

Background, Objective and Concept of the Whistleblower System at Business Metropole Ruhr GmbH

I. Background & objective of the whistleblower system

A 100% subsidiary of the Ruhr Regional Association (RVR), Business Metropole Ruhr GmbH (BMR) is ultimately in public hands. After all, the RVR with its headquarters in Essen is a coalition of the 11 urban districts and four counties in the Ruhr metropolis. The obligation of BMR is aligned with the constitutional obligation of the owners pursuant to Art. 20 Para. 3 Basic Constitutional Law, whose actions are based on current law. This principle applies to both the management board and every single employee regardless of position. Only then do the actions of executives and thus municipal actions, comply with legislation. Infringements of current law must not be tolerated or accepted.

Conscious and aware of this responsibility, particularly of the BMR management board, for organised support of standard-compliant conduct within the municipal business entity BMR, BMR wishes to establish a whistleblower system as an essential part of an effective and preventive compliance organisation. The goal is to generate information through this whistleblower system, ideally before a statutory violation occurs, but also about existing infringements, and as a result prevent or remedy an infringement.

The central contact for reporting at BMR is Mr. Jörg Kemna. The contact information is:

Jörg Kemna
Office Manager | Management

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Kronprinzenstraße 6
45128 Essen

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In addition to this internal contact person, BMR has decided to appoint an independent body outside the administration, namely the law office AULINGER in Essen, solicitor

Dr. Nicola Ohrtmann

as the ombudsman's office. The considerations for this are:

Central prerequisite for the success of a compliance ombudsperson's work guarantees that information related to corruption or other conduct damaging trust will be handled confidential and can protect the identity of the source. After all, they are afraid – unfortunately often not unjustified – of backlash which can range from bullying to relocation to lower positions all the way to losing their job. Add to this the fear of being considered a squealer or "whistleblower" and being labelled as such if released to the public. The fact this is not justified in the case of factual information does not change the subjective perception. Sources therefore require both absolute confidentiality and protection.

An outside solicitor can guarantee both, as they are bound to professional secrecy (§ 43 a Para. 2 Federal Lawyers' Act, § 203 Criminal Code) and immunity of witness (§ 53 Para. 1 No. 3 Code of Criminal Procedure). BMR formulated the client relationship with the law office AULINGER and its ombudsperson, solicitor Dr. Ohrtmann so that information generated by the whistleblower system may only be forwarded to BMR as permitted by the sources.

II. Concept of the whistleblower system 1.

Object of the whistleblower system

The ombudsman's office particularly acts for the purpose of preventing and countering corruption.

Characteristics of corrupt practices are particularly malfeasance in office and acquiring or pursuing (personal) benefits whilst typically concealing these actions.

There is no comprehensive penal provision for corruption in criminal law, but instead it sanctions the injustice linked to corruption as various criminal offences.

Criminal corruption offences relevant for BMR are based on Item 1.2 of the circular decree of the Ministerium für Inneres und Kommunales [Ministry of the Interior and Municipal Affairs] of 20.8.2014 on preventing and fighting corruption in public administration, particularly

- § 331 Criminal Code Acceptance of Benefits by a Public Official
- § 332 Criminal Code Corruption
- § 333 Criminal Code Granting of an Undue Advantage
- § 334 Criminal Code Bribery
- § 335 Criminal Code Particularly serious cases of corruption and bribery
- § 108 e Criminal Code Bribe of Delegates
- § 299 f Criminal Code Bribery/corruption in commercial transactions (commercial bribery).

This typically involves the statutory offences under

- § 261 Criminal Code money laundering, concealing illegal assets
- § 263 Criminal Code Fraud
- § 264 Criminal Code Subsidy Fraud
- § 265 b Criminal Code Credit Fraud
- § 266 Criminal Code Embezzlement
- § 298 Criminal Code Restrictive Agreements with Tenders
- § 353 b Criminal Code Breach of Official Secrets
- § 266 Criminal Code Embezzlement.

Information submitted to the ombudsman's office must be limited to criminal statutory violations. The ombudsman's office is not a "suggestion box" or complaints office and therefore not responsible for minor or merely suspected irregularities. Vague accusations will not be accepted and followed up on.

2. Addressees of the whistleblower system

The addressees of the whistleblower system include all employees of BMR and business partners suspecting corruption at or involving BMR.

3. Contacting the ombudsman's office

Sources may contact the ombudsman's office by email or phone. Telephone hours are Monday to Thursday from 9:00 a.m. to 03:00 p.m. Contact information for the ombudsman's office:

Dr. Nicola Ohrtmann

Rechtsanwältin

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4. Confidentiality

The ombudsman's office can only be successful by ensuring relayed information is treated as confidential.

The obligation to confidentiality of the ombudsperson ensures said will not disclose the identity of the source to BMR or third parties, provided the information does not involve planned offences as defined by § 138 Criminal Code or the information is defamation or libel (§§ 186 ff. Criminal Code). Current case law (LG Bochum, ruling of 16.03.2016, Case no. II-6 Qs 1/16), however, does allow an exception in the case of searches by investigative authorities. In this case documents related to the information may be confiscated, ultimately resulting in the identity of the source being disclosed by investigative authorities. Those also wishing to be protected from their identity being disclosed in this respect of course may remain anonymous to the ombudsperson.

The ombudsman's office is obligated to maintain confidentiality about all circumstances related to matters it has become aware of. Where permitted by law, BMR pledges to not release the ombudsman's office from the immunity of witnesses.

The ombudsman's office will confidentially follow up on the information. The ombudsman's office is permitted to review the necessary documents in consultation with BMR in compliance with privacy regulations in order to investigate the matter.

The ombudsman's office must immediately cease their work if it is determined that there exists a conflict of interest with respect to the source or the accused employee as defined by §§ 22 and 24 Code of Criminal Procedure. In this case the ombudsman's office will promptly notify BMR of the entrusted facts, where permitted to do so by the source, and of ceasing its work.

5. Privacy¹

5.1 Scope of data collection and data streams

When statutory violations are reported, personal information related to individuals will be collected, processed and used. The data collected by the ombudsman's office includes information related to the accused, the (alleged) breach of conduct and the respective facts. Since the BMR reporting process allows anonymous reporting, if sources are unable to submit a statement, their personal information will not be collected. Otherwise, personal information such as the name of the person reporting the incident, their position at BMR or outside and, if applicable, circumstances related to their observations will come into question.

¹ Considerations related to data protection are based on the progress report of the ad hoc task force "Employee Data Protection" of the Düsseldorfer Kreis, see https://www.datenschutz hamburg.de/uploads/media/Handreichung_Whistleblowing-Hotlines.pdf

The ombudsman's office only releases information reported by a source to the central contact person at BMR. However, personal information will only be disclosed with the express consent of the source.

5.2 Legal bases

If personal data will be processed automatically or in non-automated files, the collection, processing and use of personal data is only permissible where permitted or required under the Federal Data Protection Act or a different law or with the consent of the parties involved (§ 4 Para. 1 Federal Data Protection Act (§§ 5, 6 GDPR) resp. § 4 Para. 1 North Rhine-Westphalia Data Protection Act). The basis for assessment in this respect is § 28 Para. 1 Clause 1 No. 2 Federal Data Protection Act (Art. 6 Para. 1 GDPR) resp. §§ 12, 13 North Rhine-Westphalia Data Protection Act. These regulations firstly require the necessity to collect, process and use data, which in turn requires a justified interest of the body to collect / process / use the data and weighting this justified interest with the interests of the parties involved requiring protection.

On principle the goal of preventing and fighting corruption is the employer's justified interest - in this case BMR - justifying the processing of personal data using methods of reporting abuse in these areas. Processing data to protect this interest, however, would only be permitted, if the interests of the parties to be protected do not outweigh their exclusion from processing or use.

However, a process for reporting abuse always holds the risk of the incriminated being victimised and stigmatised. The interests of this person requiring protection will need to be reviewed with particular care in the case of concrete suspicious facts indicating relevant misconduct. Processing personal data related to uncovering irregularities relevant to corruption, however, may be considered permissible. In this case considering the interest will clearly be in favour of the justified interest of BMR, as reporting such irregularities will help avoid legal consequences due to e.g. prosecution, claims for compensation and immense damage to the image.

Based on this consideration BMR has deliberately decided to not extend the whistleblower system to so-called "soft factors" such as violations of ethical principles or standards of conduct (the administration being friendly in handling citizens, personal relationships between employees, etc.). The express object is solely conduct relevant to criminal law.

5.3 Privacy-compliant design of the whistleblowing process through the ombudsman's office

a) Principles

The design of the BMR whistleblower system is based on the following principles:

- Personal data may only be collected for clearly defined purposes and may not be processed or used in any other way, § 28 Para. 1 Clause 2 Federal Data Protection Act (Art. 6 Para. 1 GDPR), § 13 Para. 1 S. 2 North Rhine-Westphalia Data Protection Act.

- Furthermore, the data collected must be related to the purposes for which they are collected and/or processed, be required for said and not exceed this.
- Data processing systems must be designed and chosen based on the goal to collect, process or use no or as little personal data as possible.
- In particular, anonymisation and pseudonymisation options must be used where possible and the efforts involved is reasonable in relation to the desired level of protection, cf. § 3a Federal Data Protection Act (Art. 5 Para. 1 lit c) and e) GDPR) as well as § 4 Para. 2 North Rhine-Westphalia Data Protection Act.
- The ombudsman's office and during further processing BMR will take measures to ensure data which is not applicable or incomplete is deleted or corrected. Clear and unambiguous information should be provided for the purpose pursued by offering a whistleblowing hotline, cf. II. 1.1.

b) Anonymity

The drawback of anonymous allegations is always that it is contrary to the principle of transparency and with respect to naming names promotes abuse and denunciation: A person reported anonymously does not have the opportunity to defend himself against slander through legal proceedings. On the other hand the drawback of a process geared toward collecting personal data from the beginning is that it may deter the provision of desired information. Upon considering the interests of the source and BMR as well as the potentially accused during the whistleblowing process, BMR has therefore decided to generally allow anonymous reporting. However, the purpose of hiring a neutral solicitor as the ombudsman's office is to avoid anonymity. Anonymous information may always be submitted even without using the ombudsman's office. Hiring the ombudsman's office ensures the identity of the source is kept confidential and will only be disclosed to BMR by the ombudsman's office with the express consent of the source. Any individual wishing to make a report using this type of process should be aware they will not suffer disadvantages from doing so. When first establishing contact with the system, the source will therefore be informed their identity will be kept confidential throughout the process, but that disclosing their identity to the ombudsman's office at a minimum is desirable to distinguish between asserting abuse and denunciation.

c) Duties to inform

When collecting personal data from parties involved, under § 4 Para. 3 Federal Data Protection Act (§§ 13, 12 GDPR) resp. § 12 Para. 2 S. 1 North Rhine-Westphalia Data Protection Act, the responsible body must provide information about the purpose of collecting, processing or using personal data unless they have otherwise gained knowledge of said. When personal data is initially saved for internal purposes without the knowledge of the person involved, the person must be notified of this data being saved, the type of data, the purpose for collecting, processing and using it, and the identity of the responsible body, § 33 Para. 1 Federal Data Protection Act (§§ 14, 12 GDPR) resp. § 12 Para. 2 S. 1 North Rhine-Westphalia Data Protection Act. The duty to inform does not apply if the data must be kept confidential by law or based on its nature, namely for the predominantly

legal interest of a third party, § 33 Para. 2 Sentence 1 No. 3 Federal Data Protection Act, or if such notice would be detrimental to the function of the responsible body, § 12 Para. 2 S. 3 North Rhine-Westphalia Data Protection Act. In the case of substantial risk of such notice jeopardising the ability of BMR to effectively enquire into the allegations or to collect the required evidence, notifying the accused may be postponed as long as this risk exists. It may not be permanently concealed considering a potential infringement of the personal rights of the accused and their rights of defence must not be tolerated. BMR must therefore ensure the accused is notified until after the risk of jeopardising effective enquiry into the allegation no longer exists or the required evidence has been collected.

d) Duties of disclosure

Under § 34 Para. 1 Federal Data Protection Act (Art. 15 GDPR), § 18 North Rhine-Westphalia Data Protection Act the person involved, both the source and the accused, is entitled to obtain information about their data which has been stored, including if these pertain to the origin and recipient. The accused's right to information generally collides with any anonymous reporting the reporting process is intended to have. However, under § 34 Para. 4 Federal Data Protection Act, in cases of § 33 Para. 2 Sentence 1 No. 3 Federal Data Protection Act resp. in the cases specified under § 18 Para. 3 DSG the duty of disclosure does not apply. This would initially guarantee confidential reports and therefore the confidentiality of the source's identity required for a whistleblower system to work. However, in isolated cases BMR will need to review and determine under which circumstances the source will be disclosed to the accused.

e) Disclosure to third parties

Disclosing personal data about the source and the accused to third parties is generally prohibited. However, in some cases it may be necessary to make clear to sources their identity may be disclosed to those involved in further enquiry or subsequent court proceedings initiated in line with enquiries. E.g. documents about the report may be confiscated, which may ultimately result in the identity of the source being disclosed by investigative authorities. Rights of access to documents during potential criminal proceedings remain untouched. Under § 28 Para. 2 No. 2 b) Federal Data Protection Act, § 14 North Rhine-Westphalia Data Protection Act may be relayed for the purpose of prosecuting offences.

f) Blocking and correction

Under § 35 Para. 4 Federal Data Protection Act (Art. 5 Para. 1 GDPR), § 19 Para. 2 North Rhine-Westphalia Data Protection Act, personal data must be blocked if disputed by the affected person and cannot be determined to be correct or incorrect. Personal data must not be collected, processed or used for automated processing or processing by non-automated files if the affected person disputes this with the responsible body and a review shows that based on the specific personal situation the interests of the affected person outweigh the interests of the responsible body in such collection, processing or use. This does not apply if the collection, processing or use is required by law, § 35 Para. 5 Federal Data Protection Act (Art. 5 Para. 1 GDPR).

Incorrect personal data must be corrected, § 35 Para. 1 Federal Data Protection Act, § 19 Para. 1 North Rhine-Westphalia Data Protection Act.

g) Deletion

When processing personal data for internal purposes, the data must be deleted once they are no longer required for the purpose for which they were saved, § 35 Para. 2 No. 3 Federal Data Protection Act (Art. 5 Para. 1 GDPR) resp. § 19 Para. 3 lit. b) North Rhine-Westphalia Data Protection Act. Data should on principle be deleted within 2 months after the enquiry has been closed. Any further storage is only permissible until it is clear whether further legal steps such as disciplinary action or filing criminal proceedings need to be taken. Personal data related to reports considered unfounded by the agency responsible for handling the report should be deleted promptly.

6. Annual review/ Reporting

The ombudsman's office shall provide BMR with an annual report and conduct an annual review between the management board and the contact person at the ombudsman's office. The object of the report in this case is all (anonymised due to requirements to delete under data protection law) reports and sources the ombudsman's office receives in this function, with the consent of the individual source. In addition to providing a summary, the object of the meeting is to report and evaluate past cooperation as well as to plan for the future.

The ombudsman's office shall report to the supervisory board on its activities as well as measures of the management board with respect to good governance based on information.

III. The ombudsperson, Dr. Nicola Ohrtmann

Dr. Nicola Ohrtmann has been a solicitor for 15 years. She is a salaried partner at the law office AULINGER Rechtsanwälte | Notare in Essen. Dr. Ohrtmann specialises in public procurement law & compliance. Since her practice manual "Compliance – Anforderungen an rechtskonformes Verhalten öffentlicher Unternehmen" [Compliance - requirements for conduct at public enterprises in conformity with the law] was first published in 2009 (second issue 2013), she has been working intensively on tailoring compliance structures to the needs of public authorities. She is the co-editor of "Stober/Ohrtmann, Compliance – Handbuch für die öffentliche Verwaltung" [Compliance - manual for public administration] published in September 2015, which addresses the topic of compliance in detail for public authorities over more than 700 pages. The vhw - Bundesverband für Wohnen und Stadtentwicklung e.V. – as well as the Bundesanzeiger Verlag and the law office Rechtsanwaltskammer Hamm have hired Dr. Ohrtmann as a speaker on compliance and fighting corruption. Dr. Ohrtmann particularly provides clients with legal counsel related to organisational compliance matters, focusing on procurement compliance and fighting corruption.

For details about the curriculum vitae and publications please click:

[Dr. Nicola Ohrtmann](#)