Position paper on the national implementation of the Directive for the protection of persons reporting on breaches of Union law ("Whistleblowing Directive")

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21/08/2019, updated 21/10/2019

On October 7th, 2019, the European Union adopted the "Directive for the protection of persons reporting on breaches of Union law [...]" (hereinafter referred to as the Whistleblowing Directive; WBD). The declared aim of this directive is to better protect whistleblowers throughout the European Union and to significantly improve the structural framework for whistleblowing in both private and public organisations. The following position paper outlines, which legislative steps will be necessary in the next two years, in order to achieve this goal and to successfully take advantage of the opportunity to regulate whistleblowing in a coherent and practically effective manner.

1. Broaden the scope of the Directive to cover breaches of national law

- Situation: The material scope of the Whistleblowing Directive (WBD) is limited by the competences of the European Union and covers only the notification of breaches of certain European legal acts and their national implementation in limited fields of law, Art. 2 WBD.

- Recommendation: While implementing the Directive, it's scope shall be extended comprehensively to national regulatory situations, which in any case should include criminal offences and corporate fines within the meaning of § 30 of the German Code of Administrative Offences (OWiG). In accordance with § 5 of the German Law on the Protection of Trade Secrets (GeschGehG), other wrongdoing, the reporting of which is in the general public interest, should also be protected.

- Reasons: As the Directive itself emphasises, the fragmentation of protection standards is a major obstacle to the effective protection of whistleblowers, so that a consistent extension to national areas of law makes sense for all parties involved, Art. 2 (2) WBD, Recital 5 WBD.
Research and international experience have shown that a consistent scope of application and the resulting legal certainty are a central criterion for the success of whistleblowing laws.
There is no obvious reason why whistleblowers should be protected in the context of European law, but a significantly lower and more ineffective standard should apply in the case of violation of national standards.

2. Enhancement of external public whistleblowing authorities

- Situation: The Directive recognises the adequate organisation of and resources for the national public authorities as an essential success criterion, but mostly leaves the concrete implementation to the Member States, Art. 10, 11 WBD.

- Recommendation 1: For implementing the requirements of the Directive, the national whistleblowing authorities shall be organized as effective as possible and must be provided with sufficient funds.

- Reasons 1: Studies and experience show that an effective organisation of the whistleblowing authorities is of central importance for the success of a whistleblowing law. At the same time, whistleblower-friendly external reporting channels enter into fruitful competition with internal reporting channels, which are optimised all the more the higher the probability of external reporting is. For good reason, the Directive does not provide for a hierarchy between internal and external whistleblowing (Art. 10 WBD) in order to allow the whistleblower himself to choose the appropriate addressee and to create incentives through effective external channels to create actually effective internal channels (cf. Art. 7 (2) WBD).

- Recommendation 2: The authorities should be given additional powers and protective functions, namely the power to issue interim anti-discrimination orders in favour of the whistleblower.

- Reason 2: For an effective collaboration between the whistleblower and the authority, the latter must be able to support the whistleblowers significantly and, in particular, protect them from acute discrimination by their employer. Synchronising the interests of the whistleblower and the authority provides mutual incentives for collaboration in favour of the detection of breaches while at the same time protecting the whistleblower from the threat of retaliation.

- Recommendation 3: The protection of confidentiality must be guaranteed in the best possible way by whistleblowing authorities. To this end, it should be straightened out that the whistleblower's identity can only be passed on in very exceptional cases and that the whistleblowing authority, as a specialised contact point, is generally the only institution that holds personal information about the whistleblower.

- Reasons 3: Confidentiality is the basis of effective collaboration and an essential building block for effective prevention of personal disadvantages of the whistleblower. If this protection is not ex ante predictable and robust in content, whistleblowers will potentially refrain from a possible report or will only report anonymously, as is already the case with existing state reporting channels.

3. Expansion of internal reporting channels in favour of internal supervisory bodies

- Situation: The internal whistleblowing channels to be established in accordance with the Directive are directed at the respective organisation as a whole and are therefore subordinated to the respective management, Art. 8, 9 WBD.

- Recommendation: For organisations with an internal supervisory body, e.g. the supervisory board of a stock corporation, an isolated reporting channel shall be established through which the whistleblower can address the supervisory body directly and without the management body having any influence.

- Reasons: Internal reporting systems have often failed if, in the case of particularly serious infringements and criminal offences, it was to be assumed that the management level of the respective organisation was also involved. At the same time, over 90% of whistleblowers prefer internal reporting channels for reasons of loyalty. In order to encourage whistleblowers to make internal reports, especially in cases of legal violations at management level, and to counter justified fears of retaliation and obfuscation, the whistleblower must be provided with an internal reporting addressee who is independent of the management level.

4. Anonymous reporting:

- Situation: The Directive leaves it to the Member States to decide whether internal whistleblowing channels and external whistleblowing authorities should accept anonymous reports and follow them up, Art. 6 (2) WBD.

- Recommendation: Irrespective of the existence of a specifically anonymous reporting channel, both internal and external whistleblowing bodies should in any case be obliged to carry out obligatory investigations following (nevertheless) anonymous reports.

- Reasons: Experience has shown that whistleblowers frequently use anonymous reporting channels as a method of first contact, especially but not only in the case of internal organisational channels, in order to build trust in the respective reporting addressee and only disclose their identity in the course of further investigations. Especially in the case of significant breaches and the whistleblower's accompanying high interest in protection, there is a particular need for anonymous reporting options. European law already partly takes this into account by, e.g. by requiring the establishment of anonymous reporting channels to combat money laundering offences, Art. 61 (3) Anti Money Laundering Directive 4 (AMLD4).
If a whistleblowing body receives a plausible anonymous report with considerable evidence of relevant breaches, there is no good reason why it should be free not to deal with this report and not to initiate any further investigation.

5. Further support measures

- Situation: The Whistleblowing Directive emphasises the particular importance of the provision of further resources to support whistleblowers by governmental and non-governmental actors, Art. 20 WBD, Recital 89, 99 WBD.

- Recommendation: The Federal Republic of Germany should facilitate a support fund for whistleblowers, from which the advice and support of whistleblowers as well as the compensation of personal disadvantages can be provided.
Among other options, the funds could be taken from penalty payments and administrative fines made to the state on the basis of successful whistleblowing cases.

- Reasons: Whistleblowers are often confronted with serious professional and private consequences during and after their reporting, which cannot be sufficiently mitigated by the individual pursuit of claims for damages. Further support for the provision of legal, psychological and compensatory services in particular are therefore useful and necessary.

6. Systematic integration into the German legal system

- Situation: The Whistleblowing Directive consists of different regulations in different fields of law, which must be incorporated into existing German regulatory systems in order to function smoothly.

- Recommendation 1: The Whistleblowing Directive should be implemented in a uniform Whistleblowing Law.

- Reasons 1: The Whistleblowing Directive contains provisions in different areas of law which are, however, often interlinked and refer to each other (cf. Art. 6 para. 1 b) WBD), so that a uniform presentation in an independent law makes sense. At first glance, an individual allocation of the individual provisions to their respective individual legal areas through an omnibus bill would offer the advantage of an unmistakable allocation within the overall legal system. However, such a fragmentary allocation would be at the expense of the comprehensibility of the regulations from the perspective of the individual whistleblower and other affected addressees of the norm and could therefore have a negative effect on the intended success of the law.

- Recommendation 2: Protection against retaliation pursuant to Art. 6, 19, 21 WBD should be harmonised with the existing provisions of the German Equal Treatment Law (AGG).

- Reasons 2: With the AGG, Germany has a system of anti-discrimination law that has been tried and tested for several years and substantiated by relevant case law. References to the AGG in the anti-discrimination part of a future whistleblowing law will create a legally coherent and predictable level of protection so that legal uncertainty and unnecessary litigation can be avoided.

- Recommendation 3: Internal whistleblowing channels and their ability to function should be taken into account as an explicit criterion in the assessment of company fines.

- Reasons 3: In order to ensure that companies actually set up and design their internal reporting channels effectively, the existence and practical effectiveness of internal whistleblowing channels should be taken into account as criteria in the assessment of corporate fines, e.g. on the basis of § 30 OWiG. This would create flexible incentives for compliance with the law and independent optimisation of internal whistleblowing offices and would be in line with existing tendencies in German sanctioning practice.

7. Meaningful specification of ambiguous requirements of the Directive

- Situation: The Whistleblowing Directive contains elements open to interpretation, some of which are deliberately and some unconsciously left to the concrete implementation of national transposition laws.

- Recommendation 1: It shall be made clear that it is not sufficient for the refutation of the presumed connection between whistleblowing and discrimination that additional motives are put forward by the employer which, in addition to whistleblowing, are said to have contributed to the disadvantageous measure.

- Reasons 1: In contrast to the Commission proposal, the newly formulated text of the Directive does not make it clear that whistleblowing need not be the sole or determining factor of a discriminatory measure in order to classify as unlawful. However, this is precisely what is necessary in order to prevent disadvantaged employers from invoking pretended reasons and thereby undermining whistleblower protection. Only such a contributing factor test would be in line with internationally whistleblowing standards.

- Recommendation 2: The requirement of “reasonable grounds to believe” in a breach of law (Art. 6 (1) a) WBD) shall be translated with the German term "guter Glauben".

- Reasons 2: The use of the standard of guter Glauben, which has long been established in German law, ensures that in the formation of the required standard the previous court rulings can be systematically and coherently applied. Therefore, the use of exaggerated ex-post assessments of the reasonableness of the assumption of a violation of the law would be avoided. The fact that the German version of the text of the Directive refrains from using the concept of guter Glauben, which is actually appropriate in terms of content, is solely due to the fact that the apparent sister concept of "good faith" in the English legal tradition implies the examination of motives, which should precisely be avoided in this context.

- Recommendation 3: It should be made clear that the criterion of reasonable grounds to believe in a breach also refers to the admissibility of the procurement of information in accordance with Art. 21 (3) WBD.

- Reasons 3: In Art. 21 (3) WBD, the Directive also permits the procurement of information even if this violates the terms of the respective employment contract or other rules) as long as this does not constitute an independent criminal offence. So far, the standard of reasonable grounds to be believe in a breach explicitly refers only to the actual and legal existence of a breach (Art. 6 (1) a) WBD) and the necessity of the scope of the concrete information passed on for the detection of the breach (Art. 21 (2) WBD). However, the regulation of further relevant aspects is left to the member states (Recital 94 WBD). Since whistleblowers are not in a position to assess beyond doubt in advance whether the procurement measures they carry out exclusively reveal relevant information, a subjective standard of reasonable grounds must also apply here in order to prevent sanctions for alleged breaches of duty.

Recommendation 4: The provision of Art. 15 (1) a) WBD on the admissibility of public disclosure should be extended to the effect that the insufficient investigation or prosecution of a reported breach is also sufficient as a reason for disclosure.

Reasons 4: Until now, whistleblowers are only allowed to address the public pursuant to Art. 15 (1) (a) WBD if internal and external whistleblowing bodies have not taken appropriate measures within the given period of three or six months. However, there is also a legitimate interest in disclosure if (investigative) measures have been taken within the time limit, but for reasons that are not clear or have not been communicated, they have not been concluded or have been concluded only inadequately.

Recommendation 5: It shall be stated clearly that whistleblowers enjoy full protection against discrimination even if their information is addressed to a body other than those expressly mentioned, provided that they could assume on reasonable grounds that that body is also capable of resolving the situation.

Reasons 5: According to the text of the Directive, the consequences for whistleblowers who turn to an internal body other than the internal whistleblowing channels or to an external authority other than the intended whistleblowing authorities are unclear (cf. Art. 11 (6), 12 (3) WBD on the one hand, Art. 10, 21 (2) WBD on the other). However, it is in line with the spirit and purpose of the Directive as well as with the legitimate interest of whistleblowers in protecting their interests that they are not completely unprotected solely because they have turned (possibly by mistake) to another addressee who is suitable but not expressly named.