

Whistleblower protection directive (proposal)

World Competition Day

mec. Małgorzata Sz waj

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Agenda

1. Rationale
2. Scope
3. Reporting
4. Protection
5. Penalties
6. Public consultation
7. “Antitrust whistleblowers”

Proposal

- Proposal for Directive of the European Parliament and of the Council on the Protection of persons reporting on breaches of Union law published by the European Commission on 23 April 2018
- European Parliament Legislative resolution, 26 November 2018
- Implementation until 15 May 2021

Whistleblower

- Natural or legal person who reports (within the organisation concerned or to an outside authority) or discloses (to the public) information on a wrongdoing obtained in a work-related context



Why (1)

Whistleblowers help preventing damage and detecting threat or harm to the public interest that may otherwise remain hidden



But are afraid of retaliation



Providing effective whistleblower protection is required to safeguard the public interest

Why (2)

- Alongside other **means of collecting evidence**, whistleblowing is a means of feeding national and EU enforcement systems with information leading to effective detection, investigation and prosecution in breaches of Union rules

Response

- Directive laying down common minimum standards for the protection of persons reporting on the unlawful activities or abuse of (among others) Articles 101, 102, 106-108 of TFEU

Personal scope

- Persons working in the private or public sector
 - having the status of worker
 - having the status of self-employed
 - shareholders and persons belonging to the management body of an undertaking, including non-executive members
 - volunteers and unpaid trainees
 - any persons working under the supervision and direction of contractors subcontractors and suppliers
- Persons whose work-based relationship is yet to begin in cases where information concerning a breach has been acquired during the recruitment process or other pre-contractual negotiation

Reporting

- Providing information relating to breaches, i.e.:
 - actual or potential acts or omissions contrary to Union law (**unlawful activities**), or
 - acts or omissions which do not appear to be unlawful in formal terms but defeat the object or the purpose pursued by the applicable rules (**abuse of law**)
- Depending on whether information on breaches is provided:
 - within a public or private legal entity – **internal**
 - to the competent authorities – **external**

External reporting (1) - competent authority

- Establishes **independent and autonomous** external reporting **channels** securing and ensuring **confidentiality**
- Gives **feedback** to the reporting person within a reasonable timeframe not exceeding three months (or six months in duly justified cases) including on the final outcome of the investigation
- Follows up on the reports by taking the necessary measures and **investigates**

External reporting (2) – dedicated channels

- Independent and autonomous, if:
 - separated from general communication channels, and
 - designed, set up and operated in a manner ensuring the completeness, integrity and confidentiality of the information, and
 - enable the storage of durable information to allow for further investigations
- Allow written and oral reporting via telephone as well as physical meetings
- Allow competent authority seeking clarification on the information reported

External reporting (3) – confidentiality

- Procedure needs to describe in detail and clearly circumstances under which the confidential data of a reporting person may be disclosed
- **Disclosure exceptional**
 - if necessary and proportionate under Union/ national law for the purpose of investigations or subsequent judicial proceedings, or
 - to safeguard the freedoms of others including the right of defence

Protection of (externally) reporting person (1)

– conditions

- He or she has reasonable grounds to believe that **the information reported was true** at the time of reporting, and
- **First reported internally** but no appropriate action was taken in response to the report within the reasonable timeframe, or
- Internal reporting channels were not available, or
- The use of internal reporting channels was not mandatory, or
- He or she could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report, or
- He or she had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities, or
- He or she was entitled to report directly through the external reporting channels to a competent authority by virtue of Union law

Protection of (externally) reporting person (2)

- prohibition of retaliation (examples)
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- Reporting persons protected against:
 - **retaliation**, and
 - charges of breaching any restriction on disclosure of information imposed by contract or by any provision, and
 - incurring liability in respect of such disclosure

Penalties

- Effective, proportionate and dissuasive
- For natural or legal persons that:
 - hinder or attempt to **hinder reporting**
 - take retaliatory measures against reporting persons
 - bring vexatious proceedings against reporting persons
 - breach the duty of maintaining the confidentiality of the identity of reporting persons
- For persons who are **making malicious or abusive reports** or disclosures

Public consultation - examples of comments

- Obliging whistleblowers to report cartels within their own company before turning to outside authority could dissuade them from coming forward
- Internal reporting may contribute to internal cartel detection and, subsequently, lead to more leniency applications
- Mere protection from retaliation is not sufficient as incentive for an individual to address the authorities or media
- All disclosures should be protected when concerning harms or threats to the public interest that have occurred, are occurring or are likely to occur. Not only those concerning “unlawful activities” or “abuse of law”
- Timelines for initial investigations of whistleblowers’ claims should be shortened

Current “antitrust whistleblowing” by individuals

- Communication systems between competition authorities and whistleblowers
 - available in a number of Member States (including Poland) and in the EU
- Fragmentation at national level
- Whistleblowers protected?
- Successful?...

Contact details

Linklaters C. Wiśniewski i Wspólnicy sp. k.
Q22, Al. Jana Pawła II 22, 00-133 Warszawa

mec. Małgorzata Szwaj

Tel: +48 22 526 51 78

Email: malgorzata.szwaj@linklaters.com



<https://www.linklaters.com>