EMPLAWYERS

White Paper
Whistleblowing in Germany

On December 17, 2021 the deadline for the national implementation of the protection of whistleblowers in EU member states ends. A German law has not yet been passed, this is expected for early 2022 after the new German government has been formed. This whitepaper outlines the content of the EU-Whistleblowing directive and explains why companies in Germany should not wait for a decision of German law makers.

I. Introduction

The EU-Whistleblowing Directive which has been enacted on October 23, 2019 and published in the official gazette of the EU on November 27, 2019 (hereinafter Whistleblower directive) must be transferred into national law in each EU-country until December 17, 2021. In Germany this has not yet happened, a recent initiative of the old government (grand coalition) was stopped after the Parties did not agree on the scope of the law.

Regardless of the fact that the new government will soon pass a national law this White Paper provides an overview on the compliance requirements, which directly follow from the directive.

Whistleblowing is a primary task for HR departments

HR departments are primarily responsible for compliance with the directive. This is due to the fact, that the EU- directive is based on the definition of an „employed person" and the assumption, that employees will be either the whistleblower or the accused person, which needs to be protected against wrongful accusations.

The fact that the burden of proof falls on companies whenever a whistleblowing employee alleges an unjustified discrimination, leads to the necessity to present evidence for each decision, which might at a later point in time be relevant in (labor) court proceedings.

Further the implementation of an internal whistleblowing system will be a major task for HR before on the HR department, since co-determination rights of works councils need to be observed. Even where this is not the case employment law principles such as the protection of privacy, equal treatment and protection against discrimination as well as data protection rights must be observed.
Other areas of law may only become relevant as far as the characterization of the illegal act is concerned. Thus for example cartel law or as far as internal investigation are concerned criminal law experts might have to be consulted.

In view of the imminent, but belated transformation of the EU-directive into German law we will discuss below, whether the content of the EU-directive might have a direct impact as of December 17, 2021.

Further we will discuss, whether an internal whistleblowing system might even be useful for companies, which do not fall under the mandatory obligation to create such system.

II. Content of the EU- directive

1. Purpose of the Directive and current legal situation in Germany.

The EU-directive is based on the assumption that is in the public interest and the interest of every company to be protected against any damage which might be caused by illegal behavior of company employees or third parties. In these cases an insider will likely have the best knowledge of the facts and even might be the only person able to accurately inform about any misconduct.

The EU-directive intends to protect potential informants by providing a regulation based on principles of trust and accountability.

Whistleblowers currently do not enjoy any specific protection under German law. German courts often have decided in favor of companies and against informers. There is a culture and longstanding tradition in Germany which is partly based on historical experiences of the 20th century, when informants were seen as traitors and spies. There is a certain deep mistrust against informants until now. It is a slow process to view whistleblowers as an important part of good governance and a transparent company culture, which plays an important part to protect both society and company against wrongdoing.

2. Personal scope of application

The EU-directive protects any person, which has a workplace relation to a company. This does not only include active and previous employees, but temporary workers, voluntary helpers, shareholders, subcontractors and suppliers as well. Whistleblower protection does apply to private companies as well as the public sector, both companies and authorities.

3. Protected information

In view of the limited competence of the EU the directive only relates to material law, which can be decided by EU institutions.

Hence directive only relates to violations of EU law.

Following areas of law are specifically mentioned:

- Public procurement
- Financial services
- Money laundering
- Financing of terrorism
- Product safety
- Transport safety
- Environmental protection
- Atomic energy security
- Security of food and animal feed
- Protection of animals (health)
- Public safety
- Protection of consumers
- Protection of privacy
- Data protection
- Security of electronic information systems and internet

- EU market regulations within the meaning of Article 26 Abs. 2 AEUV including the EU competition law
- Corporate tax regulation
- Violations of the financial interests of the EU in accordance with Article 325 AEUV.

On the basis of the publicized coalition contract of the new German government it can be expected, that the German law transforming the EU directive into national law will extent the protection to information about any violation of German law, it is - however – not yet known whether this will include unethical behavior as well.

4. Types of whistleblowing systems

One of the most disputed questions in Germany in the past was, whether it is permitted for a whistleblower to directly inform the public without first having a taken recourse internally.

In the EU directive the member states found a compromise, according to which both internal and external whistleblowing systems will be established at the same time, both of which have an equal status and might be chosen at the free discretion of the informant. A decision – however – to immediately go public is not permitted, unless the whistleblower has tried to make use on an internal or external whistleblowing system first without success or there is an urgent call for action (ultima ratio principle)

Companies with more than 50 employees must implement an internal whistleblowing system

The most important feature of the EU-directive is the obligation for companies with more than 50 employees to implement an internal whistleblowing system. Member states might opt for an interim period until the end of 2022, during which companies with up to 249 employees might opt for a common whistleblowing system used by several companies.
The EU-directive contains a number of requirements for an internal whistleblowing system. These do especially relate to privacy rights of the informant and data protection rights of all persons involved (including accused persons). Further the directive prescribes certain procedural steps that needs to be taken with in a given time frame.

As far as external systems are concerned it is the member states themselves that are called to action. Each member state must install at least one external system, for which the directive describes certain procedural rules as well.

5. Protection of whistleblowers

The primary aim of the directive is the protection of informants acting in good faith. The motive of the informant is irrelevant, only whistleblowers providing intentional misinformation do not enjoy any protection.

The directive does not specify the protection against repressive measures in detail. Thus member states have a broad discretion to take into account local employment law when deciding about the best means to protect informants.

An important principle which is mandatory according to the EU – directive is the reversal of the burden of proof to the benefit of the informant. An informant, who has notified the company of a violation and is later treated less favorably than another person enjoys this benefit. This means, that a company must proof, that the unequal treatment is not a consequence of the information but justified otherwise. In any case of doubt the informant is entitled to damages, which may also include reinstatement.

Evidently there is a certain danger of misuse. For companies (employers) this means that all decisions affecting employees and third parties must be clearly documented and it must be able to proof in case of dispute that there is no connection between the decision and the previous whistleblowing.

Finally all member states must determine effective, adequate and prohibitive sanctions for natural and juristic persons that prevent whistleblowing (or try to do so) or seriously discriminate informants or illegally disclose the identity of a whistleblower.

6. Works Council co-determination and internal investigations

As far as a company has a works council a number of co-determination rights must be observed.

This includes e.g. rules of conduct for employees (such as an obligation to report misconduct by other employees) as well as the technical aspects of an internal whistleblowing system. Further the data protection laws must be observed as well as privacy rights of all persons involved.

Another important issue is the determination of internal responsibilities and the conduct of internal investigations. Such investigations need a thorough planning and profound legal knowledge.

III. Direct application of the EU- whistleblowing directive as of December 17, 2021?

Generally directives must be transformed into national law by the member states. Thus individuals have basically no rights against a member states that are based on an EU directive.

There are –however- cases where this principle is not applied. A direct claim may exist, if

(1) An EU directive has not been transformed into national law in time

(2) Its content is clear and unambiguous, so that it can be applied to the individual case without need for further interpretation.

In these specific cases individuals might be able to argue, especially in court proceedings, that a directive grants them rights, which must be applied in their individual case even before a transformation of the directive into national law has been effected.

A much more difficult question is, if this principle may also apply between individuals, for example between the employer and the employee. Generally the jurisdiction of the European Court of Justice does not allow such direct application, because in most cases in EU directive leaves some leverage for member states.

It is possible – however – to interpret national law in light of European law principles, which are embodied in an EU directive. This is especially relevant for countries like Germany, which do not have any whistleblower protection until now.

As a consequence it can be stated, that there will be no obligation for companies to establish an internal whistleblowing system already in December 2021, but the burden of proof for companies in cases of alleged ill-treatment of an informant can be applied in a national court proceedings already. This rule does apply regardless of the size of the company and will thus be an issue that needs to be addressed right away after the deadline for the implementation of the EU directive has passed.

IV. What companies need to do

Although the German national parliament needs to act soon now, the question is, if it is advisable for companies to act even before such law has been passed or if it might be a better strategy to wait.

Often companies decide to wait for the details of the national law, since any action taken before that the date might have to be amended or changed afterwards. In Germany companies will – however- have to bear in mind, that most parts of the intended law are undisputed. Thus most general principles are already known and can be executed. The new German government has meanwhile confirmed that it favors an extensive application of the directive. Further it needs to be taken into account, that relevant parts of the EU directive are directly applicable as of December 2021 (see III. above).

Companies further must notice that whistleblowers might opt to immediately inform the public, if there is no other formalized way to lodge a complaint. This is certainly something, which most companies will try to avoid.

As an internal whistleblowing system thus has advantages, whether there is an obligation to create one or not:

1. Any investigation can be conducted internally first, many complaints can be settled internally without any major confusion or public uproar.

2. A reputation of damages can be avoided by keeping the discussion internal and settling individual cases.

3. It can be expected, that the national law will not provide for any long transitional periods, so that companies need to be prepared immediately after the law has been passed, which happen quite early in 2022.

4. A transparent internal system is a welcome signal to employees, customers and the public that the company favors a transparent and open culture.

5. It can be assumed, that many service providers such as banks and insurance companies will view an internal whistleblowing system as essential part of compliance and thus will demand a respective policy from their customers regardless of any obligation to do so.

   In well managed transparent companies the previously discussed issue, whether national law violations might be subject covered by the law, will play no relevant role. No company will honestly want to differentiate between violations of EU law and national law. This would signal to the public, employees and business partners that the management of the company is not really interested in receiving any information about wrongdoing.

V. Conclusion

Whistleblowing already is an important part of company culture and compliance.

Our firm is well prepared to provide profound employment law related advice, which will be necessary to implement a compliant whistleblowing system in your company.

We have tested the most important providers of IT based in internal whistleblowing systems and have compared the conditions. While many law firms have an exclusive relationship to one company only we are independent and transparent. Thus we are in an ideal position to independently inform about the benefits and disadvantages of each option.

Please contact us, if you are interested in further information about Whistleblowing in Germany.

Contact

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