

**Providing an Alternative to Silence:**

**Towards Greater Protection and Support for  
Whistleblowers in the EU**

**COUNTRY REPORT: GERMANY**

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at [www.transparency.org](http://www.transparency.org).

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## Providing an Alternative to Silence:

### Towards Greater Protection and Support for Whistleblowers in the EU

#### Country Report: Germany

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#### 1. Introduction

Stereotypes often provide an image according to which Germans are good organizers, love rules and respect the rule of law. In corruption indexes Germany regularly scores reasonably well. However at the end of 2012 the country still has not ratified the United Nations Convention against Corruption or the Council of Europe Conventions against Corruption. It is criticized by the Council of Europe for a lack of independence of its and courts and prosecutors<sup>1</sup>. In 2011 its courts have been found to violate the fundamental right of freedom of speech enshrined in article 10 of the European Charter of Human Rights<sup>2</sup>. And despite the promises given by its Government already in 2010 to the other G20-States<sup>3</sup> even at the end of 2012 Germany still does not have statutory whistleblower protection other than a little fragment which is applicable only to public officials and only in bribery contexts.

For all other whistleblowing situations a potential whistleblower is left alone with a maze of different laws and principles applied by the courts. While internal whistleblowing is typically lawful this does not mean that a whistleblower would not face risks of harassment and bullying. When judging about the legality of whistleblowing to public authorities German courts tend give a lot of weight to the need to respect the interests of the employer, thus to be on the safe side a whistleblower would need to wait for his negative reaction before addressing himself to public authorities. Whoever does not follow these steps as well as those who get caught disclosing information to third parties or the media risks his dismissal without notice, disciplinary, civil and criminal liability. The same fits for those whistleblowers that are not able to show sufficient evidence that they had good will and reasons to raise their allegations. But even those who manage to escape the traps of the legal maze are normally offered only limited protections. This is due to bypasses in labor law as well as to the high burdens of prove when in comes to proving damages that occurred because of reprisals against the whistleblower.

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<sup>1</sup> See the report of S. Leutheusser-Schnarrenberger to the CoE-PACE 11993 of 07.08.2009 (<http://goo.gl/mdSwO>) and <http://gewaltenteilung.de>.

<sup>2</sup> ECtHR: Heinisch v. Germany, No. 28274/08 of 21.07.2011 (<http://goo.gl/vpa1e>).

<sup>3</sup> See G20-Anti-Corruption Action Plan agreed at the Seoul-Summit 2010 (<http://goo.gl/xO9uk>) and the 2011 OECD/ G20 Anti-Corruption Action Plan - Action Point 7: Protection of Whistleblowers, Whistleblower Protection: Frameworks, Compendium of best practices and guiding principles for legislation, 2011 (<http://goo.gl/TgTly>).

Internal whistleblowing policies are not yet very common in Germany's private sector<sup>4</sup> and can typically only be found in big corporations. Even there they often lack independent addressees, involvement of staff, feedback to and rights for whistleblowers and transparency of their application.

Some political scandals and also some so called "accidents" that caused a lot of lives in Germany could have been prevented if one would have listened to the early warnings of whistleblowers and reacted accordingly<sup>5</sup> but the insight that it needs a cultural change and legal reforms to avoid these situations to repeat in Germany is still underdeveloped.

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<sup>4</sup> According to "Putting Corruption out of Business 2011" a survey by Transparency International, only 19% of German Business say that they "Have measures in place to support potential whistleblowers" (<http://www.transparency.org/research/bps2011>).

<sup>5</sup> See <http://www.whistleblower-net.de/whistleblowing/fall-beispiele-fur-whistleblowing/falle-ohne-whistleblowing/> and [http://www.anstageslicht.de/index.php?UP\\_ID=14&NAVZU\\_ID=94](http://www.anstageslicht.de/index.php?UP_ID=14&NAVZU_ID=94).

## 2. Compilation, description and assessment of the legal situation for whistleblowers

In Germany there are no standalone whistleblower laws or regulations. Even though Germany has signed the European Conventions on Corruption and the UNCAC it has not ratified any of these international treaties and thus has no legal obligation in international law to implement whistleblower protection<sup>6</sup>. Despite the findings of a recent G20/OECD report<sup>7</sup> the German government also tends to see no need to implement specific legislation on whistleblower protection to fulfill the political commitment of the G20 action plan against corruption.

The term “whistleblower”, for which there is no clear equivalent in German<sup>8</sup> is not defined or even used in any laws. Thus the question if someone who speaks out about wrongdoing at the workplace acts lawfully or illegal, is protected or can be dismissed in labor law or even held responsible under civil or criminal law is depending on the specificities of the situation, the application of different general principles, some specific norms and finally their interpretation and application by a court.

### The situation under German labor law

In jurisprudence the question of whistleblowing up to now has most often been raised in labor courts in the context of disputes under the Employment Protection Act (Kündigungsschutzgesetz - KSchG)<sup>9</sup> by employees addressing the courts to annul their dismissal. The Employment Protection Act allows employees who were in an employment relationship that existed without interruption for more than six months and who worked for a company that typically employs more than 10 workers to ask a labor court to verify if their dismissal was socially justified. According to Sec. 1§2 of the Employment Protection Act the employer in this case has to prove the facts that determine the termination.

If the contract lasted for a shorter time or the company is smaller the Employment Protection Act is not applicable which means that the employer does not need to state any reasons while the employee will need to prove that the dismissal was illegal.

But even where the Employment Protection Act is applicable the courts might find it sufficient that an employer shows that an employee has violated his duty of loyalty or secrecy while it would still rest with the employee to prove that he had legitimate reasons to do so.

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<sup>6</sup> Germany has ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: and the y the Working Group on Bribery in International Business Transactions (CIME) also looks certain aspects of whistleblower-protection. The same fits for the “Group of States against corruption (GRECO)” to which Germany is a member.

<sup>7</sup> See Fn. 3.

<sup>8</sup> A quite neutral German expression which is used in compliance contexts is „Hinweisgeber“ (“hint-giver”) but frequently whistleblowers in Germany are negatively addressed, e.g. as “Denunzianten” (denouncers) or “Nestbeschmutzer” (those who make their own nest dirty).

<sup>9</sup> Electronic versions – in some cases also in English – of most of the federal laws of Germany are available under <http://www.gesetze-im-internet.de/>

In the concrete application on whistleblowing cases judgments by the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG)<sup>10</sup> and the Federal Labor Court (Bundesarbeitsgericht – BAG)<sup>11</sup> show some common lines that provide some orientation but also divergences. In 2011 a decision of the European Court of Human Rights<sup>12</sup> found that Germany had violated article 10 of the European Charter of Human Rights as its courts did not annul the dismissal without notice of Brigitte Heinisch who as a nurse for the elderly blew the whistle about insufficient and dangerous care. At the moment it is still unclear how German courts will take this new judgment into account.

In literature and public discussion some see this judgment mainly as a confirmation of the general principles already applied by the Federal Labor Court with only a different end result in balancing them. Others see it as a turning point as the ECtHR stated that whistleblowing to public authorities should be a valid option for whistleblowers and gave huge weight to the public interests involved which before had played almost no role in German courts.

In the German Federal Parliament (Bundestag) the oppositional parties (SPD, LINKE, BÜNDNIS90/Die GRÜNEN) asked for clarifications and improvements of the legal situation of whistleblowers and brought in two bills<sup>13</sup>. The governing parties (CDU/CSU, FDP) state that the legal status quo in dealing with whistleblowing is sufficient and in line with the ECtHR and argue that balancing all relevant aspects allows the Courts to come to just decisions in each individual case<sup>14</sup>.

This situation of case by case decisions based on the balancing of different interests make it difficult to almost impossible to foresee the legal outcome of whistleblowing. However there are some guidelines that can be distilled from legislation and jurisprudence that those who think about blowing the whistle in Germany should know.

#### *No protection for deliberately false and frivolously false claims*

Deliberately false and also frivolously (grossly negligent) false claims will typically be seen as a serious breach of contractual obligations and allow for dismissal even without notice. If the employer can prove that he suffered costs or other losses he also will have a good chance to claim damages under civil law and even criminal law might become applicable.

One might argue that this should not bother good faith whistleblowers at all. But experience shows that in a German courtroom the good faith of a whistleblower is quite likely to be challenged by the judge asking him to show on which facts he based his decision to blow the whistle. If he or she has no documents to point to or does not want to bring those into trouble from whom he or she got oral information the judge might see this as sufficient to find gross negligence. That is exactly what happened to Brigitte Heinisch.

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<sup>10</sup> E.g.: BVerfG 1 BvR 2049/00 of 02.07.2001.

<sup>11</sup> E.g.: BAG 2 AZR 235/02 of 03.07.2003 and BAG 2 AZR 400/05 of 07.12.2006.

<sup>12</sup> See Fn. 2.

<sup>13</sup> For references and a quick overview refer to the charts in chapter 6 and to the materials of the parliamentary hearing of 05.03.2012 (<http://goo.gl/JhdB>). At the beginning of 2011 an online petition to the Bundestag demanding better whistleblower protection found more than 5400 supporters (<http://goo.gl/DiHRL>).

<sup>14</sup> See the report about the parliamentary debate in the Bundestag on 14.06.2012 at <http://goo.gl/PXhUu>.

Another problem that whistleblower might encounter is that judges in labor courts often tend to handle whistleblowing cases with the same approach they normally use. These judges concentrate on the employment issue and try to avoid to end up in a situation in which they would need to decide about the truthfulness of the whistleblowers allegations or the seriousness of the wrongdoing. This has also become visible in the Heinisch case as it needed the ECtHR to address the public interests in the case which before had been almost fully neglected by the German courts.

#### *Duties to inform the employer or dedicated authorities*

On the other hand in some situations, even staying silent may get an employee into legal troubles as there are some laws that oblige employees to inform their employer or specifically mentioned authorities about wrongdoing and risks. Apart from Criminal Law, such norms can e.g. be found in Sec. 11 of the Law against money laundry (Geldwäschegesetz), Sec. 10 Securities Trading Act (Wertpapierhandelsgesetz - WpHG) and Sec. 16§1 Occupational Safety and Health Act (Arbeitsschutzgesetz – ArbSchG). An obligation to inform the employer may also follow from the employment contract and the specific responsibilities of the employee, e.g. if they include overseeing other employees or potentially dangerous technical equipment. But even for employees with no such specific job responsibilities German courts may, as they did in some decisions in the past, interpret the general loyalty duties arising from the work contract and Sec. 241 and 242 of the Civil Code (Bürgerliches Gesetzbuch - BGB) in a way that they oblige the employee to inform the employer about dangers for personal harm and other substantial damage.

#### *General right to inform (or to complain to) the employer*

Even where there is no obligation, internal whistleblowing, i.e. blowing the whistle to the own employer and to persons or bodies designated by him for receiving such disclosures is legally permitted. It thus should not lead to retaliation. In real life however whistleblowers as unwanted messengers frequently risk becoming victims of harassment and bullying by hierarchy or colleagues even in these situations. In a case where a dismissal was reasoned with a whistleblowing activity it is obvious that there has been a sanction because of the whistleblowing. This is much more difficult in case of harassment which happens informally and on a psychological level. Here the whistleblower will face a hard time to prove that he was systematically bullied because of his whistleblowing. The same fits if he tries to prove that an employer has neglected his duty to fight against harassment.

#### *Specific rights to inform (or to complain to) dedicated bodies or authorities*

Sec. 84 and Sec. 82 of the Works Constitution Act (Betriebsverfassungsgesetz - BetrVG) constitute even more specific rights of the employee but relate only to issues that personally affect the employee (complaints), thus they are not applicable in cases where a whistleblowers raises issues that only concern third persons or the public. The Works Constitution Act also constitutes the possibility of employees to form Work Councils and the right of employees to complain to them (Sec. 85) and to propose points for their agenda (Sec. 86a), so an employee might also be permitted to inform his Work Council. As Work Council members have a duty of confidentiality these disclosures have to be regarded as purely internal.

There are mainly three areas of laws which contain even more specific rights including conditioned rights for external disclosures to dedicated authorities. They have in common that these specific rights follow from the implementation of EU law into national law:

The General Equality Law (Allgemeines Gleichstellungsgesetz - AGG) deals with specific forms of discriminations due to e.g. gender, age, religious or sexual orientation. Within this context employees have specific rights for internal complaints (Sec. 13 AGG) and may also complain to a dedicated Anti-Discrimination Office on federal level (Sec. 27 AGG). The AGG contains a provision that forbids retaliation against complainers, witnesses and supporters (Sec. 16 AGG) and even a certain shift of the burden of prove. Extending this level of protection to all forms of whistleblowing might provide a good starting point not only for whistleblowers from Germany but, as this is basically EU-law for all whistleblowers within the EU. However up to now the courts in Germany, in particular the labour courts, are not extending the field of application of the AGG.

Data Protection Laws (Bundesdatenschutzgesetz – BDSG on federal level and corresponding Länder-laws) are in part also influenced by EU-law and contain specific norms which allow anybody who assumes that his data protection rights have been violated to complain to data protection authorities (e.g. Sec. 21 BDSG). On Länder-level these law sometimes contain an additional phrase forbidding discrimination or reprimands<sup>15</sup>. In autumn 2010 the federal government proposed a bill to amend the BDSG with new rules dealing with data protection in employment. Sec. 32I§4 of this bill contains a provision according to which employees should be obliged to inform their employers before they complain to data protection authorities. This clause was heavily criticized even by the Bundesrat (a body through which the Länder participate in the legislation on federal level) as a potential violation of Art. 28§4 of EU Directive 95/46/EC.

The third law which has its roots in EU law and which contains a specific clause that allows information of public authorities is the Occupational Safety and Health Act. According to Sec 17§2 ArbSchG employees who first informed their employer (see Sec 16 ArbSchG mentioned above) can turn to the regulator if the employer did not take action to assure safe and healthy working conditions.

### *General principles for judging the legality of whistleblowing*

Wherever the above mentioned specific rules do not apply<sup>16</sup> judging the legality of whistleblowing is based on the application of more general laws and the weighting of the legally protected interests of the employee and the employer. According to Sec 241§2 BGB “An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party”. Additionally according to Sec. 242 BGB “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration”. The reach of these obligations has to be interpreted in a way which takes into account the basic rights laid down in the German Constitution (Grundgesetz – GG) and in the ECHR. Art. 5§1 GG and Art. 10 ECHR guarantee the right to freedom of expression (striking in favor of the whistleblower), which however according to their second paragraphs are not unlimited but need to take into account the rights of

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<sup>15</sup> E.g. Sec 25 DSG NRW (<http://goo.gl/4m5DI>).

<sup>16</sup> There might be certain risk that a court might apply the following principles even in a case where there are specific rights or duties that normally should allow whistleblowing, e.g. if the right is contained only in the law of a Land.



others, as for example the rights of Art. 12 GG (Occupational Freedom) and Art. 14 GG (Property) (striking in favor of the employer).

In 2001 dealing with the case<sup>17</sup> of an employee who was dismissed for providing information as a witness in a criminal case the BVerfG also took Art. 2§1 (General freedom to act) and Art. 20 GG (Constitutional principles – Rule of law) into account stating that it would violate the rule of law if someone who without acting frivolously provides information exercising his duty as a witness could be dismissed. In this decision the BVerfG also stated that the same would “normally” also be true if someone used his right under Sec. 158 of the Code of Criminal Procedure to make a criminal complaint to the competent authorities.

Art. 17 GG states that *“Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.”* However this right to petition until now did not play much of role in German courts. Art. 5§3 GG contains the freedom of arts and science which in special circumstance might also get some relevance in whistleblower cases.

In 2003 the BAG had to decide about a whistleblower case<sup>18</sup> in which someone made a criminal complaint anonymously. Later his identity was discovered and he was dismissed. The BAG did not decide the case but pushed it back to a lower court giving certain guidelines that should be applied. Firstly the BAG stated that the employee could not justify himself by referring to Art. 5 GG as this article would not apply if someone acts anonymously<sup>19</sup>. Then it stated that Sec. 241§2 obliges the employee to take into account the interests of the employer and that from this it follows that external whistleblowing is only admitted if it is a proportionate reaction by the employee in the concrete situation. To find out if this condition is met the court looks at different circumstances. e.g.:

- The (possible) knowledge of the whistleblower about validity of his claim - deliberately false and frivolously false claims are not admitted.
- The degree of risk of damage and the degree of the risk of negative publicity faced by the employer - the higher these risks are the more good reasons the employee needs.
- The motivation of the whistleblower – i.e. a whistleblower should not act to wear down his employer.
- The possibility of an alternative action which would better respect the interest of the employer and still be take reasonable for the whistleblower.

The last criteria in most cases requires the whistleblower to inform his employer in a first step and to wait for his reaction before eventually turning to public authorities in a second step (and the same criteria will certainly exclude information to any other externals or even the media). According to the BAG the obligation for an employee to inform his employer first might exceptionally not be reasonable when:

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<sup>17</sup> BVerfG 1 BvR 2049/00 of 02.07.2001.

<sup>18</sup> BAG 2 AZR 235/02 of 03.07.2003.

<sup>19</sup> In clear contrast to judgments of other federal courts like BVerfG and BGH as shown in Manger P. 160ff.

- The employee is aware of criminal offenses, for which by failure to report, he would expose himself to a prosecution (such a duty however is rarely existing as e.g. Sec. 138 of the Criminal Code only applies to very serious crimes)
- The whistleblowing relates to serious offenses (the BAG does not specify those)
- Or if crimes have been committed by the employer or his executive bodies.

These criteria have since 2003 essentially been applied in the labor courts, but the diversity of the judgments based on them is a clear indication that they do not lead to very predictable outcomes<sup>20</sup>. From a counseling perspective whistleblowers should be aware that they normally will have an obligation to blow the whistle internally first before they might be able to turn to public authorities, and that they should document that they had followed this step as well as that they had good reasons to conclude that there were sufficient indications for a wrongdoing. Otherwise and especially when turning to the media they risk a dismissal without notice and have almost no chance to be reinstated by a court.

In addition to meeting these criteria whistleblowers in Germany will also need to be very prudent in the way they react to their dismissal and in the way they act while their labor dispute is pending. There are several cases in which labor courts found that a dismissal as such was illegal but in the same judgment dissolved the labor contract based on Sec. 9§1S2 KSchG. This is possible if a court following a request by the employer (Auflösungsantrag) finds that due to the alleged misbehavior of the whistleblower a constructive future cooperation between employee and employer cannot be expected. The employee might get a certain financial compensation but his job is lost retroactively from the moment a normal termination would have been possible. Using this quite unique feature of German labor law the employer may thus achieve his goal to get rid of the whistleblower even with an illegal dismissal.

In its judgment of the Heinisch case<sup>21</sup> the ECtHR took account of the above mentioned criteria of the BAG. But apart from the fact that this court denied that Mrs. Heinisch acted frivolously (which the German labor courts assumed by blaming her for not providing sufficient evidence of facts on which she based her decision to make a criminal complaint) the Heinisch judgment of the ECtHR contains at least three additional elements:

- Firstly the ECtHR referred in §§37ff. to relevant international law and practice and points out that Germany has not ratified ILO Convention No. 158. In §75 the ECtHR states that “*German law does not provide for a particular enforcement mechanism for investigating a whistleblower’s complaint and seeking corrective action from the employer*”, thus it points to certain deficits of whistleblower protection in Germany.
- Secondly §65 of the judgment reads: “*... in the light of this duty of loyalty and discretion, disclosure should be made in the first place to the person’s superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public.*” Thus the ECtHR (in contrast to the BAG) seems to give

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<sup>20</sup> References to some of those judgments can be found at: <http://goo.gl/JXkGX>.

<sup>21</sup> ECtHR: Heinisch v. Germany, No. 28274/08 of 21.07.2011 (<http://goo.gl/vpa1e>).

the whistleblower a choice to turn “in the first place” to a public “authority” and sees a reasons for limitations of the freedom of expression especially when the disclosure is made to the public.

- Finally the ECtHR e.g. in §§71 and 91 explicitly takes into account the public interest in the disclosure, the chilling effect of the sanction to other employees working in the sector and the importance of insider knowledge to bring the matter at the issue of the public’s attention. All these are aspects which until that judgment did not play much of a role in German employment jurisdiction, which dealt with whistleblowing disputes as a two party dispute weighting only the interest of those parties.

At the moment it is still too early to conclude if these three elements will thanks to the ECtHR now play a bigger role in German courts. Some parts of the literature and some recent judgments see the Heinisch judgment as very specific and thus stick to the old BAG-principles. However it is interesting to see that in at least one recent judgment the BAG<sup>22</sup> itself referred to the BVerfG of 2001 and the Heinisch judgment of the ECtHR without reiterating its own old position.

#### *Consequences of legal and illegal whistleblowing in an employment relation*

Whistleblowing which according to the above criteria is illegal may lead to sanctions by the employer, e.g. a final warning or dismissal with or without notice. Normally it is a general principle of German employment law that at least in the area of application of the KSchG a dismissal is only lawful if there had been a prior final warning or if such a final warning would exceptionally be superfluous. The latter is assumed if it cannot be expected that the employee will change his behavior or if the breach of law and trust is so serious that the employer cannot be obliged to continue working with this employee. While traditionally German labor court found even a dismissal without notice a proper reaction to “illegal” whistleblowing, recently there are some indications that the proportionality of the sanction might get more attention. In 2010 the BAG “Emmely Case”<sup>23</sup> got a lot of media attention in Germany finding in case of a suspected very minor theft (worth 1,30 EUR) by a long term employee her dismissal was (taking into account all special circumstances) not proportional (i.e. a final warning would have been sufficient). This may also be a way which German courts after the Heinisch judgment might use in whistleblower cases.

In addition the employer who suffered damage because of “illegal” whistleblowing may claim damages for a breach of duty under contractual law according to Sec. 280 BGB or under torts according to Sec. 823ff. BGB. This is especially true when a whistleblower knowingly or frivolously made false allegations, which in this case has to be proven by the employer.

Whistleblowing which according to the above mentioned criteria is considered to be “legal” allows for the application of Sec. 612a BGB which states: *“The employer may not discriminate against an employee in an agreement or a measure because that employee exercises his rights in a permissible way.”* In connection with Sec. 1004 BGB the whistleblowing-employee may require the employer to remove any reprisals and may seek a prohibitory injunction, he might also claim damages for breach

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<sup>22</sup> BAG 10 AZR 283/10 of 14.12.2011. However this case was not about a dismissal because of whistleblowing so it is unclear if this really marks a change in the position of the BAG.

<sup>23</sup> BAG, 2 AZR 541/09 of 10.06.2010.

of duty according to Sec. 280 BGB. Apart from situations where the employer explicitly sanctioned a whistleblower for blowing the whistle this typically puts the whistleblower into a situation in which he needs to prove that he suffered damage and that this happened because of his whistleblowing. While theoretically in German courts one might claim damages also in case of harassment the burden of proof for the employee is quite high.

Finally it deserves mentioning that Sec. 612a BGB is interpreted quite narrowly by German courts as normal rights of everybody e.g. the right to file an application for criminal prosecution (Sec. 158 StPO) as such do not qualify for “exercise his rights” and even where a whistleblower has fulfilled all conditions of a legally allowed whistleblowing according to case law Sec. 612a BGB is not hindering the employer to use the bypass of Sec. 9§1S2 KSchG for achieving his goal to get rid of the whistleblower.

### **The situation under civil service laws**

The rules for public officials in Germany are laid down in the Federal Civil Service Law (Bundesbeamtengesetz – BBG) for officials on federal level and in the Civil Service Status Law (Beamtenstatusgesetz – BeamtStG) and in corresponding Länder laws. All of these have since a long time four guiding principles which are relevant for whistleblowers:

- The duty to remonstrate (Sec 63 BBG, Sec . 36§2 BeamtStG) stems from the personal responsibility of officials for the lawfulness of their activities. It obliges public officials who doubt the lawfulness of an order to raise these doubts with their direct superiors. If doubts continue they must address the next level of hierarchy. If hierarchy confirms the order the official is exempted from his personal responsibility as long as the requested activity would not knowingly violate human dignity or constitute an administrative or criminal offense. So in a sense the duty to remonstrate could be seen as a specific case in which there is an obligation for internal whistleblowing. Despite them being a duty in practice remonstrations are not very common and those which do happen are often seen as a provocation act which usually does not serve to well the career of the official concerned. A study trying to find more information on remonstrations only found that almost no information is available.
- The second principle are the obligations of public officials to counsel and support their superiors and to follow their orders, there is also an obligation to act moderate when exercising political activities.
- Public officials may raise internal request and complaints but are obliged to do that only through official channels (Sec 125 BBG, Sec . 36§2 BeamtStG) i.e. step by step through all levels of the own hierarchy, whereby the level of the direct superior as first level of procedure may only be skipped when a complaint is directed against that direct superior.
- The fourth guiding principle is the obligation of official business secrecy or confidentiality (Sec 67 BBG, Sec . 37 BeamtStG) which concerns all information that officials become aware of on the occasion of their official duties. This obligation rests even after the end of the term of service and can only be overcome if messages are required in the official course of duties or when facts are concerned which are obvious or concerning their relevance warrant no

confidentiality. Until 2009 the only further exception to that rule concerned areas in which there was a duty to indicate planned criminal activities.

From all that it follows that for public officials compared to private employees there are on the one hand even more situations in which an official might be obliged to inform his direct superior and on the other hand even higher hurdles to blow the whistle if their potential addressee is not someone in their chain of command. Not respecting these obligations may lead to disciplinary sanctions, up to dismissal and loss of pension rights.

Only since a few years there are some exemptions to the above principles which had been introduced with the aim of fighting corruption. Within quite a lot of administrations specific internal policies and procedures have been established that require and/or allow officials to contact dedicated internal representatives when they suspect corruption. Since 2009 the secrecy clauses (Sec 67§2(3) BBG, Sec. 37§2(3) BeamtStG) also have been amended and now explicitly allow an official who based on facts has a reasonable suspicion of a violation of Sec. 331 – 337 of the Criminal Code to inform a dedicated internal body or public prosecutor agencies. It has to be noted that Sec. 331-337 only concern bribery related crimes and not even other forms of corruption.

Beyond these general rules there are some specific ones: Art. 45c GG constitutes a Parliamentary Commissioner for the Armed Forces, who according to Sec. 7 of the corresponding law can be contacted by any soldier (but according to Sec. 8 not anonymously). Art. 45d GG constitutes a parliamentary panel to scrutinize the intelligence activities on federal level. Since 2009 anybody who works for an intelligence agencies may contact that panel (Sec. 8 of the corresponding law). This new rule has three specialties as it allows these contacts only in job related issues but not in the interest of the informant or his colleagues, it obliges the informant to inform the head of the agency in parallel and it obliges the panel to send a copy of the information to the Federal Government for their statement.

Apart from all this public officials of course also enjoy the constitutional rights, especially the right to petition under Art. 17 GG and in a form which respects the legitimate needs of their office and duties also the right of freedom of expression under Art. 5 GG.

### **The situation under criminal laws**

In addition to a violation of an employment contract or a civil servants duty whistleblowing in some cases under German Law might also constitute a criminal activity. Apart from the Criminal Code (Strafgesetzbuch – StGB) relevant norms might also be found in other laws e.g. in the Law Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG), in the Copyright Act (Urheberrechtsgesetz – UrhG) or in data protection laws.

By the act of whistleblowing itself, i.e. by spreading the information, the whistleblower could get into conflict with the protection of private (e.g. Sec. 17 UWG, Sec. 201ff. StGB) and state secrets (e.g. Sec 93ff. StGB), copyright (e.g. Sec 106 UrhG), data-protection (Sec. 44 BDSG) or commit false accusations (Sec. 145d, 164 StGB) and defamation (Sec. 186ff. StGB) as well as insult (Sec. 185 StGB). In some cases the whistleblower by disseminating the information might also commit and embezzlement and abuse of trust (Sec. 266).

In a whistleblowing context might be interesting to note that Sec. 93§2 StGB contains a limitation of the possible content of state secrets stating: “Facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements, kept secret from the treaty partners of the Federal Republic of Germany, are not state secrets”. However in German law there is no general rule that all illegal secrets do not enjoy protection.

A whistleblower could also commit crimes by the way in which he himself gets hold of the information (e.g. Sec. 240, 242, 246, 263 StGB, Sec 44, 43§2(3f.) BDSG). Finally criminal law also deals with possible mitigations of punishment of a whistleblower who was involved in a crime about which he afterwards blows the whistle (Sec 46b StGB).

In some situations - especially for people which have an affirmative obligation to act in order to protect others - not undertaking action and not blowing the whistle might also lead to criminal sanctions (Sec. 13 StGB), while the general duty to report crimes in Germany is limited to situations in which the results of very serious crimes can still be averted (Sec. 138 StGB).

When analyzing the criminal responsibility of a whistleblower one does also need to take into account the fundamental rights mentioned above and legally relevant justifications. Justification norms can be related to a group of crimes (Sec. 193 StGB - Fair comment) or apply to all crimes (like Sec. 34 StGB – Necessity of averting an imminent danger). Other factors that could play an important role are the legal relevance of errors (Sec. 16f. StGB), duress (Sec. 35 StGB), and the individual guilt and the circumstances mentioned in Sec. 46§2 StGB.

### **Other areas of law which might become relevant in whistleblowing cases**

Apart from employment related laws and criminal laws a whistleblower might also face civil law liability especially under tort law (e.g. Sec. 823, 826, 1004 BGB). At least in relation to the own employer German courts tend to hold whistleblowers liable only in cases of knowingly or frivolously false accusations<sup>24</sup>. A whistleblower might on the other hand also try to claim damages under these laws, but is likely to end up with similar problems as with those mentioned above in relation to harassment claims.

Especially for external whistleblower laws in relation to publication and media are of course also of relevance as they might despite the fact that they are not legally permitted to do that choose to provide their information and to leak source material to media, hoping that their identity will not be discovered. The freedom of the press is enshrined in art. 5§1 GG and includes the right to protect their sources. Consequently the Criminal Procedure Code (Strafprozessordnung – StPO) provides professional journalist and their assistants with the right to refuse information (Sec. 53§1(5) StPO, a similar clause is Sec. 383§1(5) Civil Procedure Code) and excludes this material from seizure (Sec 97§5 StPO)<sup>25</sup>. In this constellation the whistleblower – who himself has no rights – fully depends on the professional journalist exercising his rights and acting sufficiently prudent not to disclose the

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<sup>24</sup> E.g. LAG Hamm 11 Sa 2248/10 of 21.07.2011 referring to BVerfG 1 BvR 1086/85 of 25.02.1987 and BVerfG 1 BvR 2049/00 of 02.07.2001.

<sup>25</sup> In its Cicero judgment (1 BvR 538/06 of 27.02.2007) the BVerfG strengthened these guarantees against attempts to circumvent them.

whistleblowers identity e.g. by technical mistakes or by using insecure means of communication<sup>26</sup>. Internet bloggers and other non-professionals as well as NGOs publishing whistleblower-information do not enjoy these legal protections. There is one other component here that deserves to be mentioned. While the BVerfG usually gives the freedom of the press a very high weight there are some lower courts especially in Hamburg and Berlin that sometimes tend to be quite fast in issuing injunctions against those who published critical information. As a plaintiff is quite free in choosing in which court he brings up his action, this leads to a situation in which those who publish might need to go through several levels of jurisdiction which leads to a certain chilling effect for those who don't have the financial background nerves and time to do that.

Data-protection laws and copyright laws might also become hurdles for a whistleblower and the media publishing their stories. E.g. in case of the Love-Parade-Disaster the city of Duisburg tried to invoke copyright laws to hinder publication of leaked material by certain websites, but dropped these allegations when they became public<sup>27</sup>.

As on European level also in Germany anti trust laws also contain leniency provisions<sup>28</sup>, allowing for the first company who blows the whistle to achieve mitigations of sanctions.

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<sup>26</sup> EU-data preservation rules constitute another threat in this context and also projects like INDECT.

<sup>27</sup> See <http://goo.gl/vFOYB>.

<sup>28</sup> See <http://www.bundeskartellamt.de/wDeutsch/publikationen/bonusregelung.php>.

### 3. Perceptions and political will

Within the last decade the term whistleblowing and the phenomena behind it got considerably more attention in Germany. There are at least five different developments contributing to this:

Firstly starting from the US Sarbanes Oxley Act and its influences via German subsidiaries of US listed companies and big German companies listed on the US markets some experts in private business started considering implementing whistleblowing policies and/or hotlines in Germany as well. This was also due to compliance and corporate governance issues which in general got more attention, especially after the Siemens and other prominent corruption scandal. While first it looked like data-protection issues were blocking these developments in the aftermath of the decision of the EU art. 29 group on data protection<sup>29</sup> and corresponding papers of German data protection agencies whistleblowing policies<sup>30</sup> and hotlines started to be implemented especially in large listed companies. Apart from purely internal solutions some companies used the services of external hotlines or service providers for incoming messages. A German company developed a system to anonymously and bi-directionally exchange over the internet which has since also been implemented by some private firms and even some public authorities<sup>31</sup>.

Another model for dealing with incoming whistleblowing messages is that of an ombudsperson. Typically these are self-employed lawyers paid by the company to whom whistleblowers may address themselves. As the lawyers benefit from professional secrecy this channel allows confidential whistleblowing and also gives the whistleblower a possibility to get professional assistance and council in formulating his message. On the other hand lawyers might end up in loyalty conflicts, especially if their task also involves informing the company about the assumed credibility of the whistleblower and/or his message. Typically despite being external lawyers this can be considered as a form of internal whistleblowing as the message finally is only reported back to the company.

Most of the whistleblowing policies are implemented top down by management via ethics regulations which frequently also create a – legally doubtful – obligation to report. According to jurisdiction wherever a working council exists its agreement is needed for the implementation of whistleblowing mechanisms but not necessarily for every clause of the ethics regulation about which the whistle should be blown<sup>32</sup>. As whistleblowing policies need acceptance by potential users they should normally be transparent and be constructed and implemented in cooperation with staff, e.g.

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<sup>29</sup> WP 117 of 01.02.2006 - Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime (<http://goo.gl/vCHHg>).

<sup>30</sup> „Arbeitsbericht der Ad-hoc Arbeitsgruppe Beschäftigtendatenschutz des Düsseldorfer Kreises, Whistleblowing – Hotlines: Firmeninterne Warnsysteme und Beschäftigtendatenschutz“ (<http://goo.gl/QbjxN>).

<sup>31</sup> The BKMS-System is e.g. used by the Länder of Lower-Saxonia (<http://goo.gl/yh8rV>), Baden-Württemberg (<http://goo.gl/B8Tah>) and by the Bundeskartellamt (Federal Anti-Trust-Agency - <http://goo.gl/Q55H6>).

<sup>32</sup> BAG 1 ABR 40/07 of 22.07.2008.



via agreements between work-council and management. However in practice this approach up to now seems to be rare<sup>33</sup>. Most companies still fear transparency as they are very concerned that media attention will not praise that they fight against corruption but just report about the cases of corruption found and thus harm the image of the company. While German companies are more and more open and positive to internal whistleblowing policies the association of German employers as well as most of the company representatives in the last parliamentary hearings strongly opposed any whistleblower protection legislation and stated that the principles of loyalty and “inform your employer first” need to be upheld. External whistleblowing for most German companies still is an evil that maybe can be fought by implementing internal whistleblowing policies. The argument that it needs external whistleblowing for enabling public discussion on relevant issues and for detecting those of their competitors who play against the rules are unheard.

Secondly also in the public sector some initiatives in the fight against corruption have been undertaken. The police in Lower Saxonia has made use of the above mentioned internet based anonymous whistleblowing system and just recently other Länder and agencies seem to follow that approach. All over federal and in a lot of Länder administrations Anti-Corruption Agents have been established to which whistleblowers could turn but there are almost no public administrations which have dedicated whistleblowing policies and regulations.

Thirdly the term whistleblower got some public attention thanks to quite intensive media coverage about WikiLeaks. The fate of the Whistleblower Bradley Manning however seems to be less interesting for media in Germany than Julian Assange. As one of the most prominent dissidents from WikiLeaks came from Germany his announcement to launch a new form of leaking platform also got some attention, but OpenLeaks still has not become operational. Instead since some German media set up anonymous e-letterboxes to receive disclosures and leaked documents, but it is too early to tell if this will have a major influence on investigative journalism and media as it is very much taking place within the usual settings.

Fourthly some German public authorities were offered to buy CD-ROMs with data about German tax evaders and their dirty savings in Liechtenstein and Switzerland. Some authorities decided to accept these offers and spend several million EURO per case. They also helped the source (which is likely to have illegally copied the data from the banks) to stay anonymous. This activity for which there is no specific legal basis was justified with allegedly hundreds of millions of EURO in recollected taxes and fees and even more money coming in from other tax evaders which in fear of discovery used the possibility to turn themselves in to the tax authorities.

Finally some specific cases of whistleblowing caught considerable media and public attention. Especially the case of Brigitte Heinisch and the fact that the ECtHR found that Germany breached her freedom of expression also brought some attention to the weak legal protection which whistleblowers currently face in Germany. However even when new whistleblowing cases pop up in the media, media and politics mostly concentrate only on the specificities of the case and perhaps link it to other cases which happened in the same field (like e.g. in nursing) but rarely use a case to talk about whistleblowing and whistleblower-protection in general.

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<sup>33</sup> For several examples and a detailed analysis refer to the study of the Hans-Böckler-Stiftung (Ed.).

For several very big disasters in Germany that each caused many deaths and injuries there is clear evidence that before the tragedies there were tips and warnings by employees that could have prevented those disasters<sup>34</sup>. But these whistleblowers had been ignored, turned down or even bullied. And even these disastrous cases did until now not turn out to become the catalysts for authorities, politicians or the media to draw the necessary consequences: they did not lead to better whistleblowing policies or protections.

In civil society some small organizations like Whistleblower-Netzwerk e.V. face quite a hard time trying to bring public attention to these issues. Even when whistleblowing protection was debated in German Parliament media took almost no notice of it. In a parliamentary debate at the beginning of 2011 some leading MEPs of the governing CDU still used a very aggressive and polemic approach referring to whistleblowers as “Blockwarte” (Nazi representative supervising a neighborhood), or plainly stating “we don’t need laws to protect denouncers”<sup>35</sup>. In the parliamentary debate in 2012<sup>36</sup> the tone was more moderate but still the governing parties did not see any need for action.

Apart from these five developments in Germany there is no reliable data about the opinion of the general public regarding whistleblowing. An educated guess could deliver a very mixed picture.

Especially in the older generation the basic attitude to whistleblowing still seems to be a very skeptical. This might be connected to the state organized denunciation under the NAZI or STASI regimes<sup>37</sup>, but there might also be a fear that someone (e.g. family-member or colleague) might whistle off one’s own secrets. Looking at younger parts of the population there might be some more sympathies, especially with internet based leaking and WikiLeaks often combined with the opinion that thanks to new technologies leaking is simple and staying anonymous is easy. When talking face to face about workplace related whistleblowing it is astonishing that after a certain while there are quite a lot of people who start to talk about their own experience at normal workplaces. And too often these are stories about them or a friend who raised concerns at work and got frustrated or paid a price for it. The common lesson of these stories is: speaking up does not pay out. While there is no data on whistleblowing there is a big study about on bullying and harassment which was published in 2002<sup>38</sup>. It asked people who considered themselves as victims of bullying about their opinion why that happened. The most frequent answer given by 62 per cent was: because I raised critique at the workplace.

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<sup>34</sup> See Fn. 5.

<sup>35</sup> See <http://www.whistleblower-net.de/blog/2011/01/20/spd-kuendigt-gesetzentwurf-zum-informantenschutz-an/> and <http://www.whistleblower-net.de/blog/2011/05/26/sind-whistleblower-blockwarte/>.

<sup>36</sup> See <http://www.whistleblower-net.de/blog/2012/06/15/bundestag-lobt-whistleblower-aber-gesetzlicher-schutz-bleibt-aus/>.

<sup>37</sup> See: Strack, Whistleblowing in Germany.

<sup>38</sup> Mobbing-Report by Meschkutat et al.

#### 4. Strengths, weaknesses and recommendations

It is quite difficult to identify strengths. Those who did report that Germany has whistleblower protection in the public sector might not have looked close enough – just covering seven provisions of criminal law that almost exclusively deal with bribery can hardly be seen as sufficient. In private law some reports about whistleblower protection in Germany mentioned a bill proposed in 2008<sup>39</sup>, but this bill never made it into the law books and has due to the active campaigning of the employers organization been given up long time ago. With more and more mini-jobbers, timed contracts and temporary workers and with a lot of people earning very low wages and no statutory minimum wage the job market does not provide too many good alternatives and incentives for whistleblowers to put their job at risk either.

There might be some private sector corporations – compared to other European countries the percentage of companies with whistleblowing policies in Germany is still very low<sup>40</sup> – which have internal whistleblowing policies that work well, however even they don't want to talk about that too much. They are mostly concerned about avoiding external whistleblowing and interventions by public agencies and up to now there seem to be no companies that actively demand statutory whistleblower protection. If they talk about legislative activities the thing companies want most is clarity – especially as regards data protection laws – and flexibility for their own activities and investigations.

Concerning weaknesses a lot of them should become clear from the previous sections of this paper, or will be identified in the accompanying tables. The biggest legal issue might be that currently even experienced legal experts have a very hard time in estimating in advance how a concrete whistleblower case might end in German courts and in properly counseling a whistleblower what to do. Thus for those who can't afford a long and costly fight with unclear results silence might still be the best alternative. And even those who "win" in court might in the end lose their job and just get a relatively minor financial compensation. Mrs. Heinisch after seven years of fighting did well in achieving a 90.000 EUR compromise but that's an exceptional case and even there one could ask the question who would be ready to go through all this. There are others like Andrea Fuchs who blew the whistle on insider activities at her workplace in a bank and is fighting in court against more than 20 dismissals for more than 15 years since<sup>41</sup>. Insecurity about the personal future and high psychological pressure are very destructive factors of these odysseys. Others are high expenses for lawyers and courts and even those who at the beginning of their legal journey had coverage thanks to a private law insurance usually will soon get kicked out of it as insurances tend not to prolong contracts with such high risks.

Turning from the dimension of whistleblower protection to that of positively affecting the wrongdoing and holding wrongdoers to account the situation in Germany is not encouraging either.

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<sup>39</sup> For the bill and the discussions related to it see the material of the hearing in the Bundestag on 04.06.2008 at <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1423&id=1134>.

<sup>40</sup> See Fn. 4.

<sup>41</sup> <http://whistleblower-net.de/Ausstellung/Fuchs.htm>

Regulators and public prosecutors are understaffed and underequipped and in big white collar crime often need to reduce the court action to only certain aspects of the usually very voluminous and complex issues to have some chance to get to a conviction. There is no criminal law for companies and sometimes as in the case of bribery of parliamentarians the criminal laws are full of loopholes. Germany is also one of a few countries in Europe that has public prosecutors that need to take orders from the ministry of justice and a judicial system in which also most judges depend on the good will of these ministries if they would like to make a career.

Looking into the future there are several bills and recommendations on the table which point into the right direction but it seems that as long as the current government is in power there is no chance that any of those will be implemented. But even if the federal election in 2013 will bring the current opposition into power it is not sure that they will protect whistleblowers and promote whistleblowing. The Heinisch case took place in a company fully owned by the Land Berlin but the local government lead by social democrats just let it happen.

## 5. References and sources

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Material from the two parliamentary hearings in the Bundestag in 2008 and 2012 can be found on the Website of the German parliament at <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1423&id=1134> and [http://www.bundestag.de/dokumente/textarchiv/2012/37624772\\_kw09\\_pa\\_arbeit\\_soziales/index.html](http://www.bundestag.de/dokumente/textarchiv/2012/37624772_kw09_pa_arbeit_soziales/index.html).

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<sup>4242</sup> All internet references in this paper had been verified on 15.10. 2012.

## 6. Chart(s)

1. Existing situation under German laws (this is a very short and therefore not precise summary of the general situation under a multitude of laws as explained in more detail in the above text).

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		The laws do not contain a definition of whistleblowing, however there are a multitude of laws covering several activities that can be addressed as whistleblowing
Broad definition of whistleblower		X		The laws do not define "whistleblower" and take as a starting point the duty of loyalty and secrecy of officials or the duty of any contractor and especially of an employee to take into account the rights and interests of the other party.
Broad definition of retribution protection			X	Theoretically any illegal reprisals may lead to the right to stop them and to a right to get compensation for damages. Practically the whistleblower needs to demonstrate that the whistleblowing was legal and that reprisals took place. In some areas of laws there are minor shifts of the burden of proof but normally it rests with the whistleblower.
Internal reporting mechanism	X			Internal reporting including to work councils is normally allowed. Some big corporations have internal whistleblowing policies and sometimes (so called "external") ombudsman. There is no obligation to have such policies. Some authorities have dedicated offices to which staff may report suspicions about corruption.
External reporting mechanism			X	Officials have a right to inform e.g. public prosecutors about bribery suspicions. Employees may inform authorities if this is a proportional reaction, which typically requires either very serious crimes, crimes committed by the employer or that the employer had stayed inactive after internal reporting. The right to petition is a basic law which is often ignored when judging whistleblowers. Information of the public is normally illegal.
Whistleblower participation		X		Typically a whistleblower is only treated as a witness with no specific rights.
Rewards system		X		Normally there is no rewards system. In criminal and anti-trust laws whistleblowing might lead to mitigation of sentences. In governmental practice some people were paid for providing CDs with data about tax evaders.
Protection of confidentiality		X		There is no general right for protection of confidentiality. Some private whistleblowing policies try to make use of lawyers secrecy privileges to achieve it. Professional Journalists may protect their sources.
Anonymous reports accepted			X	Laws are mostly silent about this (the law for the ombudsman for soldiers excludes them). The Federal Labour Court denied application of the right of free speech on anonymous speech even after the whistleblower had been identified. Practical treatment

				varies and some private and public whistleblowing policies even contain dedicated channels for anonymous reporting.
No sanctions for misguided reporting			X	Deliberately and frivolously false reporting may lead to criminal sanctions, termination and responsibility for damages. In case of negligent good faith errors theoretically there are no sanctions but a whistleblower might face a hard time to show that he had good reasons and good motives. Criminal responsibility for defamation is possible until a fact is proven as true.
Whistleblower complaints authority		X		In general there are no such dedicated authorities.
Genuine day in court			X	Anybody might address the court claiming a violation of his own rights and fighting his termination. A whistleblower has no right to bring the wrongdoing to a court if he has not been a victim of it.
Full range of remedies	X			If a violation of own rights has been established a full compensation is available. In case of illegal termination this theoretically includes reinstatement while in practice employment conflicts very often end with compensation payments without reinstatement.
Penalties for retaliation		X		There are no specific penalties for retaliation.
Involvement of multiple actors		X		Here as well only normal rules, e.g. foreseeing information of work councils in cases of termination, apply.

**2. The bill proposed by the Social Democrats (Deutscher Bundestag Drs. 17/8567 as of 07.02.2012) – the bill proposes a dedicated law for the protection of Hinweisgeber/Whistleblowers**

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X			Whistleblowing is defined as informing someone about an existing or not frivolously assumed breach of rights or duties, or a concrete danger of such a breach in connection with a workplace. Also covered are dangers to live or health or to the environment. Whistleblowing can be done not only by words but also by deeds.
Broad definition of whistleblower			X	The act covers several sorts of employees but public officials are not covered.
Broad definition of retribution protection	X			Reprisals and dismissals for lawful disclosures are forbidden. Employees benefit from a shift of the burden of proof after they showed facts that indicate a reprisal. Full proof that it did not take place then shifts to the other side (employer).
Internal reporting mechanism	X			Internal reporting to the employer or a dedicated agent named by him is explicitly allowed. The same fits for whistleblowing to the work council if its tasks are concerned. The bill requires that an employer – also proactively - takes the necessary steps to protect whistleblowers against reprisals. It does not create obligations to set up internal whistleblowing policies but allows them explicitly requiring that if these policies foresee anonymous disclosures they also have to assure that the rights of concerned others during an investigation is protected. Internal policies may not limit the rights of



				whistleblowers as foreseen in the bill.
External reporting mechanism			X	A whistleblower has the right to inform police, public prosecutors or other competent public authorities even without having blown the whistle internally. Other external and media whistleblowing requires a danger to life, health or environment or an inadequate reaction on the whistleblowing by a public authority.
Whistleblower participation			X	Typically a whistleblower is only treated as a witness with no specific rights. However at one occasion the bill states that only with the consent of the whistleblower an employer may change the job of the whistleblower in order to protect him against reprisals. The bill also mentions that if a public authority informed by a whistleblower does not confirm reception or does not inform him about the envisaged duration of its investigation and the outcome of the investigation the whistleblower may lawfully turn to other external addressees including media.
Rewards system		X		Rewards are not mentioned.
Protection of confidentiality			X	Protection of confidentiality is mentioned stating that external recipients may disclose the name of the whistleblower only if this is unavoidable. For internal disclosure it might follow from the employers duty to proactively avoid reprisals.
Anonymous reports accepted			X	Anonymous reporting is only mentioned in connection with internal whistleblowing policies (see above). For the rest the general rules may continue to apply.
No sanctions for misguided reporting	X			Simple negligence is covered and leads to protection while knowingly or frivolously false accusations are not protected.
Whistleblower complaints authority		X		Not foreseen.
Genuine day in court	X			The bill contains specific rights for the whistleblower to sue for stop and repair of reprisals as well as for material and immaterial damages. Current rules continue to apply.
Full range of remedies	X			See above. A whistleblower might also deny to fulfil his normal duties if he has reason to assume that otherwise he might need to commit a crime or a non-minor misdemeanour.
Penalties for retaliation			X	An employer has to take the necessary and proportionate measures against other employees who are responsible for reprisals against the whistleblower.
Involvement of multiple actors		X		No specific provisions dealing with this aspect.

**3. The bill proposed by the Green party (Deutscher Bundestag Drs. 17/9782 as of 23.05.2012) – the bill proposes certain amendments to the employment provisions of the Civil Code (BGB) and of the laws dealing with public officials.**

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	The term is not mentioned in the text but private employees may blow the whistle about violations of legal duties in connection with the workplace that took place or about to take place. For whistleblowing by public officials it needs a purposely committed crime or acceptance of a third party-crime by a colleague or a concrete danger to live, body, health, freedom, environment or the stability of the financial system.
Broad definition of whistleblower			X	The term is not mentioned. Public officials and normal employees are covered but with some differentiations.
Broad definition of retribution protection	X			Reprisals are forbidden. Employees and public officials benefit from a shift of the burden of proof after they showed facts that indicate a reprisal. Full proof that it did not take place then shifts to the other side (employer/authority).
Internal reporting mechanism	X			Internal reporting is explicitly allowed but the bill does not create obligations to set up internal whistleblowing policies. It explicitly forbids derivations from its rules that would have negative consequences for the employees.
External reporting mechanism			X	Officials have a right to inform competent other authorities e.g. public prosecutors about the issues mentioned above. Employees as a rule have to blow the whistle internally first but there are some exceptions to this rule, e.g. in cases of crimes and serious and concrete dangers. If the public interest to know outweighs the interest of the employer/authority to keep the secrecy and especially in cases of very serious dangers the law permits informing the public.
Whistleblower participation		X		Typically a whistleblower is only treated as a witness with no specific rights. The only provision that may become relevant in this aspect is one that explicitly permits the whistleblower to copy and transmit documentary material as far as this is necessary to blow the whistle.
Rewards system		X		Rewards are not mentioned.
Protection of confidentiality		X		Protection of confidentiality is not mentioned.
Anonymous reports accepted			X	Anonymous reporting is not mentioned, so the general rules may continue to apply.
No sanctions for misguided reporting			X	To be covered a whistleblower would need to show that there were concrete indications that lead him to assume one of the above mentioned wrongdoings.
Whistleblower		X		Not foreseen.

complaints authority				
Genuine day in court			X	No specific provisions. Current rules continue to apply.
Full range of remedies	X			No specific provisions. Current rules continue to apply. For ease of proof see above.
Penalties for retaliation		X		There are no specific penalties for retaliation.
Involvement of multiple actors		X		No specific provisions dealing with this aspect.