

# The whistle-blower as a private enforcement tool in the EU banking and financial sector: call for a unique solution

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## Abstract

Following the financial crises and several scandals, the issue of whistle-blowing has re-emerged for the banking and financial sector. These events led the EU to adopt provisions on whistle-blowing in several EU legal acts concerning the banking and financial sector such as in the Market Abuse Regulation (MAR) and in the Single Supervisory Mechanism (SSM). On October 2019, the EU adopted the Directive on the protection of persons who report breaches of Union law (Directive on the protection of whistle-blowers). The EU decided to offer to the Member States a new enforcement tool, inspired, probably, by the long-existing US model on the use of whistle-blowers as private enforcers. Nonetheless, whistle-blowers in the banking and financial sector are in a delicate position which may harden their whistle-blowing experience. The problem lies on the co-existence of sectoral whistle-blowing provisions and the Directive. Due to the diversity and inconsistency of sectoral provisions, it could have been expected to become void once the Directive is adopted. Nevertheless, the Directive does not make these sectoral provisions void but, to the contrary, makes them a sort of *lex specialis*. The paradox is that the whistle-blower becomes confused. This paper will seek to address this gap by analysing these sectoral legal provisions on the protection of whistle-blowers and the Directive rules. Then, it will be scrutinised which is the best way to present legislation on the protection of whistle-blowers in order to avoid confusion and to ensure legal clarity in the EU banking and financial sector. The purpose of this paper is to argue that the sectoral whistle-blowing provisions in the EU banking and financial sector should be declared void and the Directive should be the only point of reference.

## Keywords:

Enforcement, whistleblowing, EU banking and financial law

## I. Introduction

Following the financial crises and several scandals, the issue of whistle-blowing has re-emerged for the banking and financial sector. These events led the EU to adopt provisions on whistle-blowing in several EU legal acts concerning the banking and financial sector such as in the Market Abuse Regulation (MAR) and in the Single Supervisory Mechanism (SSM). These different provisions are specific to the subject matter of the legislation they were enacted for and they follow different styles and procedures. They are characterised as sectoral and limited in their sector specific whistle-blowing rules and protection. On October 2019, the EU adopted the Directive on the protection of persons who report breaches of Union law (Directive on the protection of whistle-blowers).<sup>1</sup> The EU decided to offer to the Member States a new enforcement tool, inspired, probably, by the long-existing US model on the use of whistle-blowers as private enforcers.

Nonetheless, whistle-blowers in the banking and financial sector are in a delicate position which may harden their whistle-blowing experience. The problem lies on the co-existence of sectoral whistle-blowing provisions and the Directive. Due to the diversity and inconsistency of sectoral provisions, it could have been expected to become void once the Directive is adopted. Nevertheless, the Directive does not make these sectoral provisions void but, to the contrary, makes them a sort of *lex specialis*.<sup>2</sup> The paradox is that the whistle-blower becomes confused. He or she should check whether the reported wrongdoing falls under the specific rules and then decide where and how to report. This discrepancy is an additional layer of confusion which may be an obstacle for future whistle-blowers, be an important problem for whistle-blowers' protection and deprives them of the necessary legal clarity and certainty.

This paper will seek to address this gap. First, the whistle-blower as a private enforcement tool is presented to demonstrate the change from public to private enforcement under EU law. Second, these sectoral legal provisions on the protection of whistle-blowers and the Directive rules are analysed. Then, it is scrutinised which is the best way to present legislation on the protection of whistle-blowers in order to avoid confusion and to ensure legal clarity in the EU banking and financial sector. The purpose of this paper is to argue that the sectoral whistle-blowing provisions in the EU banking and financial sector should be declared void and the Directive should be the only point of reference.

## II. Private enforcement and whistle-blowers in the EU

The EU is dependent on the correct implementation of EU law by the Member States.<sup>3</sup> Rules do not have a particular value if they are not enforced. Enforcement can be achieved in two ways: either enforcement from public authorities known as “public enforcement” or enforcement from private actors where individuals are allowed to act privately. The coexistence of public and private enforcement is present in the EU for many years.<sup>4</sup> As a way of example, this coexistence is to be found in cartel enforcement where individuals can bring claims concerning the violation of EU law before the European Commission. The

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<sup>1</sup> European Parliament and European Council Directive 2019/1937/EU of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17

<sup>2</sup> Dimitrios Kaferanis, ‘Sectoral Provisions and the Directive on the Protection of Whistle-blowers: No to a Complex Relationship?’ (2020) Oxford Business Law Blog available at: < <https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/sectoral-provisions-and-directive-protection-whistle-blowers-no> > accessed 15 June 2022

<sup>3</sup> Roland Bieber & Francesco Maiani, ‘Enhancing Centralised Enforcement of EU Law: Pandora’s Toolbox?’ (2014) 51 Common Market Law Review 1057, 1058.

<sup>4</sup> Cagdas Evrim Ergun, ‘Private Model of Enforcement in European Union Law’ 1(2) Ankara Law Review 253, 255.

most recent example of adoption of a private enforcement tool is the introduction of whistle-blowers legislation in the EU in order to enforce EU law.

Traditionally, the enforcement lies within state authorities.<sup>5</sup> State authorities should ensure that the rules are applied and if they are not, sanction should be put in place. The construction of the EU with several layers of rules at the national and European level as well as the plethora of new Union bodies have demonstrated that enforcement changes. The powers of the European Commission and the conferral of powers to several EU bodies have created a front-line control and can be characterised as direct enforcement.<sup>6</sup> Such an example is the area of competition law. Cases such as Google,<sup>7</sup> Intel,<sup>8</sup> and Microsoft highlight the powers of the European Commission about enforcement of competition law rules and procedures.<sup>9</sup> In this area, the European Commission has the power to impose sanctions and fines. In the area of competition law, private enforcement has a key importance as individuals can provide information to the European Commission.<sup>10</sup>

The issue of private enforcement became critical in recent years due to the notable amount of EU legislation, the introduction of specialised EU bodies and the need to better enforcement of EU law.<sup>11</sup> The prevalence of private enforcement is caused by the problems the public model of enforcement faces. First, there is a lack of knowledge of breaches of EU law.<sup>12</sup> Although the European Commission should be aware of these breaches, the broad EU primary and secondary legislation create a vast legal set of rules which makes their enforcement challenging. Information is a valuable asset for the EU and its enforcement powers.<sup>13</sup> The EU has adopted the rules but is not able to enforce them. Public enforcement mechanisms at national and EU level often lack experience, knowledge, expertise and personnel. Thus, individuals are better placed to provide information to the competent national or EU authorities for ongoing breaches of EU law.

These individuals are whistle-blowers who, as proactive citizens, are the persons who can provide national and EU authorities with information about

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<sup>5</sup> Miroslava Scholten, Michiel Luchtman and Elmar Schmidt, 'The Proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities* (EE, 2017) 4

<sup>6</sup> G Rowe, 'Administrative Supervision of Administrative Action in the European Union' in H Hofmann, G Rowe and A Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009) 188–217

<sup>7</sup> European Commission, 'Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android' (Press Release) IP/15/4780

<sup>8</sup> Intel (Case COMP/C-3/37.990) Commission Decision 227/07 [2009] OJ C 227/13

<sup>9</sup> European Commission, 'Antitrust: Commission accepts Microsoft commitments to give users browser choice' (Press Release) IP/09/1941

<sup>10</sup> Miroslava Scholten, Michiel Luchtman and Elmar Schmidt, 'The Proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities* (EE, 2017) 6

<sup>11</sup> Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Turk, *Administrative Law and Policy of the European Union* (OUP, 2011) 702

<sup>12</sup> Cagdas Evrim Ergun, 'Private Model of Enforcement in European Union Law' (2004) 1(2) *Ankara Law Review* 253, 258

<sup>13</sup> Miroslava Scholten, Michiel Luchtman and Elmar Schmidt, 'The Proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities* (EE, 2017) 5

breaches of EU law.<sup>14</sup> The whistle-blower is an important figure who can assist the enforcement of EU law. Nevertheless, the existing legal literature fails to recognise the whistle-blower as a private enforcement tool. The US authorities and scholars have long recognised the private enforcement nature of whistle-blowing.<sup>15</sup> This should be done in the EU as well. The first Article of the Directive on the protection of whistle-blowers makes clear the enforcement nature of this new tool which states: “The purpose of this 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”.<sup>16</sup>

The whistle-blower has a multifunctional enforcement role depending on where they address themselves. They are a flexible private enforcement tool, leaving behind traditional centralised enforcement. The idea of private enforcement is based on the fact that effective regulation may not only depend on enforcement by state authorities but also on private intervention. This private enforcement can come from internal reporting or by reporting to the competent authorities. Whistle-blowers are allies who are in the advantageous position to have access to information about breaches of Union law. It is a win-win situation for the EU.

By adopting EU legislation on the protection of whistle-blowers, the EU gives an empowered voice to them. As the EU needs information and to better enforce its rules, the whistle-blower protection comes handy. EU workers have now a voice and can participate to the respect of EU rules. This can construct a safer and more respectful EU. In the following part, the sectoral provisions on whistle-blowing at the EU banking and financial sector are presented and comments are made in relation to the coexistence of these sectoral provisions and the Directive on the protection of whistle-blowers.

### III. Sectoral provisions on whistle-blowing at the EU banking and financial sector

In the EU banking sector, the 2008 financial crisis changed the banking scene at the EU level. The consequences of the 2008 crisis to the EU banking sector had made it evident that new rules are needed. This led to the creation of the Single Supervisory Mechanism (SSM).<sup>17</sup> The SSM has attributed new powers to the European Central Bank (ECB). Under its new role, the ECB needs information about possible breaches of the relevant EU legislation. One of the sources of this information is the SSM whistle-blowing provision which allows potentially relevant information to arrive to the ECB from employees of credit institutions or other related parties.<sup>18</sup> The SSM whistle-blowing provisions are laid out in Article 23.

Under Article 23, the ECB shall ensure that effective mechanisms are put in place for reporting of breaches by credit institutions, other financial entities and competent authorities of violations of legal acts as found in Article 4(3). Specific procedures should be adopted for the receipt and the follow up of these

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<sup>14</sup> Dimitrios Kafteranis, ‘A new enforcement tool: a Directive to protect whistle-blowers’ (2020) 41 Business Law Review 50

<sup>15</sup> Pamela H Bucy, ‘Information as a Commodity in the Regulatory World’ (2002) Houston Law Review 946

<sup>16</sup> Directive, Art. 1

<sup>17</sup> European Central Bank Regulation (EU) 468/2014 of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1.

<sup>18</sup> Stefaan Loosveld, ‘EU Financial Supervisory Powers, Whistleblowing and Self-Reporting’ (2019) 34(9) Journal of International Banking Law and Regulation 317

reports. These reporting procedures should ensure that protection is offered to reporting persons, personal data are protected under the relevant EU legislation and appropriate protection is offered to the accused party. Persons reporting to the ECB should do it in good faith and only if they have reasonable grounds to believe that their reporting will show breaches of relevant EU law that is related to the areas of ECB competence.

ECB's competences are particular. While it supervises Significant Institutions (SIs), it shares supervisory duties with the national supervisory authorities on Less Significant Institutions (LSIs). This idiomorph of the EU banking supervision may have consequences on whistle-blowing. If the report concerns a SI, then the ECB can receive the report and act accordingly. If the report concerns a LSI, then the ECB can only assess the report in terms of breaches related to the ECB competences and then the report should be passed to the national supervisory authorities. The ECB should ensure that the identity of the whistle-blower is not revealed ensuring a certain level of confidentiality. On the protection that the ECB can offer, there are no relevant information. In which way can the ECB protect an employee from an EU bank or financial institution? It is not clear in which way protection is ensured by the ECB at the national level.

Apart from the ECB, obligations of receiving reports lie to the credit institutions as well. Under Article 71 of the Capital Requirements Directive IV (CRD IV),<sup>19</sup> Member States should ensure that the national supervisory authorities will "establish effective and reliable mechanisms to encourage reporting of potential or actual breaches" of both the Capital Requirements Regulation (CRR) or the national provisions transposing CRD IV.<sup>20</sup> The channels for disclosure should be "specific, independent and autonomous".<sup>21</sup> The following minimum standards should be ensured: specific procedures for the receipt of reports on breaches and offer a follow-up.<sup>22</sup> Moreover, three types of protection should be available. First, protection against retaliation, discrimination or other types of unfair treatment. Second, protection of personal data of the reporting person and of the accused party in accordance with EU data protection rules. Finally, confidentiality on the identity of the whistle-blower is essential apart if the identity should be revealed due to national law or judicial proceedings or investigations requirements.

Rules on whistle-blowing exist in the EU financial sector as well. These rules are the result of the different financial crises and the need to better regulate and control financial markets. They will be presented in a chronological order.

Under the Undertakings for Collective Investments in Transferable Securities Directive (UCITS),<sup>23</sup> Member States should ensure the establishment

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<sup>19</sup> European Parliament and European Council Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48 and 2006/49/EC [2013] OJ L176/338. The recently adopted European Parliament and European Council Directive 2019/36/EU of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (CRD V) [2019] OJ L150/253 does not add anything to the existing provisions of CRD IV.

<sup>20</sup> European Parliament and European Council Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012 [2013] OJ L176/1.

<sup>21</sup> Directive 2013/36, Art. 71(3).

<sup>22</sup> Directive 2013/36 Article 71(2)

<sup>23</sup> European Parliament and European Council Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L302/32.

of reporting mechanisms, under Article 99d, that will allow whistle-blowers to report potential infringements of the national law transposing UCITS.<sup>24</sup> These reporting mechanisms should have specific procedures on the receipt and follow-ups of the reports, they should ensure the protection of personal data, provide confidentiality unless it should be lifted due to further investigations or national judicial proceedings.<sup>25</sup> Furthermore, protection against discrimination, retaliation and other types of unfair treatment should be provided to whistle-blowers. The reporting persons, under UCITS, are limited to employees of investment companies, management companies and depositaries.<sup>26</sup> The European Securities and Markets Authority (ESMA) stated that ex-employees or any person can report to ESMA as long as it done in good faith.<sup>27</sup> ESMA should establish reporting channels as well.<sup>28</sup> No liability can be incurred to the reporting person and no restriction to report can be imposed by law or contract.

Article 30e of the Directive 2014/56 on Statutory Audits of Annual Accounts and Consolidated Accounts contains whistle-blowing provisions.<sup>29</sup> Its provisions are similar to those analysed above. Member State should ensure that the national competent authorities adopt effective whistle-blowing mechanisms to encourage reporting breaches of the Directive.<sup>30</sup> Protection of personal data should be ensured; certain rights of the accused party should be respected as well and there should be a proper receipt and follow-up for the reports made.<sup>31</sup> This Directive numbers the rights of the accused party; right to a defence, right to be heard, and the right to seek an effective remedy before a Court.<sup>32</sup> This is a unique feature of this Directive. Finally, audit firms should adopt internal reporting structures which allows employees to report breaches of the Directive.

The Directive 2014/65, widely known as MiFID II, is another EU Directive that has whistle-blowing provisions.<sup>33</sup> Member States, under Article 73 in conjunction with Articles 67 and 69, are obliged to ensure that the national competent authorities will establish legal provisions on the protection of reporting persons. Under Article 73(1), the whistle-blower can report externally, meaning they can report to a national competent authority. These national competent authorities should establish effective reporting channels for receiving information about potential or actual infringements of MiFID II. The competent authorities should respect certain minimum standards to facilitate reporting.<sup>34</sup> First, there should have clear procedures for the receipt of reports and the establishment of secure communication channels. Protection should be available to the whistle-

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<sup>24</sup> Ibid., Art. 99(d)(1)

<sup>25</sup> Ibid., Art. 99(d)(2)(a-d)

<sup>26</sup> Directive 2009/65/EC, Art. 99(d)(2)(b).

<sup>27</sup> Loosveld, 323.

<sup>28</sup> Directive 2009/65/EC, Art. 99(d)(3).

<sup>29</sup> European Parliament and European Council Directive 2014/56/EU of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts Text with EEA relevance [2014] OJ L158/196

<sup>30</sup> Ibid., Art. 30e(1). See also European Parliament and European Council Regulation (EU) 537/2014 of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC [2014] OJ L158/77

<sup>31</sup> Directive 2014/56, art. 30e(2).

<sup>32</sup> Ibid.

<sup>33</sup> European Parliament and European Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance [2014] OJ L173/349.

<sup>34</sup> Christos V. Gortsos, 'Public Enforcement of MiFID II?' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets* (OUP, 2016), para 19.76.

blower and their personal data in respect to the relevant EU rules. Internal reporting is the other option for reporting under MiFID II. Under Article 73(2), the relevant financial institutions – investment firms, market operators, data reporting service providers, credit institutions in relation to investment services or activities and ancillary services, and third-country firms- should adopt appropriate procedures for internal reporting of potential or actual infringements of MiFID II. Nonetheless, there are no specific rules, under MiFID II, on how to design these procedures. The whistle-blower is free to choose between internal and external reporting and their protection should be ensured in both cases.

The Market Abuse Regulation (MAR) No 596/2014 is another EU legal instrument with whistle-blowing provisions.<sup>35</sup> Under Article 32 MAR, the whistle-blowing provisions are laid down in relation to internal and external reporting. Article 32 is developed in the context of Articles 22 and 23 as it related to the obligations of the competent authorities. Furthermore, Article 32 relates to data protection rules and should be read in conjunction with Article 28 that related to professional secrecy.<sup>36</sup> While the first two paragraphs of Article 32 relate to competent authorities, the other two remaining are pertinent to employers (financial institutions).<sup>37</sup> More detailed rules for competent authorities and whistle-blowers are laid down in the Implementing Directive 2015/2392. ESMA is the responsible authority for the Implementing Directive.<sup>38</sup>

Member States should ensure that competent authorities establish effective reporting mechanisms to receive reports on infringements of MiFID II under Article 32(1). The personal data of the whistle-blower and of the accused party should be protected and the channels for communication should be secure and adequate. More information are provided in the Implementing Directive. Under Article 6(2)(a) and (b), the whistle-blowing reporting channels should be different from the regular reporting channels, they should provide for “completeness, integrity and confidentiality of the information”, non-authorised staff should not have access to the information which information should be safely stored and preserved for a considerable amount of time.<sup>39</sup> Finally, the report should be made, but not limited, in person, by phone, electronically or in paper.

Article 32(3) relates to internal whistle-blowing meaning reporting to the workplace.<sup>40</sup> The provision aims to the creation of internal reporting channels where the employee will be able to report possible infringements of MAR. While this is clear, Article 32(3) remains vague as to certain issues.<sup>41</sup> The Member State appears more like a guarantor rather than as the one responsible for creating the appropriate internal reporting structures.<sup>42</sup> The personal scope of Article 32(3) is broad obliging all employers in the financial sector to establish these reporting mechanisms. There are certain factors that need to be taken into account when designing these internal reporting channels. The size, nature and structure of the

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<sup>35</sup> European Parliament and European Council Regulation (EU) 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1

<sup>36</sup> Regulation (EU) 596/2014, Art. 22, 23 and 32.

<sup>37</sup> Kammerer, 866.

<sup>38</sup> European Securities and Markets Authority, Final Report ESMA’s technical advice on possible delegated acts concerning the Market Abuse Regulation [2015] ESMA/2015/224, paras 164 et seq.

<sup>39</sup> Kammerer, 866.

<sup>40</sup> Regulation (EU) 596/2014, Art. 32(3).

<sup>41</sup> Kammerer, 867.

<sup>42</sup> Ibid.

financial institution, the position of the concerned employee and the seriousness of the breach are certain factors that need to be considered. A reporting structure where the employee may face sanctions or an inexistent reporting structure are failures that demonstrate that internal reporting will not be successful. A key factor for the success of these internal reporting mechanisms seems to be anonymity.<sup>43</sup>

Reporting persons, under MAR, should be protected against unfair reprisals such as any type of retaliation or discrimination.<sup>44</sup> This protection applies both to internal and external whistle-blowers.<sup>45</sup> Moreover, Article 23(4) provides further protection to whistle-blowers. It reads that a “ person making information available to the competent authority in accordance with this Regulation shall not be considered to be infringing any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the person notifying in liability of any kind related to such notification”.<sup>46</sup> As the whistle-blower makes the information available to competent authorities, Article 23(4) applies to him or her.<sup>47</sup> Finally, Article 32(4) has provisions on financial rewards which, due to several problematic elements, have not been used by any Member State until now.<sup>48</sup>

Whistle-blowing provisions are to be found in Regulation No 909/2014 on Improving Securities Settlement in the EU and on Central Securities Depositories (CSDR). Under Article 65, Member States should ensure that competent authorities adopt effective mechanisms in order to encourage reporting of potential or actual infringements of the CSDR. Whistle-blowers can report internally or to the competent authorities.<sup>49</sup> Certain requirements exist for the design of the reporting structures. Firstly, there should be special procedures for the receipt and follow-up of the reports received and the establishment of safe reporting channels.<sup>50</sup> The internal reporting channels should be specific, autonomous and independent. Internal reporting channels can be delegated to social partners. Secondly, protection should be offered to the employees reporting breaches of CSDR. The minimum elements of the protection are: protection against retaliation, discrimination, and other types of unfair treatment.<sup>51</sup> Finally, personal data should be protected in accordance with the EU data protection rules.

Under Article 28 of Regulation No 1286/2014 on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (PRIIPs), whistle-blowing provisions are presented in relation to internal and external reporting.<sup>52</sup> The competent authorities should adopt effective reporting mechanisms to allow the whistle-blower to come forward with actual or potential

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<sup>43</sup> Malte Wundenberg, ‘Compliance in Wertpapierfirmen’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (Mohr Siebeck, 2014).

<sup>44</sup> Regulation (EU) 596/2014, Art. 32(2)(b).

<sup>45</sup> Regulation (EU) 596/2014, Recital 74.

<sup>46</sup> Regulation (EU) 596/2014, Art. 23(4).

<sup>47</sup> Kammerer, 867.

<sup>48</sup> Dimitrios Kaferanis, ‘The Question of One Million Dollars: Financial Rewards or Not for the Whistle-blowers’ (2021) 36 (4) *International Journal of Banking Law and Regulation* 160. For a more detailed analysis of financial rewards

<sup>49</sup> *Ibid.*, Art. 65(1).

<sup>50</sup> Regulation No 909/2014 (n. 105), Art. 65(2)(a).

<sup>51</sup> *Ibid.*, Art. 65(2)(b).

<sup>52</sup> European Parliament and European Council Regulation (EU) 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L352/1, Art. 28.



infringements of the RPIIPs.<sup>53</sup> The minimum standards for the creation of these reporting mechanisms are given in Article 28. Specific procedures for the receipt and the follow-up of the reports should be adopted.<sup>54</sup> Furthermore, the whistleblower should be, at least, protected against discrimination, retaliation, and other types of unfair treatment.<sup>55</sup> Confidentiality should be ensured unless the disclosure of the identity is necessary by national law.

Employers in financial services should put in place appropriate procedures which allow employees to report internally. These internal reporting mechanisms should be specific, independent, and autonomous. The obligation to establish internal reporting mechanisms does not stem from the Regulation, but Member States have the liberty to require it or not.

Regulation No 2015/2365 on Transparency of Securities Financing Transaction and of Reuse (SFTR) contains whistle-blowing provisions similar to CSDR. Under Article 24, competent authorities should establish reporting mechanisms to allow the report of potential or actual breaches of Articles 4 and 15 to other competent authorities.<sup>56</sup> The minimum requirements to be respected are: specific procedures for the receipt and follow-up of the reports made and the establishment of secure communication reporting channels.<sup>57</sup> Protection against retaliation, discrimination, and other types of unfair treatment should be offered to employees who report.<sup>58</sup>

Furthermore, protection of personal data should be ensured according to the EU data protection rules as well as protection of the identity of the reporting person unless its disclosure is necessary under national law.<sup>59</sup> Apart from the possibility to report to the authorities, the whistle-blower can report internally under Article 24. Financial institutions and other related bodies should adopt internal whistle-blowing mechanisms to facilitate reporting by their employees.<sup>60</sup> Unlike other sectoral provisions, Article 24 does not require the protection offered for external whistle-blowing to be applied to internal reporting.

Reporting under the Directive 2016/97 on Insurance Distribution (IDD) is regulated under Article 35.<sup>61</sup> This provision, as well, is similar to the provisions that have been analysed. Member States are invited to ensure that competent authorities establish effective reporting mechanisms to encourage and facilitate reporting on potential or actual breaches of the national provisions transposing IDD.<sup>62</sup> The personal scope of the IDD is for employees of insurance or reinsurance distributors and, where possible, for other persons who report breaches within these institutions. Protection against retaliation, discrimination or other types of unfair treatment should be offered as well as protection of the identity of the reporting person and of the accused party unless it should be revealed under national law.<sup>63</sup> Finally, appropriate procedures for the receipt and the follow-up of the reports should be in place by competent authorities.<sup>64</sup>

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<sup>53</sup> Ibid., Art. 28(1).

<sup>54</sup> Ibid., Art. 28(2)(a).

<sup>55</sup> Ibid., Art. 28(2)(b).

<sup>56</sup> Ibid., Art. 24(1).

<sup>57</sup> Ibid., Art. 24(2).

<sup>58</sup> Ibid., Art. 24(2)(b).

<sup>59</sup> Ibid., Art. 24(2)(c).

<sup>60</sup> Ibid., Art. 24(3).

<sup>61</sup> European Parliament and European Council Directive 2016/97/EU on insurance distribution (recast) (2016) OJ L26/19.

<sup>62</sup> Ibid., Art. 35(1).

<sup>63</sup> Ibid., Art. 35(2)(b) and (c).

<sup>64</sup> Ibid., Art. 35(2)(a).

The Directive 2016/2341 (IOPR II) has whistle-blowing provisions as well. Article 24 lays down the modalities of whistle-blowing in the framework of IORP II Directive.<sup>65</sup> The holders of a key function should inform competent authorities of IORP if the administrative, supervisory or management bodies (internally) do not take action in certain scenarios.<sup>66</sup> Firstly, the holder of a key function is a person that does either the risk management, or the internal audit, or, if applicable, an actuarial function. The holder of a key function may be a person or an organisational unit. The holder should inform the competent authorities when a substantial risk exists that the IORP will not comply with certain statutory requirements, under the condition that this was reported internally and it endangers the interests of members and beneficiaries.<sup>67</sup>

Secondly, when the holder has observed a breach of the laws or regulations in relation to IORP and had reported it internally.<sup>68</sup> From the wording of the provisions, it is not clear whether the holder of the key function should inform internally, at first, and then, if no action is taken, he or she should report to the competent authorities. It can be deducted that reporting internally is a good move in terms of good governance as well (one of the objectives of the Directive). If no action is taken internally, then the holder can report to the competent authorities. Protection should be offered to the holder when reporting and this should be ensured by Member States.<sup>69</sup>

Prospectus Regulation No 2017/1129 recognises the importance of whistle-blowing in Recital 77 as an important source of information for the competent authorities to enable them to detect and to improve sanctions for breaches of the Regulation.<sup>70</sup> Therefore, whistle-blowers should be protected from retaliation in order to be able to come forward.<sup>71</sup> The relevant provisions are given under Article 41. The competent authorities should adopt effective reporting mechanisms to encourage and enable reporting of potential or actual breaches.<sup>72</sup> In the case of the Prospectus Regulation, the responsibility does not fall on Member States, as in other provisions analysed above, but to the competent authorities. This raises question as to whom will be competent to control the effectiveness of the reporting systems. It is not clear whether the State has any role in the control of reporting systems instituted by the competent authorities.

The reporting mechanisms that should be adopted by the competent authorities should respect certain minimum requirements. Firstly, there should be in place specific reporting procedures for the receipt and the follow-up of reports and this should include the establishment of secure communication channels for the receipt of reports.<sup>73</sup> Secondly, the whistle-blower should enjoy appropriate protection against retaliation, discrimination, and other types of unfair treatment either by his or her employer or by a third relevant party.<sup>74</sup> Finally, protection of personal data should be ensured by respecting the EU rules on data protection and

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<sup>65</sup> European Parliament and European Council Directive 2016/2341/EU of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) [2016] OJ L354/37, Art. 24.

<sup>66</sup> Directive 2016/2341, Art. 24(5).

<sup>67</sup> *Ibid.*, Art. 24(5)(a).

<sup>68</sup> *Ibid.*, Art. 24(5)(b).

<sup>69</sup> *Ibid.*, Art. 24(6).

<sup>70</sup> European Parliament and European Council Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12, Recital 77.

<sup>71</sup> *Ibid.*

<sup>72</sup> Regulation No 2017/1129, Art. 41(1).

<sup>73</sup> *Ibid.*, Art. 41(2)(a).

<sup>74</sup> *Ibid.*, Art. 41(2)(b).

the identity of the reporting person should remain confidential unless its divulgation is demanded by national rules.<sup>75</sup>

Internal reporting mechanisms should be established by employers engaged in activities that are regulated for financial services. The employee should be able to report internally potential or actual breaches of the Regulation.<sup>76</sup> The internal reporting schemes should be specific, autonomous and independent and, this time, Member States are responsible to ensure that internal reporting schemes are adopted by the parties concerned. Finally, the Prospectus Regulation, like MAR, has provisions on financial rewards.<sup>77</sup> The provisions are more detailed than they are in the MAR. Member States have the possibility to enact financial rewards for employees reporting potential or actual breaches of the Prospectus Regulation. The conditions to be respected are the following: the whistle-blower should not have a pre-existing legal or contractual duty to report such information and the information should be new. Then, the information reported should result to the imposition of a criminal or administrative or any other type of sanction (to the employer) as imposed by national law. Despite the detailed provisions on financial rewards, no Member State has adopted them.

#### IV. The advent of the Directive 2019/1937 on the protection of persons who report breaches of Union law (Directive on the protection of whistle-blowers)

On October 2019, the European Union adopted the Directive on the protection of persons reporting breaches of Union law (Directive or Whistle-blowing Directive). The Directive has a broad material scope covering several areas of EU interest such as the banking and financial sector. As the Directive is adopted, the expectation would have been to take precedence over the aforementioned sectoral provisions and be the only EU legal act that regulates whistle-blowing. Surprisingly, the sectoral provisions are not void but they are considered as a *lex specialis* and the whistle-blower should follow them first if his or her case falls under these sectoral provisions. If protection is not offered under these sectoral provisions, whistle-blowers can refer to the Directive.

The aforementioned sectoral legal provisions on whistle-blowing in the EU banking and financial sector are found in Part II, point A of the Annex of the Directive.<sup>78</sup> Their analysis demonstrate that every EU legal act in the banking and financial sector with provisions on whistle-blowing presents similarities and differences from one provision to another. Despite their similarities, there are differences between the provisions and between the sectoral provisions and the Directive that can influence whistle-blowers' willingness to report and thus their subsequent protection if they decide to come forward. The confusing coexistence of sectoral provisions and the Directive create confusion to whistle-blowers and complexity as to the legal rules of whistle-blowing. Every time the whistle-blower decides to report, they should consult the sectoral provisions, and if they do not fall within, they should consult the Directive.

The sectoral provisions do not cover all the relevant EU legislation in the EU banking and financial sector. There are areas left outside but covered now by the Directive. This situation creates a two-layer legislation where the whistle-blower should do their research, understand and choose under which rules should

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<sup>75</sup> Ibid., Art. 41(2)(c).

<sup>76</sup> Ibid., Art. 41(4).

<sup>77</sup> Dimitrios Kaferanis, 'The question of one million dollars: financial rewards or not for the whistle-blowers' (2021) 36 (4) International Journal of Banking Law and Regulation 160.

<sup>78</sup> European Parliament and European Council Directive 2019/1937/EU of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17, p 55-56.

they report. The differences between the sectoral provisions vary: some allow internal and external reporting, some allow only for internal or only for external, protection is mentioned in most of the sectoral provisions and without any detailed analysis. The protection stays a national task and it is not always clear in which way the whistle-blower should be protected.

Two more issues arising from this confusing situation is time and personal anxiety. First, whistle-blowers are often faced with personal anxiety and stress when thinking of blowing the whistle. When rules are not clear and protection is uncertain, whistle-blowers are in a difficult position which may increase stress levels and anxiety. Second, there is an issue with time. Wrongdoings in the banking and financial sector may be detrimental if not treated in time. The confusing presentation of rules may have an impact on that; whistle-blowers should need time to search and find what is best for them. This need for time may impact the wrongdoing as it leaves it time to become bigger and bigger probably.

Finally, the existing situation diminishes the value of sectoral provisions as the Directive is a more comfortable text of reference for whistle-blowers. The Directive has clear rules on procedures and protection and it seems that whistle-blowers will be keener on using it than the existing sectoral provisions. In time, this situation will render the sectoral provisions a “dead letter” and the Directive will take the lead. Nevertheless, it should not be forgotten that there may be employers who, by way of retaliation, may bring a case against their employee for not referring to these sectoral provisions. It may seem fictional but can become reality. As a result, and as it is better to be safe than sorry, these sectoral provisions should be repealed and the Directive should be the only point of reference on whistle-blowing at the EU and national level.

#### V. Concluding remarks

Whistle-blowing at the EU is still in its infancy. Certainly, the situation has evolved positively the last decades with the milestone of the Directive on the protection of whistle-blowers. There are several positive steps towards a safer and regulated environment on the protection of whistle-blowers. In this paper, it is argued that whistle-blowers need clear and unique legislation. The adoption of the Directive which has an outstanding number of positive elements for whistle-blowers should prevail. Our proposition is that the existing sectoral provisions on whistle-blowing at the EU banking and financial sector should be repealed and the Directive should become the sole point of reference.

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