

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

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## Abstract

*The protection of Whistleblowers is a challenging issue in Germany. Unlike the United States, Germany does not have a tradition of cooperation between law enforcement agencies and private whistleblowers, at least it isn't positively connoted. On the contrary, memories of the "Gestapo" and "Stasi" seem to lead to a reluctance to use the relevant information. Even after the introduction of the "Law for the Protection of Trade Secrets" and the government's draft of corporate criminal sanctions, no radical change can be foreseen. In particular, no structured regulation on how Whistleblowers could be protected and what incentives could be given to them is to be expected. The first law already pursues a different aim in its name and only provides a very limited safe harbor rule, the new draft even leads to a restriction of the seizure protection regarding Whistleblower hotlines. Targeted incentives or even financial participation of Whistleblowers in the success of the investigations seem to remain alien concepts to the German legislator. At the same time, this means that European regulations are merely being implemented inadequately.*

*Der Schutz von Whistleblowern ist ein schwieriges Feld in Deutschland. Anders als in den Vereinigten Staaten existiert keine Tradition einer Zusammenarbeit von Strafverfolgungsbehörden mit privaten Hinweisgebern, jedenfalls keine positiv konnotierte Tradition. Im Gegenteil scheinen Erinnerungen an „Gestapo“ und „Stasi“ eher zur Zurückhaltung bei der Verwertung entsprechender Erkenntnisse zu führen. Auch nach Einführung des „Gesetzes zum Schutz von Geschäftsgeheimnissen“ und in Kenntnis des Regierungsentwurfs eines Verbandssanktionen lässt sich keine durchgreifende Änderung erwarten. Insbesondere ist keine strukturierte Regelung, wie Whistleblower zu schützen und welche Anreize ihnen zu geben sind, zu erwarten. Das erste Gesetz verfolgt bereits seinem Namen nach eine andere Zielrichtung und hält lediglich eine sehr eingeschränkte Safe-Harbour-Regelung bereit, der Entwurf führt sogar zur Einschränkung des Beschlagnahmenschutzes von Whistleblower Hotlines. Gezielte Anreize zu setzen oder die Whistleblower gar finanziell am Erfolg der Ermittlungen zu beteiligen, scheinen dem deutschen Gesetzgeber weiterhin fremde Konzepte zu bleiben. Damit werden zugleich europäische Vorgaben nur defizitär umgesetzt.*

## I. Introduction

Germany, a wasteland for whistleblowers. Granted, there have been some attempts to promote whistleblowing in German legislation. But they failed the whistleblowers requirements. Of course, whistleblowing has become more and more relevant in the past few years and its controversy has also reached Germany. The whistleblower does face risks like termination, suspension, discrimination, exclusion, blacklisting and threats or maybe even criminal liability.<sup>1</sup> Whistleblowing is an act “on the border between illegality and legality”.<sup>2</sup> The uncovering of unwanted conduct however is of course generally in the public interest and whistleblowing therefore desirable behavior. That is why it is necessary to protect the whistleblower so that he or she is not already put off by the legal situation alone and simultaneously give incentive. However, organizations have an opposing interest to keep confidential information confidential. Hence the state must find a sensible balance between the protection of whistleblowers, public interests and confidential information.

This *article/lecture* will give an overview on “whistleblowing” and its legal implications in Germany. In parallel it analyzes why there is no whistleblowing-culture in Germany and argues to introduce it into the legal system and into compliance practice.

## II. Terminology

### 1. The Act of Whistleblowing

Whistleblowing is generally defined as “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”<sup>3</sup> or, simplified, as “any time an employee complains of illegal, unethical or otherwise harmful or inappropriate conduct by an employer”<sup>4</sup>.

The organization of which the whistleblower is part of can be any civil company or association, but it can also be the state or rather any government agency.<sup>5</sup> It is not relevant for the terminology whether the act is executed openly or anonymously.<sup>6</sup>

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<sup>1</sup> Granetzny/Krause, CCZ 1/2020, 30.

<sup>2</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 21.

<sup>3</sup> Near/Miceli, in: Journal of Business Ethics 1985, 1.

<sup>4</sup> Berkowitz/Tusk/Downes/Caroline, in: Employee Relations Law Journal, Vol. 36, No. 4, Spring 2011, 16.

<sup>5</sup> Schenkel, Whistleblowing und die Strafbarkeit wegen Geheimnisverrats, 2019, pp. 13 f.

<sup>6</sup> Casper, in: FS Winter, 2011, p. 77 (78).

## 2. The whistleblower

But: Is anyone's disclosure of (every) wrongdoing gripped by the definition? As implied before, there generally is consensus that the whistleblower can only be someone from inside the organization in question. This means that he or she must be familiar with the structure of the organization specifically because of their relationship with it and therefore have access to internal information which isn't public knowledge.<sup>7</sup> This should be interpreted broadly because the important factor is the access to internal data, which is why even former employees (as long as they learned of the conduct during their employment)<sup>8</sup>, lawyers and accountants can be whistleblowers.<sup>9</sup>

More difficult is the classification of co-perpetrators who disclose conduct of which they know of precisely because of their participation. Generally, it would be imaginable to also classify these as whistleblowers since participation and disclosure are not necessarily mutually exclusive. But, some argue that, legally, principal witnesses have their own protective regulations (in Germany at least, see below) leading to their motivation to report the conduct mostly being the lower sentence and not the disclosure itself.<sup>10</sup> In common speech whistleblowing as well is associated with an "altruistic motivation" or at least only then is considered acceptable.<sup>11</sup>

It is debatable, however, whether the motivation of the disclosing person is really relevant for the classification and, moreover can be generalized and objectively distinguished merely by the fact of participation.<sup>12</sup> The recital point 32 of the EU-directive to protect whistleblowers (see below) for example explicitly makes the point of the motives being irrelevant. Also, the existence of regulations for principal witnesses could only indicate the mutual exclusiveness of whistleblowing and complicity if there were specific regulations to protect the same aspects for whistleblowers. But they target something else entirely: If the whistleblower wasn't part of the conduct there is no need to lower his sentence as there is none. If it's about the breach of confidence as an offence itself than the directive denied any bonification for the whistleblower in general. Of course, here is leeway for further improvement.<sup>13</sup>

Another aspect in favor of including co-perpetrators and of a broad definition overall is that whistleblowing is generally in the public interest and should be promoted in any way. Beyond that the participant is probably more credible and therefore capable to illustrate the unwanted practices.<sup>14</sup> That is why co-perpetrators should be included in the definition of the whistleblower. Of course, this raises

the question whether someone can be "whistleblowing" on himself, thus reporting a practice where he or she was the only perpetrator. This can only be affirmed as long as the disclosure has any effect on the organization or the disclosing person in terms of legal or reputational effects.<sup>15</sup>

## 3. The Subject of whistleblowing

What can be subject of whistleblowing? As specified before, whistleblowing is the disclosure of illegal, immoral, or illegitimate practices. Overall, the acknowledgment of the advantages of a relatively broad understanding of the term applies here as well. The whistleblower will often not be able to distinguish illegal from simply immoral or illegitimate practices. Also, the organizations will mostly have a similar interest in discretion, just as the public interest in disclosure will be similar.<sup>16</sup> We will, however, focus on the act of reporting illegal practices by the employer (or inside the organization) which is most relevant for the public and therefore controversial in legal aspects as well. It is also the only subject which can be defined objectively (especially in a legal context), the question whether something is immoral is mainly a subjective one.<sup>17</sup>

As such, moral shouldn't be considered as an crucial issue when it comes to decide whether somebody should be prosecuted as a traitor or praised as a truth-revealer – and public hero. Nevertheless, it might be discussed how to deal with the moral and motivation of those who try to keep facts secret or covering them by faked facts.<sup>18</sup>

However, the reported conduct doesn't have to be terminated before the disclosure: Against the background of a broad definition it only makes sense that continuing or impending practices can be subject of whistleblowing as well as illegal omissions.<sup>19</sup>

## 4. The Addressee

Generally, anyone who the whistleblower trusts and is in principle able to eliminate the disclosed conduct can be addressee.<sup>20</sup> There is, however, the following distinction to be drawn: The act of whistleblowing can be internal or external. Internal whistleblowing is the disclosure within the organization, that is to a superior, management or an in-house institution pre-installed for this purpose (usually part of the Compliance department). External whistleblowing on the other hand is the exposure of the conduct directly to law enforcement.<sup>21</sup> Of course, internal whistleblowing is preferable from most standpoints: The whistle-

<sup>7</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 3.

<sup>8</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 3.

<sup>9</sup> Schenkel, 2019, p. 14.

<sup>10</sup> Schenkel, 2019, pp. 15 f.

<sup>11</sup> Granetzny/Krause, CCZ 1/2020, 32.

<sup>12</sup> Kozak, Zur Notwendigkeit eines arbeitsrechtlichen und haftungsrechtlichen Whistleblowerschutzes, 2016, pp. 27 f.

<sup>13</sup> Veronika Nad and Naomi Colvin, Whistleblowing in the European Union: A new directive to protect, citizens, democracy and rule of law, Blueprint, 2018.

<sup>14</sup> Berndt/Hoppler, BB 2005, 2623 (2624).

<sup>15</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 8.

<sup>16</sup> Schenkel, 2019, p. 19.

<sup>17</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 6.

<sup>18</sup> Snowden, Permanent Record, 2019, pp. 108 ff., Mueller, Crisis of Conscience, 2019, pp. 463 ff., Wylie, Mindf\*ck, 2019.

<sup>19</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 7.

<sup>20</sup> Schenkel, 2019, p. 25.

<sup>21</sup> Bottman, in: Park, Kapitalmarktstrafrecht, 2019, Chapter 2.1. Rn. 44.

blower doesn't face own criminal liability and the organizations reputation and existence aren't threatened. It also makes sense to differentiate between disclosure to national or international addressees in terms of legal guidelines.<sup>22</sup>

### III. Legal Situation

*I will now go* into the legal situation that whistleblowers face in Germany. Since whistleblowing appears within the work environment it affects mainly two areas of law: labor law and criminal law. Because the German regulations are of course to a high degree influenced by directives and regulations by the European Union I will first show the status in the EU to get a comprehensive impression of the German laws and then go into detail of the labor and criminal regulations. Soon it will be clearly visible that the EU-legislation is far ahead the German legislation appearing as being reluctant in transforming the spirit of the EU-directive into national law.

#### 1. European Union

Until 2018 the European Union didn't really deal with the topic whistleblowing and the conflict of interests that go along with it. In April 2018 the Directive to protect "Persons who report breaches of Union law", so-called "reporting persons" was proposed and a year later issued. As of now the directive is only applicable to violations of Union-law (see the title and Art. 2 II), but it is expected to be transferred to national regulations following implementation (as it already partly happened in Germany, as you will see later).<sup>23</sup> In fact, as the network "whistleblowerprotection.eu." stated enthusiastically, "Santa came early" in 2019 and "the Whistleblower Protection Directive is now reality. On 16 December 2019 the directive enters into force following its publication in the EU Official Journal 20 days ago. This marks the start of a two-year period during which the Member States must implement the Directive into national legislation. This should also be a call to those who were involved in promoting the Directive in the first place to get active again to advocate for improving the national legislation in all Member States."<sup>24</sup>

In Article 4 the directive specifies to which people it applies: employees but also freelancers, shareholders, supervisors and people who work under the management of contractors or vendors. It therefore as well links the whistleblower-attribute mainly to the access to internal information.<sup>25</sup> Internal and external whistleblowing are equally protected, there is no privilege for internal whistleblowing, meaning that reporting persons can directly go to the authorities without fulfilling special requirements for protection.<sup>26</sup> Concerning labor law, the directive newly regulates that the burden of proof concerning discrimination of whistleblowers who are still employed after the fact lies with the employer: They need to prove that disadvantages

are not connected with the reporting of the conduct.<sup>27</sup> A negative effect of this could be a factual job protection: Employees could cause this by disclosing conduct at the right time.<sup>28</sup>

Art. 8 imposes a duty for companies of a certain size (50 employees or more) to implement internal whistleblowing-systems, meaning institutions which provide the possibility to report illegal practices openly or anonymously. As mentioned before, the motives of the whistleblower do not factor in his or her eligibility for protection under the directive, see recital point 32. This can be criticized as also protecting persons who only want to damage the organization,<sup>29</sup> but as pointed out already the public interest is factually still being protected – the motives should not play a role in classifying somebody as a whistleblower (they could, however, of course be factored into their own trials, sentencing or awards – if existent).

Additionally, people or companies who try to prevent reports can be sanctioned, Art. 23 while whistleblowers themselves can't be held responsible for disclosing trade secrets in the public interest, Art. 21 II. Art. 21 III clarifies that national criminal codes won't be interfered with: Only the legal obtainment of information is protected by the directive.

On the other hand, the EU also protects the somewhat legitimate interest of organizations in confidentiality with the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (2016) which protects companies and organizations from disclosure of their confidential information.

As set into practice in December 2019 according to the principles developed by "Blueprint" the directive still has important deficits:

#### *Principle: Broad Definition of reportable wrongdoing*

A good definition of reportable wrongdoing is one that takes in many different dimensions of potential harm to the public interest. Reportable wrongdoing within the scope of the Directive is within the scope of the Directive is expansive, but limited by the EU's mandate: it can only apply in areas where Member States have previously agreed on sharing competences. By definition, this excludes important areas like national security and policing.

#### *Principle: Oversight Authority*

The Directive does not mandate the creation of an independent whistleblowing authority or tribunal. The text only suggests that advice and support for whistleblowers "may" be provided by means of an information centre or independent authority. Scrutiny of how reporting arrangements are working is, again, left up to Member States.

<sup>22</sup> Rotsch/Wagner, in: Criminal Compliance, 2015, § 34 C Rn. 11.

<sup>23</sup> Bottman, in: Park, Kapitalmarktstrafrecht, 2019, Chapter 2.1. Rn. 44.

<sup>24</sup> <https://whistleblowerprotection.eu/blog/santa-came-early-to-whistleblowers-now-the-work-starts/>

<sup>25</sup> Gerdemann, RdA 2019, 16 (22).

<sup>26</sup> Bottman, in: Park, Kapitalmarktstrafrecht, 2019, Chapter 2.1. Rn. 44.

<sup>27</sup> Art. 21 EU 2019/1937.

<sup>28</sup> Garden/Hieramente BB 2019, 963 (966)

<sup>29</sup> Garden/Hieramente, BB 2019, 963 (967).

*Principle: Waiver of liability*

The waiver of liability is a critical element of whistleblower protection, that allows individuals to report wrongdoing in the public interest, without fear of criminal prosecution or civil penalties. In general, the Directive waives legal liability for reporting persons who follow its procedures correctly. Protection is granted as long as disclosures are made in reference to the material scope of the Directive and when reporting persons had reasonable grounds to believe the information disclosed was true. Particular rules apply for reports made to the media directly. However, there is one major caveat: protections do not apply under the Directive when the acquisition of the information reported constitutes a ‘self-standing criminal offence.’ This is a problematic aspect of the Directive, which has the capacity to undermine protections in many cases.

*Principle 18: National Security and Intelligence Whistleblowing*

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

*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 – Qui Tam*

The Directive makes no provision for financial awards for whistleblowers.<sup>30</sup>

*2. Germany*

In general, protection of whistleblowers is viewed with a certain skepticism in Germany: The history with the GDR and the Third Reich makes people cautious concerning surveillance by the government or even in the private sector and denunciators are not seen in a positive light because of this background.<sup>31</sup> And it has to be kept in mind, that Europe and Germany in particular do have a completely different approach on privacy than the US.<sup>32</sup> Although there are kind of “Freedom of Information Acts” in several states principally a public interest in disclosing the particular information or data has to outweigh the interest in privacy and keeping information secret. This causes certain problems in mutual assistance e.g.<sup>33</sup>

*a) Labor Law*

In 2001, the Federal Constitutional Court of Germany ruled that anyone has a basic right to exercise civic rights (to report to authorities) in the context of external whistleblowing.<sup>34</sup> To protect the public interest in transparency and an effective criminal justice system, employees that disclose (even wrong) information can therefore only limited be threatened with consequences under labor law, especially termination.<sup>35</sup> Of course there are several important interests of all involved parties that need to be balanced: The interest of the employer in loyalty and secrecy as part of professional freedom,<sup>36</sup> the interest of the public in the uncovering of violations,<sup>37</sup> and of course the freedom of speech and the exercise of the civic right of the employee.<sup>38</sup>

To achieve this balance the highest German court for Labor law has formed a few criteria to judge a whistleblowing employee which I will now briefly illustrate.

Generally, a loose obligation to report breaches internally first as soon as found out can of course be included in the contract.<sup>39</sup> Apart from that (if it’s not explicitly part of the contract), the court recognizes a duty of good faith for employees to first report the violation internally before going to the authorities,<sup>40</sup> and generally to report significant events inside the company to the employer and to prevent damages to it.<sup>41</sup>

It can of course be shaped how and to whom the disclosure is supposed to happen or to implement an institution within the company (eg Hotline). Because of this duty, the employee has to try and resolve things internally as long as this is reasonable (which it isn’t in case of significant crimes, crimes by the employer himself, a legal obligation to report to the authorities or a lack of follow up on an initial report).<sup>42</sup> Against this background, external whistleblowing can be a breach of contract and therefore a reason for termination.<sup>43</sup>

This was made more difficult though since a new regulation for job protection<sup>44</sup> was passed. It bases on a ruling of the European Court for Human Rights which gives employees a (limited) right to report to the authorities,<sup>45</sup> meaning that they can’t be dismissed for external whistleblowing if the reported conduct was at least potentially a crime or there was no internal investigation needed (which indirectly imposes a duty to verify).

<sup>30</sup> Veronika Nad and Naomi Colvin, Whistleblowing in the European Union: A new directive to protect, citizens, democracy and rule of law, Blueprint, 2018.

<sup>31</sup> *Granetzny/Krause*, CCZ 1/2020, 32.

<sup>32</sup> *Garton-Ash*, Free Speech, 2016.

<sup>33</sup> *Momsen/Docke*, in: Ambos/König/Rackow, NK-Rechtshilfe, 2nd Ed. (2020), 4.HT, 3.T, margin 450.

<sup>34</sup> *BVerfG*, v. 2.7.2001 – 1 BvR 2049/00, NJW 2001, 3474 (3475).

<sup>35</sup> *BVerfG*, v. 2.7.2001 – 1 BvR 2049/00, NJW 2001, 3474 (3475).

<sup>36</sup> *BAG*, v. 3.7.2003 – 2 AZR 235/02, NZA 2004, 427 (430).

<sup>37</sup> *BAG*, v. 15.12.2016 – 2 AZR 42/16, NZA 2017, 703 (704); *EGMR*, v. 21.7.2011 – 28274/08, NZA 2011, 1269.

<sup>38</sup> *BAG*, v. 3.7.2003 – 2 AZR 235/02, NZA 2004, 427 (429 f.); *BAG*, v. 15.12.2016 – 2 AZR 42/16, NZA 2017, 703 (704).

<sup>39</sup> *Granetzny/Krause*, CCZ 1/2020, 34.

<sup>40</sup> *Ohly*, GRUR, 2019, 441 (444).

<sup>41</sup> *Wessing*, in: Hauschka/Moosmayer/Lösler, Corporate Compliance, 2016, § 46 Rn. 54.

<sup>42</sup> *BAG*, NZA, 2007, 502 (503 f.).

<sup>43</sup> *BAG*, NZA 2004, 437 (428 ff.); *BAG*, NZA, 2007, 502 (503 f.).

<sup>44</sup> See Art. 17 II ArbSchG.

<sup>45</sup> *EGMR*, NJW 2011, 3501

What other possibilities do companies have to prevent external whistleblowing? They can set incentives for internal whistleblowing, of course. It is recommended to implement a secure, anonymous institution within the company,<sup>46</sup> e.g. a Phone line or compliance officers so that reporting persons aren't discouraged from the social repercussions alone or the risk of being laid-off. Some propose that companies might consider giving monetary awards for the early disclosure of information that is suitable to prevent or uncover criminal offences or other conduct that public authorities don't have knowledge about.<sup>47</sup>

This of course raises questions of the amount which needs to be carefully balanced so there is no risk of abuse and whether co-perpetrators should also be eligible (they do indeed have the most credible and valuable information).<sup>48</sup> While shaping these internal channels, companies must keep in mind the codetermination of the employees-council in the areas of duties and surveillance of employees<sup>49</sup> and, more general, the data protection standards.

## b) Criminal Law

### aa) Criminal liability

Since the whistleblower does endanger the interests of the organization it is questionable in the sense of a proper balancing whether the reporting of confidential information to the authorities itself is a criminal offense or in which cases this might be justified.

Under the general Criminal Code, a whistleblower who knowingly reports false information and therefore damages the reputation of the organization can be held accountable under §§ 145d, 164, 188 ff. of the Criminal Code. If the data was obtained illegally by evading a security system, the criminal liability is based upon § 202a Criminal Code. The disclosure of information by for example lawyers or doctors within confidentiality agreements upon § 203 Criminal Code. But these regulations do not say anything about employees who obtain information within the scope of their job.

That's why, in April 2019, the EU Directive for the protection of Trade Secrets<sup>50</sup> was transformed to German law by implementing the so called Geschäftsgeheimnisgesetz (GeschGehG, abbr.) which can loosely be translated as Business/Trade-Secrets Act. For the most part it includes civil liability and remedies the possessor (meaning the person who controls the information) has against violators in case confidentiality is broken illegally.<sup>51</sup> So it is not about protecting or encouraging whistleblower but in holding them accountable for the potential damages caused by the disclosure.

Concerning the criminal liability of whistleblowing it basically states that the disclosure of trade secrets is be a crime but also can be justified under certain circumstances. One should note that not all kinds of whistleblowing are grasped by this, as discussed in the beginning, whistleblowing generally includes disclosure of any kind of illegal practices, here only the disclosure of so-called trade secrets is protected.

§ 2 GeschGehG defines the Trade secret as 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.<sup>52</sup> Information means in theory even private information if it is related to the company or its reputation somehow.<sup>53</sup> It is confidential if it isn't accessible to the average group of people who regularly deal with this kind of information or if it is only known by the "secret-keeper" or persons bound to confidentiality.<sup>54</sup> It's not already non-confidential if only parts of the information are common knowledge – it is imperative that the information as a whole in its specific assembly isn't accessible.<sup>55</sup>

A secret has commercial value if its unauthorized usage or disclosure has the potential to harm its possessor because it being common knowledge would undermine his scientific or technological potential, his commercial or financial interests, strategic position or competitive position.<sup>56</sup> Also grasped by the definition is therefore information concerning illegal conduct<sup>57</sup> or negative information on for example liquidity.<sup>58</sup> Sufficient to meet the criteria of commercial value is a potential value.<sup>59</sup>

The (rightful) possessor of the information has to show his interest in confidentiality by implementing proper/suitable/reasonable measures to prevent disclosure because it is only then requiring protection.<sup>60</sup> These measures don't have to be fully effective or unbreachable.<sup>61</sup> But organizations should at least mark the information as confidential, regulate confidentiality explicitly in the contract, give access only to people who need to know it for their work, include some technological protection and a sensible way of disclosing information to employees.<sup>62</sup>

Furthermore, the interest in confidentiality has to be legitimate, which is one of the aspects where the German regulation differs from the EU directive by being more restrictive. This isn't the case, some say, when the information is about illegal conduct. If interpreted that way one must acknowledge that it might be a violation of the EU directive which systematically seems to want to protect illegal information as well and needs to be applied in the

<sup>46</sup> *Bottman*, in: Park, Kapitalmarktstrafrecht, 2019, Chapter 2.1. Rn. 44.

<sup>47</sup> *Granetzny/Krause*, CCZ 1/2020, 35.

<sup>48</sup> *Granetzny/Krause*, CCZ 1/2020, 36.

<sup>49</sup> § 87 Abs. 1 Nr. 6 BetrVG; *Granetzny/Krause*, CCZ 1/2020, 34, 35.

<sup>50</sup> See above.

<sup>51</sup> § 3, 4 GeschGehG

<sup>52</sup> Art. 2 Directive (EU) 2016/943; *Ohly*, GRUR 2019, 441 (442).

<sup>53</sup> *Alexander*, AfP 2019, 1 (5).

<sup>54</sup> *BGH*, GRUR 2018, 1161 Rn. 38.

<sup>55</sup> *Ohly*, GRUR 2019, 441 (443).

<sup>56</sup> Recital point 14, Directive (EU) 2016/943.

<sup>57</sup> *Granetzny/Krause*, CCZ 1/2020, 33.

<sup>58</sup> *Ohly*, GRUR 2019, 441 (443).

<sup>59</sup> Recital point 14, Directive (EU) 2016/943.

<sup>60</sup> *Ohly*, GRUR 2019, 441 (443).

<sup>61</sup> *Maafßen*, GRUR 2019, 352 (355 f.)

<sup>62</sup> BT-Drs. 19/4724, pp. 24 f.

Union-law friendly way that the legitimacy of the interest is subject to absolute presumption.<sup>63</sup>

The action that one can be liable for is regulated in § 4 GeschGehG. It prohibits the illegal obtainment, use and disclosure of trade secrets. To be more specific, the disclosure is prohibited if the trade secret was before obtained illegally or the disclosure itself violates a obligation, e.g. derived from the employment contract.

§ 23 GeschGehG then actually regulates the criminal liability. In general, under this law it is a criminal offense to obtain and disclose trade secret to a third party<sup>64</sup> if done so because of a certain motivation. These motives are what distinguishes the liability of a whistleblower from being only civil to criminal.<sup>65</sup> They include the disclosure to favor oneself or others in the competition to the disadvantage of the possessor, to personally gain any kind of advantage or for the benefit of a third party or to generally want to directly harm the company.

Theoretically, whistleblowing thus is a criminal offense under § 23 GeschGehG as long as the reported information is a trade secret and the whistleblower acts under one of the just mentioned motives. In certain qualified cases the penalty can be increased, namely due to commercial nature of the reporting or usage of the trade secret abroad. It is also already a criminal offense to just attempt disclosure,<sup>66</sup> beginning with the point of initiation of the statement or transmission.<sup>67</sup>

On behalf of a balance of interests, the act of the whistleblower might be justified under certain circumstances though. Generally, § 5 GeschGehG offers exceptions of liability because of offenses under § 23 GeschGehG. Relevant for whistleblowers is § 5 No. 2 GeschGehG which aims at regulating precisely the conflict of interests that whistleblowing portrays. If the disclosure has the subject of an illegal (at least administrative offense), occupational (meaning violating labor norms) or, otherwise unethically relevant, misconduct of some significance that actually happened and is able to protect common public interests, it is justified even if the criteria of § 23 GeschGehG are fulfilled. The disclosure is objectively able to protect public interests if it is to be expected that it will lead to the conduct being terminated immediately and definitely.<sup>68</sup>

Effectively, only directly employed reporting persons are gripped by the regulations (positively or negatively) because only they can have a contractual obligation to not disclose trade secrets.<sup>69</sup> Persons who are only indirectly part of the organizations and did not obtain the information illegally but tangent within their function, are not whistleblowers within the scope of this law. This is a

much more restrictive interpretation than in the EU-Directives and in the common discussion.<sup>70</sup> It might therefore be imperative to interpret the German law in a Union-friendly way here, too and to derive justification for reporting persons not gripped from the EU-Directive, which restricts liability of reporting persons acting in the assumption disclosure was necessary.

#### *bb) Co-perpetrators*

Neither the EU-Directives nor the German law do specifically go into whether their regulations are applicable to reporting persons who participated in the misconduct. To the contrary, the motives do play quite the role in the question whether the disclosure was justified (in the German law), meaning that it might not even be applied to people who report only to lower their own sentence. There are, however, laws in Germany that protect so called principal witnesses (crown witnesses). The Criminal Code in § 46b GeschGehG regulates this protection broadly across most offenses. Co-perpetrators who voluntarily disclose or prevent a crime of a certain significance<sup>71</sup> and context to their own crime can be eligible within judicial discretion for mitigation of their sentence. They must however successfully help solve the crime before the trial starts.<sup>72</sup> Furthermore, their own contribution to the crime must be threatened with a relatively high prison sentence, which, especially in the case of whistleblowing, might not always be the case. Additionally, there are some regulations protecting principal witnesses in specific areas, for example narcotics<sup>73</sup> or criminal or terrorist organizations.<sup>74</sup>

#### **IV. The Draft Bill on a Corporate Sanctions Act**

On August 15, 2019, the German Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz) presented a first draft bill on a Corporate Sanctions Act. The draft introduces severe sanctions on companies for corporate criminal offenses and includes regulations on internal investigations, compliance management systems and legal privilege. The draft bill includes rules about how investigations should be conducted and by whom. As well it stipulates which requirements a compliance management system has to fulfill to be recognized as beneficial when it comes to a money due against the company for corporate misconduct. But again, the draft does not address whistleblower protection. This omission may turn out as a crucial deficit. Since the provisions on witness protection in the Criminal Procedure Code do not fit whistleblowers and a Ruling like RICO (Racketeer Influenced Corrupt Organizations Act) is very much alien to German law, a provision is urgently needed. At present, however, it is not even clear

<sup>63</sup> Ohly, GRUR 2019, 441 (444, 445).

<sup>64</sup> BT-Drs. 19/4724, p. 27.

<sup>65</sup> *Hiéramente*, in: BeckOK, GeschGehG, 3rd Edition (March 2020), § 23 Rn. 8.

<sup>66</sup> § 23 Abs. 5 GeschGehG.

<sup>67</sup> *Joecks/Miebach*, in: MüKo-StGB, 3. Aufl. (2019), § 23 GeschGehG Rn. 147-152.

<sup>68</sup> *Joecks/Miebach*, in: MüKo-StGB, § 23 GeschGehG Rn. 128.

<sup>69</sup> *Bottman*, in: Park, Kapitalmarktstrafrecht, 2019, Chapter 2.1. Rn. 44.

<sup>70</sup> See above.

<sup>71</sup> Listed in § 100a Abs. 2 StPO.

<sup>72</sup> *Maier*, in: MüKo-StGB, 4. Aufl. (2020), § 46b Rn. 49-51.

<sup>73</sup> See § 31 BtMG.

<sup>74</sup> See §§ 129 Abs. 6, 129a Abs. 7 StGB.

whether a protection concept is intended or whether a reward scheme is to be the main focus. A combination would make more sense.<sup>75</sup>

## V. Conclusions and outlook

In conclusion, Germany has recently come a step closer to extensively regulating whistleblowing. But there are still inconsistencies and gaps in the protection of whistleblowers and maybe even violations of Union Law leading to the necessity to interpret the new law in a Union friendly way.

The system also doesn't really set incentives to disclose misconduct in general and especially not in a way that favors internal whistleblowing. This should, in the interest of a sensible balancing, absolutely be the case. The state could, like the U.S. does for example, give monetary

awards to whistleblowers if certain requirements are met. Legally, this would be possible as well in the EU system as in Germany, although it is "alien to the system".<sup>76</sup>

But companies are of course free to implement monetary awards to employees who report internally first. For this whistleblowing systems need to be implemented, which is generally advisable.

Overall, this controversial topic will probably stay controversial for a while and needs to be treated with the utmost sensibility.

A robust whistleblower protection is a crucial challenge for the European democracy<sup>77</sup> and German legislation in particular. Despite some attempts at cultivation by the European Union, German law remains a wasteland for whistleblowers until further notice.

<sup>75</sup> *Grützner/Momsen/Menne*, Draft Bill on German Corporate Sanctions Act, *Compliance Elliance Journal* Vol 5 Nr. 2, 2019, 26-37

<sup>76</sup> *Granetzny/Krause*, *CCZ* 1/2020, 32 ff.

<sup>77</sup> *Quentin Van Enis*, Robust Whistleblower Protection is a Crucial Challenge for the European Democracy, 2018, [https://www.academia.edu/40188127/Robust\\_whistleblower\\_protection\\_is\\_a\\_crucial\\_challenge\\_for\\_the\\_European\\_democracy](https://www.academia.edu/40188127/Robust_whistleblower_protection_is_a_crucial_challenge_for_the_European_democracy).