DRAFT OF A

**LAW ON THE PROTECTION OF WHISTLEBLOWERS**

(implementing directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of individuals who report infringements of community law)

# SECTION 1

# General part

# § 1

# Material scope

(1) This Act serves to protect whistleblowers when reporting violations of the law. A legal violation in the sense of this law includes actual and possible legal violations.

(2) This Act shall apply to the reporting of violations of laws, ordinances, general rulings and other regulations where it is the task of a legal person under public law to comply with these standards or to ensure compliance with them by the companies and persons under its supervision or to punish violations thereof. This includes criminal offences and corporate fines within the meaning of Section 30 OWiG as well as regulations and directives of the European Union and EU regulations with direct effect.

(3) Reports may also be admissibly filed against:

a) infringements of the financial interests of the Union within the meaning of Article 325 TFEU and in accordance with the more precise definitions in relevant Union measures;

(b) infringements of internal market rules within the meaning of Article 26(2) TFEU, including infringements of Union rules on competition and State aid, as well as infringements of internal market rules in respect of acts contrary to the rules on corporation tax or agreements aimed at obtaining a tax advantage contrary to the object or purpose of the applicable corporation tax law; and

(c) an act or omission which is unlawful and contrary to the aim or purpose of a provision of Union law.

4. Where specific rules on reporting infringements are prescribed by law, those rules shall apply. The provisions of this Act shall apply in a subsidiary manner. Specific rules within the meaning of the first sentence shall include, for example

a) the Ordinance on Reporting Violations to the Federal Financial Supervisory Authority (BaFin-Verstoßmeldeverordnung - BaFinVerstMeldV)

b) Section 48 of the Act on the Tracing of Profits from Serious Crime;

c) Article 23 paragraph 3 of the Securities Trading Act; and

(d) Article 32 of Regulation (EU) No 596/2014 (Market Abuse Regulation) and the implementing Regulation 2015/2392.

(5) This is without prejudice to

(a) provisions for the protection of legal and medical confidentiality;

(b) provisions concerning the judicial secrecy of deliberations;

(c) provisions of the law of criminal procedure;

(d) rules on the exercise of the right of workers to consult their representatives or trade unions and on protection against unjustified adverse measures resulting from such consultation, and on the autonomy of the social partners and their right to enter into collective agreements

(6) Rules on the protection of classified information and rules concerning the protection of essential national security interests, including public procurement rules relating to national defence or security matters, are only included within the material scope of this law in accordance with the special rules of §§ 15 Section 3, 8 Section 5 of this law.

# § 2

# Personal scope of application

(1) This Act shall apply to whistleblowers who are employed by companies and persons relevant to reporting and who have obtained information about infringements in a professional context, including the following persons

(a) employees, including those in atypical employment, including part-time, fixed-term and temporary workers

(b) civil servants,

(c) persons whose employment relationship is governed by public law, including employees and persons in a public service or official capacity,

(d those employed for their vocational training (including unremunerated trainees),

(e) volunteers, e.g. in the context of charitable activities

(f) persons who, on account of their economic dependence, are to be regarded as persons treated as similar to employees, including home-workers and persons treated as such,

(g) self-employed persons,

(h) suppliers

(i) persons working under the supervision and direction of contractors, subcontractors and suppliers

(j) shareholders and board members, including non-executive members

(2) This Act shall also apply to persons who report or disclose information about infringements of which they have become aware in the course of an employment, service or similar relationship which has ended in the meantime.

(3) This Act shall also apply to persons whose employment, service or similar relationship has not yet commenced and who have obtained information about infringements during the recruitment procedure or other pre-contractual negotiations.

(4) The measures for the protection of whistleblowers pursuant to section 3 shall also apply, where relevant, to

(a) intermediaries,

(b) third parties related to whistleblowers who may be subject to reprisals, such as colleagues or relatives of the whistleblower; and

legal entities and partnerships with legal capacity, which are owned by the whistleblower or in which the whistleblower is a partner or for which the whistleblower works or with which he is otherwise connected in a professional context.

# § 3

# Definitions

For the purposes of this Act

1. 'infringement' means an infringement which falls within the material scope of Section 1(1)

2. ‘information on infringements’ means information, including well-founded suspicions, relating to an actual or potential infringement, which has already been committed or is very likely to be committed in the organisation in which the whistleblower is or was active, or in another organisation with which the whistleblower is or was in contact by virtue of his professional activity, and relating to attempts to conceal such infringements;

3. 'reporting' or 'notifying' means the oral or written communication of information about infringements;

4. 'internal reporting' means the oral or written communication of information about breaches within a reporting company or person under public or private law

5. "reporting-relevant enterprises and persons" in the field of public law means legal entities under public law and public enterprises including entities owned or controlled by such enterprises or persons and in the field of private law legal entities or partnerships under private law with legal capacity as well as any natural person employing persons as defined in Section 2;

6. "employee" means a person within the meaning of § 2 (1);

7. "external reporting" means the verbal or written communication of information on infringements to the competent authorities;

8. "disclosure" or "disclosing" means making information on infringements publicly available

9. "whistleblower" means a natural person who reports or discloses information about infringements under this Act obtained in a professional context

10. "intermediary" means a natural person who assists a whistleblower in the reporting process in a professional context and whose assistance should be confidential;

11. "professional context" means current or past activities in the public or private sector through which persons, irrespective of the nature of the activities, obtain information about violations and where such persons could face reprisals if they were to report such information;

(12. 'data subject' means a natural or legal person identified in the notification or disclosure as having committed the infringement or with whom the identified person is associated

13. "retaliation" means any direct or indirect act or omission resulting from an internal or external report or disclosure which causes or is likely to cause unjustified harm to the whistleblower

14. "Follow-up action" means action taken by the recipient of a report or by a competent authority to verify the validity of the allegations made in the report and, where appropriate, to take action on the reported breach, including through internal investigation, investigation, prosecution, measures to (re)recover funds or close the case;

15. "feedback" means informing the whistleblower of the follow-up action planned or already taken and the reasons for that follow-up action;

16. 'competent authority' means the national authority designated to receive notifications under Section 2 and to provide feedback to the whistleblower, and/or the authority designated to carry out the tasks provided for in this Directive, in particular with regard to any follow-up action

17. 'federal whistleblower protection agency' means the central agency to be set up within the Federal Ministry of Justice and Consumer Protection to coordinate the work of the competent authorities at Land and federal level

18. "interim orders for protection against discrimination" means orders issued for a limited period of time by the competent authorities to protect whistleblowers against the concrete threat of reprisals in individual cases by companies or persons relevant to the reporting process and their employees.

19. "specific employees" means the employees of the reporting enterprise or person specifically responsible for handling reports and responsible for the entire process of handling reports, including receiving reports, ordering follow-up action, contacting the whistleblower, requesting further information from the whistleblower and reporting back to the whistleblower.

# § 4

# Conditions for the protection of whistleblowers

(1) Whistleblowers shall be entitled to protection under this Act, provided

(a) they believed that the information reported on infringements was true at the time of reporting and that such information fell within the scope of this Directive; and

(b) they have reported internally in accordance with Section 2, Subsection 1, or externally in accordance with Section 2, Subsection 2, or have made a disclosure in accordance with Section 2, Subsection 3

It is irrelevant for the worthiness of protection under sentence 1 whether the information is factually correct, whether the violation falls within the scope of this Act and for what motives the whistleblower makes a report.

(2) The reports may also be made or disclosed anonymously.

(3) The internal and external reporting channels and the competent authorities shall not disclose the identity of a person who has made a report without having first obtained the express consent of that person. Furthermore, the internal and external reporting channels and the competent authorities shall not disclose the identity of a person who is the subject of a report. Sentences 1 and 2 shall not apply if disclosure of the information is required in the context of further investigations or subsequent administrative or judicial proceedings based on a law or if disclosure is ordered by a court order or in judicial proceedings; disclosure of the identity shall only be permitted in exceptional cases and shall be subject to the principle of proportionality pursuant to section 14.

(4) The Freedom of Information Act shall not apply to the proceedings under this Act.

(5) Persons who have anonymously reported or disclosed information on violations but have subsequently been identified and are subject to reprisals shall be entitled to protection under Section 3, provided they meet the requirements under subsection 1.

(6) Persons who report violations falling within the scope of this Act to an incompetent authority shall be entitled to protection under this Act under the same conditions as persons who report externally, unless they were aware of the incompetence of the authority.

(7) Persons who report to the competent Union institutions, bodies, offices or agencies infringements falling within the scope of this Act shall be entitled to protection under this Act under the same conditions as persons who report externally.

(8) Persons who enjoy whistleblower protection under the provisions implementing Directive 2019/1937 of 23 October 2019 of another EU member state shall also be deemed whistleblowers under this Act who are entitled to protection under Section 3, insofar as they are subject to reprisals in Germany in connection with a report made in another EU state.

# SECTION 2

# Reporting procedure

# SUBSECTION 1

# Internal reporting procedures

# § 5

# Reporting via internal reporting channels

(1) Information on infringements may be reported using the internal reporting channels and procedures set out in this Subsection. A claim to protection under this Act shall also exist if the whistleblower has used the external reporting channel in the first instance.

(2) In cases in which it appears likely that the violation can be effectively dealt with via the internal reporting channel and that the whistleblower has no fear of reprisals, the special employees of the external reporting channel shall inform the whistleblower of the optional possibility of using the internal reporting channel. Civil servants may use the external reporting channel in first instance with reference to the reasons in the first sentence, unless their submission on the reasons is inconclusive.

# § 6

# Obligation to establish internal reporting channels

(1) Reporting companies and persons shall establish channels and procedures for internal reporting and follow-up. Where required by law, this shall be done after consultation and in agreement with the parties to collective agreements or the relevant works council and/or other relevant employee representative bodies.

(2) Institutions, foundations and public corporations shall set up channels for internal reporting and follow-up procedures for the authorities, offices or other bodies assigned to them in their respective areas of responsibility and sovereignty in accordance with the relevant provisions of state law. To the extent required by law, this is done in consultation and agreement with the Staff Council and/or other competent employee interest groups. The relevant provisions of state law, if any, for the technical and legal supervision of regional authorities under public law shall remain unaffected by this provision.

(3) The channels and procedures referred to in paragraph 1 shall enable employees of reporting-relevant companies and persons covered by Section 2 (1) and (2) to report information on violations.

(4) Subsection 1 shall apply to reporting-relevant enterprises and persons under private law with 50 or more employees.

(5) The threshold laid down in paragraph 3 shall not apply to notifiable companies and persons governed by private law which are covered by the Union acts referred to in Annex [...].

(6) Notifiable undertakings and persons shall designate specific employees. The dedicated employees may be operated internally by a person or department or provided externally by an appropriate third party. In doing so, the notifiable companies shall ensure that the relevant provisions on data protection, in particular in accordance with Regulation (EU) 2016/679 (DS-GVO), are observed. This applies in particular with regard to the conclusion of any necessary agreements on data protection, for example pursuant to Art. 26, 28 DS-GVO. Furthermore, the guarantees and requirements set out in Section 7 also apply to third parties who are commissioned to operate the reporting channel for companies and persons under private law relevant to reporting. The special employees are specially trained for the processing of notifications; training is provided at the beginning of their work and in the context of annual training events lasting at least one day.

(7) Enterprises and persons governed by private law with between 50 and 249 employees may share resources for the receipt of notifications and for any investigations that may be required. This shall be without prejudice to the obligations imposed on such undertakings and persons under private law by this Act, including the obligations to maintain confidentiality, provide feedback and take action against the reported infringement.

(8) The Federal Government shall be authorized to oblige by statutory order, with the consent of the Bundesrat, notifiable enterprises and persons under private law with fewer than 50 employees to establish internal reporting channels and procedures in accordance with this Act, the nature of whose activities poses an increased risk, in particular to the environment and public health. The European Commission shall be notified of the adoption of a statutory instrument under this paragraph; the notification shall be accompanied by a justification and a risk assessment.

(9) The Federal Government shall be authorized to exempt by statutory order, with the consent of the Bundesrat, municipalities with fewer than 10,000 inhabitants or fewer than 50 employees or other legal entities or enterprises with fewer than 50 employees from the obligation under subsection 1.

# § 7

# Procedures for internal reporting and follow-up

(1) Notifiable companies and persons are obliged to establish appropriate procedures for internal reporting and follow-up measures in accordance with Section 6. These should be trained accordingly and subsequently have the responsibility to appropriately train managers and employees. The procedures shall include at least the following elements:

(a) Special communication channels shall be created which are separate from the general communication channels of the companies and persons, including the communication channels through which the companies and persons communicate internally and with third parties in their general work processes.

(b) the specific channels of communication must be designed, established and operated in such a way that

i. the completeness, integrity and confidentiality (including identifiable information) is guaranteed;

ii. previous consent in writing is obtained prior to discretionary release;

iii. Prior notice of non-discretionary release is given;

iv. responsibility of confidentiality is passed on when treated by different agents;

v. the identity of the whistleblower and data subjects is preserved and unauthorised persons are prevented from accessing it;

vi. the relevant provisions on data protection are observed, particularly with regard to the security of the personal data processed in accordance with Art. 25, 32 of the DS-GVO.

(c) The special communication channels ensure the submission of notifications in the following forms:

i. written reports in paper form or by electronic means,

ii. telephone reporting with the possibility of recording conversations with the consent of the reporting persons; and

iii. at the whistleblower's request, reporting through a personal meeting with the specific employees within a reasonable time frame.

(d) The procedures shall ensure the documentation of reports in accordance with section 16 of this Act.

(e) Whistleblowers/employees/operations of external agencies are allowed to submit comments that will be included in the final report, and that the final report will appear transparently, with appropriate redactions.

f) Reports shall be routed directly to the responsible supervisor(s).

(g) The procedures shall ensure that in cases where a report has been received through reporting channels other than those referred to in paragraphs 1 and 2 or has been received by employees other than the special employees, employees other than the special employees shall be prohibited from disclosing information that would reveal the identity of the whistleblower or the person concerned. In such cases, the report shall be forwarded immediately and unaltered to the specific employees.

(h) The whistleblower shall acknowledge receipt of reports promptly and in any case within seven days of their receipt, unless the whistleblower has explicitly objected or the whistleblower has reasonable grounds to believe that acknowledgement of receipt would compromise the protection of the whistleblower's identity.

(i) Procedures shall ensure that whistleblowers are impartial and independent and autonomous in their handling of reports. The specialised staff shall not be instructed not to investigate a report or to investigate it to a lesser extent. Special employees may not be threatened with or inflicted with reprisals within the meaning of section 17 in connection with the processing of information.

j) The Special Employees are obliged to take appropriate and sufficient follow-up measures to investigate and rectify the situation, including in the case of anonymous reports.

k) The procedures shall provide the specific employees with the authority to take appropriate and sufficient follow-up action to investigate and rectify the situation, including in the case of anonymous reports.

l) Feedback to the whistleblower shall be provided within a reasonable timeframe, not exceeding three months from the date of acknowledgement of receipt of the notification or, if receipt has not been acknowledged to the whistleblower, three months after the expiry of the seven-day period following receipt of the notification.

(m) The whistleblower shall be informed by the whistleblower of the final outcome of the investigation triggered by the report, where appropriate in accordance with the relevant administrative procedural law.

(n) information on the receipt of whistleblowers through the internal whistleblowing channel shall be published in a separate, easily identifiable and accessible section of the company's or person's website. The information shall include at least the following elements:

i. Information on the specific communication channels for the receipt of a notification and for follow-up communication, including

the telephone numbers in each case with an indication of whether or not the calls can be recorded when using the respective lines, and

the e-mail and postal addresses of specific employees,

ii. information on the procedure used for notifications, in particular

an indication that reports can also be submitted anonymously,

information on the manner in which the supervisory authority may request a reporting person to provide more detailed information or additional information, and

Information on the nature, content and timeframe of the feedback on the outcome of a notification to the notifying person.

(2) The special employees shall be provided with sufficient material and personnel to fulfil the duties under this Act.

(3) The special employees shall have the authority to question employees of the enterprise or person subject to reporting requirements and to demand the return of internal documents in order to investigate the facts of the case and to prepare measures to remedy the situation. This authority may be developed by internal procedural rules. The relevant provisions on data protection, in particular under the DS-GVO, remain unaffected by this.

(4) An infringement within the meaning of this Act shall be deemed to have occurred if the procedures for internal reports and follow-up measures do not meet the requirements of paragraph 1 and Article 6.

# Subsection 2

# External reporting procedures

# § 8

# Establishment of competent bodies to receive advice

(1) The Federal Government and the Länder shall designate one or more supreme Federal or Länder authorities as competent authorities within the meaning of this Act in accordance with the relevant Federal or Länder law. The competent authorities shall be authorised to receive notifications, provide feedback on them and take appropriate follow-up action.

(2) The external reporting offices for whistleblowers, which have so far been set up at federal or Land level on a voluntary basis or on the basis of statutory provisions, shall remain unaffected by this provision. The following provisions shall apply mutatis mutandis to these external reporting points.

(3) When determining competent authorities, the Federal Government and the Länder shall ensure that all the standards referred to in § 1 (2) are adequately covered in their respective areas of responsibility. The Federal Government and the Länder may agree that responsibility for individual areas listed in section 1 (2) shall be exercised by a federal authority or one or more Länder authorities. The corresponding coordination process shall be conducted by the Federal Whistleblower Protection Office to be established pursuant to para. 5.

(4) The competent authorities may delegate the processing and investigation of incoming information to subordinate authorities, subject to compliance with data protection regulations. The competent authorities shall be guided in particular by the principle of proximity. Even in the event of delegation, the competent authorities shall remain responsible for the fulfilment of the duties laid down in this Act for competent authorities.

(5) The Federal Ministry of Justice and Consumer Protection and the Committee on Defence are directly and exclusively responsible for notifications pursuant to § 1 paragraph 6. Paragraph 4 shall not apply to such notifications. The provisions of subsection 2 shall apply accordingly to the procedure. Disclosure with regard to violations under § 1(6) is possible subject to the provisions of section 15(3). It shall not be deemed to be disclosure within the meaning of § 15 of this Act if the whistleblower addresses the Committee on Defence or its members confidentially with regard to information concerning infringements within the meaning of § 1 (6).

# § 9

# Federal Whistleblower Protection Agency

(1) A federal whistleblower protection office to be set up at the Federal Ministry of Justice and Consumer Protection shall coordinate the work of the competent authorities at Land and federal level. All federal authorities and other public bodies in the federal sphere shall be obliged to support the Whistleblower Protection Office in the fulfilment of its tasks.

(2) For the legal position of the head of the whistleblower protection office, the requirements regulated in § 26 AGG apply accordingly with the condition that the head of the whistleblower protection office is appointed by the Federal Ministry of Justice and Consumer Protection upon proposal of the Federal Government.

(3) Whistleblowers may submit reports directly to the whistleblower protection office. Upon receipt of such a report, the Whistleblower Protection Office shall examine whether there are any reasons which could prevent the report from being processed by the competent authority within the meaning of Section 8 of this Act. If, in the opinion of the Whistleblower Protection Office, there are no such conflicting reasons, the Whistleblower Protection Office shall, with the consent of the whistleblower, hand over the procedure to the competent authority, taking into account the relevant data protection requirements. Otherwise, the Whistleblower Protection Office will carry out the whistleblowing procedure itself in accordance with the requirements set out in Section 11 of this Act. If the whistleblower does not disclose his identity to the Whistleblower Protection Office, the latter will decide on a possible transfer of the proceedings on the basis of the facts known to it. In its assessment, the Whistleblower Protection Office examines whether there are any reasons that would prevent the proceedings from being handed over, in particular possible interests of the whistleblower arising from the report or other circumstances known to the Whistleblower Protection Office.

(4) The whistleblower protection office shall inform the public about relevant topics and aspects relating to whistleblower protection. These topics include in particular the protection of whistleblowers from discriminatory acts or other disadvantages.

(5) The Whistleblower Protection Office and the Federal Government Representatives and the German Bundestag delegates concerned in their area of responsibility shall jointly submit reports to the German Bundestag every four years on the current status of whistleblower protection in Germany and shall make recommendations for eliminating and avoiding possible disadvantages for whistleblowers and for improving whistleblower protection. They may jointly conduct scientific studies on whistleblower protection.

(6) The Federal Whistleblower Protection Office shall be provided with the personnel and equipment necessary for the performance of its duties. It shall be shown in a separate Section of the individual plan of the Federal Ministry of Justice and Consumer Protection.

(7) The Federal Whistleblower Protection Office shall keep a central register of the competent authorities designated at Federal and Land level. The Federal Government and the Länder shall inform the Whistleblower Protection Office of the Federal Government annually in a central register of the competent authorities established in their area of responsibility and their activities. The central register contains the following information:

(a) Name and address of the competent authority,

(b) contact person at the competent authority,

(c) the area of competence of the competent authority,

(d) the number of notifications received during the past year,

(e) An anonymised overview of the handling of reports received (activity report).

# § 10

# Establishment of a Whistleblower Support Fund

(1) The Whistleblower Protection Office of the Federal Government shall set up a Whistleblower Support Fund within six months of the effective date of this Act. The purpose of the Whistleblower Support Fund is to provide appropriate financial support upon application by the whistleblower and discretionary decision pursuant to paragraph 3. The whistleblower protection office shall grant financial support.

(2) The Federal Government is authorised to determine by statutory order the details of the Whistleblowing Support Fund, in particular the decision-making criteria for granting and amount of financial assistance as well as the deadline and form of application.

(3) There is only a right to a decision free of discretionary error within the limits of the financial resources of the whistleblower support fund. Applications may be made as of the effective date of this Act.

# § 11

# Powers and duties of competent authorities

1. The competent authorities shall

(a) set up independent and autonomous external reporting channels to receive and process information on infringements

(b) designate impartial specialized staff; provision by external third parties shall be excluded

(c) provide whistleblowers with feedback within a reasonable timeframe not exceeding three months, or six months in duly justified cases.

2. The competent authorities shall ensure that the follow-up measures they take provide sufficient protection for whistleblowers.

(3) To protect whistleblowers, the competent authorities may issue temporary restraining orders against the companies and persons concerned if there is reasonable cause to suspect that the whistleblower is or could be subject to reprisals by companies or persons relevant to the report or their employees. Interim injunctions issued by the competent authority for the protection against discrimination shall automatically cease to have effect upon conclusion of the proceedings, unless in individual cases a longer protection of the whistleblower is required due to concrete indications.

(4) The competent authorities may, after due consideration of the facts, decide that a reported violation is clearly minor and, with the exception of the discontinuation of the proceedings, does not require any further follow-up action under this Act. This shall not affect the right to protection under this Act in respect of internal or external reports. In the event of closure under this paragraph, the competent authorities shall inform the whistleblower of their decision and the reasons for it.

5. Competent authorities may close proceedings if the notification does not contain relevant new information on infringements compared to a previous notification for which the relevant proceedings were closed, unless new legal or factual circumstances justify a different course of action. When the procedure is closed, the competent authorities shall inform the whistleblower of their decision and the reasons for it.

6. The competent authorities may give priority to notifications of serious infringements.

7. Authorities which have received a notification but which are not competent authorities within the meaning of paragraph 1 shall, within seven days, transmit the notification to the competent authority in a secure manner and in compliance with the relevant data protection requirements, and shall inform the whistleblower of the transmission without delay.

(8) The competent authorities shall forward the information contained in the notification in good time to the respective competent institutions, bodies, offices and agencies for further investigation, where this possibility exists under the relevant federal or Land law.

(9) The Länder shall provide the competent authorities with sufficient resources and personnel to enable them to carry out their tasks under this Act.

# § 12

# Design of external reporting channels

The external reporting channels must meet the requirements of § 7 in appropriate application, unless § 11 makes a special provision.

# § 13

# Information on the receipt of notifications and the follow-up action taken

Competent authorities shall publish in a separate and easily identifiable and accessible section of their website at least the following information:

(a) the conditions for protection in accordance with this Act,

(b) contact details for external reporting channels, in particular e-mail and postal addresses and telephone numbers of such channels, including whether telephone conversations are recorded;

(c) the applicable procedural rules for reporting infringements, in particular the manner in which the competent authority may request the whistleblower to clarify the information reported or to provide additional information, the timeframe for reporting, and the nature and content of such feedback;

(d) the applicable confidentiality regime for notifications and in particular the information on the processing of personal data - depending on its applicability - pursuant to Section 14 of this Act, Articles 5 and 13 of the DS Block Exemption Regulation, Article 13 of Directive (EU) 2016/680 or Article 15 of Regulation (EU) 2018/1725;

e) the type of notifications to be received and the follow-up action to be taken;

(f) the available remedies and procedures for protection against reprisals and the availability of confidential advice to persons considering making a notification;

(g) an explanation clearly stating under which circumstances persons making a report to the competent authority cannot be held liable for breach of confidentiality under section 21 of this Act; and

(h) where appropriate, the contact details of the federal whistleblower protection agency within the meaning of Article 8(5).

# § 14

# Review of procedures by the competent authorities

Competent authorities shall review their procedures for the receipt of notifications and follow-up action on a regular basis and at least every three years. In making this review, the competent authorities shall take into account the experience gained by themselves and other competent authorities and shall adapt their procedures accordingly.

# Subsection 3

# Disclosure

# § 15

# Disclosure

(1) An informant who discloses information shall be entitled to protection under this Act if one of the following conditions is met:

a) He has first reported internally or externally in accordance with Section 2, subsections 1 and 2, but his report was not made within the time frame specified in Section 7, paragraph 1, letter j), in connection with § 10, no suitable or sufficient measures were taken to investigate, rectify or suspect the violation; or

(b) it has reasonable grounds to believe that

(i) the infringement may pose an immediate or manifest threat to the public interest, including a risk to life or limb or irreversible damage; or

(ii) reprisals are to be feared in the case of external reporting; or

(iii) there is little likelihood of effective action being taken against the infringement because of the particular circumstances of the case, for example because there are indications that evidence may be suppressed or destroyed, that collusion may exist between an authority and the perpetrator of the infringement, or that the authority may be involved in the infringement

(2) This shall not apply in cases where a person discloses information directly to the press on the basis of specific provisions constituting a system of protection of freedom of expression and information.

(3) A whistleblower who discloses information under section 1(6) shall not be entitled to protection under this Act insofar as the disclosure constitutes a criminal offence within the meaning of sections 93-100 of the Criminal Code.

# Subsection 4

# Rules for internal and external reporting

# § 16

# Non-disclosure

(1) The reporting enterprises and persons shall ensure that the identity of the whistleblower is not disclosed to anyone other than the specific employee disclosures without the whistleblower's express consent. This also applies to all other information from which the identity of the whistleblower can be directly or indirectly derived.

(2) Rights to information under data protection law are excluded to the extent that this is necessary to prevent the obstruction, frustration or delay of reports, follow-up measures or investigations and to maintain the confidentiality of the whistleblower's identity. In particular, affected persons may not demand information about the identity of whistleblowers or circumstances that allow conclusions to be drawn about the identity of whistleblowers in accordance with Art. 15 DS-GVO or § 57 Federal Data Protection Act (BDSG). Nor do the information duties regulated in Art. 13, 14, 31, 34 DS-GVO or §§ 55, 56, 65, 66 BDSG refer to the identity of whistleblowers or circumstances relevant for identification. Other possible exceptions to the data protection information and disclosure obligations, in particular under the DS-GVO and the BDSG, remain unaffected.

(3) Notwithstanding paragraph 1, the identity of the whistleblower and all other information referred to in paragraph 1 may only be disclosed if this is a necessary and proportionate obligation in the context of investigations by public authorities or of legal proceedings, including with regard to safeguarding the rights of defence of the person concerned.

(4) Disclosure under the exception in paragraph 3 shall be subject to appropriate safeguards under applicable Union and national law. In particular, the whistleblower shall be informed before his identity is disclosed, unless such information would jeopardise the relevant investigations or legal proceedings. When informing whistleblowers, the competent authority shall provide them with a written explanation of the reasons for the disclosure of the confidential data concerned.

(5) Competent authorities shall not use or disclose business secrets received in connection with information relating to infringements for purposes other than those necessary for proper follow-up.

# § 17

# Processing of personal data

1. The processing of personal data under this Directive, including the exchange or transmission of personal data by the competent authorities, shall be carried out in accordance with the DS-GVO and the BDSG. The exchange or transmission of information by Union institutions, bodies, offices or agencies shall be carried out in accordance with Regulation (EU) 2018/1725.

(2) Special categories of personal data within the meaning of Article 9 (1) DS-GVO may only be processed in accordance with the relevant provisions for the processing of special categories of personal data, in particular Article 9 (2) DS-GVO and Section 26 (3) BDSG. The same applies to the processing of personal data relating to criminal convictions and offences within the meaning of Art. 10 DS-GVO.

(3) Personal data which are obviously not relevant to the processing of a specific notification shall not be collected or shall be deleted immediately if they were collected unintentionally.

(4) The Freedom of Information Act does not apply to operations carried out under the whistleblowing procedure.

# § 18

# Documentation of the messages

(1) The companies and persons relevant to reporting shall document each report in accordance with the confidentiality obligations under Section 16 in a secure system that guarantees the confidentiality and protection of the whistleblower and the person concerned and is accessible only to the special employees who need the documentation to perform their duties. Reports shall not be kept longer than is necessary and proportionate to meet the requirements of this Act

(2) In the case of a notification by telephone with sound recording of the conversation, the documentation shall

(a) by storing the sound recording of the conversation in a durable and retrievable form; or

(b) by making a complete and accurate transcription of the interview.

(3) In the case of a telephone message without sound recording of the conversation, documentation shall be made by making a detailed record of the conversation.

(4) In the case of reporting by means of a personal meeting with the special employees, the documentation shall be

(a) by storing a sound recording of the conversation in a durable and retrievable form, provided that the person making the notification gives prior consent to the sound recording; or

(b) by drawing up detailed minutes of the interview.

(5) The special employees shall give the whistleblower the opportunity to check and correct the transcription or the minutes of the interview. If the whistleblower has disclosed his identity, the special employees shall also give the whistleblower the opportunity to confirm the transcription or the transcript of the conversation by signature.

(6) The provisions on data protection remain unaffected by the above provisions of this § 16. When preparing telephone records, transcripts, minutes of meetings or other records, the notifier-relevant companies and persons and the competent authorities shall observe in particular the principles of data minimisation pursuant to Article 5(1)(c) DS-GVO and of integrity and confidentiality pursuant to Article 5(1)(f) DS-GVO.

(7) Any documentation obligations under data protection law, in particular under Article 5(2) DS-GVO or Article 24(1) DS-GVO, remain unaffected by this provision.

# Section 3

# Protective measures

# § 19

# Ban on reprisals

(1) Reprisals against whistleblowers, including their attempt or threat, are prohibited.

(2) Reprisals in this sense are in particular

a) Suspension, termination or comparable measures;

b) downgrading or refusal of promotion;

c) transfer of tasks, change of place of work, reduction of salary, change of working hours;

d) refusal to participate in further training measures;

(e) negative performance evaluation or issuing of a poor job reference;

(f) disciplinary measure, reprimand or other sanction, including financial sanctions;

(g) coercion, intimidation, bullying or exclusion;

(h) discrimination, disadvantageous or unequal treatment;

(i) failure to convert a fixed-term contract of employment into a contract of indefinite duration in cases where the worker could reasonably expect to be offered a contract of indefinite duration;

(j) non-renewal or early termination of a fixed-term employment contract;

(k) damage (including damage to reputation), particularly in the social media, or financial loss (including loss of contracts or income);

(l) blacklisting of the whistleblower on the basis of an informal or formal sectoral or industry-specific agreement, with the consequence that the whistleblower is no longer able to find employment across the sector or industry;

(m) early termination or cancellation of a contract for goods or services;

(n) withdrawal of a licence or permit;

(o) psychiatric or medical referrals;

(p) extradition or other detrimental residence measures; in so far as residence measures are linked to criminal offences or misdemeanours in connection with the procurement of information for reporting or disclosure, the intention to contribute to the clarification, cessation and presumption of a violation of law and order shall be subject to a proportionality assessment.

(q) any other discriminatory measure that may affect the exercise of rights under this Act.

# § 20

# Measures and obligations for notifiable companies and persons

(1) Companies and persons relevant to reporting shall be obliged to take the necessary measures to protect whistleblowers from reprisals in accordance with Section 19. This protection also includes preventive measures.

(2) Companies and persons relevant to the reporting process shall draw attention to the inadmissibility of such reprisals in a suitable manner and shall take steps to ensure that they are not carried out. At least once a year, companies and persons relevant to the reporting process shall inform their staff of the inadmissibility of such reprisals within the framework of mandatory vocational training and further training and shall take steps to ensure that they are not carried out.

(3) If employees of a notifiable company or a notifiable person violate the prohibition of reprisals under Section 17, the notifiable companies and persons concerned shall take the appropriate, necessary and reasonable measures to prevent reprisals such as warning, implementation, transfer or termination.

(4) Enterprises and persons relevant to reporting may not instruct the special employees not to follow up a report or to a lesser extent.

(5) Companies and persons relevant to reporting must not threaten or inflict reprisals on specific employees within the meaning of Section 19 in connection with the processing of reports.

(6) If whistleblowers experience reprisals within the meaning of Section 19 in the course of their work by third parties, companies and persons relevant to the report must take the appropriate, necessary and reasonable measures to protect the whistleblower in each individual case.

(7) This Act as well as information on the offices responsible for handling reports under this Act shall be made public in the company or office. The announcement may be made by posting it or making it available in a suitable place or by using the information and communication technology customary in the establishment or office.

# § 21

# Elimination, omission, compensation

(1) In the event of a violation of the prohibition of reprisals, the whistleblower may, without prejudice to further claims, demand the removal of the reprisal. If further reprisals are to be procured, he may sue for injunction. The whistleblower is entitled to interim legal protection.

(2) In the event of a violation of the prohibition of reprisals, the party responsible shall be obliged to compensate for the damage caused thereby. This shall not apply if he is not responsible for the breach of duty. The whistleblower can demand appropriate compensation in money for damage that is not financial loss.

(3) Claims in tort remain unaffected.

(4) The burden of proof rule of § 24 applies to the remedies in paragraphs 1 to 3.

(5) The party causing the damage may not invoke an agreement, order, policy or authority which deviates from the provisions of this Act.

# § 22

# Right of appeal and right to refuse performance

(1) Whistleblowers shall have the right to complain to the competent authorities of the enterprises and persons relevant to the reporting if they feel that they are subject to reprisals by the employer, superiors, other employees or third parties as a result of the report within the meaning of this Act. The complaint must be examined and the result communicated to the whistleblower.

(2) If the enterprise or person relevant to the reporting does not take any measures, or obviously unsuitable measures, to prevent reprisals in connection with a report under this Act, the whistleblowers concerned shall be entitled to cease their activities without loss of remuneration, insofar as this is necessary for their protection. § Section 273 of the German Civil Code remains unaffected.

# § 23

# Disclaimer

(1) Notwithstanding Section 1 (5) and (6), persons who report or disclose information about violations under this Act shall not be deemed to have violated any disclosure restriction. They may not be held liable for such report or disclosure unless the report or disclosure was made intentionally or through gross negligence. The exclusion of liability also applies to obtaining or accessing information for the purpose of reporting or disclosure, provided that proportionality is maintained.

(2) This shall also apply in legal proceedings, including legal proceedings under private law, public law or labour law, for defamation, breach of copyright, breach of confidentiality, breach of data protection regulations, disclosure of business secrets and proceedings for damages. Whistleblowers have the right to request that the action be dismissed with reference to the report or disclosure in question, unless the report or disclosure was made deliberately or grossly negligently untruthfully.

(3) If a person reports or discloses information about violations falling within the scope of this Act that contain business secrets, and if such person fulfils the conditions of this Act, such report or disclosure shall be deemed lawful within the meaning of Section 3(2) of the Business Secrets Act.

# § 24

# Burden of proof

(1) In proceedings before a court or an authority relating to a reprisal suffered by the whistleblower, in which the whistleblower claims to have suffered this reprisal as a result of a report or disclosure that has been made or is intended, it shall be presumed that the reprisal was due to the report or disclosure. In such cases, it is the responsibility of the person who took the reprisal to prove that their actions were in no way related to the reporting or disclosure that occurred..

(2) Paragraph 1 shall apply to all types of proceedings with the exception of criminal law and shall cover in particular contractual and non-contractual civil claims.

# § 25

# Criminal law justification, mitigation

(1) Anyone who, for the purpose of obtaining information for reporting or disclosure within the meaning of this Act, commits a criminal offence shall not act unlawfully if, in weighing the conflicting interests, including the legal interests involved and the degree of the dangers threatening them, the protected interest substantially outweighs the impaired one. The prevention and detection of violations of law within the meaning of this Act shall be deemed to be a protected interest. A justification of intentional crimes against life and limb according to this provision is excluded; this includes the attempt, the threat and the concrete endangerment.

(2) If the whistleblower commits a criminal offence for the purpose of obtaining information reported or disclosed within the meaning of this Act and if the requirements of subsection 2 half-sentence 2 are not met, the court may mitigate the penalty under section 49(1) of the Criminal Code or refrain from imposing a penalty if the whistleblower has made a significant contribution to the fact that an infringement under this Act could be detected or prevented.

(3) The criminal liability of persons who report or disclose information against their better judgment without fulfilling the requirements of this Act shall remain unaffected.

# § 26

# Supporting measures

(1) The competent authorities under subsection 2 of Section 2 of this Act shall

(a) to provide the public with comprehensive and independent information and advice, including legal advice, for whistleblowers on the remedies available and procedures available against reprisals and on the rights of the data subject in an easily accessible manner and free of charge

(b) to provide effective assistance to whistleblowers in their contacts with possible authorities involved in the protection against reprisals;

(c) issue whistleblowers with a certificate that the conditions for protection under this Act, including the good faith of the whistleblower, are met; and

(d) refer whistleblowers to an appropriate psychological support service if necessary

(2) In proceedings before the civil courts and under the Mediation Act, a whistleblower shall receive legal aid on application if the intended prosecution or legal defence offers sufficient prospect of success and does not appear to be deliberate. Sections 114 to 127a ZPO apply. For cross-border legal aid within the European Union, §§ 1076 to 1078 ZPO apply in addition.

(3) In criminal proceedings a public defender shall be appointed to the whistleblower. The sections 141 et seq. StPO remain unaffected.

(4) If a whistleblower suffers a disadvantage as a result of a reprisal, he may submit an application to the Federal Whistleblower Protection Office for financial assistance from the Whistleblower Assistance Fund.

# § 27

# Penal Code

Anyone who is guilty of the following shall be punished by imprisonment for up to two years or by a fine

(a) intentionally obstruct or attempt to obstruct the making of a declaration or disclosure

(b) causes serious harm to the whistleblower with the intention of sanctioning a report or disclosure; or

(a) wilfully breaches the duty entrusted to him by the authorities or by contract to protect the confidentiality of whistleblowers' identity

# § 28

# Fines regulations

(1) An administrative offence is committed by anyone who

a) complies with its obligation to establish internal reporting points and appropriate procedures for internal reporting and follow-up in accordance with sections 6-7 within [one year] after this Act enters into force; or

(b) infringes an obligation under section 18

(2) The administrative offence may be punished by a fine of up to EUR 40,000. § Section 30 of the Administrative Offences Act shall apply.

# § 29

# Measures to protect data subjects

(1) The rules on the protection of the identity of whistleblowers laid down in § 14 shall also apply to the protection of the identity of persons and undertakings concerned. The competent authorities shall ensure that the identity of persons and undertakings concerned is protected for the duration of an investigation triggered by the report or disclosure.

2. If the notification is made to an external body, the undertakings and persons concerned shall have the right to inspect the file and to obtain copies, extracts and transcripts. The rules on the protection of whistleblowers' identity shall remain unaffected.

3. Before follow-up action is taken, the undertakings and persons concerned shall be given the opportunity to comment.

# § 30

# No suspension of rights and remedies

(1) The provisions of this Act may not be derogated from to the detriment of protected persons. In particular, the rights and remedies provided for in this Act may not be waived or limited on the basis of any employment agreement, provision, type or condition, including a preliminary arbitration agreement.

(3) Where an existing law would seem to conflict with an obligation under this one, the present one takes precedence.

# LEGISLATIVE REASONING

# Implementation in a separate law

The provisions of Directive (EU) 2019/1937 ("Directive") address a wide range of legal areas, from labour law to criminal law. In the context of national implementation, the provisions of the Directive must be embedded in already existing regulatory systems and laws in order to ensure the smooth functioning of the regulatory regime.

The effective implementation of the Directive requires a separate Whistleblowing Act. The individual embedding of the provisions in their respective fields of law within the framework of an article law would lead to a fragmentary transposition into national law, which would be detrimental to the comprehensibility of norm addressees, in particular potential whistleblowers. The majority of the provisions of the Directive are of fundamental applicability, i.e. they are applicable like a "general part" to notifications of all infringements irrespective of the specific legal subject matter. For such horizontal regulations, a separate law is the obvious choice. In addition, the provisions of the Directive interact with each other and regularly refer to each other. Finally, an independent law has an important legislative signal effect.

# Re § 1 (material scope of application)

## Regarding paragraph 1

The material scope of application includes actual and possible legal infringements. Article 5 No. 2 of the Directive makes it clear that a notification or disclosure of a potential infringement is covered by the scope of the Directive. According to it, "information on infringements, information, including reasonable grounds for suspicion, relating to actual or potential infringements". This also follows imperatively from the meaning and purpose of the Directive. Information on infringements" is one of the key concepts of the Directive, to which the essential protective provisions are linked. Article 6, which sets out the conditions for whistleblower protection, requires that whistleblowers "had reasonable grounds to believe that the information reported on infringements was true at the time of reporting and that this information fell within the scope of this Directive". Similarly, the definitions of "report" or "report", "internal report", "external report", "disclosure" or "disclose" and "whistleblower" refer to "information on infringements" (see Article 5(3) to (7)).

In terms of purpose, possible violations of the law are also covered, since prevention will often be more important than repression. Moreover, it is not reasonable to expect the person giving the information to wait until the violation has actually occurred. There will also be cases in which it is unclear whether a possible violation of the law has matured into an actual one - this uncertainty cannot be at the expense of the bona fide whistleblower.

## Regarding paragraph 2

The material scope of the Directive is limited to certain European legal acts and their national implementation.

The scope of application of the Act on the Protection of Whistleblowers covers all public-law provisions of German law as well as directly applicable Union law.

This extension of the material scope of application also to national provisions is in line with the intention of the European legislator to establish common minimum standards to ensure effective and comprehensive protection of whistleblowers. The guarantee of national minimum standards as well is consistent in this sense (see Recital 5 of the Directive) and contributes decisively to legal certainty for the norm addressee, since even for legally qualified whistleblowers it would regularly not be apparent whether the infringement concerned national or European law. The large number of life facts possibly covered further complicates a clear differentiation between national and European infringements. This legal uncertainty would run counter to the intended level of protection and lead to gaps in protection, as there is a risk that a presumed European infringement will ultimately be assessed by national authorities as a purely national infringement. These difficulties would discourage whistleblowers from making reports.

Furthermore, there is no objective reason to justify a lower level of protection for whistleblowers in national situations compared to infringements of European standards.

## On paragraph 3

Paragraph 3 makes it clear that "specific" reporting arrangements already existing in law should not be affected by this Act. "Statutory" in the sense of this provision includes both Union law and German law. § Section 1(3) contains an exemplary list of such specific rules.

## Regarding Paragraph 4

Paragraph 4 transposes Articles 3(3) and 4 of the Directive.

**Regarding Paragraph 6**

It is imperative that reports of violations in the area of national security also be subject to the protection of this law. This means that this draft law goes beyond the requirements of the directive in an important area. This is because hierarchies marked by a power imbalance, especially such as those in military organisations, can contribute to the fact that violations are not reported or are reported much less frequently or are not prosecuted properly within the framework of internal official channels. This can lead to a culture of acceptance in an area in which the consequences of violations of the law can be particularly serious because, for example, human lives are at stake or large contracts worth millions are to be awarded. The dissolution of the KSK's second company by the Ministry of Defence by October of this year shows that the infiltration of the Bundeswehr from within by anti-constitutional forces is a relevant danger. Effective whistleblower protection can make an important contribution to breaking through a misunderstood and state-undermining "corps spirit" within the Bundeswehr and thus help to protect the constitutional order and the legitimacy of the Bundeswehr.

The particularly high potential for damage stands in stark contrast to the sensitive nature of certain information that may be a part of whistleblowing, especially state secrets. The protection of this information requires special precautionary measures. For this reason, reports in the security-relevant area are only possible in accordance with the special provisions in §§ 15 (3), 8 (5) of this Act.

# Re § 2(1) (Personal scope of application)

§ Section 2 contains a list of persons worthy of protection and is comparable with Section 6 of the AGG. § Paragraph 2 includes primarily natural persons who are (paragraph 1) or have been (paragraph 2) active in the private or public sector and addresses the objective laid down in recital 37 of the Directive to cover as wide a range of potential whistleblowers as possible.

It is essential that the information on infringements has been acquired in the context of the professional activity. The term "professional context" within the meaning of § 2 must be interpreted broadly and in each case in the light of all relevant circumstances and not merely reduced to the formal employment or service relationship (see Recital 37 of the Directive).

In addition to the protection of the professional context, important objectives of the Act are also special protection against reprisals and, in particular, the protection of persons who "may" gain privileged access to information about possible infringements of the law within the meaning of this Act (see recitals 1 and 36 of the Directive). Lit. a) to d) of paragraph 1 therefore clarify that in this context persons in "atypical employment relationships", part-time workers, fixed-term workers or temporary workers, are also covered by the personal scope of application in the same way as employees for their vocational training (see recital 38 of the Directive). Whether the whistleblower is a trainee or a head of department is just as irrelevant for the regulatory purpose of the Act as is the position as a civil servant (lit. b) or any other employment relationship under public law (lit. c). In all cases, the context is "professional context" and in all these cases whistleblowers can gain privileged access to relevant information. Civil servants are also explicitly covered by Article 4(1)(a) of the Directive (see Section 1(1)(b) of the Act)

§Section 2(1)(e) and (f) address persons worthy of protection who, although not in an employment or service relationship, are nevertheless covered by the protective purpose of the law, since they too can obtain privileged access to information on possible infringements of the law within the meaning of the law (such as volunteers at internal company events) (see recital 40 of the Directive). Recital 37 of the Directive, cited above, clarifies in this respect that persons associated with the organisation in the broader sense should also be protected.

## On paragraph 4

§ Section 2(4)(c) covers not only legal persons but also partnerships with legal capacity which are owned by the whistleblower or in which the whistleblower is a partner, since the latter are also covered by the above objectives. The classification under company law in German law cannot lead to a limitation of the personal scope of application. Moreover, the English language version of the Directive speaks of "legal entities" and thus also for a wider scope of application than the "legal person".

# Re § 3 (Definitions)

## To No. 5

The insertion of a definition of "reporting enterprises and persons" extends the concept of "legal person" in the Directive, which is to be interpreted autonomously, to the corresponding addressees in German law. On the need for autonomous interpretation, see e.g. Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, Article 8 marginal 8 ff.

## On nos. 17 and 18

The insertion of the definitions "Federal Whistleblower Protection Agency" and "interim orders for protection against discrimination" are explained in the explanatory memorandum to Section 8 (5) and (6) and Section 9 (3).

## Re No. 19

The insertion of the term "special employees" is explained in the explanatory memorandum to Section 6(5).

# Re § 4 (Conditions for the protection of whistleblowers)

## Regarding paragraph 1

§ Paragraph 4(1) transposes Article 6(1) of the Directive and lays down the conditions under which whistleblowers are entitled to protection under that law.

It is useful to refer in § 4 (1) (a) to the good faith of the whistleblower at the time of the report (ex-ante perspective). This serves to clarify that the question of whether an infringement actually occurred is not relevant. Furthermore, the whistleblower's motives for providing information are irrelevant in the assessment, as Recital 32 of the Directive states: "The reasons for which the whistleblower reports information should not be relevant in determining whether the person should be protected". The second sentence in paragraph 1 has a clarifying effect.

The term "good faith", instead of the wording "sufficient reason to believe", refers to an assessment standard for whistleblower cases established in German legal practice, which has been accepted by the BAG and the BVerfG. Acts in good faith that are based on a sufficiently substantial basis of evidence are to be protected by this Act. This is consistent with the purpose of Article 6 of the Directive.

Furthermore, those persons who base their decision to provide information in bad faith on imprecise or false information should also fall within the scope of protection of this Act (see also Recital 32). All in all, the application of the assessment standard of good faith ensures a fair balance of interests between sufficient protection of the whistleblower and protection of the company against damage to its reputation, since deliberate or deliberate false reports or even deception are not covered by the standard of good faith.

§ Section 4 para. 1 lit. b) refers to the protected reporting channels. It is important that the person making the report can fall back on effective internal reporting channels. Internal reporting channels can help to prevent damage to the company's reputation and also protect the whistleblower from public ostracism.

## The choice of the reporting channel ("or") ensures that the information provided is best suited to the circumstances of the case (see recital 33 of the Directive). In particular, there is no obligation or commitment on the whistleblower to choose the internal reporting channel first. To this extent, the directive rejects this law from a "priority of internal whistleblowing", as the BAG, for example, has previously demanded or is found in § 17 II ArbSchG. The use of the internal reporting channel bears the risk that the report will not be followed up effectively and that reprisals will be imposed. In case of doubt, it is the whistleblower who can best assess these risks (see also recital 33 of the Directive). In addition, a right to choose between different reporting channels on the company side leads to an optimisation of the internal reporting channel in order to avoid external reports.

## Regarding paragraph 2

Article 6(2) of the Directive leaves Member States free to decide whether internal or external reporting channels or authorities should be obliged to receive and follow up anonymous reports of infringements.

§ Article 4 (2) is modelled on Article 4d (1) sentence 2 FinDAG, which expressly provides that reports can also be submitted anonymously.

An effective whistleblower system cannot do without anonymous reports and must be available both in the internal and external reporting channels.

The concrete design of the respective reporting channel has a major impact on the confidence of potential whistleblowers and thus on the guarantee of effective whistleblower protection. The possibility of anonymity of reports strengthens the confidence of potential whistleblowers in the reporting system. The more serious the violation - and thus also the need for clarification - the more is at stake and the higher the whistleblower's sensitivity and (self-)protection interest. It is precisely in such cases that an appropriate level of trust is necessary for whistleblowers to take the first step and approach the reporting office.

The concern that reports made anonymously might regularly not be credible has not been empirically confirmed. Instead, many companies allow the submission of anonymous reports without having been able to prove a significant threshold of abuse cases so far. Moreover, the anonymity of reports is also provided for in other comparable legal acts. For example, Article 61(3) of the Money Laundering Directive makes anonymous reporting channels mandatory. It is not clear why whistleblowers should not be afforded the same level of protection.

Finally, the possibility of anonymous reporting does not prevent effective prosecution of the reported violation. The submission of an anonymous report with substantiated reasons, if necessary with the submission of appropriate evidence, should regularly make further investigative steps possible. The plausibility of the submitted report must be evaluated accordingly by the respective reporting office.

## Regarding paragraph 3

The last half-sentence of paragraph 3 clarifies that the disclosure of the whistleblower's identity is only allowed in exceptional circumstances, to the extent compatible with the principle of proportionality. This corresponds to the explicit provision in Article 16 of the Directive, which is implemented in § 16 of this Act. This ensures that the evaluations of the Directive and the Whistleblower Act are also taken into account when interpreting other laws and judicial orders.

## Regarding paragraph 6

# Paragraph 6 extends the principle of protection in the case of information to a competent authority of paragraph 7 to information to the non-competent authority. Whistleblowers who report infringements to an incompetent authority without being aware of the incompetence require the full protection of the Whistleblower Act. The burden of proof that the whistleblower was aware of the incompetence of the authority lies with the person who invokes it.

## Regarding paragraph 8

## Paragraph 8 enables whistleblowers who have acted as whistleblowers in other EU Member States and are nationally protected by the protective measures there to also be protected from reprisals in the Federal Republic of Germany. Particularly in the case of large international corporations, mere national protection against reprisals is not sufficient. Instead, there is a need for comprehensive, interlocking mechanisms to effectively protect whistleblowers from cross-border reprisals. It is conceivable, for example, that an engineer who has given information in France and is now applying for a job in the same industry in Germany may not be able to obtain it through a formal or informal industry-wide blacklisting within the industry. This is in line with the protective purpose of the directive, which is to provide complete protection for whistleblowers throughout Europe. This also includes the cross-border protection of whistleblowers, which is of great practical importance, particularly in view of the free movement of workers under Article 45 TFEU.

# Regarding Section 2 (Reporting Procedure)

# For subsection 1 (Internal reporting procedures)

# Re § 5 (reporting via internal reporting channels)

## Regarding paragraph 1

Paragraph 1 sentence 2 makes it clear that the internal and external reporting channels are equivalent (see already the explanation to § 4 paragraph 1).

## Regarding paragraph 2

Paragraph 2 sets out the requirements of Article 7(2) of the Directive. The implementation of the Directive is put into concrete terms by qualifying the "probable occurrence" and standardising an obligation to refer to the optional internal reporting channel. In view of the disadvantages inherent in the internal reporting channel, it is not advisable to go beyond an obligation to provide information (see the explanation of § 4 (1) for the risk of inadequate measures and the imposition of reprisals).

In addition, paragraph 2 clarifies that although officials may use both internal and external reporting channels, it is considered appropriate, in view of the special duty of loyalty of officials, to require a check of coherence when choosing the external reporting channel in the first instance. This should ensure that the external reporting channel is not called upon in the first instance without good reason. A finding of coherence shall be made if the official presents credible facts which call into question the effectiveness of the internal reporting channel or give rise to fears of reprisals.

# Re § 6 (obligation to set up internal reporting channels)

## Regarding paragraph 1

## The obligation to set up internal reporting channels shall also extend to organizations within the meaning of Article 1(7).

## Regarding paragraph 2

## Paragraph 2 establishes the internal reporting channels within the institutions, foundations and public bodies. Insofar as these are subject to Land law, the draft leaves it to the Länder to designate the competent authorities.

## Regarding paragraph 3

## Article 8(2) of the Directive leaves it to the discretion of the Member States whether an internal report may also be made by the other persons referred to in Article 4(1)(b), (c) and (d) and Article 4(2) who, in the course of their professional activities, have contact with the notifiable undertaking. It is necessary to extend the internal reporting channel to these persons as well, since these groups of persons obtain information on the enterprises relevant to reporting in the same or a similar way. The interests are similar in this respect. It also enables these companies to prevent or remedy infringements internally and thus prevent damage to their reputation.

## Regarding paragraphs 4 and 7

Paragraphs 3 and 6 refer to the concept of worker under labour law.

## Regarding paragraph 6

Paragraph 5 refers to the concept of "special employees", which is based on Article 1 (1) of the BaFin Violation Reporting Regulation. The term is legally defined in section 3 no. 17. In particular, it is clarified that the entire procedure of the investigation triggered by the notification is in the hands of the same person or department.

Paragraph 5 sentence 3 arranges annual further training events for specifically employed persons in order to ensure the effective implementation of the Directive and to safeguard the rights of the whistleblower and of the persons concerned.

## Paragraph 8

The standardisation of an authorisation by regulation implements the possibility under paragraph 7 of the Directive to exempt particularly risky business activities from the exception in paragraph 3. The second sentence transposes Article 8(8) of the Directive.

## Regarding paragraph 9

The internal reporting channels under public law are set up at local authority level to ensure proximity to citizens and the facts. One might think of the local public order offices, for example. A settlement on the level of the administrative districts also seems appropriate. The derogations provided for in Article 8(9) of the directive are implemented by means of a regulation.

# Re § 7 (Procedure for internal reporting and follow-up)

§ Section 7 standardises the requirements for internal reporting channels and is largely based on the provisions of the BaFin Violation Reporting Regulation, in particular Sections 2, 3, 4 and 6.

## Regarding paragraph 1

## Re point (e)

The provision extends the provisions of Article 12(3) of the Directive to the internal reporting channel. There is no reason to strengthen whistleblower protection for reporting outside the channels provided for external reporting only.

## Re lit. f)

The provision provides for an exception to the obligation to confirm in the two situations of exclusion in Section 4 of the BaFin Violation Reporting Regulation. This is necessary to protect the whistleblower.

## Re lit. g)

The provision, which is based on Article 12(1) of the Directive, requires the independence and autonomy of the internal reporting channels and, in accordance with Article 9(1)(c) of the Directive, the impartiality of the specific employees. The provision contains two important prohibitions to protect the integrity of the internal reporting channel. It is forbidden to instruct special employees not to follow up a report or to follow it up to a lesser extent. Furthermore, special employees may not be threatened with or inflicted with reprisals within the meaning of § 19 in connection with the processing of reports.

## Paragraph 2

The requirement that the internal reporting channel be adequately equipped with material and personnel is an essential prerequisite for effective whistleblower protection. Accordingly, Article 11(1) of the Directive requires Member States to provide the competent authorities of the external reporting channel with "adequate resources". There is no reason not to extend this requirement to the internal reporting channel.

## Paragraph 3

Paragraph 3 contains an independent legal power for specific employees to question employees of the reporting company or person and to demand the return of internal documents. This power may be further developed but not restricted by internal procedural rules.

## Paragraph 4

Paragraph 4 serves to clarify that violations of the procedural requirements in paragraph 1 and § 6 may themselves be the subject of a notification under this Act.

# For subsection 2 (External reporting procedures)

# Re § 8 (Establishment of competent bodies to receive notices)

§ Paragraph 8 transposes Article 11(1) of the Directive. It requires Member States to establish authorities responsible for receiving, reporting back and following up notifications. The person making the notification must have the possibility of reporting possible infringements to the competent authorities. The possibility of external reporting is intended in particular to encourage persons to report infringements who fear disadvantages in using internal reporting channels.

## On paragraphs 1 to 4

The Directive provides only a basic framework for the establishment of competent authorities. The establishment is primarily governed by the law of the Member States. This is intended to enable Member States to take account of their own legal principles and structures when determining and establishing competent authorities, in particular with regard to the applicable administrative law. In this context, the present draft law takes particular account of the federal structure of the Federal Republic of Germany. The decision as to which authorities are to be designated as competent authorities should therefore be primarily a matter for the federal states. The federal states determine the competent authorities in accordance with their applicable administrative and state laws. However, the present draft law lays down general principles for the establishment of competent authorities in order to ensure that the level of protection for whistleblowers is comparable throughout Germany. Therefore, the federal states are obliged, as far as possible, to designate the supreme state authorities as competent authorities. In addition, competent authorities may also be established at federal level This applies in particular to those areas of law that are essentially regulated by federal authorities, such as antitrust law.

## Regarding paragraph 5

## Paragraph 5 modifies paragraph 1 for information on infringements in the sense of § 1 paragraph 7, where, due to the explosive nature of the conceivable information, special caution and secrecy are required. Consequently, a competent body is to be established at the level of the Federal Ministry of Justice and Consumer Protection which will deal exclusively with information from this area. This serves the interest in effective clarification and secrecy with regard to classified information and breaches of national security.

## In addition, whistleblowers concerning breaches within the meaning of Section 1(7) have the additional option of contacting the Committee on Defence or a member thereof directly in confidence, without this being regarded as disclosure within the meaning of Section 15 of this draft. This opens up access to a further expert supervisory body, so that a potential whistleblower only feels compelled to disclose in the extreme case.

# Re § 9 (Federal Whistleblower Protection Agency)

## Section 9 provides for a central whistleblower protection office at federal level, which coordinates the work of the individual competent bodies. To this end, the individual competent authorities shall inform the Federal Whistleblower Protection Office of their administrative structure and activities. The structure, powers and tasks of the Whistleblower Protection Office are based on those of the Federal Anti-Discrimination Agency. The regulations provided for in Section 9 are in this respect modelled on Sections 25 et seq. of the AGG.

## The Federal Whistleblower Protection Office is also authorised to receive reports from whistleblowers and to process them. This does not apply insofar as the whistleblowing procedure in question can be processed by the competent authority as defined in § 8. However, in order to take the whistleblower's interests into account, the procedure may only be handed over to the competent authority if the whistleblower agrees to this handing over and if there are no interests of the whistleblower opposing this handing over.

# Re § 10 (Establishment of a Whistleblower Support Fund)

## The Whistleblower Support Fund is an important element of an effective whistleblower protection system. It is true that such a fund is not explicitly provided for in the Directive. However, Article 20 of the Directive requires Member States to provide whistleblowers with access to support measures. The recitals to the Directive often link the financial burden on whistleblowers and require the competent authorities to provide whistleblowers with the necessary assistance (see e.g. recitals 90 and 99). There are also voices in the literature in favour of setting up a whistleblower support fund.

## Whistleblowers are often confronted with professional and private consequences after reporting. The decision to become a whistleblower entails risks of a financial (e.g. loss of job or promotion) or other nature (e.g. health and psychological consequences). The consequences are often long-term and can even place a financial burden on relatives (e.g. family). Whistleblowers who cannot remain anonymous are at risk of social ostracism. In the worst case, this can even lead to the whistleblower not finding a new job in certain sectors.

## Whistleblowers have the possibility to pursue claims for damages. However, this is always associated with a risk of litigation. It will therefore be easy for financially strong companies in particular to deliberately prolong proceedings in order to drive up the costs of proceedings and deter potential whistleblowers. Even if the whistleblower is awarded damages, this is only done after a time delay. Until then, the whistleblower, who may be unemployed, must provide for his livelihood. Legal aid and often the damages awarded cannot always fully cover the financial losses of the whistleblower.

## Financial reasons must not be allowed to counteract the aim of the Directive, which is the comprehensive detection of maladministration. The establishment of a whistleblower support fund fulfils precisely this objective of the Directive. Such a fund is by no means foreign to German law. The Victims' Compensation Act (Opferentschädigungsgesetz), for example, contains an enforceable legal right to care to alleviate the health and economic consequences of physical assaults. There is also a central fund, the "Sexual Abuse Fund" (Fonds Sexueller Missbrauch), which is financed by the Länder.

## Regarding paragraph 3

## A promise of financial support may include in particular assistance with living expenses, care allowance (e.g. for relatives who are cared for at the whistleblower's expense) or costs for medical treatment.

## Whether financial support is needed must be assessed on the basis of objective criteria (e.g. loss of income, impairment in future working life). The whistleblower protection office must always observe the principle of proportionality.

## The decision on whether or not to grant financial support is a discretionary decision. In determining the assessment criteria, the Federal Government may be guided in particular by the criteria of the Federal Pensions Act. Benefits should only be provided to the extent that whistleblowers do not receive other benefits for the same purpose, such as procedural assistance, social assistance.

## If applications are submitted before the whistleblower support fund has been set up, they will be processed retroactively and financial support will be granted retroactively accordingly.

# Re § 11 (Powers and duties of the competent authorities)

## Regarding paragraph 3

In particular, the competent authorities may issue temporary anti-discrimination orders to legal persons in the civil and public sectors. These measures are intended to protect notifying persons from possible disadvantages in connection with their notification. Such measures may include, inter alia, temporary prohibitions on dismissal. Since the aforementioned interim measures interfere comprehensively with the civil law principle of private autonomy, they are subject to strict conditions. In particular, the potential interests of the legal persons concerned must also be taken into account. In addition, the provisional measures generally lose their effect automatically as soon as the administrative proceedings are concluded. An exception to this principle applies if the notifying persons can prove that they will suffer considerable disadvantages without the provisional measures.

## Regarding paragraphs 4 and 5

The possibility of suspension in minor or repeat cases serves to focus on significant cases and strengthens whistleblower protection in important cases. The Directive leaves it to the discretion of the Member States to provide for such grounds for recruitment.

## Regarding paragraph 9

The Länder shall provide their competent authorities with sufficient resources to enable them to carry out their tasks under this Act effectively. The concrete form of the competent authorities is at the discretion of the Länder, taking into account the particularities of the respective area of law and local requirements.

# Re § 12 (Design of external reporting channels)

With regard to the design of external reporting channels, Section 12 refers to Section 7 on internal reports and follow-up measures and ensures that internal and external reporting procedures are subject to the same procedural rules and protection guarantees, e.g. with regard to the establishment of special communication channels and the maintenance of the documentation obligation and the confidentiality requirement. These are largely general procedural principles and safeguards in favour of whistleblowers to be respected by the internal and external reporting channel.

The Directive largely leaves it to the Member States to organise the procedures of the internal and external reporting channels. A high degree of similarity serves the uniform and comprehensive protection of whistleblowers and reduces the complexity of the law. This contributes to predictability from the whistleblower's perspective and thus to greater legal certainty.

# Re subsection 3 (Disclosure)

# Re § 13 (Disclosure)

## Regarding paragraph 1

According to Article 15(1)(a) of the Directive, the whistleblower who discloses information shall only be protected if internal and external reporting bodies have not taken appropriate action in respect of the reported infringement within the prescribed three and six month periods. This provision constitutes a minimum procedural guarantee for the whistleblower on the one hand, and a clear benchmark of when disclosure is justified on the other.

Section 15 (1) lit. a) extends the protection against disclosure to cases in which no suitable or sufficient measures have been taken to identify, stop or punish the infringement. The extended and clarifying wording is in line with the purpose of the Directive and the law and prevents inadequate measures taken by the external reporting channel from thwarting the clarification of the facts, whether through deliberately inadequate clarification measures, maliciously protracted investigations or the non-use of powers to punish and remedy.

Whether the measures taken were appropriate and sufficient must be assessed on a case-by-case basis by reference to objective criteria such as the nature of the allegedly infringed provision, the validity of the allegations made in the notification and the extent of the potential or actual damage. Accordingly, suspected violations of provisions of criminal law require a more comprehensive and detailed examination than administrative offences.

This clarification is in line with recital 79 of the Directive, which requires the competent authority to assess and investigate the infringement properly and to take appropriate remedial action.

## Regarding paragraph 3

Section 15(3) takes into account the legitimate security interests of the Federal Republic of Germany when disclosing infringements of legal provisions concerning classified information or essential national security interests (within the meaning of Section 1(7)). To this end, paragraph 2 orders that protection of whistleblowers is ruled out to the extent that disclosure violates the relevant criminal provisions of §§ 93-100 of the German Criminal Code, which have been sufficiently specified by case law. According to these provisions, in particular the disclosure of state secrets is prohibited under § 95 of the Criminal Code. By enacting these criminal provisions, the legislature has brought the conflicting interests to a proper balance and there is no reason to restrict the protection of whistleblowers beyond these criminal law elements.

The usefulness of such a rule can be understood in the light of the latest findings on right-wing extremist tendencies within the KSK, a special forces unit. A member of the KSK could, provided that the further conditions of Section 15(1) are met (in particular that the external reporting channel does not provide a remedy), pass on information to the press of a general nature which reveals the problem of right-wing extremist orientation within the KSK. The disclosure of such information would not constitute an offence under Sections 93 et seq. of the Criminal Code, in particular they are not state secrets, and disclosure is therefore protected under this draft law.

# Subsection 4 (Provisions for internal and external reporting procedures)

# Re § 16 (confidentiality requirement)

Section 16 adds a second paragraph to Article 16 of the Directive; the second paragraph precludes the provisions on the protection of the whistleblower procedure and the identity of the whistleblower from being overridden by data protection law. This is in line with Recital 85 of the Directive, which provides for the restriction of certain data protection rights by the national legislature in order to ensure effective protection of whistleblowers. Paragraph 2, first sentence, largely takes over the wording of Recital 85 in the context of a general clause-type exclusion. Paragraph 2, sentence 1 excludes certain claims under data protection law. The necessity of excluding claims under data protection law which are suitable for thwarting whistleblower protection is recognised in the literature.

# Re § 17 (Processing of personal data)

§ Paragraph 15 extends Article 17 of the Directive by adding paragraphs 2 and 4, and the inserted paragraph 2 specifies the relevant data protection requirements for data processing. By analogy with section 4d(5) of the Financial Services Supervision Act, the inserted paragraph 4 excludes the application of the Freedom of Information Act in order not to jeopardise effective protection of whistleblowers.

# Re § 18 (Documentation of the reports)

§ Section 16 establishes parallelism with Section 5 of the BaFin Violation Reporting Regulation, which implements the requirements of Article 18 of the Directive in terms of content.

# Regarding Section 3 (protective measures)

# Re section 19 (prohibition of reprisals)

This provision transposes Article 19 of the Directive.

## Regarding paragraph 1

In order to counteract any form of reprisals and to avoid loopholes in the law, paragraph 1 formulates as a general clause an all-encompassing prohibition of reprisals, which includes any discriminatory act or omission in a professional context. This is also intended to cover those cases that could not be foreseen at the time of the enactment of this Act.

## Regarding paragraph 2

Paragraph 2 sets out a non-exhaustive list of examples of prohibited reprisals. The list is intended to provide legal certainty and to inform potential whistleblowers of what they are protected from in the event of a report. In addition to the examples of reprisals mentioned in the Directive, letter p), "extradition or other detrimental measures under residence law", is added. Furthermore, it is clarified that, insofar as measures under residence law are linked to criminal offences or administrative offences in connection with the procurement of information for reporting or disclosure, the intention to contribute to the clarification, cessation and suspicion of a violation of law and order must be assessed within the framework of a proportionality test. Letter p) is intended to prevent the means of the right of residence from being misused as a means of sanction against unwelcome whistleblowers.

# Re Section 20 (Measures and obligations for companies and persons relevant to reporting)

The provision is modelled on § 12 AGG and, like its predecessor, aims at taking preventive measures to prevent reprisals by companies and persons relevant to reporting, instead of referring affected persons to compensation provisions after the occurrence of damage.

For effective enforcement, the obligations in § 18 are subject to a fine under § 26.

## Regarding paragraph 1

In order to prevent reprisals through preventive measures, the provision obliges companies and persons relevant to reporting to take the necessary measures to protect potential whistleblowers from reprisals. What is "necessary" must be assessed according to objective criteria and can vary depending on the size of the company. The obligation can only go as far as companies and persons relevant to reporting are legally and actually able to fulfil their obligations in this area. Sentences 1 and 2 are based on § 2 paragraph 1 of the Employee Protection Act. Both organisational measures and information and training measures are to be considered.

## Regarding paragraph 2

Paragraph 2, first sentence, makes it clear that, in the context of measures to protect against reprisals, vocational training and further training in particular are of considerable importance and contains an obligation to train staff annually to this end.

## On Paragraph 3

Paragraph 3 obliges, in line with Section 4(1) of the Employee Protection Act, the enterprise and persons relevant to reporting must take appropriate measures if a whistleblower becomes the victim of reprisals by other employees. The possible labour law measures against employees are not exhaustively listed here.

## On paragraphs 4 and 5

Paragraphs 4 and 5 are intended to protect the integrity of the whistleblowing procedure from the influence of the reporting company or person. On the one hand, instructions to special employees not to follow up a report or to follow it to a lesser extent are prohibited. Such instructions fundamentally interfere with the autonomy and independence of the specific employees and are likely to be motivated in most cases by the intention to exert undue influence. Secondly, the prohibition of reprisals in § 17 is extended to special employees in order to prevent undue influence on the whistleblower procedure.

## Regarding paragraph 6

Paragraph 4 lays down an obligation for companies and persons relevant to reporting to also protect whistleblowers from reprisals not emanating from themselves or their employees. If a whistleblower is discriminated against by third parties in the exercise of his activity, appropriate measures must be taken in individual cases.

## Regarding paragraph 7

In order to make it easier for those affected to exercise their rights, companies and persons subject to reporting requirements are obliged to publicise the statutory provisions and provide information about the bodies responsible for handling reports under this Act. The announcement can be made by posting or making it available in a suitable place or by using the information and communication technology customary in the company or department, such as the intranet. It is necessary that the group of addressees can learn of the announcement.

# Re § 21 (removal, omission, compensation)

Beyond an explicit legal prohibition of reprisals, it is crucial that whistleblowers facing reprisals have access to legal remedies and the right to compensation. Insofar as § 21 does not contain any special provisions, the relevant general provisions of civil law, in particular the German Civil Code, shall apply.

## Regarding paragraph 1

Paragraph 1 sets out the primary remedies and injunctions. Sentence 1 already gives a claim for removal in the case of an objective violation of the prohibition of reprisals. In accordance with general principles of law, sentence 2 also gives a claim for future injunctive relief in the event of a risk of recurrence.

The provision makes it clear that the whistleblower can claim interim legal protection. The interim legal protection is decisive in order to prevent threats or continuing reprisals such as bullying or unjustified dismissal or to put an end to them without delay. Reprisals often have irreversible, drastic personal or financial (often ruinous) consequences. It is precisely this prospect that can permanently discourage a potential whistleblower. In this respect, reference should be made to the general provisions, e.g. of the Code of Civil Procedure, which remain unaffected by this Act.

The provision does not affect other claims and remedies, e.g. under the Protection Against Dismissal Act. It merely serves as a catch-all for recording all conceivable reprisals in order to avoid loopholes in the law.

## Regarding paragraph 2

Paragraph 2 lays down the obligation of the person who violates the prohibition of reprisals to compensate fully and effectively for the financial loss or to pay appropriate compensation for the impairment, which is not financial loss.

In this context, one can think, for example, of actions for compensation for financial losses such as loss of salary, costs caused by a change of job, legal costs and costs for medical treatment, as well as for non-material damage in the form of compensation for pain and suffering.

Sentences 1 and 2 correspond structurally to § 280 paragraph 1 sentences 1 and 2 BGB: Sentence 1 lays down the principle according to which the culpable use of reprisals under this Act triggers the obligation to compensate for the financial loss caused thereby. The general provisions, in particular §§ 280 et seq. BGB, remain unaffected.

The claims under paragraphs 1 and 2 shall stand independently of each other and may also be asserted cumulatively.

## Regarding paragraph 3

Paragraph 3 makes it clear that claims in tort are not affected. In this respect, there may be a competition of claims.

## Regarding paragraph 4

Paragraph 4 makes it clear that the burden of proof rule in § 24 applies without exception to the remedies in paragraphs 1 to 3.

## Regarding paragraph 5

Paragraph 4 makes it clear that notifiable companies and persons may not rely on an agreement which derogates from the prohibition of reprisals. In particular, unilateral legal transactions that violate the statutory prohibition of reprisals are void under Section 134 of the German Civil Code, for example, terminations that are made on the basis of a notification under this Act.

# Regarding § 22 (Right of appeal and right to refuse performance)

This provision is modelled on §§ 13, 14 AGG and serves to protect whistleblowers who are exposed to reprisals in their everyday work and for whom it may be unreasonable to continue their activities under these circumstances.

## Regarding paragraph 1

The regulation provides for the right of the whistleblower to complain about reprisals to the competent bodies of the establishment or to the employees' representatives. The concept of competent authorities must be understood in a comprehensive way. This could be, for example, a superior, an equal opportunities representative or a company complaints office. Sentence 2 makes it clear that the content of the complaint must be examined and the complainant must be informed of the result of the examination. In particular, if no concrete measures are taken as a result of the complaint, it is important for the persons concerned to know the reasons for this.

## Regarding paragraph 2

The provision is modelled on Section 4 of the Employee Protection Act and entitles the whistleblower to stop the activity without loss of the right to remuneration if the employer or supervisor does not take sufficient measures to prevent reprisals. This can be the case in particular if the employer does not react sufficiently to a complaint or in the case of reprisals by the employer or supervisor himself/herself. The right to refuse performance exists only to the extent necessary to protect the whistleblower. The reference to § 273 BGB makes it clear that the general right to refuse performance of § 273 BGB remains unaffected. The provisions pursue different objectives. § Section 273 BGB is intended to exercise a compulsion to fulfil a binding obligation, while Section 20(2) serves to protect the whistleblower from further reprisals.

# Re § 23 (exclusion of liability)

This provision is intended to implement Article 21 of the Directive and to protect whistleblowers vis-à-vis employers, in particular in legal proceedings under private, public or employment law.

## Regarding paragraph 1

Paragraph 1 makes it clear that employers may not rely on an individual's legal or contractual obligations towards whistleblowers, such as loyalty clauses in contracts or confidentiality or non-disclosure agreements, to preclude the possibility of reporting, deny protection to whistleblowers or impose sanctions on whistleblowers for reporting information about infringements or for making a disclosure if they believed in good faith that disclosure of the information covered by those clauses and agreements was necessary to detect the infringement.

The provision covers both the reporting or disclosure of the information and the obtaining of the information that is reported. This also applies if the whistleblower obtains the information in breach of contractual obligations or conflicting property rights

This is without prejudice to the whistleblower's liability for actions not related to the report or not necessary for the detection of an infringement under this Act. Furthermore, the criminal liability of the whistleblower, to which § 25 of this law applies, remains unaffected.

## Regarding paragraph 2

A significant deterrent effect on whistleblowers may also be provided by measures such as legal proceedings for alleged defamation or alleged infringements of copyright, trade secrets, confidentiality or personal data protection. In such proceedings, whistleblowers may claim to have made the report or disclosure in accordance with this Act.

## Regarding paragraph 3

The Law on Protection of Trade Secrets contains provisions ensuring civil law protection in case of illegal acquisition or illegal use or disclosure of a trade secret. However, it also stipulates that the acquisition, use and disclosure of a trade secret is lawful insofar as it is permitted by law, Section 3(2) of the Act on the Protection of Trade Secrets. Accordingly, the acquisition, use and disclosure is permitted if the requirements under this Act are met, in particular that the disclosure was necessary to uncover an infringement falling within the material scope of this Act. Moreover, both laws should be considered complementary, and the civil law protection measures, procedures and remedies and exceptions provided for in the GeschGehG should continue to apply whenever disclosure of trade secrets does not fall within the scope of this Act.

# Re section 24 (Burden of proof)

The provision is intended to transpose Article 21(5) of the Directive and provides that in judicial proceedings or proceedings before authorities which involve reprisals against whistleblowers, it is for the other party to prove that the reprisals were in no way connected with the report or disclosure made or intended to be made.

The practical significance of the standard can hardly be overestimated. It takes into account the fact that reprisals, the reason for which lies in the report made or intended to be made, are regularly untruthfully justified. An almost classic example is the untruthful justification that the quality of the whistleblower's work is insufficient. This makes it practically impossible for whistleblowers to prove the causal connection between the report and the reprisals. The person or company from whom the reprisal emanates is regularly in a better position to substantiate his or her own reasons and to document them accordingly, thereby proving that the reason for the reprisal is not the report or disclosure made or intended. For the proof of exoneration, it is insufficient to refer to possible other reasons that may have been causal for the reprisal in addition to the report.

The reversal of the burden of proof is to be extended to cases in which a person demonstrably intended to report or disclose but ultimately did not do so. First and foremost, cases should be considered here in which a report was not made precisely because of a reprisal. In such a constellation, the person concerned remains in need of protection, as it will regularly be unreasonable to accept further reprisals.

Paragraph 2 makes it clear that the shift in the burden of proof applies to all types of proceedings with the exception of criminal law. This is in line with the requirements of Article 21(5) of the Directive and the objective of effective and comprehensive whistleblower protection.

# Regarding § 25 (criminal law justification, mitigation of sentence)

§ Section 23 extends the protection of whistleblowers in accordance with the purpose of the Directive to include the criminal liability of whistleblowers who commit a criminal offence in order to obtain information for the purpose of reporting or disclosure, provided that this act constitutes a proportionate means of investigating or preventing an infringement.

## Regarding paragraph 1

Paragraph 1 provides a legal justification based on the wording of § 34 StGB.

The standardisation of a justification reason is appropriate in order to help the Directive's objective of facilitating and enabling reports to be fully valid. Whether a whistleblower merely violates employment-related regulations when obtaining information, e.g. when obtaining access to business premises not normally accessible to him, or is liable to prosecution for trespassing depends on the circumstances of the individual case. The transition from one to the other may be fluid and may not be clear to the whistleblower without prior legal knowledge. A different treatment is then not justified, especially in view of the fact that the whistleblower contributes to the detection and prevention of legal violations. The danger of being subject to prosecution by the public prosecutor even in the case of minor offences, the significance of which falls well short of the protection of whistleblowers when a reasonable assessment of the merits is made, regularly with the active and financially strong assistance of the perpetrator of the legal violation, has a deterrent effect that is hardly compatible with the objective of the Directive.

The justification proposed here achieves an appropriate balance of interests by means of a weighing of legal interests which the criminal prosecution authorities and criminal courts carry out daily within the framework of § 34 StGB. In any case, the legal interests of life and limb deserve priority, so that a justification of intentional crimes against life and limb under this provision is excluded, including their attempt, threat or concrete endangerment.

## Regarding paragraph 2

In addition to paragraph 1, paragraph 2 provides for a mitigating factor. Insofar as the prerequisites of subsection 1 are not met, the sentence can nevertheless be reduced under § 49 subsection 1 StGB. This is intended to cover cases in which whistleblowers exceed the limit of what is legally permissible in order to obtain information for a report. The act of a whistleblower who subjectively pursues the intention of uncovering or preventing a violation of the law and objectively contributes to the uncovering or prevention of the violation will usually be of considerably less value. Mitigation is not obligatory, but is at the discretion of the court, which will take into account all the circumstances of the individual case, e.g. the proximity to proportionality within the meaning of paragraph 1, the damage caused, etc.

## Regarding paragraph 3

Finally, paragraph 3 also serves to protect the rights and interests of the notifiable company or person concerned, and clarifies that criminal prosecution remains otherwise unaffected.

# Re Section 26 (Supporting Measures)

This provision lays down supporting measures for whistleblowers in implementation of Article 20 of the Directive.

## Regarding paragraph 1

## To lit. a) and d)

Persons wishing to report infringements under this Act must be enabled to make an informed decision on whether, when and how to report (see recital 59 of the Directive).

To this end, competent authorities must provide comprehensive and accurate information in a clear and easily accessible manner to the general public. They will also be obliged to provide individual, impartial and confidential legal advice free of charge to answer questions from potential whistleblowers on the legal requirements and consequences of this law.

In addition, the provision provides for the referral of the whistleblower for psychological counselling in appropriate cases. This is necessary because of the considerable risks and consequences resulting from a report or disclosure.

The Directive provides for legal advice and psychological assistance in Article 20(1)(c) and (2).

## Re point (b)

The competent authorities shall provide whistleblowers with the necessary assistance. This includes, among other things, the provision of evidence or other documents that can be used to confirm to other authorities or in court that an external report has been made.

## Re lit. c)

The provision provides that whistleblowers can have it certified that the conditions for protection under this Act are fulfilled (e.g. the characteristic of good faith). Such a certificate is expressly provided for in Article 20(1)(b) of the Directive. If the legal requirements are met, whistleblowers have a right to have the certificate issued, which can be enforced through the administrative courts.

## On paragraphs 2 and 3

The paragraphs transpose Article 20(1)(c).

For whistleblowers who take legal action to defend themselves against reprisals they have suffered, the legal costs involved may be a considerable burden, particularly if they have become unemployed and/or have been placed on a "black list" as a result of reporting. Legal aid should therefore be granted in order to provide whistleblowers with full legal protection.

German law does not provide for legal aid in criminal proceedings. However, in order to guarantee the protection of whistleblowers in criminal proceedings, a public defender must be appointed instead.

## On paragraph 4

Paragraph 4 follows on from the whistleblower support fund in Section 10. Details of the whistleblower support fund are explained in the explanatory statement to § 8 paragraph 8.

# Re §§ 27, 28 (penal provisions; provisions on fines)

The provisions transpose Article 23 of the Directive, which requires Member States to provide for effective, proportionate and dissuasive sanctions for natural and legal persons.

In order to ensure the effectiveness of the provisions on the protection of whistleblowers, it is necessary to provide for appropriate sanctions which go beyond mere reparation of the damage caused in the form of civil damages and compensation for pain and suffering. Recital 102 of the Directive states in that regard that appropriate civil, criminal and administrative sanctions against persons who repress whistleblowers are necessary to ensure the effectiveness of the protection of whistleblowers. Criminal sanctions are therefore provided for in the case of particularly serious acts of obfuscation or breach of duty: the deliberate concealment of reports; the infliction of serious harm with the intention of sanctioning a report; and the deliberate disclosure of whistleblowers' identity by employees of internal or external reporting channels.

In addition, § 28 of the Act on Administrative Sanctions for Certain Violations provides for the imposition of fines. The purpose of these provisions is to discipline companies and persons relevant to reporting and to punish minor violations of the provisions of this Act, such as those against internal company measures and obligations. From a proportionality perspective, such violations are not subject to criminal sanctions. However, fine regulations nevertheless ensure that there is no sanction-free scope for violations of internal company obligations.

In their personal scope of application, the offences are not limited to companies or persons relevant to reporting, but rather also apply to third parties in order to avoid gaps in criminal liability and provide comprehensive protection for whistleblowers.

# Regarding § 29 (measures for the protection of affected persons)

In parallel with the protection of whistleblowers, the rights and interests of the persons and companies affected by a report must also be protected, for whom a false report can cause damage to their reputation or other negative consequences.

In addition to the individual, impartial and comprehensive examination of the notification by the competent authorities, it is therefore particularly important to guarantee the anonymity of the company or person concerned during the notification procedure, as guaranteed in paragraph 1. To this end, it must be ensured, for example, that the specialised staff responsible at the authority for receiving notifications, who have the right to access confidential information notified, are subject to their professional secrecy and the duty of confidentiality.

In order to ensure an effective defence of the undertakings and persons concerned against the notification, paragraph 2 lays down a comprehensive right of access to the file and a right for the undertaking or person concerned to respond to the allegations. In order to protect the whistleblower, his identity must not be disclosed.

Companies or persons who are directly or indirectly disadvantaged as a result of a notification or disclosure of misleading or false information are entitled to general legal remedies. In particular, this includes false suspicion under criminal law in accordance with § 164 StGB and claims for damages under the German Civil Code in the case of culpable false reporting.

# Re § 30 (No cancellation of rights or legal remedies)

In accordance with European law, the protective regulations contained in this law are mandatory. Thus, for example, no deviation from them to the detriment of the employees can be made either in the employment contract or in collective agreements.