

Whistleblowing – A Guide to Compliance: Part 1



Crowell & Moring LLP's 2021 series of client alerts: Whistleblowing – A Guide to Compliance is intended to provide companies with a practical guide to help them comply with their obligations under the EU Whistleblower Directive. Via a monthly alert, Crowell & Moring LLP will explain the different steps that companies need to take for compliance and emphasize various points for consideration.

STEP #1: How to determine if your company must comply with the EU Whistleblower Directive

Which companies have to establish internal reporting channels and procedures?

Article 8.3. of the EU Whistleblower Directive stipulates that the internal reporting channels should be established by “legal entities in the private sector with 50 or more workers.”

- The number of workers should be calculated for each legal entity separately (i.e., not as a total in the EU or globally).
- The EU Whistleblower Directive refers to “workers,” without providing any definition or further specification as to how this threshold should be calculated.
 - Recital (48) of the EU Whistleblower Directive simply states that “all enterprises having 50 or more workers should be subject to the obligation to establish internal reporting channels, irrespective of the nature of their activities, based on their obligation to collect VAT.” Recital (50) of the EU Whistleblower Directive emphasizes the exemption of small and micro enterprises from this obligation.
 - The EU Whistleblower Directive therefore leaves it up to the EU member states to provide a definition of “workers” and clarify the calculation of this threshold.
 - In its “User Guide to the SME Definition,” the EU Commission states that member state national law governs the definition of “employee”:

“What is the definition of an ‘employee’?

National labour rules apply. These vary from country to country, for instance, for temporary staff working as independent contractors or on hire from an interim employment agency. You should contact your own authorities to establish how your national legislation defines the term ‘employee’.”

- For Belgium: It is likely that reference will be made to (i) Article 1:24 § 1 and § 5 of the Belgian Code of Companies and Associations for the definition of small

companies and to (ii) the definition of workers/employees as used within the framework of the social elections' legislation (to be confirmed by the Act transposing the EU Whistleblower Directive into national law):

- Article 1:24 § 1: "Small companies are companies with legal personality which on the date of the balance sheet for the last closed financial year, do not exceed more than one of the following criteria: an annual average number of employees: 50 (...)"
- Article 1:24 § 5: "The average number of employed employees referred to in § 1 is the average of the number of employees expressed in full-time equivalents registered in the DIMONA database in accordance with the Royal Decree of November 5, 2002 (...) at the end of each month of the financial year (...)"
- Article 4, 8° Law on Social Elections: "employees: the persons employed by virtue of an employment contract or an apprenticeship contract; persons placed for professional training in the company by institutions in charge of professional training are equated with these persons; (...)."

By when do companies need to establish internal reporting channels and procedures?

The EU Whistleblower Directive should be transposed by the EU member states into national law by December 17, 2021, and this same deadline applies to the obligation of companies to establish their internal channels and procedures in accordance with the EU Whistleblower Directive and the relevant national law (although there is a possibility for the EU member states to provide for a later deadline of December 17, 2023 for private companies with 50 to 249 workers). The EU member states must therefore keep this deadline in mind when transposing the EU Whistleblower Directive into national law, and EU member states' representatives will be reminded of this fact at the next EC Expert Meeting.

Consequently, it is recommended that companies do not wait for the deadline of December 17, 2021, but already start putting internal reporting channels in place, based on the EU Whistleblower Directive.

Action point #1: Analysis of the company's obligation to establish internal reporting channels and procedures.

Emmanuel Plasschaert

Partner – Brussels

Phone: +32.2.282.4084

Email: eplasschaert@crowell.com

Stefanie Tack

Counsel – Brussels

Phone: +32.2.282.1848

Email: stack@crowell.com