

Whistleblowing in Germany

by Guido Strack

Whistleblowing unwanted

“The greatest rogue in the whole land is, and will remain, the informer”. This is a quote attributed to Hoffmann von Fallersleben (1798-1874), author of the lyrics of the German national anthem. It is frequently used by those who want to block any discussion on the necessity to support whistleblowers and the concept of whistleblowing in Germany. After two dictatorships using denunciations as a tool, after Gestapo and Stasi¹, the Germans are fed up with informers².

Whistleblowers, just another English term most people know nothing about, often are immediately measured by the same yardstick as those informers – without further discussion.

Normally there is no reflection that Hoffmann made his statement against police spies in the mid-19th Century and that today he could certainly be described as a whistleblower himself. In 1842, he had lost his professorship at the University of Wrocław because he had, based on his national liberal convictions, criticised the prevailing conditions in his poems which had the ironic title "non-political songs" (1840/1841)³.

Those who exert criticism in Germany must still often fear losing their jobs. It is true that, especially in comparison to the Anglo-Saxon countries, there is a sophisticated labour and employee protection legislation. However, when dealing with the issue of whistleblowing it often fails – as will be shown later. And the situation is aggravated by the fact that, under the pressure of globalisation and mass unemployment, the German employee protection is noticeably on the decline.

Case examples

The history of whistleblowing in Germany has not yet been written and this can not be done on this occasion. If whistleblowers are defined as people who no longer silently tolerate illegal activities, maladministration or danger to humans, the environment and the economy, but reveal those abuses within or outside their business, their company, their organization or their bureaucracy, they have always been around, also in Germany. But as elsewhere, they are the exception, not the rule, or to use a quote of Reich-Chancellor Otto von Bismarck: "courage on the battle field is our common good, but it is not infrequently you will find that very honourable people lack civil courage".⁴

¹ Judith Rauhofer, Blowing the whistle on Sarbanes-Oxley: Anonymous hotlines and the historical stigma of denunciation in modern Germany, *International Review of Law Computers and Technology* (2007), volume 21 , issue 3 , pp. 363 – 376.

² On the research on informers in Germany: e.g. I. MarBolek; O. Stieglitz (Hg.): *Denunziation im 20. Jahrhundert*, Sonderheft der Zeitschrift *Historische Sozialforschung* 96/97 (ISSN: [0172-6404](https://doi.org/10.1007/s10237-001-0001-0)), Köln 2001, and M. Schröter (Hrsg.), *Der willkommene Verrat – Beiträge zur Denunziationsforschung*, Weilerswist 2007, ISBN 978-3-938808-38-2.

³ <http://www.fallersleben-bildungswerk.de/hoffmann.html>

⁴ *Martin Knobbe, Die Tugend der Wächter*, in: *Stern* 31/2005, Hamburg 2005, p.113

Perhaps even Martin Luther, one of the world's most famous Germans, could be classified as an early whistleblower.⁵ In the organization to which he belonged he had pointed out maladministration and this led to reprisals against him, just like this led to reprisals for so many others later. At the same time, his case shows the consequences that incorrect handling of whistleblowers may have for the organization itself.

While there is hardly any knowledge about early whistleblowers in the private sector there are at least a few cases in the public service in German history that can be categorised as whistleblowing or closely related as performance refusal for ethical reasons:

Regiment commander Johann Friedrich Adolf von der Marwitz (1723-1781), who later served the resisters of the 20 July 1944 as a role model, refused during the Seven Years' War to follow the command of Frederick II of Prussia ordering him to plunder a Saxon castle. Instead, he quit the service. The inscription on his grave stone reads: "Chose disgrace where obedience did not bring honour".⁶ Frederick II also faced resistance by Chamber Court President Christian Ludwig von Rebeur, who in the case of the miller Arnold invoked his judicial independence: "We have decided like that and this must be sufficient."⁷

In addition to individual officers, soldiers and judges from the 19th Century, especially professors are still remembered for expressing criticism and facing the consequences: men like Ludwig Uhland, Friedrich List and the Göttingen Seven (the professors FC Dahlmann, E. Albrecht, Jacob and Wilhelm Grimm, G. Gervinius, H. Ewald and William Weber).⁸ Safeguarding their own rights against the access of authority often went along with highly political statements.

For the period at the beginning of the 20th Century one could point to chemist Clara Immerwahr (1870-1915). As the wife of Fritz Haber, she intensively opposed her husband's activities in exploration and use of poison gas.⁹

Whistleblowing and resistance mingled as this was the case during the periods of the German dictatorships. This is not the place to analyse the resistance during the Nazi-era nor that in the German Democratic Republic (GDR), but one could point to the dunning words on the pamphlets of the White Rose: "We *must* attack the evil, where it is most powerful." [...] "Everyone wants to excuse himself from his blame, everyone does it and afterwards sleeps with quiet and best conscience. But he can not absolve. Everyone is *guilty, guilty, guilty...*" and the words of Sophie Scholl: "All of you think what we have written and said, but you lack the courage to speak it out."¹⁰

5 http://findarticles.com/p/articles/mi_m4339/is_n2_v19/ai_20823856;

<http://pwp.lincs.net/sanjour/Fraud%20Magazine%209-07.htm>;

<http://www.erudit.org/revue/ri/2001/v56/n1/000156ar.html>

6 Alfons Wenzel, *Zivilcourage im öffentlichen Dienst*, München 1965. (p. 34)

7 Karl Dickel, *Friedrich der Große und die Prozesse des Müllers Arnold*, Marburg 1891, p. 15

8 Hunger, *Böhme/Vierhaus, Stadtgeschichte*, p. 197ff.; Lampe, Jörg H.: *Politische Entwicklungen in Göttingen vom Beginn des 19. Jahrhunderts bis zum Vormärz*, in: *Böhme/Vierhaus, Stadtgeschichte*, pp. 45-137, here:

91ff. (<http://www.uni-goettingen.de/de/30770.html>)

9 http://www.ipnw.de/soziale_verantwortung/claraimmerwahr_auszeichnung/index.html?expand=828&cHash=0b81139b16

<http://www.uni-muenster.de/PeaCon/wuf/wf-92/9210501m.htm>

10 Alfons Wenzel, *Zivilcourage im öffentlichen Dienst*, München 1965. (p. 61)

http://www.bpb.de/themen/EG49IN,0,0,Wir_sind_Euer_b%F6ses_Gewissen%21.html

Referring to the example of the "Goettingen Seven" and based on their responsibility as scientists, on 12 April 1957, eighteen nuclear scientists spoke up against the plans to equip the West German army with nuclear weapons. Their "Goettingen Declaration"¹¹ was supported by fourteen important nuclear scientists of the GDR on 3 Mai 1957. In 1959, the Goettingen Eighteen also became the nucleus of the Association of German Scientists (VDW).¹²

In the Federal Republic of the postwar period, in the upsurge of the economy, the issue of criticism at the workplace initially did not play a big role. In some ways it is also significant that in the German language until today there is no equivalent word for the meaning which the term whistleblower acquired in the English speaking countries throughout the last decades. In the search for concrete cases from the period after 1945 only a few names get into the focus, largely unknown to the general public in Germany even though some of those cases were of significant importance.

One example is the case of Klaus Förster, a tax investigator who in the middle of the 1970s revealed the Flick-Scandal during which political parties handed out excess donations receipts in a 1:5 ratio and used charity organisations for money laundering. The scandal involved highest political circles, but Chancellor Dr. Helmut Kohl later on could not remember any details due to a "blackout". Förster who persisted and only wanted to do his duty was first impeded from the top and finally assigned to another job against his will. In 1983 he finally resigned from the tax administration.¹³

The pattern of obstruction from above and unwanted employee transfers can also be found with other tax investigators that blew the whistle. While Werner Borcharding in the 1990s in Munster protested against alleged tax gifts for a local industrialist,¹⁴ Rudolf Schmenger and his colleagues suffered from obstruction from above at the beginning of the new century in Frankfurt as they did not want to follow the order of the state government of Hesse to withdraw during investigations against banks and big illegal tax evaders. When Schmenger even after his transfer still did not rest, he was medically classified as having a querulant personality and forced to take early retirement. Meanwhile the Medical Association is investigating against the doctor who made the wrong diagnosis and Schmenger, now holding a positive medical certificate, is working as a private tax consultant.¹⁵

Taxes and a lot of money are also involved with whistleblowers from the banking sector. Werner Demant¹⁶, clerk at Commerzbank Frankfurt, had suspicions about illegal transfers of securities to Luxembourg and Switzerland in the bank. His internal message was

11 http://www.dhm.de/lemo/html/dokumente/JahreDesAufbausInOstUndWest_erklaerungGoettingerErklaerung/index.html

Böhme, Ernst: Zwischen Restauration und Rebellion. Die Georgia Augusta und die politische Kultur Göttingens in den fünfziger Jahren, demnächst in: Göttinger Jahrbuch 2005; Friedensinitiative Garchinger Naturwissenschaftler (Bearb.): 30 Jahre Göttinger Erklärung. Nachdenken über die Rolle des Wissenschaftlers in der Gesellschaft (Schriftenreihe Wissenschaft und Frieden 11), München 1987

<http://www.uni-goettingen.de/de/54319.html>

12 <http://www.vdw-ev.de/ueber-vdw/geschichte-und-ziele.html>

13 <https://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2000/0125/none/0002/index.html>

Mira Gajevic, Jochen Arntz, Försters Fall, Berliner Zeitung dated 25 January 2000.

14 Werner Borcharding, wegen Gesetzestreue strafversetzt, Business-Crime-Magazin, 1-2004, pp. 22- 26.

<http://business-crime-control.de/doc/bcmag/bc012004/Gesetzestreue%20aus%20BC1-2004.pdf>

15 <http://www.hr->

[online.de/website/rubriken/nachrichten/index.jsp?rubrik=5712&key=standard_document_12776660](http://www.hr-online.de/website/rubriken/nachrichten/index.jsp?rubrik=5712&key=standard_document_12776660)

<http://www.heise.de/tp/r4/artikel/25/25520/1.html>

16 <http://www.bpb.de/files/7NTX8Y.pdf> ; *Ich verpfeife meine Firma – Zivilcourage im Beruf*, Germany, documentary, 1997, 45 min., film by V. Thurn, [content](#)

unsuccessful, so he finally turned to the authorities and thus a major banking scandal was triggered, which revealed how some banks systematically offered help for tax evasion. Demant was terminated and his career came to an end. DG Bank employee Andrea Fuchs¹⁷ is having a similar experience. She also - first internally - pointed to possible illegal insider trading, meanwhile, however, she is in legal disputes with DZ Bank for already 12 years, which has just issued another termination.

But also in the German health care system, there are some whistleblowers. One example is the Berlin doctor Cora Jakobi¹⁸, whose public criticism of a practice of premature dismissal on grounds of cost savings led to labour court disputes. Veterinary Margrit Herbst¹⁹ lost her job at the slaughterhouse Bad Bramstedt and was sued for damages when she – after unsuccessful internal approaches – made the public aware of BSE risks. While those cases already happened in the 1990s, in the recent years some other can be found in the care taking business. These courageous whistleblowers pointed to the incredibly cynical abuses in nursing homes. It is thanks to women such as Brigitte Heinisch²⁰, Heike Hengl²¹ and Petra Richers²² that meanwhile there is a public debate on greater quality control and quality assurance in the care sector and that also politics cannot ignore this issue any longer. However, these women paid a price for their civil courage and encountered considerable pressure and the loss of their jobs, some of them still suffering the economic and health consequences even today.

Even more serious are the consequences in those cases where no one blew the whistle. There are some examples of dramatic disasters in Germany of the post-war period where there were prior risk indications clearly visible for insiders. Had there been more courageous whistleblowers and responsible persons listening to them the Thalidomid scandal and the ICE train crash in Eschede probably could have been avoided, just like the collapse of the ice rink roof in Bad Reichenhall.²³ While the analysis of the causes of the sinking of the Harold of Free Enterprise led to a public awareness of the need to protect whistleblowers in Britain, thus enhancing early risk detection,²⁴ in Germany, this awareness is still lacking.

Whistleblowers and employers' interest

While whistleblowing in the last century, above all, was an issue of a critical-alternative milieu and whistleblowers were seen as persons acting altruistic for public interests, the concept of whistleblowing in Germany has become popular for very different reasons since several years now. This was triggered by the Enron and Worldcom scandals in the U.S. and

17 <http://www.bpb.de/files/7NTX8Y.pdf> ; *Ich verpfeife meine Firma – Zivilcourage im Beruf*, Germany, documentary, 1997, 45 min., film by V. Thurn, [content](#)

18 <http://www.bpb.de/files/7NTX8Y.pdf>; *Ich verpfeife meine Firma – Zivilcourage im Beruf*, Germany, documentary, 1997, 45 min., film by V. Thurn, [content](#)

19 Deiseroth, Dieter: Whistleblowing in Zeiten von BSE -- Der Fall der Tierärztin Dr. Margrit Herbst; ISBN: 3-8305-0258-3; 2001.

20 Deiseroth, Dieter; Falter, Annegret (Hg.): Whistleblower in Altenpflege und Infektionsforschung -- Whistleblowerpreis 2007 an Brigitte Heinisch und Dr. Liv Bode; ISBN: 978-3-8305-1455-8; 2007.

21 http://www.verdi.de/gesundheit-soziales/branchenpolitik/pflegeeinrichtungen/data/seite_7_drei_20.pdf

22 <http://www.message-online.com/82/krueger.htm>

23 http://anstageslicht.de/index.php?UP_ID=14&NAV_ID=55

24 <http://www.guardian.co.uk/Archive/Article/0,4273,4036250,00.html>

the impact of the U.S. Sarbanes-Oxley Act²⁵. Another trigger was the increased discussion about the fight against corruption and economic crime, not least because of the development of appropriate provisions in US and International law.

The Sarbanes-Oxley Act (SOX) obliges companies listed at U.S. stock exchanges to establish independent internal audit committees and to provide opportunities for employees to make protected and, if desired, also anonymous internal whistleblowing disclosures in relation to accounting or financially relevant issues (Sec. 301). At the same time, SOX (Sec. 806) foresees penal sanctions and a duty to repair damages for those disadvantaging whistleblowers. The primary background of this statute is the protection of the interest of the shareholders and not that of the general public. SOX applies directly only to some large German corporations listed in the U.S., but also to German subsidiaries of U.S. companies. However, due to the paramount role of the United States for the international financial markets, SOX meanwhile spreads as a global de facto standard.

Point of reference in the German stock corporation law is Section 91 Paragraph II of the AktG (“Aktengesetz”).²⁶ According to the currently prevailing opinion this paragraph does not necessarily mean that a whistleblower system needs to be established, however it stipulates certain measures, especially the creation of a monitoring system for the early detection of developments threatening the continuation of the company. This, as well as the further developments of jurisdiction concerning personal liability of directors and supervisory council members, has for sure enhanced reflections on whistleblowing systems within the German economy.²⁷

Other enhancements came from the UN Convention against Corruption (UNCAC Article 33²⁸), the Council of Europe conventions against corruption (Article 22 of the Criminal Law Convention²⁹ and Article 9 of the Civil Law Convention³⁰) and the OECD Guidelines for Multinational Enterprises (Section II.9)³¹, which also stress the importance of whistleblowing in the fight against corruption and demand to enable repression-free whistleblowing.

In addition to and beyond these legal obligations meanwhile more and more companies have recognised that non-compliance with regulatory rules and internal economic crime can lead to major damages to the company and that the management often learns about these abuses only thanks to whistleblower information. Finally, there is a growing recognition that the promotion and channelling of internal whistleblowing is a means to prevent or at least limit the occurrence of external whistleblowing and its risks for the company's reputation.

Some companies even go as far as to oblige their employees to blow the whistle. The most blatant example was the U.S. group Wal-Mart, which, during its attempt to get into the German market (which had meanwhile been stopped), issued internal ethics and conduct

25 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ204.107

26 http://www.gesetze-im-internet.de/aktg/_91.html

27 Keun, Iris-Carola: Interne Whistleblowing-Stelle fördert Präventionskultur -- Höhere Chancen zur Aufklärung doloser Handlungen; in: Börsenzeitung; ISSN: 0343-7728; 2007; Nr. 221, Verlagsbeilage v. 16.11.2007, p. 10.

28 http://www.pcaw.co.uk/news_attachments/whistleblowing_uncac.pdf

29 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=9/9/2008&CL=ENG>

30 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=8&DF=9/9/2008&CL=ENG>

31 [http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/\\$FILE/00085743.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/$FILE/00085743.PDF)

guidelines ordering all employees to report any violations of these guidelines by fellow employees to the management. The regional Labour Court in Duesseldorf³² found these guidelines to be invalid, as they included the prohibition of love relationships in the workplace and thus violated human rights. Another reason for the cancellation was that the clause about whistleblowing would have required the approval of the workers' council. This need for the consent of the internal workers' representatives when establishing whistleblowing systems has meanwhile been confirmed in other high-court jurisdiction.³³

Another legal problem in introducing and arranging internal whistleblower systems is data privacy. However, this initial obstacle for SOX compliance can be considered as a solvable problem thanks to the decision of the Article 29 group of European Data Protection Supervisors on 1 February 2006.³⁴ Thus, when certain preconditions are met, whistleblower systems can be designed in such a way that they are compatible with European and also with German data protection laws. Main points are the protection of the rights of concerned persons/suspects by means of early information and data erasure and the restrained use of anonymous reporting. The latter, at least according to the non-legally binding statement of the Article 29 group, is possible, but should not be propagated. Preferable shall rather be the establishment of confidential communications, where the whistleblower is known by a person acting as intermediary – like an ombudsman – but where his identity is not disclosed to the employer and third parties.

Starting with the companies bound to comply with SOX, whistleblower systems have meanwhile found their way via large enterprises down to the medium sized. The practical implementations that can be found within German companies today vary a lot and a "best practice standard" is not yet established. As basic forms one can distinguish facilities for (anonymous) message reception (mostly via telephone or email boxes), systems with a back channel (such as anonymous internet reporting with the opportunity to establish a mailbox) and ombudsman systems (mostly with an outside lawyer who is bound to secrecy, but also with some in-house lawyers or journalists)³⁵. These basic forms stand alone or are offered in parallel or in different combinations. The circle of possible messengers also varies. Often, all employees are addressed, but sometimes only individual employee groups. Sometimes in addition to all employees also suppliers, business partners and customers are possible messengers. Differences can also be found concerning the issues to which messages can relate, ranging from a narrow area of financial manipulations or corruption and economic crime in general to all types of breaches of internal and/or external rules. More differences lie in the degree of involvement of the workforce in the formation and implementation of these systems as well as in the advertising and training efforts undertaken to make the systems known. Finally, it is also crucial who the person or entity who ultimately receives the messages is (such as a specific – compliance – department, the Chairman, or the Supervisory Board) and to what extent this person or entity possesses the willingness, competence and necessary independence to investigate and clarify the facts even if allegations are directed against the members of upper management. Common to most systems is that they promise whistleblowers protection against discrimination in case of not deliberately false declarations by means of non-identification (be it through anonymity or confidentiality).

32 LAG-Düsseldorf – Beschluss vom 14.11.2005, Aktenzeichen: 10 TaBV 46/05,

<http://www.juraforum.de/urteile/urteil/lag-duesseldorf-beschluss-vom-14-11-2005-az-10-tabv-4605.html>.

33 *Bundesarbeitsgericht, Beschluss vom 22. Juli 2008 - 1 ABR 40/07* - <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2008&nr=12892&pos=0&anz=58>

34 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf

35 Further information and links leading to examples can be found under <http://www.whistleblower-net.de/content/view/60/57/lang.de/>

The establishment of such an internal whistleblower system constitutes a positive first step towards addressing the issue of whistleblowing. The current implementations that can be found in Germany, however, fall short of what is needed. The most obvious reason for this shortcoming is that they, by dealing with the fear of reprisals that shall be taken away through anonymity or confidentiality guarantees, address only one of the three main obstacles for whistleblowing. Where whistleblowers are currently pushed into anonymity, they can not be positively rewarded for their activities, although it actually is a cultural change towards the acceptance of the reporting of errors and failures and a repression-free communications culture that would be needed. This is especially required to effectively overcome the second obstacle, namely that of the psychological hurdles and the culture of silence, non-interference and misunderstood loyalty. Also in relation to the third obstacle there has not been done enough yet, for a further reason for which whistleblowing often does not take place is that the potential whistleblower believes that the flaw would not really be eliminated even if he sends the message.

What therefore seems to be needed is orientation to internationally recognised "best practice standards" as they are for example set out in the relevant code of practice of the British Standards Institution (BSI).³⁶ The following should be demanded: that the workforce has a say in the design, introduction and implementation of such a system; that the system is available to all employees and also to business partners of all kinds; that it covers all types of business-related abuses and risks; that a variety of confidential and anonymous reporting channels are available and accessible and that, apart from these channels, also low-level and non-binding information and counselling services for potential whistleblowers are offered.

Lastly, there have to be guarantees that the messages lead to thorough investigations and that abuses and risks are really addressed even when this leads to conflicts with the interests of the management. This requires transparency and external control, or at least an escalation possibility to the outside. Therefore within the company it should in any case be possible to involve the Supervisory Board or owner level. Ultimately, however, also a possibility of reporting to government agencies is necessary as this is the only way to ensure compliance with long-term public interests that go beyond short-term business interests.

The legal situation of whistleblowers

At constitutional level, the German *Grundgesetz* (Basic Law) guarantees, apart from the general freedom of action (Article 2, Paragraph 1 GG), the freedom of conscience (Article 4 GG) and the freedom of information and expression (Article 5, Paragraph 1 GG), also the right to petition (Article 17 GG), which, in addition to the classic petitions to the parliament, also includes the right to address requests or complaints to the relevant government agencies. This concerns also the reporting of offences to the public prosecutor, which in Germany is a right but normally no obligation. According to Criminal Law (Sec. 138 of the German Criminal Code StGB), such an obligation exists only in exceptional cases namely knowledge of the planning of extremely serious offences.

Whistleblowing to authorities should therefore not be problematic at all and thanks to a section in the Labour Law (Section 612 a of the German Civil Code BGB), which forbids any

³⁶ PAS 1998/2008, which was established with support of the UK charity "public concern at work" and is available on their website: <http://www.pcaw.co.uk/bsi/>

discrimination caused by a permitted exercise of rights, should not lead to sanctions. In reality, however, it is problematic as the jurisprudence up to now more or less ignores these norms. One justification put forward for this is that the fundamental rights shall directly apply only in the relation between the citizens and the state, so that only the state is prohibited to sanction a petitioner. In other cases, it is reasoned that an anonymous exercise of fundamental rights would not be possible. So while the economy is pushing for anonymity, the state simply denies protection.

In addition, case law repeatedly refers to the fundamental liberties of the employer, namely the occupational liberty (Article 12 GG) and the right to property (Article 14 GG) which shall guarantee him protection of his trade secrets and shall, in conjunction with the basic principles of labour law, also allow him to immediately lay off workers for launching criminal complaints against their superiors or the employer as this is seen as a breach of loyalty. Only thanks to a decision by the Federal Constitutional Court in 2001³⁷ a certain process of rethinking started. According to this judgement, a dismissal violates the fundamental general freedom of action and the rule of law principle when it is carried out because someone served as a witness for the public prosecutor and thus did nothing else but follow his civic obligations. The Federal Constitutional Court also stated that "normally" the same would be applicable in case of a voluntary notification to the law enforcement agencies, at least if the whistleblower acted in good faith, assuming the existence of a criminal offence, perpetrated for example by his employer.

In two decisions from the years 2003 and 2006,³⁸ the highest non-constitutional court, the Federal Labour Court, virtually turned this positive case law of the Federal Constitutional Court upside down. According to it, the worker may only report the crime if this is proportionate. The principle of proportionality, which normally only comes into play if the government interferes with the fundamental rights of the citizens, is used here to put additional burdens on the employee. Now, he must therefore examine in particular whether there are any less incriminatory means compared to launching a criminal complaint, which according to the second step of the reasoning of the Federal Labour Court usually means that the employee has a duty to first seek in-house clarification. Where he has failed to do this, his dismissal would therefore be legal, unless exceptionally an internal clarification would have been unreasonable, i.e. because this could have only been done by contacting the suspect himself and may have given him an opportunity to cover up the crime.

In addition, the potential whistleblower also has to keep in mind that informing the authorities must be appropriate, i.e. that clarification interests of society must outweigh his loyalty obligation. This often leads to the court undertaking its own appreciation of values after the event, not taking sufficiently into account how the situation presented itself to the whistleblower at the moment when he took his decision. As a result, the currently prevailing case law leads to one advice for potential whistleblowers who do not want to risk their jobs: Don't become a whistleblower!

Even a whistleblower, who thanks to good legal advice in advance manages to meet all the criteria of the case law is far from being protected against retaliation. To qualify for the protection of Section 612a BGB (Civil Code), he must not only demonstrate that his whistleblowing was legally permissible but also prove that discrimination actually took place and that this happened because of his whistleblowing. As long as an employer has not

37 Bundesverfassungsgericht vom 2.7.2001 - [1 BvR 2049/00](#);

http://www.bundesverfassungsgericht.de/entscheidungen/rk20010702_1bvr204900.html

38 Bundesarbeitsgericht vom 3.7.2003 – 2 AZR 235/02 und vom 7.12.2006, [2 AZR 400/05](#)

explicitly mentioned this as the reasons for termination this proof is practically almost impossible. But even where this obstacle is overcome there is finally Section 10 Paragraph 2 of the Termination-Protection Employment Law (KSchG), which foresees that an employment contract can come to an end by a decision of a judge even if the termination as such was illegal in cases where a continuation of the employment contract would be unacceptable for the employer. In this case, the employer must pay a lump sum, but against the background of an increased poverty risk due to "social reforms" like Hartz IV, high unemployment rates, low wages and often only a small chance to find another job in the same industry, especially as a known whistleblower, this is often a very weak compensation.

Even besides official warnings and termination of employment there are effective sanction mechanisms against criticism at the workplace: bullying. A large-scale study funded by the German Federal Government in 2002³⁹ concluded that over 60% of bullying victims stated as the cause of bullying against them: "I have practiced criticism in the company." This is also the most common cause of bullying. Yet in Germany authorities hardly do anything against bullying and nothing for whistleblowers.

This finding is also likely to remain unchanged by the proposal issued in the summer of 2008⁴⁰ from three federal ministries of a new whistleblowing section in the Civil Code (Section 612a new Civil Code), as this proposal is concentrating on codification of established case law. While thanks to requirements of the European legislation we nowadays have explicit bans of retaliation combined with special onus of proof rules providing a certain relief for victims of such discriminations, even in this respect no modifications are proposed for whistleblowers. Also the obligation to try to resolve matters in-house first will in principle be held up. In addition, the proposal contains a collection of vague legal terms, so that even the lack of predictability of subsequent court decisions would hardly be improved.⁴¹

The really good idea of codifying whistleblower protection therefore is likely to lead to nothing. There is even a danger that more workers believe to be protected, become whistleblowers and afterward learn that there was no effective protection. Currently, however, it is still unclear whether the proposal will have a chance to make it anyhow into the law books. The lobby of the employers' associations and the economic wing of the largest government party still try to prevent this.

Until now, the principle of official secrecy forbids government officials any job-related statements without explicit permission of the administration. This also applies to criminal complaints and whistleblowing. From April 2009, the new Civil Service Status Law (Section 37, Paragraph 2, No. 3 BeamStG) will lead to a slight relaxation since, thanks to the implementation of international anti-corruption conventions, officials from then on will explicitly have the right to directly bring corruption offences (Section 331 - 337 of the Criminal Law StGB) to the attention of the public prosecutor. For all other offences even then the official secrecy requirements will continue to apply.

39 http://www.baua.de/nr_28474/de/Publikationen/Forschungsberichte/2002/Fb951.xv=vt.pdf

40 http://www.bundestag.de/ausschuesse/a10/anhoerungen/a10_81/16_10_849.pdf

41 The documents relating to the hearing on § 612a n.F. BGB are available under:

http://www.bundestag.de/ausschuesse/a10/anhoerungen/a10_81/index.html. These include the expertise by the author. The statement of the Whistleblower-Netzwerk is available under: <http://www.whistleblower-net.de/content/view/87/80/lang.de/>

Poorly organized support

Also organized support for whistleblowers in Germany is quite limited. Founded in 1994, the ethics protection initiative (Ethikschutzinitiative) of the International Network for Engineers and Scientists for Social Responsibility (INESPE) had attempted through continuous work to make whistleblowing more popular in Germany and had asked for a legal protection for whistleblowers. The aim was to enable the public interest to be heard in the business sector and especially in the field of scientific research wherever there are threats to humans and to the environment. Added to this was the desire to help whistleblowers also in their particular case and to assist them i.e. in disputes concerning their workplace and in their fight against deficiencies. Despite initial successes such as cinematic portraits of three whistleblowers,⁴² a major International Congress,⁴³ its own website⁴⁴ and some publications,⁴⁵ the momentum of many contributors decreased and finally was limited mainly to the tireless work of the Managing Director and journalist Antje Bultmann. She attempts to help individual whistleblowers and to keep the issue in the media and in 2006 became one of the initiators of the association Whistleblower-Netzwerk e.V.

Since 1999, the Ethikschutzinitiative together with two scientists' organizations, the German section of the International Association of Lawyers Against Nuclear Arms (IALANA) and the Federation of German Scientists (VDW), sponsors the German Whistleblower Award which is awarded every two years⁴⁶. A characteristic feature of the state of whistleblowing in Germany is that so far all award winners, except for Margrit Herbst in 2001 and Liv Bode and Brigitte Heinisch in 2007, came from abroad.

VDW and IALANA focused their whistleblower work on the awards and accompanying publications⁴⁷ primarily by Antje Falter and Dr. Dieter Deiseroth. The latter is Judge at the Federal Administrative Court and made with the exact description and analysis of the case of Margrit Herbst⁴⁸ a significant contribution to the discussion of whistleblowing in Germany. In numerous publications, they pointed out both the problems of individual cases as well as the lack of legal protection of whistleblowers in Germany in general.

Originally on the initiative of the lawyer and former TI board member Bjorn Rohde Liebenau, also the German Chapter of Transparency International⁴⁹ repeatedly addressed the issue of whistleblowing. However, it deliberately excluded individual cases and referred these cases to

42 *Ich verpfeife meine Firma – Zivilcourage im Beruf*, Deutschland, documentary, 1997, 45 min., a film by V. Thurn, [content](#)

43 http://www.buergerwelle.de/pdf/whistleblower_kongressbericht.pdf

44 http://web.archive.org/web/*/http://ethikschutz.de

45 Ethikschutz-Initiative INESPE: Wenn das Gewissen NEIN sagt -- Ethisch handeln in der abhängigen Arbeit - Ein Ratgeber in Konfliktfällen; ISBN: 3-923637-49-7; 1995. Cf. also: Bultmann, Antje (Hg.): Auf der Abschußliste -- Wie kritische Wissenschaftler mundtot gemacht werden sollen; ISBN: 3-426-77265-5; 1997.

46 <http://www.vdw-ev.de/whistleblower/whistleblower-Preis.html>

47 Deiseroth, Dieter; Falter, Annegret (Hg.): Zivilcourage im BSE-Skandal - und die Folgen -- Whistleblower-Preis 2001 für die Tierärztin Dr. Margrit Herbst Dokumentation und kleine Wirkungsgeschichte - VDW-Materialien Nr. 2; 2002. # Deiseroth, Dieter; Falter, Annegret (Hg.): Whistleblowerpreis 2003 -- Daniel Ellsberg; ISBN: 3-8305-0973-1; 2005. # Deiseroth, Dieter; Falter, Annegret (Hg.): Whistleblower in Gentechnik und Rüstungsforschung -- Whistleblower-Preis 2005 an Theodore A. Postol und Arpad Pusztai; ISBN: 978-3-8305-1262-2; 2006. # Deiseroth, Dieter; Falter, Annegret (Hg.): Whistleblower in Altenpflege und Infektionsforschung -- Whistleblowerpreis 2007 an Brigitte Heinisch und Dr. Liv Bode; ISBN: 978-3-8305-1455-8; 2007. # Deiseroth, Dieter; Götting, Dietmar (Hg.): Der Fall Nikitin -- eine Dokumentation zur Verleihung des Whistleblowerpreises 1999; ISBN: 3-923637-56-X; 2000.

48 Deiseroth, Dieter: Whistleblowing in Zeiten von BSE -- Der Fall der Tierärztin Dr. Margrit Herbst; ISBN: 3-8305-0258-3; 2001.

49 <http://www.transparency.de/>

the Fairness Foundation in Frankfurt⁵⁰, which focuses on the promotion of fair structures in enterprises and organizations and provides – in addition to fairness training - for some years now a telephone hotline which offers advice for whistleblowers. Mr Rohde-Liebenau meanwhile became with several publications and an analysis for the EU Parliament⁵¹ an expert in the field and with his company RCC now offers services to companies as Ombudsman and in implementing good risk management.⁵²

Finally there is media researcher Professor Johannes Ludwig who focuses on whistleblowing and media. On his websites⁵³, he documents well-researched stories of whistleblowers and their treatment in the media and provides tips for whistleblowers on how to deal with journalists. In addition to the author, who himself as a whistleblower at the EU Commission became aware of the whistleblowing issue just a few years ago, Johannes Ludwig now belongs to the Executive Board of the Whistleblower-Netzwerk e.V.⁵⁴

This association, founded in the autumn of 2006, tries, in a certain continuity of the work of the Ethikschutzinitiative to help whistleblowers, to raise awareness about whistleblowing in Germany and to lobby for effective whistleblower protection rules both on corporate and on governmental level. In 2007, the association together with the whistleblower NGOs "Explicit" from Norway and "Freedom to Care" from the UK issued an opinion paper on the EU green paper on labour law⁵⁵ which, in Brussels, however, got little attention. In addition, a conference of journalists was co-organized. In 2008, the whistleblower network issued opinions on legislative procedures and was also involved in the parliamentary hearings on the currently planned introduction of a whistleblower section in the Civil Code.⁵⁶ For 2009, a major project is planned which will cover the preparation of case documentations, lobbying for legislation and the analysis and influencing of the currently existing whistleblower systems in German corporations. Further information on the work of the association as well as news reports and interesting facts can be found under www.whistleblower-netzwerk.de and in the blog section of that website.

50 <http://www.fairness-stiftung.de/>

51 <http://www.risk-communication.de/Whistleblowing-Rules-In-EU-Institutions.pdf>

52 <http://www.risk-communication.de/>

53 <http://www.whistleblowerinfo.de/>; http://www.anstageslicht.de/index.php?UP_ID=14

54 <http://www.whistleblower-net.de/>

55 <http://www.whistleblower-net.de/content/view/41/43/lang,en/>

56 <http://www.whistleblower-net.de/content/view/87/80/lang,en/>