

Factsheet

On the

Draft Law of the Republic of Germany for Better Protection of Whistleblowers and

for the Implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law

In 2019, the European Union agreed on introducing union-wide whistleblower protection measures in form of the [EU Directive on the protection of persons reporting breaches of Union Law](#) ("Whistleblowing Directive"). In accordance with Union law, EU Member States are required to introduce legislation translating this Directive into national law within two years of its coming into force. This deadline ends on December 17, 2021.

The German Ministry of Justice has now passed on a draft law in response to the Directive to other ministries, and awaits approval before being submitted to parliament. It will be the Federal Republic's first dedicated whistleblower protection act, and is likely to improve the situation for German citizens who encounter irregularities and misconduct in their workplace. In the past, whistleblower cases have often usually been decided in the courts – and rarely in favour of a whistleblower.

Blueprint for Free Speech has analyzed the proposed law and measured it against international standards, including our own Blueprint Principles for Whistleblower Protection. Here are our findings:

Expanded material scope

While the EU Directive is limited in its material scope to the overall legal mandate of the European Union, German lawmakers have suggested an expanded material scope to **include breaches of national legislation which constitute criminal or regulatory offences**. This is an important decision, as limiting disclosable wrongdoing to issues that are within EU competence is likely to make it difficult for whistleblowers to assess whether their disclosure would be protected.

Expanding the material scope to include breaches of national legislation is dramatically improving legal certainty for anyone making a report. Furthermore, it allows authorities to investigate misconduct on instances that are solely regulated by national legislation, **enhancing the general value of the measure and contributing to increased overall transparency**.

This decision also comes with implications for the federal armed forces: Soldiers and all employees of the Bundeswehr are protected when speaking up about misconduct in the army. Their ability to report is however limited by provisions outlined in section 5(1) relating to the disclosure of information in the interest of national security.

Confidentiality regime

While the EU Directive introduces a sound confidentiality regime when it comes to protecting the identities of persons involved in a disclosure, the German proposal transposes it in ways that may effectively water down the protection of whistleblowers' identities. According to EU provisions, **personal data may only be passed on with explicit consent of reporting persons**, or when it is "necessary and proportionate" in compliance with other national or Union law.

Corresponding **carve-outs in the German proposal are quite far-reaching**: Personal data may be relayed to secure authorities' abilities to investigate and punish criminal activities, upon court order, but also upon instruction in the context of any administrative proceedings. As this broad approach may result in careless transfer of a whistleblower's identity, **the draft should include a specific weighing of interests, taking due account of the necessity and proportionality of the disclosure**, as foreseen in the Directive.

The general duty of confidentiality applies not only to reporting persons, but also to those who are subject of a disclosure or otherwise involved. Furthermore, it **extends to authorities receiving disclosures regardless of whether they are appropriate recipients of a disclosure or not**.

Introduction of independent oversight

One of the strongest features of the draft is the **introduction of a centralized independent oversight mechanism**. Linked to the Office of the Federal Commissioner for Data Protection and Freedom of Information, its task is to receive and investigate external disclosures, provide whistleblower support and to submit an annual report to parliament.

In addition to the introduction of a Federal Reporting Office, the federal states may decide to establish their own regional reporting authorities, provided it functions within the parameters outlined in the law. In the financial sector, oversight and reception of disclosures remain with the Federal Financial Supervisory Authority (BaFin). Furthermore, the draft foresees the establishment of a **separate failsafe entity designed to deal with complaints regarding the Federal Reporting Office** itself.

While the centralized approach is to be welcome, especially provisions on whistleblower support remain rather undefined. Here, it would be advisable to **add specific provisions on duties, obligations and proceedings** that may also serve as binding guidelines for regional reporting authorities.

Disclosures on matters of national security remain unprotected

Notwithstanding international recommendations, the German draft law specifically excludes protection of persons reporting misconduct that entails disclosing information that “concern” national security or other material security interests. While it is **advisable to introduce dedicated channels in sensitive sectors**, the draft law effectively excludes reports on national security matters from protection. This is problematic because misconduct in high-security sectors is especially prone to affect the general public interest, while at the same time being more difficult to bring to light.

In the interest of covering various instances of wrongdoing that can occur in a society, including in sensitive sectors, German lawmakers should **consider including specific regulations for disclosures in the national security sector**. International guidelines for balancing national security versus the public interest can be found in the [Tshwane Principles on National Security and the Right to Information](#).

No obligation to follow up on anonymous disclosures

Anonymous disclosure is an issue mostly left to the discretion of Member States: The European Directive merely stipulates that **whistleblowers who report anonymously and whose identities yet become revealed are eligible to receive protection** as long as they complied with the prescribed requirement of making a protected disclosure.

German lawmakers have decided on a conservative approach when it comes to anonymous disclosures: There is no obligation to introduce reporting channels that would allow for or incentivise anonymous disclosures. Furthermore, §26 of **the draft includes a provision allowing for anonymous disclosures to be ignored.**

Given that especially whistleblowers who perceive themselves at high risk of negative consequences often prefer to make their report anonymously, and that numerous high-profile disclosures such as the Wirecard or Dieselgate scandals have been revealed by anonymous whistleblowers, this must be seen as a risky approach. Corporate experiences as well as our own research show that the often feared abuse of anonymous channels is, in fact, neglectable. The draft's explanatory note refers to concerns of overburdening the new mechanism; one option to address this concern would be to include a provision that requires a follow-up on severe violations, a concept that is included in the draft law elsewhere. **By setting a general standard that does not require authorities to follow up on any anonymous disclosures, German lawmakers risk deterring disclosures critical for safeguarding the public interest and giving way to systemic misconduct and abuse to prevail.**

Deterring liability regime

When it comes to concrete protective measures for whistleblowers, both the EU Directive as well as the German draft transposition law state that **whistleblowers may not be prosecuted for their actions** when making a protected disclosure. There is, however, one crucial exemption: Whistleblowers committing „self-standing criminal offenses“ in the context of obtaining the information risk being made (criminally) liable.

While such provisions are appropriate in the interest of preventing abuse of whistleblower legislation, they may have a severe deterring effect on employees considering to make a report. Whistleblowers who have brought cases to employment tribunals under the UK's Public Interest Disclosure Act 1998 have lost cases after finding themselves in the **'catch 22' situation of being accused of 'stealing' the documentation necessary to prove their case.** Given that the example of LuxLeaks whistleblower Antoine Deltour formed one of the key drivers behind the Directive, it is

ironic that he found himself in precisely this kind of situation in the Luxembourg courts. Trade secrets, data protection and even computer crimes laws could all be used to undermine protections for valid whistleblowing reports.

German lawmakers should thus be careful to transpose this provision in a way that is consistent with the overall aims of the Directive, for example by **including a provision exempting them from legal liability if their actions were necessary and proportionate for obtaining information about a severe transgression of the law**. Minor offenses can be proportionate, while acts affecting the life and safety of another person never are.

Provisions on public disclosures

When it comes to public reporting, the German draft does not faithfully transpose relevant conditions outlined in the Directive. Where the Directive states that whistleblowers may go public when „no appropriate action was taken in response to the report“ within a defined timeframe, the German draft law only permits the same if whistleblowers have not received a confirmation about appropriate actions. Hence, **the German draft does not require that appropriate actions to address the violation have been taken within three or six months to preclude a public disclosure**, but merely a notice with possibly unspecific information about future measures (and does not provide for a deadline or any indicative timing for any subsequent action).

To make sure that whistleblowers' abilities to make a protected public disclosure are not curtailed and in line with EU requirements, **the German draft should be adapted to match the provisions outlined in the Directive**.

References

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