

Guidance on the introduction of a whistleblower system. The significance of the whistleblower policy and the report management contract

1. Definitions

1.1 Internal reporting office

Companies with more than 250 employees must set up an internal reporting office (and also companies with between 50 and 249 employees from 17.12.2023)¹ that is entrusted with receiving and handling reported information (reports). The internal reporting office can be managed either by persons within the company or by a third party on the company's behalf.

Persons within a company are considered to be individual persons such as the head of legal services, compliance officer, workers' council chairman or data protection officer or an entire department whose focus is for example law and compliance.

A third party entrusted with managing the internal reporting office can be for example a law firm, an auditor or another person with a duty of professional secrecy.

The third party can also take the form of an ombudsman's office that receives reports so as to ensure the best possible confidentiality for the whistleblower. In distinction to an internal reporting office, which is managed by an individual or department of the company, the ombudsman's office acts solely in the interests of the whistleblower and secures their rights. For potential whistleblowers, it serves as a point of contact outside the company.

1.2 External reporting office

An external reporting office refers to a point of contact set up solely by the state, for example the Federal Office of Justice, that likewise is entrusted to receive reports.

2. Whistleblower policy

The template of the whistleblower policy can be used for both individual companies and for a corporate group of companies. It clarifies and informs about

- Who and what the reporting office is.
- What the reporting office is responsible for.
- How the whistleblower system operates.
- How reports are handled.
- What the possible consequences are of whistleblowing.
- What the consequences may be of misuse.
- What external reporting offices are also available to the whistleblower (mandatory: section 13 para. 2 HinSchG-E).

The passages in the template that require individualisation to suit the respective company structure are marked with notes.

The policy draws on the assumption that the internal reporting office of the company has been set up in the form of an ombudsman's office and that a compliance officer has been appointed in the company to act as contact person. This conception allows scope for individual adaptation to the company's specific requirements and circumstances. Thus for example the compliance officer of the company can be appointed instead of the ombudsman's office. The report

¹ This obligation is based on the Whistleblower Protection Act (Hinweisgeberschutzgesetz; HinSchG-E) that is not yet (time of writing: 01.12.2022) in force.

management contract sets out their rights and obligations in respect of the whistleblower and of the company management. The person would have to contact the company management with regard to the implementation of follow-up measures once a report is received.

Practical tip: Appointing an ombudsman's office is recommended. This prevents conflicts of interests: A whistleblower report is received by the compliance officer. The whistleblower asks for confidentiality. An internal investigation is initiated, as a result of which an employee is dismissed. During the process, the dismissed employee disputes even the fact that the report was submitted. If the company compliance officer is appointed as a witness, they would be required to testify truthfully in accordance with the principles of civil procedure, and could thereby break confidentiality in respect of the whistleblower. Whether a compliance officer acting as the internal reporting office has a right in some circumstances to refuse to give evidence pursuant to section 383 para. 1 no. 6 Code of Civil Procedure (ZPO) is not yet clarified. If on the other hand the ombudsman's office is led by a person with a duty of professional secrecy, that person has the support of a right to refuse to give evidence pursuant to section 383 para. 1 no. 6 ZPO. He can testify to having received a report and also exercise his right to silence in respect of confidential information.

3. Report management contract

The report management contract serves as a contractual basis between the company (or company within a corporate group) and a third party acting as the internal reporting office. The designation as a contract is optional. Where an employee of the company is entrusted with the position of internal reporting office, they may alternatively be appointed to the position and the contractual content can be transferred to a corresponding job description.

It is evident from the notes to the government draft of HinSchG-E (see page 91) that in accordance with the separation principle in corporate law, each company within the group (e.g. parent company, sister company or subsidiary) must set up an independent internal office acting in confidence. The internal office can however also act for multiple independent companies within the group. In this case also, however, a report management contract is required between the internal office and each group company. Additionally, the internal office must report to the contact person of the company to which the information relates regarding reports received. Delegation to a central contact point in the group is possible, but the management of the specific company concerned must not be ignored entirely.

4. Possibility of linking the whistleblower system to the complaints procedure in accordance with the Supply Chain Act (Lieferkettensorgfaltspflichtengesetz, LkSG)

The whistleblower system can also be used as a means for implementing the obligations from the Supply Chain Act (LkSG). For this, the methods of raising a complaint arising from LkSG must be linked to the whistleblower system. This can be undertaken where the need exists in an individual company.

Note: In a statement on the government draft of HinSchG-E by Transparency International Deutschland e.V. of 10 May 2022, the linking of the two channels of reporting is in fact recommended (p. 10 f.). In practice it should be noted however that the two acts pursue different objectives and the notes invoke different legal obligations. If a single reporting channel is used, then, reports must be clearly assigned to the two sets of provisions.

5. Requirements of whistleblower systems in terms of compliance standards

The requirements of whistleblower systems are set out in DIN ISO 37002:2021. The German Institute for Compliance (DICO e.V.) has also published a standard for whistleblower systems

(p. 11, as at March 2021). The whistleblower policy is based on these regulatory frameworks, which, however, contain further specifications for their practical implementation. It should also be noted that in some cases the standards extend beyond the statutory requirements of HinSchG-E, for example in the question of the permitting and handling of anonymous reports. It can also be seen from the standards, at least implicitly, that digital systems that enable communication back to an anonymous whistleblower are deemed preferable.

As with all components of the compliance management system, the whistleblower system, including the whistleblower policy and the report management contract, must be monitored by the company management on a continuing basis and be updated where necessary.