EU DIRECTIVE ON THE PROTECTION OF WHISTLEBLOWERS: A MISSED OPPORTUNITY TO ESTABLISH INTERNATIONAL BEST PRACTICES?

1. INTRODUCTION

The EU Directive (EUD) "on the protection of persons who report breaches of Union law" was published in November 2019 and allows two years for transposition in the Member States (MS).[1] The Directive has been welcomed in many quarters as a significant step forward, particularly when for many years campaigners had been told that there was no legal basis for such a measure and that the requisite political will was lacking! This article will not recount the general rationale for protecting those who report concerns [2] or the particular background which led to the emergence of the EU provisions [3] but will discuss whether the EUD reflects international best practice principles. The conclusion reached is that the EUD is valuable in that it requires MS to get to first base in their whistleblowing arrangements and might encourage other countries to follow suit. However, nations that want to reflect best practice in their legislative provisions will have to look beyond the minimum standards contained in the EUD.

[1] Art.26(1)EUD 2019/1937. However, Art 26 (2) provides that private sector entities with 50-249 workers will not need to have to internal reporting channels in place until December 2023.

[2] The rationale is discussed extensively in a range of publications. See, for example, Brown, AJ, Lewis, D, Moberly, R, Vandekerckhove, W. eds.) 2014. *The International Whistleblowing Research Handbook.* Cheltenham, Edward Elgar.

[3] The Recital to the EUD mentions fragmented protection across the MS and the need to address breaches of EU law with a cross –border dimension as well as specific problems with: (inter alia) tax and financial services; product, transport and nuclear safety; the protection of the internal market, the environment and the food chain.

2.MATERIAL SCOPE

Consistent with the objective of enhancing "the enforcement of Union law and policies in specific areas",[4] Article 2 (1) identifies the breaches that will be covered.[5] Unsurprisingly, Art.2 (2) recognises that many countries both inside and outside of the EU afford protection to those who report on a much wider range of matters.[6] Thus the Council of Europe Recommendation [7] covers reports or disclosures that "represent a threat or harm to the public interest" and advocates that member States "should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment".[8] Subsequently, in calling for an EU-wide horizontal legislative measure on whistleblower protection,

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[4] Art.1.EUD

[5] "(a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (i) public procurement; (ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety; (v) protection of the environment; (vi) radiation protection and nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data, and security of network and information systems;

(b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures;

(c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law".

[6] "The Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1". See also Art.25 on more favourable treatment and non-regression in MS. However, paragraph 104 of the Recital requires that any provisions that are more favourable to reporters should not "interfere with the measures for the protection of persons concerned". (see section ?? below)

[7] "Protection of Whistleblowers." CM/Rec(2014)7

[8] Recommendation paragraph 2.

the European Parliament adopted a notion of "breach of the public interest" which includes, but is not limited to, "acts of corruption, criminal offences, breaches of legal obligations, miscarriages of justice, abuse of authority, conflicts of interest, unlawful use of public funds, misuse of powers, illicit financial flows, threats to the environment, health, public safety, national and global security, privacy and personal data protection, tax avoidance, consumers' rights, attacks on workers' rights and other social rights and attacks on human rights and fundamental freedoms as well as on the rule of law, and acts to cover up any of these breaches".[9]

Indeed, some whistleblowing statutes already identify a broad range of matters as potentially reportable. For example, Section 2A (1) of Norway's Work Environment Act 2005 gives employees the right to notify "censurable conditions" which are understood to be those that are worthy of criticism. Australia's Public Interest Disclosure Act 2013 defines 'disclosable conduct' to include maladministration, abuses of public of trust, wastage of public funds and damage to the environment as well as breaches of legal obligations.[10] According to Section 3 of New Zealand's Protected Disclosures Act 2000, "serious wrongdoing" includes "an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement". [11] Article 2 of Korea's Act

[9] European Parliament Resolution 2016/2224 para 17. The UN Special Rapporteur provided the following examples of issues that might be disclosed in the public interest: "a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety". See 'Promotion and protection of the right to freedom of opinion and expression', Note by the Secretary-General, seventieth session of the UN General Assembly, September 2015. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf

[10] Section 29.

[11] Similarly, the list of relevant wrongdoings in Section 5 of the Irish Protected Disclosures Act 2014 includes "an act or omission by or on behalf

on the Protection of Public Interest Whistleblowers defines the term "violation of the public interest" to mean an act that infringes on the health and safety of the public, the environment, consumer interests and fair competition.."

Turning to empirical research about what concerns are raised, again we find a range of matters are covered. For example, Section 301 of SOX requires public companies in the US to have internal reporting procedures only for reporting accounting and financial concerns. However, a recent large -scale study in the US indicated that 54.9% of concerns raised related to human resource issues.[12] Thus it would appear that firms acquire information about a broad range of issues via whistleblowing procedures. Similarly, a survey of NHS Trust staff in 2014 revealed that the most frequently reported concerns were safety, harassment/bullying, clinical competence and mismanagement.[13] Respondents to the OECD survey on "Business Integrity and Corporate Governance" selected from a range of serious corporate misconduct categories that were reported via internal mechanisms. The most commonly reported were fraud (42%), workplace safety and health issues (27%), and industrial relations and labour issues (24%).[14]

As regards the thorny issue national security and classified information, Art.3 makes it clear that the EUD does not affect the responsibility or powers of MS. By way of contrast, the Council of Europe Recommendation suggests that "a special scheme or

of a public body (which) is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement".

[12] Stubben, S and Welch, K. "Evidence on the use and efficacy of internal whistleblowing systems". 2019. SSRN_ID3379975_code342237

[13] 15,120 people responded to this survey.

[14] 2015. http://www.oecd.org/daf/ca/Corporate-Governance-Business-Integrity-2015.pdf

rules…may apply to information relating to national security, defence, intelligence, public order or international relations of the State".[15] Similarly, paragraph 18 of the European Parliament Resolution in 2017 suggested that "special procedures should apply for information involving …… classified information related to national security and defence".[16] Indeed, the "Tshwane Principles on National Security and the Right to Information" [17] provide that laws should protect public servants, including members of the military and contractors working for intelligence agencies, who disclose information to the public if four conditions are met.[18] Even if a disclosure does not meet these criteria, the Tshwane principles recommend that the whistleblower should not be punished so long as the public interest in disclosure outweighs the public interest in keeping the information secret.[19] Where a country has laws that criminalise disclosure to the

[15] Paragraph 5.

[16] See, for example, Section 18 Irish Protected disclosures Act 2014 which deals with security, defence, international relations and intelligence.

[17] 2013. https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points.

[18] (1) the information concerns wrongdoing by government or government contractors; (2) the person attempted to report the wrongdoing, unless there was no functioning body that was likely to undertake an effective investigation or if reporting would have posed a signifcant risk of destruction of evidence or retaliation against the whistleblower or a third party; (3) the disclosure was limited to the amount of information reasonably necessary to bring to light the wrongdoing; and (4) the whistleblower reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.

[19] A United Nations report recommends that: "if a disclosure genuinely harms a specified legitimate State interest, it should be the State's burden to prove the harm and the intention to cause harm". See 'Promotion and protection of the right to freedom of opinion and expression', Note by the Secretary-General, seventieth session of the UN General Assembly, September 2015. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf

public of classified information, any punishment should be proportionate to the harm caused.

Art.3(4) mentions "the autonomy of the social partners and their right to enter into collective agreements …without prejudice to the level of protection granted by this Directive". This is an important principle since it is the role of trade unions to negotiate more favourable provisions than the minimum levels set out in legislation. Indeed, workers' rights in relation to whistleblowing can be enhanced in many ways by collective bargaining. For example, a collective agreement could contain arrangements that are more generous than the statutory provisions in relation to: what can disclosed, by and to whom and how; feedback after investigations; advice and representation; remedies etc. [20]

3. PERSONAL SCOPE AND CONDITIONS FOR PROTECTION

Article 4 makes it clear that both the public and private sectors are covered but the information about breaches must have been acquired "in a work- related context". Importantly, the word "breaches" covers not only acts or omissions which are unlawful but also abusive practices i.e. those which "defeat the object or the purpose of the rules" in the areas covered by the EUD.[21] "Information on breaches" includes "reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur….and about attempts

[20] See Lewis, D, and Vandekerckhove, W. 'Trade unions and whistleblowing process: an opportunity for strategic expansion'. *Journal of Business Ethics*. 2018.Issue 4. ISSN 0167-4544.

[21] Art 5 (1)

to conceal such breaches".[22] Paragraph 43 of the Recital indicates that protection should not apply to those who report information which is "already fully available in the public domain or of unsubstantiated rumours and hearsay". One problem here is that the reporter's concern may be that the information that is in the public domain has not been acted upon.

Art.6(1) makes it clear that in order to qualify for protection the reporter must have "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting ..etc". It is important that MS make it clear that the reasonableness of a reporter's belief should be judged by what a person in a comparable position with similar knowledge might have believed rather than how adjudicators might have reacted. Given that some whistleblowing statutes [23] and ECHR decisions [24] still refer to the issue of good faith,[25] it important to note that paragraph 32 of the Recital states that: "The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection".

The expression "work- related context" [26] constitutes a constraint because much valuable information about possible wrongdoing may not emerge from such a context. Paragraph 36 of the Recital justifies the restriction

[22] Art.5(2). It is worth noting that both the UK and Irish legislation use the word "likely". The practical difference between "very likely" and "likely" will ultimately depend on case law.
[23] For example, in India and the US.
[24] See, for example, *Guja v Moldova (No.2) (Application no. 1085/10) [2018]*
[25] 'Good faith' as a necessary ingredient of a qualifying disclosure was removed from Part IVA ERA 1996 when a public interest was inserted. See now Section 43B
[26] Defined in Art.5(9)

on the basis that there is an "economic vulnerability vis-à-vis the person on whom *de facto* they depend for work. Where there is no such work-related power imbalance, ….there is no need for protection against retaliation". This proposition would seem contentious given that ordinary citizens who report alleged wrongdoing may well suffer non-work related reprisals, for example, denial of or unfavourable access to the services offered by an employer. Indeed, paragraph 14 of a European Parliament resolution in October 2017 "takes 'whistle-blower' to mean anybody who reports on or reveals information in the public interest, including the European public interest, such as an unlawful or wrongful act, or an act which represents a threat or involves harm, which undermines or endangers the public interest, usually but not only in the context of his or her working relationship, be it in the public or private sector, of a contractual relationship, or of his or her trade union or association activities".[27]

It should be observed that many countries extend the definition of whistleblowing beyond work-based relationships. For example, the UK legislation protects workers who raise concerns based on information obtained outside the work context so long as the subject matter is within the list of qualifying disclosures contained in Section 43B Employment Rights Act 1996 (ERA 1996) and the report is made to an

[27] "Legitimate measures to protect whistle-blowers acting in the public interest." (2016/2224 INI). http://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.html. According to Principle 3 of the G20's High-Level Principles for the effective protection of whistleblowers,"G20 countries should seek to provide appropriate protection to persons reporting corruption to competent authorities outside of an employment situation including confidentiality".

appropriate recipient.[28] Section 2 of the Ghanian Whistleblower Act 2006 covers persons making a disclosure in respect of another person or an institution [29] and Section 4(1) of India's Whistleblowers Protection Act 2014 states that: "any public servant or any other person including any non-governmental organisation, may make a public interest disclosure before the Competent Authority".

As regards who can report, the EUD takes a broad view covering (inter alia): workers within the meaning of Article 45(1) TFEU,[30] former workers, job applicants, the self-employed, shareholders, volunteers and trainees.[31] Importantly, the EUD acknowledges the notion of indirect retaliation by affording protection to facilitators, defined as a person who assists a reporter,[32] as well as third parties who are connected with the reporter and "who could suffer retaliation in a work-related context". [33] Indeed, paragraph 41 of the Recital points out that trade union or employee representatives should be protected under the EUD "both when they report in their capacity as workers and where

[28] Section 43C –H ERA 1996.
[29] Section 2.
[30] In *Genc v Land Berlin [2010]ICR 1108* the Court of Justice of the European Union ruled that:"any person who is in an employment relationship, the essential features of which were that for a certain period of time he performed services for and under the direction of another person in return for remuneration, was a 'worker' if he pursued activities which were real and genuine and not on such a small scale as to be marginal and ancillary".
[31] Paragraph 37 of the Recital suggests that third –country nationals as well as EU citizens should be protected and paragraph 62 makes it clear that the EUD applies even though a person has a contractual or statutory duty to report.
[32] Arts 4(4)(a)and 5(8).
[33] Art 4(4)(b). Many whistleblowing statutes protect associated persons. For example, Article 6 of the Serbian Law on the Protection of Whistleblowers Act.

they have provided advice and support to the reporting person".[34]

INTERNAL REPORTING CHANNELS

Although the EUD contemplates people raising concerns internally, externally or publicly, Art.7(2) obliges MS to "encourage" internal reporting and Art 8 requires MS to ensure that public sector employers and private sector entities with 50 or more workers establish internal procedures for reporting and follow-up.[35] However, Art 8(7) provides that, following an appropriate risk assessment, MS may require private sector entities to establish internal reporting arrangements. Indeed, Paragraph 49 of the Recital recognises the value of whistleblowing procedures by suggesting that small private sector entities might be subject to less prescriptive requirements than those contained in the EUD so long as they "guarantee confidentiality and diligent follow-up". Where there are no internal channels, paragraph 51 makes it clear that people should still be able to report externally

[34] Legislation in France and Malaysia allows anybody to make a disclosure without a requirement that they acquire the information in a work context. See Law on Transparency, The Fight Against Corruption and The Modernisation of Economic Life Sapin 11 Article 6 and Whistleblower Protection Act 2010 of Malaysia, Part I respectively.

[35] MS might consider introducing penalties and other sanctions for employers who fail to introduce an internal whistleblowing procedure within a stipulated time period. See Serbia Art 37. S43G ERA 1996 () provides an indirect incentive for employers to have procedures by allowing them to argue that a wider disclosure was unreasonable because internal arrangements were not followed. See also Section 7 of the Bribery Act 2010 which provides employers with a defence if they can show adequate reporting procedures were in place.

to the competent authorities and "enjoy the protection against retaliation provided by the Directive".[36]

Mention is made of consultation and "agreement with the social partners where provided for by national law". Clearly lip service is being paid here to the principle of democracy at the workplace and the practical gains to be had from worker participation in and commitment to reporting arrangements that have been negotiated by their representatives. Indeed, Dutch law provides for the compulsory consent of the works council when adopting a whistleblowing policy. [37]

The reporting channels provided must enable workers to raise concerns but "may enable" other persons mentioned in Art.4 to do so (see above). This raises the interesting question as to how many reporting procedures employers think it desirable to have in place. For example, is it realistic to have separate procedures for workers, non-workers who are in contact with the employer in the context of work-related activities and others with relevant information?

Art.8 (5)(6) stipulate that reporting channels may be operated internally or provided externally by a third party and private sector entities with 50 -249 workers "may share resources as regards the receipt of reports and any investigation to be carried out". In terms of recipients of reports, paragraph 54 of the Recital notes that third parties could be "external reporting

[36] Paragraph 52 mentions imposing an obligation on contracting authorities in the public sector to have internal reporting arrangements.
[37] House for Whistleblowers Act 2016.

platform providers, external counsel, auditors, trade union representatives or employee representatives." The operation of whistleblowing arrangements by external parties raises issues of principle as well as some practical considerations. For example, does outsourcing to a specialist agency in some way undermine an organisation's commitment to encouraging people to raise concerns internally? Is third party involvement more likely to give rise to delays in investigating, rectifying any wrongdoing or providing feedback? The recognition that relatively small employers can pool resources is unsurprising although not all countries currently make specific adjustments for employer size.[38]

Art. 9 deals with the contents of reporting procedures. It provides for information to be supplied in writing, orally or both and, upon request by the reporter, a "physical meeting within a reasonable time frame" should be possible. This Article also refers to the need to: keep the identity of both the reporter and the subject of an allegation confidential; acknowledge the receipt of the information to the reporter within seven days; designate an impartial person or department that is competent to diligently follow- up on reports and communicate with the discloser of information; provide feedback within a reasonable period, not exceeding three months; and provide "clear and easily accessible information regarding procedures for reporting externally to competent authorities…" (discussed below). Paragraph 59 of the Recital mentions making such information available to persons other than workers and suggests that it could be posted "on the website of the entity and could also be included in courses and training seminars on ethics and integrity".

[38] For example, the UK. However, at the time of writing, employers in this jurisdiction are not legally obliged to have whistleblowing procedures.

4. EXTERNAL REPORTING

It is a feature of the EUD that external reporting can take place either directly or after an internal procedure has been invoked.[39] Art 11 requires MS to designate competent authorities for reporting purposes and to provide them with "adequate resources". These authorities must be required to: set up "independent and autonomous external reporting channels for receiving and handing information…";[40] acknowledge receipt of reports within seven days and diligently follow them up; give feedback to the reporter within a reasonable timeframe (not exceeding three months or six months in "duly justified cases"[41]); communicate to the reporter the final outcome of any investigation "in accordance with procedures provided for under national law". Importantly, MS must ensure that authorities which receive a report outside their remit transmit it to a relevant competent authority within a reasonable time and notify the reporter accordingly.[42]

Art 11 (3) stipulates that MS can provide for competent authorities not to follow –up reported breaches that are "clearly minor". It is be hoped that, consistent with the objective of encouraging reporting, MS will

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[39] Art 10.

[40] Art 12(1)states: "External reporting channels shall be considered independent and autonomous, if they meet all of the following criteria: (a) they are designed, established and operated in a manner that ensures the completeness, integrity and confidentiality of the information and prevents access thereto by non-authorised staff members of the competent authority; (b) they enable the durable storage of information in accordance with Article 18 to allow further investigations to be carried out".

[41] It would be good practice for MS to spell out the circumstances that justify the longer timeframe.

[42] Art 11(6).

err on the side of caution and introduce tightly drawn lists of what is likely to be considered "clearly minor." In the same vein, Art.11 (4) facilitates the closure of procedures where competent authorities receive "repetitive reports which do not contain any meaningful new information". In the event of "high inflows of reports", MS may allow competent authorities to give priority to reports of "serious breaches or breaches of essential provisions.[43]

The competent authorities will also be required to publish a minimum amount of information on their websites "in a separate, easily identifiable and accessible section".[44] The procedures of competent authorities must be reviewed regularly "and at least once every three years". In undertaking this

[43] The possibility of judicial review is mentioned in paragraph 103 of the Recital to the Directive.

[44] Art 13 …. (a) the conditions for qualifying for protection under this Directive; (b) the contact details for the external reporting channels as provided for under Article 12, in particular the electronic and postal addresses, and the phone numbers for such channels, indicating whether the phone conversations are recorded; (c) the procedures applicable to the reporting of breaches, including the manner in which the competent authority may request the reporting person to clarify the information reported or to provide additional information, the timeframe for providing feedback and the type and content of such feedback; (d) the confidentiality regime applicable to reports, and in particular the information in relation to the processing of personal data in accordance with Article 17 of this Directive, Articles 5 and 13 of Regulation (EU) 2016/679, Article 13 of Directive (EU) 2016/680 and Article 11 of Regulation (EU) 2018/1725, as applicable; (e) the nature of the follow-up to be given to reports; (f) the remedies and procedures for protection against retaliation and the availability of confidential advice for persons contemplating reporting; (g) a statement clearly explaining the conditions under which persons reporting to the competent authority are protected from incurring iability for a breach of confidentiality pursuant to Article 21(2); and (h) contact details of the information centre or of the single independent administrative authority as provided for in Article 20(3) where applicable".

exercise they must take into account their own experience and that of other such authorities and adapt their arrangements accordingly.[45]

5. PUBLIC DISCLOSURES

According to Article 15 (1), public disclosures qualify for protection if: (a) the person reported internally or externally but no appropriate action was taken within the timeframes specified in Articles 9 and 11; or (b) the reporter had reasonable grounds to believe that either the breach "may constitute an imminent or manifest danger to the public interest [46] or, in the case of external reporting, owing to the particular circumstances, there is a risk of retaliation or low prospect of the alleged breach being "effectively addressed". Paragraph 45 of the Recital provides examples of how information may come into the public domain: "directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions or professional and business organisations".

6. CONFIDENTIALITY AND ANONYMITY

MS must ensure that a reporter's identity is not disclosed other than to staff authorised to receive or follow -up reports without the express consent of the person reporting (on penalties see section 12 below). However, this does not apply if there is a "necessary

[45] Art 14
[46] "such as where there is an emergency situation or a risk of irreversible damage".

and proportionate obligation imposed" by EU or national law in the context of investigations. In these circumstances the reporter must be informed before their identity is revealed unless this would jeopardise investigations or legal proceedings. In addition, Art. 16(3) provides: "When informing the reporting persons, the competent authority shall send them an explanation in writing of the reasons for the disclosure of the confidential data concerned".

Article 6(2) of the EUD provides that the Directive "does not affect the power of Member States to decide whether legal entities in the private and public sector and competent authorities are required to accept and follow -up on anonymous reports of breaches". Art 6 (3) adds that anonymous reporters who meet the EUD's conditions should enjoy protection if they are "subsequently identified and suffer retaliation". Interestingly, EU law requires anonymous reporting channels in relation to money laundering [47] and in 2017, the European Commission launched a new whistleblower tool to make it easier for individuals to provide information anonymously about cartels and other anti-competitive practices.[48]

7. RECORD-KEEPING AND DATA PROTECTION

Public and private sector organisations as well as the competent authorities will be obliged to keep records of each report received and store them for no longer that is necessary and proportionate. Provision is made for documenting oral reports and producing minutes or conversations being transcribed and reporters being

[47] See, for example, Article 61(3) of the Anti-Money Laundering Directive (EU) 2015/849.
[48] https://ec.europa.eu/competition/cartels/whistleblower/index.html

given the opportunity to check etc their contents. Similarly, provision is made for records of meetings with recipients of concerns to be kept in a durable and retrievable form if the person reporting by this mechanism so consents.[49] Significantly, the EUD does not create an EU-wide report-collecting agency as suggested in the European Parliament Resolution.[50]

Art 17 requires that the processing of personal data that is carried out as a result of the EUD must comply with the EU data protection laws.[51] As observed in paragraph 44 of the Recital, this may oblige MS to invoke Art 23 of the 2016 Regulation and restrict the exercise of certain data protection rights in order to "prevent and address attempts to hinder reporting or to impede, frustrate or slow down follow-up,…or attempts to find out the identity of the reporting persons".

8. RETALIATION

Article 19 requires MS to prohibit any form of retaliation (including threats and attempts to retaliate) against reporters, third parties connected with them and facilitators.[52] Paragraph 87 of the Recital provides the following detail: "Reporting persons should be protected against any form of retaliation, whether direct or indirect, taken, encouraged or tolerated by their employer or customer or recipient of services and by persons working for or

[49] Art.18
[50] 2016/2224.
[51] Regulation (EU) 2016/679 and Directive (EU) 2016/680.
[52] Fifteen examples of possible types of retaliation are listed.

acting on behalf of the latter, including colleagues and managers in the same organisation or in other organisations with which the reporting person is in contact in the context of his or her work-related activities".

Article 21 deals with measures to ensure protection against retaliation and provides illustrations of the steps that MS need to take. For example, provided that the reporter did not commit a criminal offence, no legal liability [53] should be incurred for a disclosure if the reporter had reasonable grounds to believe that the information was necessary for revealing a breach covered by the EUD. In this respect it is worth noting that paragraph 92 of the Recital suggests that accessing emails of a co-worker or files that they normally do not use, taking photos of work premises or visiting locations they usually do not have access to would not undermine a reporter's immunity since they give rise to civil or administrative rather than criminal liabilities. Paragraph 97 of the Recital states that the person initiating such proceeding should be obliged to prove that the reporter did not meet the conditions set out in the EUD. Paragraph 98 of the Recital adds that, where these conditions are met in relation to trade secrets, a disclosure will be considered allowing within Art.3(2) of Directive (EU) 2016/943. No mention is made of physical protection although some countries feel it necessary to do so.[54]

[53] Art.21(7) specifically mentions legal proceedings for defamation, breach of copyright, breach of secrecy, breach of data protection rules and disclosure of trade secrets.

[54] See Ghana's Whistleblower Protection Act 2006 Section 17 and Article 13 of South Korea's Protection of Public Interest Reporters Act 2011.

In terms of remedies, reference is made of full compensation being available [55] and interim relief pending the conclusion of legal proceedings.(Article 23, which deals with penalties, is outlined below). According to paragraph 95 of the Recital, compensation or reparation must be dissuasive and should not discourage potential whistleblowers. Of particular note here is the observation that "providing for compensation as an alternative to reinstatement in the event of dismissal might give rise to systematic practice in particular by larger organisations..".

9. PROTECTION OF ALLEGED WRONGDOERS AND ASSOCIATED PERSONS

The EUD uses the term "persons concerned" and requires the identity of such persons to be protected while investigations or the public disclosure are ongoing. For these purposes, protection is also afforded to people who are associated with the person to whom the breach is attributed.[56] In addition, MS must ensure that such persons get the benefit of the presumption of innocence, a fair trial and right of access to their file.[57]

10. MEASURES FOR SUPPORT

Article 20 requires MS to offer support to reporters covered by the EUD and mentions the following measures:

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[55] Paragraph 94 of the Recital mentions reinstatement and the need to compensate for actual and future losses, including both economic and intangible damage (for example, pain and suffering).
[56] Art 5(10).
[57] Art 22.

(a) "comprehensive and independent information and advice, which is easily accessible to the public and free of charge" ….; (b) effective assistance from competent authorities ….., including, where provided for under national law, certification of the fact that…[reporters] qualify for protection under this Directive";[58] and (c) "legal aid in criminal and in cross-border civil proceedings ….and, in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance". Article 20(3) indicates that the support measures may be offered by "an information centre or a single and clearly identified independent administrative authority". Paragraph 89 of the Recital goes further by suggesting that MS could extend advice to legal counselling and: "Where such advice is given to reporting persons by civil society organisations ….. Member States should ensure that such organisations do not suffer retaliation, for instance in the form of economic prejudice ….."

11. PENALTIES

MS must provide for "effective, proportionate and dissuasive penalties" for:(a) hindering or attempt to hinder reporting;(b) retaliating against persons referred to in Article 4; (c) bringing vexatious proceedings against persons referred to in Article 4;(d) breaching the duty to maintain the confidentiality of the identity of reporting persons;

[58] Article 7(1)of the *Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina* 2013 provides for the Agency for Prevention of Corruption and Coordination of the Fight Against Corruption to determine whether an employee has whistleblower status.

(e) knowingly reporting or publicly disclosing false information.

In relation to hindering reporting, Paragraph 46 of the European Parliament Resolution suggests that 'gagging' orders should attract criminal penalties. As regards retaliation, it worth observing that, according to Section 19 of Australia's Public Interest Disclosure Act 2013, a reprisal is a criminal offence with a maximum of 2 years' imprisonment. By way of contrast, Section 13 of Ireland's Protected Disclosures Act allows whistleblower to bring a civil action against a person taking reprisals. As regards confidentiality, Paragraph 47 of the European Parliament Resolution suggests that breaches of confidentiality should attract criminal penalties. With respect to knowingly false reporting, Paragraph 102 of the Recital notes that the "proportionality of such penalties should ensure that they do not have a dissuasive effect on potential whistleblowers". Good practice requires that the burden should be on a complainant to prove that the reporter knew the information was false at the time of disclosure.

12. CONTRACTING OUT

Article 24 requires MS to ensure that the rights and remedies provided by the EUD cannot be "waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."

13. EVALUATION AND REVIEW

Article 27 obliges MS to furnish the EU Commission with information about the implementation of the EUD and, on the basis of the information supplied, the Commission must submit a report to the European Parliament and the Council by December 2023.[59] The annual statistics required from MS must detail: "(a)the number of reports received by the competent authorities; (b) the number of investigations and proceedings initiated as a result of such reports and their outcome; and (c) if ascertained, the estimated financial damage, and the amounts recovered following investigations and proceedings, related to the breaches reported."

Within six years of the EUD coming into force, the EU Commission must submit a report to the European Parliament and the Council assessing the impact of national laws transposing the EUD.[60] In addition to an evaluation of the way in which the EUD has functioned, this report must assess the need for additional measures, "including, where appropriate, amendments with a view to extending the scope of this Directive to further Union acts or areas, in particular the improvement of the working environment to protect workers' health and safety and working conditions". [61]

14. CONCLUSION AND RECOMMENDATIONS

Much of this section will be devoted to how, in transposing the EUD, MS might build on its provisions in order to reflect best practices in their countries. Indeed, in accordance with the principle of subsidiarity, the EUD establishes basic principles

[59] Paragraph 28 of the European Parliament Resolution 2017 called on the Commission "to consider creating a platform for exchanging best practices …(on whistleblowing legislation) between Member States and also with third countries".

[60] Art.27(4) stipulates that the reports required by this Article must be "public and easily accessible".

[61] Art.27(3)

and it is the intention that MS will introduce measures that meet their particular needs and cirumstances. It is also important to acknowledge that the EUD is the result of extensive consultation and debate and that the final text avoids some of the pitfalls that beset some whistleblowing statutes. For example, it is now clear that good faith cannot be used as a condition for protecting whistleblowers because it diverts attention from the message to the motives of the messenger. A related matter is the EUD stipulation that innocent misinformation should not result in loss of protection but knowingly supplying false information can lead to legal liability.[62] Another test that features prominently in whistleblowing legislation is that of acting in the public interest. Again the EUD approach is useful here in that it contains no separate test - the public interest is assumed if a breach of Union law is reported to a designated recipient in the manner specified in the relevant Articles. The issue of rewarding whistleblowers also seems to have been put to bed at the moment because it does not feature in the EUD. MS may choose to operate reward schemes but should bear in mind that these may indirectly re-open the question of a whistleblower's motive. Far more positive would be the encouragement of awards for disclosing particularly valuable information and public recognition via a state honours system.

As regards the matters that can be reported, it seems highly unlikely that MS will confine themselves to breaches of Union law. Indeed, Transparency International (TI) argues that restricting the range of information for which disclosers will be protected hinders whistleblowing: "if people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning

[62] Arguably it would be appropriate simply to deny protection to the individual. See Bosnia Art 9(1)

that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests".[63] In "A best practice guide for whistleblowing legislation",[64] TI offers a broad definition of whistleblowing [65] and recommends that indicative rather that exhaustive lists of reportable conduct should be provided.[66] In relation to national security, defence, intelligence and international relations, it would have been helpful if the EUD had required special rules to apply as advocated by the European Parliament and the Council of Europe.[67]

In terms of personal scope, MS may choose to follow the approach of the European Parliament and several countries by not confining their legislation to breaches and abusive practices "in a work related context". The EUD is very inclusive about who can report although MS choose to protect disclosures made on the basis of reasonable suspicions rather than reasonable grounds to believe that the information was true. The need to protect those who assist reporters and third parties who are connected with them is recognised in the EUD. However, it would be good practice for MS to also cover those who incur

[63] 2018. Page 7. https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation.

[64] 2018. Principle 3. https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation

[65] Thus it offers the following broad definition of whistleblowing: "the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation (including perceived or potential wrongdoing); miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these".

[66] The formula "detriment/penalisation includes" is not uncommon. See Australia Section 13(2) and Ireland Section 3

[67] For an example, see Irish Protected Disclosures Act 2014 Section 18.

reprisals because they are wrongly perceived to be a whistleblower or because of their attempt to blow the whistle. In this respect it is worth noting that Article 7 of the Serbian Law on the Protection of Whistleblowers Act provides protection to those who are wrongly identified as a whistleblower.[68]

The EUD contains a 50 worker threshold for internal reporting procedures but MS may consider a lower figure on the grounds that such procedures promote transparency, integrity and business efficiency.[69] Significantly, paragraph 15 of the Council of Europe Recommendation does not have a small employer threshold for putting reporting procedures in place. Curiously, the term "follow - up" is used in the EUD in relation to internal reporting procedures whereas communicating the "outcome of investigations" is mandatory in relation to external reporting. By way of contrast, the Council of Europe Recommendation expressly mentions investigations and, "where necessary, the results acted upon".[70] It might be argued that investigating (where circumstances justify it) and acting on results are implicit but it would be good practice for MS to make these obligations explicit.[71] Indeed, MS may well be advised to produce official guidance or a Code of Practice for both employers and competent authorities about how to establish and maintain suitable whistleblowing procedures.[72] Arguably, such guidance would include a recommendation that reporters should also have the opportunity to comment on the

[68] Page 26.
[69] See Transparency International: "The business case for whistleblowing". 2018.
[70] Paragraphs 15 & 19. Investigations are also specifically mentioned by the G20 and in the European Parliament Resolution.
[71] See, for example, Art 14 of Serbia's Law on the Protection of Whistleblowers 2014 which requires employers to correct irregularities.
[72] In Ireland, Section 23 (3) of the Protected Disclosures Act 2014 allow the Minister to issue guidance.

feedback they receive.[73] MS might also consider introducing penalties and other sanctions for employers who fail to introduce an internal whistleblowing procedure within a stipulated time period.[74]

Although Art 12 of the EUD obliges MS to ensure that competent authorities have designated staff responsible for handling reports and that they receive "specific training for the purposes of handling reports", training is not mentioned in relation to internal reporting arrangements. MS should bear in ming that it is good practice to provide special training for managers and those responsible for operating whistleblowing arrangements and general training to all staff (as potential whistlebowers or retaliators). Since training obligations rarely feature in existing whistleblowing legislation it would also have been helpful if the EUD had set out some minimum standards. Indeed, it would be valuable if judges and employee representatives were also trained in national whistleblowing provisions.

Disclosures to the public are covered in many whistleblowing statutes but specific mention of the press is not common. Paragraph 46 of the Recital observes that "protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies". The European Parliament is more specific when it "calls on the MS to ensure that the right of journalists not to reveal a source's identity is effectively protected; takes the view that

[73] See The Netherlands Whistleblowers Authority Act 2016 Section 17
[74] See Serbia Art 37.

journalists are also vulnerable and should therefore benefit from legal protection".[75]

The issue of whether or not to accept anonymous reports is left open by the EUD. However, the European Parliament Resolution is more assertive about their value and "believes that the option to report anonymously could encourage whistle-blowers to share information which they would not share otherwise; stresses, in that regard, that clearly regulated means of reporting anonymously, to the national or European independent body responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistle-blowers, including in the digital environment, should be introduced, setting out exactly the cases in which the means of reporting anonymously apply; stresses that the identity of the whistle-blower and any information allowing his or her identification should not be revealed without his or her consent; considers that any breach of anonymity should be subject to sanctions".[76] The importance of this avenue for raising concerns is underlined by empirical research. According to the OECD, approximately half of the member countries surveyed allow anonymous reporting in the public sector.[77] In the private sector, 53% of respondents to the 2015 OECD Survey on Business Integrity and Corporate Governance indicated that their company's internal reporting mechanism provided for anonymous

[75] Para 21.
[76] Paragraph 49 of the Resolution. According to the G20, "where appropriate, G20 countries could also consider ways to allow and support whistleblowers to make a report without revealing their own identity while being able to communicate with the recipient of the report". Principle 5.
[77] See, for example, Section 28 (2) of Australia's Public Interest Disclosure Act 2013.

reporting.[78] Section 301 of SOX requires public companies to set up procedures so that people can report financial misconduct anonymously [79] and in their large –scale study Stubben and Welch found that 28.5% of those reporting chose to remain anonymous. In the NHS 2014 survey, staff were asked if a range of measures would make it likely or unlikely that they would raise concerns about suspected wrongdoing in the future. The ability to report anonymously was the second most supported option by NHS trust staff and the most supported option by primary care staff.[80]

One aspect of protection from reprisals is dealt with in the EUD is immunity from legal liability if a disclosure is made in accordance with its Articles. However, MS might wish to consider providing exemptions from disciplinary proceedings as well.[81] The Recital contemplates retaliation coming from a number of sources but the issue of vicarious liability is not mentioned at all [82] Perhaps of more general concern is the lack of emphasis in the EUD on *preventing* retaliation. In this context it is worth noting that Section 59(1) of Australia's Public Interest Disclosure

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[78] "Committing to Effective Whistleblower Protection". 2016. https://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf

[79] Section 301 (4) requires audit committees to "establish procedures for (a) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters".

[80] Annex Di of the *Freedom to Speak Up Report.* http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

[81] See, for example, Section 18 of New Zealand's Protected Disclosure Act 2000 and Art.7 of the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina 2013

[82] For example, Section 43 ….ERA 1996 deals with both personal and vicarious liability for detriments.

Act 2013 requires the assessment of risks that reprisals may be taken and failure to fulfil the duty to prevent detrimental acts can result in a civil remedy.[83] Indeed, a risk assessment approach would be consistent with the EU's approach to health and safety and other matters. A different approach to inhibiting reprisals is taken in Slovakia where the legislation aims to stop employers taking detrimental action against whistleblowers without prior approval of the Labour Inspectorate.[84]

Where a person demonstrates that he or she has suffered a detriment following a report, the EUD states that it must be presumed that that this was made in retaliation. Thus the person who inflicted the detriment must prove that what happened was "based on duly justified grounds". It would have been preferable if the EUD had adopted the formula contained in paragraph 93 of the Recital i.e. it must be demonstrated that the detrimental action was not "linked in any way" to the disclosure. Indeed, such an approach is consistent with the widely accepted test in anti-discrimination legislation of whether any acts or omissions suffered were "in no sense connected with" a disclosure of information. In relation to penalties, the EUD requires that these must be "effective, proportionate and dissuasive". It is clear that MS could adopt civil, criminal or administrative sanctions

[83] Section 337BB of the Fair Work (Registered Organisations) Act 2009 (as amended).
[84] Section 7 of the "Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain Acts" (2014)

and that exemplary damages might be available where flagrant breaches of obligations have occurred.[85]

Turning to measures for support,the EUD does not go as far as the Council of Europe Recommendation in relation to the raising of awareness. Paragraph 27 advocates that national frameworks should be "promoted widely in order to develop positive attitudes amongst the public …and to facilitate the disclosure of information…". Similarly, EU Parliament's Resolution 2016 [86] emphases the role of public authorities, trade unions and civil society organizations in assisting whistleblowers and in raising awareness about existing legal frameworks.[87] In particular, paragraph 24 calls for "a website to be launched where useful information on the protection of whistle-blowers should be provided, and through which complaints can be submitted; stresses that this website should be easily accessible to the public and should keep their data anonymous." [88]

Finally, MS are obliged furnish the EU Commission with information about the implementation of the EUD. In order to supply the statistics required MS will need to ensure that the competent authorities collect relevant data. In the same way as the European Commission must

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[85] See, for example, Section 337BB of the Fair Work (Registered Organisations) Act 2009 (as amended).

[86] 2016/2224. Paragraph 53.

[87] According to the OECD, awareness campaigns are only conducted in the public sector by slightly more than half of the member countries surveyed. "Committing to Effective Whistleblower Protection". 2016. Page 3. https://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf

[88] Paragraph 55 of this Resolution contemplates a role for the European Ombudsman in relation to whistleblowing.

submit a report assessing the effect of transposing the EUD, MS should ensure that they receive sufficient information from the competent authorities to enable them to evaluate the impact of their laws on the whistleblowing process. This may well reinforce the case for establishing national whistleblowing agencies.[89]

[89] Existing national whistleblowing agencies perform a variety of functions including: receiving and investigating reports of wrongdoing and retaliation ,giving advice and providing representation.