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Implementation of the EU Whistleblowing Directive: Uncertainty Around Local Hotlines

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An Article discussing EU member state implementation of EU Directive 2019/1937 on the Protection of Persons Who Report Breaches of Union Law (Directive 2019/1937) (Whistleblowing Directive) and whether member states can permit organizations to exclusively rely on centralized whistleblowing hotlines. This Article discusses the European Commission Expert Group's position that organizations must set up and operate separate, local hotlines in addition to a centralized hotline, and the reasons why this position may not fulfill the Whistleblowing Directive's objectives in practice.

On December 16, 2019, Directive (EU) 2019/1937 on the Protection of Persons Who Report Breaches of Union Law (Whistleblowing Directive) entered into force. It sets new EU-wide minimum standards for protecting whistleblowers, requires member states to establish comprehensive whistleblower protection frameworks, and addresses:

- Procedures for establishing internal and external reporting channels for receiving and investigating complaints relating to potential violations of a broad range of EU laws.
- The scope of activities that whistleblowers may report.
- Protections for whistleblowers.
- Examples of retaliation that trigger whistleblower protection.

Member states must transpose the Whistleblowing Directive into their national laws by December 17, 2021, at which time organizations with at least 250 workers must comply (Article 26(1), Whistleblowing Directive). Private sector organizations with 50 to 249 workers have until December 17, 2023 to comply with the Whistleblowing Directive's internal reporting channel requirements in Article 8(3) (Article 26(1), (2), Whistleblowing Directive). As multinational organizations grapple with compliance, another major stumbling block persists, namely, whether a corporate group operating only a centralized whistleblowing hotline will meet the Whistleblowing Directive's requirements or whether separate, local hotlines are required for each EU legal entity with more than 50 workers.

This uncertainty stems from the European Commission Expert Group's (ECEG) position that it would be "an incorrect transposition of the [Whistleblowing] Directive" if member states permitted corporate groups to rely solely on centralized whistleblowing reporting channels without offering separate local reporting channels (ECEG Minutes of the fifth meeting of the Commission expert group on Directive (EU) 2019/1937 (June 14, 2021) (ECEG Minutes)). The ECEG argues that local hotlines are more easily accessible. However, this may not be the case considering:

- Centrally run hotlines can be just as accessible as locally run hotlines.
- Centrally run hotlines often already function as local hotlines.
- The ECEG's interpretation goes beyond the Whistleblowing Directive's language and imposes additional requirements on organizations.
- The ECEG's requirements could deter whistleblowers from coming forward if they feel their local office is too close to the alleged wrongdoing to investigate it impartially.
- The ECEG's requirements could increase the risk of organizations not properly investigating whistleblower reports or retaliating against whistleblowers if there is no central oversight and information sharing.

This Article discusses the ECEG's position and why member state laws implementing the Whistleblowing Directive should permit corporate groups to rely exclusively on centrally run hotlines. For more detailed information on the Whistleblowing Directive and

its requirements, see Practice Note, Whistleblower Programs and EU Data Protection Law Compliance: Overview.

Whistleblowing Directive Requirements

The Whistleblowing Directive requires covered organizations to implement whistleblowing programs that enable individuals to report a wide range of EU law violations. It sets minimum standards for organizations on how to establish reporting channels and respond to and address whistleblower reports.

The Whistleblowing Directive establishes three channels for whistleblowers to report their concerns:

- Internal reporting within their organization.
- External reporting to national and EU authorities.
- Public reporting and disclosures.

This Article focuses on the requirement to establish internal reporting channels. The Whistleblowing Directive encourages whistleblowers to first report their concerns through internal channels when the organization can address the report internally and there is no risk of retaliation (Article 7(2) and Recital 47, Whistleblowing Directive). Member states must ensure that private sector organizations with more than 50 workers establish channels and procedures for internal reporting and follow-up (Article 8(1), (3)).

Private sector organizations with 50 to 249 workers (which the ECEG terms medium-sized) can share resources for receiving reports and carrying out investigations, provided they meet the Whistleblowing Directive's requirements to maintain confidentiality, give feedback, and address the reported breach (Article 8(6), Whistleblowing Directive). The ECEG states that this provision applies to entities in the same group (ECEG Minutes, at 2).

Whistleblowing Directive Recital 55 provides that organizations should make hotlines available for all workers within the corporate group, noting that internal reporting procedures should enable legal entities to confidentially receive and investigate reports from workers of the entity and its subsidiaries or affiliates. This is not restricted to medium-sized organizations.

The Whistleblowing Directive explicitly permits legal entities to outsource certain obligations to third parties, including operating reporting channels on their behalf. These third parties, including reporting platform providers, must offer appropriate guarantees for independence, confidentiality, data protection, and secrecy (Recital 54, Whistleblowing Directive).

Operating a Whistleblowing Hotline

Large, multinational organizations operating whistleblowing hotlines usually offer an online platform and telephone-based reporting channels that are available to workers across the entire corporate group. Third-party service providers often run these reporting channels, as they can:

- Offer organizations access to 24/7 local phone lines staffed with trained personnel.
- Offer reporting channels in multiple languages, including each operating entity's local language.
- Provide technological solutions, such as data analytics on how hotlines are used across the organization.
- Identify patterns across the organization to help them improve their compliance programs and internal processes and procedures.

Organizations normally escalate incoming hotline reports to a designated contact in the organization with no connection to the issues raised in the report, such as a member of the compliance department. The contact will investigate the report, provide feedback, and take appropriate action according to the Whistleblowing Directive and applicable implementing law. However, using a centrally run hotline does not preclude local entities from participating in investigations.

Many organizations use centralized hotlines because they are:

- Often more cost-effective and efficient.
- Can be customized for local user interfaces.
- A useful internal reporting channel for whistleblowers, regardless of their location or language.
- Consistent with the Whistleblowing Directive's objectives.
- A tested means of facilitating effective, confidential, and independent investigations and protecting against retaliation.

By processing all reports centrally, compliance experts within an organization are able to:

- Triage and prioritize reports in order of importance or severity.
- Determine whether to use investigators from the local entity, a corporate affiliate, or a third party to conduct the investigation.
- Identify patterns in reports and organization-wide compliance issues.
- Maintain consistency and impartiality when handling investigations across the entire organization.

The ECEG's Position on Local Hotlines

The European Commission often seeks advice from outside sources when preparing legislative initiatives, including expert groups, studies, European agencies, green papers, public consultations, and hearings. The ECEG is a consultative body established by the European Commission to provide advice and expertise. The ECEG's advice is not legally binding and the European Commission can decide whether or not to follow it. For more information on the European Commission's expert groups, see European Commission: Register of Commission Expert Groups and Other Similar Entities.

In its June 14, 2021 meeting, the ECEG noted that large corporate group associations were requesting clarity on whether establishing one central reporting channel per corporate group would meet the Whistleblowing Directive's requirements. In response, the ECEG stated that:

- Whistleblowing Directive Article 8(3) requires each legal entity in the private sector with 50 or more workers to establish channels and procedures for internal reporting.
- No exception to this rule exists for legal entities belonging to the same corporate group.
- Member states permitting corporate groups to establish only a centralized reporting channel have incorrectly transposed the Whistleblowing Directive in their implementing laws.

(ECEG Minutes, at 2.)

The ECEG set out the following reasons for its interpretation:

- **Accessibility.** Local reporting channels will be more accessible to whistleblowers and will encourage external persons, such as self-employed contractors or former employees, to report their concerns.
- **Closer relationship to whistleblower.** Local reporting channels will enable the entity to designate an impartial person or department that has a work-related relationship with the whistleblower to follow up on the report, provide feedback, and maintain communication. In addition, whistleblowers may have the right to request an in-person meeting, which would be difficult for an organization to coordinate from another country.
- **Differentiation between member states.** Since member states may implement the Whistleblowing Directive in different ways with varying requirements, a centrally run hotline will not be feasible.
- **Whistleblower choice.** Though Article 8(6) permits entities with 50 to 249 workers that are part of a corporate group to pool their resources for receiving whistleblowing reports and carrying out investigations, this only applies if, among other things:
  - reporting channels remain available at the subsidiary level; and
  - follow up measures and feedback to the reporting person take place at the subsidiary level.

  (ECEG Minutes, at 2.)

The ECEG has made clear that the option to report at the subsidiary level must always remain available, and that whether to report centrally or locally is a decision left to the whistleblower. The ECEG did not elaborate on the details of the required local hotlines or their operation.

Practical Difficulties with the ECEG's Position on Local Hotlines

The ECEG's interpretation may result in practical implications that member states should consider when transposing the Whistleblowing Directive into their national laws. Member states should also consider whether the ECEG's interpretation furthers the Whistleblowing Directive's objectives such as impartiality, confidentiality, and preventing retaliation.

Accessibility of Centrally Run Hotlines with Local Reporting Lines

The ECEG does not view centralized hotline providers offering local reporting channels as sufficient. The ECEG's interpretation of Whistleblowing Directive Article 8(3) requires each legal entity in the private sector with 50 or more workers to establish their own internal reporting channels and procedures and does not exempt entities belonging to the same corporate group. The ECEG concedes that the Whistleblowing Directive does not prohibit centrally run hotlines or require organizations to separate local hotlines from the central hotline, but argues that organizations must set up separate local hotlines in addition to any centrally run hotlines to ensure accessibility to all whistleblowers.

There is an unhelpful lack of detail in the ECEG Minutes as to how the ECEG expects organizations to comply, in practice, with its interpretation of the Whistleblowing Directive. This approach is likely to be unworkable for large corporate groups with many subsidiaries that have centralized finance, legal, compliance, and human resources functions which are not present in each legal entity, with ultimate responsibility sitting at the group or parent level.

Centrally run hotlines can be just as accessible to whistleblowers as locally run hotlines. Organizations

routinely use third-party service providers to operate their hotlines across multiple jurisdictions, and a local hotline is usually indistinguishable from a centrally run hotline at the user interface level. Third-party service providers offer access to 24/7 local phone lines as well as other communication channels in multiple languages, and cover all of the group's local entities. It is reasonable to view these centrally run hotlines as already operating at a local level and accessible to potential whistleblowers.

Impartiality and Conflicts of Interest

The ECEG argues that organizations must make local hotlines available to whistleblowers because the organization must designate an impartial person or department in the legal entity with which the whistleblower has a work-related relationship. This person or department will follow up on the report, provide feedback, and maintain communication with the whistleblower (ECEG Minutes, at 2.)

It is not clear whether a "work-related relationship" refers to a direct employment or engagement relationship at local entity level or in a broader context. The Whistleblowing Directive does not specify that a work-related relationship only exists at a local entity level, but focuses on designating an impartial person to ensure independence and that no conflict of interest exists (Recital 56, Whistleblowing Directive).

In order to ensure an independent and impartial investigation, concerns raised through whistleblowing hotlines are often more appropriately investigated elsewhere in the organization (such as the parent level) with additional resources including impartial investigators. Centrally run hotlines offer this flexibility, which would be harder to achieve if an organization had to operate separate local hotlines. Centralized whistleblowing models also more likely to ensure consistent decision making compared to a local level where outcomes may differ depending on the subsidiary. There is often a lower risk of confidentiality breaches and actual or perceived retaliation when a corporate parent manages a whistleblowing investigation than at a local entity level. One of the member states made this argument to the ECEG, but it did not change the ECEG's position (ECEG Minutes, at 3).

Resource and Information Sharing and Consistency

The Whistleblowing Directive permits legal entities with 50 to 249 workers to share resources for receiving and investigating reports (Article 8(6), Whistleblowing Directive). This provision was drafted in response to Belgium's request to legislators to raise the threshold requiring legal entities to set up a hotline from 50 to 250 workers (Council of the European Union: Declarations from Member States (Jan. 25, 2019), at 3 to 4). The Whistleblowing Directive does not address resource sharing for larger entities and it is impossible to know whether this was an oversight or intentional. The Whistleblowing Directive's legislative history does not provide any further guidance on why the law excluded entities with over 250 workers from the resource sharing provisions.

The ECEG takes the position that affiliates can benefit from parent company resources only if hotlines are available at the local level and all follow-up measures occur at the local level. This goes beyond the language of Article 8(6), which does not impose these conditions on resource sharing.

The ECEG also states that when "structural problems" affect more than one entity in a corporate group and the local entity cannot effectively address the problem, the entity must obtain the whistleblower's consent to share information about the report with its affiliates. If the whistleblower does not consent, they may withdraw the report and issue a report to a member state authority. This requirement is not included in the Whistleblowing Directive and may prevent corporate groups from learning about and effectively investigating serious reports that affect several entities (for example, if the member state authority concluded the issue raised in a whistleblower report was too minor for it to pursue).

Legal entities in a corporate group should be able to benefit from shared group resources and information about reports that impact multiple entities. Many currently operating centrally run hotlines are set up with local phone lines and other communication channels in multiple languages staffed by trained independent personnel. These channels are all easily accessible to potential whistleblowers in the relevant jurisdictions, and arguably already are "local" hotlines that meet the Whistleblowing Directive's objectives.

Maintaining duplicative hotlines at the local and group levels may result in unnecessary administrative, organizational, and financial burdens on organizations, with no tangible benefit to internal or external whistleblowers. If organizations are now required to also set up locally run hotlines, some may no longer maintain their centrally run hotline channels. This may ultimately reduce the protection of EU workers, as centrally run hotlines are available to all group entities, including those with fewer than 50 workers. It may also weaken corporate groups' overall compliance programs if information sharing and consistency between entities is restricted.

Differences in Member State Implementing Laws

The ECEG expressed concern that centrally run hotlines will not be feasible due to differing requirements in member state implementing laws. However, many

multinational organizations successfully operate hotlines in compliance with a myriad of local requirements and have been doing so since the U.S. Sarbanes-Oxley Act of 2002 came into effect. These programs function to maintain impartiality and confidentiality and cover their affiliates around the globe in local languages and in compliance with local requirements without the need for separate local hotlines.

For more information on operating global whistleblower programs, see Practice Note, Whistleblower Hotlines and Non-US Data Protection Law Requirements: Overview.

Member State Implementation of the Whistleblowing Directive

The Whistleblowing Directive requires member states to implement it into their national laws by December 17, 2021. Denmark, Sweden, and Portugal are the only countries to adopt their implementing laws as of the date of this Article. Denmark and Sweden have legislated for centrally run hotlines without the need for additional channels at the local entity level, in contrast to the ECEG's opinion, however:

- Danish legislators included a caveat permitting the Danish Ministry of Justice to repeal this provision if it is incompatible with the EU and member states' positions (Article 9(3), Whistleblower Protection Act, Law No. 1436 of June 29, 2021 (in Danish)).
- Swedish legislators specified that corporate group entities may share procedures related to receiving reports and investigating the reported violations, but not contacting the whistleblower (Chapter 5, Section 3, Whistleblower Protection Act, No. 2020/21:193 (Sept. 29, 2021) (in Swedish)). The scope of this exemption is unclear and further guidance is welcomed. A Swedish affiliate may need to explicitly authorize the parent company or other third parties, such as law firms or advisers, to centrally manage the entire whistleblowing hotline and communicate with the whistleblowers on behalf of the affiliate.
- The newly adopted Portuguese law only states that legal entities with 50 to 249 workers can share resources for receiving and following up on reports, including with affiliates in different countries (Article 8, Whistleblower Protection Law no. 91/XIV of 2021 (Nov. 30, 2021) (in Portuguese)).

The European Commission may bring infringement proceedings against member states whose implementing laws do not conform to its interpretation of the Whistleblowing Directive. If the member states do not change their laws on the European Commission's request, the Court of Justice of the European Union has the authority to decide the matter.

Draft implementing laws in other member states currently reflect a patchwork of approaches. The draft laws in Lithuania, Latvia, Greece, Ireland, and Slovakia do not address a corporate group's ability to rely solely on a centrally run hotline. Others, such as the draft laws in Spain, Portugal, and Estonia, have restated the Whistleblowing Directive's requirements without explicitly permitting or prohibiting reliance solely on centrally run hotlines.

Next Steps for Corporate Groups

It is an uncertain time for multinational corporate groups as they work to develop internal reporting channels consistent with the Whistleblowing Directive's requirements. In the meantime, these organizations should consider:

- Tracking the status of member state laws implementing the Whistleblowing Directive.
- Reviewing draft implementing laws for provisions on central and local hotlines and resource sharing within corporate groups.
- Monitoring for further regulatory guidance from the European Data Protection Board, European Commission, and member state authorities.
- Ensuring that their whistleblowing hotlines:
  - provide required information about the hotline and the privacy policy in local languages;
  - support reporting in local languages; and
  - have technical capabilities to support compliance with legal requirements in all applicable member states.
- Updating decisionmakers and key stakeholders on relevant developments as member states implement the Whistleblowing Directive and regulators publish guidance. Organizations should provide cost estimates of various scenarios to educate decisionmakers and stakeholders on the cost of implementing a new or revamped whistleblowing hotline.
- If the organization participates in lobbying efforts, contacting relevant authorities and legislators to share their thoughts on the ECEG's interpretation of the Whistleblowing Directive.

For more information on implementing a whistleblower program in the EU, see Practice Note, Whistleblower Programs and EU Data Protection Law Compliance: Overview: Implementing a Whistleblower Program.