal reporting systems is the solution offering a fair balance. Internal reporting must be effective, easily accessible to all workers and reinforced by clear follow-up mechanisms.**
Only when internal reporting is unsuccessful, or in case of emergency, should external reporting be encouraged (through specific mechanisms that must be designed with the support of social partners). When this happens, legislation must ensure the protection of the individual against any form of retaliation.

Because of their roles and responsibilities in ensuring that company "behavior" is consistent with its business policies, managers have a primary position in identifying potential internal misconducts. Together with the obligations of confidentiality and trust that derive from their professional status (which, in many cases, sets managers in the position of legally representing the company for which they work), managers are equally bound by their individual and social ethics to act bearing in mind the importance of serving the interest of the economy and the society as a whole.

Our affiliates can be confronted on a regular basis with acts, decisions and orientations from within the company that might be unlawful per se or that might lead to the adoption of practices and policies contrary to the common good and/or to the codes of conduct that the company might have subscribed to. Whenever such events occur to them, we insist that they make use of the share of power and competence granted by their hierarchical position to voice the issue, express their concern and imagine alternative

practices. To lead by example and to apply transparency in every phase of the decision-making process within the company is one of the principles that CEC European Managers considers to be the founding values of the conduct of its affiliates.

In addition to this direct involvement, managers can also be indirectly concerned by whistleblowing activities as they collect all the claims that other workers might raise when noticing a wrongdoing and are responsible for finding the appropriate way to give resonance to them. Whistleblowing is therefore a topic of major interest and concern for managers, and in this text, we will highlight what is the position of managers and professionals that we represent.

We are in favor of a European legislative initiative to regulate whistleblowing. There is a need to set common standards for legislation to create a level playing field for all companies in Europe; this is even more true if we consider the situation of companies that have branches in other European countries and the special case of cross-border workers. The proposal of directive presented by the European Commission last April represents an initiative that goes in the right direction. However, we regret the decision not to activate the provisions of art. 154 TFEU on social partners' consultation. This not only represents in our eyes a violation of the prerogatives of social partners, but has also a direct impact on the content of the proposal, with shortcomings that could have been avoided if a significant exchange with social partners would have taken place in the right time The insufficient attention to and acknowledgement of the role workers' representation needs to play in this context is underlined also by the lack of any reference to their involvement in the definition and management of the reporting mechanisms provided for by the proposal. We will get more into the detail in the next paragraphs of our text.

One final consideration concerns the interaction between whistleblowers and journalists, activists and other actors from civil society. For the latter, whistleblowing represents the starting point of their watchdog function; their activity is not influenced by the need to respect those accountability and responsibility obligations towards the company that workers (and managers especially) are bound to. Journalists are the other pillar on which this system stands and deserve protection for the contribution they give to the society. However, it is necessary to draw a clear line (and the proposal correctly does it) between the prerogatives and possible contributions internal watchdogs can bring, whose voice is based on first-hand experience developed from the inside of the company, and those of external actors. It is important that also the public opinion develops the awareness of the differences that exist between these two categories.

- General remarks

Whenever an individual "blows the whistle", irrespective of his/her individual condition, several interests come into conflict: besides the individual interest to guarantee the protection of the whistleblower, the "general" interest of the society to avoid serious harm (corresponding to the sectors mentioned in art. 3 of the proposal of the directive), the

specific business interest of the company against which the reporting activity is done (following to which a serious economic damage for the company might stem) and finally the interests of any other third party that might be potentially involved in the whistleblowing act – for instance, the case of a person who is not directly/in a criminally relevant way involved in the issue whose name goes public. All the above-mentioned interests need to be taken into account in a balanced way.

As mentioned in the first paragraph of our paper, the managers and high-level professionals that we represent bear major responsibilities towards their company and are often bound by specific "secrecy" obligations, as they participate in the definition of business strategies that are of major importance for the company. In some specific cases, these managers act on behalf of their employers (including in terms of legal responsibility). It is therefore with a special attention that we look at the issue of confidentiality and the implications in terms of protecting business interests deriving from whistleblowing.

At the same time, the case of managers blowing the whistle should be considered differently than when other workers report internally wrongdoings: because of their higher share of responsibilities towards the company, risks of retaliatory measures can be higher, too. And in general, the risks for their career prospects and professional credibility towards possible new employers can be affected more significantly than for other categories of workers. It is therefore surprising to notice that the proposal of directive seems to "ignore" this specificity of managers; the absence of a structured dialogue in the context of a social partners' consultation has in our eyes clearly contributed to this weakness.

- On the proposal of directive

On these bases, the provision (art. 4 of the proposal) setting the principle that internal reporting must be attempted before "external" one is done represents a fair balance between the different interests at stake – including that of the company not to see any sensitive information being unduly disclosed. Of course, we insist on the need that these internal reporting mechanisms are effective, easily accessible and reinforced by clear follow-up mechanisms. Even in this respect, new technologies could be of great help to simplify the task to whistleblowers and make it easier for companies to comply with such a rule. In Italy for instance, national legislation has already introduced the recurse to IT-based channels (internal to companies) as a requirement for notifying to the upper management the existence of misdoings. Although such requirements might represent an additional administrative burden, we are sure that the obligation to put in place internal reporting tools will by itself already have significant dissuasion effects and influence positively the internal business culture. In this respect, legislation should also provide for specific training and awareness-raising facilities (including counseling and psychological support, if requested) to be put in place within companies; possible synergies with existing legislation providing for union representation are clear and should be further encouraged.

In this context, the full involvement of social partners in the definition of such mechanisms is essential: their consultation, as referred to in paragraph 1, should be compulsory, in order to reinforce the role of union representation in the whole process.

Another aspect that deserves being analyzed concerns the scopes of the proposal. As far as the material one is concerned (art. 1), we are in favor of an exhaustive list, as this increases transparency and clarity of the whole legislation. We are however more doubtful about the inclusion of some specific categories of individuals in art. 2 covering the personal scope: one might question for instance the likelihood for an applicant to a specific position to be made aware of possible wrongdoings of the company (for which he/she has not even worked). Extra-care should also be paid for profiles like consultants, sub-contractors and other professionals who can have find themselves in a position of conflict of interests if working with competitors of the concerned company.

When reporting through internal means is unsuccessful, or in case the urgency of the potential harm deriving from the wrongdoing is not compatible with the procedural aspects of internal reporting, then external reporting must be authorized and protected. Internal reporting tools might not be rapid enough to prevent serious collective harm from happening or might be "neutralized" by an insufficiently reactive hierarchy. In this case, legislation must ensure all forms of protection against retaliation, including demotion, discrimination and mobbing as well as dismissal. The provision imposing the "burden of proof" on the employer set in paragraph 5 of art. 15 reinforces the protection against the adoption of retaliation measures and is consistent with a traditional approach that is common to many national legal systems in Europe.

Another issue is worth mentioning when analyzing the provisions concerning the implementation of external reporting systems. Here again, no mention was made to the contribution of social partners, which should be associated in the process of designing the most effective external reporting channels (art. 7 of the proposal), as to better mirror the specificities of the business and industrial relations sectors of each Member State. Their role should not be confined to the setting-up of internal reporting channels only, as the proposal now provides for in art. 4. Additionally, when designing such external tools, specific attention should be given to safeguarding the privacy of third-parties and other concerned individuals, whose identity should be kept anonymous for as much as possible.

As a final step in the reporting procedure, the proposal for the directive correctly mentions public disclosure as the reporting system to recur to when the previous two (internal and external reporting) have not been successful or in case of "imminent danger". Going public should definitely be considered a last-resort decision, since in this case no safeguard of the interests and rights of the concerned company and third parties is possible.