



LEGAL UPDATE

New Whistleblower Protection Bill in Germany

On 27 July 2022, Germany's Federal Cabinet approved a bill on whistleblower protection (German Whistleblower Protection Act), that aims to transpose the EU Whistleblower Protection Directive (EU) 2019/1937 into national law. As the previous government had been unable to agree on a bill by the deadline (17 December 2021), the European Commission initiated an EU infringement procedure. The draft law will now enter the legislative process in the German Parliament and is expected to enter into force – according to the current draft – three months after its promulgation.

The German Whistleblower Protection Act sets out far-reaching obligations for legal entities in both the private and public sectors to provide whistleblowers with comprehensive protection.

Scope and Purpose

- While the EU Whistleblower Protection Directive only applies to the reporting of EU law violations, the German Whistleblower Protection Act is broader in scope, covering certain violations of national law as well. In particular, the Act's protections extend to reports on any and all criminal violations as well as administrative violations (*Ordnungswidrigkeiten*) if the law concerned protects the life, health or rights of employees or their representative bodies. Violations of German antitrust law are also in scope as well as certain other legal violations of German and EU law. A violation only falls within the scope of the draft law if it relates to an occupational, business or official activity.
- The purpose of the draft law is to protect individuals who come into possession of information on such violations, as mentioned above, in a broadly defined work-related context (including e.g. the recruitment process), and who then report that information via the reporting channels defined in the law or who disclose it to the public. The bill also aims to protect individuals who are the subject of such reports or who are otherwise affected by whistleblowing.



Internal Reporting, External Reporting and Public Disclosure

- The German Whistleblower Protection Act obliges certain employers to set up internal reporting units (*interne Meldestellen*), while requiring certain public authorities at the federal and state level to implement external reporting units (*externe Meldestellen*).
- Whistleblowers may choose freely between reporting either to an internal or an external unit. Internal reporting units need to provide whistleblowers with clear and easily accessible information on external reporting channels and on how to report violations to EU institutions.
- A whistleblower disclosing information to the general public is protected under the draft law if the whistleblower previously submitted a report via an external channel, i.e., a channel operated by public authorities, and no proper follow-up measures were taken or no feedback was given to the whistleblower. Public disclosure is also protected if making an external report appeared inappropriate for narrowly-defined reasons.

Reporting Channel Requirements

- Subject to certain thresholds, employers in all industries and sectors (companies with at least 50 employees and municipalities with more than 10,000 inhabitants) will be required to set up an internal reporting unit and the necessary channels. This requirement applies to employers in certain sectors, e.g., capital management companies, regardless of the number of their employees. Should the Act take effect, these obligations will immediately apply to all employers except for those with between 50 and 249 employees, which will become subject to them starting 17 December 2023.
- The internal reporting unit can be operated by the employer's staff or by a third party. Employers with between 50 and 249 employees may operate reporting units together with other employers. Corporate groups can also establish reporting units centrally, rather than at each entity – subject to certain requirements.
- The reporting channels have to accommodate both oral and written reporting. Whistleblowers can also request an in-person meeting to make their reports. While the German Whistleblower Protection Act does not include an obligation to enable anonymous reporting, it does protect individuals who report information on breaches anonymously – even if they are subsequently identified. Internal and external reporting units have no obligation to follow-up on anonymous reports but are supposed to follow-up on them if they have sufficient resources to do so in addition to dealing with reports from named individuals.
- Among their obligations, both internal and external reporting units must assess reports, give feedback to the whistleblower within specified time limits and take appropriate follow-up measures, such as initiating an investigation. The identity of the whistleblower has to be kept confidential unless one of the exemptions set forth in the law apply. Officials operating external reporting channels may request information from companies and public authorities to verify the validity of reports. They can also transfer the case to a competent authority for further investigation.



Protection Measures and Enforcement

- Under the draft law whistleblowers are protected if they made a report to an internal or external channel or publicly disclosed information as provided for in the law and had reasonable grounds to believe that they were reporting or publicly disclosing true information relating to a legal violation within the scope of the Whistleblower Protection Act.
- The whistleblower cannot be held liable for acquiring or accessing the relevant information unless the acquisition or accessing of that information is a criminal violation.
- Reporting or disclosing information is not considered a violation of non-disclosure obligations and does not result in any legal liability if the whistleblower had reasonable grounds to believe that reporting or publicly disclosing the information was necessary to reveal a violation within the scope of the Whistleblower Protection Act.
- The draft law prohibits any kind of retaliation against whistleblowers. If a whistleblower suffers a disadvantage in a work-related context after making a report or public disclosure, the disadvantage is presumed to be an act of retaliation. In such cases, the burden of proof lies with the person who caused the disadvantage to demonstrate that the measure was duly justified or that it was not in retaliation for the report or public disclosure. If the whistleblower is retaliated against, he or she is entitled to compensation for any damage suffered.
- Individuals who deliberately report incorrect information or do so with gross negligence are not protected by the Whistleblower Protection Act and are liable for damages resulting from the inaccurate or misleading information.
- Violating certain obligations under the German Whistleblower Protection Act will be an administrative offence. Administrative fines of up to EUR 100,000 can be issued for hindering or attempting to hinder reporting, retaliating against whistleblowers and failing to keep the identity of whistleblowers confidential. The competent authorities can impose a fine of up to EUR 20,000 for a failure to set up internal reporting channels.

If and when the Federal Cabinet's bill is enacted, companies in Germany are likely to check whether their existing reporting channels meet the new legal requirements and, where necessary, to accelerate their efforts to implement whistleblowing systems. Companies are well-advised to incentivize employees to report any suspected violations internally. Such internal reporting gives a company the opportunity to investigate any alleged wrongdoing in-house, to take swift remedial action and, if it is required by law or in the interests of the company, to self-report to the authorities on an adequate factual basis.



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