

Whistleblower Protection: No Need for Regulatory Action on the European Level

Balanced Approach for Protection Mechanisms is
Essential

Introduction

Listed companies in Germany as well as throughout the European Union Member States are aware of the tremendous importance of a functioning Compliance Management System (CMS). Mechanisms to protect whistleblowers are today a crucial part of a modern CMS. These mechanisms frequently ensure an early detection of misconduct or shortcomings within a company and thus enable action to prevent or limit damage.

Deutsches Aktieninstitut therefore supports the establishment of mechanisms for whistleblower protection. As procedures enabling persons to anonymously report misconduct or legal offenses in a range of different languages are standard today not only in large listed companies but in public interest entities at large, Deutsches Aktieninstitut sees no need for regulatory action on the European level. In any case, the establishment of any protection mechanisms requires a balanced approach and must follow the principle of proportionality.



Well Balanced and Proportionate Approach for Whistleblower Protection

As stated above, mechanisms enabling persons to anonymously report misconduct or legal offenses are today standard in large companies. However not all – in fact the least - information reported via these channels amounts to serious infringements of the law affecting the general public. Anonymous reporting channels are instead often used by left-behind employees, who feel discriminated and follow the exclusive purpose of causing harm to potential rivals within the company. Therefore, when creating protection mechanisms, one has to be careful to not throw out ‘the baby with the bathwater’. A well-balanced and proportionate approach should rather be followed.

In this sense, the following aspects – which from our point of view are not adequately reflected in the Commission’s questionnaire – deserve thorough deliberations:

- For the sake of a sound and healthy working-environment, the unintended creation of an atmosphere of mistrust among employees should be avoided. Internal company-surveys, which we became aware of, show that many employees fear that they will be secretly observed or even spied on when addressed on the subject of whistleblowing. These fears should not be ignored but should be taken very seriously. The implementation of reporting and whistleblower protection mechanisms is thus a balancing act.
- It should be taken into account that the one who blows the whistle and discloses conduct which might – even though only in few cases – amount to severe law-infringements will often commit a legal offense him-/herself to the disadvantage of the (third) person/entity affected by his/her report. For example, data-protection laws might be violated or other legal rules protecting e.g. business secrets. Therefore, the question of whether a system should be created, which knowingly invites to breaches of the law to the disadvantage of a third person deserves to be discussed. In any case, it must be thought about how the affected third party can effectively be protected.
- In this context, the motives of the whistleblower must also be carefully considered. In many cases, the whistle will not be blown exclusively for altruistic motives. On the contrast, a lot of whistleblowers will report only for the purpose of limiting damage for themselves. These will be cases when the whistleblower him-/herself has been involved in

misconduct/violations of the law and now hopes to enjoy the benefits of a principal whitens. These features have to be respected. Thus, a general rule exempting the one who blows the whistle unconditionally from prosecution or civil law action should not be adopted!

- Against this background, the report of misconduct should also not be linked to a reward. A respective rule in the United States has been largely abused.
- A graduate approach of the protection mechanism is needed, since an unconditional public disclosure can have severe consequences for third parties acting in good faith (s.a.). The person reporting misconduct should therefore be asked for efforts to stop the misconduct in his /her entity internally prior to turning to governmental authorities and/or the general public.

Since German and European listed companies have themselves implemented carefully balanced whistleblower protection mechanisms corresponding to the above-mentioned features, no legal action on the European level is required. In addition, the German Corporate Governance Code has recently adopted a recommendation to implement whistleblower protection mechanisms into the company's Compliance Management System (CMS).

Companies themselves have the most vital interest in implementing protection mechanisms ensuring the early detection of shortcomings in order to prevent severe damages either in form of voluminous fines or, even worse, of a harmed reputation.

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