Whistleblower Directive

Why does it matter to intermediaries?

Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law ("Whistleblower" Directive) was adopted by the EU legislators in October 2019. Its purpose is to lay down minimum standards providing for a high level of protection of persons reporting breaches of Union law. The deadline for transposition of the Directive was 17 December 2021. However, Member States had until 17 December 2023 to transpose the obligation to set up internal reporting and follow up channels (Article 8(3)), as regards entities with 50 to 249 employees.

The Whistleblower Directive applies to persons reporting breaches on Union law in several areas, **including "*financial services, products and markets and prevention of money laundering and terrorist financing*".** It specifies that the provisions of the Directive do not apply when there exist specific rules on the reporting of breaches within the sector-specific acts listed in the Annex to the Directive. The Article further states that the provisions of the Whistleblower Directive are applicable to the extent that a matter is not regulated in these sector-specific acts. The sector-specific acts referred to in the Annex (Part II) include, amongst others, the IDD, MiFID II, the IORPs Directive, the PRIIPs Regulation, etc.

Although certain of these sector-specific EU acts (notably the IDD and MiFID II) contain some provisions on the reporting of breaches (ex: Article 35 of the IDD), it appears that none of them includes any requirements on the setting-up of internal channels for reporting and follow-up. Therefore, the Whistleblower Directive requirements on this particular topic (Chapter II, Articles 8 and 9 and parts of Chapter V) apply to the sectors regulated by these acts, such as the insurance distribution sector.

The private legal entities subject to the obligations of the Whistleblower Directive include amongst others, **insurance intermediaries as defined in the IDD and investment firms as defined in MiFID II.**

State of play

Article 8 of the Whistleblower Directive lays down an obligation for Member States to ensure that private and public legal entities establish internal channels for reporting and follow-up that workers can use to report information on breaches of Union law.

Article 8(3) specifies that this obligation only applies to private legal entities with 50 or more workers. Small and micro-enterprises are therefore excluded from the scope of this Article. However, as explained in **Recital 50 and Article 8(4),** the exemption of small and micro-enterprises from the obligation to establish internal reporting channels does not apply to private enterprises which are obliged to establish internal reporting channels by virtue of Union acts referred to in Parts I.B and II of the Annex. Part II of the Annex refers to a number of EU legislations including the IDD, MiFID II, the Directive on the activities and supervision of IORPs and the Regulation on key information documents for PRIIPs.

Entities such as insurance intermediaries as defined in the IDD, are, therefore, all subject to the obligation of setting up internal channels for reporting and follow-up, even if they have fewer than 50 workers, i.e. small and micro-intermediaries.

Article 8(6) allows private legal entities with 50 to 249 workers, to share resources as regards the receipt of reports and any investigation to be carried out. However, for the small and micro-enterprises that are not exempted from the obligation to establish internal reporting channels, such as intermediaries, as explained above, this means that they cannot rely on shared resources regarding the receipt of reports or investigations.

BIPAR believes there might be a breach of the proportionality principle within Article 8(6): the requirements of the Whistleblower Directive that apply to intermediaries with fewer than 50 employees are more stringent than for intermediaries with 50 to 249 employees.

BIPAR conducted a short survey among its members and realised that **Member States had different approaches regarding the transposition of Article 8(6) into their national legislations:**

- some transposed the Directive literally, including the breach of proportionality in Article 8(6) (inter alia, the Netherlands, Hungary, etc.);
  some transposed the Directive while correcting the breach of proportionality in Article 8(6) (inter alia, Austria, Belgium, France, etc.);
- some transposed the Directive but excluded entities with fewer than 50 employees from the scope of the obligation to establish internal channels for reporting and follow up (inter alia Sweden);
- some haven't (fully) transposed the Directive as yet (inter alia, Germany, Italy, etc.).

BIPAR's position / key messages

BIPAR believes Article 8(6) of the Whistleblower Directive represents a **breach of the proportionality principle** by imposing stricter standards on some micro and smaller entities than on larger ones. The proportionality principle is of very high importance within EU financial legislation, in order to ensure smaller entities are not subjected to unreasonable administrative or financial burden. Therefore, BIPAR contacted the Commission (specifically DG JUST that was in charge of that topic) in order to inquire about the intentions behind Article 8(6) and whether or not they intended to exclude micro and small entities from its scope.

Next steps

BIPAR is still awaiting a response from the Commission on this issue. It will keep its members updated when it receives an answer.

Link

- Whistleblower Directive