German Bundestag

18th electoral term

Bill

presented by Members Hans-Christian Ströbele, Luise Amtsberg, Volker Beck, Kai Gehring, Katja Keul, Sven-Christian Kindler, Renate Künast, Monika Lazar, Dr Tobias Lindner, Irene Mihalic, Dieter Janecek, Beate Müller-Gemmeke, Özcan Mutlu, Brigitte Pothmer, Dr Konstantin von Notz, Corinna Rüffer, Dr Gerhard Schick, Dr Julia Verlinden and the parliamentary group of Alliance 90/The Greens

Draft of an Act Promoting Transparency and Protecting Whistleblowers from Discrimination (Whistleblowers Protection Act)

Problem

Over the past few years, abuses and illegal acts in businesses, institutions and public authorities have often remained concealed until they have come to light through revelations made by staff members, commonly known as whistleblowers.

Knowledge of the facts in question, to which only a limited circle of persons are privy, is often a matter of great public interest, as in cases relating to nursing care or the exposure of scandals concerning foodstuffs.

In the realm of employment too, whistleblowers can contribute to better law enforcement in cases where minimum wages are not being paid or social-insurance contributions are being underpaid.

In addition to bullying, whistleblowers frequently face an additional threat of disciplinary action extending even to dismissal and criminal charges. As a result, staff are confronted with the moral conflict of having to decide whether they should speak out against abuses or whether they ought rather to remain silent.

The same applies to the sphere of data protection and the intelligence services. The revelations made by Edward Snowden, a former employee of the US National Security Agency (NSA), about 14 months ago exposed the greatest surveillance and intelligence scandal of all time, involving infringement of the fundamental human right to privacy and secure communication as well as mass violation of data protection by security authorities and intelligence services.

In contrast to the UK and the United States, Germany has only piecemeal legislative provisions protecting employees from disciplinary action and other repercussions. These provisions are too narrowly framed and often cover only internal whistleblowing within companies. Individual judgments of labour courts on this matter are no substitute for legislative regulation.

In the G20 Anti-Corruption Action Plan of November 2010, the Federal Government was party to the pledge to protect whistleblowers and to an explicit undertaking to “enact and implement whistleblower protection rules by the end of 2012”. There is no sign, however, of any substantive preparations for such action. Although the Federal Government presented the United Nations Convention against Corruption to the Bundestag for ratification at the end of September 2014, it did not take that opportunity to launch serious efforts to implement the recommendations and meet the verification requirements of the Convention, some of which relate to the protection of whistleblowers.

Yet action is needed for the following reasons:

Back in July 2011, the European Court of Human Rights ruled against the judgment of a Germany labour court which had upheld the dismissal of a Berlin whistleblower; the European Court found that the lack of protective provisions had infringed her freedom of expression. The subsequent coalition agreement, however, stated only that, “With regard to the protection of whistleblowers, we shall examine whether international requirements are being adequately fulfilled”.

When it receives questions on this matter or reminders of the urgent need to improve and develop whistleblower protection, the Federal Government merely cites this verification pledge from the coalition agreement.

Draft of an Act Promoting Transparency and Protecting Whistleblowers from Discrimination (Whistleblowers Protection Act)

Amendment of the German Civil Code

In section 612a, the following paragraph 2 shall be added:

"(2) Where an employee credibly sets out facts from which it may be presumed that he or she has been disadvantaged for exercising his or her rights, the burden of proving that paragraph 1 above has not been infringed shall lie with his or her employer."

After section 612a, the following section 612b shall be inserted:

"Section 612b

Right of notification

(1) If an employee believes, on the basis of specific grounds for suspicion, that legal obligations are being breached in connection with the activity of a business or that such a breach may be imminent and has decided to report this, he or she must first approach his or her employer or a body responsible for internal clarification.

(2) The employee shall be entitled to approach a competent body outside the company if an internal body within the meaning of paragraph 1 above does not exist or if the employer does not respond to the request for redress within a reasonable time or if, in the employee's view based on specific grounds for such a conclusion, the employer does not respond adequately. There shall be no need for a preceding request for redress if this cannot reasonably be expected of the employee. Such a request shall, in particular, be deemed an unreasonable expectation if the employee, on the basis of specific grounds for such a conclusion, takes the view that:

1. in the context of business operations an acute danger is imminent to life, inviolability of the person, health, free development of the personality, personal freedom, the stability of the financial system or the environment, or

2. in the context of business operations a serious crime has been committed or is imminent, or

3. a criminal offence is planned, and the employee himself or herself would be liable to criminal prosecution if he or she failed to report this, or

4. there will be no internal redress within the company or such redress will be inadequate.

In the case of item 3 above, it shall suffice for the employee to state the specific grounds for such a conclusion.

(3) The employee shall be entitled to address himself or herself directly to the public if the public interest in the disclosure of the information considerably outweighs the business interest in observing secrecy. Such an overriding public interest shall, in particular, exist if the employee assumes, on the basis of specific grounds for such a conclusion, that in the context of business operations a significant acute danger is imminent to life, inviolability of the person, health, free development of the personality, personal freedom, the stability of the financial system or the environment or there is a risk of serious crimes being committed.

(4) The employee may create a reproduction of the business information that he or she wishes to disclose and transmit it to the competent authority if this is needed to substantiate the conditions for the exercise of his or her rights under paragraphs 1 to 3 above.

(5) There may be no derogation from the provisions of paragraphs 1 to 4 above to the detriment of the employee.

(6) The foregoing provisions shall be without prejudice to the employee's rights of complaint, notification and comment and his or her notification obligations under other legal and administrative provisions as well as to the rights of employees' representative bodies."

Amendment of the Federal Civil Service Act (*Bundesbeamtengesetz*)

After section 67, the following section 67a shall be inserted:

"Section 67a

Right to report illegal official acts

(1) Civil servants must address themselves to their superiors or to a dedicated internal official body if, in the performance or course of their official duties, they come to suspect, on what they consider to be warranted specific grounds for such a conclusion, that:

1. a person belonging to a public authority or agency has committed a significant criminal offence in connection with his or her official activity,

2. a person belonging to a public authority or agency has knowingly acquiesced, in connection with his or her official activity, to significant criminal offences committed by third parties, or

3. in the context of official activities an acute danger is imminent to life, inviolability of the person, health, free development of the personality, personal freedom, the stability of the financial system or the environment.

Section 125(2) of this Act shall apply, *mutatis mutandis*. If there is no substantiated response concerning the notified case within a reasonable time or if there are, in the civil servants' view, specific grounds for concluding that the response is inadequate, they shall be entitled to notify a continuing suspicion within the meaning of the first sentence of this paragraph to another competent authority or external agency.

(2) Civil servants shall be entitled to address themselves directly to the public if the public interest in the disclosure of the information considerably outweighs the interest in observing secrecy. Such an overriding public interest shall, in particular, exist if civil servants, in the performance or course of their official duties, come to suspect, on what they consider to be warranted specific grounds for such a conclusion, that an acute danger is imminent to life, inviolability of the person, health, free development of the personality, personal freedom, the stability of the financial system or the environment, or that there is a risk of significant criminal offences being committed, through or consequent to illegal official acts or omissions and if they believe that action in accordance with paragraph 1 above could not be expected to result in redress or in timely redress.

(3) In the cases referred to in the third sentence of paragraph 1 and in paragraph 2 above, civil servants are not acting in breach of duty. Lawful exercise of the rights and fulfilment of the obligations deriving from paragraphs 1 and 2 above must not give rise to any legal or *de facto* disadvantages.

(4) Where a civil servant credibly sets out facts from which it is evident that he or she has been disadvantaged for lawfully exercising the rights and fulfilling the obligations deriving from paragraphs 1 and 2 above, the

burden of proving that the provision set out in the second sentence of paragraph 3 above has not been infringed shall lie with his or her official superior.

(5) The foregoing provisions shall be without prejudice to rights of notification and comment and to notification obligations under other provisions."

Amendment of the German Criminal Code

After section 97b, the following sections 97c and 97d shall be inserted:

"Section 97c

Lawful disclosure of state secrets

Anyone who discloses state secrets for the purpose of exposing, preventing or terminating a violation of a fundamental right or other serious violation of the law or the commission of a serious crime if timely redress is not to be expected and the public interest in the disclosure of the information considerably outweighs the interest in observing secrecy is not thereby acting unlawfully. The same shall apply to the disclosure of state secrets to prevent or terminate an imminent or acute danger.

Section 97d

Disclosure of state secrets by Members of the German Bundestag

Any Member of the German Bundestag who has come to suspect, on the basis of specific grounds for such a conclusion, that the constitutional order of the Federation or of a *Land* is being violated and voices such suspicion in the Bundestag or in one of its committees and thus discloses a state secret, is not thereby acting unlawfully."

After section 353b, the following section 353c shall be inserted:

"Section 353c

Authorised disclosure of a secret

The disclosure of a secret is authorised in any event if the person disclosing the secret does so for the purpose of exposing, preventing or terminating a violation of a fundamental right or other serious violation of the law or the commission of a serious crime if timely redress is not to be expected and the public interest in the disclosure of the information considerably outweighs the interest in observing secrecy. The same shall apply to the disclosure of a secret to prevent or terminate an imminent or acute danger."

Afterword

Anyone who considers 'blowing the whistle' is well advised to give a great deal of prior thought to what might well await him or her. The fact is that whistleblowers are not only liable to be subjected to bullying but often find themselves in breach of company or service disciplinary rules or even criminal law. Their action frequently culminates in their dismissal. Regrettably, at the present time, particularly for civil servants and employees in the public sector, it is often better to keep silent than to draw attention to abuses or criminal offences. The bill

that we present to the Bundestag today – Friday, 7 November 2014 – is designed to change all this and to improve considerably the protection afforded to whistleblowers, regardless of whether they work in the public or private sector, from employers' reprisals and dismissal and to create greater legal certainty. To this end, we are proposing amendments to the German Civil Code, the Vocational Training Act (*Berufsbildungsgesetz*), the Federal Civil Service Act and the Status of Civil Servants (*Länder*) Act (*Beamtenstatusgesetz*) that will protect whistleblowers from employment- or service-related discrimination as well as specifying the conditions in which they may address themselves to an external agency or other competent authority or directly to the public. Amendments to the German Criminal Code exempt whistleblowers from criminal liability, subject to certain conditions.

What specific changes would occur in practice?

Example 1: A haulage driver informed the police that meat which had gone off was being transported and so exposed the rotten-meat scandal. For this he was awarded the Golden Plaque by the Federal Minister of Consumer Protection of the time. At work, however, he was subjected to bullying and was ultimately dismissed.

Under our bill, the haulage driver would have enjoyed full protection and could not have been dismissed. The new right of notification that would be enshrined in section 612b of the German Civil Code prescribes a graduated process, defining at each stage the persons or entities that employees may provide with information. Under paragraph 1, an employee should initially inform his or her employer or a competent internal body. This, however, would not be appropriate in all cases, and so employees may, in certain circumstances, address themselves to an external body or directly to the public. Meat that has gone off endangers the health of large numbers of consumers. The haulage driver would therefore have been permitted to inform an external body – in this case the police – without further ado and would, moreover, have run no risk of discrimination in the workplace or dismissal. Since the public interest in disclosure of the information considerably outweighs the interest in observing secrecy, the driver could even have addressed himself directly to the public.

Example 2: A newspaper, the *Süddeutsche Zeitung*, recently reported that the German intelligence service had been gathering Internet data at the Frankfurt exchange node for years and had very possibly been passing on masses of information, including protected data, to the United States. In its report, the newspaper cited top-secret documents from Operation Eikonal. It is possible that someone from the Federal Intelligence Service (BND) had passed these documents on to the press.

If we assume that the information had indeed been passed on from inside the BND and that the latter had discovered which member of its staff had given the documents to the press, under the law as it stands, with its provisions on breaches of confidentiality, its general ban on 'running to the press' and its special obligations to observe secrecy, this would normally have resulted in the immediate suspension of that person from his or her duties and in disciplinary and criminal consequences, including dismissal and a conviction for violation of official secrecy under section 353b of the Criminal Code. If our legislative proposal were implemented, things would be very different: under the new section 67a of the Civil Code, civil servants would first have to address themselves to their superior if they suspected illegal official acts and would only then be entitled to take the next step of informing external authorities. If, however, the civil servant considered, on the basis of specific grounds for such a conclusion, that redress or timely redress could not be expected through these channels, the whistleblower in this particular case would be entitled to go straight to the public – provided that the public interest in disclosure of the information considerably outweighed the interest in keeping it secret. This would be the case, for instance, if the civil servant believed that, as a result of unlawful official acts, a significant acute danger was imminent to various legally protected rights. If the civil servant had specific grounds for concluding that this suspicion was warranted, he or she could only assume that the BND, by passing on data, was intentionally violating fundamental rights on a massive scale. If the foregoing conditions obtained, he or she would have been able to go straight to the public with the information without thereby running the risk of dismissal or of any other legal or *de facto* disadvantages. Nor could the notional member of

the BND staff incur criminal liability under section 353b of the Criminal Code. Our proposal provides for the introduction of a section 353c, which would regulate the authorised disclosure of a secret. Among the instances in which disclosure would be permissible are those in which – as in the BND case – the purpose of disclosure is to expose or prevent violations of fundamental rights. Since the information exposed in this context will surely include material classified as secret, the section 97c we propose for the Criminal Code would also apply; under this provision, disclosure of state secrets would not be a criminal offence, provided that the selfsame conditions set out in section 353c were met.