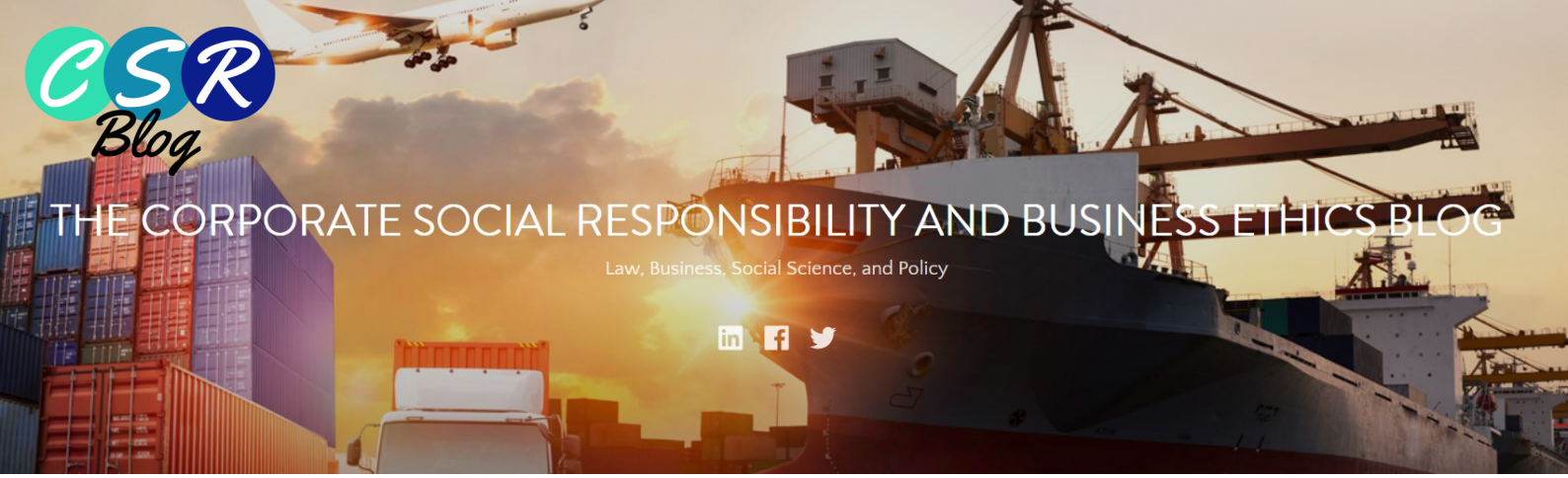

Gagging Clauses and Whistleblowing in the UK: An Irreconcilable Conflict?

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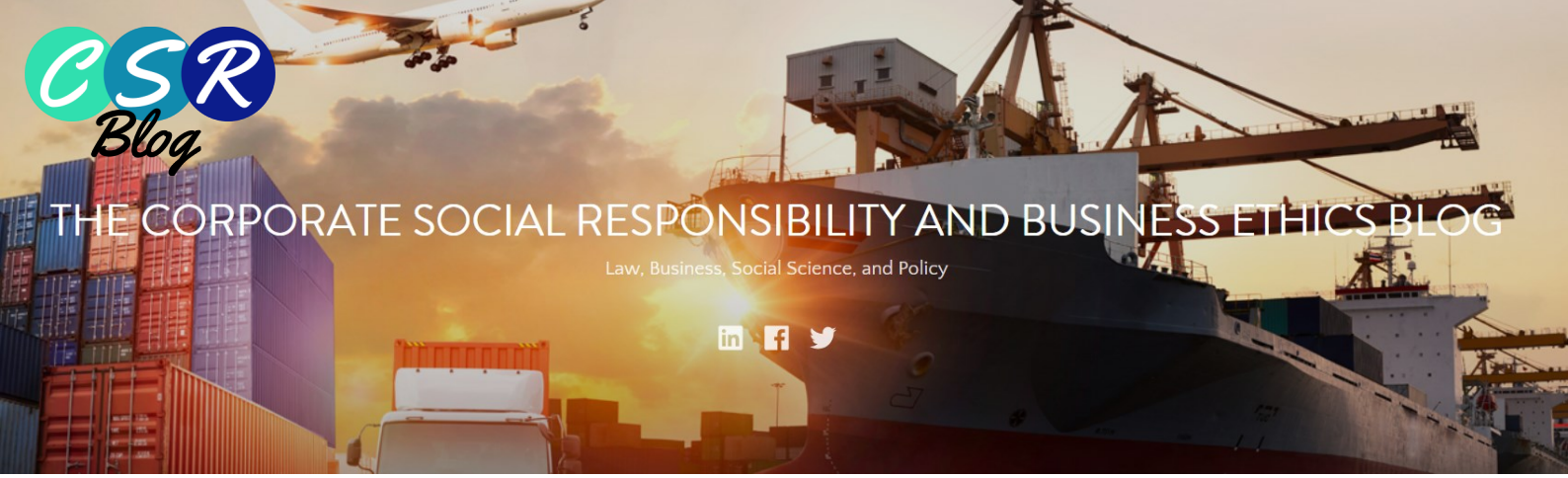
Non-disclosure agreements (NDAs) or, as they are often called, gagging clauses, are provisions set out in settlement agreements or employment contracts, which serve the purpose to prohibit employees from disclosing particular information to the general public. This article addresses the problematic aspects of NDAs with a special focus on the UK jurisdiction. Specifically, the paper investigates the general concern that gagging clauses may be used to stop the employees from "blowing the whistle." In order to do that, the article offers an overview of the relevant legal framework currently applicable in the UK, explores the outcomes of the recent consultation published by the Department for Business, Energy & Industrial Strategy, and tries to assess the potential impact of the EU Whistleblower Protection Directive.



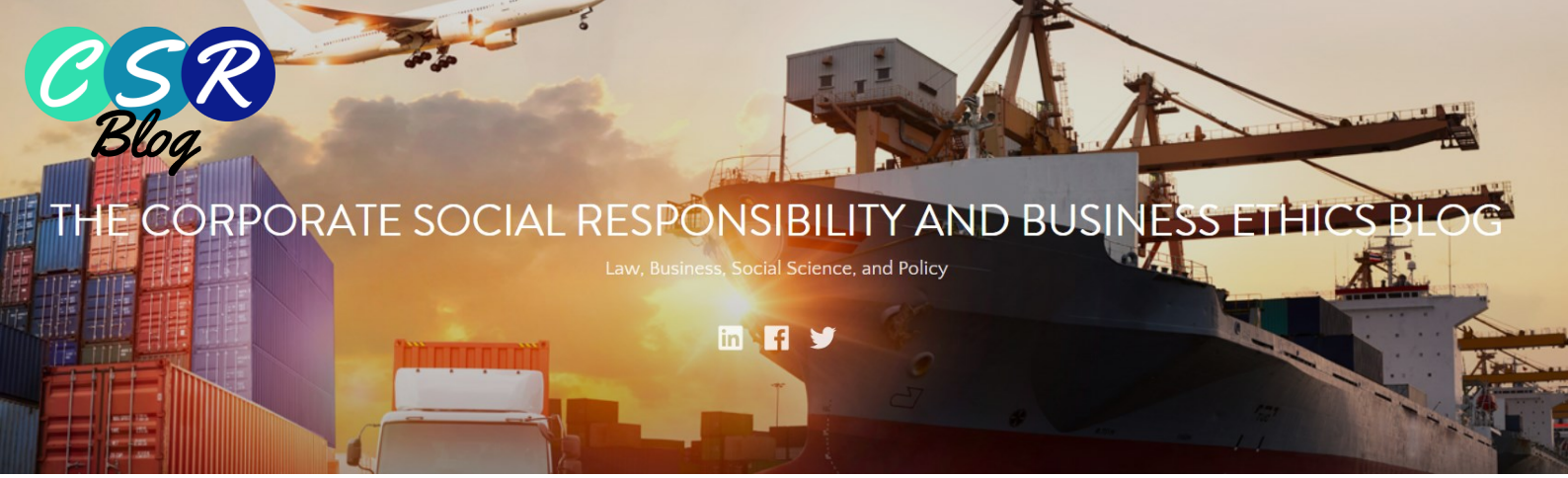
Introduction

Confidentiality clauses, non-disclosure agreements (NDAs) or, as they are often called, gagging clauses, are provisions set out in settlement agreements or employment contracts, which serve the purpose to prohibit employees from disclosing particular information to the general public. This article will limit its scope to addressing only the confidentiality clauses inside the employment contracts. In the context of employment contracts, such confidential information usually refers to trade secrets, manufacturing processes, customer lists, pricing data, supplier information and other sensitive information. During the course of the employment, an employee is bound to the confidentiality clause present in his employment contract and has an obligation to not disclose any confidential information he came across during the employment to any third parties. Some employees still have a duty of confidentiality towards the employer even after the termination of the employment, being obliged to protect the trade secrets of the employer.

The problematic aspects of NDAs

In the UK, there is a general concern that the gagging clauses are used in the employment context to stop the employees from enjoying their right to "whistleblow" in cases of harassment or discrimination in the workplace. This type of gagging clauses benefits the employers and discourages employees from disclosing any misconduct to the police, in fear that they will become liable for breaching the duty of confidentiality.

These concerns have at their foundation the #MeToo movement, which began in 2017, when the disclosures of British producer Zelda Perkins drew the public's attention towards certain abusive behaviors in several industries. Perkins revealed details about a gagging order she signed with her former employer Harvey Weinstein, which prohibited her from disclosing sexual harassment to the police and to the public.

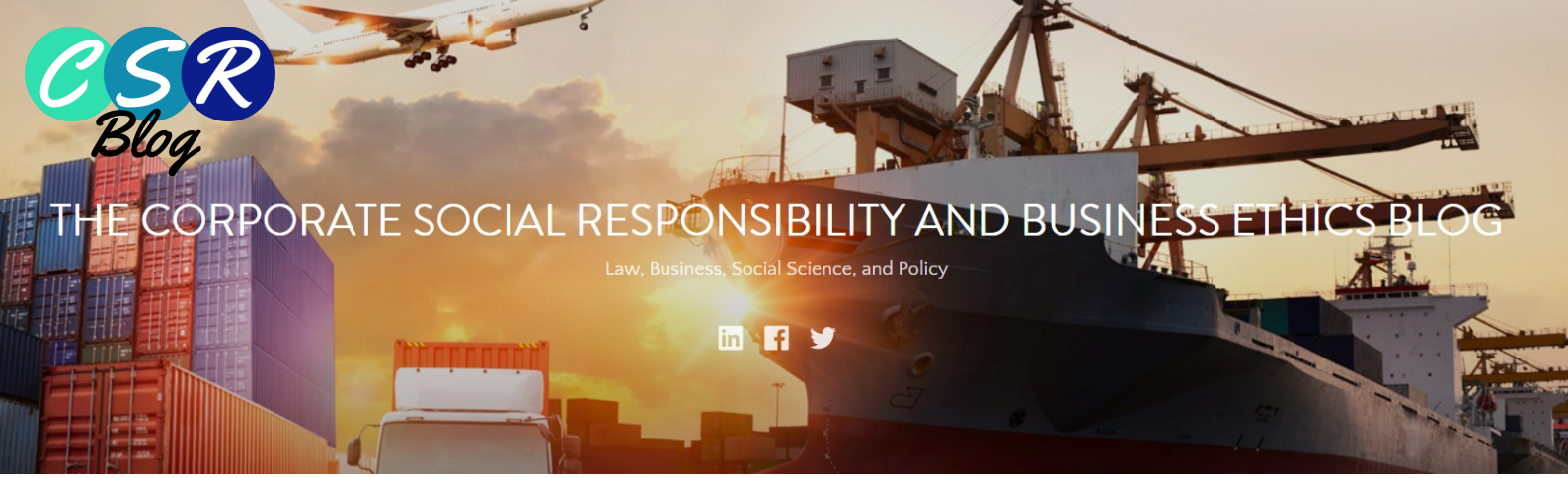


The text of the NDA Perkins signed with Weinstein states that not only "information about the Company, its business plans or methods of operations including, but not limited to, trade secrets, customer lists, pricing policies and other information which would be commercially valuable to a third party which is not in the public domain" is referred to as Confidential Information, but also "private and/or non-public information about the Released Parties, including, without limitation, Harvey Weinstein and Bob Weinstein and their immediate family members, close personal friends and/or close business associates"[1]. As well, the NDA prohibited Perkins from disclosing this information to any third party "without prior written consent of Harvey Weinsein or Bob Weinstein".[2]

The Women and Equalities Select Committee developed an inquiry on sexual harassment in the workplace in 2018, following the #MeToo saga, urging the UK Government to take action by imposing that all confidentiality clauses in the employment context clearly explain the limits to the confidentiality, by prohibiting the misuse of confidentiality clauses and by expanding the whistleblowing protections, in order to encourage the victims of workplace harassment to disclose such behavior to the police.[3]

The currently applicable legal framework in the UK

The current limitations of confidentiality clauses are provided for by the Employment Rights Act 1996 (ERA), as amended by the Public Interest Disclosure Act 1998 (PIDA). Under Article 43B of PIDA, a qualifying disclosure, or a whistleblowing, is a disclosure protected by law only if it refers to a criminal offence, failure to comply with legal obligations, miscarriage of justice, endangerment of health and safety, damage to the environment, or the concealment of any such information. In order to be protected under the PIDA when whistleblowing, an employee has to have a reasonable belief that the information to be disclosed (not necessarily a criminal wrongdoing, but also could be environmental damage or non-criminal endangerment of health and safety and also miscarriages of justice) refers to past, present or future misconduct on behalf of the employer, and to have reasonable belief that he is acting in the public interest. [4]

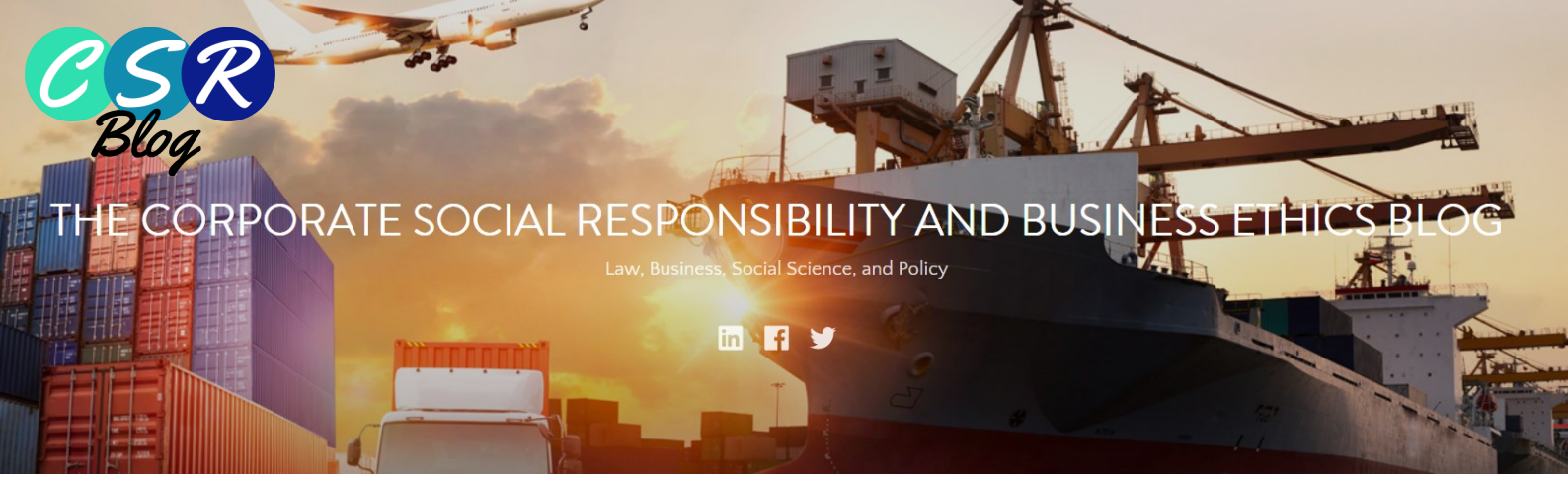


According to Article 43J of PIDA, any confidentiality clause or such, which seeks to breach an employee's right to blow the whistle, is considered void under common law. This theoretically limits the use of the confidentiality clauses in the UK, allowing the employees or past employees to disclose information to any third party in an act of whistleblowing.

However, the concerns on the workers' inability to blow the whistle due to gagging clauses still exist. First of all, the current applicable legal framework concerning whistleblowing has certain limitations, which may bring uncertainty to employees. The legislation does not punish or penalize an employer for imposing a restrictive NDA on an employee. The employers are liable if they punish an employee for making a qualified disclosure, but there is no consequence for them getting the employees to sign such excessive NDAs. As well, the legislation only seeks to protect "workers", as the wording specifies, thus individuals who do not classify as "workers", but who may suffer or witness misconducts, may not be protected. Secondly, and most important, the wording and scope of the whistleblowing regime can be complex and individuals may not even fully grasp the extent of their protections under the law, thinking that any disclosure on their part will result in a lawsuit brought against them by the employer.

The recent criticism against UK universities and their use of gagging orders is emblematic of such an issue. Since the Committee's inquiry was publicized, the scandal in the context of UK universities emerged, when employees of several universities reported being obliged by non-disclosure agreements to not disclose any misconduct.[5] BBC received reports of bullying, as in the case of Anahid Kassabian and sexual harassment, as in the case of Emma Chapman. Between 2017 and 2019, the UK universities had to pay out nearly £90 million to employees with gagging clauses.

These pressing matters have raised the need for the UK Government to act.



DBEI Consultation

On 4 March 2019, the Department for Business, Energy & Industrial Strategy (DBEI) published a Consultation on measures to prevent misuse in situations of workplace harassment or discrimination. The consultation was left open for feedback until 29 April 2019. It was created as a response to the Women and Equalities Select Committee's report and to the general emergence of so many cases of gagging clauses throughout the UK. The consultation had two core purposes. First, its role was to understand the existing legal framework surrounding the confidentiality clauses and second, to address the necessary changes in the legal framework in order to protect individuals from the misuse of confidentiality clauses.

Through this consultation, the Government agrees that it is impending to adopt better laws regarding the confidentiality clauses in the employment context. Specifically, the Government wishes to assess three subject-matters in the consultation: (1) whether there should be more limitations of the use of confidentiality clauses in the employment contracts, for employees to understand the situations where they are allowed to disclose information regarded as confidential, (2) making the confidentiality clauses clear for the employees when they sign an employment contract and (3) the enforcement of new regulations on this issue.

Therefore, the Government agrees that confidentiality clauses should not seek to protect information regarding harassment and discrimination and should instead clarify all the limitations to the duty of confidentiality, permitting whistleblowing when it is necessary. The Government notices that the current laws regarding the protection of whistleblowing present in the Public Interest Disclosure Act 1998 would be sufficient, but that it is necessary to clarify that any disclosure to the police is protected, regardless of whether it meets the legislative whistleblowing tests.

The clarity of the confidentiality clauses in the employment contracts is also approached from the perspective of their wording. In some cases, the gagging clauses are drafted with the purpose to discourage employees from whistleblowing. In such cases, the main risk of these unethical NDAs is making the employees compelled not to disclose wrongdoings to the law enforcement, not to assist in investigations against such wrongdoings and to hinder public awareness.[6]

The Government disagrees with the Committee in recommending a standard confidentiality clause applicable to all employment contracts but admits that it is necessary for all employees to understand their rights from the wording of the clauses.

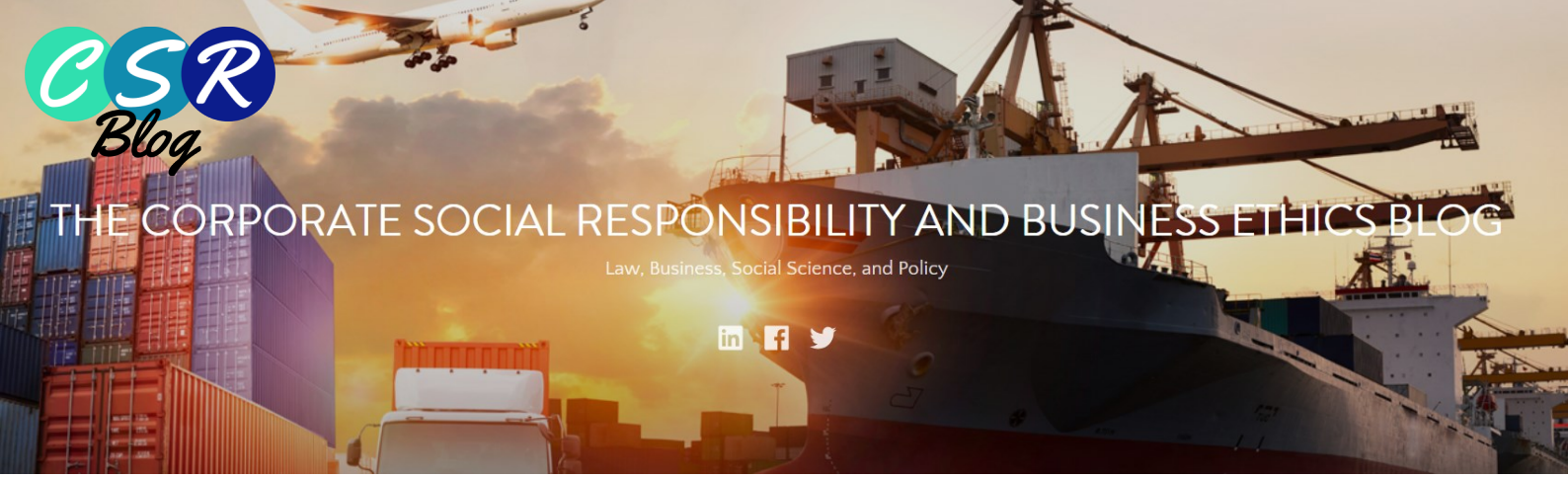
Concerning the enforcement of the confidentiality clauses within the employment contracts, the Government suggests that a written statement of particulars including the limits of any confidentiality clause must be provided to all employees, and that this requirement already had an enforcement mechanism in the employment tribunals.

By its closing date, the consultation received 582 responses from all types of organizations, most of which supported the legal reforms to enhance protection.

Response to the Government consultation

After gathering the responses to the consultation, the Department for Business, Energy & Industrial Strategy published the Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination, in July 2019. In order to tackle the current issue surrounding gagging clauses, the Government made six proposals in its response of legislative measures.

The first proposal refers to changing the legislation "so that no provision in an employment contract or settlement agreement can prevent someone from making any kind of disclosure to the police".[7]



This is very relevant to the issue at hand, because prohibiting NDAs within employment contracts from preventing employees from disclosing any misconduct of the employer to the law enforcement officials will serve as a guarantee to employees that whistleblowing is not discouraged and that the NDAs they sign will not be a means of silencing them. Gagging clauses limit the reporting rights of employees, because they feel like they are not able to report to the authorities the misconducts in the workplace. The Government agrees that victims of employment misconduct such as harassment and discrimination, but not only, should not feel that they are bound by confidentiality duties to not disclose any information to regulated professionals.[8] Therefore, in this Response to the Consultation, the Government commits to legislate to ensure that no confidentiality clause or non-disclosure agreement will prevent anyone from disclosing any information to the police, regulated health and care or legal professionals.[9] However, the Government will limit the disclosure permissions to regulated legal and health and care professionals.

The rest of the proposals address legislation concerning the clarity of the limitations of confidentiality clauses to the signatory parties but also taking action to ensure that the wording of confidentiality clauses is clear and specific about the rights and obligations of employees. As well, the government ensures legislative changes to provide employees with an independent legal advice when signing a confidentiality clause, in order to ensure that the settlement agreement is valid. The Government also proposed an enforcement mechanism to ensure that all confidentiality clauses meet the new drafting requirements, allowing employees who bring claimants as such before an employment tribunal to receive additional compensation, if their claim is successful. The last proposal addresses the possibility to require organizations to monitor and report the use of confidentiality clauses, by requiring employers to annually monitor and report both the discrimination and harassment complaints and the settlement agreements containing confidentiality clauses.

The New Approach at the European Union Level

The EU member states have shown certain signs to tackle this situation, but until now, only 10 EU member states have designed comprehensive legal protection for whistleblowers.[10] The rest of the EU member states have only done it partially, such as covering only certain categories of employees. However, these laws do not meet the European standards for whistleblower protection.[11]

For this matter, 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 (Whistleblower Directive) was adopted at EU level, and its aim is to set EU-wide standards for the whistleblowers' protection.

The subject matter of whistleblowing through work-related activities is addressed in recital (36) of the Whistleblower Directive. It underlines the need for comprehensive legal protection for employees who become whistleblowers against work-related retaliation. Since employees are in a position of economic vulnerability in regards to their employer, their fear of suffering retaliation for breaching the duty of confidentiality by disclosing information prohibited by the NDAs they signed with their employer is put at peace by the existence of this Directive.

As well, recital (91) strengthens the urge to make punishments for reporting or denial of whistleblower protection impossible for employees who report any kind of liability to third parties.

There are two conditions for qualification of protection under Directive (EU) 2019/1937, under Article 6:

1. Reporting persons should have reasonable grounds to believe that the information they report is true at the time of reporting and falls under the scope of the Directive; and

2. Reporting persons did so either internally or externally or made a public disclosure.

The Directive ensures to provide in Article 23 for penalties applicable to employers who either hinder reporting, retaliate or bring vexatious proceedings against reporting persons and breach the duty of confidentiality by disclosing their identity. The same penalties apply to reporting persons who disclosed false information. Article 24 sets an obligation upon Member States to ensure that there is no waiver or limitation of rights and remedies provided for under the Directive.

However, the implementation of the principles enshrined in this directive in the UK law has suffered after Brexit. The European Communities Act 1972 (ECA), which served as an instrument for EU law to be incorporated into UK law, was repealed by the European Union (Withdrowal) Act 2018 (EUWA) on 31 January 2020 and it ceased to have effect on 1 January 2021.

In order to avoid the end of any domestic legal effect of EU law on the UK law, the EUWA provides for the existence of "retained EU law". Any EU law becomes "retained EU law" if it has effect in the UK on 31 December 2020 and it will keep its legal effect after Brexit. [12] There are three types of such EU law: (1) EU-derived domestic legislation, (2) direct EU legislation and (3) otherwise retained EU law. Directive (EU) 2019/1973 falls under otherwise retained EU law, as Section 4 of EUWA refers to "any rights, powers, liabilities, obligations, restrictions, remedies and procedures". However, any EU law which has been passed but which did not come into force before 31 December 2020 will not be considered retained EU law, and Directive (EU) 2019/1973 is included in this category. Therefore, the UK has no obligation to implement the Whistleblowing Directive, unless in the future it will be so agreed between the EU and the UK.[13]

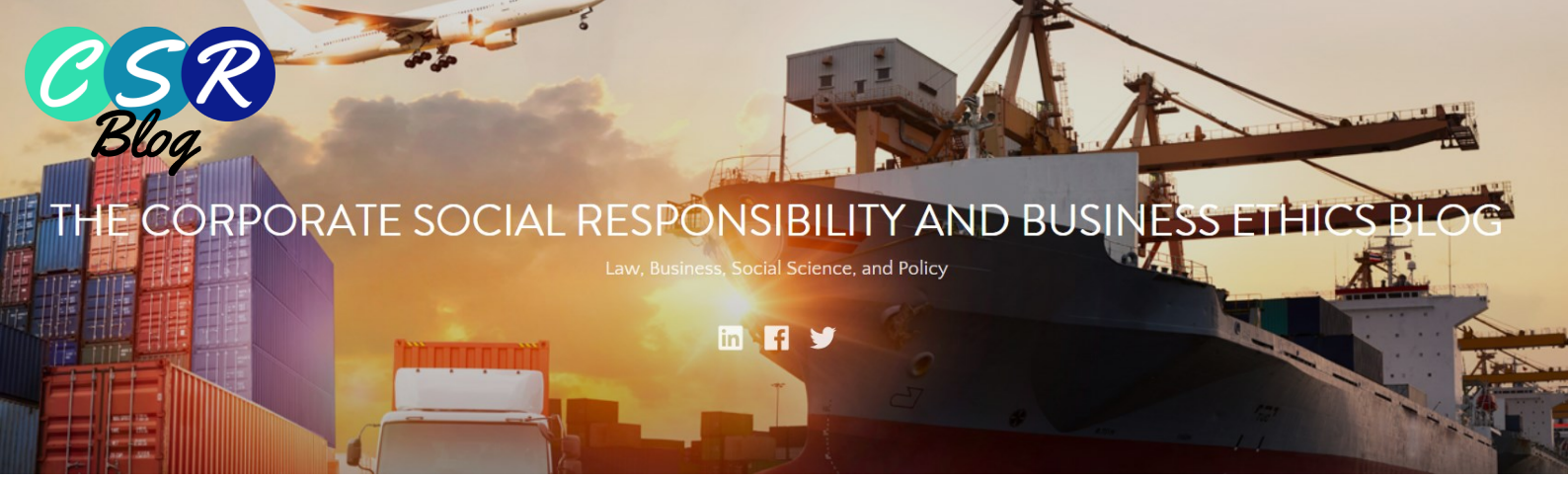
Final remarks

Even after the results of the consultation and the data indicating a major concern on the oppression of whistleblowing by the confidentiality clauses that employees are obliged to sign, there are still opposing views on this matter. John Hull uses a 2018 survey on Sexual Harassment and Employment Law conducted by the Employment Lawyers Association to claim that the majority of disputes arising out of employment relationships do not refer to harassment and discrimination allegations, but rather to unfair dismissal and performance at work, suggesting that the proposals given by the Response to the Consultation Paper are not proportionate and may restrict the parties to the employment relationship to enjoy agreements free from the risk of disclosing confidential information.[14]

On the other hand, some encourage the Government to act now and claim that the Government's proposals may not do enough to encourage victims of employment misconduct to speak out and disclose necessary information to the police.[15]

The confidentiality clauses clearly serve a significant purpose to ensure that employees only use confidential information to the extent necessary to perform their contractual duties.

However, employees that suffer abusive treatment in their workplace need to have a clear pathway, to be able to disclose such misconduct to the relevant professionals and be ensured that such treatment cannot remain silenced or unpunished. The situation must change, especially since Brexit became an obstacle in aligning UK's legal framework revolving whistleblowing to the EU standard of whistleblower protection. The Government is urged to take immediate action to ensure that whistleblowing will not be prohibited or prevented by gagging clauses, and that employers will respect the reporting rights of their employees.



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Endnotes

[1] Written evidence from Zelda Perkins, <https://www.parliament.uk/globalassets/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf> accessed 17 July 2021

[2] ibid

[3] Women and Equalities Committee, *Sexual harassment in the workplace* (HC 2017-19, 725)

[4] Marcus Rowland, 'New proposals to prevent the misuse of "gagging clauses" in the workplace' (2019) 30(5) Ent. L.R. 158-160, 159

[5] John Hull, 'Do gagging clauses need to be gagged?" (2019) 41(8) E.I.P.R., 525-528, 526

[6] Women and Equalities Committee, *Sexual harassment in the workplace* (HC 2017-19, 725) 38

[7], [8], [9] Department for Business, Energy & Industrial Strategy, *Confidentiality Clauses. Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination* (July 2019) 8

[10] France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and UK

[11] Mark Worth, Dr Suelette Dreyfus and Garreth Hanley, 'Gaps in the System: Whistleblower Laws in the EU'(2018) Blueprint for Free Speech 4-5 < https://fibgar.org/upload/publicaciones/34/es/gaps-in-the-system–whistleblower-laws-in-the-eu–huecos-en-el-sistema–leyes-de-proteccion-de-alertadores-en-a-ue-.pdf> accessed 12 July 2021

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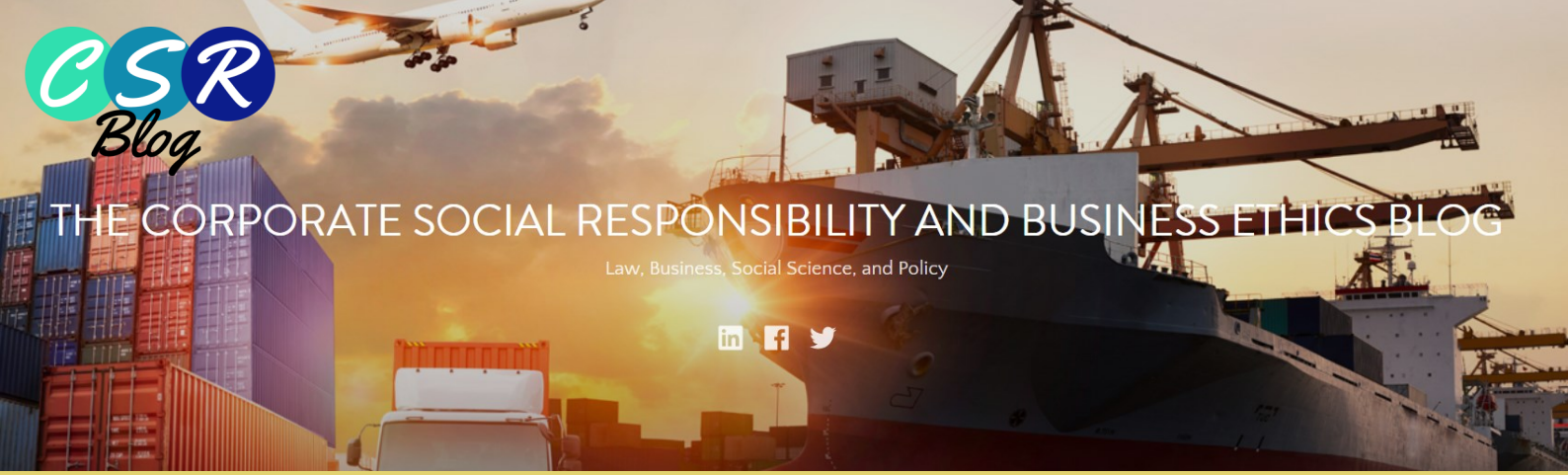

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