

WHISTLEBLOWERS FOR CHANGE:

THE SOCIAL AND ECONOMIC COSTS AND BENEFITS OF LEAKING AND WHISTLEBLOWING

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ACKNOWLEDGEMENTS

The author would like to thank all of the research participants who gave up their time to be interviewed and, in many cases, to provide follow-up information. I would also like to acknowledge the support of the Open Society Initiative for Europe for funding the research and to Peter Matjašič and Laura Nortey for their support. Particular thanks must go to the whistleblowers interviewed for this project who very generously gave up their time to share their experiences despite having to relive the difficult experiences that they went through. Whistleblowers often do not get the praise that they deserve.

EXECUTIVE SUMMARY

Civil society organizations across Europe are campaigning for a European-wide directive on whistleblowing. This would ensure that there is a streamlined, clear system in place to both hear and protect those who are compelled to blow the whistle on activities within their organization that they believe endanger the common good. While it has become widely accepted that whistleblowers play an important role in an open society, right now, in Europe, protections are varied dependent on the country in which a potential whistleblower lives, if, indeed, they exist at all.

The decision to be a whistleblower is not easy. Mental trauma, the risk of retaliation, the potential loss of employment or ostracisation by work colleagues, not to mention the impact on one's personal life, all weigh heavily on the individual who decides to speak out in support of the common good.

In the report, *Whistleblowers for Change: The Social and Economic Costs and Benefits of Leaking and Whistleblowing*, Ashley Savage meets with whistleblowers across eight European countries who describe their experience once they decided to take the step to blow the whistle. He also speaks with civil society experts to get their take on what a directive should look like, and how best to ensure that, when an individual blows the whistle, they are protected.

There is much debate.

In the age of #metoo, is the person who reveals sexual harassment in the workplace a whistleblower? Or should the description "whistleblower" only be reserved for those who expose gross mismanagement or malpractice that has a tangible impact on the wider public. Can a nongovernmental organization be a whistleblower, or should the term only apply to individuals?

What should protections look like? Too restrictive and they will deter people from speaking out. Too broad and they will lose their impact.

One thing is clear, without regulations in place, an individual is less likely to blow the whistle, and open society as a whole will suffer.

An EU-wide directive on whistleblowing would act as a driver for change. As one of those interviewed for this report says, "a directive would bring the protection of whistleblowers to a whole other level." It would also have a positive impact on other parts of the world.

"Whistleblowing for Change" recognizes the necessity of establishing an EU-wide directive for whistleblowing, and argues for a multi-level, multi-stakeholder approach that reinforces the need to support whistleblowers and to deal with their concerns at every stage of the process.

REPORT OVERVIEW AND STRUCTURE

The report provides a detailed study of whistleblowing and leaking in eight countries, seven EU member states (Austria, France, Germany, Italy, The Netherlands, Spain, and United Kingdom) and Serbia as a comparator.

The author has utilised a methodology of semi-structured interviews to obtain a rich evidence base. Each interview was structured into three parts. The first part focussed on the participant's background and current role, the second part asked general questions on the topic area and the definitions and the third area concentrated on substantive issues relevant to the participant's role and area of focus. Participants were identified depending on their current role and experience of the topic. The study is comprised of interviews with a range of actors, including representatives from civil society organisations, investigative journalists, representatives from public organisations handling whistleblowing concerns, compliance professionals, lawyers and whistleblowers. Where possible, interviews were conducted in the participant's home country. Where this was not possible, the interview was conducted via Skype or responses to questions were provided by email.

The below chapters provide the results of this analysis.

Chapter 2 contains the views of a number of civil society actors who are campaigning for an EU-wide directive on whistleblowing. This chapter highlights some of the concerns in relation to how the directive has been drafted together with concerns regarding implementation and acceptance by member states.

Chapter 3 identifies a number of cross-cutting issues common across all jurisdictions utilising quotes from interviews conducted for this study. This chapter shows similarities and differences in views on particular issues and a number of important considerations for actors working on whistleblowing across Europe. The chapter advocates for a multi-level, multi-stakeholder approach to better promote and support whistleblowing across societies.

Chapter 4 provides a conclusion to the research comprising of a table to illustrate the suggested approach.

1. INTRODUCTION

Whistleblowing is gaining increased acceptance. Politicians, policy makers, civil society organisations, media organisations, public and private organisations are increasingly realising the value of supporting whistleblowing and strengthening protections for those who come forward. In the struggle for transparency and accountability, whistleblowers can play an invaluable role. As Mark Worth, executive director for the European Center for Whistleblowing describes it:

“I really compare whistleblowing to seatbelts. When I was a kid we didn’t wear seatbelts, people slowly realised that we needed them, and the auto companies were dragged kicking and screaming and now they say we need them. So now some governments are saying we not only accept and acknowledge that we need a whistleblower law framework and the whistleblowers to help us do our jobs. There is a critical mass of stories every day about cases. It’s just impossible in most parts of the world to ignore it anymore.”¹

Whistleblowers can shed light on illegal acts and other bad practices but crucially, if listened to at an early stage; they can proactively stop harm from occurring in the first place. Unfortunately, despite the current interest in the topic and very promising efforts in many jurisdictions, there is still a long way to go before whistleblowers can be empowered to raise concerns without the fear or risk of retaliation and with the confidence that the concerns will be addressed by the recipient.

Despite the term ‘whistleblowing’ being increasingly accepted and used widely in society, there is no uniform definition. The boundaries of who should be protected, when they should be protected, and why they should be protected differ according to legal definitions and perspectives. Different perceptions of whistleblowing, can be driven by different backgrounds (depending on the organisation and its strategic priorities), experiences (either personal, because many campaigners are former whistleblowers themselves, or professional due to the advice and representation of whistleblowers) and societal challenges (depending on the particular jurisdiction in question). These ambiguities create challenges for shared understanding, but they also create opportunities for the sharing of various approaches, which could be utilised as examples of good practice.

PURPOSE AND SCOPE OF THE RESEARCH

The aim of the research was to generate a clearer understanding of the impact of whistleblowing and leaking on society and to focus on smaller, ‘national’ and ‘local’ cases of whistleblowing. Moreover, the idea was to effectively provide a resource guide for the various actors on the topic of whistleblowing so that they may consolidate existing knowledge and obtain new perspectives. This study focussed on eight countries, seven EU Member States, Austria, Germany, France, Spain, The Netherlands, Italy and the United Kingdom, with Serbia as a comparative jurisdiction.

1 Interview, Mark Worth, Executive Director, European Center for Whistleblower Rights.

In order to conduct the research, it was determined that a semi-structured interview approach would be most beneficial. This is because there is a lack of accessible and comparable data to conduct accurate statistical analysis. Semi-structured interviews offer the scope to ask a mixture of closed and open questions and supplementary questions based upon the participant's responses. However, semi-structured interviews do not allow for rigorous in-depth comparative analysis. The purpose of the project was not to critically evaluate particular views, provide extensive side-by-side comparisons or to rank or score the different jurisdictions. The views obtained from the participants do not provide a definitive account of whistleblowing in a certain jurisdiction and that is not the purpose of the study. Rather, the purpose is to identify different challenges and approaches for shared learning.

The study comprises interviews with a range of actors, including representatives from civil society organisations, investigative journalists, representatives from public organisations handling whistleblowing concerns, compliance professionals, lawyers and whistleblowers. Participants had the option to be anonymous or to waive their right to anonymity. The project was conducted in compliance with the University of Liverpool's ethics policy and procedures.

WHAT IS WHISTLEBLOWING?

There is no universally accepted definition of the term 'whistleblower.' Arguably, this has a direct impact on national and international policy, on how laws are drafted and how procedures are implemented. The OECD defines whistleblowing as:

"Legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace."²

The OECD definition provides wide scope to capture information under the term 'wrongdoing.' Similarly, the Council of Europe makes reference to the disclosure of information "on a threat or harm to the public interest," it does not seek to define the term 'public interest.' Article 33 of the United Nations Convention against Corruption (UNCAC) does not use the term 'whistleblower' but instead uses the term 'reporting persons' which takes into account the fact that whistleblower may not translate easily into other languages. The Article finds that states should:

"Consider 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 corruption offences."

The aforementioned examples provide an indication of international standards and practice; however, it can be observed that the definitions are far from cohesive. Without a shared understanding of what it means to be a whistleblower and what information can be considered to be 'whistleblowing' it can be difficult for states to understand how to approach the topic.

2 OECD, *Committing to Effective Whistleblower Protection*, 2016, page18: <http://dx.doi.org/10.1787/9789264252639-en>

WHAT IS LEAKING?

The term leaking is arguably as difficult to define as ‘whistleblowing.’ A leak may be considered to be a disclosure of information without official authorisation.³ Leaks are often made from a person inside an organisation to someone based outside,⁴ for example to the media or an online disclosure platform. Alternatively, the information could be self-published using a blog or social media. Leaks are arguably more controversial than examples of whistleblowing using authorised procedures because they are more likely to be done anonymously.⁵ Anonymous disclosures raise questions about the individual’s motivation for leaking. Individuals may suggest that a person could be disclosing documents for malicious purposes; however, it should also be considered that the person could just as easily be fearful of the organisation they are working for. To some, an anonymous disclosure may seem like the only option available in their particular circumstances.

Not all leaks originate from whistleblowers; disclosures could just as easily come from individuals trying to obtain personal or political advantage. The question of when a leaker becomes a whistleblower or whether it is even appropriate to conflate the two terms is not an easy one to answer. However, unauthorised disclosures made to the public are likely to be considered whistleblowing where there is a public interest value in the information disclosed. As this study will identify, the terms ‘whistleblowing’ and ‘leaking’ create difficulties for civil society actors and even the whistleblowers themselves. This chapter will now proceed to outline

several justifications for why society can benefit from whistleblowers based upon the responses from participants in this study.

THE CASE FOR WHISTLEBLOWING

When attempting to define or conceptualise the term ‘whistleblowing’ it is beneficial to consider why societies should be motivated to support and protect whistleblowers. Firstly, Tom Devine, legal director of the Government Accountability Project believes that whistleblowers can have a proactive role: “To me the most significant value of whistleblowers is the freedom to warn because they can prevent unavoidable disasters.”⁶ It is this freedom to warn which illustrates the need to support whistleblowers to raise concerns but also to ensure that organisations deal with concerns in an effective and timely manner. The UK’s Public Interest Disclosure Act 1998 for example was enacted in response to a number of public inquiries into disasters which had detailed that employees had not been listened to or were afraid to speak up because the culture of the organisation and the risk of retaliatory practices.⁷ Whistleblowing is about empowering individuals to speak up. As Martin Jefflén, president of Eurocadres explains:

“Whistleblowing is about basic democratic values and it is about ethics. People should be able to feel comfortable at work. They have a right to freedom of speech and the right to speak up in the workplace. These people should be seen as heroes and they need to have proper protection.”⁸

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- 3 For more detailed analysis beyond the scope of this study see: Ashley Savage, *Leaks, Whistleblowing and the Public Interest: the law of unauthorised disclosures* (Edward Elgar, 2016).
- 4 Unauthorised disclosures can also be made to persons within an organisation who do not have authorisation to view the material.
- 5 Alternatively, disclosures could also be made to a journalist who knows the identity of the individual and then protects the individual as a confidential journalistic source.
- 6 Interview, Tom Devine, Legal Director, Government Accountability Project, United States.
- 7 For example, the Piper Alpha disaster resulted in the loss of 167 lives, see further: The Hon. Lord W. Douglas Cullen, *The public inquiry into the Piper Alpha disaster (1990)* London: H.M. Stationery Office. the Zbrugge ferry disaster resulted in the loss of 193 lives, see: Sir Barry Sheen, *MV Herald of Free Enterprise, 1987*, Report of Court No. 8074.
- 8 Interview, Martin Jefflén, President, Eurocadres (trade union of European managerial and professional staff).

The right to freedom of expression for whistleblowers is now well-established by the jurisprudence of the European Court on Human Rights (ECtHR), however states still have a long way to go before this right is fully appreciated domestically. In determining justifications for the protection of freedom of expression under art.10 ECHR, the ECtHR will focus heavily on the benefit of the speech to society. Veronika Nad of Blueprint for Free Speech identifies the strong role that whistleblowers can play in supporting democratic society:

“Whistleblowers play a crucial role in promoting a more open society. I think democratic societies win the moment we are able to discuss things that aren’t going well publicly, without pointing fingers, understanding the fact that everybody makes mistakes, acknowledging this and trying to give our best as a society and to change the things that are the products of these mistakes.”⁹

Nad’s description of the value of whistleblowing also highlights the opportunity that whistleblowers provide to learn from past mistakes so that things can be rectified to prevent further harm or malpractice

from occurring. One of the challenges in societies is that accountability for past mistakes can often happen years after the event particularly where the accountability and oversight mechanisms have proven to be ineffective. Whistleblowers can bring much needed attention to these issues and much sooner. Finally, it is important to recognise that whistleblowers can also speak up for those who are unable to do so themselves. As Francesca West, chief executive of Public Concern at Work says, whistleblowing can be:

“To protect vulnerable individuals...Certainly, a lot of cases we deal with are in health and care. These people are speaking up because a lot of vulnerable people are at risk and without them having the bravery to question the behaviour of the organisation we’d be seeing a lot more serious tragedies and disasters.”

The aforementioned views provide justifications for why society should support whistleblowers. The next chapter will explore the benefits of an EU-wide directive on whistleblower protection and the potential challenges associated with it.

9 Interview, Veronika Nad, Head of the German Whistleblower Project, Blueprint for Free Speech.

2. WHISTLEBLOWING IN THE EUROPEAN UNION

2.1 INTRODUCTION

In a globalised and networked economy, matters of domestic concern are increasingly more likely to have an international impact. The 2013 horsemeat scandal provides just one example involving multiple jurisdictions that required a multi-national, multi-agency response.¹⁰ Whistleblowers are increasingly raising concerns that have an impact beyond national jurisdictional borders.¹¹ The impact of Antoine Deltour, the Luxleaks whistleblower who disclosed confidential information about tax rulings in Luxembourg, was felt in jurisdictions across Europe and beyond.

On 28 April 2018, the European Commission presented proposals for a draft directive on the protection of whistleblowers. As the explanatory

memorandum states, whistleblower protection across EU member states is fragmented.¹² Therefore, the proposal has the potential to require member states to introduce whistleblower protection laws where they have not already done so and to empower states to strengthen existing laws. However, if the Directive fails to provide comprehensive legal protection, there is a risk that it will undermine rather than strengthen national laws. Many are critical of the current draft and highlight the potential damage if implemented. The purpose of this chapter is to explore some of the benefits of an EU directive by providing the views of a number of important actors on whistleblowing and to focus on some of the challenges and risks posed by the draft in its current form. The aim is not to provide an exhaustive critique of the draft Directive but to highlight key issues of relevance to the study.

10 For consideration of cross-border whistleblowing and the handling of such concerns by regulators and enforcement agencies see: Ashley Savage, *Embracing the challenges and opportunities of cross-jurisdictional whistleblowing* (2018) Anti-Corruption & Integrity Forum: <http://www.oecd.org/corruption/integrity-forum/academic-papers/Savage.pdf>. For more detailed analysis of the role of information sharing across regulatory networks on the topic of food see: Richard Hyde and Ashley Savage, *Coming together to Combat Food Crime: Regulatory networks in the EU*, A Handbook on Food Crime Immoral and illegal practices in the food industry and what to do about them, Policy Press, 2018.

11 Richard Hyde & Ashley Savage, *Cross-border concerns: Perils and possibilities*, [2013] 23 E- Journal of International and Comparative Labour Studies http://adapt.it/EJCLS/index.php/ejcls_adapt/article/view/132

12 European Commission, Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law, 2018/0106. Para 1, Accessible via: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0218>

2.2 BENEFITS OF AN EU DIRECTIVE ON WHISTLEBLOWING

Whistleblowing as a global issue

Whistleblowing is a global issue and it requires a cross-border, multi-jurisdictional response. The European Union provides a foundation for co-operation. Veronika Nad of Blueprint for Free Speech identified that:

“One of the reasons why Blueprint for Free Speech is working on the European level is due to an increasing internal market and less and less borders within companies in Europe. Whistleblowing for us is a European matter because you see that while there are some countries in Europe that have whistleblower laws, others don’t. This increases inequality amongst European citizens on issues where the European treaties foresee equality.”¹³

Inequality amongst European workers can also have an impact on those wanting to blow the whistle. If certain jurisdictions do not have whistleblowing laws in place, citizens based in those countries are less likely to raise issues in the public interest. This can further impact on how organisations perceive whistleblowers and handle concerns. If there are no legal requirements to handle concerns or the whistleblower in a certain way, then organisations will be less likely to act. This creates a risk, not only to citizens in the domestic jurisdiction but also in the other jurisdictions in Europe, particularly where the issue is a common risk (for example, a transport network or a food supply chain). In addition to the above, an EU Directive on whistleblowing will support organisations. Domestic jurisdictions

will be required to adopt the same minimum standards and to incorporate these into national law. Whilst there may be variances in how domestic jurisdictions incorporate the law, the standards are likely to be more similar than they are at present. Organisations will therefore be more able to adopt common good practice and whistleblowing systems across jurisdictions, rather than applying multiple approaches, which may influence how the organisation deals with concerns in different jurisdictions. Articles 4 and 5 of the draft Directive also require public organisations and many private legal entities (including those with 50 or more persons) to establish internal reporting procedures and sets out minimum standards for the operation of those procedures.¹⁴

A catalyst for change in domestic jurisdictions

If implemented, a Directive on whistleblowing could act as a driver for change. Flutura Kusari of the European Centre for Press & Media Freedom suggests that: “...it will finally oblige countries to work on the topic. We’ve seen more countries passing legislation or thinking about it, but this will bring the protection to a whole other level.”¹⁵ The advantage of a directive is that it offers scope for member states to extend protection beyond the directive. As Marie Terracol from the Transparency International Secretariat states: “A directive is quite flexible on how countries decide to implement it nationally, so they are also allowed to go further which is what we will probably push for at a national level.”¹⁶ However, as will be illustrated below, there may be challenges for national acceptance and implementation by member states.

13 Interview, Veronika Nad, Blueprint for Free Speech.

14 For the full list, see art.4(3) of the draft Directive.

15 Interview, Flutura Kusari, European Centre for Press & Media Freedom.

16 Interview, Marie Terracol, Whistleblowing Programme Co-ordinator, Transparency International Secretariat.

Potential impact beyond the European Union

According to Tom Devine, legal director of the Government Accountability Project:

“I think that the directive might have a positive impact on other parts of the world. For example, I hope that it gets approved before Brexit because the English model for whistleblowing has sprung up around the world and all of the former colonies have based their laws on the Public Interest Disclosure Act so if England’s whistleblower law gets updated that could have a nice spill-over effect. I think that the EU directive will become the most common model that people start from and I think it’s going to be a sort of pacesetter globally.”¹⁷

Many states across the globe are in the process of either introducing whistleblower laws or reviewing existing whistleblower protections. The Directive and any national laws, which follow, are likely to serve as a tool for states looking to identify examples of contemporary good practice. Moreover, if implemented, the Directive would also likely have an impact on candidate countries and potential candidates for the European Union who may be keen to be in line with EU on this issue.

2.3 CURRENT AND FUTURE CHALLENGES

Drafting of the directive

Many civil society groups have welcomed the purpose of the draft directive; however, several also have concerns about the way in which the current version has been drafted. Currently, Article 13 of the draft creates conditions for the protection of

reporting persons. According to Anna Myers, the executive director of Whistleblowing International Network (WIN)¹⁸ there are structural problems with how concerns may be raised:

“The two structural problems are the malicious reporting and mandatory internal reporting. Mandatory internal reporting is not the right way of looking at it. It is a bottom up approach, rather than starting from the top – i.e. the public’s right to know and then determining where any limits lie. Even though there are some exceptions [to mandatory internal reporting] they have put these as exceptions only to making a disclosure to one’s employer, as if anything beyond the employer is “going public.” They have put the balancing test for public disclosures at the door of the employer...What they did was take the jurisprudence of the European Court of Human Rights and applied it to any disclosure outside the employment relationship as if regulators are not part of the accountability mechanism but instead are an external reporting outlet for which you can get into trouble.”¹⁹

The wording of article 13 arguably makes the draft directive far more procedurally rigid than laws such as the Public Interest Disclosure Act 1998 which makes it relatively easy to obtain protection for disclosures to an external ‘prescribed person.’ In the United Kingdom context alone, art.13 represents a retrograde step. Further, the focus on penalties for malicious reporting contained in art.17 is potentially harmful to the whistleblower’s position. Whilst the explanation of the Directive suggests that it would ‘ensure that protection is not lost where the person made an inaccurate report in honest error,’²⁰ there is a danger that any such provision is likely to either encourage retaliatory action against a whistleblower, deter individuals from raising concerns or create situations whereby individuals feel obliged to prove

17 Interview, Tom Devine, Legal Director, Government Accountability Project.

18 WIN is a network organisation with members and associates in +35 countries. WIN helps to strengthen the public benefit of whistleblowing by supporting independent non-profit civil society organisations around the world to advise and support whistleblowers.

19 Interview, Anna Myers, Whistleblowing International Network.

20 *Proposal of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law*, 2018/01/6 (COD), Page, 12.

their concerns for fear of action taken against them. As one anonymous compliance professional from the UK said in regard to reporting:

“People should do what they believe is right and the organization, whether or not it turns out what they said was true or not, if they do it for the right reasons, we should support them to the hilt and I think Society should support them to the hilt.”²¹

The provision is not only potentially harmful, it is arguably unnecessary. Many domestic jurisdictions already make provision for malicious and false reporting in existing national laws. The provision in the draft effectively undermines the purpose of the directive to protect whistleblowers and to encourage individuals to report concerns.

In addition to the above, Martin Jèfflen, president of Eurocadres expressed concerns that the directive is too complex for citizens to understand because it requires individuals to determine whether their disclosure would be covered:

“A whistleblower would have to work out if their disclosures are covered by one of a long list of regulations and to be foolproof you need to know the content of each and check to see whether your concern is within the scope.”

As Jèfflen identifies, the problem is that art.10 of the draft Directive requires individuals to review the various relevant regulations to see whether their information would be covered. One must consider whether the ordinary citizen would be aware of their legal rights as a whistleblower, let alone be able to determine whether they are protected after reviewing a large range of detailed and complex provisions.

2.4 DOMESTIC IMPLEMENTATION

Whilst it is hoped that the draft EU Directive, if accepted, will lead to states going beyond the minimum standards required, some participants in this study suggested that there might be resistance to the provisions, which may be based, in part, on historical perceptions of whistleblowers as ‘informers.’ As one anonymous civil society representative suggested:

“Some countries have a troubled history with people ‘blowing the whistle’... For example, in Austria, Germany, Poland and much of the Eastern Bloc there is a history of fascism or communism, where informers were a key part of the state security apparatus. It will take more than an EU directive [on whistleblower protection] to change that cultural context. There will be a long road ahead and I think it will have the most effect in smaller jurisdictions, so some countries in Central/Eastern Europe where they do not have cultural aversions and they have the capacity to invest in a law.”²²

The aforementioned quote highlights the need for awareness raising around the positive impact of whistleblowing on society to dispel myths and highlight positive examples of where whistleblowing can be used to support society. Annegret Falter, chair of Whistleblower-Netzwerk, Germany, also expressed her concern that the minimum standards could be ‘watered down’ by employers and politicians, thus diminishing the overall purpose of the legislation:

21 Interview, Anonymous compliance official, United Kingdom.

22 Interview, Anonymous, civil society representative.

“When the draft directive is adopted one day, Germany will have to implement the minimum standards. However, employers and the conservative party CDU and the liberal party FDP will do their utmost to water down the standards. In particular, they will seek to further reduce the exceptions to mandatory internal reporting. The primary objective is to avoid external reporting and going public.”²³

2.5 CONCLUSION

Whilst it remains to be seen what form the final draft EU Directive will take and whether it will be accepted, it is extremely important that the Directive should strengthen rather than weaken existing protections. Moreover, it is equally important that the Directive be fully incorporated into domestic legislation in a way that provides consistent protection for whistleblowers across EU member states. Martin Jèfflen of Eurocadres identifies a significant challenge:

“We don’t want to create a culture of informants but a culture of transparency. There are echoes from history, particularly in Central Eastern European Countries and this plays an important role in how the directive will be transposed and accepted.”²⁴

It is hoped that the insights into country specific challenges together with the cross-cutting issues contained in the following chapters of this study will provide a useful resource for stakeholders looking to overcome these challenges.

23 Annegret Falter, Chair, Whistleblower-Netzwerk, Germany.

24 Martin Jèfflen, President, Eurocadres.

3. REVISITING THE DEFINITIONS: RE-IMAGINING THE SOLUTIONS

The following chapter provides a thematic discussion comprised of information obtained through the course of in-depth interviews with participants from a variety of different backgrounds. This chapter is split into two parts. Part I deals with the foundations of whistleblowing, how whistleblowing and other important terms might be defined and the potential impact that the use of different terminology and approaches can have in practice. The aim is not to assess whether these approaches are right or wrong, but rather to highlight a number

of key considerations, which may be of benefit to stakeholders working on whistleblowing. Part II of this chapter will discuss the handling of whistleblowers and their concerns. It will identify the impact of poor communication and concern handling. It will also outline the various retaliatory practices and the impact that these can have on personal and family life. The chapter will conclude by suggesting that stakeholders need to consider a comprehensive approach to whistleblowing that aims to deal with the issue at all stages in the process.

PART I: THE FOUNDATIONS OF WHISTLEBLOWING

3.1 DEFINITIONS OF WHISTLEBLOWING

All participants in this study broadly described a whistleblower as someone who raises concerns in the public interest, but many of those interviewed answered differently when discussing who could actually be protected and what sort of information could be classed as a whistleblower concern.

At which point does a person become a whistleblower?

Media stories about whistleblowers often focus on the negative experience of individuals who raise concerns. Vladimir Radomirović, editor in chief of Pištaljka, an organisation that provides support, representation and journalistic services to whistleblowers in Serbia identified that: “Our experience so far is that more often than not whistleblowers are defined by what happens to them.”²⁵ Similarly, Henrietta Hughes, MD, National

25 Interview, Vladimir Radomirović, Editor in Chief, Pištaljka, Serbia.

Guardian for the National Health Service, United Kingdom, also focussed upon the consequences of raising concerns:

“I don’t think people set out in the morning to become a whistleblower. I think people speak up about something that is getting in the way of them delivering good patient care and it’s the response of their organisation that determines whether they are just a person going about their everyday work or they suddenly find that they’re a whistleblower.”²⁶

However, Priscilla Robledo, project manager of Riparte Il Futuro, Italy, recognised that retaliation can often occur, but would not include this in a definition:

“Retaliation is not part of the definition to me because retaliation may or may not happen. But of course it does happen many times and this can depend on the nature of the information concerned.”

When interviewed, two former whistleblowers, Swen Ennulat (Germany) and Nicole-Marie Meyer (France), identified that they did not think that they were whistleblowers. In raising their concerns, they were just doing their jobs by drawing the attention of their superiors to the malpractice. Arguably, it was the consequences of their actions, their mistreatment, subsequent media coverage and engagement with civil society groups, which led to their description as ‘whistleblowers.’

The aforementioned views raise questions as to whether a person becomes a ‘whistleblower’ the moment that they raise a concern, or whether this occurs depending on their treatment because of raising it. By concentrating on retaliatory practices, civil society organisations and media outlets draw attention to important individual stories. This can have a wider impact on awareness raising in the hope

that future whistleblowers will not suffer the same experiences. However, this could also deter future individuals from speaking up for fear of retaliation. A major challenge for those working on whistleblowing is that regardless of the positive outcome of the disclosure, it is often the whistleblower that suffers as a result of raising the concern and it is these stories that feature most prominently in the public domain. The positive outcomes, where individuals raise concerns internally and potentially informally to a line manager or through an internal process in an organisation, are more difficult to quantify. They therefore feature less prominently in the public debates around whistleblowing.

Can a person be called a ‘whistleblower’ if they informally bring something to the attention of their supervisors or should ‘whistleblowing’ confer a special status, possibly requiring certain procedural hurdles and outcomes? Whilst the determination of such status might be desirable for whistleblowers to have clarity at an early stage, it might create administrative burden or challenges at a later stage. If the first interest easily outweighs the latter, the potential impact on the whistleblowing process as a whole would require careful consideration. Whilst it is clear that many whistleblower protection laws and definitions include ‘internal’ disclosures, how the term is perceived and defined can have an impact on when and how people raise concerns. Henrietta Hughes stressed that using the term ‘whistleblowing’ can suggest that there is a threshold that individuals need to meet in order to be classed as a whistleblower.²⁷ This has resulted in the National Guardian’s Office adopting the term ‘speak up’ as an alternative. The impact of this so-called threshold can be observed in the Netherlands where one anonymous whistleblower was repeatedly challenged that they were not a whistleblower as if they needed to meet a certain set of criteria for their concerns to be taken seriously.²⁸

26 Interview, Henrietta Hughes, MD, National Guardian for the NHS, United Kingdom.

27 Interview, Henrietta Hughes, MD, National Guardian for the NHS, United Kingdom.

28 Interview, Anonymous, whistleblower, The Netherlands.

Types of information that may constitute whistleblowing

The civil society actors in France favour a particularly wide public interest definition, free for the courts to interpret depending on the concerns that they encounter on a case-by-case basis. Nicole-Marie Meyer, an expert on whistleblowing and former whistleblower, suggested that:

“...if you make a list of wrongdoing you always forget something, and you discover two years or three years or five years later because of a scandal or tragedy that you forget something.”²⁹

Arguably, a wide definition is consistent with the approach taken by the European Court of Human Rights that deals with the issue of the public interest on a case-by-case basis rather than through a series of defined categories of information. However, this also raises the question of whether all types of information could constitute a whistleblowing disclosure. For example, a wide, and possibly undefined, definition of the public interest allows the scope for individuals to raise concerns about matters of policy. Should civil servants be able to disclose policy documents to the media because, based on their professional experience, they believe a particular policy to be wrong? Should disclosures about unethical or immoral conduct also be covered in the law and in a definition of whistleblowing? Tom Devine, legal director of the Government Accountability Project (GAP) in the United States notes that:

“In the United States, you are not protected under the Whistleblower Protection Act for saying that a policy is wrong, but disclosing the consequences of a policy is covered by the law. So, you’re not protected if you say that a policy is wrong or short-sighted but you’d be protected if you said that the effect of that policy is going to be a thousand needless deaths.”³⁰

Devine’s explanation of the approach in the United States also provides potentially useful guidance for whistleblowers in other jurisdictions. By concentrating on the harm or risk caused as a result of a policy, rather than the policy itself it becomes easier for individuals to identify the public interest value of the concerns, thus making it more likely that the disclosures will be considered to constitute ‘whistleblowing.’

There is a distinction between a concern which identifies a clear breach of the law, and a concern which may not be illegal but appears to show individuals or organisations subverting the purpose of the law. This is particularly problematic where the information disclosed concerns complex areas of law across multiple jurisdictions. The LuxLeaks disclosures, where Antoine Deltour disclosed information detailing tax avoidance provides an example of this. Deltour, has been accepted as a whistleblower, not only by society, but also finally by the courts who applied the jurisprudence of the European Court of Human Rights. A recent Eurocadres report authored by Anna Myers, director, Whistleblowing International Network and David Lewis, professor of Employment Law, Middlesex University highlight the difficulties associated with the public interest, including that this “makes it difficult to advise someone whether or not they will be protected if they raise a concern.”³¹

Ethics and morality issues can also be problematic, particularly where, depending on the individual circumstances, these tread the fine line between illegality and immorality. Some participants of this study identified that due to media interest and the debate around sexual harassment and the #metoo campaign, these issues were increasingly being seen as whistleblowing. Public Concern at Work, which categorises concerns on its free helpline as ‘public’ (generally whistleblowing) and ‘private’ (generally not whistleblowing) identified a shift in

29 Interview, Nicole-Marie Meyer, former whistleblower and expert on whistleblowing, France.

30 Interview, Tom Devine, Government Accountability Project, United States.

31 David Lewis and Anna Myers, Cross-border workers at risk: The case for an EU-wide whistleblower protection, Eurocadres, 2018, p.20: <https://drive.google.com/file/d/1pcyqcltHTHhPRhsmObFkomE7AktxDGmu/view>

understanding. Francesca West, chief executive of Public Concern at Work, UK, said on the issue of sexual misconduct:

“...Whilst in the past it might have been seen as a personal issue if someone had suffered sexual harassment at work, increasingly the conduct of the harasser in the workplace might be seen as a public interest issue, and because there is a wider context to their behaviour in the workplace....”³²

Two of the organisations interviewed for this study made the determination to keep sexual misconduct and harassment and their compliance whistleblowing systems separate. Lufthansa Group initially tasked their ombudsman who deals with whistleblowing to also receive sexual misconduct concerns.³³ After wanting to keep the compliance system separate to sexual harassment issues, a new external ombudsperson system was set up specifically tasked to deal with these issues (alongside internal reporting channels).³⁴ Similarly, in Austria, an anonymous compliance official for a major Austrian company identified that sexual misconduct and bullying issues were dealt with by a labour psychologist, separate to the compliance function.³⁵ The company had considered whether it was appropriate to include sexual misconduct reporting as part of their online BKMS whistleblowing system but instead decided to keep the functions separate. Priscilla Robledo, project manager, Riparte Il Futuro, Italy, expressed concerns regarding the impact that the #MeToo campaign was having on the definition of whistleblowing:

“#MeToo is not whistleblowing, but is a digital social movement on something which led to a general awareness in society of sexual harassment in the workplace. This is amazing what happened, this is exactly what social movements are for, to trigger a change in mind-set and practices but that doesn't

mean that the first person who did the #metoo thing was a whistleblower. I am against this mixing up of definitions, every time I get a chance to be reported by the media I tend to specify and use words correctly.”³⁶

To what extent should legal definitions contained in whistleblower protection laws define what types of information should constitute how society defines ‘whistleblowing’? Regardless of how the courts deal with whistleblower protection, determinations on the ‘public interest’ in everyday life are more likely to be based on the subjective assessments of individuals: whether the whistleblower believes that their concern is in the public interest and later, whether the recipient and wider society agrees. Members of society are arguably more likely to reach agreement that a concern is in the public interest where there are clear breaches of law or where the concern discloses evidence of malpractice of a serious nature, for example gross-mismanagement (which might not be covered by the whistleblowing protection law in that jurisdiction). However, individuals disclosing information about policy and practices or ethical issues may encounter difficulties in convincing others that their concerns should be classed as whistleblowing.

If the definition is restricted to the law, and the law is restrictive in scope, this may deter individuals from raising concerns and provide justifications to not protect those that do. If the definition is extremely wide and all encompassing, there is a danger that the term ‘whistleblowing’ may be appropriated for all manner of circumstances and may influence the policy messages that the civil society groups and others are attempting to use to increase awareness. A lack of distinction might also create challenges for those who are responsible for handling different incoming concerns.

32 Interview, Francesca West, Chief Executive, Public Concern at Work, United Kingdom.

33 Interview, Dr. Stephan Zilles, Corporate General Counsel, Chief Compliance Officer, Lufthansa Group.

34 Interview and follow-up correspondence, Sebastian Reick, Head of Corporate Compliance Strategy & Processes, Lufthansa Group, Germany.

35 Interview, Anonymous, compliance professional, Austria.

36 Interview, Priscilla Robledo, Project Manager, Riparte Il Futuro, Italy.

Who should be classified as a whistleblower?

Responses from participants in this study highlight that the ‘traditional’ perception of whistleblowers being employees in an organisation is changing. Lotte Rooijendijk, communications and project officer, Transparency International Nederland, of the Netherlands identified the other types of individuals who could be classified as a whistleblower:

“This could be as an employee, but it could also be as an intern, freelancer, volunteer or third party who sees something that goes wrong and wants to support it. We lobbied for [these other persons] to be included in the law. We think that this perspective is actually really important because you see that employees are more involved and that can be more difficult to have a clear perspective, or they might even be part of the problem as well. Interns and volunteers [etc.] have a perspective that’s a bit more at a distance.”³⁷

The above perspective provides a very useful justification for protecting individuals who may not be employees but are still engaged in the activities of the organisation. By not being employees in the traditional sense these individuals may be able to provide a different outlook on the concern, may be less institutionalised and more willing to speak up than well-established employees. The inclusion of a wider scope of individuals was also favoured, in particular, by Priscilla Robledo, of Riparte Il Futuro, Italy, who stated that:

“Whether they are volunteers, part-time workers, full-time workers, consultants, contractors, employees of the contractors, the public interest is more relevant than the legal definition of an employee.”³⁸

A wide definition of ‘whistleblowing’ that encapsulates a number of different types of

individuals increases the scope for important public interest concerns to be raised, but should there be limits to this scope? For example, in France, Glen Millot of Sciences Citoyennes argues that legal entities (for example civil society organisations) should also be included in the definition:

“Our concern is not mainly about protection, but about having the concern addressed. What we want is to have some sort of organisation or agency being able to receive these disclosures even if they are from a legal entity and not only citizens.”³⁹

Transparency International France and Sciences Citoyennes do not agree on the inclusion of legal entities in the definition of whistleblowing. It can be observed that Millot’s inclusion of legal entities is principally motivated by the handling of whistleblowing concerns. Similarly, Giorgio Frascini, of Transparency International Italy, believes that it “was a mistake to not include civil society organisations in the Italian law.” Transparency International Italy has an agreement protocol with the Italian Anti-Corruption Agency (ANAC) to support their handling of whistleblowers:

“What we are doing, along with them, is to make people understand whether their report is a whistleblowing report or a personal grievance and if they have enough information to report because most of the time it is hearsay, something that they have heard, and it’s not really qualified to be addressed by someone.”⁴⁰

The various definitions of whistleblowing can be driven by particular societal needs and the aims and objectives of particular organisations. How society defines the term can impact on the drafting of laws, procedures and policy and on how concerns are handled in practice. It can also affect the perspectives and experiences of the individuals who speak up. The aforementioned views suggest that it is no longer appropriate to think of whistleblowing just

37 Interview, Lotte Rooijendijk, Communications and Project Officer, Transparency International Nederland, The Netherlands.

38 Interview, Priscilla Robledo, Project Manager, Riparte Il Futuro, Italy.

39 Interview, Glen Millot, Sciences Citoyennes, France.

40 Interview, Giorgio Frascini, Transparency International Italy.

in the employment law or traditional employment relationship context, but something that is capable of a wider application.

3.2 LEAKING: DEFINITIONS AND VIEWS

The terms ‘leaker’ and ‘whistleblower’ can often be conflated and there is continuing debate of when a disclosure by an individual can constitute a leak and when it can constitute an act of whistleblowing. These disclosures are often made to the media or via an online disclosure platform and are likely to be made either anonymously (without the journalist knowing the individual’s identity) or confidentially, whereby the journalist will protect the individual’s identity as a journalistic source. Naomi Colvin, director of the Courage Foundation, makes a distinction between leaking and whistleblowing based on the public benefit of the disclosure:

“A leak can be a politically motivated disclosure which is done from the inside for political benefit. I think that a ‘leak’ is probably a broader category. With whistleblowing, the term indicates that it’s a good thing to do, it is done for the public benefit rather than for a partisan game.”⁴¹

By making a distinction between disclosures purely for personal reasons and disclosures aimed at supporting the public interest, it becomes easier to determine where a disclosure to the media might constitute whistleblowing. However, this is likely to be based upon the journalist’s assessment of the person disclosing the information (if possible and if known) and the substance of the information. Media outlets are increasingly turning to online disclosure platforms to support their work. For example, PubLeaks in the Netherlands allows for journalists to communicate with the whistleblower whilst the individual can choose to remain anonymous.⁴² This allows the journalist to ask why the person

is disclosing the information whilst safeguarding anonymity.

Whilst whistleblowing disclosures could be made immediately to the media, they could also be a result of the poor handling of concerns or the culture in an organisation: Henrietta Hughes, MD, National Guardian for the National Health Service, United Kingdom, opined that:

“I think if somebody goes outside of the regulatory framework, e.g. to the press, then it’s really about saying what was their experience before they did that? Was that their first act? If it was, that really would be quite unusual it’s certainly not one that I’ve come across. It’s really about unpicking to say what went wrong in the initial speaking up that lost that trust.”⁴³

Nicole-Marie Meyer, an expert on whistleblowing, draws a distinction between the different types of individuals who can make contact with journalists:

“I think that for me a whistleblower can be anybody who discovers wrongdoing or harm or threat to the public interest. The aim is not transparency; it is to put an end to the wrongdoing. I think that the aim of the leaker is perhaps more to give information to the wider public with an ideology of transparency. A whistleblower if they can’t find another way will only become a leaker if the other ways don’t work. They will not choose to leak straight away but if they don’t find another way then they will be obliged to do that, and I suppose that for very big scandals you have no other way. Also, some leakers can be a source for a journalist without being a whistleblower. A whistleblower, a leaker, a source for journalists, these are three different things.”⁴⁴

Whether intended or not, definitions can have an impact on the whistleblower and the message they are trying to convey. Robert Mclean, a United States whistleblower, expressed concerns that the press

41 Naomi Colvin, Director, Courage Foundation, United Kingdom.

42 Interview, Marcel Oomens, Free Press Unlimited, The Netherlands.

43 Henrietta Hughes, MD, National Guardian for the NHS, United Kingdom.

44 Interview, Nicole-Marie Meyer, former whistleblower and expert on whistleblowing, France.

had, on occasion, called him a “leaker” rather than a whistleblower.⁴⁵ Andrea Franzoso, a whistleblower in Italy, said that papers had referred to him as ‘deep throat’ and that this showed a lack of understanding of whistleblowing.⁴⁶ It is suggested that those working on whistleblowing should consider strategies for awareness raising to consider what terminology may be most appropriate for use in their jurisdiction when describing whistleblowers and what terms may lead to negative perceptions.

3.3 VIEWS ON ANONYMITY

It should be considered whether anonymity should be part of the whistleblowing process. Where individuals choose to raise concerns anonymously, rather than on a confidential or self-identified basis, this can impact on how the individual and the disclosure is perceived. An anonymous compliance professional, based in Austria identified that:

“There are a lot of psychological reasons behind it and whistleblowers are not always the heroes. They can be angry employees or angry spouses of employees and the hints may not be given with integrity. I think that if the hints are about breaches of the law or policy then it is less important for these people to be anonymous. But if they have hidden motives, if the hints are not so honest and maybe not given with integrity then maybe it is more important for them to give these hints anonymously.”⁴⁷

Whilst anonymity increases the likelihood that the whistleblowing system could be abused or utilised for malicious purposes, whistleblowers may also raise concerns anonymously because of fear of retaliation or because the system in their organisation allows for it. Many organisations are increasingly adopting automated whistleblower platforms such as BKMS which allow the disclosure of anonymous ‘hints.’ The

whistleblower and the recipient can communicate without the identity of the whistleblower being revealed. Priscilla Robledo, of Riparte Il Futuro, Italy, identifies the benefit of anonymous reporting:

“I think that the debate on anonymity is wrongly framed so [we should] start from what is happening in practice, in reality. Data tells us, and I am citing a report from the Association of Certified Fraud Examiners, that more than half of internal corporate fraud has been detected through anonymous tips. It tells us that if we want to prevent crime from happening we need to allow for anonymous reporting as do we want to allow ourselves to lose half of the reported crimes to be investigated?”⁴⁸

Opinions will continue to differ as to whether anonymous whistleblowing is acceptable, however these disclosures do happen and there are justifications for anonymous disclosures to be accepted. The approach to this topic also differs depending on the jurisdiction in question, for example, in Italy, whistleblowing disclosures to the anti-corruption authority, ANAC, can be made anonymously but not confidentially. Approaches can also differ depending on the organisation receiving the concern. Research on responses to whistleblower concerns by regulators in the United Kingdom by Savage and Hyde identified that some regulators did not accept anonymous disclosures.⁴⁹

3.4 WHERE WHISTLEBLOWING COULD BE PERCEIVED AS HARMFUL

Several participants provided views as to where whistleblowing may be perceived as negative or harmful to society and the public interest:

45 Interview, Robert Mclean, whistleblower and U.S. Air Marshall, Transportation Safety Administration.

46 Interview, Andrea Franzoso, whistleblower, Italy.

47 Interview, Anonymous, compliance professional, Austria.

48 Interview, Priscilla Robledo, Project Manager, Riparte Il Futuro, Italy.

49 Ashley Savage and Richard Hyde, *The Response to Whistleblowers by Regulators: a practical perspective* [2015] 35 Legal Studies 3: <https://doi.org/10.1111/lest.12066>

National security

A number of participants highlighted national security as being potentially harmful. Lotte Rooijendijk of TI Netherlands suggested that the risks could be mitigated against by providing for strong internal procedures:

“When it’s about national security, I think that there should be a very clear and good internal reporting procedure. I think the guarantee of anonymity is very important as well... We have the media as the last possibility. We always say, it’s best to report internally first because that’s where the problem is and if you want to solve something then you [should] start internally.”⁵⁰

Jurisdictions such as the United Kingdom have displayed a reluctance to include a public interest defence for unauthorised disclosure offences such as the Official Secrets Act 1989. National security whistleblowers need to be heard but this creates an inevitable and unavoidable tension between the needs of the state to keep information secret and the needs of society to receive important information in a democratic society. The Tshwane principles identify:

“Criminal action against those who leak information should be considered only if the information poses a ‘real and identifiable risk of causing significant harm’.”⁵¹

However, there has been a traditional reluctance for states to be prepared to outline the harm caused by unauthorised whistleblowing disclosures. This is often based on the argument that disclosing information as to the harm caused would create further harm to national security. Moreover, official secrecy laws often protect executive candour. A point, which is often missed in the wider debate

on national security. Executive candour allows officials to explore and test ideas of policy, (a healthy and important part of government decision making) without fear that the information will be leaked. If officials knew that the information would be made public, they may fail to engage in these important policy discussions. However, this must not be used as a justification for excessive secrecy or harmful decision-making. It is here that whistleblowers face particular challenges, at what point can it be acceptable for whistleblowers to disclose policies to which they do not agree and how can they do so without risking prosecution for official secrecy offences? For states that ascribe to the jurisdiction of the European Court of Human Rights, there is no escaping the fact that national security whistleblowers are capable of receiving protection where the public interest value of the information is so strong that it outweighs the very high countervailing interest in national security. In *Bucur and Toma v Romania*, disclosures to the media regarding illegal wiretaps were considered to be protected by article 10 of the European Convention of Human Rights.⁵²

Malicious intent and false accusations

Kristof Wabl, Partner Forensic Services, PwC Austria and Task Force Leader for Whistleblowing at Transparency International – Austrian Chapter identified that:

“Whistleblowing could cause harmful or negative consequences when whistleblowers reveal information, which is — knowingly or unknowingly — incorrect.”⁵³

The aforementioned quote raises the question as to how the law and society should deal with

50 Interview, Lotte Rooijendijk, Communications and Project Officer, Transparency International Nederland, The Netherlands.

51 *Global Principles on National Security and the Right to Information “The Tshwane Principles”*, 2013: [https://issat.dcaf.ch/download/22892/289132/Global%20Principles%20on%20National%20Security%20and%20the%20Right%20to%20Information%20\(Tshwane%20Principles\)%20-%20June%202013.pdf](https://issat.dcaf.ch/download/22892/289132/Global%20Principles%20on%20National%20Security%20and%20the%20Right%20to%20Information%20(Tshwane%20Principles)%20-%20June%202013.pdf)

52 *Bucur and Toma v Romania* [2013] Application No 40238/02.

53 Response to questions by email, Kristof Wabl, Partner Forensic Services, PwC Austria, Task Force Leader Whistleblowing at Transparency International – Austrian Chapter.

whistleblowers who unintentionally raise concerns, which are incorrect. In the United Kingdom for example, the Public Interest Disclosure Act 1998 uses the term ‘reasonable belief’ that effectively allows individuals to obtain protection if they raise a concern to their employer with a reasonable but mistaken belief that their concern is valid. Whistleblowers are likely to encounter more difficulties where the law their jurisdiction uses good faith as a key requirement for protection. The disclosure of inaccurate information will clearly allow respondent organisations to challenge the whistleblower on good faith grounds. One must also consider to what extent a whistleblower should attempt to test or prove that their concern is valid before raising it and the potential risks, which may be attached to doing so.

To safeguard a person’s employment position

Concerns can be raised by individuals attempting to safeguard their own personal employment position. For example, an anonymous compliance professional in the United Kingdom identified that:

“...we...see people using the whistleblowing service for their own personal benefit. When people are at risk of redundancy all of a sudden people will blow the whistle, say they have blown the whistle and therefore they can’t be sacked.”⁵⁴

Similarly, a compliance official in Austria identified that the thought process behind the raising of the concern was relevant:

“Every person, every decision isn’t as objective as it might seem, a whistleblower protection law helps but you have to take psychology into consideration because otherwise people will try to claim that they are a whistleblower so that they can have a fixed job position and not be fired.”⁵⁵

There is clearly a difference between individuals who raise false or minor non-consequential concerns to safeguard their employment position and the raising of public interest concerns. It is advised that a distinction should be made between the concern and the person raising it. Regardless of motive, individuals may still provide important information, which needs to be addressed. The relationship between employees and managers or colleagues, can often be complex. Whilst the employee’s motivation for raising the concern may be useful for investigators, this should not be a determining factor as to whether organisations should investigate. The conduct of the whistleblower is better considered as part of a judicial process, if it needs to be considered at all. There is a notable shift in many jurisdictions covered by this study towards laws, policies and practices, which focus on the concern raised rather than the person who raised it.

3.5 SOCIETAL CULTURE

Many participants interviewed stressed the need for society to support whistleblowers, for example, Carlota Tarín of Fundación Hay Derecho identified that:

*“If society would really support them and what they do, whistleblowers would feel supported and that would make the process easier. It is really important that the law recognises that whistleblowers are valued by society and what they do is good for all of us.”*⁵⁶

Many interviewees in different jurisdictions referenced societal culture as a reason for whistleblowers to not be fully accepted by society. In several jurisdictions, interviewees referenced the impact of history on societal perceptions of whistleblowers. For example, Lotte Rooijendijk of TI Netherlands and Annegret Falter Whistleblower-Netzwerk referenced the use of informants

54 Interview, Anonymous, compliance professional, United Kingdom.

55 Interview, Anonymous, compliance professional, Austria.

56 Interview, Carlota Tarín, Research Manager, Fundacion Hay Derecho, Spain.

during World War II as relevant to perceptions on whistleblowing. Glen Millot identified that during a debate on whistleblowing before the Senate in 2013, reference was made to the ‘ghost of Vichy,’ acts of denunciation during the Second World War. Millot identified that perceptions changed once the first whistleblowing law (on environmental issues) came into force. Marie-Agnés Vieitez, a compliance professional based in France provided her views regarding history and its impact particularly on the acceptance of anonymous whistleblowing:

“I always had trouble understanding the ‘continental Europe’ reluctance towards anonymous whistleblowers. For a long time, it was said that because of WWII, those who wanted to remain anonymous could not be trusted. I do not think it’s correct. Anonymity is the measure of fear of retaliation not the measure of bad faith.”⁵⁷

All of the aforementioned participants identified that old perceptions were changing, however this information still provides an important consideration for civil society groups and policy makers who may encounter resistance against whistleblowing based upon mistaken perceptions or outdated beliefs. In Italy, Andrea Franzoso, a whistleblower in a publicly owned company, made reference to a well-known Italian proverb:

“In Italian we have a proverb which says that ‘Who spies is not the son of Mary’... I would like to replace this proverb with another one, ‘who keeps silent agrees’ so by keeping silent a person is an accomplice to the ‘wrongdoing’.”⁵⁸

Whether based on historical perceptions or tradition, these experiences reinforce the importance of awareness raising on whistleblowing, identifying the positive impact that whistleblowers can have

on society. Giorgio Frascini, Transparency International – Italy highlighted that he believed the problem in Italian society was with regard to how recipients dealt with the concerns:

“I think the cultural problem is in the recipients. They are not ready, and they don’t understand what it means to provide people with a safe path to reporting. They don’t understand the economic value of a good report.”⁵⁹

Similarly, in the United Kingdom, Francesca West, of Public Concern at Work, United Kingdom, stated that:

“I think there is a grass-roots factor that perhaps hasn’t been taken into account as much as it should be. I don’t think people really think about what their responsibilities are how they should behave towards how people raise concerns in the workplace and that comes down to the need for much better education.”⁶⁰

The aforementioned quotes highlight that awareness raising should comprise of a multi-level approach, concentrating at high legal and policy development levels (executive, legislative and parliamentary), the courts and judiciary (judges and court officers) the legal implementation level (government departments and agencies), the media (traditional print media, television and modern platforms) the external agencies receiving concerns (regulatory and law enforcement), and employers (public and private organisations). A multi-level approach would have the benefit of ensuring that no matter who raises the concern or how, the recipients of the information will have a more developed understanding of how to deal with the concern and crucially how to respond, support and protect the whistleblower.

57 Interview, Marie-Agnés Vieitez, Le Cercle D’Ethique Des Affaires, France.

58 Interview, Andrea Franzoso, whistleblower in a publicly owned company, Italy.

59 Interview, Giorgio Frascini, Transparency International Italy.

60 Interview, Francesca West, Chief Executive, Public Concern at Work, United Kingdom.

PART II: THE HANDLING OF WHISTLEBLOWERS AND THEIR CONCERNS

3.6 RESPONDING TO WHISTLEBLOWERS' CONCERNS

Where organisations fail to respond to a whistleblower or leave a significant period of delay without keeping a whistleblower informed this can have a detrimental impact, not only on the individual who raised the concern but also on the culture of the organisation as a whole. According to an Anonymous National Health Service whistleblower in the United Kingdom:

“If people are ignored it sends a terrible message. People learn to shut up. It can be quite subtle because it doesn't have to be full blown whistleblowing that gets ignored because people often test out the waters by half making disclosures or providing an indication that something might not be quite right. If they are not listened to, they will not raise the more serious concerns.”⁶¹

The concept of individuals ‘testing the water’ by first raising minor concerns was also identified by Henrietta Hughes, MD, national guardian for the National Health Service, UK, who advises the ‘speak up guardians’ (individuals tasked to receive whistleblowing concerns) to take concerns seriously, no matter how minor they may appear:

“...if somebody's coming to you about something that seems really unusual or minor be grateful to them because that could be them testing you to see whether you're going to be trustworthy for the bigger thing and we've got examples where people have gone to a Guardian about a couple of small things and then they come with something really major.”⁶²

Interviews with compliance officials in several jurisdictions also suggest that it is good practice for organisations to take all concerns seriously, no

matter what the content or intention. In explaining the concern handling process, Sebastian Reick of Lufthansa Group said:

“First of all, we take every hint seriously. It is worthwhile for us to do so because there might be a serious problem behind it.”⁶³

Based on the aforementioned quotes it can be identified to be good practice to ensure that recipients respond to the whistleblower and at least make a preliminary assessment of the concern. In addition, it is extremely important that the whistleblower is provided with updates as to what is being done about the concern. As Priscilla Robledo of Riparte Il Futuro, Italy says:

“...handling the concern and keeping the whistleblower updated is crucial in order to encourage people to speak up because psychologically data again shows us that people are not inclined to blow the whistle because they believe that the disclosure will lead to nothing. If the receiving organisation follows up on the report, you know that this promotes a transparent environment...”⁶⁴

Several whistleblowers interviewed for the purposes of this study identified the impact that a lack of communication as to whether the concern had been dealt with had on their experience of raising concerns. Those who raise concerns need to know that they are being listened to. If they are not told that the concern has been, or will be, addressed, this can create unnecessary anxiety, suggesting to the whistleblower that the issue will not be dealt with and that the risk of harm or malpractice continues. For whistleblowers who raise concerns internally, this could act as a prompt to take the risk to make

61 Interview, Henrietta Hughes, MD, National Guardian for the National Health Service, United Kingdom.

62 *Ibid.*

63 Interview, Sebastian Reick, Head of Corporate Compliance Strategy & Processes, Lufthansa Group, Germany.

64 Interview, Priscilla Robledo, Project Manager, Riparte Il Futuro, Italy.

external unauthorised disclosures to the media. For others in the organisation, this will serve as a message that they will not be taken seriously. Effective communication and the prompt handling of concerns are key to a healthy whistleblowing culture.

3.7 IMPACT FOR THE WHISTLEBLOWER

Workplace retaliation

Retaliation is not always immediate, and it is not always immediately obvious. Ton de Wijs, a psychosocial care worker for the Whistleblowers Expert Group and House for Whistleblowers, The Netherlands, provided a detailed explanation of how organisations can retaliate against whistleblowers:

“With whistleblowers you think you are in a civilised country and you can rely on justice and that people will support you, but you suddenly realise that the means that are there to support you are put against you. So, the human resources department is finding out how they can fire you or the [company] gets in a mediator for you but after a few sessions you feel he is pushing you towards the exit of the company. There are all kind of things happening which do not correspond with your vision of what is normal. You see people losing self-confidence, people losing a grip on their situations and thinking they must be mad. On the other end, you find yourself isolated at work, people don’t talk to you anymore, your manager suddenly has all kinds of talks with you saying that things are not going well when beforehand there was nothing.”⁶⁵

The aforementioned quote highlights that it is important to consider the retaliation of whistleblowers as a process, which can result in a number of continuing efforts to retaliate against a whistleblower rather than a single act of detrimental treatment or dismissal. This is particularly relevant for those considering the drafting of whistleblowing laws and implementation in practice. We must consider protecting whistleblowers much sooner in

the process before the situation causes irreparable harm. Many whistleblowers effectively experience a process of ‘attrition’ whereby employers can continue to retaliate against the whistleblower through ‘express/hard’ measures such as litigation and court action requiring expensive legal resources that many whistleblowers simply do not possess to more ‘implied/soft’ measures such as removing whistleblowers from their duties leaving them with little or nothing to do. This tactic was highlighted in particular by whistleblowers Andrea Franzoso in Italy and an anonymous police officer in Serbia.

Loss of employment

Quite obviously one of the most common retaliatory techniques is to dismiss the whistleblower or to make the situation so unbearable that the whistleblower has no choice but to leave the organisation. Whilst the whistleblower can take action through litigation or via the courts, it is important to stress that this does not always end in positive outcomes, even if the whistleblower wins their case. Stéphanie Gibaud, a whistleblower who raised concerns at the bank UBS, faced court action for defamation after publishing a book on her experiences. She also took a court case against UBS for her treatment:

“The court made judgments where I was not found guilty of defamation against the bank, later I also won for the harassment I suffered at the bank, but I was a homeless person. It was five years of my life, I had to go to court, I had to pay lawyers, I won but so what? It doesn’t give me the right to have a job anymore, it doesn’t give me my dignity back. The procedures were awfully long but on purpose.”⁶⁶

Whilst Gibaud’s experiences were prior to the enactment of the Sapin II whistleblower protection law in France her comments highlight the need for ensuring that whistleblowers who seek protection from the courts do not face unnecessary delay and that, where possible, they have access to free legal advice, representation and other funding to provide assistance. In addition, this highlights the need for

65 Interview, Ton de Wijs, psychosocial Care for the Whistleblowers Expert Group and House for Whistleblowers, The Netherlands.

66 Interview, Stéphanie Gibaud, whistleblower, France.

considering how courts and judges can be supported to deal with whistleblowing cases in an effective and timely manner whilst observing well-established principles concerning the administration of justice.⁶⁷

Impact on mental and physical well-being

Ton de Wijs of the Expert Group for Whistleblowers in The Netherlands identified that the effects of whistleblowing can be long lasting:

“I cannot speak for the whole population, only those I see but whistleblowers are very effected by this, even years afterwards. They resent the situation that they had to give in. They are still mentally occupied with the whistleblowing. You see a lot of people who are very disappointed in society and they tend to put distance between themselves and society. People still haven’t coped with the psychological aspects of whistleblowing and if they have physical complaints some are irreversible after some time (e.g. a heart attack).”⁶⁸

De Wijs' insights suggest that the focus on whistleblowers must be provided at a much earlier stage in the process. Civil society organisations and policy makers should aim to attribute sufficient focus, and where possible resources, to supporting the effective handling of whistleblowers and their concerns by organisations, in order to prevent the negative outcome of whistleblowing rather than focussing purely on whistleblower protection laws which provide a way for whistleblowers to take action after they have suffered negative consequences. The aforementioned insights also suggest that consideration needs to be given to provide psychosocial support to whistleblowers, in addition to legal advice and assistance.

Physical threats

Physical threats of violence may be a less common occurrence of raising concerns, but they do happen. For example, Nicole-Marie Meyer was forced to hire a bodyguard to protect herself after finding out that the person she accused had obtained the services of a hitman.⁶⁹ In Serbia, an anonymous whistleblower, a police officer who raised concerns about police corruption, described an incident whereby the individual’s apartment was fired upon in the middle of the night, causing a risk of serious harm to the whole family.⁷⁰ The police officer moved several times over the course of a short number of weeks but did not feel able to trust his superiors to provide his new address. Vladimir Radomirović, editor in chief of *Pištaljka*, also based in Serbia identified that:

“The most common form of retaliation is termination of contract but there are also some more severe forms of retaliation where the persons who were reported by the whistleblower would go to any lengths to threaten and force the whistleblower to be silent including threats against families. Six months ago, there was a case in Novi Sad [the second largest city in Serbia] where a person who assisted a whistleblower to report on corruption had his car set on fire in front of his apartment building...”⁷¹

Threats of violence can be used to silence the whistleblower but they can also be used to send a message to others working in the organisation of the potential consequences if they speak up. It is therefore vitally important that threats of physical retaliation are sufficiently considered as part of whistleblower protection laws and policy and that investigators have adequate resources to provide appropriate protection where required.

67 For example, Pištaljka in Serbia provides training to judges and prosecutors.

68 Interview, Ton de Wijs, psychosocial Care worker for the Whistleblowers Expert Group and House for Whistleblowers, The Netherlands.

69 Interview, Nicole-Marie Meyer, France.

70 Interview, Anonymous, whistleblower, Serbia.

71 Interview, Vladimir Radomirović, Editor in Chief, *Pištaljka*.

Impact on family life

All of the whistleblowers interviewed for this study identified that whistleblowing had had a negative impact on their personal life. One anonymous whistleblower in The Netherlands identified that their partner had been very supportive, but it had impacted on other areas of normal, every-day family life:

“... Because of the fight I am in, if something happens or you have to go to a teacher to arrange things I have had a time when I was very tired of fighting and I have also had a time when my friend had troubles and I normally I would have stood up for her. I was very passive and that’s not what I’m normally like.”⁷²

An anonymous whistleblower in the United Kingdom expressed regret for having to put their partner through the situation. In some cases, the retaliatory practices of organisations can be directed, not at the whistleblower but directly at their loved ones. When Anthony Jacobi raised concerns, he was later accused of running an ‘erotic business’ with the inference that his wife was involved in prostitution:

“I had to tell my wife. I couldn’t keep it a secret. She was from Russia and if you say this in Russia about somebody’s wife, trust me, they are going to get you. She kind of expected me to do the same thing. I told her that I have a good lawyer and I am going to win this. She didn’t think that was enough. I was lucky to win my lawsuit and keep my job, but she had an abortion. She said she ‘didn’t want the dad of my kid to be a loser like you.’ I took her to the clinic and after I brought her home I checked myself into a crisis centre and I was really glad to be there...I lost everything that I had. My career was over, I was completely broke and because I had a very good lawyer I had a 12,500 euro bill to pay.”⁷³

All of these experiences highlight why society needs to support whistleblowers, before, during and after the process of raising concerns.

3.8 CONCLUSION

Where various stakeholders provide differing views on how the term ‘whistleblowing’ might be defined, by focussing on the general importance of whistleblowing for society and the public interest they are much more likely to find common ground. Whilst jurisdictions may face culturally specific challenges, these challenges actually create similar barriers to the acceptance of whistleblowers. The various actors working on whistleblowing can therefore benefit from experiences in other countries, learning from the different approaches and identifying practices, which could be adopted in their own jurisdiction.

The types of retaliation suffered by whistleblowers are notably similar regardless of the jurisdiction and this highlights the potential benefit of an EU-wide directive on whistleblower protection, which aims to counter the different forms of retaliatory practices. It was apparent from a number of individuals interviewed for this study that a whistleblower protection law is not enough. All of the whistleblowers interviewed for this study wanted their concerns to be addressed after they raised it and for more support during the process. Of course, all of the whistleblowers interviewed for this study had encountered negative outcomes. More detailed in-depth research in multiple countries is needed to identify positive outcomes of whistleblowing. This would be beneficial for the purposes of learning the lessons of why these experiences were positive so that organisations could benefit from examples of good practice, but these experiences could also act as an important resource for the positive promotion of whistleblowing in society. This study finds that a multi-stakeholder, multi-level approach is necessary to maximise whistleblowing as a positive tool for change in society.

72 Interview, Anonymous, whistleblower in a local authority, The Netherlands.

73 Interview, Anthony Jacobi, Probation Service whistleblower, The Netherlands.

4. CONCLUSION

The insights in this study identify that we should not only deal with the whistleblowing concerns much further upstream, but we should also support whistleblowers much earlier in the process by ensuring that not only is the concern dealt with but that the individual who raised it is provided with the necessary support and protection from the outset before any detrimental treatment or retaliatory action can take place. All of the whistleblowers interviewed for this study suggested that they had wanted their concern to be addressed and for it to be the end of the matter. Unfortunately, a chain of events, often led by retaliatory practices by their organisations, meant that the whistleblowers suffered, and continue to suffer unnecessarily. This highlights that whilst it is extremely important for states, and the European Union as a whole, to consider the implementation of whistleblower protection laws, we must not lose sight of the fact that

we also need to educate and support organisations and society as a whole to treat whistleblowers better in the first place, thus removing the need for individuals to have to make a choice between not raising the concern and years of life-changing psychosocial, physical and familial consequences.

For some jurisdictions and some organisations, supporting and handling whistleblowers from the outset of them raising their concerns will require a substantial shift in understanding towards a more inclusive and accepting response towards whistleblowers. Civil society and other actors working on whistleblowing can support this process by actively engaging with stakeholders at multiple levels. The below table provides an illustration of the different suggested levels, potential stakeholders and several examples of engagement and technical assistance.

FIGURE 1**A multi-level, multi-stakeholder approach**

LEVEL	STAKEHOLDERS	EXAMPLES OF ENGAGEMENT AND TECHNICAL ASSISTANCE
Legal and policy development	Executive, legislative and parliamentary bodies	<ul style="list-style-type: none"> • Policy briefings and advocacy
Courts and judiciary	Judges and court officers	<ul style="list-style-type: none"> • Capacity building through training and the provision of resource guides.
Legal implementation	Government departments and agencies	<ul style="list-style-type: none"> • Monitoring of organisations tasked with legal implementation. • Direct engagement with organisations, where necessary to provide training and capacity building.
The media	Print media, television and online platforms	<ul style="list-style-type: none"> • Development of working relationships • Awareness raising
External agencies receiving concerns	Regulatory and law enforcement agencies, oversight bodies	<ul style="list-style-type: none"> • Development of guidance on various options for receiving concerns. • Provision of appropriate best practice on the handling of concerns. • Capacity building
Employers	Public and private organisations	<ul style="list-style-type: none"> • Provision of good practice on the handling of concerns. • Promotion of the value of whistleblowers to organisations.
Societal	Citizens	<ul style="list-style-type: none"> • Awareness raising through storytelling and education. • Where necessary, positive messaging to clarify difference between whistleblowing and ‘informing.’

It is hoped that civil society, activists, policy makers and other stakeholders will be able to make use of various examples of good practice that exist already in Europe. There are a number of examples of training activities (for example the training of judges and prosecutors in Serbia), education and capacity building (Italy), engagement with publicly listed companies (The Netherlands) and engagement with policy makers (France) that can act as a starting point for future guidelines.

Whilst it is hoped that all state actors would one day move towards a shared understanding of

whistleblowing, the issue is not arguably with the need for an exact definition but rather with the impact of definitions which are unnecessarily restrictive or prevent individuals from being able to raise concerns because of misunderstanding around the terminology in relation to relevant established legal principles. Where there is disagreement on terminology, organisations can seek to reconcile these differences by developing a mutual and flexible shared understanding of the term public interest, which provides a constant underlying motivation for the protection of whistleblowers that is evident in all chapters of this study.

AUTHOR

Ashley Savage is a specialist in whistleblowing, information rights and governance, based in Vienna. He is currently undertaking a Research Fellowship at the International Anti-Corruption Academy in Laxenburg Austria. He has previously taught at the University of Liverpool (lecturer), Northumbria University (senior lecturer) and the University of Durham (part time teaching staff). Prior to joining academia, he advised whistleblowers at Public Concern at Work, a UK charity and leading authority on whistleblowing. After receiving a scholarship he was called to the Bar by the Honorable Society of Gray's Inn. Ashley's PhD (obtained at University College, University of Durham) considers the unauthorised disclosure of official information and whistleblowing.

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