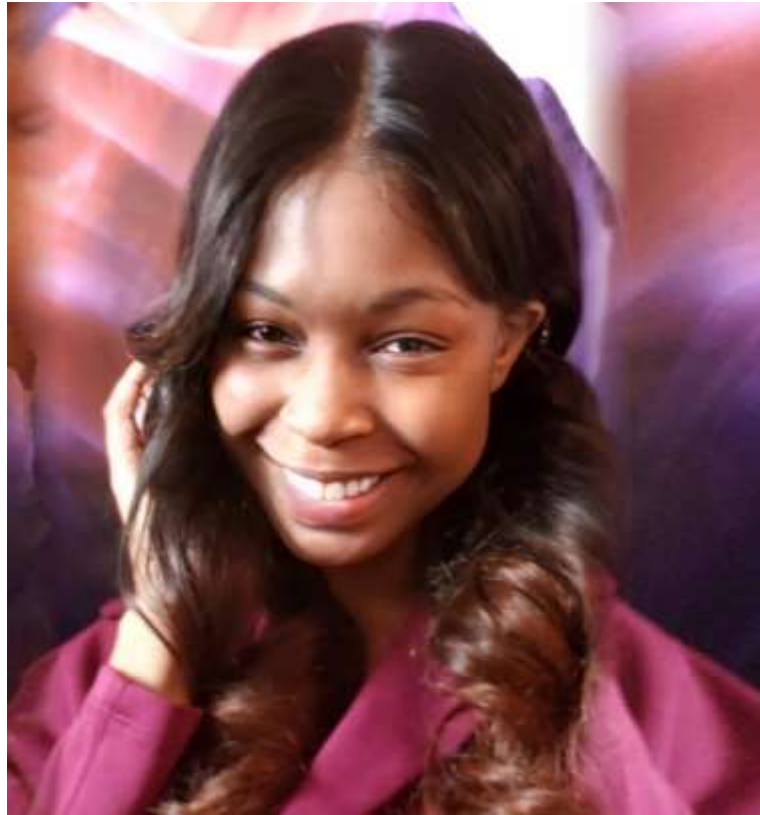




The EU Whistleblower Directive:

A status update and practical considerations for employers in Europe



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The ELA Presents



The EU Whistleblower Directive

A status update and practical considerations for employers in Europe

Date: June 10, 2021

Time: 3:00 p.m. Central Europe Summer Time /9:00 a.m. Eastern

Duration: 1 hour



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Description

First Name*

Last Name*

The EU Whistleblower Directive sets a legal framework of minimum standards to provide whistleblowers with greater protection. The deadline for EU member states to incorporate this legislation into national law is December 17, 2021. In this special session, we will provide you

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For the following event, note the resources below will be provided in English:

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Resources provided by the speakers and their firms:



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Overview

The EU Whistleblower Directive

- Differences in whistleblower procedure for EU law and Non-EU law
- The Directive vs. law concerning whistleblowing
- Employee and employers' role in whistleblower procedure
- The EU Whistleblower Directive: protection and support measures

General Remarks – The Netherlands



Danny Vesters
Partner
Boontje Advocaten
Netherlands

General remarks

- EU Directive 2019/1937 of 23 October 2019 on the protection of individuals who report breaches of Union law ("the Directive").
- On 7 December 2019 the Directive came into force and must be implemented by 17 December 2021.

The Netherlands

- The (Dutch) Act on the House for Whistleblowers (AHW)
- The Dutch 'House for Whistleblowers'
- On 30 July 2020, the draft bill amending the Act on the Protection of Whistleblowers, and the accompanying draft Explanatory Memorandum were launched for consultation, which consultation closed on 10 September 2020.

The Netherlands - Proposed Amendments AHV



Danny Vesters
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Proposed amendments AHV (because of the Directive)

- Personal scope
- Internal reporting
- External reporting
- Protection and support measures

The Netherlands - Privacy



Danny Vesters
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Boontje Advocaten
Netherlands

- When recording a whistleblowing report, every detail is essential.
- The European Data Protection Board guidelines on whistleblowing
 - Implement defined channels for internal and external reporting
 - Ensure confidentiality of the information received
 - Apply the principle of data minimization
 - Identify what personal information means
 - Apply the two-step procedure to inform each category
 - Maintain anonymity when responding to rights of access request
 - Assess the appropriate competence of the recipient
 - Define proportionate conservation periods
 - Implement both organizational and technical security measures



S P E A K E R

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AUGUST DEBOUZY

Whistleblowing under French law



Philippe Durand
Partner
August Debouzy
France

- Sapin II Act (2016) : obligation to set up a whistleblowing procedure into companies with more than 50 employees
- Today, France has not started implementing the Directive

Employees and employers' obligations according to French law



Philippe Durand
Partner
August Debouzy
France

- **Reporting procedure for employees :** « cascade system » with 3 levels
 - Internal reporting to the company
 - External reporting to the relevant administrative or judicial authority or a professional organization
 - Public reporting to the press or media
- **Employers' obligations :**
 - Confidentiality of the whistleblower's identity
 - Prohibition of retaliation, sanctions or discriminatory against the whistleblower

Differences between the Directive and the French law concerning whistleblowing



Philippe Durand
Partner
August Debouzy
France

- Smaller material scope in EU law
- Larger personal scope in EU law
- “Cascade system” of the reporting procedure is optional in EU law as the whistleblower can choose between the internal and external channel



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**BEITEN
BURKHARDT**

Germany - Status Quo



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- Germany has no specific rules governing the situation of whistleblowing
- Whistleblowing cases are mostly handled by the labor courts based on accessory contractual obligations and the principle of good faith, both governing employment relationships in Germany (case-by-case basis)
- No explicit protection for whistleblowers against dismissal or other forms of retaliation
- No obligation for employers to set-up whistleblowing reporting systems
- Impact on data privacy regulations (GDPR) and criminal law apart from employment matters

Germany - Implementation Process



Peter Weck
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Beiten Burkhardt
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- Since 2008 a total of six attempts have been made under German legislation to initiate binding rules concerning whistleblowing (all failed)
- In view of the EU directive 19/1937, an initial draft has been produced by the Federal Ministry of Justice, but has not yet been introduced by the Government into the legislation process (back in November 2020); so called Hinweisgeberschutzgesetz - HinSchG (Act on the Protection of Informants)
- Overview HinSchG: system of internal / external channels to use for employees (freedom of choice); anonymous approach possible only for internal channels; internal channels only mandatory for companies with 50+ employees (250+ from 2023); no protection for employees making false allegations intentionally or with gross negligence (burden of proof lies with the employer)
- This draft is under review and highly disputed within the Government and by opposing parties; the initial draft remains in most parts relatively close to the EU directive, but in some respects, it oversteps the mark, e.g., covering all kinds of criminal offence as well as administrative misdemeanors.
- Problem: Federal Election on 26 September 2021



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Handling of whistleblowing in Switzerland



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- Legislative project to explicitly regulate whistleblowing in Switzerland failed last year, after 12 years of debates in Swiss parliament
- Accordingly, whistleblowing is not explicitly regulated in Swiss law – primarily we rely on case law and the general principles of Swiss employment law, such as the employee’s duty of loyalty and the employer’s duty of care

Duties of employees and employers according to Swiss law in connection with whistleblowing



Polia Rusca
Senior Associate
Froriep
Switzerland

Employee:

- According to case law the employee is entitled to address and report irregularities
- Reports must be based on reasonable grounds and may not be malicious
- Observance of “*cascade system*”, established by the Swiss Federal Supreme Court – an employee must always first report internally. Only if the internal report is unsuccessful, he/she may then address the competent external authority. And only if the external authority does not react within a reasonable period the employee may – and only if the circumstances warrant it – turn to the public
- Disregard of this cascade system: Breach of duty of loyalty, ordinary termination may be justified (in severe cases even a termination with immediate effect)

Duties of employees and employers according to Swiss law in connection with whistleblowing



Polia Rusca
Senior Associate
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Switzerland

Employer:

- Required to react to such reports
- Employer must protect the personalities of both, the person making the report (disclosure of identity only in exceptional cases) and the person accused in connection with an irregularity (right to be informed about the allegations made and the measures already initiated, right to be heard)
- Protection of reporting person from retaliation
- Data processing: Only data related to the employment relationship may be processed, if data is processed it must be recognizable for the respective employee in advance

Differences between EU law and Swiss law concerning whistleblowing



Polia Rusca
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- Contrary to the EU member states there are no specific regulations which specify how to deal with whistleblowing – especially for the whistleblower this leads to a certain legal uncertainty.
- Accordingly:
 - No duty to create an internal whistleblowing reporting office
 - No explicit special protection for employees who make a good-faith report
 - No relief from the burden of proof for the employee if it comes to the legitimacy of a termination of the employment relationship
- Important difference concerning the question to whom the reports are to be addressed. While employees in the EU have the choice of contacting either the internal whistleblowing reporting office or the competent external authority directly, employees in Switzerland must always adhere to the cascade system and contact their employer first



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History and current situation of whistleblowing for Turkey



Nisa Saraç
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- Brief summary of the ILO Convention titled Termination of Employment Convention and the first and most known decisions of the European Court of Human Rights on Whistleblowing. Their bindingness under Turkish law.
- Whistleblowing legislation still has not been regulated specifically in Turkey except for the termination prohibition clause which has been revised within the framework of the ILO Convention but is not sufficient.
- Supreme court decisions and its bindingness on whistleblowing.

The adaptation of EU Directives on whistleblowing in Turkey and differences from the EU Directive



Nisa Saraç
Associate
Karadağ Law Office
Turkey

- Turkey adapting its laws and regulates new laws in line with the EU Directives within the framework of harmonization with the EU. However, no legal regulation on whistleblowing has been put on the parliamentary agenda so far
- Differences between EU law and Turkish law concerning whistleblowing

Questions?



Thank You!

M O D E R A T O R



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Speakers

Moderator



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Presenter



Philippe Durand
Partner

Presenter



Peter Weck
Partner

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