

Whistleblower Updates: New EU-wide Standards to Protect Whistleblowers



09 April 2019, Athens

Ulf H. Grundmann

Tel: +49 69 257 811 400

E-Mail: ugrundmann@kslaw.com

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I. Background

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What is a “Whistleblower”?

General definition:

A **whistleblower** (also written as **whistle-blower** or **whistle blower**) is a person who exposes any kind of information or activity that is deemed illegal, unethical, or not correct within an organization that is either private or public. (*Vandekerckhove, Wim (2006), Whistleblowing and Organizational Social Responsibility : A Global Assessment, Ashgate*)

What is a “Whistleblower”?

Historical perspective:

Whistleblower are also considered as “informer”, “squealer” or “shamus”.

Informers were in particular used by:

NAZI-Germany

Socialism (East European Counties)

Informers usually received benefits provided by the Regime.

What is a “Whistleblower”?

Intention of the Commission:

Protection of the public after “Diesel-Gate”, Corruption, Snowden, etc.

Definition in the EU Directive:

“Reporting Person”, limited to specific information and to specific reporting channels

Whistleblower and Trade Secrets:

A Reporting Person is disclosing Trade Secrets and/or Know How. This is generally not allowed (Directive EU 2016/943)

Exception: “Protecting General Public Interest” (Art. 5)

II. When does the protection of Whistleblowers apply? (Art. 13)

When does the protection of Whistleblowers apply? (Art. 13)



1. A reporting person shall qualify for protection under this Directive provided he or she has reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive.

When does the protection of Whistleblowers apply? (Art. 13)



2. A person reporting externally shall qualify for protection under this Directive where one of the following conditions is fulfilled:
 - a) he or she first reported internally but no appropriate action was taken in response to the report within the reasonable timeframe;
 - b) internal reporting channels were not available for the reporting person or the reporting person could not reasonably be expected to be aware of the availability of such channels;
 - c) he or she could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report;

When does the protection of Whistleblowers apply? (Art. 13)



2. A person reporting externally shall qualify for protection under this Directive where one of the following conditions is fulfilled:
 - d) he or she had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities;
 - e) he or she was entitled to report directly through the external reporting channels to a competent authority by virtue of Union law.

When does the protection of Whistleblowers apply? (Art. 13)



3. A person publicly disclosing information on breaches falling within the scope of this Directive shall qualify for protection under this Directive where:
 - a) he or she first reported internally and/or externally, but no appropriate action was taken in response to the report within the timeframe referred to in the Directive; or
 - b) he or she could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger for the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage.

III. Who needs to provide reporting channels and follow-up procedures?

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Internal reporting (Art. 4)

Legal entities in the private and in the public sector

Private sector:

- a) private legal entities with 50 or more employees;
- b) private legal entities with an annual business turnover or annual balance sheet total of EUR 10 million or more;
- c) private legal entities of any size operating in the area of financial services or vulnerable to money laundering or terrorist financing

Internal reporting (Art. 4)

Legal entities in the private and in the public sector

Public sector:

- a) state administration;
- b) regional administration and departments;
- c) municipalities with more than 10 000 inhabitants;
- d) other entities governed by public law

External reporting (Art. 6)

Member States shall designate the authorities competent to receive and handle reports:

- Independent external reporting channels, which ensure confidentiality
- Providing feed-back within 3 months (up to 6 Months)
- Transmission of information to competent authorities for further investigation

External reporting (Art. 6)

Specific design of reporting channels (Art. 7)

Dedicated staff members (Art. 8)

Specific procedures (Art. 9)

Information on websites regarding the received reports and follow-up
(Art. 10)

Record-keeping of received reports (Art. 11)

IV. Scope of protection of whistleblowers

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Scope of protection of whistleblowers (Art. 14)



Reporting Persons must not be subject to

- a) suspension, lay-off, dismissal or equivalent measures;
- b) demotion or withholding of promotion;
- c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
- d) withholding of training;
- e) negative performance assessment or employment reference;
- f) imposition or administering of any discipline, reprimand or other penalty, including a financial penalty;
- g) coercion, intimidation, harassment or ostracism at the workplace;

Scope of protection of whistleblowers (Art. 14)



Reporting Persons must not be subject to

- h) discrimination, disadvantage or unfair treatment;
- i) failure to convert a temporary employment contract into a permanent one;
- j) failure to renew or early termination of the temporary employment contract;
- k) damage, including to the person's reputation, or financial loss, including loss of business and loss of income.

Scope of protection of whistleblowers (Art. 14)



That means: there are NO financial benefits or other benefits.

There is no “invitation for breach of confidentiality in order to receive personal benefits”.

V. What kind of whistled information is protected?

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Protected whistled information (Art. 1)

Unlawful activities or abuse of law:

- a) breaches falling within the scope of the Union acts set out in the Annex (Part I and Part II) of the Directive as regards the following areas:
- i. public procurement;
 - ii. financial services, prevention of money laundering and terrorist financing;
 - iii. product safety;
 - iv. transport safety;
 - v. protection of the environment;

Protected whistled information (Art. 1)

Unlawful activities or abuse of law:

- a) breaches falling within the scope of the Union acts set out in the Annex (Part I and Part II) of the Directive as regards the following areas:
- vi. 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.

Protected whistled information (Art. 1)

Unlawful activities or abuse of law:

- b) breaches of Articles 101, 102, 106, 107 and 108 TFEU and breaches falling within the scope of Council Regulation (EC) No 1/2003 and Council Regulation (EU) No 2015/1589;
- c) breaches affecting the financial interests of the Union as defined by Article 325 TFEU and as further specified, in particular, in Directive (EU) 2017/1371 and Regulation (EU, Euratom) No 883/2013;

Protected whistled information (Art. 1)

Unlawful activities or abuse of law:

- d) breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

VI. What kind of whistleblower is protected?

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Protected whistleblower (Art. 2)

Reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following:

- a) persons having the status of worker, with the meaning of Article 45 TFEU;
- b) persons having the status of self-employed, with the meaning of Article 49 TFEU;

Protected whistleblower (Art. 2)

Reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following:

- c) shareholders and persons belonging to the management body of an undertaking, including non-executive members, as well as volunteers and unpaid trainees;
- d) any persons working under the supervision and direction of contractors, subcontractors and suppliers.

Protected whistleblower (Art. 2)

This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information concerning a breach has been acquired during the recruitment process or other pre-contractual negotiation.

This means: customers or consumers or other third parties are NOT protected.

This means: Reporting Persons are ONLY protected, if they use the correct channels: 1. internal channel, 2. external channel ONLY, if internal channel does not work.

VII. How is the “concerned person” protected?

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Protection of “concerned person” (Art. 16)



Concerned persons fully enjoy the right to an effective remedy and to a fair trial as well as the presumption of innocence and the rights of defense, including the right to be heard and the right to access their file, in accordance with the Charter of Fundamental Rights of the European Union.

Where the identity of the concerned persons is not known to the public, competent authorities shall ensure that their identity is protected for as long as the investigation is ongoing.

The protection of the identity of the persons shall be the same as the protection of the identity of the reporting person – regarding the external reporting channel.

VIII. Interaction with the Directive (EU) 2016/943 on Trade Secrets

Interaction with the Directive on Trade Secrets



Trade Secrets:

‘trade secret’ means information which meets all of the following requirements (Art. 2 Sec. 1):

- a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

Interaction with the Directive on Trade Secrets



Trade Secrets:

‘trade secret’ means information which meets all of the following requirements (Art. 2 Sec. 1):

- b) it has commercial value because it is secret;
- c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Interaction with the Directive on Trade Secrets



Exceptions: These Trade Secrets are not protected:

- a) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;
- b) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;
- c) for the purpose of protecting a legitimate interest recognized by Union or national law.

Interaction with the Directive on Trade Secrets



Exceptions: These Trade Secrets are not protected:

This means: Whistleblowers are mostly not violating the EU Trade Secret Directive.

IX. What are necessary steps to comply with the Whistleblower Directive?

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Steps to comply with Whistleblower Directive



The procedures for reporting and following-up of reports shall include the following:

- a) channels for receiving the reports which are designed, set up and operated in a manner that ensures the confidentiality of the identity of the reporting person and prevents access to non-authorised staff members;
- b) the designation of a person or department competent for following up on the reports;
- c) diligent follow up to the report by the designated person or department;

Steps to comply with Whistleblower Directive



The procedures for reporting and following-up of reports shall include the following:

- d) a reasonable timeframe, not exceeding three months following the report, to provide feedback to the reporting person about the follow-up to the report;
- e) clear and easily accessible information regarding the procedures and information on how and under what conditions reports can be made externally to competent authorities pursuant to Article 13(2) and, where relevant, to bodies, offices or agencies of the Union.

Steps to comply with Whistleblower Directive



The channels provided for in point (a) of paragraph 1 shall allow for reporting in all of the following ways:

- a) written reports in electronic or paper format and/or oral report through telephone lines, whether recorded or unrecorded;
- b) physical meetings with the person or department designated to receive reports;
- c) Reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party, provided that the safeguards and requirements referred to in point (a) of paragraph 1 are respected.

Steps to comply with Whistleblower Directive



The person or department referred to in point (b) of paragraph 1 may be the same person who is competent for receiving the reports. Additional persons may be designated as “trusted persons” from whom reporting persons and those considering reporting may seek confidential advice.

X. Outlook

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Outlook

Currently the Whistleblower Directive has “only” a draft status and is therefore not binding law.

But Companies should take steps in order to implement reporting channels and follow-up procedures.

ONLY, if internal reporting channels and follow-up procedures are not in place or do not work properly, external channels are open for reporting externally.

This means that the company involved can channel any whistleblower activities.

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Contact details



Ulf Grundmann specializes in regulations and compliance regarding the pharmaceutical, medical devices, cosmetic and food industries, and in litigation in the European Union. As partner in our FDA and Life Sciences practice, he has an additional focus on corporate and financial transactions for life science industries.

Ulf H. Grundmann

Partner

FDA and Life Sciences

ugrundmann@kslaw.com

+49 69 257 811 400