

Limited Protection and No Reward: An Overview of Whistleblowing in Germany

Prof. Dr. Carsten Momsen, Freie Universität Berlin,
Department for Comparative Criminal Law



Disclosing information can be lifesavingbut
.... difficult



Terminology

Whistleblowing: “The disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action”

Terminology

- Whistleblower:
 - Insider = access to internal data
 - Also: Co-perpetrators
- Subject:
 - Illegal, immoral, illegitimate practices
 - Continuing or impending
 - Illegal omissions
- Addressee: Anyone who the Whistleblower trusts and is able to eliminate the conduct
 - Internal: within the organization (superior, management, compliance)
 - External: directly to law enforcement

Legal Situation: EU

- 2016: Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure
- April 2019: Directive to protect Persons who report breaches of Union law
 - Applies to broad group of company-related persons
 - Equal protection of internal and external Whistleblowing
 - Burden of proof for disadvantages with the employer
 - Duty for companies with >50 employees to implement internal whistleblowing system
 - Motives irrelevant
 - Sanctions for preventing reports
 - No criminal liability for Whistleblowers but no interference with national criminal codes
- December 2019: Directive in force

Legal Situation: EU

Principle 18: National Security and Intelligence Whistleblowing

The provisions of the Directive specifically do not include reports related to national security or defence procurement, which fall outside of the EU's usual remit. Matters related to the protection of classified information are explicitly reserved to Member States.

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WHISTLEBLOWING IN THE EUROPEAN UNION:
A NEW DIRECTIVE TO PROTECT CITIZENS, DEMOCRACY AND RULE OF LAW

Principle 19: Extradition

The Directive aims to establish a common base level of whistleblower protection within the EU, particularly given the operation of the Single Market across national borders. The Directive is silent on the issue of extradition.

Principle 20: Financial rewards

The Directive makes no provision for financial awards for whistleblowers.

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Legal Situation: Germany – Labor Law

- 2001: a Basic Right to exercise civic rights (to report to authorities)
- Loose obligation to report breaches internally first can be included in the contract
- Duty of good faith for employees to first report internally & to report significant events inside the company to the employer and to prevent damages
 - External Whistleblowing can be a breach of contract
- Ruling of the European Court for Human Rights: Right to report to the authorities
- Internal institutions or monetary awards to prevent external WB

Legal Situation: Germany – Criminal Law

Criminal Code:

- Knowingly reporting false information: §§ 134d, 164, 188ff.
- Illegal obtainment § 202a
- Information within a confidentiality agreement: § 203

Legal Situation: Germany – Criminal Law

- April 2019: Geschäftsgeheimnisgesetz = Business/Trade Secrets Act
 - Civil liability and remedies
 - Trade secret: confidential information with a commercial value which is subject of appropriate security measures and in which the company has a legitimate interest to keep secret
 - § 23: Criminal offense to obtain and disclose trade secrets to third party under certain motives
 - § 5: Justification if disclosure is able to protect common public interests
 - Not all persons included = Violation of EU-Directive?
- Co-perpetrators § 46b Criminal Code: mitigation of sentence

Legal Situation: Germany – Draft Bill on Corporate Sanctions Act

- 2019: draft bill by Federal Ministry of Justice and Consumer Protection
- Severe sanctions to companies for corporate criminal offenses
- Regulations on internal investigations, compliance management, legal privilege
- No whistleblower protection

Conclusion and outlook

- Still inconsistencies and gaps in protection of whistleblowers
- Violations of Union Law?
- No real incentives
 - Especially not for external whistleblowing
 - Maybe monetary awards by state or companies?
- Advisable for companies to implement internal whistleblowing systems
- Qui tam

Without whistleblower protection

