



LEGAL NEWS

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LEGALLY COMPLIANT WHISTLEBLOWING IN YOUR COMPANY - COUNTRY UPDATE

I. WHISTLEBLOWING IN THE COMPANY

“Whistleblowing” describes the uncovering of abuses, such as corruption, money laundering, and environmental hazards, by whistleblowers who have acquired insider knowledge due to their professional activity. Whistleblowers must usually accept serious personal or professional disadvantages as a result of their reports.

To protect whistleblowers, the EU already issued the Whistleblowing Directive in 2019. This directive stipulates that enterprises have the obligation to establish channels and procedures to enable reports of abuses and breaches of the law.

In the following pages of this newsletter, we provide an update on the current status of transposition in the respective countries of our partner law firms.

II. LEGAL COMPLIANCE THROUGH SCHINDHELM WHISTLEBLOWING SOLUTION

Our SCHINDHELM WHISTLEBLOWING SOLUTION offers whistleblowers a completely anonymous, legally compliant way to report company abuses and meets all the requirements of the EU Whistleblowing Directive and the national transpositions thereof. With our SCHINDHELM WHISTLEBLOWING SOLUTION, we are happy to help you implement all important whistleblowing provisions regarding Data Protection and Compliance & Corporate Governance.

When establishing an internal reporting system, other legal areas, such as labour law, criminal law, etc., are also affected and must be considered in addition to the regulations of the national transposition act. Our lawyers bundle the entire range of expertise that is required to implement your internal reporting system and to successfully implement the resulting legal steps.

AUSTRIA

Austria, too, should have transposed the EU Whistleblowing Directive by 17 December 2021. The parliament has now belatedly adopted the appropriate national legislation with the Whistleblower Protection Act (“HSchG”).

Essentially, enterprises must enable written or verbal reports. At least, this applies with respect to public procurement, financial services, financial products and financial markets as well as prevention of money laundering and terrorist financing, product safety and compliance, traffic safety, environmental protection, radiation protection and nuclear safety, food and feed safety, animal health and animal welfare, public health, consumer protection, protection of privacy and personal data as well as security of network and information systems, prevention and punishment of certain criminal offences, especially abuse of office, bribery, etc.

All reports must be confirmed no later than seven days after receipt. The identity of whistleblowers must be protected by the enterprise. Appropriate processes must be established in the enterprise.



Breaches of the requirements of the HSchG may result in administrative penalties of up to € 20,000,00.

The provisions of the HSchG will generally enter into force upon announcement. A precise date is still unknown at this time. The provisions of the HSchG concern internal reporting channels of enterprises with 50 to 250 employees and will enter into force with binding effect on 17 December 2023.

CZECH REPUBLIC

In November of 2022, the government of the Czech Republic passed an amended draft of the Act on the Protection of Whistleblowers (the “Whistleblowing Act”) and forwarded it to the Chamber of Deputies of the Czech Parliament. The draft law is currently in its second reading, and further discussion of the law in the Chamber of Deputies is not planned until after 14 March 2023. The draft law must then be passed by the Senate and needs to be signed by the President of the Czech Republic. Only then will the legislative procedure be completed.

It cannot be ruled out that the draft law will still be amended during the legislative procedure, in particular with regard to the list of unlawful actions to which the law will apply. However, the basic parameters are defined by European Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law and will be maintained.

The draft law stipulates that the whistleblowing law will enter into force on the first day of the second calendar month after its publication in the body of laws. For enterprises that employ between 50 and 249 employees, the law will then provide for an additional period of time for implementing an internal reporting channel, a period that will last until at least 15 December 2023.

Since the Czech Republic has not met the deadline for transposing the European Directive into the national legal system, it may be faced with a suit by the European Commission before the Court of Justice of the European Union.

FRANCE

On 16 February 2022, the law to transpose European Directive 2019/1937 was definitively passed in France. It was confirmed by the Constitutional Council on 17 March 2022 and officially published on 21 March 2022 and entered into force on 1 September 2022.

A little more than a month after the law entered into force, the government finally passed the implementing decree, which is the prerequisite for the law’s effective application. Decree No. 2022-1284 of 3 October 2022 relates to the procedures for collecting and processing whistleblower reports and specifies the list of external authorities established by the legislature.

The publication of this decree thus concludes the process of transposing Directive 2019/1937 of 23 October 2019 on whistleblowers in France—even though France had received a reasoned opinion concerning incomplete transposition of the directive from the European Commission on 15 July 2022.

Only enterprises that employ at least 50 employees in two consecutive financial years are obligated to establish a procedure for gathering and processing reports.

Enterprises with fewer than 50 employees are not obligated to establish such a procedure; however, in accordance with the law of 21 March 2022, they must offer their employees a way to submit a report to their direct or indirect supervisor, their employer, or an aide designated by the latter.

Until now, enterprises with fewer than 250 employees were able to merge their procedures for gathering and processing reports, subject to a “unanimous decision [by the] relevant bodies” of each unit. The Decree explains that this is “possible in groups of undertakings in particular” without the need for a maximum number of employees that depends, for example, on the internationality of the parent company.

The internal channel for receiving reports must make it possible for anybody to submit a report, whether anonymous or not, in written or verbal form.



GERMANY

In Germany, the draft of the Whistleblower Protection Act was adopted by the Bundestag at the end of last year, after already being delayed for a year. The law should have already been transposed by 17 December 2021 according to the EU Whistleblower Directive on which it is based. Due to this delay, the European Commission has already initiated infringement proceedings against Germany and a suit was brought before the Court of Justice of the European Union on 15 February 2023.

Under the directive and under the German transposition law, enterprises with, as a rule, at least 50 employees have the obligation to establish internal reporting offices via which abuses and breaches of applicable law can be reported. Changes had still been made to the most recent version of the current German draft law. Among other things, for example, the duty to also enable completely anonymous reports was included.

Since the Whistleblower Protection Act is a law requiring consent, it must also be passed by the Bundesrat in Germany. During its session on 10 February 2023, the Bundesrat refused to consent to the draft. The central point of criticism of the federal states refusing to consent is that the current version of the draft law constitutes an excessive financial burden for small and medium-sized enterprises due to the duty to enable the submission of anonymous tips. The scope of the law, which was expanded compared to the EU Directive, was also considered too wide.

It is to be expected that the draft law will now be sent to the Mediation Committee in order to reach an agreement on a final version that will also be accepted by the Bundesrat. The law should therefore not be expected to enter into force before the summer of 2023. Nevertheless, there is a need for action because employees of enterprises with at least 250 employees can already indirectly invoke the protection of the EU Directive, the transposition of which is behind schedule in the national legislature. Smaller enterprises should also take precautions now as whistleblowers from enterprises with at least 50 employees will also fall within the scope of protection by the end of this year at the latest.

The range of reports that must be included in the procedure extends to incidents that have taken place or, and this is new, will “very likely” take place in the unit concerned.

HUNGARY

Although the deadline has expired, no legislative proposal or other draft for transposing Directive 2019/1937/EC on whistleblowing into national law has yet been submitted in Hungary. However, Act CLXV 2013 on complaints and communications of public interest already contains provisions that the legislature will likely supplement and/or amend in the near future. As the minimum requirements defined in the directive are directly applicable, enterprises can already prepare for their own whistleblowing solutions on the basis of the directive, even if the Hungarian legislation does not yet conform to the applicable EU Directive. Hungary will presumably comply with its obligation to transpose the directive into national law in the second half of 2023.

ITALY

The transposition of Directive 2019/1937 on whistleblowing in the Italian legal system got underway last year with Act 127/2022, which authorised the government to issue the legislative regulations required for transposition.

Subsequently, on 9 December 2022, the Council of Ministers temporarily approved the draft of the legislative decree for transposition. On 1 February 2023, the data protection authority issued a favourable opinion on the draft regulation.

The final text of the regulation must now be published in the Official Journal by April of 2023 at the latest. The national provisions will then definitively enter into force within four months after their publication, i.e. presumably in August of 2023. Currently, the transposition amounts to the rules applicable to whistleblowing being comprehensively regulated, with special attention being paid to the whistleblower’s protection in order to encourage the active use of the whistleblowing channels. The statutory regulation is also expected to provide for the introduction of fines imposed on enterprises that



do not pursue the notifications received. Regardless of the details of the final draft, the enterprises will certainly have to design the internal procedures and organisation in such a way that an effective and timely response to received notifications is guaranteed.

POLAND

Poland is still working on a draft of the Whistleblower Protection Act with which the Whistleblowing Directive is intended to be transposed. The draft law is intended to provide legal protection to any person who decides to report breaches, transgressions, or criminal offences in the workplace. A whistleblower can thus be a person who is affiliated with an institution or organisation that commits breaches by virtue not only of an employment contract but by any legal or actual relationship (e.g. as a subcontractor). In addition, the report itself can be made not only during the term of the employment relationship concerned but also before this relationship begins or after it has ended, e.g. due to termination of the employment relationship.

The draft law also regulates the conditions for granting whistleblower status, the possibilities for submitting reports, and the office obligated to receive and document such reports.

Reports can be submitted via three reporting channels: internal, external or by means of disclosure.

According to this provision, internal reporting relates to a situation in which an employee reports breaches within an organisation. External reporting, in contrast, relates to external reporting to government authorities. Designation of the government labour inspectorate (Paenstwowa Inspekcja Pracy) as the competent authority for external reports is currently being considered.

The third reporting channel is what is known as disclosure—the release of information to the public, such as to the media, which offers protection to the whistleblowers who have communicated breaches of the law to the public.

In the case of internal channels, employers can choose between a written report, including via

electronic reporting channels, and a verbal report during a meeting or by telephone call (including via an answering machine).

The Polish Whistleblower Protection Act specifies exactly which breaches can be reported within the framework of this law. However, employers can expand the scope by means of an internal policy and add cases related to labour law, safety and health protection in the workplace, for example.

The current draft of 10/01/2023 is currently being revised by the European Affairs Committee.

However, it still has to be accepted by the Council of Ministers before it is forwarded to the Sejm for further revision. It should also be noted that the draft law had been amended several times.

ROMANIA

Act No. 361/2022 on whistleblowing entered into force on 22 December 2022.

As of the date of entry into force, enterprises with 250 or more employees must implement an internal reporting channel in accordance with Act 361/2022 so that the facts provided for and to be reported within the framework of the law and/or the breaches of law described further below can be reported.

For enterprises with 50 to 249 employees, the obligation to establish internal reporting channels was postponed until 17 December 2023.

The offences to be reported are legal violations that constitute an act or omission in the following areas: public procurement, financial services, products and markets, money laundering and terrorist financing, product safety and compliance, transport safety, environmental protection, radiation protection and nuclear safety, food safety and feed safety, animal welfare, healthcare, consumer protection, data protection, internet security, breaches affecting the financial interests of the EU, including violations of competition and state aid laws or the internal market as well as breaches of corporate tax standards or tax optimisation.

Whistleblowers can use the reporting channels stipulated in Act 361/2022 to report information concerning the above-mentioned breaches of



the law, including justified suspicions in connection with actual or potential breaches of the law, as mentioned above, whether they have taken place or are imminent, as well as information about activities undertaken to conceal such breaches.

The reporting offices can be established internally or externally at enterprises specialised in this regard.

In the event that the enterprises concerned fail to establish the reporting channel described above, a fine of up to € 8,000,00 is provided for under the new law.

SLOVAKIA

In Slovakia, Act No. 54/2019 Coll. on the protection of whistleblowers of socially harmful activities will take effect on 1 March 2019. This new law has replaced the previous law that regulated the basic framework for the protection of whistleblowers of socially harmful activities in the Slovakia. The objective of adopting this new law was to deepen and expand whistleblower protection and make it more effective, among other things by establishing the Office for the Protection of Whistleblowers, expanding the concept of serious socially harmful activity, amending the concept of reporting, clarifying the regulation of the protection granted, etc.

At the time, the establishment of the legal framework for the protection of whistleblowers made the Slovak Republic one of the ten EU Member States whose legal systems had consolidated statutory regulations for the protection of whistleblowers.

As regards Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (“the Whistleblowing Directive”), the Slovak Republic did not properly transpose this directive into its legal system by the specified date.

The proper transposition of the Whistleblowing Directive is the objective of the above-mentioned law’s amendment, which is currently in the midst of the legislative process but has not been passed yet. For example, the amendment

is supposed to extend the protection to individuals who report breaches of Union law, expand the definition of whistleblower, expand the duties of employers, etc.

SPAIN

The deadline set by the European Commission for the transposition of the directive by the Member States already expired on 17 December 2021. Like most other Member States, Spain also did not transpose the directive by the deadline.

In order to transpose the directive into national law, a working group of the Ministry of Justice began drafting a bill in mid-2020.

However, the resulting preliminary draft was not approved by the Spanish government’s Council of Ministers until 4 March 2022.

In September of 2022, the Council of Ministers sent Parliament a formal draft law to be debated and passed by the Congress. The parliamentary revision of the draft law began with this step. The parliamentary groups were able to submit motions to amend the draft law, and these had to be discussed before being definitively passed in the Congress of Deputies and then in the Senate.

On 22 December 2022, the Spanish legislature then approved the draft law and forwarded it to the Senate.

There, the draft was approved on Thursday, 9 February 2023, with 147 yes votes versus 106 no votes and four abstentions.

Since changes were incorporated into the text during this vote, the draft will be referred back to the Congress of Deputies in a next step so that the plenary sitting can ratify these changes. With this planned step, the parliamentary proceedings would then be definitively concluded.

In January of 2022, the European Commission had already asked the Spanish government to clarify the status of the work to adapt the legislation to the European standard within two months. In July of last year, the authorities set another two-month deadline for the adaptation of the legislation.



On 15 February 2023, the European Commission announced that it would be suing Spain and seven other countries before the Court of Justice of the EU (CJEU) because the countries have not fully transposed the directive and have not communicated the implementation measures. Germany, the Czech Republic, Estonia, Hungary, Italy, Luxembourg and Poland are to be sued in addition to Spain.

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