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OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
To:	Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)
Subject:	Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ("whistleblowers" proposal) - legal basis

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I. INTRODUCTION

1. On 23 April 2018, the Commission published the above legislative proposal.² The aim of the proposed directive is to set minimum standards in the Member States for the protection of "whistleblowers"³ who, in a work-related context, report or disclose information on wrongdoing relating to EU law. With this proposal the Commission responds to repeated requests from the European Parliament⁴ for a horizontal legislative initiative for the protection of whistleblowers in the private and public sectors across the EU.
2. So far, the Union legislator has chosen to proceed sector by sector, by inserting in several sector-specific Union acts specific rules on the reporting of breaches. These acts are listed in Part 2 of the Annex to the proposed directive. The proposal aims at proceeding to a more horizontal approach and will complement those specific provisions which will continue to apply (see Article 1(2) of the proposed directive). The horizontal minimum rules set out in the proposed directive will therefore not entail a formal modification of the Union acts that already contain rules on reporting of breaches.
3. The proposal has thus far been examined in meetings of the FREMP during the months of September, October and November 2018. A number of delegations asked for an opinion of the Legal Service on the proposed multiple legal bases (seventeen in total⁵). At its meeting of 5 November 2018 the Chair of FREMP formally asked the Legal Service to provide an opinion on the legal basis of the proposal. This Opinion responds to that request.

² Document 8713/18 and 8713/18 ADD 1.

³ The operational part of the proposal does not use the term "*whistleblowers*", but uses the following descriptive definition: "*persons working in the private and public sector who acquired information on breaches in a work-related context (...)*" : See for example, Article 2(1). In this Opinion the shorthand "*whistleblowers*" will be used.

⁴ See Explanatory Memorandum to the Commission proposal, p.2.

⁵ The Commission has proposed the following legal bases: Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 and 325(4) TFEU and Article 31 EAEC ('Euratom'). In its view, these legal bases are all necessary to cover the Union policy fields selected by the Commission: the single market, product safety, transport safety, environmental protection, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data and security of network and information systems, competition, and the financial interests of the Union.

II. THE COMMISSION'S APPROACH

4. The Commission has adopted a cumulative sectoral approach or an "omnibus" approach, in which it considers the protection of whistleblowers as part of the "enforcement toolkit" of Union law in selected Union policy fields.⁶ The multiple legal bases proposed are the result of the screening of the legal bases that the Commission has conducted in respect of all EU acts and/or policy fields mentioned in the proposal.⁷
5. For the selection of specific Union policy areas the Commission has used three criteria:
 - "i) there is a need to strengthen enforcement;*
 - ii) underreporting by whistleblowers is a key factor affecting enforcement;*
 - and*
 - iii) breaches may result in serious harm to the public interest.⁸"*
6. The policy areas that were thus selected are set out in Article 1 of the proposal, entitled 'Material scope'. This article needs to be read partly in conjunction with the Annex to the proposal and covers four separate categories: a), b), c) and d).

⁶ See Explanatory Memorandum, p. 2 and p. 5; See too: recital 81, Articles 1(1), 3(1) and 3(2) of the Proposal, in addition to oral explanations provided by the Commission in FREMP.

⁷ This approach is reflected in particular in Recital 81 of the proposal. Nonetheless, as noted further below, it appears that the Commission has not cited all legal bases mentioned in the various acts concerned. For example, Articles 113 and 115 TFEU have not been mentioned, nor has Article 106a of the EAEC ("Euratom Treaty").

⁸ See Explanatory Memorandum, pp. 2-3 and Recital 5 of the proposal.

7. As to the first category, point a) of Article 1(1) of the Commission's proposal lists 10 different policy areas, without mentioning an overall heading or theme. Article 1 (1) a) reads as follows:

"breaches falling within the scope of the Union acts set out in the Annex (Part I and Part II) as regards the following areas:

- (i) public procurement;*
- (ii) financial services, prevention of money laundering and terrorist financing;*
- (iii) product safety;*
- (iv) transport safety;*
- (v) protection of the environment;*
- (vi) nuclear safety;*
- (vii) food and feed safety, animal health and welfare;*
- (viii) public health;*
- (ix) consumer protection;*
- (x) protection of privacy and personal data, and security of network and information systems."*

8. The 10 policy areas referred to in Article 1(1) (a) must further be read in connection with the detailed and extensive list of secondary legislation provided in the Annex. Only breaches that fall within the scope of one of the acts listed in the Annex will lead to the activation of the rules set out in the proposal.⁹ Furthermore, the Union acts listed in the Annex fall under two categories: Part I lists acts which currently contain no rules protecting whistleblowers, whereas Part II lists acts which already contain rules protecting whistleblowers. In relation to Union acts listed in Part I the proposal would consequently introduce new rules supplementing the listed acts whereas in relation to Union acts listed in Part II the proposal aims at complementing the listed existing rules on whistleblowers protection.¹⁰

⁹ See too Article 3 (1) and (2) of the proposed directive which defines breaches as follows:
"(...) *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*".

¹⁰ See too Article 1(2) of the Commission's proposal.

9. As to the second category, point b) of Article 1(1) of the Commission's proposal refers to breaches of provisions of primary law in the policy area of competition law and state aid as well as to breaches falling within the scope of the main Council regulation on Competition rules and the main Council regulation on State aid respectively. Article 1 (1) b) reads as follows:

"breaches of Articles 101, 102, 106, 107 and 108 TFEU and breaches falling within the scope of Council Regulation (EC) No 1/2003 and Council Regulation (EU) No 2015/1589."

10. As to the third category, point c) of Article 1(1) of the Commission's proposal refers to:

"breaches affecting the financial interests of the Union as defined by Article 325 TFEU and as further specified, in particular, in Directive (EU) 2017/1371 and Regulation (EU, Euratom) No 883/2013."

11. As to the fourth category, point d) of Article 1(1) of the Commission's proposal reads as follows:

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

12. Unlike for points a), b), and c), the proposal does not cite any secondary legislation for the operational text of the policy field described in point 1 (1) d). However, the Explanatory Memorandum¹¹, and the references in the footnotes to recital 17 of the proposal, clarify that the Commission has two specific EU directives in mind, as well as two pending draft directives which it has proposed:

- Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation¹²;
- Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market¹³;
- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base¹⁴;
- Proposal for a Council Directive on a Common Corporate Tax Base¹⁵.

III. ANALYSIS

A. Principles deriving from the settled case law

13. According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued but must be determined according to objective factors amenable to judicial review, including in particular the aim and the content of the measure.¹⁶

¹¹ Explanatory Memorandum, p. 3.

¹² OJ L 64, 11.3.2011, p. 1–12; special legislative procedure based on Articles 113 and 115 TFEU.

¹³ OJ L 193, 19.7.2016, p. 1–14 4; special legislative procedure based on Article 115 TFEU.

¹⁴ COM/2016/0683 final — 2016/0336; Council document 13731/2016; special legislative procedure based on Article 115 TFEU.

¹⁵ COM/2016/0685 final — 2016/0337; Council document 13730/2016; special legislative procedure based on Article 115 TFEU.

¹⁶ See Case C-300/89 Commission v Council ("Titanium dioxide"), EU:C:1991:244, at paragraph 10 of the judgment; Case C-147/13, Spain v Council, EU:C:2015:299, paragraph 68 and the case-law cited. This jurisprudence is consistently recalled in opinions of the Legal Service. See also: Legal Service Opinion of 26 September 2018, Council document 12004/18 paragraphs 9 and 10 and the case law referred to in footnotes 4 and 5 of that opinion and Legal Service Opinion of 26 March 2018, Council document 7502/18, paragraph 6 as well as the case law cited in footnote 11 to that opinion.

14. Furthermore, according to the same case law, the procedures involved in the different legal bases are the result of the choice made by the authors of Treaties and should not determine the choice of a legal basis.¹⁷
15. In addition, given that the Commission has proposed 17 legal bases, it should be noted that, according to the settled case law, multiple legal bases can only be justified in exceptional circumstances, which require demonstration that the measure pursues simultaneously multiple different legal objectives of equal weight. In particular, the Court has consistently held that:

"If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component (...).

Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases (...)."18

¹⁷ See Case C-130/10, European Parliament v Council of the European Union, EU:C:2012:472, paragraphs 80 to 82.

¹⁸ Cases C-300/89, Commission v Council ("Titanium dioxide"), EU:C:1991:244, paragraphs 17 to 21; C-36/98, Spain v Council, EU:C:2001:64, paragraph 59; C-211/01, Commission v Council, paragraph 39; C 336/00, Huber, EU:C:2002:509, paragraph 31; C-338/01, Commission v Council, EU:C:2004:253, paragraphs 55 et seq.; Case C-411/06 Commission v Parliament and Council, EU:C:2009:518 paragraphs 46 and 47; C-155/07, Parliament v Council, EU:C:2008:605, paragraphs 36 et seq.

16. The Court has also consistently held that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other¹⁹ or where the use of two legal bases is liable to undermine the rights of the Parliament.²⁰
17. It follows that, pursuant to settled case law, a legislative act may be based on two or more legal bases only if three conditions are met:
- First, the act pursues two or more objectives without one objective being the main objective or predominant to the others.
 - Second, the objectives as set out in the legislative act have to be inseparably linked.
 - Third, the legal bases provide for compatible procedures.²¹

B. Examination of the aim and content of the proposal

18. In the light of the established case law cited above, the aim and the content of the proposal need to be examined first in order to establish what the (main) objective of the proposal is.

¹⁹ Cases C-300/89, *Commission v Council (Titanium dioxide)*, EU:C:1991:244, paragraphs 17 to 21. As will be seen further below, such incompatibilities arise, for example between legislative procedures and non-legislative procedures. An incompatibility also exists between an ordinary legislative procedure where QMV is the principal voting rule in Council and a special legislative procedure requiring unanimity in Council.

²⁰ Joint Cases C-164/97 and 165/97 *Parliament v Council*, EU:C:1999:99, paragraph 14; Case-338/01 *Commission v Council*, EU:C:2004:253, paragraph 55 et seq.; Case 178/03 *Commission v Parliament and Council*, EU:C:2006:4, paragraph 57.

²¹ See too: Legal Service Opinion of 24 April 2018, Council document 8268/18, paragraph 16 and case law referred to in footnote 6 of that opinion.

19. As already mentioned above, the main aim of the Commission's proposal - based on the text presented to the Council as it has been modified following the discussions in FREMP so far - is to enhance the enforcement of Union law through the enactment of rules aimed at protecting persons who assist with the detection, investigation and prosecution of Union law in specific policy areas. Article 1(1) of the proposal confirms that this is indeed the proposal's the main aim:

"With a view to enhancing the enforcement of Union law and policies in specific areas....".

This main aim is also reflected in recitals 2, 19, 25, 48 and 84, the relevant parts of which read as follows:

"At Union level, reports by whistleblowers are one upstream component of enforcement of Union law: they feed national and Union enforcement systems with information leading to effective detection, investigation and prosecution of breaches of Union law."

"Each time a new Union act for which whistleblower protection is relevant and can contribute to more effective enforcement is adopted, consideration should be given to whether to amend the Annex to the present Directive in order to place it under its scope"

"Effective enforcement of Union law requires that protection is granted to the broadest possible range of categories of persons (...)"

"Effective detection and prevention of breaches of Union law requires ensuring that potential whistleblowers can easily and in full confidentiality bring the information they possess to the attention of the relevant competent authorities which are able to investigate and to remedy the problem, where possible."

"The objective of this Directive, namely to strengthen enforcement in certain policy areas and acts where breaches of Union law can cause serious harm to the public interest through effective whistleblower protection (...)."

20. The content of the proposal is set out at length in Chapters II, III and IV. These chapters contain the rules proposed by the Commission aimed at providing minimum standards for the harmonisation of whistleblowers protection for 'reporting persons', which fall, pursuant to Article 2, within the personal scope of the directive, and who work in the private and public sectors as defined in the directive.
21. Chapter II sets out the standards for internal reporting and follow-up of reports. In particular, Articles 4 and 5 of this chapter set out the obligation for Member States to ensure that legal entities in the private and public sectors establish appropriate internal reporting channels and procedures for receiving and following-up on reports.
22. Chapter III sets out the standards for external reporting and follow-up of reports. Pursuant to Articles 6 to 12 of this Chapter, Member States are obliged to ensure that competent authorities have in place external reporting channels and procedures for receiving and following-up on reports and sets out the minimum standards applicable to such channels and procedures.

23. Chapter IV sets out minimum standards for protection of reporting and ‘concerned’ persons²². In particular, Article 13 outlines the conditions under which a reporting person shall qualify for protection under the Directive. For example, it is required that the reporting persons had reasonable grounds to believe that the information reported was true at the time of reporting. Furthermore, reporting persons are generally required to use internal channels first. Articles 14 and 15 deal with prohibited retaliation. Article 16 makes clear that those concerned by the reports shall fully enjoy their rights under the EU Charter of Fundamental Rights, including the presumption of innocence, the right to an effective remedy and to a fair trial, and their rights of defence. Article 17 obliges Member States to provide for effective, proportionate and dissuasive penalties.
24. Finally, it should be noted that the rules proposed in the directive are minimum rules. This follows clearly from Article 1 which states that the directive aims at providing common minimum standards for the protection of whistleblowers in specific Union policy areas and from Article 19 which allows Member States to introduce or retain provisions more favourable to the rights of reporting persons.²³ In addition, nothing prevents Member States from keeping in place or introducing national legislation protecting whistleblowers for policy sectors not referred to in the Commission's proposal.
25. It follows from the above, that the proposal has as main or predominant aim the enhancing of the enforcement of certain areas of Union law through rules on the protection of whistleblowers.

²² For the definition of ‘concerned persons’ see: Article 3 (11) of the proposal.

²³ See too: Explanatory Memorandum, p. 6, which describes the proposal as a 'minimum harmonization Directive'.

C. Identification of the legal basis

26. The Legal Service notes that there is no single legal basis in the Treaties conferring on the Union the competence to legislate specifically on enhancing enforcement of Union law through protecting whistleblowers across several sectors of Union law and policy.²⁴ The Commission's approach, which is to proceed on a sector-by-sector basis, is therefore the legally correct approach. As indicated in paragraph 2 above, the Union legislator has already adopted this approach earlier by inserting, in sector-specific legislative acts, specific provisions about the protection of whistleblowers, acting on the basis of the legal basis of each of those acts. Based on this approach, the Legal Service considers that the directive pursues simultaneously separate objectives of equal weight, that are furthermore indissociably linked. In particular, the directive aims, as set out in Article 1(1) of the proposal, at enhancing the enforcement of Union law and policies of each of the enumerated specific policy areas, such enhancement being in each case a distinct objective.
27. However, as set out below, the Legal Service also considers that a number of the sectoral legal bases proposed by the Commission are unnecessary and that there are some legal bases that provide for incompatible procedures and hence will need to be adopted in a separate act (in most cases through a splitting of the proposal).

²⁴ It should be noted that there are some provisions in the Treaties that oblige Member States to ensure that Union law is properly applied. Article 4(3) TEU provides that "*the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*" (second subparagraph). Furthermore, Article 197(1) TFEU provides that "*effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest*" and contains a legal basis empowering the Union legislator to adopt measures supporting the administrative capacity of Member States. Also, Article 291(1) TFEU provides that "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts*".

28. One of the main legal bases that the Commission has proposed is Article 114 TFEU.²⁵ As the Court of Justice has consistently held, a measure adopted based on Article 114 TFEU:

*"must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market."*²⁶

"(...) the measures referred to in that provision are intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition."

*"(...) while recourse to Article 95 EC [now Article 114 TFEU] as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them"*²⁷.

29. There is language in the Commission's proposal which justifies using Article 114 TFEU as a main legal basis. In particular, recital 4 of the proposal refers to the fragmentation of the protection of whistleblowers in Member State legislation and the unevenness across EU policy areas. Furthermore, recital 6 refers to distortions in competition and recital 10 to possible spill-over impacts across national borders as regards environmental crimes. There are also text references to the effective functioning of the internal market and/or Article 114 TFEU in the recitals relating to public health and consumer protection (recital 13), privacy, personal data, security of network and information systems (recital 14) and in recital 81.

²⁵ See recital 81 of the Commission's proposal.

²⁶ Case C-270/12, United Kingdom v European Parliament and Council, EU:C:2014:18, paragraph 11.

²⁷ Case C-491/01, R v Secretary of State for Health, ex parte British American Tobacco, EU:C:2002:741, paragraph 60. See also, Case C-376/98, Germany v European Parliament and Council, EU:C:2000:544, paragraph 84.

30. Nonetheless, for the reasons set out below, Article 114 TFEU would not constitute a sufficient legal basis for the entire proposal. In particular, Article 114 TFEU cannot be used to enhance the enforcement of Union law that cannot be directly linked with the internal market, nor can it be used where there is a more specific legal basis in the Treaties. In addition, Article 114 TFEU provides for the ordinary legislative procedure, which presents incompatibilities with other legal bases cited by the Commission.

Subject matters referred to in Article 1 (1) a)

31. Insofar as the first category of subject matters is concerned, referred to in Article 1 (1) a), the Legal Service considers that measures to enhance the enforcement of Union acts set out in the Annex and relating to the following sectoral policy fields can be brought under Article 114 TFEU: public procurement²⁸; financial services, prevention of money laundering and terrorist financing²⁹; product safety³⁰; food and feed safety³¹; consumer protection³² as well as the protection of privacy and personal data, and the security of network and information systems.³³
32. Nonetheless, there is one act in the Annex relating to the subject of 'product safety' that needs to be removed: Regulation (EU) No 258/2012 relating to illicit manufacturing and trafficking in firearms referred to in the Annex, Part I C 2 (iii) which is aimed at implementing the UN Firearms Protocol. This regulation cannot be included as it relates to a legislative act under Article 207 (2) TFEU pertaining to the Common Commercial Policy, which only allows for the adoption of legislation by means of regulations, not directives. If the Union legislator wishes to adopt rules on whistleblowers protection relating to this Union act, it will have to adopt a separate regulation on the basis of Article 207 (2) TFEU to do so (through splitting the proposal).

²⁸ Article 1 (1) a) (i).

²⁹ Article 1 (1) a) (ii).

³⁰ Article 1 (1) a) (iii).

³¹ Article 1 (1) a) (vii).

³² Article 1 (1) a) (ix).

³³ Article 1 (1) a) (x).

33. In addition, there are a number of subject matters listed under the first category, coverage of which cannot be based on Article 114 TFEU, because enhancing the enforcement of Union law for these subject matters discloses a separate sectoral legal objective that requires an own legal basis.
34. One of these is the heading public health, which relates to current Union acts based solely on Article 168(4) TFEU.³⁴ These acts are aimed exclusively at the protection of human health and do not present a sufficient link with the establishment or functioning of the internal market. In order for these acts to be covered, a separate legal basis with an appropriate justification will be needed. The objective of enhancing the enforcement of Union law in the area of public health is to be considered a separate objective of the directive, justifying the use of Article 168(4) TFEU as a distinct legal basis, inseparably linked with the other objectives identified in this opinion.
35. As regards the acts relating to the sector of public health listed under Part I H of the Annex, only those based on a provision allowing for harmonisation can be covered by the proposed directive. This means that acts adopted on the basis of Article 168(4) TFEU can be listed but not acts based on Article 168(5) TFEU, as the latter allows the Union to adopt incentive measures but explicitly excludes harmonisation. It follows that the Decision No 1082/2013/EU listed under Point I H (3), relating to serious cross-border threats to human health, cannot be included, as this decision has been adopted on the basis of Article 168(5) TFEU,³⁵

³⁴ See, in particular, the EU acts mentioned under Part I, H, point 1.

³⁵ The Commission has orally acknowledged in the FREMP this was an error and has agreed that this act should be removed from the Annex.

36. The second policy field under the first category refers to acts relating to the EU's common transport policy, which according to the TFEU and the case law of the Court of Justice presents distinct features and requires a separate transport legal basis.³⁶ Consequently, breaches of the Union acts listed in the Annex relating to the policy field of transport safety³⁷ cannot be covered by Article 114 TFEU. Inclusion of breaches of acts in this policy field requires a separate corresponding legal basis (Articles 91 and 100 TFEU) distinct from the legal basis relating to the internal market.
37. Furthermore, Article 114 TFEU cannot be used in relation to the Union acts set out in the Annex aimed at the protection of animal welfare.³⁸ Many of the acts in question are currently based only on Article 43(2) TFEU (Agriculture and Fisheries), and any direct link with the internal market seems absent. The objective of enhancing the enforcement of Union law and policies in the area of animal welfare is to be considered a separate objective of the directive, justifying the use of Article 43(2) TFEU, which is indissociably linked with the other objectives identified in this opinion.

³⁶ See Article 58(1), 91 and 207(5) TFEU; Case C-97/78, Schumalla, EU:C:1978:211, paragraph 4; Joined Cases C-248/95 and C-249/95, SAM Schiffahrt and Stapf, EU:C:1997:377, paragraph 23; Case C-176/09, Luxembourg v Parliament and Council, EU:C:2011:290, paragraph 34; Case C-344/04, IATA and ELFAA, EU:C:2006:10, paragraph 80; Joined Cases C-184/02 and C-223/02, Spain and Finland v Parliament and Council, EU:C:2004:497, paragraph 29; Joined Cases C- 27/00 and C-122/00, Omega Air and Others, EU:C:2002:161, paragraph 63; Case C-440/05, Commission v Council, EU:C:2007:625, paragraph 58.; Case C-338/09, Yellow Cab Verkehrsbetrieb, EU:C:2010:814, paragraph 30; Joined cases C-184/02 and C-223/02, Kingdom of Spain and Republic of Finland v. European Parliament and Council, EU:C:2004:497, paragraphs 29 et seq.

³⁷ Article 1 (1) a) (iv) and the acts listed in Part I D and II B of the Annex.

³⁸ Article 1 (1) a) (vii) and Part I, G, point 4 of the Annex.

38. In a similar vein, the Legal Service considers that enhancing the enforcement of Union law on the protection of the environment does not present an obvious legal link with the functioning of the internal market either.³⁹ In any event, the link with the internal market does not exist for measures listed in the Annex which are, in substantial part, aimed at implementing international environmental policy of the EU.⁴⁰ For this sector, Article 192 (1) TFEU will need to be added as a separate legal basis, with a separate legal justification. The objective of enhancing the enforcement of Union law and policies to protect the environment is to be considered a separate objective of the directive, justifying the use of Article 192(1) TFEU as a distinct legal basis, indissociably linked with the other objectives identified in this opinion.
39. All legal bases mentioned thus far (Articles 43 (2), 91, 100, 114, 168(4) and 192 (1) TFEU) are legally compatible as they all provide for the ordinary legislative procedure.

³⁹ Article 1 (1) a) (v)) and Part I, E and II, C of the Annex.

⁴⁰ See, for example, Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (OJ L 201, 27.7.2012, p. 60), mentioned in Part I, E, vii. This regulation is currently based on Article 192(1) and Article 207 TFEU. Also, Directive 2013/30/EU mentioned under Part II, C, point I only has an environmental objective.

40. The aforementioned observation does not apply to the Euratom⁴¹ acts in the policy field of nuclear safety referred to in Article 1 (1) a) and the corresponding part of the Annex, which lists five acts⁴². These acts have been adopted under Article 31 of the Euratom Treaty, which establishes a specific procedure, which is outside the TFEU and is non-legislative.⁴³ In addition, this Euratom procedure requires that the Commission consults public health experts appointed by the Scientific and Technical Committee under the Euratom Treaty as well as of the Economic and Social Committee, and that it forwards their opinions to the Council.⁴⁴ This defect cannot be cured by the Council as the Scientific and Technical Committee referred to in Article 31 of the Euratom Treaty is attached to the Commission.

⁴¹ Consolidated version of the Treaty establishing the European Atomic Energy Community, OJ C 327, 26.10.2012, p. 1–107.

⁴² See Article 1(1) a) (vi)) and Part I (F) of the Annex.

⁴³ Article 31 of the Euratom Treaty reads as follows: *"The basic standards shall be worked out by the Commission after it has obtained the opinion of a group of persons appointed by the Scientific and Technical Committee from among scientific experts, and in particular public health experts, in the Member States. The Commission shall obtain the opinion of the Economic and Social Committee on these basic standards. After consulting the European Parliament, the Council shall, on a proposal from the Commission, which shall forward to it the opinions obtained from these Committees, establish the basic standards; the Council shall act by a qualified majority. "*

⁴⁴ Article 134 of the Euratom Treaty reads as follows: *"1. A Scientific and Technical Committee is hereby set up; it shall be attached to the Commission and shall have advisory status. The Committee must be consulted where this Treaty so provides. The Committee may be consulted in all cases in which the Commission considers this appropriate. 2. The Committee shall consist of forty-two members, appointed by the Council after consultation with the Commission. The Members of the Committee shall be appointed in their personal capacity for five years. Their appointment shall be renewable. They shall not be bound by any mandatory instructions. The Scientific and Technical Committee shall each year elect its chairman and officers from among its Members"* (emphasis added).

41. In addition, it should be noted that Article 31 of the Euratom Treaty is a non-legislative procedure. The Legal Service has already had the occasion to explain why legislative and non-legislative legal bases should not be combined in one and the same Union act. The reasons relate to the different rules on publicity and on the compulsory forwarding of draft legislative acts to national parliaments; the application of the principles of subsidiarity and proportionality and the role for the national parliaments; different rules pertaining to the transparency of Council meetings and the criteria for *locus standi* for review of legality of Union acts, all which vary depending on the legislative or non-legislative nature of the act.⁴⁵
42. This means that for the adoption of rules on whistleblowers protection relating to these Euratom acts referred to as the policy area of 'nuclear safety', a separate Union act will be needed in accordance with Article 31 of the Euratom Treaty, which will require the Commission to forward to the Council the required opinions obtained from the Scientific and Technical Committee and from the Economic and Social Committee.

⁴⁵ See for further details: Council document 9303/13, Legal Service Opinion of 6 May 2013, paragraphs 28-39; See too Council document 6138/11, Legal Service Opinion of 9 February 2011, paragraphs 20 and 23 in which it was held that hybrid acts combining a legislative measure (Article 352 TFEU) and an implementing measure (Article 291 TFEU) are not compatible with the Treaties.

Subject matters referred to in Article 1 (1) b)

43. Article 1 (1) (b) of the proposal relates to the enhancing of the enforcement of Union law in the policy fields of Competition law and State aid. This sectoral objective can be based neither on Article 114 TFEU nor on any other of the sectoral legal bases retained thus far. The reason is that the legal bases for adopting measures in these policy fields - Articles 103 and 109 TFEU - even if they are related to internal market, are non-legislative procedures. As mentioned above, the Legal Service has already explained why, since the entry into force of the Treaty of Lisbon, the concurrent use of legislative and non-legislative acts should be avoided.⁴⁶

Subject matters referred to in Article 1 (1) c)

44. The proposed provision reads as follows:

"breaches affecting the financial interests of the Union as defined by Article 325 TFEU and as further specified, in particular, in Directive (EU) 2017/1371 and Regulation (EU, Euratom) No 833/2013. "

45. Article 114 TFEU cannot be used to cover breaches of measures aimed at the protection of the financial interests of the Union. Nor can this be covered by any other sectoral legal basis retained thus far. This measure will hence need its own legal basis (Article 325 (4) TFEU). The objective of enhancing the enforcement of Union law and policies to protect the financial interests of the Union as defined by Article 325 TFEU is to be considered a separate objective of the directive, indissociably linked with the other objectives previously mentioned. As this legal basis is compatible with the other legal bases mentioned above, which also refer to the ordinary legislative procedure, Article 325 TFEU can be added to these other legal bases.

⁴⁶ The three institutions will need to exchange views on the change of legal basis. See paragraph 25 of the Interinstitutional agreement between the Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better law-making (O.J., 12.5.2016, L 123/1): *"If a modification of the legal basis entailing a change from the ordinary legislative procedure to a special legislative procedure or a non-legislative procedure is envisaged, the three Institutions will exchange views thereon."*

46. However, the reference to Directive (EU) 2017/1371 needs to be removed. This directive has been adopted on the basis of Article 83(2) TFEU, introduced by the Lisbon Treaty, to allow the Union to approximate criminal laws and regulations of Member States through "*minimum rules with regard to the definition of criminal offences and sanctions*" in a given area of Union policy where such approximation "*proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures*".⁴⁷ Consequently, the purpose of the legal basis of Article 83(2) TFEU is to support, through criminal law provisions, other Union policies. More specifically, Directive (EU) 2017/1371 supports Regulation (EU, Euratom) No 833/2013, but deals with a more narrow subject matter. There is no need to refer to Directive (EU) 2017/1371 in Article 1(1) c).⁴⁸
47. Finally, unlike for the Euratom acts relating to nuclear safety, there is no problem of incompatibility relating to Regulation (EU, Euratom) No 883/2013. This is because Article 106a of the Euratom Treaty⁴⁹ renders Article 325 TFEU applicable to the Euratom Treaty. The legal basis of Article 106a of the Euratom Treaty would nonetheless have to be added.

⁴⁷ See Council document 15309/12, Legal Service Opinion of 22 October 2012, paragraphs 6 and 7.

⁴⁸ It should be recalled also that Article 83(2) TFEU falls under Part Three, Title V of the TFEU and triggers the application of Protocols N° 21 and 22 relating to the position of the United Kingdom, Ireland and Denmark. In addition, Article 83(3) TFEU gives the right to a member of the Council that considers that a draft directive would affect fundamental aspects of its criminal justice system to request that the draft directive be referred to the European Council, suspending the ordinary legislative procedure. Conversely, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they can proceed on that basis.

⁴⁹ Article 106a of the Euratom Treaty reads as follows: "*1. Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.*"

Subject matters referred to in Article 1 (1) d)

48. The Legal Service notes that Article 114 TFEU cannot be used to pursue the enhancement of the enforcement of Union law aimed at strengthening the fight against corporate tax avoidance/evasion, which needs to be based on 115 TFEU.⁵⁰ The legal basis for the Union legislation or proposed legislation referred to implicitly in point 1(1) (d), and explicitly in the footnotes to recital 17 of the Commission's proposal are the procedures provided for in Article 113 and/or Article 115 TFEU. Both these articles provide for a special legislative procedure requiring unanimity in the Council and the consultation of the European Parliament. This policy field (referred to in Article 1(1) d)) will therefore have to be taken out of the draft proposal through a splitting and treated in parallel, because it is not possible to combine in one single EU act an ordinary legislative procedure and a special legislative procedure requiring unanimity⁵¹.

⁵⁰ See too, Legal Service Opinion of 11 November 2016, Council document 14384/16.

⁵¹ See Case C-300/89 Commission v Council "Titanium dioxide", EU:C:1991:244, paras 17 to 21. The Court found that the "co-decision procedure" (and the previous "cooperation procedure") under ex-Articles 251 EC is incompatible with a legal basis requiring unanimity within the Council. See too: Legal Service information Note to Coreper regarding the judgment of the Court of Justice in Case C-130/10, Parliament v Council: Council document 15826/12, paragraph 9.

IV. CONCLUSIONS

49. For the above reasons, the Council Legal Service is of the opinion that:

- 1) the proposed directive requires the following legal bases: Articles 43(2), 91, 100, 114, 168(4), 192 (1) and 325 TFEU, in conjunction with Article 106a of the Euratom Treaty; these legal bases can cover all sectors of Union law referred to in Article 1(1) a) and 1 (1) c) of the Commission's proposal, with the exception of Nuclear Safety;
- 2) separate acts, each with their separate legal basis, will be required through a splitting for the following sectors and Union acts, the examination of which can be made in parallel to the proposed directive and be treated as a package:
 - a) for the Union acts relating to Nuclear Safety, referred to in Article 1(1) a) (viii) of the Commission's proposal, as a separate act will need to be based on the specific non-legislative procedure as set out in Article 31 of the Euratom Treaty;
 - b) for the Union acts relating to Competition law and State aid, referred to in Article 1(1) b) of the Commission's proposal, as a separate act will need to be based on the non-legislative procedure set out in Articles 103 TFEU and 109 TFEU;
 - c) for rules on corporate tax or to enhance the enforcement of measures against arrangements the purposes of which is to obtain a tax advantage, referred to in Article 1(1) c)), as a separate act will need to be based on the special legislative procedure set out in Article 115 TFEU;
 - d) for the Regulation (EU) No 258/2012 (firearms), referred to in Part I C 2 (iii) of the Annex to the Commission's proposal, as a separate act will need to be adopted in the form of a Regulation under Article 207 (2) TFEU;

3) references to the following Union acts will need to be removed:

- a) the reference to Directive (EU) 2017/1371 in Article 1(1) c) of the Commission's proposal;
 - b) the reference to Decision No 1082/2013/EU listed under Point I H (3) of the Annex, relating to serious cross-border threats to human health.
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