LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins White Collar Defense & Investigations Practice 6 June 2023 | Number 3119

# German Whistleblower Protection Act: Considerations for Companies

***Companies operating in Germany should implement reporting mechanisms or adapt their existing ones to comply with the new legal requirements.***

The German Whistleblower Protection Act (Hinweisgeberschutzgesetz — HinSchG) will enter into force on 2 July 2023. The HinSchG is the (albeit late) German implementation of the EU Whistleblower Directive,[1] which entered into force on 16 December 2019 and aims to establish uniform protection standards for whistleblowers throughout the EU. The transposition period for the directive ended on 17 December 2021.

The HinSchG is the result of a comparatively long legislative process in Germany, following a rejection of the original draft by the German Federal States (Bundesrat). The German parliament (Bundestag) subsequently slightly revised the scope of the draft law. On 9 May 2023, the Mediation Committee (Vermittlungsausschuss) deliberated on the revised draft law, producing some amendments. On 11 May 2023, the Bundestag accepted the Mediation Committee's proposal, and the law was passed.

## Background

Prior to the HinSchG, the protection of whistleblowers was not regulated uniformly in the EU Member States, and some Member States did not have any such legislation in place. As a result, the protection of whistleblowers was inconsistent across the EU. In Germany, only isolated regulations for the protection of whistleblowers exist in specific legal areas.[2] Moreover, the protection of whistleblowers in Germany is partly based on case law (among others of the European Court of Human Rights), which leads to considerable legal uncertainty for employees who want to expose unlawful conduct, abuse, and dangers in their working environment. This situation is now changing with the comprehensive HinSchG, which will impose several new obligations on German companies.

## Key Provisions

### Who is protected?

To strengthen and improve the protection of whistleblowers, the German government has gone beyond the requirements set forth within the EU legislative framework and extended the personal and material scope of the HinSchG. While the EU Whistleblower Directive only protects persons who report (certain) violations of EU law, the HinSchG also includes persons who report violations of specific German law,

such as criminal offences and certain violations of administrative law, e.g. environmental laws, data protection laws, product safety requirements, and record-keeping provisions.

The personal scope of application is broad and includes:

- employees, including those whose employment term has already ended, job applicants, interns, and temporary workers;
- self-employed persons providing services, freelancers, contractors, subcontractors, suppliers, and their employees; and
- shareholders and members of management bodies.

Besides whistleblowers, the HinSchG also protects persons who are the subject of or are otherwise affected by a report.

### Who is affected?

In general, the obligation to implement a whistleblower system applies to all natural and legal persons under private law, partnerships with legal capacity, and other associations of persons with legal capacity with at least 50 employees on a regular basis. Branch offices are excluded since these are not legally independent. Companies with at least 250 employees are expected to operate their internal reporting channels within three months of the promulgation of the HinSchG. Companies with 50 to 249 employees must implement their whistleblower systems by 17 December 2023.[3]

### How can whistleblowers report a suspected violation?

Whistleblowers can report suspected violations via reporting channels implemented by the respective company (internal reporting channels) or via external reporting channels that will be established at the Federal Office of Justice (Bundesamt für Justiz), the German Federal Cartel Office (Bundeskartellamt), and the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht). However, according to Section 7 HinSchG, employers should encourage whistleblowers to use internal reporting channels before contacting external reporting channels.

According to Section 16 *et seq.* HinSchG and the following, companies should consider the following when establishing internal reporting channels:

- The reporting channel must allow for reports to be made verbally, in writing, or in person.
- Companies are not obliged to design the reporting channels in such a way as to allow anonymous reports to be submitted.
- The identity of the whistleblower and of the person(s) who are the subject of the report must remain confidential.
- The reporting channel must confirm receipt of the report to the whistleblower within seven days of receiving it.
- The companies must investigate the report and take appropriate follow-up action.
- Three (and in complex cases six) months after receipt of the report, companies should provide feedback to the whistleblower on how the report has been processed.
- Companies must respect data protection laws.
- Companies must document and keep reports for three years after the end of the whistleblower proceedings.

While internal reporting channels are not required to allow anonymous reporting and subsequent anonymous communication with whistleblowers, the HinSchG provides that the internal reporting unit

should process reports received anonymously. This provision is highly relevant in practice, since a large percentage of reports are received anonymously. Companies need to implement measures that allow anonymous reporting/communication by 1 January 2025.

The HinSchG also enables companies to outsource their internal reporting channels to law firms or other third parties.[4] Moreover, businesses may also concentrate reporting within groups of companies and establish a central reporting office at a group company for the entire group. These central reporting offices would then be responsible for any further internal investigation of the report. The responsibility and obligation to remedy the violation would remain with the respective subsidiary. While this possibility will be highly relevant in practice, as companies can bundle competences and resources, the question of whether centralised reporting channels at group level are fully in line with the EU Whistleblower Directive remains unclear.

### How are whistleblowers protected?

Whistleblowers enjoy liability privileges and extensive protections under the HinSchG. Such protections apply only if the whistleblowers, at the time of the report or disclosure, had reasonable grounds to believe that the information reported or disclosed by them is true and corresponds to a violation of the legal areas covered by the HinSchG. Whistleblowers are protected by the HinSchG in the following ways:

- protection of their identity;
- prohibition of reprisals, i.e., any work-related acts or omissions in response to a report that cause or may cause unfair prejudice to the person making the report (e.g., suspension, termination, demotion or denial of promotion, coercion, intimidation, bullying or suspension, non-renewal of fixed-term employment contracts, damage to reputation, revocation of a licence or permit, negative performance appraisal, etc.);
- compensation for material and immaterial damages;
- reversal of burden of proof if a whistleblower does suffer a reprisal (e.g., the company has to prove that a whistleblower's suspension does not constitute a reprisal); and
- protection from liability for the disclosure of unlawfully obtained information, especially liability arising from contractual provisions under which access rights to data are restricted.

### What are the sanctions?

Violations of the essential requirements of the HinSchG are punishable as administrative offenses with a fine of up to €500,000 depending on the respective violation.[5]

## How Companies Can Prepare

Companies with at least 250 employees and companies in the financial sector need to start implementing the legal requirements set forth under the HinSchG, as their internal whistleblower system must be in place by 2 July 2023. Medium-sized companies with 50 to 249 employees should also act sooner rather than later, as fully implementing an effective whistleblower system takes time and effort.

A whistleblower system is most effective when it is embedded in an existing compliance system. The system should be designed to be transparent to the employees. Good communication with employees is essential: Information on the reporting offices, the procedure, and protections against repercussions must be made easily accessible to employees and easy to understand. Transparency also includes providing information in the employee's respective working language, particularly if a group establishes a central reporting office for several group companies that may be located in different countries. In companies with

a works council, the works council may need to be involved in the process of implementing a whistleblower system, which should be considered when setting a timeline.

---

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Thomas Grützner**
thomas.gruetzner@lw.com
+49.89.2080.3.8179
Munich

**Stefan Bartz**
stefan.bartz@lw.com
+49.40.4140.30
Hamburg

**Julia-Bianka Schenkel**
julia-bianka.schenkel@lw.com
+49.211.8828.4638
Düsseldorf

**You Might Also Be Interested In**

Whistleblow Insights: Recurrent Themes and Common Drivers

How Germany's New ESG Law Will Affect Suppliers Globally

---



**Endnotes**

1 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937.

2 E.g. Sec. 5 Nr. 2 GeschGehG; Sec. 4d Abs. 6 FinDAG; Sec. 3b Abs. 5 BörsG; Sec. 53 Abs. 5 GwG.

3 Sec. 42 para. 1 HinSchG.

4 Only medium-sized companies of 50 to 249 employees are allowed to share resources by establishing a shared office, although this applies both to companies within the same group and companies that have no link to each other.

5 Cf. Sec. 40 para. 6 HinSchG in conjunction with Sec. 30 para 2 sentence 3 German Administrative Offences Act (OWiG); whoever prevents (or attempts to prevent) a report or subsequent communication, whoever takes (or attempts to take) a prohibited reprisal, or whoever intentionally or recklessly disregards the confidentiality requirement, shall be subject to a fine of up to €50,000. In the case of negligent violations, a fine of up to €10,000 may be imposed. If someone acts in a position of responsibility for the management of a company (e.g., as member of a representative body) and in the course of this commits one of the above administrative offenses, the penalties can increase up to tenfold, i.e., up to €500,000. Companies that do not set up an internal reporting office face a fine of up to €20,000.