

CLIENT ALERT

German Government Adopts Draft Whistleblower Protection Act

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Eight months following the expiration of the transposition period, the German government has adopted the Draft Law for a Better Protection of Whistleblowers (the “**Draft Law**”). The Draft Law is set to implement the EU Whistleblower Directive ((EU) 2019/1937; the “**Directive**”) into German national law. The Draft Law will now proceed through the legislative process. Significant changes are not expected.

Aiming to encourage individuals to report illegal conduct in their professional environment while effectively protecting such individuals (“**Whistleblowers**”) from adverse consequences, the Draft Law provides for the following key mechanisms:

- The protections afforded by the Draft Law apply to the employees of the respective company, its shareholders, self-employed workers and employees of suppliers.
- The Directive requires protection for Whistleblowers reporting on breaches of European law in certain areas. The Draft Law addresses the same areas in terms of subject matter (including anti-money laundering, product and road safety, consumer and environmental protection, etc.) but does not distinguish between breaches of European and German law. In addition, the Draft Law offers protections for reporting on criminal offenses (without limitation as to the type of crime) and on a broad set of administrative offences. In this respect, the Draft Law exceeds the minimum requirements of the Directive. However, the scope of application of the German Draft Law is narrower than, for example, the respective French regulation implementing the Directive, which affords Whistleblower protections for any reports of harm to the public interest, irrespective of a breach of a law or regulation.
- Companies with 50 or more employees must set up “internal reporting offices” that Whistleblowers can turn to in strict confidence. The internal reporting office may either consist of one or more individuals employed by the company, or a third party commissioned for this purpose. Companies with 50 to 249 employees may establish a joint internal reporting office together with other companies in the same size category. These companies do not need to set up internal reporting offices before December 17, 2023. Companies with 250 or more employees need to do so as soon as the Draft Law comes into effect, which will be three months following its publication in the German Federal Gazette. It is possible to designate a central internal reporting office within a group of companies (e.g., at the parent company for all subsidiaries).

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- The federal government, the states and certain agencies are called upon to establish so called “external reporting offices” for Whistleblowers wishing to contact someone outside of their organizations.
- Whistleblowers shall primarily report to either the internal or external reporting offices. They are free to decide between these options. Whistleblowers who disclose information to the public are protected by the Draft Law only in exceptional circumstances, *e.g.*, in case they made a report with an external reporting office but no timely action was taken or in case the Whistleblower was acting under the legitimate assumption that the breach they are disclosing is generating a risk of irreversible harm or endangerment of the public.
- Whistleblowers who made a report to an internal or external reporting office or legitimately disclosed information to the public are protected from repressive measures against them as a result of such reporting. The prohibition of repressive measures is not limited to the Whistleblower’s employer but instead extends to anyone. If repressive measures are taken in connection with the Whistleblower’s professional activity, it is upon the person imposing such measures to prove that the measures are not based on the reporting, but on other duly justified grounds (this represents a reversal of the burden of proof). Whistleblowers are entitled to compensatory damages in case the person that imposed the measures cannot show that it acted for other legitimate reasons.
- Whistleblowers cannot be pursued for obtaining the information they reported unless they obtained the information by committing a criminal offense. Likewise, a Whistleblower is not liable for violating a confidentiality obligation (*e.g.*, arising from an NDA) if the Whistleblower legitimately believed that it had to disclose the information to report a breach.
- Violations of the Draft Law can result in administrative fines up to EUR 100,000. These are in addition to potential civil law damages.
- The Draft Law will enter into effect three months after its publication in the German Federal Gazette, which may be as early as late Fall 2022.

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