

Webinar Hinweisgeberschutzgesetz

What is required on an international level?

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Agenda

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- 02** | Scope of National Laws
- 03** | Composition of the Whistleblower Office

- 04** | Group-wide implementation
- 05** | Remarkable Country Specifics

Main Purpose of the Directive

01

Prohibition of Retaliation

Retaliation against persons providing information are prohibited.
This also applies to the threat and attempt of reprisals.

Protection of Identity of Whistleblower

Both the person providing the information and - to a lesser extent - the other persons involved (victims, witnesses) enjoy strict protection of their identity.



Content of the European Directive

01

Scope of the Directive

The Directive only provides that the violation of certain European legal provisions such as data protection, European anti-corruption and AML related offences is protected;

Member states are of course allowed to extend whistleblower protection also for reporting violations of national law.

Whistleblower Office

Companies must ensure that a whistleblower office is established within the company that is competent for receiving the whistleblower reports.

The staff at this office must be independent and they must keep the identity of the reporting person and third parties concerned by the report confidential



Reporting Channel

Member States must ensure that companies with 50 or more employees must establish internal reporting channels for whistleblowers. Companies with less than 250 employees can share reporting channels and whistleblower offices.

Competence of Whistleblower Office

Companies with up to 250 employees can share whistleblowing offices and reporting channels.

According to two statements of the European Commission this will also apply to group companies meaning that corporations with more than 250 employees must always have their own reporting channel and whistleblower office

Scope of the National Laws

Austria

The scope of application was extended to also include certain **criminal bribery and corruption offenses**.

However, any violations of **labor law**, which are very relevant for practice, are **not included**.

The Austrian law does **not distinguish between violations against EU or national law**. This eliminates difficult delamination questions.

A **voluntary extension** remains of course possible (disclaimer!).

France

Material scope: In addition to the EU provisions, French law includes reporting of any information relating to a crime, a misdemeanor, a threat or harm to the general interest, a violation or an attempt to conceal a violation of (i) an international commitment duly ratified or approved by France, (ii) a unilateral act of an international organization taken on the basis of such a commitment, (iii) the law or the regulations.

Personal scope: Similar list and similar definition as compared to the Directive.

Conditions for protection: good faith, no direct financial consideration. WB may or may not have obtained the information in the course of **professional activities**. If the information was not obtained in the course of professional activities, WB must have had personal knowledge of it.

Germany

The scope has been widened compared to the Directive

In addition to the EU provisions German law also includes reporting of **any violation of criminal law and violations of administrative offences**, the latter insofar as the violated provision serves to protect life, limb or health or to protect the rights of employees.

This leads to some incoherences, e.g. that reporting of **sexual harassment** is only protected when made with physical contact.

Spain

Spanish law **broadens** the **material scope** of application, including reports of any violation of criminal law and severe or very severe administrative offenses.

It also extends the personal scope of application, including **workers' representatives**.

Political parties, trade unions, employers' organizations and its foundations must also establish internal reporting channels.

Private companies that voluntarily establish reporting channel must stick to the law.

Composition of the Whistleblower Office

03

Austria

WB-office must be provided with the **financial and personnel resources** necessary to perform their duties.

Companies must ensure

- that the WB-office may act **independently** from any directions of the management but also **impartially** and **without bias**,
- that the **confidentiality** of the identity of the WB and third parties mentioned in the report is maintained,
- assignment of **follow-up measures**.

France

Internal and external whistleblowing procedures must identify the person(s) or department(s) designated by the entity to receive and deal with reports.

The designated persons or departments must have sufficient **competence, authority** and **resources** to carry out their duties. The procedure must provide guarantees of **impartiality** in the performance of their duties, and of the **integrity** and **confidentiality** of the information gathered.

The procedures prohibit access to confidential information to employees who are not designated as being responsible for the collecting and processing of the reports.

Germany

Persons entrusted with receiving reports must be **independent** and **not subject to directions of the management**.

They are bound to **confidentiality** with respect to the reporting person and concerned third parties; The identity of the whistleblower may only be disclosed to third parties if the whistleblower **agrees and** a strict need to know policy is applied.

It is therefore advisable to have **side letters to the employment contract** of the staff members granting independence.

Spain

The appointment and dismissal of the person in charge of the reporting channels and the following-up of reports (Reporting System Manager) shall be decided by the administrative body and **notified to the Independent Whistleblower Protection Authority**. The Reporting System Manager may be an individual or a collegiate body.

H/S must be an **independent** senior staff person, who may not receive instructions of any kind and must be provided resources enough.

Group-wide Implementation

04

Austria

The Austrian law explicitly provides for the possibility of a **central whistleblowing system for corporate groups**.

It is **not required** that the internal system is **set up in an Austrian entity**.

Companies should ensure their WB-system is **easily accessible** and designed to **maintain confidentiality** of the WB as well as the **integrity of the investigation**.

Outsourcing to third parties (e.g. lawyers) **possible**.

France

The procedure for **collecting and processing reports** may be common to several or all of a group's entities, subject to various thresholds imposed by the concerned regulation.

Regarding **internal reporting channels**, reporting channels may be provided externally by a **third party** (i.e. physical person or entity in the private or the public sector, with or without legal personality).

Germany

The law allows any **third party** to be entrusted with the task of an internal whistleblower office.

This can also be another group company (e.g. parent company).

Usually, a **contractual relationship** between the group companies regulating the capacity for running a whistleblower office for a subsidiary will be necessary.

Unclear: **joint responsibility** or commissioned **data procession**.

Spain

In a corporate group the **parent company** may approve a **general policy** concerning the internal reporting system and the protection of reporting persons.

The Spanish law sets out the **possibility to have a single internal reporting system** and a single Reporting System Manager for a group of companies.

When the reporting channel is managed by a third party it is considered as data processor.

Remarkable Country Specifics

05

Austria

The Austrian Law **concretizes the "need-to-know" principle under data protection law** to protect whistleblowers and punishes violations with high fines.

Anonymous reports do **not** have to be permitted; if they are permitted, the system must be designed in such a way that **anonymous two-way communication is possible**.

Clear rules for **document and data retention** (e.g. period for deletion for personal data).

France

As indicated, **material scope substantially wider** than in the Directive.

Information reported may have been obtained **outside professional activities**, provided that the WB has personal knowledge of such information (no hearsay).

Detailed provisions as to the compulsory contents of the procedure for collecting and processing reports.

Germany

The whistleblowing office must also follow **anonymous** leads; there is, however, no obligation to design the whistleblowing channel in a way that it allows anonymous reports.

Allowing anonymous reports will be **recommendable** though, for general compliance principles require to follow up on anonymous leads if they are specific enough.

In addition, companies should have their channels **attractive for anonymous whistleblowers** so that they will not turn to external channels provided by law enforcers.

Spain

The Spanish law imposes the obligations to immediately **forward the information to the Public Prosecutor's Office** when the facts could be indicative of criminal offenses.

Internal whistleblowing channels should allow the submission and investigation of **anonymous** reports.

The Spanish law includes an entire title on **data protection** (lawfulness of the treatment, information to data subjects, etc.).

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