
European Union implements whistleblower protection

Legal flash

December 2019

Directive 2019/1937 of October 23, 2019 on the protection of persons who report breaches of Union law (OJEU of November 26, 2019) enters into force on December 17.

The main highlights and essential aspects of the Directive are discussed below.



Highlights

- > The Directive requires companies having 50 or more workers to establish internal reporting channels.
- > It establishes protection for persons who report breaches of European Union law who have obtained their information in the context of their work-related activities, and it provides a series of safeguards against possible retaliation.
- > As a minimum harmonization directive, it affords Member States broad discretion in transposing it into national law.
- > The deadline for transposing the Directive is December 17, 2021.



Scope of protection

- The Directive protects persons in the public or private sector who report or publicly disclose information on breaches of EU law who have acquired it in a work-related context, provided they have reasonable grounds to believe that the information was true at the time it was reported.
- Breaches of EU law are defined as acts or omissions that are unlawful and relate to the Union acts and areas falling within the material scope of the Directive¹ referred to in article 2 and in the Annex to the Directive or that defeat the Directive's object or purpose.
- The Directive allows Member States discretion when transposing it into national law, so the material scope of reporting that activates protection could be extended. The protection conferred by the Directive is compatible with protection for other reporting unrelated to breaches of Union law.
- The Directive protects workers and persons with self-employed service status; shareholders and members of management bodies; volunteers and unpaid trainees; persons working under the supervision and direction of contractors; and persons whose work-based relationship has ended or is yet to begin.
- Facilitators²; persons who are connected with the reporting persons and who could suffer retaliation in a work-related context; and legal entities that the reporting persons own, work for, or are otherwise connected with in a work-related context are also protected.
- Protection is afforded against all kinds of retaliation, understood in a broad sense, for any direct or indirect act or omission that 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.
- The Directive sets up a list of possible forms of retaliation, including dismissal; demotion or withholding promotion; transfer of duties or change of location of place of work; wage reduction; disciplinary measures; failure to convert temporary employment

¹ These areas are (i) breaches falling within the scope of the Union acts that concern the following areas: public procurement; financial services; products and markets; prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety; animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems; (ii) financial interests of the Union; and (iii) breaches relating to the internal market.

² Facilitators are persons who assist a reporting person in the reporting process in a work-related context and whose assistance should be confidential.



contracts into permanent contracts; and early termination or cancellation of contracts for goods or services.

- Reporting persons will not incur liability for the information disclosed, provided they had reasonable grounds to believe that the reporting or disclosure was necessary.
- Under the protection conferred, any measure taken against a reporting person is presumed to be retaliatory, and the person who has taken the measure must prove that it was taken on grounds wholly unrelated to the report.
- Reporting persons are entitled to access to legal remedies and compensation. As examples of compensatory measures, the Directive refers to reinstatement in case of dismissal, transfer or demotion; restoration of a canceled permit, license or contract; compensation for financial losses (including loss of income); costs linked to a change of occupation; legal expenses and costs of medical treatment, and intangible damages.
- Member States must provide effective, proportionate, and dissuasive penalties to prevent retaliation against reporting persons.

Reporting channels

- The Directive establishes three types of channels for reporting breaches: (i) internal channels in a public or private legal entity; (ii) external channels that will depend on the competent authorities designated by Member States; and (iii) public disclosure, i.e., making information on breaches available to the public.
- Companies in the private sector having 50 or more workers and all public sector entities must put in place internal reporting channels. Public sector entities having fewer than 50 workers or municipalities with a population below 10,000 people may be exempt from this obligation.
- Channels and procedures for internal reporting and follow-up must be implemented after consultation and agreement with social partners, if so provided by national law.
- The internal reporting channel can be operated externally by a third party or internally by a person or department designated by the company for that purpose.
- Internal reporting channels must comply with a series of requirements regarding response times for processing any reports submitted. In addition, reporting persons must be informed about the existence of external reporting channels and how to use them.



- The use of internal reporting channels is preferred over external channels, and whistleblowers must be encouraged to use the former.
- Nevertheless, reports may be submitted directly through external channels where no internal channel exists; where it has not worked properly; where the report has not been duly followed up or has not been followed up within reasonable time or appropriate measures have not been taken; and where internal channels cannot be reasonably expected to function properly and there is fear of retaliation.
- Furthermore, public disclosure can be made where the report has first been made through internal and external channels, and
 - (i) no appropriate action was taken in response to the report within the stipulated deadline;
 - (ii) there are reasonable grounds for believing that the breach may constitute an imminent or manifest danger to the public interest; or
 - (iii) in the case of external reporting, there is a risk of retaliation or a low prospect of the breach being effectively addressed because of the circumstances of the case.³
- The Directive allows anonymous reporting, and Member States may decide whether such reports will be accepted and followed up. The Directive also protects a person who has made an anonymous report and is subsequently identified.
- Member States must issue regulations concerning the obligation to keep records of all internal and external reports received.
- Processing of data contained in the reports submitted must comply with the data protection regulations set out in the General Data Protection Regulation 2016/679 and in Spain's Organic Law 3/2018 on the Protection of Personal Data and Guarantee of Digital Rights.

Term for transposition

- The term for transposing the Directive will end on December 17, 2021, though Member States may extend the term for bringing into force the laws and regulations necessary to implement reporting channels in companies having between 50 and 249 workers until December 17, 2023.

³ For instance, where evidence may be concealed or destroyed, or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.



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