



Freshfields Bruckhaus Deringer

Whistleblower protection in the EU



As whistleblowing stories continue to make the news, businesses are increasingly aware of how important it is to have an effective whistleblowing framework in place. This encourages workers to ‘blow the whistle’ without fear of retaliation and allows the business the opportunity to investigate and resolve any disclosed issues before they cause significant reputational or financial damage.

Whilst whistleblowing policies and procedures can be highly effective at promoting a ‘speak up’ culture, another key factor which encourages whistleblowers to disclose wrongdoing is the extent to which the laws of their jurisdiction provide comprehensive, transparent protection to whistleblowers.

In this briefing we look at the range of whistleblowing protections available and new developments at an EU level which may result in greater harmonisation of those protections.

The current legal landscape

The whistleblowing legal landscape can be difficult to navigate. At present, most of the countries which offer whistleblower protection do not have consolidated whistleblowing legislation, but rather provide protection through a number of different laws.

This can make it very difficult for whistleblowers to understand what protections they benefit from. Some countries do, however, have comprehensive whistleblower protection, including protection from retaliation.

| UK

In the UK, for example, whistleblowing protection is well-established. Protection is afforded to ‘workers’ who make a ‘protected disclosure’. ‘Worker’ is defined very widely. It includes current and former employees and individuals who work (or who formerly worked) under a contract to provide work or services personally for the employer (but excluding individuals who are genuinely in business on their own account). This includes contractors under the control of the employer and LLP members.

The protected disclosure must, in the reasonable belief of the whistleblower, be in the public interest and fall within specific categories set out by the law, such as a breach of a legal obligation or a threat to someone’s health and safety. Any dismissal or detriment suffered by a whistleblower as a result of their whistleblowing is unlawful and there is no cap on the damages which can be awarded in the employment tribunal.

| US

In the United States, the Dodd Frank Act allows overseas whistleblowers to blow the whistle to the Securities and Exchange Commission. The whistleblower does not need to be a US citizen or expose violations that occurred on US soil, but there does need to be some sort of link with the US.

| Financial incentives

Some jurisdictions offer financial incentives to whistleblowers. For example:

- in the United States, whistleblowers may receive a reward from the regulators for reporting breaches of anti-corruption, securities and consumer protection legislation;
- in **China**, there are several laws that incentivise whistleblowing; and
- the EU Market Abuse Regulation allows member states to offer financial rewards for individuals reporting breaches, but no member state has yet to use this option.

The current legal landscape

Whistleblowing legislation has been slower to take hold in continental Europe compared to the United States and the UK but a number of countries now have protections in place.

| Europe

In **France**, under the Sapin II law of 2017, companies with at least 50 employees must have processes for receiving confidential disclosures from staff. Employers can be fined and individuals imprisoned for up to a year for blocking reports. Whistleblowers are protected from retaliatory measures, such as dismissal, which would be automatically void.

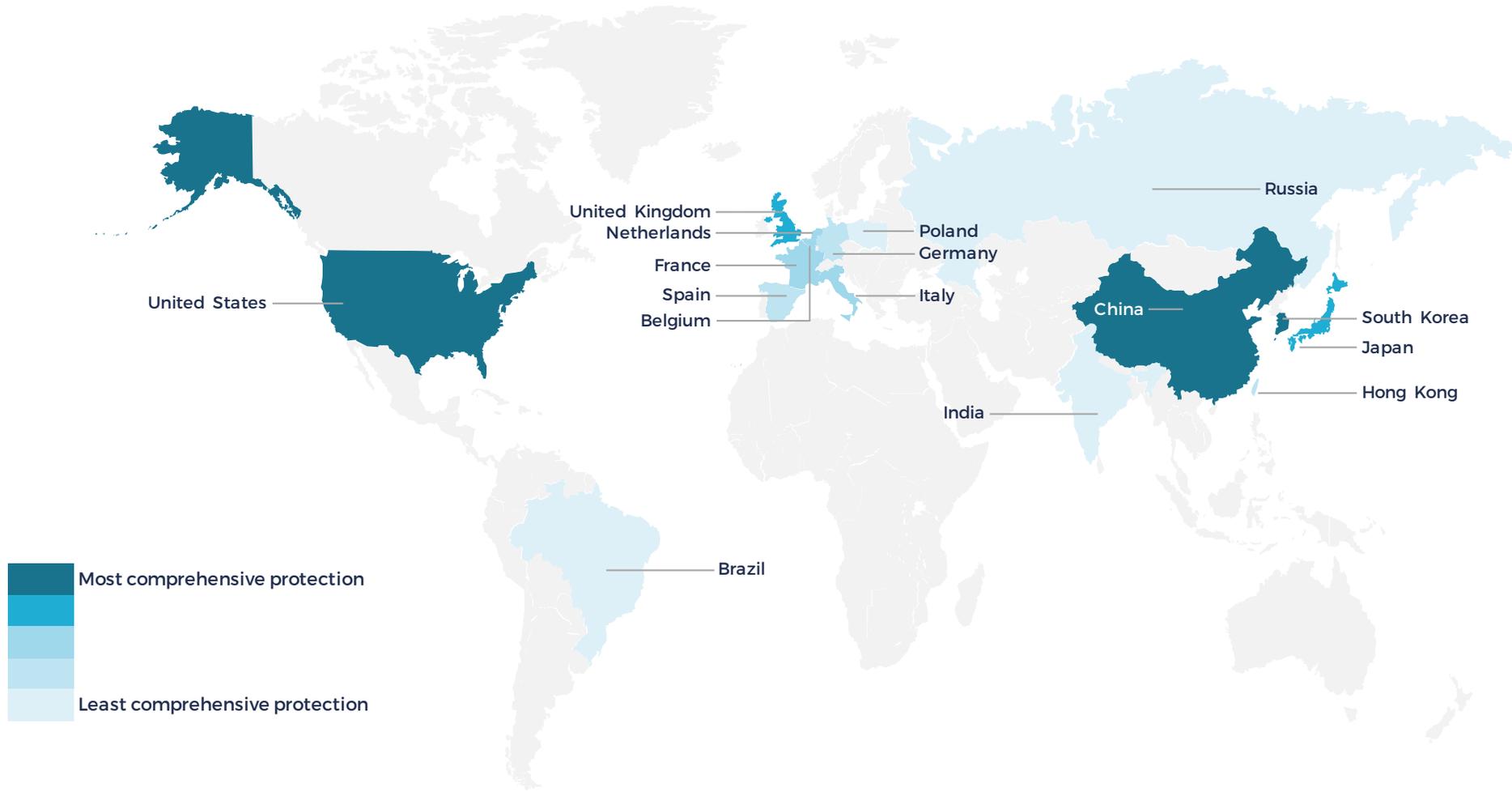
If a whistleblower brings a claim in court, the normal burden of proof is reversed – the whistleblower only has to show that they acted in accordance with the whistleblowing law. It is then up to the employer to prove that its decision, eg to sanction or dismiss the employee, was justified by objective reasons unrelated to the whistleblowing.

Other European countries, such as **Germany** and **Spain**, currently have no specific whistleblowing-related legislation. But general employment legislation may nevertheless protect an employee who is dismissed unfairly or subjected to a detriment for blowing the whistle.

Read more about whistleblower protection in a range of regions and jurisdictions in our global guide (PDF).



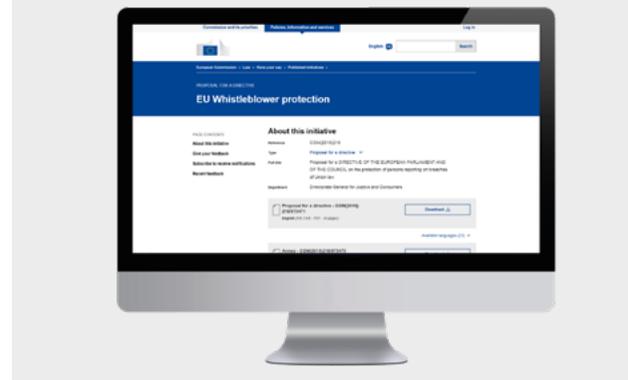
Levels of whistleblower protection



A new EU initiative

The protection afforded to whistleblowers in different member states varies considerably, and is overlaid by whistleblowing provisions set out in sector specific EU-wide legislation, eg legislation regulating financial services, transport, the environment and equal treatment. Steps to ensure a more harmonised approach to whistleblowing protection across the EU are now being taken.

In April 2018 the European Commission published a draft directive to protect whistleblowers who report breaches of EU law. Click below to read.



Minimum standards of protection

The proposed directive sets out 'common minimum standards' to protect whistleblowers in the private or public sector from retaliation for reporting breaches of laws in specific EU policy areas, where the violations or abuses of EU law may cause serious harm to the public interest or there is an identified need to strengthen enforcement.

These policy areas include public procurement, financial services, environmental and consumer protection, product and transport safety, and the protection of privacy and personal data, as well as violations of competition law and tax evasion and avoidance, including VAT.

The proposal draws upon the case law of the European Court of Human Rights (ECtHR), which strikes a balance between the right of the employer to protect its interests and business reputation and the freedom of expression enshrined in Article 10 of the European Convention on Human Rights.

The recitals to the directive confirm that the directive does not take away any protection already afforded to whistleblowing employees under existing EU employment law, eg in relation to health and safety issues.

The directive sets the minimum standard — member states can introduce more favourable protections if they wish.

A new EU initiative

| Scope

The scope of the proposals is very broad in that they protect not only workers but also volunteers, unpaid trainees, job applicants, self-employed consultants, persons under the supervision of contractors, subcontractors, suppliers and gig workers.

| Conditions for protection

In order to enjoy protection, whistleblowers must have reasonable grounds to believe that the information they report is true at the time of the reporting (in line with ECtHR case law) and falls within the scope of the directive. Individuals who are the subject of a disclosure will enjoy the presumption of innocence, the right to a defence and the right to an effective remedy.

To preserve the credibility of the system, member states must put in place effective and proportionate penalties against those who make malicious or abusive reports.

The directive provides for a three-tier reporting system – the individual must comply with this if the protections are to apply:

- firstly the individual should blow the whistle via internal channels;
- if this doesn't work, they should report the issue to the competent authorities; and
- if neither of these routes works or where there is an overriding public interest, the whistleblower can report to the media.

This aspect of the draft directive differs slightly from the non-legislative resolution adopted by the European Parliament in October 2017, which included recommended steps for the Commission to implement an EU-wide whistleblowing programme.

The Parliament recommended legal protection for whistleblowers disclosing information in the public interest directly to the media, suggesting the whistleblower did not have to consider the other channels first.

As the two positions are not fully aligned, there may still be movement on the disclosure requirements during the legislative process.



A new EU initiative

| Internal reporting channels

Businesses with more than 50 employees or with an annual turnover of €10m or over, as well as companies of any size operating in the financial services sector or which are vulnerable to money laundering or terrorist financing, will have to set up internal reporting channels. Member states may decide that smaller companies must also set up such reporting channels if this is justified by the nature of their activities.

The public sector will also be subject to the obligation to set up internal reporting channels, although municipalities with fewer than 10,000 inhabitants will be exempt from this obligation.

| Prohibition of any form of retaliation

Taking retaliation against a whistleblower is prohibited. The proposal lists some examples of retaliation, including those that may be suffered by non-employees.

Adequate remedies must be made available to whistleblowers, such as access to effective assistance, protection from so-called ‘gagging’ clauses, the employer having the burden of proof, interim relief, defence in judicial proceedings, and legal aid in line with EU law in civil and criminal proceedings.

Member states must have effective penalties for those who retaliate against whistleblowers, bring procedures against them or break the confidentiality provisions.

The aim of the draft directive is to ensure that violations of EU law that may cause serious harm to the public interest are effectively and quickly detected, addressed, investigated and – if needed – prosecuted.



Next steps

The proposed directive falls under the ordinary legislative procedure, also known as the co-decision procedure.

The co-legislators (European Parliament and Council) will separately discuss the proposal and propose amendments. Once the co-legislators have adopted their respective positions, they will seek to agree a final text with the European Commission.

The proposed directive could be adopted in about seven to ten months – before the next EU elections (May 2019) and potentially even before Brexit (March 2019), unless there is unexpected controversy over the content of the proposal.

Although the new legislation will only come into force post-Brexit, complying with the directive may be required in the context of future trade deals.

How we can help

We recently commissioned a [whistleblowing survey of 2,500 business managers in France, Germany, Hong Kong, the UK and the US](#).

The results show that whistleblowing is becoming the 'norm':

- 7 per cent of business managers reported that they had witnessed or engaged in whistleblowing, or had had wrongdoing reported to them; and
- only 13 per cent of business managers now claim that their employers discourage whistleblowing.

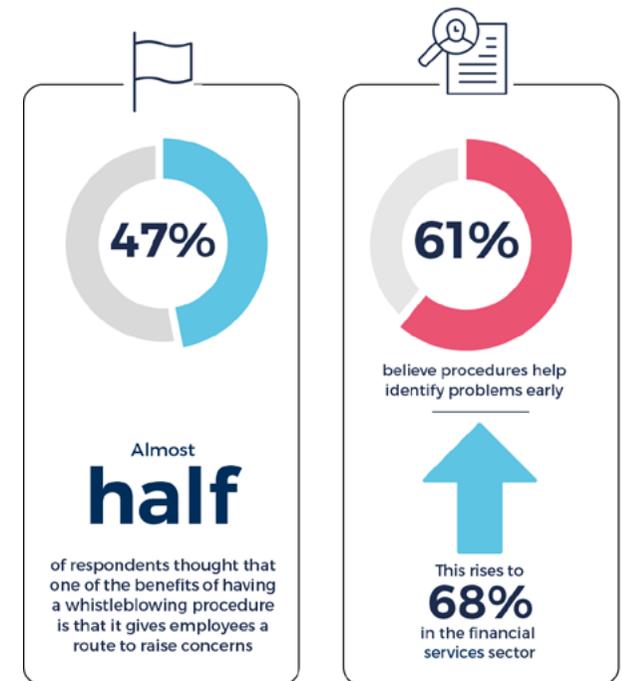
But the results also show that workplace culture is still deterring large numbers of workers from reporting wrongdoing:

- 55 per cent of managers reported that they and their co-workers would be deterred from whistleblowing by concerns that it would damage their career prospects or reputation; and
- the same percentage claim that they and their co-workers would be deterred from whistleblowing by concerns that their reports would not remain anonymous.

It is encouraging to see a positive shift in attitudes towards whistleblowing, but there is some way to go before it becomes fully embedded in the workplace.

For a whistleblowing process to work effectively, workers need to feel protected by the policies in place, and believe that they are being enforced and endorsed at every level of the organisation. So businesses need to consider how they implement whistleblowing procedures, and how they can become a key part of their corporate culture.

We have helped many employers establish and operate whistleblowing procedures. We have also helped clients conduct investigations into whistleblower allegations of bullying, sexual harassment, bribery, fraud. In many instances, reporting has helped a client identify a problem before it has had the chance to cause major financial and reputational damage.



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