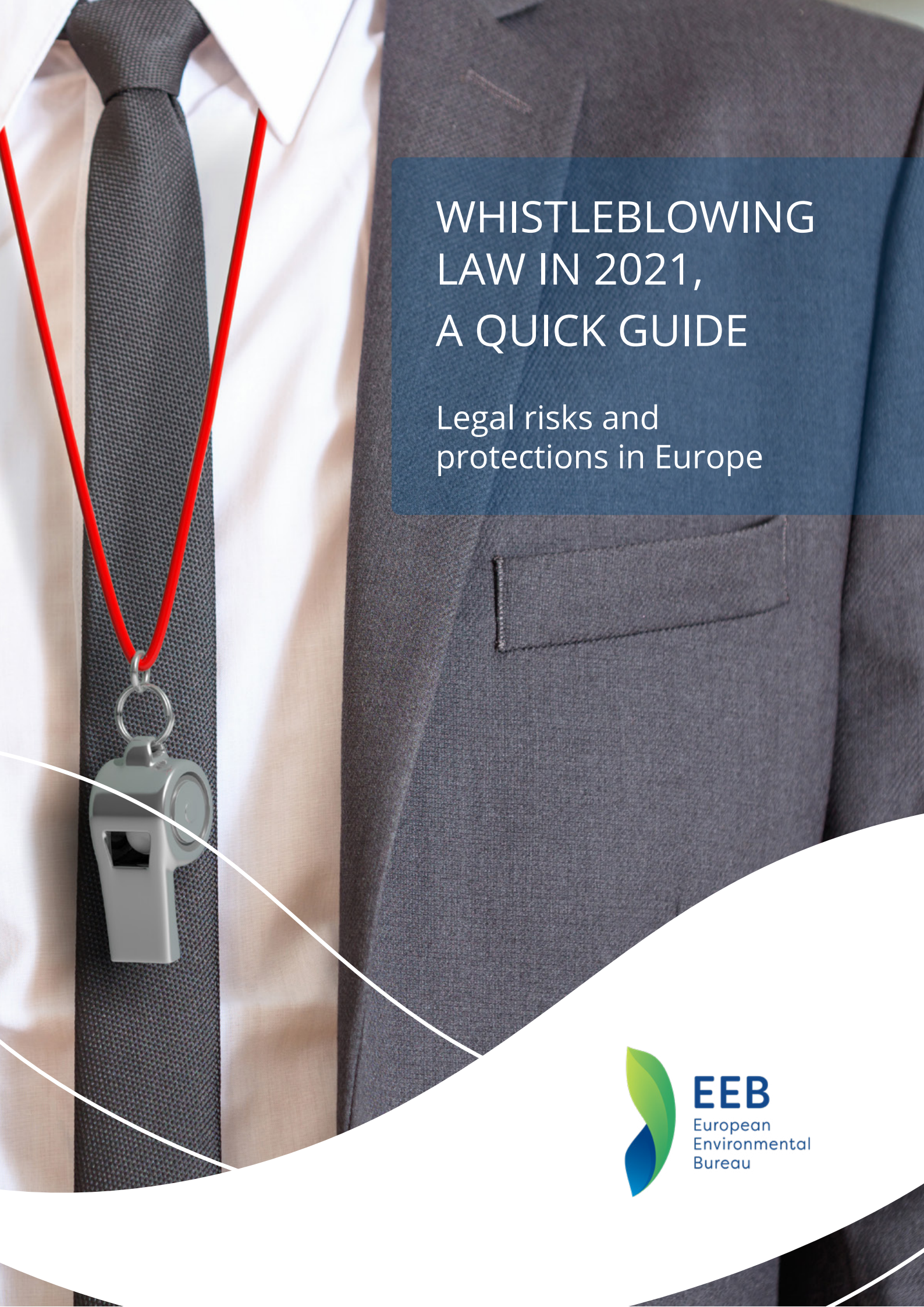

WHISTLEBLOWING LAW IN 2021, A QUICK GUIDE

Legal risks and protections in Europe

EEB
European Environmental Bureau

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Foreword

It has become a sad statement of the obvious that old political orders have been shaken to their core. Regimes led by America's Donald Trump, Brazil's Jair Bolsonaro and a European crop of populists have ripped up the rulebooks. Their disdain for science-based policy is felt not least in terms of environment impacts.

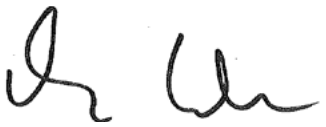
Political institutions are ballast in this storm. Individuals can, and should, call out and expose wrongdoing, internally or externally, and empower corrective forces.

Over the course of history, ordinary people have, time and again, chosen to speak out to hold powerful people, corporations, institutions or other types of organisations to account for their wrongful actions. Many a time they knowingly risked their careers, even lives, to act in line with their moral compass and in the public interest. 'Shooting the messenger' is an all-too-common tactic in the playbook of those whose misdeeds have been outed.

Whistleblowing by definition is not about individual gain. When the public interest is at stake, the whistleblower's disclosure of a wrongdoing serves a greater good, safeguarding the interests of the many.

Sadly, rattling the cage rarely results in an immediate acknowledgement and addressing of the problem at hand, and individuals who choose to expose wrongdoings show immense courage and staying power.

Whistleblowers' ability to remain steadfast in following their moral imperatives thus deserves our respect and support, for their moral resilience is what makes these ordinary people truly extraordinary. Officials or private employees are more likely to take the courageous step of speaking out if they understand their legal protections and the risks they face, hence this report.



Jeremy Wates
Secretary General

Jeremy Wates has served as Secretary General of the European Environmental Bureau, Europe's largest network of environmental citizens' organisations, since May 2011.

Introduction

This report is a summary of legal protections and risks faced by whistleblowers in Europe's largest economies. We aim to give officials and private employees the information they need to judge whether they are in a position to call out wrongdoing and how to protect themselves from any reprisals.

Summaries by country offer would-be whistleblowers a quick overview of legal protections where they live. More complete information is available here. Though the law of the land is a relatively fixed matter, the scale of the incoming EU Whistleblowing Directive, which must be transposed into national law by 17 December, means that it is already influencing decisions of senior judges even in countries where it is not yet transposed into law. This report therefore also offers an analysis of this landmark directive and the direction of travel for national law.

In summary, where legal protections exist, they mostly shield those who blow the whistle on corrupt or illegal behaviour, not least criminal behaviour with environmental impacts. Protections are less clearly defined when it comes to exposing poor or harmful but lawful governmental policies. The situation is less clear still when it comes to EU institutions, whose staff are shielded only by a patchwork of staff regulations that are often a pale imitation of the whistleblower directive they may have helped create.

Of particular interest to the European Environmental Bureau are the opaque forms of corporate lobbying and how they influence policymaking. Europe's corridors of power have long welcomed powerful corporate interests that do not operate in the public interest, let alone for the environment that supports all life on Earth. This favour is why populists characterise national governments and the EU in particular as a playground for corporate lobbyists. They have a point, one that successive Commission Presidents have done little to dispel, their reluctance to meet with representatives of environmental organisations contrasting starkly with their willingness to meet regularly with business representatives. .

It is crucial that citizens are better heard and that their representatives in the environment, consumer, labour, development and other non-profit organisations play a prominent role in law-making. With the environment the pre-eminent issue of our lifetime, we are particularly interested in the European Green Deal, the EU budget and pandemic recovery plans.

Regardless of who is in charge, however benign, there will always be a place for the whistleblower. These are individuals that feel so strong a sense of public duty that they willingly risk their job and even their liberty to expose wrongdoing. The outcome is a glimpse into embryonic and still malleable lawmaking or enforcement, intelligence irresistible to journalists and invaluable to NGOs.

This report seeks to inform those who wish to expose confidential company or official documents in the public interest because the public's right to know outweighs other concerns. It provides an up-to-date summary of the legal protections afforded to whistleblowers, as well as expert opinion on how aggressive prosecutors have been to date and what the possible sanctions are. The format is designed to offer a quick digest, backed up by legal references to facilitate any legal advice they may wish to take, and longer supporting texts available separately. We hope that by increasing understanding of the risks and protections, we can contribute to removing barriers to whistleblowing in the public interest.

Acknowledgements

This report was conceived by Jack Hunter, Senior Communications Officer of the European Environmental Bureau. It is based on national assessments undertaken by litigation and regulatory lawyers co-ordinated by Grégoire Paquet and Margaux Bia of DLA Piper.

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Belgium

Introduction

Although numerous specific provisions regarding those who share privileged information in the public interest exist in Belgium, the current legal framework has drawbacks. The federal nature of the Belgian state, territorial applicability and the fact that legal norms concerning whistleblowers are spread across a variety of sectors result in a diffuse legal framework which makes an understanding of which rules apply more complicated. There is an absence of general provisions for private sector employees.

However, to the best of our knowledge, no criminal prosecution has ever been brought against whistleblowers nor have any civil suits been reported. The imminent transposition into Belgian law of the EU 'Whistleblower Protection Directive' (2019/1937) should clarify and increase whistleblower legal protections further.

As regards officials and other servants of the European Union working in Brussels, their employment rights and obligations are governed by the EU Staff Regulations [1] and not national laws. However, whatever Belgian law results from the Whistleblower Protection Directive will be available to them where they wish to report breaches that occur in a work-related context outside their employment relationship with the EU institutions, bodies, offices or agencies.

Regulation of whistleblowing

Despite the diffuse nature of Belgium's legal framework, the most important legislative acts are:

- The federal law of 15 September 2013 that establishes principles for the protection of individuals who report "suspected violations of integrity" in the federal public sector [2]. Violations of integrity means: the performance or omission of an act by a member of staff constituting a breach of the laws, orders, circulars, internal rules and procedures applicable to authorities and members of their staff and which constitutes a threat to or infringement of the general interest; the performance or omission of an act by a member of staff that involves an unacceptable risk to the life, health or safety of persons or to the environment; the performance or omission of an act by a member of staff that is manifestly indicative of a serious breach of professional obligations or of the proper management of the authority;

- The Flemish decree of 7 July 1998 concerning the Flemish ombudsman and the Flemish Civil Servant Statute of 13 January 2006, which includes the protection afforded to Flemish civil servants who report suspected violations

of integrity;

- The Brussels region joint decree and ordinance concerning the Brussels Ombudsman of 16 May 2019 with regard to the report of suspected violations of integrity in the Brussels regional public sector. Here, suspected violations of integrity are to be understood as gross negligence, abuse or an offence, constituting a threat or prejudicial to the public interest, committed within the Brussels regional public sector;

- National laws focusing on disclosure and adequate protection in relation to specific sectors, such as finance [3], audits [4] and money laundering [5];

- The protection of the right of freedom of expression by Article 10 of the European Convention on Human Rights, Article 11 of the Charter of Fundamental Rights of the European Union, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Belgian Constitution.

In addition, several federal laws and regional decrees and ordonnances enshrine the right of public access to information [6].

1. Public sector
In the public sector, officials have the duty to report crimes they discover in the course of their duties to the Crown Prosecutor on the basis of art. 29 of the Criminal Code. Federal employees who witness suspected violations of integrity can rely on the federal whistleblower law to report the facts in a confidential procedure that protects them from retaliation.

On the Flemish regional level, former and current civil servants, contractual employees and apprentices who observe, for instance, negligence, unlawful activities and abuse of the law at work can raise a concern with both internal and external bodies, for instance line managers, heads of unit, Flemish ombudsman, or directly to the internal audit of the Flemish administration thanks to the Flemish decree of 7 July 1998. The whistleblower can be placed under the protection of the Flemish Ombudsman, if requested. Whistleblowers are protected against disciplinary sanctions, dismissal or any other form of overt or hidden sanction, unless they are found to have acted in bad faith, for personal benefit or have made a false declaration.

Brussels Capital Region employees who suspect a fellow staff member of acting with negligence, conducting unlawful activities or abusing the law can benefit from a protection and investigation regime, consisting of internal and external components, pursuant to Article 15 of the Brussels joint decree and ordinance of 16 May 2019. Similar to the Flemish region, on request, they can be placed under the protection of the Ombudsman.

2. Private sector
The current Belgian legal framework lacks general provisions governing whistleblowers in the private sector. However, a number of principles have legal consequences. One the one hand, whistleblowers in the Belgian private sector should keep in mind that employers and employees owe each other 'awe and respect' as a general principle and have a duty to refrain from committing or co-operating in acts of unfair competition. On the other hand, employment laws provide protection against workplace bullying or arbitrarily dismissal of employees, including whistleblowers.

Liability and judicial consequences of whistleblowing

The Belgian criminal code does not explicitly penalise whistleblowing or the disclosure of information. However, it does contain several provisions to prosecute individuals who unlawfully disclose information outside of the scope of the report suspected violations of integrity in the public interest. Examples include professional secrecy, embezzlement, theft, unauthorised access to IT systems, abuse of trust, defamation and slander. Those who respect the legally sanctioned forms of whistleblowing but who nevertheless are

faced with criminal charges may wish to resort to grounds for justification and exemption of criminal prosecution as well as mitigating circumstances.

If a civil servant or private individual illegally discloses information, they could be held liable to pay financial damages commensurate with that which their disclosure caused. When considering the potential civil liability of a whistleblower, the court will need to take into account and balance the individual's right to freedom of expression, which includes the right to pass on information. This right is enshrined by Article 10 of the European Convention on Human Rights, Article 11 of the Charter of Fundamental Rights of the European Union, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Belgian Constitution.

Additionally, certain legislation expressly states that the disclosure of information does not expose the whistleblower to civil damages, such as article XI.332/5, 2° of the Belgian Code of Economic Law in the field of intellectual property. This offers complete protection to individuals disclosing such information from civil liability.

Penalties

Pursuant to the Federal law, Flemish Decree and Brussels joint Decree regarding reports made in the public sector, whistleblowers who made invalid or abusive reporting may be subject to disciplinary proceedings in their respective institution.

Belgian law does not contain a particular provision protecting whistleblowers, family members or colleagues from harassment. However, where employers threaten whistleblowers, these threats are criminalised under criminal law if they can objectively be considered likely to instil a serious fear in a reasonable person. In such cases, threats shall be punishable by imprisonment of between three months and two years and a fine of between €400 and €2,400 as per Article 327 of the criminal code.

Disclosure of information leading to the committing of a criminal offence, such as theft, embezzlement or computer fraud for example, may fetch a custodial sentence of between eight days and ten years and a fine of up to €800,000.

In civil cases, defendants could be forced to repay financial losses in full.

Interpretation and application by national courts

Almost no judgments are available regarding the interpretation and application by national courts on the matter of the current legislation governing whistleblowers or their respective criminal or civil liability. Although several whistleblowers have challenged administrative sanctions or decisions before the Belgian administrative courts, these judgments did not clarify the interpretation and application of the specific Belgian legal framework on whistleblowers. To the best of our knowledge, there have been no criminal or civil prosecutions of whistleblowers.

End notes

[1] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 045 14.6.1962, p. 1385).

[2] Law of 15 September 2013 on the reporting of a suspected breach of integrity within a federal administrative authority by a member of its staff.

[3] Article 36/7/1 of the federal law of 22 February 1998 establishing the statute of the National Bank of Belgium, which grants

protection to any person or entity who reports infractions on the laws and regulations governing the supervision of financial institutions; article 69bis and 69ter of the law of 2 August 2002 on the supervision of the financial sector and financial services.

[4] Articles 82-84 of the law of 7 December 2016 on the organisation of the profession and the public supervision of auditors.

[5] Article 10 of federal law of 18 September 2017 concerning the prevention of money laundering and terrorist financing and limitation of the use of cash.

[6] For "federal administrative authorities" the law on public access to government information of 11 April 1994 and the law on public access to environmental information of 5 August 2006 is applicable; In Flanders, the Administrative Decree of 7 December 2018 is applicable to "Flemish public authorities"; in Wallonia, the Environmental Code, in particular the provisions with regard to the public's right of access to environmental information is applicable; for the Brussels region the Joint Decree and Ordinance of the Brussels-Capital Region, the Joint Community Commission and the French Community Commission of 16 May 2019 on public access to administration in the "Brussels institutions" is applicable, as well as the Order of the Government of the Brussels-Capital Region of 10 November 1994 laying down the arrangements for access to environmental information.

England & Wales

Introduction

Freedom of expression is a right upheld in England and Wales by the Human Rights Act 1998, which transposes Article 10 of the European Convention on Human Rights (the right to freedom of expression and information) into English law. That right is generally well protected and, in particular, the right of journalists to protect the identity and confidentiality of their sources, including whistleblowers, is generally upheld. However, these rights and protections are qualified and in certain circumstances can be restricted by public authorities to, for example, protect national security and prevent public disorder.

The concept of whistleblowing is established and protected in certain circumstances under English law, including through the Public Interest Disclosure Act 1998 (PIDA). PIDA affords employment law protection to workers who disclose confidential information to relevant authorities.

To this date, England and Wales have not transposed the EU 'Whistleblower Protection Directive' (2019/1937) into domestic law. With the UK leaving the EU on 31 December 2020 due to Brexit and according to the EU (Withdrawal) Act, the country will not retain EU directives themselves into domestic law, as opposed to the legislation already implementing them or rights and obligations under them, which will be retained. Therefore, as England and Wales have not transposed the Directive to this date, they will not have to do so before 17 December 2021. They might decide to transpose the principles laid down in the Directive to ensure legal clarity and continuity but will have no obligation to proceed to that.

There are a number of potential criminal and civil consequences for making unauthorised disclosures, although criminal prosecutions are rare in practice. It should be noted that where a journalist's right to protect their source is upheld, the identity of the whistleblower is likely to be protected and kept confidential, with the result that civil or criminal charges cannot be brought against the whistleblower.

Regulation of whistleblowing

Broadly speaking, PIDA 1998 permits whistleblowing in certain circumstances where employees make 'qualifying disclosures'. That is the disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest by proving one or more of the following:

•That a criminal offence has been committed, is being committed or is likely to be committed;

•That a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject;

• That a miscarriage of justice has occurred, is occurring or is likely to occur;

• That the health or safety of any individual has been, is being or is likely to be endangered;

• That the environment has been, is being or is likely to be damaged, or that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

PIDA does not in general apply to self-employed professionals, voluntary workers (including charity trustees) or to the intelligence services.

PIDA offers employment law protection. An employee can claim automatic unfair dismissal if their employment contract is terminated because they made a 'qualifying disclosure'. It also provides whistleblowers protection in circumstances such as redundancy, denial of promotion, facilities or training opportunities.

The rights of an employee under PIDA will need to be considered alongside an employee's confidentiality obligations to his or her employer at contract and English common law.

Where a criminal offence is committed, PIDA is less likely to be relevant.

Liability and judicial consequences of whistleblowing

1. Civil
Whistleblowers could face civil proceedings in England and Wales for breach of contract, such as an employment contract or confidentiality agreement. The way in which such a claim would proceed and the ultimate consequences for the whistleblower would depend on the terms of contract in question and the factual context.

2. Criminal
Individuals should be aware of the following four most high-profile criminal laws when considering disclosing confidential documents:

a. The Official Secrets Act 1989 (OSA) states that it is an offence for a crown servant or government contractor to make certain unauthorised disclosures which may potentially damage any of the below categories of government work: security and intelligence; defence; international relations; crime and special investigation powers; information resulting from authorised disclosures or entrusted in confidence; information entrusted in confidence to or by other states or international organisations.

For past or present members of the security and intelligence services, for whom PIDA does not apply, any unauthorised disclosure relating to security and intelligence is an offence.

b. The Data Protection Act 2018 states that it is an offence to disclose personal data without the consent of the individual concerned. This would be relevant where leaked sensitive documentation contains personal data, such as names, addresses or dates of birth.

c. The Misconduct in a public office states that it is a common law offence to make unjustified disclosures that seriously undermine public trust in a public servant.

d. The Theft Acts states that an individual who provides a confidential government document to a journalist could in theory, depending on the form and nature of the document disclosed, be prosecuted under the Theft Acts for the appropriation of property belonging to another.

Penalties

1. Civil
If a claim for breach of contract against a whistleblower is successful, the whistleblower may be forced to pay an indemnity or

damages, or be subject to an injunction restraining their behaviour in relation to the documents in question, which might also restrain future behaviour.

2. Criminal

a. Official Secrets Act 1989: prosecution is rare, with no more than one case a year on average. Defendants face a maximum two-year custodial sentence and an unlimited fine.

b. Data Protection Act 2018: defendants face up to an unlimited fine, depending on the type of conviction.

c. Misconduct in a public office: this offence carries a maximum sentence of life imprisonment.

d. Theft Acts: the potential maximum custodial sentence in this case is seven years imprisonment and an unlimited fine.

France

Introduction

The Sapin II Act (Act) protects whistleblowers from criminal liability (Article 7), ensures the confidentiality of their identities (Article 9), and prohibits and sanctions the taking of retaliatory measures against them via reintegration into the workplace in case of dismissal. It also defines civil and criminal sanctions against employers acting vindictively (Articles 10, 11, 12, 13, 15 and 16). To benefit from protection under the Act, individuals must (i) satisfy the legal definition of whistleblower (Article 6), divulge only the information necessary to make their alert, and (iii) if they are public or private employees report their concerns following a graduated specified procedure (Article 8). At the moment, whistleblower protection extends only to individual persons (whether employees or not) as opposed to legal persons.

The Act extended legal protections that were previously focused on the disclosure of wrongdoing in a limited number of sectors to the reporting of: any crime, misdemeanour, offence, serious and clear violation of an international commitment which has been ratified or approved by France or of a unilateral act of an international organisation adopted on the basis of such commitment; a serious breach of a law or regulation; or a serious threat or serious harm to the public interest, excluding national defence secrets, medical secrets and attorney-client privilege, so long as the individual reporting the information has first-hand knowledge of it.

The EU Whistleblower Protection Directive (2019/1937) is expected to expand the scope of whistleblower protection in France even further, once it is transposed into French law by December 2021. For example, while the Act limits protection to individuals, the Directive extends protections to trade unions or associations. Furthermore, the Directive merely encourages rather than requires internal reporting by employees as a first step.

Regulation of whistleblowing

Article 6 of the Act states:

"...a whistleblower is «(i) any individual who reveals or reports, (ii) acting selflessly and in good faith, (iii) a crime or a misdemeanor, an offence, a serious and clear violation of an international commitment which has been ratified or approved by France or of a unilateral act of an international organisation adopted on the basis of such commitment, or a serious breach of a law or regulation, or a serious threat or serious harm to the public interest, (iv) of which the individual has personally become aware» excluding «facts, information or documents, in whatever form or on whatever medium, classified

on national security grounds or covered by medical secrecy or legal privilege.»

Several points are noteworthy. First, only conduct that is selfless is protected by the Act. This condition implies that the report must be raised in defense of the general interest and not for personal gain, especially financial interest. Further, only conduct that is carried out in good faith is protected. According to French case law, an employee is considered to have acted in bad faith only when it is established that they knew their allegations were false and, therefore, abused their freedom of expression. In other words, innocently reporting allegations that turn out to be wrong is still protected where the above conditions are met.

Also, to gain legal protection under the Act, private and public sector employees must follow a graduated reporting procedure governing when and to whom a disclosure can be made. An exception is made for cases of grave or imminent danger, or when there is risk of irreversible damage.

Under the graduated reporting procedure, reports must first made internally (the Act requires entities with 50 or more employees to set up the appropriate channels to receive such a report), then to a regulatory body (a judicial authority, the administrative authority or professional bodies) and only in case of failure to properly reply by the latter within three months may an employee whistleblower make the information public. Escalation from the first to the second step is permitted only when the whistleblowing report is not properly addressed within a reasonable period of time. The Act does not define who should make these value judgements, which will vary case-by-case. Individuals, as opposed to employees, can report wrongdoing directly to the relevant authorities.

The Act also protects the identity of whistleblowers, under Article 9. Anyone who discloses identifying information of a protected whistleblower faces a maximum of two years of imprisonment and up to €30,000 in fines. The Act moreover prohibits and sanctions the taking of retaliatory measures against protected whistleblowers and guarantees the reversal to the status quo in case retaliatory measures are taken against them as well as opens the possibility for civil and in some cases criminal sanctions against such retaliating individuals in Articles 10, 11, 12, 13, 15 and 16.

Importantly, the Act has vested an independent administrative authority, the Défenseur des Droits, with the responsibility of orienting and advising whistleblowers confidentially. In the three years since the enactment of the Sapin II Act, it registered a total of 240 alerts, 84 of which were registered in 2019. A potential whistleblower can approach the Défenseur des Droits, in writing, at any stage of the process for assistance and advice. If a whistleblower is considering making their alert publicly, either because they followed Steps 1 and 2 of the graduated reporting procedure and have not yet received a response within the requisite amount of time or because the alert is necessary due to grave or imminent danger or in the case of the risk of irreversible damage, they are advised to consult with the Défenseur des Droits in advance, due to the risks of going public with such information. This can also be helpful in order to verify whether an alternate legal framework may apply. Indeed, whistleblower legislation enacted prior to the Act dealing with specific sectors (including banking, insurance, and the environment) is still applicable and may offer additional advantages, such as a simplified reporting procedure. Constitutional or human rights law could provide additional protection.

One might potentially argue that unfair or harmful policy decisions constitute a “serious threat or serious harm to the public interest” disclosure of which could be protected under the Act, especially if such policy decisions have been adopted or are likely to be adopted. Transparency International lists the following as examples of things that could fall under the category of «serious threat or serious harm to the public interest»: damage to public health, public safety or the environment, serious management error, concealment of evidence relating to protected reports.

Liability and judicial consequences of whistleblowing

It is important to keep in mind that the Act seeks to encourage whistleblowing and aims to protect whistleblowers. Under the Act, any person (e.g. an employer or representative of an entity that may be subject to an alert, etc.) who hinders in any way the submission of an alert to the designated representative of the company or to the authorities can incur criminal liability. Such obstruction may be punished with up to one year imprisonment and a fine of up to €15,000. Article 9 stipulates that disclosure of confidential information likely to identify a whistleblower may be punishable by up to two years in prison and a fine of up to €30,000. The Act also expressly prevents any retaliation from being taken against protected whistleblowers such as dismissal from place of employment, having in a recent case led to reinstatement and payment of back pay through an expedited judicial procedure [1]. A non-employee whistleblower protected under the Act is also protected from retaliation such as retraction of a right like enrollment in a daycare or any other public service. In some cases, retaliation can even be subject to criminal sanction. For example, an employer who abusively initiates an action for defamation against an employee whistleblower protected under the Act may be subject to a fine of up to €30,000 (Article 13).

As to the risks faced by whistleblowers themselves, the Sapin II Act expressly exempts protected whistleblowers from criminal liability. However, disclosure of military secrets, medical data and information covered by the attorney-client privilege is not covered. Also, if an alert is made in violation of the Act, for example by violating the graduated reporting procedure in place for employees, by exposing more information than is necessary to treat the alert, or by reporting inaccurate information, there may be potential civil and/or criminal liability, the specific penalties for which are outlined below.

Penalties

Individuals disclosing information without complying with the Sapin II Act face criminal or civil penalties. For example, disclosing a professional secret could fetch a prison sentence of up to a year and a fine of up to €15,000 (Article 226-13 of the French Criminal Code). Slanderous denunciation («dénonciation calomnieuse»), i.e. reporting someone to the authorities on the basis of information that one knows to be false even partially, is subject to a maximum of five years imprisonment and a fine of up to €45,000 (Article 226-10). The act of opening, deleting, delaying or diverting correspondence, including electronic correspondence, addressed to third parties in bad faith is subject to a maximum prison term of one year and a fine of up to €45,000 (Article 226-15), while theft, for example of confidential documents, fetches a maximum prison sentence of three years and a fine of up to €45,000 (Article 311-1). The crime of “recel”, in French, meaning the concealing, holding or transmitting of material tied to a crime, fetches a maximum prison term of five years and a fine of up to €375,000 (Article 321-1), while for defamation, the maximum prison term is five years and the maximum fine is €45,000 (Article 226-10).

With respect to possible civil penalties, Article 1240 of the Civil Code may also apply. This article requires the author of any harm to another individual to repair that harm. In other words, this provision establishes a general regime of civil responsibility outside of contractual cases for harms committed against others. For example, a “false whistleblower” can incur civil liability for the damages caused to the employer by his or her allegation. Such a whistleblower would be shielded from civil liability, however, if acting in good faith.

Interpretation and application by national courts

From the available case law applying the protections of the Sapin II Act, it is clear that courts will require strict compliance with the graduated reporting procedure applicable to public and private employees under the Act in order for such individuals to benefit from its protection. For example, a French Court of Appeal considered that a public employee was not protected under the Act for leaking information that became public before exhausting the required reporting procedure under the Act [2]. Furthermore, an individual will not be protected as a whistleblower under the Act in case of leaking information to the press where the authority in question had taken the necessary measures to remedy the situation within a reasonable amount of time [3]. Interestingly, courts have considered whistleblowers protected under the Act in relation to reporting that took place before the Act (i.e. have applied the protections of the Act in a retroactive manner) [4].

End notes

[1] Conseil des Prud'hommes de Lyon, Formation de référé, 17 avril 2019, M. X, n°1900087.

[2] CA Lyon, 4ème chambre, 24 octobre 2019, n° 19/00554.

[3] TA de Châlons-en-Champagne, 13 février 2018, jugement n° 1701162.

[4] Conseil des Prud'hommes de Lyon, Formation de référé, 17 avril 2019, M. X, n°1900087.

Germany

Introduction

A comprehensive package of legislation to protect whistleblowers is missing in Germany, but several sectoral regulations are in place that offer some protection. Public and private employees enjoy different levels of protection. Criminal and private prosecution is rare. However, labour law is rather frequently used against whistleblowers. Major improvements to whistleblower protections are expected to be in place by December 2021 thanks to the implementation of the EU 'Whistleblower Protection Directive' 2019/1937.

Regulation of whistleblowing

The most relevant legal protections in place today are:

·An EU Directive on the protection of trade secrets against their unlawful acquisition, use or disclosure ((EU) 2016/943)) has been transposed by the Geschäftsgeheimnis Gesetz (GG - "Business Secrecy Act") of 18 April 2019. The Business Secrecy Act protects business secrets and prohibits their disclosure, but also specifies conditions that allow disclosures (Section 3 para. 2 and Section 5 Business Secrecy Act).

·National laws protect disclosures by workers in banks[1], financial services[2] and insurance companies [3], or when performing certain activities such as reporting anomalies in the general workplace [4] and specifically the mining sector [5];

·The protection of the right of freedom of expression and information under Art. 5 German "Grundgesetz" ("GG", "Basic Law") theoretically protects anybody, under certain conditions.

1. Public sector
Civil servants have the right to blow the whistle, under certain strict conditions defined in article 5 GG. They are generally required to use mandated reporting channels to raise concerns about official orders or shortcomings, defects or injustices in connection with their job. They can only go public after they have exhausted all internal administrative means, if their concern is in the public interest and not merely personal matters. Going public with claims of corruption that break the German Criminal Code is also permitted [6], if law enforcement is notified.

2. Private sector
The Business Secrecy Act allows a disclosure of information if it aims to protect a legitimate interest [7], while labour law Section 612 a Bürgerliches Gesetzbuch ("Civil Code") prevents discrimination against an employee

because the employee exercises their rights. Thus, if an employee has a right to disclose information, they cannot be disadvantaged for this disclosure. In addition, the Working Conditions Act provides that in certain situations workers are permitted to disclose certain information to the authorities if health and safety at work is not guaranteed. However, labour courts often disadvantage whistleblowers for violating their duty of loyalty towards their employer and approve dismissals. Moreover, in the private sector the German Code of Corporate Governance encourages publicly listed companies to create internal reporting channels for suspected breaches of the law within the company. Anonymous whistleblowing in the finance sector is protected2 if done through a channel specified in the Federal Institution for Financial Services Supervision, the Bundesanstalt für Finanzdienstleistungsaufsicht. The German Code of Corporate Governance encourages publicly listed companies to create internal channels to report suspected lawbreaking within the company.

Liability and judicial consequences of whistleblowing

Public servants may break the German Criminal Code if they aid disclosure or directly disclose official, professional, scientific or industrial information that is considered confidential. In addition, there are further criminal laws under which anybody could break the German Criminal Code by disclosing sensible information. As for the incitement to disclose information, such activity is criminalised under the general provisions of the German Criminal Code.

However, according to the general law provisions, the disclosure of official information might fall under a list of exemptions from criminal liability, such as 'necessity' (Sections 34, 35 Criminal Code). Furthermore, cases might occur where the whistleblower has a legal obligation to report or disclose information (see Section 138 Criminal Code). In this case, the whistleblower cannot be held criminally liable. In addition, a whistleblower might act on the grounds of an error concerning the legality of the disclosure (See memo 8.5 of the German part of the annex to this report). The whistleblower is therefore acting without intent.

Beyond the Criminal Code, Section 23 of the Business Secrecy Act defines a criminal offence with relevance for whistleblowers. However, Section 5 Business Secrecy Act provides exemptions from criminal liability if the disclosure is done for one of the following purposes: the exercise of freedom of expression and information, including respect for freedom and plurality of media (Section 5 no. 1); the detection of an unlawful act, professional or other misconduct where its acquisition, use or disclosure is likely to protect the general public interest (Section 5 no. 2); or disclosure made by employees to the employees' representative body with the purpose of enabling the latter to fulfil its legal responsibilities (Section 5 no. 3). With regard to the burden of proof for criminal conviction, case law has made it clear that this requires the judge's sufficient degree of belief according to experience of life, precluding reasonable doubt, which are not merely founded on theoretical possibilities.

From a civil law standpoint, while employees are generally obliged not to disclose their employer's business secrets, respecting the obligation of professional secrecy or 'duty of loyalty', if the disclosure follows the legal method, whistleblowers should not suffer any civil consequences. If such disclosure is not compliant, the activity could lead to disciplinary measures up to dismissal or damage claims. Under the German Law of Civil Procedure ("ZPO"), a court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue (section 286 ZPO).

Penalties

Whistleblowers face a range of penalties, from fines to imprisonment of up to five years. In exceptional cases, charges of treasonous espionage or spying of state secrets may be brought, crimes punishable by jail terms of up to 10 years.

Under German law, there are no specific sanctions to protect whistleblowers, their family or colleagues from harassment, such as from an employer. However, should the harassing behaviour constitute a criminal offence, such as defamation Section 185 et seqq of the Criminal Code may apply.

Interpretation and application by national courts

After a thorough search, no criminal cases were found in which a whistleblower has been prosecuted. However, several civil cases have tested whether termination of employment contracts were justified or not. The most important case in this regard reached and set precedent in the European Court of Human Rights. It was sparked when geriatric nurse Brigitte Heinisch complained internally about deficiencies in nursing care and fraud against insurance companies, then alerted a public prosecutor in 2005 and 2006. She was fired without notice. This was upheld by a German labour court, but later overturned by the European Court of Human Rights. It ruled that whistleblowers who have exercised their constitutional right to file criminal charges in good faith cannot simply be dismissed (European Court of Human Rights, Judgement of 21 July 2011, Application no. 28274/08).

End notes

[1] Section 56 para. 4 f Nr. 9 Kreditwesengesetz („Banking Act").

[2] Section 4 d Finanzdienstleistungsgesetz („Financial Services Act").

[3] Section 23 para. 6 Versicherungsaufsichtsgesetz („Insurance Supervision Act").

[4] Section 17 para. 2 Arbeitsschutzgesetz («Working Conditions Act»).

[5] Section 61 Änderungsverordnung zu bergrechtlichen Vorschriften im Bereich der Küstengewässer und des Festlandsockels („Regulation Amending the mining provisions regarding the regulation of coastal waters and the continental shelf").

[6] Section 67 para. 2 Federal Civil Servants Act and Section 37 para. 2 Civil Servant Status Act. See in detail our memorandum under 5.2.2

[7] See memo 3.2 of the German part of the annex to this report.

Italy

Introduction

Whistleblowers acting in the interest of organisations, both private and public, are relatively well protected in Italy. This is largely thanks to the long and challenging creation of Law 179/2017, known as The Whistleblowing Law, adopted on 30 November 2017. Aiming to encourage employees to uncover illegal practices and fight corruption, the law strengthens existing protections for public employees and introduces, for the first time, specific protections in the private sector. It introduces several measures to curb retaliation against whistleblowers, including measures to reintegrate dismissed employees. The anonymity of whistleblowers is now protected and once an allegation is made, any subsequent disciplinary measures or other negative consequences, direct or indirect, are invalid unless the employer can demonstrate that they have nothing to do with the whistleblowing.

On the other hand, the Law sanctions individuals who make false reports. In particular, those making complaints that are wilfully or negligently groundless are vulnerable to civil or criminal charges.

Regulation of whistleblowing

The most relevant laws are:

- Law no. 179/2017 protecting individuals who report offences or other misconduct, both in the private and public sector;

- National laws protecting disclosure in the banking sector[1], financial intermediaries[2], insurance and reinsurance companies[3] and across all sectors where disclosure relates to anomalies in the workplace[4] or money laundering[5].

Additionally, freedom of expression is protected in general terms under Article 21 of the Italian Constitution; while the Workers Statute, Law no. 300/1970, protects employees' right to freely express their thoughts (Article 1) and stops an employer investigating political, religious or trade union opinions of workers (Article 8).

1. Public sector
Public officials and persons in charge of public services must disclose in writing any criminal offences they discover in the course of their duties. Failure to do so is punishable by a fine of up to €516 or up to a year in jail. Law no. 179/2017 states that whistleblowers must report offences or other misconduct to the person mandated by law to handle transparency and anti-corruption within every public entity, or to the Italian National Anti-

Corruption Authority (ANAC), or to the Corte dei Conti (the Italian National Audit Office) or to the judicial authorities.

2. Private sector
Private sector employees are not required to disclose wrongdoing they discover in the course of their duties. But Law no. 179/2017 requires enterprises to establish channels to report offences, violations of 231 Model compliance programmes and any other misconduct. They must also establish adequate protection for whistleblowers; in particular, the Whistleblowing Law requires companies to prevent retaliatory or discriminatory actions against the whistleblower for reasons related, directly or indirectly, to his or her reporting of allegations, as well as to provide, in the disciplinary system, specific sanctions against any person who violates such protective measures, and against those who intentionally or negligently make false reports. By setting up these provisions, companies gain legal grounds to avoid liability for criminal acts of their employees.

3. Common principles
In both sectors, whistleblowers are protected against dismissal, demotion, retaliatory measures and, in some cases, also against criminal liability. Indeed, the disclosure of official, professional, scientific or industrial secrets, which are generally punishable offenses under Articles 326, 622 and 623 of the Italian Criminal Code, are allowed if made in compliance with the specific and relevant whistleblowing provisions described above. Non-officials are not obliged to inform the authorities of a potential misconduct.

Criminal offences arising from the unsanctioned disclosure of official, professional, scientific or industrial secrets are not punished if the disclosure is made:

- In compliance with the specific whistleblowing provisions previously mentioned, for, respectively, the public and private sectors;

- Properly and in a good faith, using the appropriate reporting channels adopted by the organisation, or, in the public sector, externally to prescribed regulators;

- In the interest of the integrity of the organisation, whether public or private, and to prevent or combat misconduct.

Protections are not afforded to those obliged to maintain the professional secrecy due to their consultancy agreement with the concerned individuals or organisations

Liability and judicial consequences of whistleblowing

Whistleblowers could face criminal or civil charges if they wilfully or negligently make groundless complaints. This most likely results in charges of criminal slander or defamation. On the other hand, whistleblowers are not liable if they make, in good faith, an incorrect claim based on their knowledge and following the legally prescribed methods for reporting wrongdoing.

If disclosures trigger criminal proceedings, defendants can argue that the disclosed information is not secret, professional, industrial or official. Or they can argue that the disclosure was made with 'just cause' (giusta causa), or, for instance, with the consent of the individual / legal entity identified in the disclosure.

From a civil law standpoint, employees must generally respect business secrets and maintain an obligation of professional secrecy or "duty of loyalty", as defined in Article 2105 of the Italian Civil Code. However, a valid disclosure could protect whistleblowers from civil consequences. Invalid disclosures could lead to disciplinary measures including dismissal.

Penalties

The Whistleblowing Law does not protect

public or private sector individuals who knowingly make false claims. Private entities are entitled to apply 231 Model disciplinary sanctions against those making false claims, up to and including sacking the individual.

At the same time, the law sanctions those who persecute whistleblowers. Specifically, in the public sector, ANAC may levy administrative fines of between €5,000 and 30,000 for retaliation, depending on the seriousness of the act[6] against whistleblowers, including harassment. Sanctions from €10,000 to 50,000 exist for public administrations that fail to set up whistleblowing procedures compliant with the law or that do not correctly follow up whistleblowing reports. In the private sector, to avoid corporate criminal liability, companies should define in their disciplinary systems, part of the Model 231, specific penalties against those who persecute whistleblowers, such as by disclosing their identity or worsening their working conditions. This includes suspending or firing the persecutor.

Italian law does not provide for specific sanctions to protect whistleblowers, their family or colleagues from harassment. However, criminal offences are punishable, as set out in the Italian Criminal Code.

Interpretation and application by national courts

Very few judgments exist in relation to Law no. 179/2017. However, the Italian Criminal Supreme Court [7] has ruled that the identity of the authors of anonymous reporting can be revealed, if necessary and even when they used channels afforded by the Whistleblowing Law, during a trial so long as: (i) the whistleblower's disclosure is the only evidence of the alleged misconduct and (ii) their identity is essential to the defence of the accused. In addition, the Italian Criminal Supreme Court clarified that employees cannot carry out any kind of illicit investigation activities in order to disclose the relevant information. More specifically, the court confirmed that if a criminal offence was committed (i.e. cybercrime) to obtain the disclosed information, criminal liability may arise [8].

End notes

[1] Legislative Decree no. 385/1993.

[2] Legislative Decree no. 58/1998.

[3] Legislative Decree no. 209/2005.

[4] Legislative Decree no. 81/2008.

[5] Legislative Decree no. 90/2017.

[6] Article 54bis of Legislative Decree no.165/2001 as amended by Article 1 of Law no. 179/2017.

[7] Italian Criminal Supreme Court, section VI, 31/01/2018, No. 9041; Italian Criminal Supreme Court, section. VI, 31/01/2018, No. 9047.

[8] Italian Criminal Supreme Court, section V, 21/05/2018, No. 35792.

Spain

Introduction

Spain lacks a culture of whistleblowing. But in recent years, political parties have recognised the value [1] of calling out wrongdoing and the practice is being promoted to both public and private employees. Most large businesses and foreign companies established in Spain have created whistleblowing policies of varying quality, perhaps because it allows them to distance themselves from liability if employees break the law. Profound legal change is coming thanks to the incoming EU Directive 2019/1937. But much of the directive is still to be transposed into Spanish law. So today, Spain still lacks broad legal protections for whistleblowers or mandated reporting procedures. That said, the Supreme Court has begun protecting the anonymity of whistleblowers in cases of criminal conduct and the court made a momentous decision on 6 February 2020 that may prove to be a turning point in the defence of Spanish whistleblowers.

Regulation of whistleblowing

Laws offering some whistleblower protection include:

- Law 10/2010 of 28 April on the Prevention of Money Laundering;
- Law 3/2018 of 5 December on of Personal Data Protection and guarantee of digital rights (Article 24.3);
- Law 19/1994 of 23 December on the protection of witnesses and experts in criminal cases;

Regional (autonomical) laws that provide whistleblowing protection expressly;

- The protection of the right of freedom of expression under Article 20 of the Spanish Constitution;

In Spain, on the national level, the main law that specifically references whistleblowing in the private or public sectors is Law 10/2010 of 28 April on the Prevention of Money Laundering. Article 26 establishes that natural and legal entities, those subject to the law with special obligations, must establish a procedure for their employees, managers or agents to communicate, even anonymously, relevant information on possible breaches of this law.

Freedom of expression (Article 20 of the Spanish Constitution) is a fundamental but not an absolute right insofar it may be subject to limitations. Therefore, in Spain, the disclosure of personal or corporate secrets, as

well as acts of libel, may count as criminal acts [2]. Also, infringing personal honour or privacy may be treated as a civil offence [3].

Official secrets are defined as "acts, documents, information, data and objects whose knowledge by unauthorised persons may damage or jeopardise the security and defense of the State" under Article 2 of Law 9/1968. The Business Secrets (Law 1/2019) [4] (Article 1) defines a corporate secret as something that has business value and has been kept confidential.

The disclosure of private information may constitute an offence under Articles 197 and seq. of the Spanish Criminal Code. This article considers as secret those papers, letters, e-mails, sound, voice or image recordings or any other documents, as well as data of a personal or family nature of another that are recorded on computer, electronic or telematic files or computer storage media, or in any other type of public or private archive or register.

Taking possession of company secrets and/ or disseminating them may be considered an offence under the Spanish Criminal Code (Article 278). According to the Business Secrets Act (Article 1), a corporate secret is considered something that has business value and has been kept confidential.

Taking possession of company secrets and/ or disseminating them may be considered an offence under the Spanish Criminal Code (Article 278).

Liability and judicial consequences of whistleblowing

There are currently no specific exemptions from criminal liability in whistleblowing cases. But the criminal code provides general grounds for exemption under Article 20 which may offer a defence. Specifically, this includes: mental anomaly or alteration; absolute intoxication due to consumption of alcoholic beverages, toxic and narcotic drugs, psychotropic substances or others that cause similar effects; withdrawal syndrome; serious alteration of reality due to disturbances in perception; self-defence; state of necessity; insurmountable fear; acting in the performance of a duty or in the legitimate exercise of a right, office or title. However, these grounds are very difficult to prove and / or meet judicial approval, so are rarely relied on in general criminal cases.

Penalties

Penalties for whistleblowing established in the criminal code are quite varied and depend on the type of crime committed. For revealing personal secrets, penalties are: a custodial sentence of between one and seven years; a daily fine lasting from 12 to 24 months (see article 50 of the Spanish Criminal Code, which provides that a day-fine system is applied to determine the fine's amount); professional disqualification of six to 12 years. Illegal discovery of business secrets incur: a custodial sentence of 2 to 4 years; a daily fine of 12 to 24 months.

Regarding immunity, the criminal code does not establish specific causes for obtaining total immunity or partial reduction of penalties for the specific offences defined above. But general grounds for exemption from criminal liability set out in article 20 of the Spanish Criminal Code and the circumstances for mitigating criminal liability set out in article 21 of the Spanish Criminal Code apply.

Unlike in other European countries, Spanish law does not specify penalties against those harassing whistleblowers, their family or friends, though harassment is generally considered a crime. Thus, article 169 of the Spanish Criminal Code punishes with imprisonment from six months to five years anyone who threatens another with causing them, their family or other persons with whom they are intimately linked to any harm. That drops to a custodial sentence of 3 – 12 months or a daily fine lasting from six to 24 months if the threat is non-criminal. However, penalties

may be increased under specific conditions.

If whistleblowing is found to be a criminal offence, it could trigger additional civil liability, which can consist of either reparation of the damage (which can be an obligation to pay compensation, make good or cease an action) or compensation for the damage. Nevertheless, we have not been able to locate any whistleblowing case where civil liability has been imposed in addition to criminal liability.

Interpretation and application by National Courts

It is difficult to know how the Spanish courts treat whistleblowers because there are very few instances of whistleblowing and therefore very few cases reach the courts. Due to the lack of legal protections and supportive channels for reporting wrongdoing, few have the courage to reveal the irregularities committed by companies or institutions because they understand that the figure of whistleblower is socially frowned upon.

Recently, good news for whistleblowers has come from the Criminal Chamber of the Spanish Supreme Court [5]. Decision 35/2020, rendered on 6 February 2020, affirmed several protections for the anonymous reporting of criminal wrongdoing that is corroborated by an internal or police investigation. The Court validated an anonymous complaint that triggered an internal company investigation into fraud. The court stressed the importance of anonymity and specifically cited the EU directive mentioned earlier. The court recognised the importance of establishing a channel within companies or organisations so that whistleblowers, who are most likely to uncover wrongdoing, are protected from reprisals.

The court's verdict specifically set out its intention to strengthen the protection of whistleblowers and the exercise of their right to freedom of expression and information, as enshrined in Article 10 ECHR and 11 of the EU Charter of Fundamental Rights, and with this to increase their power to discover illicit or criminal practices. The judgment highlights the following:

- The importance of compliance programs in companies.
- The creation of a whistleblowing channel linked to the compliance program.
- The existence of an internal investigation procedure linked to the whistleblowing channel.
- The Supreme Court already considers the EU Directive 2019/1937 to be a mandatory rule.
- Protection mechanisms against retaliation should be put in place.
- The importance of internal whistleblowing channels as a means of investigation.

«The aim is to strengthen the protection of whistleblowers and the exercise of their right to freedom of expression and information as recognised in Article 10 of the ECHR and Article 11 of the Charter of Fundamental Rights of the EU, and thereby to increase their role in the detection of illegal or criminal practices, as in this case was carried out and led to the proper police investigation and discovery of the facts.»

End notes

[1] See articles here and here.

[2] Article 208 of the Spanish Criminal Code: https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444

[3] Organic Law 1/1982, of 5 May, on civil protection of the right to honour, to personal and family privacy and to one's own image: https://www.boe.es/buscar/act.php?id=BOE-A-1982-11196#:~:text=El%20derecho%20fundamental%20al%20honor,en%20la%20presente%20Ley%20Org%C3%A1nica.

[4] Law 1/2019 of 20 February on Business Secrets.

[5] See STS 54/2019 de 6 de febrero de 2019, de la Sala de lo Penal del Tribunal Supremo (Fundamento Juírido Quinto) and STC 97/2019 de 16 de julio de 2019, del Pleno del Tribunal Constitucional (Fundamento Jurídico Sexto) and Sentencia núm. 405/2019 de 2 de diciembre de 2019, de la Audiencia Provincial de las Palmas de Gran Canaria (Fundamento Jurídico Quinto).

European institutions

The European Whistleblower Directive is bringing much needed protection to those seeking to blow the whistle throughout Europe. A notable exception are all the staff who work for EU institutions, who are subject to separate rules that often fail to match the standard of the whistleblowing directive they may have helped to create.

According to Transparency International (TI), employment rights and obligations of EU staff are governed by the EU Staff Regulation and not national laws, and whistleblowing rules vary from institution to institution.

Anonymous reporting is an example of the lack of harmonisation cited by TI last year: OLAF, the EU's anti-fraud agency, and structurally a part of the European Commission, actively encourages citizens to report fraud anonymously on a secured website. The European Commission's guidelines discourages anonymous reporting and the Parliament's rules forbid staff to act anonymously. There is also the Parliament's unique problem of failing to protect accredited parliamentary assistants (APAs) who report fraud and wrong-doing by their own MEP. Extraordinarily, the Parliament's Secretary General, despite a legal obligation to provide protections, admitted: "Whistleblowing rules are applicable to APAs but the EP cannot provide employment protection, as they are dependent on their individual MEPs."

TI EU deputy director and head of political integrity, Nicholas Aiossa, feels that rules for all EU institutions to some extent fall below the minimum standards of the EU directive. For instance, the directive protects whistleblowers when, under specific circumstances, they directly disclose wrongdoing publicly. Under the EU Staff Regulation public disclosure is not allowed under any conditions. The Directive's confidentiality requirements are clearer and the measures to prohibit retaliation against the whistleblower are more robust. The Parliament's negotiating team for the Directive insisted on measures that are contained in the Parliament's own rules, such as on the inclusion of malicious reporting.

Mr Aiossa said: *"As well as reeking of double standards, this divergence has serious consequences. Inadequate rules can inhibit staff from speaking up and reporting wrongdoing. Since the Commission's Internal rules have entered into force, very few case have been reported, which puts into question the efficacy of the current framework."*

The European Whistleblowers Directive

The Whistleblowers Directive (WBD) must be transposed into national law by all EU member states by 17 December 2021. The task remains a work in progress. At the time of publication, the EU Whistleblower Meter states that no country had fully transposed the directive, 21 are working on it and 6 have not begun the process. Nevertheless, senior judges are taking the directive into account, even where it is not national law. Spain's Supreme Court in its Decision 35/2020 is a case in point. We therefore provide an analysis of the directive and its interpretation to date.

Analysis of the directive, its integration into national law and comparable laws

The WBD aims to protect public interests by strengthening the enforcement and the efficiency of Union law by strengthening the protection of whistleblowers. Whistleblowers shall be encouraged to disclose relevant information which can lead to effective detection, investigation and prosecution of breaches of Union law, thus enhancing transparency and accountability (WBD, recital 2). The protection of whistleblowers shall also support the work of investigative journalists. The reason for this is that the protection of whistleblowers as journalistic sources is crucial for safeguarding the "watchdog" role of investigative journalism in democratic societies (WBD, recital 46).

The protection of whistleblowing by the WBD is based on the right of freedom of expression and information (Art. 11 Charter of Fundamental Rights of the European Union (the "Charter") and Art. 10 Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Accordingly, the WBD draws upon the case law of the European Court of Human Rights ("ECtHR") on the right to freedom of expression and the principles developed on this basis by the Council of Europe in its Recommendation on the Protection of Whistleblowers adopted by its Committee of Ministers on 30 April 2014 (WBD, recital 31).

The WBD sets a common standard of protection for whistleblowing if breaches of Union law are disclosed which are crucial for the protection of public interests. The regulatory regime of the WBD notably explains the permissibility of whistleblowing and the obligation of companies to implement appropriate reporting channels.

The common standard set by the WBD shall ensure that whistleblowers protecting public interests shall enjoy the same protection against retaliation with regard to breaches of Union law within all Member States. Currently, on the national level, only ten EU member states have comprehensive legislation regarding the protection of whistleblowers. Such legislation include: The French "Loi Sapin II" of 2016; Italian Law No. 179/2017; the "Business secrecy act" of 2019 (Gesetz zum Schutz von Geschäftsgeheimnissen) which partially guarantees protection; as well as further legislation i.a. from Hungary, Ireland, Lithuania, Malta, Netherlands, Slovakia and Sweden.

The common standard of the WBD shall also help to overcome the fragmented legislative background of the Union concerning the protection of whistleblowers. At the Union level, prior to the WBD, only the following Regulations and Directives explicitly required the establishment of reporting channels and the protection of whistleblowers from retaliation:

- The market abuse Regulation ((EU)

596/2014) and the implementing Directive on Regulation (EU) 596/2014 ((EU) 2015/2392);

- The Regulation on the reporting, analysis and follow-up of occurrences in civil aviation ((EU) 376/2014);
- The Regulation on improving securities settlement in the EU and on central securities depositories ((EU) 909/2014);
- The Directive on the safety of offshore oil and gas operations ((EU) 2013/30); and
- The Directive on the protection of trade secrets against their unlawful acquisition, use or disclosure ((EU) 2016/943)).

In the following, we will explain the scope of the WBD (see below 1.1). Subsequently, the conditions to enjoy protection will be demonstrated (see below 1.2). Against this background, the different reporting channels (see below 1.3) and the protection measures (see below 1.4) will be presented.

1.1 Scope and Definitions (Chapter I; Art. 1 – 5 WBD)

1.1.1 Material scope (Art. 2, 3 WBD)

The material scope of the WBD includes areas of the law regarding which the legislator identified a special need for heightened whistleblower protection. Pursuant to Art. 2 WBD, the WBD notably includes breaches of Union law in the following areas of the law:

- Public procurement: Within this area, breaches of public procurement rules create distortions of competition, increase costs for doing business, undermine the interests of investors and shareholders and, in general, lower attractiveness for investments and create an uneven playing field for all businesses across the Union, thus affecting the proper functioning of the internal market (WBD, recital 6). However, the WBD shall not apply to reports of breaches of the procurement rules involving defence or security aspects unless they are covered by the relevant acts of the Union (Art. 3(2) sent. 2 WBD);
- Financial services, products and markets, and prevention of money laundering and terrorist financing: Within this area, the added value of whistleblower protection has already been acknowledged by the Union after the financial crisis as the financial crisis exposed serious shortcomings in the enforcement of the relevant rules (see recital 7);
- Product safety and compliance: In this regard, businesses involved in the manufacturing and distribution chain are the primary source of evidence, with the result that reporting by whistleblowers in such businesses has a high added value, since they are much closer to information about possible unfair and illicit manufacturing, import or distribution practices regarding unsafe products. Whistleblower protection as provided for in the WBD would also be instrumental in avoiding diversion of firearms, their parts and components and ammunition, as well as of defence-related products (WBD, recital 8);
- Transport safety: Within this area, breaches of Union rules can endanger human lives, as sectorial Union acts on aviation have already acknowledged (WBD, recital 9);
- Protection of the environment: Furthermore, with regard to the protection of the environment the introduction of protection is necessary to ensure effective enforcement of the Union environmental acquis, the breaches of which can cause harm to the public interest with possible spillover impacts across national borders (WBD, recital 10);
- Radiation protection and nuclear safety (WBD, recital 11);
- Food and feed safety, animal health and welfare: In this field the legislator wants to

ensure a high level of protection of human health and consumers' interests in relation to food, as well as the effective functioning of the internal market (WBD, recital 12);

- Public health (WBD, recital 13);
- Consumer protection (WBD, recital 13);
- Protection of privacy and personal data, and security of network and information systems: Whistleblowers' reporting in this area is particularly valuable for the prevention of security incidents that would affect key economic and social activities and widely used digital services, as well as for the prevention of any infringement of Union data protection rules (WBD, recital 14);
- Breaches affecting the financial interests of the Union as referred to in Article 325 Treaty on the Functioning of the European Union ("TFEU"). The protection of the financial interests of the Union, is related to the fight against fraud, corruption and any other illegal activity affecting Union expenditure, the collection of Union revenues and funds or Union assets, is a core area in which enforcement of Union law needs to be strengthened (WBD, recital 15); and
- Breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

Despite the broad scope, the WBD shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests (Art. 3(2) WBD). Further, the WBD shall not affect the application of Union or national law relating to the protection of classified information, the protection of legal and medical professional privilege, the secrecy of judicial liberations or rules on civil procedure and rules on criminal procedure (see. Art. 3(3) WBD).

Finally, the WBD clearly does not apply to reports which only concern mere breaches of national law. In this regard, it is up to the Member States to decide if breaches of national law shall be subjected to a protection similar to that provided by the WBD.

1.1.2 Personal scope (Art. 4 WBD)

Art. 4 WBD outlines the personal scope of the WBD. Pursuant to this article, the WBD applies to reporting persons working in the private or public sector who acquired information on breaches in a work-related context.

Art. 5 WBD further clarifies the meaning of this definition:

- "Reporting person" means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities (Art. 5 para. 7 WBD);
- "Information on breaches" means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches (Art. 5 para. 2 WBD);
- "Breaches" in the sense of the WBD means acts or omissions that are unlawful and relate to the Union acts and areas falling within the scope referred to in Art. 2 WBD or defeat the object or the purpose of the rules in the Union acts and areas falling within the scope referred to in Art. 2 WBD (Art. 5 para. 1 WBD). Additionally, the notion of breaches also includes abusive practices which are defined as acts or

omissions which do not appear to be unlawful in formal terms, but defeat the object or the purpose of the law (WBD, recital 42); and

- "Work-related context" means current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information (Art. 5 para. 9 WBD).

The inclusion of the precondition that the information has to be obtained in a work-related context shapes the personal scope of the WBD. Generally, protection shall be granted to the broadest possible range of categories of persons, who, irrespective of whether they are Union citizens or third-country nationals, by virtue of their work-related activities, irrespective of the nature of those activities and of whether they are paid or not, have privileged access to information on breaches that it would be in the public interest to report and who may suffer retaliation if they report them (WBD, recital 37). The ratio behind this precondition is that persons who acquire the information they report though their work-related activities are exposed to the risk of work-related retaliation. Their protection is thus warranted by their position of economic vulnerability vis-à-vis the person on whom they depend for work (WBD, recital 36). In sum, anyone who can be suspect to any kind of work-related retaliation, e.g. the early termination of contracts, blacklisting, loss of business license or a damage of reputation falls within the scope of the WBD (WBD, recital 39). On the contrary, with regard to non-work-related activities the protection from retaliation is not needed, because there is no work-related power imbalance. This is for example true for ordinary complainants or citizen bystanders (WBD, recital 36).

Against this background, Art. 4 WBD specifies that the abovementioned definition includes at least, the following persons:

- Persons having the status of worker, within the meaning of Art. 45(1) TFEU, including civil servants (Art. 4(1)(a) WBD);

- Persons having self-employed status, within the meaning of Art. 49 TFEU (Art. 4(1)(b) WBD). Self-employed persons in this sense can for example include suppliers or freelance workers (WBD, recital 39);

- Shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees (Art. 4(1)(c) WBD); and

- Any person working under the supervision and direction of contractors subcontractors and suppliers (Art. 4(1)(c) WBD).

In addition, accordingly to Art. 4(4) WBD, the measures for the protection of reporting persons shall also apply where relevant to:

- Facilitators, which pursuant to Art. 5(8) WBD are natural persons who assist a reporting person in the reporting process in a work-related context, and whose assistance should be confidential (Art. 4(4)(a) WBD);

- Third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons (Art. 4(4)(b) WBD); and

- Legal entities that the reporting persons own, work for or are otherwise connected with in a work related context (Art. 4(4)(c) WBD).

Finally, the WBD has to be applied cautiously to lawyers or medical employees. The reason for this is that the WBD shall not affect the application of Union or national law relating to the protection of legal and medical professional privilege (Art. 3(3)(b) WBD and recital 26). Thus, lawyers and medical employees generally can only disclose information within the limits of the legal and medical professional privilege.

1.2 Conditions to enjoy protection (Art. 6 WBD)

Art. 6 WBD lays down the preconditions pursuant to which a reporting person shall qualify for protection under the WBD. The rule is explained in Art. 6(1) WBD pursuant to which the reporting person must have had reasonable grounds to believe that the information was true at the time of reporting and such information fell within the scope of the WBD (see below 1.2.1). In addition he person must have reported in line with the provisions of the WBD (see below 1.2.2). Moreover, with regard to anonymous reporting, special rules apply (see below 1.2.3).

1.2.1 Reasonable grounds to believe in a breach of Union law

Pursuant to Art. 6(1)(a) WBD reporting persons must have had reasonable grounds to believe that the information was true at the time of reporting and such information fell within the scope of the WBD. This requirement is an essential safeguard against malicious and frivolous or abusive reports as it ensures that those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection (WBD, recital 32). In sum, a reporting person must thus have had reasonable grounds to believe in a breach of Union law. Reasonable grounds in a breach of Union law in the sense of Art. 6(1)(a) WBD shall be interpreted broadly as the effective prevention of breaches of Union law requires that protection is granted to persons who provide information necessary to reveal breaches which have already taken place but also with regard to breaches which have not yet materialized, but are very likely to take place (WBD, recital 43). For the same reasons, protection is also justified for persons who do not provide positive evidence but raise reasonable concerns or suspicions (WBD, recital 43). However, protection shall not be granted if the information is already fully available in the public domain or of unsubstantiated rumours and hearsay (WBD, recital 43).

1.2.2 Reported in line with the WBD

Art. 6(1)(b) WBD further clarifies that the reporting person must have reported in line with the reporting methods as provided for by the WBD. This means that the reporting person must have reported either – basically also in the following order – internally in accordance with Art. 7 WBD, externally in accordance with Art. 10 WBD, or made a public disclosure in accordance with Art. 15 WBD (see in detail below 1.3). Pursuant to Art. 5(3) WBD "reporting" means, the oral or written communication of information on breaches.

1.2.3 Anonymous reporting

With regard to anonymous reporting Art. 6(2) WBD states that without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, the WBD does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches (WBD, recital 34). However, pursuant to Art. 6(3) WBD persons who reported or decided to publicly disclose information on breaches anonymously but who are subsequently identified and suffer retaliation shall still qualify for the protection provided by the WBD if they disclosed the information in accordance with Art. 6(1) WBD.

1.3 Reporting channels

As set out before the protection of the WBD depends on the precondition that the reporting was in line with the reporting methods provided for by the WBD. Generally, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case (WBD, recital 33). The whistleblower should consider to report internally (see below 1.3.1) or externally (see below 1.3.2). If both ways fail or are not available, whistleblowers can make a public disclosure (see below 1.3.3). The WBD also provides for rules regarding the arrangement of the internal and external reporting channels (see below 1.3.4).

1.3.1 Internal reporting and follow-up (Chapter II; Art. 7 – 9 WBD)

Pursuant to Art. 5(4) WBD "internal reporting" means the oral or written communication of information on breaches within a legal entity in the private or public sector. The internal reporting channels are regulated by Chapter II of the WBD (Art. 7-9 WBD). Art. 7(1) WBD clarifies that information on breaches may generally be reported through internal reporting channels. The internal reporting channels have the benefit of possibly being the most efficient way of remedying a breach as they include the person closest to the source of the problem (WBD, recital 47). Thus, the WBD explains that Member States shall encourage reporting through internal channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation Art. 7(2) WBD.

Furthermore, Art. 8 WBD provides for an obligation of the Member States to ensure that legal entities in the private and public sector establish internal reporting channels and procedures. The duty to introduce reporting channels as a private entity applies to all legal entities in the private sector with 50 or more workers (Art. 8(3) WBD). However, Member States may require legal entities in the private sector with fewer than 50 workers to establish internal reporting channels. They can do so following an appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk, in particular, with regard to legal entities in the environmental or public health sector (Art. 8(7) WBD and recital 48, 49).

Art. 9 WBD lays down ground rules with regard to the reporting procedures which vary depending on the size and the private or public nature of the legal entities. For example, the internal reporting channels have to be designed, established and operated in a secure manner ensuring the confidentiality of the identity of the reporting person (Art. 9(1) (a) WBD). The receipt of the report has to be acknowledged within seven days (Art. 9(1)(b) WBD). An impartial person or department for following up on the report must be designated (Art. 9(1)(c) WBD). A reasonable timeframe to provide feedback, not exceeding three months, has to be established (Art. 9(1)(f) WBD). Finally, clear and accessible information regarding the procedures for reporting externally must be provided (Art. 9(1)(g) WBD).

The channels provided for in Art. 9(1)(a) WBD shall enable reporting in writing or orally, or both. Oral reporting shall be possible by telephone or through other voice messaging systems, and, upon request by the reporting person, by means of a physical meeting within a reasonable timeframe (Art. 9(2) WBD). Written reporting shall be possible by submitting reports by post, by physical complaint box(es), or through an online platform, whether it be on an intranet or internet platform (WBD, recital 53). Thus, provided that the confidentiality of the identity of the reporting person is ensured, it is up to each individual legal entity in the private and public sector to define the kind of reporting channels to establish.

1.3.2 External reporting and follow-up (Chapter III; Art. 10 – 14 WBD)

Pursuant to Art. 5(5) WBD "external reporting" means the oral or written communication of information on breaches to the competent authorities. The external reporting channels are regulated by Chapter III of the WBD (Art. 10-14 WBD). Pursuant to Art. 10 WBD external reporting channels shall generally be used after the reporting person has already reported through an internal reporting channel or by directly reporting through an external reporting channel. The possibility to directly report through external reporting channels notably shall be used if internal reporting channels do not exist or that they were used but did not function properly (WBD, recital 61). External reporting channels shall also used if the use of internal channels cannot reasonably be expected to function properly which notably is the case where reporting persons have valid reasons to believe that they would suffer retaliation in connection with the reporting (WBD, recital 62).

External reporting channels include national

reporting channels and reporting channels of the Union.

On the one hand, reporting persons can turn to national external reporting channels. In this regard, Art. 11 WBD provides under certain conditions for an obligation of the Member States to establish external reporting channels and to follow up on reports. Where provided for under Union or national law, the competent authorities should refer cases or relevant information on breaches to competent institutions, bodies, offices or agencies of the EU (e.g. European Anti-Fraud Office ("OLAF") or the European Public Prosecutor Office "EPPO") (WBD, recital 71). In order not to overstrain public authorities and to ensure the effectiveness of the external reporting channels, Member States may provide that competent authorities, after having duly assessed the matter, can decide that a reported breach is clearly minor and does not require further follow-up pursuant to the WBD, other than the closure of the procedure (Art. 11(3) WBD; recital 70). Art. 11, 12 and 13 WBD provide further details with regard to the functioning and the design of the external reporting channels. Art. 12 WBD clarifies that the external reporting channels have to be independent and autonomous (Art. 12(1) WBD) and that the reporting channels shall, again, enable reporting in writing and orally (Art. 12(2) WBD, see for details above 1.3.1). Moreover, pursuant to Art. 13 WBD, the competent authorities shall publish on their website certain information about their external reporting channels.

On the other hand, persons can also externally report to the existing channels of the Union such as OLAF, the European Maritime Safety Agency ("EMSA"), the European Security and Markets Authority ("ESMA") or the European Medicines Agency ("EMA") (WBD, recital 69). Art. 6(4) WBD clarifies that if persons report to EU institutions, they are also protected by the WBD under the same conditions as externally reporting persons.

1.3.3 Public disclosures (Chapter IV, Art. 15 WBD)

Pursuant to Art. 5(6) WBD "public disclosure" or "to publicly disclose" means the making of information on breaches available in the public domain. Public disclosures are regulated by Chapter IV of the WBD (Art. 15 WBD). As mentioned before, the public disclosure shall be the last resort which a whistleblower may opt for if the internal and external reporting channel do not provide for viable reporting options.

In this regard Art. 15(1) WBD elaborates that a person who makes a public disclosure shall only qualify for protection under the WBD if

- The person first reported internally and externally, or directly externally, but no appropriate action in line with the WBD was taken in response (Art. 15(1)(a) WBD); or

- If the person has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest (Art. 15(1)(b)(i) WBD) or in the case of external reporting if there is a risk of retaliation or a low prospect of the breach being effectively addressed due to the particular circumstance of the case (Art. 15(1)(b)(ii) WBD).

With regard to the precondition of imminent or manifest danger to the public interest the case law of the ECtHR might provide further clarification. For example, the corruption within a parliament can justify a direct disclosure to the public (ECtHR, Guja vs. Moldova, Judgment of 12 February 2008, Application no. 14277/04, recital 82).

1.3.4 Provisions applicable to internal and external reporting (Chapter V, Art. 16 - 18)

In Chapter V (Art. 16-18 WBD), the WBD provides general rules with regard to the arrangement of the internal and external reporting channels. Firstly, Art. 16 WBD provides for a duty of confidentiality. In line

with this provision, the Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorized staff members competent to receive or follow upon reports without the explicit consent of the person (Art. 16(1) WBD). In addition, the responsible staff members should be specially trained in how to handle reports in a proper and safe manner (WBD, recital 74). However, the identity of the reporting person may be disclosed beyond the competent staff members if this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings (see Art. 16(2) und (3) WBD). Secondly, Art. 17 WBD deals with the procession of personal data. Thirdly, Art. 18 WBD deals with the obligation to keep records of reports of potential breaches. Fourthly, the channels generally have to be user-friendly, secure, ensure confidentiality for receiving and handling information provided by the reporting person on breaches and enable the durable storage of the information to allow for further investigation. This might also mean that the reporting channels have to be separated from general communication channels of the competent authorities (WBD, recital 73).

1.4 Protection measures (Chapter VI; Art. 19 – 24 WBD)

Finally, Chapter VI (Art. 19-14 WBD) deals with protection measures. As a ground rule, Art. 19 WBD provides that the Member States shall take the necessary measures to prohibit any form of retaliation against persons in the scope of the WBD. Pursuant to Art. 5(11) WBD "retaliation" means any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person. Art. 19 WBD further provides a list of 15 acts or omissions qualifying as retaliation. Inter alia Art. 19 WBD names:

- The suspension, lay-off, dismissal or equivalent measures Art. 19(a) WBD;
- The transfer of duties, change of location of place of work, reduction in wages, change in working hours (Art. 19(c) WBD);
- The withholding of training (Art. 19(d) WBD);
- Discrimination, disadvantageous or unfair treatment (Art. 19(h) WBD); or
- Harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income (Art. 19(a) WBD (Art. 19(k) WBD).

In the following, Art. 20 WBD deals with the necessary measures of support including comprehensive and independent information and advice, effective assistance from competent authorities and legal aid in criminal and in cross-border civil proceedings. Art. 21 WBD deals with the measures for protection against retaliation (see below 1.4.1), Art. 22 WBD deals with the protection of persons concerned, Art. 23 WBD deals with penalties (see below 1.4.2), and Art. 24 WBD provides that the rights and remedies under the WBD cannot be waived.

1.4.1 Measures for protection against retaliation (Art. 21 WBD)

With regard to the measures for protection against retaliation, Art. 21(2) WBD provides that persons reporting information on breaches or making a public disclosure in accordance with the WBD shall not be considered to have breached any restriction on disclosure of information. Furthermore, they shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to the WBD. Thus, the WBD provides for a limited exemption from liability, including criminal liability in the event of a breach of confidentiality (WBD, recital 28). The exemption of liability firstly applies if the acquisition raises issues of civil, administrative of labour-related liability (WBD, recital 92).

Moreover, Art. 21(7) WD further clarifies that in legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons within the scope of the WBD shall not incur liability of any kind as a result of reports or public disclosures under the WBD.

However, pursuant to Art. 21(3) sent. 1 WBD, the protection of the WBD does not apply if the acquisition or access of the information constitutes a self-standing criminal offence, such as physical trespassing or hacking. With regard to reporting person who acquired the information by committing such a criminal offense, the exemption of liability does not apply (WBD, recital 92) and the criminal liability remains governed by the applicable national law (Art. 21(3) sent. 2 WBD). The exemption from liability shall also not affect national rules on criminal procedure, particularly those aiming at safeguarding the integrity of the investigations and proceedings or the rights of defence of persons concerned (WBD, recital 28).

Moreover, Art. 21(6) WBD clarifies that persons within the scope of the WBD shall have access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law. The appropriate remedy in each case should be determined by the kind of retaliation suffered, and the damage caused in such cases should be compensated in full in accordance with national law. The appropriate remedy could take the form of actions for reinstatement, for instance, in the event of dismissal, transfer or demotion, or of withholding of training or promotion, or for restoration of a cancelled permit, license or contract, compensation for actual and future financial losses, for example for lost past wages, but also for future loss of income, costs linked to a change of occupation, and compensation for other economic damage, such as legal expenses and costs of medical treatment, and for intangible damage such as pain and suffering (WBD, recital 94).

With regard to all proceedings, Art. 21(5) WBD provides that in proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure.

1.4.2 Penalties (Art. 23 WBD)

With regard to penalties, Art. 23(1) WBD provides on the one hand that the Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that: hinder or attempt to hinder reporting; retaliate against persons within the scope of the WBD; bring vexatious proceedings against persons within the scope of the WBD; or breach the duty of maintaining the confidentiality of the identity of reporting persons, as referred to in Article 16.

On the other hand Art. 23(2) WBD provides that the Member States shall provide for effective, proportionate and dissuasive penalties applicable in respect of reporting persons where it is established that they knowingly reported or publicly disclosed false information. The member states should impose penalties against persons who report knowingly false to preserve the credibility of the whistleblower-protection system. However, the penalties should not be too harsh to prevent dissuasive effect (WBD, recital 102).

Reference to relevant jurisprudence at EU level

The relevant jurisprudence at the EU level with regard to whistleblowing notably concerns the jurisprudence of the ECtHR with regard to the freedom of expression (Art. 10 ECHR). The ECtHR notably laid down rules regarding

the balancing between, on the one hand, the interest of employers to manage their organisations and to protect their interests and, on the other, the interest of the public to be protected from harm. The WBD also makes reference to the case law of the ECtHR (WBD, recital 33).

The European Court of Justice ("ECJ") has not yet commented on the issue of whistleblower protection based on the freedom of expression and information. However, in a preliminary ruling regarding the interpretation of the Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ("Equal Opportunities-Directive"), the ECJ included the spirit of the WBD in its decision (Judgment of the ECJ of 20. June 2019, Hakelbracht/ Vandenbon vs. WTG Retail BVBA, Case No° C-404/18 = ECLI:EU:C:2019:523). The case in question concerned an employee who was dismissed because she had assisted an unsuccessful job-applicant to report her employer to the competent authority for anti-discrimination violations. The job-application indeed had not been recruited because of her pregnancy. Against this background the ECJ decided that the Equal Opportunities-Directive must be interpreted as precluding national legislation under which, in a situation where a person who believes to be discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that context is protected from retaliatory measures taken by the employer solely if that employee has intervened as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements laid down by that legislation.

Important cases of the ECtHR include inter alia:

- Guja vs. Moldova (Judgment of 12 February 2008, Application no. 14277/04, in the following "Guja") regarding the dismissal of the Head of the Press Department of the Moldavian Prosecutor General's Office;

- Kudeshkina vs. Russia (Judgment of 26 February 2009, Application no. 29492/05), regarding the dismissal of a Russian judge; and

- Heinisch vs. Germany (Judgement of 21 July 2011, Application no. 28274/08, in the following "Heinisch") regarding the dismissal of a geriatric nurse.

These cases all dealt with employees internally or externally disclosing breaches of national law in which the employers subsequently sanctioned the disclosure of the information by terminating the contracts. In sum, the ECtHR held that the freedom of expression (Art. 10 ECHR) might warrant the protection of disclosing information. The question whether the protection is warranted has to be determined based on a balancing test which considers the need to protect the employer's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other (Heinisch, recital 94). This balancing test regarding the proportionality of the disclosure notably takes into consideration the following factors: The question whether the disclosed information is of public interest; the authenticity of the disclosed information; the choice of the appropriate reporting channel; the motive behind the action of the reporting person; the detriment of the employer; and the severity of the sanctions.

1.1 Disclosed information is of public interest

As a first factor the ECtHR assessed whether the disclosed information was of public interest (Heinisch, recital 66 and 71; Guja, recital 74 and 90 et seqq.). The Court explained that there is little scope under Article 10 para. 2 ECHR for restrictions on debate on questions of public interest (Heinisch, recital 66, Guja, recital 74 with further references). The Court further elaborated that in a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so

strong as to override even a legally imposed duty of confidence (Guja, recital 74 with further references).

1.2 Authenticity of the disclosed information

As a second factor the ECtHR pointed out to the authenticity of the disclosed information (Heinisch, recital 67 and 77 et seqq.; Guja, recital 75 and 89). In this context, the Court elaborated that it is open to the competent State authorities to adopt measures intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith. Moreover, the Court made clear that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable (Heinisch, recital 67 and 77; Guja, recital 75 with further references). In the cases brought before the ECtHR, however, none of the involved parties questioned the authenticity of the information.

1.3 Appropriate reporting channels

As a third factor, the ECtHR assessed whether an appropriate reporting channels had been used (Heinisch, recital 65 and 72 et seqq.; Guja, recital 73 and 80 et seqq.). The Court explained that disclosure should be made in the first place to the person's superior or other competent authority or body. In the view of the Court, it is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, it must therefore be taken into account whether the applicant had any other effective means of remedying the wrongdoing which he or she intended to uncover (Heinisch, recital 65; Guja, recital 73). By way of example, the Court held that a direct public disclosure should, under certain circumstances, enjoy protection if the employee or the civil servant is the only person or part of a small group that is aware of what is happening and it is necessary to alert either the employer or the public at large (Guja, recital 72).

With regard to the ratio of this rule, the Court explained that employees owe to their employer a duty of loyalty, reserve and discretion which may be more pronounced in the event of civil servants and employees in the public sector as compared to employees in private-law employment relationships. In the view of the Court, the nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee's rights and the conflicting interests of the employer (Heinisch, recital 64).

1.4 Motive behind the action

As a fourth factor, the ECtHR ponders the reporting person's motive behind the actions (Heinisch, recital 69 and 82 et seqq.; Guja, recital 77 and 92 et seqq.). The Court reasoned that the motive of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. In the perspective of the Court, for instance, an act motivated by a personal grievance or personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. The Court argued that, on the contrary, it is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her (Heinisch, recital 69; Guja, recital 77).

1.5 Detriment to the employer

As a fifth factor, the Court introduced the potential detriment to the employer (Heinisch, recital 88 et seqq.; Guja, recital 90 et seqq.). The Court explained that there is an interest in protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good. However, the Court attenuated this principle with regard to the provision of vital public service by State-owned or administered companies. In this regard, the Court explained that the protection of public confidence is decisive for the functioning and economic good of the entire sector and that

the public shareholder itself has an interest in investigating and clarifying alleged deficiencies within the scope of an open public debate (Heinisch, recital 89.) The Court also stated that it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State. In this regard the Court further explained that the public interest in having information about undue pressure and wrongdoing within a prosecutor's office is so important in a democratic society that it outweighed the interest in maintaining public confidence in the prosecutor general's office (Guja, recital 90 et seqq.).

person but could also have a chilling effect on other employees of the employer or on the whole sector. Moreover, the Court was concerned that the chilling effect would be a detriment to society as a whole (Heinisch, recital 91; Guja, recital 95).

1.6 Severity of the sanctions

Finally, as a sixth factor, the ECtHR pointed out to the severity of the threating sanction (Heinisch, recital 91; Guja, recital 95 et seq.). In this regard, the Court assessed if the employer imposed the heaviest sanction possible under labour law, i.e. the termination of the employee, or if the employer applied a less severe penalty. The Court reasoned that, in the first case, the sanction does not only had negative repercussions on the reporting