EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Directorate C: Fundamental rights and Union citizenship
Unit C2: Fundamental rights policy

Minutes of the fifth meeting of the Commission expert group on Directive (EU) 2019/1937
(videoconference)

14 June 2021

1. Adoption of the draft agenda

The Chair (Maria Rosaria Mollica, Unit C.2 of DG JUSTICE) welcomed the participants to the meeting. The draft agenda was adopted without comments.

2. *Tour de table* on the transposition progress

Member States reported on ongoing transposition work, including the measures envisaged to ensure compliance with the obligation to set up internal reporting channels in the private sector and whether or not it is envisaged to make use of the possibility to extend the transposition period of such obligation for medium-sized companies (Article 26(2)).

The Commission ("COM") recalled that by providing that "Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up", Article 8 (1) of Directive 2019/1937 ("the Directive") imposes on Member States a double obligation: i) to transpose the obligation contained therein and ii) to ensure that the obligation is actually respected, *i.e.* that internal channels are in place within private and public entities; this will be checked in the context of the transposition assessment.

The principle of sincere cooperation, in and of itself, requires monitoring and sanctions where the channel is not created in breach of the attendant obligation. It is up to the Member States to determine the enforcement mechanism to use.

As indicated by Member States, compliance mechanisms envisaged include regular monitoring by supervisory authorities, the possibility to impose fines and bans on subsidies, the possibility to bring action before court by any interested person (including NGOs), and the establishment of a representative body of employees monitoring compliance from inside the company.

Around half of the Member States are planning to make use of the possibility provided in the Directive to extend the deadline for medium-sized companies to set up internal channels until 17 December 2023. One Member State expressed a concern: as external channels have to be in place by end 2021, the postponement of the deadline for setting up internal channels within medium-sized companies by December 2023 could pose a disadvantage for this category of company. COM clarified that the Directive *allows* Member States to postpone the deadline for medium-sized companies by December 2023, but Member States are not obliged to make use of such possibility.

COM advised that, where Member States can already foresee that the Directive will not be transposed sufficiently ahead of the 17 December 2021 deadline, it would be useful to launch information campaigns shortly, in order to inform companies in due time of the requirements that they need to satisfy by 17 December 2021.

3. Presentation on specific topics based on "Frequently Asked Questions" to the Commission

a. Internal reporting channels in the private sector - rules and allowed flexibilities

COM reported that large corporate group associations are reaching out to argue in favour of an interpretation of the Directive according to which it is sufficient if a corporate group has one central reporting channel.

As a main point, COM stressed that Article 8(3) lays out the basic rule: each legal entity in the private sector with 50 or more workers is required to establish channels and procedures for internal reporting. **There is no exception from this rule exempting from this obligation legal entities belonging to the same corporate group. Therefore, national transposition laws that would allow corporate groups to only establish reporting channels in a centralised manner at group level would constitute an incorrect transposition of the Directive**.

The rationale behind this requirement is the reporting channels' efficiency, including by ensuring their proximity to the whistleblower. To facilitate reporting, channels must be easily accessible to the whistleblower; ii) comprehensive information on their use and on the procedures for reporting externally to competent authorities must be provided on the website and/or premises of the legal entity where the whistleblower works (see recital 59 *in fine*); iii) an impartial person or department must be designated in the legal entity with which the whistleblower has a work-related relationship to follow up on the report, give feedback and maintain communication with the whistleblower; iv) whistleblowers may have the right to request a physical meeting in the company with which they have a work-related relation. Moreover, the Directive encourages legal entities to open reporting channels also to external persons having a work-related relation with the company in question (self-employed, contractors, sub-contractors etc. – see Article 8(2), 2nd sentence). For these persons, the proximity of internal channels and procedures would be even more important because they are only familiar with the company they work with/for.

The reasons why a central group solution would not be sufficient apply *a fortiori* where companies of the same group are located in different Member States, as relevant rules may differ depending on the applicable national transposition law. The differences will likely concern, for example, the material scope (Article 2(2)); the application of more favourable provisions (e.g. shorter deadline for acknowledgment of receipt or for feedback, rewards for whistleblowers, etc. – Article 25); rules on aspects of the internal reporting channels and procedures for follow up, such as on methods for providing feedback (see by analogy Art. 13(c)); the organisation of internal reporting channels and procedures for follow up of the consultation of/agreement with the social partners (Article 8(1)).

At the same time, COM explained in detail **the different flexibilities provided for by the Directive** as regards the setting up of internal channels:

(1) Parent company's channels should remain open to the workers of subsidiaries/affiliates

Recital 55 indicates that internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates ('the group'). This will cater for cases where persons working in a subsidiary would decide to report to the parent company of the group. In such cases, the parent company should accept and follow up on the report.

(2) Possibility for medium-sized companies to pool resources as regards the receipt of reports and any investigation to be carried out according to Article 8(6) of the Directive

Article 8(6) of the Directive grants the possibility for medium-sized companies (companies with 50 to 249 workers) to pool resources as regards the receipt of reports and any investigation to be carried out. This applies also to companies that belong to the same group. The responsibility to maintain confidentiality, to give feedback, and to address the reported breach remains however with each medium-sized company concerned.

(3) Application of Article 8(6) of the Directive within a group where compliance programmes are organised at headquarter level

Based on Article 8(6), it can be compatible with the Directive that medium-sized subsidiary companies in a corporate group benefit from the investigative capacity of the parent company. This applies only provided that: i) reporting channels remain available at subsidiary's level, ii) clear information is provided to the reporting persons as to the fact that a designated person/department at headquarters level would be authorised to access the report (for the purpose of carrying out the necessary investigation), and the reporting person has the right to object and to request investigations at the level of the subsidiary; iii) any other follow up measure is taken and feedback to the reporting person is given at subsidiary level.

(4) If the report reveals a structural problem or a problem affecting two or more entities of the group

Where the report received by a subsidiary of a group reveals a structural problem or a problem that affects two or more entities of the group and that can therefore not be effectively addressed by the subsidiary where the report was made, to ensure the effectiveness of the Directive it would be compatible with the spirit of the Directive that the person/department designated to maintain communication with the reporting person (Article 9(1)(c)) will inform him/her of such conclusion and ask for her/his agreement to report the facts to the company within the group which would be able to effectively address the breach, whilst recalling that if s/he does not agree to that, she/he in any case has the possibility to withdraw the report submitted internally and report externally to the relevant competent authority. The duty of confidentiality under Article 16 of the Directive will continue to apply.

(5) Outsourcing the operation of internal channels according to Article 8(5) of the Directive

Article 8(5) of the Directive sets out the possibility to outsource the operation of the channels. It should be noted however that this possibility refers to *third* parties that are *external* to the legal entity with which the reporting person has/had/is about to have a work-related relationship, thus excluding entities within the same corporate group (see recital 54 "Such third parties could be external platform providers, external counsel, auditors, trade union representatives or employees' representatives"). Moreover, the third parties' role does not extend to giving follow up (see recital 54 "third parties could also be authorised to receive reports of breaches on behalf of legal entities in the private and public sector…").

In the ensuing discussion, a Member State expressed doubts about the obligation to ensure proximity between the subsidiary and the whistleblower and the requirement of offering a physical meeting. Referring to the pandemic situation, the question whether a videoconference would be sufficient in this context, came up. COM pointed to the fact that Article 9(2) provides that reporting should be possible in writing *or* orally, or both and that a physical meeting is a form of oral reporting. Where entities provide the possibility for oral reporting, they should also provide for the possibility of a physical meeting upon request by the reporting person, within a reasonable timeframe.

Another Member State asked if a specific person/department should be designated to receive and follow up on reports at the level of each company. COM recalled that, according to Articles 8(3) and 9(1)(c), within each company with 50 or more workers there needs to be a reporting channel and designated persons or department competent for following up and maintaining communication with and provide feedback to the whistleblower, to ensure proximity.

Upon request for clarification on the types of third parties to which internal reporting channels can be outsourced, COM referred to the examples mentioned in recital 54.

A Member State expressed concern that the Directive prohibits larger companies within a group from having central reporting channels and suggested that those might be more efficient because an internal channel at the level of a subsidiary is closer to whistleblower/his surrounding and, potentially, there is a greater risk that the subsidiary could be involved in the reported breach.

COM clarified that the Directive does not require that central channels at group level be suppressed where they exist; rather it requires that, in addition, reporting channels be set up in all companies of the group with 50 or more workers (whilst allowing for the flexibilities set out above). It will then be for the whistleblower to make an informed decision on whether to report to the subsidiary or to the central level. In fact, a corporate policy instilling trust in the channel set up at parent company level, coupled with information publicising its availability and encouraging whistleblowers to report directly at central level, may result in whistleblowers naturally turning to those reporting channels. However, the possibility to report at subsidiary level must always remain effectively available: where to report must remain a judgment call of the whistleblowers (just as they have the choice to report directly externally).

b. Penalties for breaches of the confidentiality requirement under Article 23(1)(d) of the Directive

The question has arisen whether Member States are required to provide for specific penalties for breach of the duty of maintaining the confidentiality of the identity of reporting persons under Article

23(1)(d) or whether it would be sufficient to provide for the penalties laid down in the General Data Protection Regulation ("GDPR").

COM confirmed that disclosing the identity of the whistleblower is at the same time "data processing" within the meaning of the GDPR. However, to ensure the effectiveness of the protection under the Directive, the penalties for disclosing the identity of a whistleblower need to be more severe than the penalties generally provided for in national legislation for any other disclosure of personal data under the GDPR, because disclosing the identity of the whistleblower could potentially expose the whistleblower to retaliation and weaken the overall trust in the system. COM stressed that Member States should provide for penalties for breaches of the confidentiality requirement in Article 16 of the Directive as *lex specialis*, i.e. laying down penalties that pertain specifically to the violation of this provision of the Directive.

A candidate country asked for specific guidelines and thresholds for such penalties. COM clarified that this falls within the procedural autonomy of each Member State; Union law only requires that sanctions be proportionate, dissuasive and effective.

c. Certification according to Article 20(1)(b) of the Directive

As regards the certification procedures referred to in Article 20(1)(b) (and recital 90) of the Directive, COM underlined the following aspects. Where, under the law of a Member State, granting protection under the Directive is made subject to the certification of a person as "whistleblower" by a competent authority on the basis of an assessment of the compliance with the requirements of the national legislation transposing the Directive, persons must have the right to contest their non-certification before the courts (see recital 103).

Moreover, the certification cannot be a *conditio sine qua non* to be granted protection under the Directive (e.g. if a whistleblower is sued by the employer for defamation/breach of non-disclosure agreement, s/he must be able to rely on the protection of the Directive even if s/he had not requested/obtained the certification as whistleblower). In short, the certification must not be an additional condition (a constitutive requirement) for protection. Certification must give legal certainty in a positive way, but its lack cannot, in itself, deprive the person of protection.

Additionally, certification following a report to a competent authority can be accompanied by a monetary reward, but it remains the responsibility of Member States to encourage internal reporting pursuant to Article 7 of the Directive (see also recital 47). Certification, therefore, cannot have the effect of discouraging internal reporting.

A Member State reported that, under their national law, when the competent authority receives a report, it has to assess if this actually falls within the scope of the law on whistleblower protection within 10 days. If certification is not granted, there will be no further investigations of the report as a case of whistleblowing. COM underlined, that, even in the case of denial of the certification, this does not deprive the person of the possibility to bring the case to court to claim protection under the Directive. It will then be for the court to assess the case on the basis of its specific circumstances.

d. The seven-day period for the acknowledgment of receipt in Article 9(1)(b) and 11(2)(b) of the Directive

COM explained that the 7 days' time-limit to acknowledge receipt of reports in Articles 9(1)(b) and 11(2)(b) of the Directive is to be meant as calendar days, given that the Directive does not provide otherwise. Relevant in this regard is the general Regulation on the rules applicable to periods, dates and time limits (Regulation 1182/71), which explains in its Article 3(3) that the periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days. No discretion is left to Member States.

4. AOB

Questions evolved around the conditions under which direct public disclosures are allowed.

One Member State asked if it is possible to allow direct public disclosures to media without requiring that the conditions of Article 15(1) be observed, by relying on Article 25 of the Directive. COM clarified that a transposition law that would not reflect the conditions of Article 15(1) would not

constitute a correct transposition of the Directive. The conditions set in Article 15(1) are meant to strike a fair balance between the public interest to bring to light breaches that may harm the public interest and the right to freedom of speech and of information on the one hand, and to protect the interests of the persons concerned by the disclosure on the other hand (including reputational damage).

Upon enquiry about the scope of Article 15(2), COM explained that this provision is intended to allow Sweden to maintain – in parallel with the system of the Directive – its constitutional regime, aimed at respecting freedom of expression and information, which provides, under certain conditions, specific forms of protection to civil servants who make disclosures directly to the press. As a consequence, a person who meets the relevant conditions may choose to disclose information to the press under the Swedish constitutional system and benefit from the protection of that system (instead of relying on the protection regime of the Directive). It was agreed that further information about the Swedish constitutional regime covered by Article 15(2) would be provided at the next meeting of the group.

Another question asked was whether a report could also be made by a lawyer on behalf of the whistleblower. COM explained that a lawyer is not a person in a work-based relationship with the entity where the breach occurred, therefore the lawyer would not need any protection under the Directive. If the use of a lawyer is intended for the whistleblower to remain anonymous, Article 6(3) would apply, entailing that, if the whistleblower is identified as being the source of the report and suffers retaliation, s/he will benefit from the protection of the Directive if the conditions for protection are met.

Before concluding the meeting, COM informed the participants about the June meeting of the Network of European Integrity and Whistleblowing Authorities ("NEIWA" https://www.huisvoorklokkenluiders.nl/samenwerking/internationaal/europees-netwerk).