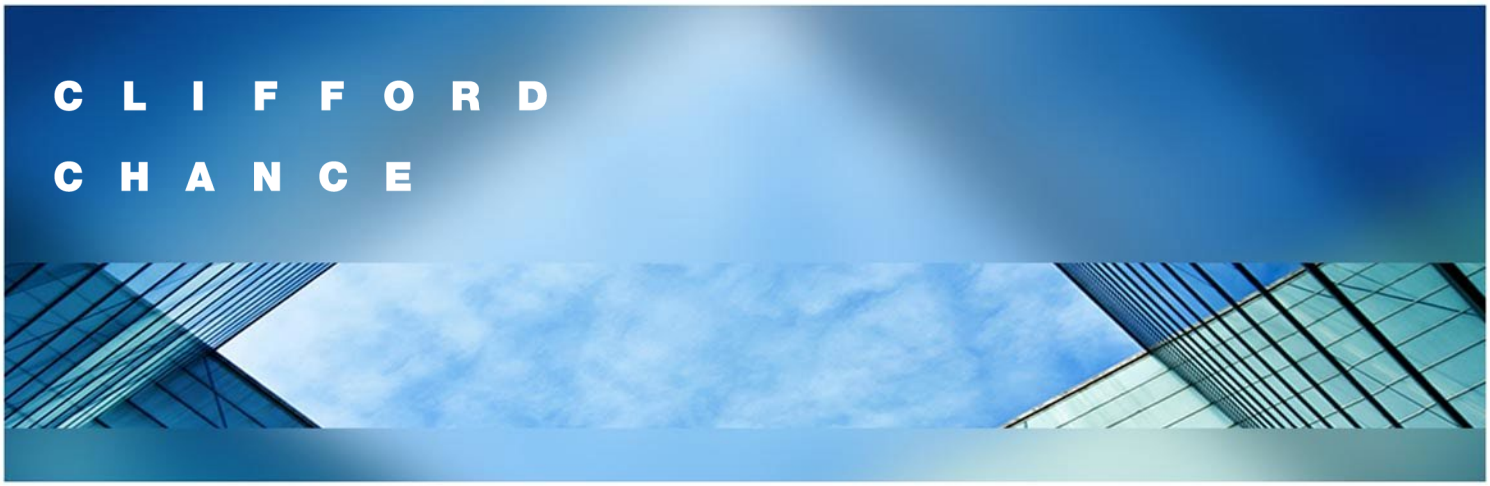

THE WHISTLEBLOWER DIRECTIVE: SAFEGUARDING EFFECTIVE ACCESS TO LENIENCY

The EU Whistleblower Protection Directive ("**Directive**") offers protections to individuals who report breaches of EU law, including EU antitrust rules. However, whilst aimed at increasing enforcement overall, the Directive may impact companies' ability to investigate potential antitrust breaches internally and apply for leniency for antitrust infringements. Following implementation of the Directive in the different EU Member States, companies should consider carefully how to maintain effective reporting systems.

Key issues

- The Whistleblower Protection Directive seeks to encourage reporting by employees of antitrust and other EU law violations. Since 17 December 2021, EU Member States should have implemented the Directive's provisions in their national laws.
- Following the implementation of the Directive, companies of a certain size will have to establish internal reporting channels and inform their employees of the possibility to also report breaches externally.
- The way in which companies set their internal reporting channels and encourage internal reporting will play a crucial role in preserving the companies' ability to investigate potential antitrust breaches internally effectively and apply for leniency where relevant.

In most EU Member States, companies who report their participation in a cartel (and sometimes other types of antitrust infringements) may benefit from immunity or reduction of fines under a leniency program. Leniency programs are an important tool to help competition authorities discover and investigate antitrust violations.

The Directive pursues a similar objective of encouraging the reporting of breaches of EU law, including violations of antitrust rules.

While leniency programs offer protection to companies that report an infringement, the Directive seeks to protect individual whistleblowers. It foresees the creation of channels by companies with more than 50 employees, that employees may use to report an infringement within their company, and requires EU Member States to set up external channels for reporting infringements to an independent authority. The Directive provides for an enhanced protection against retaliation for employees who report suspected breaches internally or externally. In some limited circumstances, the Directive also seeks to protect whistleblowers who report such breaches publicly. For more detail on the Directive, see our earlier briefing.

From 17 December 2021, Member States should have implemented the Directive's provisions in their national laws. Even though some Member States may be late in transposing the Directive, international companies are well advised already to implement internal processes in order to make sure that they comply with the provisions of the Directive in each relevant jurisdiction.

IMPACT ON COMPANIES' ABILITY TO MAKE LENIENCY APPLICATIONS

Leniency programmes require the company reporting an infringement to provide certain information about the infringement to the competition authority. Immunity from fines is usually offered to the first undertaking that provides the authority

with information that allows the initiation of an investigation and/or the finding of an infringement, where the authority did not previously have such information. If the competition authority has such information but the company provides it with evidence of significant added value, a company may see its fine reduced.

Thus, to be able to benefit from a leniency program, a company needs to be able to gather information about the infringement that is unknown to the competition authority. The Directive creates certain hurdles in that regard.

Increased risk of suspected infringements being reported externally rather than internally

As well as requiring companies to set up internal channels to report infringements of EU law, the Directive also requires Member States to entrust a national authority with receiving reports from whistleblowers. That authority should transmit the reports to the competent national (or EU) bodies or agencies for further investigation when appropriate.

At the same time, according to the Directive, companies must inform their employees of the possibility of reporting competition law breaches *both* internally and externally and may not hinder or attempt to hinder such reporting. Depending on how Member States implement the Directive and how effective a company's internal reporting channels are, this obligation could have the effect of encouraging individuals to report suspected violations externally instead of, or in addition to, making an internal report. If an employee chooses to make an external report, this may hinder a company's ability to obtain immunity from fines or benefit from a reduction of its fine, as the authority may already be in possession of evidence of the infringement.

Communication of whistleblowers' reports between different competition authorities

Reports by whistleblowers, containing evidence of an infringement, may end up being shared between competition authorities. In Europe, national competition authorities and the European Commission cooperate within the European Competition Network. As part of that cooperation, competition authorities may share among themselves information on their investigations. In certain circumstances, such information may also be shared with competition authorities in other non-EU jurisdictions.

In the absence of an EU-wide harmonised leniency programme, a leniency application in one Member State does not grant a similar immunity or reduction in another Member State. Depending on the nature of the infringement, a company may therefore need to make leniency applications to several national competition authorities (as well as, potentially, the European Commission). Such applications often need to be coordinated with help from antitrust counsel at the EU or global level.

While information submitted as part of a leniency application to a national authority benefits from particular protection that prevents another authority from starting an investigation on the basis of that information, no such protection currently exists for information a competition authority receives from employees using external reporting channels established by the Directive. Thus, an external report to a competition authority in one Member State may trigger additional investigations for similar conduct in other jurisdictions and limit the potential benefits of applying for leniency in these jurisdictions.

IMPLICATIONS ON COMPANIES' ABILITY TO INVESTIGATE SUSPECTED ANTITRUST BREACHES

The Directive may also create some hurdles to a group's ability to act upon information received internally. The Directive requires each 'legal entity' of a certain size to establish its own internal reporting channels. While it is possible to maintain group-wide reporting channels, as many companies already do, the European Commission has made clear during an expert group meeting that a reporting mechanism at group level will not necessarily satisfy the Directive's requirements. Complying with the Directive may therefore require implementing additional reporting channels specific to each legal entity concerned.

Where such parallel channels exist, an employee can choose to report a breach using either of them. If an antitrust breach is reported at the level of a legal entity, that may limit the group's ability to act upon the information. Indeed, the Commission indicated at an expert group meeting that information reported through a legal entity's reporting channel may not be shared with the wider group unless the whistleblower has been informed and has given their consent. This might prove particularly burdensome in the context of antitrust breaches, given that key information about a potential infringement often includes information that would allow the employee to be identified (*e.g.*, information on the whistleblower's participation in meetings or specific communications with competitors). Groups headquartered outside of the EU face an additional hurdle, insofar as any transfer of personal data outside of the EU would need to consider the applicable data protection requirements.

KEY CONSIDERATIONS FOR IMPLEMENTING EFFECTIVE INTERNAL REPORTING CHANNELS

The exact impact of the Directive will ultimately depend on how it is implemented in each Member State. However, companies should already be thinking as to how to meet the Directive's requirements (and escape sanctions determined by each Member State) while minimising the risk of this impeding their ability to investigate potential antitrust breaches internally and submit leniency applications where needed.

In that regard, companies should foster an environment that favours internal communication and reporting. This entails ensuring that employees know no retaliatory measures would be taken and that their identity will be protected, as well as showing that the company takes internal reports seriously and acts upon them diligently and impartially. This is particularly important as investigating an antirust infringement efficiently may require obtaining the employee's consent.

The processes of internal reporting should incorporate a triage system enabling a company to identify quickly reports that relate to suspected antitrust breaches and develop standard operating procedures for investigating them, both when reported at the group level or at the legal entity level. Companies should also encourage employees who choose to report a breach to first and foremost report the relevant facts internally and, if they choose to report externally, to also file a report internally. This increases the chances of the company discovering an infringement and being in a position to apply for leniency before the information reaches, and is processed by, a competition authority.

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