



Committee: Human Rights

Issue: The Question of the protection of whistleblowers

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Introduction:

Whistleblowing is the reporting of illegal or unethical activities of an individual or organisation. It is one of the most effective ways of exposing, fighting and remedying corruption. Whistleblowing can vary in scale, including government accountants who report on the misuse of public money or company members exposing bribery to cover up illegal activity such as environmental destruction. Whistleblowers are essential for exposing wrongdoing, and they often take personal and professional risks which can result in harassment, arrest, fines, blacklisting or in extreme cases threat to life. Therefore, there is a clear necessity for protection of these individuals so that unlawful and unethical behavior can be safely exposed free from fear. Given the global impact of whistleblowing, it is particularly important to strengthen whistleblower protection at an international level. National and international frameworks should encourage reporting or disclosing in an open manner which can include reports within organisations, to public regulatory bodies, law enforcement or supervisory bodies, without fear of retaliation.

A human rights approach to whistleblowing focuses on a framework built upon the human right to freedom of speech. This has led the European Court of Human Rights (ECtHR) to expand its case law on Article 10 of the European Convention on Human Rights (ECHR)¹, which protects freedom of speech. The ECtHR has established an extensive body of case-law on the right to freedom of speech at work for whistleblowers. This case law highlights that freedom of expression and the right to share information are fundamental for a functioning democracy² and therefore that protecting whistleblowers is essential to fight corruption and promote transparency and accountability. In its

¹ Guide on Article 10 of the European Convention on Human Rights. European Court of Human Rights. Updated April 30, 2021. Accessed at: https://www.echr.coe.int/documents/guide_art_10_eng.pdf

² Protection of Whistleblowers (Recommendation CM/Rec(2014)7 and explanatory memorandum). Council of Europe. April 30, 2014. 5. Available at: <https://rm.coe.int/16807096c7>

2014 report, the Council of Europe stated that there was little or no readily available protection in most legal systems for reports and disclosures even if they were justifiable and reasonable³. This was because credibility was often doubted from anonymous sources. Anonymous disclosures, which are often made to prevent retaliation and maintain privacy, are difficult to investigate. Anonymity when making a disclosure is not a guarantee that the whistleblower's identity will remain unknown and when they are uncovered this jeopardises their position and in some cases their credibility. This can have possible effects on their careers especially due to media attention. This is hugely discouraging to whistleblowers. So, it is important to consider the issue of the right to protection of whistleblowers to ensure they come forward. This includes protection of the right to privacy, particularly when in conflict with the right of the press to obtain and publish information.

There is a currently a problem of a lack of national laws in place for protection of whistleblowers, and in the case of some countries the issue of no or minimal enforcement. Officials and civil society organisations who push for protection of whistleblowers often have little support, so global action is necessary. A key reason for people's reluctance to become whistleblowers is the impression that authorities will not take their report seriously and that nothing will be done. Other reasons for this reluctance include lack of awareness of reporting mechanisms and fear of retaliation. For example, currently only 47% of EU citizens feel they can safely report corruption⁴. Those who witness malpractice are often not empowered enough to speak up.

Definitions of key terms:

Anti-Fraud and Corruption Policy- a policy concerned with international acts of dishonesty and deception.

Confidentiality- a term in a contract of employment stating an employee will not disclose confidential information that concerns a company or employer, however when an employee discovers information concerning malpractice, unethical conduct or illegal behavior information can be disclosed.

Corruption- the abuse of entrusted power for private gain in business, government, the courts, the media, and in civil society, which erodes trust, weakening democracy, restricting economic development and furthering poverty and division within a country.

³ Protection of Whistleblowers (Recommendation CM/Rec(2014)7 and explanatory memorandum). Council of Europe. 14. <https://rm.coe.int/16807096c7>

⁴ Nowers, Ida & Terracol, Marie. "Are EU countries failing to protect whistleblowers?" Whistleblowing International Network. December 17, 2021. <https://whistleblowingnetwork.org/News-Events/News/News-Archive/TI-WIN-Report>

Liability- something a person or company owes, usually as a sum of money often settled through the transfer of economic benefits such as goods or services. Liabilities include loans, mortgages, bonds, warranties and accrued expenses.

Malpractice- failure to act correctly, honestly or legally when doing a job, often causing injury, harm or loss.

Protected disclosure- disclosure of information that the member of staff reasonably believes. Tends to show malpractice members of staff are protected from suffering any detriment as a result of disclosures.

Public interest report or disclosure- the reporting or disclosing of information on acts and omissions representing a threat or harm to public interest⁵.

Receivables- also referred to as accounts receivables, are debts owed to a company by its customers for goods or services that have been delivered or used but not yet paid for.

Unsecured Creditor- an individual or institution that lends money without obtaining specified assets as collateral. This poses a higher risk to the creditor because it will have nothing to fall back on should the borrower default on the loan. If a borrower fails to make a payment on a debt that is unsecured, the creditor cannot take any of the borrower's assets without winning a lawsuit first⁶.

Major organisations involved:

- **United Nations Office on Drugs and Crime (UNODC)-** The UNODC is the UN agency responsible for providing assistance to member states in accordance with the Guidelines on Justice in matters involving child victims and witnesses of crime. They support public authorities to better protect and empower whistleblowers to speak up. The UN also provides support in respect of the UN Convention against Corruption (UNCAC).
- **Transparency International-** Transparency International is an independent, non-governmental organisation working on a global movement in over 100 countries to end the injustice of corruption and promote transparency, accountability and integrity at all levels and across all sectors of society.

⁵ “public interest report or disclosure definition.” Law Insider. Accessed February 1, 2022.
<https://www.lawinsider.com/dictionary/public-interest-report-or-disclosure>.

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- **Organisation for Economic Co-operation and Development-** The OECD is an international inter-governmental organisation with 38 member countries that works to build better policies for better lives.
- **WIN-** the Whistleblowing International Network is an international charity based in Scotland which connects and strengthens NGOs and civil society organisations that defend and support whistleblowers.
- **Equality and Human Rights Commission-** the Equality and Human Rights Commission is an independent statutory body with the responsibility to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote the human rights of everyone in Britain. They have been awarded an 'A' status as a National Human Rights Institution (NHRI) by the United Nations.
- **Human Rights House Foundation-** HRHF is an international organisation headquartered in Oslo with an office in Geneva and representation in Brussels and Tbilisi. HRHF holds consultative status at the United Nations and participatory status at the Council of Europe. They work closely with Human Rights Houses and partner organisations to advocate for and fulfil rights that underpin independent civil society and make it possible to hold institutions and individuals accountable.
- **National Whistleblower Centre-** The National Whistleblower Center (NWC) is a non-partisan organization which educates whistleblowers about their rights, assists in finding them legal aid, and provides support for high-impact whistleblower litigation.
- **Council of Europe-** The Council of Europe exists to uphold and further pluralist democracy, human rights and the rule of law and has taken a lead in fighting corruption as it poses a threat to the very foundations of these core values.
- **European Court of Human Rights-** The ECtHR is a regional human rights judicial body based in France created by the Council of Europe and began operating in 1959, and has delivered more than 10,000 judgments regarding alleged violations of the European Convention on Human Rights.
- **Group of States against Corruption (GRECO)-** GRECO was established in 1999 by the Council of Europe to monitor State's compliance with the organisation's anti-corruption standards. Currently GRECO is comprised of 50 member states (48 European states, Kazakhstan and the USA)
- **The International Justice Resource Center (IJRC)-** The IJRC is a non-profit human rights organisation based in California which shares information, skills and guidance with advocates and victims to help achieve accountability for human rights violations using international law. The IJRC has special consultative status with the ECOSOC, attending and participating in the activities of UN human rights bodies.
- **Government Accountability Project-** The Government Accountability Project is a non-profit organization that is the international leader in whistleblower protection with a broad capacity for political advocacy for whistleblower protections and legal campaigns. They have worked with high profile clients such as Edward Snowden, who disclosed systematic cases of abuses of power by the U.S. government, and Dr. Aicha Elbasri, who exposed the United Nations' failure to protect civilians in Darfur.

- **Amnesty International**- Amnesty International is an NGO that is the world's largest grassroots human rights organisation who lobby governments and companies to ensure international human rights laws are respected

Timeline of events:

1778- A resolution passed unanimously for America's first whistleblower protection law by the Continental Congress after a letter from sailors discloses misconduct by the commander of the US Navy.

1863- The False Claims Act (FCA) is one of the strongest whistleblower laws in the United States, originally signed into law in 1863 by President Abraham Lincoln during the Civil War and has had several revisions. Under this provision, whistleblowers can be rewarded for confidentially disclosing fraud that results in a financial loss to the federal government. It is important to note that the FCA was written to be expansive. As a result, it is (1) applicable to conduct outside the U.S. – so long as there is federal spending, procurement or contracting, (2) suitable for building criminal cases as well as civil, and (3) possible for anyone to serve as a whistleblower, including non U.S. citizens and NGOs.

1948- the Organisation for European Economic Co-operation (OEEC) was established to help administer the Marshall Plan.

1961- Following the 1957 Rome Treaties to launch the European Economic Community, the Convention on the Organisation for Economic Co-operation and Development was drawn up to reform the OEEC. This was signed in December 1960, and the OECD officially superseded the OEEC in September 1961. It consisted of the European founder countries of the OEEC plus the United States and Canada.

1971- Vladimir Bukovsky smuggled hospital records to the West to prove the immoral practice by the Soviets who branded political opponents and other dissidents as mentally unstable to justify locking them away.

1974- Karen Silkwood, a chemical technician at a Kerr-McGee plutonium plant concerned about disregard for safety and her own contamination, planned to provide evidence of the corporation's negligence to The New York Times but died en route. Investigators were unable to locate the folder of evidence she compiled in her car, raising concerns that her death was orchestrated to ensure she did not leak further information.

1977- the Institute for Policy Studies (IPS) launched Government Accountability thanks to IPS' positive experiences working with national security whistleblower Daniel Ellsberg before he released the Pentagon Papers and President Nixon's illegal and direct efforts to retaliate against Ellsberg.

1998- The National Whistleblower Center (NWC) was founded in 1988 by three experienced whistleblower attorneys to educate the public about the plight of whistleblowers at the Comanche Peak nuclear power plant.

2002- Congress passed the historic Sarbanes-Oxley Act, which protects employees of publicly traded companies who report violations of Securities and Exchange Commission regulations or any provision of federal law relating to fraud against the shareholders.

2010- The Dodd-Frank Act was passed following the financial crisis of 2008-09. The Act is a major Wall Street reform law covering commodities and securities actions worldwide that aims to promote financial stability by improving accountability and transparency. It created two whistleblower programs in the U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), as well as enhanced whistleblower provisions under the Foreign Corrupt Practices Act.

2010- At the Seoul Summit in November 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anticorruption agenda.

2013- The Tshwane Principles, drafted by 22 civil society organizations and academic centers in June 2013, provide that laws should protect public servants who disclose information to the public. The principles focus on National Security and the Right to Information and address the question of how to ensure public access to government information without jeopardizing legitimate efforts to protect people from national security threats.

2013- Edward Snowden was working for the National Security Agency as a government contractor when he leaked highly classified information to The New York Times and the Washington Post, insisting his name be printed alongside information given. The Department of Justice charged him with espionage and theft of government property, but he escaped to Russia before they revoked his passport.

Relevant UN treaties and conventions:

Corruption dramatically undermines economic development and furthers inequality in a country and is a significant contributor to combatting corruption is whistleblower reports. Without reports, it is difficult to discover systemic corruption. In 2003 the UN recognized the crucial role of whistleblowers and need for their protection in the Convention Against Corruption⁷ which was signed by 140 nations and formally ratified, accepted, approved, or acceded to by 137 nations, including the United States. The UN Convention against Corruption (UNCAC) binds all signatory countries to consider legal provisions to protect individuals who report corruption-related offences from facing retaliation. Article 33 of the UNCAC sets out parameters of protection for reporting persons and encourages their consideration by signatories⁸. The UNCAC is the only legally binding universal anti-corruption instrument, and it emphasises the necessity of “bullet-proof” protection in policies and legislation adopted to protect against reprisal.

International enforcement authorities who play a significant role in implementing the UNCAC operate under the auspices of the Council of Europe’s Civil Law Convention on Corruption and the OECD’s Anti Bribery Convention. These conventions have established a considerable number of principles and templates concerning the protection of Whistleblowers, including the G20 Guiding Principles for Legislation on the Protection of Whistleblowers. The G20 Anti-Corruption Action Plan was established in 2010 to report to G20 leaders on anti-corruption. International organizations and intergovernmental bodies involved act as observers and in particular these include the UNODC, OECD, World Bank, International Monetary Fund (IMF) and the Financial Action Task Force (FATF)⁹. At the Seoul Summit in November 2010, G20 Leaders identified the protection of whistleblowers as a high priority area in their global anticorruption agenda. It is important to note in G20’s Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, there is a recommendation for protective legislation to be applied in cases of disclosures made on reasonable grounds, even if the individual’s belief is incorrect. South African courts are an example of good practice in such cases. In South Africa an allegation of lack of good faith must be proved by the employer, otherwise the whistleblower is afforded protection based on the assumption that the report was made in good faith¹⁰. South Africa provides comprehensive protection from retaliation against whistleblowers. This includes prohibiting actions and threats by employers to jeopardise a whistleblower’s employment status, for example threats of dismissal, refusal of a reference, and harassment or intimidation. This exemplifies protection that extends to

⁷ United Nations Convention Against Corruption. United Nations Office on Drugs and Crime. New York. 2004.

<https://www.whistleblowers.org/wp-content/uploads/2018/10/un-convention-against-corruption.pdf>

⁸ United Nations Convention Against Corruption. United Nations Office on Drugs and Crime. 26.

<https://www.whistleblowers.org/wp-content/uploads/2018/10/un-convention-against-corruption.pdf>

⁹ United Nations Office on Drugs and Crime. “The G-20 Anti-Corruption Working Group.” United Nations.

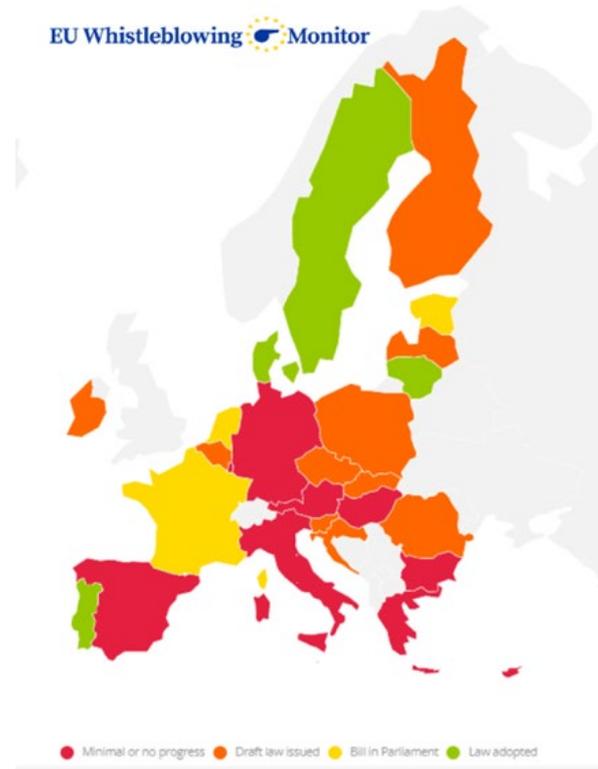
<https://www.unodc.org/unodc/en/corruption/g20-anti-corruption-resources/by-thematic-area.html>

¹⁰ Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation. G20 Anti-Corruption Action Plan. November 25, 2011. 10. <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

preserve human rights- the right to just and favorable conditions of work and to protection against unemployment according to Article 23 of the United Nations' Universal Declaration of Human Rights¹¹.

Previous action:

In 2019 the European Union drove forward international standards by adopting a directive on whistleblower protection which included provisions to improve weaknesses and fill gaps in protection. 19 out of 27 EU countries have enacted at least partial legal protections for whistleblowers, however 7 EU countries meet none of the European and international conventions and standards on protection for whistleblowers. Countries such as Sweden and Portugal have implemented the EU Whistleblowing Directive, while many other countries are still drafting legislation¹². Ireland and France are models for supporting whistleblowing in the fight against corruption. The 27 EU member states involved were given the goal to transpose the directive into their national law in two years, but following this deadline in December 2021, two-thirds of member states had not started or had made minimal progress towards implementing the directive. This clearly suggests a failure to take effective and current action, so new measures to ensure the progression of countries towards ensuring the safety of whistleblowers need to be discussed, proposed and enforced. Adopting a law is only one step. Often, the law does not enter into force immediately, and further regulations and administrative provisions will be needed.



¹¹ Universal Declaration of Human Rights (1948). United Nations. 2001. 6.

<https://www.un.org/sites/un2.un.org/files/udhr.pdf>

¹² Trevisol, Lorenzo. "Whistleblower protections across Europe- the legal context." Integrity Line. Last updated January 21, 2022. <https://www.integrityline.com/expertise/blog/whistleblower-protections-across-europe-legal-context/>



In response to the 2007 recession experienced in America, the administration of President Obama proposed the legislation of the Dodd- Frank Wall Street Reform and Consumer Protection Act in 2009 to strictly regulate lenders and banks to protect consumers and prevent another all-out economic recession¹³. Whistleblowers with knowledge of financial fraud in America can receive protections and

rewards through the Dodd-Frank SEC Whistleblower program, which allows them to confidentially report securities and commodities fraud. Under the Dodd-Frank Act, whistleblowers who provide information that leads to successful prosecution can receive between 10% and 30% of monetary sanctions imposed on the wrongdoer¹⁴.

This has had a prominent impact in cases of financial fraud in industry, however it has not had complete success in encouraging whistleblowers to come forward and report on fraud. A well-known case of this is the Shell Reserves Scandal in 2004. Shell Group (Shell), at the time the world's largest publicly traded oil and gas company, announced it had substantially reduced its "proved" reserves by 4.47 billion barrels. Two exchange regulators, the SEC and the British Financial Services Authority (FSA) investigated and alleged this was due to fraud. As early as 2000, Shell's management had received several internal communications suggesting the company was overstating its reserves, but executives frequently dismissed reports. By the end of 2003, the strategy of using new, legitimate reserves to quietly replace earlier questionable bookings began to lower the company's Reserve Replacement Ratio which was a growing indicator of fraud, so the company announced a dramatic reduction in its proved reserves. Had a whistleblower reported to exchange regulators, the scheme might have been uncovered earlier. In similar cases, employees have used the Dodd-Frank SEC whistleblower program to alert the SEC to companies who were fraudulently overstating assets. Instead, the false statements in this case were uncovered only after investigations by the FSA and the SEC. Shell settled claims with the SEC and the FSA for a combined total of \$150 million¹⁵.



On the other hand, an example of the success of the Dodd-Frank Act demonstrates the necessity to protect whistleblowers from retaliation. In 2016 the SEC announced a settlement with SandRidge Energy Inc. over allegations that they had retaliated against an internal whistleblower who was an employee. According to the SEC, over two and a half years, the whistleblower had repeatedly raised

¹³ "Dodd-Frank Act." History. Last Updated August 21, 2018. <https://www.history.com/topics/21st-century/dodd-frank-act>

¹⁴ Hayes, Adam. "Dodd-Frank Wall Street Reform and Consumer Protection Act." Investopedia. Updated December 28, 2021. <https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp#citation-10>

¹⁵ "Fraudulent Oil and Gas Reserve Reporting." National Whistleblower Center. <https://www.whistleblowers.org/fraudulent-oil-and-gas-reserve-reporting/>

concerns with senior management concerning the company's process for calculating oil and gas reserves, but the internal audit was never completed. The employee was labeled "disruptive" by senior management and, as part of a large-scale reduction in workforce, the whistleblower was fired. The company attempted to negotiate a separation agreement that included non-disparagement clauses that could have impeded the whistleblower from reporting to the SEC. According to the SEC order, the company also attempted to use restrictive agreements with hundreds of other employees. Without admitting or denying the SEC's findings, SandRidge agreed to pay a penalty of \$1.4 million to the SEC¹⁶.

While recent changes to the SEC whistleblower program now require whistleblowers to report directly to the SEC to be covered by anti-retaliation provisions, this case sends an important message about the consequences for companies who try to block whistleblowers from reporting to the SEC. In addition to SandRidge Energy, the SEC has issued similar sanctions against BlackRock and KBR, among others, for blocking whistleblower communications.

¹⁶ "Whistleblower Retaliation and Illegal Severance Agreements in the Oil and Gas Industry." National Whistleblower Center. <https://www.whistleblowers.org/whistleblower-retaliation-and-illegal-severance-agreements-in-the-oil-and-gas-industry/>

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