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EU Whistleblowing Directive – where are we now?

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A large majority of EU member states have missed the deadline for implementation of the Whistleblowing Directive, which means uncertainty and likely extra costs for multinational organisations, say **Alja Poler De Zwart** and **Dan Alam** of Morrison & Foerster.

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The European Union (EU) Whistleblowing Directive was approved two years ago to

Don't blow yet...

establish a new whistleblowing framework across the EU. As we write, on the 17 December 2021 deadline for EU Member States to implement the Directive on a national level, only four countries – Sweden, Denmark, Portugal, and Lithuania – have done so. This means that the vast majority – 23 – have not adopted the necessary local legislation. Some EU Member States have not even published their first draft bills.

This is not only causing substantial problems for multinational organisations, which are left grappling with how and when to comply with the new rules, but it is also leaving potential whistleblowers without safe and confidential avenues to report their concerns about



EU law violations.

The Directive

The Directive requires EU Member States to create rules for public and private organisations with more than 50 workers to set up whistleblowing hotlines and accept reports about EU law violations. The Directive also contains a number of specific requirements on how these hotlines should work and how reports should be handled. It sets up very specific and far-reaching protections for whistleblowers, which have not existed on an EU-wide level to date. It also instructs EU Member States to create additional reporting avenues to local whistleblowing authorities and permits reporting to the public (such as the media) when certain conditions are met.

The Directive only provides minimum standards for responding to and handling whistleblowers' concerns. The EU Member States may legislate further, and therefore deviate from the Directive in their implementing laws on a number of issues. So there will be no full harmonisation across the EU. The UK will not be implementing the Directive, and it already has existing whistleblowing legislation in place.

EU Member States are required to implement the Directive into their national laws by 17 December 2021. The Directive imposes two deadlines for organisations to comply with the new rules: organisations with over 250 workers must comply by 17 December 2021; smaller organisations with 50–249 workers are required to comply by 17 December 2023.

What should compliance professionals do?

Considering that only four EU Member States have managed to adopt their implementing laws so far, organisations that would need to comply with the Directive by 17 December 2021 in one or more of the remaining 23 EU Member States are likely wondering what to do. They are left in a holding pattern, and are most likely uncertain how to proceed.

Decisions need to be made about whether hotlines will be updated or created in compliance with the requirements of the Directive, and then updated again each time a relevant local implementing law is adopted. This could potentially result in 23 additional updates to hotlines if a multinational organization has more than 50 workers in each EU Member State. This approach would no doubt result in substantial additional costs and the need for more resources to be redirected towards whistleblowing compliance.

For example, organisations may need to consult with and even obtain approval from their European and/or local works councils or unions multiple times in certain jurisdictions, which is often a slow and difficult process to conduct and finalise. Organisations may also need to translate policies, notices, and other relevant documents into local languages several times to incorporate the required changes prescribed in local implementing laws. Internal processes and procedures for investigating reports may need to be rewritten and adjusted for any possible local deviations, which means that designated investigators and investigation coordinators/leads will need to be continuously trained and retrained on the constantly incoming new rules.

Due to the ongoing uncertainty about how EU Member States will deviate from the Directive, and the above-mentioned costs, many organisations that have centrally run hotlines may choose to adopt a “wait and see” approach instead.

Global organisations that already have existing centrally run hotlines in place for all their affiliates will also need to consider if and how they will update their hotlines in countries where they are not required to comply with the Directive (including EU Member States where they have fewer than 50 workers). Many global organisations will likely prefer to adopt a common approach across all jurisdictions, as far as it is possible.

In addition to the above-mentioned issues, organisations can consider several practical steps until local legislators and regulators provide more clarity:

1. Determine in which EU Member States your organisation has close to, or more than, 50 or 250 workers. Based on this assessment, establish a timeline of when and where your organisation may need to direct its focus towards the new rules.
2. Monitor the status of EU Member States' local implementing laws by checking reliable sources. [1]
3. Inform relevant decision-makers in your organisation about the Directive's requirements, lack of local implementation, and what this means for your organisation. Keep them regularly updated about ongoing developments.
4. Prepare estimates of the potential costs and resources that your organisation will need to comply with the new rules. Do not forget to budget for additional training for relevant personnel, such as predetermined investigators and investigation coordinators/leads. Discuss these estimates with appropriate stakeholders so that they are not surprised when the organisation needs to take additional action as local implementing laws are adopted and take effect.
5. Consider ahead of time if your organisation will need to consult with and/or obtain approvals/agreements from any works councils and unions with respect to the changed or newly established whistleblowing hotline. If such approvals or agreements are indeed required, determine the best approach to handle these issues in a situation with so much uncertainty and so many moving parts.

What's next?

Nobody really knows. The European Commission (EC) may take enforcement action against EU Member States that have failed to either adopt the Directive on time or implement it properly. If the EC does take enforcement action, it will start by issuing a formal notice, followed by a request, to the relevant EU Member State asking it to comply with the Directive within a specified period. If the EU Member State fails to comply, the EC can refer the matter to the Court of Justice of the European Union (CJEU). The EC may also ask the CJEU to impose financial penalties on the EU Member State.

Losing time

The Directive is a positive step forward for the protection of whistleblowers. Businesses should also view the Directive as an opportunity to uncover illegal behavior within their organisation, prevent further escalation of such behaviour, and minimise potential negative consequences for the organisation and its reputation. It is in everyone's interest – whistleblowers, public and private organisations, and governments – for EU Member States to implement the Directive into their national legislation sooner rather than later.

Without the implementation of the Directive in all EU Member States, organisations are stuck between a rock and a hard place; they have no clarity about when, where, and how they should comply with the new whistleblowing requirements. In valiant attempts to be as compliant as possible with rules that are either non-existent or quite unclear at this time, many multinationals are incurring unnecessary costs while trying to determine the best way for their organisations to proceed. If national legislators had already adopted implementing laws, burning through such additional resources would not have been necessary. We can only hope that regulators take this into account whenever local laws are finally adopted, and give organisations sufficient additional time (should the implementing laws have not already done so) and proper additional guidance to become compliant with the new rules.

Note

1. See, for example, Morrison & Foerster's Whistleblowing Resource Center – <https://www.mofo.com/special-content/gdpr-european-privacy/whistleblowing/>

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