JUNE 25
2022

Weekend EU LAW LIVE Edition

stay alert | keep smart

Nº105

DANIEL WASSER & VAGELIS PAPAKONSTANTINOU

WHISTLEBLOWING DIRECTIVE NOT YET TRANSPOSED

OBLIGATION FOR CORPORATIONS TO IMPLEMENT WHISTLEBLOWING OR 'SO WHAT ABOUT IT'?

www.eulawlive.com

Whistleblowing Directive not yet transposed

Obligation for corporations to implement whistleblowing or 'so what about it'?

Daniel Wasser[1] and Vagelis Papakonstantinou[2]

On 9 October 2019, the EU legislature adopted Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law (the Whistleblowing Directive) (3). According to Article 26(1) of the Directive, the Member States were obliged to transpose its provisions into national law by 17 December 2021.

Even though the deadline has now passed, several Member States have failed to transpose the Directive. On 9 February 2022, the European Commission decided to send letters of formal notice due to the lack of transposition of the Directive, to Portugal and Sweden (4). The Commission has also sent letters of formal notice to other Member States, including Belgium, Finland, France, Germany, Ireland, Italy, Spain, and the Netherlands. Even though the Member States are aware the deadline has not been met (for example the Federal Ministry of Justice published a first draft of a 'Hinweisgeberschutzgesetz (HinSchG) (5)'), the actual adoption of the laws transposing the Whistleblowing Directive has also often failed to occur.

Facing the fact that several Member States failed to transpose the Whistleblowing Directive, it is questionable whether corporations are willing to already implement the measures stipulated in the Whistleblowing Directive. If the Directive would have been adequately implemented, this would have likely given rise to several additional costs for corporations, such as new reporting lines, hiring or training employees, mandating consultants, and so on. Corporations might therefore decide not to take the Whistleblowing Directive into account until it has been transposed within their host Member State. For the moment, they might be tempted to think – 'So what about the Whistleblowing Directive?; Does it really matter for now?'

1. Daniel Wasser, LL.M. is a Ph.D. researcher being supervised by Prof. Papakonstantinou at the Vrije Universiteit Brussels. His research mainly focuses on aspects of compliance, data protection and employment law. Moreover, he is an Attorney at Law in Labour& Employment at Rödl & Partner based in Nurnberg.
2. Prof. Papakonstantinou is Professor at the Vrije Universiteit Brussel. His research focuses on personal data protection, both from an EU and an international perspective, with an emphasis on supervision, in particular Data Protection Authorities' global cooperation. Other research topics include cybersecurity, digital personhood and software. He is also a registered attorney with the Athens and Brussels Bar Associations. Since 2016 he has been serving as a member (alternate) of the Hellenic Data Protection Authority. From 2013 to 2016 he served as a member of the Board of Directors of the Hellenic Copyright Organization.
3. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17).
4. To be retrieved here.
5. To be retrieved here.

The following Long-Read briefly analyses the measures stipulated by the Whistleblowing Directive and will then argue that, regardless of transposition into national law, adjusting the corporate Compliance-Management-Systems (CMS) to the Whistleblowing Directive is necessary. Considering the variety of legal obligations imposed by different provisions in the Member States, this Op-Ed mainly focuses on German law.

I. Whistleblowing as an indefinable term?

1. Whistleblower as disclosing of unlawful practices by staff

1. To the public the term whistleblowing is straightforward: it means the specific act of leaking internal information. On the contrary, the language used in the Whistleblowing Directive is technical and does not use or legally define the term 'whistleblowing' (6). Despite the difference in minor details, the underlying definition of whistleblowing that the Directive seems to rely on does contain the same aspects as the generally used definition.

According to Article 5(7), a whistleblower is a natural person *reporting* or publicly disclosing information concerning *legal breaches* in the context of his or her work-related activities. 'Reporting' in this context means the oral or written communication of information on breaches (Article 5(3)). A 'breach' in the sense of the Directive is any unlawful act or omission related to acts of the European Union in specific areas or any act defeating the object or the purpose of acts of the EU. In other words, whistleblowing under the Whistleblowing Directive is defined as any internal or external disclosure related to breaches of EU laws by internal persons.

6. Abazi, The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?, *Industrial Law Journal (IJL)*, Volume 49, year 2020, p.640 (645).

Whistleblowing is thus to be characterised by three aspects (7). Firstly, whistleblowers are part of the corporations' internal organisation. Secondly, the whistleblower recognises illegal, dishonest or illegitimate practices by other employees within the corporations. Finally, the whistleblower typically discloses information via a defined channel with good intentions. In both the Whistleblowing Directive as well as academic literature a distinction is made between internal and external whistleblowing.

2. Compliance Management Systems not uniformly defined either

Furthermore, the terms 'compliance' and 'Compliance Management Systems' (CMS) are not easily understood either. Besides the fact that compliance has been a challenge for the Management Boards of corporations for as long as governments have imposed regulations on businesses and other organisations, there is as of yet no comprehensive understanding of the term 'compliance' and which mechanisms and interventions are mandatory. In other words, compliance is still not a uniformly defined term and the measures necessary to ensure it are not defined either.

Besides the fact that compliance has been a challenge for the Management Boards of corporations for as long as governments have imposed regulations on businesses and other organisations, there is as of yet no comprehensive understanding of the term 'compliance' and which mechanisms and interventions are mandatory

3. Compliance, Compliance-organisation and CMS?

However, from the authors' perspective, three terms are to be used separately. First, compliance as a general term is understood in a functional sense describing a corporate organisation that has a preventive approach and minimises liability risk (8).

Second, the term CMS describes a measure or system intended to ensure compliance with the rules relevant to the company. According to the German Institute of Public Auditors (Institut der Wirtschaftsprüfer, IDW), for instance, CMS generally contain seven measures: compliance-culture, -goals, -risks, -programme, -organisation, -communication and information, as well as -monitoring and improvement.

The CMS leads to the final concept of (compliance-) organisation. Compliance-organisation, which can be easily confused with a CMS, is a measure of the CMS aiming to effectively reduce the risk of legal violations being committed from within the company. The objective of a compliance organisation is to establish structures that enable compliance with the laws and regulations established by the corporation itself.

7. E.g. outlined by *Berndt/Hoppler*, Whistleblowing - einintegralerBestandteileffektiver Corporate Governance, Frankfurt am Main: dfv-Mediengruppe, Betriebs-Berater (BB), 2005, p. 2623 (2624).
8. *Rohner* in Gummer, MünchnerAnwaltshandbuchPersG, Munich: C.H. Beck, edition 3, 2019, § 3 no. 7.

II. Actions necessary regardless of transposition in Member States

From a current perspective, adjusting the corporations' CMS prior to transposing the Whistleblowing Directive into the Member States' national laws is not only recommendable but legally required.

1. No legal requirements according to EU law

According to Article 288(3) TFEU, Directives – even if they do not regulate the form that the national law should take or the methods to achieve the relevant objectives – are binding as to their results. Moreover, Directives do not exclusively affect Member States. If a Member State fails to transpose the provisions of a Directive, the Directive is directly applicable with respect to its content. The rulings of the Court of Justice only require that the Directives' provisions are unconditional and precise (9).

However, other rulings of the Court of Justice establish that their applicability (mainly) occurs in cases concerning the relationship between individuals and a Member State ('vertical direct effect'), but is not applicable in proceedings between individuals: the obligation is not imposed on one party, and an enforceable right is not conferred on the other ('the no horizontal direct effect rule') (10).

2. Obligation to implement Compliance Management Systems even if the Whistleblowing Directive has not been transposed

However, the lack of obligation does not lead to an absence of an obligation to implement whistleblowing into the corporations' CMS. In Germany, for instance, the legal obligation of on the management board is – on the basis of § 93 par. 1, 2 of the German Stock Corporation Act (AktG) – to ensure the legal security of the company. In this context, the management board must ensure that the company is organised and supervised appropriately (11). To comprehensively fulfil this obligation, the management board is obliged to set up a CMS aiming to control risk (12). Moreover, the DCGK stipulates an obligation on managing boards to regularly inform the Supervisory Board, promptly and comprehensively, about any compliance issues (no. 3.4 DCGK) requiring an adequate compliance management system throughout the corporation (13).

The specific design of the CMS differs with respect to the type, size and organisation of the corporation, the regulations to be observed, geographical placement, as well as suspicious cases from the past.

9. Court of Justice, e.g. judgment of 19 November 1991 - Cases C-6/90 and 9/90.
10. See e.g., *Dashwood*, From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?, *Cambridge Yearbook of Legal Studies*, Volume 9, year 2007, p. 81 (82)).0
11. Munich Regional Court I, Decision from December 10,2013 - 5HK O 1387/10.
12. Munich Regional Court I, decision from December 10, 2013 - 5HK O 1387/10.
13. *Bissels/Lützeler*, Compliance-Verstöße im Ernstfall: Der Weg zu einer verhaltensbedingten Kündigung, Betriebs-Berater (BB) 2012, 189 (192).

It is furthermore considerable that labour courts will interpret national law in the light of the Whistleblower Directive, at least now that the implementation period has expired (14). In the academic literature, it is in this context considered that the principle of 'effet utile' applies, according to which the application of national law must not make it practically impossible or excessively difficult to ensure the effectiveness of EU law (15). Whistleblowers who have been dismissed may thus already be able to invoke various protective provisions of the Whistleblower Directive (16).

Labour courts will interpret national law in the light of the Whistleblower Directive, at least now that the implementation period has expired

In other legislations, whistleblowing is part of a functioning CMS. As an example, the regulations of the §1514A.(a) US Sarbanes-Oxley Act (SOX) also require the establishment of a functioning internal reporting and control system and its documentation.

3. Possibility to freely construct the CMS in smaller corporations

If a corporation is not mandatorily obliged to implement a specific CMS due to legal requirements (for example banks), the corporation is free to decide using its own judgement, depending on the content and structure of the system aiming to prevent breaches of laws within the corporation. The corporations' CMS can thus be structured around the specific legal obligations that apply to the organisations within which they have been established. The fact that the corporations' CMS is not uniformly defined enables smaller corporations or those with a lower risk profile – to implement an adequate CMS solely containing a commitment to compliance by the management and a code of conduct (17).

Whistleblowers who have been dismissed may thus already be able to invoke various protective provisions of the Whistleblower Directive

14. Croonenbrock/Hansen, Die europäische Whistleblower-Richtlinie: Eine (nahende) Compliance-Herausforderung für die Unternehmenspraxis, Arbeitsrecht-Aktuell (ArbRAktuell), year 2022, p. 139 (140).
15. Dzida/Granetzny, Die neue EU-Whistleblowing-Richtlinie und ihre Auswirkungen auf Unternehmen, Neue Zeitschrift für Arbeitsrecht, year 2020, p. 1201 (1204).
16. Croonenbrock/Hansen, Die europäische Whistleblower-Richtlinie: Eine (nahende) Compliance-Herausforderung für die Unternehmenspraxis, Arbeitsrecht-Aktuell (ArbRAktuell), year 2022, p. 139 (140).
17. Kremer a.o./Bachmann, Deutscher Corporate Governance Kodex, edition 8, year 2021 A.2 no. 4.

4. General aspects of a CMS

As already stated, the German IDW stipulates that a CMS generally contains seven measures (listed above). Several additional aspects of a CMS are necessary in the academic literature (18) including risk analysis, a work organisation preventing conflicts of interest (dual control principle), an ombudsman, codes of conduct, a documentation system, a compliance department carrying out audits, a Data Protection Officer, and regular staff training. Analysing these measures, however, is beyond the scope of this article and has to be carried out on another occasion.

Comparing these measures to other laws, the aspects of compliance management systems barely differ (19). In 2017 (updated in 2020), for example, the US Department of Justice published a guide titled 'Evaluation of Corporate Compliance Programs' (guideline) (20). The guideline provides practical advice for designing an effective and efficient CMS intending to provide greater transparency and legal certainty for companies to have an effective CMS (21). The categories are: Analysis and Remediation of Underlying Conduct, Autonomy and Resources, Policies and Procedures, Risk Assessment, Training and Communications, Confidential Reporting and Investigation, Incentives and Disciplinary Measures, Continuous Improvement, Periodic Testing and, Third-Party Management, Mergers and Acquisitions, Incentives and Disciplinary Measures as well as Investigation of Misconduct.

In the United Kingdom, the Ministry of Justice published a guidance entitled 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing' (Guidance) (22). This Guidance contains six measures: proportionate procedures, top-level commitment, risk assessment, due diligence, communication, as well as monitoring and review.

5. Whistleblowing is already a part of CMS in larger corporations

Besides the fact that the measures stipulated in the specific guidelines differ in the details, focusing on whistleblowing, reporting, investigation or monitoring is always a necessary aspect of any CMS. In the academic literature as well as in practice, several elements are acknowledged to be necessarily part of an adequate CMS within larger corporations (see I.3.). In this respect, a measure to enable whistleblowing is acknowledged as a necessary part of a CMS (23).

18. Giving an overview: *Dendorfer-Ditges* in Moll, Münchner Anwaltshandbuch Arbeitsrecht, Munich: C. H. Beck, edition 5, 2021, § 35 n. 24; *Thüsing/Forst* in Thüsing, Beschäftigtendatenschutz und Compliance, Munich: C.H. Beck, edition 3, 2021, § 2 no. 41.
19. This part is significantly inspired by *Wiedmann/Greubel*, Compliance Management Systeme – Ein Beitrag zur effektiven und effizienten Ausgestaltung, Corporate Compliance (CCZ), year 2019, page 88, (93).
20. To be retrieved at: download (justice.gov), last checked on 1 May 2022.
21. *Wiedmann/Greubel*, Compliance Management Systeme – Ein Beitrag zur effektiven und effizienten Ausgestaltung, Corporate Compliance (CCZ), year 2019, p. 88, (p. 93).
22. To be retrieved at: The Bribery Act 2010 - Guidance (justice.gov.uk), last checked on 1 May, 2022.
23. E.g. an excerptoftheliterature: *Brinkmann/Blank*, Umsetzungspflichten für Unternehmen aus der EU-Whistleblowing-Richtlinie, Frankfurt am Main: dfv Mediengruppe Betriebs-Berater (BB) 2021, 2475 (2475; *Dendorfer-Ditges* in Moll, Münchner Anwaltshandbuch Arbeitsrecht, Munich: C. H. Beck, edition 5, 2021, § 35 n. 24; *Thüsing/Forst* in Thüsing, Beschäftigtendatenschutz und Compliance, Munich: C.H. Beck, edition 3, 2021, § 2 no. 41; *Coglianese/Nash* in The Cambridge Handbook of Compliance, Cambridge: Cambridge University Press, 2021, part VII, no. 39.2.

Finally, the obligation to implement whistleblowing into the corporates' CMS is stipulated by so-called 'soft laws' (for example by the German Corporate Governance Code (24)). The provisions stipulated by the DCKG are not binding. Nonetheless, if a German stock corporation (AG) does not comply with the provisions of the DCKG, the corporation is obliged to explain the reasons for being non-compliant ('comply or explain' according to § 161 AktG). Finally, according to the Guidance related to the UK-Bribery Act, reporting of bribery including 'speak up' or 'whistle blowing' procedures is also necessary (25).

If the internal reporting system is inappropriate, employees will likely use external reporting systems causing damage to the corporations' reputation

6. Additional practical considerations

If the internal reporting system is inappropriate, employees will likely use external reporting systems causing damage to the corporations' reputation. Functioning internal reporting systems can additionally play a decisive role in an employee's decision to choose an internal or external reporting system. Any implementation of internal reporting systems additionally requires a certain period of time, and coordinating the measures with the works council is – depending on national co-determination laws – necessary as well.

Establishing an internal reporting system prior to the enactment of Member State laws will also enable corporations to develop best-practice models as well as to train employees regarding the procedure of dealing with reporting

Establishing an internal reporting system prior to the enactment of Member State laws will also enable corporations to develop best-practice models as well as to train employees regarding the procedure of dealing with reporting.

III. The Whistleblowing-Directive's scope of application

The purpose of the Whistleblowing-Directive is, according to Article 1, to enhance the enforcement of EU law and policies in specific areas providing a high level of protection for persons reporting breaches of EU law.

24. To be retrieved here.
25. Guidance, p. 22, to be retrieved at: The Bribery Act 2010 - Guidance (justice.gov.uk), last checked on 1 May, 2022.

In addition, the Whistleblowing-Directive not only applies to persons defined as employees according to Article 45(1) TFEU (Article 4(1) lit. a)) but also to several other persons reporting breaches of laws. The personal scope of the Whistleblowing Directive also contains for instance shareholders (Article 4(1) lit. c)) and any other person working under the supervision and direction of contractors, subcontractors and suppliers (Article 4(1) lit. d)). Finally, the Whistleblowing Directive's personal scope contains former employees (Article 4(2)) and is applicable in the private as well as public sector (Article 4(1)). The material scope of application, however, is limited to specific violations (Article 2). According to Article 2, the Whistleblowing Directive lays down minimum standards facing breaches in the sectors of (for example) public procurement, financial services, products and markets or protection of privacy and personal data, and security of network and information systems.

IV. Obligation to implement internal reporting channels

According to the Whistleblowing Directive, internal and external reporting channels (Articles 7f., 10f.) as well as public disclosures (Article 15) are mandatorily to be set by national laws (a three-tiered model, as described by Abazi) (26).

In general, private sector corporations with more than 50 employees are obliged to implement internal reporting channels (Article 8(3)). To decrease the work, corporations with a maximum of 249 employees are able to cooperate in using reporting channels (Article 8(6)).

Article 9(1) lit. (a) – (g) in particular stipulates that the procedures for internal reporting and follow-up shall include designed and secured channels for receiving the reports, an acknowledgment of receipt within seven days, the designation of an impartial whistleblowing department dealing with reports, as well as the obligation to provide feedback within a reasonable timeframe. In this respect, the reporting – depending on the transposing laws – can be done in writing, orally or by both means (Article 9(2)).

Moreover, according to Article 48 of Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities ('LED-Directive') (27), national authorities will be obliged to implement whistleblowing hotlines with respect to data processing in these authorities.

26. Abazi, The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?, *Industrial Law Journal (IJL)*, Volume 49, year 2020, p. 640 (p. 645).
27. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

V. Creating internal whistleblowing channels in practice

There is no 'one size fits all' solution (28). In smaller corporations, a corporate employee filling a dual role will be able to report to the management board directly (29). Whether a corporation uses an internal solution in the form of a compliance officer, legal department or another department, or uses an external contact can be individually decided (30). With respect to the possibility to use external contacts, the most popular options are an external hotline, mailbox-based telephony systems, web-based reporting systems, as well as ombudspersons (31).

VI. Implementing whistleblowing into the CMS

Yet the remaining question is how to implement whistleblowing into an existing or initially created CMS. Prior to starting the implementation, in order to successfully implement a whistleblowing system, the requirements for the system should be clearly defined and organisational prerequisites created. In this respect, the corporation should define whether the act of 'blowing the whistle' is carried out via an online tool, hotline or a completely different way.

When using a digital whistleblowing system, the corporation may use standard texts that are pre-filled into the input masks. However, it is necessary that these masks are individually adaptable to ensure that all relevant questions can be addressed and queried (32). In addition, reporting categories must be defined, which serve as an initial assignment or topic categorisation. And there is a large number of standards which, although not legally binding, can serve as guidance when designing a compliance management system (33).

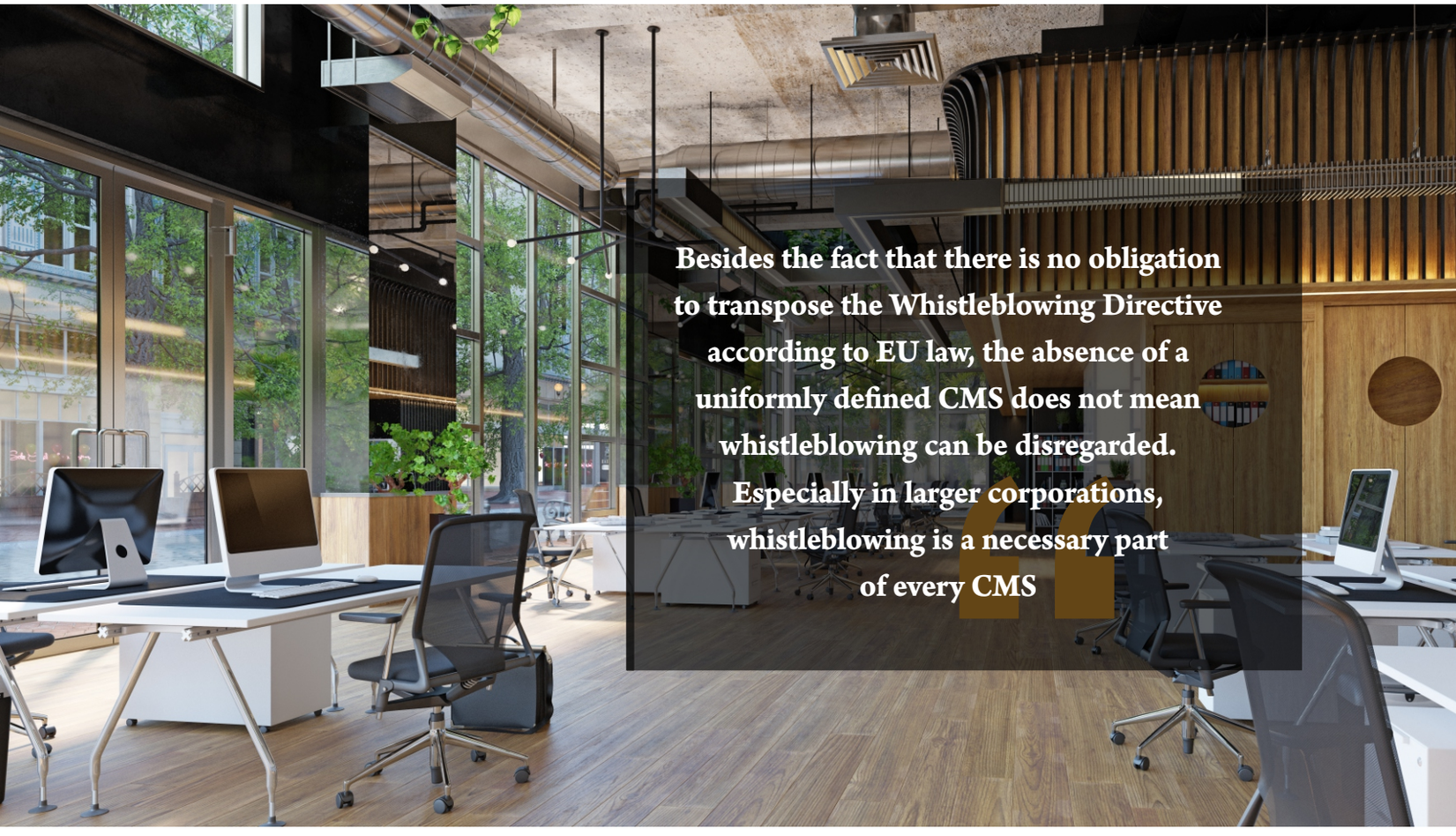
Finally, the corporation can freely decide whether employees are obliged to use the corporations' whistleblowing system in any case where there is knowledge about a potential breach of laws. If a specific obligation is intended, the corporation may implement this obligation – depending on the structure – for example, via collective agreements , collective bargaining agreements (CBA), or an individual contractual agreement.

VII. Conclusion

In the present perspective, the initially asked question is to be answered with 'the Whistleblowing Directive matters'. Besides the fact that there is no obligation to transpose the Whistleblowing Directive according to EU law, the absence of a uniformly defined CMS does not mean whistleblowing can be disregarded. Especially in larger corporations, whistleblowing is a necessary part of every CMS.

28. *Miege*, Einrichtung eines Hinweisgebersystems, Corporate Compliance (CCZ), year 2018, p. 45 (p. 46).
29. *Wiedmann/Greubel*, Compliance Management Systeme – Ein Beitrag zur effektiven und effizienten Ausgestaltung, Corporate Compliance (CCZ), year 2019, page 88, (91).
30. *Miege*, Einrichtung eines Hinweisgebersystems, Corporate Compliance (CCZ), year 2018, p. 45 (p. 46).
31. *Miege*, Einrichtung eines Hinweisgebersystems, Corporate Compliance (CCZ), year 2018, p. 45 (p.46).
32. Homann, EU-Hinweisgeberrichtlinie: Wie Unternehmen die Direktive effektiv umsetzen, Frankfurt am Main: dfv Mediengruppe, Compliance Berater (CB) 2021, 336, (337f.)).
33. *Homann*, EU-Hinweisgeberrichtlinie: Wie Unternehmen die Direktive effektiv umsetzen, Frankfurt am Main: dfv Mediengruppe, Compliance Berater (CB) 2021, 336, (337f.)).

Moreover, facing the fact that the Directive's provisions will undoubtedly affect corporations in the upcoming years, it is highly recommendable to adjust the corporations' CMS to the measures stipulated by the Whistleblowing-Directive without being transposed to Member State laws. Otherwise, the 'hustle and bustle' known with respect to implementing the measures of the General Data Protection Regulation (GDPR) will likely be repeated.



Besides the fact that there is no obligation to transpose the Whistleblowing Directive according to EU law, the absence of a uniformly defined CMS does not mean whistleblowing can be disregarded. Especially in larger corporations, whistleblowing is a necessary part of every CMS

News Highlights

20 to 24 June 2022

Intel seeks payment from Commission of default interest following the annulment of 1.06 billion euros fine

Monday 20 June READ MORE ON EU LAW LIVE

Official publication was made of an action brought by Intel against the European Commission in the case Intel *Corporation v Commission*, seeking payment of 593 million euros in default interest, following the annulment of the principal amount of the antitrust fine.

PhD researcher position in European and comparative procedure available at University of Nantes

Monday 20 June READ MORE ON EU LAW LIVE

The University of Nantes is hiring a PhD researcher for a project focusing on European and comparative procedure. The candidates must be able to work in English and French. The researcher will participate in different aspects of the project, ranging from publications to organising events.

Council publishes its position on updated rules for alternative investment funds managers

Monday 20 June READ MORE ON EU LAW LIVE

The Council agreed on its position on a review of the Alternative Investment Fund Managers Directive to improve the Capital Markets Union and strengthen investor protection. The legislative framework governs managers of hedge funds, and other alternative investment funds in the EU.

Council fosters reciprocity on third countries' public procurement markets: new regulation adopted

Monday 20 June READ MORE ON EU LAW LIVE

The Council adopted a regulation to promote reciprocity in access to international public procurement markets. This act will introduce a trade policy tool to ensure access and a level playing field for EU companies on third countries' public procurement markets.

Grand Chamber hearing to be streamed by Court of Justice today: assessment of genetic modification rules

Monday 20 June READ MORE ON EU LAW LIVE

The Court of Justice broadcasted a new hearing: *Confédération paysanne and Others (Mutagenèse aléatoire in vitro)* that was only accessible that day. The case concerns interpretation of rules on genetically modified organisms obtained by mutagenesis.

Three separate sanctions' actions in context of Russia-Ukraine war before General Court: now published

Monday 20 June READ MORE ON EU LAW LIVE

Three different actions before the General Court were lodged by applicants disputing sanctions imposed against them by the EU, brought by the Russian Direct Investment Fund; a Russian-Luxembourgish pilot; and the Uzbeki sister of a Russian businessman and oligarch.

Banca di Cividale's action against European Central Bank's decision to authorise other banks' controlling stakes in it published

Monday 20 June READ MORE ON EU LAW LIVE

An action before the General Court brought by Italian bank *Banca di Cividale SpA – Societa Benefit* against the European Central Bank was published in the Official Journal.

Commission investigates possible anti-competitive dissemination of misleading information by Vifor Pharma about its competitor's iron medicine

Monday 20 June READ MORE ON EU LAW LIVE

The European Commission opened a formal antitrust investigation to assess whether Vifor Pharma (Switzerland) has restricted competition by illegally disparaging its closest competitor in Europe on the market for intravenous iron treatment – Pharmacosmos (Denmark).

Court of Justice: arbitration proceedings in one State cannot block recognition of compensatory judgment in an insurance case from other State

Monday 20 June READ MORE ON EU LAW LIVE

The Court of Justice ruled in *London Steam-Ship Owners' Mutual Insurance Association* that the arbitration proceedings initiated in the United Kingdom cannot block the recognition of the Spanish judgment ordering the insurer to pay compensation for the damage caused by the oil spill.

Seventh progress report on EU-NATO cooperation published

Tuesday 21 June READ MORE ON EU LAW LIVE

The Council published the seventh report on EU-NATO cooperation that elaborates on the progress achieved between June 2021 and May 2022, demonstrating tangible deliverables in all areas of cooperation.

Preliminary ruling request on entitlement to compensation for Italian civil servants in case of voluntary resignation

Tuesday 21 June READ MORE ON EU LAW LIVE

A preliminary ruling request was published in the Official Journal: *Comune di Copertino*. The case concerns the entitlement to financial compensation for paid annual leave not taken before the end of the employment relationship in the event of voluntary resignation by a civil servant.

Council approves conclusion of partnership agreement between EU and New Zealand

Tuesday 21 June READ MORE ON EU LAW LIVE

A decision on the conclusion of a partnership agreement on relations and cooperation between the EU and New Zealand was adopted by the Council of the EU. This decision clears the path for the entry into force of the partnership agreement between the two parties by the end of July 2022.

EU-Gulf partnership: Council approves conclusions

Tuesday 21 June READ MORE ON EU LAW LIVE

The Council of the European Union approved conclusions on the EU's plans to build a strategic partnership of 'enhanced and deep cooperation' with the Gulf Cooperation Council and its member states, which is described as a 'key priority'.

Court of Justice clarifies limits when processing air passengers' data for combating terrorism and serious crime

Tuesday 21 June READ MORE ON EU LAW LIVE

The Court handed a judgment in *Ligue des droits humains*, addressing how should the balance between the rights of individuals and general interest be defined in the collection, storage, processing and analysis of a large amount of personal air passengers data for predictive purposes.

Detention regime of third-country nationals: AG Richard de la Tour's Opinion in Staatssecretaris van Justitie en Veiligheid

Tuesday 21 June READ MORE ON EU LAW LIVE

AG Richard de la Tour clarified whether Return and Reception Directives requires a court to assess if all conditions pertaining to detention have been met, including those where the foreign national has not disputed that compliance occurred, despite having had the opportunity to do so.

AG Rantos: bondholders with interdependent contractual relationships related to a bank can challenge Commission State aid decision concerning that bank

Tuesday 21 June READ MORE ON EU LAW LIVE

AG Rantos issued his Opinion advising to dismiss an appeal lodged by the Commission seeking annulment of General Court's judgment, which admitted an action against the Commission's decision declaring State aid granted by Italy to Banca Monte dei Paschi di Siena compatible with EU law.

Anti-discrimination law, residence rights, and basic income: preliminary ruling request published

Tuesday 21 June READ MORE ON EU LAW LIVE

A preliminary ruling by which a court in Napoli is seeking the interpretation of EU anti-discrimination law in social security matters was published: *Criminal proceedings against ND.*

Corporate Sustainability Reporting Directive progressing: co-legislators provisionally agree

Wednesday 22 June READ MORE ON EU LAW LIVE

An amending Directive on Corporate Sustainability Reporting, focused on more detailed (non-financial) reporting requirements and requiring large companies to report on sustainability issues, was provisionally agreed by the co-legislators the European Parliament and Council.

Commission publishes first assessment of Conference on the Future of Europe's proposals

Wednesday 22 June READ MORE ON EU LAW LIVE

The Commission published a Communication analysing the proposals stemming from the Conference on the Future of Europe. It comprises an assessment of what is needed to follow-up on the Conference's proposals, and an overview of the next steps, among others.

Protection and safety of journalists: Council conclusions

Wednesday 22 June READ MORE ON EU LAW LIVE

The Council approved conclusions which call for further actions to protect 'journalists and media professionals' in the context of an increasingly threatening environment for them preventing them from working freely and independently, as well as a precarious economic context.

Council and Parliament reduce limit values of persistent organic pollutants in waste

Wednesday 22 June READ MORE ON EU LAW LIVE

The Council and the Parliament reached a provisional deal concerning the revision of annexes to the persistent organic pollutant regulation in order to set further restrictions to the presence of these substances in waste.

Court of Justice: national rules can provide that employed Data Protection Officer can only be dismissed for serious reasons

Wednesday 22 June READ MORE ON EU LAW LIVE

The Court of Justice ruled in *Leistritz* that EU law does not preclude national regulations providing that an employer of a Data Protection Officer may only dismiss him or her for a serious reason.

Court of Justice clarifies temporal application of Competition Damages Directive in the context of Trucks cartel case

Wednesday 22 June READ MORE ON EU LAW LIVE

The Court ruled in *Volvo and DAF* Trucks that a five-year period to bring actions for damages and the presumption of harm under Directive 2014/104/EU are substantive provisions and cannot apply retroactively to cases originating before the national measures transposing the Directive.

General Court upholds Commission's decision prohibiting thyssenkrupp/Tata Steel merger

Wednesday 22 June READ MORE ON EU LAW LIVE

In *thyssenkrupp v Commission* (T-584/19), the General Court rejected thyssenkrupp's appeal against the Commission's decision that prohibited the proposed merger with another carbon and electrical steel products manufacturer, Tata Steel.

General Court dismisses Ryanair's action challenging recapitalisation of Finnair

Wednesday 22 June READ MORE ON EU LAW LIVE

The General Court handed down its judgment in *Ryanair v Commission (Finnair II; Covid-19)* (T-657/20), dismissing the action for annulment lodged by Ryannair against the European Commission's decision approving 286 million euros Finnish measure to recapitalise Finnair.

Commission proposes new regulation to reduce risks of pesticides and halve their use by 2030

Wednesday 22 June READ MORE ON EU LAW LIVE

The European Commission proposed new rules to reduce the use and risk of pesticides in the EU, delivering on the Farm to Fork Strategy objective of a fair, healthy and environmentally respectful food system.

Withdrawal of Austrian AAB Bank's authorisation as a credit institution upheld by General Court

Wednesday 22 June READ MORE ON EU LAW LIVE

The General Court ruled that the European Central Bank's decision to withdraw Anglo Austrian AAB Bank's authorisation as a credit institution is justified by the banks' serious breaches of the rules on anti-money laundering and countering the financing of terrorism (T-797/19).

Eurodac and screening regulations to improve asylum and migration frameworks: Council adopts negotiating mandates

Thursday 23 June READ ON EU LAW LIVE

The Permanent Representatives Committee adopted Council negotiating mandates on the amended Eurodac and the new Screening regulations – the first-stage texts on asylum and migration, based on the proposals presented by the Commission in the framework of the Pact on Migration and Asylum.

Commission's Communication: strengthening trade partnerships for greener and fairer economic growth

Thursday 23 June READ ON EU LAW LIVE

The Commission unveiled a new plan to enhance the contribution of EU trade agreements in protecting climate, environment and labour rights worldwide. The plan strengthens the implementation of trade and sustainable development aspects of EU's trade agreements.

Frontex Fundamental Rights Officer publishes 2021 Annual Report

Thursday 23 June READ ON EU LAW LIVE

The Frontex Fundamental Rights Officer released the annual report for 2021 providing an overview of the activities carried out by the Fundamental Rights Office during the last year.

ECtHR: no violation of right to respect for private life and correspondence by seizing documents during antitrust investigation

Thursday 23 June **READ ON EU LAW LIVE**

The European Court of Human Rights ruled in *Naumenko and SIA RIX Shipping v. Latvia* that there has been no violation of the applicants' right to respect for private life and correspondence during the search and seizure performed in relation to an antitrust investigation.

Council and European Parliament reach agreement on response to cross-border threats to health

Friday 24 June **READ ON EU LAW LIVE**

The Council and the European Parliament agreed on a draft regulation on serious cross-border threats to health. The Regulation strengthens preparedness and response planning, and sets out the rules for flexible surveillance systems.

European Council publishes conclusions on Ukraine, EU membership applications and external relations

Friday 24 June **READ ON EU LAW LIVE**

At the meeting held on 23 June 2022, the European Council adopted its conclusions concerning the situation in Ukraine, the membership applications of Ukraine, Moldova and Georgia, the membership perspective of the Western Balkans Balkans, and external relations.

Commission opens in-depth investigation in retail motor fuel markets

Friday 24 June **READ ON EU LAW LIVE**

The European Commission opened an in-depth investigation to assess the proposed acquisition of OMV Slovenija by MOL under the EU Merger Regulation. The Commission is concerned that the proposed transaction may reduce competition in the retail motor fuel markets in Slovenia.

Ombudsman: Council committed maladministration in refusal to grant full public access to legal opinion on EU-UK Trade Agreement

Friday 24 June **READ ON EU LAW LIVE**

The Ombudsman found that full access to an opinion of the Legal Service of the Council on the legal nature of the EU-UK Trade and Cooperation Agreement should be made available, in the context of a request and subsequent complaint made by a complainant.

Secret Slovakian surveillance operation was not lawful and violated applicant's right to respect for private life, ECtHR rules

Friday 24 June **READ ON EU LAW LIVE**

The European Court of Human Rights unanimously ruled in *Haščák v. Slovakia*, that Slovakia violated the applicant's right to respect for private and family life when it placed him as a subject of an unjustified secret surveillance operation.

Insights, Analyses & Op-Eds

Drawing on Context: Assessing Political Cartoons Following *Patrício Monteiro Telo De Abreu v Portugal*

by Lewis Reed

READ MORE ON EU LAW LIVE

Op-Ed on the European Court of Human Rights' judgment in *Patrício Monteiro Telo De Abreu v Portugal*, holding that freedom of expression was infringed by finding an applicant guilty of defamation due to the publication of satirical cartoons which targeted a politician. The author notes that the Court has now signalled a preference for narrowing the margin of appreciation granted to national authorities to limit 'political satire'.

Second Time Lucky? A second AG Opinion in Case C-530/20 SIA *'EUROAPTIEKA'*

by Elijah Granet

READ MORE ON EU LAW LIVE

Analysis of the two Opinions from Advocate General Szpunar in *SIA 'EUROAPTIEKA'*, concerning the Directive 2001/83/EC which lays out a clear framework for the regulation of advertising of 'medicinal products to the general public'. The AG's Opinions contain, in the author's view, a magnificently comprehensive analysis, interpreting the Directive from the textual, systemic, and teleological perspectives, but bringing 'bad news' to the pharma industry.

Lights off on supranational citizenship for UK nationals. Let the reckoning begin (*Préfet du Gers*, C-673/20)

by Francesca Strumia

READ MORE ON EU LAW LIVE

Op-Ed on the *Préfet du Gers* case in which the Court of Justice clarifies once and for all that it is the sovereign decision of a Member State upon withdrawing from the EU to switch off its citizens' supranational status. The author concludes that the ruling clears the ground to engage the questions of citizenship that Brexit raised but could not answer.

Lesson *almost* learnt: 1+1 does not equal anticompetitive effects when applying the Intel test in exclusive payments cases (Case T-235/18)

by Nora Lampecco

READ MORE ON EU LAW LIVE

Analysis of the General Court's judgment in *Qualcomm v European Commission*, which annulled the Commission's decision fining Qualcomm for abusing its dominance in offering payments to Apple for exclusive use of Qualcomm's chipsets in its device. The author considers that the General Court's review of the *Intel* test in *Qualcomm* saw it reasserting a strong case by case effect-based approach towards exclusivity payments abuses while rendering unclear the place of the five factors test previously set out in *Intel*.

Inland ports, logistics crisis and sustainability: the judgment of the Court of Justice in *Port de Bruxelles* (C-229/21)

by Vincenzo Zeno-Zencovich READ MORE ON EU LAW LIVE

Op-Ed on the *Port de Bruxelles* ruling in which the Court of Justice places the judgment, according to the author, well beyond the necessary interpretation of the relevant Regulations, in a complex context of development of European transport infrastructures and their adaptability to broader EU policies.

The General Court Confirms the UK's Group Financing Tax Exemption for Controlled Foreign Companies Is Illegal State Aid (*United Kingdom and ITV plc v Commission*, T-363/19 and T-456/19)

by David Pérez de Lamo READ ON EU LAW LIVE

Analysis of the General Court's dismissal of the UK's and ITV's applications for annulment of the Commission's decision of 2 April 2019 (SA.44896), which declared certain exemptions of the UK's anti-tax avoidance rules for Controlled Foreign Companies as illegal State aid. The author indicates that the judgment underlines the importance of Member States establishing consistent tax regimes, and of any deviation being duly justified on objective grounds.

Green Power and SCE Solar v Spain: Arbitral Tribunal Endorses Achmea Case Law for the First Time

by Trajan Shipley READ ON EU LAW LIVE

Op-Ed on the arbitral tribunal's award in *Green Power Partners K/S & SCE Solar Don Benito APS vs Spain*, which endorsed the Achmea case law and upheld Spain's intra-EU jurisdictional objection ratione voluntatis to arbitration proceedings pursuant to the Energy Charter Treaty. The author believes that it is a big legal victory for Spain, which has seen many intra-EU objections dismissed, as well as for the Commission, who traditionally submits amicus curiae briefs in these proceedings.

Second time around: German rules governing the taxation of outbound dividends again under the spotlight: *ACC Silicones* (C-572/20)

by Gerard Everaert READ ON EU LAW LIVE

Analysis of the Court of Justice's judgment in *ACC Silicones*, which found that the different requirements to be met by resident and non-resident companies to apply for a refund of German withholding tax breached the right to free movement of capital. The judgment confirms that evidentiary requirements should be set carefully so that they are in line with the principle of proportionality.

Library - Book Review By Luigi Lonardo

Edouard Dubout (Bruylant)

READ ON EU LAW LIVE

Droit Constitutionnel de l'Union Européenne

Review of the book that under the reviewer's opinion is a reflection about how classic concepts of constitutional law (constituent power, federalism, liberalism, fundamental rights) contribute to explaining the nature of the European Union. The reviewer considers that the book is simply indispensable for those with an interest in a comparative and theoretical study of EU constitutionalism, but also about the intellectual history of public law in Europe.

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com

ISSN

EU Law Live **2695-9585**
EU Law Live Weekend Edition **2695-9593**

www.eulawlive.com