## Central vs. Local Whistleblowing Channels: Towards an Effective Implementation of the EU Whistleblower Directive in Multinational Organisations

# Central vs. local whistleblowing channels

## *Towards an Effective Implementation of the EU Whistleblower Directive in Multinational Organisations*

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**Whistleblowing systems are an important instrument for any organisation wishing to uncover misconduct. Their design and level of accessibility determine their effectiveness. Many multinational organisations tend to establish a central whistleblowing system consisting of an online platform, allowing employees and third parties to raise their concerns regardless of their physical location around the world. That practice must be re-evaluated and possibly adjusted in light of the common interpretation of the EU Whistleblower Directive, which underscores the importance of local whistleblowing channels. This article explores the standards set forth by the EU Whistleblower Directive with respect to the required design of whistleblowing systems in Europe, and canvases the standards adopted by the national laws implementing the EU Whistleblower Directive across European Member States. It then proposes a practical design of a hybrid whistleblowing model, comprised of a central and multiple local whistleblowing channels, while relying on implicit nudging in directing reporters to choose the most appropriate whistleblowing channel.**

### 1. Introduction

Whistleblowing, i.e., the act of reporting information about concerns relating to illegal, unethical or otherwise wrongful activities, has played a central role in the exposure of some of the most notorious scandals in the last decades, such as the Watergate (1972), Enron (2001), WorldCom (2002), Luxleaks (2014), Dieselgate (2015), Panama papers (2016) and many other scandals. Acknowledging the benefits of whistleblowing, various enforcement authorities around the world seek to encourage that practice, including by securing the protection of whistleblowers against retaliation,[2] and even by providing financial awards (bounties) to whistleblowers who disclose original information which led to a successful enforcement action.[3] This way, enforcement authorities are able to increase detection rates and reduce investigation costs, thereby ultimately increasing the deterrence effect of enforcement.

When the report of misconduct is done externally, e.g., to enforcement authorities or to the media, whistleblowing presents a substantial threat to organisations. Such whistleblowing may lead to the commencement of high-impact investigations, severe enforcement actions, as well as to civil claims, loss of reputation and in some cases it also threatens business continuity. That said, whistleblowing may also present a significant opportunity to organisations, notably, when they manage to encourage reporters to report internally, thereby allowing these organisations to address the potential misconduct and limit its adverse impact.[4] Employees and other individuals engaged with the organisation are often aware of red flags indicating potential misconduct in an early stage, and may alert the organisation before the misconduct becomes systemic or widespread.

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2. See, for instance, OECD (2016), Committing to Effective Whistleblower Protection, OECD Publishing, Paris, available at: https://doi.org/10.1787/9789264252639-en.

3. See, for instance, the US Securities and Exchange Commission Whistleblower Program, available at: https://www.sec.gov/whistleblower.

4. See, for instance, Sharon Oded and Ingaborg Braam (2016), 'Breaking the silence from the inside: effective mitigation of whistleblowing risks', *Tijdschrift voor Compliance*, *2016*(3), 130–136.

Early detection of misconduct allows the organisation the opportunity to cease the misconduct and often also to limit its adverse impact. Moreover, appropriate handling of whistleblowing reports allows organisations to nurture a culture of trust and confidence, as well as to learn from its own experiences, strengthen its internal compliance programme, and prevent future recurrence of that behaviour.

Seeking to benefit from the opportunities of whistleblowing, many commercial organisations have established whistleblowing systems allowing employees and other third parties, such as business partners, suppliers, and customers, to blow the whistle and report concerns to the organisation about illegal, unethical or otherwise wrongful activities taking place within the organisation or by any party connected to the organisation. In the most common form, organisations make an online platform available which allows reporters to share input and upload any supporting evidence to substantiate their concerns.[5] Often, the input can be shared anonymously, and the reporter obtains a user name and a password, allowing the whistleblowing team – either internally within the organisation or at an external whistleblowing service provider – to further communicate with the reporter without the reporter needing to expose his/her identity.

Organisations operating multinationally often tend to establish a central whistleblowing system at a headquarters level, allowing employees and third parties to raise their concerns regardless of their physical location around the world. Once a report is made, the whistleblowing team would normally triage the report, assess its nature, severity, urgency and the possible adverse impact it entails, and determine next steps required in handling the report. In some occasions, a local team will be assigned to handle the report and address the concerns locally. That would be the case, for instance, when the report concerns employment-related grievances (e.g., unjustified delayed promotion, unequal allocation of assignments, discriminating treatment by a direct manager), which from an organisational perspective are often better handled locally by a team which is sensitive to local culture and is familiar with the relevant characters who may be involved in the matter. In other occasions, especially when the report relates to potential misconduct which may lead to corporate liability, significant reputational damages, harm to customers, or other significant adverse consequences, the whistleblowing team would assign the further handling of the report to a specialised team at the headquarters level which would instruct further actions to be taken to investigate and address the concerns raised by the reporter.

Traditionally, the allocation of each report to the central or a local team for further handling was the sole prerogative of each organisation and it was done on the basis of a self-determined matrix. That prerogative seems to have been limited by the standards established by 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 (the Whistleblower Directive or Directive). The Whistleblower Directive apparently underscores the importance of local whistleblowing channels and appears to oblige organisations, under certain circumstances, to operate local whistleblowing channels in each relevant jurisdiction of operation separately from a central whistleblowing system. In that sense, the Directive—at least partially—shifts the prerogative to decide whether a certain whistleblowing report is shared and followed up through either a central or a local whistleblowing channel. Any reallocation of the report for further handling requires at least that the reporter is informed and obtains the opportunity to withdraw the whistleblowing report.

In what follows, we explore the standards set forth by the Whistleblower Directive with respect to the required design of whistleblowing systems in Europe (Section 2). We then canvas the standards adopted by the national laws implementing the Directive across European Member States (Section 3). Subsequently, we present some key considerations supporting the establishment of a central whistleblowing channel as well as other considerations that would advocate for local whistleblowing channels (Section 4). Having provided that background, we move on to propose a practical design of a hybrid whistleblowing model, comprised of a central and multiple local whistleblowing channels, while relying on implicit nudging in directing reporters to choose the most appropriate whistleblowing channel (Section 5). Lastly, we provide some concluding remarks (Section 6).

## 2. Whistleblower Directive

### 2.1. Background

Whistleblower protection for many years was fragmented in different national laws and largely unsecured across the European Union.[6] European countries scored low on implementing whistleblowing protection measures, and even when such measures existed, they varied from one Member State to

5. In earlier years, many organisations used telephone-based hotlines, which facilitated the sharing of concerns by reporters.

6. Apparently, before 2019, only ten of the then 28 Member States had full whistleblowing protection. See further, Mark Worth, Suelette Dreyfus and Garreth Hanley, 'Gaps in the System: Whistleblower Laws in the EU' (2018) <BLUEPRINT-Gaps-in-the-System-Whistleblowers-Laws-in-the-EU.pdf>, p. 6-7; Transparency International, 'Whistleblowing in Europe, legal protections for whistleblowers in the EU' (2013) < EU Whistleblower Report_final_3 (transparencycdn.org)>, p. 6-7.

the other and were insufficiently enforced.[7] This lack of proper protection of whistleblowers was considered by the European Commission as discouraging whistleblowing, thereby leading to a lost opportunity to uncover violation of Union laws.

On 23 October 2019, the European Commission adopted the Whistleblower Directive as a first step in establishing a comprehensive legal framework for whistleblower protection. The purpose of the Directive, as laid down in Article 1 of the Directive, is: "*to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.*"[8] Accordingly, while the Directive came into force on 16 December 2019, Member States were tasked to implement the Whistleblower Directive into their national laws by 17 December 2021. In practice, the transposition of the Directive took longer than expected and in December 2021 only three of the 27 Member States had met that deadline.[9] Earlier this year, in February 2023, the European Commission decided to refer several Member States to the Court of Justice for failure to transpose and notify national measures transposing the Directive into their legal framework.[10] Eventually, in August 2023, most Member States have implemented the Directive into their national laws, with the exception of Estonia and Poland.

The Whistleblower Directive contains certain key obligations and protections. Firstly, chapter II includes key obligations of subjected organisations to establish internal whistleblowing channels, to set-up procedures for following up on internal reports, and to provide clear information on external whistleblowing channels. Entities with 50 or more fulltime employees (FTEs) are required to implement an internal whistleblowing channel. As to the timeline for implementation, entities with more than 250 FTEs were required to set up their whistleblowing channels by 15 February 2023, while legal entities employing between 50 and 249 FTEs may implement such channels by 17 December 2023.

The specifications of the whistleblowing channels, such as hotlines, websites or apps, are to be determined in national laws by Member States.[11] According to the Directive, third parties can also be authorised to receive reports on behalf of organisations as long as these offer appropriate guarantees for independence, confidentiality, data protection and secrecy. Such third parties can include reporting platform providers, external counsel, auditors and other similar parties. That said, the responsibility for following up on reports and giving feedback remains with the designated person within the organisation and may not be delegated.[12]

To establish a wide protection, the definition of 'reporting persons' (i.e., persons who may benefit from whistleblower protection) set forth by the Directive is broad and includes not only employees. A reporting person can be a person who acquired information on breaches in a work-related context and such persons can include current, former or future workers, paid or unpaid volunteers, shareholders and any person working under the supervision and direction of contractors, subcontractors and suppliers.[13]

The Directive prohibits retaliation of any kind against a reporter as well as against those who advised or supported the reporter.[14] The Directive adopted a broad definition of retaliation, which includes "*any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person.*"[15] Examples of prohibited retaliation include suspension, withholding of training, cancellation of a permit, and coercion.[16]

Lastly, the protection established by the Directive applies when (a) the whistleblower reports in good faith, meaning that there is a reasonable ground to believe that the information reported is true at the time of reporting; (b) the subject matter falls within the scope of the Whistleblower Directive; and (c) the report is made internally, externally or through a public disclosure.[17] Internal reporting is possible through, for instance, internal channels or a hotline, while external reporting is done to competent authorities. The Directive does not require internal reporting before reporting externally.[18] A

7. Mark Worth, Suelette Dreyfus and Garreth Hanley, 'Gaps in the System: Whistleblower Laws in the EU' (2018) <BLUEPRINT-Gaps-in-the-System-Whistleblowers-Laws-in-the-EU.pdf>, p. 8; Transparency International, 'Whistleblowing in Europe, legal protections for whistleblowers in the EU' (2013) < EU Whistleblower Report_final_3 (transparencycdn.org)>, p. 6-7. See also, European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection? | Industrial Law Journal | Oxford Academic (oup.com).
8. 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 (Whistleblower Directive or Directive), Art. 1.
9. European Commission, 'The European Commission decides to refer 8 Member States to the Court of Justice of the European Union over the protection of whistleblowers' (15 February 2023) <Protection of whistleblower (europa.eu)>
10. See European Commission's Press Release, The European Commission decides to refer 8 Member States to the Court of Justice of the European Union over the protection of whistleblowers, 15 February 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_703.
11. Whistleblower Directive, Chapter 2.
12. Ibid, Art. 8.
13. Ibid, Art. 4.
14. Ibid, Recital 41.
15. Ibid, Art. 5.
16. Ibid, Art. 19.
17. Ibid, Arts. 6, 7, 10 jo. 15.
18. Ibid, Arts. 7 jo 10.

whistleblower who makes a public disclosure is also protected by the Directive when certain conditions are fulfilled.[19]

## 2.2. Whistleblowing channels

Article 8(1) of the Directive states that "*member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law*." Article 8(3) adds that Article 8(1) applies to legal entities in the private sector with 50 or more workers.[20]
These channels and follow-up mentioned in Article 8 must include the following:

a. "*Channels for receiving the reports which are designed, established and operated in a secure manner that ensures that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected, and prevents access thereto by non-authorised staff members;*
b. *Acknowledgment of receipt of the report to the reporting person within seven days of that receipt;*
c. *The designation of an impartial person or department competent for following-up on the reports which may be the same person or department as the one that receives the reports and which will maintain communication with the reporting person and, where necessary, ask for further information from and provide feedback to that reporting person;*
d. *Diligent follow-up by the designated person or department;*
e. *Diligent follow-up, where provided for in national law, as regards anonymous reporting;*
f. *A reasonable timeframe to provide feedback, not exceeding three months from the acknowledgment of receipt or, if no acknowledgement was sent to the reporting person, three months from the expiry of the seven-day period after the report was made;*
g. *Provision of clear and easily accessible information regarding the procedures for reporting externally to competent authorities.*"[21]

While the Directive in Articles 8(1) and (3) set forth the requirement for organisations to establish whistleblowing channels, the Directive does not explicitly dictate whether organisations operating multinationally may satisfy the requirement by establishing a central whistleblowing channel, or whether they have to establish separate local whistleblowing channels in each of their relevant jurisdictions of operations or for each separate subsidiary. Adhering to the language of the Directive, one may conclude that by establishing a central whistleblowing channel, multinational organisations in fact satisfy the minimum requirement of the Directive and that they are not obliged to set up any additional local whistleblowing channel. That said, and as explained in the following section, the European Commission appears to have a different interpretation of the Directive.

## 2.3. European Commission's interpretation of the Whistleblower Directive

On 19 May 2021, multiple Danish companies sought clarification from the Danish Parliament regarding the interpretation of the Whistleblower Directive with respect to the existence of an obligation to set up local whistleblowing channels. The Danish Parliament forwarded the request for clarification to the European Commission.[22]

On 2 June 2021, the Directorate General Justice and Consumers at the European Commission clarified that Article 8(3) of the Whistleblower Directive should be interpreted as making no exemption for distinct legal entities belonging to the same corporate group. Accordingly, the European Commission concluded that:

> *"[…] the reporting channels cannot be established in a centralised manner only at group level; all medium-sized and large companies belonging to a group remain obliged to have each their own channels."*[23]

19. Those conditions are as follows: The person first reported internally and externally, or directly externally but no appropriate action was taken in response to the report within the applicable timeframe; the person has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or the person has reasonable grounds, in the case of external reporting, to believe that there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach. See Whistleblower Directive, Art. 15.
20. Recital 55 can be read in conjunction with Articles 8(1) and (3): *'Internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates ('the group'), but also, to any extent possible, by any of the group's agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group.'* See Whistleblower Directive, Art. 15.
21. Ibid, Art. 9.
22. European Commission, 'Your joint letter regarding the EU Whistleblower Directive (our ref. Ares(2021) 3355262)' (2 June 2021), p. 1, available at: <https://uploads-ssl.webflow.com/5c0fc9074a4585fa30a7a914/6184ffc9c12f11012d46c0a7_Mitteilungen.pdf>.
23. Ibid, p. 2.

In that respect, the European Commission further explained that the Directive provides some flexibility for international organisations in five different manners:[24]

1. Whistleblowing channels may be operated internally or provided externally by a third party, such as a platform provider. However, if an organisation decides to use a platform provider for receiving reports and acknowledging receipts, a designated person or department still needs to be appointed internally to follow-up on reports and to provide feedback.
2. Organisations employing between 50 and 249 FTEs can share resources with regard to receipt of reports and investigations.
3. When corporate compliance programmes are organised at headquarters level, subsidiaries may benefit from the investigative capacity of the parent organisation as long as the subsidiary has between 50 and 249 FTEs, whistleblowing channels exist and remain available at the subsidiary level, clear information is provided to the reporting persons that the headquarters would be authorised to access the report and any follow-up measure and feedback is provided on the subsidiary level. It should be noted that the reporting person has the right to object to the headquarters having access to their report and has the right to request that the conduct is only investigated at the subsidiary level.
4. If a report reveals a structural problem or a problem with a cross-border aspect which the subsidiary does not have the power to address, the report may be transferred to an entity in the group which is able to address the report appropriately. However, in line with the essence of the Directive, the designated person or department should communicate to the reporter that the report is transferred and ask for agreement to report the facts to another entity within the group, while recalling that if they do not agree, they can withdraw their report submitted internally and report externally to any relevant authority.
5. A reporter may choose not to report locally but to report to the parent organisation of the group. A reporter could, for instance, find it safer to report to the headquarters. The parent organisation in such cases should accept and follow up on that report. The option to have a central whistleblowing channel should not be turned into an obligation for reporters to report using that channel.

The Commission's approach requiring organisations to establish separate local whistleblowing channels next to any central whistleblowing channel existing at a group level seems to be based on two key considerations:[25]

1. **The proximity of the whistleblower to the whistleblowing channel**: the Commission explains that to facilitate reports, the whistleblowing channels must be easily accessible. They should be made available while providing would-be reporters with comprehensive information on their use and on the procedures for reporting externally to competent authorities, and they should be handled by an impartial person or department in the legal entity where the whistleblower works.

In the same vein, the Directive encourages legal entities to open whistleblowing channels to external persons who have a work-related relationship with the company, such as contractors. These persons are often only familiar with the entity they work for, and thus a local channel is important.

2. **Variations between Member States' transposition laws:** the Directive establishes only a minimum standard for the implementation of whistleblowing channels and whistleblower protection. Member States may adopt a higher standard and may therefore differ from each other in their established local standards. For instance, deadlines for organisations to provide feedback or to acknowledge reports may be shorter and the material scope of what type of breaches may be reported can differ in different Member States. Similarly, while some Member State laws may entitle whistleblowers to request a physical meeting in the organisation with which they have a work-related relationship, other laws may not establish such rights.

A centrally-run whistleblower channel may not—according to the European Commission's line of thinking—provide the required level of access to the whistleblowing channel and cannot sufficiently guarantee proper implementation of whistleblower standards given potential differences between Member States laws. Accordingly, as per the interpretation of the European Commission, each entity of a group company employing more than 50 employees should set up its own local whistleblowing channel, while the central, group level whistleblowing channel may exist along with the multiple local whistleblowing channels.

The European Commission's interpretation was further communicated on 29 June 2021, in response to another letter on this topic which it received from several other multinational organisations,[26] as well

24. Ibid, p. 3-4.
25. Ibid.
26. European Commission, 'Your joint letter of 13 June 2021, addressed to the functional mailbox of the Commission's expert group on the Whistleblower Directive, to DG JUSTICE Acting Director General Salla Saastamoinen and myself (registered in Ares(2021) 3865815)' (29 June 2021), available at: <https://www.cmshs-bloggt.de/wp-content/uploads/2021/08/Stellungnahme_4667786.pdf>.

as on 14 June 2021 by the European Commission's Expert Group on the Whistleblower Directive.[27]

## 3. National laws

A survey of Member States' national laws implementing the Whistleblower Directive reveals that at least some of the Member States—Belgium,[28] Czech Republic,[29] Estonia,[30] Ireland,[31] Malta,[32] the Netherlands,[33] Poland,[34] Romania,[35] and Slovakia[36]—adopted an interpretation similar to the one adopted by the European Commission, and set forth an obligation to establish local whistleblowing channels for entities with more than 50 FTEs. That said, and as mentioned earlier, against the extensive interpretation of the Whistleblower Directive by the European Commission, a literal reading of the Directive may lead to a different interpretation. Hence, it is not surprising that many Member States appear to have adopted a different interpretation of the Directive, supporting the conclusion that by establishing a central whistleblowing channel, multinational organisations satisfy the standards of the Directive. Below we map the different approaches followed by Member States in relation to the obligation to establish local whistleblowing channels. The table below is followed by further input regarding Member States that appear to deviate in their approach from the European Commission's approach.

| Member State | Allowed to only have a central channel |
|---|---|
| Austria | 🟢 |
| Belgium | 🔴 |
| Bulgaria | 🟠 |
| Croatia | 🟢 |
| Cyrpus | 🟠 |
| Czech Republic | 🔴 |
| Denmark | 🟢 |
| Estonia* | 🔴 |
| Finland | 🟢 |
| France | 🟠 |
| Germany | 🟢 |
| Greece | 🟠 |
| Hungary | 🟠 |
| Ireland | 🔴 |
| Italy | 🟠 |
| Latvia | 🟠 |
| Lithuania | 🟢 |
| Luxembourg | 🟢 |
| Malta | 🔴 |
| Netherlands | 🔴 |
| Poland* | 🔴 |
| Portugal | 🟠 |
| Romania | 🔴 |
| Slovakia | 🔴 |
| Slovenia | 🟢 |
| Spain | 🟠 |
| Sweden | 🟠 |

*Law currently in draft

🟢 Allowed
🟠 Under conditions or unclear
🔴 Not allowed; local channel required

- In **Austria**, the implementation law allows corporate groups and their subsidiaries to operate a single central whistleblowing channel.[37]

- The law in **Bulgaria** allows entities with more than 50 FTEs to either have a local whistleblowing channel or use an channel which is established by the group to which they belong if that channel is compliant with local law.[38] Such a central whistleblowing channel can only be used for the receipt of reports and registration. The investigation has to be conducted by a designated

27. European Commission, 'Minutes of the fifth meeting of the Commission expert group on Directive (EU) 2019/1937' (14 June 2021), available at: Register of Commission expert groups and other similar entities (europa.eu).
28. See *Wet betreffende de bescherming van melders van inbreuken op het Unie- of nationale recht vastgesteld binnen een juridische entiteit in de private sector*, Art. 11. We thank Julien Haverals and Wilko van Weert from *Norton Rose Fulbright* (Brussels) for providing local law input.
29. See, *Zákon o ochraně oznamovatelů jo Zákon, kterým se mění některé zákony v souvislosti s přijetím zákona o ochraně oznamovatelů*, Art. 8. We thank Katerina Nespurkova, Djukic Livia, Martin Rott and Dusan Valet from *Havel and Partners* for providing local law input.
30. See *Tööalasest rikkumisest teavitaja kaitse seadus*, Art 4. Please note that this legislation is currently still in draft. We thank Hegle Pärna, Gerli Kivisoo and Ants Nõmpern from *Ellex Raidla* for providing local input.
31. See The Protected Disclosures Act 2014 (the 2014 Act), as amended by the Protected Disclosures Act 2022 (the 2022 Act), Section 6A. We thank Dunvan Inverarity and David Murry from *A&L Goodbody LLP* for providing local input.
32. See Protection of the Whistleblower Act, Section 2 (12). We thank Mattea Pullicno, Deo Falzon and Paul Gonzi from *Fenech + Fenech* for providing local input.
33. *Wet bescherming klokkenluiders*, Art. 2.
34. Please note that this legislation is currently still in draft. We thank Damian Pawlaw and Piotr Strawa from *Norton Rose Fulbright* (Warsaw) for providing local input.
35. See *Legea nr. 361/2022 privind protecția avertizorilor în interes public*, Art. 9. We thank Cladiu Ciunotaru from *Kinstellar* for providing local input.
36. See *ZÁKON z 30. januára 2019 o ochrane oznamovateľov protispoločenskej činnosti a o zmene a doplnení niektorých zákonov*, Art 11. We thank Katerina Nespurkova, Djukic Livia, Martin Rott and Dusan Valet from *Havel and partners* for providing local input.
37. See *HSchG*, Article 13 (4); Katharina Brückner and Eric Hohenauer, 'Der Entwurf des HinweisgeberInnen schutzgesetzes aus Konzernsicht' (Ecolex 2022). We thank Thomas Angermair from *DORDA Rechtsanwälte GmbH* for providing local input.
38. *Закон за защита на лицата, подаващи сигнали или публично оповестяващи информация за нарушения*, Art. 12. We thank Elitsa Pophlebarova, Radoslav Alexandrov and Deyan Terziev from *Boyanov & Co* for providing local input.

person who is an employee of the local entity.[39] As an exception, certain organisations in the finance, transport, oil and gas sectors, including entities that are subject to specific Bulgarian anti-money laundering rules, are obliged to have a local whistleblowing channel and may not use a central channel.[40]

- In **Croatia**, an organisation with 50 FTEs or more is obligated to adopt its own Rulebook on its internal whistleblowing procedure. However, such an organisation is allowed to use the group's resources for receiving the reports and conducting an internal investigation. No obligation exists to establish a separate local whistleblowing channel for such an entity.[41]

- In **Cyprus**, the implementation law does not explicitly state whether there is a requirement for the establishment of a local whistleblowing channel per entity with more than 50 FTEs within a group of related entities. No further guidance on this matter has been issued by the legislature. However, the law allows entities to benefit from '*common*' internal whistleblowing channels, indicating that channels likely are allowed to be shared subject to appropriate confidentiality and data protection measures being put in place.[42]

- The implementation law in **Denmark** allows group companies to establish a central whistleblowing channel.[43] The current possibility to include entities with more than 249 FTEs in a group whistleblower scheme may be subject to revision by the Danish Ministry of Justice.[44]

- In **Finland**, group companies are allowed to have a central whistleblowing channel instead of local channels.[45]

- In **France**, the implementation law is not clear whether a local whistleblowing channel is required.[46]

- In **Germany,** the implementation law states that employers with 50 to 249 FTEs can set up joint whistleblowing channels.[47] Moreover, the legislative materials accompanying the law state that a whistleblowing channel can also be established at group level and group companies can implement a centralised group-wide whistleblowing channel. The German legislature argues that the obligation for follow-up and remedying an identified violation does remain with the respective legal entity, whereas the report can take place at a group-wide channel.[48]

- In **Greece**, organisations in the private sector with 50 to 249 FTEs may share an Officer for the Receipt of Reports. The Officer for the Receipt and Follow-Up on Reports is seen as the internal whistleblowing channel in Greece.[49]

- The implementation law in **Hungary** in principle obliges entities that have at least 50 FTEs to set up a separate whistleblowing channel. However, local law does allow entities with 50 to 249 FTEs to set up and operate a joint whistleblowing channel.[50]

- In **Italy,** organisations with up to 249 FTEs can share internal whistleblowing channels. On the contrary, organisations with more than 250 FTEs have to adopt their own whistleblowing channel.[51]

- The implementation law in **Latvia** states that entities with 50 FTEs or more should have a whistleblowing channel. However, if an entity has 50 to 249 FTEs, the whistleblowing channel may be shared with other entities. Pursuant to the Guidelines provided by the State Chancellery (the institution which is also a contact point for the whistleblowers pursuant to the law in Latvia), it is not allowed to have only a central whistleblowing system.[52]

39. Ibid.
40. Ibid.
41. See *Odluku o proglašenju zakona o zaštiti prijavitelja nepravilnosti*, Art. 19. We thank Iva Vukoja Divjak and Andrija Duvnjak,from *Bahtijarević & Krka OD d.o.o.* for providing local input.
42. See *ΕΠΙΣΗΜΗ ΕΦΗΜΕΡΙΔΑ ΤΗΣ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ ΠΑΡΑΡΤΗΜΑ ΠΡΩΤΟ ΝΟΜΟΘΕΣΙΑ - ΜΕΡΟΣ Ι*, Art. 8. We thank Thekla Homata, Angelos Lanitis, Aki Corsoni-Husain, Theordoros Zafiropoulos and Elina Mantrali from *Harneys* for providing local input.
43. See *Lov om beskyttelse af whistleblowere*, Art 9. We thank Jacob Falsner, Marcus Elskær Mollerup and Tina Brøgger Sørensen from *Plesner* for providing local input.
44. Ibid.
45. See *LakiEuroopan unionin ja kansallisen oikeuden rikkomisesta ilmoittavien henkilöiden suojelusta*, Arts. 10, 11 jo. 12. We thank Laura Parkkisenniemi and Hanna-Mari Manninen from Dittmar and Indrenius for providing local input.
46. We thank Stepahnie Tchnanon and Solene Sfoggia from *Norton Rose Fulbright (*Paris) for providing local input.
47. See *Hinweisgeberschutzgesetz*, Section 14. We thank Clara Naujack and Nils Ostermeier from *Norton Rose Fulbright* (Frankfurt) for providing local input.
48. Ibid. See for guidance from the German Legislator: Drucksache 20/3442 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden (bundestag.de)).
49. See *Συγκριτική επισκόπηση των νέων υποχρεώσεων συμμόρφωσης των επιχειρήσεων υπό το πρίσμα του Ν 4808/2021 και του Ν 4990/2022*. We thank Theodore Konstantakopoulos, Rania Papakonstantinou and Iliana Papntoni from *Zeya and Yannopoulos* for providinglocal input.
50. See *évi XXV. törvénya panaszokról, a közérdekű bejelentésekről, valamint a visszaélések bejelentésével összefüggő szabályokról*, Section 5. We thank Szabolcs Szilágyi, Daniel Endre Nagu and Péter Dániel from *Kinstelller* for providing local input.
51. See *Decreto legislativo - 10/03/2023, n.24*, Art 4. We thank Irene Bega from *Norton Rose Fulbright* (Milan) for providing local input.
52. See *Trauksmes celšanas likums*, Section 5. We thank Irina Kostina from *Ellex Klavins* for providing local input.

– In **Lithuania**, the law allows having only a central whistleblowing channel.[53]

– In **Luxembourg,** the law also allows for a central whistleblowing channel.[54]

– In **Portugal,** the law is not clear on whether each entity with 50 FTEs or more requires a local whistleblowing channel.[55] The law potentially suggests that only public sector entities may share whistleblowing channels.[56]

– In **Slovenia**, the implementation law allows organisations to outsource their reporting and therefore group companies can have a centralised whistleblowing channel as long as whistleblowers are able to report in Slovenian.[57] The review and investigation of the report must be done at the local entity.[58]

– The implementation law in **Spain** allows corporate groups to set up a central whistleblowing system for the whole group, instead of one for each subsidiary with 50 FTEs or more.[59] However, from the definition of *corporate group* it is unclear whether this only applies to groups of which the parent is based in Spain or also for other international organisations not headquartered in Spain.[60]

– In **Sweden**, the law allows entities with 50 to 249 FTEs to share internal whistbelowing channels.[61]

If the European Commission considers that a Member State has not implemented the Whistleblower Directive properly, the Commission is empowered to bring infringement proceedings against the relevant Member State before the Court of Justice of the European Union. If that happens, it would be up to the Court to determine the ultimate interpretation of the Directive. To our knowledge, to date such infringement proceedings have not been initiated by the Commission in relation to the interpretation of the Directive. It would be crucial to follow developments on that front.

## 4. Considerations in establishing a central vs. local whistleblowing channels

In section 2.3 above, we summarised the key considerations brought by the European Commission in reasoning its interpretation of the Directive in relation to the duty to establish local whistleblowing channels, namely: (i) the proximity of the whistleblower to the whistleblowing channels, and (ii) the variations between Member States' transposition laws. Regardless of the European Commission's reasoning, the establishment of local whistleblowing channels may also present various advantages compared to a central whistleblowing system and may therefore be the chosen design of a whistleblowing system by some organisations. To name a few of those advantages:

– **Faster and tailored responses**: a local channel with a greater proximity to the relevant behaviour may enable a quicker response which is tailored to the local context and cultural nuances.

– **Better understanding, access to data and ease of implementation**: local teams are often better qualified to understand the unique challenges of the relevant team and to access data sources relevant to verify the concern. Similarly, in many cases the local team can better implement any responses to the concerns raised by the whistleblower while reducing the burden on central resources.

– **Trust and certainty**: reporters may better trust the local, familiar management and are able to anticipate their reaction. The distance between the headquarters and local team may increase uncertainty in relation to the expected outcome of the report, thereby discouraging reporters to share their concerns.

– **Simplified procedures**: local handling of concerns reported by whistleblowers may often involve less formal procedures and bureaucracy. It may reduce the costs of the whistleblowing system and encourage whistleblowing by making it simpler and more accessible.

– **Secured confidentiality and prevention of retaliation**: local management may often better protect the identity of the whistleblower by seeking cor-

53. See *Galiojanti suvestinė redakcija* (nuo 2022-02-15). We thank Ramunas Petravicius from *Ellex Valiunas* for providing local input.
54. See *La loi du 16 mai 2023 portant transposition de la directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l'Union est entrée en vigueur le 21 mai 2023*, Art 6. We thank Yuri Auffinger from *Barreau* for providing local input.
55. See *Estabelece o regime geral de proteção de denunciantes de infrações, transpondo a Diretiva (UE) 2019/1937 do Parlamento Europeu e do Conselho, de 23 de outubro de 2019, relativa à proteção das pessoas que denunciam violações do direito da Uniãoarticle*, Art 8. We thank Sofia Ribeiro Branco and Andreia Oliveira Ferreira from *Viera de Almeida* for providing local input.
56. Ibid.
57. See *Zakon o zaščiti prijaviteljev*, Art. 9. We thank Ana Oštir and Iris Pensa from *Jadek & Pensa* for providing local input.
58. Ibid.
59. See *Ley 2/2023, de 20 de febrero, reguladora de la protección de las personas que informen sobre infracciones normativas y de lucha contra la corrupción*, Arts 8 – 11. We thank Enrique Rodriguez Celada, Marta Pantaleon Diaz and Luis Acuña Alonso from *Uria Menéndez* for providing local input.
60. Ibid.
61. See Act on the Protection of Persons Reporting Irregularities (2021), Chapter 5, section 3. We thank Jenny Lundberg and Josephine Gjerstad Medina from *Hannes Sbellman Attorneys Ltd* for providing local input.

roborating evidence without exposing the identity of reporters. Moreover, they are often able to set the local scene in such a way that the protection against retaliation is safeguarded.

– **Fostering organisational commitment**: local whistleblowing channels may place the ownership of compliance throughout the organisation and project commitment to compliance throughout the organisation, rather than only at headquarters level.

That said, managing a decentralised whistleblowing system composed of multiple whistleblowing channels across the organisation is not free of challenges. In many respects, establishing a central whistleblowing system which consolidates all whistleblowing reports presents a preferred design of whistleblowing systems for multinational organisations. Among the considerations that would support establishing a central whistleblowing system, we would consider, for instance, the following:

– **Consistency**: a central whistleblowing system facilitates a standardised process which equally applies to all reports, thereby increasing the chances that reports are handled fairly and professionally.

– **Efficiency, control and transparency**: a central whistleblowing system allows organisations to save on operational costs and to consolidate the management of all reports in a single platform. The access to all reports allows organisations to better control the process of handling reports, monitor progress, and provide relevant reports to management. In that respect, the central system facilitates a holistic compliance approach within the organisation.

– **Experience and expertise**: handling whistleblowing reports requires investigation expertise and sometimes deep understanding of the organisation. A dedicated central whistleblowing team, which accumulates experience in dealing with whistleblowing reports, may better utilise that experience and expertise in handling reports than a local team which lacks the relevant experience.

– **Conflict of interest and protection of the whistleblower**: local management may sometimes be involved in the reported conduct. Channelling reports to a central whistleblowing system may reduce the risk of conflict of interest and facilitate better protection of the whistleblower.

– **Enhanced credibility**: handling reports by a central whistleblowing channel often guarantees better oversight by senior management and is likely to be perceived as more credible and therefore is likely to enhance the accountability.

– **Crisis management**: when reports lead to management of a corporate crisis, handling the report through a central whistleblowing system often guarantees enhanced capabilities to address critical aspects.

– **Reduced importance of physical location of affiliation**: with the increasing tendency of remote working, the physical location of employees and their affiliation with a specific subsidiary of the group loses its importance. Handling reports centrally ensures effective handling of reports, regardless of the formalities of location and affiliation.

Summing up, both central as well as local whistleblowing channels present important comparative advantages. As with any other component of a compliance program, designing a well-functioning whistleblowing system must take the unique aspects of each organisation into account and the weight that the incumbent organisation allocates to considerations such as those mentioned above. Organisations that commonly favour a decentralised compliance program (e.g., group companies composed of subsidiaries operating in completely distinct and unrelated industries), may prefer to design whistleblowing systems which rely more heavily on local whistleblowing channels and extract the benefits of multiple tailor-made channels which are built around each of their subsidiaries or location of operation. Conversely, organisations that commonly favour a centralised compliance programme (e.g., group companies composed of subsidiaries operating in similar industries and provide similar or related lines or products and services), may prefer to design whistleblowing systems which rely more heavily on a central whistleblowing channel and extract benefits such as consistency, efficiency and enhanced control. That said, considering the European Commission's interpretation of the Whistleblower Directive as well as the approach taken by several of the Member States, even those latter type companies may be required to establish local whistleblowing channels and secure the required proximity of would-be whistleblowers to the whistleblowing channels. For many multinational organisations, thus, a hybrid approach may present the most sensible design.

## 5. Practical way forward: a hybrid whistleblowing channel model

A hybrid whistleblowing model is composed of a combination of a central whistleblowing channel and multiple local whistleblowing channels. Such a system may, for instance, rely on a single online whistleblowing platform, allowing reporters to share their reports through the platform, regardless of their physical location or affiliation. Yet, to meet the requirement of a local channel, the whistleblowing channel would require local tailoring. For instance, depending on the IP address of the reporter, the whistleblowing channel may be introduced in local languages and provide information on local external reporting possibilities. Similarly, the whistleblowing platform on its opening page could offer a reporter the choice between central handling

or local handling of their reports. When the reporter chooses local handling of the report, the platform may be tuned such that the report is automatically directed to a local team member who is responsible for assessing and handling whistleblowing reports.

### 5.1. Explicit encouragement

While the proposed hybrid model leaves the choice between a central whistleblowing channel and a local whistleblowing channel to the reporter, adopting that system does not necessarily mean that the organisation is unable to influence the choice of reporters to use one channel or another. Even under the interpretation of the European Commission, the Whistleblower Directive does leave room for organisations to encourage reporters to use one channel rather than the other. As stated by the European Commission:

> *"corporate policy instilling trust in the group whistleblowing function, possibly accompanied by an information policy publicising its availability and encouraging whistleblowers to report directly to the central group whistleblowing functions may result in whistleblowers tending to report there. However, the possibility to report to the subsidiary where the whistleblower works must remain effectively available."*[62]

That is to say, using the hybrid whistleblowing model, the online whistleblowing platform may present an opening page in which the organisation shares circumstances in which reporting through the central whistleblowing channel may be preferable (e.g., when the reporter considers his/her report to require handling by headquarters; when local management may be involved in misconduct; when the reporter does not have sufficient trust in the local team; when the reporter fears retaliation; or for instance, when the damage to the organisation that may result from the misconduct may be substantial). Alternatively, the organisation can share on the opening page of the whistleblowing platform other circumstances in which local handling may be preferable, and thereby encourage the reporter to opt for the local whistleblowing channel (e.g., when the matter must be handled quickly but a local person who may be better familiar with the system; when the reporter trusts the local team and management; when escalating the matter to headquarters may complicate matters unnecessarily). Thus, guiding the reporters to choose one channel or the other may assist organisations in utilising the hybrid whistleblowing model in a favourable manner and it appears to satisfy the European Commission's interpretation of the Whistleblower Directive, as long as an effective possibility to report locally is maintained.

### 5.2. Implicit nudge

Organisations may also influence a reporter's choice regarding using the central or a local whistleblowing channel in a more subtle way, by *nudging* them. The concept of nudging hinges on the behavioural economy's Nudge Theory which was popularised in 2019 by Richard Thaler and Cass Sunstein.[63] The Nudge Theory is centred around the ability to influence people´s behaviour by changing their choice architecture and without restricting their free will. The starting point of the theory is that people do not always make fully rational decisions and their decisions can be influenced by a subtle change in their environment. According to that theory, a small change in the way choices are presented to individuals can significantly influence their decisions and behaviour.

Applying the Nudge Theory to the context of whistleblowing channels, by making some design choices in the online whistleblowing platform, organisations are able to influence reporters´ choice to use a central or a local whistleblowing channel. Such design choices may include, for instance:

- **Default option**: the whistleblowing platform may be set to offer a preferred channel—the central one or the local one as the case may be—as a default reporting option, thereby utilising people's tendency to stick to default options.

- **Visibility and simplification**: for instance, organisations favouring the use of central over the use of local whistleblowing systems may make that option more salient and central in the online page. They may use visual cues to nudge reporters to use the selected channel. Similarly, they may simplify the process by avoiding numerous opening questions regarding relevant locations and affiliation, and minimise any other bureaucratic or cumbersome steps that may discourage people from using it.

- **Framing**: organisations may share true facts supporting the choice of channel they wish to promote on the online whistleblowing page. For instance, by mentioning: 'FYI: 97% of the whistleblowing reports submitted through the central channel were reviewed within 3 days.'

62. European Commission, 'Your joint letter regarding the EU Whistleblower Directive (our ref. Ares(2021) 3355262)' (2 June 2021), p. 3-4, available at: https://uploads-ssl.webflow.com/5c0fc9074a4585fa30a7a914/6184ffc9c12f11012d46c0a7_Mitteilungen.pdf.

63. Richard H. Thaler, and Cass R. Sunstein (2009). Nudge: Improving decisions about health, wealth, and happiness. Penguin.

Importantly, by utilising nudging in a hybrid whistleblowing model, one must maintain ethical standards and avoid misleading or manipulating reporters into decisions which contradict their genuine will. Organisations wishing to nudge whistleblowers to use one channel rather than the other would then strive to design the whistleblowing system in a way that makes the desired choice preferable for the reporter, without undermining the reporter's autonomy and without eliminating the option to use the alternative whistleblowing channel.

## 6. Concluding remarks

Whistleblowing systems provide organisations with the opportunity to learn about illegal, unethical or otherwise wrongful activities connected to their organisation. Choices made by organisations in designing their whistleblowing system may affect the benefit that such systems may generate to the organisation. The choice of establishing a central whistleblowing channel, multiple local channels, or a hybrid model may be done effectively when taking the unique aspects of each organisation into account.

This article presented the key standards set forth by the Whistleblower Directive and suggested that a literal reading of the Directive may support the conclusions that establishing a central whistleblowing system may satisfy the obligations set forth by the Directive. That said, this article also explored the different interpretation of the Directive by the European Commission, according to which entities with 50 or more FTEs are required to implement internal whistleblowing channels. That requirement, according to the Commission, is not satisfied by establishing a centralised whistleblowing system at group level. All medium-sized and large companies belonging to a group remain, according to the Commission, obliged to have their own whistleblowing channels. A review of local law in all Member States revealed that while 9 Member States[64] follow a similar approach to the European Commission´s, many of the other Member States follow a different approach.

After presenting several considerations supporting the establishment of a central and of multiple local whistleblowing channels, this article proposed a hybrid whistleblowing model, composed of both a central and local whistleblowing channels, while preserving the organisation's ability to influence a reporter's choice through information-sharing and nudging.

Note: The content in this article is provided for general information purposes only and does not constitute legal or other professional advice of any kind.

64. Please note that the laws in Estonia and Poland are still in draft.