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## I Background

On May 12, 2023, the German legislator passed the new Whistleblower Protection Act (Hinweisgeberschutzgesetz - "**HinSchG**"), which transposes Directive (EU) 2019/1937 into national law. The act requires employers to establish internal reporting channels and to protect whistleblowers by treating their identities as confidential. It also prohibits unjustified discrimination such as dismissal, warning, denial of promotion or bullying. At the same time, the act addresses the risk of reputational damage to companies and public authorities by establishing incentives for preference of internal reporting channels and by allowing public disclosure only as a secondary option under specific conditions.<sup>1</sup>

## II The protection of whistleblowers and others

### 1. Who is protected by the HinSchG?

The protection extends to whistleblowers themselves, as well as to persons who are subject of or otherwise affected by a report.<sup>2</sup> This also includes the protection of the rights and confidentiality interests of concerned legal entities.<sup>3</sup>

### 2. When is the reporting of a violation protected?

A whistleblower is protected when their report meets each of the following requirements:

- The report must concern information on a violation<sup>4</sup> (i) that constitutes a criminal offense under German law, or (ii) of a provision that serves to protect life, body or health or the rights of employees or their representative bodies and is subject to a fine, or (iii) of specific German federal or state legislation or directly applicable legal acts of the EU listed in the HinSchG (including e.g. regulations on money laundering, product safety, environmental protection, consumer rights, data protection, financial services, tax law and many others).<sup>5</sup>

<sup>1</sup> <https://www.bundesregierung.de/breg-de/suche/hinweisgeberschutz-2064178>. See also Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 33 and Explanatory memorandum, 14.12.2022, Drucksache 20/4909, p. 53 f.

<sup>2</sup> Sec. 1 HinSchG.

<sup>3</sup> Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 57.

<sup>4</sup> For definition of a "violation" and "information on violations" see Sec. 3 (2), (3) HinSchG.

<sup>5</sup> Sec. 2 HinSchG. For details see Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 57 et seq.

- The whistleblower must have obtained the information about the violation in connection to or in advancement of their professional activity.<sup>6</sup>
- There is no priority of security interests or obligations of confidentiality or secrecy as listed in the HinSchG (including the duty of confidentiality of lawyers, notaries or doctors, whilst for example the disclosure of business secrets is permissible under certain conditions).<sup>7</sup>
- If a violation does not fall within the scope of the HinSchG, the whistleblower must at least have had sufficient reason to believe that this was the case at the time of the report.<sup>8</sup>
- The information must be reported to the reporting channels provided for under the HinSchG.<sup>9</sup>
- The information generally must be true<sup>10</sup> (see in detail under II.6.).

Similar requirements apply to the protection of other affected persons.<sup>11</sup>

### **3. How can whistleblowers make reports?**

Whistleblowers have the right to choose between reporting a violation to an internal or external reporting channel, although internal reporting channels enjoy preference if they can effectively deal with a violation and there is no fear of reprisals.<sup>12</sup>

### **4. Can information about violations also be made public?**

Yes, provided certain conditions are met, information about violations also may be disclosed to the public. These include that either (i) no timely response or appropriate follow-up action was taken despite an external report, or (ii) that there was sufficient reason to assume an exceptional situation, which includes, for example, the immediate or evident endangerment of public interests, such as for example the risk of irreversible damage to the physical integrity of a person, or loss of evidence.<sup>13</sup>

### **5. How are whistleblowers protected?**

Whistleblowers are protected in particular by the fact that reporting channels must maintain the confidentiality of the whistleblower's identity.<sup>14</sup> Furthermore, it is prohibited to take, attempt or threaten reprisal against them.<sup>15</sup> In the case of reprisal, the whistleblower may be granted relief from the burden of proof and the

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<sup>6</sup> Sec. 1 (1) HinSchG. The personal scope of application is very broad, for details see Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 56 f.

<sup>7</sup> Sec. 5, Sec. 6 (1), (2) HinSchG.

<sup>8</sup> Sec. 8 (1) No. 1, Sec. 33 (1) No. 1, 3 HinSchG.

<sup>9</sup> Sec. 1 (1), Sec. 8 (1) No. 1, Sec. 33 (1) No. 1 HinSchG.

<sup>10</sup> Sec. 33 (1) No. 2, Sec. 9 (1) HinSchG.

<sup>11</sup> Sec. 34 HinSchG.

<sup>12</sup> Sec. 7 (1) HinSchG.

<sup>13</sup> Sec. 32 HinSchG.

<sup>14</sup> Sec. 8 (1) No. 1 HinSchG.

<sup>15</sup> Sec. 36 (1) HinSchG. For details and examples see Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 95 and Art. 19 Directive (EU) 2019/1937.

perpetrator is obliged to compensate the whistleblower for any financial damage incurred.<sup>16</sup> Also, a whistleblower cannot be held legally responsible for (i) obtaining or accessing information, unless it constitutes an independent criminal offense, or (ii) for disclosing information subject to a disclosure restriction, if the whistleblower had reason to believe that the disclosure of the information was necessary to expose the violation.<sup>17</sup>

## 6. What if whistleblowers give incorrect or false information?

In principle, whistleblowers are only protected under the HinSchG if they pass on information that is true. In the case of an intentional or grossly negligent reporting of incorrect information, the whistleblower's identity is no longer protected, and the whistleblower is obligated to compensate injured parties for resulting damages.<sup>18</sup> Moreover, the other protection mechanisms only apply if at the time of the report or disclosure the whistleblower had at least reason to believe that the information provided was true.<sup>19</sup> In the event of a disclosure of knowingly incorrect information to the public, a fine also may be imposed on the whistleblower.<sup>20</sup>

## III Role of employers

### 1. What are the main obligations of employers?

All employers<sup>21</sup> that regularly have at least 50 workers are required to set up at least one internal reporting channel.<sup>22</sup> In addition, there are a number of sector-specific employers, such as in the financial or insurance sectors, who are obligated to do the same, regardless of the number of employees, insofar as special laws do not already prescribe internal reporting channels.<sup>23</sup> Employers also must establish mechanisms through which these internal reporting channels can be contacted, provide precise and easily accessible information on them and create incentives for their use.<sup>24</sup>

### 2. By when do employers have to implement the HinSchG?

The HinSchG will enter into force on July 2, 2023.<sup>25</sup> With respect to the establishment of internal reporting channels, smaller private employers (which are not listed as sector-specific) that regularly have 50 to 249 workers benefit from a grace period lasting until December 17, 2023.<sup>26</sup>

<sup>16</sup> Sec. 36 (2), Sec. 37 (1) HinSchG. Compensation for non-pecuniary damages was dropped, see decision from 11.05.2023, Drucksache 210/23, p. 2.

<sup>17</sup> Sec. 35 HinSchG.

<sup>18</sup> Sec. 9 (1) HinSchG, Sec. 38 HinSchG. See also Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 97.

<sup>19</sup> Sec. 33 (1) No. 2 HinSchG.

<sup>20</sup> Sec. 40 (1), (6), Sec. 32 (2) HinSchG.

<sup>21</sup> For definition see Sec. 3 (9) HinSchG.

<sup>22</sup> Sec. 12 (1), (2) HinSchG.

<sup>23</sup> Sec. 12 (3), Sec. 4 (1) HinSchG. Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 78.

<sup>24</sup> Sec. 7 (3), Sec. 16 (1) HinSchG.

<sup>25</sup> Federal Law Gazette Volume 2023 Part I No. 140, <https://www.recht.bund.de/bgbl/1/2023/140/VO.html>, p. 19, Art. 10 (2).

<sup>26</sup> Sec. 42 (1) HinSchG.

### 3. How is the regular number of employees determined?

Within the meaning of the HinSchG, "workers" are not only workers within in the strict (limited) legal meaning of the term, but also persons employed for training purposes, civil servants, judges, and others.<sup>27</sup> The determination of the regular number of workers is not to be based on a specific cut-off date, but rather on a review of past staffing levels and an assessment of future developments.<sup>28</sup>

Apart from this distinction, there is little guidance yet, especially in terms of group structures or multinational companies. While the European Commission has previously stated regarding the EU Directive that "each legal entity with 50 or more workers is required to set up channels and procedures for internal reporting, even where such legal entities belong to a group of companies"<sup>29</sup>, the German legislator has declared that the group-wide use of a central internal reporting system also is sufficient.<sup>30</sup> It is unclear whether, against this background, the number of workers should be counted on a group-scale or separately for the parent company and each subsidiary. Likewise, it also is uncertain whether only workers in Germany count towards the threshold. In view of this, companies should consider setting up internal reporting systems and not relying on the transition period in borderline cases.

### 4. In what form must internal reporting channels be organized?

The tasks of the internal reporting channel can be assigned to a single employed person, a work unit consisting of several employed persons or a third party, although assigning third parties does not release the employer from the obligation to take its own appropriate measures to remedy infringements.<sup>31</sup> According to the German legislator, a third party in this sense also can be an entity within a group, such as the parent company.<sup>32</sup> Whether this view will hold up in light of the EU Commission's previous contrary view remains to be seen.<sup>33</sup> Multiple private employers with regularly 50 to 249 workers also may establish and operate a joint internal channel, although the duty to take action to remedy a violation and the duty to report back to whistleblowers remain with each individual employer.<sup>34</sup>

In any case, the persons working at the internal reporting channel must be independent and have the necessary expertise.<sup>35</sup> While the internal reporting channel must be available for all employees and temporary workers, employers also are free to open them for other private individuals who are in contact as part of their professional activities and for anonymous reports.<sup>36</sup> Reporting channels must allow reports to be made verbally or in text

<sup>27</sup> Sec. 3 (8) HinSchG.

<sup>28</sup> Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 77.

<sup>29</sup> European Commission, 29.06.2021, JUST/C2/MM/rp/(2021)4667786, p. 1 f.

<sup>30</sup> Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 79 and Explanatory memorandum, 14.12.2022, Drucksache 20/4909, p. 51.

<sup>31</sup> Sec. 14 (1) HinSchG.

<sup>32</sup> Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 79.

<sup>33</sup> See in this regard Government statement, 07.10.2022, Drucksache 20/3859, p. 48 f.

<sup>34</sup> Sec. 14 (2) HinSchG.

<sup>35</sup> Sec. 15 HinSchG.

<sup>36</sup> Sec. 16 (1) HinSchG.

form, and on request also in person, and are to be designed in such a way that only the responsible persons have access to the reports.<sup>37</sup>

## 5. What are the main obligations for the internal reporting channels?

The responsible persons must operate the reporting channel, manage the process, and take follow-up actions in the legally prescribed manner and time, as well as provide information on external reporting channels, established mainly by the federal government, and EU reporting procedures.<sup>38</sup> They are obliged to keep the identity of whistleblowers confidential and to create document reports.<sup>39</sup> Provisions of data protection regulations also must be observed.<sup>40</sup>

## 6. What are the consequences of non-compliance?

For certain violations of the HinSchG, such as hindering reports, improper use of reprisals, or violations of confidentiality obligations, a fine may be imposed on natural or legal persons and equivalent associations of persons.<sup>41</sup> This also includes the intentional or negligent failure of business or company owners to exercise proper supervision.<sup>42</sup> A grace period lasting until December 1, 2023 applies to fines for failure to set up an internal reporting channel.<sup>43</sup> However, companies should not regard this as an extended deadline for complying with this obligation. Once the act comes into force, whistleblowers will in any case have the option to contact external reporting channels or make the information public (subject to the aforementioned conditions).

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<sup>37</sup> Sec. 16 (2), (3).

<sup>38</sup> Sec. 13 (1),(2). For details on internal reporting procedure see Sec. 17, Sec. 18 HinSchG. For external reporting channels see Sec. 19 et seq. HinSchG.

<sup>39</sup> Sec. 8, Sec. 11 HinSchG.

<sup>40</sup> Sec. 10 HinSchG.

<sup>41</sup> Sec. 40 HinSchG. Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 97 et seq.

<sup>42</sup> Explanatory memorandum, 19.09.2022, Drucksache 20/3442, p. 97.

<sup>43</sup> Sec. 42 (2) HinSchG.