NKF Client News

NOVEMBER 2018

Whistleblower Protection in the Private Sector: Proposed Partial Revision of the Swiss Code of Obligations

1. Introduction

In recent years, many governments and international organizations have enacted laws on whistleblowing protection and established international standards and best practice principles in this regard. In Switzerland, the legal framework does currently not provide any specific whistleblower protection regulations in the private sector. So far, the competent courts decide on a case-by-case basis whether the reporting of irregularities – the so called "whistleblowing" – is legitimate. A clear statutory regime for determining when whistleblowing is legitimate – as envisaged by the Swiss Federal Council (see Section 2 and 3 below) – would thus ensure greater legal certainty and clarity for both companies and employees.

2. Swiss Legislative Activity

In November 2013, the Swiss Federal Council proposed new rules on whistleblower protection in the private sector (by way of a proposed partial revision of the Swiss Code of Obligations ["**CO**"]). In May and September 2015, respectively, the two chambers of the Swiss Parliament decided to reject the draft legislation due to its unclear language and "bureaucracy". On 21 September 2018, the Swiss Federal Council published its revised draft legislation and adopted the corresponding dispatch[1]. The revised draft aims at setting out clear procedures and rules to ensure that irregularities at work can be properly addressed and communicated to supervisors and authorities. The draft's detailed provisions are briefly summarized below.

3. Swiss Federal Council's Proposed New Legislation

a) Definition of Irregularities

Art. 321a$^{bis°}$ para. 2 Draft-CO ["**D-CO**"] defines "irregularities" as violations of criminal and administrative law as well as of other laws and breaches of internal regulations. This list is not exhaustive and the provision itself is non-mandatory, i.e. the employer is free to depart from this definition.[2]

Furthermore, only facts subject to professional secrecy obligations pursuant to art. 321a para. 4 CO can be regarded as irregularities. Facts that are not subject to such confidentiality obligations do not have to be treated in a way that is compliant with art. 321a$^{bis°}$ et seqq. D-CO.[3]

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[1] The dispatch is the accompanying explanation to the Swiss Federal Council's proposed new legislation.
[2] See section 1.2.2, p. 8 and section 2, p. 14 of the Swiss Federal Council's dispatch.
[3] See section 2, p. 14 of the Swiss Federal Council's dispatch.

b) Reporting System

The proposed legislation introduces a three-step reporting system:

Step 1: Reporting to the employer

First, any misconduct needs to be reported to the employer (see art. 321a^{bis} D-CO). Such reporting is compliant with the employee's obligation of loyalty (art. 321a CO) if the employee has a reasonable suspicion of misconduct within his organization and if he reports it to an internal or external person or body authorized to receive these reports (see art. 321a^{bis} para. 1 lit. a and b D-CO). Such reporting may also be made anonymously (see art. 321a^{bis} para. 2 lit. b D-CO).

In turn, the employer has an obligation to (1) deal with the report within a reasonable timeframe (not exceeding 90 days); (2) inform the employee about the receipt and the handling of the report; and (3) take sufficient measures[4] (art. 321a^{bis} para. 2 lit. a, b and c D-CO).

Step 2: Reporting to the competent authority

Pursuant to the proposed legislation, the competent authority is responsible for monitoring compliance with the infringed provisions (art. 321a^{ter} first sentence D-CO). This monitoring covers criminal and administrative law but excludes, in principal, private law.

In addition, the draft distinguishes between two reporting procedures: (1) reporting to the competent authority after having reported to the employer; and (2) direct reporting to the competent authority without prior reporting to the employer.[5]

The two-step process (art. 321a^{ter} D-CO) will apply, and reporting irregularities under this process will be deemed to comply with the employee's obligation of loyalty, if one of the following conditions is fulfilled: (1) the employee has previously notified the employer of the irregularity and the employer has not taken the measures provided for in art. 321a^{bis} para. 2 D-CO; or (2) the employee has been dismissed or other disadvantages have arisen as a result of the reporting to the employer. [6]

Direct reporting to the competent authority is deemed to comply with the employee's duty of loyalty if (1) there is a reasonable suspicion of misconduct; and (2) the employee can reasonably believe that (a) reporting to the employer would be ineffective[7]; (b) the activity of the competent authority could be obstructed if reporting is not done immediately; or (c) there is an imminent and serious danger to the life, health or safety of people or the environment or an imminent risk of severe damage (art. 321a^{quater} D-CO).

The new draft legislation assumes that reporting to the employer is effective if (1) an independent body receives and processes the reports; (2) regulations regarding the processing of reports are in place; (3) dismissals and all other forms of retaliation are prohibited; and (4) anonymous reporting is possible (art. 321a^{quater} para. 2 D-CO).

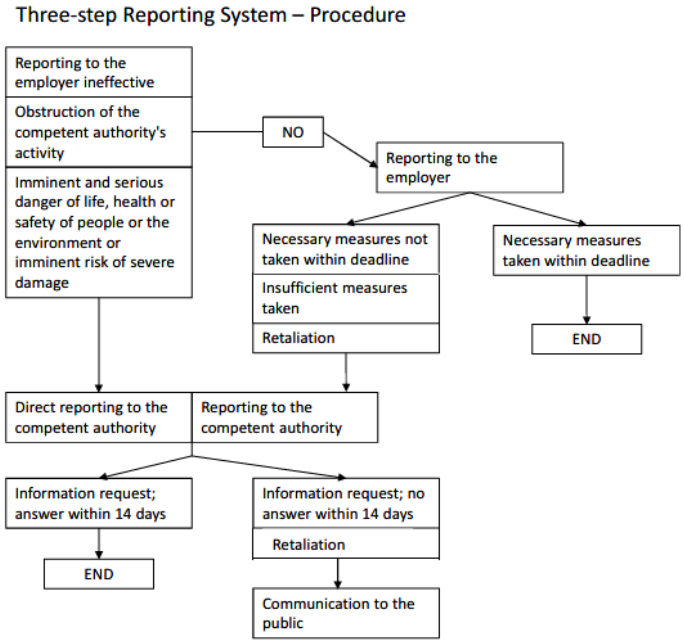
The key takeaways here for any Swiss-based companies are that employers with **state of the art reporting regulations** can benefit from the assumption that the reporting to the employer is effective and can thus prevent the employee from validly directly reporting to the competent authority.

[4] The courts will decide whether the measures taken by the employer are objectively sufficient, in particular with regard to the reported irregularities as well as the promptness and appropriateness of the employer's reaction (Section 2, p. 16 of the Swiss Federal Council's dispatch).
[5] See Section 2, p. 18 of the Swiss Federal Council's dispatch.
[6] Retaliation covers dismissal and any other form of disadvantages pursuant to art. 328 CO (section 2, p. 9578 of the Swiss Federal Council's dispatch, dated 20 November 2013).
However, in case of an unlawful reporting, i.e., reporting that is not compliant with art. 321a^{bis} D-CO, dismissal or any disciplinary action is not considered retaliation (see section 2, p. 18 of the Swiss Federal Council's dispatch).
[7] For examples, see section 2, p. 9579 of the Swiss Federal Council's dispatch, dated 20 November 2013.

Step 3: Communication to the public

As a last resort, employees can approach the public (art. 321a^{quinquies} D-CO), e.g. via the media. In order for this to comply with the employee's duty of loyalty, the following prerequisites have to be met: (1) the employee must have serious reasons ("ernsthafte Gründe") to believe the reported circumstances to be true in good faith[8]; (2) the employee must have reported the irregularity in advance to the competent authority or directly to the competent authority as provided for in art. 321a^{ter} or 321a^{quater} D-CO; and (3) either of the following conditions is met: (a) the employee requested that the competent authority is informed regarding the treatment of the report, and the competent authority did not provide the relevant information within 14 days of the employee's request (art. 321a^{quniquies} lit. c no. 1 D-CO), or (b) after reporting to the authority, the employee was dismissed or suffered other disadvantages (art. 321a^{quniquies} lit. c no. 2 D-CO).

The proposed legislation does not permit direct communication to the public while omitting the preceding stages (i.e. reporting to the employer and the competent authority).



c) Further Legislative Amendments

Under the new legislation, employees will have the right to consult a person subject to secrecy obligations (e.g. attorneys subject to attorney-client privilege) to advise whether or not to report certain incidents as irregularities in compliance with the new legislation (art. 321a^{sexies} D-CO).

In addition, art. 328 CO (i.e. the protection of the employee's personality rights) will be supplemented by a third paragraph, obliging the employer to ensure that reporting employees do not suffer any disadvantages. The amendment of art. 336 CO (i.e. wrongful termination) shall protect the employee from a dismissal as a result of the reporting of irregularities.

Importantly, provisions regarding professional secrecy (art. 321 SCC, art. 47 of the Banking Act and art. 43 of the Stock Exchange Act) as well as specific provisions regarding reporting duties and

[8] The wording was taken from art. 173 no. 2 Swiss Criminal Code ("**SCC**"), which is why the draft provision will be interpreted based on the existing case law to art. 173 no. 2 SCC (see section 2, p. 9581 of the Swiss Federal Council's dispatch, dated 20 November 2013).

rights are reserved under the new art. 321a^{septies} D-CO. Unless another legal justification exists (art. 15 et seq. SCC), the reporting of irregularities may be based on the extra-legal justification for safeguarding legitimate interests ("Wahrung berechtigter Interessen") if the conditions recognized by case law are met. According to current case law, the disclosure of facts subject to professional secrecy is not unlawful if it serves an overriding interest and is proportionate.[9]

d) Legislative Process

Swiss legislative process provides that the Swiss Federal Council's revised draft will first be discussed by the Committee for Legal Affairs of the National Council before the National Council itself will decide on the matter. Then the proposed draft will be read in the Committee for Legal Affairs of the Council of States. Eventually, the Council of States will deliberate on the proposed partial revision. If both Councils concur, the proposed legislation will possibly be subject to a referendum. The date of entry into force will be specified by the Swiss Federal Council. We expect that the proposed new legislation will not enter into force before mid-2020.

e) Conclusion

Currently, it is uncertain to what extent and when these legislative proposals on whistleblowing protection will come into force. Once in force, it is further unclear whether such law will prove its worth in practice, and in particular, whether employees will actually exercise their right to report irregularities and whether the three-step reporting system will be practicable.

Furthermore, the proposed new legislation uses a number of abstract legal terms, e.g. "reasonable deadline", "sufficient measures", "reasonable suspicion", which will need to be redefined by the courts. This grants the courts a vast margin of discretion, which inevitably entails some degree of legal uncertainty.

It thus remains to be seen whether the proposed rules will actually improve the situation for whistle-blowing employees and whether they will be enforceable such that reporting employees will be protected from any retaliatory measures.

[9] Decision of the Swiss Federal Court, 6B_1369/2016 of 20 July 2017, at 6.

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