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Breaking Down Germany's New Whistleblower Protection Act

By **Mark Zimmer and Katharina Humphrey** (June 14, 2023, 5:49 PM BST)


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On May 12, Germany passed a law protecting those who report violations in the workplace: the Whistleblower Protection Act. As an essential part of the act, companies with 50 or more employees in Germany must establish internal reporting channels for this purpose.[1]

In order to give an insight into its main facets, this article summarizes the purpose of the act, describes the main obligations for companies as well as the protective provisions, and gives practical hints regarding the implementation in companies.

Background and Scope

The new law implements European Union's Whistleblower Directive 2019/1937, which was due to be transformed into national law by Dec. 17, 2021.

Like most other EU member states, Germany was late in the game.[2] Only five European Union member states, Denmark, Sweden, Malta, Lithuania and Portugal implemented the directive on time. One and a half years after the implementation deadline, 24 EU member states have adopted a law transforming the directive while three countries, Poland, Slovakia and Estonia still have not implemented the directive.

With regard to the scope, Germany, like most European member states, goes far beyond the directive in that almost every type of violation can be subject to protected whistleblowing, notably: (1) any conduct punishable under the penal code — the Strafgesetzbuch, or StGB, — and (2) administrative offenses protecting employees.

The scope even includes actions that are not illegal, but deemed to be an abuse because they are directed against the purpose of legal provisions.

However, there is also a restriction: The alleged violations must have occurred at the whistleblower's own employer or an organization connected with the employee's professional dealings.

Main Obligations

Under the act, there are three different channels for reporting a violation: (1) internal reporting within an organization, (2) external reporting to a special government agency, and (3) public disclosure.

The last option is permissible only if external reporting has not proven successful, or in several other cases — for example, if there is an urgent threat to public interest.

Unfortunately, as mandated by the directive, the act does not stipulate a clear priority of internal over external reporting. However, the act explicitly encourages employees to make use of the internal reporting channel first, and companies are supposed to promote internal over external reporting.

Companies with 50 or more employees in Germany have to offer internal reporting lines for whistleblowers and set up properly, yet not necessarily full-time, staffed functions to deal with such reports. In light of heightened liability risks for the people tasked with this function, such internal staffing will likely not be the prime option for most companies, at least not for each entity.

A company can outsource such tasks to an external service provider. Alternatively — as will often be the case — it can defer to its centralized group reporting scheme as long as the local entity remains responsible for remediation measures.[3]

The latter option is not specifically contained in the text of the German law, but expressly named in its recitals. This is the result of a long and heated debate between trade organizations and the European Commission, which insisted on its — rather business-adverse — interpretation of the directive in stipulating that group companies have to operate their own local reporting systems.

The commission argued that the key factor for a reporting system to be efficient is the proximity to the reporter and thus concluded that even companies belonging to a corporation operating a reporting system on group-level have to implement their own local system. The commission failed to see that reporting systems on group-level generally typically will be able to operate much more efficiently than local reporting systems because of the greater budget as well as personnel resources available on group-level.

The proximity to the reporter will have no effect on the effectiveness of the reporting system in most cases as large corporations typically operate their global reporting system in multiple languages as well as multiple different reporting channels, hotline, ombudsman, etc., accessible from all group companies.

Germany has now adopted the trade organizations' sound argument: If a company is allowed to outsource the hotline to an external provider, it can also — and even more so — delegate its operations to a groupwide system.

Other EU member states have chosen a different path in implementing the directive by not allowing group companies to delegate its operations to the groupwide system, resulting in a patchwork of rules across the EU.

There is a transition rule for companies that have between 50 and 249 employees: Their obligation to set up internal reporting lines is deferred until Dec. 17.

Neither internal nor external reporting lines have to provide for anonymous reports, but they ought to handle them nevertheless. In practice, most existing hotlines already allow anonymous reporting, acknowledging the empirical fact that many — if not most — reports occur anonymously, and likely the more important ones.

Protection of Reporting Persons

The internal or external reporting function must not disclose the identity of good-faith whistleblowers, not even to the company's management, unless the whistleblower consents or a public authority asks for it. The person who is the subject of the report enjoys similar, yet weaker disclosure protection.

Whistleblowers acting in good faith must not be retaliated against in any way because of their report. Such retaliation could take the form of dismissal, pay cut, relocation or other similar actions by the employer.

If whistleblowers have experienced retaliation, they can claim damages from whoever is responsible for the retaliation, typically the employer. However, this claim does not grant punitive or other immaterial damages.

In order to help the whistleblower procedurally, the act presumes that any disadvantage experienced after the report is retaliation. This presumption can be rebutted, mainly in one of two ways: Either there is a sound reason for the measure, or the employer did not know about the report at the time of the measure.

The latter option may sound strange at first, but it is not unrealistic, given the strict need-to-know principle about protecting confidentiality.

In any case, employers should carefully document their personnel measures against whistleblowers in order to be able to prove that the measure is based on reasons other than the whistleblowing.[4] Arguably, the reversed burden of proof does not apply to the damages claimed by a reporter claiming retaliation.

Further, good-faith whistleblowers shall not be legally liable for retrieving the information they report, unless accessing or using the information was a criminal act in itself. This comes as a shift to German employment law, as illicit access to confidential company information had previously been regarded as a violation of duties, which could have been sanctioned by disciplinary action. Such sanction is no longer possible if the information reflects a violation under the scope of the act.

Finally, even trade secrets may be disclosed, if such disclosure is necessary to launch the report. This should motivate organizations to protect their various intellectual property rights, which for most companies represent their crown jewels, even more than before.

Works Council Rights

German works councils have extensive rights in general. These employee representation bodies, which are not to be confused with unions, are to be informed about any major developments with particular impact on the employees.

Further, they have ample consent rights when hiring or relocating employees, they must be notified before each dismissal in great detail, and they have broad co-determination rights on a number of personnel issues. Lastly, if the company wants to implement certain restructuring measures, the works council has very extensive negotiation rights, which can delay the process for months.

The act, however, does not mention works councils at all, not even in its recitals. Thus, their rights could

be derived only from the Works Constitution Act.

With respect to implementing the reporting lines required by the act, the works council certainly has the right to be notified about the details of the technicalities. It also likely has a say in how personnel are trained to take over the job of an internal reporting cell and about the selection of personnel hired or relocated for that purpose.

Stronger rights, however, such as co-determination with regard to the implementation of reporting lines, are not evident, because the mere implementation of reporting lines as stipulated by the act does not require to set binding rules on workplace conduct. Also, the reporting line as such does not supervise employees' conduct or performance.[5]

Fines

Violations of the obligations contained in the act carry a fine of up to €50,000 ($54,000). Although the directive does not require such sanctions, Germany, following a Teutonic law-and-order style, insisted on these strict deterrence rules despite the parliamentary opposition's well-founded concerns.

After all, the fines predominantly affect individuals, not companies, and this should limit the willingness of employees staffing an internal reporting cell even more. Rather, it might prompt companies to favor external rather than internal reporting lines.

Companies' Responses and Next Steps

The act will come into force on July 2.[6] Any company with 50 or more employees in Germany now has to check whether it has adequate reporting lines in place and properly staffed functions to handle whistleblower reports in order to comply with the new requirements.

Companies with 50 to 249 employees are granted more time and do not have to install the reporting lines until Dec. 17. There is no obligation to file the reporting system with any public authority.

Next to the new statutory obligation to offer reporting lines, the main difference to the previous legal status is that employees now have a free choice between internal and external reporting. Up until now, German courts demanded that an employee, to avoid the risk of disciplinary action, would first have to raise a potential violation internally before launching an external complaint.

On the very last mile, the parliament has added a sentence, according to which employees ought to prefer internal over external reporting, if possible. Luckily, this preference is also reflected by empirical data, as studies have shown that the majority of reports are indeed launched internally. Obviously, most employees have an inherent sense of what is better for their company.

Most hotly debated until the end was the question of whether the hotline must also offer anonymous reporting. The proponents argued that the most important reports are usually done anonymously, the opponents feared the risk of abuse. The final compromise was that the employer should consider anonymous reports, but does not have to facilitate them.

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[1] The text of the act can be accessed here: https://www.recht.bund.de/bgbl/1/2023/140/VO.html.

[2] See https://www.whistleblowingmonitor.eu/ for an overview of the implementation status across EU members states.

[3] See https://www.gibsondunn.com/wp-content/uploads/2022/02/Zimmer-Humphrey-Petzen-Ja-bitte-Meldesysteme-nach-der-Whistleblower-Richtlinie-der-EU-Betriebs-Berater-02-2022.pdf.

[4] See https://www.gibsondunn.com/hilfe-fur-hinweisgeber-beweislastumkehr-nach-%c2%a7-36-ii-hinschg-rege/.

[5] For details, cf. https://www.gibsondunn.com/die-rolle-des-betriebsrats-beim-hinweisgeberschutzgesetz/.

[6] https://www.recht.bund.de/bgbl/1/2023/140/VO.html.