From rat to hero: a new perspective on whistleblowing in the EU

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Adriana de Buerba
Pérez-Llorca, Madrid
adebuerba@perezllorca.com (mailto:adebuerba@perezllorca.com)

Andrea Bartolomé
Pérez-Llorca, Madrid
abartolome@perezllorca.com (mailto:abartolome@perezllorca.com)

Alba Hernández
Pérez-Llorca, Madrid
ahernandezw@perezllorca.com (mailto:ahernandezw@perezllorca.com)

Introduction

Merriam Webster's dictionary defines a whistleblower as 'one who reveals something covert or who informs against another' and offers synonyms such as betrayer, fink, rat or snitch. Words can reflect a society's views and, in this case, the view is a negative one. However, reporting violations of the law is not easy. Only a brave few dare to do so, despite the fact that the law in most European countries does not provide for their protection. It seems, however, that this has started to change.

The 7 October 2019, the Council of the European Union passed the Directive of the European Parliament and of the Council on the protection of persons who report breaches of Union Law ('the Directive'). The Directive lays out common minimum standards to be implemented by Member States, in order to ensure the protection of whistleblowers from possible retaliation, as well as strengthen the enforcement of EU Law.[1]

The importance of the Directive lies not only in the benefit that can and will be obtained by unifying the laws of different Member States, but also in expressly recognising the whistleblower's role in law enforcement.

Whistleblowers are essential in uncovering and deterring secret or unaddressed wrongdoing. People who, in the context of their work-related environment, are brave enough to report unlawful conducts are of fundamental importance in the fight against criminal activity, evidence gathering and general prevention of risks in the public interest.[2]

This is important for individuals, as well as for companies. Since the implementation of criminal liability of corporations in many EU countries the need for effective compliance systems, which allows a company to identify risks and manage them before they become harmful to that company, is of vital importance. To this end, internal reporting by employees is a key part of compliance.

Before the adoption of the Directive, the Council of Europe had already previously highlighted the need to protect whistleblowers. In 2010, the Parliamentary Assembly of the Council of Europe, invited Member States to review their legislation concerning the protection of whistleblowers, stressing that not only legislative improvements were of necessity, but also a cultural attitude change towards 'individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk'.[3] In 2012, the European Committee on Legal Cooperation (CDCJ) commissioned a report to determine the feasibility of preparing a legal instrument on the protection of employees who make disclosures in the public interest.[4] It concluded that a Council of Europe recommendation, setting out the principles on which these legislative developments should be based, was not only feasible but also desirable.

Two years later, the Council of Europe issued a recommendation on the protection of whistleblowers,[5] which has since become the main inspiration and basis for the Commission's proposal of 2018.[6] Recent corruption scandals such as Lux-Leaks or the Panama Papers have further brought to light the need to protect the whistleblower, as well as define that identity.

This Directive is thus very welcome and the efficient protection of these individuals is long overdue. What does this new piece of legislation bring to the table?

The key points of the Directive

The Directive seeks to create secure complaint channels in both the public and private sectors and to guarantee the protection of reporting persons within their own organisation. To this end, the Directive stipulates that both private companies (with more than 50 employees) and public institutions must implement effective and confidential internal channels.[7] In the same way, Member States must ensure the implementation of external reporting channels.[8] In addition to these two options, the Directive also provides the possibility for whistleblowers to turn to the media and publicly disclose information on infringements, thus offering a complete reporting system with three different channels.

The main development under the Directive is its broad material[9] and the personal scope[10] of protection. According to the Directive, not only employees but also shareholders, managers, suppliers, contractors and even job applicants or former employees may be considered complainants and thus entitled to the protection that the Directive offers.

This protection is mainly focused on prohibiting retaliation from employers both inside and outside the workplace.

Due to the wide scope of the Directive its implementation will affect many different areas of national and EU Law and may either complement or collide with them. Criminal law is no exception.

How will the Directive interact with national criminal law?

Although European States have been reluctant to relinquish their sovereignty concerning criminal justice, since the Treaty of Lisbon and over the last ten years a substantial degree of harmonisation has been achieved. This has been in the domains of money laundering, corruption, counterfeiting or tax evasion, to name a few.

In this context, other EU instruments have already recognised the importance of whistleblowers and set out obligations to protect them. For example, the Commission, in its communication responding to the Panama Papers Scandal in 2016,[11] highlighted the need to protect whistleblowers in order to enhance fraud detection and tax evasion, which deprive the European tax authorities of legitimate revenue. The Fifth EU Anti-Money Laundering Directive establishes that Member States shall ensure that individuals who report suspicions of money laundering and terrorist financing are legally protected from threats or retaliation.[12] Hence, the whistleblower Directive will reinforce, support and broaden the existing sectoral protection.[13]

One of the key protections that the Directive awards those considered to be whistleblowers is immunity from the potential criminal liability that arises from reporting and disclosing information.[14]

The Directive states, in no uncertain terms, that the persons protected shall not incur liability of any kind regarding restrictions on disclosure of information.[15] Moreover, in legal proceedings resulting from the reporting or public disclosure of information the persons protected will not incur liability of any kind, this includes:

- defamation;
- breach of copyright;
- breach of secrecy;
- breach of data protection rules;
- disclosure of trade secrets; or
- compensation claims, [16]

These people shall have the right to rely on that reporting or public disclosure to seek dismissal of the case.

If we take into account cases brought before the European Court of Human Rights (ECtHR), there would seem to be a great need for the type of measures the Directive introduces. In the case of Tillack v Belgium,[17] a German journalist published articles on alleged irregularities taking place in the European Commission's anti-fraud office (OLAF), based on reports made by a European civil servant. When OLAF failed to uncover the identity of the reporting official, it initiated proceedings against the journalist alleging bribery.

Another notable case is that of Marchenko v Ukraine,[18] in which a teacher had reported the possible criminal conduct of the director of the school where he worked. In this context, the teacher participated in a demonstration, along with many others, against the director in question. For this, Marchenko was convicted of defamation. Although these cases were analysed by the ECtHR in the light of freedom of speech, they are good examples as to why protection against criminal prosecution is necessary.

Equally, we might ask ourselves how broad the protection should actually be. The Directive is unclear on what the minimum standard is regarding this point. On the one hand, it states that in the relevant proceedings the persons should be able to rely on the defence of having reported breaches or made a public disclosure in accordance with the Directive.[19] This, of course, is desirable.

However, the Directive also states, very generally, that whistleblowers shall not incur any liability regarding the disclosure of information.[20] Direct immunity might not be so desirable, considering that the threshold for protection — that is, that the reporting person had reasonable grounds to believe that the reporting was necessary — is a nebulous parameter [21] that will have to be interpreted by the Courts on a case-by-case basis. As the report commissioned by the CDCJ points out, individuals need to be able to defend themselves against mistaken or irresponsible claims.[22] It remains to be seen how the EU will interpret this and how the Member States will implement it.

It is worth noting that, in respect of the acquisition of information, the Directive expressly states that reporting persons might enjoy civil or employment-related immunity but, when it comes to criminal responsibility, this will still be decided solely based on national law.[23] The Directive will not affect national criminal procedure laws.[24] This is unsurprising, as the rules on criminal procedure in the EU are bound by the standards contained in the Charter of Fundamental Rights and have undergone substantial harmonisation. Nonetheless, the Directive does establish (in Article 22) that Member States shall ensure the rights to effective remedies and fair trials, as well as the presumption of innocence and the rights of the defence (including the right to be heard).

What may, in fact, affect criminal procedure (and specifically evidence concerning possible reported crimes) is the question of anonymity. The Directive leaves up to each State the acceptance and follow-up (or lack thereof) regarding anonymity in the report of breaches.[25] In this respect, legislative fragmentation will still exist.

It is important not to confuse confidentiality and anonymity. The issue of correctly processing, managing and data storage is now permanently on the agenda, especially when it comes to something as delicate as 'blowing the whistle' on, for example, fellow employees. Confidentiality is – as the Commission's proposal states — a cornerstone of whistleblower protection.[26] The Directive ensures confidentiality regarding the identity of the reporting person,[27] as well as regarding the reported information[28] and even obliges Member States to provide for penalties when this confidentiality duty is breached.[29]

Anonymity is different. Anonymous reports may hinder the effective investigation and ultimate prosecution of the person in question, not to mention the fact that anonymous information is rarely admitted as legitimate evidence in court. It is therefore fair to hope that the Member States will be enthusiastic about the possibility of anonymity.

Direct effect

The Member States still have two years to transpose the Directive and, as experience has shown, many States do not fulfil their duties regarding the incorporation of EU Law into national law on time or correctly.

Although directives must be transposed into national law by the States to become applicable, they can also have a 'direct effect',[30] where the directive has not been properly transposed, or if the implementation has not taken place before the established deadline.[31]

In these cases, individuals could invoke the rights granted by a directive in a court of law, given that the provisions intend to confer rights to individuals that are sufficiently clear and are also not conditional on any legislative measure enacted under national law. If the provisions of the Directive were to fulfil these requirements, individuals would be able to invoke them, for example, in criminal proceedings initiated against them. As the protective measures that Member States are to adopt must include 'in particular' those set out in paragraph 21, it is probable that it will be possible for individuals to invoke these safeguards, even if Member States fail to comply with their obligations.

[1] Recital 5 of the Directive mentions that under-reporting by whistleblowers is a key factor affecting enforcement.

[2] Recitals 6 to 18 of the Directive specify the benefit that whistleblowers bring to the detection, prevention and reduction of risks in different competence areas. Recital 46 of the Directive stresses the particular importance of whistleblowers as sources for investigative journalists.

[3] Recital 5, Resolution 1729 (2010) of the Parliamentary Assembly.

[4] Stephenson Paul, Levi Michael (2012) The protection of whistleblowers: a study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest, CDCJ, 9FIN.

[5] (2014) Recommendation and explanatory memorandum, Protection of Whistleblowers, Council of Europe, CM/Rec 7.

[6] Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches in Union Law, European Commission: (COM (2018) 218, 10.

[7] Chapter 2 of the Directive.

[8] Chapter 3 of the Directive.

[9] Art 2 of the Directive.

[10] Art 4 of the Directive.

[11] Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, European Commission, 2016: COM (2016) 451 final.

[12] Art 38 of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

[13] In addition those already mentioned, in the context of environmental crimes the EU has also promoted whistleblower protection, in the Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013, on safety of offshore oil and gas operations.

[14] Recital 91 in connection with Article 21 of the Directive.

[15] Art 21.2 of the Directive.

[16] Art 21.7 of the Directive

[17] Case of Tillack v Belgium, ECtHR [Application nº 20477/05, 27 November 2007].

[18] Case of Marchenko v Ukraine, ECtHR [Application nº. 4063/04, 19 February 2009].

[19] Recital 97 of the Directive.

[20] If we follow the letter of Art 21, the Directive obliges Member States to offer full immunity in the face of proceedings concerning the reported information.

[21] This does constitute an improvement compared to the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. In this case, it is the 'public interest' criterion which allows for protection against the measures, procedures and remedies provided.

[22] Stephenson Paul, Levi Michael (2012) The protection of whistleblowers: a study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest, CDCJ 9FIN, point 5.35, 33.

[23] Art 21.3 of the Directive.

[24] Recital 28 and Art 3.3 (d) of the Directive.

[25] Recital 34 and Art 6 (2) of the Directive.

[26] Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches in Union Law, European Commission: (COM (2018) 218 final, 11.

[27] Art 9, 16 of the Directive.

[28] Arts 12, 16 of the Directive.

[29] Art 23 of the Directive.

[30] Case Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62), European Court of Justice, 5 February 1963.

[31] Case Yvonne van Duyn v Home Office (Case 41-74), European Court of Justice, 4 December 1974.

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