

EU Adopts Common Minimum Standards for Whistle-Blower Protection

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There are cultural differences in the treatment of whistle-blowing on both sides of the Atlantic: While the United States focuses on the lawful action of the business and considers whistle-blowing an essential element of a functioning compliance management system, many EU Member States, including France and Germany, place greater emphasis on harmonious relationships between employees and their employer.

**Debevoise
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The European Union introduces secure reporting channels and effective protection from retaliation for whistle-blowers reporting on or disclosing breaches of certain Union law. The final adoption of the Directive is expected in fall 2019, and EU Member States are required to implement the Directive into national law by 2021.¹

Background and Purpose

Reports and public disclosures by whistle-blowers inform national and Union enforcement systems and can lead to the effective detection, investigation and prosecution of breaches of EU law harmful to the public interest and the welfare of society.

Current whistle-blower protection provided in the European Union is fragmented across Member States and uneven across policy areas. Only 10 EU countries, including the United Kingdom and France, provide comprehensive legal protection. In the remaining countries, protection is only partial or applies to specific sectors or categories of employees.

The Directive aims to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of

¹ See for further information the press release of the European Parliament, *available here*: <http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved>. The current text of the “Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law” is still subject to legal-linguistic finalisation and can be accessed here: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0366_EN.pdf.

protection of persons reporting on breaches of Union law. The instrument encourages the Member States to not only implement the European requirements but to also consider an extension to breaches of Union law not yet covered or of national laws.

Main Features of Whistle-Blower Protection

Information on Breaches of Union Law

The Directive considers three types of breaches: *first*, the breach of certain acts referenced in an Annex and relating to, *inter alia*, public procurement; financial services, products and markets and prevention of money laundering and terrorist financing; consumer protection; protection of privacy and personal data, and security of network and information systems. The reference comprises not only genuine Union law but also national implementing acts; *second*, breaches affecting the financial interests of the Union through fraud, corruption or any other illegal activity affecting the Union funds; and *third*, breaches relating to the internal market, including breaches of the competition and state aid rules, and breaches relating to corporate tax law.

The law complements already-existing, sector-specific whistle-blower regimes, e.g., in the field of financial services or money laundering. The Member States' national security interests, including procurement in the defence sector, remain unaffected by the Directive. Further, the reporting or disclosing of classified information or information covered by legal and medical professional privilege is not protected. Members of other professions, including auditors, may qualify for protection. Both the secrecy of judicial deliberations or rules on criminal procedure remains outside the scope of whistle-blower protection.

The broad concept of "information on breaches" means information or reasonable suspicions about actual or potential breaches. It further refers to information about attempts to conceal past or, very likely, future breaches.

Protected Persons

The Directive protects reporting persons working in the private or public sector who acquired information on breaches in a work-related context. The protection extends to information that has been acquired before the work has actually begun or disclosed after the work has already ended.

Protected persons are workers or civil servants or self-employed persons, volunteers or trainees. The law further protects persons belonging to the administrative, management

or supervisory body of an undertaking and the shareholders of an undertaking. The Directive also covers persons working for contractors, subcontractors and suppliers.

Facilitators who are assisting the reporting person in the reporting process, third persons connected with the reporting person, such as colleagues or relatives, and legal entities connected to the reporting person enjoy the same level of protection.

Conditions for Protection

Persons reporting information on breaches qualify for protection if they follow the procedures of the Directive and have reasonable grounds to believe that the information reported was true at the time of reporting and that the information fell within the scope of the Directive.

Thus, making a report in honest error is protected while there is no protection for deliberately and knowingly making a wrong or misleading report. The motives of the reporting person are not relevant to the scope of the protection, and, therefore, a person making a report for personal advantage or based on a grievance arrangement may qualify for protection. However, the Directive does not envisage financial rewards for whistle-blowing.

The Directive covers non-anonymous reporting, but it also protects anonymous reporting persons from suffering retaliation in the event they are identified. Whether to also protect anonymous reporting remains at the discretion of the EU Member States.

Reporting Channels

The Directive provides for internal or external reporting and public disclosure.

Reporting through public disclosure to the press or social media is only protected in two cases: *first*, where the reporting person reported internally or externally, but no appropriate action was taken; and *second*, where the reporting person has reasonable grounds to believe that the issue which they are making the report about may (i) constitute an imminent and manifest danger to the public interest or (ii) that there is a risk of retaliation or low prospect of the breach being effectively addressed in the case of internal or external reporting.

In all other cases, whistle-blowers will be able to choose between internal and external reporting. The Directive encourages the use of internal channels before external reporting where the breach can be effectively addressed internally and where the reporting person considers that there is no risk of retaliation. That said, the reporting person enjoys the same level of protection whether they report internally or directly to the competent authorities.

Legal entities in the private sector with 50 or more employees will be required to establish internal channels and procedures for reporting and following up on reports. These procedures may be operated internally by the company or by a third party. For entities with less than 250 employees, this requirement will become effective not earlier than two years following the Directive's implementation into national law. Internal procedures established under this Directive will require the acknowledgment of the receipt of a written or oral report via a confidentially secure channel by an impartial person who is then responsible for communicating with the reporting person and following up and providing feedback within a reasonable period not exceeding three months. The legal entity will also be required to inform the reporting person about the conditions and the procedures for reporting externally.

For the purposes of external reporting, Member States shall designate authorities competent to receive, give feedback or follow up on the reports. The authorities will transmit the report to the competent authorities for further investigation and communicate, if national law so provides, the final outcome of the investigation to the reporting person. Member States ensure that information about the conditions for protection, the contact details of the authority and the procedures is publicised.

The Directive protects the identity of the reporting person whether they have reported internally or externally. Their identity may only be disclosed in the context of state investigations or to preserve the rights of defence of the concerned person. Any processing of personal data must be undertaken in accordance with data protection laws, and personal data manifestly not relevant must be deleted without undue delay. Authorities and private and public legal entities shall keep records of every report received.

Protection Measures

Protection of the Reporting Person

The Directive prohibits any form of direct or indirect retaliation, including threats and attempted threats, and lists a wide variety of possible detrimental measures. This does not hinder employers from making employment-related decisions which are not prompted by the reporting or public disclosure.

In proceedings before a court or authority relating to a detriment suffered by the reporting person, it is presumed that the detriment was made in retaliation for the report or disclosure. Once the person suffering a detriment demonstrates prima facie that he has made a report, the burden of proof shifts to the person who took the detrimental action.

The Member States support the whistle-blower in the form of free-of-charge independent advice on the procedures and remedies available for protection against retaliation, effective assistance of designated authorities and access to legal aid.

The reporting person shall not incur any liability in respect of the reporting or disclosure, be it civil, criminal, administrative or employment related. The reporting person enjoys immunity not only in respect of lawfully acquiring or obtaining access to the information reported but also if that acquisition of information creates separate administrative or labour-related liability. The reporting person will not benefit from immunity in cases where the acquisition of or access to the information is a criminal offence under national criminal law.

This protection will be mandatory and overrides loyalty clauses in contracts or confidentiality/nondisclosure agreements that would preclude reporting. Further, rights and remedies under the Directive may not be waived or limited by any agreement including a pre-dispute arbitration agreement.

The Directive requires the Member States to ensure that any whistle-blower who suffers retaliation shall benefit from remedies and full compensation for damages suffered including interim relief. In proceedings for defamation, breach of copyright, breach of data protection rules or disclosure of trade secrets, the reporting person shall have a defence based on their reporting.

Protection of the Concerned Person

The Directive requires the Member States to also protect the fundamental rights of the concerned person to an effective remedy and to a fair trial as well as the presumption of innocence and the rights of defence including the right to be heard and the right to access its files. The authorities shall ensure that the identity of the concerned person is protected for as long as the investigation is ongoing.

Penalties and Civil Sanctions

Persons that hinder reporting, take retaliatory measures, bring vexatious proceedings against reporting persons or reveal the identity of the reporting person shall be punished.

Persons who suffer prejudice from reports based on inaccurate or misleading information should retain the protection and the remedies available to him under the rules of general law. In particular, the concerned person should be entitled to compensation in accordance with national law if the inaccurate or misleading information was used deliberately or knowingly.

The Impact on the United Kingdom, France and Germany

United Kingdom

In the United Kingdom, whistle-blowers receive protection from their employment being terminated and from becoming subject to detriment or disadvantage at work. Protection is afforded to whistle-blowers only if they have made a “protected disclosure”. Whether a disclosure qualifies for protection depends on the method of disclosure, the subject matter of disclosure and whether there is a reasonable belief that the disclosure is in the public interest. A qualifying disclosure must relate to one of six relevant subject matters: criminal offences, breaches of legal obligations, miscarriages of justice, danger to the health and safety of any individual, damage to the environment or the deliberate concealing of information about any of the aforementioned. In order for the qualifying disclosure to be protected, the disclosure must be made to an appropriate party which will often be the whistle-blower’s employer (whether or not the employer has a whistle-blowing policy in place).

Although the United Kingdom already offers extensive protection to whistle-blowers, there are certain aspects of the Directive that would involve additional requirements on companies. For example, currently, the United Kingdom does not require companies of any size, other than regulated entities, to implement whistle-blower policies. As stated above, the Directive will require companies with 50 or more employees to establish internal channels and procedures for reporting and following up on reports.

It is unclear what impact Brexit will have on the implementation of the Directive into English law. The government has not released any statements addressing the Directive specifically, and, therefore, if the United Kingdom leaves the European Union prior to the adoption of the Directive, it is not clear whether any change will in fact be made to national law.

France

In France, whistle-blowers’ protection is provided for in Law No. 2016-1691 of Dec. 9, 2016 (the so-called “Sapin II Law”). The Law states that protection is afforded if the whistle-blower discloses or reports, in a “selfless manner” and in good faith, (i) a crime or an offence, (ii) a serious and manifest breach of an international commitment duly ratified or approved by France of a unilateral act of an international organisation adopted on the basis of such commitment, or of a law or a regulation, or (iii) a serious threat or harm to the general interest. According to article 6 of the Sapin II Law, a whistle-blower must have had personal knowledge of the facts to benefit from the protection, which is not a prerequisite under the Directive. Procedures implemented to collect alerts shall ensure strict confidentiality of the whistle-blower’s identity.

Whistle-blowers are protected from retaliation, in the form of various employment-related measures including a prohibition against discriminatory treatment or dismissal. From a criminal standpoint, whistle-blowers, as defined by the Sapin II Law, cannot be held liable where the information disclosed infringed a legally protected secret, provided that such disclosure is necessary and proportionate to the protection of the interests at issue and that such disclosure took place in accordance with the reporting procedures laid down by the law. However, whistle-blowers cannot disclose facts covered by National Defence secrecy, medical secrecy or attorney-client privilege.

Although whistle-blowers are already protected, the French legal framework will still need to be amended at least as far as it transposes the Directive. In particular, to the requirement in the Sapin II Law that a whistle-blower must act in a “selfless manner”, i.e. not be motivated by any personal interest (such as a monetary reward or business advantage), would need to be removed, at least as applies to violations of EU law. In addition, again at least as far as violations of EU law are concerned, potential whistle-blowers will need to be allowed to report directly to competent authorities without, in principle, raising a prior internal alert as the Law currently requires. Also, French law does not provide for financial assistance and support, including psychological support, for whistle-blowers as provided for in article 20 of the Directive.

Germany

Germany is one of the Member States that offers protection to whistle-blowers only in special instances, such as in cases of reporting the misconduct of companies under the supervision of the German financial regulator, Bundesamt für Finanzdienstleistungsaufsicht, in accordance with the Act Establishing the Federal Financial Supervisory Authority, of violations of the Money Laundering Act or the General Equality Law and the Act on the Implementation of Measures of Occupational Safety and Health. German law further protects, in certain instances, whistle-blowers disclosing trade secrets in accordance with the recently promulgated Act on Trade Secrets.

It remains to be seen whether German implementing law will exceed the minimum standards, extend the scope also to other EU and domestic laws or put additional safeguards in to protect the participants' rights and interests.

German companies may be eager to use the mandatory reporting channels not only for the limited purpose of reporting certain EU law breaches but also to invite whistle-blowers to report on breaches affecting the business to cope with compliance issues as early as possible.

What Should an Organisation Do Now?

There is also consensus in the European Union that a whistle-blower system is a key element of sound corporate governance, despite cultural differences between the Member States. The Directive is only the first step to create a level playing field across the European Union in this area.

Organisations operating with entities in the European Union should watch out if the national implementation goes beyond the requirements of the Directive and prepare for the establishment or enhancement of a whistle-blowing process. They should already foster a corporate culture that ensures that the relevant information swiftly reaches the organisation as it is closest to the source of the breach, most able to investigate and with powers to remedy it.

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