safecall

Beyond Governance
Creating clarity, improving business

EU Whistleblowing Directive

A white paper.

EU Directive 2019/1937 on the protection of persons who report breaches of Union law

Simon & Erika share their insights
Our thoughts

Simon Rowse, Strategy Delivery Director, Safecall

"The EU Whistleblowing Directive marks an important point in the evolution of global Whistleblowing legislation and the continued recognition of the value of effective whistleblowing programmes to individuals, businesses and the economy. Unifying standards will help firms to put effective arrangements in place to prevent, discover and resolve employee misconduct and make workplaces safer, both physically and mentally".

Erika Percival, CEO, Beyond Governance

"Good whistleblowing procedures have always been a key internal control mechanism to ensure that wrong behaviours can be raised and addressed. The EU Whistleblowing Directive extends the breadth and depth of the requirements capturing more organisations. For the Directive to really affect behaviour change and support the identification of wrongdoing, organisations need to embrace the changes and put in place the right mechanisms to protect themselves and their workforce".

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EU Whistleblowing Directive

What is it?
Minimum standard of protection for whistleblowers

On October 7th 2019 the Council of the EU formally adopted a set of principals intended to set a minimum standard of protection for whistleblowers across all EU member states.

At a high-level, member states must;

- Make organisations, within their jurisdiction with over 50 employees, establish effective internal reporting channels; *
- Create or appoint a competent authority as an escalation route, should an organisation fail to manage a whistleblowing complaint;
- Provide a wide range of legal and financial protections for whistleblowers; and
- Invalidate non-disclosure type agreements (NDAs) in relation to whistleblowing cases.

Member states have until December 2021 to adopt the new rules into their national legislation. The precise implementation of these rules will vary between member states. 10 of the 27 member states, and indeed the UK, already have some whistleblower protections within their national legislation, and some member states may choose to further enhance protections for whistleblowers.

* *This accounts for more than 50,000 organisations within the UK and over 500,000 across the EU. Additionally, the Directive will also require all organisations to ensure that whistleblowers are protected against retaliation irrespective of size.*

Key elements of the Directive:

- **Creation of reporting channels**
  There is an obligation to create effective and efficient reporting channels in companies of over 50 employees with the intention of positively contributing to the development of a healthy corporate culture.
- **Hierarchy of reporting channels**
  Whistleblowers are encouraged to use internal channels within their organisation first, before turning to external channels which public authorities are obliged to set up. In any event, whistleblowers will not lose their protection if they decide to use external channels in the first place.
- **An increased number of profiles protected**
  Persons protected include those who could acquire information on breaches in a work-related context such as employees, civil servants at national/local level, volunteers, trainees, non-executive directors and shareholders.
- **Feedback obligations for authorities and companies**
  The rules create an obligation to respond and follow-up on whistleblower reports within 3 months (extended to 6 months for certain external channels in certain circumstances).
- **A wide scope of application**
  The new rules will cover areas such as public procurement, financial services, prevention of money laundering and public health. For legal certainty, a list of all EU legislative instruments covered is included in an annex to the Directive. That said, Member States may go beyond this list when implementing their new rules.
- **Additional support and protection for whistleblowers**
  The rules introduce safeguards to protect whistleblowers from retaliation, such as being suspended from work, demoted or intimidated. Those assisting whistleblowers, such as colleagues and relatives are also protected. The Directive also sets out a list of support measures which must be put in place by Member States for whistleblowers.

Adopting whistleblowing
Will the UK adopt?

Following Brexit, the UK is not required to abide by EU initiatives. The UK was however amongst the first nations to adopt whistleblowing legislation in the form of the Public Interest Disclosure Act (PIDA) in 1998. PIDA contains the concept of 'Prescribed Persons' which are similar to the EU's required 'Competent Authorities'.

There are also early signs that the UK will adopt the Directive in full in order to remain closely aligned to the EU and promote cross-border trade. An All Party Parliamentary Group (APPG) was formed in 2018 to review UK whistleblowing protections. In 2020 the APPG proposed a Bill to create 'the Office of the Whistleblower', a central Competent Authority to oversee whistleblowing activity in the UK. The Office is also reviewing the use of NDAs in relation to whistleblowing cases despite their lack of legal standing in current UK law.

Additionally, there is another Bill making its way through the House of Commons seeking to overhaul PIDA. The most significant changes are to expand the coverage of protection to match the EU Directive and to make 'failure to investigate matters effectively' a criminal offence.

What changes are needed?

	EU Directive	UK Legislation (Current)	Changes Required (Current)
Reporting Channels	All organisations employing more than 50 people must facilitate internal reporting	No requirement	Yes
Reporting Hierarchy	Internal, external, public	None	Yes
Scope of Protection – Individuals	Anyone with a work-related relationship to the organisation and anyone with a relationship with the reporting party.	Employees, Trainees, Contractors, Partners	Partial
Scope of Protection - Areas	Breaches of Union Law	Crime, health and safety, environmental damage, miscarriage of justice, covering up wrongdoing	Partial
External Authorities	Competent Authorities	Prescribed Persons	No
Retaliation	Prohibited by law	Prohibited by law	No
Confidentiality Clauses (e.g. NDAs)	Invalid	Invalid	No

Compliance with the Directive
How will the Directive be enforced?

EU States will have until 17 December 2021 to bring into force the laws, regulations and administrative provisions necessary to ensure compliance with the Directive. Whilst the UK will have left the EU before implementation it is still likely to be relevant as:

- it exceeds the current requirements and has Parliamentary support;
- it will be relevant for all companies with operations in Europe; and
- many multinational companies operate in Europe and as such have a Global Whistleblowing Framework/Policy which will need to be reviewed and updated.

There are currently two Bills progressing through Parliament which will more closely align British legislation with the EU Directive. Therefore it is assumed that the UK is working towards the 17 December 2021 deadline.

The FCA (Financial Conduct Authority) and PRA (Prudential Regulation Authority), as regulators of the Financial Services sector, currently have rules which follow PIDA and EU legislation on whistleblowing. It is therefore likely that they will impose further requirements on organisations which align with the Directive requirements. The FRC may also look to bolster its whistleblowing requirements as part of a further iteration of the UK Corporate Governance Code.

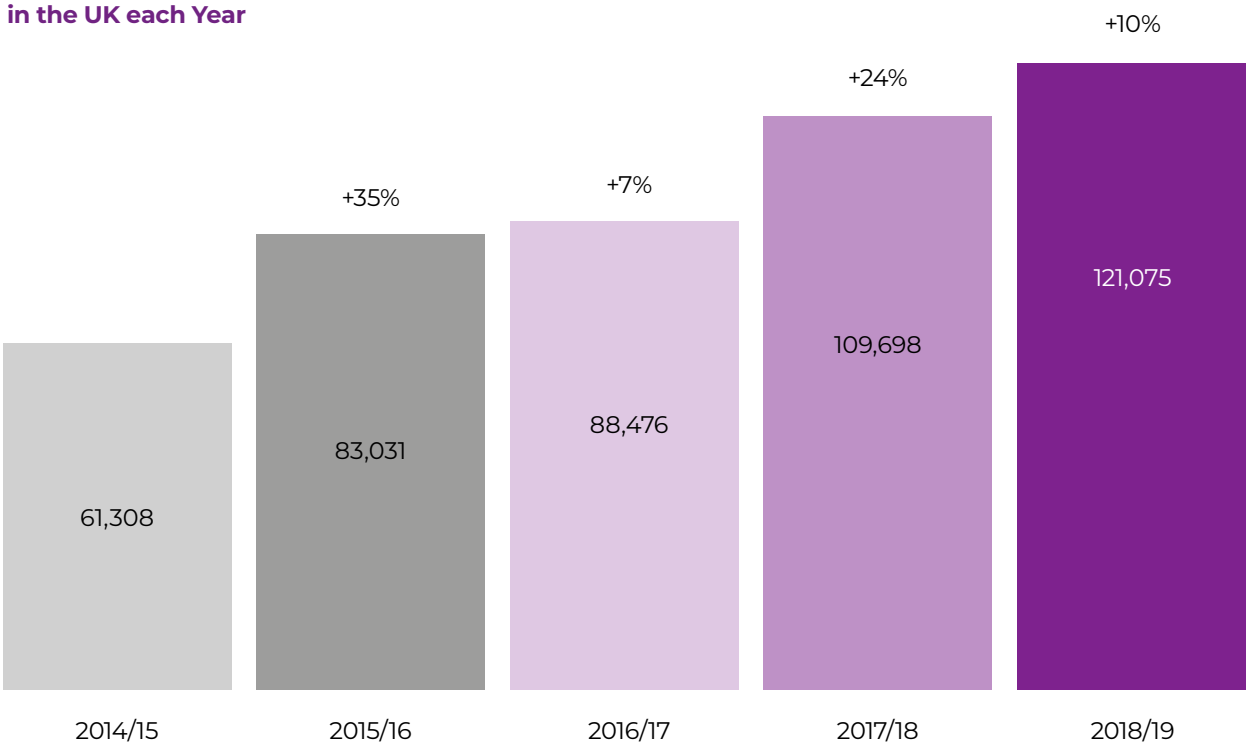
Flexibility of Implementation

The Directive permits Member States to determine certain aspects by their national laws and as a consequence, different reporting systems may be necessary in the different Member States. For example, Member States can decide whether anonymous reporting shall be permitted, whether the permissible subject matters shall be expanded, and whether the rights of the whistleblowers shall be even more favourable than those of the Whistleblowing Directive. Sanctions for non-compliance may also vary between Member States.

Employment Tribunals

The number of Employment Tribunals in the UK has increased by an average of 15% over the last 5 years, currently running at 1 tribunal each year for every 11 businesses in the UK. If this trend continues there will be one tribunal for every 7 businesses within 3 years. With enhanced protections for whistleblowers, particularly relating to corporate inaction or retaliation, it is likely that this rate will accelerate substantially going forward unless organisations are able to demonstrate clearly that they have at least followed minimum standards, or ideally best practice, relating to the management of whistleblowing cases.

Number of Employment Tribunals in the UK each Year



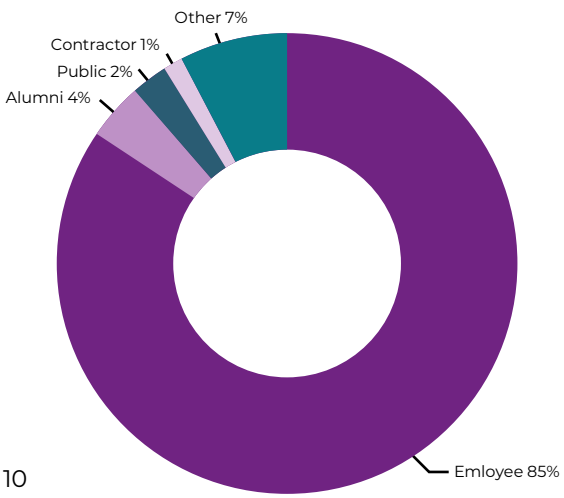
https://www.gov.uk/government/publications/tribunal-statistics-quarterly-april-to-june-2020/tribunal-statistics-quarterly-april-to-june-2020

High-level of protection
Who will this impact?

The Directive is applicable to all EU states and aims to provide a high-level of protection to whistleblowers across a wide range of sectors including public procurement, financial services, anti-money laundering, product and transport safety, nuclear safety, public health, consumer and data protection. It is applicable to both public and private companies as well as public authorities. For organisations with more than 50 employees, an internal reporting system will be required. Additionally all companies, irrespective of size, will be required to ensure that whistleblowers are protected against any form or retaliating measures.

In the UK, financial services firms are subject to the FCA's (Chapter 18 of the SYSC Senior Management Arrangements, Systems and Controls) and the PRA's rules on whistleblowing. Given the scope to now cover companies with over 50 employees, this will broaden the number of companies that will need to have effective processes and procedures in place.

Types of Whistleblower



The definition of a whistleblower has been widened to include any of the following who have a work-related activity:

- Employees.
- Contractors.
- Volunteers and Interns.
- Suppliers.
- Consultants.
- Shareholders.
- Managers.
- Candidates (current and former) and alumni.
- Non-Executive Directors.

In addition, protections will also be given to:

- Facilitators.
- Colleagues.
- Relatives with a work connection.

These extra protections are new but highlight that the ripples created from whistleblowing in the workplace often impact many more people than just the individual concerned.

Currently 85% of whistleblowers are employees and given the increase in coverage, it is likely that more cases will be raised by non-employees.

What do you need to do? Should you DIY or Buy?

Given the heightened level of obligations that the EU directive is likely to bring, 'What do we need to do?' is a question many Boards will be discussing in the upcoming months. Directors will want to know what needs drafting, changing or amending to comply and how much it is going to cost. Cost is a key factor for many companies especially in the current uncertain economic climate.

The Directive mandates that Member States introduce effective, proportionate and dissuasive penalties relating to;

- **Hinderance**
  If an organisation or individual hinders, or attempts to hinder, reporting of concerns.
- **Confidentiality**
  If an organisation or individual fails to appropriately safeguard the identity of a whistleblower.
- **Retaliation**
  If an organisation or individual takes, or permits, detriment to the Whistleblower.

DIY

If you have an in-house legal resource, with the knowledge and time available to bring themselves up to speed with the new EU requirements, this could be something you task them with. However, your legal team's time may be better spent focusing on other more sensitive or time critical areas of the business.

Buy

You may want to look at external providers who live and breathe the legislation. They will be offering 'off the shelf' products that you could incorporate easily into your business operations. Given that they are the experts, the procedures will have been considered fully and should be robust. Additionally, outsourcing whistleblowing helplines can help provide that added level of independence and security to ensure that anonymity is not compromised unintentionally.

Conclusion

Whether or not to DIY or buy is a decision which will be unique to an organisation. 85% of the FTSE 100 already have independent whistleblowing services in place. Whichever route is chosen, the output will need to be of a high standard to ensure that the procedures are robust as the risk attached with getting it wrong is likely to outweigh the cost of buying a quality product.

Types of reporting
Out of your hands

Under the Directive whistleblowers will receive full protection if they follow a predefined escalation route. There are two scenarios in which a whistleblower will receive protection when reporting externally;

01

If they do not believe internal channels are safe or effective.

If your whistleblowing arrangements are not in line with best practice, for example;

- You operate a digital only system.
- It is well known that the whistleblowing arrangements in place are ineffective i.e. email, voicemail or webform only.
- Your whistleblowing policy is insufficient.

A whistleblower can report externally citing the poor efficacy and/or confidentiality of the system.

02

If they have reported internally at least 3 months ago and the issue has not been resolved.

If your whistleblowing arrangements are operating poorly and do not produce results within 3 months a whistleblower can report externally citing poor efficacy of the internal system.

The same approach to protection also applies to the External Competent Authority, if this body handles the case ineffectively and the whistleblower reports this publicly.

It is clear to see how it would be possible to lose control of a situation before an organisation is even aware of an issue. It is therefore vital that your whistleblowing arrangements are of good quality to enable your firm to resolve an incident of misconduct before it becomes a public relations disaster

Whistleblowing cases
Why is it important?

The Directive is likely to drive a further increase in whistleblowing cases given the increased protection and legal aid & financial assistance available to whistleblowers coupled with increasing public awareness of speaking up for instance the '#metoo' and 'BLM' movement.

This is made even more relevant in the age of social media. If an employee has an issue with the behaviour they observe in the workplace it is easier than ever to leave poor reviews on sites such as Glassdoor or even to take to Twitter to vent their frustrations.

Whistleblowing is culturally sensitive, and historically has been stigmatised. This stigma is disappearing fast with research and lived experience starting to show whistleblowing as a valuable and courageous act. While routine 'spying' on colleagues will remain controversial, whistleblowers raising genuine concerns are able to make positive change in the world today.

As the existing legislation does not financially support whistleblowers to pursue a claim against their employer there may be an under representation of cases and companies may find their working practices are not as effective as they were previously led to believe.

In addition to enhanced financial support for whistleblowers they will no longer lose their protection if they decide to report their case through external channels, as is currently the case. This may mean that companies are exposed to external bodies at an earlier stage and may cause more reputational damage than before. Given the current economic downturn, reputational damage may signal the end for some businesses as they may never be able to recover.

In essence, the increased protections and support offered are likely to encourage more whistleblowers to speak up about their concerns. The risk of exposure for wrongdoings are likely to trend upwards in businesses generally with some businesses being held to account for the first time. New robust processes will be required for many and existing frameworks will need to be reviewed to ensure that the procedures currently in place will still be fit for the future.

Whistleblowing & misconduct
The cost of neglecting your whistleblowing arrangements

Whistleblowing and misconduct have been commonly reported as front page news for some time. The long history of modern corporate misconduct is often discussed with reference to the Enron scandal in 2001. Almost 20 years on and corporate scandals continue to make the headlines and damage reputations. The recent Wirecard fraud has cost investors around $22.5bn and has caused many honest employees to lose their jobs.

The financial benefits of effective whistleblowing arrangements are now well understood, so much so that this is a key driver of the EU Directive. All businesses are vulnerable to employee misconduct. The Annual Fraud Indicator (2018) estimated the cost of business fraud in the UK to be £190bn which averages out at over £135,000 per business in the UK. The average cost of fraud varies dramatically when weighted by headcount;

The figures in the table are of course averages and the cost of any one individual incident may be far greater, both in terms of direct cost and reputational damage.

Whistleblowing arrangements alone of course will not eliminate corporate fraud, but with a detection rate of 1 fraud for every 10 organisations* whistleblowing can certainly detect incidents and limit damage. Whistleblowing also covers a wide range of misconduct including activities which carry direct cost, such as fraud or theft, and incidents which incur indirect costs including poor employee morale, high attrition and reputational damage such as bullying and discrimination.

*(*Safecall Data 2020)*

Average annual direct cost of fraud

Business size	Cost
1-9 employees	£30,520
10-49 employees	£163,314
50-249 employees	£818,227
250 or more employees	£11,856,103

References; Annual Fraud Indicator 2018, BEIS Business population estimates for the UK and regions: 2019 statistical release

Fraud represents only one element of misconduct, it can be much wider:

Type of Costs	Types of Misconduct	Examples of Costs
Direct Costs	Fraud	Loss of cash
	Theft	Loss of assets
	Data Protection Breach	Increased Insurance Premiums
		Fines
		Legal Proceedings
Indirect Costs	Bullying and Harassment	Poor Morale
	Discrimination and Racism	High Attrition
	Substance Abuse	Poor Reputation
	Bribery and Corruption	Lost Business
	Health and Safety	Lost Investment

In addition to the direct and indirect financial costs and the mitigatory benefits of effective whistleblowing systems, it is increasingly likely that organisations and responsible individuals will be held accountable for failing to manage concerns effectively.

The Directive mandates that Member States introduce effective, proportionate and dissuasive penalties relating to;

- **Hinderance**
  If an organisation or individual hinders, or attempts to hinder, reporting of concerns.
- **Confidentiality**
  If an organisation or individual fails to appropriately safeguard the identity of a whistleblower.
- **Retaliation**
  If an organisation or individual takes, or permits, detriment to the whistleblower.

It is also worth noting that the burden of proof will sit with the party accused of retaliatory action to prove that their action was not retaliatory in nature.

Under the Directive, if a reporting person cannot report concerns easily, have their identity protected, have their concern thoroughly investigated and be safeguarded from retaliation, their organisation and senior managers will have a case to answer and may find themselves personally liable before a judge.

Non-Disclosure Agreements
The death of the NDA relating to unacceptable behaviour

Non-Disclosure Agreements ('NDAs') are commonplace in business. When exiting a senior employee from a business, you are an outlier if you don't have one signed, regardless of whether they are a good leaver or a bad leaver. With the new rules around whistleblowing coming into force this common practice will be shaken-up.

The basics of a confidentiality clause in a settlement agreement are not usually controversial; they usually contain exceptions which allow the employee to tell their immediate family and professional advisers about the settlement terms (providing that those told maintain the confidential nature) and the employer can disclose details to their HR team, payroll provider and advisers.

An NDA cannot however stop a person from whistleblowing or reporting a crime to the police. In the past there has often been a misconception that it can serve as a gagging order and NDAs have been used for the wrong reasons which can create a culture of distrust in the workplace. Indeed the APPG on whistleblowing found evidence that NDAs are routinely used in whistleblowing cases, finding that employees often lack the resources required to challenge these agreements [1]

The introduction of the EU Whistleblowing Directive will help to enshrine strong whistleblowing procedures in businesses and dispel any doubt that an NDA has the power to silence whistleblowing of unacceptable behaviour.

Many organisations try to bury bad news, but by having a culture which encourages employees to speak up and support one another they can address problems early, avoid legal actions, help to retain a talented workforce (by making employees feel valued and motivated) as well as promote an inclusive workplace culture.

[1] https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_9754e54bc641443db902cd963687cb55.pdf

The EU Directive 2019/1937 Conclusion

The EU Directive 2019/1937 is the latest in a raft of legislative reform designed to enhance the protections of whistleblowers including SAPIN II in France, Sarbanes Oxley (SOX) in the US and amendments to the Whistleblower Protection Act (2004) in Japan. The UK is also actively reviewing whistleblowing protection legislation. The goal of all of these reforms is to reduce the fear of retaliation by encouraging individuals to report serious incidents to the appropriate people for investigation and remedy. This is a recognition of the value of whistleblowers in fighting workplace misconduct which costs employees, organis ations, suppliers, customers, shareholders and economies billions of pounds each year.

Issues such as fraud, money-laundering, corruption and discrimination make headline news on a daily basis due to the harm they cause to a wide range of people in the name of personal gain. The best chance of remedying these issues is when they are brought to the attention of those with an appropriate mandate and sufficient resources to diagnose and remedy the issue(s).

Organisations are then able to resolve the individual incident and take steps to prevent similar issues reoccurring in the future.

Establishing a minimum standard of whistleblower protections across all EU Member States is a vital step towards supporting people to raise their concerns free from fear of personal detriment and stigmatisation.

Increasingly it will benefit organisations in all geographies, all sectors and of all sizes to ensure that their mechanisms for discovering, investigating and resolving serious misconduct are effective. The costs, both direct and indirect, of failing to resolve these issues looks set to increase substantially over time.

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