



# Newsletter

3 August 2020

## Directive (EU) 2019/1937 on the protection of persons who report Union Law breaches - Key points on whistleblower rights, companies' obligations and next steps - Establishment of a special legislative committee

Recent scandals such as the Dieseltgate, Luxleaks, Panama Papers or Cambridge Analytica, have shown major wrongdoings happening inside companies or organizations, which harmed public interest across the EU and have demonstrated how important whistle-blowers' revelations are to detect and prevent breaches of EU law harmful to the public interest.

Until the adoption of the Directive, only a few EU countries provided comprehensive legal protection, whereas now, the Directive aims at ensuring that all Member States have common high protection standards for whistleblowers who unveil illegal activities and law abuse relating to wide range of EU policy areas.

Following its adoption, Member States should incorporate its provisions into domestic law by 2021, and all companies employing more than 50 employees must comply with the new legislative provisions.

In view of the integration of the Directive into our national legal order, a **special legislative committee** has been set up to draw up a draft law, which must be completed by 30 October 2020.

Within the above framework, we set out below the main provisions of the Directive.

### **Material Scope of the Directive**

The Directive aims to protect employees in a private or public sector organization who report on breaches of the EU's financial interests, internal market-related violations and breaches of EU law in the following 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.

### **Who is protected?**

- Persons having the status of worker, including civil servants;
- Persons having self-employed status;
- Shareholders and persons belonging to the administrative, management or supervisory body of the undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees;
- Any persons working under the supervision and direction of contractors, subcontractors and suppliers;
- Persons reporting or publically disclosing information on breaches acquired in a work-based relationship which has since ended.

### **Which information is protected?**

Information on breaches includes information as well as **reasonable suspicions** about actual or potential breaches, which occurred or are very likely to occur.

### **How can a breach be reported?**

Whistleblowers may proceed with an **"internal report"**

(within a legal entity in the private or public sector), with an “**external report**” (to the competent authorities), or with a “**public disclosure**” (making the information on a breach available in the public domain). Reporting persons are encouraged to report through internal channels before reporting through external channels, where the breach can be addressed effectively internally and when there is no risk of retaliation.

### **What are the obligations of private sector legal entities?**

Private sector legal entities **employing more than 50 employees** must establish channels and procedures for internal reporting and follow-up. Channels for reporting might be assigned either to a person or a service within the organization or outsourced to a third party.

The procedures for internal reporting and follow-up must include the following steps:

- Design, installation and operation of channels for receiving the reports. Channels should operate in such a manner that ensures both that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected and that non-authorized staff members won't have access thereto;
- Acknowledgment of receipt of the report to the reporting person within seven days of that receipt;
- Designation of an impartial person competent for following-up on the reports;
- Diligent follow-up by the designated person or department;
- A reasonable timeframe to provide feedback;
- Provisions of clear and easily accessible information regarding the procedures for reporting externally to competent authorities.

Reports shall be submitted in writing, orally (by telephone, through other voice messaging systems, or by means of a physical meeting), or in both ways.

Member States have the right, following an appropriate risk assessment, to require the legal entities of the private sector with **less than 50 employees** to establish internal channels and reporting procedures. The reasoned decision of each Member State shall be communicated to the Commission and then to the other Member States.

### **Provisions applicable to internal and external reporting:**

- Duty of confidentiality, in other words protection of the identity of the reporting person
- Compliance with the provisions for the protection of personal data
- Record keeping of the reports

### **What type of protection does the Directive provide for?**

The protection measures provided for by the Directive revolve around 6 main axes:

- **Prohibition of retaliation:** means of retaliation might include any form such as: suspension, lay-off, demotion or withholding of promotion, a negative performance assessment or employment reference, failure to renew, or early termination of a temporary employment contract;
- **Support measures to the reporting persons:** Member States shall ensure that the reporting persons have access to support measures, such as easy and free of charge access to information and advice regarding their legal protection, effective assistance from competent authorities, legal aid in criminal proceedings, financial assistance and support measures etc.;
- **Measures for protection against retaliation:** such a measure, worth mentioning is the reversal of the burden of proof before the Court. In particular, the burden of proof is transferred from the reporting person, to the person that caused the harm or that took the measure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.
- **Measures for the protection of persons concerned:** Member States shall ensure that persons concerned fully enjoy the right to a fair trial and that their identity is protected.
- **Penalties:** such penalties shall be imposed to those who obstruct the observance of the procedures provided by the Directive.
- **No waiver of rights and remedies:** Member States shall ensure that the rights and remedies provided for under this Directive cannot be waived or limited by any agreement, policy, form or condition of employment etc.

### **More favorable treatment and non-regression clause**

Member States may introduce provisions more favorable to the rights of reporting persons than those set out in the Directive. However, the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States.

### **Transposition to national legislation and entry into force**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within a two year period, ending on **17 December 2021**.

With respect to private sector legal entities employing 50 to 249 persons, Member States have two additional years (until **17 December 2023**) to bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels.

### **Comments**

The Directive provides Member States with a degree of flexibility; consequently there might be **different reporting systems per country**. Member States might also adjust

and differentiate penalties for non-compliance.

Regarding the **reversal of the burden of proof**, employers are expected to be even more cautious when it comes to ensuring that the decision-making process on every measure affecting employees/ reporting persons is extensively documented.

In addition, it should be mentioned that the **definition of actions described as “retaliation”** is broad and includes termination of employment contract, demotion, non-extension of fixed-term contract, etc.

Moreover, the reporting persons are protected from **possible claims for breach of confidentiality and confidentiality**.

It should also be highlighted that the rights and means of protection provided for in the Directive **cannot be restricted or abolished by agreement, term of employment or corporate policy**.

With regards to the protection of personal data, the Directive provides that **the provisions of the GDPR are not affected**. However, it is not clear how the requirements of the GDPR will be combined with the protection provided under the Directive (e.g. the right of a defendant under the GDPR to obtain information on the identity of the applicant might contradict to the confidentiality obligation of the Directive).

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