

German Bar Association Makes Critical Statement on Whistleblower Draft Directive

Thomas Wahl

In November 2018, the German Bar Association (Deutscher Anwaltverein – DAV) tabled a position paper on the Commission proposal for a directive on the protection of whistleblowers (COM(2018) 218 final, see eucrim 1/2018, p. 27). The position paper is available [in German and English](#).

The DAV welcomed the introduction of EU-wide minimum rules for persons reporting breaches of Union law, but also sees room for improvement. More specifically, the DAV suggests the following:

- *Material scope*: The directive should include protection of employees against health impairments;
- *Personal scope*: Professional secrecy obligations, such as those for the legal profession, have not been sufficiently considered and therefore an exception should be expressly included in the directive for persons whose professions involve professional secrecy obligations;
- *Extension*: Protection should be extended to parties/facilitators supporting the “reporting person;”
- *Obligations*: The scope of “legal entities” in the private sector, who will be obliged to establish internal reporting channels, should be reconsidered. The definition of “legal entities” is too narrow. The proposed broad thresholds should be refined, particularly in view of the burdens for small businesses. Furthermore, the peculiarities of group companies should be reflected. Companies below the thresholds should not, however, be fully exempt from the obligation to create internal reporting possibilities;
- *Feedback system*: Further clarifications are required;
- *Conditions of whistleblower protection*: Strict adherence to the three-tiered approach, i.e. resolve grievances internally first. External whistleblowing must remain the *ultima ratio*. In addition, the draft directive must fully clarify the relation between external reports by a whistleblower and the potentially justified interest of the company concerned in ensuring the confidentiality of the measures taken internally;
- *Prerequisites for protection*: Revision should include the introduction of a condition that the report was made in the public interest;
- *Practical implementation*: The approach favouring a comprehensive protection of whistleblowers is problematic. In particular, EU legislation needs to better rebalance the legitimate goal of the employer to defend himself against unjustified allegations with protection of the whistleblower acting in good faith;

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ISSN: 1862-6947

<https://eucrim.eu>



- *Reporting system*: The three-tiered reporting system should apply comprehensively to all businesses. Exemptions from use of internal reporting channels are too far-reaching and should either be deleted or at least specified.
- *Limitation*: Public disclosure should only be protected as an *ultima ratio*.
- *Penalties*: The proposed penalties against natural or legal persons, who hinder reporting and take retaliatory measures or bring vexatious proceedings against reporting persons, are too vague and require clarification. They also do not sufficiently take into account the situation of maliciously or abusively made reports or disclosures.

The DAV concluded that the protection of reporting persons is generally favourable, but does not require safeguarding through criminal sanctions. The behaviour of reporting persons should first and foremost be regulated in labour law if they are employed persons. Furthermore, the DAV opposes tendencies to further dilute the three-tiered reporting system.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



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