

WHISTLEBLOWING



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Context and global developments

Many cases of corruption and other violations of law, malpractices or risks are only exposed because **whistleblowers provide crucial information**. Although people are familiar with the basic principle as reports on whistleblowing or whistleblowers regularly appear in the media, **much remains to be clarified and regulated**. At the global level and within Europe, there is currently a great deal of debate and movement concerning protection for whistleblowers. In addition, the United Nations Convention against Corruption (UNCAC)¹ helped in directing more attention towards the topic in a number of countries and regions, with article 33² calling on States parties to consider incorporating protection

for whistleblowers into domestic law. How each State party protects whistleblowers and which challenges they face are analysed as part of the UNCAC Implementation Review Mechanism. The resulting country reports³ provide the basis for targeted support measures. These measures contribute, amongst others, to the development of new standards and recommendations⁴ and to the revision of laws and processes by Member States. Most importantly, the EU Directive on the Protection of Persons Reporting on Breaches of Union Law (which was adopted in 2019 and will enter into force at the end of 2021)⁵ will set new standards and will be particularly relevant to companies. Private legal entities with 50 or more employees will be obliged to establish effective and efficient internal channels and procedures for reporting.⁶

1 United Nations Convention Against Corruption: www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last accessed: 13 Feb 2020)

2 Article 33 Protection of reporting persons: Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

3 UNODC (2017), State of Implementation of the United Nations Convention against Corruption, pp. 152-157. www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html (last accessed: 13 Feb 2020)

4 Such as the High-Level Principles on Effective Whistleblower Protection adopted by the members of the G20 in June 2019: www.bmjv.de/SharedDocs/Downloads/EN/G20/G20_2019_High-Level-Principles_Whistleblowers.pdf;jsessionid=E382DB027FD62A7289CD-D59DD67B24C4_1_cid324?__blob=publicationFile&v=1 (last accessed: 13 Feb 2020)

5 EU Directive: <https://data.consilium.europa.eu/doc/document/PF-78-2019-INIT/en/pdf> (last accessed: 13 Feb 2020)

6 Article 8 of the EU Directive.

Theory and concept

A key issue in protecting whistleblowers is determining how to define who constitutes a whistleblower. The most widely accepted view is that a whistleblower is an insider; in other words, someone working in the private or public sector who reports wrongdoings⁷ discovered in the course of one's work. In terms of the workforce, coverage is becoming broader and extending to self-employed people, interns, suppliers and shareholders.⁸ The core idea here is firstly, that these individuals have **special professional expertise and knowledge of internal procedures**, both of which are important resources that should be used and fostered, and secondly, that they could be **subjected to very specific reprisals, such as dismissal or transfer**, to name only two.

Generally speaking, protection for whistleblowers is designed to encourage people to report wrongdoings in order to expose and help eliminate a criminal offence, violation of law or risk and to ensure that the people who report these wrongdoings are better appreciated. **The main focus of protection for whistleblowers should be to prevent reprisals.** This can be achieved, among other things, by informing people about the permitted reporting channels, dealing properly with the reports received and protecting the identity of the whistleblower. For various reasons, however, the latter may not always be possible. If the whistleblower does suffer negative consequences, further protective measures, such as protection under labour laws and compensation for financial or other damages, should be available and prescribed by law.

With regard to the permitted and hence protected reporting channels, the following should be noted: Figures from the United Kingdom⁹ and Australia¹⁰ show that more than 90 per cent of whistleblowers initially

report their concerns to someone within their own organisation. Even though the research is not representative of all countries and there may be regional differences, it is an indication of the importance of internal channels and procedures. It is in the interest of both employers and regulatory authorities to use these channels and procedures to identify and manage problems and risks promptly and close to the source, and to avoid or limit damage, liability and other losses.

In countries in which the use of internal reporting channels and procedures is permitted and protected (something that is increasingly the case, but certainly not yet everywhere), whistleblowers appear to contact official external bodies, such as supervisory authorities, only if the internal reporting channel does not work. This might be due to a lack of response, incorrect handling of reports, ineffective communication with the whistleblowers or even systemic shortcomings. In order to ensure that important information is not lost in cases such as these, whistleblowers are usually free to report to external bodies immediately, if the circumstances require. If neither internal nor official external bodies respond and public interest in exposing wrongdoings outweighs other conflicting interests, contacting the media or other forms of public whistleblowing may be protected. Some countries have legal regulations governing such cases directly; in the absence of such legislation, rulings by bodies such as the European Court of Human Rights may provide guidance.¹¹

Even if employers prefer the use of internal reporting channels and procedures, there are a number of reasons why they too should permit and protect external whistleblowing. Competitors of companies that use illegal methods might have a vested interest in these wrongdoings being exposed, for example.

7 The exact concept is specified in national laws and includes not only crimes but also risks, etc.

8 Article 4 of the EU Directive; UNODC (2015), Resource Guide on Good Practices in the Protection of Reporting Persons, p. 9. www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf (last accessed: 13 Feb 2020)

9 Protect (formerly Public Concern at Work) (2013), Whistleblowing – The Inside Story – a study of the experiences of 1,000 whistleblowers, p. 12. <https://gala.gre.ac.uk/id/eprint/10296> (last accessed: 13 Feb 2020)

10 Griffith University (2018), Whistleblowing: New Rules, New Policies, New Vision, pp. 3 and 16. www.whistlingwhiletheywork.edu.au/wp-content/uploads/2018/11/Whistleblowing-New-Rules-New-Policies-New-Vision-Working-Papers-Final-13.11.18.pdf (last accessed: 13 Feb 2020)

11 UNODC (2015), Resource Guide on Good Practices in the Protection of Reporting Persons, pp. 39–45.

Practice

Whistleblowing systems are tried and tested methods within companies in the field of compliance and security, among others. There are many ways of organising such systems and various reporting channels and procedures for different areas exist. In principle and as a first step, companies should educate themselves about the current legislation and forthcoming changes (such as the EU Directive) to be able to establish what the minimum requirements are and determine whether their systems need to be adapted.

When planning and introducing a whistleblowing system, companies not only need to comply with general legal requirements (particularly those concerning data protection); above all, they need to offer potential whistleblowers a better alternative both to remaining silent and to going through external reporting channels. Instead of a duty to report, which is often extremely difficult to enforce, employees should be able to submit reports not only through the usual levels of hierarchy but also through special channels. In order to manage the information thus received more effectively, companies should consider drawing up relevant forms or provide resources that explain the minimum information that whistleblowers ought to communicate. It is also useful to include staff members or their representatives when designing a whistleblowing system in order to build trust and ensure clarity. On account of their size, small companies may face difficulties in setting up a whistleblowing system unless they are subject to separate rules on the basis of their specific area of work, for example in the case of those operating in high-risk areas. A strategically placed employee (e.g. personnel manager or compliance officer) could be

appointed as the internal contact for whistleblowers. The use of an external provider or a trusted lawyer could also be considered.¹² In any case, the conditions under which staff members can turn to certain official bodies must always be clearly communicated. **Due to the growing regulation in the field of protection for whistleblowers, more experience is likely to be shared and an increasing amount of information can be expected in the coming years.** The recipients and investigators in particular need training, for example on which questions to ask during the initial contact with a view to conducting the investigation and protecting the whistleblower appropriately, and on how to deal with reports properly.

To build trust at various levels, it is also important to maintain communication with the whistleblower about the main decisions taken and the results of the inquiry, and, in general, for example at company-level, to share information about results and successes as long as this is in accordance with data protection requirements. This will enhance trust in the system, promote a culture of dialogue and also spread knowledge about standards of conduct and risks.

During investigations, the group of people involved should be kept as small as possible. The presumption of innocence and the rights of the individuals concerned need to be respected, including the right to be informed about investigations against oneself as soon as this would no longer jeopardise the object of the investigation. Apart from whistleblowers, other individuals who may be falsely accused must be protected and provided with compensation for damages.

¹² Article 8 of the EU Directive permits private legal entities with 50 to 249 employees to share resources in order to find appropriate solutions.

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