Implementation of EU Whistleblowing Directive: Where Are We Now?

Answer – for the most part, roughly where we were three months ago.

In September, we produced a short note setting out the state of play in the EU concerning the implementation of the new Directive on the protection of persons who report breaches of EU law (the Whistleblowing Directive). Very little has changed since then, perhaps unsurprisingly given the emergence of Omicron in the meantime, and it now seems that the vast majority of EU countries will miss this Friday’s 17 December deadline, with any relevant local legislation slipping into 2022. See below our “at a glance” table showing the current status of implementation in certain key European countries.

As the UK has already left the EU, it will not be required to implement the Directive. To the extent UK companies have operations in continental Europe, however, it will of course still be relevant and changes to UK whistleblowing policies and procedures may still be necessary if they are part of a European/global framework.

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<th>Country</th>
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<td><strong>Belgium</strong></td>
<td>The National Labour Council has given its advice on the draft legislative proposal. The government has indicated that the Belgian Act will be ready by summer 2022.</td>
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<td><strong>Czech Republic</strong></td>
<td>A draft law has been published. If it is approved as it currently stands, affected companies will be obliged to:</td>
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<td>• establish internal reporting channels for receiving and processing reports of unlawful conduct by <strong>March 2022</strong>. Such channels will have to be established by: (i) all companies with more than 25 employees; (ii) other affected organisations, such as providers and brokers of consumer credit, investment companies and funds, brokers of insurance and reinsurance, and insurance and reinsurance companies; and (iii) public</td>
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contracting entities.

- appoint a person/function responsible for the receipt and investigation of such reports.
- ensure whistleblowers are protected against retaliation.
- ensure there is an adequate response to reports of unlawful conduct, including compliance with relevant time limits.

If employers do not comply with their new obligations, they may face:

- a fine of up to CZK1,000,000 or 5% of their net turnover.
- the risk of information being published about the particular unlawful conduct (e.g. on social media).
- having to pay damages.
- other liability risks.

**France**

There has been a bit of movement in France recently, with the proposed Bill being sent up to the Senate on 18 November. It was reviewed in a Senate commission on 10 December and will be discussed in a public session on 19 January 2022.

Based on the bill voted through by the *Assemblée Nationale*, it appears that:

- the general whistleblower protection scheme already provided for by 2016’s Sapin 2 law has been amended.
- it extends certain protections offered to whistleblowers to other individuals and non-profit private legal entities.
- it simplifies the reporting channels by removing the hierarchy established by the Sapin 2 law so that:
  - whistleblowers will be able to choose directly between internal and external reporting but
  - public disclosure remains limited to certain cases
- it reinforces confidentiality guarantees in connection with any report made and completes the list of prohibited reprisals
against a whistleblower and any sanctions.

Germany

After the recent election in Germany, the new government plans to implement the Whistleblowing Directive. The legislative process is scheduled to begin in spring 2022.

The coalition agreement contains the following indications of future whistleblower protection in Germany, in particular:

- protection not only in the event of violations of EU law, but also in the case of other significant misconduct under national law where disclosure is in the public interest.

- protection to be improved in relation to reprisals against the whistleblower (including more effective enforcement of claims against the infringer).

Italy

The Italian government has been empowered by the Italian Parliament to implement the Directive by means of a Legislative Decree. However, as of 16 December, the government has yet to release any drafts or documents.

Poland

On 18 October, the long-awaited draft law on the protection of whistleblowers was published.

It remains to be seen if any amendments will be proposed to the new law to allow for the clearly sensible option of a single hotline accessible by employees of all the companies in the same group, as currently no such regulations are proposed. Pending that, it will not be sufficient for an employer simply to adopt as its own the compliance hotline terms operated by a holding company. Further, it will be necessary for them to consult on their intended new rules with trade unions or employee representatives.

Keep an eye out for a future blog for further details on the proposals in Poland.

Slovak Republic

Proposed changes to existing whistleblowing provisions to reflect requirements of the Directive are expected to come into force on 1 May 2022.
Spain

Spain has still not published any legislation (even in draft form) to implement the Directive.

What should global companies be doing now?

Although the implementation date for the Directive is clearly going to slip in most EU member states, as per our previous note on this issue, we recommend that companies take preparatory steps now to comply with its minimum requirements to ensure they are in a strong position to comply with local implementing legislation as and when it is finalised. As highlighted in our previous blog, if you thought you could deal with the implementation of the Directive into your EU business just by changing the headings on your UK policy, you are heading for a fall. While the underlying core of what constitutes a protected disclosure is little different in principle, the EU rules will have much greater breadth and come attached to a great deal of procedural machinery which will be new to most UK-based businesses.

Frequently asked questions

One of the key challenges raised with us by global companies relates to whether corporate groups will be able to stick with one centralised group-level reporting channel rather than introduce local-level reporting channels in every member state where the group operates. According to the minutes of a meeting of the EU Commission’s Expert Group on the Directive back in June, the answer is no, although we understand that lobbying is still taking place by employer representatives in an attempt to get the Commission to change its approach on this issue. The current stance of the Expert Group is that to facilitate whistleblowing it is important that internal reporting channels are easily accessible to the whistleblower, i.e. at a local level. It is also concerned that as implementation rules will differ slightly between EU member states it would be difficult to ensure that a single central group solution is compliant with each state’s requirements. Having said that, it then went on to say that it would be possible to have a centralised system within a group together with local-level reporting channels. It will then be for the whistleblower to make an informed decision on whether to report to the subsidiary or at a central level.

It should also be noted that the Directive grants some flexibility in terms of how complaints are handled, including the scope for medium-sized companies (50 to 249 workers) to pool resources as regards the receipt of reports and the conduct of any consequent investigation and this would apply equally to companies within the same group.

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