EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS

Directorate C : Fundamental Rights and Rule of Law
Unit C2 : Fundamental Rights Policy
Acting Head of Unit

Brussels, 29.06.2021
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[redacted]

Dear Madam, Sir,

I refer to your joined letter of 13 June 2021, addressed to the functional mailbox of the Commission's expert group on the Whistleblower Directive, to DG JUSTICE Acting Director General Salla Saastamoinen and myself *(registered in Ares(2021)3865815).*

As you may be aware, in its role as Guardian of the Treaties, the Commission oversees the correct implementation of Union law, including by providing indications about the correct interpretation of Union legal acts (such as Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law), subject to the authoritative interpretation of the Court of Justice of the European Union.

In your letter, you ask us to reconsider any interpretation of the Directive that would run counter to a centralised whistleblowing solution and provide investigative capacities *only* at group level.

Allow me to start with an important clarification: Directive 2019/1937 was adopted by the European Parliament and the Council on the 23 October 2019 and entered into force on 26 November 2019. The Directive is therefore already part of Union law and Member States have until 17 December 2021 to transpose it into their legal orders.

The provision in Article 8(3) leaves no room for interpretation: each legal entity with 50 or more workers is required to set up channels and procedures for internal reporting, even

where such legal entities belong to a group of companies. Any different interpretation would be *contra legem*.

This said, the Directive does not prohibit maintaining or creating *also* centralised whistleblowing functions within a group. The Directive requires that, in addition, where the group comprises entities with 50 or more workers, each one of them set up and operate its own internal channels (Article 8(3)). Where such central group whistleblowing function exists within a group, it will then be the whistleblower's choice to decide whether to report at that level (see below, point iv) or at the level of the subsidiary where s/he works, depending on the specific circumstances of each case. A corporate policy instilling trust in the group whistleblowing function, possibly accompanied by an information policy publicising its availability and encouraging whistleblowers to report directly to the central group whistleblowing functions may result in whistleblowers tending to report there.

Moreover, I would like to underline the flexibilities that the Directive allows, which address some of your concerns:

i) Article 8(6) allows **medium-sized companies them to share resources as regards the receipt of reports and any investigation to be carried out**. It should be underlined that the responsibility to maintain confidentiality, to give feedback, and to address the reported breach remains, however, with each medium-sized company concerned. Only medium-sized companies can benefit from this possibility, but **this applies both to distinct companies with no link to each other and to companies that belong to the same group**.

ii) Based on Article 8(6), where in a given corporate group compliance programmes are organised at headquarters level, **it could be compatible with the Directive that a subsidiary company benefits from the investigative capacity of its parent company provided that:**

1. the subsidiary company is medium-sized (has 50 to 249 workers);
2. reporting channels exist and remain available at the subsidiary's level;
3. clear information is provided to the reporting persons as to the fact that designated person/department at headquarters level would be authorised to access the report (for the purpose of carrying out the necessary investigation), and the reporting person has the right to object to that and to request that the reported conduct is only investigated at the level of the subsidiary;
4. any other follow up measure is taken and feedback to the reporting person is given at subsidiary level.

iii) Furthermore, in cases **where the report reveals a structural problem or a problem that affects two or more entities of the group and that can only be effectively addressed with a cross-border approach** that the subsidiary where the report was made has not the power to apply, to ensure the effectiveness of the Whistleblower Directive, it would be compatible with its spirit that the person/department designated to maintain communication with the reporting person (Article 9(1)(c)) will inform him/her of such conclusion and ask for her/his agreement to report the facts to the company within the group which has such power, whilst recalling that if s/he does not agree to that, s/he in any case has the possibility to withdraw the report submitted internally and report externally to the relevant competent authority.

iv) Finally, **Recital 55** indicates that "**internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates ('the group')**". This relates to cases where persons working in a subsidiary would decide to report to the parent company of the group (for instance because they feel safer or because they consider that the breach might be most effectively resolved by the parent company - e.g. it is not clear where the decision for the breach was taken/where the breach occurred, etc.). In such cases, the parent company should accept and follow up on the report.

In your joint letter, you outline a number of arguments to plead for a different interpretation of the Directive (which in any event, as indicated above, would be *contra legem*).

First, you point to the fact that it is common practice for European groups to centralise whistleblowing systems. Before proposing the Directive, the Commission conducted an open public consultation and commissioned a study,[1] among other things, to identify the reasons for whistleblower underreporting. It appeared that the *status quo* was not fit for purpose, among other things, because potential whistleblowers did not know where and how to report for lack of easily accessible channels and information (including communication with trusted locally designated persons).

With your second and third arguments, you refer to the risk for the whistleblower of being immediately identified where a report is made at the level of a subsidiary, and the inappropriateness of reporting at that level where the management of the subsidiary is involved in the wrongdoing. It should be noted that Article 9(1)(a) requires that channels be "designed established and operated in a secure manner that ensures the confidentiality of the reporting person (...) and prevent access to non-authorised staff members". Moreover, should the management be involved in the wrongdoing, the whistleblower would naturally turn to the channels established at the level of the parent company – where these are open to workers of its subsidiary, as indicated in Recital 55 - or to external channels within competent authorities.

With your fourth, fifth, sixth and seventh arguments, you underline that processing allegations in a centralised manner is important to prevent different handling of the same matters, that the specific facts of the matter must be understood in order to be able to identify systematic misconduct, that a whistleblower report may concern different subsidiaries within the group and that handling a report at central level is more effective as it can take into consideration all local particularities. The flexibility under point iii) above addresses these concerns.

With your last argument, you refer to the high cost that the setting up reporting channels per company with 50+ workers entails. Please note that the financial and administrative burdens on private sector entities related to the set-up of internal channels were adequately taken into consideration in the system of the Directive. You may find more details about

[1] https://ec.europa.eu/info/sites/default/files/14_annex_-_icfs_study_whistleblower_report_-_vol_i_-_principal report.pdf

this assessment in the explanatory memorandum of the 23 April 2018 Commission proposal for a Directive on the protection of persons reporting on breaches of Union law[2].

I hope the above clarifies.

Yours sincerely,

[redacted]

[2] https://eur-lex.europa.eu/resource.html?uri=cellar:a4e61a49-46d2-11e8-be1d-01aa75ed71a1.0001.02/DOC 1&format=PDF.