

Summary

Recognizing a whistleblower can be a delicate, time-consuming procedure. Depending on the context, the potential whistleblower might depend on some type of formal recognition. This can take different forms, and might not be awarded for each request. The importance of validating the experience of the whistleblower should be a priority. By designing a spectrum of tools and interventions, tailor-made solutions can be offered, suitable for the needs of the individual. The key is to realise the isolated position of the whistleblower and stay in close contact in all stages of the reporting process.

Call for the member states:

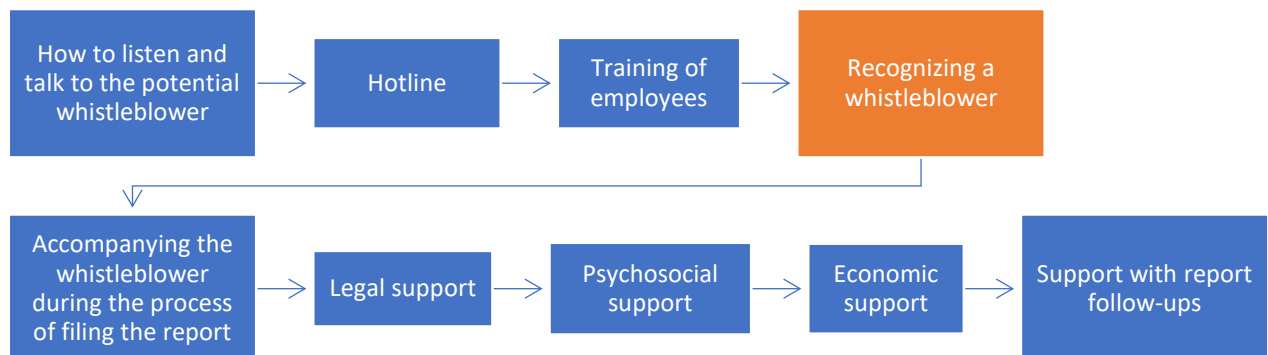
As for many experiences, a successful process of recognizing a whistleblower can comprise a number of different routes. The key is in presence and connection with the whistleblower. It helps when member states are able to differentiate within their recognition process in order to offer flexibility whenever necessary. Authorities should be prepared by acknowledging that formal recognition also comes with specific pitfalls. The whistleblower can face additional pressures and any person not granted formal recognition might also be in need of additional support.

Chapter 4

Types of Support for Whistleblowers before the report (before filing the WHIB report)

RECOGNIZING A WHISTLEBLOWER

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Intentions derived from the Directive

Even though the Directive does not specifically state the obligation to provide certification for a whistleblower, it is possible to add to the measures put in place by the Directive.

For this element the basis can be found in the text of articles 21 and 22. The process of recognition serves as a means to ensure that the intent of the Directive and the local whistleblower protection law is followed and the protection is in place. Article 22 and article 25 together can serve as a rationale behind providing additional services to the (potential) whistleblower.

Article 22

Measures for the protection of persons concerned

1. Member States shall ensure, in accordance with the Charter, that persons concerned fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file.
2. Competent authorities shall ensure, in accordance with national law, that the identity of persons concerned is protected for as long as investigations triggered by the report or the public disclosure are ongoing.
3. The rules set out in Articles 12, 17 and 18 as regards the protection of the identity of reporting persons shall also apply to the protection of the identity of persons concerned.

Article 25

More favourable treatment and non-regression clause

1. Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive, without prejudice to Article 22 and Article 23(2).
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive.

Source: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>

Providing a certification, or statute of protection as in place with some of the authorities, can be viewed as an additional element of whistleblower protection. After carefully assessing the validity of the report and acknowledging the position of a whistleblower, this can be a landmark event for a reporting person.

Introduction

In this chapter, the ways of talking and listening to a potential whistleblower are explored. Important things to keep in mind are discussed according to the experiences of a number of authorities. First, the procedure used by the Dutch Whistleblowers Authority is shared. This procedure is then reviewed and supplemented with the experience and best practices of other authorities.

To be able to determine the ways different authorities deal with recognition of potential whistleblowers we sent out a short survey. The results have been compared with our own way of working to give an overview of possible best practices.

What to expect

The process of recognizing a whistleblower follows a fixed procedure, to ensure the consistency in the treatment of reports and reporting persons. The baseline is making sure the report was made in a work-related context and that the report addresses an issue that is in the public interest.

Since the Directive and local laws have a rather broad understanding when it comes to the work-related context, it is important to get to know the exact context of the organization. When and where did the potential whistleblower observe the possible wrongdoing? And what was their relation to the organization where this issue came to light? This is not always a straightforward exercise. Employees can be seconded to other organisations or there are examples of times potential whistleblowers are in a pre-contractual phase. Being clear on the limitations of the legislation, but also gaining enough information regarding the details of the employment are important elements.

When it comes to the assessment whether an issue constitutes a matter that is in the public interest, the lines are not always as sharp and the context matters even more. The potential whistleblower, usually a professional in their field, can give detailed information regarding the exact nature of the observed breach or violation. It is essential to make an independent assessment, but the expertise of the potential whistleblower should not be forgotten. After these two steps, the verification generally consists of the assessment and evaluation of the report when it comes to credibility and potential impact.

Sometimes it is also possible to confirm the statements of the reporting person, through documentation, reports or other types of evidence. A timeline is constructed and the steps taken by the potential whistleblower are traced to understand how the reporting procedure has been handled up to that point. Another important element is understanding if there is any risk of retaliation.

There is a format in use to aid the assessment. All information is presented in accordance to the content of the report as conveyed by the potential whistleblower. Because of differences in the sense of urgency shared with each request, the time needed to complete the assessment can vary. Depending on the context of the potential whistleblower, this stage can be moved through relatively fast – or over the course of a few months. The format touches the following topics:

- Description of the suspected wrongdoing.
- Establishing the facts brought forward by the potential whistleblower.
- Determining whether the suspicion has reasonable grounds.
- Timeline and details of the reporting process.
- Indications of possible retaliation.
- Next steps required by the potential whistleblower.
- Possible other aspects to consider.

This format is discussed for every case. After this deliberation, the decision is shared with the potential whistleblower. In practice there are two possible outcomes, formalizing the relationship by offering a letter or sharing our considerations why the report does not constitute a wrongdoing in the public interest. Either message needs to be conveyed with care to ensure the person that made the request understands why this consideration was made and what it means for the remainder of the reporting process. The most important part is using this process of recognition to provide clarity regarding the rights of a person.

Exactly this transition is a defining moment for the whistleblower, this gives a larger responsibility for the authority. After recognition, the stage “during the process of filing a report” can also have many different outcomes. This can be influenced or structured by the advice given in the “before”-stage. Making sure there is a solid foundation with clear expectations on the process, can help moving forward. In case there is no letter shared and no formal recognition given, the quality of the preliminary stage, and more importantly – the quality of the bond of trust between the reporting person and the representative of authority – can influence the end of the advisory process. When a potential whistleblower trusts that the authority works according to their best interest, it is also easier to understand that there might be other solutions available. The formal certification speaks of the intention to support a whistleblower, but also opens up the option to be referred to psychosocial support and legal subsidies. So for some potential whistleblowers, a lot can depend on the certification process.

As a final thought, it would be interesting to highlight that, in practice, the two stages of how to listen and talk to a potential whistleblower and the process of recognizing a whistleblower, can have some overlap. Especially since the advisory process can sometimes span a longer period of time, in rare cases even a number of years.

Reflection

The benefits to recognizing a whistleblower may include the possibility of formally placing the emphasis on the status as a reporting person protected under whistleblower protection law. For instance in the form of a certificate. This certificate can be offered to an employer or can be brought into any legal proceedings. This does not always guarantee adequate protection, but it certainly gives a reporting person the support they might need. It is also seen that, after certification, the employer develops an increased awareness regarding the legal obligations when it comes to whistleblower protection.

In the next paragraphs the framework offered will be supplemented by the feedback offered by some other authorities on this topic.

The survey was completed by:

- The National Integrity Agency (ANI) – Romania
- Valencian Anti-Fraud Agency (AVAF) – Spain
- Defender of Rights (DDD) – France
- Andalucian Anti-Fraud Bureau (OAAF) – Spain
- State Chancellery – Latvia
- Whistleblower Protection Office (WPO) – Slovakia
- Commission for the Prevention of Corruption – Slovenia

Practical experiences

Verifying the report

Regarding verifying a report in practice, the ways of doing this can differ. Some authorities can do this through inquiries directed at the other party, some authorities make use of open sources. Another way to potentially stress the truthfulness of a report can be by reviewing documents or other files that underline the issues raised in the report made by a potential whistleblower. An important part is the verification of the identity of the reporting person. It is furthermore important to confirm the content of the initial report that was made and to verify to whom this report was made.

The timeline can vary, due to the specialization of the authority, but also due to the process in place and the number of available staff members. A number of authorities try to keep the timelines very short – sometimes as short as 10 working days. This can be very advantageous to the whistleblower, seeing the fact that retaliation can also be swift and the need for protection is more often urgent than not.

Form of recognition

At last, it is important to note that there are a number of different types of formal recognition in existence. There are different ways of approaching this issue. A fundamental thought is that the Directive is assumed to be in place regardless of the status of the assessment – so even before this has taken place – a potential whistleblower should see themselves protected under whistleblower law.

When viewing recognition of a whistleblower as a spectrum, it helps to see situations where a reporting person may meet the criteria for whistleblowing protection, but might do so without being (made) aware of this fact. This stresses the importance of clear and concise communication regarding the details of the whistleblower protection status. Some authorities can act at a relatively short notice. When a report is submitted to the authority regarding pending retaliation such as termination of an employment contract, the authority can be requested to directly address the employer or impose sanctions. This is a very direct method of enforcing the aims of the Directive.

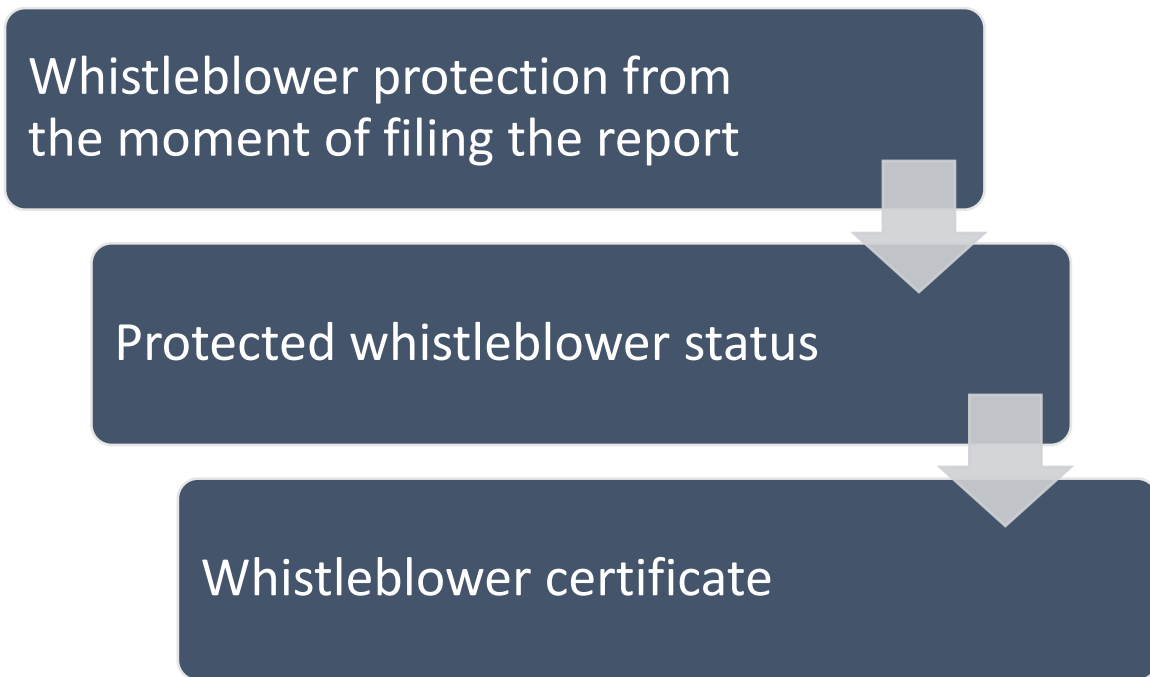


Figure 1 - Potential interpretations of whistleblower protection

The variation in methods of certification, from pre-certification to a protected status up to a formally recognized certificate does not change the fact that the baseline presented in the Directive allows for safely reporting suspicions of a wrongdoing. There are also some different practices when a person is not granted a formal certificate. So, in practice the actual method of enforcement of the whistleblower protection varies. In some cases the whistleblower protection authority can intervene in the early stages of reporting. In other cases matters of retaliation have to be brought up in legal proceedings which can take several years. There are authorities where cases that are not awarded a document regarding whistleblower protection can be appealed through the court system, but this is not the norm. It is important to be informed about the practical meaning of formal certification and the different possible outcomes available when it comes to certification.

Best practices

The common aspect for recognition of a whistleblower is found in the assessment of the report. There are multiple ways to verify a report – but when the framework has been decided upon, it is possible to make decisions rapidly. Sharing information regarding the process of recognition, as well as the motivation for using a certain method can help a potential whistleblower when making a request. What does someone actually need to be able to qualify?

Can you briefly describe your process of recognizing a whistleblower?



Figure 2 - Wordcloud: The process of recognizing a whistleblower

It is important to note that formalizing the recognition is an option, but it does not have to be the only answer. The most important part is that a whistleblower is protected by law when making a report – regardless of the status of their request for recognition. In some cases, a decision *not* to give a formal document of recognition can be appealed in court. A formal document is a part of recognition, but the most important issue is how to get there. By looking at recognition as a spectrum, it is possible to differentiate while also sending a message regarding the intent of the Directive and local laws.

Significant experiences

The experiences and practices vary widely, but it is possible to mark some points in the process that can be experienced as fundamental or an important part to consider when it comes to recognition:

- Recognizing a whistleblower can be worth a lot in terms of validating one's experience.
- Verifying a report (credibility) is crucial, it helps to share the methods used to do so.
- The option to appeal a decision not to “award” a formal whistleblower document is something to consider and evaluate.
- A speedy resolution of a request for recognition can assist both the authority and the potential whistleblower.
- Offering some form of contact with the employer where the possible wrongdoing was observed supports the whistleblower by stressing the importance of their rights.
- Whenever possible, it is effective to reach out to an employer after reprisals.
- Prepare for the event that retaliation can take place even after recognition.

In the end, regardless of the steps taken to give professional counsel to a potential whistleblower, enforcing the legal protection is not always straightforward. The process can appear to be one step forward, two steps back. Some authorities have greater capabilities than others, but even with more available tools for intervention, the whistleblower is still one person - quite vulnerable. The main point is the commitment to respond adequately to any challenges faced by the individual.