

WHISTLEBLOWING PROTECTIONS IN THE CEE AND THE IMPACT OF THE RECENT EC DIRECTIVE

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Major recent whistleblowing affairs like LuxLeaks have sparked a debate in Europe about not only the content, but also the methods, of the disclosures involved. Some whistleblowers have faced criticism and even legal action - all against the backdrop of a legal landscape in Europe with widely varying national rules and regulations governing whistleblowing. Seeking to harmonize law across the EU while encouraging responsible and effective whistleblowing, the EC earlier this year adopted a directive for member states to enact comprehensive legislation that helps public and private-sector insiders report EU law violations by establishing formal procedures for whistleblowing and protections for those who use them.

In this article, we look at what the EC's directive might mean for whistleblowers and their employers within the context of the current patchwork of regulations in several CEE jurisdictions.

European Commission's Directive on Whistleblower Protections

On 16 April 2019, the European Union adopted the "Directive on the protection of persons reporting on breaches of Union law" requiring member states to set up laws to ensure that appropriate procedures and protections are available to whistleblowers.

The Directive's scope is limited to reports on infringements of certain EU laws (mainly, public procurement, money laundering, product safety, and

and animal health and welfare), but it broadly covers both the public and private sector. It sets up systems to encourage internal reporting of misconduct within an organization while also providing additional avenues for external reporting to public authorities. It covers a large swath of the civil service and private sector workforce, though private companies or municipalities with fewer than 50 employees (and municipalities with fewer than 10,000 inhabitants) are exempt from requirements for setting up internal reporting procedures.

The Directive protects whistleblowers from retaliation (such as demotion, suspension, withholding of training or promotion, denial of services or supplies, boycotting of business, etc.) or being in breach of any contractual or legal requirements regarding disclosure of their employer's information. It also penalizes hindering a report, retaliating or bringing vexatious proceedings against a reporting person as well as revealing their identity. Additionally, it provides for free information and assistance to whistleblowers who report misconduct to obtain protection from retaliation.

The Directive confers "minimum" harmonization, leaving the method and means of compliance (and the option to set stricter rules) to member states, with a 15 May 2021 deadline for implementation.

Survey of National Laws

>> Austria

There is no whistleblower law directly dealing with the private sector in Austria. Employees facing retaliation as a result of reporting corporate wrongdoing outside their organization would need to seek protection under general labour laws which may, under some circumstances, protect employees against reprisals. In addition, laws and regulations specific to the banking and environmental sectors do contain some whistleblowing protections.

In the public sector, Austria's Public Service Law was amended in January 2012 to include "Protection Against Discrimination" clauses that protect federal civil servants who make "good faith" (i.e., verifiable and substantiated) reports of wrongdoing from retaliation. However, these protections are effectively limited to reports of corruption offenses. Moreover, what constitutes the requisite level of discrimination (i.e., retaliation) to trigger the law's protections has not been well-defined by the law or in practice.

Thus, Austrian law provides little by way of guidance on what shape or form reporting procedures should take and what protections exist for whistleblowers come from a hodgepodge of disconnected rules or laws.

>> Czech Republic

There is no whistleblowing statute in the private or public sectors in the Czech Republic. However, the government is currently considering draft legislation for the protection of whistleblowers (Czech: zákon o ochraně oznamovatelů). The proposed bill includes: (i) procedures for submitting reports; (ii) protections of whistleblowers; and (iii) the establishment of a new Whistleblowing Protection Agency. It would extend only to reports that concern crimes or offences committed by one's employer or another co-employee.

The proposed regulation applies to a broad group of employers (i.e., those with more than 50 employees, annual turnover of 10 mn, or falling within the statutory definitions of a liable person under the anti-money laundering law or a contracting authority under public procurement law) and includes state entities and law enforcement authorities. Employers are obliged to adopt (and make publicly known) an internal reporting system that processes and investigates reports. The whistleblower may report to either (i) an internal designated person or department of the employer, or (ii) to the Whistleblowing Protection Agency. Any such report may not be deemed a breach of any contractual duty of confidentiality to the employer and the whistleblower may not be punished for having made it (e.g., by

dismissal, transfer to a different job position, salary reduction, discrimination or other disadvantage).

The bill has not been submitted to the Chamber of Deputies yet, but is proposed to take effect on 1 January 2021. If enacted, it would clearly amount to a far-reaching whistleblowing regulation.

>> Hungary

In force since January 2014, Hungarian Act no CLXV of 2013 (“the Whistleblowing Act”, which itself replaced an earlier whistleblowing law) aims to ensure that crimes, offences and breaches of internal corporate regulations are reported and that reporting employees are protected from reprisals. It extends to both the private and public sectors. Public bodies and municipalities are required to set up systems for receiving and investigating complaints. Private companies are not required to do so, but if they decide to set up procedures for handling reports of wrongdoing, those procedures must adhere to the law’s requirements.

Under the Whistleblowing Act, companies must make their policies and procedures for handling complaints publicly known and accessible for employees, business partners or anybody else with a legitimate interest. They must conduct an impartial investigation in response to any “good faith” report made within six months of the witnessing of the conduct (though anonymous reports do not trigger an obligation to investigate). The investigation is to be completed within 30 days, with the possibility for extending it to a total of three months. Employees making a good faith report are to have their identity kept strictly confidential (only essential personal information is to be kept and the data must be erased after a short period of time), and they are protected from retaliation by their employer.

Apart from the possibility to give 1% of the fine to those who report hardcore cartels (but maximum HUF 50.000.000 that is about EUR 150.000), financial initiative is not available for whistleblowers in Hungary.

Despite a seemingly expansive whistleblowing law in Hungary, commentators note that its enforcement is unclear and the extent of its protections of employees has not been well-tested.

>> Romania

There is no whistleblower protection law for the private sector in Romania, though employees might enjoy some limited protections under the general Labour Code and Competition Law. To this end, the Competition Law sets forth, without differentiating between the public and private sector, that the provision by the whistleblowers of information regarding potential anti-competitive infringements does not represent an infringement of the confidentiality obligation deriving from the labour law provisions or from the employment agreement. However, Romania has a whistleblowing statute governing the public sector. Law no. 571/2004 protects personnel of public authorities, institutions and companies who report infringements of violations of certain laws, of professional ethics or of the principles of good governance, efficiency, effectiveness, economy and transparency that have been committed by individuals in leadership or executive positions at such public institutions. Therein, the law's protections extend to reporting on various forms of misconduct encompassing not only financially-motivated matters (e.g., bribery) but also many other core aspects of the duties and responsibilities of public officials.

The whistleblower's identity is protected as long as his or her supervisor is implicated by the report, and the whistleblower cannot be disciplined or sanctioned for lodging a "good faith" complaint (which is presumed until proven otherwise). The report can be made through various channels, including internally with one's employer and externally to other public authorities or even the media.

Thus, Romania's law appears to be potentially broad in its reach, though the protections it offers to employees and the methods by which reports are to be lodged are not covered in detail.

>> Slovakia

On 1 March 2019, Act No. 54/2019 Coll. on the Protection of Whistleblowers came into force in Slovakia, introducing important changes to pre-existing rules. The previous law, passed in October 2014, requires private companies with more than 50 employees (under threat of fine) and public authorities to introduce internal procedures and systems that would allow employees to confidentially report so-called “anti-social activities”, which then must be investigated. In addition, under the law, employees reporting such activity internally (within the organization) or externally (to criminal or administrative authorities) can receive certain protections to their employment status, up to and including oversight from a Labour Inspectorate to ensure that the employee does not suffer retaliation.

Employees also stand to receive a reward up to fifty times the minimum wage if the reported conduct leads to a successful criminal conviction or administrative proceeding, i.e. to a final decision which finds the respective person guilty. Natural person who is the first to provide the Antimonopoly Office of the Slovak Republic with significant evidence on the cartel activity is entitled to a reward in the amount of 1% of the sum of the fines imposed on all cartel members in the Office's decision, up to a maximum of EUR 100,000. If the court changes the amount of the fine imposed, such amount shall be the basis for calculating the remuneration. In case the fine is not paid, the reward shall be reduced to 50 %, maximum of EUR 10,000.

The recent amendments to the law somewhat broaden the definition of anti-social activity, which now encompasses, mainly, (i) certain criminal offences involving public procurement, public officials, and corruption/bribery, (ii) any criminal offence punishable by at least 3 years imprisonment, and (iii) any administrative offences punishable by a fine of at least EUR 30,000. The recent amendments also put in place stricter requirements for the appointment of a person in charge of a company's reporting systems and procedures, such that now the individual must be qualified to handle the responsibilities and be adequately supported in that role, and also must have no conflicts of interest with respect to reported

conduct. Following the amendments, the law now allows for imposing a fine against a company for making certain changes to the employment status of the whistleblower without prior consent from the newly constituted Office for the Protection of Whistleblowers or for otherwise retaliating against or revealing the identity of the whistleblower (the amendments have also extended the time period during which the whistleblower receives such protections). Finally, the amendments establish a new regulatory body, the Office for the Protection of Whistleblowers, to oversee compliance with the law.

Thus Slovakia's whistleblower law appears to be among the more sweeping surveyed in this article.

Takeaways About the National Laws Surveyed and the Potential Impact of the EC Directive

The national laws surveyed range widely in their scope. Hungary may have the longest history of whistleblowing laws, but their effectiveness in practice may fall short of some of the other jurisdictions surveyed. By contrast, Slovakia passed its first whistleblowing law in only 2015, yet it has already amended the law once and created perhaps the most sweeping regulations surveyed. Although Romania's whistleblowing law protects public sector employees, it seems narrower than some of the others, and, unlike Hungary and Slovakia, it does not extend to the private sector at all. As for the two jurisdictions surveyed that have no comprehensive whistleblowing laws, the Czech Republic is closest to enacting one (having already proposed a bill containing comprehensive legislation), while Austria for the time being continues to rely on a patchwork of general labour and other laws and some very limited regulation of whistleblowing in the public sector.

The EC's Directive on whistleblower protections may provide a timely nudge for putting in place comprehensive laws governing whistleblowing. The Directive's key features are its reach to both the public and private sector,

its emphasis on internal (before external) reporting, its formal procedures for ensuring effective reporting (and investigations in response thereto), and its specific and expansive protections to whistleblowers that follow those procedures. But in addition to imposing rigorous standards, the EC Directive will help to level-set whistleblowing regulation across the EU, where the current landscape is a patchwork of widely varying procedures and protections.

However, it is important to acknowledge that the Directive has clear limits. Most notably, it only reaches reports of violations of EC laws (and not even all of those). That means national laws will continue to be important for regulating whistleblowing. Though the Directive's impact may go beyond EC law, some member states may take the opportunity of implementing it to enact similarly rigorous procedures and protections with respect to whistleblowing of violations of national laws, such as some of those seen in our survey above.

Doubtless, no one-size-fits-all solution is likely to emerge, and for the foreseeable future practitioners should expect to continue to face an inconsistent and sometimes unclear regulatory framework for whistleblowing compliance which may often require relying on counsel with local expertise.

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