DILLON EUSTACE

Blowing the whistle in a European context

Last November the EU published the Whistleblower Protection Directive (Directive (EU) 2019/1937). MUIREANN REEDY looks at the differences between the Directive and the Protected Disclosures Act 2014, and asks what changes will it bring about for businesses?

Background

The Whistleblower Protection Directive (the "Directive") was adopted due to concerns about the different levels of protection for whistleblowers across the EU. When the Directive was published, only ten out of the then twenty-eight EU Member States had comprehensive laws protecting whistleblowers.

Ireland's Protected Disclosures Act 2014 (the "Act") came into force in July 2014 with the aim of encouraging workers to speak up about wrongdoings which have come to their attention in connection with their employment, without fear of reprisal from their employers or any third party. The Act has received positive commentary internationally and has been held up as an example of best practice in certain areas.

This article looks at what changes the Directive will bring about to domestic legislation, and what practical impact it will have on businesses. Member States must implement the Directive into national law by 17th December 2021.

Scope

The Directive protects individuals who report breaches of certain Union laws which they encounter through work. The Directive covers breaches of Union laws concerning financial services, prevention of money laundering, consumer protection, competition, public procurement, and protection of the environment, among others.

The range of individuals who are protected by the Directive is broader than under the Act, as the Directive not only protects employees and contractors (as does the Act), but also shareholders, volunteers and individuals who learn of breaches during a recruitment process, as well as others. Directors are also protected by the Directive (it appears that they also are covered by Act).

Protections

The protections for whistleblowers contained in the Directive, broadly mirror those under the Act and include protection from retaliation (such as suspension, dismissal, demotion and early termination of a temporary employment contract), protection from any liability for making the disclosure (subject to limited exceptions), and protection of the whistleblower's identity (again subject to certain exceptions).

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New requirements for businesses

Once the Directive becomes law in Ireland, all legal entities in the private sector with fifty or more workers will be required to establish internal whistleblowing channels for the first time, so that breaches falling within the Directive's scope may be reported. The Directive sets out requirements for the internal reporting procedures, including that they be secure and confidential. It also imposes timelines on the recipient of the report e.g. that the report is acknowledged within seven days, and that feedback must be given within a reasonable timeframe, and no later than three months after the report is received. Organisations will also be required to provide clear and accessible details on how reports can be made externally to a "competent authority". Under the Directive Member States must designate one or more national "competent authorities" who can receive reports about a wrongdoing which falls within the Directive's scope, where an individual for whatever reason, decides to blow the whistle externally.

Although the Directive does not specify who might be responsible for receiving these internal reports, a recital to the Directive notes that they should be received by someone whose function is such as to ensure independence and absence of conflict of interest. In smaller organisations it is suggested that the reports could be received by someone who is well placed to report to the organisational head, such as chief compliance or human resources officer, a legal or privacy officer, a chief audit executive or member of the board.

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Entities with less than fifty workers will also be required to have internal whistleblowing channels in place where they are subject to certain Union laws relating to financial services, products and markets, and prevention of money laundering and terrorist financing. In some instances entities will already have internal whistleblowing channels in place as a result of existing Union laws, particularly in the financial services sector. In that case the existing requirements will still stand, with the provisions of the Directive complementing the existing legislation in so far as any matter concerning whistleblowing is not regulated by it. Member States have until 17 December 2023 to bring in laws requiring legal entities in the private sector with

between fifty and two hundred and forty nine workers to create internal reporting channels.
While most companies will have whistleblowing policies in place as a matter of good corporate governance, only public bodies are required to have whistleblowing procedures in place under the Act. As the Act gives no guidance on whistleblowing procedures, many companies will welcome the fact that the Directive specifies parameters for internal reporting procedures.

Reporting Channels
Although the Directive expresses a preference for whistleblowers to raise concerns internally first (where such procedures exist), there are no additional obligations imposed on a whistleblower who decides to report a breach directly to a "competent authority". However, whistleblowers who decide to make a "public disclosure" (e.g. to the media) will only qualify for protection if certain conditions are met. These include where the matter was first reported internally and/or to a "competent authority", but no appropriate action was taken in the relevant timeframes. This has some parallels to the reporting regime under the Act, whereby workers who make reports to their employers have to satisfy fewer requirements to qualify for protection, than those who report to external bodies or make a disclosure in the public domain.

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Next steps
As mentioned above, Member States will need to have laws in place to give effect to the Directive by 17th December 2021 (with further time being given to implement the requirement on internal reporting channels for certain entities). It seems from the Government's 2018 statutory review of the Act that it may transpose the Directive by making changes to the Act.

Commentary
It is likely that the number of whistleblowing reports will increase over the coming years, due to more awareness in the public generally about the statutory protections available. Firms should therefore check that their whistleblowing policies are fit for purpose and publicised to staff, in order to encourage reporting internally. This will reduce the risk of staff blowing the whistle to a third party and the reputational fall out which goes with that.

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