



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS

Directorate C: Fundamental rights and rule of law  
**Unit C.2: Fundamental rights policy**

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

**10 November 2021**

**1. Adoption of the draft agenda**

The Chair (Georgia Georgiadou, Unit C.2, DG JUSTICE) welcomed the participants. The draft agenda was adopted without comments.

**2. *Tour de table* on the transposition progress**

The majority of Member States reported that they would not be able to meet the deadline of 17 December 2021. The Chair expressed disappointment and strongly encouraged Member States to speed up the process. The Chair recalled that, in case they do not transpose the Directive in time, in addition to infringement proceedings, Member States are exposed to a number of unforeseeable, potentially serious legal consequences, such as direct vertical effect for those provisions that are clear, precise and unconditional; possible horizontal direct effect concerning the relations between private companies and their employees, in light of the evolving case law of the CJEU, and State liability if there is a causal link between their failure to transpose and the damages suffered by individuals. On the notification of the transposition measures, the Chair recalled that Member States are required to provide sufficiently clear and precise information and in particular to indicate, for each provision of the Directive, the national provision(s) ensuring its transposition, referring to the CJEU judgment in case *Commission v Belgium* (C-543/17, paras 51 and 59). The Commission services (“COM”) would provide a template for a correlation table that Member States may find useful to notify such measures.

**3. Discussion on specific topics**

***a) Internal reporting channels and the modalities of outsourcing their operation under Article 8(5) and Article 9(1)***

COM responded to outstanding questions regarding the obligation on private legal entities to set up internal channels. In particular, it clarified that the term ‘legal entity’ in Article 8(5) refers to entities with their own legal personality. COM also clarified that, in case the parent company of a corporate group has a central reporting channel in addition to the channels per legal entity as foreseen by the Directive, and a worker in a subsidiary reports through that channel (a possibility explicitly reflected in recital 55) the reporting person would be protected. The Directive aims to facilitate and encourage whistleblowing by providing the reporting persons with the choice to decide whether to report at the level of the parent company or of the subsidiary where they work, depending on the specific circumstances of each case.

Regarding the calculation of the staff headcount as regards the threshold of 50 workers mentioned in Article 8(9) and related issues, COM recommended to consult the Commission Recommendation of 6 May 2003, concerning the definition of micro, small and medium-sized enterprises (2003/361/EC)<sup>1</sup> and the (updated) 2020 User guide to the SME definition<sup>2</sup>.

<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003H0361>

<sup>2</sup> <https://op.europa.eu/en/publication-detail/-/publication/79c0ce87-f4dc-11e6-8a35-01aa75ed71a1>

Concerning the possibility of “outsourcing” the operation of reporting channels, COM recalled that, under Article 8(5) – which has to be read in conjunction with recital 54 – third parties may be entrusted with the receipt and acknowledgment of reports and, depending on the type of services they offer, possibly also with the conduct of investigations (eg. in the case of auditors or law firms). However, the obligation to address and follow up on a breach identified remains with the legal entity concerned and cannot be outsourced. Whilst the follow-up is decided by the legal entity concerned, the third parties may also be tasked to transmit the feedback to the reporting persons. The entities should provide clear information on the role and tasks of the third parties.

Upon enquiry about whether Article 8(5) would allow the operation of the reporting channels for a corporate group by a company within this group, COM recalled the outcome of the discussion at the 5<sup>th</sup> meeting of the expert group, highlighting that this provision concerns the outsourcing of reporting channels to *external* third parties – who have therefore no link of affiliation with the company – and *does not include addressing the breaches identified* – therefore, the third parties cannot fully substitute themselves in the obligations of the entities on behalf of which they operate the channels.

The guarantees of independence and confidentiality need to be reflected in the contract of the entity with the third party, and in case of a breach of related obligations, it is a shared responsibility of the third party and the legal entity (cf. the word ‘also’ in Article 8(5)). The regime that would best protect the rights of the reporting persons would be one of several and joint liability, so that the reporting person can act against the entity concerned, against the third party, or against both.

Member States asked whether the possibility to share internal channels, provided for in Article 8(9) third paragraph, could also extend to companies owned by municipalities. COM pointed out that, as a derogation, this provision must be interpreted strictly and cannot be applied to further public entities beyond “municipalities” and “joint municipal authorities”. At the same time, COM recalled that Member States may make use of Article 8(9), second paragraph, to exempt from the obligation to provide for internal channels public entities with fewer than 50 workers.

***b) The scope of the derogation under Article 26(2)***

As regards the scope of derogation under Article 26(2), COM clarified that it applies only to private legal entities for which the Directive establishes the obligation to have reporting channels for the first time, and not to those that are already under such an obligation by virtue of pre-existing sectorial EU rules on whistleblowing, in particular on financial services and on the prevention of money-laundering and terrorist financing. The application of such pre-existing rules should not be affected by the Directive (cf. Article 3(1) and recital 20).

***c) Anonymous reporting (Article 6(2) and (3))***

COM indicated that providing for the possibility to report anonymously may in some cases encourage whistleblowing. Moreover, its added value is increasing, as current technology allows for a two-way communication - and therefore for asking follow up questions - also with whistleblowers wishing to remain anonymous. According to Article 6(2), Member States are free to decide whether to require that public authorities accept and follow up on anonymous reports – or not –. However, if they do impose such an obligation, the authorities need to comply with all the requirements of the Directive related to the handling of reports (acknowledgement of receipt, follow-up, feedback to the whistleblower etc.) and to provide clear information on this aspect, so as to ensure legal certainty for potential whistleblowers. In response to questions about the acceptance of anonymous reports through external channels, COM indicated that, whilst different rules on the acceptance of anonymous reports may apply to different competent authorities, the rules should be determined by law and not left to the discretion of each authority.

COM also recalled, that, irrespective of whether anonymous reports are accepted and followed up, anonymous whistleblowers who meet the requirements of the Directive must be protected if their identity is revealed (Article 6(3)).

One Member State enquired about how cross-border transfers of reports should be handled, in particular if a report is transferred from one Member State that does allow anonymous reporting to a Member State that does not. COM clarified that Article 11(6) does not provide for cross-border transfers, but only applies to transfers between authorities of the same Member State. The fact that information on a breach with a cross-border dimension was received through anonymous reporting would not affect the use of cooperation mechanisms, as mentioned in recital 72.

**d)        *Public disclosures (Articles 15 and 22)***

Following up on the discussion at the 5<sup>th</sup> meeting of the expert group on the conditions under which direct public disclosures are allowed:

i) COM highlighted that the Directive pursues a balanced approach between the interests of employers and the public interest (recital 33). The Directive also balances the protection of whistleblowers with the right for protection of persons concerned (cf. Article 22, Article 25(1) and recital 104). As a result, a rule that would allow for direct public disclosures also in other cases, beyond the ones cited in Article 15(1)(b), cannot be considered as a more favourable provision that may be introduced or retained in line with Article 25(1).

ii) COM and a representative of Sweden provided detailed information about the very specific principles enshrined in the Swedish Constitution on the protection - under certain conditions - of public servants making disclosures to the press. Article 15(2) (as is the case of other rules in different EU acts) allows Sweden to maintain this constitutional regime unaffected; it is not a generally applicable possibility for derogation from Article 15(1).

**e)        *Measures for the protection of persons concerned (Article 22)***

COM drew attention to recital 100, which illustrates in more detail the content and objective of Article 22. In response to a question, COM pointed out that this provision would not prevent employers from taking disciplinary measures against an employee who is a “person concerned” by a report or disclosure of a breach, whilst respecting that person’s rights, as recalled in this provision.

**4.        AOB.**

COM referred to the latest declaration of the Network of European Integrity and Whistleblowing Authorities (“NEIWA”): <https://www.huisvoorklokkenluiders.nl/samenwerking/internationaal/europees-netwerk>