

RISK ADVISORY SERVICES

WHISTLEBLOWING - NEW EUROPEAN DIRECTIVE

A correct reporting system for a healthy business culture

The European Parliament recently approved a proposal from the European Commission to protect whistleblowers. Companies, organisations and governments must arrange a reporting system and may not take reprisals against whistleblowers. The subject is high on the political agenda. It is thus highly likely that the directive will also enter into force in Belgium. This is not a bad thing, as it gives management a powerful weapon to actively combat fraud.

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Whistleblowers are persons who, in a professional context, have information about misconduct or fraud and who wish to report this in the public interest in order to prevent further business damage. With the exception of regulated sectors such as banking and finance, there is as yet no legal framework in Belgium. As a result, potential whistleblowers often do not disclose their information for fear of possible reprisals afterwards.

Other countries are already well advanced. Examples among our neighbouring countries include the 'Loi Sapin II' in France, the 'Huis voor klokkenluiders' legislation in the Netherlands, and the 'Public Interest Disclosure Act' in the United Kingdom. Increasing globalisation shows that there is a need for a sound European framework. The adoption of the directive by the European Parliament is a first step in the right direction.

FROM HABIT TO CULTURE

BDO research shows that as many as 92% of company managers recognise that deviant behaviour can be a serious problem, but they assume that this does not happen in their own organisation. The question is whether there really is no deviant behaviour, or do reports of it simply not reach management?

Every company is characterised by its corporate DNA or culture. That DNA is given form under the influence of people and their mutual interaction. A statement supported by a gesture or action or attitude can quickly turn into a habit. Before you realise it, habit becomes the norm. Everyone regards the norm as normal. And from that moment on, we're talking about a culture.

When the culture conflicts with internal ethical values, the organisation has a problem. No matter how hard management resists that culture or subculture, it will be so embedded, and have such a solid foundation, in the workplace that there is little that can be done about it. Rationalising misconduct is a dangerous thing to do in this regard.

DISRUPTED COMMUNICATION

That's why it's important that managers always know what is going on in the workplace. This can be done by using open communication, by making things discussable, and by tackling them before they become the norm.

We all know the game from our childhood in which we whispered a phrase down a chain of people one by one. The sentence at the end of the chain is often completely different from the original message. The cause? The murmuring along the way or the joker who deliberately translates the sentence into nonsense. Is it really so different in a professional context? At the end of the communication line, the initial message will have been distorted a number of times, if in fact it even reaches its final destination.

“Organisations that prevent individuals from reporting, that persecute them or that reveal their names, will be punished.”

Many organisations still have a vertical structure, with a large distance between the lower levels and senior management. This structure also makes it difficult for any reports of misconduct to reach senior management, because the message has to pass through many (possibly too many) intermediaries (who may also be involved in the story).

DISCONCERTING FIGURES!

Recent studies by the International Association of Forensic Accountants and Fraud Investigators (ACFE) show that, each year, an average company loses 5% of its worldwide turnover to cases of fraud that may or may not remain under the radar. A recent study by BDO shows that a tip-giver is at the source of no less than 32% of the frauds that come to light in Belgium, and that 37% of the frauds are committed by a company's own employees.

ACFE also showed that companies with a whistleblower system can reduce the financial loss and the duration of the fraud by half.

In the event of fraud, more than one employee may be aware of it, but they don't dare to tell others for fear of possible reprisals. In short, you can consider a whistleblower system as an investment in your employees – an important factor in fighting fraud efficiently.

LIABILITY

The new Code of Companies and Associations (also read the article on page 18) requires the board of directors and the executive team to

supervise and monitor the development of a proper system of internal control and risk management. In the case of fraud, the directors must be able to demonstrate that they have taken measures to limit the risk of fraud.

The criminal code goes even further in this respect, linking high fines to failure on the part of the directors, and even providing for the possible dissolution of the company. In the event of shortcomings, the directors may be held personally responsible.

WHAT DOES THIS EUROPEAN LEGISLATION SAY?

In plain language, Europe's main objective is better protection for those who report suspected fraud. Belgium may further refine and tighten up the various types of fraud declarations covered by this protection in national legislation.

Who must now comply with the directive?

- ▶ All stakeholders within the organisation (employees, shareholders and management bodies, as well as contractors, subcontractors and suppliers) must be allowed to report misconduct or crimes through specific channels.
- ▶ Companies with more than 50 employees or an annual turnover of more than EUR 10 million will be required to set up these specific internal channels and procedures within the 2-year period approved by the European Parliament in April 2019.
- ▶ Organisations active in financial services, or carrying out activities that are sensitive with regard to money laundering or the financing of terrorism, are also expected to set up such a reporting system.
- ▶ For the public sector, the obligation applies to national and regional governments, municipalities with more than 10,000 inhabitants, and other public law entities that still need to be specified.

However, it goes without saying that all organisations, regardless of size or activity, must consider applying the measure.



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The setting up of a reporting system can be done internally or can be outsourced. Furthermore, the system must guarantee the necessary integrity and confidentiality and be operated by independent and objective persons.

The reporting system must be made known correctly and transparently to all stakeholders, and persons who communicate misconduct in the agreed manner may not be called to account afterwards.

Organisations that fail to comply, that prevent individuals from reporting, that persecute them or that reveal their names will be penalised. The directive also states that, in the event of intentional false reporting, it must be possible to recover the resulting damage from the alleged whistleblower.

What about reports that exceed the capabilities of the company? Consider, for example, reports in which the recipient him/herself is involved, or where no action is taken regarding a report. The new directive states that a channel must be set up at national level, where stakeholders who cannot rely on the internal reporting system will still have the opportunity to report. As a result, they may feel less compelled to go to the press to get a hearing.

IMPLEMENTATION IN YOUR ORGANISATION

As stated above, you can roll out and manage the reporting system yourself or outsource it to an external provider.

The advantage of an in-house system is that everything remains within the walls of the organisation, and management itself decides

on the best way to release it externally. The disadvantage is that stakeholders will be less inclined to report fraud involving a manager.

An external provider can be an alternative. This also provides a better guarantee of anonymity, and cases are handled by neutral professionals.

An investment in a whistleblower system must be effective and efficient. Therefore, first and foremost, ensure that your stakeholders

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support you and make clear and transparent agreements about the purpose, operation and possible consequences of the system. Of course, it's important to formalise the agreements afterwards.

Communication and awareness-raising about the new reporting system are essential in order to inform stakeholders about the new system and how it will be rolled out and used in your organisation.

Finally, it is very important to handle a fraud report correctly. Anonymity and understanding are paramount. Also, remember to approach the project forensically: i.e., to underpin it with technical research into evidence by a certified researcher. This ensures that no rules are breached in the event of legal proceedings.

RISK OF ABUSE?

Sceptics wonder whether a reporting system is going to trigger a witch hunt. After all, the adverse consequences of a case of fraud that appears in the press cannot be foreseen and can undermine the continuity and survival of the organisation. Employees will leave, customers will fall away, etc.

Moreover, the risk of 'nice to know' reports is high. These are reports of things that go wrong, but are not actually fraudulent. They are often made out of self-interest with the

intention of harming others. You can have the wheat separated from the chaff by an external party, so that management only needs to assess the relevant reports and take action where necessary. ■

DO YOU HAVE ANY QUESTIONS ABOUT THE NEW LEGISLATION REGARDING WHISTLEBLOWERS?

Are you looking for help with the implementation of a reporting system? If so, please do not hesitate to contact the specialists from our 'Risk Advisory Services' team: ras@bdo.be

More information is also available in the 'Whistleblowing as a service' brochure at: www.bdo.be/insights
Or download our study (2018) on the impact of fraud on Belgian companies via: advisory.bdo.be/fraudsurvey