

Whistleblower protection: are reporting systems on group level allowed?

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Companies will soon have to take concrete measures to protect persons that anonymously disclose unlawful activities (“**Whistleblowers**”). EU member states will have to implement the Whistleblower Directive¹ by 17.12.2021.

In the recent past, corporations have tried their best to implement central reporting systems within compliance departments in order to meet these obligations (cost) effectively.

In two controversial statements, the EU Commission now held that exclusively centrally or regionally based reporting and investigation systems for companies from large groups were insufficient. In the light of these imperative interpretation instructions, groupwide compliance systems have to be analyzed again and, if necessary, completed with local reporting systems on legal-entity-level.

Internal reporting system for each company

The Commission states that the protection of whistleblowers and a higher number of disclosures will only be achieved if each company having more than 49 employees will establish its own whistleblowing system.

This should be, *on the one hand*, easier to access for whistleblowers that are not necessarily employees of the company in question (and thus have no access to an internal reporting system at group level). *On the other hand*, a local reporting system could be better adapted to the national implementation of the directive (for instance deadlines for receipt confirmation, financial incentives, personal meetings, if applicable). However, what speaks against it is the fact that a local reporting system makes the identification of a whistleblower rather easy, which may actually discourage the disclosure.

Whether a local reporting system is more efficient than a centralized solution at corporation level or not is unclear. It definitely generates considerably high personnel and organizational costs. In case the Commission is wrong with this interpretation and whistleblowers will not trust local reporting systems, they might address their issues rather to external (public) authorities, which could damage the company's image.

Simpler procedures for middle-sized companies

According to art 8, para 6 of the Whistleblower Directive, companies with 50 to 249 employees (regardless of the group) should however keep the option to consolidate their own reporting and investigation resources.

To this end, they must simultaneously introduce local reporting systems, inform the whistleblower that the disclosure is transferred and verified at central level and grant him or her the right to object against such transfer. All measures on the communication with the whistleblower, such as follow up and sanctioning, have to take place at local level.

¹Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

In practical terms, this means that while notifications for such companies may be received and reviewed on centralized level, internal/local entities are required to handle the rest of the process and provide feedback. The justification of the directive explains, especially for groups, that parent companies may receive notifications of employees of smaller subsidiaries and, in certain cases, even conduct investigations.

Therefore, according to the interpretation of the Whistleblowing Directive, it is not prohibited to establish a centralized system, but such system must be run in parallel with the mandatory local system. The whistleblower has thus the possibility to choose between both systems, whereas by way of a targeted company policy, the centralized whistleblower system may be preferred. The whistleblower must give his/ her consent also for breaches that require an investigation at corporation level.

It remains unclear, however, if the company has to further track and investigate the breaches if the whistleblower takes back his or her notification.

Large group companies with more than 250 employees have no possibility to pool resources and capacities and must establish completely functioning systems on local entity-level.

Conclusion and Prospects

The current interpretation instructions of the EU-Commission are surprising, not quite convincing and hard to implement for company groups. They increase personnel and bureaucratic expenses significantly so that special solutions at national level have to be sought. The national regulation, including the combination of central and local systems, is still to come.

Ultimately, what matters is to create a system that would strike a balance between a better protection and an increased motivation of the whistleblower for notifying breaches. Groups of companies must give more thought to organization; in many cases, outsourcing to third parties seems to be a better and more cost-effective solution.

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