



VIRTUAL SERIES | GROUP COLLABORATION

Exposing the Truth:

What the EU Whistleblower Directive means for global business

FOREWORD BY EDITOR, ANDREW CHILVERS

Speaking Out: What impact will the EU whistleblowing law have on business transparency?

In the past few years, demands have been growing around the world for more accountability by businesses and governments – particularly since the start of the Covid-19 crisis. Indeed, the global pandemic has heightened issues around whistleblowing like never before.

Nevertheless, whistleblowers often still face dire consequences – often fatal – if they report on problems their superiors would rather the world didn't know about.

Dr Li Wenliang, in Wuhan China, was a case in point. Officially reprimanded for warning the world about Covid-19, he was then later ruthlessly silenced by the Wuhan public security bureau. In Poland, meanwhile, Renata Pizanowska, a nurse and midwife, was sacked for posting pictures on social media of her totally inadequate homemade surgical mask used by hospital staff for protection against the deadly virus.

Elsewhere, in the UK at the start of the pandemic, Linda Fairhall, an NHS nurse since 1979, was sacked after warning that the crippling workload NHS staff were under had led to a patient's death. After she raised the alarm she was summarily dismissed for concerns about her leadership capabilities.

Theoretically, this was all set to change on December 17, with the implementation of the EU's new whistleblowing directive that was due to be adopted into national laws by different EU states. The aim is a laudable one – to fight for more transparency from governments and organisations not just in the EU but beyond its borders. As with GDPR compliance, the hope is that there will be a positive knock-on effect with all businesses and public sector organisations that are located or have an office in an EU state.

The idea of the directive is to set up uniform minimum protection for people who want to report breaches of EU law – giving them legal security against any retaliation by companies or colleagues. Along with this minimum level of protection, each EU state is obliged to introduce a national legislation to give an added layer of security for whistleblowers. However, almost all professional services advisers agree that this

added protection in the form of national laws will take time to enact given the patchwork of legislation that exists across the diverse EU member states.

What is a whistleblower?

Essentially, a whistleblower is defined under the new law as a natural person who reports on or discloses information about breaches or other issues in the context of any work-based activities. The whistleblower will be entitled to legal protection providing there are reasonable grounds to believe that the information on breaches they report were true at the time of reporting. Importantly, the directive also prohibits retaliation and attempts at retaliation (this includes blacklisting, dismissal etc), something that could be extremely difficult to implement among EU governments and further afield.

A single framework?

From a compliance point of view, the Whistleblowing Directive will have a number of hurdles to overcome as EU countries digest the new law and implement it. One of the main debating areas is the idea of applying a single framework and policy across the entire EU or simply adopting different levels of compliance country by country. This will have a huge impact on organisations, which will need to implement compliance according to the local national legislation.

The other issue is how to accommodate whistleblowers who are outside these national boundaries, working from home and/or mobile – which legislation would be applicable? This in turn will have a big impact on employees and employers.

For public and private sector organisations, the directive states that any enterprise with more than 50 employees or public body will have to instigate its own internal whistleblowing channel. Again, many professional services advisers see this as problematic given the complexity of the issues depending on where companies are based and what laws they are adhering to.

Experts have told IR Global these will probably be digital and so will need to be GDPR compliant to ensure they comply with the directive and maintain the whistleblowers' anonymity. Anna Fernqvist Svensson, partner at Hellstrom Law in Sweden, said: "I work with my clients on data protection and whistleblowing is closely connected with issue around personal data.

"The whistleblowing channel and the new EU directive will take time to implement and to educate everyone on this topic. Given that so many companies in the public and private sectors are not GDPR compliant at the moment (if that's even possible), there's a long way to go."

There is also historical baggage to a take into account for each nation. Robert Lewandowski, managing partner at Dr Lewandowski & Partners in Poland, said: "In Poland the term whistleblower has negative connotations related to being an "informer". This attitude has historical roots going back to the times of Poland's Communist era where "whispering" to officials was treated almost as an act of treason.

"Nevertheless, the draft on whistleblowing is definitely an act that should also encourage employer organisations to actively promote whistleblower protection systems as management tools in workplaces."

Outside the EU, many believe the legislation will never be implemented to mirror that of the Brussels legislators. Rebecca Torrey, founding partner at The Torrey Firm in California, doesn't see any federal laws on whistleblowing happening soon. In the US, whistleblowers will continue to have to make difficult decisions on reporting: "It's quite a ways off before such a law is enacted on the federal level.

"In the United States known whistleblowers do face blacklisting. One example is Frances Haugen, the woman who worked at Facebook, now called Metaverse. She was whistleblowing initially anonymously."

"She went to the Security Exchange Commission, and then the Washington Post ran a series of articles and didn't say that she was one of their sources. Then it expanded to a testimony in front of Congress. Obviously, that's not very anonymous.

"It's hard to imagine any company in the US would want to hire Ms Haugen as an employee after that."

Such debates will continue for some time, but ultimately for most people it's a start in the right direction. As Joris Lambrechts, Manager Compliance & Forensics at Finvision in Belgium, says: "It's a cliché but maybe we're making a better world with baby steps; one baby step at a time. I don't think the directive will change the world we're living in. It will help it change over years."

In the following pages, IR Global members discuss the huge complexities involved with whistleblowing and how the EU Whistleblowing directive will affect businesses in their different jurisdictions.



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View from IR



ENGLAND

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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

Featured Members



US - CALIFORNIA

Rebecca Torrey

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Rebecca represents companies in litigation in federal and state courts nationwide. She is an across-the-board employment lawyer with significant trial experience representing management in bet-the-company cases involving wage and hour and fair credit class actions, trade secret, wrongful termination, discrimination and fair pay claims.

Rebecca provides strategic advice to companies aimed towards aligning personnel practices with an employer's culture, values and priorities and minimizing legal risk. She is committed to developing a client's understanding of the law to improve human resources practices and guide business forward. A frequent speaker and writer on key developments and cutting-edge legal issues, Rebecca is known for pragmatic, out-of-the-box solutions that support strategic growth.



BELGIUM

Joris Lambrechts

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Joris Lambrechts is Manager Compliance & Forensics at Finvision assisting clients in all matters related to ethics, compliance and fraud investigation.

He obtained a Master in Law at the Antwerp University (2009) and the 'Master Class Forensic Auditing' certificate at the Antwerp Management School (2012). He is also a registered fraud auditor at the Institute of Fraud Auditors (IFA - 2013) and is holder of the certificate 'Special Training in Supreme Court Procedure in Criminal Cases' since 2016.

Before joining Finvision Joris worked as an attorney for more than 10 years. He specialised in Criminal Law and Procedure, with a particular focus on Corporate Criminal Law.

Joris regularly speaks at seminars and wrote several publications on different fraud-topics. He is a native Dutch speaker, but also fluent in English and French.



FRANCE

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Admitted to the Bar in 1997 and founder of Galion, Lionel Paraire has a DESS de Droit des Affaires and a Magistère-DJCE (Masters in Business and Tax law) from the University of Montpellier.

He worked for six years with Cabinet Jeantet Associés, then worked at the firm Baker & McKenzie, and then Mayer Brown where he became Of-Counsel.

Lionel has been Senior lecturer at the University of Paris XII in Labour Law and European Labour Law. He is a member of Avosial, EELA (European Employment Lawyers Association), ANDJCE (Association Nationale des Diplômés Juriste Conseil d'Entreprise) and IBA (International Bar Association). He is also Senior lecturer at the University of Montpellier I (DJCE).



POLAND

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The Polish branch of DLP Dr Lewandowski & Partners was established in order to provide effective legal consultancy to clients, especially foreign companies entering the Polish market, along assisting Polish clients in cross – border activities throughout Europe.

The Warsaw and the Wrocław offices are headed by Dr. Robert Lewandowski, who has previously worked for major legal firms in Warsaw and London and who has written many legal books and taught university courses in English, German and Polish.



POLAND

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Dr. Karol Świtaj studied law and graduated from the Stefan Wyszyński University in Warsaw (Master of law). He successfully completed his PhD thesis in the area of law on the subject of "Action for the declaration of incompatibility with the law of valid judgments" at the University of Łódź. He practiced law at the Polish Supreme Court and at the State Treasury Solicitor's Office and also at different regional and district courts as assistant judge. He was enrolled into the list of Polish attorneys at law in 2015.

Karol has a broad experience especially in civil and commercial litigation before ordinary and arbitration courts as well as within mediation process. This includes advice on products liability personal injury tort claims and contract disputes He also represents domestic and foreign clients before courts of appeal and the Polish Supreme Court. His further fields of expertise cover in particular criminal law and law of tourism.

Karol is author of many articles, books and commentaries on law published in Poland. He is co-author of the commentary on tourist events and tourism services published 2020.



SWEDEN

Anna Fernqvist Svensson

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Anna Fernqvist Svensson is a partner at Hellström Law. Her areas of practice are Data Protection Law, EU/Competition Law and Corporate & Commercial Law. Since the Swedish Personal Data Act of 1998, she has assisted clients to resolve their legal issues including work with audits, drafting of agreements and policies. She is currently assisting clients with their internal work to become compliant with the GDPR.

Anna is a member of the Swedish Bar Association and of the Swedish Academy of Board Directors (certified director), the ICC Digital Economy Committee; the ICC Competition Committee, Network leader of the JUC Network on Personal Data and Privacy, DP Forum (data protection), SIJU (Swedish Organisation for IT & Law), President of the Election Committee of the French Chamber of Commerce, President of Club Södermark (not-for-profit organisation participating in the Nordic Competition on the Human Rights) and the Swedish Forum for Competition Lawyers. She is also a very experienced lecturer.

Anna holds an LL.M. degree in EC Business Law from the Amsterdam School of International Relations (A.S.I.R.), the Netherlands. She speaks Swedish, English, French, German and Italian.



ENGLAND

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Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high-value commercial dispute resolution and contentious corporate matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes. Shilpen also advises and represents employers, employees and professional clients in all aspects of employment law.

He has particular expertise in acting for senior executives, self-employed professionals and company directors in connection with their entire employment needs, including claims in the Employment Tribunal and the High Court.

SESSION ONE

What is the status of legal whistleblower protection within your jurisdiction and – if outside the EU – will there be an alignment with EU legislation because of the new law?

Rebecca Torrey - California: It's probably unlikely in the United States that there's going to be an alignment with the whistleblower legislation in the EU. That doesn't mean that there won't be a compliance requirement for a lot of companies. The approach to whistleblower issues is very different in the US. There's no across-the-board federal regulation on whistleblowing in the US. There are in certain sectors, but not generally, such as the directive and the whistleblowing legislation that exists with activities like trading markets, for securities, for commodities, for banking.

Outside the financial sector, there's no federal legislation. Consequently, it's like the EU where different states are similar to members of the EU – they have their own whistleblowing laws, but it's really only a patchwork. There's no effort to have consistency or coordination.

The other difference in the US is that whistleblowing focuses on the protection of whistleblowers from retaliation, usually in employment or in contracting relationships. Apart from those industries that I mentioned, there's not any requirement to have

companies report or encourage people to report improper activities, to self regulate or to report to any government authority. I always joke about how California is looking to the EU for trends in the law, because in some ways it seems California is so different from the rest of the US and shares a lot of values with the EU, and our legislators seem to look there.

Ultimately, the directive has a big impact on global business originating from the United States in the EU. It will take some new thinking for companies, even more structured companies like banks or companies involved in health care, to get their arms around the cultural and regulatory differences between what exists in the United States and what is planned to be rolled out in Europe.

Joris Lambrechts - Belgium: When it comes to compliance with new laws, I've noticed is that it generally takes a couple of years for a compliance market to become more or less mature.

It takes that long for people to recognise the importance of compliance programmes, from GDPR and whistleblowing to anti-money laundering laws. For whistleblowing compliance, it will take a while for people to acknowledge its importance.

In Belgium, we already have some legal protection for whistleblowers in the public sector. This protection will need to be levelled up when you compare it to the directive. In the private sector in general, apart from specific sectors such as the financial institutions, we don't have anything in place. We won't have anything in place by the December 17, the deadline of the directive.

Right now, we have a draft of a bill that is being discussed within the majority parties of the government, and they will only start to discuss the draft of the bill by the start of next year. The schedule is that it should be voted in Parliament by the end of June – it will only be by the end of June that we will have a legally binding document other than the directive.

Private companies are already looking at what is going to be implemented. I feel that most companies are reluctant to implement something.

For the public sector, you have four possible legal documents that should be approved and implemented to give protection to whistleblowers depending on where you are based in Belgium. For the private sector it's less complicated because you don't have this division between federal and regional (Flemish, Brussels and Walloon) legislation.

We are a hub for a lot of multinational companies that have offices in Belgium and the problem for American and other companies across the world is how to comply with all these different legislations that provide for whistleblower protection. Where does this whistleblower protection exist regarding the level of the parent company, the holding structure or the different subsidiaries?

Lionel Paraire - France: Whistleblower protection is a hot topic in France, as a new act aimed at improving the protection of whistleblowers was adopted at first reading in the National Assembly on November 17, 2021 and sent to the Senate the following day, where it will be discussed on January 19 and 20, 2022. The new act should come into force in France by mid-2022.

Essentially, the new text is aimed, by modifying the provisions of the "Sapin 2" law dated December 9, 2016 "on transparency, the fight against corruption and the modernization of economic life" to broaden the scope of beneficiaries of the protective status, to simplify the terms of alerts and improve the protection granted to whistleblowers, in particular employees. In doing so, it transposes into French law the provisions of European Union Directive 2019/1937 of 23 October 2019 on the protection of persons who report violations of Union law, but gets also a bit further than the Directive on several points.

The so-called "Sapin 2" already sets for a protection regime for the person who launches an alert in the general interest, but also for those legal or natural persons who could be the object of an alert which would ultimately prove to be malicious or unfounded.

According to the new act, a whistleblower should be now a "natural person who reports or discloses, without direct financial compensation and in good faith, information relating to a crime, an offense, a threat or an injury to the general interest, a violation or an attempt to conceal a violation of an international

commitment duly ratified or approved by France, of a unilateral act of an international organization made on the basis of such a commitment, European Union law, law or regulation".

Dr Robert Lewandowski & Dr Karol Świątaj - Poland: It should be stressed that in Poland the term whistleblower has negative connotations related to being an "informer". This attitude has historical roots going back to the times of Poland's Communist era where "whispering" to officials was treated almost as an act of treason.

Polish law currently does also not have a comprehensive and thoroughgoing national whistleblower act that meet the requirements of the 2019/1937 EU Whistleblower Directive. However, some regulations subject to protection of whistleblowers may be found in special legal regulations such as Labour law, Criminal Law and Banking law. These allow reporting of certain types of misconduct internally and to regulators under certain circumstances:

According to the labour laws, no employee should be discriminated against and treated unequally and this corresponds with the obligation of the employer to prevent any forms of discrimination of his/her employees and any unjust dismissal during their engagement. Any employer disclosing irregularities – for instance, to a trade union and to other employee's organisations about, for instance, so called white collar crimes (e.g. embezzlement, fraud, illegal stock trading or price fixing) or about mobbing and discrimination at work – may face possible retaliation from employers such dismissal if their identity is revealed. In practice, labour courts in Poland typically base their rulings on such matters on termination notices not the underlying cause of a whistleblower dismissal. As a result, many whistleblowers have lost their cases before labour courts and have been victimized without any further protection.

Within the criminal law regulations, there is an overall lack of provision subject to protection and anonymity of whistleblowers. Law enforcement agencies in general are reluctant to take up cases of whistleblowers due to their complex and ambiguous nature and difficulties in substantiating the facts.

Banking law in Poland requires banks to introduce internal disclosing mechanism aimed at the protection of employees in the banking sector from employer retaliation. Financial sector whistleblowers can also report violations of market abuse regulations and related fraud by online form, e-mail or telephone.

Anna Fernqvist Svensson - Sweden: Sweden is a member of the EU and has adopted a new act on whistleblowing replacing the previous one. The new act has a wider scope and implements the rules of the new EU directive. The new Swedish whistleblowing law entered into force on December 17 2021.

Big companies have to implement a whistleblowing channel in 2022. For smaller businesses, between 50 and 250 employees, they have another year to implement a whistleblowing channel. So there is time to do it. As I say to my clients, if you already know that you have to set up this type of whistleblowing channel, why wait, just get started and commence to familiarise yourself with it.

It will take some time to implement whistleblowing channels and to educate everyone on this topic. Sweden is in the forefront of the new legislation while a lot of other EU countries have not yet adopted any new whistleblowing laws.

Rebecca Torrey pictured at the IR 'On the Road' Conference, Miami 2020



I work with my clients on data protection and whistleblowing is closely connected with issues around personal data. I've been asked by a number of clients how we're going to assist them with a whistleblowing channel and if we can provide a solution for them. We have been in discussion with a Danish law firm that has offered a digital whistleblowing channel to their clients for some years. We think it would be a good idea to be able to offer this to clients.

Given that so many companies in the public and private sectors are not compliant at the moment (if that's even possible), there's a long way to go. Implementing a whistleblowing channel in organisations is a good opportunity to help with GDPR compliance – and answer a lot of basic questions employees often have about how their data is being used.

Shilpen Savani - England: The UK already has a strong whistleblower regime in place and there are signs that this will be further improved in the future. This contrasts with the EU, where only about 10 or so countries previously had comprehensive laws in place to protect those who expose illegal acts. So the EU Whistleblowing Directive, which was passed in 2019, is a gamechanger because it required all Member States to transpose the core protections into their laws by December 2021.

SESSION TWO

Will anonymous reporting be permitted? Will this help develop a culture of transparency?

RT - California: In the United States, it makes a difference depending what part of the country you're in. People often feel that businesses and people from other regions are foreign to them and that there are not really many shared values. I would say that there is a practice of anonymous whistleblowing in the United States. I was trying to figure out where it comes from because I don't really think it's from any practice in the law. Employees can move in and out of employment very easily in the United States compared to Europe, probably a little bit more like the UK and less like the EU.

As a result people use anonymous ways of complaining or whistleblowing, whether it means going to an agency or using a hotline. The most common channel now is social media whistleblowing on companies for employees who probably haven't invested much time in a particular job that they're in.

Within businesses employees imagine they can stay anonymous to start with, and that's why they've gone through the whistleblowing process rather than just complained to human resources or to their supervisor.

One example is Frances Haugen, the woman who worked at Facebook, now called Metaverse. She was whistleblowing initially anonymously. She went to the SEC, the Security Exchange Commission, and then the Washington Post ran a series of articles and didn't say that she was one of their sources. Then it expanded to a testimony in front of Congress. Obviously that's not very anonymous. What she reported is very dear to most Americans, involving political misinformation, hate speech, teenage mental health, human trafficking, ethnic violence etc.

It is still early in the post-Brexit era and it remains to be seen how far the UK will align itself legally with the Directive. We have decided not to adopt the Directive so far, but it is still directly relevant to UK-based organisations that have EU operations.

There is also the fact that the UK-EU Trade and Co-operation Agreement commits us to keep up with EU levels of employment protection. This makes it likely that the government will eventually decide to amend UK law to keep pace with EU worker rights and best practice.

If there is a push for alignment then the changes to UK whistleblowing law could include widening the scope of individuals who are afforded protection, such as to include self-employed contractors, volunteers and non-executive directors; requiring larger employers to set up internal channels and feedback procedures; introducing standards for how regulators maintain confidentiality and respond to disclosures; extending protection to whistleblowers from exposure to potential liability, such as defamation and data protection; and providing support for whistleblowers seeking to bring employment-related claims.

International organisations active in the EU and involved in the industry sectors covered by the Directive - which include public procurement, financial services, protection of privacy and data – must be especially alert to their obligations.

Facebook has had such a huge impact on American culture that what she had to say was so profound. To hear an insider talking about that kind of thing, there's no way that it would stay anonymous. A lot of times it starts off anonymous, but when the complaint is made people try to figure out who the reporter is, what other information is known and who would actually have that information, and what job must they have had?

In the United States known whistleblowers do face blacklisting. It's hard to imagine that any company would want to hire Ms Haugen as an employee.

JL - Belgium: It's a cliché but maybe we're making a better world with baby steps; one baby step at a time. I don't think the directive will change the world we're living in. It will help it change over years. A whistleblowing channel will be a tool that has to fit in a general ethical approach or a sustainable approach that should start to exist more within companies – and it already exists in companies in Belgium.

Yes, anonymous reporting will be allowed, but it will not immediately change the way Belgians think. In the long run, I feel it can make us become a bit more like the Netherlands or Nordic countries, where things are much more transparent and people are much more open to each other when it comes to giving feedback. So, this is not just about lacking ethics or whistleblowing on illegal activities. It will also help with the efficiency of an organisation.

The directive can help us to be more open minded towards each other and to engender an environment of trust. Whenever there is trust, people are willing to speak up openly and they will not use the whistle blower hotline.

LP - France: One of the main modifications to the current legislation is to offer the whistleblower the possibility of going directly through an external channel (administrative or judicial authority, professional order, etc.). Currently, they must report internally, within the company or administration, and can only use the external channel if the first alert has not been taken into account. Potentially, whistleblowers can then find themselves in a fragile situation for several months, even in companies that have set up a specific system.

Confidentiality is obviously key in both the EU Directive and the “Sapin 2” law, the latter providing that the procedures implemented to collect reports guarantee strict confidentiality of the identity of the authors of the report, of the persons targeted by it and of the information collected by the report. Disclosing one of this information is punishable by two years' imprisonment and a fine of EUR 30.000.

The text currently under discussion strengthens the rights of whistleblowers. Criminal penalties, up to three years' imprisonment and heavy fines (EUR 45.000), should be introduced for retaliation. The text also provides for the impossibility of resorting to any method likely to destabilize the whistleblowing employee: layoff, demotion, refusal of promotion, disadvantageous treatment, placing on blacklist in a given sector of activity, etc.

RL & KS - Poland: According to the draft on whistleblowers, persons reporting about misconduct or violations of law qualify for protection and anonymous reporting provided that: (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and (b) they reported either internally or externally or made a public disclosure.

Within the scope of internal notifications, public and private entities engaging at least 50 persons and financial institutions (regardless of staff numbers) shall be obliged to implement whistleblower protection measures without any exemptions. Smaller entities may implement such whistleblower programmes on a voluntary basis. According to the draft, internal procedures introduced by those entities shall specify: organisational bodies responsible for receiving and processing the notifications, manners in which the infringement can be reported and deadlines for certain kind of actions.

When it comes to external notification, the draft on whistleblower states that the body selected to receive and process whistleblower complaints will be the Commissioner for Human Rights in Poland. This is a body to which a whistleblower shall send his/her notification, bypassing the internal notification channel or if the final outcome of internal proceedings will prove to be unsatisfactory.

It should also be noted that persons reporting about breaches internally falling within the scope of the Directive shall qualify for protection under the same conditions as persons who report externally. In principle, a whistleblower's public disclosure will

only give rise to protection if the claim was first reported internally or externally and no appropriate action was taken within the timeframe set out in the Whistleblower Directive.

It is expected that the Draft on whistleblowers will be implemented in Poland by December 17, 2021, unless Poland grants an extension for private companies with 50-249 employees to have a compliant internal reporting system in place by that time at the latest. The draft is definitely an act that should also encourage employer organisations to actively promote whistleblower protection systems as management tools in workplaces.

AFS - Sweden: – In Sweden and probably in other countries as well, we believe this will be built on secure digital platforms where you can have a reporting system. You can then report back to someone, even if you don't know who that person is. So the issue of confidentiality around whistleblowing (and anonymous reporting) would be solved.

I think it's vitally important to choose the right secure platform, because what we're also seeing in Sweden is that there are many companies implementing whistleblowing channels on a commercial basis ahead of the new law – but will they all be secure?

With so many businesses involved, it's clear now that there's an appetite in Sweden to bring transparency into business. How will this help to develop a culture of transparency? Of course, we hope that it will do that, but we don't know yet.

What I think people maybe forget is that you must not use this kind of channel or reporting structure as a first channel for reporting. Normally, you go to your boss, if you see something that is wrong or if you have complaints. If the boss is the one who is doing wrong, you escalate it to another level and you go to the boss of your boss. That would be the normal way of reporting irregularities – and if you can't do that then you can use this type of system. In many companies and organisations I don't think there will be many reports being made.

The basic attitude within the Nordic countries is that we trust people. That also has an impact on companies and organisations and how we do business.

SS - England: One of the main aims of whistleblowing law is to protect the person reporting wrongdoing from retaliation, and anonymous reporting is an essential part of this. The goal is to remove the fear of losing your job and reputation if you are brave enough to come forward and make a report.

Under the Directive, affected organisations are required to establish internal reporting channels. There is no equivalent requirement in the UK (and no legal requirement for a whistleblowing policy), except for specific requirements applying to regulated firms in the financial sector. There is a similarity with the UK in that reporting through internal channels is encouraged in the first instance, followed by escalation to external channels if needed.

The Directive also states that the identity of the whistleblower must not be disclosed without consent to anyone beyond those dealing with the report, unless this is necessary and proportionate in the context of the investigation.



Shilpen Savani, Rebecca Torrey and Lionel Pararie pictured at the IR Global Annual Conference in Berlin, 2017

This is comparable to the position in UK law, which has emerged through case law, although it is not specifically set out in legislation yet.

The uniform standards set by the Directive are a very good thing and should bring much more transparency and encourage workers to bring illegal acts – or suspected illegal acts – into the light. Here in the UK any employer who tries to dismiss or punish a legitimate whistleblower is likely to face a claim in the Employment Tribunal, where the resulting award is potentially unlimited

SESSION THREE

Under the Directive, criminal law will remain a prerogative of each member state. How will the new legislation impact criminal law in different jurisdictions?

RT - California: I feel that the US would benefit from the direction the EU is going, even though it's quite a way off before such a law is enacted on the federal level. I just know all of us probably agree that corporate misconduct is bad and it shouldn't continue. The fear of prosecution is what urges people to keep information to themselves.

Some of those individuals may have been actually involved in the wrongdoing, so they don't know until they blow the whistle whether they're going to get a plea bargain and they aren't willing if they were involved. They may be frightened that they're going to be prosecuted themselves if they go ahead and report it. So the corporate misconduct continues and usually when it continues, it gets bigger, worse and more pervasive. If people can get away with something, then they usually try something worse in terms of evading the law.

So I don't know that there's any great insight on any good things that are happening in the United States in that respect. I do hope that the US learns from the direction that the EU is going.

Culture is important in the US. I grew up in the Midwest, in Kansas, and people in the Midwest tend to be more trusting. People are more open, friendly, trusting, less suspicious and I think as you get into urban areas, people are less. Maybe it's more rural/urban or small town/urban.

The biggest phenomena in the United States in the last five years were the #MeToo and #BlackLivesMatter movements. They really have had a huge impact, especially in my field, in employment. The kinds of things that were covered up for hundreds of years have come to light as a result, primarily because of young people speaking up.

So, that habit of speaking up or that value of speaking up that's more common among younger people than people my age, for example, is something that will head in the right direction.

JL - Belgium: I do see a possible impact on everything that's related to criminal law. I think there are two main issues in Belgium. The first one related to hacking. What we see in some of the bigger whistleblowing cases is that people obtain information and get it out to the public after accessing data that they weren't allowed to access. Think here about Edward Snowden and WikiLeaks.

in value. The aid packages offered by the government represent a relief and rescue measure, but not for all companies. They offer some help for very specific situations.

Where I see some issues is that according to Belgian criminal law, where we have different forms of hacking legally, some require a specific criminal intention and others a general knowledge of the fact that they are committing a crime. In this context, it's important to understand that idea of the whistleblowing directive is that people are acting in the best interests of society. By consequence, people acting in the best interest of society might not be prosecuted when no specific criminal intention is required (as is the case for certain forms of hacking).

The second thing I've noticed recently, and which is of huge importance, are potential issues around professional secrecy and the violation of it by whistleblowers. The general legal assumption in Belgium is that holders of a professional secrecy obligation are allowed to set aside the latter when confronted with an emergency situation. Think of a doctor treating a gangster that is informed of the fact that this gang would commit new crimes that could endanger other people. This doctor chooses then to save the physical integrity of the future victims instead of respecting his professional secrecy obligation.

Some scholars claim that the same could go for professional service providers – like many of us – advising on tax issues. When confronted with substantial tax evasions, they could (according to these scholars) set aside their professional secrecy obligation and blow the whistle to safeguard fiscal transparency. Personally, I do not agree. The fact that the issue is open for debate is already remarkable.

This then has a big potential impact on professional services providers that have some kind of legal professional privilege towards their client – the contradiction between legal professional privilege compared to full transparency, for instance, regarding tax.

LP - France: French legislation already provides that whistleblowers benefit from civil and criminal immunity.

The new act should provide that whistleblowers would not be civilly liable for damage caused by their reporting or public disclosure when they could consider, when they did so, that the reporting or disclosure was necessary to the protection of the interests in question.



Shilpen Savani pictured with IR members at our Annual Conference in London, 2021



Lionel Paraire pictured at the IR Annual Conference in London, 2018

Article 122-9 of the penal code already provides that the person who meets the definition criteria of a whistleblower who infringes a secret protected by law is not liable if this disclosure is necessary and proportionate to the safeguard of the interests in question and that it intervenes in compliance with the reporting procedures defined by law.

This immunity would be extended to the persons referred to in article 6-1 of the "Sapin 2" law, namely facilitators and relatives in particular, who remove, reveal or conceal data covered by secrecy or confidential.

However, facts, information or documents, whatever their form or medium, covered by national defense secrecy, medical secrecy, secrecy of judicial deliberations, of the investigation or of the judicial investigation, or legal privilege.

RL & KS - Poland: The Polish legislator has decided to expand the catalogue subject to notifications which will cover not only violations of EU law (as stipulated in the Whistleblower Directive) but also of Polish law within the draft on whistleblowers.

It may be expected that the new legislation on protection of whistleblowers will have an impact on criminal law, especially on business crimes that do not depend on violence and force. One reason for the large number of business crimes such as embezzlement, price fixing, employee theft through manipulation of computers, money laundering etc is that the risk of being caught and sent to prison is still slight. Business crimes have often been considered a legitimate cost of doing business and a company is usually hesitant to prosecute its employees because disclosure would have an adverse effect on the image of the business. Through the draft on whistleblowers the relation of crime to business may significantly change when employees will be encourage to report about criminal conduct without any fear and retaliation from their employees.

AFS - Sweden: Sweden is a very open country and I think we are unique in this respect.

How will it impact the criminal law in our jurisdiction? I don't know if it will change just because of this directive and the new act on whistleblowing. I think we will just continue to work with strengthening the whistleblowers position even further.

SS - England: In the UK whistleblowing protection in the workplace is covered under the Public Interest Disclosure Act 1998 as incorporated into the Employment Rights Act 1996. This provides statutory protection to workers, who can bring a claim in the Employment Tribunal if they are subjected to any detriment by their employer on the ground that they have made a protected disclosure.

The Directive does not seem to have any direct implications for criminal law in the UK. However, there are various initiatives aimed at changing the existing regime and one worth mentioning is the Public Interest Disclosure (Protection) Bill, which was presented to Parliament in 2020 and seeks to create a new independent Whistleblowing Commission to set, monitor and enforce standards. This also advocates the creation of two new criminal offences, namely the offences of subjecting a whistleblower to detriment and failing to handle a protected disclosure adequately.

Another Private Members Bill, the Office of the Whistleblower Bill 20192021, was presented to Parliament in 2020 and it wants to establish an independent Office of the Whistleblower, which would deal with the administration of arrangements to facilitate whistleblowing. This would act as a point of contact for whistleblowers, but also maintain a fund to support whistleblowers and a panel of legal firms.

These draft laws could one day lead to the formation of an independent regulatory body in the UK in line with the Directive. It will be very interesting to see if any of these good ideas eventually take seed and become law. If this happens, it will surely bring the UK's whistleblower laws closer to the new EU regime.

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Exposing the Truth: What the EU Whistle-blower Directive means for global business

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