

EXPLANATORY MEMORANDUM ON A EUROPEAN UNION DOCUMENT

OPINION OF THE EUROPEAN COURT OF AUDITORS

13195/18 Opinion No 4/2018 (pursuant to Article 325(4) TFEU) concerning the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law

Submitted by the Department for Business, Energy and Industrial Strategy on 31 October 2018

SUBJECT MATTER

1. The Court of Auditors is an institution of the EU which acts as an independent external auditor. It works to improve the European Commission's management of the EU budget and reports on EU finances.
2. The document is Opinion No 4/2018 of the European Court of Auditors. It contains the Court of Auditors' assessment of the proposed Directive on whistleblowing.
3. The Court of Auditors note the piecemeal approach to whistleblowing protections across the EU and welcome the proposed Directive as a complement to top-down law enforcement. The Opinion notes that reported non-compliance may also feed into the work of the Court of Auditors.
4. The Opinion offers specific remarks and analysis on several articles of the proposed Directive. These comments and analysis are summarised below.
5. Material scope: The Court of Auditors' Opinion welcomes broad coverage, although it notes concerns that the material scope is complex. The Opinion notes that, where Member States do not extend the scope to offer widespread protections, whistleblowers may face legal uncertainty as to whether or not they would qualify for protection for reported breaches. The Opinion notes that this may be mitigated by the provision of advice and assistance by competent authorities.
6. Personal scope: The Court of Auditors welcomes the breadth of coverage for whistleblowers, including volunteers, unpaid trainees and persons being recruited.
7. Obligation to establish internal channels: The Court of Auditors welcomes the requirement to establish internal reporting channels for whistleblowers. However, they consider that the exemption for municipalities of under 10,000 persons reduces the protection afforded, as the average size of a municipality in the EU is 5,887 persons.
8. Procedures for internal reporting and follow-up: The Court of Auditors considers that the proposed Directive does not adequately cover awareness-raising or

staff training measures as part of the requirements it places on internal reporting channels.

9. Conditions for the protection of reporting persons: The Court of Auditors state that when considering protections for information revealed by whistleblowers, public interest should be the determining factor. They consider that any exclusions from protection based on subjective motivations should not be allowed. While noting that several exceptions to the requirement to first report internally may create uncertainty for whistleblowers, they call for an additional exception so that whistleblowers can report externally where they fear a risk to personal safety or legitimate interests. The Court of Auditors also welcomes the protections for those who report to an EU institution, and the protection of anonymous whistleblowers.
10. Measures for the protection of reporting persons against retaliation: The Court of Auditors welcomes the inclusion of protections against a broad array of retaliation. They note the proposed Directive's lack of temporal limits on protection.
11. Reporting, evaluation and review: The Court of Auditors considers there is room to improve transparency and the extent of the proposed optional reporting requirements. They state that the Commission could examine the possibility to deliver EU funding to assist Member States with data collection and note that publication of this data would ensure confidence in the whistleblowing framework.

SCRUTINY HISTORY

12. The Department for Business, Energy and Industrial Strategy submitted EM 8713/18 – Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law on 15 June 2018. The proposal has not yet been cleared from The House of Commons and The House of Lords EU Justice Sub-Committee.

MINISTERIAL RESPONSIBILITY

13. This matter falls primarily within the remit of the Secretary of State for Business, Energy and Industrial Strategy.
14. As the proposed whistleblowing Directive is cross-cutting, with impacts upon several areas of EU law, many other Ministers including the Secretary of State for Justice and the Chancellor of the Exchequer also have an interest.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

15. The Devolved Administrations have been consulted in the preparation of this Explanatory Memorandum.

LEGAL AND PROCEDURAL ISSUES

16. As the document is an Opinion on proposed legislation there are no new legal or procedural issues to consider.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

17. The Opinion does not have any bearing on application of the whistleblowing Directive.

SUBSIDIARITY

18. The Opinion does not have any bearing on the principles of subsidiarity related to the proposed whistleblowing Directive.

POLICY IMPLICATIONS

19. The Opinion does not contain direct policy implications for the UK but aims to inform the development of the existing EU proposal. The Government set out the policy implications of this proposal in EM 8713/18.

CONSULTATION

20. No consultation is required on this Opinion.

IMPACT ASSESSMENT

21. The Opinion creates no additional impacts on business, local authorities or the third sector. An impact assessment is therefore not required.

FINANCIAL IMPLICATIONS

22. The Opinion does not contain detailed information on the financial implications of the proposed whistleblowing Directive. It does however note that the proposal has the potential to generate savings for the EU budget, as reported breaches of the EU's financial interests will likely result in enforcement activity, rule changes and budget savings.

TIMETABLE

23. The European Parliament have indicated that they expect trilogues on the whistleblowing Directive to commence in the new year. This would require a General Approach being reached by the end of December. As there are many outstanding issues on the proposed Directive still subject to negotiation, it is unclear whether a General Approach can be reached within this timeframe.

24. The Government will update the House of Commons and House of Lords scrutiny committees as discussions progress and ahead of any expected General Approach.



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