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Preface

This working paper is written as part of the project Workers' voice and the right to manage – the case of whistleblowing in a comparative context, financed by the Norwegian Research Council.

The aim of the project is to obtain new knowledge on what makes employers suppress or encourage workers raising concerns, and thereby contribute to a better understanding of how employers balance two fundamental but possibly conflicting democratic principles: the property right and freedom of speech.

The project has a mixed method approach, combining legal method and social science.

In WP1 we study how the right to manage and the protection of whistleblowers are balanced in national law, in Norway, Denmark, Ireland and the UK. These countries have different legal protection of whistleblowers, and law and employment models differ.

WP2 will examine how national law are filtered through sector level characteristics and transposed into guidelines at organisational level in banks and hospitals. In both sectors, law and professional ethics impose a duty on staff to raise concerns in certain situations. One question is how this duty is reflected in internal procedures. Drafting procedures can mobilise power resources of the parties involved, who will try to adapt and apply rules in a way that is consistent with their interests. The outcome can thus deviate from legislative intentions.

WP3 will identify and explain observed conformity or tensions in organisations, and the impact of different employment systems when it comes to how legal rules and guidelines are practiced at organisational level. Can whistleblowing and its responses, be linked to the design of procedures, how the notion of the right to manage is translated into practice and whether the raising of concerns is supported by co-workers and workers' representatives?

Sissel C. Trygstad
Project manager

1 Introduction

This document describes and comments on the whistleblowing arrangements that existed in Denmark, Ireland, Norway, and the UK prior to the transposition date of 17 December 2021 for Directive 2019/1937/EU of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law ('Directive'). From this date, Denmark and Ireland, as EU Member States, are obliged to ensure compliance with the Directive, Norway's legislation may be impacted as a result of EEA membership, but the UK legal framework will be unaffected.

The document discusses the various sources of the right to whistleblow in the four countries mentioned, as well as outlining when duties to raise concerns are imposed (such duties are relevant to the employer's right to manage which is considered in another document). The sources are considered in the following order: *(i)* individual contractual rights and obligations; *(ii)* collective agreements and employer policies and procedures; *(iii)* general national legislation on whistleblowing and protection against unfair dismissal; *(iv)* specific sectoral regulations and issues; and *(v)* the international human right to freedom of expression.

2 Individual contractual rights and obligations

Denmark

In Denmark, both employer and employee are subject to implied terms in the contract of employment. For employees, the duty of loyalty means that behaviour which discredits or otherwise damages the position of the employer internally or externally can be a breach of duty and can be sanctioned, including by dismissal with notice or – in grave situations - without notice.

An employee is under a duty to report internally on situations that can affect the business interests of the employer. This includes a duty to report on the employee's own wrongdoings,[1] the wrongdoings of colleagues,[2] and general circumstances relating to the running of business.[3] Caselaw has settled that dismissal may be considered lawful if the employer learns that employees are not reporting concerns about the business.

When the employee has fulfilled their duty to report concerns correctly, the employee has complied with the duty of loyalty. Thus, if the employee continues to raise their concerns about the business internally to colleagues,[4] other managers,[5] the director[6] or board members,[7] this action will be in breach of the duty of loyalty. Likewise, if the employee reports to external sources,[8] such as the media,[9] social media,[10] enquiring journalists, customers,[11] suppliers, collaborators[12] or public authorities, this can be sanctioned by the employer if the actions have damaged the business or the market position.

Ireland

Under the common law in Ireland, employees owe their employers an implied duty of loyalty and fidelity.[13] This duty has been developed to the extent that there must be a relationship of trust and confidence between the employer and the employee. This duty is implied in all contracts of employment, unless expressly excluded. As regards

[1] Supreme Court ruling U 1991.378 H and Supreme Court ruling U 2006.1046 H.
[2] Supreme Court ruling U 66.115 H and Western High Court ruling of 31 August 2007.
[3] Industrial Arbitration ruling of 2 October 2007. The duty of reporting is discussed in Munkholm, Loyalitet i Arbejdsretlige relationer,DJØF 2016, pp. 352-365 and p. 477.
[4] western high court ruling of 6 December 2006 and Eastern High court ruling of 2 May 2012.
[5] Supreme court ruling U 1970.184 H and Eastern High Court ruling of 28 February 2013.
[6] Industrial Arbitration ruling of 21 December 1994.
[7] Eastern High Court ruling of 24 September 1999 and Eastsern High Court ruling of 19 January 2015.
[8] Or threatens to do so, Western High Court Ruling of 8 December 2005.
[9] Dismissal Board ruling of 10 October 2007 and Industrial Arbitration ruling of 28 May 2002.
[10] Such as on Facebook, eg Dismissal Board ruling of 21 July 2014, Industrial Arbitration ruling of 11 September 2013. As well as other social media Eastern High Court ruling of 27 August 2008.
[11] Western High Court ruling of 27 October 2011.
[12] Supreme Court ruling U 1987.495 H
[13] Boston Deep Fishing & Ice Co v Ansell (1888) 39 CH D 339.

the disclosure of confidential information by an employee, the duty of fidelity and loyalty requires employees to maintain confidentiality during the course of their employment, as well as afterwards. This is an implied term in all contracts of employment[14] but it may also be expressed. The duty also requires employees not to use information obtained in confidence during the course of their employment to the detriment of their employer.[15] The Irish Supreme Court has confirmed that the duty of confidentiality is fettered by the public interest. However, the boundaries of the public interest exception remain undefined.[16]

Norway

In Norway, the legal basis for the duty of loyalty is the employment contract, which requires that the parties be loyal and attentive.[17] This duty can be said to have both a negative and a positive form. With regard to freedom of expression, the negative form is the most important one -the employee will have an obligation to refrain from acting detrimentally to the interests of the employer. The duty will be more onerous for managers than for employees holding lower positions. In the preliminary work to the regulations on whistleblowing, the duty is described as follows: 'The duty of loyalty may limit the freedom of expression for employees. An employee cannot make unjustified statements that may do harm to the interests of the company or its activities. Among other things, the employee cannot make unjustified statements about the employer or the company.'[18] Whether a statement is considered disloyal is ultimately for a court to decide. However, in general, the constitutional protection of freedom of speech is strong and any limitation on this must be relevant, just, and necessary.

UK

In the UK, employers can include express terms in contracts which prohibit the disclosure of information acquired during employment. Even if there is no express prohibition, the implied duty of fidelity prevents employees from disclosing information which has been acquired in confidence. However, there is an exception where there is 'any misconduct of such a nature that it ought in the public interest to be disclosed to others'[19] Unfortunately, if this 'right' is triggered it is unclear who, apart from industry regulators,[20] will be regarded as appropriate recipients of concerns. Whether or not a disclosure is justified in the public interest, an employee who suffers reprisals for whistleblowing has few remedies at common law. Dismissals will not amount to a breach of contract if proper notice is given, and any contractual procedure is followed. In short, although certain individuals are required by their jobs to report wrongdoing, for example, auditors and 'senior' employees,[21] the common law has largely been used to reinforce an organisation's need for secrecy and loyalty.

[14] Amber Size and Chemical Co v Menzel (1913) 2 Ch 239.
[15] Merryweather v Moore (1892) 2 H 518.
[16] National Irish Bank Ltd and National Irish Bank Financial Services Ltd v Radio Telefís Éireann [1998] 2 IR 465, 475.
[17] See Rt. 1990 p. 607 *Saga Data* where the court stated that there applies a general and case law-based duty of loyalty and faithfulness in employment relationship.
[18] Ot.prp.nr.54 (2005-2006), 4.2.1, own translation
[19] Initial Services v Putterill [1968] 1 QB 396
[20] See Re A Company's Application [1989] IRLR 477
[21] See RBG Resources plc v Rastogi [2002] EWHC 2782

3 Collective agreements and employer procedures

Denmark

In Denmark, collective agreements are legally binding on the signatories and their members, and breaches of such agreements are sanctioned by heavy penalties, including payments for both economic and non-pecuniary losses. Historically, however, collective agreements have rarely dealt with whistleblowing per se.

Ireland

The dominant view in Ireland is that collective agreements do not intend to create legal relations.[22] Therefore, there is no legal right under collective agreements for workers to whistleblow. The Irish Congress of Trade Union ('ICTU') published guidance for trade union negotiators for drafting a whistleblowing policy. It states that its aim is 'to provide trade union negotiators with pointers to key provisions in the Act and assist them in negotiations with employers who are interested in having a whistleblowing policy in place. Good practice means that workers will know how to make a protected disclosure in their workplace and that they are assured about protection from reprisal when they do so.'[23]

As regards procedures, under s 21(1) of the Protected Disclosures Act 2014 ('2014 Act'), all public bodies are obliged to establish and maintain procedures for the making of protected disclosures by workers who are or were employed by the public body and for dealing with such disclosures.[24] Section 21(3) of the 2014 Act provides that 'The Minister may issue guidance for the purpose of assisting public bodies in the performance of their functions under subsection *(1)* and may from time to time revise or re-issue it.' Section 21(4) goes on to provide that 'Public bodies shall have regard to any guidance issued under subsection (3) in the performance of their functions under subsection (1).'[25] In 2016, the government published the guidance to assist public bodies with their obligation under s 21(1) of the 2014 Act by providing advice and information on how they should design and operate their procedures.[26] Only those who disclose in 'an appropriate' manner are protected under the procedures, and further they will only be protected under the 2014 Act if they fulfil the requirements of that legislation. In addition, only 'workers' as defined under the 2014 Act[27] who make protected disclosures as per the requirements of the 2014 Act are covered

[22] O'Rourke v Skyways Ltd [1984] ILRM 587.
[23] Irish Congress of Trade Unions, 'Drafting a Whistleblowing Policy, Guidelines for Trade Union Negotiators on The Protected Disclosures Act 2014'
[24] Protected Disclosures Act 2014, s 21(1).
[25] Protected Disclosures Act 2014, s 21(4).
[26] Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under Section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).
[27] Protected Disclosures Act 2014, s 3(1).

by that legislation, whilst others, such as volunteers, can only avail of internal organisational protection for making a disclosure as per the requirements of the procedures.

The obligation under the 2014 Act to establish and maintain procedures is limited to the public sector. In 2015, the Workplace Relations Commission ('WRC'), an independent statutory body, produced a statutory code of practice on protected disclosures ('2015 Code') which is intended to impact on employers in the private and non-profit sectors. [28] The 2015 Code sets out best practice to help employers, workers, and their representatives understand the law with regard to protected disclosures and how to deal with such disclosures. Section 42 of the Industrial Relations Act 1990 ('1990 Act') provides that a Code of Practice is admissible in evidence in proceedings and any provision of the code which appears to be relevant to any question arising in the proceedings will be taken into account in determining that question. [29] In *Baranya v Rosderra Irish Meats Group Limited* [30], the Irish Supreme Court assumed that the 2014 Act comes within the scope of s 42 of the 1990 Act[31] but ultimately found that the 2015 Code of Practice does not accurately reflect the terms of what the 2014 Act actually says because it introduces a distinction between 'a grievance' and 'a protected disclosure' which is not drawn by the 2014 Act itself. [32] Consequently, although the 2015 Code is intended to provide best practice to help employers, workers, and their representatives, it will have to be approached with caution. Thus, in the private sector, those who blow the whistle must either disclose in the manner prescribed by the procedures to be afforded organisational protection or they will only be protected under the 2014 Act, or other sectoral whistleblowing provisions, if they meet the necessary statutory tests.

Norway

Collective agreements are legally binding under Norwegian law. They are usually established at sector or industry level and negotiated by industry level trade unions and employer organisations. However, regulations on whistleblowing have so far not been part of such agreements.

UK

Collective agreements in the UK rarely afford a right to whistleblow and, even where they do, such agreements are highly unlikely to be legally enforceable either by the parties to them or by individuals. In practice, whistleblowing policies and procedures are likely to be management documents. Although UK law does not require employers to have a whistleblowing policy or procedure, the Department of Business, Innovation, and Skills published guidance and a non-statutory Code of Practice on whistleblowing in 2015. The guidance states, inter alia, that 'If an organisation recognises a trade union it might develop a policy in consultation with them' and provides fourteen tips about what a policy should include and suggests how a policy might be promoted and made accessible.

[28] Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464.
[29] Industrial Relations Act 1990, s 42(4).
[30] Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77.
[31] Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77 [34].
[32] Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77 [35].

4 General national legislation on whistleblowing and protection against unfair dismissal

Denmark

Prior to the end of 2021, Denmark had no general national legislation protecting whistleblowing. A number of sector-specific whistleblowing schemes were in place, see below section 4.

Ireland

The provisions of the 2014 Act extend protection to 'workers' in all sectors who make a disclosure of information that, in their reasonable belief, tends to show one or more 'relevant wrongdoings'.[33] This information must come to the worker's attention in connection with their employment.[34] The 2014 Act sets out what qualifies as a 'relevant wrongdoing' and this includes: a criminal offence; failure to comply with a legal obligation (excluding one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services); a miscarriage of justice; the endangerment of any individual's health and safety; environmental damage; unlawful or improper use of funds or resources of a public body, or of other public money; oppression, discrimination, gross negligence or gross mismanagement by or on behalf of a public body; or concealment or destruction of information relating to a relevant wrongdoing.[35]

The definition of 'worker' under the 2014 Act is quite broad and includes, employees, temporary employees, former employees, contractors, consultants, interns, trainees, agency staff, members of the Garda Síochána, members of the Permanent Defence Force and the Reserve Defence Force, and civil servants.[36]

The 2014 Act provides for a stepped disclosure regime. The purpose of such provisions is to incentivise workers to raise concerns, in the first instance, with their employer or other responsible person.[37] If having made a disclosure to their employer, the employer fails to act on the information disclosed, or if the worker does not wish to avail of the internal disclosure channel, alternative channels are provided for under the 2014 Act, such as disclosure to a prescribed person,[38] to a Minister (if the worker works for a public body),[39] in the course of obtaining legal advice from a legal

[33] Protected Disclosures Act 2014, s 5(2)(a).
[34] Protected Disclosures Act 2014, s 5(2)(b).
[35] Protected Disclosures Act 2014, s 5(2)(b).
[36] Protected Disclosures Act 2014, s 3(1).
[37] Protected Disclosures Act 2014, s 6.
[38] Protected Disclosures Act 2014, s 7.
[39] Protected Disclosures Act 2014, s 8.

advisor (including a solicitor, barrister, or trade union official),[40] or to any other recipient than those already listed, such as to the media.[41] There is no requirement that the disclosures be made in good faith.[42] However, the 2014 Act allows for compensation for penalisation and unfair dismissal to be reduced by up to 25 per cent where the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure by the employee.[43]

A range of protections are included in the 2014 Act for workers who are retaliated against for having made a protected disclosure. Employees who make protected disclosures have protection from acts or omissions that constitute 'penalisation.[44] 'Penalisation' is defined very broadly under the legislation and includes acts such as, dismissal, demotion, suspension, a reduction in wages, unfair treatment, harassment, loss, and threat of reprisal.[45] Importantly, workers will be protected from dismissal from the first date of their employment.[46] Compensation of up to a maximum of five years remuneration may be awarded to an employee who is dismissed/penalised.[47]

Additionally, the 2014 Act enables workers to seek damages in a tort claim for 'detriment' suffered for having made a protected disclosure.[48] 'Detriment' is defined under the legislation as including: coercion, intimidation or harassment; discrimination, disadvantage, or adverse treatment in relation to employment (or other prospective employment); injury, damage or loss; and threat of reprisal.[49] This protection is extended to third parties, such as family members for example, who suffer detriment because another person has made a protected disclosure. Job seekers are also protected if they suffer adverse treatment in relation to potential employment for having made a protected disclosure. Unlike claims for penalisation, there is no cap on the amount of compensation that can be awarded for claims of detriment (bar the limit imposed due to the monetary jurisdiction of the court where the claim is brought). Workers who are employed to detect, investigate or prosecute wrongdoing and make a disclosure in relation to that wrongdoing will not be protected under the legislation unless the wrongdoing was on the part of their employer.[50]

Those who make protected disclosures will benefit from certain immunities under the 2014 Act. A worker who makes a protected disclosure as per the requirements of the 2014 Act is immune from civil liability.[51] Immunity from criminal liability for any offence prohibiting or restricting the disclosure of information applies to a disclosure that the worker reasonably believes was a protected disclosure.[52] In any proceedings involving a dispute as to whether the disclosure made by the worker is a protected disclosure, the presumption lies in favour of the worker.[53]

The identity of the worker making the disclosure is protected to the extent that the person to whom the disclosure is made must take 'all reasonable steps' to avoid

[40] Protected Disclosures Act 2014, s 9.
[41] Protected Disclosures Act 2014, s 10.
[42] Protected Disclosures Act 2014, s 5(7).
[43] Protected Disclosures Act 2014, s 1(4), sch 2; Protected Disclosures Act 2014, s 11(1)(e).
[44] Protected Disclosures Act 2014, s 12, sch 2.
[45] Protected Disclosures Act 2014, s 3(1).
[46] Protected Disclosures Act 2014, s 11(c).
[47] Protected Disclosures Act 2014, s 11(1)(d); Protected Disclosures Act 2014 s.1(3), sch 2.
[48] Protected Disclosures Act 2014, s 13(1).
[49] Protected Disclosures Act 2014, s 13(3).
[50] Protected Disclosures Act 2014, s 5(5).
[51] Protected Disclosures Act 2014, s 14(1). However, this immunity from civil liability excludes a cause of action in defamation.
[52] Protected Disclosures Act 2014, s 15.
[53] Protected Disclosures Act 2014, s 5(8).

disclosing to another person, information that might identity the person who made the protected disclosure.[54] This protection is not absolute, however, and disclosure of identity can occur in specific circumstances, for example, where the person disclosing identifying information reasonably believes that it is necessary for the prevention of serious risk to the security of the State, public health, public safety or the environment, or the prevention of crime or prosecution of a criminal offence.[55]

Some of the existing sectoral whistleblowing provisions are amended by the 2014 Act which provides that if a disclosure is made under a sectoral provision and complies with the requirements of a protected disclosure under the 2014 Act, then it will fall under the ambit of the 2014 Act and attract the protections therein.[56] If, however, a disclosure made under a sectoral provision does not satisfy the requirements of the 2014 Act that disclosure will still be covered by the sectoral provisions.[57]

If an employee is not protected under the 2014 Act, an employee[58] who has one-year's continuous service[59] is entitled to seek redress for unfair dismissal under the Unfair Dismissals Acts 1977-2021 ('1977 Act'). In proceedings under the 1977 Act, the WRC or the Labour Court must identify the employer's reason for the dismissal. The adjudication body will then consider whether this was a fair[60] or unfair[61] reason or whether there were other substantial grounds justifying the dismissal.[62] If the disclosure does not meet the conditions under the 2014 Act, the reason for the dismissal may be justified by the employer as potentially fair, for example, for 'some other substantial ground'. In determining if a dismissal is unfair, regard may be had to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal.[63] If an employee is successful under the 1977 Act in an ordinary unfair dismissal claim, they may be awarded redress consisting of reinstatement,[64] re-engagement,[65] or compensation not exceeding 104 weeks' remuneration.[66] In calculating compensation, regard must be had to the extent to which the employee's financial loss was attributable to an action, omission, or conduct by or on behalf of the employee.[67]

Norway

The Norwegian Working Environment Act of 2005 ('WEA') contains sections on the right of employees to blow the whistle.[68] The aim of the regulations are to strengthen freedom of speech, promote transparency, and contribute to a better climate for

[54] Protected Disclosures Act 2014, s 16(1).
[55] Protected Disclosures Act 2014, s 16(2).
[56] Criminal Justice Act 2011, s 20 (mandatory disclosure); Central Bank (Supervision and Enforcement) Act 2013, s 38(1) (voluntary disclosure); Health Act 2004, as amended by Health Act 2007, ss 55L, 55M, and 55S (voluntary disclosure).
[57] Protected Disclosures Act 2014, s 24, sch 4.
[58] Unfair Dismissals Act 1977-2021, s 1.
[59] Unfair Dismissals Act 1977-2021, s 2(a).
[60] Unfair Dismissals Act 1977-2021, s 6(4).
[61] Unfair Dismissals Act 1977-2021, s 6(2).
[62] Unfair Dismissals Act 1977-2021, s 6(1).
[63] Unfair Dismissals Act 1977-2021, s 7(a).
[64] Unfair Dismissals Act 1977-2021, s 7(1)(a).
[65] Unfair Dismissals Act 1977-2021, s 7(1)(b).
[66] Unfair Dismissals Act 1977-2021, s 7(1)(c).
[67] Unfair Dismissals Act 1977-2021, s 7(2)(b).
[68] Working Environment Act 2005 Chapter 2 A.

expressions within undertakings.[69] The provisions only cover contraventions of legal rules and ethical guidelines and norms. All expressions, also those outside the scope of the Act are covered by s 100 of the Constitution. There are limitations on the right of expression owing to the duty of loyalty towards the employer.

WEA s 2 A-1(1) gives the employee the right to notify 'censurable conditions at the employer's undertaking'. The same right is given to those hired by the undertaking through temporary work agencies. Other persons working at the premises of the undertaking are not covered, for example consultants and subcontractors. The right to notify is limited to 'censurable conditions'. Section 2(2) provides a legal definition of the term 'censurable conditions', ie conditions that are in contravention of legal rules, written ethical guidelines in the undertaking or ethical norms on which there is a broad agreement in society. The last, more vague term of 'ethical norms' is further exemplified as: *(i)* danger to life or health; *(ii)* danger to climate and the environment; *(iii)* corruption or other economic crime; *(iv)* abuse of authority, *(v)* unsatisfactory working environment; and *(vi)* breach of personal data security. Statements concerning conditions that only apply to the employee's own employment will not be regarded as a protected notification unless such conditions are covered by the 'ethical norms'.

The rest of the regulations are procedural. These deal with: *(i)* how the notification may be made;[70] *(ii)* how the employer is obliged to react;[71] *(iii)* what not to do (ie retaliate);[72] *(iv)* what happens if the employer acts in breach of these regulations;[73] and *(v)* obligations to have procedures for notification in the undertaking[74]. In s 2 A-7 there is also a duty of confidentiality for public authorities if they receive a notification.

A Norwegian employee may always notify internally, ie to the employer, in line with internal notification routines, in accordance with an obligation to notify or via a safety representative, union representative, or a lawyer. Employees will also have the right to notify a public authority, for example, the Labour Inspectorate. Any person who performs work or services for the body receiving such notification shall be obliged to prevent other persons from gaining knowledge of an employee's name or other identifying information.

In some situations, the employee will also have the right to notify externally to the media or the public at large. The conditions for doing this are that the employee is not negligent and is acting in good faith regarding the content of the notification, that the notification concerns censurable conditions of general interest, and that the employee has notified or tried to notify internally or has reason to believe that such notification would not be appropriate. When employers receive a notification that regards censurable conditions in the undertaking, the employer is obliged to ensure that the notification is adequately investigated, and that this is done within a reasonable time.

An employee that has notified in line with the requirements set out in the WEA or has made known that the right to notify will be invoked, is protected against retaliation. If necessary, the employer is obliged to take measures to protect the employee from such retaliation. The WEA stresses the obligation on the employer to ensure

[69] Ot.prp. 84 (2005-2006) p 7.
[70] Working Environment Act 2005 Section 2 A-2.
[71] Working Environment Act 2005 Section 2 A-3.
[72] Working Environment Act 2005 Section 2 A-4.
[73] Working Environment Act 2005 Section 2 A-5.
[74] Working Environment Act 2005 Section 2 A-6.

that the notifier has a fully satisfactory working environment.[75] In this regard the preliminary papers state that the notifier can be in a vulnerable situation, and that it would be important to make sure that he or she is not frozen out of the working community.[76] In relation to this, no further information is provided in the WEA about the measures the employer is obliged to take. The preliminary papers state that the kinds of measures that should be taken are to be based on a concrete assessment, and that in companies with a positive climate for speaking up, there is a presumption that no measures need to be taken. However, some examples are given. These include having follow-up talks with the notifier and trying to protect his or her identity.[77]

Retaliation is further defined in s 2 A-4 as 'any unfavourable act, practice or omission that is a consequence of or a reaction to the fact that the employee has notified'. The section provides examples of this, including threats, harassment, arbitrary discrimination, social exclusion or other improper conduct, warnings, change of duties, relocation or demotion, suspension, dismissal, summary discharge, or disciplinary action. Following a breach of the prohibition against retaliation, an employee may claim redress and compensation without regard to the fault of the employer or hirer, ie it does not matter whether the employer is to blame or not (strict liability).[78]

The burden of proof in cases where the employee claims that retaliation has taken place is shared between the employer and the employee.[79] Thus, if the employee provides information that gives reason to believe that retaliation has taken place, the burden shifts to the employer. For instance, the employee might show that they have notified and that the dismissal took place shortly afterwards. The employer will then have to prove that retaliation for notifying has not occurred. The reason for having a shared burden of proof is that it can be challenging for the employee both to prove that a retaliation has taken place and that it can be linked to the whistleblowing. In the preliminary papers, the Ministry of Labour argues that in most cases it will be easier for the employer to prove that the claimed retaliation can be justified based on grounds other than the whistleblowing.[80] Furthermore, the employer has the burden of proving that the notification had been in contravention of the WEA.[81]

In order to facilitate reporting, undertakings that employ at least five employees are obliged to have procedures for internal notification.[82] Procedures must be prepared in cooperation with the employees and their elected representatives. There are some minimum requirements for these routines. They must be in writing and easily accessible and, as a minimum, contain an encouragement to report censurable conditions and the procedure for notification and for the employer's receipt, processing and follow-up of notifications.

Employees are protected against unfair dismissals according to the WEA.[83] If an employee is not protected by the whistleblowing provisions, the case has to be determined in accordance with the general dismissal laws. Section 15-7 states that an employee cannot be dismissed unless this is objectively justified on the basis of circumstances relating to the undertaking, the employer, or the employee. Disloyalty could be a justified reason.

[75] Working Environment Act 2005 Section 2 A-3 (2).
[76] Prop. 74 L (2018-2019) section 10.2.4.
[77] Prop. 74 L (2018-2019), 10.4.2. and comment to Section 2 A-3.
[78] Working Environment Act 2005 Section 2 A-5 (1).
[79] Working Environment Act 2005 Section 2 A-4 (4).
[80] Prop. 74 L (2018-2019), 10.4.3.
[81] Working Environment Act 2005 Section 2 A-2 (4)
[82] Working Environment Act 2005 Section 2 A-6.
[83] Working Environment Act 2005 Section 15-7.

UK

In 1999, the UK's Public Interest Disclosure Act 1998 ('PIDA') came into force as Part IVA of the Employment Rights Act 1996. It gives priority to the employer's own whistleblowing arrangements by making internal reporting the paradigm for disclosing information.[84] Thus, reporting to a regulator or other prescribed person[85] is made more difficult by the need for the worker to reasonably believe that 'the information disclosed, and any allegation contained in it, are substantially true'. [86] Section 43G, which deals with disclosures in other cases, requires a number of additional conditions to be met, including demonstrating that it was reasonable in all the circumstances to make the disclosure. In assessing reasonableness, regard will be had to six matters [87].

In practice, PIDA only offers compensation as a remedy for detriments suffered. On paper, re-employment may be ordered where an employee has been dismissed but this is extremely rarely awarded. Perhaps of greater concern is that employment tribunals are only interested in the cause of any detriment suffered and it is not their task to determine whether wrongdoing actually occurred, let alone to order its rectification. This is important since research shows that one of the main reasons for not reporting is that potential whistleblowers do not have confidence that their concern will be dealt with.[88] Finally, it should be noted that PIDA sits on top of the common law and only changes it in one respect – it renders void a provision in any agreement which prohibits a worker from making a protected disclosure.[89]

The general law of unfair dismissal normally only allows employees to claim if they have two years' service. If a person is qualified to claim,[90] the employer is required to offer a potentially fair reason for dismissal. Although a protected disclosure cannot constitute a fair reason, if the information disclosed is not covered by Part IVA of the Employment Rights Act 1996, for example, because the public interest test is not satisfied or the recipient was inappropriate, misconduct or 'some other substantial reason' for dismissal might be alleged. If the employer establishes a potentially fair reason, the employment tribunal must decide whether 'in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and *(this matter)* shall be determined in accordance with equity and the substantial merits of the case.'[91] At this stage a tribunal might consider whether any actual or threatened harm was serious, the manner in which the information was obtained, the employee's motive in making the disclosure, and whether steps were taken to resolve the matter internally before going outside the organisation. Even if the dismissal is held to be unfair, the desire to be reinstated or re-engaged can easily be frustrated. Not only must tribunals be persuaded that it would be practicable to order re-employment [92] but the employer can simply choose to pay additional compensation rather than comply with any order. Where compensation is awarded, the

[84] See Section 43C ERA 1996
[85] This includes Members of Parliament, see: Employment Rights Act 1996, s 43F.
[86] Employment Rights Act 1996, s 43F(1)(b)(ii).
[87] These are listed in Employment Rights Act 1996, s 43H.
[88] Brown, A; Lewis, D; Moberly, R & Vandekerckhove, W (2014). *International Handbook on Whistleblowing Research.* Edward Elgar, Cheltenham, UK.
[89] Employment Rights Act 1996, s 43J.
[90] Normally employees need to have two years' service.
[91] Employment Rights Act 1996, s 98(4) (emphasis added).
[92] Employment Rights Act 1996, ss 114 and 115.

basic award will simply reflect accrued rights to redundancy pay, and the compensatory award is designed to compensate for any loss suffered rather than to punish the employer.

5 Regulations in specific sectors and on particular issues

Denmark

In Denmark, specific regulations limit the employers right to sanction employees who whistleblow so long as the correct channels are used.

Employees in the public sector enjoy a wide freedom of expression, including a right to report internally and externally on issues covered by the freedom of expression. The freedom of speech of public employees is considered protected by art 10 in the European Convention on Human Rights and art 11 in the EU Charter on Fundamental Rights. The caselaw of the Ombudsman has, in a number of statements, developed and clarified the freedom of speech of public employees,[93] which is not considered to be limited by a duty of loyalty.[94] The Ministry of Justice has issued a guideline on the Freedom of speech of Public employees (2016).[95] Public employees have a right to express their personal views about matters concerning unlawful public administration,[96] and may freely transfer information that are of a non-confidential character, in situations where there is doubt as to the lawfulness of the public administration, other forms of questionable practices or decisions,[97] including misuse of public funds. The public employee is not obliged to use internal complaints or reporting mechanisms before expressing their views externally, including to the media.[98] Public employees are not entitled to issue false or clearly untrue information,[99] to express their views in an unreasonably coarse manner,[100] or to issue statements similar to slander.[101] Also, the public employee only enjoys protection of their freedom of speech, when the statements are clearly made as a private person and not on behalf of the (employer) authority.[102] Sanctions issued by a public authority against their employees for statements covered by their freedom of expression are unfounded,[103] this includes reprimands in meetings,[104] formal warnings,[105] dismissals, and immediate dismissals.

[93] See: www.ombudsmanden.dk/find/?query=&mat_type=Udtalelser&aarstal=&myndighed=&topic=2-ans_ttelses__og_arbejdsret%2F9%2F9&viewmode=grid
[94] Ombudsman statement in case FOB 2016-37.
[95] Justitsministeriet, Guideline on the freedom of speech of public employees, October 2016, www.justitsministeriet.dk/wp-content/uploads/2021/10/Vejledning-om-offentligt-ansattes-ytringsfrihed.pdf
[96] Ombudsman statement nr 05.547 on unlawful pressure on a doctor to sign a press release on the treatment of certain patiens.
[97] Ombudsman statement nr 04.190 on lack of policemen to investigate a murder case.
[98] Ombudsman statement 2018-12 and Ombudsman statement nr 95.422.
[99] Ombudsman Statement 2019-27.
[100] Ombudsman statement 2021-33 and Ombudsman statement 2020-036.
[101] Omdbusman statement 2017-1.
[102] Ombudsman statement 2018-8 and Ombudsman statement 2018-20.
[103] Ombudsmand statements often review such sanctions, and will recommend that the authority revisits the sanctions.
[104] Omdbusman statement 2019-2.
[105] Ombudsman Statement 2019-27.

In 2014, the Act on Supervision of Social Services introduced a whistleblower scheme within the field of public social services. The whistleblowing scheme is available to staff, citizens, and others who can report on situations of concern in the provision of social services. The Act deals with the supervision of actions of social service providers, such as the treatment of addicts, foster parents, and housing matters. The whistleblower must be guaranteed total anonymity. The scheme is not called a whistleblower scheme but is described as a facility for staff and relatives to report anonymously about concerns.

Specific whisteblower regulation was also introduced in 2014 to implement EU Directives, and for services in the Ministry of Justice in 2019. The Act on Financial Businesses was introduced in 2014 in order to implement Directive 2013/36.[106] This protects employees in financial institutions who report actual or potential violations of the financial regulations by companies to the Danish Financial Supervision Agency (Finanstilsynet). The Act stated that it must be possible to report anonymously and that the company must follow up on the reports and document them in writing. Section 75b(1) of the Act (Lov om finansiel virksomhed)[107] protects whistleblowers in the financial sector by providing that an undertaking cannot expose employees to unfavourable treatment, including dismissal, if the employee has reported actual or potential violations of the financial regulations to the Danish Financial Supervision Agency (Finanstilsynet). Section 75b(2) further provides that employees, who have been subject to dismissal in breach of Section 75b(1) can be awarded compensation. The compensation is based on the employee's seniority and the specific circumstances. The right to compensation cannot be reduced or derogated by individual agreement, including 'full and final' severance terms.[108] There is no available caselaw on whistleblowers under this regulation.

Section 35 of the Anti-Money Laundering Act,[109] implementing EU-directive 2015/849/EU, which deals with prevention of money laundering and the financing of terrorism, provided, inter alia, that savings and investment institutions were obliged to establish a special, independent, and autonomous channel allowing their employees to report violations or potential violations of the Anti-Money Laundering Act.[110] It must be possible to report anonymously and the company is obliged to follow up on any reports which must be documented in writing. This applies to companies with five or more employees. The right to report cannot be derogated by individual clauses before, during, or after the employment, and ex-employees are entitled to report violations by their former employers. Employees cannot be subjected to adverse treatment as a result of reporting about actual or potential violations by the employer.[111] Breaches of the protection for reporting employees are sanctioned with compensation, which follows the standards in the Equal Treatment Act. In 2019, the Danish Gambling Authority, part of the Ministry of Taxation, established a whistleblower scheme for employees in companies with less than five employees to report on actual or potential breaches of the Anti-Money Laundering Act.

[106] Article 71, Section 2 litra b of Directive 2013/36, cf. Preliminary Works for Amendment Act 268 of 25 March 2014, FT 2013-14.
[107] The Financial Business Act, Section 75b regarding whistleblowing.
[108] The Financial Business Act Section 75b(3), cf. Preparatory Works for Amendment Act 268 of 25 March 2014, FT 2013-14.
[109] The Statutory Act on Anti-Money Laundering, act no 316 of 11 March 2022, before the whistleblower act, Act no 1782 of 27 November 2020, https://www.retsinformation.dk/eli/lta/2020/1782#idf63fc7ee-29d5-435e-bc03-7b9ec2bc1ec8
[110] The Act implements EU-directive 2015/849/EU on Money Laundering, etc.
[111] cf. Section 36.

Under the Act on Approved Auditors and Audit Firms 2016, the Auditor Act[112] and other acts, an audit firm with more than one auditor was obliged to establish a whistleblower channel, as part of the quality assurance system, to report on actual or potential breaches of the regulations on auditing. It is a requirement, that reports can be made anonymously. The Danish Business Authority (Erhvervsstyrelsen) has, as part of the implementation of Directive 2014/56/EU on auditors and audit firms, established a whistleblower program for auditors. Anonymous reports can be made about breaches or potential breaches of the financial regulations by an auditor, an audit firm, a company of interest to the public, or a member of the primary management organ or committee. Reports can be submitted anonymously online.

As part of the implementation of EU Regulation no 596/2014 on abuse of markets, the Danish Financial Supervisory Authority in 2016 established a scheme to enable suspicions about market abuses to be reported. This Authority established an internal whistleblower scheme where their own employees and former employees can report on mistakes and suspicious issues in the Danish Financial Supervisory Authority. This scheme is not founded in EU law but is inspired by the corresponding requirements in the CRD IV-directive.

The Act on Trade Secrets[113] stipulates the situations where acquisition, use of, or disclosure of trade secrets are lawful. As an exception to the general prohibition against unlawful use etc, s 5(2) stipulates that requests for sanctions for unlawful access, use, or transfer must be denied if the acquisition, use, or disclosure revealed violations, irregularities, and unlawful activities, and the action was performed with a view to protecting the general public interest.[114]

As part of the implementation of Directive 2013/30/EU on offshore security,[115] the Danish Work Environment Authority (Arbejdstilsynet) 2014 has established a whistleblower scheme. The scheme enables reports of health and safety concerns related to offshore oil and gas activities. The same implementation act established a whistleblower scheme in the Danish Environmental Protection Agency to facilitate confidential reporting of environmental problems in relation to platforms and pipe systems within the safety-zone. The scheme relates to any issues covered by the Ocean Environment Act.

Since 2019, the Ministry of Justice has provided a whistleblowing scheme in the police, the Danish Security and Intelligence Service (Politiets Efterretningstjeneste), the Prosecution Service, the Department of Corrections (kriminalforsorgen), and the Permanent Secretariat of the Ministry of Justice (Justitsministeriets departement). In the same year, the Ministry of Defence established a whistleblower scheme for employees managed by the ministry's internal auditors.

In 2020, the Danish Business Authority established a whistleblowing scheme for covid-19 related compensation programs.[116]

For employers not subject to binding regulations, it has been possible to voluntarily establish a whistleblower scheme and the Danish Data Authority assists with this process. In addition, in order to process personal data, the Data Authority must be informed and approve whistleblower schemes.[117] Many private companies

[112] Act no 631 of 8. June 2016, implementing EU Directive 2014/56/EU on Auditors and Audit Firms.
[113] Statutory Act no 309 of 25 April 2018 on Trade Secrets, www.retsinformation.dk/eli/lta/2018/309
[114] As in Article 5 of Directive 2016/943/EU on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
[115] Statutory Act no 1499 of 23 December 2014 amending the Act on Off- shore Operations, the Act on Protection of the Ocean Environment, and the Environmental Damages Act,
[116] Act no 796 of 9 June 2020 amending the Act on Promotion of Businesses.
[117] www.datatilsynet.dk/om-datatilsynet/whistleblowerordning

established voluntary whistleblower schemes, with a view to promote openness and transparency in relation to potential breaches of the law and serious irregularities in the company.[118]

Ireland

In Ireland, prior to the formal adoption of the sectoral approach to whistleblower protection, there were a number of relevant provisions in place related to the protection of: persons reporting suspicions of child abuse or neglect to authorised persons;[119] persons reporting alleged breaches of the Ethics in Public Office Acts;[120] persons reporting breaches of competition law to the relevant authority (and also protections specific to employees for doing so);[121] employees against penalisation for exercising any right under the Safety, Health and Welfare at Work Act 2005;[122] and Gardaí and Garda civilian employees reporting corruption or malpractice in the police force.[123] Following the formal adoption of the sectoral approach, the measures took the form of either statutory mandatory disclosures or statutory voluntary disclosures. Oversight bodies were also established to oversee the enforcement of the legislation.[124]

Ireland has now included a duty to inform, coupled with protection for such persons, in various pieces of legislation. Such a duty applies to two categories of people. The first category relates to those who have specialist knowledge[125] and the second applies to those who have knowledge of all serious crimes.[126]

Certain 'designated persons' have obligations under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 in order to prevent and detect money laundering. These 'designated persons' are required to make suspicious transaction reports ('STRs') to the Garda Financial Intelligence Unit ('FIU') and Revenue Commissioners. The STRs are made, on reasonable grounds, in relation to known or suspected money laundering or terrorist financing offences, as a result of information acquired during the course of business. This duty also covers attempted offences.[127] The STR must be made as soon as practicable.[128] Without prejudice to the way in which the STR may be made, it may be made in accordance with an internal reporting

[118] Preparatory works to the Whistleblower act, proposal no 213 of 2020, Section 3.1.1.3 Sector specific existing protection of whistleblowers, www.retsinformation.dk/eli/ft/202012L00213
[119] Protections for Persons Reporting Child Abuse Act 1998, s 4.
[120] The Standards in Public Office Commission are empowered to investigate complaints about alleged contraventions of the Ethics in Public Office Acts. The Ethics in Public Office Acts 1995 – 2001 Section 5, governs complaints by civil servants against other civil servants.
[121] Competition Act 2002, s 50.
[122] Safety, Health and Welfare at Work Act 2005, s 27.
[123] Garda Síochána Act 2005, s 124.
[124] For example, the Standards in Public Office Commission; the Health and Safety Authority; the Health, Information and Quality Authority; the Pensions Board; the Office of the Director of Corporate Enforcement; the Irish Stock Exchange; the National Consumer Agency; the Data Protection Commission; the Central Bank of Ireland; the Property Services Regulatory Authority; and Revenue.
[125] Company Law Enforcement Act 2001, Companies Act 1963, Companies Act 1990, Company Law Enforcement Regulations 2002; Companies (Auditing and Accounting) Act 2003.
[126] Offences against the State (Amendment) Act 1998, Criminal Justice Act 1994, Criminal Justice Act 2011, Residential Institutions Act 2002.
[127] Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 42(1).
[128] Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 42(2).

procedure established by an employer for the purpose of facilitating the operation of the obligation to make the STR.[129] It is a defence for a person charged with an offence to prove that they were, at the time of the purported offence, an employee who made the STR, in accordance with an internal reporting procedure, to another person.[130]

The Criminal Justice Act 2011 ('CJA 2011') applies to 'relevant offences' ie offences that attract penalties of at least five years imprisonment, that come within prescribed groupings relating to white-collar crime. Section 19 of the CJA 2011 provides for an offence of 'withholding information'. This section places a positive obligation on a person to provide information that would be of material assistance in: (*a*) preventing the commission by any other person of a relevant offence;[131] or (*b*) securing the apprehension, prosecution or conviction of any other person for a relevant offence.[132] An employer must not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee for making a disclosure[133] or for giving evidence in relation to such disclosure in any proceedings relating to a relevant offence, or for giving notice of their intention to do so.[134] This only provides protection to 'employees' who make a disclosure under the CJA 2011 and not to 'persons'. For certain forms of penalisation, it is a defence for an employer that the penalisation was necessary to ensure that the business concerned is carried on in an efficient manner or it was for economic, technical or organisational reasons.[135]

Under the Central Bank (Supervision and Enforcement) Act 2013 ('2013 Act') a person appointed to a perform a pre-approval controlled function is required to disclose to the Central Bank information relating to a matter that the person believes will be of material assistance to the Central Bank[136] and falls within one of four categories.[137] A person is not required to make a disclosure if they have a reasonable excuse.[138] The 2013 Act provides civil immunity to a person who makes a protected disclosure.[139] The identity of the person who makes the protected disclosure must also be protected by the Central Bank and cannot be disclosed without first obtaining the person's consent, subject to certain exceptions.[140]

The 2013 Act also protects employees from penalisation/threats of penalisation by their employer or by any other person that the employer causes or permits to penalise/threaten to penalise the employee who made the protected disclosure.[141] It is an offence for an employer to penalise/threaten to penalise an employee who made a

[129] Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 44(1).
[130] Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 44(2).
[131] Criminal Justice Act 2011, s 19(1)(a).
[132] Criminal Justice Act 2011, s 19(1)(b).
[133] Criminal Justice Act 2011, s 20(6) defines "employer", "employee" and "disclosure".
[134] Criminal Justice Act 2011, s 20(1).
[135] Criminal Justice Act 2011, s 20(3).
[136] Central Bank (Supervision and Enforcement) Act 2013, s 38(2).
[137] (*a*) that an offence under any provision of financial services legislation may have been or may be being committed; (*b*) that a prescribed contravention may have been or may be being committed; (*c*) that any other provision of financial services legislation may have been or may be being contravened; (*d*) that evidence of any matter which comes within *paragraph (a)*, *(b)* or *(c)* has been, is being or is likely to be deliberately concealed or destroyed. Central Bank (Supervision and Enforcement) Act 2013, s 38(1).
[138] Central Bank (Supervision and Enforcement) Act 2013, s 38(2)(c).
[139] Central Bank (Supervision and Enforcement) Act 2013, s 40(1).
[140] Central Bank (Supervision and Enforcement) Act 2013, s 40(5).
[141] Central Bank (Supervision and Enforcement) Act 2013, s 41(1).

protected disclosure.[142] The 2013 Act also provides for a right of action in tort by a person who made a protected disclosure against a person who causes the detriment to them.[143] In addition, the 2013 Act protects voluntary disclosures. For these purposes, a person makes a protected disclosure if they make a disclosure to an appropriate person, in good faith, whether in writing or otherwise, and the person making the disclosure has reasonable grounds for believing that the disclosure will show one or more of the four matters listed.[144]

Under the Health Act 2004, as amended by Health Act 2007, a disclosure made by employees and persons in good faith, where they have reasonable grounds for believing that it will show one or more specific matters, is a protected disclosure. These protections apply to employees of a relevant body,[145] employees of a designated centre,[146] employees of a person providing mental health services,[147] persons who disclose information in relation to regulated professions,[148] and applications and complaints about health professionals made in accordance with certain legislative provisions.[149] An employee is protected from penalisation by an employer for making a protected disclosure.[150] Further, a person will not be liable in damages in consequence of a protected disclosure.[151]

Under the Safety Health and Welfare at Work Act 2005 ('2005 Act') employees are protected from penalisation/threats of penalisation by their employer for making a complaint or representation to their safety representative, employer, or the Health and Safety Authority.[152] Employees who are penalised/threatened with penalisation can complain to the Workplace Relations Commission which can require the employer to take a specified course of action and/or require the employer to pay compensation to the employee that it considers to be just and equitable having regard to all the circumstances.[153] In penalisation proceedings under the 2005 Act, the burden of proof is on the employer to show the reason for the alleged penalisation.[154]

Norway

In Norway the duty of banking and financial institutions to report can be found in the Act on measures towards money laundering and the financing of terror ('Money Laundering Act 2018'). The Money Laundering Act 2018 transposes the EU fourth money laundering directive (Directive (EU) 2015/849) into Norwegian law, but also includes other regulations. The Money Laundering Act 2018 applies to both legal and natural persons. Section 4 lists several natural persons including accountants, lawyers carrying out financial transactions, real estate brokers, and professional service providers. However, if these natural persons are employed by a legal person, the duty

[142] Central Bank (Supervision and Enforcement) Act 2013, s 41(4).
[143] Central Bank (Supervision and Enforcement) Act 2013, s 42(1).
[144] Central Bank (Supervision and Enforcement) Act 2013, s 38(1).
[145] Health Act 2004, s 55B, as inserted by Health Act 2007, s 103(1).
[146] Health Act 2004, s 55C, as inserted by Health Act 2007, s 103(1).
[147] Health Act 2004, s 55D, as inserted by Health Act 2007, s 103(1).
[148] Health Act 2004, s 55E, as inserted by Health Act 2007, s 103(1).
[149] Health Act 2004, s 55F, as inserted by Health Act 2007, s 103(1). An application in accordance with either the Medical Practitioners Act 1978, s 45, the Dentists Act 1985, s 38, the Nurses Act 1985, s 38, or the Health and Social Care Professionals Act 2005, s 52.
[150] Health Act 2004, s 55M(1), as inserted by Health Act 2007, s 103(1).
[151] Health Act 2004, s 55L(1), as inserted by Health Act 2007, s 103(1).
[152] Safety Health and Welfare at Work Act 2005, s 27(3)(e).
[153] Safety Health and Welfare at Work Act 2005, s 28.
[154] ibid.

to report lies with the legal person only. Thus, employees are not obliged to report under this Act.

The Money Laundering Directive includes regulations on the protection of whistleblowers and such regulations are also part of the Norwegian Act. However, the Money Laundering Act 2018 only covers external whistleblowing, as the Ministry of Finance found the WEA to be sufficient as regards internal reporting.[155] Those institutions that have an obligation to report under the Money Laundering Act 2018 must ensure that the person who reports suspicions of money laundering or terror financing to Økokrim[156] is not subject to threats or similar retaliation for doing so.[157] Furthermore, this section provides that if a risk assessment based on the size and the nature of the company requires it, the company should set up an independent system where breaches of the law or administrative regulations can be reported anonymously.[158] In the preliminary papers, it is stated that the WEA 2005 regulations on whistleblowing and protection against retaliation will apply to reports made within systems established under s 37 (2) of the Money Laundering Act.[159] The relation between the Act on Money Laundering and WEA chapter 2A is not discussed any further in the preliminary papers. The Money Laundering Act 2018 includes regulations on the duty of confidentiality for public authorities in relation to whistleblowing etc [160] and authorities are obliged to keep the identity of a whistleblower secret.

The Health Personnel Act deals with both the duty and ability to report for health personnel in some situations. Section 17 imposes an obligation on staff to report to the health authorities if they have information about issues that could be a danger to the safety of patients or clients. This duty does not allow the person to disclose information that is required to be kept secret. There are also several other situations where health workers are obliged to report, for example, to the Child Welfare Service when they believe children are mistreated[161] and to public authorities if pilots, drivers, etc do not meet health requirements.[162]

In some situations, people can report, despite the existence of a duty of confidentiality. This include: *(i)* health personnel, when they believe, animals are exposed to mistreatment;[163] *(ii)* when compelling private or public interests make it lawful to disclose the information;[164] *(iii)* for physicians, psychologists, and opticians in the case of health issues that may affect the ability of train guards, captains, and sea pilots, if the position requires a health certificate.[165]

UK

In the UK, the Financial Conduct Authority ('FCA') is the regulator for around 51,000 financial services firms and financial markets and the prudential supervisor for 49,000 firms, setting specific standards for around 18,000 firms. In March 2021, the FCA launched a campaign to encourage people to report potential wrongdoing to

[155] Prop. 40 L (2017-2018), 8.7.3.
[156] The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime.
[157] Money Laundering Act 2018, s 37.
[158] Money Laundering Act, s 37(2).
[159] Prop. 40 L (2017-2018), 8.7.3.
[160] Money Laundering Act 2018, s 45.
[161] Health Personnel Act, s 33.
[162] Health Personnel Act, s 34.
[163] Health Personnel Act, s 23.
[164] Health Personnel Act, s 23
[165] Health Personnel Act, s 34a.

them. As part of the campaign, the FCA has published materials for firms to share with their staff and has also produced a digital toolkit for industry bodies, consumer groups, and whistleblowing groups to encourage individuals to have confidence in coming forward. According to their publicity, those that report to the FCA will have a dedicated case manager, can meet with the FCA to discuss their concerns, and can receive optional regular updates throughout the investigation.

The FCA asserts that every report it receives will be reviewed and the FCA will protect individual whistleblowers' identities. Additionally, the FCA states that it will not confirm the existence of a whistleblower unless legally obliged to do so. Its whistleblowing rules require firms to have effective arrangements in place for employees to raise concerns and to guarantee these concerns are handled appropriately and confidentially. The FCA has also introduced a requirement for firms to appoint a non-executive director as a whistleblower's champion to ensure there is senior management oversight over the integrity, independence, and effectiveness of the firm's arrangements.[166] These include the arrangements designed to protect whistleblowers from victimisation. Finally, it should be noted that neither the FCA nor the Prudential Regulation Authority ('PRA') have imposed a general duty to report concerns.

Nevertheless, in the UK, a duty to disclose[167] is more common than a right. For example, Regulation 12 of the Management of Health and Safety at Work Regulations requires employees to inform employers of any work situation which could reasonably be considered to represent a serious and immediate danger to health and safety, and of any shortcomings in the employer's protection arrangements, which have not been previously reported. This is underpinned by ss 100(1)(c) and 44(1)(c) of the Employment Rights Act 1996 which apply irrespective of an employee's length of service. These sections provide that where there was no safety representative or safety committee, or there was such a representative or committee but it was not reasonably practicable for the employee to raise the matter by those means, it is unlawful to dismiss or take detrimental action against an employee who has 'brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety'.

The NHS is the UK's publicly funded healthcare service and although it covers the whole of the UK, in practice, health is a devolved matter and there are separate services with separate policies and procedures in England, Wales, Scotland, and Northern Ireland. In terms of whistleblowing, since 2010, s 21.1 of the NHS Staff Council's terms and conditions of service handbook has stated that 'All employees working in the NHS have a contractual right and a duty to raise genuine concerns they have with their employer about malpractice,patient safety, financial impropriety or any other serious risks they consider to be in the public interest.' In April 2016, NHS England and NHS Improvement [168] published its 'Freedom to speak up: raising concerns (whistleblowing) policy…' and expected it to be adopted by all NHS organisations as a minimum standard.

A statutory duty of candour was introduced by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 which requires organisations to act in an

[166] SYSC 18.4

[167] It goes without saying that a duty to disclose can lead to problems in determining precisely when the duty is triggered. Thus, employers are increasingly encouraging staff to report rather than obliging them to do so. See NHS below.

[168] NHS Improvement is the regulatory body for NHS Foundation Trusts, NHS Trusts and for independent providers that deliver care funded by the NHS.

open and transparent way with people receiving care or treatment from them. There is also a professional duty of candour which, according to the General Medical Council and the National Midwifery Council, requires healthcare professionals to 'be open and honest with their colleagues, employers and relevant organisations, and take part in reviews and investigations when requested. They must also be open and honest with their regulators, raising concerns where appropriate. They must support and encourage each other to be open and honest, and not stop someone from raising concerns.' [169] Clearly, the risk of deregistration by a professional body puts additional pressure on staff to speak up.

The recommendations of the *Freedom to Speak Up* report [170] have been implemented through the creation of Freedom to Speak Up policies and guardian roles in English NHS organisations. Such organisations are required to report data to the National Guardian's Office. In Scotland, an Independent National Whistleblowing Officer ('INWO') has been established [171] and each NHS organisation is required to have both a confidential contact (a person tasked with receiving reports) and a whistleblowing champion (a non-executive director position). [172] Although NHS Wales has a procedure for staff to raise concerns [173] which has been adopted by all trusts and health boards, neither Welsh nor Northern Irish health bodies operate a system of guardians/champions.

[169] The professional code of conduct for nurses and midwives imposes an obligation to "raise and, if necessary, escalate any concerns..about patient or public safety, or the level of care people are receiving in your workplace or any other healthcare setting". (para. 16.1). Paragraph 4 of the accompanying guidance states that failure to report concerns may bring that nurse's fitness to practice into question and put their registration at risk. See: *Raising concerns: Guidance for nurses, midwives and nursing associates*. 2019.

[170] ***Report on the Freedom to Speak Up review.*** 2015, page 16. http://freedomtospeakup.org.uk/the-report/

[171] See: The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020.

[172] See: Independent National Whistleblowing Officer, The National Whistleblowing Standards, Part 4: Governance: NHS board and staff responsibilities, April 2021:

[173] All Wales procedure for NHS staff to raise concerns. 2020

6 The human right to freedom of expression

Introduction

Freedom of expression is one of the essential foundations of a democratic society. It has been recognised that whistleblowing qualifies as speech and therefore could attract the protection of Article 10 of the European Convention on Human Rights.[174] The European Court of Human Rights ('ECtHR') has confirmed that art 10 of the European Convention on Human Rights applies to the workplace.[175] This protection, however, is not absolute and can be subject to interference, as long as the interference is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. In order to determine whether an interference is lawful in a whistleblowing case, the ECtHR has generally applied the following six criteria:

i. whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure;
ii. the public interest in the disclosed information.
iii. the authenticity of the disclosed information
iv. detriment to the employer.
v. whether the disclosure is made in good faith.
vi. the severity of the sanction imposed on the person who made the disclosure and its consequences.

The proportionality test applied by the ECtHR means that the discloser's freedom of expression would be weighed against the interests of the employer, thus the nature and extent of the duty of loyalty will have an impact on this assessment, which inevitably results in uncertainty for potential and actual whistleblowers.[176] The authenticity test is also relevant to the balancing exercise. However, requiring the discloser to verify the contents of the information to be disclosed in order to determine whether it is accurate and reliable, subject to the extent permitted by the circumstances, is another restrictive criterion. The application of this test has been criticised for being unclear, especially when contrasted with the tests to be applied under national whistleblowing legislation in relation to a discloser's reasonable belief for different levels of disclosure. Another inhibiting feature of the case law of the ECtHR is the requirement for good faith. This requirement can be considered anachronistic

[174] "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…..(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
[175] *Guja v Moldova* [2008] ECHR 144 [52].
[176] Ashley Savage, Leaks, Whistleblowing and the Public Interest, The Law of Unauthorised Disclosures (Edward Elgar 2016) 136.

and does not feature in some national whistleblower protection legislation,[177] whilst in others it merely affects the remedy and does not deprive a discloser of protection.

Denmark

Freedom of expression is protected as a constitutional and fundamental human right enshrined in s 77 of the Constitution of Denmark. The European Convention on Human Rights is incorporated in Denmark by statute,[178] giving the international law instrument the same legal status as other binding national acts. However, the freedom is limited to private expressions, not as employees, and to topics that are of general public interest and suitable for contributing to public debate. For public employees, the general public in principle has an interest in anything relating to how the public authority conducts business. Thus, public employees have considerable freedom to make critical statements about their employer, as explained above under section 4.[179]

The same starting point applies to employees in the private sector, that the freedom of expression cannot be limited. However, as the general public does not display a comparable level of interest in how private companies conduct business, the same wide freedom does not apply to employees in the private sector. For this reason, the freedom of expression about business related topics can be balanced against the confidentiality interests of private companies.

Ireland

In Ireland, freedom of expression manifests itself in Article 40.6.1°(i) of the Irish Constitution. The European Convention on Human Rights Act 2003 gives effect to the standards set out in the European Convention on Human Rights in Irish law.

Norway

In Norway, freedom of speech is protected by s 100 of the Constitution which states that "[t]here shall be freedom of expression". Furthermore, art 10 of the European Convention on Human Rights is transposed into national law and given precedence.[180] Following this, any limitation on freedom of speech requires authority in law to be justifiable and to be necessary and proportionate. Employees are covered by the same protection as any citizen.[181] However, the duty of loyalty will limit freedom of expression.[182] Expressions that might be legitimate in some situations might be unprotected in an employment relationship[183]

UK

Workers in the UK are currently covered by art 10 of the European Convention on Human Rights but have no constitutional right to whistleblow.

[177] For example, the Italian whistleblowing law, Legislative Decree 2001/165, s 54-bis, amended by Law No 2017/179 (Provisions for the protection of whistleblowers). The omission of a good faith test can also be seen in whistleblowing statutes in countries outside of the EU, eg the Australian Public Interest Disclosure Act 2013 and the Serbian Law on the Protection of Whistleblowers Act, no 2014/128.

[178] Implemented by statutory Act in 1992, current version is Statutory Act no 138 of 26 January 2022, www.retsinformation.dk/eli/lta/2022/138

[179] Betænkning nr. 1573, del 1/2020, Betænkning om ytringsfrihedens rammer og vilkår i Danmark, Ytringsfrihedskommissionen.

[180] Human Rights Act 1999.

[181] NOU 1999: 27.

[182] ibid.

[183] ECtHr Palomo Sanchez et al. vs. Spain

7 Summary

In all four countries under consideration, a duty of loyalty arises expressly or impliedly from contracts of employment. In Denmark, employees have a positive duty to disclose information internally about wrongdoing that affects their employer's business interests but both excessive internal and all external reporting can be sanctioned. In Norway, the emphasis is on refraining from acting detrimentally to the interests of the employer. While what amounts to disloyalty is a matter of discretion, the constitutional protection of freedom of expression has an impact in this context. The common law in Ireland and the UK protects the confidentiality of an employer's information both during employment and after it has ended. In both countries, an undefined public interest in disclosure can be used as a defence to a contractual claim for breach of confidence.

In Denmark and Norway, collective agreements are legally binding but have rarely dealt with whistleblowing. In the UK, collective agreements are not normally legally enforceable and do not usually embrace whistleblowing. Although there is no legal right to whistleblow contained in Irish collective agreements, employers have been provided with detailed guidance. Public bodies are required by legislation to establish and maintain protected disclosure procedures. In addition, there is a statutory code of practice, which is intended to impact on the private and non-profit sectors.

In all four countries, whistleblowing is regulated in specific sectors and on particular issues.

In Denmark, whistleblowing schemes were in place primarily to implement EU-directives. This was the case in the Financial Sector, in money laundering, off shore security, trade secrets, auditors, and for abuse of markets. In addition, public authorities supervise whistleblowing schemes on specific issues, for example, abuse of social services, occupational health and safety, environmental matters, defence, and the criminal justice system. A feature of the Danish system is the ability to report anonymously and an obligation on employers to follow-up on allegations that financial regulations have been infringed. On the other hand, as whistleblowing schemes are an exception, whistleblowers are only protected if they follow the correct channels.

In Ireland, a feature of the sectoral approach to whistleblowing protection is a requirement for both statutory mandatory and voluntary disclosures. As regards money laundering and the financing of terrorism, 'designated persons' are obliged to make suspicious transaction reports. It is an offence to withhold information under the Criminal Justice Act 2011 but employees who report are protected from penalisation. Interestingly, the Central Bank is obliged to protect the identity of those who have fulfilled their duty to disclose information under the Central Bank (Supervision and Enforcement) Act 2013 and those who have made voluntary disclosures in good faith about specified matters. Good faith reporting is also a requirement for protection under the Health Act 2004.

Norway also imposes an obligation to report money laundering and the financing of terrorism, although this can be fulfilled by a legal rather than a natural person. Natural persons are protected against reprisals and anonymous disclosures are

provided for. There are also statutory duties on health workers to report dangers to patients, children, and the public in certain circumstances.

In the UK, there are the usual statutory obligations to report money laundering and the financing of terrorism. One of the regulators in the financial services sector, the Financial Conduct Authority, undertakes to protect the identity of those supplying information to it. In addition, its rules require regulated firms to have effective whistleblowing arrangements in place and to appoint a non-executive director as a whistleblower's champion. In the National Health Service, employees have a contractual right and duty to raise concerns with their employer. In England, a national whistleblowing policy sets out a minimum standard for employers who are encouraged to appoint freedom to speak up guardians. Another feature of the health sector is the duty of candor, which requires professionals to raise concerns 'where appropriate'.

Whereas Denmark has no general national legislation protecting whistleblowers prior to transposing the Directive in 2021, the other three countries had detailed provisions affecting employers and workers. In Ireland, Norway, and the UK relevant wrongdoings are identified with varying degrees of specificity and all three countries attempt to exclude protection for the reporting of purely personal grievances in most circumstances. Ireland and the UK apply conditional tiered disclosure regimes and good faith is only relevant to the assessment of compensation for retaliation. In addition, Ireland makes unlimited tort damages available for detriments suffered and this right of action is extended to affected third parties. A feature of the Norwegian scheme is the relevance of good faith and the public interest in assessing the validity of external disclosures. Ireland and Norway both afford some protection for the identity of disclosers and require public sector employers to have whistleblowing procedures. In the UK, a worker has to be identified in order to receive statutory protections and the legislation imposes no general obligation on employers to have a whistleblowing procedure, investigate allegations, or rectify proven wrongdoing. Employees in Ireland and the UK who do not satisfy the requirements of the whistleblowing statutes have little chance of redress under their country's general law of unfair dismissal.

In relation to the human right to freedom of expression, we have seen that this is enshrined in the constitutions of Denmark, Norway, and Ireland. The UK has no written constitution but, like the other countries, is currently a signatory to the European Convention on Human Rights. Article 10 has been applied in several important whistleblowing cases but the approach of European Court of Human Rights to some key issues has been contentious, for example, on the authenticity of the information disclosed, the proportionality of the detriment suffered, and the requirement for good faith.

Despite the protections under the European Convention on Human Rights and constitutional provisions, both employment law and civil law remedies will 'remain the backbone of achieving more effective whistleblowing regimes.'[184] Therefore, although citizens may enjoy freedom of expression under constitutional and human rights law, specific legislation is still needed to protect whistleblowers exercising that right. The risk with specific whistleblowing legislation, however, is that it may limit the circumstances under which a discloser may be protected, and therefore a legal system should offer both basic freedom of expression guarantees and specific statutory provisions for disclosures and protections.[185]

[184] David Lewis, Tom Devine and Paul Harpur, 'The key to protection: Civil and employment law remedies' in AJ Brown (ed), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 352.
[185] Björn Fasterling, 'Whistleblower protection: A Comparative law perspective' in AJ Brown (ed), *International Handbook on Whistleblowing Research* (Edward Elgar 2014) 335.

8 Conclusion

Arguably, Denmark was least prepared when the EU Directive was approved since it had no pre-existing general whistleblowing legislation. However, the absence of such legislation may have made transposition easier since there were no provisions in place that were potentially inconsistent with the requirements of the Directive. Ireland and Norway were best prepared since public sector employers were required to have whistleblowing procedures and to adhere to guidance on their implementation. Significantly the Norwegian legislation required employers to consult with employee representatives about their whistleblowing arrangements. Both Ireland and the UK made compensation available to whistleblowers who experienced retaliation but in neither country is re-employment the primary remedy for unfair dismissal in practice. By way of contrast, Denmark's general laws on dismissal could be applied to whistleblowers and are more robust.

An overview of the right to whistleblow prior to the transposition of the EU-directive on whistleblowing

This working paper provides a description of national regulations regarding employees' right to whistleblowing in Denmark, Ireland, Norway, and the United Kingdom as they stood before these countries (except for the United Kingdom) implemented the EU Whistleblower Directive (2019/1937/EU) into national law. The paper is written as part of the project "Workers' voice and the right to manage - the case of whistleblowing in a comparative context".

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