Crowell

CLIENT ALERT

Whistleblowing – A Guide to Compliance: Part 6

December 17, 2021

Knowing that the EU Whistleblowing Directive was supposed to be transposed by the EU member states into national law by December 17, 2021 at the latest and that the majority of the EU member states (including Belgium) have not met this deadline, the question arises whether employees can already rely on the provisions of the non-implemented EU Whistleblower Directive? *Via this alert in our Crowell & Moring LLP's 2021 series: Whistleblowing – A Guide to Compliance, we will address this question by clarifying the effect of the EU Whistleblower Directive before its transposition into national law based on a number of concrete questions and emphasizing various points for consideration.*

STEP #6: What effect will the EU Whistleblower Directive have in Belgium before its transposition into national law?

1. *Current status of the implementation of the EU Whistleblower Directive in the various EU member states*

   According to its text, the EU Whistleblower Directive should have been transposed by the EU member states into national law by December 17, 2021. While the majority of member states is well advanced in the transposition process, only a limited number (Sweden and Denmark) have effectively transposed the Directive. The other EU member states, including Belgium, did not meet the deadline for transposition.

2. *Direct effect of EU directives*

   EU directives are not directly applicable. A national transposition act is generally required for it to become a part of national law. However, the Court of Justice of the European Union (CJEU) has repeatedly held that if a directive is not implemented in a timely and properly manner, individuals can directly rely on its provisions under certain conditions, in other words produce a direct effect.

   According to the CJEU, provisions of directives can only produce, what is called *vertical* direct effect: the right of an individual to invoke a provision in national courts against the State. In contrast, provisions of a directive cannot produce *horizontal* direct effect (individuals vs. individuals or private entities, such as employees against employers).

   The CJEU however accepts that individuals can rely on the provisions of a non-transposed directive, as a defense against the application of a national provision that is contrary to the directive. This is known as the passive or indirect *horizontal* effect and amounts to the directive being used solely as a defense (a "*shield*"). In addition, according to the principle of consistent interpretation, when a national court applies national law it is bound to interpret its provisions, as far as possible, in the light of the wording and the purpose of the EU directive concerned.

3. *Is there a direct obligation for private companies to set up internal reporting channels as from December 17, 2021?*

According to CJEU case law, companies can never be sanctioned for failing to take measures required by a directive that has not yet been transposed. As the EU Whistleblower Directive does not directly impose its requirements on companies, they are consequently not obliged to set up internal reporting channels as from December 17, 2021.

Therefore, even if employees will have the right to rely actively against state employers (as a "*sword*") and passively (as a "shield") against private employers on *precise* and *unconditional* rights conferred upon them by the EU Whistleblower Directive (see below), this right cannot result in an obligation on employers to set up internal reporting channels and procedures as long as the EU Whistleblower Directive is not transposed in the concerned Member State.

4. *Are employees nevertheless protected against retaliation measures as from December 17, 2021?*

As stated above, the absence of a direct obligation on companies to set up internal reporting procedures after December 17, 2021 leaves unaffected the right for employees to rely on certain precise and unconditional rights conferred upon them by the EU Whistleblower Directive, such as the protection against retaliation provided in Article 19 of the EU Whistleblower Directive.

This means, in our opinion, that as of December 17, 2021, even in the absence of implementation of the EU Whistleblower Directive, employees will be protected against retaliation (they cannot be sanctioned, for example dismissed, for having reported a breach of EU law) provided that (i) they reported either internally or externally (e.g. to the Belgian Data Protection Authority) or, under the strict conditions of Article 15, made a public disclosure of the EU Whistleblower Directive and (ii) they had reasonable grounds to believe that the information on breaches reported was true at the time of the reporting and that such information fell within the scope of the EU Whistleblower Directive.

In the event the employee would nevertheless suffer damages as a result of a retaliation measure taken by his or her employer, the employee could take action against the defaulting member state.

In conclusion, until the transposition of the EU Whistleblower Directive into national law, private companies will not be under any new direct obligations. However, employees who report breaches of EU law in accordance with the EU Whistleblower Directive will, from December 17, 2021, already benefit from some protection against retaliation under the EU Whistleblower Directive. We therefore advise companies to be careful when taking any actions that are prohibited by the EU Whistleblower Directive, even before its transposition in local law.

Our team assists client with the complete whistleblowing implementation process. For more information, please contact the professionals listed below or your regular Crowell & Moring contact.

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