Exploring the new EU protections for whistleblowers

26/04/2019

Corporate Crime analysis: On 16 April 2019, the European Parliament approved a new Directive, designed to provide individuals who expose corporate wrongdoing and guarantee a high level of protection to such whistle-blowers across a wide range of sectors, by a vote of 591–29. Once EU ministers approve the draft legislation, Members States will have two years to comply with the provisions. Quinton Newcomb, director and barrister, and Farheen Ishtiaq, solicitor, at Fulcrum Chambers discuss the potential legal implications of the new rules.

Original news

European Parliament approves new EU-wide whistleblowing rules, LNB News 16/04/2019 59

The European Parliament has approved at plenary the new whistleblowing directive proposed by the Commission in April 2018. The new rules lay down EU-wide standards to protect whistleblowers revealing breaches of EU law in a wide range of areas including public procurement, financial services, money laundering, product and transport safety, nuclear safety, public health, and consumer and data protection.

What is the background to the proposal?

In 2018, following a number of global corporate scandals such as the Panama Papers and Volkswagen's infamous 'diesel-gate', uncovered by whistle-blowers, the European Commission (the Commission) sought to strengthen the protection of whistle-blowers, who may be discouraged from reporting their concerns for fear of retaliation.

As such, in April 2018, the Commission proposed a Directive, which aims to guarantee a high-level of protection for whistleblowers who report breaches of EU law, by setting new, EU-wide standards. The Whistleblowing Directive ensures protection for whistleblowers reporting breaching of EU legislation in the fields of:

- public procurement
- financial services
- money laundering and terrorist financing
- product, transport, food and nuclear safety
- environmental protection
- animal health and welfare
- public health
- consumer protection
- protection privacy, data protection and security of network and information systems

The main aim of the Proposal for the Directive (the proposal) is to unify the currently fragmented rules on whistle-blower protection in the various Member States. The Commission notes in the proposal accompanying the Directive that currently only 10 EU countries have comprehensive rules in place, with the remaining countries only covering specific sectors or offences. These are:

- France
- Hungary
- Ireland
- Italy
- Lithuania
- Malta
- the Netherlands
- Slovakia
- Sweden
- United Kingdom

What are the key provisions of the proposal and how would they apply in practice?

The key elements of the proposal include the introduction of a tiered reporting mechanism across all industry sectors and within both private companies and public institutions. The proposal also sets out the framework for protection against dismissal and other forms of retaliation from an employer against a whistleblowing employee.

A whistle-blower is defined in Article 3(9) as 'a natural or legal person who reports or discloses information on breaches acquired in the context of his or her work-related activities'. This definition is deliberately broad to encompass not only employees but also shareholders, volunteers and contractors.

Legal entities

The Directive introduces an obligation on all organisations—both public and private—with fifty or more employees, or with an annual turnover or total assets of more than €10m, to set up internal processes for reporting and whistleblowing. These requirements are mandatory for all financial services organisations—irrespective of these thresholds being met—due to their greater exposure to money laundering or terrorist financing.

The reporting system

In an attempt to unify the whistleblowing provisions, the proposal sets out a new three-tier reporting process for organisations to implement and follow:

- Tier One: Internal reporting within organisation—the first stage of the reporting process is for an employee to first make a whistleblowing report to their employers using internal reporting channels and the Directive imposes a three- or six-month response timeframe, dependent upon the complexity of the issue. The first line of reporting may be omitted, however, if the whistle-blower has grounds to believe that an internal report could jeopardise any subsequent investigation.
- Tier Two: External reporting to the competent national authorities—this second stage of reporting is to be utilised where internal reporting processes are not available or in the absence of a satisfactory response to an internal report. In such circumstances, whistle-blowing employees should report to the central state authorities and, where relevant, EU bodies.
- Tier Three: Public/media reporting—as a final resort, the whistle-blower can disclose the information directly to the media if the employer or the public authorities have taken no timely action, or if the breach must be disclosed immediately due to an imminent danger to the public interest.

Protection against retaliation and in judicial proceedings.

A key feature of the proposal is the protection afforded to whistle-blowers against retaliatory behaviour from their employers, such as demotion, transfers of duties or location, reduction of salary or hours, disciplinary or financial penalties, discrimination and termination of contract (Article 14).

An interesting feature of the proposal is the introduction of the 'reverse burden of proof', which places the burden upon an employer to demonstrate that they did not act in retaliation where retaliatory behaviour is alleged. In cases of retaliation, the whistle-blower will be entitled to remedies in order to prevent workplace harassment or dismissal, in addition to access to free advice.

Further, whistle-blowers will be afforded the right to an effective remedy and fair trial, the presumption of innocence, and the right of defence. If the whistle-blower made the report in good faith to public authorities or media in a lawful way, they will be exempt from liability for breach of any restriction on disclosure of information imposed by contract, such as employment agreement, or by law.

What additional protections would be afforded to whistle-blowers in the UK and EU and how do they differ from current provisions?

The current legislative framework governing whistle-blowing in the UK was introduced by the Public Interest Disclosure Act 1998 (PIDA 1998), which came into force in 1999. PIDA 1998 amended the Employment Rights Act 1996 (ERA 1996) to protect workers who blow the whistle not only for personal gain, but also in the public interest.

Under the amended ERA 1996, the dismissal of an employee for whistle-blowing is automatically deemed unfair if the reason, or principal reason, for their dismissal is that they made a 'protected disclosure'. Whether a whistle-blower qualifies for protection depends on the following tests:

- Has the worker made a qualifying disclosure under s 43B of the ERA 1996? Whether a disclosure represents a 'qualifying' disclosure is dependent upon the following criteria:
    - Has there been a disclosure of information? While 'disclosure' is not defined, it can be made orally or in writing, and 'information' must be more than merely an allegation or a statement of position (see: *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38)
    - What is the subject matter of the failure? Under ERA 1996, s 43B, the information must relate to one of six types of 'relevant failure', such as criminal offences, miscarriages of justice, danger to the health and safety of any individual, damage to the environment or the deliberate concealing of information about any of the aforementioned
    - Is there reasonable belief? The worker must have a reasonable belief that the information tends to show one of the relevant failures. As long as the worker subjectively believes that the relevant failure has occurred, or is likely to occur, on a reasonably objective basis, it does not matter that the belief subsequently turns out to be wrong (see: *Babula v Waltham Forest College* [2007] IRLR 346 (CA))
    - Is it in the public interest? Under ERA 1996, s 43B, the worker must also have a reasonable belief that the disclosure is in the public interest (unless it was made before 25 June 2013, when this was not a requirement)
- Is it a protected disclosure? Under ERA 1996, ss 43C-43H, the disclosure must qualify as a protected disclosure, which broadly depends on the identity of the person to whom the disclosure is made. Internal disclosure to the employer is encouraged as the primary method, with wider disclosures to the police or media qualifying in limited circumstances

As is apparent, the Directive will plug many of the gaps in ERA 1996, not least because the definition of 'worker' under the Directive extends to a wider group of people, even including individuals who have not yet commenced employment or those that are going through the recruitment process.

Further, as set out above, the Directive widens the scope of reporting and offers protections to those who make reports directly to the media, something not guaranteed under ERA 1996. Also, in stark contrast to ERA 1996, the Directive imposes obligations on organisations to have a whistle-blowing policy in place and to respond to whistleblowing issues in a timely manner, which is not a requirement under ERA 1996.

What will be the impact of Brexit on the proposal?

The laws of the European Union have been incorporated into UK legislation since the enactment of the European Communities Act 1972. EU Directives have therefore required implementation nationally in order for them to take legal effect. As such, the Directive will require a UK act of Parliament for it to be legally binding.

At the time this article was drafted, uncertainty remains on the terms of the UK's exit from the European Union, with a further extension being agreed until 23:00 on 31 October 2019 on 11 April 2019 during the Special European Council Summit. Of course, this period may end sooner, if a Withdrawal Agreement (a deal) is approved and completed by 31 October 2019. In such a scenario, the UK is to leave the EU on 1 November 2019. It therefore remains to be seen how, and if, the Directive will be implemented in a deal, no-deal, or no-Brexit scenario, respectively.

What is, however, somewhat certain is that in the event the UK leaves the EU with a deal, the Directive and associated legislative provisions are likely to be incorporated into UK law post-Brexit, by way of update to the existing regime. It is likely that the Directive will form part of the corporate governance and accountability standards that the EU will want to be upheld as part of any trade deal between the UK and the EU. Therefore, implementation of the Directive, which seeks to streamline the currently fragmented provisions, is most likely going to be a prerequisite of any such deal.

However, even if the provisions were not so incorporated or if the UK were to leave in a no-deal situation, it is right to note that whistle-blowers already enjoy considerable protection—pursuant to ERA 1996—and many of the principles underpinning the Directive are already embodied in UK law. Indeed, the Commission has already recognised the UK as having one of the most advanced whistle-blowing systems in the European Union, something entirely lacking in some Member States. In this situation, there will be no compulsion on the UK to take any steps to amend its current laws or implement further changes to the existing regime in accordance with the Directive.

In the extremely unlikely event that there is no Brexit, the current EU legislative framework will continue to apply. As EU Directives must be transposed into law by UK legislation, the provisions of the Directive will be binding. In such a scenario, it is likely that ERA 1996 will be amended to plug the gaps between it and the provisions of the Directive—including, for example, the implementation of mandatory internal whistleblowing policies, the three-tier reporting system, and the protection against retaliation set out above.

What will be the key differences developing between UK and continental rules and how will these cause issues for corporates operating in a multinational market?

One of the key challenges that will affect the implementation of the Directive is the potential conflict with existing rules. The whistle-blowing proposals may conflict with other legislation in Member States, it therefore remains to be seen how Member States will seek to overcome such hurdles.

Further, the Directive does not introduce significant financial incentives for whistleblowers, in contrast to other jurisdictions such as the United States. By way of example, the US Securities and Exchange Commission (SEC) whistleblowing programme makes individual whistle-blowers eligible to receive a financial reward of between 10% and 30% of the value of the sanction applied to the offending company or organisation.

To date, while compensation is available to those who have been the victim of retaliatory behaviour, no such US-regime has been applied in the UK. While application of the US model may create a higher level of transparency by incentivising those that expose wrongdoing in their organisations, it may be difficult to apply

such a regime in the UK and EU criminal spheres. While plea-bargaining is more culturally acceptable in the US and financially inducing individuals to cooperate with investigations ordinarily does not pose evidential issues, in UK trial proceedings a financial incentive would be likely to undermine the credibility of any whistle-blower witness.

Interviewed by Andrew Muir.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.