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Proposed Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law

Response from the Employment Lawyers Association

13 July 2018

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(EU Whistleblowing Directive)

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Introduction

The UK Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. We include those who represent both Employees and Employers in the courts and Employment Tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of specialist employment lawyers who meet regularly to consider and respond to proposed new legislation.

An ELA working party was set up to prepare this response to the European Commission's consultation on a proposal for a Directive on EU Whistleblower Protection: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218_en

It was chaired by Arpita Dutt of Brahams Dutt Badrick French LLP. The other members of the working party are listed at the end of this paper.

Background

The UK brought the Public Interest Disclosure Act 1998 into force on 2 July 1999 to protect whistleblowers from detrimental treatment by their employer. The UK has also developed sector specific legislation applicable to the financial services and insurance sectors, and to the NHS. The 20 years of experience of UK lawyers in this area informs our response below.

Article 1: Material scope

Article 1 takes a prescriptive approach to setting out the European Union laws in relation to which whistleblower protection will apply. This provides an interesting contrast to the position in the UK, where whistleblowing legislation includes a more general sweep-up category (alongside prescribed subject matters), referring to "breach of a legal obligation". Member States may not wish to go so far

as extending protection to reported breaches of contractual obligations (unless they already do so), as it is a point which has caused significant issues in the UK, arguably extending protection to issues which do not have any public interest element and which the Directive does not seem intended to

address. However, it seems likely that they may wish to consider including breaches of legal obligations falling outside the prescribed European Union acts.

Scenarios involving serious, perhaps criminal, misconduct within an organisation which may not breach any of the prescribed European Union acts but which ought still to attract whistleblowing protection. If they were to do so, we envisage that the differing approaches between Member States may make collection of, and reporting on, whistleblowing statistics (and comparison of those statistics between Member States) challenging.

Article 2: Personal scope

Article 2 describes the intended scope of the Directive and refers in the present tense to individuals "working" in the private or public sector (or, under Article 2(2), who have not yet started work). It seems clear from some of the definitions in Article 3, such as the reference to "past" work activities in the definition of "work-related context", that the intention is also to capture former employees, for example, by preventing retaliation in the form of a negative reference, thus hindering future employment opportunities. We would suggest that this is made explicit in Article 2.

We note that Article 2 refers to "shareholders" as potential beneficiaries of the protection under the Directive, but it is not clear how the Directive's provisions would apply to them. For example, it is difficult to envisage a shareholder meeting the requirement of having acquired information in a work-related context (it is noted that the Council of Europe defined a whistleblower as a person who reports or discloses information on a threat or harm to public interest in the context of their work-based relationship), or satisfying the definition of "report" (which refers to the organisation in which the reporting person works or has worked or in another organisation with which he or she is or was in contact through his or her work). The very nature of a shareholder/company relationship, including the balance of power and ability to subject an individual to retaliation, is not comparable to that of an employee/employer relationship or indeed volunteer, unpaid trainees or job applicants.

We would note that the inclusion of unpaid trainees and volunteers within the scope of protection does significantly widen the pool of potential claimants from those protected under UK law (unpaid workers are excluded). That being said, because these roles are unpaid, it is difficult to foresee how a claimant would convincingly establish financial loss caused by any detriment, unless it was loss of a chance (of paid employment) and there was strong evidence to support this.

Article 3: Definitions

We note that the aim of the Directive is to adopt a broad definitional approach with a view to ensuring effective protection and enhancing enforcement. However, in our view, the definitions are in some cases too wide and consideration should be given to refining them with a view to creating more certainty. We set out some examples below.

'Potential'

We note that there are some overlapping uses of the word "potential" within the definitions. For example, the definition of "breaches" refers to "actual or potential" unlawful activities or abuse of law. To the extent that "potential" in this context is intended to capture a suspicion, our view is that this is better dealt with through the definition of "information on breaches" (which refers to reasonable suspicions about potential breaches). We also consider that the word "potential" in the context of a breach is vague and could give rise to a whole spectrum of actions being caught, from the "mere possibility" of a breach occurring to an "all but actioned" breach. By contrast, in the UK, instead of referring to "potential breaches" our legislation refers to breaches / offences which are "likely to happen / be committed". This phrase is more precise and captures those actions / breaches at the more advanced stage of "potential", yet excludes those which are unlikely to happen but are still possible.

'Abuse of Law'

The definition of "abuse of law" could give rise to significant debate around its interpretation, given that it captures something much less specific than an unlawful activity, essentially applying to concerns that a company or organisation is acting outside the 'spirit' of the law. This arguably takes the concepts too far, notably in view of the definition of information on breaches which already covers suspicions about potential breaches.

'Report'

We note that the definition of "report" refers to "the provision of information relating to a breach" rather than the defined term of "information on breaches". It is not clear whether there is a deliberate difference here as compared to, for example, the definitions of "internal reporting" and "external reporting", which use the defined term. To the extent that the definition of "report" should use the defined term "information on breaches", the words "which has occurred or is likely to occur" appear superfluous as they are already captured by the definition of "information on breaches".

'Retaliation'

The definition of "retaliation" refers to an act or omission "prompted by" internal or external reporting. We envisage that this phrase could be open to a variety of interpretations, and therefore potential uncertainty. By way of comparison, we note that the test applied in UK whistleblowing legislation is that the reason or principal reason for the treatment was the making of a protected disclosure.

Further, in the definition of "retaliation" we note that there is a reference to an act or omission which "may cause unjustified detriment". It may be clearer to refer to an act or omission which does cause detriment (as "may" is speculative and therefore hard to establish) or which if threatened and actually materialised would cause detriment. We also note the use of the word "unjustified" and query whether this is meaningful, e.g. is there a circumstance in which a detriment of the type listed in Article 14 may be considered justified?

Need for a 'public interest' element when reporting 'information on breaches'

We note that there is no general requirement that the person reporting the "information on breaches" has a reasonable belief that the information is in the "public interest". This is in contrast to the position under UK law where the intention behind whistleblowing legislation was to exclude disclosures which were, in their nature, "private". It may be that by applying a prescriptive approach as regards the European Union acts to which whistleblower protection applies, the effect of the Directive is that disclosures will automatically be in the public interest. However, particularly with regards to "protection of privacy and personal data", we can envisage situations where individuals could complain about breaches (or potential breaches) of data protection law which may only impact them, and therefore may not be within the intended scope of the Directive (if, indeed, the intention is to limit protection to disclosures in the public interest).

Article 4: Obligation to establish internal channels and procedures for reporting and follow-up reports

Article 4(3) relates to application to legal entities in the private sector which is incredibly wide, and in particular Art 4(3)(c) (when taken with the Annex).

Articles 5, 6, 9 and 12

These articles relate to the timing of providing feedback to the reporting person.

The timing of feedback must be within a "reasonable timeframe, not exceeding three months" (Article 5(1)(c)) or "not exceeding three months or six months in duly justified cases" (Article 6(2)(b) and 9(1)(b)). This will undoubtedly be problematic in practice and could potentially lead to additional complaints about the timing of feedback. In practice, these periods may be unreasonable (or unrealistic) to allow for a full and thorough investigation and report, and for meaningful feedback to be provided. We suggest setting a statutory timeframe for acknowledging the report and to require regular updates to the reporting person, i.e. at least every three months. Guidance would be helpful as

to what is "reasonable" and what are "duly justified cases" outside of the Directive and to what is meant by "giving feedback" to the reporting person.

In addition, the requirement contained in Article 12 to review procedures every 2 years may be burdensome, particularly for small entities. Guidance could provide for a proportionate approach to reviewing procedures, such review to be dependent upon the size of the organisation, and the level of risk their activities pose to the public interest. Again, such reviews, we suggest, could be "reasonably frequent". Furthermore, consideration could be given to a process for external auditing of reporting procedures to ensure that complaints are handled effectively.

Articles 5(1)(a), 6(2)(a) and 9 encompass confidentiality provisions, ensuring where possible, that the 'reporting persons' confidentiality is preserved. We believe some consideration could be given to balancing the need for confidentiality against the need, in many cases, to share information to allow for a thorough investigation to be conducted. There could be an opt-out to maintaining confidentiality, invoked in special circumstances, which must be freely agreed and documented. Whilst the protection of anonymity may encourage people to make reports, wholly anonymous reports are often more difficult to investigate as thoroughly as a report made by a person who is prepared for their identity to be shared.

Consideration should be given to how the reporting and recording requirements will work alongside the General Data Protection Regulation (GDPR). We would recommend that guidance, outside the Directive, is issued to explain the relationship between the GDPR and the Directive.

Article 13: Conditions for the protection of reporting persons

Article 13(1) sets out the first condition concerning protecting a 'reporting person' [from retaliation]. It states that the person will qualify for protection provided they have "reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive."

This wording raises important issues regarding the person's belief that the information is 'true'.

In the UK, whistleblowing legislation does not require a worker to believe the information disclosed is 'true' (unless the disclosures are being made to a prescribed external person such as a regulator) or that the wrongdoing falls within any of the categories of listed wrongdoings. Instead it requires that the worker believes that failure has occurred or is likely to occur and the UK courts consider whether or not their belief is reasonable. It does not matter if their belief ends up being incorrect, or if the allegations would not amount to be a relevant failure.

We consider that the UK position should be considered in the proposed Directive, as this is less restrictive than the wording in the proposed Directive. As currently drafted, European whistleblowers

may end up falling outside the necessary protection should they not be certain of the truth of the wrongdoing, which sets a very high hurdle.

Article 13(2)-(4) generally requires reporting persons to use internal channels first. They may only report to the competent authorities, or, the public and media as a last resort, if these channels do not work or could not reasonably be expected to work.

This places additional hurdles upon reporting persons to qualify for protection, as they will be required to prove to an objective standard that they satisfy one of the conditions where they have reported outside of internal channels. This may involve producing evidence which could be difficult for a reporting person to obtain, such as why they believe internal reporting could jeopardise an investigation by the competent authorities.

By contrast, the UK position encourages internal disclosure to employers or other responsible persons, but permits external disclosure to legal advisers, prescribed persons or a government minister. Whilst certain conditions must be met, these are not onerous and prior disclosure to an employer is generally not required. It is only where an individual makes a wider disclosure outside of the identified categories that prior disclosure is required. Therefore, the UK position permits disclosure:
(a) to a wider range of organisations or individuals and;
(b) with less onerous conditions attached.

However, the proposed Directive has a considerably broader scope than UK legislation. It is recognised that prescribing an internal reporting mechanism provides some balance to the wider-reaching provisions. Notwithstanding this, the restrictions should be considered to ensure that reporting persons are not discouraged from making disclosures.

Article 14: Prohibition of retaliation against reporting persons

Article 14 requires Member States to take necessary measures to prohibit any form of retaliation and provides a non-exhaustive list of forms that retaliation can take.

UK whistleblowing legislation does not prescribe or describe any particular form of retaliation, save that employees are protected from dismissal and employees and or workers protected from "*detriment*" (which is not defined). The courts have looked to the meaning of "*detriment*" as established in equality law in interpreting the provision and consider it to be a low threshold, – essentially where a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. This appears consistent with the forms

of retaliation set out in the Directive and generally with those described in the UK's Whistleblowing Commission's Code of Practice[1] (at paragraph 11).

However, the forms of retaliation from which whistleblowers are protected appear to go further in some respects than the UK position. In particular, whistleblowers are protected from "indirect" retaliation. If, through the victimisation of one individual, another person suffers due to the consequences of, say, the cancellation of a contract for goods or services, or a licence or permit, they may have protections not currently available in UK law. This provision combined with the wide scope of those that the Directive "at least" applies to, such as shareholders, persons in managerial bodies, legal persons or a person working under a supplier (see Article 2), is likely to enlarge the population of those that may benefit from whistleblowing protections but also widen the scope of potential claims. For example, the right to claim interim relief provided by Article 15(6) could result in difficult cases where interim relief relating to the ending of a contract for services affecting a person working under a supplier may be sought and which could have wider commercial ramifications.

Furthermore, the provision expressly proscribes blacklisting on the basis of a sector or industry-wide informal or formal agreement. The UK position is that currently applicants for roles are not protected by whistleblowing laws. There is however, draft legislation (the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018), currently before the UK Parliament which prohibits a NHS employer from discriminating against an applicant for a job because it 'appears' they have made a protected disclosure. Under this legislation it does not matter if the prospective employer was mistaken and the applicant had in fact, not blown the whistle or had acquired information outside the application and interview process. This is not the position under the proposed Directive and therefore similar provision could be considered to apply to applicants for posts. Furthermore, this UK legislation would introduce a reverse burden of proof akin to that found in UK equality law, and similar to the EU Directives.

The widening and enhancement of the protections provided to whistleblowers may be viewed as appropriate in the context of EHRC rights. Whereas the EU has not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Member States are bound by its human rights law and external monitoring. For example, Article 14 EHRC provides for the enjoyment of the rights and freedoms set forth in the European Convention on Human Rights (ECHR) without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It may be necessary and possible in order to give effect to the rights under Article 10 ECHR, alternatively Article 14 ECHR read with Article 10 for wider protections to be provided for in the Directive, on the premise "other status" can and ought to include whistleblowers.

[1] http://www.pcaw.org.uk/files/PCaW_COP_FINAL.pdf

Article 15: Measures for the protection of reporting persons against retaliation

With regard to 15(2) and 15(3), we agree that easily accessible information, including a clear explanation in lay terms of what falls for protection under the Directive, procedures for obtaining protection and remedies available for retaliation, are essential. It may be sensible that this is produced as part of a collaboration between the relevant regulatory bodies charged with monitoring breaches falling within the scope of the European Union acts.

There is concern as to what is envisaged by effective assistance by competent authorities and that certification of the fact of qualification for protection under the Directive (as proposed by 15(3)) is impractical and goes too far. It is unclear who is intended to be the arbiter of such a finding, which is likely to be impossible at an early stage and without being in possession of all of the relevant information. It creates the risk of inconsistent findings and the possibility of satellite litigation.

One solution which has received some support in the UK, including from Whistleblowers UK, (a not-for-profit organisation in the UK which provides help, support and information to whistleblowers), is the creation of a national Office for the Whistleblower. The Office's function would be to protect, advise and support whistleblowers by overseeing, co-ordinating, setting standards and holding to account the regulators and employers. A central whistleblowing authority has its attractions, including its ability to provide the type of information and advice envisaged by 15(2) and (3). On the other hand and aside from questions of funding, potential misconduct is often very sector-specific, and a proper investigation into the allegation will often require expertise in the subject matter, usually found in the regulatory body monitoring the sector. There is also a strong concern that the creation of such a body

may lead to duplication of effort and is unlikely to present the most efficient means of providing information of alleged or actual misconduct or wrongdoing. If this is envisaged, this should be clearly prescribed by the Directive.

It is generally agreed that the protection at Article 15(4) already exists under UK law, which guides whistleblowers to appropriate channels for disclosure and ensures any agreement which purports to prevent an individual from making a protected disclosure under the whistleblowing legislation is void (section 43J Employment Rights Act 1996). It is recognized this is essential to promote the disclosure of misconduct above other duties which often discourage disclosure, such as duties of loyalty and fidelity but ensure an appropriate route is followed in the interests of protecting all stakeholders. That said, other than in relation to some settlement agreements in specific sectors e.g. financial services, there are currently no requirements for limitations of non-disclosure agreements to be expressly set out in the agreement containing the non-disclosure provisions. If it is intended that this protection should be more widely known and understood, it may be that the Directive could be more prescriptive to require that any contractual restriction on disclosure of information must include express carve-outs and a clear explanation in lay terms of what falls within the whistleblowing regime.

With regard to 15(5), to achieve protection under UK law, the reporting person must:

- make a disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of six specified types of malpractice has taken place or is likely to take place (a qualifying disclosure); and
- make the qualifying disclosure to one of the categories of people listed in sections 43C-43H of the ERA 1996, with varying conditions according to the category of person to whom the qualifying disclosure is made.

Under UK whistleblowing law, the reporting person must prove that:

- they have made a protected disclosure; and
- that there has been detrimental treatment/they have been dismissed.

The employer then has the burden of proving the reason for the treatment.

There is general support for whistleblower protection to focus on whether a person reasonably believes that the information they are reporting is true or likely to be true (Article 13). However, the requirement that the reporting person provides reasonable grounds of their belief that the detriment was in retaliation for having made the report or disclosure appears to go further than this, and places a burden on the reporting person to establish a prima facie case on causation. We express concerns as to whether this strikes the right balance between encouraging reporting and discouraging spurious claims.

It is also unclear how this then fits with the requirement that the person taking the retaliatory measure to prove that the detriment was not a consequence of the report but was exclusively (emphasis added) based on duly justified grounds. Article 15(5) also raises a question about the position if the protected disclosure influenced the treatment but was not the only reason. It would be helpful if the extent to which any influence would lead to liability is clarified.

At what point is it envisaged that the burden shifts? It is broadly agreed that the burden on the reporting person should not be unduly onerous and establishing a causal link when they may have no insight into the decision making process of the person taking the allegedly retaliatory action may be going too far.

In light of the above, it is therefore suggested that 15(5) requires clarification in the following material respects:

- When is a disclosure protected? Does protection require establishment of a prima facie case as to causation? and;
- Causation and burden of proof.

With regard to 15(6) and paragraph 73 of the proposed Directive, it is understood that the remedial measures envisaged are wide ranging. Article 15(6) describes the measures as including "interim relief". Under the UK whistleblowing legislation, "interim relief" relates to the making of an order for continuation of employment pending final determination of the case such that the reporting person continues to receive a salary and benefits pending the full hearing. In practice, mainly due to the high hurdle of obtaining the relief and strategic downsides of an unsuccessful application (which must be made within 7 days of termination) interim relief is rarely sought and even more rarely granted. Clarity with regard to the type of remedies available, the circumstances in which it is envisaged they should be available and any conditions would be welcomed.

Article 15(7) requires that a reporting person should have the right "*to rely on having made a report or disclosure in accordance with the Directive to seek dismissal [of proceedings*]". The protection of a whistleblower that reasonably believes they are reporting malpractice from retaliatory civil action is generally welcomed. As such, clarity would be helpful in the following areas:

- When is the protection available? Paragraph 74 suggests that "provided a report has been made", this would be sufficient to amount to a defence. It also refers to Directive (EU) 2016/943 of the European Parliament and of the Council which it states "exempts reporting persons from the civil redress measures, procedures and remedies it provides for, ***in case the alleged acquisition, use or disclosure of the trade secret was carried out for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest"*** **[Emphasis added].** Neither qualification is included in Article 15(7).
- How would proceedings arising out of detrimental treatment for whistleblowing and civil actions for breach of confidentiality interrelate? Issues of reasonable belief are not typically determined in whistleblowing actions until trial of a matter. Is it envisaged that civil actions should be stayed or dismissed pending the outcome of the whistleblowing proceedings?

With regard to Article 15(8), persons who report alleged or actual misconduct contribute significantly to the integrity of our public and private institutions. Without their help wrongdoing would often go undetected. Most practitioners and commentators agree that reporting persons who suffer detrimental actions following disclosure of wrongdoing should be compensated. A more difficult question is what (if any) additional support should be given as a form of interim remedy as they pursue such compensation. Often adverse actions in the workplace following exposing wrongdoing in an

organisation come in the form of unlawful dismissal. It may take some a long time to find alternative employment. Some may never work in the same industry again. It is widely accepted that a major deterrent for whistleblowers reporting or pursuing their complaints to resolution is the inequality of arms and cost of pursuing action for compensation for detrimental treatment.

We note that paragraph 75 of the proposed Directive contemplates that reporting persons contesting retaliation could recover legal fees at the end of proceedings. This is not replicated in the Articles. It

also highlights the difficulty of reporting persons covering these fees up front, especially where reporting persons are unemployed and/or blacklisted.

As the employment tribunal is a no cost jurisdiction, the likelihood of recovery of legal costs for pursuing such compensation in the UK, even if such action is successful (let alone as an interim remedy), is limited[2]. Accordingly, clarification would be welcome in relation to the following:

- The circumstances where the legal costs incurred by whistleblowers should be recoverable;
- If, and in what circumstances, legal and financial assistance should be available for reporting persons as an interim measure. It is clear that support is envisaged in criminal proceedings and for those who are in serious financial need. However, greater clarity is required as to:
    - when a reporting person should qualify for such support; and
    - to what extent is support envisaged beyond this?; and
- How should such costs be funded?

Article 16: Measures for the protection of concerned persons

Article 16 has broad application because the definition of a concerned person is "a natural or legal person who is referred to in the report or disclosure as **a person to whom the breach is attributed or with which he or she is associated**." [Emphasis added]

The protections in Article 16 (the right to a fair trial, presumptions of innocence and rights of defence, including the right to be heard) are more relevant to the accused rather than their associates. The meaning of the "right to an effective remedy" for "concerned persons" should also be clarified. Concern was expressed as to the extent to which it is intended that this should imply any right of action against the whistleblower, which is likely to be counterproductive to the aims of the Directive.

The reference to having the right of access to their file in Article 16(1) should be clarified as this is broader than a right of access to personal data. In practice, a file containing data relating to other persons would be redacted and any privileged materials removed but the drafting is broad and does not contain those caveats.

The obligations in Articles 16(2) and (3) concerning the importance of protecting the identity of concerned persons are not controversial. However, it would be useful to have guidance as to how that might work in practice.

[2] There are exceptions to the general rule but they are not specific to whistleblowing actions and generally relate to the conduct of the parties.

Article 17: Penalties

In relation to each limb it would be useful to have further guidance as to its intended meaning. It is currently unclear what is meant by "penalties". Are they financial and/or non-financial penalties? Are they separate to or do they include compensation? We note that a right to compensation for reporting persons who suffer retaliation following exposure of breaches falling within the scope of the Directive is not expressly covered elsewhere in the Articles. How would these penalties be determined?

In relation to 17(1):

- We query how it would be determined that someone/an entity had hindered or attempted to hinder reporting. We also query who would determine this, and note that this determination could potentially be very difficult.
- We query what is meant by retaliatory measures and whether this should be cross-referenced to Article 14. We suggest that this would need to be clearly defined. We query who would determine whether someone/an entity had taken retaliatory measures. If this is meant to be the basis on which compensation is available for retaliatory measures, this should be clearer. If it is intended that payments to reporting persons could/should go beyond performing a compensatory function e.g. punitive damages or financial incentives/rewards, guidance should be provided as to when such remedies should be available and what conditions would need to be satisfied to access such damages/rewards.
- We query what "vexatious proceedings" brought against a reporting person means. We assume that they would be proceedings such as defamation or action for a breach of confidentiality. Under UK law, a person or entity is likely, in any event, to be prevented from taking action for a breach of confidentiality in so far as the disclosure was relevant to a protected disclosure (whistleblowing).
- We also query how it would be determined whether proceedings were vexatious or not, and who would determine this. Again, this could be very difficult.
- If it is intended that the Directive requires that Member States implement laws which protect the anonymity of the reporting persons, this should be made clear. With regards any natural or legal persons that breach the duty of maintaining the confidentiality of the identity of reporting persons, save in relation to regulatory requirements in specific sectors, there is no general rule of UK law that automatically protects the identity of a reporting person. Again, guidance as to the applicable conditions, nature, calculation and responsibility for determination of "penalties" as envisaged by 17(1)(d) should be provided.

In relation to 17(2):

- We query how it would be determined whether or not a person had made malicious or abusive reports or disclosures, and suggest this would need to be clearly defined. This may be clear in

some circumstances, but very difficult in others even following the conclusion of Employment Tribunal proceedings. We also query who would determine this.

- We appreciate the desire to preserve the credibility of the system. However, under UK law it is relatively difficult for a reporting person to pursue and succeed in a claim for detriment/dismissal related to them having made a protected disclosure; the legal test is multi-faceted and difficult for claimants, particularly litigants in person, to understand. In addition, generally speaking if a protected disclosure is made maliciously this may well impact on any compensation that a Tribunal may award to the reporting person in the event their claim is successful, or could be a factor in their claim failing. We suggest therefore that additional penalties may not be warranted.

Article 18: Processing of personal data

We consider Article 18 to be uncontroversial given the requirement to comply with the GDPR and UK data protection law. However, concern was expressed in relation to the following requirement:

"*Personal data which are not relevant for the handling of a specific case shall be **immediately deleted**".* [Emphasis added]

We consider that adequate protection already exists under the GDPR to ensure personal data is not retained for longer than necessary and we consider this additional requirement under Article 18 is unduly onerous. It may be difficult to determine whether personal data remains relevant or not at any particular stage, or it may be that it does not become clear what information is relevant until a late stage. There is an argument that personal data would need to be retained to ensure competent authorities can justify decisions they have taken. Detailed guidance would help to clarify the timescales and responsibility for making such determinations, and more flexibility would be preferable.

Article 21: Reporting, evaluation and review

We note the requirement in Article 21(2)(a) for Member States to submit information (if available) on the number of reports received by the competent authorities. The stated aim of this submission is to assist the Commission in reporting to the European Parliament and the Council on the implementation of the Directive in national law. It is likely that any statistics provided by Member States may provide a significantly incomplete picture of how their national law is operating, given that the reporting obligation applies only in respect of reports received by competent authorities (and not, for example, any internal reporting). We do not consider that it would be practicable to require statistics to be gathered on internal reporting, but do think that statistics showing only the reports made to competent authorities should be treated with caution when being used as a basis for assessing the operation of national whistleblowing laws. Incorporating a requirement for members states to introduce a legal requirement for all employers, or at least employers above a certain size threshold, to report certain information as regards whistleblowing to the Government on an annual basis (making comparisons

with the UK gender pay gap reporting obligations) could be considered, alongside an impact assessment on the effect of introducing such an obligation on employers.

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