

UPDATE ON THE GERMAN IMPLEMENTATION ACT OF THE EU WHISTLEBLOWER DIRECTIVE

and on the "German Midway" for centralized whistleblowing systems in corporate groups

Luisa Wermter

AUTHOR

Dipl. jur. Luisa Wermter works as a research assistant in the law firm for business and medical criminal law of Prof. Dr. jur. Hendrik Schneider in Wiesbaden.

In addition to her work in the law firm she studied law at the Goethe University Frankfurt am Main and passed the first juristic state examination in 2020. After that, she graduated in 2022 with the majored criminal science.

TABLE OF CONTENTS

I. INTRODUCTION	53
II. THE CURRENT STATUS OF THE GERMAN DRAFT LAW “HINWEISGEBERSCHUTZGESETZ (HINSCHG-E)” AND THE LEGISLATIVE ASSESSMENT OF THE FINANCIAL BURDENS FOR COMPANIES	54
A. The path to the “Draft Law for Better Protection of Whistleblowers and for the Implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law” and its status quo	54
B. Expected costs for companies in setting up an internal reporting channel	55
III. IS THE USE OF CENTRALIZED WHISTLEBLOWING SYSTEMS IN CORPORATE STRUCTURES POSSIBLE AFTER ALL?	56
A. Admissibility of outsourcing and resource sharing under the EU Whistleblower Directive	56
B. Rejection of the EU Commission to the use of centralized whistleblowing systems as internal reporting channel	56
C. The German Midway: “Outsourcing” within the group	57
IV. CONCLUSION	58

I. INTRODUCTION

The process of drafting legislation has progressed further in recent months and the draft law of the Federal German Government¹ has been submitted to the Bundestag for a decision. Provided that the legislative process proceeds according to plan, the law is expected to be promulgated before the end of this year. Although the draft law still provides for a "grace period" – according to Article 10 of the draft law dated 07/22/2022, the law is not to come into force until three months after promulgation in the first half of 2023 the introduction of internal reporting channel² will become a legal obligation for around 90,000 German companies³.

The resulting organizational and financial burden for companies already in distress due to the Corona pandemic and currently due to the effects of the war in Europe⁴ are known to be cause for criticism, both of the directive and of the draft implementation law⁵. The burden on "companies in this country with new bureaucracy, one-off costs of over 200 million euros, annual costs of 400 million euros"⁶ due to the obligation to set up and operate internal whistleblowing systems was also a topic of discussion within the parliamentary debate in the German Bundestag.⁷

From an economic perspective, it is of interest to companies to find out what kind of resource-saving implementation options are available. Potential savings are offered by whistleblowing units that can be used by several companies or by centralized whistleblowing systems, which are often already in place, especially in international operating groups⁸. However, the EU Commission has so far rejected such central offices as inadequate.⁹ Nevertheless, according to the German Minister of Justice, Dr. Marco Buschmann, the German legislature has now opened up a "Midway" for centralized whistleblowing functions.¹⁰

¹ Draft law of the Federal German Government, 07/22/2022, available at: https://www.bmi.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Hinweisgeberschutz.pdf?__blob=publicationFile&v=2.

² This designation corresponds to the wording of the EU Whistleblower Directive. Only whistleblowing systems that meet the requirements of the Directive are therefore included here. Henceforth, the term "whistleblowing system" will be used as an umbrella term that includes all internal reporting channels and other systems that pursue the same goal but may not comply with all the requirements of the Directive. Only systems that comply with the Directive are referred to as internal reporting systems.

³ According to the data from the business register of the Federal Statistical Office, which was used as the basis for the draft law, there were 90,621 companies with more than 50 employees in Germany in 2019, cf. Draft law of the Federal German Government, p. 46.

⁴ Cf. for example <https://www.tagesschau.de/wirtschaft/unternehmen/firmenpleiten-insolvenzen-september-101.html>.

⁵ Cf. speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6390, plenary protocol available at: <https://dserver.bundestag.de/btp/20/20057.pdf>.

⁶ Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6390.

⁷ Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, available at: <https://dserver.bundestag.de/btp/20/20057.pdf>.

⁸ Cf. Felix Metzner/Isabel Gloeckner, "Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?, CCZ, p. 256 (5/2021).

⁹ See also Felix Metzner/Isabel Gloeckner, "Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?, CCZ, p. 256 et seq. (5/2021).

¹⁰ Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6389.

II. THE CURRENT STATUS OF THE GERMAN DRAFT LAW “HINWEISGEBERSCHUTZGESETZ (HINSCHG-E)”¹¹ AND THE LEGISLATIVE ASSESSMENT OF THE FINANCIAL BURDENS FOR COMPANIES

A. The path to the “Draft Law for Better Protection of Whistleblowers and for the Implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law” and its status quo

The Directive (EU) 2019/1937 of the European Parliament and of the Council of 10/23/2019 on the protection of persons who report breaches of Union law (from now on: EU Whistleblower Directive) has already entered into force on 12/16/2019. According to Article 26 para. 1 EU Whistleblower Directive, EU member states were required to transpose the Directive into national law by 12/17/2021.

As is known, the legislative process has not been completed in many member states in time.¹² In Germany, the Federal Ministry of Justice and Consumer Protection had already developed a draft bill for an implementation law in November 2020.¹³ However, the parties of the grand coalition¹⁴ could not agree on this draft, in particular on an extension of the material scope of application to national law.¹⁵ The “Ampelkoalition” of the Social Democratic Party of Germany (SPD), the German Green Party and the Free Democratic Party of Germany (FDP), in office after the last federal election in 2021, had in the coalition agreement the “legally secure and practicable”¹⁶ implementation of the EU Whistleblower Directive, with protective effect “not only in the reporting of violations of EU law (...) but also of significant breaches of regulations or other significant misconduct, the disclosure of which is in the particular public interest”^{17, 18}.

The Federal Cabinet then adopted the draft of the “Law for better protection of whistleblowers and for the implementation of the Directive on the protection of persons who report violations of Union law”. After the expiry of the deadline for comments by the various interest groups on the draft law¹⁹, it was

¹¹ This abbreviation of: „Entwurf eines Gesetzes für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden“ will be used from now on to designate the draft law.

¹² As of 10/25/2022, only 10 of the 27 obligated member states have implemented a national law, 16 of the member states are still in the implementation phase, Hungary has not yet started an implementation process, see the overview: <https://www.whistleblowingmonitor.eu>.

¹³ Cf. Simon Gerdemann, *Referentenentwurf für ein deutsches Hinweisgeberschutzgesetz*, ZRP p. 37 et seq. (2021).

¹⁴ Meant is the grand coalition between Sozialdemokratischen Partei Deutschlands (SPD) und der Christlich Demokratischen Union Deutschlands (CDU) from 2017 to 2021.

¹⁵ See the reporting <https://www.sueddeutsche.de/wirtschaft/kriminalitaet-whistleblower-hinweisgeberschutz-justizministerium-1.5245315>.

¹⁶ Coalition contract 2021-2025 between the Sozialdemokratischen Partei Deutschlands (SPD), Bündnis 90/ Die Grünen und den Freien Demokraten (FDP) 12/07/2021, p. 88, available at: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf.

¹⁷ Loc. Cit.

¹⁸ As timely implementation was no longer possible, the EU Commission initiated formal infringement proceedings on January 27, 2022 against the member states, including Germany, that had missed the deadline for implementation, cf. <https://www.handelsblatt.com/politik/deutschland/vertragsverletzungsverfahren-ueberfaelliges-whistleblower-gesetz-deutschland-bekommt-blauen-brief-aus-bruessel/28056780.html>. This was averted by the resumption of the legislative process in the meantime, see the Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6389.

¹⁹ Available at: <https://www.bmi.de/SharedDocs/Gesetzgebungsverfahren/DE/Hinweisgeberschutz.html>.

now debated in the Bundestag on 09/29/2022. On the part of the opposition, the draft law was criticized as "unclear, half-baked and unbalanced"²⁰. In addition, the considerable burden of "about 90,000 companies in this country with new bureaucracy, one-time costs of over 200 million euros, annual costs of 400 million euros"²¹ was denounced.

B. Expected costs for companies in setting up an internal reporting channel

In the explanatory memorandum to the HinSchG-E²², different cost estimates are given for the establishment of an internal reporting channel. According to the impact assessment of the European Commission²³, medium-sized companies are expected to incur implementation costs on average of EUR 1,374.²⁴ However, this sum is far below the estimates of inquired bodies in Germany.

According to a survey of its members, the German Institute for Compliance²⁵ assumes implementation costs of EUR 12,500²⁶. According to an international law firm²⁷, which was also queried by the Normenkontrollrat²⁸, costs of EUR 15,000 to 25,000 could be incurred for "legal advice and support in the conception of a whistleblower system, the creation of the necessary guidelines and process flows, support in implementation and communication, design in compliance with data protection law, and training of whistleblower office employees in total."²⁹ However, as stated by this last assessment, how much companies actually have to spend in practice depends on company-specific factors such as existing structures, e.g., internally available know-how and existing compliance units. Companies could save between EUR 3,000 and 5,000 here by having suitably good and modern compliance equipment.³⁰ In the case of German companies that already have a whistleblowing system in place³¹, the key factor here will be the extent to which the systems comply with the new legal requirements.

There is also fundamental savings potential for companies that do not have their own whistleblowing system but belong to a group that already operates a centralized whistleblowing system. This way of recognizing the "external" whistleblowing system, e.g., of the parent company, for one's own company and referring the employees to use it, has so far been blocked by the positioning of the EU Commission (see below the details under III. B.). However, the move by the German legislator now offers a loophole

²⁰ Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6390.

²¹ Speech of Dr. Martin Plum (Member of the parliament, CDU), Plenary protocol of the 57th Session of the German Bundestag on 09/29/2022, p. 6390.

²² Draft law of the Federal German Government, p. 47 et seq.

²³ European Commission, Impact Assessment, SWD (2018) 116 final.

²⁴ European Commission, Impact Assessment, SWD (2018) 116 final, p. 61.

²⁵ Deutsches Institut für Compliance e.V., for more information see: <https://www.dico-ev.de>.

²⁶ See draft law of the Federal German Government, p. 47 with reference to German Institute for Compliance - DICO Member Survey (2021), inquiry by the Normenkontrollrat on the implementation of the EU Whistleblower Directive.

²⁷ See draft law of the Federal German Government, p. 47 with reference to CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB, Inquiry of the Normenkontrollrat on the Implementation of the EU Whistleblower Directive.

²⁸ Institution of the German Federal Government that examines draft rules and estimates compliance costs for citizens, businesses and public authorities, for more information see: <https://www.normenkontrollrat.bund.de/nkr-en/overview-of-nkr-tasks/ex-ante-review>.

²⁹ Draft law of the Federal German Government, p. 47.

³⁰ Draft law of the Federal German Government, p. 47.

³¹ According to the information in the draft law, 73.9% of companies with more than 250 employees and 43.7% of SMEs have already introduced a whistleblowing system, draft law of the Federal German Government, p. 46.

through which, at least group companies, might be able to significantly reduce the costs of implementation – and further also the operation of the internal reporting channel – by using already existing systems.

III. IS THE USE OF CENTRALIZED WHISTLEBLOWING SYSTEMS IN CORPORATE STRUCTURES POSSIBLE AFTER ALL?

A. Admissibility of outsourcing and sharing resource under the EU Whistleblower Directive

The EU Whistleblower Directive already expressly provided for the possibility of commissioning third parties to receive and – with the appropriate professional competence – also to process whistleblowing, see Recital 54 and Article 8 para. 5 of the EU Whistleblower Directive. These third parties must "provide appropriate guarantees of independence and confidentiality, data protection and secrecy," Recital 54 of the EU Whistleblower Directive. External third parties are named in the Directive as, e.g., external consultants, auditors, trade union representatives or employee representatives.

In addition, it is also emphasized that the decision as to which person or department is most suitable to act as an internal reporting office depends decisively on the respective structure of the company, cf. Recital 56 of the EU Whistleblower Directive. A recommendation for or against outsourcing the whistleblowing function is therefore not made.

In view of the differences in the human and financial resources available for the establishment and operation, the EU Whistleblower Directive also provides in Article 8 para. 6 that companies between 50 and 249 workers "may share resources for the receipt of reports and for investigations that may have to be carried out".

B. Rejection of the EU Commission to the use of centralized whistleblowing systems as internal reporting channel

With the adoption of the EU Whistleblower Directive, the question arose for companies that were covered by the scope of the Directive but in whose group there was already a whistleblowing system as to their own need for action. The core of the problem was whether Article 8 para. 3 EU of the Whistleblower Directive: "Paragraph 1 applies to legal entities in the private sector with 50 or more employees" should be interpreted strictly according to the wording, or whether the given possibilities of use of a central system of the parent company could be sufficient.

Accordingly, inquiries were already submitted to the European Commission's expert group on whistleblower protection in 2021, in response to which the (further) use of a central system was rejected: „Article 8(3), which provides that "Paragraph 1 [the obligation to establish channels and procedures for internal reporting] shall apply to legal entities in the private sector with 50 or more workers", does not make any exemption for distinct legal entities belonging to the same corporate group. This entails that reporting channels cannot be established in a centralized manner only at group level; all medium-sized

and large companies belonging to a group remain obliged to have each their own channels.³²

Centralized whistleblowing systems could continue to be offered but should only represent an additional option to the group company's own reporting internal channel. By referring to this possibility of coexisting whistleblowing channels within the group, the Commission also rejected the preferability of receiving and processing information via a centralized system, e.g., with regard to better protection of the anonymity of the whistleblower and ensuring uniform treatment of whistleblowing and uncovered misconduct throughout the group.³³

C. The German Midway: "Outsourcing" within the group

The fact that the EU Commission's position on centralized whistleblowing systems is also unlikely to meet with much approval in Germany is to be expected, if only because of the human resources required to create additional decentralized whistleblowing channels. The approach now chosen for German implementation is therefore likely to be a relief for some companies.

In the parliamentary discussion in the German Bundestag, the Federal Minister of Justice, Dr. Marco Buschmann, stated: "In the implementation, it was important to us that we exploit all the flexibility margins in the directive. We also had very intensive discussions with the Commission and we succeeded in changing the Commission's legal view on a whole range of things to the benefit of our companies."³⁴

However, the fact that a middle course was chosen on the question of the possibilities of using the resources of the group parent company is not clear from the text of the law itself, but only from the explanatory memorandum to the law.

Section 14 para. 1 HinSchG-E "Forms of organization of internal channels" initially only clarifies that, as already provided for by the Directive, a third party can be entrusted with the tasks of the internal channel. The German Midway does not result from the text of the law, but only from the understanding of the third party set out in the special section of the explanatory memorandum to the law on pages 90 et seq.³⁵

³² Opinion of the European Commission, Directorate – General Justice and Consumers, 06/02/2021, JUST/C2/MM/rp/(2021)3939215; European Commission, Directorate – General Justice and Consumers, 06/29/2021, JUST/C2/MM/rp/(2021)4667786: "Any different interpretation would be *contra legem*"; European Commission, Directorate – General Justice and Consumers, 07/16/2021, JUST/C2/MM/rp/(2021)4622438, in addition, the comments refer to the possibilities opened up in the Directive, e.g., as a company with 50 to 249 employees, to share resources that would also be open to sister companies in the group or, even if always subject to the consent of the whistleblower, to use investigation capacities of the parent company or to treat the report as relevant for the entire group and thus also inform the parent company about it.

³³ Cf. Felix Metzner/Isabel Gloeckner, "Reality Check" der EU-Whistleblower Richtlinie – Ist die Einführung eines lokalen Hinweisgebersystems wirklich erforderlich?, CCZ, p. 256 et seq. (5/2021).

³⁴ Speech of the German Minister of Justice, Dr. Marco Buschmann (FDP), Plenary protocol of the 57th Session of the German Bundestag on 29/09/2022, p. 6389.

³⁵ Criticism of this due to the resulting legal uncertainty: Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update!*, ZRFC, p. 234 (2022).

With reference to the principle of separation under group law³⁶, from which the legal independence of each member of the company results, it is clarified that an organizational unit of another group company can also be a third party within the meaning of the HinSchG-E and thus a suitable reporting office. This means for practice: If, e.g., a compliance department already has a central or regional reporting office within the group that meets the other requirements³⁷, this can be commissioned as a third party. The existing structures and the given personnel resources can still be used for all or at least several companies of a group.

However, there is still a need for action. This is because, just as with the commissioning of another third party (e.g., an external law firm or ombudsperson), an explicit commissioning of the body by the individual companies is required. It must be clear that the commissioned body, even if it is an organizational unit of another group company, will act in its function as an internal reporting channel for the respective client company. In addition, it is necessary that the competencies and responsibilities are regulated in such a way that there is no transfer of responsibility to the parent or sister company at which the organizational unit is located. At the latest, decision-makers of the commissioning company must be involved in the decision-making process as to how an assumed or already discovered legal violation is to be remedied.³⁸

In addition to the questions regarding the regulations of whistleblowing management within the group, it will also be central in practical implementation that the organization of the internal reporting channels ensure the clear allocation of the whistleblowing to the subsidiary in question without endangering the confidentiality of the whistleblower. Due to the remaining legal responsibility of the individual company (see above), there could otherwise be liability risks e.g., due to failure to take measures to put an end to a breach.

IV. Conclusion

The German government's draft seeks to give companies freedom in the design and organization of internal reporting channels. This provides opportunities to adapt the design and organization to the company and its human and financial resources (which may be scarce anyway due to the current situation) in a meaningful way. It is therefore positive that already existing whistleblowing systems can continue to be used as internal reporting channels (if necessary by adapting them to the new legal requirements).

Nevertheless, the approach taken in the draft law continues what already caused problems with the Directive: the text of the law itself explicitly only contains the obligation of companies with 50 or more workers and the reference to the possibility of outsourcing to third parties. The fact that a third party does not have to be outside the group of companies is not made clear by the wording of the law;

³⁶ Gerd Krieger, in Hoffmann-Becking (Ed.), Münchener Handbuch des Gesellschaftsrechts, 5th Edition, chapter 12, Konzernrecht des Aktiengesetzes, Rn. 64 (2020).

³⁷ Cf. p. 91 of the draft law of the Federal German Government: guaranteeing confidentiality, independence and impartiality; For further requirements, also specifically with regard to transnationally active groups see Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update!*, ZRFC, p. 234 (2022).

³⁸ Draft law of the Federal German Government, p. 92.

instead, group companies are dependent on the supplementary references to the legislator's understanding. Since it has not yet been finally clarified whether the EU Commission will take a position on the “German Midway”, the sustainability of this solution approach is at least questionable.³⁹

³⁹ Critical with regard to a possible renewed threat of infringement procedure: Gülüstan Kahraman, *Herausforderungen für Unternehmensgruppen bei der Umsetzung der Whistleblowing-Richtlinie. Der neue Gesetzesentwurf entschärft die Thematik – ein Update*, ZRFC, p. 234 (2022).