DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committees on CSR, Labour Law and Criminal Law

on the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law COM (2018) 218 final

Position Paper No.: 51/2018 Berlin/Brussels, November 2018

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 64.500 German lawyers. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession.

Summary

The DAV welcomes the intention of the Commission to improve the protection of persons reporting on breaches of Union law. This includes extending the personal scope to third parties who are economically dependent on the legal entities concerned, such as suppliers and sales partners. With regard to the personal scope of the draft Directive, the DAV believes that an exception should be explicitly included for the legal profession and other professions bound by professional secrecy obligations. The justified political and social goal of providing whistleblowers – especially against the background of recent and highly publicised cases – with legal protection against discrimination and sanctions, may furthermore not set aside the constitutionally protected fundamental rights of those under suspicion irrespective of whether they are natural persons, private or public legal persons. The draft Directive unfortunately does not always sufficiently satisfy this concern and therefore requires amendment. Furthermore, the Commission's proposal does not sufficiently follow the *ultima ratio* principle in situations where a whistleblower chooses to publicly disclose information.

0. Introduction

On 23 April 2018, the European Commission published a proposal for a Directive on the protection of persons reporting on breaches of Union law (whistleblowing). It stipulates that, inter alia, private entities with 50 or more employees or an annual business turnover or annual balance sheet total of EUR 10 million or more, as well as state and regional administrations and local communities with more than 10,000 inhabitants, must establish internal channels and procedures for reporting and following up on reports (Articles 4 and 5). If there is no reaction to an internal report, the reporting person should be allowed to turn to the competent public authorities in a second step (Article 13 (2)). In the case that no appropriate measures are taken in response, the person may publicly disclose information (Article 13 (4)). If the reporting person follows these procedural steps, he shall be protected

comprehensively both internally and in court proceedings (Articles 13 to 16). In addition, sanctions shall be established for natural or legal persons who hinder reporting or its confidentiality or initiate retaliation against a reporting person.

Breaches falling within the scope of the draft Directive are, in particular, those relating to areas such as financial services, public procurement, product and transport safety, animal health and welfare, protection of the environment, consumer and data protection, public health and nuclear safety (Article 1 (1)). The protection applies, in addition to employees of the private and public sector, to self-employed persons, contractors, subcontractors, as well as volunteers, trainees and applicants (Art. 2). The DAV supports the intention of the draft Directive to further and uniformly protect whistleblowers within the European Union. The level of protection currently provided in the EU is fragmented and inadequate, depending on the Member State. With the implementation of the draft Directive, a general obligation for public and private entities to set up a whistleblowing system is created that *de lege lata* does not currently exist in Germany. The heterogeneous rules in the member states lead to a clear difference in the level of protection for reporting persons. Hence, in cases with cross-border violations detected by a whistleblower the results will be inadequate. In addition e.g. in Germany, the basis for the protection of the reporting persons stems from several individual laws (for example, § 612a German Civil Code, the General Act on Equal Treatment, the various regulations in financial regulation law and the trade secrecy law which is still within the legislative process) and principles developed by jurisprudence, which creates confusion and uncertainty about the legal situation of reporting persons. The German Corporate Governance Code (DCGK) only recommends to listed companies in point 4.1.3 sentence 3 that employees shall be given the opportunity to report protected indications of legal infringements within the company in a suitable manner. Accordingly, all DAX 30 companies, but also many medium-sized companies, have so-called whistleblowing systems today.

1. Art. 1: Material scope

In order to detect and prevent serious damage to the public interest, the protection of reporting persons shall not only apply to the reporting of unlawful activities, but also

to the reporting of abuse of law, i.e. acts or omissions that do not appear formally unlawful, but are incompatible with the objective or the purpose of the relevant legislation; Art. 1 para. 1, Art. 3 para. 1, 3 (see also recital 29).

The DAV considers that the concept of "abuse of law" should be entirely removed from the material scope of the draft Directive. As a layperson, a reporting person will not be able to judge whether acts or omissions are incompatible with the objective of the applicable rules and regulations. Hence, the reporting persons' assessment will regularly be a subjective decision, which will encourage unfair reports and lead to considerable legal uncertainty. The scope should therefore be limited to unlawful activities.

Article 1 (1a) lists the areas in which reports of breaches of Union law shall be subject to the specific protection of the draft Directive. Labour law is entirely left out of this scope. However, the protection of workers should be a particular focus of the draft Directive and equal to consumer protection or animal welfare. The DAV proposes to extend the scope of application to "protection of workers from health impairments". The compliance with established European labour law regarding the protection of employees against health impairments is a matter of public interest and should therefore be included in the material scope. Workers are doubly affected by these situations. For one, they work in conditions that are incompatible with EU law, and further, internal remedy is particularly difficult to obtain in such cases and the danger of retaliation is especially high.

2. **Art. 2: Professional secrecy obligations of the legal profession and other professional secrecy obligations are not considered in the personal scope**
   Art. 2 provides in its wording that lawyers and other persons with professional secrecy obligations fall under the scope of protection of the Directive within a specific mandate. However, there are also statutory and professional confidentiality obligations outside of a specific mandate relationship, which are guaranteed by the Charter of Fundamental Rights of the European Union (second sentence of Article 47(2) EU Charter) for these occupational groups. Although the Commission appears to have recognised this issue of constitutional rights (see recital 69), it has not

reached the necessary conclusion to include an explicit exemption within the text of the draft Directive. An exemption for persons with professional secrecy obligations should therefore be explicitly included in the text of the draft Directive.

3. **Art. 3: Extension of protection to facilitators of the reporting person**
   Article 3 (9) refers to “reporting person” as a person who reports or discloses information on breaches acquired in the context of work-related activities. In view of Articles 13 et seq., only that person, whether natural or legal, is subject to protection. This, however, excludes all persons who have supported the whistleblower, e.g. by providing him with information or otherwise cooperating with him. This is a legal gap in the policy. This gap should be closed by extending the protection to supporting parties/facilitators.

4. **Art. 4: General obligation to use internal channels for all reporting persons**
   Art. 4 para 2 provides that only employees are obliged to first use internal reporting channels whereas third parties (suppliers, clients, etc.) can refrain from using them. This proposal is neither appropriate nor reasonable. Third parties, just like employees, fall under the full protection against sanctions and reprisals of the draft Directive, meaning that an exemption of third parties from the use of internal channels appears to be inconsistent with the proposed reporting system. Therefore, the last part of Art. 4 para 2 second sentence can be deleted. However, there needs to be a reporting possibility for third parties as well. This can for example consist in contacting the top management.

   Further, limiting the applicability of the draft Directive only to private sector organisations which are organised as legal entities is too narrow. Especially in Germany, but also in other European countries, there are many businesses organised as partnerships or sole trader businesses which surpass the threshold of 50 employees or an annual turnover of EUR 10 million set out by the draft Directive. For these businesses there is a need of effective whistleblower protection regardless of their legal form. On the other hand, the scope of the draft Directive is very broad concerning the chosen thresholds. For example, particular organisational requirements such as the codetermination requirements in Germany (concerning the

right of workers to participate in management decisions) usually only apply for much higher thresholds or are linked to being publicly listed (cf. e.g. §§ 76 para 4; 87 para 1 sentence 2-4; 96 paras 2, 3; 100 para 3 German Stock Corporation Act). The proposed thresholds should therefore be reconsidered, especially whether it is necessary and sensible to burden small businesses with the administrative expense and costs of a whistleblowing system. Due to the typically close personal bonds existing in such businesses, adequate whistleblowing protection might be provided through other means than the reporting channels foreseen in the draft Directive. The draft Directive further does not reflect the particularities of group companies. There should not be an obligation for every company within a group that passes the threshold to introduce an independent whistleblowing-system. Rather, it can make sense in such situations to introduce one uniform whistleblowing-system for the entire group and situate it at the level of the parent company. This option should be explicitly included for group companies.

Companies below the thresholds should however not be fully exempt from the obligation to create internal reporting possibilities, but simply provide for such possibilities in an appropriate manner. Internal reporting should take precedence in these companies as well.

5. Art. 5: General comments on the feedback system

The draft Directive does not explicitly state whether anonymous reports should be allowed. This should definitely be the case and is indeed a legal requirement in some cases. For anonymous reports, an exemption from the obligation to provide feedback has to be foreseen.

A. Art. 5 para 1 d)

For legal reasons feedback often cannot include a report on all follow-up measures. When a report is received, the necessary measures may well be very complex. The whistleblower often cannot be fully informed about this. The goal of the draft Directive is not to create a “private enforcement” system but to make reporting systems efficient. Therefore the phrase “about the follow-up to the report” should be deleted.

B. Three month deadline for feedback to the reporting person

Practical experience, e.g. from big international companies (especially in cross-border cases with non-EU countries) which have created whistleblowing-systems as part of their compliance management systems, shows that a deadline of three months to give feedback to the reporting person is not feasible. Art. 3 number 13 clearly states that a simple confirmation of receipt is insufficient as feedback. At least, the feedback should include information about follow-up measures, such as on-going internal research and investigation. If a confirmation of receipt should be sufficient, this needs to be clarified in the text. However, if substantial feedback is required, including concrete activities and some first results, the deadline is too short. Internal investigations often take much longer and qualified local external investigators are often not available on short notice. Further, giving substantive feedback at an early stage can even thwart the investigation of the validity of the report or at least hinder it substantially. Data protection rules and criminal procedure rules can be further reasons why a three month feedback deadline cannot be met. The DAV therefore suggests extending the deadline for feedback to at least six months. This should also apply for the regular deadline for feedback for external reporting channels according to Art. 6 para 2 b) of the draft Directive.

Several aspects of the internal design of the whistleblowing-system furthermore remain unclear in the draft Directive. First, it is left open how exactly the confidentiality of the identity of the reporting person is to be guaranteed in practice and whether the identity needs to remain completely anonymous or if it is simply to be treated in a confidential manner. There are also no further explanations concerning the design of the internal contact point to be set up for receiving the reports and initiating follow-up measures. Currently supervisors, employees of the compliance or revision department or the works council are often named as addressees for reports. In smaller companies this function can also be fulfilled by external contractors.

6. Art. 13: Conditions for the protection of reporting persons

It is positive that the draft Directive provides for a three-step procedure. This prescribes inter alia that grievances should first be resolved internally, which is

beneficial to internal peace in the company and the mutual trust between employers and employees. External whistleblowing must remain the *ultima ratio*, if the entity concerned does not take any steps against the reported issues. What remains completely unclear in the draft Directive is the relation between external reports by a whistleblower and the potentially justified interest of the concerned company in ensuring the confidentiality of the measures taken internally. This it is possible for a whistleblower (in good faith) to get the wrong impression that the company is not following up on the report, because it is not providing feedback on remedying or other measures taken. Providing further information to the reporting person might be impossible due to reasons related to data protection or insider law. In such situations, it must be assured that the whistleblower does not (mistakenly) turn to the external authorities or even the public, since this could significantly damage the company in question. Whether and to what extent companies choose to cooperate with public authorities or to defend themselves against the accusations raised, is a complex decision taken by the decision-making bodies of the company in consideration of all possible advantages and disadvantages for the company. This decision should not be prejudiced or put into question ex-post by a whistleblower.

The prerequisites for the protection provided for whistleblowers in the draft Directive should also be reviewed critically. Currently, to receive comprehensive protection, it is sufficient that the whistleblower is convinced of the accuracy of his claim and that he follows the procedural steps. However it is not a condition in the draft Directive that the report is made in the public interest. Considering that whistleblowing generally carries a risk of being abused to damage a business or colleague for purely selfish reasons and also considering the comprehensive catalogue of forbidden retaliatory measures it is advisable to reconsider and possibly adapt the prerequisites for protection.

The comprehensive protection of whistleblowers is certainly to be welcomed, but it also entails several problems with regard to the practical implementation. In particular from a labor law perspective, the eligibility conditions for protection for the whistleblower need to be more precise. The condition for the protection is that the reporting person had “reasonable grounds to believe” that the information reported

was true at the time of the report. What exactly constitutes “reasonable grounds” is not sufficiently clear in the draft Directive, including in the recitals. Especially considering the comprehensive protections against retaliation and the reversal of the burden of proof implied therein, there needs to be a rebalancing between the legitimate goal of the employer to defend himself against unjustified allegations and the protection of the whistleblower acting in good faith. The current solution of reversing the burden of proof can lead to the impression that the draft Directive might make it possible for smart employees to protect themselves against anticipated labor law-related sanctions by making false claims which the employer is unable to refute. The DAV would therefore welcome a reconsideration of the general conception of the whistleblower protection and the associated conditions, to avoid that the legitimate goal of the draft Directive is undermined in the public perception by the accusation that it invites abuse.

7. Three-tiered reporting system

The three-tiered reporting system implemented in Art. 13 of the draft Directive corresponds to a landmark decision by the ECtHR, the rules set out by the German Constitutional Court and the jurisprudence of the German Labor Law Court. The DAV in general welcomes this system.

A. <u>The three-tiered system must apply to all businesses in a comprehensive manner</u>

It is appropriate to exclude small businesses (with the exception of the financial services sector) from the obligation to create internal reporting channels. However, the conclusion that reporting persons from small business are therefore allowed to directly go to external reporting channels or the press, is disproportionate, in contradiction to the existing case law and would lead to wrong results. Reporting persons from such companies should also first look for internal solutions before turning to external third parties. It is however not necessary for these businesses to create reporting channels in accordance with the provisions set out in Art. 5 of the draft Directive. Appropriate contact persons also exist in these businesses, even if they are not formally designated.

B. Exemptions from the use of internal reporting are too extensive

Rules allowing deviations from the use of internal reporting channels are in general appropriate in clearly and narrowly defined cases. The exemptions proposed in Art. 12 para 2 d) and e) are however too far reaching and should be either deleted or at least specified. Both exemptions are too unclear and provide reporting persons with too many ways to circumvent the three-tiered reporting system.

i. Art. 13 para 2d)

The proposed rule, which exempts reporting persons from the use of internal reporting channels when it cannot be expected "in light of the subject matter of the report", is inadequate. This only implies that the reporting person does not need in-depth knowledge on the one hand and cannot completely decide based on his own discretion on the other hand, meaning the best- and worst-case scenarios are excluded. However, it remains unclear whether a subjective or objective (or objectivized) standard should be applied. Neither the reporting person nor the person concerned should be burdened with the risk of misinterpreting the rule, which could lead to image damage or even the potential disclosure of business secrets.

ii. Art. 13 para 2e)

According to Art. 13 para 2 e) of the draft Directive the reporting person can forego the use of internal reporting channels, if he has "reasonable grounds" to believe that this would jeopardize the effectiveness of investigative actions by competent authorities (external reporting channel acc. to Art. 5f draft Directive). "Reasonable grounds" is an undetermined legal term, which has to be interpreted and is fully subject to judicial verification. This limits the room for maneuver for the reporting person. The term "reasonable grounds" is not further defined in the draft Directive and therefore unclear to the reporting person. The burden of proof for the existence of "reasonable grounds" also falls on the reporting person. In case of a dispute, they would have to be able to present – and potentially prove – all related circumstances thereof. This will most likely be impossible since the reporting person has no internal insight into the competent authority and cannot judge what would undermine an investigation.

Should the exemptions be considered necessary, there should be an exhaustive and concrete list of specific cases, taking into consideration both the interests of the reporting persons and the affected persons. Next to the protection of whistleblowers, affected persons also need adequate protection.

C. Public disclosure of breaches of Union law

The draft Directive shall protect reporting persons, who publicly disclose information, in two different cases. The DAV however considers that public disclosure should only happen as a *ultima ratio* measure, since making (alleged) breaches of law public creates a considerable danger for the reputation and trade secrets of those concerned. The practical experience in whistleblowing systems shows that reporting persons often do not have a complete view of complex issues and only know about small parts of a process. Such a selective view from the reporting person may be acceptable during the first two steps of the reporting procedure, but this is no longer the case when the reporting person addresses the general public.

i. Art. 13 para 4a)

The DAV considers this rule to be adequate and a logical consequence of the three-tiered system. The issue of insufficient deadlines for feedback was raised above.

ii. Art. 13 para 4b)

This rule should be deleted, since it renders the three-tiered system obsolete. The proposed provision is in complete opposition to the *ultima ratio* principle since it does not present a last resort or option. In the case described the reporting person can avoid solutions proposed by the parties concerned and/or external reporting channels and can first and foremost seek to publicize (alleged) breaches of law through the media.

The proposed rule inadequately favors the interest of the reporting persons. The interests and rights of the persons concerned by a report should be equally protected and balanced with the rights and interest of the reporting persons. It is a fundamental achievement of a free and democratic rule of law system that persons under suspicion have a right to a fair trial and the presumption of innocence until

legally proven guilty (cf. Art. 6 ECHR). Nothing less should apply to the procedure following up on reported breaches of law. The legitimate political and social goal of protecting reporting persons against discrimination and retaliation for their whistleblowing actions, may not disregard the constitutionally protected rights of a person under suspicion for a breach of law.

8. Art. 17: Penalties

Art. 17 obliges member states to provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that hinder reporting and take retaliatory measures or bring vexatious proceedings against reporting persons as well as penalties including measures for compensation against reporting persons who make abusive or malicious reports. The type of penalty is not further specified. Both rules are not suitable to create criminal law procedures that are uniform across the EU and satisfy the principle of legal certainty.

Unlike Art. 13, which provides for clear conditions for the protection of whistleblowers, Art. 17 obliges member states to create penalties without any further point of reference for persons that:

- Hinder or attempt to hinder reporting
- Take retaliatory measures against reporting persons
- Bring vexatious proceedings against reporting persons
- Breach the duty of maintaining the confidentiality of the identity of reporting persons

No further criteria are provided for in Art. 17. In particular, the respective sanctions are not even linked to the fact that the reporting person is entitled to protection according to Art. 13 of the draft Directive. Therefore, measures against reporting persons that do not comply with the criteria of Art. 13, also have to be penalized. Even if no “injustice” or “wrongdoing” has taken place or is to be expected, because the potential report is factually wrong, just the attempt to hinder a report shall be penalized. It is evident, that a criminal penalty that is not based on “wrongdoing” cannot be proportionate.

Even if penalties would only apply to reports and reporting persons that fall under the protection of Art. 13, it is not clear how the design of these criminal penalties would satisfy the requirements of the principle of legal certainty. Art. 13 uses undetermined legal terms and complex subjective elements, where two perspectives – that of the reporting person and that of the person concerned– are mixed ("the reporting person could not reasonably be expected to be aware" Art. 13 para 2b and d)). Such criteria are not suited to serve as points of reference to determine a criminal act. This might be the reason why the Commission does not make reference to Art. 13. However, the fact that this problem was eventually recognized does not justify obliging member states to create criminal penalties for measures against any kind of reporting person. According to the current conception those who are not reporting persons would not be punishable only if the reporting person themselves would act in a way that makes them subject to a criminal penalty. This, according to Art. 17, shall be the case if reporting persons make "malicious or abusive reports or disclosures".

These criteria lack clarity as well. Considering the far-reaching protection granted to whistleblowers in Art. 13, it is questionable how member states should determine when information is disclosed in a malicious or abusive manner. According to the draft Directive reporting persons shall also be protected if the information is objectively false, if the reporting person objectively chose the wrong reporting channel (public instead of internal) and the whistleblower shall also be allowed to report potential forthcoming breaches of law. The DAV considers that it is highly problematic that the draft Directive leaves it up to member states to choose when a wrong information or information through a wrong channel or information on a situation that did not take place becomes punishable information. This rule is therefore also unsuitable.

Overall, the impression remains that the concept of the sanctions was not thoroughly thought through with regard to their possible practical use. In addition, the vague criteria cannot guarantee that member states will create even somewhat uniform rules.

The DAV is of the opinion that the protection of reporting persons, which is in general welcome, does not require safeguarding through criminal sanctions. The requirements for the behavior of reporting persons, in the case of employed persons, should be regulated in labor law first and foremost. If there are conflicts about the respective behavior of reporting persons and their employers, this would in any case have to be solved under labor law. The DAV considers that it would be completely sufficient to anchor the necessary protection of reporting person in the relevant labor law, both as a statutory offense and if necessary in the procedural rules with a limited burden of proof for the employee. For reporting persons and those concerned by reports who are not in dependent employment relationships, there are also sufficient rules regarding false claims, such as injunctive and compensation claims for those concerned as well as criminal sanctions for slander and misdirection of the relevant authorities by feigning a crime through the reporting person acting in bad faith. Therefore, there is no need for new criminal sanctions in this respect either.