

ARE THE EU MEMBER STATES READY FOR THE NEW WHISTLEBLOWER PROTECTIONS?

Introduction

On 16 December 2019, Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the “Whistleblower Protection Directive”) entered into force.

The Whistleblower Protection Directive reflects the EU policies aiming to protect individuals seeking to expose wrongdoings in both the private and the public sector. It establishes the minimum requirements for the Member States’ internal regulations concerning protection of whistleblowers. Most importantly, it provides that the Member States must: ensure that all forms of retaliation against whistleblowers are prohibited; oblige legal entities with over 50 workers, in both the private and the public sector, to introduce specific internal reporting channels to ensure that the whistleblowers’ identity is kept confidential; and designate the competent authorities responsible for external reporting and follow-up.

The EU Member States are obliged to transpose the Directive’s provisions into their national legislation by 17 December 2021 (with the exception of the regulations requiring organisations with between 50 and 249 workers to introduce internal reporting channels, which may be brought into force by 17 December 2023).

This briefing provides an overview of the Whistleblower Protection Directive.

Who will be considered a protected whistleblower?

The Whistleblower Protection Directive applies to reporting persons working in the private or public sector who: (i) acquired information on breaches of EU law in a **work-related context**; (ii) have reasonable grounds to believe that the reported **information is true and falls within the policy areas covered** by the Directive; and (iii) **reported the information** internally, externally or by way of public disclosure.

What does “work-related context” mean?

This includes (i) “workers” within the meaning of the EU law, i.e. individuals performing services for and under direction of another person, for a certain period of time, in return for remuneration; (ii) self-employed persons; (iii) shareholders or members of the administrative, management or supervisory bodies within the organisation, as well as volunteers and trainees; and (iv) persons working under supervision and direction of the organisation’s contractors or suppliers.

Notably, the work-related context also encompasses past and future working relationships, which means that the whistleblower will also be offered protection if he/she reports any breaches of which he/she had become aware during the recruitment process or other pre-contractual negotiations. The Whistleblower Protection Directive provides that the whistleblower’s motivation in reporting is irrelevant and should not affect the availability of the protections offered.

What policy areas are covered?

The scope of application of the Whistleblower Protection Directive is rather broad. The protections provided for in the Directive will be triggered with regard to breaches of the EU law in several policy areas that have been identified to be in need of whistleblower protection as carrying significant risks for the welfare of the society.

These areas include **breaches affecting the financial interests of the EU (in particular fraud), breaches relating to the internal market (including competition and State aid rules), as well as breaches** of the specific EU law acts listed in the Annex to the Directive and **relating to the following policy areas:**

- public procurement;
- financial services, products and markets, and prevention of money laundering and terrorist financing;
- product safety and compliance;
- transport safety;
- protection of the environment;
- radiation protection and 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.

The Directive also stipulates that Member States may decide to extend its application to national laws.

Reporting channels

The Whistleblower Protection Directive offers **three reporting options** to the whistleblowers that must be ensured by the Member States in their national legislation: (i) internal reporting; (ii) external reporting; and (iii) public disclosure.

The Directive imposes on the EU Member States several requirements to introduce appropriate reporting regulations, as described below. The Directive however provides that the Member States must encourage internal reporting first.

Finally, the Whistleblower Protection Directive provides that the whistleblower may qualify for protection also if he/she makes a public disclosure, but only if: (i) if he/she first reported the breach internally or externally, but no appropriate action was taken in response to the report; or (ii) he/she reasonably believes that the breach may constitute an imminent or manifest danger to the public interest, or that external reporting carries the risk of retaliation or has low prospects of being effectively addressed due to the particulars of the case (e.g. in case of collusion).

What requirements for the reporting procedures are to be introduced by the member states?

Internal reporting

The Whistleblower Protection Directive requires the EU Member States to ensure, at a minimum, that legal entities with 50 or more workers establish channels and procedures for internal reporting and for follow-up.

The reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party and may enable reporting in writing, orally or both, and must in particular:

- be designed, established and operated in a secure manner ensuring confidentiality of the identity of the whistleblower;
- ensure that the whistleblower obtains acknowledgment of receipt of the report within seven days of its receipt;
- designate an impartial person or department responsible for following up on the report;
- ensure a diligent follow-up by this designated person or department;
- envisage a reasonable timeframe (up to three months) to provide feedback.

External reporting

The Whistleblower Protection Directive also requires the EU Member States to designate authorities competent to receive, give feedback and follow up on whistleblower reports and to provide these authorities with proper resources.

In particular, these authorities should establish independent and autonomous reporting channels, with requirements as regards confidentiality, acknowledging receipt of the reports, follow-up and feedback similar to those of the internal reporting channels.

Additionally, the authorities should communicate to the whistleblower the final outcome of investigations triggered by the report and refer the information contained in the report to competent institutions for further investigation, where provided for under the EU or national law. They should also publish on their websites easily identifiable sections on the reporting rules and the confidentiality regime. The external reporting channels should also enable durable storage of the reported information, allowing for any further investigations.

Notably, the authorities are also empowered by the Whistleblower Protection Directive to consider that the reported breach is minor and does not require further follow-up other than closure of the procedure.

What protection is to be offered to the whistleblowers by the national legislation?

The Whistleblower Protection Directive specifies, among other things, the following measures which the Member States are required to implement in order to protect whistleblowers:

- **prohibition of any form of retaliation** (such as suspension, dismissal, withholding of training, wage reduction, unfair treatment, medical referrals and similar measures);
- **access to support measures for whistleblowers**, in particular free legal advice, financial assistance or psychological support;
- **introducing anti-retaliation measures**, e.g. ensuring that whistleblowing is not considered to be in breach of any restrictions on disclosure of information, and does not result in any kind of liability; or making a presumption in the court proceedings that any detriment to the whistleblower's situation is caused in retaliation for the reporting activity, placing the burden of proof on the employer;
- **ensuring the whistleblowers' right to an effective remedy and fair trial**, as well as protection of identity while the investigations are ongoing;
- **introducing penalties** applicable to individuals that hinder or attempt to hinder reporting, retaliate or bring vexatious proceedings against the whistleblower, or breach the duty of confidentiality.

Checklist for companies:¹

- Implement an internal reporting system providing for confidentiality;
- Ensure acknowledgment of receipt of the report to the reporting person within seven days;
- Designate an impartial person / department responsible for follow-up and feedback to the reporting person;
- Ensure a diligent follow-up by the designated person / department, including developing a follow-up procedure;
- Ensure that feedback is provided to the reporting person within a reasonable timeframe, not exceeding three months from the acknowledgment of receipt of the report;
- Implement a clear and easily accessible procedure for external reporting;
- Ensure compliance with the GDPR while processing personal data;
- Ensure that records are kept of every report received and that they are stored for no longer than necessary.

¹ This checklist should not be treated as ensuring full compliance with the Whistleblower Protection Directive.

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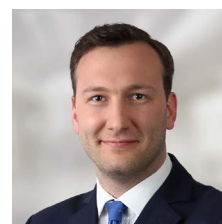
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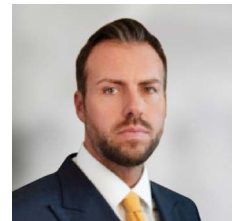
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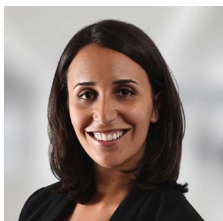
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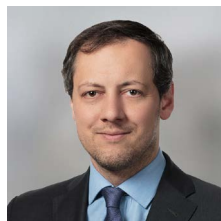
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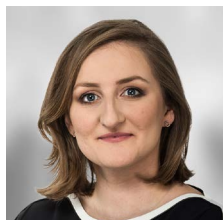
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