I KNOW WHAT YOU DID LAST SUMMER

Whistleblowing in the European Union and German Employment Law Arena

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INTRODUCTION

Wikileaks, LuxLeaks, Dieselgate and Cambridge Analytica have recently become prime examples of so-called "Whistleblowers." The European Union has now followed up on the increasing number of whistleblower cases and, after a long debate, issued the "Directive on the protection of persons who report breaches of Union law" (*Directive*). This article will first outline the current situation in Germany, followed by a comparison with France and the United Kingdom, and finally examine the changes for Europe resulting from the Directive in more detail.

WHERE ARE WE WITH WHISTLEBLOWING IN GERMANY TODAY?

To put citizens' jobs at risk, in order to prioritize disclosure of misconduct and breaches of the law in the public interest may appear honorable and selfless. In Germany, however, individuals coming forward as whistleblowers are by no means treated in such a way. Quite the opposite: for whistleblowers, dismissal and other sanctions including "blacklisting," being condemned by colleagues, bullying, and being passed over for promotions are strong deterrents/real threats. Why? Because Germany, like many other European Union (EU) Member States, has not yet implemented an effective legal mechanism to protect whistleblowers from such sanctions. Instead, even rulings from the Federal Labor Court declare such terminations as lawful in lawsuits against illegal termination. A mere internal disclosure to the employer, who may or may not take the necessary measures, is thereby given priority over the involvement of the competent external authorities. In doing so, the courts regularly classify the employee's interest in external whistleblowing as secondary to the employer's interest in confidentiality. Protection of the "sacrificed" employee, who puts the interests of the community above his own, should look different.

WHAT ABOUT FRANCE AND THE UNITED KINGDOM?

Comparing the legal situation in France or the United Kingdom with the legal situation in Germany, shows that Germany is trailing behind when it comes to whistleblower protection.

France enacted an extensive set of regulations for the protection of whistleblowers as part of an anti-corruption law only recently, in 2018. The main goal was to improve the standard of protection and encourage reporting of misconduct, which has thus far been very limited due to fear of retaliation. Now, every company with more than 50 employees must set up a system for dealing with whistleblowers. Nonetheless, the procedure for whistleblowers is strict: a disclosure must initially be made to the supervisor internally and only once the internal disclosure proves ineffective, to an external authority.

The United Kingdom has also regulated the treatment and protection of whistleblowers with the Public Interest Disclosure Act1998 (the *Act*), which covers most workers in the public, private and voluntary sectors. In summary, the *Act* protects employees from detrimental treatment and retaliation from their employer after reporting wrongdoings. The *Act* contains

provisions on the regulatory body for disclosures, the type of disclosures protected and the procedure that follows afterwards. The government also provides advice and guidance through informational websites and brochures for potential whistleblowers.

WHAT DOES THE EUROPEAN WHISTLEBLOWER DIRECTIVE COVER? WHAT IS ITS IMPACT IN THE FUTURE?

In essence, the content of the *Directive* can be divided into three key regulations:

- Regulation of the reporting procedure;
- Establishment of reporting channels; and
- Protective measures and prohibition of repressive discrimination and sanctions (retaliation).

1. In order to be protected under the Directive, the whistleblower must follow a certain reporting procedure: First, she/he must either use the internal reporting channels within the company (see 2.) or contact the responsible authority externally. Public disclosure through media or press is the last resort. It is only an option if no suitable measures have been taken within a maximum period of 3 or 6 months, if there is a threat to the public interest or if there is a risk of reprisals when using the reporting channels.

2. Another key provision to ensure an effective reporting mechanism is the establishment of reporting channels. Art. 8 of the Directive directs companies with 50 or more employees to set up internal reporting channels and ensure certain procedures. In doing so, confidentiality, transparency, feedback within a certain period and subsequent follow-up measures must be ensured. The same principles also apply to the external reporting channels provided by the regulatory authorities.

3. As part of the protection measures for whistleblowers, Member States have to provide access to support measures (e.g. advice and effective assistance from competent authorities) and measures to protect against retaliation and sanctions (e.g. protection against liability for the procurement of information). Additionally, EU Member States need to ensure that retaliations or the threat of such are prohibited by means proportionate and dissuasive penalties.

These key regulations will lead to some significant changes for whistleblowers in Germany in terms of protection against unlawful termination and the compliance responsibility of public listed companies' management boards.

Due to the new reporting system, an employee will now enjoy protection against unlawful termination even if she/he contacts the responsible external authority directly, instead of only reporting internally first. This is due to the fact that internal and external reporting channels are classified on the same level under the *Directive* (see above)"

In the future, public listed companies could be obliged to set up a whistleblower system regardless of the number of employees. In this respect, Art. 8 of the Directive allows EU Member States to make an exception regarding the minimum threshold of employees (50 or more) for companies exposed to a special risk. Thus, the management board's decision, whether to establish a whistleblower system, would no longer be a discretionary one, but would be a legal obligation.

IMPLEMENTATION IN GERMANY

Although the *Directive* is a step in the right direction, it is rather fragmentary, as it only applies to violations of European Union law, not the national law of each EU Member State. As a consequence, the Directive does not cover the disclosure of breaches of national law. Notwithstanding this, national lawmakers can decide to implement the Directive extensively and regulate the disclosure of violations of national law accordingly. This is certainly required for effective protection of whistleblowers: for non-lawyers, the difference between a violation of EU law and national law is often difficult to identify - not to say it is impossible. Additionally, extensive implementation to cover breaches of national law is necessary in order for Germany to stay competitive internationally. Due to the still ongoing lawmaking process, it is not foreseeable whether Germany will decide in favor of an extensive implementation as described above.

WHAT NOW? - AN ACTION PLAN FOR COMPANIES AND THEIR EXECUTIVES

Many companies will ask themselves this question and wonder what to do with the new European whistleblower framework. Many businesses with ties to the U.S. may already have a whistleblower system in place, due to whistleblower legislation in America. Of course, these are not necessarily identical with the new EU *Directive* and require additional action. The following checklist can help identify where companies stand:

• Implementing the defined internal whistleblower system and reporting channels is a must

Those channels must be easily accessible and completely confidential. The best way to achieve this is through in-house trainings for managers who will deal with or are typically be in touch with whistleblower reports (supervisors, HR). Such an internal system can also reveal many benefits: Staff will be more likely report through easily accessible internal channels, rather than involving external authorities. This way companies can avoid external inquiries and conduct the investigation internally.

• Follow-up measures and deadlines

Companies need to confirm receipt of a whistleblower report within one week and must provide feedback on the report within 3, maximum 6 months. Should companies remain inactive or refuse to carry out follow-up measures, the whistleblower would be free to make the disclosure public.

• Comprehensive documentation

It is crucial for companies to document the reporting procedure thoroughly to prove that any termination or missed promotion or other sanction is not connected to the whistleblower report and therefore cannot be labeled as retaliation.

CONCLUSION

The new EU whistleblower *Directive* gives the much-needed push towards a uniform whistleblower protection in the EU. While the issue of an extensive implementation by national lawmakers is unresolved, companies with operations in the EU should nevertheless prepare themselves for an extensive implementation into the national laws of EU Member States. We recommend using the time until December 17, 2021 (deadline for implementing the *Directive* into German law), to work on the various protective measures. We recommend that even companies with existing whistleblowing systems in place review their systems and prepare for the new EU whistleblowing landscape.

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