

# OBLIGATIONS OF THE PRIVATE SECTOR TO PROTECT REPORTING PERSONS: A COMPARATIVE ANALYSIS OF THE EU WHISTLEBLOWER PROTECTION DIRECTIVE AND THE DRAFT CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

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## ABSTRACT

*On 1<sup>st</sup> June 2023, the European Parliament adopted amendments to the EU Commission proposal for a directive on Corporate Sustainability Due Diligence (CSDD-D) with a material effect on the requirements of grievance procedures. Due to the character of the grievance procedures accessible for qualified persons or organizations, intersections to Directive (EU) 2019/1937 (WBD) on the protection of persons who report breaches of Union Law exist. The article examines and compares requirements to and obligations of private sector actors in operating reporting channels (WBD), respectively grievance procedures (CSDD-D) in consideration of protection standards of reporting persons. Private sector actors with the obligation to comply with both directives face requirements in organizing reporting channels centrally and in their subsidiaries, the material scope of qualified reports and grievances, persons and organizations eligible for reporting reports and submitting grievances, and the protection standards and protective measures applicable. The article aims to discuss the requirements and obligations of each directive individually as well as in comparison to each other, having regard to the practical implications for private sector actors and reporting persons and taking into account the purpose of the directives. The article finds nonuniformity in key aspects of the examined requirements potentially leading to endangering the purposes of both directives.*

**Key words:** *grievance procedure, reporting channel, whistleblowing, whistleblower protection, adverse impact, human rights, environmental impacts, retaliation, corporate sustainability due diligence directive, whistleblower protection directive.*

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## **1. INTRODUCTION**

In recent years, the European Union (EU) has adopted and proposed legal instruments regulating the establishment of reporting channels in private companies' operations and value chains. Among these instruments are the Directive (EU) 2019/1937<sup>1</sup> henceforth: WBD, on the protection of persons who report breaches of Union law and the Draft Directive on corporate sustainability due diligence (the Corporate Sustainability Due Diligence Directive, henceforth: CSDD-D<sup>2</sup>). The WBD aims to protect whistleblowers who report breaches of EU law in various areas, such as public procurement, financial services, money laundering, product safety, or environmental protection. The CSDD-D aims to oblige companies to identify, prevent, mitigate, and account for their (potential) adverse impacts on human rights, the environment, and good governance in their operations and value chains.

This article compares the provisions of the WBD and the CSDD-D regarding actors of the private sector and the obligations those actors have in establishing reporting channels and the protection of reporting persons. The objective of this article is to assess similarities, contradictions, and potential synergies of the two directives for obligated private sector actors and the implications thereof.

## **2. PURPOSE AND GENERAL SCOPE OF WBD AND CSDD-D**

Discussing the purpose of the directives facilitates the understanding of scope as well as further considerations of the respective directives and is the basis for assessing the differences and similarities of both directives. Art. 1 WBD sets the purpose of the directive as “(...) enhancing the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.” In recitals 1 and 3 of WBD, the directive derives “harm to the public interest” and “significant risks for the welfare of society” as unfavorable circumstances within the context of “work-related activities” that the directive seeks to combat by “(...) by introducing effective, confidential and secure reporting channels and by ensuring that whistleblowers are protected effectively against retaliation.”

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<sup>1</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, (L 305/17, 26/11/2019).

<sup>2</sup> Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD), 01/06/2023).

In lieu of a dedicated article regarding the purpose of the proposed CSDD-D, Art. 1 para 1 (a) regulates “(...) obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts (...)” Recitals 1 – 12 CSDD-D contain several initiatives, Conventions, and EU legislation<sup>3</sup> as factors that were considered with the proposed CSDD-D, hence focusing on human rights, environmental and climate protection as well as social rights. Rec. 14 CSDD-D followingly names the aims of the directive as ensuring “(...) that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies by respecting human rights and the environment, through the identification, prevention, and mitigation, bringing to an end remediation and minimization, and where necessary, prioritization, of potential or actual adverse human rights and environmental impacts connected with companies’ own operations, subsidiaries and value chains, and ensuring that those affected by a failure to respect this duty have access to justice and legal remedies.”

Both directives aim at regulating conditions in the work environment with effects on the “public interest” and “welfare of society” WBD, respectively on the “sustainability transition of economies and societies” (CSDD-D) and both aim to oblige the private sector, at least partly, in achieving the respective purpose. The WBD aims at facilitating reporting of breaches of EU Law while the CSDD-D aims at regulating the internal market and also incorporates considerations of (adverse) impacts by actions of participants of the internal market to global supply chains.<sup>4</sup> A major difference between WBD and the CSDD-D lies in the purpose of protecting persons reporting breaches that Art. 1 WBD directly mentions as one of its main purposes and further outlines in the recitals while the CSDD-D neither mentions a protection of reporting persons as its purpose in the Articles, nor in the recitals or the explanatory memorandum.

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<sup>3</sup> See recital 4: Kaff, K: Enterprise Models and the EU agenda, *CEPS Policy Insights*, No PI2021-02 2021 & recital 5: United Nations Guiding Principles on Business and Human Rights, (HR/PUB/11/04) & recital 9: Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), (L 243/1, 09/07/2021).

<sup>4</sup> See recital 13 and Council Conclusions on Human Rights and Decent Work in Global Supply Chains, (1 December 2020, 13512/20, 01/12/2020).

### **3. RESPONSIBLE PARTIES – PRIVATE SECTOR ACTORS**

Following the objective of this paper, the obligation of private sector actors, respectively the responsibility of member states to obligate private sector actors in establishing reporting channels shall be in discussion.

#### *3.1. RESPONSIBLE PARTY UNDER ART. 8 WBD*

As per Art. 8 para 1 WBD, member states have to ensure that legal entities in the private sector establish channels and procedures for internal reporting and follow-up. At a minimum, legal entities of the private sector must have 50 or more workers, see Art. 8 para 3 WBD, to be in the scope of para 1. The directive allows in Art. 8 para 6 for deviations from the obligation to establish channels and procedures for internal reporting and follow-up for legal entities with 50 to 249 workers in a way that they “(...) may share resources as regards the receipt of reports and any investigation to be carried out.”

The provision under which participants of the private sector shall be obligated is not directly addressed by the directive as the terminus “legal entity”<sup>5</sup> is not defined in the directive. The definition of “legal entity” is of relevance as the term can be understood as requiring some form of legal personality. In consequence, the responsibility for establishing reporting channels might exclude organizations without legal personality. The wording of the German version of the directive supports this notion as the translation to “juristische Person” would imply a legal personality. However, a singular translation, in this case regarding “legal entity” or “juristische Person”, must be interpreted on the real intention of its author and the sought aims in light of all language versions.<sup>6</sup> Colneric/Gerdemann found that other language versions do not imply a legal personality and hence argue that the purpose of the broad scope of Art. 4 WBD, where “legal entity” is also used by the directive, is to avoid gaps in protection and therefore includes forms of enterprises that do not have legal personality.<sup>7</sup> Hajn similarly argues with the semantic context and the role of “legal entity” within the directive as a whole pointing to the conclusion that both natural and legal persons, as well as associations of persons or organizational entities having legal capacity despite not having legal personality, are covered.<sup>8</sup>

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<sup>5</sup> “Legal entity” is shortened where the directive addresses “legal entities in the private sector” in line with the objective of this article.

<sup>6</sup> Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 1969 -00419.

<sup>7</sup> Colneric, N., Gerdemann, S.: Die Umsetzung der Whistleblower Richtlinie in deutsches Recht, *HSI-Schriftenreihe*, 34 2020, p. 35.

<sup>8</sup> Hajn, Z: Protection of Whistleblowers in the Workplace. Who Is Protected and Who Is Responsible under the Provisions of the EU Directive 2019/1937?, in: Skupień, D. (ed.): *Towards*

While the provisions address obligations to legal entities that operate individually, the question arises of how corporate groups should organize their internal reporting channels as every subsidiary with 50 workers or more needs to establish individual reporting channels (Art. 8 paras 1, 3 WBD). A solution might lay in Art. 8 para 5 WBD, whereby external third parties can be authorized to receive reports of breaches. Such a third party could be understood as a parent company that operates reporting channels for its subsidiaries. Rec. 54 WBD narrows the possibility of the usage of third parties by stating that such third parties should also “(...) offer appropriate guarantees of respect for independence, confidentiality, data protection, and secrecy”. Additionally, the second sentence of the recital non-exhaustively lists external reporting platform providers, external counsels, auditors, trade union representatives, or employees’ representatives as suitable third parties. The specification of rec. 54 WBD does not exclude a potential usage of Art. 8 para 5 WBD by corporate groups even though they are not expressly mentioned in the given examples. Rec. 55 WBD might strengthen this interpretation as internal reporting procedures should enable legal entities to receive and investigate reports by workers of the entities’ subsidiaries or affiliates, thereby recognizing the common implementation of whistleblower systems that are managed at the group level under consideration of the respective subsidiaries.<sup>9</sup>

However, according to the EU Commission, such a privilege for corporate groups cannot be derived from the provisions. The EU Commission argues that Art. 8 para 5 WBD refers only to third parties that are external to the legal entity without a “work-related relationship”. Albeit, the EU Commission does not expressly state that it interprets the subsidiary-to-parent company affiliation as constituting such a relationship.<sup>10</sup> The reading of “external third parties” is of importance since the law of member states might qualify the relation of the parent company to the subsidiary as being an external third party. An example is the separation principle under German corporate law after which parent companies are not liable for their subsidiaries and vice versa, leading to the justification of the federal Ministry of Justice wherein they argue that parent companies and their subsidiaries qualify under the term “third party” in Art. 8 para 5 WBD.<sup>11</sup> Additionally, in the EU Commission’s opinion,

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*a Better Protection of Workplace Whistleblowers in the Visegrad Countries, France and Slovenia*, Lodz, 2021, p. 43.

<sup>9</sup> As evinced by the request of employer lobby organizations, *see* EU Commission Opinion from 2<sup>nd</sup> June 2021, (JUST/C2/MM/rp/ (2021)3939215).

<sup>10</sup> *Ibid*, 3.

<sup>11</sup> Entwurf eines Gesetzes für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden, (Drucksache 20/3442, 19/09/2022), Justification to § 14 para 1.

the role of an external third party only lies in receiving the reports and does not extend to follow-up actions in terms of investigating and addressing the breach.<sup>12</sup> The EU Commission interprets rec. 55 WBD not as an argument for the possibility of a sole group-wide reporting channel but rather as an option given to the workers in subsidiaries that “(...) cannot be turned into an obligation for them to report to the parent company.”<sup>13</sup> The EU Commission rejects a possibility to establish only centralized whistleblowing procedures at group level by focusing on the requirement of Art. 8 para 3 WBD to establish such procedures at companies with 50 or more workers except for combined resources where companies including subsidiaries have less than 250 workers, Art. Para 6 WBD, and declaring any different interpretation as *contra legem*.<sup>14</sup> The Commission expert group on the WBD addresses the aforementioned discussion points in its fifth meeting and comes to terms with the opinions given by the EU Commission in the referenced letters, effectively stating that “there is no exception from this rule (meant here is Art. 8 para 3 WBD) exempting from this obligation legal entities belonging to the same corporate group.”<sup>15</sup>

Legal scholars have taken up the dispute with non-uniform opinions regarding the conformity of the interpretation of the German legislator with Union law. Gerdemann expects the German transposition to ultimately not be upheld by the decision of the European Court of Justice.<sup>16</sup> Dilling also negates a possibility for a corporate group solution deriving from Art. 8 para 5 WBD but argues that the sharing of resources in receiving reports and carrying out investigations where companies have less than 250 workers shall also apply for centrally operated reporting channels in corporate groups if the subsidiaries have less than 250 workers.<sup>17</sup>

Contrary to the aforementioned opinions, Bruns argues that legal entities within a corporate group can qualify as external third parties as per Art. 8 para 5 WBD.<sup>18</sup> Bürkle in simulating a decision of the European Court of Justice by

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<sup>12</sup> Ibid, 3.

<sup>13</sup> Ibid, 5.

<sup>14</sup> EU Commission Opinion from 29<sup>th</sup> June 2021, (JUST/C2/MM/rp/ (2021)4667786).

<sup>15</sup> <https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=28015, 24/09/2023>.

<sup>16</sup> Gerdemann, S.: Neuer Entwurf für ein Hinweisgeberschutzgesetz - Auf Konfrontationskurs zu EU-Kommission und Koalitionsvertrag, *Zeitschrift für Rechtspolitik*, 4 2022, p. 100.

<sup>17</sup> Dilling, J.: Die Konzernlösung gemäß § 14 Abs. 1 S. 1 HinSchG im Spannungsfeld zwischen europarechtlichen Vorgaben und den praktischen Bedürfnissen der von der Umsetzung betroffenen Unternehmensverbände, *Corporate Compliance Zeitung*, 4 2023, p. 95.

<sup>18</sup> Bruns, P.: Das neue Hinweisgeberschutzgesetz, *Neue Juristische Wochenschau*, 23 2023, p. 1616.

using its test criteria, concludes that a single reporting channel on a group level complies with WBD.<sup>19</sup> The dispute cannot be understood as solved where at least one member state implements the provision in its (draft) law differently, hence having the potential to be decided by the European Court of Justice.<sup>20</sup>

### *3.2. RESPONSIBLE COMPANIES UNDER ART. 2 CSDD-D*

Although the responsibility of companies as defined here relates to the personal scope of the entire Directive, in the following, only the responsibility in connection with the notification and non-judicial grievance mechanism (henceforth: grievance procedure) according to Art. 4 para 1 (d) CSDD-D will be discussed, taking into account the objective of this article.

To postulate the obligation to establish a grievance procedure, the general application of the directive must be assessed. According to Art. 2 para 1 (a) CSDD-D, the directive applies to all companies under the law of a member state with more than 250 employees on average and a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared and are in line with the thresholds of a “large undertaking” according to Art. 3 para 4 (EU) 2013/34<sup>21</sup>. The EU Commission in its initial draft set the threshold much higher at 500 employees and EUR 150 million and stipulated the lower thresholds for predefined “high impact sectors” that were deleted after the EU Parliament’s amendment. Where the threshold is not met, the amended directive uses the initial general thresholds for companies that are the ultimate parent company of a group that had 500 employees and EUR 150 million according to Art. 2 para 1 (b) CSDD-D. Analogously to the aforementioned variants, Art. 2 para 2 obliges companies under the jurisdiction of a third country with the additional requirement that at least EUR 40 million of the net worldwide turnover was generated in the Union, including turnover generated by third-party companies with whom the company and/or its subsidiaries has entered into a vertical agreement in the Union in return for royalties.

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<sup>19</sup> Bürkle, J.: Zur Unionsrechtskonformität zentraler Konzernmeldestellen für Hinweisgeber, *Corporate Compliance Zeitung*, 11 2022, p. 340.

<sup>20</sup> *Ibid*, 336.

<sup>21</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, (L 182/19, 29/06/2013), Art. 3 para 4.

Notably, the wording regarding the responsible party being a “company” deviates from “legal entity” as per WBD. The CSDD-D understands a “company” to be listed under Annex I or Annex II to directive (EU) 2013/34 (see Art. 3 a) i) CSDD-D) and therefore being, either legal persons with limited liability (i), limited liability structured partnerships under the right of a member state (iii), third country legal persons that are comparable to the aforementioned (ii), or conclusively listed regulated financial undertakings regardless of its legal form (iv). The scope of the CSDD-D is limited in comparison to WBD due to the focus on selected legal persons rather than the widely scoped meaning of legal entity as per WBD and the aforementioned thresholds in employees and turnover.

Companies must regard due diligence considerations, among others, in their subsidiaries. Subsidiaries are controlled undertakings as per Art. 2 para 1 (f) 2004/109/EC<sup>22</sup>, hence must be a legal entity without a prescribed legal form.<sup>23</sup> By this, a parent company has the obligation of due diligence for its subsidiaries, regardless of legal form, while subsidiaries that fulfill the requirements of Art. 2 para 1 (a) CSDD-D themselves are responsible companies under CSDD-D. Also, the wording of the CSDD-D seems to indicate that the number of employees and net turnover thresholds are to be calculated company by company, and not at the group level, potentially posing a risk of manipulation of the thresholds by splitting activities among structures.<sup>24</sup> First corporate advocacy groups and corporations expressed their concerns regarding a missing privilege for corporate groups in the initially proposed draft directive by the EU Commission.<sup>25</sup> Under consideration of the aforementioned discussion points, the amended Art. 2 para 1 (b) CSDD-D that now expressly names the obligation of an ultimate parent company that only meets the threshold in a ho-

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<sup>22</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, (OJ L 390, 31/12/2004), Art. 2 para 1.

<sup>23</sup> Jurić, D., Zubović, A., Čulinović-Herc, E: Large Companies Saving People and the Planet – Reflections on the Personal Scope of the Application of the Corporate Sustainability Due Diligence Directive, *INTEREULAWEAST: Journal for the international and European law, economics and market integrations*, 9(2) 2022, p. 22.

<sup>24</sup> Pietrancosta, A.: Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives, *European Corporate Governance Institute (ECGI) - Law Research Paper Series*, 639 2022, p. 24.

<sup>25</sup> See: [https://bdi.eu/media/themenfelder/recht/publikationen/221004\\_Position\\_BDI\\_Corporate\\_Sustainability\\_Due\\_Diligence\\_and\\_amending\\_Directive.pdf](https://bdi.eu/media/themenfelder/recht/publikationen/221004_Position_BDI_Corporate_Sustainability_Due_Diligence_and_amending_Directive.pdf), 24/09/2023 & [https://www.basf.com/global/documents/en/about-us/politics/BASF\\_Mandatory-Due-Diligence.pdf](https://www.basf.com/global/documents/en/about-us/politics/BASF_Mandatory-Due-Diligence.pdf). assetdownload.pdf, 24/09/2023.

listic view of the Group does not change the general obligation of the individual company that meets the threshold of Art. 2 para 1 (a) CSDD-D. However, the recent amendment of Art. 9 para 1 CSDD-D postulates in its second sentence that companies shall be enabled “(..) to provide a possibility to submit notifications and grievances through collaborative arrangements, including industry initiatives, with other companies or organizations, by participating in multis-takeholder grievance mechanisms or joining a global framework agreement.” The wording of Art. 4 para 1 (d) CSDD-D clarifies that participation in collaborative arrangements is not limited to submitting notifications but can also include the grievance mechanism itself. In contrast to WBD, the possibility of participation may be used by corporate groups to set up grievance procedures while simultaneously keeping the overall due diligence responsibilities of CSDD-D in each subsidiary. Additionally, the newly added Art. 4a para 1 CSDD-D describes a “due diligence support at group level” wherein parent companies may perform actions that can contribute to their subsidiaries to meet their obligations of Arts. 5 – 11, 15 CSDD-D in cases where the subsidiary under the conditions of Art. 4a para 2 (a) – (g) CSDD-D. The conditions demand cooperation of the subsidiary with the parent company including the provision of all relevant and necessary information (a), adaption of the parent company’s due diligence policy to include the subsidiary (c) and abiding by the subsidiary to the policy (b), an integration of due diligence (d) and climate (g) in the subsidiaries policies and risk management (d), preventing and bringing to an end of adverse impacts (e) and clear communication of the actions taken by the parent company to stakeholders and the public domain (f).

### *3.3. COMPARISON OF RESPONSIBLE PARTIES*

The directives have different scopes when looking at responsible parties as there is no responsibility for small and medium-sized enterprises (SMEs) under the CSDD-D. The first draft of the CSDD-D by the Commission was estimated to oblige 13,000 EU companies;<sup>26</sup> the newly amended threshold will lead to covering potentially up to 49,000 companies similar to (EU) 2022/2464.<sup>27</sup> In contrast, according to the latest data from Eurostat, at least 231,521 SMEs with

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<sup>26</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, (2022/0051(COD), 23/02/2022), Explanatory Memorandum, p. 16.

<sup>27</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, (L 322/15, 16/12/2022), Art. 1. *Note: Number will be lower as (EU) 2022/2464 also includes nearly all publicly listed SMEs (excluded are listed micro-companies); see Pietrancosta op. cit. 5.*

50 to 249 employees and 51,119 enterprises with 250 or more employees acted as employers in the EU and therefore fall under the directive WBD.<sup>28</sup>

While not the same, the amendment of the CSDD-D by the EU parliament to decrease the initially sought thresholds draws the personal scope of the CSDD-D and the WBD closer together. Differences exist especially in the narrower scope of “company” (CSDD-D) in contrast to “legal entities” (WBD), financial thresholds of the CSDD-D, the inclusion of SMEs under the WBD, and a corporate privilege for centralized grievance procedures under the CSDD-D. As no group privilege exists in the WBD, implementation of several reporting channels for qualified subsidiaries including at least one grievance procedure at the group level or a collaboratively arranged grievance procedure at the subsidiary level will still be necessary in qualified groups.

The group privilege within the CSDD-D and the additional possibility of participation in collaborative arrangements for grievance procedures is in stark contrast to the (disputed) negation of centralized whistleblowing channels within the WBD. The SME privilege of WBD surprises especially in comparing it with the CSDD-D, as companies with below 250 employees would not be considered individually responsible companies under CSDD-D but already are not permitted to share resources under Art. 8 para 6 WBD. In addition, it is generally hardly understandable why the possibility in the WBD for a collaboration of not associated SMEs with 50 – 249 employees should facilitate whistleblower protection but not in larger companies in a corporate group. The newly defined group privilege within the CSDD-D therefore reinforces the question of why a group privilege should not be suitable under the WBD.

The differences in the directives might seriously undermine the purpose of the WBD (facilitation of a reporting of EU law breaches) and the CSDD-D (reporting of adverse impacts of market participants) as “(...) knowledge about the proper avenues for reporting unethical behavior, and clear safety measures to protect whistleblowers from retaliation” is key for a reporting person to step forward.<sup>29</sup> While a setup with multiple channels for reporting breaches, respectively grievances, does not appear convenient for reporting persons, further complexity arises due to different scopes of the directives: A whistleblower working in a subsidiary with a whistleblowing channel according to WBD but not according to CSDD-D with a concern regarding collective labor law sees

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<sup>28</sup> NACE Rev. 2, 2021 [[https://ec.europa.eu/eurostat/databrowser/product/view/SBS\\_SC\\_OVW?lang=en](https://ec.europa.eu/eurostat/databrowser/product/view/SBS_SC_OVW?lang=en)], 24/09/2023. *Note: Enterprises from Italy were not assessed due to lack of data.*

<sup>29</sup> Dungan, J., Waytz, A., Young, L.: *The Psychology of Whistleblowing, Current Opinion in Psychology*, 6 2015, p. 131.

him-/herself in a situation where s/he wants to report to his/her own company but sees that the WBD reporting channel is not open to this kind of report; such a whistleblower might be discouraged from reporting on a higher level as a consequence. Further problems may arise if a corporate group has a high level of integration, where key processes visible to employees such as the human resource, the IT, and the compliance department are managed at the group level and communicated through a group-wide communication platform (e.g., group-wide intranet). An employee of a subsidiary in such a group would assume to find one centralized point of contact for whistleblowing as well but is confronted with a multitude of possible reporting channels.

## **4. MATERIAL SCOPE**

### *4.1. MATERIAL SCOPE OF THE WBD*

According to Art. 2 para 1 (a) WBD the material scope of the directive is limited to persons reporting breaches of select Union law with the respective acts listed in Annex Part 1 to the directive: public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety; transport safety; protection of the environment; radiation protection and nuclear safety; food and nutritional safety; animal health and welfare; public health; consumer protection; the protection of privacy and personal data; and the security of networks and information systems. Additionally, breaches affecting the financial interests of the Union Art. 2 para 1 (b) WBD and breaches relating to the internal market (c) are in the material scope; member states may extend protection under national law as regards areas or acts not covered by paragraph 1 (para 2). With this, the directive applies a sectoral rather than a horizontal approach, resulting in the protection of persons reporting on violations of EU law and not national law, potentially posing legal uncertainty to a reporting person whether the reported information would fall within the scope.<sup>30</sup> However, the directive is designed as a minimum scope of breaches that member states are encouraged to transfer into comprehensive frameworks for whistleblower protection based on the same principles and extending these rules to other areas.<sup>31</sup> Apart from a potential widening of scope

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<sup>30</sup> White, S.: A Matter of Life & Death: Whistleblowing Legislation in the EU, *The European Criminal Law Associations' Forum eucrim*, 3 2018, p. 174 & Erlebach, K.: Die Regelungen der EU-Hinweisgeberrichtlinie und ihre Auswirkungen auf deutsche Unternehmen, *Compliance Berater*, 8 2020, p. 285.

<sup>31</sup> Stappers, J. T.: EU Whistleblowing Protection Directive: Europe on Whistleblowing, *ERA Forum*, 22 2021, p. 91.

during the transposition of the directive in national law, the material scope of the directive does not cover serious crimes such as human trafficking.<sup>32</sup> Breaches within the meaning of Art. 5 (1) WBD are acts or omissions in the scope of the material scope that are unlawful and relate to the Union acts (i) or defeat the object or the purpose of the rules in the Union acts (ii). Notably, acts or omissions that defeat the object or the purpose of EU rules (Art. 5 (1) (ii) WBD) extend the material scope to lawful acts if the purpose of a covered rule has not been achieved and the person acting as intended to gain an advantage by artificially creating the conditions laid down for obtaining it.<sup>33</sup>

#### *4.2. MATERIAL SCOPE OF THE CSDD-D*

About a comparison of obligations private sector actors have in the protection of reporting persons, this article focuses on the CSDD-D grievance procedure's material scope. According to Art. 9 para 1 CSDD-D in concretization of Art. 1 para 1 CSDD-D, companies are obligated to provide publicly available and effective notification and non-judicial grievance mechanisms at the operational level, that can be used by persons and organizations (see 6 Definition of Reporting Persons) to notify them of or raise grievances and request remediation, where they have legitimate information or concerns regarding actual or potential adverse human rights impacts or adverse environmental impacts concerning the companies' own operations, the operations of their subsidiaries and their value chain. Art. 3 (ca) CSDD-D defines an adverse impact as any potential or actual adverse human rights or adverse environmental impact and further specifies such adverse impacts in Art. 3 (b), (c) CSDD-D by allocating instruments, international texts, and conventions as per Annex Part I and II to the two kinds of adverse impacts. According to Art. 3 (b) CSDD-D, an adverse environmental impact has an impact on the environment resulting from the failure to comply with obligations in line with respective references to the Annex and in specific cases where national legislation related to listed international texts exist, such legislation must also be taken into account. A human rights impact, according to Art. 3 (c) CSDD-D is defined as having an impact on persons resulting from any action that removes or reduces the ability of an individual or group to enjoy the rights or to be protected by prohibitions en-

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<sup>32</sup> Colneric, N., Gerdemann, S.: The EU Whistleblower Directive and its Transposition: Part 2, *European Labour Law Journal*, 12(3) 2021, p. 261.

<sup>33</sup> Colneric, N., Gerdemann, S.: The EU Whistleblower Directive and its Transposition: Part 1, *European Labour Law Journal*, 12(2) 2021, p. 197. *In reference to:* Joint cases C-116/16 and C-117/16 *Skatteministeriet v T Danmark and Y Danmark Aps*, ECLI:EU:C:2019:135 para 97-98.

shrined in international conventions and instruments as per the respective references to the Annex. In contrast to the EU Commission proposal, the wording was changed from “violation” to “failure to comply” (b) resulting in a convergence to the EU Parliament resolution where an impairment of rights had been enough to qualify for an adverse impact on human rights.<sup>34</sup> In the case of (c) the wording changed to “any action which removes or reduces the ability (...) to enjoy right or to be protected”, hence aligning the definition with the key concept of the UN Human Rights Office of the High Commissioner.<sup>35</sup> The directive makes use of a two-sided approach firstly by scoping adverse impacts founded on specific provisions of the conventions in the annexes and secondly through Annex Part I Section 1 Number 21 by widening the scope for adverse human rights impacts to violations of conventions as a whole, effectively creating a catch-all element for adverse human rights impacts.<sup>36</sup> The requirement for the catch-all element was amended by the EU Parliament amendment to only require “(...) a foreseeable risk that such a prohibition or right (*meant is: prohibitions and rights in Annex Part I Section 2*) may be affected.”

#### 4.3. COMPARISON OF MATERIAL SCOPE

The material scope of both directives from a reporting perspective is significantly different as WBD limits reports to select Union law whereas the CSDD-D opens up the scope for grievances regarding violations against select international instruments, texts, and conventions. Reports under WBD, respectively grievances under CSDD-D can potentially be in the scope of both directives, e.g., in case of a violation against the regulation on shipments of waste (EC) No. 1013/2006 which is also covered by WBD.<sup>37</sup> However, serious crimes such as human trafficking are reportable under the CSDD-D but do not fall in the scope and under the protection of WBD.<sup>38</sup>

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<sup>34</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, (2020/2129(INL), 10/03/2021), Annex Art. 3 (6).

<sup>35</sup> United Nations Human Rights Office of the High Commissioner, The Corporate Responsibility to Respect Human Rights, HR/PUB/12/02, 2012, p. 5.

<sup>36</sup> Nietsch, M, Wiedmann, M: Der Vorschlag zu einer europäischen Sorgfaltspflichten-Richtlinie im Unternehmensbereich (Corporate Sustainability Due Diligence Directive), *Corporate Compliance Zeitung*, 5 2022, p. 128.

<sup>37</sup> See Annex Part II Number 10 CSDD-D, respectively Annex Part I, E. 3. (ii) WBD

<sup>38</sup> See Annex Part I Section 1 Number 14 CSDD-D. Also: Gerdemann Part 2, op. cit. 261.

German scholars have already argued for private sector entities to establish grievance procedures jointly together with internal reporting channels.<sup>39</sup> Whereas Gläßer/Kühn argue against jointly operated grievance procedures and internal reporting channels by pointing to differences in the material scope and purpose of the GDDL, respectively the WBD, with the former aiming at a protection against human/environmental rights violations and risks and the latter on ensuring minimum standard for the protection of whistleblowers against repression.<sup>40</sup> In light of differences, especially in differences of protection standards, this discussion is prone to be of relevance on a European level concerning the WBD and CSDD-D as well.

## 5. DEFINITION OF REPORTING PERSONS

### 5.1. REPORTING PERSONS IN THE WBD

Reporting persons, according to Art. 4 para 1 WBD, must work in the private or public sector and must have acquired information on breaches in a work-related context. Art. 5 (7) WBD defines a reporting person as a natural person who reports or publicly discloses information on breaches acquired in the context of his/her work-related activities. “Work-related context” is defined as current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information (Art. 5 (9) WBD).

The provisions “information on breaches in a work-related context” (Art. 4 para 1 WBD) and “information on breaches acquired in the context of his or her work-related activities” (Art. 5 (7) WBD) have differences in wording as the later requires an acquirement in the context of work-related activities, hence posing a higher barrier. However, the aforementioned incongruence does not pose a constraint of scope to Art. 4 para 1 WBD as para 1 (a) – (d) enumerate as minimum applicability, among others, volunteers (c).<sup>41</sup> A wider scope of the

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<sup>39</sup> Gehling, C, Ott, N, Lüneborg, C.: Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis, *Corporate Compliance Zeitung*, 5 2021, pp. 238 – 239. *Less explicit also:* Stemberg, C.: Die drei „Schlüsselkriterien“ des Beschwerdeverfahrens nach § 8 Lieferkettensorgfaltspflichtengesetz, *Corporate Compliance Zeitung*, 4 2022, p. 93.

<sup>40</sup> Gläßer, U, Kühn, K.: Verhältnis von § 8 LkSG zur Whistleblower-RL und deren Umsetzung, in: Henn, E. V.; Jahn, J. (eds.): *BeckOK Lieferkettensorgfaltspflichtengesetz*, München 2023, rec. 299.

<sup>41</sup> Forst, G.: Die Richtlinie der Europäischen Union zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden, *Europäische Zeitschrift für Arbeitsrecht*, 3 2020, p. 287.

directive is also apparent as “any persons working under the supervision and direction of contractors, subcontractors and suppliers” (d) and hence not in direct working relation to the responsible party are in scope. Also, reporting persons who report or publicly disclose information on breaches acquired in a work-based relationship that has since ended (Art. 4 para 2 WBD) and whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations (Art. 4 para 3 WBD) are scoped in. Additionally, facilitators (a), third persons who are connected with the reporting person (b), and legal entities the reporting person is connected to within a work-related context (c) are protected under Art. 4 para 4 WBD. While the scope of reporting persons under WBD is generally inclusive, the possibility to report breaches is not necessarily open to such individuals as Art. 8 para 2 WBD only obligates legal entities to establish internal reporting channels for their workers and may optionally enable other persons (Art. 4 para 1 (b) – (d) and para 2 WBD) to report information on breaches. With that, internal reporting channels do not need to necessarily open to reporting persons whose work-based relationship is yet to begin although they are still regarded by the Directive as such (Art. 4 para 3 WBD).

To qualify as a reporting person under the directive, Art. 6 para 1 (a) – (b) WBD determines that reporting persons must have had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of the directive (a) and was reported following the provision regarding internal or external reporting or public disclosure (b). Recital 32 specifies “reasonable grounds to believe” so that the matters reported by them are true in light of the circumstances and the information available to them at the time of reporting. Recital 32 also draws the line between reports that the reporter “(..) deliberately and knowingly reported wrong or misleading (..)” and “inaccurate information on breaches by honest mistake”; also, the motives of the reporting persons should not be relevant to their protection. It is questionable whether “by honest mistake” is subject to ongoing protection in the case of ordinary negligence and subsequently gross negligence and intent are required to constitute a loss of protection. While the directive including the recital does not dedicatedly address the form of negligence that is still covered under an “honest mistake”, Forst argues that a loss of protection in cases of ordinary negligence would be inconsistent with the allowance of reporting suspicions that later on turn out to be false. He argues that allegations “out of the blue” are not “reasonable suspicions” as part of the definition of “information on breaches” in Art. 5 (2) WBD and therefore do not fall under the protection of the directive. A reporting person who is subjectively convinced about the suspicion must not disregard what

should have been obvious to everyone in the given case to fall under the directive's protection.<sup>42</sup> Such an assessment in its results is supported by further authors on this matter.<sup>43</sup> Connecting the explicit purpose of the directive in "providing for a high level of protection of persons reporting breaches" (Art. 1 WBD) and the assessment of recital 3 that enforcement is enhanced "by ensuring that whistleblowers are protected effectively against retaliation" with the discussion about the level of negligence point to the lowest possible threshold for inclusion of protection while simultaneously prevent misuse, i.e. ordinary negligence, to achieve the directive's purpose.

## 5.2. REPORTING PERSONS IN THE CSDD-D

Art. 9 para 2 CSDD-D defines potential submitters (henceforth also: reporting person) as persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact including their legitimate representatives or organizations with a purpose of protecting the environment (a) and trade unions and other workers' representatives representing individuals working in the value chain concerned (b). Added with the amended Art. 9 para 2a CSDD-D are legal or natural persons defending human rights or the environment (a) and civil society organizations active in the areas related to the value chain concerned (b). Though neither a definition of a human or environmental rights defender is given by the CSDD-D nor is a convention cited by the recital such as by rec. 5 CSDD-D, the Council of the European Union has adopted with the European Union Guidelines on Human Rights Defenders a broad definition: "Human rights defenders are those individuals, groups, and organs of society that promote and protect universally recognized human rights and fundamental freedoms. Human rights defenders seek the promotion and protection of civil and political rights as well as the promotion, protection, and realization of economic, social, and cultural rights. Human rights defenders also promote and protect the rights of members of groups such as indigenous communities. The definition does not include those individuals or groups who commit or propagate violence."<sup>44</sup> A similar definition for environmental

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<sup>42</sup> Ibid, 297.

<sup>43</sup> Hajn, Z., Skupień, D: Workplace Whistleblower Protection in the Visegrad Countries, France and Slovenia – Proposals for Changes in: Skupień, D. (ed.): *Towards a Better Protection of Workplace Whistleblowers in the Visegrad Countries, France and Slovenia*, Lodz, 2021, p. 225. Further: Kain, F.: Whistleblowing and labour law: The Whistleblower Directive – development, content and obstacles, *Italian Labour Law e-Journal*, 13(2) 2020, p. 139.

<sup>44</sup> Council of the European Union, Ensuring protection – European Union Guidelines on Human Rights Defender, (16332/2/08, REV 2, 10/06/2009), Chapter 2, No. 3.

human rights defenders has not been issued by an EU institution. However, the UN Environment Programme defined such persons as “(...) anyone (including groups of people and women human rights defenders) who is defending environmental rights, including constitutional rights to a clean and healthy environment, when the exercise of those rights is being threatened.”<sup>45</sup> In any case, the non-definition by the CSDD-D, as well as both, cited definitions point to an inclusive character of “rights defenders” and, considering the wording of Art. 9 para 2a CSDD-D “(...) as far as they are not covered (...)”, posing as a catch-all element.

The initial EU Commission proposal did not define the protection of reporting persons similar to Art. 4 WBD. The lack of protective measures conflicted with the explicit recommendation of the European Parliament that such reporting procedure “(...) should ensure that the anonymity or confidentiality of those concerns, as appropriate by national law, as well as the safety and physical and legal integrity of all complainants, including human rights and environmental defenders, is protected”.<sup>46</sup> However, according to Art. 23 CSDD-D, WBD is applicable for the reporting of all breaches to the CSDD-D and the protection of persons reporting such breaches. While the aspect of protection of reporting persons is not widely discussed, some see in this provision an applicability of WBD for grievances under Art. 9 para 2 CSDD-D.<sup>47</sup> This assessment must be challenged as Art. 23 CSDD-D only describes an applicability of WBD for breaches against the CSDD-D not for grievances itself. This distinction is necessary as grievances under Art. 9 para 2 CSDD-D are submittable if they address an “adverse impact”, that does not compulsively need to be a breach of law but may be present where a right or prohibition of an international convention has been violated (Art. 3 (b) – (c) CSDD-D). Therefore, a submittable grievance need not constitute a breach of CSDD-D but rather is the necessary precondition that must exist for a person to submit a grievance under Art. 9 para 2 CSDD-D. Including the submitting of grievances in the sense of Art. 9 para 2 CSDD-D under the protection of WBD would enhance the material scope of reportable concerns that are limited to breaches of EU law under

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<sup>45</sup> United Nations Environment Programme, Promoting Greater Protection for Environmental Defenders: Policy, 09/02/2018, p. 2.

<sup>46</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, (2020/2129(INL), 10/03/2021), Annex recital 43, and Art. 9, 2.

<sup>47</sup> See: Methven O’Brien, C., Martin-Ortega, O.: Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective, *Publications Office European Union - Think Tank European Parliament*, Brussels, 2022, pp. 14 – 15. Further: Wiedmann, M.; Hoppmann, V.: Whistleblowing im DAX – Auswirkungen von HinSchG, LkSG, CSRD und CS3D-E, *Corporate Compliance Zeitung*, 1-2 2023, p. 16.

WBD to the broad scope of the CSDD-D, thus including not only law of the member states but also opening up whistleblower protection to extraterritorial jurisdiction. Rec. 65 CSDD-D highlights only the protection of reporting persons under the WBD as the WBD “(...) should therefore apply to the reporting of all breaches of this Directive and the protection of persons reporting such breaches.” One could additionally argue that in a given case, the infringing of a grievance that was submitted under the CSDD-D constitutes a non-achievement of the purpose of the CSDD-D and the acting person had intended to gain an advantage by artificially creating the conditions laid down for obtaining it<sup>48</sup>, to apply under Art. 5 (1) (ii) WBD. This argumentation still cannot hold true as, again, the original grievance that was submitted and infringed did not qualify *ex-ante* as a report under WBD.

Under the amended CSDD-D, a more profound consideration of reporting persons took place with the newly added rec. 65a CSDD-D acknowledging the vulnerable status of reporting persons as being “(...) on the front line of the consequences of adverse environmental and human rights impacts (...)” resulting in a request that “companies should therefore not expose them to any kind of violence.” Additionally, according to the amended rec. 42 CSDD-D companies should ensure that reporting persons “(...) are protected from potential retaliation and retribution, including by ensuring anonymity or confidentiality (...)”, hence introducing a certain protection level of reporting persons (see 6 Protection Standards for a detailed assessment).

### 5.3. COMPARISON OF REPORTING PERSONS

The definition of a reporting person under WBD is characterized by a required work-related context between the reporting person and the legal entity concerned. The requirement is defined widely by the directive as even a non-direct link to a past or not started work activity is also defined as work-related context; the protective character is also expanded to natural and legal persons connected to the reporting person. However, the possibility of enabling reporting persons to submit a report via an internal reporting channel must only be ensured by the responsible legal entity for its own workers; opening the reporting channel to reporting persons outside the legal entity is optional.

The CSDD-D requires the reporting person to be personally affected by an adverse impact or to have reasonable grounds to believe they might be affected by an adverse impact. Also, representatives of (potentially) affected persons and other organizations or representatives connected to the value chain or de-

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<sup>48</sup> Gerdemann Part 1, *op. cit.* 197.

fending human rights or the environment are considered as reporting persons. In contrast to the WBD, the CSDD-D requires reporting persons to be personally affected, believing to have reasonable grounds to be personally affected, to be representatives of such affected persons, to be organizations active in the concerned value chain, or to be organizations defending human rights or the environment. In connection with the material scope of Art. 9 para 1 CSDD-D, the main criteria for all the qualifications of reporting persons within para 2 and para 2a are connected to an adverse impact within the companies' own or subsidiaries' operations and their value chains. Besides differences in material scope (see 4.3 Comparison of Material Scope), the different definitions of reporting persons are characterized through the focus on a work-related context, respectively an adverse impact. The CSDD-D's scope can be viewed as more inclusive due to the aforementioned aspects and especially due to the inclusion of human and environmental rights defenders as reporting persons.

Concerning the qualification of persons who believe they might be affected by an adverse impact, the considerations under 5.1 Reporting Persons in the WBD regarding the limitation effect of "have reasonable grounds" are of the same wording as used within the CSDD-D. Even though the assessment of a low threshold for "having reasonable grounds to believe" within the WBD is reasoned about the directive's protective purpose, a similar threshold should be assumed for the CSDD-D as well since the context is in both directives addressing a situation of reporting by vulnerable persons.

## **6. PROTECTION STANDARDS**

### *6.1. PROTECTION OF REPORTING PERSONS IN THE WBD*

Wherever a reporting person qualifies as such under Art. 4 WBD and reports following the conditions outlined in Art. 6 para 1 WBD, s/he is entitled to minimum protection standards as set forth by the directive. The WBD describes protective measures along the whistleblowing process, starting with the report itself: While according to Art. 6 para 2 WBD member states can decide upon the duty to accept and follow up on anonymous reports, qualified persons who report anonymously still qualify for the further protection measures of Art. 19 – 24 WBD, where identified as per Art. 6 para 3 WBD. Recital 34 WBD similarly states that such qualified persons "(...) should enjoy protection under this Directive if they are subsequently identified and suffer retaliation."

Where a qualified report was submitted, certain whistleblower protection is assigned by design as reporting channels must be set and operated under Art. 9 para 1 WBD in a way that the confidentiality of the reporting person and

mentioned third parties is ensured (a), the report reception is confirmed to the reporting person (b), communication with the reporting person in a reasonable timeframe and follow-up by competent and impartial functions is ensured (c) – (f) and the provision of clear and easily accessible information on external reporting procedures (g). Reporting persons must also be given the possibility to seek a physical meeting on request, besides oral or textual reporting channels (para 2).

A key element of WBD that is safeguarded by the aforementioned procedures, is the confidentiality of the reporting person. Responsible parties have a duty of confidentiality according to Art. 16 para 1 WBD in non-disclosing the reporting person's identity to anyone beyond authorized staff members of the internal reporting channels without consent. This is an essential ex-ante measure to prevent retaliation and an obligatory element of both the prescribed procedures for internal reporting and follow-up with an infringement that may only be lifted under necessity and appropriateness considerations of an EU or national law obligation Art. 16 para 2, 3 WBD.<sup>49</sup>

Besides requiring confidentiality and prescribing protection by design of reporting channels, a further protective character is defined through prohibiting retaliation (Art. 19 WBD), measures of support (Art. 20 WBD), and measures against retaliation (Art. 21 WBD), as well as penalties in case of infringements (Art. 23 WBD). Art. 19 WBD prohibits any form of retaliation, including threats and attempts of retaliation against reporting persons, and lists 15 nonconclusive forms of prohibited forms. Retaliation is defined in Art. 5 (11) WBD as any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person. Recital 87 specifies potential retaliators as employers, customers, and recipients of services including persons working for or acting on behalf of the latter. Explicitly mentioned forms of retaliation also include such retaliations that are under the threshold of formal legal measures, such as coercion, intimidation, harassment, and ostracism (Art. 19 (g) WBD), and forms that are not specific to employees, such as cancellation of a license or permit (Art. 19 (n) WBD).<sup>50</sup> Further, Art. 20 para 1 WBD defines measures addressing member states in supporting reporting persons, including rights to information and advice (a), assistance in their protection against retaliation (b), and legal aid in criminal and cross-border civil proceedings (c).

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<sup>49</sup> Stappers, *op. cit.* 95.

<sup>50</sup> Gerdemann Part 2, *op. cit.* 257.

Art. 21 para 1 WBD obliges member states to implement a set of measures for protecting reporting persons against retaliation, outlined in Art. 21 para 2 – 8 WBD. Protective measures include that persons who meet the conditions for protection shall not be considered to have breached any restriction on information disclosure and shall not incur liability on that account (2), including not incur liability of any other kind as a result of a protected act or omission in any legal proceeding (7) or acquisition of or access to the information (3). Also, reporting persons have the right to remedial measures against retaliation by national law (6), thereto the member states shall take the necessary measures to ensure that remedies and full compensation are provided for damages suffered by protected persons (8). Detriments suffered and brought forward to authorities or courts by reporting persons are presumed to be made in retaliation for the report and are for the person who has taken the detrimental measure to prove the measure to be based on duly justified grounds (5). Rec. 93 WBD further describes the reversal of the burden of proof as the person who took the detrimental measure must demonstrate that the action taken was not linked in any way to the reporting, hence s/he also must prove that the protected act was not even a contributing factor among other potential factors leading to the action being taken.<sup>51</sup> Wherever a reporting is hindered or a hindering is attempted (a), a reporting person and/or other persons defined in Art. 4 WBD are retaliated against (b), vexatious proceedings are brought against such persons (c), or the confidentiality of reporting persons according to Art. 16 WBD are breached, Art. 23 para 1 (a) – (d) WBD obligates member states to provide for effective, proportionate and dissuasive penalties for natural or legal persons. The purpose of the penalties is to deter against infringement of whistleblower rights and hindrance of the whistleblowing process.<sup>52</sup>

## *6.2. PROTECTION OF REPORTING PERSONS IN THE CSDD-D*

Whereas the protection of reporting persons was not defined under the initial EU Commission's proposal of the CSDD-D, the amendment of the EU Parliament proposed provisions addressing the protection of reporting persons. As per Recital 42, the establishment of grievance procedures is to follow specific criteria, derived from Principle 31 of the United Nations Guiding Principles on Business and Human Rights (henceforth: Guiding Principles)<sup>53</sup>. According to the added Art. 9 para 3a CSDD-D grievance procedures must be "(...) legitimate, accessible, predictable, equitable, transparent, rights-compatible, gen-

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<sup>51</sup> Gerdemann Part 2, *op. cit.* 257 – 259.

<sup>52</sup> Stappers, *op. cit.* 98.

<sup>53</sup> United Nations Guiding Principles on Business and Human Rights, (HR/PUB/11/04).

der- and culturally responsive and based on engagement and dialogue.” The criterium of “gender- and culturally responsive” of Art. 9 para 3a CSDD-D is not mentioned by the Guiding Principles, however, can be seen as an extension in line with the Guiding Principle’s expectation for guidance to business enterprises on respecting human rights in Guiding Principle 3, by connecting effective human rights due diligence methods with considerations regarding “(...) issues of gender, vulnerability and/or marginalization (...)”. Guiding Principle 31 (g) includes “a source of continuous learning” as effectiveness criterium for grievance procedures that are not regarded in Art. 9 para 3a CSDD-D but are included by Art. 10 para 1 CSDD-D as companies must “continuously verify the implementation and monitor the adequacy and effectiveness of their actions (...)”.

The grievance procedure as promoted by Art. 9 CSDD-D is on an operational level in line with the Guiding Principles 29 and 31 and has the key functions of identifying “(...) adverse human rights impacts as part of an enterprise’s ongoing human rights due diligence” and addressing grievances as well as remediating adverse impacts early and directly by the company, thereby preventing harms from compounding and grievances from escalating (see Guiding Principle 29); such grievance procedures “(...) need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised (...)”. Putting the CSDD-D’s grievance procedure in perspective of a dialogue-based solution, it cannot be considered “quasi-adjudicative” by design without providing “redress against the will of a perpetrator”<sup>54</sup>, hence generally requiring a lesser level of protection for reporting persons.

However, Art. 9 para 3b CSDD-D prescribes that “companies shall take measures to ensure that persons submitting notifications or grievances are free from retaliation or retribution, including by ensuring that notifications and grievances can be raised either anonymously or confidentially (...)”. The CSDD-D does not seem to fully adjust to the dialogue-based nature of the grievance procedure as companies are at will to establish processes that either allow confidentiality along the grievance procedure or allow anonymous submitting of notifications and grievances. Setting up an all-anonymous grievance procedure would in consequence also allow companies to negate the reporting persons’ rights of Art. 9 para 3c CSDD-D, respectively Art. 9 para 4 CSDD-D by excluding anonymously reported grievances from the applicability of the mentioned provisions.

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<sup>54</sup> Scheltema, M.: Assessing the effectiveness of remedy outcomes of non-judicial grievance mechanisms, *Dovenschmidt Quarterly*, 2 2013, p. 192.

Art. 9 para 3c CSDD-D provides reporting persons under Art. 9 para 2 CSDD-D with the rights to timely and appropriate follow-up from the addressed company, to reasoning as to whether a grievance has been considered founded or unfounded and provided with information on the steps and actions taken (a), to engage with the company's representatives at an appropriate level to discuss potential or actual adverse impacts that are the subject matter of the grievance (b), and to request that companies remediate or contribute to the remediation of actual adverse impacts (c). Where a notification is submitted by a qualified reporting person as per Art. 9 para 2a CSDD-D, the person or organization has the right to receive timely and appropriate follow-up from the addressed company as per Art. 9 para 4 CSDD-D.

The rights promoted by Art. 9 para 3c, 4 CSDD-D have to be claimed by the respective reporting persons as indicated by the wording "are entitled to". This is in contrast to the set-up of channels for internal reporting and follow-up under Art. 9 para 1 WBD as they include a design where reporting persons are to be informed about the acknowledgment of their report within seven days (1) (a), and are provided with feedback within at most three months and seven days (1) (f). The right to engage with a company's representative (Art. 9 para 3c (c) CSDD-D), respectively to request a physical meeting are similar concerning their pull character.

According to Art. 9 para 3b CSDD-D, companies may only share information if it needs to be shared, and doing so does not endanger stakeholders' safety, including not disclosing their identity. Even though the wording of "stakeholders" is not defined by the directive, context allows us to assume that the usage within Art. 9 para 3b CSDD-D aims at "affected stakeholders" as per Art. 3 para 1 (n) CSDD-D, hence includes the reporting persons themselves. The existence of a need to share information together with the vague concept of "stakeholders' safety" may lead to a breach of confidentiality that is not in the reporting persons' interest therefore potentially infringing the protection of reporting persons.

According to Art. 20 para 1 CSDD-D, member states must implement effective, proportionate, and dissuasive sanctioning rules applicable to infringements of national provisions to the directive, hence also includes infringements to the protection principles as laid down in Art. 9 CSDD-D. Additionally, effective dealing with complaints under Art. 9 CSDD-D, can, among other parameters, be regarded in defining the nature and appropriate level of the sanction or the waiver of a sanction following Art. 20 para 2 (i) CSDD-D. Also, the amended Art. 22 para 1 CSDD-D provides for the possibility of civil liability of companies, if they fail to comply with the directive (a) and cause or contribute to an actual adverse impact that should have been identified, prioritized, prevented, mitigated, brought to an end, remediated or its extend minimized through

the appropriate measures laid down in the directive and led to damage (b). A civil liability, therefore, may be possible if the failure to comply with Art. 9 CSDD-D either caused or contributed to an adverse impact and is conceivable for a multitude of possibilities in infringing obligations of Art. 9 CSDD-D, e.g., by neglecting the grievance report hence not identifying a preexisting adverse impact, but also may constitute the adverse impact, e.g., where a retaliation measure by a company against a reporting person is based on the grievance report itself and is in violation of Art. 7 of the International Covenant on Economic, Social, and Cultural Rights as per Annex Part I Section 1 Number 7 CSDD-D. However not legally binding, as per recital 44d CSDD-D member states shall provide safeguards to address manifestly unfounded claims or abusive court decisions which were brought against natural or legal persons to prevent or penalize speaking up on issues of public interest.

The CSDD-D does not provide for the reversal of a burden of proof for assumed detrimental actions against a whistleblower; neither in proceedings regarding sanctions (Art. 20 CSDD-D) nor in civil liability proceedings (Art. 22 CSDD-D). A missing reversal of the burden of proof is assessed to have a decisive impact on the success of anti-retaliation provisions, hence hindering the effectiveness of the protection of reporting persons.<sup>55</sup>

### *6.3. COMPARISON OF PROTECTION STANDARDS*

he CSDD-D provides for protection measures for reporting persons, namely absence from retaliation or retribution, possibilities for confidential or anonymous reporting, timely and appropriate follow-up from the addressed company, possibility to engage with a company's representative, to request remediation of the underlying adverse impact.

Among others, the WBD provides for similar protection measures, namely confidentiality, confirmation of received whistleblowing reports to the reporting person, follow-up communications by competent and impartial functions, and the possibility to seek a physical meeting on request. Differences exist in the degree of formalization and especially in the required participation of the reporting persons: While under the WBD the aforementioned communicative measures must be provided to the reporting persons, the CSDD-D describes the measures that must be claimed by the reporting person.

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<sup>55</sup> Moberly, R.: Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, *William & Mary Law Review*, 49(1) 2007, p. 120 & Devine, T.: The Whistleblower Protection Act Burdens of Proof: Ground rules for Credible Free Speech Rights, *E-Journal of International and Comparative Labour Studies*, 2(3) 2013, p. 19 & Gerdemann Part 2, op. cit. 258.

Besides a more formalized approach by the WBD in securing the protection measures, e.g. by defining timeframes for communication and follow-up, the WBD lays focus on enforcement procedures where protection measures are infringed upon, consisting of dedicated obligations of member states to implement a sanction regime as well as providing for supporting measures for reporting persons. The CSDD-D does not follow such a formalized approach for safeguarding the required protection measures. However, the CSDD-D obligates member states to establish a sanctioning regime that may also include infringements on the grievance procedure, specific provisions for a violation of reporting person's rights and protection measures are not defined. However, the CSDD-D makes use of an incentive system where effective dealing with complaints shall be regarded in the nature and appropriate level of sanctions; an element that is not incorporated in the WBD.

In the WBD, persons who suffered retaliation are to be remedied and fully compensated. The CSDD-D also describes a civil liability which regards infringements of the grievance procedure provisions, however always requires a combination with an effect to an adverse impact which is not necessarily always given. Also, the possibility for a sanctioning can be derived directly from the WBD wherever vexatious proceedings are brought against reporting persons, whereas the CSDD-D mentions such safeguards to address manifestly unfounded claims or abusive court decisions only in the recitals, hence not being legally binding.

In comparing both directives concerning protection in its reporting procedures, it becomes apparent that one main purpose of the WBD is the protection of reporting persons against retaliation while the CSDD-D, especially in its grievance procedures, is focused more on a benevolent and dialogue-based solution with persons affected by the adverse impacts. Besides the mentioned differences, the possible sharing of information by companies of the CSDD-D as long as not clearly defined "stakeholders" are not endangered in consequence led to reporting person rights subside, shows the focus on persons affected by adverse impacts rather than on reporting person rights. Simultaneously, the reversal of the burden of proof that applies under the WBD is not granted for reporting persons under the CSDD-D.

The different levels of protective measures can pose a risk to the purpose and scope of both directives, as "(...) legal uncertainties regarding the existence and level of protection afforded by a legal system may have a direct negative impact on the willingness to blow the whistle."<sup>56</sup> Saloranta, in discussing opportunities from the WBD by operationalizing the Corporate Human Rights Grievance Mechanism concludes that "(...) rightsholders should be identified as whistleblowers if they disclose human rights-related information about a

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<sup>56</sup> Gerdemann Part 2, op. cit. 252.

company's operational impacts, which has public interest."<sup>57</sup> The assessed discrepancies in protection standards do not appear to have fulfilled this recommendation for such persons within the CSDD-D.

## **7. CONCLUSION**

The main purpose of the WBD is to establish a minimum standard for whistleblowing in the EU. While the objective of the article is not to assess the achievement of the WBD's purpose, it can be stated that incongruities leading to an ultimately non-uniform level of protection may stem from the WBD itself. An indication of this is the ambiguous wording of Art. 8 para. 5 WBD potentially postulating a group privilege, which has led to scholarly discussion and a deviation from the Commission's opinion by the German legislator. The uncertainty of a group privilege under WBD must also be criticized regarding homogeneity aspects as the CSDD-D allows for a centralized grievance procedure in corporate groups. In cases where companies are obliged under the WBD and the CSDD-D, incongruities may therefore arise from the perspective of the whistleblower. This might lead corporate groups to consider the two directives individually and implement reporting channels, respectively grievance procedures, close to the protection standard of the directives. In consequence, such a corporate group might operate numerous possible channels with different material scopes, different addressees as reporting persons, and different levels of protection.

It should be noted that grievance procedures and whistleblower systems have partly different purposes and therefore do not necessarily need to be implemented as the same procedure. From the reporting person's point of view, however, the purpose of the channels is not necessarily a key distinguishing criterion when they are looking for a place to turn to with their concerns.

Although the amendment of the CSDD-D by the EU Parliament of June 1, 2023, postulates stronger protection for reporting persons compared to the version of the EU Commission, especially from the reporting person's point of view an alignment of the protection level of the CSDD-D for transmitted grievances to that of the WBD would still be desirable. What initially appears to be a tightening of obligations for companies could also bring synergy effects, for example through better effectiveness of the reporting channels, which could subsequently contain valuable information for the companies them-

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<sup>57</sup> Saloranta, J.: The EU Whistleblowing Directive: an opportunity for (operationalizing) corporate human rights grievance mechanisms?, *European Business Organization Law Review*, 22 2021, p. 776.

selves. In addition, such an alignment would only affect companies that are already obliged by the WBD and may be managed by opening the reporting channels according to the WBD.

These uncertainties favor the risk that potential reporting persons do not report at all. In consequence, an adverse impact might not be remedied and harm to the public interest or significant risks for the welfare of society might not be mitigated timely. The differences in scope and protectional levels may therefore undermine the purposes of both directives.

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