

***„Whistleblowing Systems“
in Germany***

September 2021



What`s the issue?



WHAT`S THE ISSUE?

For years anticorruption and whistleblowing protection laws exist in other parts of the world. Notably in the UK since 2016 (FCA Rules) and in France since 2018 (Sapin II). This is – still - not the case in Germany.

New whistleblower laws, however, have been discussed across Europe; the topic being in the news constantly. <https://www.wiwo.de/finanzen/steuern-recht/arbeitsrechtsexperte-zur-umstrittenen-eu-richtlinie-whistleblower-sind-in-deutschland-bereits-gut-geschuetzt/23657944-all.html>

Those voices of critics against the lack of explicit codified regulations in Germany forget to acknowledge the following facts:

- protection rights do exist in Germany,
- beginning with strict termination protection rights,
- rights to complain and confidentiality rights.

One of the strictest termination protection laws within the EU is codified in the German **KSchG**, plus strict requirements to work safety rules and equal treatment exist pursuant **ArbSchG** and AGG, not to forget various confidentiality obligations pursuant **AktG** und **UWG**.



EXISTING REGULATIONS?

Also, be aware that there are specific whistleblowing regulations regarding trade secrets in the financial services sector in Germany pursuant **GeschGehG** and **FinDAG**.

Sec. 4d *FinDAG* provides for the establishment of whistleblower channels and the protection of whistleblowers.

As of today, there are no harmonized sets of protection laws codified in Germany for whistleblowers. In particular, there is no explicit termination protection for whistle-blower provided by law.

In view of the upcoming German federal elections, there will be little time left to transform the EU directive and to implement its rules and regulations into national (German) law; in particular .

Hence, for German and multinational employers there is need for action!



WILL THE *HIN*SCHG BE ENACTED?

The deadline has long been certain:

No later than by **December 17th, 2021** the EU directive ((EU) 2019/1937), which was enacted on December 16th, 2019, must be implemented into national law by the EU member states.

By the end of April 2021, the draft German Whistleblower Act (*HinSchG*) was rejected by the German Government.

Since then the topic is stuck in legislative process; to no one`s surprise, because the draft act provided for rules and regulations far beyond the EU requirements.



WHAT WILL HAPPEN IF NOT?

It is not only unlikely but certain that Germany will fail to meet the deadline.

In this case, there will be EU infringement proceedings looming from Brussels as well as potential sanctions and liability risks threatening for companies who have - thus far not succeeded in establishing whistle-blower channels.

Hence, companies are well advised to consider how to implement respective channels and to get acquainted with the terms of the ***HinSchG***.

This is especially true for those entities, who have failed to implement whistle-blower schemes and channels.



WHO MUST ACT?

We all should have learned from painful experiences made in the past when implementing the General Data Protection Regulation (**DSGVO**).

A timely preparation of company compliance schemes is essential to avoid dramatic fines or other liability risks.

There is a need for action for:

- all finance service providers regardless of their size,
- entities with more than 50 employees, including freelancers, and
- entities with an annual turnover of more than € 10 millions;

- **nota bene:** for entities with 50 but less than 250 employees, there will be an extended grace period for implementation until **December 17th, 2023**.

There are not few voices who forecast an immediate and direct application of the EU directive in the event of failure to meet the deadline...



WHAT`S PROVIDED IN THE EU DIRECTIVE?

Applying the EU directive immediately and directly would mean:

- it applies to workers, self-employed individuals, shareholders, contractors and subcontractors,
- former employees and workers, as well as job applicants;

- employers with 50 or more employees must establish
- internal channels and procedures for whistleblowers
- to make a report and for the employer to follow up;

- reporting channels must be secure and
- ensure the whistleblower's identity is kept confidential;
- whistleblowers must be given feedback by the employer within three months;

- their identity cannot be disclosed without their explicit consent;
- whistleblowers will be protected against retaliation and will be
- immune from civil liability relating to their use of information (e.g. confidentiality claims).



What are the goals of *HinSchG*?



GOALS OF THE *HINSCHG*

In accordance with the (rejected) draft act of the Federal Ministry of Justice (**BMJV**), employers should be obliged to:

- establish and implement whistleblower schemes,
- enabling internal or external channels,
- to provide whistleblower with means to report violations against
 - EU Law,
 - the Administrative Offence Act (**OWiG**), or
 - Criminal Law.

The ultimate goal of the *HinSchG* being to improve the crime detection and to prevent illegal actions and behavior by means of providing better and more effective protection of whistleblowers against reprisals, as well as providing protection for companies against false allegations.



CONTENT OF THE *HINSCHG*

Key contents include:

- Access to reporting channels for all staff,
- appointing trained and professional personnel at those channels;

- independent decision making by whistleblower channels,
- protection of confidentiality of the whistleblower and
- at the same time of the individual affected by the report;

- establishment of deadlines,
- establishment of documentation obligations as well as
- commencement of follow-up measures.



What`s next to do?



WHAT`S NEXT TO DO?

All companies, who

- neither have established a „hotline“ for whistleblowers,
- nor other internal reporting channels

should **carefully consider actions to:**

- establish internal reporting channels, accessible for all staff;
- guarantee independent decisions making of such channels, by educated and professionally trained personnel.

Either by effective internal reporting channels or externally through third parties such as outside attorneys or other ombudsmen.



The establishment of reporting channels **must provide for:**

- a guarantee of confidentiality of the whistleblower, as well as
- an obligation to follow-up reports also if given anonymously,
- protection for the reporting employees against reprisals and
- at the same time protection for the employers against false allegations.

It is highly recommended to review and check existing reporting schemes and channels, and if necessary to correct, amend or change them.

Please always keep in mind potential mandatory co-determination rights of existing works councils pursuant **Sec. 87 I Nr. 1 und 6 BetrVG**, the German Shop Constitution Act.



ALWAYS REMEMBER

As in all other **compliance topics**, note that:

Implementing a successful reporting scheme and effective whistleblower channels require a strong and existing company culture.

The clear commitment of top management is essential to implement compliance schemes.

Broad support from your staff and an acceptance of the measures will bring success to whistleblower schemes and channels.

Be aware that – traditionally – concerns by German staff may exist; still whistleblowers are often seen as denouncing informers. Hence, questions and concerns of the staff should be taken seriously:

- will confidentiality and anonymity be guaranteed?
- are my reservations against a full discovery and serious investigations valid?
- are my fears against reprisals justified („***will I lose my job ...***“).



WHO MUST BE INVOLVED?

The following departments must be involved from the very beginning:

- HR and Compliance teams,
- IT departments and, (if available)
- the **data protection officer** (Datenschutzbeauftragte).

Existing investigation processes need to be reviewed and evaluated. Questions **need to be answered like:**

- do we want to collect reports centrally or
- do we want reports to be directed to the „concerned“ addressee?

- are storage and delete processes ready and available for stored data?
- how transparently will we deal with the whistleblower subsequent to commencing the reporting process?



Digital Whistleblower Schemes



PRO AND CONS

The following means are used by companies, ranging from a simple letter box to advanced online platform systems:

- letter box at the facility, often near the office of the works council,
- central email account, into which reports are mailed,
- local phone hotlines providing for voicemail or other recording devices,
- internal or via external call-centers;

- reporting channel via an external, independent **ombudsman**, or
- establishing **a digital online platform**, which can be used confidentially and anonymously (*PUMA*'s „*SpeakUP*“ platform is a reknown example).

Digital whistleblowing schemes will often provide advantages. In traditional production facilities, however, there might be hurdles to implement advanced digital schemes.



TIME CONSUMING AND COSTLY?

The amount of time and the involved costs should not be underestimated by companies;
measures start with:

- the definition of reporting categories,
- the description of escalation processes,
- the commencement of tests via „*dry-run*“ until
- the final launch of the whistleblowing systems.

Internal communication and the successful selling of whistleblowing schemes require professional expertise and experience. The establishment of phone hotlines and the implementation of digital online platforms for collecting, storing and processing written reports are often combined by companies in practice.

Whistleblower reporting schemes will form an important part of company compliance processes.



What to expect in the future?



EXAMPLES FROM THE USA?

Do we have to expect financial incentives for whistleblower in Germany?

"200 Million \$ Record Award for Deutsche Bank Whistleblower - CFTC pays record award"

According to the recent FAZ article (FAZ dated 23 October 2021) Deutsche Bank alone paid record fines in the amount of 2,5 billion \$ (USB 1,2 billion € and british banks high triple million amounts). In addition the EU Commission sanctioned record fines against said banks in the total amount of 1,7 billion €.

Since early 2020 the **CFTC (Commodity Futures Trading Commission)** pays out awards to whistleblowers to uncover fraudulent financial transactions, as the **SEC** does; here record awards amounted to 130 million €.

Neither the EU directive nor the HinSchG provide for financial incentives.

In view of the intended options for whistleblowers to either use internal or external reporting channels, companies will carefully consider to introduce incentives to convince their staff to use internal channels with priority.

To offer rewards in form of boni payments may be an option.



DIFFERENTIATION?

How will the *HinSchG* provide for differentiations against the Law on the Protection of Business secrets (*GeschGehG*) and the Corporate Liability Act (*VerSanG*)?

Under the current draft of the *HinSchG*, only illegal behaviour – be it in form of actions or failures – will open the scope of its applicability.

Unethical behaviour is not sufficient.

To disclose of forward business secrets shall only be justified under the *HinSchG*, if the whistleblower has sufficient evidence to believe, that forwarding or disclosing business secrets were necessary to uncover a violation.

Hence, the exemption of Sec. 5 Nr. 2 ***GeschGehG*** remains applicable, also under the *HinSchG*.



COMPLIANCE REQUIREMENTS?

Do we have to expect increasing compliance requirements as and when we enter the age of the „*digital workplace*“?

We will have to accept that whistleblowing schemes and reporting channels must be closely integrated and combined with all other existing compliance processes.

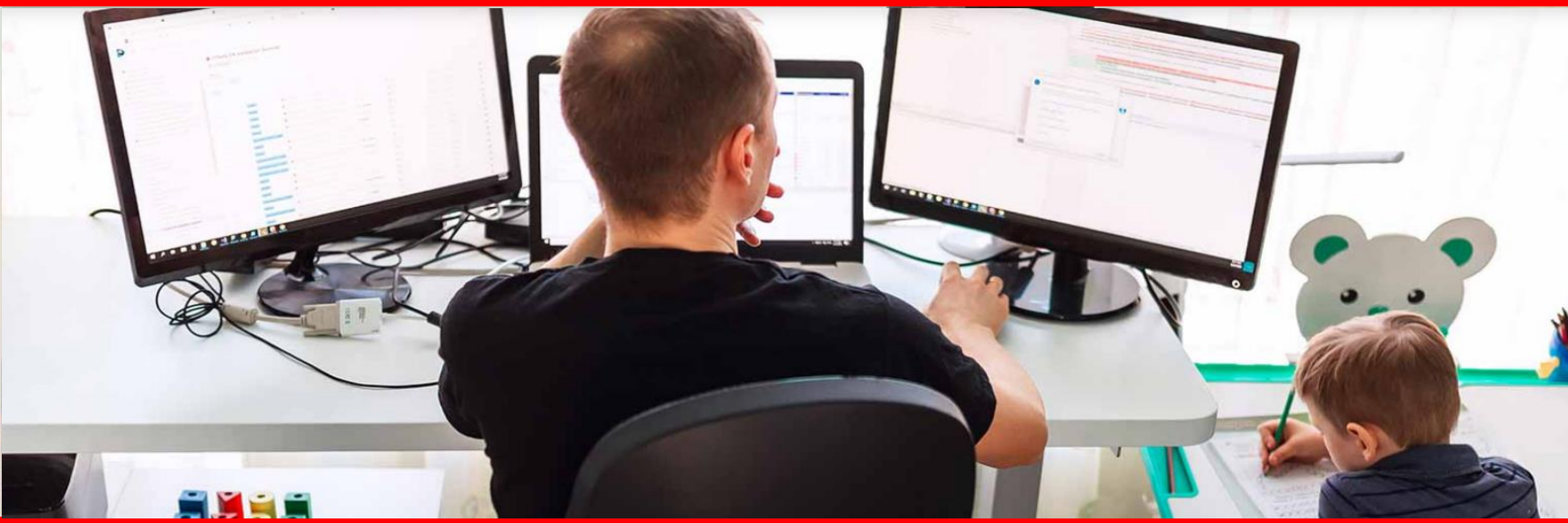
During the Covid19 pandemic, whistleblowing complaints have been constantly increased and it is fair to say that the amount of filed reports will further increase as employees are currently returning to their workplaces and as hybrid work structures will become more common.

It seems undisputed that any compliance schemes and processes will have to be adopted and adjusted to the increasingly demanding requirements of our digital reality; this will likely occur in even shorter time periods.



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- ✓ Data Protection



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Michael held various management positions for other law firms.

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