



Blueprint for Free Speech
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Germany

**Statement on the Draft Ordinance on the Organisation of the External
Federal Reporting Office to be Established under the
German Whistleblower Protection Act
(Hinweisgeberschutzgesetz-Externe-Meldestelle-des-Bundes-
Verordnung – HEMBV)**

Berlin, 26.07.2023

We welcome the introduction of concrete and comprehensive steps for the organisation of the external reporting office. In our opinion, there are three critical points to be noted.

1) The draft does not provide any concrete technical solutions for the implementation of the receipt of "reports, including anonymous reports, via the reporting channels established pursuant to section 2, paragraph 1" mentioned in section 4.

Your commentary on Section 4(2) states:

"In order to strengthen confidence in the effectiveness of whistleblower protection and to reduce the likelihood of further reports on the same facts, it is important that the Federal External Reporting Office is able to maintain contact with whistleblowers even in the case of anonymous reports. Frequently, effective further processing of a report also requires targeted enquiries.

"For this reason, a reporting channel must be designed in such a way that it enables anonymous contact and anonymous communication between the whistleblower and the external reporting office. This can be ensured, for example, by technical devices. Reporting channels that enable anonymous contact and anonymous communication between the whistleblower and the reporting office are associated with additional expenditure for the necessary technical devices. [...]"

As per paragraphs 2 and 4 and the comments thereto, technological solutions have a valuable set of properties that enable whistleblowers to make their disclosures with a

reasonable assurance that the content of their messages and their anonymity will be protected. One feature that lends itself to the use of digital solutions is the ability for a whistleblower and the person in receipt of their report to engage in back and forth encrypted communication without compromising the former party's anonymity.

A number of commercial and open source software solutions are currently in use. These vary in their configuration and the strength of the anonymity protections they offer users. In the past few years, an increasing number of public authorities in Europe have adopted these technologies - a list current as of 31 January 2021 is supplied at Appendix A of the attached project report "Expanding Anonymous Tipping Technology in Europe", available online via

https://static1.squarespace.com/static/5e249291de6f0056c7b1099b/t/60fee180f7b25d77581c6f98/1627316617173/Expanding+Anonymous+Tipping+in+Europe_EAT.pdf

This list includes public authorities in Germany. In particular, we note that BaFin has operated an anonymous dropbox for whistleblower reports since 2017, initially in response to EU Directive 2015/849. In an interview conducted for the report referenced above, a BaFin employee discussed the organisation's positive experience with their dropbox, which had generated an increased number of reports, these benefits outweighing any possible disadvantages associated with the receipt of anonymous reports.

We therefore welcome the endorsement of anonymous reporting for Germany's external reporting agencies and suggest that the recommendation of a technological solution for anonymous reports could be explicit rather than implied.

2) The draft does not include, either in § 6 "Information and Consultation" or elsewhere, the obligation of the Reporting Office to provide information on the extent to which the disclosure of information is protected under § 32 HinSchG

Under Section 32 HinSchG, persons who disclose information about violations are subject to the protections of this law under certain conditions

The Federal External Reporting Office should provide information and advice on these protections on disclosure, as the disclosure of information on violations is one of the key tools for whistleblowers, which at the same time is associated with much uncertainty and ambiguity

We consider such an extended presentation of the range of available ways of dealing with information on violations to be all the more important, since § 6 paragraph 2 explicitly mentions "the possibilities of an internal report and its advantages" or orders information and advice in this respect, but at no point does it mention information and advice on the possibility of disclosure (e.g. via the media)

Explaining the full range of recourse and protections available to whistleblowers and reporting persons in Germany is not inconsistent with the rest of the provisions in this section, in fact it strengthens them and enables the reporting person to make a fully informed decision as to which route is most appropriate.

3) The obligation of the external reporting office to enable the receipt of anonymous reports only from 1 July 2024

The commentary to § 4 paragraph 2 justifies the effectiveness of the "[...] obligation to enable the receipt of anonymous tips via this channel only as of 1 July 2024 [...]" with the fact that "[...] the external reporting office of the Federation shall be given sufficient time to design a reporting channel accordingly [...]"

Given that anonymous dropboxes are now a mature technology, used in a number of settings across public administration, business and the media we do not think this delay is necessary or justified. It is not clear to us why the "additional effort for the necessary technical devices" makes such a postponement necessary.

Against the background of the great benefits of enabling the receipt of anonymous reports set out both in the draft regulation and in our opinion above, and the maturity of these technologies already in use across the continent and beyond, put this into operation without undue delay