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A suggested New Year's Resolution for the EU Member States still getting around to implementing the EU Whistleblowing Directive: Please include national competition law

Agnieszka Blonska, Judith Feldner (EISENBERGER & HERZOG Rechtsanwalts GmbH) · Wednesday, January 12th, 2022

In the traditional spirit of resolving to do better in the new year, there is some low-hanging fruit for the EU Member States who have not finalized their national implementation of the EU Whistleblowing Directive: Cover national competition law as one of the protected areas.

The Directive itself (Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law; "Whistleblowing Directive") protects whistleblowers who report breaches of certain Union acts. Employees can report breaches in many areas of EU law, including public procurement, financial services, product safety, transport safety, and protection of the environment. In addition, the Whistleblowing Directive includes breaches of Union competition and State aid rules. It does not, however, cover national competition law.

Although the EU lacks the power to cover national competition law in the Whistleblowing Directive, EU Member States should not hesitate to cover it in their implementing laws. It makes sense for a number of reasons:

1. Competition law is an important area to cover. The Whistleblowing Directive intends to protect employees against retaliation so that they will report potential legal violations in the workplace that could threaten or harm the public interest. The Directive states, "*Specifically, the protection of whistleblowers to enhance the enforcement of Union competition law, including concerning State aid, would serve to safeguard the efficient functioning of markets in the Union, allow a level playing field for business, and deliver benefits to consumers. As regards competition rules applying to undertakings, the importance of insider reporting in detecting competition law infringements has already been recognized.*" (Recital 17). In other words, the suggestion for the Member States to cover national competition law is not radical because the EU specifically intended for breaches of competition law to be covered. The EU does not have the power to include national competition law, but the Member States can.

2. It's uncomplicated. Employees will already be able to report violations of EU competition law,

and on a practical level, they won't be able to differentiate between EU and national competition law, so they'll be reporting both. If they suspect price-fixing, they are going to report it, whether it violates EU or national law or both. They should be protected regardless. Otherwise, good luck explaining when something "may affect trade between Member States" (see the 16 pages of guidelines that even experienced competition lawyers have to consult every now and then, and national court cases referred to the ECJ dealing with this question[1]. In the end, it's less complicated to cover national competition law than to split hairs over the differences.

3. This is not "gold-plating". Covering national competition law would not impose significant additional burdens or obligations. "Gold plating" refers to national implementing laws that take EU legislation to a new level, markedly expanding the substance or consequence of the law. Rather, covering national competition law here would close a gap in interpretation and application, reducing confusion and avoiding problems down the road.

4. It may already be covered in many instances, based on the facts. Pursuant to the Whistleblowing Directive, reporting persons to qualify for protection provided that (i) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of the Whistleblowing Directive and (ii) they reported either internally, externally or – under certain circumstances – made a public disclosure.[2] Taking a whistleblower-friendly interpretation of this provision, one could argue that even if the national whistleblowing law does not explicitly protect reports on violations of national competition law, the whistleblower would still be protected as he or she had reasonable grounds to believe that the information fell within the scope of the law (simply as it is hardly possible to distinguish between EU competition law and national competition law). Unfortunately, only time and litigation will tell on this matter. Better to settle the question at the outset and just include national competition law.

5. The extension of protection only by companies implementing a whistleblowing system does not solve the problem. Companies are free to decide which areas of law they want to include in their whistleblowing systems, and they can exceed legal requirements. While this approach is, of course, highly welcomed (in fact, it is standard practice that company whistleblowing systems apply to far more areas of law than provided in the Whistleblowing Directive), it cannot substitute the inclusion of national competition law in the national whistleblowing law. A big topic to consider in this discussion is protection measures the Member States have to grant the whistleblower if he or she falls into the scope of the Whistleblowing Directive (which he or she would not when reporting breaches of national competition law). The Whistleblowing Directive states that Member States shall take necessary measures to protect the whistleblower from any form of retaliation and ensure that remedies and full compensation are provided for damage suffered by whistleblowers. Most importantly, Member States shall ensure that whistleblowers have access to support measures, like for example information and advice on procedures and remedies available; effective assistance from competent authorities and legal aid in criminal, and cross-border civil proceedings. Member States shall also ensure, in accordance with the Charter of Fundamental Rights of the European Union, that persons concerned fully enjoy the right to an

effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defence.[3] Although many of these aspects (like the right to an effective remedy and to a fair trial) already and regardless of the circumstances are – or should be – part of national legal systems, for a whistleblower, an inaccurate distinction between EU and national competition law may still bring a significant disadvantage when it comes to his or her protection.

The Whistleblowing Directive was supposed to be transposed into national law by 17 December 2021. However, only a few EU jurisdictions did so (e.g. Denmark, Sweden, and Portugal). In the majority of the EU member states, public and private organizations do not yet know what their national laws will cover. Some already have whistleblowing systems, mostly voluntary, and need to know what updates will be required by the law. Others do not have a system in place but have already selected a provider for a digital whistleblowing system that is not yet live as so many aspects of the implementation of the directive into national law are still unclear. It's time for the Member States to pass these laws, and we entreat them to include national competition law for a good start to the New Year!

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[1] See some relevant ECJ preliminary rulings: 13.07.1966, 56/64 and 58/64 – *Consten und Grundig*; 17.11.1972, 8/72 – *Cementhandelaren*; 31.05. 1979, 22/78 – *Hugin*.

[2] See Art 6 of the Whistleblowing Directive.

[3] See Chapter VI (Protection Measures) of the Whistleblowing Directive.

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