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**Whistleblowing Rules: Best Practice;  
Assessment and Revision of Rules Existing in EU Institutions**

**STUDY**

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**Abstract:**

The study explains the concept of "whistleblowing" and its importance notably for risk management. It reports different approaches from UK, USA and from other law traditions. From this it distills 18 elements constituting Best Practice and which can be used for benchmarking. The current rules on whistleblowing in EU institutions are described and discussed in their context. The assessment against the benchmarks leads to proposals for a revision of these rules.

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## Executive Summary

This study with the terms of reference:

*What, if any, are the shortcomings of the EU Institutions' current rules on whistleblowing? What improvements could be introduced on the basis of the best practice applying in the Member States, the USA and the private sector?*

was called for by European Parliament Committee on Budgetary Control and was commissioned by the Parliament's Directorate D, Budgetary Affairs, of the DG Internal Policies of the Union.

This study has received input from four EU Institutions and six EU whistleblowers who have been approached with standardised questions, specifying aspects of the terms of reference. The quotations from whistleblowers have been kept anonymous. Two of them expressed their willingness to witness to the Parliament, so that their identity would be released, if the Parliament expresses a desire to hear them on the subject of this study.

The research phase for this study was quite constrained by the tight time schedule of the European Parliament. The specifications would be worthy of a thorough dissertation.

The RCC approach is based on the conviction that any organisation only exists because of the fundamental conventions, including laws and ethics, of a society. This applies to public administration as well as to private companies. Both may lose their right to exist (their legitimacy), if they behave in contravention of the law. Laws and Ethics are not outside demands on these organisations, they are their fundamentals.

On this basis the study strove to develop a measure to evaluate the "shortcomings" of the current rules as in the terms of reference. There is no statutory definition of a whistleblower – not in the Staff Regulations of the Officials of the European Union, nor anywhere else. Typically the word is not even used in legal texts. However, there are a number of decidedly different understandings of the concept behind the term. Accordingly, the study first ventures to highlight the context of Whistleblowing. There exists now significant experience with different approaches so that the study can deliberately choose a definition that is helpful in addressing the problems experienced under the scope of this study.

The definition of Whistleblowing thus chosen by the end of the first part is:

- the insider disclosure of what is perceived to be evidence;
- of illegal conduct or other serious risks;

- out of or in relation to activities of an organisation including the work related activities of its staff.

A definition in itself cannot suffice to determine the possible shortcomings of an approach. For this purpose two more elements are required as tools of analysis: a spectrum of possible approaches and a description of what can actually be experienced under the EU Institutions' current rules on Whistleblowing.

Part 2 defines the State of the Art, first describing conceivable and actually existing approaches to Whistleblowing. The conceivable approaches are developed from the concept that Whistleblowing happens in a system in which the disclosure of information has to relate to consequences and the organisation and its management is in the position of interface between the individual and the public (interest). The duty to disclose is mentioned as an approach to resolve the underlying dilemma, as well as the contributions of law and the judiciary or the appeal to management. Finally soft law and "alternative" approaches are mentioned. The chapter suggests the concept of responsibility matched with an escalating system of liabilities as praiseworthy and ends with a recall of the other perspective: the sufferings typically experienced by whistleblowers. It is fairly well known and documented that the act of blowing the whistle often has two or three years of run-up and afterwards takes five to ten years to return to a more or less normal life. The study strives to raise attention to the fact that on the side of the organisation similar long-term developments and damages can be observed, which do not balance or outweigh those of the whistleblower, but add to them.

The next chapter gives an overview of the most relevant models of dealing with the syndromes around Whistleblowing internationally. The situation in the countries of the Roman Law tradition is explained with particular regard to France and Germany, but also mentioning the Netherlands and the new Member States. Contrary to common belief, these countries are not traditionally immune or uninterested in whistleblower protection, but do in fact have valuable elements that can in fact be compared with the situation in the Common Law countries. These practically all have explicit whistleblower protection legislation. The situation in the U.S.A. and the UK are explained in more detail. Finally the situation in the private sector, and the brand new policy at the UN General Secretariat are explained – both strongly influenced by the U.S. models. The situation at the UN is of particular interest to this study, since the UN administration has some traits in common with the EU Institutions. Attention is drawn to the reasons, why the UK Public Interest Disclosure Act and the UN policy are closest to what can be a best practice from the point of view of the EU Institutions. Very briefly at this point, both examples include the widest range of irregularities and misconduct as subject matter, which can be disclosed by anyone who could possibly have such insider knowledge. In both cases,

whistleblowers can eventually go even to an external institution of their choice, if that is necessary to respond to dangers, and if internal reporting is impossible (unreasonable). Harassment of whistleblowers is decidedly treated as misconduct. Otherwise, there are also marked differences between the two models, partly due to the fact that the UK statute resides in a larger legal framework, while the UN policy has to rely on internal regulations and partly has to create its own framework, including a new Ethics Office reporting only to the Secretary General and the General Assembly.

The Best Practice particularly with regard to a large international public administration, is developed from the best elements of these approaches and consists of 18 different points, which are explained at the end of this part in some detail.

Part 3 relates the EU experiences and the international framework in which the European Union exists. The EU Institutions have to adopt and maintain a meaningful system of whistleblower protection as a matter of convergence and because of the requirements of international treaties. This is shown in the first two chapters. Most of this has only evolved in the last 10 years but much more is in development, including within the Member States, e.g. in France and Germany.

The study then continues to evoke some of the events that led to Whistleblowing rules in the EU, and reactions in the Commission in order to clarify their purpose. The third chapter analyses the current Whistleblowing arrangements of the EU and how they can serve their purpose. An analysis of the mechanisms of these rules and how they work stands at the centre. At that point of the study an opinion on possible shortcomings of the EU regulations can take shape. After a clear understanding of what Whistleblowing is and how it is situated in its environment, has been developed, it will be permissible to state that even the regulations themselves are technically and in their wording ill disposed to encourage risk communication, or grant whistleblowers meaningful protection. This explains to some extent why only a handful of whistleblowers are recorded in OLAF registries, although all whistleblowers have the possibility to approach OLAF themselves, and, even if they don't, all whistleblowers' reports should eventually be forwarded to the OLAF.

Articles 22a and b of the Staff Regulations address only a fraction of what would typically be defined as Whistleblowing activity. Furthermore, they are of limited effect in promoting desirable behaviour both on the management side as well as on the staff side: There is a mechanism that stresses only a duty to report. The Institutions promise no more than not to react negatively, if officials comply with these rules. This cannot be seen as an encouragement. Furthermore the duty to report is so described that it seems virtually impossible to comply "honestly and

reasonably." Any potentially permitted reporting activity is narrowed down to become meaningless. For these reasons only a small proportion of the reports that could be expected in the private sector are in fact recorded in the EU institutions.

It will be necessary to study a "right to report" that leads beyond the confines of the institutions, if that is necessary to avoid a significant damage to the public interest or to the operations of the Communities and the use of internal mechanisms is not possible for defined reasons. Beyond a right to report and the obvious protection against harassment, it may be necessary but also sufficient to motivate superiors and management to give every bit of risk information from the staff qualified evaluation with due diligence. It will also take meaningful and timely feedback if a risk dialogue is to start in the Institutions, enhancing responsible behaviour on the job with a sense of loyalty to the Communities and their citizens.

The study ends with a number of proposals on how the situation can be improved within an ambitious schedule of about five years. While a significant change of policies and practices will be necessary, changing the Staff regulations will not likely be the first step. The author recommends a staff consultation process (including possibly a staff survey) for an integrative Ethics approach of which new, improved Whistleblower Regulations would form a part.

The findings of the study are supported by a benchmarking in Annex 1, which takes the 18 best practice elements and holds them against their EU equivalent. The process is explained and there are specific remarks to each of the points. The overall score of the EU Institutions' current rules on whistleblowing is 43% – which means clearly failed against the benchmark. Only 6 out of 18 elements can be judged as passed – and of them none as good. In particular the elements of Protection, Burden of Proof and Whistleblower Participation urgently need improvement.







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### Annexes:

- I. Benchmarking
- II. Sources
- III. Excerpts from the Staff Regulations
- IV. Excerpt from 2005 CSPL Report

## ***O. Introduction***

The Purpose of this study is to determine whether the EU Institutions' current rules on Whistleblowing have any shortcomings, and if so, what they are. Based on such an evaluation and on the basis of "best practice," improvements are to be suggested.

"Whistleblowing" is not a technical term nor has it found a common legal definition. The **Staff Regulations of Officials of the European Communities** make no mention of the word. Shortcomings can only be measured against a defined standard. Improvements can only be suggested once the benefits to be expected are clear. RCC Risk Communication Concepts, as author of this study, leaves no doubt that it sees Whistleblowing primarily as part of risk communication. However, one catch word should not be replaced by another. Therefore this study sets out to explore the meaning of Whistleblowing in its context, which includes also the context of the EU Communities (international public administration). **Part 1** of this study concludes with a **definition of Whistleblowing** relevant for the present setting: a large international administration.

**Part 2** on the "State of the Art" will explore how the most can be made out of a situation, which those involved usually find highly unpleasant. This part aims to define a Best Practice against which the current practice at the EU Institutions can be measured. Looking at the phenomenon of Whistleblowing, there are a number of actors involved in very separate roles, which are sometimes changing. What the "benefits" of the process might be, can only be defined by first exploring what the agenda, what the "goals" of the participants will be – and what the EU Institutions can expect to get out of it. Conceivable approaches show in which direction to think. The best existing approaches demonstrate the current "State of the Art" in the field of Whistleblowing. Taken together with the best elements of conceivable approaches, they form the "Best Practice," which is spelled out at the end of this part.

There exists already an international framework of rules and recommendations, all of which have been influenced by the European Institutions and the EU member states, and which are in turn influencing the path the EU Institutions have chosen. In **Part 3** this, as well as the EU Institutions' own experiences with Whistleblowing, form the background of a legal analysis of the current Staff Regulations in regard to Whistleblowing. The underlying question is whether the current rules are suited to meet the self-proclaimed goals. This part ends therefore with an overall evaluation of the current rules, which is additionally summed up in **Annex I (Benchmarking)**.

On this basis, **Part 4** makes some proposals on what practical changes might lead to instant improvements. Three areas are pointed out, in which changes are particularly urgent and which would lead already to significant improvements. Considering that any changes on the Staff Regulations have to go through a lengthy procedure – the further recommendations for deeper-rooted changes make good use of such a period by entering into a structured staff consultation.

## 1. Whistleblowing

### 1.1. Context of Whistleblowing

The following section forms the fundamental part of this study. The current rules and practices in the EU institutions can only be assessed meaningfully with a thorough understanding of the multi-faceted phenomenon of Whistleblowing. There may be suitable approaches for any one of these facets. A "most appropriate approach" can only be chosen, if the object to be approached, the aim and its context have been elucidated. The sketch of the chronology in which Whistleblowing has its place (1.1.1), will lead into the subject. The following subsection will describe some basic forms of Whistleblowing (1.1.2), followed by a section on the events that are, in consequence, to be expected in practice (1.1.3). This will lead to some examples of what, while looking similar, is not in fact Whistleblowing (1.1.4). These practical observations will be supplemented by two more abstract contextual observations: the role of Whistleblowing in management systems (1.1.5) and finally the systems, in which Whistleblowing has its place (1.1.6). The last sub-section (1.1.7.) explains the role of certain third parties that can intervene or assist in a Whistleblowing situation: the media and counsellors.

#### 1.1.1 The chronological context of Whistleblowing

##### a) Duty to Disclose

In any relationship with mutual considerations, contractual or conventional, in all cultures and legal systems there seems to be a duty to notify the partner of certain dangerous situations. This duty may have different objectives and thresholds. The closer the dependence, the further will this duty go. A well known example is the property lease: where the lessee observes deterioration or a danger to the object, he will have to inform the lessor, unless the problem is so minor and/or so obviously within the lessee's duties to repair, that the duty to notify subsides.

Equally, it has always been the duty of the agent to inform the principal; an employee has to inform his superior, if he observes a risk related to his work or the organisation, which he cannot take care of himself immediately, being beyond his duties or capacities. Here, the scope of this duty has generally been narrowed to such an extent as to:

- not place too high burdens of liability on the employee,
- consider the overall responsibility of the superior and
- not interfere unreasonably with the responsibilities of co-workers.

The more prevalent the element of dependence, the more will the contractual relationship resemble a trusteeship. One partner is (co-) responsible for the integrity of the goods of the other inasmuch as they can be affected by their respective relationship. Very often, this does not need to be mentioned in a written contract because

- a) it is an underlying principle,
- b) it serves the interest of both sides and
- b) the situations where it may become relevant cannot be enumerated.

These descriptions state the obvious only for bi-polar relations. In multi-polar relations the roles of principal and agent and those to whom a duty is owed, may shift and spread unevenly. The duty continues to exist, even though it may become less clear, who owes what to whom.

In any case, providing the information serves a twofold purpose: besides helping to protect the assets of the principal, it also serves to secure the basis for continuing the relationship. Even where there is no duty to disclose, there may be a responsibility to inform.

Once the information has been provided (disclosure), the principal has to take appropriate action. This is obviously the expectation of the disclosing agent and in case of an emergency, a "rescue operation" could be the natural reaction of the principal. However, it should be noted, the primary obligation of the principal will be to evaluate the disclosed information. To do nothing may be an appropriate choice but after due evaluation. Inasmuch as only his own private property can be affected and possibly also his contractual performance may be affected, he will be relatively free in discerning, which consequences to take. All this is complicated in real-life multi-polar relations and often he will be legally bound to act.

**b) Dissent at the workplace**

If, in the case of the above duty to inform, the information provided is not acted upon at all or is ignored by the principal or superior, the agent will face several possibilities, described in a groundbreaking study as "Exit, Voice and Loyalty<sup>1</sup>." Which route he<sup>2</sup> will take, depends on a number of factors, but will correlate strongly with the degree of involvement of the agent. A dilemma starts where the agent perceives a need for (emergency) action. In the situation here described, it is not his responsibility or capacity to provide the remedy. If it had been, he should have acted himself at the previous stage. Now in this phase, he is confronted with a superior who neither lets him go ahead nor takes the expected visible action himself.

The agent has loyalty to this superior but in any real life situation he will also have other loyalties, in particular for those whose interest may suffer in case of default, be it the company owner, the public or other third parties. He may have an argument with the superior; he may leave his work, if he has a chance to do so, or he may decide to remain passive. Of course, when the agent has the impression that nothing is being done, negative consequences for their relationship can largely be avoided, if the superior is able to explain and convince that he in fact is doing something adequate (e.g. assessment) or is having somebody else do something. Another question is, just how much "convincing" the superior and the organisation want to afford. There will always be a constraint on time. There are also aspects of face, hierarchy and effectively organisation of responsibilities and collaboration, all of which may affect communication.

The employee (agent) does not necessarily have to step out of line with what the management seems to expect: he will certainly not always become a whistleblower. He may stay passive. Such behaviour is sometimes called "loyal," which is misleading, since the motives are not clear and it is more likely that the agent will in fact disassociate himself from the interests of the management and the organisation – "quit-stay" being a well known phenomenon<sup>3</sup> in situations where "exit" is no viable alternative. Inconspicuous behaviour leaves everything in a precariously unstable state. The agent may soon decide to adopt a radically different stance, the management does not know what to expect and the possibly affected third parties are left out in the rain. So, if everything is left unresolved in Phase I, and Whistleblowing does not take place, the situation is best described as "undecided."

**c) Internal Whistleblowing**

Where an employee perceives a high level of conflicting loyalties and great risks for "other" goods but sees too little effort on the side of his superior or those in fact responsible for adequately addressing the issue, the chances are that the agent will take the next step – Whistleblowing. Whistleblowing is the step out ("exit") of the regular intra-organisational reporting cycle (Phase I), out of the range of dissent ("voice") permitted in the workplace (Phase II). It may be the case that the information in Phase I had seemed to have got lost; it may be that the management was unwilling to debate its decisions or make them transparent. It may also be that the possible addressees did not seem trustworthy to receive the information or capable of processing it adequately.

<sup>1</sup> Albert O. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States*, Harvard University Press, Cambridge, Ma. 1970

<sup>2</sup> Whistleblowers are female or male. For reasons of legibility this study uses the male form only.

<sup>3</sup> More than 250 billion € in economic losses per year in Germany alone, according to Gallup 2005 cited in a Gallup press release of 31 Aug. 2005, <http://www.presseportal.de/story.htx?nr=719311>

At this point the agent might turn to the auditing or oversight department or straight to the board; thus skipping hierarchies. Now, the information may reach someone who is willing and able to process it responsibly – or in a manner that is deemed responsible by the agent. In this phase, it is the second-level addressee, who is confronted with the unresolved issues of the previous phases. He can be expected to hand the issue back down. In that case, the underlying messages are:

- don't bother me with your problems,
- get your acts together,
- you (superior) have a staff member, who has to be brought in line,
- you (whistleblower) don't know what you are doing.

This undercurrent may become more dominant than the issue the agent had focussed on. Where the manager addressed in this phase does not hand the issue back down immediately, he too will face his own split loyalties: e.g. between the organisation, the staff member, his superior and possibly affected third parties. Any personal involvement will make him more responsible for the results. He will have to get active, where previously he had no direct involvement – and all that in addition to his regular work. From this perspective there may be great reluctance to receive such information, even to appear as a potential addressee for it. For the employee, having to decide between Exit, Voice and Loyalty, there are many good reasons not to engage in internal Whistleblowing.

#### **d) External Whistleblowing**

The duty to inform in the above sense may extend beyond the confines of the organisation. In all EU member states there are a few instances in which there is even duty to disclose under criminal law. A right of privacy, data protection and confidentiality may end, where it protects crime and serious threats to the public interest.<sup>4</sup> With or without explicit duties to this effect, if the agent cannot find a responsive addressee inside the organisation, he may decide to turn to an external body ("Exit" plus "Voice"), such as a supervisory board, regulator, ombudsman etc. The idea is to find an agency that is in a position to take or influence the necessary steps to address the perceived risk. This is the general outline of external Whistleblowing.

Since these addressees usually have no executive power, they will indeed have to return the issue to someone who has. Additionally they will tend to be in a position of other divided loyalties. Before they can decide who could be addressed to resolve the issue and to whom it can be returned without causing further damage, they will have to weigh carefully how much investigation they will have to do themselves. While otherwise not inherently different from internal Whistleblowing, external Whistleblowing shows a certain lack of confidence and possibly sheds a light on intra-organisational difficulties. It takes extra-ordinary communicative skill to steer this phase back into regular management cycles without much disruption.

### **1.1.2. The basic forms of Whistleblowing**

#### **a) Internal/External**

Clearly, from the organisational point of view, it does make a difference if accusations and dissent can be kept internal. Any debate obviously changes its character depending on the participants – and, once a disclosure has been made to the public, there will be new participants with different interests. It does make sense therefore to differentiate between internal and external Whistleblowing, without even mentioning questions of privacy and confidentiality, yet.

#### **b) Un-/Authorised**

Rather closely related to this first possible distinction is the question, whether the disclosure was specifically authorised or it was generally according to the rules. As we have seen previously, there is a general obligation to make certain internal disclosures and there may even be an explicit one, as is the case in the EU Commission. However, in many situations, there will be rules gagging a disclosure. For the whistleblower, this differentiation makes sense, if he can expect to be rewarded – or at least not to suffer from reprisal - for dutiful behaviour.

<sup>4</sup> Precedence cited below at 1.1.4.e, a Common Law principle since the middle of the 19th century.

**c) Public/Private Interest**

It is important to know whether a disclosure is made in "the Public Interest" or for private reasons and whether it harms other private interests. If in either case rights and values will be damaged, the protection of the public interest will have to be balanced against damages to private interests. Serious irregularities and criminal acts always work against the public interest, since the established rules including Criminal Law express the public interest and what is seen as good order. In the case of the EU, it may be open to argument, whether the interest of "the Communities" as in Article 11 Staff Regulation can differ from the public interest in the observance of the laws and the physical integrity of all citizens. Were this interest of the Communities to be understood as the (self) interest of the administration, that would designate a typical example of private interest.

In some regulations, a largely equivalent distinction is made as to whether the whistleblower made his disclosure "only with the public interest in mind" or whether perhaps also for other motives. Looking back on the issue of multi-polar loyalties mentioned in section 1.1.1 b),<sup>5</sup> many questions remain open as to demanding a "public Interest" motive: is a single source of motivation realistically conceivable, is there only one Public Interest ?

**d) Personal Involvement/Detachment**

Sometimes there may be a whistleblower, who was or is personally involved in what he wants to disclose. Reporting from the workplace and from his own observations, he may have become involved quite innocently: it may be a question of mere proximity, or of reasons of the interrelatedness of tasks, or knowing without fully understanding the implications – or fully understanding but later regretting them, suddenly becoming aware of unforeseen and entirely unwanted consequences. There may still be a chance to prevent further damage. Even at a very late stage of investigations, it may be important to get the information from such a source to help analyse the structural problems and prevent re-occurrence. Involvement or detachment does not predetermine the value of the information – or of the disclosing person.

**e) Crime/risk as object of a disclosure**

Defined narrowly, only "organisational wrongdoing," which might even exclude private acts committed at the workplace, would be admitted as object of disclosure. An even narrower definition would include only "serious" or otherwise specified crimes or other degrees of misconduct committed by employees, while a much wider one takes in any sort of risk arising from or relating to the activities of the organisation and its staff. The advantage of the risk focus is the avoidance of blaming and shaming and the orientation on future potential, including learning from previous errors. The Risk approach, with the connotation of uncertainty and not of damage, suits today's environment, where one strategy is perceived as fitting today and as a failure under tomorrow's circumstances.

**f) With/Without retaliation**

There have been attempts to provide a certain amount of protection after disclosures, but only to persons who previously have been harassed in consequence of the disclosure. In one particular organisation, part of their definition of a "whistleblower" included prior harassment, officially acknowledged by the organisation. Protection only when the damage is done seems particularly ineffective. Since organisations do not themselves tend to link harassment to an act of whistleblowing, such a definition will tend to turn into a circular argument: no protection, unless you have been harassed; but if you have been harassed, that was probably not because you are a whistleblower – and again: no protection.

**g) Whistleblower from inside/outside**

The position of the whistleblower in relation to the organisation and other staff might also be a basis for discernment: All known definitions seem to regard a whistleblower as someone close enough to the organisation to potentially suffer retaliation. This clearly includes every employee with the possible exception of top management. Top management will usually be excluded, because they are seen to be in a position to effect the necessary changes themselves. However, this is

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<sup>5</sup> The issue of loyalties and whistleblowing is further discussed in section 1.1.6 below.



not necessarily the case and reprisals are certainly conceivable from different sides. Retired and contract personnel are potential whistleblowers. So are job applicants, although they may have less contact with evidence and more difficulties in proving harassment caused by their Whistleblowing. Persons periodically working inside an organisation, which is not their employer (modern type of outsourcing), may have typical whistleblower knowledge and deserve protection. Since external contractors are usually not included in a definition of whistleblowing, these workers need protection through special agreements between their employer (the contractor) and the beneficiary (e.g. the EU Commission), providing for a right to disclosure to the beneficiary and protection against harassment both from the side of the beneficiary as well as from the employer. In this type of situation, it will also be appropriate to protect the external contractor from harassment (e.g. loss of contract etc.). Obviously there needs to be put a lot of thought into an adaptive solution, when setting up any corporate rules on this.

#### **h) Who is by-passed**

Similar to the argument regarding top executives, there is usually no situation, where a middle manager would be perceived as "blowing the whistle" on one of his subordinates. He ought to have the capabilities and the responsibility personally to take care of any perceived work-related problem in which they may be involved. While "mobbing" against a superior is not exactly exceptional, this type of "disclosure" is generally excluded by definition.

#### **i) others**

There have also been differentiations along the lines of "Unbending Resistors, Implicated Protesters and Reluctant Collaborators." The substantial content of such descriptions seems to be included in the above points. The language of such descriptions sounds more judgemental than can be useful in finding a common understanding in this context. If they add anything new, it might be situative in the sense that they refer to different phases of dissent at the workplace, out of which the whistleblower would make his disclosure; or in that they refer to the degree of emotional involvement. While it may be true that high degrees of personal or emotional involvement co-relate with the likelihood of harassment and can also become an impediment to communication, there seems to be no apparent reason to value the information from a highly involved whistleblower less than from one with little involvement. Equally there is no justification for harassment and all good reason to protect such persons. As will be discussed in the further course of this study, early disclosures should be encouraged.

### **1.1.3 The typical consequences of Whistleblowing**

The duty to report crimes or serious misconduct of officials inside organisations is not always fortified by specific protections for an employee who makes an outside disclosure – even if it is in good faith, justified and reasonable, occasionally even demanded by criminal law. There are witness protection programs, but these apply mostly to rare high-profile cases and encompass identity change or police bodyguards. Such measures are obviously futile in the workplace. The situation of an insider reporting about another insider who is in a superior (or at least not inferior) position and who is so well-connected that outside disclosures seem necessary to stop a serious hazard, generally seem to make reprisals at least as likely as between perpetrator and victim in domestic violence.

The fear of their disclosures being ignored or "not making a difference" - even more than fear of harassment – is what keeps whistleblowers silent for so long.<sup>6</sup> But once they do come out, they can expect to be ridiculed, gagged, declared ill and otherwise harassed in virtually unlimited ways. An eye-opening introductory statement regularly heard in the practice of the author: "I have lost my small fortune and my health." Typically people, who make external disclosures, forfeit their career – not just in the affected organisation. More media attention is attracted to their personal plight than to what they have reported. If silencing and seeming to ignore don't effectively stop the whistleblower, they will be followed by increasing levels of harassment.

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<sup>6</sup> Tom Devine, *Whistleblowing in the United States*, p. 81, with further reference

This can only discourage others from sounding the alarm. Even in the US with its ample whistleblower protection legislation, surveys of civil service workforce suggest that the majority of employees are reluctant to blow the whistle either because they fear retaliation or because they believe that nothing will be done in response to their disclosures.<sup>7</sup> The result of a survey among 8.000 public servants in the Netherlands showed astonishing parallels.<sup>8</sup> Maybe it is the confusion about duties and loyalties, which leads to the occasionally extreme forms of harassment reported by many whistleblowers.<sup>9</sup>

Consulting practice and the entire literature show that outright harassment is the rule, not the exception. Once a disclosure is not absolutely supported by the superior, which means, according to the above models that there is not the slightest dissent in the workplace, any sort of harassment extending even over years can be expected. Even when a whistleblower leaves the organisation, it may still continue. If a right to disclosures (Whistleblowing) theoretically were defined as requiring prior approval by the superior, there would obviously not be much harassment. Such a definition checked against reality is absurdly dysfunctional: self-contradicting and equal to banning Whistleblowing.

The near certainty that an outside disclosure will lead to serious reprisals, often means that the matter is not raised until the employee leaves the organisation. That often makes matters much worse. Investigation will be hampered, evidence will be old, and alleged personal motives of the whistleblower may serve the wrongdoer to distract attention from the misdeeds.

An organisation needs to be protected from baseless allegations and even from premature release of information in the wrong place, which can send a warning signal to perpetrators and cause a loss of evidence. There may be good reasons for a restrictive information policy as part of risk management. At the same time, the inflow of information will be low, if there is no communication (the backflow, or feedback).

Whistleblowing, especially the external variety, can certainly have devastating effects on the affected organisation, without necessarily facilitating improvements. Foremost the reputation will be affected – throwing doubt on how trustworthy the organisation seems to the public and to the staff. For a public administration this will mean also a loss of legitimacy. In the case of democratic institutions, trust in public administration is “invaluable” – which means an asset that is extremely hard to restore. The fact that there has been an incident of (external) Whistleblowing shows to the public that something is not going well inside the organisation. Even with the support from investigative journalist, it will be difficult for the public to find out, exactly what is not going well: procedure, substance or both. The reactions may go as far as political disaffection and lethargy – eventually giving rise to a political counter-culture and corruption.

The opportunity for the management to take action – assess the information, take steps to manage the risk or at least determine what went wrong in internal communication - should be counted as a positive result of Whistleblowing. Even in ill fashioned cases of Whistleblowing “against the rules,” Whistleblowing entails the potential for improvements. Proper risk management needs to find out what the true causes were and how a derailing of internal risk-communication can be avoided in the future – by establishing and communicating improved risk communication and follow-up mechanisms.

#### **1.1.4 Similar activities which are not Whistleblowing**

##### **a) Informant / Witness**

The external whistleblower can also become an informant or witness. In fact even in Phase I the agent who performs his duty to inform could be witness or informant. For clearer communication on

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<sup>7</sup> Kaplan, p.42

<sup>8</sup> A FNV survey in April 2000, <http://www.eiro.eurofound.eu.int/2000/05/inbrief/nl0005191n.html>

<sup>9</sup> Without reference to the widely covered EU experiences, an insightful perspective is taken in C. Fred Alford's book *Whistleblowers: Broken Lives and Organizational Power*

the issue, it is suggested, however, to use the terms "informant" or "witness" for those who do not come on their own initiative to report on their organisation. Either they are not insiders from the organisation itself, or they have been called upon because the risk has already materialised or someone else had already detected the risk and a legal action had been initiated. Outside a legal action the person can be called "informant," and otherwise "witness." Of course, a person can become first an internal whistleblower, then an external one and finally a witness in the ensuing legal actions. These are different roles that may become more evident at different times. Statutory whistleblower protection cannot be lost if a person who first blows the whistle e.g. with the media, is later called up as witness in court.

On the other hand, a person who may never have thought of himself as a whistleblower may be called upon as a witness for his organisation in the course of court proceedings, and he may still face reprisals if his testimonial is truthful but not what is expected by his organisation. He simply states the facts when called or rather forced to do so. What unites him with a whistleblower is the fact that there may be harassment as a consequence – and obviously there needs to be a similar type of protection. Such cases can be discerned from Whistleblowing behaviour in that the acting person is not moved by the intention to halt or change the course of events.

#### **b) Complaints and grievances**

Complaints and grievances should be distinguished from Whistleblowing for another reason. Again, as all other activities within this section, these activities may be followed by reprisals. However, complaints and grievances typically focus on an issue mostly concerning the person who utters them. Of course, complaints and grievances can also be brought forward altruistically. Even if that is the case, though, the object of concern is in an intra-organisational relationship: between an employee and his superior, between two employees etc. There may be a risk, even a risk from the outside (e.g. criminal prosecutions), but the focus is on "human resource" issues of a predominantly bi-polar nature.

#### **c) Remonstrations**

To remonstrate, i.e. to seek a reconsideration of a superior's order or decision is a staff right seldom used for fear of being looked upon as "trying to be difficult." Related to the right of remonstrations is the right to refuse orders. Such behaviour may be part of an employee's behaviour preceding Whistleblowing, but should not be confused with it. This behaviour is generally acknowledged as legitimate in certain ethically challenging situations, sometimes even designated as a duty.<sup>10</sup> It is to a certain degree confined to the personal level, because it frees the public servant from personal liability but not from the duty to act, unless that would involve a criminal act. When drafting Whistleblowing procedures, a right to refuse orders needs to be considered in Staff regulations (as is the case in Article 21 a, EU Staff Regulations). A right or even a duty to remonstrate should explicitly be integrated, since it may help to solve an issue internally. But it is different from Whistleblowing in that it is a solely internal process and usually confined to the affected person: not so much "we cannot do this," but rather: "I cannot participate in this" a typical case of conscientious objection.

#### **d) Defamation and Denunciation**

Defamation and denunciation may involve the reporting of correct facts. In the worst case the acting person does not care too much, whether the facts are correct, or not. Often an unfair concoction of facts and ill-intentioned judgement is presented. In any case, these acts are not primarily targeted at stopping what is reported but at rather having someone look bad. These unfair attacks are therefore typically part of escalated harassment, occasionally under the pretext of self-help against the primary aggressor. They are never justifiable, because even in a real self-defence situation they cause avoidable extra damage in a particularly unfair way. Normally, they have nothing to do with Whistleblowing, although for example a by-passed superior may be expected to claim "defamation" or "denunciation" where his actions are challenged by the whistleblower. Defamation and denunciation can be a criminal act, depending on the form and the circumstances. It can be another form of defence for the person who feels attacked by the whistleblower

<sup>10</sup> e.g. Art 21 a EU Staff Regulations or § 38 II BRRG Germany

to point at "what he does to me..." Of course, a whistleblower needs to take good care that he does not mix his facts with unfair personal attacks, even where he does already feel personally harassed. Similarly, reporting something or someone to the authorities may be equivalent to an unfair attack, if there is just hearsay and no evidence to support it. This is where even some well-intentioned whistleblowers may occasionally need "coaching" or confidential feedback, lest the true issues get lost in a quarrel over who threatens whom.

#### e) Espionage

Espionage is a criminal charge occasionally confronted by whistleblowers, but does not typically fit the act of whistleblowing. In espionage, the accusation is a breach of confidence damaging the interests of the employer with intent to benefit a third party. What sets Whistleblowing apart from espionage is usually the addressee: the information is not handed over to the competitor, nor presented in a way to have others use it for their own purposes and production. Whistleblowing is addressed to someone in a position to make a difference in setting things right, which could usually be said about espionage. Whistleblowing is therefore practically the opposite, even though it does occasionally involve a formal breach of confidentiality rules. Where these rules, strict and narrow as they may be, have been breached, it remains to be determined, whether an ulterior justification for such breach – be it for the well-understood interest of the organisation or the public interest - exists or the whistleblower at least believed himself to be justified in such a way. In this context a traditional common-law exception to the employer's right of confidentiality can be quoted: There is „no confidence as to the [non-] disclosure of iniquity“<sup>11</sup> (to appropriate institutions) – crime is not a legally protected trade secret.

### 1.1.5 The management functions in which Whistleblowing has its place

Management is a word that has found its way into the science of the administration of public services. Management is then understood as the practical side of steering – as opposed to the strategic steering which belongs to the rule-setting and oversight functions of the board in business enterprises and the legislature in a democracy. We can identify three basic aspects of management, in which Whistleblowing may play an important role:

- a) Quality Management,
- b) Risk Management and
- c) Human Resources Management.

#### a) Quality Management

Quality Management means safe-guarding the quality of service. In the Public Service this means providing the best value for tax payers' money, and/or democratic structures generating trust and enabling citizen participation through information and accountability. At the level of the European Union, it may also involve the co-operation and co-ordination of individual interests of the member States, providing efficient structures to define priorities, implement policies and monitoring interfaces with the rest of the world.

Quality Management is a structured approach to monitor an organisation's input and output continuously. Relevant parameters and facts are used to identify areas for improvement. Structural flaws and problems from product design to customer relations are spotted as soon as possible and overall progress assessed periodically. Ideally all staff members are involved in the process, or at least aware of their responsibilities in it. Suggestions for improvement become part of standard operations. Quality Management can be standardised as a procedure so that a comparison with similar organisations becomes possible (e.g. under ISO 9001:2000). One of these standardised approaches has become known under the name of Total Quality Management (TQM). TQM means, a continuous ("circular") monitoring process is used to monitor delivery to the needs and expectations of all stakeholders. The process provides information for decision making, based on current

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<sup>11</sup> *Gartside v. Outram* (1856) 26 LJ Ch 113, 114, 116 per Wood VC, cit. by Amma Myers "Whistleblowing – The UK Experience" in Dehn et. al. . Whistleblowing around the World

performance and benchmarks. The cycle continues in "regular mode," for as long as all relevant policies, objectives and plans of the organisation are properly implemented and lead to the expected results. Input from any of the stakeholders may lead to improvements on a day-to-day basis. Deviations or detected faults lead into another cycle designed to amend the process to the extent necessary to avoid future reoccurrence. This cycle, sometimes called exception cycle, necessitates decisions based on factually reliable information, relating to current and projected performance, to process and system capability, to stakeholder needs, all normally produced by the regular cycle. The exception cycle ideally turns round just once to lead back into the regular cycle. The foreseeable processes to assess the causes of the deviation and their necessary remedies as well as their implementation are also formally described in an abstract form. So far the exception cycle is simply the second type cycle in Quality Management. It is absolutely necessary and has to exist in any type of organisation, if not formally at least as a rudimentary equivalent – just as risk management.

Quality management relies on the information input of all stakeholders, in particular of all staff members. There is no built-in differentiation as to where or when information about a divergence from the regular cycle comes in: in any case it leads into the exception cycle and from there back as soon as arrangements have been made to avoid reoccurrence. Clearly Quality Management would not differentiate between the information from a whistleblower and that from other sources. However, Quality Management would normally want to take a closer look as for the reasons that necessitated Whistleblowing. Apart from the factual information provided by the whistleblower, there may be a message between the lines to the effect that direct communication with a superior was seen as impossible or unreasonable. If the reasons for this perception become known, they can also be treated as a divergence, lead into an exception cycle – until proper communication paths are viable again.

Whistleblowing in this environment provides staff information regarding opportunities to improve services further. Such information is normally in high demand and welcomed in the regular "Total Quality Management" cycle. Harassment of whistleblowers is clearly the opposite and needs to be treated as another "deviation" from a quality production environment – especially where the goods produced are public services.

#### **b) Risk Management**

Risk Management is a key management function with the purpose of monitoring and, where appropriate, influencing factors that could influence the organisation or individual processes in the future (= definition of risks). Originally risk is therefore not negative or positive but ubiquitous. Risk Management is often described in a three step procedure:

- gathering information,
- assessing the information and
- implementing an adequate reaction.

A core problem in risk management is perception. Since any risk is a factor that can influence future developments, risk assessment depends on how these factors are perceived. The assessment will always have to rely on standards to guide the prognosis. There may be excellent formulae to calculate the frequency or importance of consequential damages. However, the figures filled in will depend on (subjective) perceptions. Two persons will perceive factors and potential consequences differently. Efficacious risk management will therefore find ways to integrate the perceptions of a variety of stakeholders. Doing risk management single-handedly avoids conflicts over perceptions but cannot be seen as adequate. Whistleblowing is often also about a conflict over risk perception. Ideally the conflict is resolved by way of a transparent risk assessment process.

In practice, any implemented solution and the entire situation will need to be observed continuously – until there is no more risk. The risk (opportunity as correlate) has finally disappeared only when the organisation has ceased to exist. This is obviously very similar to the TQM cycle, where the final stage of excellence is only reached when production is terminated. Hence, to clearly set Risk and Quality Management apart, the definition of risk is habitually confined to negative future

developments. However it should be noted that by reducing the likelihood or severity of negative events or developments, the overall prospects improve in a way similar to that of the introduction of "improvements," which incidentally also take away impediments or obstructions from the past. An example: the continued use of outdated (production) methods can be viewed as a risk, the introduction of better ones ("improvement") therefore as risk management.

The most important link between Risk Management and Quality Management is the Factor 10 Rule of Costs of Error. The Factor 10 rule says that the costs of making up for an error can be reduced by the factor of 10, if the error (failure, problem etc. = risk) is detected in an earlier value chain segment. During the production process from the original invention or design to the customer (citizen) the costs rise by the factor 1000.<sup>12</sup> This means the value of relevant information is not only directly related to the time of its communication, but decreases geometrically with the lapse of time.

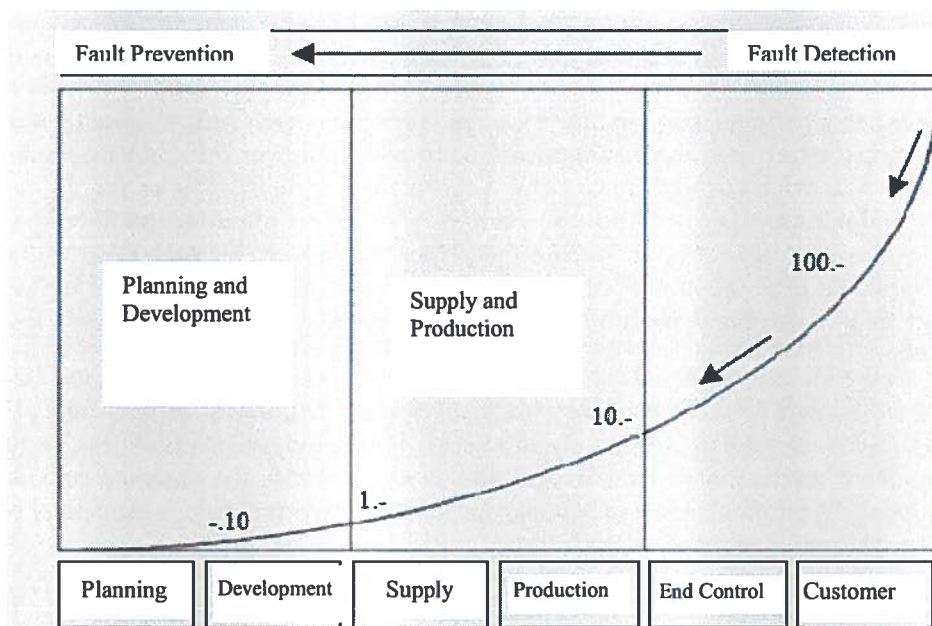


Chart 1: Relation between failure cause phases and failure costs, from: Pfeifer, Qualitätsmanagement

The emphasis on "Governance" and "Accountability" has introduced an obligation to install proper risk management systems into company laws world-wide. In some cases, the laws are taken to require "only" a system that warrants every substantial risk is detected as early as possible.<sup>13</sup> The Sarbanes Oxley Act of the U.S.A. implicates more specifically even the installation of a system that facilitates staff giving risk information without harassment or other unwarranted impediments.

If risk management is understood in a formal way, such as having a manager or a member of the staff, who is remote from operations, fill out forms about the guessed statistical likelihood of typical scenarios from time to time, (new) information is not really important. In all other cases, the daily observations of only the person filling out the form will not suffice. No one in a complex environment as observed in any larger organisation (for this purpose sometimes meaning just larger than 5 persons, but certainly when larger than 50 persons who do not have identical tasks), or in any complex environment (all environments today), can possibly gather and assess personally all information that may be relevant to take the necessary risk management decisions. In fact, risk management is not possible if staff cannot pass on information to their supervisors for fear of harassment. It is not possible, because the most likely source of relevant information is blocked, and the decision will be "uninformed."

<sup>12</sup> Pfeifer, Qualitätsmanagement, S.11

<sup>13</sup> The German KonTraG, introducing § 91 II AktG

The staff is the most likely source of risk information for two reasons: Risk is always attached to the interfaces between the organisation and its environment. There should always be a staff member close to any one of these interfaces. Additionally in some cases a staff member will be actively involved. Even if that occasionally makes him personally blind to the risk, the next closest person that could be expected to provide information is his colleague. Of course, this is not promoting denunciations: everything that can and should be taken care of through direct responsibility and routine will not be delayed and sent through a bureaucratic risk management cycle. Direct communication between colleagues is always preferable and any issue should be resolved at the lowest feasible level.

The management is therefore legally held by already existing regulations and common sense to install and maintain systems that warrant staff providing risk information without fear of harassment.

### c) Human Resource Management

Finally there is an important reason to look at Whistleblowing from the Human Resources Management perspective. In all environments there are many situations in which staff members have a duty to report serious risks, breaches of duties or even plain lack of professionalism. Some of these duties are founded in the obligation to protect other staff members from dangers in the workplace. This may be the case for example where hazardous substances are employed, but also where sexual harassment or similar "home made" dangers need treatment. Management has to organise the work environment so that unreasonable dangers are avoided. Staff may expect a crime free work place. Listening to information pertinent to such dangers is the minimum requirement.

Another aspect of Human Resource Management becomes important, when a whistleblower may be seen as engaging in unreasonable reporting, perceived as e.g.:

- slightly mysterious stories for which there seems to be no reasonable evidence,
- the belief that one's story is well supported, although experts cannot see anything dangerous or even verify the basic facts, or
- any sort of disconnected "obsessions."

It does not meet the standards of good Human Resource management, to leave these staff members out in the rain or even tolerate their harassment. Every individual needs to be guaranteed protection against unfair harassment. If it is clearly not "risk information" that this person can provide, it will be necessary to find out, what the real problem is. Organisations do not per se hire "lunatics." Usually these persons had done a good job so far and they can be supported to such an extent that their full ability to work is restored. This explicitly does not involve declaring them to be ill. A more loyal approach from the management side is to look at the communication situation and improve it, first of all, by filtering out possible risk message of which ever kind. For either side engaged in this type of situation, it is always helpful to look for the "innocent explanation" of the others' behaviour.

An extra Human Resource management effort may be needed, when it becomes known that an act of Whistleblowing has taken place. Harassment is still very common, even if not always immediately visible. Staff rules should make it clear that such harassment will be considered a serious breach of duties. The rules alone give anything but a guarantee and transferring the whistleblower is almost certainly viewed as another form of reprisal. For Human Resource management it will therefore be necessary to study both preventive measures and the communicative structures of the Whistleblowing situation in order to be able to help before the damage is done. One way will be to provide training for those potentially affected – most of all for those managers, who could be addressed with risk information from staff. Eventually the rules will be accepted only if the management is seen to live by them.

The role of Human Resource management in the context of Whistleblowing is therefore to take the necessary measures to warrant the protection of whistleblowers and other staff members. This in itself is again an aspect of risk management: managing the risk of letting the most valuable asset most organisations have – its personnel - go to waste. But it is also an auxiliary function of Risk and

Quality management, because Human Resource management can help create and protect the structures necessary for proper communication about risks and potential for improvement.

### 1.1.6 Loyalty and Whistleblowing

Whistleblowing happens within social structures that are determined by loyalties. To ask: "Who is acting on whose account?" helps to understand the phenomenon. This is the **principal-agent** question<sup>14</sup>, which is an "objective" version of loyalty. Principal, according to this theory, is the person or entity from which power originates. So, in cases of powers of attorney or generally powers of representation, the representative is the agent, the person represented is the principal. In this relationship there is no room for private interests of the agent beyond an agreed consideration. In particular, there is no room for the representation of contradicting interests of third parties. An attorney may not serve more than one side on one case – any breach of this duty is a crime (e.g. § 356 StGB Germany) and may lead to disbarment. § 357 of the German Penal Code deals with superiors including public officials who have their subordinates commit an unlawful act in public office or even allow such unlawful act of a subordinate to happen."<sup>15</sup> From the perspective of the principal agent theory, this is a very serious crime. A crime committed in public office is necessarily committed against a member of the public – the principal. If that is allowed to happen or even instigated by a superior, who is of course an agent even closer and more immediately responsible ("called upon to answer"), this responsibility to lead and manage for the benefit of the principal is also breached and thus entrusted power is turned against its origin. Two or more agents conspiring against their principal may form new alliances and "loyalties" (albeit against the law) possibly ending in secret (counter- or parasite) structures.

The other type of breach of loyalties directly involves an outside third party. An example could be the case of a procurement manager who enters into an agreement on kick-backs. Corruption is largely about a deception regarding prevailing loyalties. Instead of true loyalty (according to the law) for the principal, a new and at least in some important aspects stronger loyalty is formed for the outsider, who provides the kickbacks. Corruption always produces an unstable environment. It is unstable primarily where loyalties have to be questioned. Stability is sought to be restored by forming networks of corruption. These networks have to be unstable by definition, because their loyalties are against the law – and thus against other loyalties. Money or other material incentives are not sufficient to stabilise such a system of competing loyalties in the long term. Usually "peer group" pressure, carrot and stick methods, blackmail and extortion are employed for the purpose – with only limited success. Corruption has been described as abuse of entrusted powers for private gain. The entrusted powers are in fact loyalties. So, there are conflicting loyalties, of such a nature however, as the principal would have reason neither to expect nor to suspect.

Conflicting loyalties are not unusual. In fact, they are an everyday experience, because no one ever has only one role to play. Occasionally some of these concurrent roles can be inappropriate, unwarranted or – as in the above cases – illegitimate and illegal. All whistleblowers find themselves caught between conflicting loyalties. There is an appropriate loyalty between colleagues and superiors. The loyalty to the public and to its best interest should theoretically co-exist peacefully because the public service serves the public. Of course, in practice it is not as easy as that. The public is not monolithic and even specific groups or individuals may carry conflicting interests – just as different departments of an organisation naturally have different special interests. So what seems to serve the public on one side may seem dangerous from another perspective. This could lead to a conflict of interests – and of loyalties. It is not true that the loyalty toward the colleague who shows criminal behaviour is negligible. Although there may be a duty to "blow the whistle," there will always be at least a moment of hesitance. This shows why Whistleblowing cannot simply be switched on or off. Probably most whistleblowers see themselves as very loyal – not just to the

<sup>14</sup> In economic sciences often also called PRA Property Rights Approach, the best practice of allocating liability

<sup>15</sup> Translation found at <http://www.iuscomp.org/gla/statutes/StGB.htm>



public and "to the cause" but also to their superiors. It has often meant a hard struggle for one loyalty to have overcome the others.<sup>16</sup>

A duty to inform may help to make the prevailing loyalties clearer. Such a duty should, however, build on individuals who are able to make a personal decision, informed by guiding principles or ethics, and consciously consistent with corporate policies and practice. More important than a duty to inform, is therefore guidance in making such decisions. Such guidance cannot reside in books alone – though a Code of Ethics may help. The real guidance comes from the observation and experience of how others behave in the same environment. Management is always the best example. If guidance by rules, however, conflicts with practice and experience, then the correct choice of loyalties is certainly made more difficult. Finally, loyalties always go both ways and superiors may experience a similar sense of conflict between loyalties: for different staff members, their own superiors and the loyalty to the cause of "getting the job done."

### 1.1.7. Third party assistance and Intervention

There are two types of third parties that can play an important role in Whistleblowing: the media and certain types of whistleblower counsellors or representatives and advocates of the public interest.

The media can be envisaged in two different roles in relation to a Whistleblowing situation: as recipient and promulgator of a disclosure; or as commentator on the ensuing consequences of previous Whistleblowing elsewhere. The first role is not fully accepted legally under most existing Whistleblowing regimes, i.e. when the whistleblower has no permission to ever make a disclosure to the media,<sup>17</sup> whilst on the other hand in most countries with a reasonable extent of freedom of press traditionally, exists media source protection. This is obviously subject to a certain tension: media reporting on confidential internal occurrences potentially affecting the public is obviously appreciated by society and the media are protected by certain guarantees relating to the disclosing insiders so that they can come forward more confidently. Unfortunately, the anonymity, which the media can promise and which can sometimes be upheld even against the prosecutors, is seldom air-tight in relation to the employer. If the whistleblower as source is detected by the employer – his relative fame, if any, from media coverage will not protect him.<sup>18</sup> Contrary to what many whistleblowers originally expect, the media do not offer a safe haven but in their function tend to aggravate the conflict. Once there is a need and justification for external whistleblowing, it seems indispensable that the media for their watchdog role are among the potential addressees. While media exposure can certainly promote a return to proper risk management, it shouldn't be assumed that the media could also provide professional counselling to the whistleblower or indeed guarantee anonymity.

Comparable to the importance of the prevalence of the Rule of Law including the effective enforcement of protection, is the importance of advocates of the whistleblowers' cause and the public interest. Politicians can be petitioned and may sometimes be able to advocate or mediate such causes. Then, there are certain other intermediaries, notably organisations like Public Concern at Work (PCaW) in the United Kingdom, the Government Accountability Project (GAP) in the U.S.A. or to a modest extent RCC Risk Communication Concepts (RCC) in Germany, who can support those involved in a Whistleblowing situation and even play a mediating role. All those named give advice to whistleblowers and organisations. In addition to that, the Government Accountability Project occasionally acts as attorney in favour of whistleblowers, Public Concern at Work is promoting the "Public Interest" aspects and RCC focuses on governance and the structural benefits

<sup>16</sup> This is one reason, why whistleblowers usually take such a long time before they eventually come forward.

<sup>17</sup> With the notable exception of the PIDA (UK) and most recently the UN whistleblowing policy (see below) providing protection for such external disclosures under certain circumstances, and the outstanding Swedish system of Freedom of Information plus Freedom of Expression – including Whistleblowing – and media source protection all guaranteed in the constitution

([http://www.handels.uu.se/Uppsatser/2005/d\\_omoffentliganst%E4lldasnyttjandeavmeddelander%E4tten.pdf](http://www.handels.uu.se/Uppsatser/2005/d_omoffentliganst%E4lldasnyttjandeavmeddelander%E4tten.pdf))

<sup>18</sup> This is an ongoing observation of the author throughout his counselling practice and research.

of effective risk communication. Obviously such organisations cannot replace effective rules and structures, but they can act as a sounding board for the experiences of those involved in Whistleblowing situations and thus help promote the public interest by promoting effective risk communication. Even under particularly effective systems, it seems necessary to offer independent advice to potential whistleblowers – which may defuse escalations helping early on to avoid unnecessary harm. To a some extent such advice can be institutionalised – as in the United Nations Ethics Office,<sup>19</sup> or in Ombudsman Offices, if they are so equipped. However, generally it seems preferable to keep advice clearly independent of the organisations: informing (potential) whistleblowers what sort of advice is available but letting the concerned individuals make their own free choices where eventually to ask for such advice.<sup>20</sup>

## 1.2. Definition of Whistleblowing

A good definition can help to work out strategies for coping better with reality. Therefore a definition has to be seen as a function and with an intention to function in a particular way. Richard Calland and Guy Dehn, who also quote dictionaries and other official sources for the same purpose, start their more comprehensive coverage of the topic with a usefully broad definition as “the options available to an employee to raise concerns about workplace wrongdoings.”<sup>21</sup> Of course, it is further specified by the authors, but not in the sense of a closed definition.

A definition that only includes prescribed paths of communication would not help in this environment. The previous sections of this chapter showed by way of approximation that Whistleblowing grows out of internal risk communication, i.e. where there is a perceived necessity to report a risk, be it for legal, ethical or practical reasons. The risk management cycle is by definition open to any type of relevant information at virtually any time and from any source.

Whistleblowing shall then be described as:

- **the insider disclosure of what is perceived to be evidence;**
- **of illegal conduct or other serious risks;**
- **out of or in relation to an organisation’s activities including the work related activities of its staff.**

Note should be taken that this definition does not contain any motives or elements of individual ethics. In a broader sense, there are two access points through which the individual side may enter:

- the “perception” of something as evidencing certain (risky) circumstances and
- the inherent “reason to believe” (also a “perception”) that using prescribed paths would not make the necessary difference.

It does not preclude other explanations but functions mostly to alleviate the whistleblower of otherwise existing burdens of proof, thus guaranteeing that the information will reach a place where it will be processed. The absence of subjective elements additionally distinguishes Whistleblowing from complaints and grievances.

For similar reasons, the prerogative of a duty to disclose or even a responsibility to make such a disclosure is not included in the definition, as it would raise the burden and would hinder an adequate flow of information. This can be differentiated in rules on Whistleblowing – but should not

<sup>19</sup> See below at in chapter “Existing approaches”

<sup>20</sup> The experience reported by Guy Dehn of PCaW, who together with Calland also included a special section on the civil society environment in their book on Whistleblowing around the World.

<sup>21</sup> Richard Calland and Guy Dehn, Whistleblowing around the World: The State of the Art, in Calland/Dehn (eds.), Whistleblowing Around the World – Law, Culture and Practice

be excluded from the basic definition. Whether or when Whistleblowing requires special protection, e.g. where it happens outside the prescribed internal paths of reporting, cannot be part of the definition but instead of the (legal) consequences. Whether at a later stage certain types of Whistleblowing should be promoted and/or others prohibited is a point for discussion when setting up rules.

The focus on risk communication and its functions means that it particularly requires such protection where it is addressed not to the supervisor or other immediately responsible person but to another person or institution that is capable of stopping or remedying the illegality or managing the risk. This would be the case where there is reason to believe that prescribed paths would not lead to someone willing or able to address the perceived risk constructively. In these cases the risk information carries two important additional messages: the risk management system needs to be checked for efficiency and there may be a personal risk for the whistleblower that needs to be taken care of.

## 2. The State of the Art

### 2.1. The Goal

Part 1 of this study has given an overview of the functions of Whistleblowing and its environment in order to understand what Whistleblowing means and how it should be defined. It already included a very brief recall of the typical consequences of Whistleblowing for the whistleblower as well as the organisation. These grave consequences clearly indicate a twofold need to act:

- Communication (of risk) needs to be organised in such ways that risk information reaches the person or unit where it can be properly assessed and then dealt with at the earliest possible time;
- risk communication needs to be welcomed and put to use in the risk management cycle so that potential whistleblowers visibly know that disclosing their knowledge will be useful and will not lead to adverse reactions.

The goal of such measures is to allow risk information reach the responsible managers in the fastest manner possible. As a result of the findings in Part 1, protection systems will need to be studied as well as structural improvements for best practice risk communication. Part 2 aims to define a Best Practice against which the current practice at the EU Institutions can be measured. The Best Practice definition can then be compared with the self-declared goals of the EU Institutions to check whether there are inherent reasons that demand a modulation of generally applicable rules to the particular environment of the EU.

**Section 2.2** lays out the conceivable approaches showing all the intervention points where a solution could be installed to improve internal risk communication and protect EU officials' intent to carry out their duty to disclose risk information. **Section 2.3.** describes the existing approaches and their major differences. This leads to a definition of Best Practice in **Section 2.4.**

### 2.2. Conceivable Approaches

We have seen that Whistleblowing is an area of conflicting duties, loyalties, interests, perceptions, cultures and interests. This area of conflict shall be called the risk communication dilemma. There are mainly three parties (actors or subjects) involved in this dilemma:

- the whistleblower,
- his organisation, including its management,
- and other stakeholders (the "public").

Their relation is not linear but could best be depicted by three partly overlapping spheres. Similarly there are three objects to which the subjects relate each in a specific manner, depending on their role and the approach chosen. These objects can be defined as

- the information,
- the disclosure,
- and the consequences.

No matter which of the subjects or objects an approach chooses as the pivot, each of the others will be affected. When we look at the conceivable approaches, we therefore simultaneously have to look at the parties and their activities as potentially appropriate points of intervention.

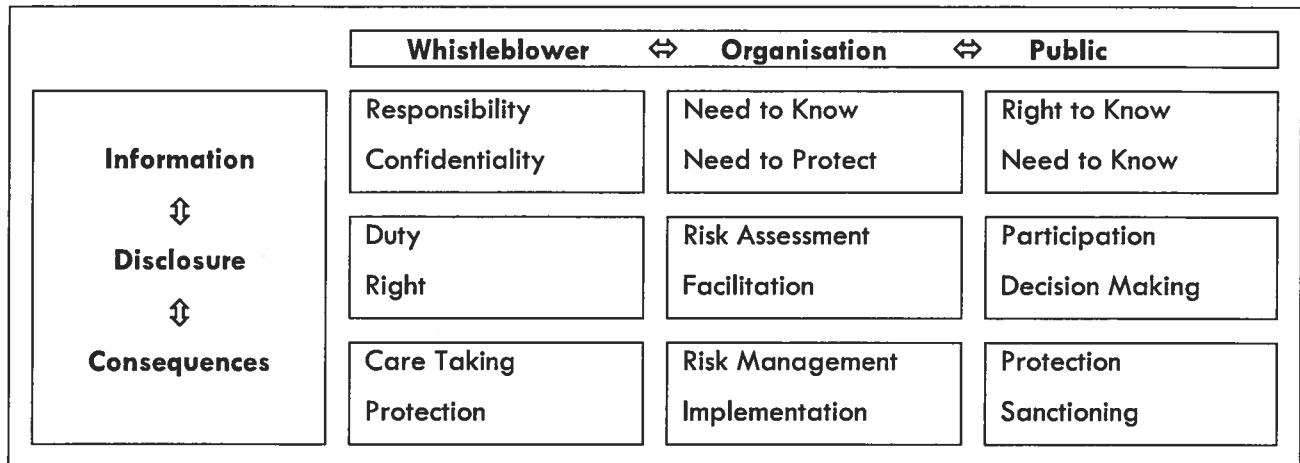


Chart 2: Interfaces for Intervention through Rules on Whistleblowing or Communication

Each interface or point of transition (↔ or ⇕) is sensitive because it requires communication between the subjects and may suffer from frictional losses (transmission inefficiencies).

Interventions at any of these points can be legal, economic, psychological, pedagogical, moral etc. or any combination of these. It can be facilitating or suppressing certain behaviour. It can strengthen existing resources and/or bring in new ones.

### 2.2.1. The Duty to Disclose as an Approach

One example for locating a specific approach on this chart: When looking at the above described chronology in which Whistleblowing has its place:

- a) Duty to Disclose,
- b) Dissent in the workplace,
- c) Internal Whistleblowing,
- d) External Whistleblowing;

activating the first element may already be an approach to the dilemma. It addresses the gap between information and disclosure and immediately affects the relation between whistleblower and organisation. All this is primarily located on the upper left of the above chart. It may also have effects further to the right and bottom, but these will tend to be indirect effects and harder to predict and/or requiring additional efforts. Another test for the approach is to assess how it can be implemented and enforced successfully and whether it is capable of protecting the rights of the affected subjects.

In installing such a duty to disclose while observing confidentiality and other rights, care will be necessary to avoid raising additional dilemmas and conflicts before resolving the already existing ones. A general duty to disclose without definitions that demand careful weighting of open juridical terms, could flood the recipients with unclear and petty allegations. Taken seriously, such a duty might also cause a climate of distrust in the organisation. Postulating a duty to disclose would have to comply with other rules that may even penalise certain disclosures. When employees find out that their performance is rated as more dutiful if they don't make such disclosures or if they find out there is no useful follow-up, the effect of such contradictory messages may be defeating the original purpose as well as making other staff duties dubious by contagion.

### 2.2.2. Addressing the Management

Another valid approach addresses not the whistleblower on the left of the chart but the organisation in the middle column. How incentives on management work in this field has been shown in two

European studies.<sup>22</sup> The basic insight from management science is that whistleblowers don't need extra motivation to share risk information. They do need to be relieved of inefficient or destructive blockades. The management, however, needs to be motivated, because receiving risk information is not immediately to their own advantage. Liability for a mishandling of risk information is most appropriately allocated to the management (Property Rights Approach<sup>23</sup>), because it is the management that has the overall responsibility for risk management including the tools to provide for changes as necessary. Again such an approach could be implemented on the legal, economic, psychological, pedagogical and moral level. While motivating management and raising awareness as to the benefits, it would also seek to take away whatever impedes proper responses to risk information.

According to yet other approaches, legislation for the protection of employees from various hazards can occasionally be found to incorporate a right or even a duty of all or certain employees to report certain hazards (risks). Inasmuch as this is done for their own good or "only" for the benefit of the staff, such an attempt should be seen as part of grievance or complaint procedures. If it is also, or only, focussed on a broader interest (the public interest), such rules are in fact Whistleblowing rules. The main addressee of the norm is then the organisation, and its management who are obliged to conform to certain standards. These standards are partly enforced by the employees who act in a double role safeguarding the public interest when witnessing irregularities. As an approach to addressing Whistleblowing it is again located on the left of **Chart 2**.

### 2.2.3. Law and the Judiciary

Law can also address Whistleblowing. Labour Law obviously regulates the relations between employee and employer. By definition, Labour Law does not let too much of the public sphere inside its realm. This shows that a Labour Law approach is necessarily focussed more to the bottom left of the chart – the consequences on the individual side. What Labour Law may specifically add to a solution of the dilemma is the promise of protection. In order to be efficient in building trust and promoting desired employee behaviour, such promise would need to be credible. Whistleblowers fear a triad of

- ignoring,
- silencing and
- harassment.

The promise of protection becomes credible only if all these fears are addressed. Labour Law alone will not even stymie harassment – let alone address the other fears. This supports the obvious conclusion that a combination of approaches will need to be sought.

Substantial as well as Procedural Criminal Law would mostly address the whistleblower and, obviously, the person who may be involved in a "wrong" disclosed by the whistleblower. This is different in the few judicial systems with a corporate criminal law. However an organisation may be influenced by embarrassment if its employees or officials are found to have committed illegal acts. Since Criminal Law is a sanction of the society against the individual perpetrator, all three spheres can be involved. However, its clear disadvantage is its belated direct intervention and its lack of addressing the complexities of the typical subject matter. For a number of reasons investigations have taken years and eventually ended without avail. Since whistleblowers are particularly sensitive to being silenced or ignored, these observations mean that Criminal Law is far from effective in promoting the disclosure of vital risk information.

If one truly believed in the positive effects of Criminal Law, clearly any rules prohibiting disclosures to public investigative or prosecuting bodies would need to be lifted. Quite to the contrary, especially in public administration, there is a tendency to explicitly forbid such disclosures and to prefer strictly internal measures equivalent to auditing in commercial enterprises. However, the observation is that the media will then take the initiative to dwell on speculations from the "black box," occasionally fuelled by anonymous reports.

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<sup>22</sup> Grüninger and Schmidt

<sup>23</sup> Raphaela Seubert, On the Nature of the Corrupt Firm – Where to situate Liability

In regard to the role of the judiciary, it is obvious that courts cannot be more than good referees on whether the parties have acted according to the rules. Their role is not so much to promulgate what is right but rather what is according to the rules. For reasons of the nature of justice<sup>24</sup> the focus will usually have to be on the formal side of the rules. Often that will preclude any occupation with the act of disclosure itself. The courts in the Common Law tradition have a stronger position in constructing the Legal Order than in the Roman (statutory) law tradition. Generally courts are in a position to mediate between conflicting interests and find situative solutions to creatively balance them, to solve the dilemma. However, in their proceedings they don't reach to this point very often. They are not the only institution to resolve the dilemmas of society and should not be the most prominent one for this purpose. For many whistleblowers they will be a last resort (of hope) – but under an objective light, mostly because they are the last stop in the chronology of Whistleblowing. The new Civil Service Tribunal at the Court of First Instance should not be expected to be much different. It is also the last instance for matters of substance; an appeal is only possible over matters of law.

Together with management action and labour law, criminal law may come to sanction whistleblowers negatively. In fact, threats of criminal and civil defamation claims will often be enough to keep even a perfectly honest whistleblower from providing his important risk information.

#### 2.2.4. Alternative Approaches

Two examples of approaches much further to the right of the spectrum of the above chart shall be presented here, very briefly. Both provide extra protection for whistleblowers without directly addressing the whistleblower.

- The Public's Right to Know has now been widely recognized with Freedom of Information legislation in place in all EU member states and the EU Institutions themselves.<sup>25</sup> What the public knows anyhow, or at least has immediate access to, is not likely to become an object of external Whistleblowing.
- Freedom of information, as it is discussed and generally applicable now, can help whistleblowers, if they can expect the public will find out about and deal with a risk that they have discovered, before it is too late. The official could only be assured of this, if he could take steps of his own to call facts or circumstances to the notice of the public, so that the public will be motivated to exercise its right. This, in effect, turns us back to the duty to disclose and raises the question of whether a right to disclose would not serve the purpose much better.

Other measures that make transgressions of rules less likely, lower levels of risks, and intensify oversight, also cut down the potential need for Whistleblowing – thus indirectly protecting potential whistleblowers. This can usually be expected to raise costs of control and to increase unproductivity quickly above the limits, beyond which a useful surplus can be achieved. One important exception is the right to refuse to participate in illegal conduct, which is not Whistleblowing itself, but an important, traditionally recognised, auxiliary right, which may relieve of some of the pressures under which whistleblowers often find themselves. However, persons who make use of this right in the workplace are often exposed to the same sorts of reactions as whistleblowers so that such a right alone is also not an effective solution.

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<sup>24</sup> Stuart Hampshire, *Justice Is Conflict*

<sup>25</sup> In fact the Treaty establishing a Constitution for Europe includes all three aspects of the Freedom of Information principle: Freedom of expression and information in Article II-71 and Right of access to documents in Article II-102

### 2.2.5. "Soft Law" and Organisational Systems

Instead of or in addition to "hard law" so-called soft law may effectively address the Whistleblowing dilemma. Modern Corporate Governance is typically regulated by soft law – starting probably with the Code of Best Practice of the Cadbury Commission in the UK in 1992.<sup>26</sup> These recommendations try to influence the culture, partly by positive incentives, partly by peer pressures as found in the characteristic: "comply or explain." The rise of Soft Law is not only in a historic parallel with what is called globalisation. It is part of a trend towards self-regulation and more intense interaction with non-state actors ("civil society") as well as toward so called "corporate social responsibility." Government and administrations also have to redefine their roles that have been changing as part of the same development. Whistleblowing is part of this new interaction between corporate sector, state and "civil society," changing intensiveness and efficacy of regulation and creating new demands for accountability.

We have mentioned reasons why Whistleblowing policies have to address management. Whistleblowing is an essential source of information

- to improve quality in Quality Management,
- to improve the knowledge basis for a full assessment of opportunity and risk,

but also indicating that necessary communication is not fully efficient and needs to improve. Furthermore, it is a matter of not wasting the organisation's existing and fully paid for resources – Human Resources and information resources.

This means that a management oriented approach needs to design rules that take care of management's concern about

- being flooded with irrelevant information when important new risk information is expected;
- having to re-channel information largely going to the wrong address,
- having to clean up after ill-delivered misinformation has caused disruption among stakeholders and general public;
- even having to sort out malicious allegations and defamation.

At the same time the rules would need to be open enough to make sure, no relevant information gets lost. A proper understanding of what different risk perceptions mean, and how differences of language or culture (basically risk acceptance levels) can be addressed, could be part of "soft law." Management may want to be trained in related "soft skills." It is up to management to build up the necessary trust for communicating risk information within the organisation. It has never been easy to be the conveyor of "bad news." This can be made unbearable, or conversely it can be put in the right mind frame – as a possibility or even necessity to improve. Doing so may occasionally be the last chance for all involved – Whistleblowing as a vital venture.

Without a safe internal route, the only alternative to silence is to leave – and then probably to disclose the information outside. What exactly is "safe" is also not a proper object for hard rules under these sensitive and largely unpredictable circumstances, but harassment needs to be treated as a clear breach of duties. It does make sense under these circumstances to try to channel where the information flows - be it to the authorities or more widely. This should be acceptable to the whistleblower, where he has a wide range of options, as long as the addressee can reasonably be expected to react so that proper risk management can come back into play as soon as possible – which is in the organisation's best interest. It should also be acceptable to the whistleblower - as well as to the management – that the further outside of the organisation the whistleblower believes he needs to take the information, the more convinced he should be about the relevance of the information as well as the need to go outside.

This approach obviously tends to permit external Whistleblowing, something not easily understood by organisations. The mechanisms started by such rules, however, affect the communicative struc-

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<sup>26</sup> Cadbury Commission, chaired by Sir Adrian Cadbury, Report of the Committee on the Financial aspects of Corporate Governance



tures of an organisation in such a way, that it could be taken for a recipe to make external Whistleblowing redundant. The managers and the entire organisation will want to show how responsive they are to any sort of information even if controversial. This can be set up with clearly defined but largely open internal communication paths. The catch word coined by RCC Risk Communication Concepts is the "communication by-pass." This means that every route communication might take inside an organisation has a by-pass in case it is (subjectively) not viable. This concept can be supported further by offering technically different routes (e.g. electronic, telecom etc.). However it is a prerequisite that any recipient of such information makes in turn a responsible and probably documented choice on what he does with the information – processing it and feeding it into a risk management process personally, if his responsibility is to pass it on to someone who will responsibly take care.

Such an approach promotes a duty to react responsibly to the information, rather than a duty to disclose it. Organisations and their managers ought to be held fully liable if information that was available inside could not be heard and put to use. This is already the legal situation for the larger companies under the latest European company (accountability) laws. The same thinking should be embraced in the administration. It necessarily includes a meaningful feedback to the source of information, because only then will such sources not dry up. Knowing that the process is taken care of responsibly inside, such sources will not feel a need to provide the same information to others as well, including externally destinations - such an action being then at least redundant or even dangerous. This is to suggest that

**"responsibility matched with escalating liability"**

may be the formula that makes the best use of elements of a "duty" and a "right" to disclose. Taking all useful suggestions from above approaches into account, eventually removing whatever obstructs constructive risk communication and otherwise stimulating alert staff, together with the management to be aware of their responsibilities.

As a result of such an organisational culture, the responsible employer has the opportunity to protect his interests better than under any other system; potential trespassers see that problems are taken care of immediately, and media and the general public, as well as other stakeholders can regain confidence in prevention and deterrence instead of having to focus on scandals and harassment – or even punishment.

Factors that could motivate management to move in this direction could be

- personal civil liability for neglected information (partially existing, may need better enforcement),
- elimination of anything to the effect of silencing or ignoring of whistleblowers,
- in particular absolutely enforced sanctions for the harassment of honest whistleblowers, and finally
- continuous appraisal for proper risk management in the entire organisation.

What whistleblowers need at the end of the day is not special treatment but fair treatment. Dutiful behaviour needs to reflect on career development. That is a matter of fairness and consistency with rules, not of reward. Particular attentiveness – such as blowing the whistle about something serious not yet seen by anyone else - should receive extra credits. "Acknowledgement" is the magic word in the relationship between management and whistleblower – combined with responsibility (the faculty to answer for their respective actions) it is what binds them together in true loyalty.

### 2.2.6. A Change of Perspective

A quick shift of perception may be offered to highlight how the issues discussed here are largely independent of personality traits: The OECD has gathered and discussed experiences of multinational enterprises and published them as an annex to its 2005 Annual Report on the Guidelines for Multinational Enterprises.<sup>27</sup> In Annex 6 a paragraph is titled "Bearing witness" - rightly so, because what follows is clearly not Whistleblowing in the sense as used here. The parallels are however so striking that a full quotation seems warranted:

*Bearing witness. Consultation participants generally supported the view that companies have some kind of responsibility to "report wrongdoing to the appropriate authorities" and provided indications that companies are already doing this. One business executive at the December consultations noted that, in his company's experience, when companies do speak out, they are often ignored – by host and home governments and by international organisations. Participants also stressed the obvious risks of Whistleblowing – losing business, "getting shot" and expropriation. Some doubted that companies could play an important role in this respect because of the gravity of the threats against them. One NGO suggested that there is a need for a "witness protection programme" for businesses and that, if companies felt they could not "report serious wrongdoing to an international body and/or host country institution without suffering negative consequences," then this was a reason not to invest in that host country. Noting that "unilateral action under such conditions is usually suicidal", participants highlighted the value of collective action – e.g. operating through business associations or in partnership with international organisations – in facilitating effective whistle-blowing. The useful role played by some OECD embassies in channelling such information was acknowledged.*

The message is the same. The information is there, disclosures would be made, if it were not for fear of reprisal or of being ignored. A mediator or some other type of third party intervention might be desirable.

## 2.3. Existing Approaches

The ideas from above remarks on conceivable approaches need to be tested against observations on existing approaches in order to define a best practice model, against which the existing EU regulations can be benchmarked.

The number of fundamentally different approaches is limited. In fact, the world wide legal situation can be fully described by three levels of whistleblower protection:

- Common Law countries with some specific, statutory whistleblower protection,
- Roman Law countries with unspecific but not insignificant statutory protection,
- Other countries with or without statutory protection but without structures to warrant minimum standards of protection.

In comparative law it is not sufficient to compare individual sections and articles of law. The functions in the entire system have to be assessed although little more can be done than to line up models against each other, because anything else would be the famous comparison of apples and pears.

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<sup>27</sup> OECD Guidelines for Multinational Enterprises, 2005 Annual Meeting,, Annex 6, p. 82, in the report the quotes are attributed to individually named MNEs

There are books<sup>28</sup>, articles and studies<sup>29</sup> available comparing different national approaches. A thorough study commissioned by the same entity as this study was published 10 years ago.<sup>30</sup> The best researched Whistleblowing countries, i.e. the USA, Canada, the UK, Australia and New Zealand possibly together with South Africa and Japan<sup>31</sup> obviously make up a list of Common Law or strongly Common Law influenced countries. Some articles now also include Korea and Israel,<sup>32</sup> which does slightly change the spectrum. Belgium, India, Ireland, Japan, The Netherlands, Philippines, Sri Lanka and Switzerland, are countries where specific bills have recently been introduced. The entire spectrum is screened with a focus on the reasoning behind the laws in a Dutch article.<sup>33</sup>

The Canadian Government Public Service Integrity Office had prepared a "Comparative International Analysis of Regimes for the Disclosure of Wrongdoing ("Whistleblowing") – again focussing on the usual Commonwealth Countries<sup>34</sup> just as in more recent recommendations of a Canadian Government Commission.<sup>35</sup> There is an interesting analysis, and indeed comparison in the closer sense, of the different regimes co-existing in the states of Australia.<sup>36</sup> There are two notable studies that have performed valuable comparisons on the European level, one focussing on the transmission of the May 1999 Inter-Commission "Model Decision,"<sup>37</sup> the other one on the new Members (then Candidates).<sup>38</sup> The latter seems most valuable, though quite brief, because it takes a useful perspective on what is indeed there, although not necessarily oriented on the Anglo-Saxon perspective or embedded in a Common Law legal culture.

Since this study strives to determine a best practice, the Roman law approaches will not be left out. However, only what might contribute in one way or another to a best practice model will be mentioned there. While the Common Law approaches differ considerably in practically all details, they follow comparable structures and could probably with a few adaptations replace each other in their respective contexts. Research seems to agree that among the Commonwealth approaches, the British model stands out and may be the most far-reaching legislation on Whistleblowing. Therefore the Public Interest Disclosure Act is explained in more detail, while the other Commonwealth laws are mentioned only where this permits additional insight. The situation in the U.S.A. is mentioned briefly with a special focus on the public sector, as is the recent development in Canada. The Whistleblowing Policy of the United Nations' General Secretariat, which came into effect on January 1, 2006, is also mentioned to see in how far it could be a model for the European Institutions.

### 2.3.1. French and other Roman Law Tradition Approaches

In all European countries, there are systems that permit or even demand disclosures, and grant from time to time a certain level of protection. The downside to this is the fact that all of these systems are limited to certain parts of the workforce, certain types of disclosures, or do not explicitly provide for protection against reprisal.<sup>39</sup>

To take just one example, there has been a lively debate in **France** over the appropriateness and legality of Sarbanes-Oxley type of rules on Whistleblowing in companies operating in France,

<sup>28</sup> Notably Calland and Dehn (eds.), *Whistleblowing Around the World – Law, Culture and Practice*

<sup>29</sup> Peter Bowden, *A comparative analysis of whistleblower protection*, Australian Association of Applied Ethics, 12th Annual Conference, Adelaide, 2005

<sup>30</sup> *Public Concern at Work, Whistleblowing, Fraud & the European Union*, 1996

<sup>31</sup> Japan, the last of these, introduced its law in 2004, Canada is working on an important remodelling of the rules on accountability in the public service

<sup>32</sup> Canadian Government, *A Comparative International Analysis of Regimes for the Disclosure of Wrongdoing*, and the much briefer study by Marten and Crowell, *Whistleblowing: A Global Perspective*

<sup>33</sup> Wim Vandekerckhove, *The ethics of whistleblowing policies*

<sup>34</sup> Government of Canada – Public Service Integrity Office, *A Comparative International Analysis of Regimes for the Disclosure of Wrongdoing („Whistleblowing“)*, 2004

<sup>35</sup> In detail: Kernaghan in Canadian Government, *Restoring Accountability - Phase 2 Report*

<sup>36</sup> Peter Bowden, *ibid.*

<sup>37</sup> European Parliament, *Comparative Study of „Whistleblowing“ Procedures in Community Institutions*

<sup>38</sup> Ari-Matti Nuutila, *Whistleblowing, Exchange of Information and Legal Protection*

<sup>39</sup> Ari-Matti Nuutila, *Whistleblowing*, *ibid.*

candidly refused e.g. in the National Anti-Corruption Agency (SCPC) 2004 Annual report,<sup>40</sup> whose director Mathon has seen the issue basically as that of avoiding inadvertently introducing systems based on US American values thus neglecting ones own culture.<sup>41</sup> Reporting is, however, not entirely foreign to the French business culture. There are even obligations for companies to report e.g. in the plea-bargaining procedures set up by the Conseil de la Concurrence (Fair Competition Authority) with leniency and settlement procedures as well as in the legal obligation to report suspicions to the TRACFIN authority on money laundering. Members of specific professions (Court of Auditors, Banks) may also be obliged to report irregularities or suspicions to TRACFIN or the judiciary. Civil Servants have to report corruption under Article 40 of the Code of Civil Procedure to the public prosecutor.

France does even have statutes explicitly demanding "external" disclosures. Examples concern such disparate topics as money laundering and child molestation. Internal reporting of serious risks is the rule. This is not surprising, since no system can survive without such self-regulating information. That is not so much a matter of culture than of necessity. Of course, French organisations are not interested in tolerating collusive behaviour against the interests of the organisation. The problem starts when risk information is by-passing superiors. Clearly, this sort of information is highly sensitive, and to be in a position of having to disclose such information is not desirable anywhere in the world. There may be cultures that regard "saving face" so highly that an employee might kill himself rather than disclosing anything about his patron – with the patron ending up having to kill himself, when eventually the disaster becomes public. This seems to have been the case in Far-Eastern societies. Even there, rules addressing external disclosure and protecting whistleblowers have been introduced now.<sup>42</sup> France – as well as the central and eastern European countries and even Spain, Italy and Germany for that matter – are countries that have strong, historically founded fears about defamation. That notwithstanding, they have always had and still do have a duty to report. Resistance movements, supposedly intrinsic to a national anti-whistleblower culture, could not have existed if everyone had always adhered to internal lines of reporting. Even then responsibility meant having to but also being able to "answer for."

It is paradigmatic and helpful to understand fully the stance of the French Commission on Information Technology and Liberty (Data protection agency, CNIL) on Sarbanes Oxley type of technical Whistleblowing systems. The CNIL

- stresses the due process rights of incriminated employees
- recommends not to encourage anonymous reporting and
- advises against a (general) duty to report, which might be illegal,
- warns against relying on Whistleblowing instead of reasonable internal auditing.

Otherwise the CNIL announces its support for measures that conform to Sarbanes Oxley and acknowledges the necessity for Whistleblowing as such as well as support and protection for whistleblowers.<sup>43</sup> The Dutch Data Protection Authority had a hearing on the related subject of cross-border exchange of personal data in 2004.<sup>44</sup> In its session of 31 Jan – 1 Feb, 2006, the careful stance of the CNIL has been adopted by the so-called Article 29 Data Protection Working Party of the EU in a yet unpublished document: "Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime."<sup>45</sup> The requirements of EU Data Protection Directive 95/46/EC in whistleblower hotlines were summed up by the Working Party as follows:

<sup>40</sup> Service Central de Prévention de la Corruption, SCPC, Rapport d'activité pour l'année 2004

<sup>41</sup> In a discussion on Radio France Culture, „le Bien Commun,“4 June, 2005 together with Daniel Lebègue, the President of the French section of Transparency International, who clearly favours the introduction of such measures

<sup>42</sup> In South Korea and Japan

<sup>43</sup> CNIL Guideline document, 10 Nov 2005

<sup>44</sup> [http://europa.eu.int/comm/justice\\_home/fsj/privacy/docs/binding-rules/hearing\\_bcr\\_en.pdf](http://europa.eu.int/comm/justice_home/fsj/privacy/docs/binding-rules/hearing_bcr_en.pdf)

<sup>45</sup> Released after this study was finished and now available at

[http://europa.eu.int/comm/justice\\_home/fsj/privacy/docs/wpdocs/2006/wp117\\_en.pdf](http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf)

- The scope of application and the persons against whom a report can be filed must be limited according to the purposes (risk management, crime prevention).
- Those making a disclosure should be assured that their identity will be kept confidential. Anonymous reports should not be encouraged under ordinary circumstances.
- Only data necessary for further investigation of the report may be processed.
- Within two months after closing the investigation the data should be deleted. Only in cases, which require further legal steps, may the data be saved for a longer period.
- The indicted person must be informed of the report (disclosure) as soon as there is no more risk of loss of evidence. The name of the disclosing person should normally be given to the accused only when the disclosure was maliciously wrong.<sup>46</sup>

**Germany** has seen a 2003 Federal Labour Court decision, which detailed under which conditions an employee could disclose to investigators evidence of criminal acts committed by his superior.<sup>47</sup> Ever since a Federal Constitutional Court Decision of 2001, it has been accepted that an employee had a right to such disclosures to the prosecutors.<sup>48</sup> The Labour Court upholds this right in so far as the employee shows he was not motivated to injure the employer with the disclosure. This was immediately criticised<sup>49</sup> and is not likely to stay, since it effectively voids the Constitutional Court decision. In effect, it would make Whistleblowing impossible: no one will ever be able to prove non-existing motives. This means that although the German constitution provides a fairly wide and protected right to disclosure, in practice its extension is unclear. As anywhere else, people in Germany have an explicit right, and occasionally a duty, to report under certain administrative laws,<sup>50</sup> which extend even further for members of the public service. The general principle of protection from unreasonably discriminatory or harassing measures is spelled out in § 612a BGB (Civil Code). Additional regulations to protect the whistleblower are in the process of discussion with more and more large corporations adopting private whistleblower policies, occasionally employing an interesting electronic system to facilitate a dialogue with anonymous whistleblowers.<sup>51</sup>

It is not surprising that the **new EU Member States** all seem to have a duty for public officials to disclose fraud,<sup>52</sup> which, if breached, is occasionally even a criminal offence. They had to comply with the international conventions and treaties before accession. Hungary is one of the few countries with a criminal law provision (Article 257 of the code) protecting whistleblowers against "taking a disadvantageous measure against the announcer because of an announcement of public concern," and punishable with imprisonment of up to two years.<sup>53</sup> In all candidate countries it seems to be difficult in practice to disclose, collect and manage risk information effectively, whereas everywhere dismissal from work for Whistleblowing is illegal. The study by Nuutila deplors that in practice there is no protection against dismissal. Any reason can be made up and will usually be sufficient – and it assumes that the disclosure processes are even less satisfactory in the old member States – with the now following exception.<sup>54</sup>

### 2.3.2. Public Interest Disclosure Act (PIDA, UK) and other Common Law models

The UK Public Interest Disclosure Act 1998 (PIDA) covers all "workers" in a broader sense and provides for disclosure to a number of prescribed bodies in circumstances set out in the Act. As in business and charitable organisations, any public administration is required to have a Whistleblowing procedure in place. Detailed guidance on raising matters under this Act and the Civil Service Code is set out in the Directory of Civil Service Guidance. The groundwork was laid by the Parliamentary Commission on Standards in Public Life (CSPL), whose "Seven Principles of Public Life" form a basis

<sup>46</sup> Referenced at <http://www.datenschutz.de/news/detail/?nid=1750>

<sup>47</sup> BAG 2 AZR 235/02 (3 July 2002)

<sup>48</sup> BVerfG 1 BvR 2049/00 (2 July 2001)

<sup>49</sup> Peter and Rohde-Liebenau, Review of BAG 2 AZR 235/02 in *Arbeit und Recht*, issue 11/2004

<sup>50</sup> Deiseroth, p. 75pp.

<sup>51</sup> The Business Keeper Monitoring System (BKMS)

<sup>52</sup> Nuutila, Whistleblowing, Exchange of Information and Legal Protection, p. 259

<sup>53</sup> Corruption and Anti-Corruption Policy in Hungary, Open Society Institute 2002,

<sup>54</sup> Nuristan, Whistleblowing, Exchange of Information and Legal Protection, p. 263

for all public officials, upon which the various departments have developed specific codes, training plans etc.

The latest remarks of the CSPL on Whistleblowing are documented completely in Annex IV of this study. It emphasises that the PIDA "is a helpful driver, but must be recognised as a 'backstop' which can provide redress when things go wrong, not as a substitute for cultures that actively encourage challenge of inappropriate behaviour."<sup>55</sup> As a backstop, PIDA delimits the minimum of what should be expected in proper risk communication from the organisation and managers as well as from staff and outlines a minimum of whistleblower protection. This is complemented by various other rules, particularly in Labour Law, some of which are statutory, e.g. the Civil Service Code for the public sector.

A disclosure (not a whistleblower !) is "protected" under the PIDA, if it relates to specific subject matter (breaches of law, environmental, health and safety issues or a cover-up of such matters). The PIDA then contains something like a reasoned escalation manual directing staff

- first to seek confidential advice, then to
- blow the whistle within the internal hierarchy, or
- with another responsible person (Level I: internal disclosure).
- Depending on the degree of evidence supporting the disclosure, it also protects Whistleblowing to designated authorities (Level II: regulatory disclosure ) or even wider disclosures (Level III) where evidence and/or circumstances justify it.

On the third level, there must also be a reasonable expectation of a cover up or harassment of the whistleblower, or a failure to react to the concern. Extraordinary seriousness of the matter is also sufficient, as long as it is reasonable to make the disclosure at the chosen point, and the whistleblower has acted in good faith, believing the facts to be substantially true. The escalation procedure takes into account a weighted measure, whereby it must be reasonable to address the particular recipient of the disclosure, according to its seriousness, or particular concerns of confidentiality on the one hand, and for example past experiences with the employer's risk management culture, to transfer more and more of the burden of proof to the whistleblower in exchange for a wider right of disclosure.

## PIDA Three Step Protected Disclosure Regime: Best Practice in Whistleblowing

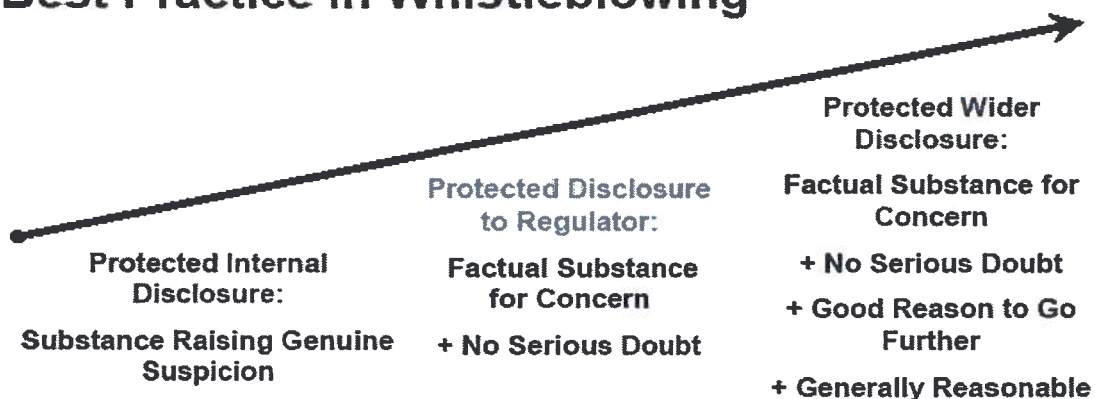


Chart 3: UK Public Interest Disclosure Act 1998

<sup>55</sup> The Committee on Standards in Public Life (CSPL), 10th Report, 4.46

The PIDA motivates employers to set up improvements in the risk communication culture without making any particular demands on them. It does not even grant whistleblowers any extraordinary protection, however it does permit them to choose how far they want to go in making external disclosures depending on how strong the evidence is and how inadequately internal risk communication is managed. The Act sends out the message: if you really don't think you can make your important disclosure internally, it will be better to make it at some relevant external institution rather than not at all.

The employer can expect to experience the undesirable consequences of external Whistleblowing if he has not been able to show that a serious and reasonably well supported concern will be acted upon responsibly in the enterprise. It is therefore not primarily the exercise of free individual expression that eventually motivates organisations under the PIDA to make the necessary adjustments. It is in their own self-interest to listen to what may be well supported information on serious risks. The management is then free to choose solutions for the communicative process that suit its situation, as long as it addresses the risk and does not persecute the messenger. The employee is free to choose where he wants to make the disclosure as long as the requirements of the respective level are met.

The PIDA system automatically enforces an internal reporting system as a prerogative, because the disadvantages for the employer who cannot demonstrate the installation and efficacy of such a system are considerable (protected external disclosures and further consequences). While there are no statutory punishments as Protection against reprisals, the remedies and rewards awarded under the PIDA seem on average<sup>56</sup> considerable enough to thwart obvious harassment.

What distinguishes the PIDA from other legislation:

- It covers virtually any employee. In the public service, the security related services had been promised an equivalent solution. Since this seems not to have happened, there is now a movement to also include these groups under PIDA.
- An honest and reasonable suspicion will mean the whistleblower is protected, as long as he carries the suspicion only to his manager or his employer. "Honest and reasonable" means that the disclosure cannot be malicious and against better knowledge.
- If the whistleblower additionally believes that the information is true, he may go to an outside body – but only to certain prescribed ones – usually the respective regulator.
- If yet additionally the risk is exceptionally serious or the whistleblower has reason to believe, he would have to face reprisal, or if there is really no one else to turn to, the whistleblower can make his disclosure to virtually any recipient, as long as this seems reasonable. It will seem reasonable if that recipient is so selected as to be able to effectively address the risk, and reasonable interests of confidentiality are considered.
- Protection means "full compensation" in case there has been a reprisal – i.e. normally reinstatement or monetary compensation to the extent that the whistleblower is materially in the same position as if no reprisal had happened. It is important to note that an interim injunction may be granted to continue on the job for the time of any judicial proceedings.
- Inasmuch as the above conditions are met, contractual agreements on confidentiality (gagging clauses) or other agreements prejudicing these rights are void. The Official Secrets Act alone prevails over the PIDA.

The CSPL has explicitly adopted recommendations to assure that

- employees know about and trust the disclosure mechanism;

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<sup>56</sup> According to the CSPL explanatory notes on PIDA, 46 % of the whistleblowers who took their case to the Employment Tribunal were successful with rewards averaging over 100.000 GBP.

- employees have realistic advice on the implications of disclosure;
- the practice is continuously monitored for efficiency of the rules; and
- employees are routinely informed of the disclosure channels available to them.<sup>57</sup>

The **Australian** situation has some parallels with the situation in the U.S.A. (next section below), which is to be discussed next, in that it is dissected into diverse regimes in the different states, in addition to one on the national level. Furthermore it was found to be generally not working well by a National Integrity Assessment, some of the reasons being

- a vague description of covered subject matter,
- a limited personal coverage,
- a limited protection from reprisal,
- no independent body as point of disclosure.<sup>58</sup>

**New Zealand's** Protected Disclosures Act of 2000 offers a more consolidated picture than that in the different regions of Australia. The rules in New Zealand can be summed up this way: any employee in the widest sense has a right to make a disclosure to the Ombudsmen who would also take up investigations as necessary. This generally includes even officers in the security services, to whom some additional special rules apply. Usually anyone should first try internal disclosures, but disclosures direct to the Ombudsmen are also permissible immediately. However a complaint to the Ombudsmen over improper internal handling of a disclosure in the private sector (appeal) seems not to be possible. That means there is an incentive in the private sector to go to the Ombudsmen directly. The threshold for disclosures in the private sector is that of a serious risk, whereas where public funds are involved, any irregularity will suffice. Reasonable belief that the information is true or even likely to be true is enough. As a way of protection Sec. 18 of the PDA offers immunity from civil and criminal proceedings for the whistleblower. Possible reprisals are illegal but would have to be dealt with under regular labour law jurisdiction. The identity of the whistleblower and his actions are to be kept confidential, unless exceptionally, the investigation or a number of other reasons (natural law, procedural fairness) necessitate otherwise. The rules and pathways seem generally simple and clear. Amendments are sought from practical experience to provide for a guidance and assistance function to whistleblowers in the Ombudsmen's Office. Low level of usage was attributed to inconsistencies in application and lack of trust in the protection of the identity of the whistleblower.<sup>59</sup>

**South Africa** has a Protected Disclosure Act modelled after the PIDA but with some serious drawbacks in comparison with PIDA which have been highlighted by a Government Commission discussion paper.<sup>60</sup>

**Canada** has adopted a new regime late in 2005 after years of careful evaluations and monitoring of the 2001 policy on Internal Disclosures of Wrongdoing in the public sector. It seems that the recommendations of another Government Commission will lead to further improvements increasing the scope of personal and subject matter coverage, timeliness of response and of access to information in the foreseeable future.<sup>61</sup> The Recommendations dwell on fortifying a statute on Whistleblowing with a separate value statement (Code of Conduct).

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<sup>57</sup> The Committee on Standards in Public Life (CSPL), 10th Report, 4.43

<sup>58</sup> Kernaghan, p. 89

<sup>59</sup> Mary T Scholtens QC, December 2003, Review of the Operations of the Protected Disclosures Act 2000

<sup>60</sup> Quoted in Campbell, pp. 59-66

<sup>61</sup> Government of Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities (Justice John H. Gomery), Restoring Accountability - Phase 2 Report - Recommendations



### 2.3.3. The U.S.A.

This leads to the picture revealed in the forerunner country of Whistleblowing legislation, the **USA**. The situation there is graphically described by one of the founder activists and legal scholars, Tom Devine, stating that Whistleblower Laws had continuously undermined protection against retaliation.<sup>62</sup> Since 1983 a maze of whistleblower protection legislation has spread from the federal to the state level and back. The common denominator is a First Amendment (Freedom of Speech) based protection for the individual. The first obstacle is the patchwork of different provisions, all of them with their specific outline of protected individuals, procedures to be followed, statutes of limitation etc.<sup>63</sup>

The statutes typically focus not so much on the disclosure but on the person of the whistleblower and the act of retaliation, having their reasoning in the Freedom of Speech Amendment to the Constitution. Being focussed on retaliation, they typically require that the employer knew of the protected activity (otherwise no interconnection), and that the retaliation was indeed at least partly motivated by the protected activity. The typical defence then is that other behaviour had also justified the employer's reaction. The relative quality of the respective law is then determined by how the burden of proof is balanced between the parties.

A peculiarity of the federal whistleblower protection regime in the US originated in the 19<sup>th</sup> century civil war and experience with fraudulent military supplies: the **False Claims Act**. It is one of the older laws on Whistleblowing worldwide. After a scrapping of the most important clauses in 1943, it was revamped in 1986 with renewed provisions granting whistleblowers acting as proxy prosecutors ("qui tam ...") to collect a 15 - 30 % fraction of the collected damages. This has returned far more than a billion US Dollars to the Federal budget.

The broadest and earliest act in the USA covers (only) federal civil servants (**Whistleblower Protection Act** of 1978, WPA). WPA protects "speech," defined as the act of lawfully disclosing information that an employee or applicant reasonably believes evidences illegality, gross waste, gross mismanagement, abuses of authority, or a substantial and specific danger to public health or safety.<sup>64</sup>

A practical obstacle in the US system has been for some time the Office of Special Council (OSC), an agency established in 1979 to support whistleblowers and chaperone them through the procedure of the WPA, but found in fact to be acting as a gatekeeper and bottleneck, which in the early years seemed to make it often impossible even to enter the system. Once the OSC has investigated a case of reprisal it makes a recommendation to the employer and if that is futile, takes the case to the Merit System Protection Board, a panel of administrative judges for labour complaints. In recent years, the OSC has established better relationships with whistleblower protection groups. OSC has also embarked upon a policy of publishing its actions on behalf of whistleblowers, and undertaking initiatives (like the Special Counsel's "Public Service Award") to publicly recognize the contributions of whistleblowers to the public interest.<sup>65</sup>

The scope of the act with the stiffest sanctions against harassment, the **Sarbanes Oxley Act** of 2002 (SOX), is not yet fully tested, while some practitioners believe it to cover virtually any employment situation.<sup>66</sup> It makes an impact in the sense that it obliges covered corporations to set up a system for the intake of generally internal disclosures (sec. 301) and the protection of their confidentiality – but in sec. 307 also an obligation of company counsel (attorneys !) practising at the Security and Exchange Commission (SEC) to disclose any relevant information there. This is an innovative concept, since it reverses traditionally total confidentiality in favour of the client. It also seriously influences corporate risk management, since a system could be faulty, potentially leading to delisting with the SEC, if even one disclosure was not documented and given plausible follow-up.

<sup>62</sup> Devine, Whistleblowing in the United States: the Gap between vision and lessons learned, p. 83

<sup>63</sup> As a guideline, Stephen M. Kohn, Concepts and Procedures in Whistleblower Law

<sup>64</sup> Stephen M. Kohn, Concepts and Procedures in Whistleblower Law. p. 74

<sup>65</sup> Elaine Kaplan, The International Emergence of Legal Protections for Whistleblowers, p. 42

<sup>66</sup> Baker et. al. Whistleblower Protection Under the Sarbanes-Oxley Act

This addresses the primary concern of whistleblowers that they might be ignored. Under SOX, ignoring risk information seems harder on management than giving proper follow-up. In any case failure to set up and manage the system in this prescribed way can be sanctioned by imprisonment as well as heavy fines on individuals and companies and delisting. Discrimination against a whistleblower can be penalised by a prison sentence of up to 10 years and/or a fine of up to 5 million USD.

Probably all of the European companies listed under the SEC, and a majority of their affiliates have installed formal procedures aiming to conform to SOX whistleblower regulations. Obviously that has an enormous influence also on non-U.S. legal culture, as the French discussion reflects. Finally another important feature of the US system are the Corporate Sentencing Guidelines, their modernisation invoked by SOX. They provide for incentives to corporations to prove that they have functioning systems in place to react adequately to risk communication. Corporations otherwise run the risk of being delisted by the SEC, fined up to 5 Mio. USD and liable for further compensation.

#### 2.3.4. The UN General Secretariat

On 1 Jan. 2006 a Policy on Whistleblowing for the United Nations Organisation came into effect.<sup>67</sup> An original draft version had been prepared by the UN Office of Internal Oversight supported by the author of this study. The Government Accountability Project had helped in drafting a final version after several rounds of input from the entire UN staff.

The UN Policy contains a considerable number of elements typically highlighted in U.S. whistleblower legislation. The statement of purpose is focussed on the whistleblower and his protection, more than on how reporting can help the organisation reach its goals and values. However everyone who could possibly make an internal report is covered, and even persons from the outside, reporting on wrongdoing inside the organisation, are officially protected against retaliation.

In a general section it defines the reporting of any breach of the organisation's rules as a staff duty. Illegal behaviour of staff constitutes such a breach, so that all sorts of illegal behaviour inside the organisation plus certain types of irregularities give a right to protection. A refusal to participate in such breaches, and cooperation in audits and investigations are equally protected.

The Policy lists four types of internal recipients of reports, without any hierarchy or preference. Other internal addressees are not prohibited. Clearly, external reporting will be very limited under the policy. External reporting is also protected, but only in the following cases:

- if the use of (all) internal mechanisms is not possible,
- for reasonable fear of retaliation;
- for fear that evidence would be concealed or destroyed
- or that the organisation has not reacted on a previous report within six months; and
- that the individual does not accept benefits for such an external disclosure.

The substance of these categories may be relatively easy to fulfil. The burden of proof, however, is with the whistleblower. There is an additional third condition, which will be particularly difficult to prove, unless the UN administrative justice system can define reasonable ways: external reporting needs to be "necessary" to avoid violations of national or international law or other imminent substantial risks.

The UN General Secretariat has established an Ethics Office, reporting only to the Secretary General and the General Assembly, which is responsible for receiving complaints and protective measures including preliminary injunctions. It may by-pass the internal investigation and oversight mechanisms if there could be a conflict of interest. The Ethics Office will complete a preliminary review of a report or complaint within 45 days. If then the Office of Internal Oversight Services

<sup>67</sup> ST/SGB/2005/21, [http://www.un.org/reform/stsgb\\_2005\\_21\\_eng.pdf](http://www.un.org/reform/stsgb_2005_21_eng.pdf)

(OIOS, functional equivalent of OLAF but a fraction its size) is asked for further investigations, the OIOS will report within 120 days and seek to complete its investigations by that date.

The Ethics Office has an extensive counselling function and may advise the staff of the other relevant services of the organisation, such as the Office of the Ombudsman, or refer a situation to the Management Performance Board.

Retaliation against a person engaging in protected behaviour, explicitly defined as misconduct and possibly leading to a demotion, is investigated by the OIOS.

### 2.3.5. The situation in the private sector

In private sector companies a tendency to adopt policies on reporting serious risks, misconduct or mismanagement became observable recently. Improving the management of internal reporting came into focus as part of the Corporate Governance and accountability debate. The field of risk management has extended its realm from specialised finance, where it originated as a discipline, to sustainability and reputation management as new applications.<sup>68</sup> Scandals like Enron, which cost the stakeholders billions, underscored the importance of early warning systems. Since similar events have been reported from other parts of the world without necessarily leading to Whistleblowing policies or even legislation, it may be assumed that the benefits of Whistleblowing policies and legislation are better understood in highly liberalised economies. There are more characteristic traits:

- typically the policies were adopted by companies incorporated in countries that have national whistleblower regulations,
- and by companies that already have a Code of Conduct and strong compliance monitoring,
- also,
  - the more internationally exposed,
  - the more ethically conscious, the more "experienced" with Whistleblowing the greater the likelihood of such policies in a company.

Since the company-wide policies on Whistleblowing hinge on the national legislation, they are usually quite brief, stating the importance of Whistleblowing for the company, and the protection against retaliation. The most important contribution of such rules is their part in a framework consisting of a Code of Conduct, a company Value Statement, the Tone from the Top, proactive internal auditing and risk management, transporting the outside rules into practice. In the meantime a number of large companies that are not under a jurisdiction with explicit whistleblower protection have adopted company-wide whistleblower schemes.<sup>69</sup>

## 2.4. Best Practice

This section ventures to distil the most relevant elements from above listed existing and conceivable approaches relevant to an (international) civil service administration inasmuch as they are mutually compatible. The purpose is to create a reading aid before an in-depth look at the existing EU regulations.

### 1) Awareness

In a best practice model, stakeholders, including all potential whistleblowers should be aware of the benefits of risk communication within a framework of mutual responsibilities, clearly defined in

<sup>68</sup> This was laid out in Leisinger, Whistleblowing und Corporate Reputation Management

<sup>69</sup> e.g. German Rail with an elaborate ombudsman system specifically for fraud and corruption, or German Telekom, which also employs the Business Keeper Monitoring System for protected communication.

proprietary Value Statements and/or Codes of Conduct plus a definition of (limited) duties to disclose (as on money laundering, organised crime, preparations for war or genocide).

## **2) Who can be a Whistleblower ?**

The widest possible definition of a whistleblower should be chosen, including everyone who can possibly be a source of (internal) risk information. Outside of a whistleblower statute, it should be emphasised that relevant risk information from outside sources is also welcome and will not lead to reprisal (e.g. in sourcing decisions). These outside sources would not be defined as whistleblowers, but would add to comprehensive risk communication system and lead into a productive stakeholder dialogue.

## **3) On what sort of subject matter ?**

Generally, all risk relevant issues should be covered. The responsibility of potential whistleblowers to judge what sort of information would be relevant to the organisation and/or the public interest should be left intact.

## **4) How should it be effected ?**

The establishment of clear steps and procedures is a value in itself. "All" and "everywhere" is better than a long list of possible recipients or protected personnel. Every stipulation should leave no doubt as to how the effect in a practical situation will be. Too many conditions raise doubt about the message of the entire policy and means important risk information will be lost.

## **5) Only internally or also externally ?**

Risk information will eventually need to be managed internally. Processes will therefore usually be much more efficient if disclosures are made internally. This protects also the vital interests of the organisation and other affected stakeholders. If, however, in some cases an internal disclosure seems ineffective or unreasonable, outside disclosures should be possible and equally protected. The venue for outside disclosures should be limited by inefficacy to address the perceived risk or problem, with the media as last resort. Generally there should always be a designated bypass for every route of communication that may be perceived as blocked.

## **6) Confidentiality**

Confidentiality is necessary to protect legitimate interests. This clearly includes private data and intellectual property but not the fact of illegal activities. Since harassment of a whistleblower is illegal or illegitimate, the whistleblower deserves the confidentiality that it takes to protect him from harassment.

## **7) Anonymity**

Anonymous disclosures are less effective, as long as the information is incomplete and communication with the provider is impossible. Retaliation against an anonymous whistleblower is impossible, since he is not identified as the source. However, in most cases of originally anonymous Whistleblowing, it does not take long before the source is discovered. Then protection from harassment is needed. Because there may be value in the information from whistleblowers who want to remain anonymous, this source should be admitted and equally protected, meanwhile encouraging potential whistleblowers to seek more effective channels of communication. Electronic protection of risk communication will be a compromise. Obviously, there should not be a duty to use such systems.

## **8) Time Scale**

While most processes having to do with risk communication and potential consequences are highly time sensitive, information should not be barred for the sole reason that it could have come earlier. Similarly, complaints of harassment should not be time-barred, although there may be statutes of limitation that reflect the gravity of a harm. If, for example, one year after a consequential damage was first realised or three years after it has happened, no complaint has been made, it could be barred. However, suggestions for improvements should never be inhibited.

## **9) Protections**

There should be no retaliation or harassment against anyone under any circumstances. A breach of this rule should be treated as a very serious case of misconduct because it threatens effective risk

communication and destroys confidence in mutual loyalties. Maliciously purporting rumours or distorting facts is for very similar reasons also misconduct. "Reprisal" or "retaliation" seems to require knowledge of previous Whistleblowing. The term "harassment" is preferable over "retaliation" or "reprisal" because it makes protection dependent not on the whistleblower having to show that he behaved correctly, but on the supervisors having to show that any disciplinary measures they took had been warranted by misconduct and are unrelated to an act of Whistleblowing. There should be no more reason to suspect that whistleblowers would be sanctioned quickly, while fraud is "forgiven" after years of futile investigations.

#### **10) Right to Refusal**

The system of regulations needs to permit potential whistleblowers to refuse participation in illegal activities and other activities that could qualify for a disclosure. The same protection as for Whistleblowing should be available for this refusal.

#### **11) The sanctioning system**

The sanctioning system needs to send the right messages. It should promote effective risk communication. Therefore, there should be sanctions for blocking the information channels or stopping information that needs to be further processed. There should be negative sanctions for harassment of whistleblowers and they should be applied in a manner that sends a message of credibility to the staff. Cases of Whistleblowing should be positively reflected in the staff report, especially where a difficult matter was handled in a particularly constructive manner.

#### **12) Burden of Proof**

A sliding scale of the burden of proof, both in regard to the quality of proof of risks and the amount of material, seems most adequate, similar to the model of the UK PIDA. In case of harassment, the whistleblower is burdened with prima facie proof; once that is established, the institution will have to prove that it would have taken the same action against staff member regardless of the Whistleblowing.

#### **13) Management Follow-Up**

Since the perception that making a disclosure will make no difference has been determined to be a major obstacle to efficient risk communication, it is important to establish transparent rules on what will happen on the (risk) management side once a disclosure has been made. While proper risk management does not necessarily require a management intervention, each disclosure of risk information needs to be followed by an assessment and a decision-making procedure. The process is only effective if every whistleblower learns that at least this assessment and decision-making has indeed taken place. Exceptional confidentiality requirements notwithstanding, the whistleblower should also be informed about the substance of this process. Indeed the entire staff should be made aware at least of the existence of the follow-up procedure and of the outcome in the more visible cases.

#### **14) Whistleblower Participation**

Since the whistleblower has invested something into making the disclosure, and often already has some specialist knowledge, loyalty and identification can be raised even further if he is acknowledged as an active contributor in the follow-up procedure. There should be no doubt as to with whom rests the power of decision making, but before it comes to that, more input from the side of the whistleblower should be welcomed. Often, a whistleblower has only tried out the mechanisms with his first message, and the real disclosure follows when he has gained confidence – and has been asked for it. However, in a transparent risk communication environment with best practice protection against harassment, there is no room for trade-offs and information bargaining. At a certain point relatively early on, it should be clear that a full disclosure has been made.

#### **15) Independent Review**

Confidence will also depend on an independent review system. There are two subjects that may need review:

- what consequences to draw from the disclosure
- whether harassment has taken place.

Risk management decisions are a management responsibility. Therefore, there needs to be a review in the form of a final decision by the top management or an institution on which the management has delegated the execution. However, if a serious risk for the general public continues unmanaged, there may well be good reasons for external Whistleblowing, and an external type of review, which may lead into the court house.

If harassment ensues at one stage or another, there will need to be a non-partisan review of whether the observed behaviour indeed constitutes harassment and whether it was related to an act of Whistleblowing. As long as the management can be seen as impartial, this function can be performed by the management or yet another institution to which the management has delegated this task. On a second level, there should be free access to the court system, preferably with independent out-of-court dispute resolution options (mediation) as a less interruptive intermediate alternative, at the whistleblower's choice. The relevant clause promoting settlement in court at the Civil Service Tribunal can be found in Annex I Article 7 paragraph 4 of the Council Decision.<sup>70</sup>

### **16) Support**

Providing access to impartial advice, especially before the disclosure, is a win-win exercise. It means invaluable support for the prospective whistleblower, if he has a chance to get independent feedback on some aspects of his case, and if he is advised of previous experiences and routes of disclosure most likely to lead to success. The organisation can expect to encounter more efficient risk communication. Redundant information, personality conflicts or managerial issues are channelled more easily. This sort of support is however only effective if it can be seen as primarily in the interest of the "cause," or even of the whistleblower – and is certainly not intended to silence whistleblowers. If it cannot be offered through an independent outside service provider, heed should be taken to protect the highest attainable degree of impartiality. It will help if the service reports regularly on the sort of advice it gives.

### **17) Staff Buy-in**

The entire risk communication system will profit from a higher degree of staff confidence if staff is allowed to participate in the original process of setting up the rules and structures. The basis for such participation is a complete disclosure of the goals the management hopes to attain (no hidden agendas to be suspected), of how such systems have been working elsewhere and of how staff input will be treated. The final decision on rules and structures will remain with the management.

### **18) Credibility**

The system can only work in a manner that coincides both with the tone from the top and with the message that is contained in the rules on Whistleblowing and the practice in the organisation. The management has literally to be so open as to meet the expectations from its statements. The statements should not require much reading between the lines. If in a precarious situation two different readings of a message are possible, for reasons of self-protection the less trustworthy will be understood. The staff will take all signals from all management levels as part of the message. If some individuals do not understand the importance of the risk communication system, and block it, this will be taken as part of the official message and may render the entire system ineffective. It therefore makes much sense not to promise more openness or protection than can be kept and to train as many individuals as necessary before rolling out of a new policy.

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<sup>70</sup> OJ L 333/7, 09.11.2004

### 3. The EU Experience

#### 3.1. *The International Framework*

The EU Commission is part of a legal culture and environment that demands acceptable levels of whistleblower protection. This is not just a question of the above discussed governance and risk communication requirements. The UN Convention against Corruption as well as the OECD specifically demand whistleblower protection. The European Council's Group of States against Corruption (GRECO) routinely spells out very specific recommendations to its 40 member states on their Whistleblowing regimes.<sup>71</sup> Both the European Council Civil Law and Criminal Law Conventions against Corruption contain clauses on the facilitation of Whistleblowing and the protection of whistleblowers.

Clearly, the EU Commission in its own affairs should provide the best practice pattern for national administrations to follow. In this endeavour, the Commission may perceive itself slightly handicapped, because it has not the same sort of complete legal framework as a national state. Where a real gap exists, the European Parliament is called upon to fill it. In a comparable incomplete legal situation, the UN General Secretariat has found itself able to put a useful Whistleblowing policy into effect. That policy has been integrated into the best practice as stated in the previous chapter of this study.

#### 3.2. *The EU Learning Experience*

The circumstances under which the Santer College of Commissioners had to step down had not been the beginning of measures to reform the Commission, but "Reform" as the setting of new or improved standards of administration was the focus from the beginning of the Prodi College's mandate. The Barroso Commission continues this work, though slightly shifting the emphasis toward "Transparency." Early in 2006 a Green Paper is to be published to launch a wider debate on transparency in the EU – quoted as a complement to "Democracy, Dialog and Debate."<sup>72</sup> Transparency is described in this Commission Press Release as an essential condition for the legitimacy of any modern administration and a key element in European citizens' trust in their public institutions.

Whistleblowing has not yet explicitly been selected as a topic for the Green Paper. This present study may provide a basis to decide to add it – maybe even to the Green Paper. The Transparency Initiative already identifies a need for more information about the conclusions of investigations as a means of improving transparency that should be performed by the OLAF and DG Justice.<sup>73</sup> Providing some background select statements may contribute to elucidating how far the Commission has come in the field of openness and transparency.

As the European Parliament will remember, on 11 October 2004, Commissioner designate Mr. Kallas, in addressing the Parliamentarians called for a renewal in the Commission:

*"Over the past few years, the European Parliament – and this Committee in particular – has either proposed or supported many of the improvements implemented by the Commission in the areas of administration, audit and anti-fraud. I therefore wish to acknowledge that contribution, including from members present here today, and express the hope that the creative work and cooperation will continue in the future. (...) We have to create a climate where*

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<sup>71</sup> <http://www.greco.coe.int/evaluations/Default.htm>

<sup>72</sup> Making Brussels more transparent, 09/11/2005, IP/05/1397

<sup>73</sup> On an attached table "Identification of Lead Departments"

*criticism is welcome and addressed in a constructive way. This ensures protection of those who speak up and allows reform from within rather than only reacting to outside pressure.*<sup>74</sup>

On 1 May 2004, a major renewal of the 1968 **Staff Regulations** came into force. This amendment contained the altogether new rules of Articles 22a and 22b – but also a new version of Article 17. In fact, from Articles 11 through 26a, every single Article saw major changes, amendments or deletions. Articles 22a and 22b are indeed not concerned with criticism or policy questions. They are restricted to illegal activities and serious compliance failures –by far surpassing the scope of debate or criticism.

In 2004 the Prodi College also published a Progress Report on its Reform mandate and the Measures to be implemented in 2004.<sup>75</sup> It stated:

(...)

*the Eurostat affair has shown that the current system does not provide the Commission with a sufficiently complete overview of all available information concerning a specific matter. As a matter of fact, the Commission's knowledge of all the information available on Eurostat was for a long time too partial and fragmented, which prevented it from taking rapid precautionary measures at an early stage.*

*It is for this reason that the Commission considers it necessary to ensure that pertinent information is collected from all sources, analysed rapidly and communicated to the College. It will therefore charge a group of Commissioners to ensure that all information and/or allegations of fraud, irregularity and other reprehensible acts will be treated in conformity with existing procedures and will be the subject of rigorous follow-up by the concerned services. Furthermore, this group of Commissioners will bring the most important cases to the attention of the Commission, i.e. those cases which require precautionary measures in order to protect the interests of the Union, in particular those of a financial nature.*

(...)

*This new approach will require the active and continuous cooperation of all services<sup>76</sup> and actors who are the natural addressees of information concerning allegations of fraud, irregularity or other reprehensible acts and whose competence for analysis and follow-up in their respective domains of responsibility remains entirely untouched. It will therefore require the cooperation of middle and senior management, and above all of Directors General or Heads of Service who are also the first interlocutors of whistleblowers.*

(...)

*Although the Commission was the largest source of information for OLAF case records in 2002/2003,<sup>77</sup> experience has however shown that, despite these rules, staff often seem to have chosen not to follow the Whistleblowing procedure as identified above. In the majority of cases, officials either raised such concerns about serious wrongdoings in another context (for example at the occasion of a career review), or the allegations made by the official concerned were not "serious wrongdoings" in the sense of the Whistleblowing provisions.*

*The Commission therefore intends to take measures to increase the awareness of these new rules amongst staff. More publicity will be given to these rules via other means, such as a publication in the internal newspaper and the inclusion of these rules in information provided to new staff.*

<sup>74</sup> SPEECH/04/555 of 11/10/2004, also quoted in EU Press Analysis for 2004; [http://europa.eu.int/comm/anti\\_fraud/press\\_room/analys-press/2004\\_en.html](http://europa.eu.int/comm/anti_fraud/press_room/analys-press/2004_en.html)

<sup>75</sup> COMMUNICATION FROM THE COMMISSION, COMPLETING THE REFORM MANDATE: PROGRESS REPORT AND MEASURES TO BE IMPLEMENTED IN 2004 COM(2004) 93 final, p. 9 ([http://europa.eu.int/comm/dgs/internal\\_audit/documents/reform%20progress%20report\\_com2004\\_0093\\_en.pdf](http://europa.eu.int/comm/dgs/internal_audit/documents/reform%20progress%20report_com2004_0093_en.pdf))

<sup>76</sup> This concerns in particular the European Anti-Fraud Office (OLAF), the Disciplinary and Investigative Office (IDOC), the Directorate General for Personnel and Administration and the Internal Audit Service.

<sup>77</sup> According to OLAF's Activity Report 2002/2003, the Commission provided 173 case records, i.e. 26% of total new case records. However, this figure is not disaggregated to show how many of these referrals to OLAF were undertaken by whistleblowers. See: OLAF Fourth Activity Report of the Year ending June 2003, p.13



*In its measures to raise the profile of these rules, the Commission will also highlight the protection offered to bona fide whistleblowers. Of course, in order to enable the Commission to apply the protection measures described below, the member of staff concerned will be expected to identify him- or herself as a whistleblower to the Institution and to observe the procedures as outlined in the Whistleblowing rules.*

- In practice this protection means that the Commission will take all necessary steps to assure staff that complying with their Whistleblowing obligations will not negatively affect their career. This will mean that if the member of staff concerned wishes to be moved to another Commission department in order to safeguard him or her against hostile reactions from his immediate work environment, then the Commission will facilitate such a move;*
- Particular care will be taken during staff evaluation and promotion procedures to ensure that the whistleblower suffers no adverse consequences in this context. The career guidance function, introduced under the administrative reform, will have a monitoring role in this respect. In those cases where the career development report of staff who have made use of the Whistleblowing provisions has significantly deteriorated, they will be able to ask for a review of their career development report through a special process.*

*Through its decision of 4 April 2002 the Commission has opened the possibility for officials to address such information to the Presidents of the Court of Auditors, the European Parliament, the Council or the Mediator, if the official concerned had previously disclosed information to OLAF and/or the Commission, and has allowed a reasonable period for them to take appropriate action.*

As early as 10 September 1999 the Committee of Independent Experts had published its second report containing an important recommendation on the subject of this study:

**Recommendation 80**

*The rights and obligations of officials to report instances of suspected criminal acts and other reprehensible behaviour to the appropriate authorities outside the Commission should be established in the Staff Regulations and the necessary mechanisms put in place. The Staff Regulations should also protect whistleblowers who respect their obligations in this regard from undue adverse consequences of their action.*

In 7.4.6. setting up a Code a Conduct of Conduct for the Commission was suggested:

*"If, as it should, the new Commission pursues the intention of laying down codes of conduct, it must ensure that the formal legal framework, in the form of binding laws and regulations is adequate. (This would include, for example, the clarification of the legal protection to be given to whistleblowers, as required by Principle 4 of the OECD code)."*

The most relevant sections for the purpose of this study were 7.6.8.-10.

**Whistleblowing**

*7.6.8. The second point of concern to the Committee is the need to delineate the obligation for officials to "expose actual or suspected wrongdoing within the public service ... [to] include clear rules and procedures for officials to follow... Public servants also need to know what protection will be available to them in cases of exposing wrongdoing".*

*7.6.9. The events leading up to the resignation of the former Commission demonstrated the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also showed how the reaction of superiors failed to live up to legitimate expectations. Instead of offering ethical guidance, the hierarchy put additional pressure upon one such official. This clearly flouts the principle referred to above, as well as with the third of the OECD principles, according to which "[...] impartial advice can help create an environment in which public servants are more willing to confront and resolve*

*ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace".*

*7.6.10. This does not mean that officials must be encouraged to come forward in all instances where they believe that superiors or colleagues have not acted correctly. The duty of loyalty and discretion should not become an empty concept. But neither must it be used to install a conspiracy of silence. In this regard, a distinction has to be drawn between criminal behaviour, where there is an unambiguous duty of any civil servant to report to the appropriate authorities (particularly OLAF), and other breaches, which have to be reported in accordance with departmental procedures. Nonetheless, when these procedures have not made it possible to resolve concerns within a reasonable period of time, a mechanism should exist to allow the civil servant to address an external authority (for example, the Ombudsman, the parliamentary Committee on Petitions or the Court of Auditors.)*

While reflecting on whether the current system adequately reflects what was proposed by the Commissioners and the Committee of Independent experts, it is worth noting from where OLAF receives its information. It states in its 5<sup>th</sup> annual report for 2003/04:

*The single most important source of information are informants (34% of the total) closely followed by Commission services (31%). Information received from the Commission services and from the Member States increased by 18% and 22% compared to last year.  
(...)*

*At the end of the reporting period, OLAF had five active cases where the primary source of information was a whistleblower.<sup>78</sup>*

This was updated in a report for the second half of 2004.<sup>79</sup> The number of active cases with a whistleblower as primary source remained unchanged. A split-down of the internal investigation was shown, according to which the five active cases would make up for about 7 % of all internal investigation:

EU Institutions	Evaluations	Active Investigations	Grand Total
Committee of the Regions	1	0	1
Council	1	31	4
Court of Auditors	0	2	2
EU Agencies	5	2	7
Economic and Social Committee	1	1	2
European Commission	12	56	68
European Investment Bank	5	2	7
European Parliament	0	4	4
<b>Total</b>	<b>25</b>	<b>68</b>	<b>93</b>

Chart 4: OLAF, EU Internal Investigations

Of course, there is no particular reason to suspect that all whistleblower cases led (only) to internal investigations. It should be noted that there were 511 active cases at the end of the 2003-2004 reporting period, therefore according to OLAF about 1 % of the cases had an official as source of information, who dutifully reported observations of wrongdoing.

<sup>78</sup> Quotes and chart on next page from REPORT OF THE EUROPEAN ANTI-FRAUD OFFICE, Fifth Activity Report for the year ending June 2004

<sup>79</sup> This chart from the OLAF Supplementary Activity Report for the Year 2004, [http://europa.eu.int/comm/anti\\_fraud/reports/olaf/2004/en.pdf](http://europa.eu.int/comm/anti_fraud/reports/olaf/2004/en.pdf)

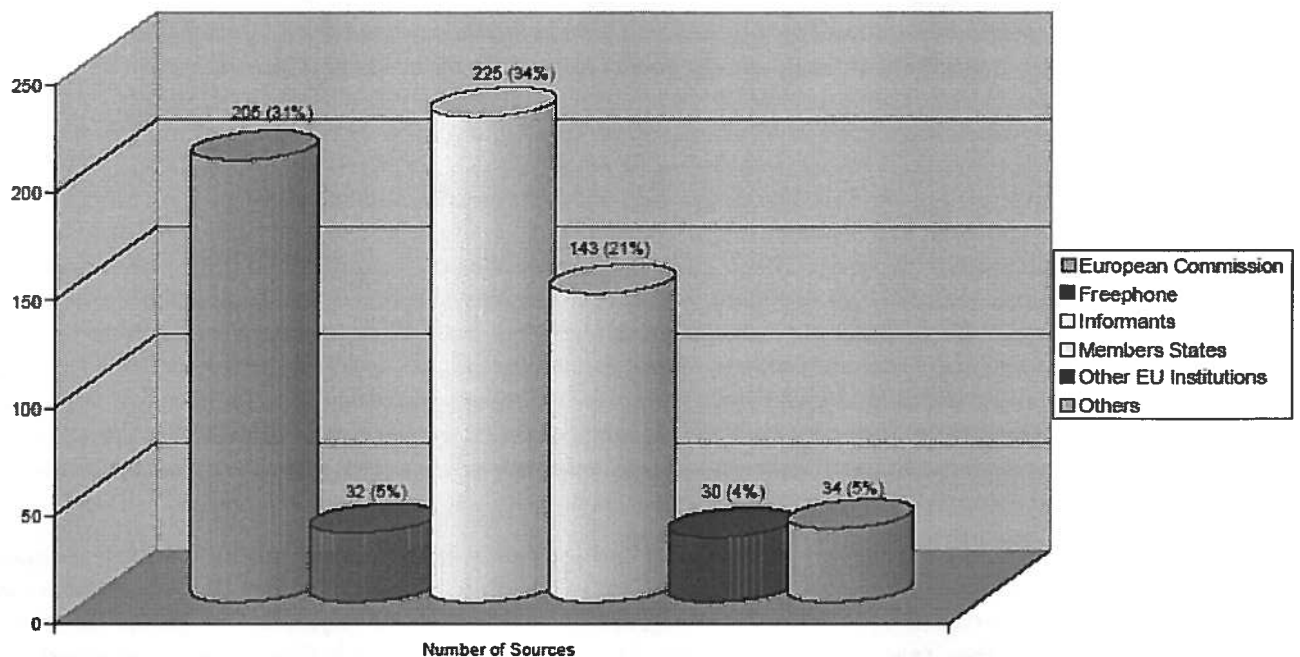


Chart 5: OLAF, Sources of Information

Economic crime is a growing problem in Europe. Since the annual EU Commission budget of 100 billion EUR is a factor affecting the economy, it may be worthwhile to look at this environment. According to a PwC European Economic Crime Survey of 2001 of the surveyed larger companies 42 % reported having been a victim of economic crime.<sup>80</sup> The average damage per fraud was 6.7 million € - for the larger companies notably higher. Around 60 % of frauds against a company are perpetrated by its own people within the organisation – the higher ranks involved in a disproportionately higher fraction of the damage. Internal and external audits played a major part in detecting economic crime for 48% of Western European companies. However, in this report over a third of fraud incidences (34%) were discovered by chance. In the European study of 2001 PwC stated that in 58% of the cases fraud was discovered by chance. Since this detection factor plays no role in OLAFs reporting, the figures cannot easily be compared. It is striking however that in the global 2003 study,<sup>81</sup> 28 % of PwC respondents (36 percent) claimed that Whistleblowing had been important in discovering economic crime. Now, these discrepancies may be owed to incompatible definitions, or to different investigative patterns in these very different sectors.

What is clear and common sense in the PwC studies is that the vast majority of information comes from insiders. The OLAF figures, in which informants are by definition not EU officials,<sup>82</sup> clearly show that internal sources make up for only about one third of information resources, or about half of the figure in business. A reason may, of course, be that OLAF is investigating a large proportion of cases without any direct involvement of EU officials. The OLAF report shows 83 internal investigations, which probably each involve at least one internal subject and certainly some internal activities. Still, it could be that internal sources of information might be under-utilised.

Risk Management would be the lever for improvements, where necessary. As explained above, risk management builds on risk information. Without this information as a basis, there can be no risk assessment; without the assessment – no management. Given the nature of economic crime being largely a breach of trust and a secretive crime (fraud, embezzlement, corruption), insider informa-

<sup>80</sup> [http://www.securitymanagement.com/library/Cybercrime\\_Tech0901.pdf](http://www.securitymanagement.com/library/Cybercrime_Tech0901.pdf)

<sup>81</sup> [http://www.pwc.com/gx/eng/cfr/gecs/PwC\\_GECS03\\_global%20report.pdf](http://www.pwc.com/gx/eng/cfr/gecs/PwC_GECS03_global%20report.pdf)

<sup>82</sup> OLAF Manual 2005, p. 64

tion is the key. This information is “there” – it is a waste of resources not to use it. Whistleblowing is indispensable, but any information from staff needs to be encouraged – the earlier the better. The responsible managers cannot rely on such information readily finding its way onto their desks. There are many reasons for this – a major complex lies in past experiences of whistleblowers – an organisational learning experience that may require some re-learning still.

### 3.3. The Current EU Rules on Whistleblowing

A comparative study of 2002<sup>83</sup> had shown that there was already a strong tendency across the Institutions to apply very similar regulations on this subject. Since then, the relevant rules have converged even further – with obviously all EU Institutions participating and even the EIB as probably the most independent of all eventually adopting rules<sup>84</sup> along the lines of the model decision. Article 22a and 22b of the Staff Regulations of Officials of the Communities are the two core stipulations trusted to bring the change viewed as necessary after 1998. They were controversially discussed on the basis of a “Consultative Document – Raising Concerns about Serious Wrongdoing.”<sup>85</sup>

This section will first take a more detailed look at Articles 22a and b of the Staff Regulations of Officials of the European Communities, not in the sense of a legal commentary but with a word-by-word understanding that a staff member as reader of these regulations might have. A short overview of other relevant articles in the Staff Regulations is added. It will then proceed with some feedback on the encountered practice, and how it is perceived by some of the stakeholders. This is followed by a description of the extent to which the regulations and their practice deviate from the stated purposes. The section ends with a brief evaluation of the EU approach, which essentially answers the question at the heart of this study.

#### 3.3.1. Staff Regulations Article 22a and 22b

Articles 22a and b of the Staff Regulations of Officials of the European Communities were first introduced in 2004, but the basic concept contained in Article 22a had existed in practically the same form since 1999 outside the Staff Regulations as a Commission Decision. Since it was acknowledged that these rules did not have the expected impact, it was decided that they needed more visibility and should be added to the official collection of Staff Regulations. They are interpreted in a legally non-binding way by the Commission’s “Administrative Guide – What sort of conduct is expected of Commission officials?” The rules have a two-tiered structure consisting of a duty to report under certain conditions and, where these and other conditions are met, additionally a right to also report to the heads of certain other EU Institutions. Protection is granted in the sense that the employing institution will not harass the official, if he has complied with his duty to report.

Article 22a states the duty to inform without delay and in writing. The primary recipient shall be the official’s immediate superior or his Director General. Reading the article explains the permitted content: only facts can be an object of such a written report. There is no such duty, if awareness of the respective fact was not gained in the course of, or in connection with, the performance of his (other) duties. It is not clear, whether accidental knowledge, such as overhearing a conversation in the hall, or finding a paper in the bin, would give rise to the duty to report. The consequential question then is, whether there is a right to such reporting, in cases where there is no duty. In the light of Article 22b this generally does not seem to be the case: there is no duty but a right to report to the Institutions listed in Article 22b. In the light of the Article 17 and its broad interpreta-

<sup>83</sup> European Parliament, Comparative Study of „Whistleblowing“ Procedures in Community Institutions, WIP 2002/07/0063, Luxembourg, 2002

<sup>84</sup> European Investment Bank, EIB Guidelines on Fighting Corruption and Fraud, 19 Nov, 2004

<sup>85</sup> Communication from Mr. Kinnock to the Commission 29 November 2000, SEC (2000) 2078, inviting general comment

tion in practice, there is not even a right to internal disclosures other than through the channels described in Article 22 a.

Next, the facts gained in this way would have to qualify as giving rise to further qualified presumptions. Two alternative presumptions could be:

- either possible illegal activity, but only if it is detrimental to the interests of the Communities. This interest is obviously not identical with the Public Interest, otherwise it would say so. Illegal activities would always be detrimental to the Public Interest. Some sort of effect on the Communities" is almost certain to exist, since as a consequence of the way it was gained, it must somehow relate to the Communities. Here, however, it must be determined that the effect will be detrimental to the interests of the Communities. This requirement turns out to be a burden in the face of a duty of immediate and written reporting, it may be quite difficult and time consuming to study possible long term effects, to offset all potential negative or positive effects and side-effects.
- or in the other case, the seriously irregular professional conduct of a colleague. For this alternative, the requirements seem to be expressed in an unnecessarily complicated construction. The problem is however, not the language but the meaning of the word "serious." Not in the staff regulations themselves but only the Disciplinary Proceedings, Annex IX, Article 10, provide advice on what might be serious in this context by listing nine factors which need to be weighted against each other. This again is not an easy task in the face of a duty to provide a written report without delay.

After that, the official seems free to opt maybe not to give the information to his immediate superior or Director General, but instead to the Secretary-General (of the Commission) or the OLAF. There may be some confusion about the identity of the very last possible internal recipients, which are defined as "persons in equivalent positions." The syntax suggests it would have to be a person in an equivalent position to that of the Secretary-General. Since that would be a very small group, it would make sense to list these persons specifically. It might, however, also permit reports being passed on to anyone in an equivalent position to that of the superior or Director General – and even in another EU institution. The rest of this Article does not seem to allow for this latter interpretation. However, Article 11 clearly states that loyalty is not owed to the Appointing Institution (as presumed in the Staff Info Newsletter first presenting the new rules and in the Administrative Guide<sup>86</sup>), but to the Communities. Therefore an interpretation reaching beyond the official's own institution is not entirely unreasonable. We will come back to this problem in reviewing Article 22b.

The last sentence of the first paragraph of Article 22a would certainly be difficult to understand for many EU officials. The German version of the Staff Regulations is remarkably different but not necessarily clearer. The English version, which is used for the purposes of this study, probably implies that there is also a duty to make a written report about wrongdoing outside the Commission but inside other EU institutions. It could also mean that a written report must be made, if somebody in the Institutions is observed as not reporting, whereas he is obliged to report under this paragraph. The sentence gives cause to a warning about clarity in original phrasing as well as consistency of translations.

According to Article 22a paragraph 2, any recipient (immediate superior etc.) of information pertaining to the facts mentioned in paragraph 1, must hand over any evidence of which he is aware to OLAF. The official writing the report under paragraph 1 had no such obligation. This is therefore clearly not just the information received from the originally reporting official, but any other evidence as well. It will be a lot of evidence, because this evidence qualifies already, when irregularities as in paragraph 1 may be presumed from it. The first problem for the recipient of the report is then, that he will have to think long and hard to make this batch of evidence complete – again without delay. His next problem is that he will not always have access to this evidence, although he may be aware of its existence.

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86 Chapter 7.3.2. of the Administrative Guide and N. 332/04 of Staff Info (Slootjes, von Witzleben)

Paragraph 3 of Article 22a comes as a bit of a surprise, if the context is unknown: There is not a warranty on every staff duty that compliance will not lead to victimisation. Since the obligations from paragraph 1 and 2 are burdensome and difficult to comply with both for officials and recipients of information anyhow, the official might be led to expect here a provision promising a reward, such as a positive entry in his career development records. Instead, he realises, there will be another test put upon him first: whether all of his reasoning, weighting and data collecting would be judged as honest and reasonable by the institutions. Honesty is probably not what would usually be disputed, but given the complexity of above evaluations, it seems difficult to see, how a fair judgement on being reasonable could be promised. Then, if he has passed this test, he "shall not suffer any prejudicial effects." That is not much of a reward. It could mean that he is fully protected from any retaliatory action. However, this promise is confined to actions "on the part of the institution." Now, it would be a striking self-contradiction, to set up staff duties and sanction compliance with "prejudicial effects" on the part of the institution. This means literally that there is no protection from anything that could be expected. The meaning might be extended to include measures on the part of the institution to effectively prevent its dependents (superiors of the whistleblower) from exerting such prejudicial effects on their part and - if that happens in spite - to make good any detriment. Since that is easier said than done, it could be expected to be spelled out, but it is not. The way the paragraph is phrased, it is not likely to encourage even internal disclosures, because it warns of the retaliation that can be expected on the part of individuals, rather than offering any substantial protection.

Paragraph 4 offers more surprises. The reporting official himself is not obliged to provide the mentioned documents etc. under paragraph 1. Therefore this paragraph addresses only superiors and other possible recipients outside the OLAF. The meaning could be that these officials are not allowed to take materials out of legal files. Since these would mostly contain copies, there would be not much of a regulative effect. Instead of such an interpretation, any non-lawyer would only guess that he should steer completely clear of anything that might have legal implications – everything worth reporting under paragraph 1 would effectively be excluded. Lawyers having to counsel an official finding himself under a duty as in paragraph 1 or 2, would probably come to the same conclusion, trying to make sense of the words "pending legal case." A legal case is not an action but obviously much broader. A "legal case" is not identical with a "court case." "Pending" implies, it must have begun, but since "legal case" only means a case with legal implications, pending here means it must have begun to have legal implications. Therefore, even if all the other requirements of Para. 1-3 had been met, this paragraph in effect will have to be understood in a way that there is no duty to disclose, no protection accordingly, and even less a right to report. The German version of the staff regulation uses the word "Gerichtsverfahren" (legal or court proceedings), which might clarify this rule, however the use of the tenses there is such that it would be sufficient that such documents could generally be held ("die ... werden") in a file. Finally, it seems impossible for an official to determine whether any materials that might here be relevant have ever been put as duplicate or in any other form into a legal file or are also on somebody else's desk as part of a "legal case".

Paragraph 1 of Article 22b almost leads to expect who is meant by the dubious "anyone in an equivalent position" of Article 22a. Then, however, the relation between Articles 22a and 22b would be quite unclear. Under Article 22b, in case the official turns to these heads of institutions outside of his own, he must not only believe in the truth of the facts he is conveying, but also in any allegations contained in it. Originally under Article 22a the official was not required to make allegations, but to report facts. Now, therefore, he has to reassess these facts and find out what allegations might be contained in them. That can be very far reaching. An allegation can be anything that is unsupported. The facts themselves cannot be unsupported; they support themselves. So this phrase alludes probably to the conclusions that anyone could draw (but the official so far has not drawn) and any other undercurrent. However, it is quite daring to proclaim that one believes in the truth of something unsupported. It is certainly too much to require anyone to believe in the truth of an allegation – and then consider that to be honest and reasonable. Again, a seemingly irresolvable dilemma.

If the official still manages honestly to believe all this, facts and allegations, and stay "reasonable" before he can report to one of the Presidents or even the Ombudsman, he will have to wait up to two months for OLAF to tell him how long OLAF will need to take appropriate action, because he first has to provide the identical information to them. Appropriate action might be to start an investigation. However under the OLAF rules no investigative action may start during the assessment of initial information. This assessment may only begin after the period mentioned in Article 22b Para 1 (d), and can itself take another two months (3.3.3. of the OLAF manual). So, it can take up to fourth months after OLAF has received the written report to which the official was obliged under Article 22a. If he did not address the OLAF directly in the first place, it could take even longer. However, he should not be so sure that he could really go to one of the Presidents or the Ombudsman with his information after only 4 months, because for the OLAF to "take appropriate action" would not necessarily mean merely to begin with investigations. If this clause were to warrant undisturbed investigations by the OLAF, "to take" in the case of investigations would mean "to finish." That means the official may go and report to one of the Presidents or the Ombudsman after 4 plus X months, totalling probably at least 18-20 months. Since the subject matter of the report was of particular interest to the Communities - and not merely a complaint - it is difficult to understand what the significance of this stipulation might be, other than to ban any sort of reporting outside the Institution concerned.

According to paragraph 2, the official is relieved of this block, if he can demonstrate that it is unreasonable to wait for such a period. It seems difficult to imagine a case of the seriousness outlined in Article 22a in which waiting for far more than a year could seem reasonable. Therefore, this entire set of conditions may practically be void. The problem here is that it is upon the official to demonstrate this to the conviction of the Commission. The existence of the rule gives the impression that the Institution will not easily be convinced.

These interpretations may seem severe and not entirely in balance with the spirit of the Institutions, but probably few of them could be dismissed as totally unreasonable. There may be a great deal of argument over how these provisions should really be understood. This is just the point; these rules convey a very strong message not to disclose anything that is not explicitly asked for. And that the burdens will be exasperating for the official, who might originally have wanted to make a report under these regulations, as he believes is his duty.

To fully understand Articles 22a and 22b, it would be necessary to appreciate them in their entire context. Their most direct context is Articles 11 – 26 a containing them in the Staff Regulations. A glance at the context shows that the problems and contradictory messages observed in Article 22a and b will certainly not be totally turned around or even mitigated by their regulatory environment. A lot might be expected from the Article 12a prohibiting harassment. However, this Article suffers from similar complications as Articles 22a and b, when it simply promises that anyone who had been made a victim of harassment would not suffer prejudicial effects "on the part of the institution."

A general clause for what is stipulated more specifically in Article 22a is stipulated in Article 21: the duty to tender advice to one's superior. This enforces what is often called loyalty but should not be confused with the loyalty as under Article 11. It is not clear that Article 22a, when it permits bypassing the superior, overrides Article 21. However, this is where the promise not to suffer prejudicial effects as in Article 22a becomes relevant.

Article 21a contains the important right to refuse manifestly illegal orders and question potentially irregular other ones (remonstration). It is surprising that this clause does not contain a promise of protection, although it challenges the authority of the superior possibly even more than a report according to Article 22a.

In the context of Whistleblowing, Article 24 might be one of the most effective rules, promising assistance and compensation from the side of the Communities if an official is attacked by reason of his position or duties. Clearly, someone who reports as under Articles 22a and b should find support under Article 24 – in particular against officials who are neglecting their duties under

Article 12a. However, as shown above, occasions on which it could be expected to find anyone reporting under Articles 22a and b will be rare. Therefore the support offered under Article 24 will not come into effect very often, if it is indeed possible to call on Article 24 for protection against the harassment from other officials.

### 3.3.2. How is the EU regulatory approach administered ?

*"The European anti-fraud office, OLAF was created to achieve more trust among the general public, that management in the EU, especially financial matters, are handled properly. Is this goal achieved? Unfortunately it seems to me, that the answer is no ... I want OLAF to become a pillar for confidence, and not a subject of suspicions and speculations."*<sup>87</sup>

OLAF had recorded five open cases by the end of the last reporting year. As discussed above, this could be a question of definitions. However according to Article 22a/b all such leads should end up with OLAF, so that the total number would be recordable there, even if it came in through an intermediary. OLAF has explicitly declared that it followed Articles 22 a/b to define who is a whistleblower.<sup>88</sup> The Ombudsman has received three cases classified by the Ombudsman as complaints but simultaneously termed as approaches by whistleblowers.<sup>89</sup> All other whistleblower reports under Articles 22a and 22 b should have eventually been forwarded to the OLAF, so that the EU total is fairly clear. This practice was confirmed by the President of the Court of Auditors, who reported having received a "very small" total of "less than ten" reports. The information received through these channels overall did not yield what could be expected.

The Investigation and Disciplinary Office of the Commission's Personnel and Administration Directorate General (IDOC) can be taken as the functional counterpart of the OLAF, for cases where the financial interests of the Institutions (OLAF's domain) are not concerned and also for certain disciplinary matters. The IDOC mentions regular high-level meetings between the Commission services and OLAF to ensure that all cases are dealt with by one service or another, with a Memorandum of Understanding drawn up to improve the exchange of information between these bodies. This highlights another explanation: some cases that are relevant to the Institution's finances and would therefore fall within OLAF's competence are reported internally within the DGs but never reach the OLAF. This means that the duty to report under Article 22a has been violated somewhere along the line. The IDOC believes that one way of enforcing the duty to report could be the application of disciplinary measures, but prefers coupling effective control mechanisms with training and information.<sup>90</sup> IDOC is an office of the Commission and can therefore only deal with Commission affairs. The OLAF states that even comparing the sizes of services, the largest amount of information still comes from the Commission. This suggests another level of lacking risk communication: that between the Institutions.

The IDOC also mentions in a communication<sup>91</sup> that the Commission's approach is strongly inspired by the COSO<sup>92</sup> Enterprise Risk Management framework. The COSO, concerned with internal auditing standards may also have a few things to say about risk management. However, since the focus of internal auditing is control, without really any interface with staff reporting, it will have very little to say about Whistleblowing. Although the IDOC certainly did not imply that Articles 22a and b are also inspired by the COSO, heed should be taken, that a reasonable audit and controls approach (independent audit, rather than departmental self-audit) is supplemented by effective internal risk communication in implementing the Commission's new risk management strategy.<sup>93</sup>

A practical instrument that may indeed foster accountability and improve risk management if coupled with "training and information" is the new institution of DG's annual declarations. These

<sup>87</sup> Commissioner designate Kallas in front of the European Parliament, SPEECH/04/555 of 11/10/2004

<sup>88</sup> The director of OLAF in an interview with the author of this study.

<sup>89</sup> In a written reply to the author of this study.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> The (U.S.) Committee of Sponsoring organizations of the Treadway Commission, a body promoting internal auditing standards.

<sup>93</sup> SEC (2005) 1327



declarations are made to the best of knowledge, confirming that the director is not aware of matters not reported, matters which could harm the (any) interests of the Institutions. Training should be provided to make the reasons and importance of this declaration clear – and how far a manager has to go to become aware of knowledge that is in his realm. This declaration could become a core instrument in administrative risk management. It already resembles the oath or declaration on annual reports and balance sheets in the private sector.

### 3.3.3. How is this perceived by the stakeholders ?

The comment received from the institutions reflects a desire to further develop the culture of openness. There is an awareness that important information still reaches the destination where it can be effectively dealt with too late or not at all. The consequential damages can easily be expected to be in the millions. OLAF welcomes that the pool of servants of the Communities that are entitled to make disclosures has been enlarged under Articles 22a and 22b – but would like to see it extended still further. The IDOC proposes more training. The Ombudsman raises the important point that much relevant information is covered by the letter of Articles 22a and b but is sometimes left under unclear responsibilities. This information is typically not given follow-up by OLAF, because it would not affect the financial interests of the Communities. For OLAF it is a “non-case” – others may perceive it as having passed over to OLAF. OLAF seems to be free to discern whether it passes the case back to IDOC or others or simply closes it, although OLAF has no jurisdiction. This seems to be a structural problem that needs to be addressed at its root – especially the requirement that all reports have to go to OLAF while whistleblowers have not much of a choice in deciding as to which institution is most likely to give proper follow-up.

Staff remarks still reveal a lack of trust that their reports would be assessed properly and appropriate remedies taken. Also a continuing fear of reprisals is reported. OLAF is seen as an internal mechanism lacking independence and lacking prosecuting power. The process of preparing a case effectively for outside prosecution often seems to consume more time than is possibly saved later by the national institutions.

It was suggested by staff that if IDOC had more independence to open its own investigations (in non-OLAF cases), a considerable number of disputes in the Civil Service Tribunal could be avoided, because reports to DG Admin, treated as “complaints,” would not have to be rejected blindly.

Experiences of EU whistleblowers, two before and two after the inclusion of Articles 22a and b in the Staff Regulations, come from the same environment and point to the same deficiencies. They criticise a culture of denial and the tendency to investigate the whistleblower instead of the serious problems to which they raised attention. This is not surprising since the fact of formal inclusion and relatively minor adjustments caused neither a change of the legal response to Whistleblowing nor of the organisational culture.

An alarming signal recently came from the Court of Auditors:

*“... risk management in the Commission is still in a rather embryonic state. DGs focus largely on risk analysis, and risk management is not embedded in regular management processes. This situation persists despite the fact that BUDG has recently launched very welcome initiatives in this field (these are detailed in the body of this report). A Commission-wide approach to risk management, including methodology and tools, has yet to be implemented and should result in a consolidated risk overview at the Commission level (allowing for a complete top down view of key risks). This seems to be essential for managing risks related to multiple DGs and for better informing the Commission’s decisions on resource allocation in the framework of the Strategic Planning and Programming cycle and is in line with best practice.”<sup>94</sup>*

This means that once risk management is properly established and understood in the Commission, there will be a chance to reap the benefits of risk communication. This process is reported to have started with SEC (2005) 1327.

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<sup>94</sup> Annual Report to the Discharge Authority on Internal Audits Carried out in 2004, COM(2005)257 final, Brussels, 15.06.2005, {SEC(2005)782}

Of course, the general public and its members also constitute stakeholders whose comment would be relevant. The public awareness of how risk communication is treated in the Institutions is certainly not very acute, so that not all disenchantment with the European Institutions can be attributed to this. However, after what has been said about the relation between internal risk communication and the external (official) communication, it is clear that internal improvements would also improve the perception from the outside.

#### 3.3.4. Conclusion

When we seek to understand to what degree the Rules on Whistleblowing fulfil their stated purpose, one can ask, whether

- all relevant information in the Institutions is made available,
- all information and/or allegations on irregularities and other reprehensible acts are passed on according to the rules and are subject to the necessary follow-up,
- the current system provides the Institutions with the necessary management information, and
- precautionary measures in the interest of the public and other stakeholders are facilitated.

Articles 22a and 22b of the Staff Regulations address only a fraction of what would typically be defined as Whistleblowing activity. Furthermore, they are of limited effect in promoting desirable behaviour both in management as well as on the staff side.

This originates in a mechanism that stresses only a duty to report. The fact that an institution, in case of staff compliance to a rule, has to promise not to react negatively exemplifies the inherent problems and cannot be seen as an encouragement. On top of that the duty is so described that it seems virtually impossible to comply with "honestly and reasonably." Any possibly permitted reporting activity is narrowed down until it becomes virtually meaningless. These are the reasons why only a fraction of the reports that could be expected in the private sector are recorded in the EU institutions.

Some beneficial effect of the current system in the EU might be expected from the ongoing combination of public acknowledgement that Whistleblowing should be encouraged, and strong incentives to use the internal paths. It seems, however, that the internal paths are not nearly wide enough to facilitate the disclosure of information needed by the Institutions as well as the Public.

To clarify this point, in order to avoid significant damage to the public interest or the operations of the communities and if the use of internal mechanisms is not possible for the reasons described, it will be necessary to study a "right to report" that leads beyond the confines of the institutions, when discriminate use of such a right is necessary to avoid significant damage to the public interest or the operations of the Communities and internal mechanisms cannot be used. Beyond establishing a right to report, and the obvious protection against harassment in relation with good faith disclosures, it will be necessary but also sufficient to motivate superiors and management to evaluate every bit of risk information from the staff with due diligence, truly engaging in a risk dialogue enhancing responsible behaviour on the job with a sense of loyalty to the Communities and their citizens. Loyalty to ones colleagues and superiors is natural and strong. In the public service there needs to be a keen sense that loyalty is also and foremost owed to the community – in the case of the EU to the Communities and their citizens, as spelled out in Article 11 of the Staff Regulations.

The existing rules on Whistleblowing in the EU Institutions need to be revised completely in their context. The staff members of the Institutions should be invited to join a debate how this should be done along the lines mentioned above and integrated into a comprehensive system of EU governance and ethics guidelines.

## 4. Possible revision of the current EU rules on Whistleblowing

The assessment of the formal rules on Whistleblowing in the EU institutions and the practice in their application leads to the following proposals:

Since total top-down control is impossible in an organisation of the size of the EU Institutions and operating in an ever-changing environment marked by "globalisation," the best possible use of the risk information that is available inside the organisation is *conditio sine qua non*. This is primarily the information that staff members would be willing to share. "The greatest irresponsibility is to let things drift."<sup>95</sup> Letting things drift, leaving staff members in their fears as today, would constitute not only the waste of the "Human Resources" of the EU, but also the constant exposure to unknown and unmanaged risk – the opposite of governance and accountability which is owed to the citizens. A turn-around in the internal risk-communication culture needs to be achieved as soon as possible.

Management training to raise awareness for these necessities and their particular responsibilities can be useful. Risk communication as such may also require training to strengthen the capacity to "manage the communication" in a constructive way. That the disclosure of risk information is not usually meant to criticise a person but to raise attention is a basic idea that cannot be taught but has to be exercised and experienced. The perceived risk is not necessarily caused by a failure. But it constitutes a failure if this information cannot be shared and channelled into a risk dialogue and be assessed to become the basis of a risk management decision. If this does not happen, it means primarily a failure of the system, not necessarily that of one person. Risk communication always takes (at least) two. It can turn into a systematic failure if these circumstances are ignored.

Success requires more than training and good intentions. The organisational framework can be constructed to facilitate or to impede risk communication. This study has shown that in spite of all the good intentions laid into the current rules there can be no doubt that these very rules impede proper risk communication in the EU Institutions. They should be changed and adapted to best practice. The international environment sends urging signals through the conventions practically all EU members are part of and from the legal development in the Member States. It is therefore a matter of European convergence to improve drastically in this field. The UN General Secretariat has shown that it is possible to organise a large scale staff consultation and come up with a proprietary set of rules on Whistleblowing that is certainly not far from best practice.

At the UN the process had originally begun with a staff survey. Later the author of this study helped in defining a best practice and the essentials of the staff consultation. A similar process should be started within the EU Institutions without delay. This paper describes the best practice as it should be adopted by a large international administration such as the EU Institutions. The 18 points in this paper can serve as a model to start a consultation process with the staff and seek for the necessary adaptations at the interfaces with other existing EU rules and bodies. In such a consultation process, a Code of Conduct either for all EU staff members or respectively for all staff members of the particular Institutions and other instruments of Good Governance should also be discussed. The necessary change of culture will only be effected, if new rules form an integral part of an EU Ethics System.

It is suggested to have the consultation process facilitated by a third party. This does not need to be done with enormous manpower, since the EU Institutions obviously dispose of the necessary infrastructure to reach all members of the staff. The role of a third party moderator would be to help all involved to stay substantially on the track without causing anyone to suspect that one interest might be overriding another. The European Parliament as representative of the citizens seems in the position to initialise such a process.

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<sup>95</sup> A Cadbury Family wisdom, provided by Sir Adrian Cadbury, founder of the first National Commission on Corporate Governance, the Cadbury Commission (UK).



## Benchmarking

Element	Best Practice	EU Equivalent	Score	Remarks
<b>1 Framework and Awareness</b>	Awareness of the benefits of risk communication fostered, within a framework of mutual responsibilities, clearly defined in proprietary Value Statements and/or Codes of Conduct plus a definition of (limited) duties to disclose.	Staff Regulations, Ethics proclamations, Code of Conduct for Commissioners	<b>2/5</b>	Whistleblowing is treated as a disciplinary issue and danger. Value System could be more pronounced and shows little integration of Whistleblowing and harassment issues.
<b>2 Scope of Personal Coverage</b>	Everyone who can possibly be a source of (internal) risk information. Relevant risk information from outside sources is also welcome. Protection according to exposure.	Art. 22a, 1, 1a, OLAF free phone, European Ombudsman	<b>3/5</b>	Officials covered by policy, not other servants, not former staff or applicants; Free Phone and Ombudsman for contractors, suppliers, citizens etc.
<b>3 Subject Matter</b>	All risk relevant issues covered. Personal responsibility to judge what sort of information relevant to organisation and/or public interest.	Article 22a	<b>3/5</b>	Only, if detrimental to interests of Communities – not clear whether interests of General Public covered, too many conditions.
<b>4 Implementation</b>	Clear steps and procedures. Too many conditions and important risk information will be lost.	Art. 22 a, 22 b	<b>2/5</b>	Limited recipients not clearly defined; OLAF has to be involved, even where issue has no financial relevance.

## Benchmarking

<p><b>5</b> <b>Internal / External</b></p>	<p>Preferably internally. Where that seems unreasonable or effective, also outside disclosures</p>	<p>Art. 22 a, 22 b</p>	<p><b>2/5</b></p>	<p>The emphasis on a limited number of internal addresses is clear; external recipients immediately lead back to OLAF.</p>
<p><b>6</b> <b>Confidentiality</b></p>	<p>Confidentiality to protect legitimate interests. Whistleblower identity protected against harassment.</p>	<p>Art. 17</p>	<p><b>2/5</b></p>	<p>Unclear, what protection Art. 17 would provide to a whistleblower.</p>
<p><b>7</b> <b>Anonymity</b></p>	<p>Anonymous sources should be admitted and equally protected, encouraging whistleblowers to seek more effective communication. Electronic protection a compromise.</p>	<p>OLAF Free Phone</p>	<p><b>3/5</b></p>	<p>No explicit provision, OLAF Free Phone might be open to staff, protection unclear, technical solution in planning stage</p>
<p><b>8</b> <b>Time Scale</b></p>	<p>Reasonable statutes of limitation, e.g. one year after consequential damage first realised.</p>	<p>Art. 22 a</p>	<p><b>2/5</b></p>	<p>"Without delay" is very strict and means whistleblower has burden of proof, this could preclude protection.</p>
<p><b>9</b> <b>Protections</b></p>	<p>No retaliation or harassment against anyone under any circumstances. Harassment as well as reporting rumours or distorted facts as serious misconduct.</p>	<p>Art. 22 a, 22 b, 24, 12 a</p>	<p><b>1/5</b></p>	<p>Harassment formally illegal; sanctions against harassment unheard of. Unclear whether Art 24 protects against colleagues, other protection nearly impossible to acquire.</p>
<p><b>10</b> <b>Right to Refuse</b></p>	<p>Permit right to refuse participation in illegal activities with same protection as for Whistleblowing.</p>	<p>Article 21a</p>	<p><b>3/5</b></p>	<p>Reasonable right to refuse exists, protection as problematic as for whistleblowers.</p>

## Benchmarking

<p><b>11</b> <b>Sanctioning System</b></p>	<p>Sanctions for blocking information channels. Sanctions for harassment of whistleblowers. Cases of Whistleblowing should be positively reflected in the staff report.</p>	<p>Art. 12 a, 22a, 24</p>	<p>2/5</p>	<p>Harassment is misconduct, however rules on Whistleblowing so narrow, that much harassment could appear as appropriate "disciplining."</p>
<p><b>12</b> <b>Burden of Proof</b></p>	<p>A sliding scale of the burden of proof, both in regard to the quality of proof and the amount of material, analogous to UK PIDA. Prima facie proof in case of harassment, the shift.</p>	<p>Implicit</p>	<p>1/5</p>	<p>Burden of proof seems almost totally on whistleblowers' side, since hurdle for dutiful reporting high and explicit protection only against activities of Institution itself.</p>
<p><b>13</b> <b>Management Follow-up</b></p>	<p>Transparent rules on what will happen once disclosure has been made. Generally information about substance of this process.</p>	<p>OLAF</p>	<p>2/5</p>	<p>OLAF handbook quite clear, time scale surprising; unclear how other services have to react.</p>
<p><b>14</b> <b>Whistleblower Participation</b></p>	<p>Whistleblower acknowledged as active contributor in the follow-up procedure.</p>	<p>OLAF</p>	<p>1/5</p>	<p>Report has to include all evidence, no provisions for further input or dialogue</p>

## Benchmarking

Formally the judicial review is intact, until recently, though resource intensive, hearings were not appreciated as adequately providing justice. Only review of matters of law after Civil Service Tribunal decision; as yet, no experience with this panel; settlement is to be promoted; third party mediation should be institutionalised.

Independent review system, whether observed behaviour constitutes harassment and whether related to Whistleblowing. Access to the court system, preferably with independent out-of-court dispute resolution options (mediation) as a less interruptive intermediate alternative.

Ombudsman,  
European Civil  
Service Tribunal,  
CFI

3/5

Formally the judicial review is intact, until recently, though resource intensive, hearings were not appreciated as adequately providing justice. Only review of matters of law after Civil Service Tribunal decision; as yet, no experience with this panel; settlement is to be promoted; third party mediation should be institutionalised.

Ombudsman,  
European Civil  
Service Tribunal,  
CFI

3/5

Formally the judicial review is intact, until recently, though resource intensive, hearings were not appreciated as adequately providing justice. Only review of matters of law after Civil Service Tribunal decision; as yet, no experience with this panel; settlement is to be promoted; third party mediation should be institutionalised.

OLAF is focussed on prospective investigations, not on whistleblower concerns. Independent advice should be made available.

2/5

OLAF

Impartial advice for the prospective whistleblower.

16  
**Support**

Codes of Conduct, Rules on Ethics and Rules on Risk Communication should be set up with the widest possible involvement of stakeholders.

2/5

EU System of Joint Committees, Hearings etc.

Risk communication system needs staff confidence.

17  
**Staff Buy-in**

General tone certainly very positive; the impression of the statements has been impaired by delayed and incomplete implementation, stance of middle management unclear.

3/5

Commission Statements and Practice

Tone from the top and message in the rules support Whistleblowing and the practice in the organisation.

18  
**Credibility**

= 43%

39/90

**TOTAL**



### Explanation of Benchmark

The Benchmark and criteria have been adopted from the Study and take particular regard to the situation of the EU Communities. The issue of the study is certainly not a matter of statistics. However, since all criteria are essential, a performance of

- less than 50% on an overall average, or
- less than 2/5 on more than one element

raises serious doubt about the effectiveness of the system, even where parts were outstanding. Currently the EU Staff Regulations reach an overall average of 43 % – on the first glance not so far from an acceptable 50 % - however with three elements at only 1/5 points. The situation has to be rated as clearly below minimum standards, if one considers that the rules fail (2/5 points or less) on two thirds of the criteria. That means, on two thirds of the criteria current rules and practice are clearly below what has to be expected as against the benchmark. Only 6 out of 18 criteria are clearly in the acceptable region, none is outstanding.

In order to improve,

- first, all marks of 1/5 need to be addressed. These are clearly unacceptable but also relatively easy to bring in regions of acceptability;
- next all marks of 2/5 should be addressed. These need to be improved to an overall "pass" (equal or better than 3/5);
- from time to time it will be easy and obvious to make improvements on all other points as well.

With this strategy and understanding the complexities of changing the Staff Regulations, an overall "pass" should be achievable within one year (by 2007). The necessary cultural improvements can be expected to a certain extent even throughout that first year, because the process will have to be taken very seriously. Beyond that it will take much longer to build up a host of positive experiences for all, which in turn will influence the underlying culture. An overall mark of at least 66 % (~50% improvement) should be aimed for and seems achievable within 3 years. Better marks than 75% will only be possible once there is trust in safe internal risk communication. Trust needs repeated positive experiences and time to build up. Along this ambitious schedule this can be possible within 5 years.



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Excerpts from  
*Staff Regulations of Officials of the European Communities (01.01. 2005)*



**Staff Regulations of Officials of the European Communities**

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## **Title II: Rights and obligations of officials**

### *Article 11 (96)*

An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Communities. An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.

### *Article 11a (96)*

1. An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests.
2. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter.
3. An official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties.

### *Article 12 (96)*

An official shall refrain from any action or behaviour which might reflect adversely upon his position.

### *Article 12a (96)*

1. Officials shall refrain from any form of psychological or sexual harassment.
2. An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evi-

dence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.

3. "Psychological harassment" means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.

4. "Sexual harassment" means conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment. Sexual harassment shall be treated as discrimination based on gender.

*Article 12b (96)*

1. Subject to Article 15, an official wishing to engage in an outside activity, whether paid or unpaid, or to carry out any assignment outside the Communities, shall first obtain the permission of the Appointing Authority. Permission shall be refused only if the activity or assignment in question is such as to interfere with the performance of the official's duties or is incompatible with the interests of the institution.

2. An official shall notify the Appointing Authority of any changes in a permitted outside activity or assignment, which occur after the official has sought the permission of the Appointing Authority under paragraph 1. Permission may be withdrawn if the activity or assignment no longer meets the conditions referred to in the last sentence of paragraph 1.

*Article 13(96)*

If the spouse of an official is in gainful employment, the official shall inform the appointing authority of his institution. Should the nature of the employment prove to be incompatible with that of the official and if the official is unable to give an undertaking that it will cease within a specified period, the appointing authority shall, after consulting the Joint Committee, decide whether the official shall continue in his post or be transferred to another post.

*Article 14 (96)*  
*Repealed*

*Article 15 (96)*

1. An official who intends to stand for public office shall notify the Appointing Authority. The Appointing Authority shall decide, in the light of the interests of the service, whether the official concerned:

- (a) should be required to apply for leave on personal grounds, or
- (b) should be granted annual leave, or
- (c) may be authorised to discharge his duties on a part-time basis, or
- (d) may continue to discharge his duties as before.

2. An official elected or appointed to public office shall immediately inform the Appointing Authority. The Appointing Authority shall, having regard to the interests of the service, the importance of the office, the duties it entails and the remuneration and reimbursement of expenses incurred in carrying out those duties, take one of the decisions referred to in paragraph 1. If the official is required to take leave on personal grounds or is authorised to discharge his duties on a part-time basis, the period of such leave or part-time working shall correspond to the official's term of office.

*Article 16 (96)*

An official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits. Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. The institution shall, after consulting the Joint Committee, notify its decision within 30 working days of being so informed. If no such notification has been made by the end of that period, this shall be deemed to constitute implicit acceptance.

*Article 17 (96)*

1. An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public.
2. An official shall continue to be bound by this obligation after leaving the service.

*Article 17a (96)*

1. An official has the right to freedom of expression, with due respect to the principles of loyalty and impartiality.
2. Without prejudice to Articles 12 and 17, an official who intends to publish or cause to be published, whether alone or with others, any matter dealing with the work of the Communities shall inform the Appointing Authority in advance. Where the Appointing Authority is able to demonstrate that the matter is liable seriously to prejudice the legitimate interests of the Communities, the Appointing Authority shall inform the official of its decision in writing within 30 working days of receipt of the information. If no such decision is notified within the specified period, the Appointing Authority shall be deemed to have had no objections.

*Article 18 (96)*

1. All rights in any writings or other work done by any official in the performance of his duties shall be the property of the Community to whose activities such writings or work

relate. The Communities shall have the right to acquire compulsorily the copyright in such works.

2. Any invention made by an official in the course of or in connection with the performance of his duties shall be the undisputed property of the Communities. The institution may, at its own expense and on behalf of the Communities, apply for and obtain patents therefore in all countries. Any invention relating to the work of the Communities made by an official during the year following the expiration of his term of duty shall, unless proved otherwise, be deemed to have been made in the course of or in connection with the performance of his duties. Where inventions are the subject of patents, the name of the inventor or inventors shall be stated.

3. The institution may in appropriate cases award a bonus, the amount of which shall be determined by the institution, to an official who is the author of a patented invention.

*Article 19*

An official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service. The provisions of the preceding paragraph shall not apply to an official or former official giving evidence before the Court of Justice of the European Communities or before the Disciplinary Board of an institution on a matter concerning a servant or former servant of one of the three European Communities.

*Article 20 (96)*

An official shall reside either in the place where he is employed or at no greater distance therefrom as is compatible with the proper performance of his duties. The official shall notify the Appointing Authority of his address and inform it immediately of any change of address.

*Article 21 (24) (96)*

An official, whatever his rank, shall assist and tender advice to his superiors; he shall be responsible for the performance of the duties assigned to him. An official in charge of any branch of the service shall be responsible to his superiors in respect of the authority conferred on him and for the carrying out of instructions given by him. The responsibility of his subordinates shall in no way release him from his own responsibility.

*Article 21a (96)*

1. An official who receives orders which he considers to be irregular or likely to give rise to serious difficulties shall inform his immediate superior, who shall, if the information is given in writing, reply in writing. Subject to paragraph 2, if the immediate superior confirms the orders and the official believes that such confirmation does not constitute a rea-

sonable response to the grounds of his concern, the official shall refer the question in writing to the hierarchical authority immediately above. If the latter confirms the orders in writing, the official shall carry them out unless they are manifestly illegal or constitute a breach of the relevant safety standards.

2. If the immediate superior considers that the orders must be executed promptly, the official shall carry them out unless they are manifestly illegal or constitute a breach of the relevant safety standards. At the request of the official, the immediate superior shall be obliged to give such orders in writing.

*Article 22*

An official may be required to make good, in whole or in part, any damage suffered by the Communities as a result of serious misconduct on his part in the course of or in connection with the performance of his duties. A reasoned decision shall be given by the appointing authority in accordance with the procedure laid down in regard to disciplinary matters. The Court of Justice of the European Communities shall have unlimited jurisdiction in disputes arising under this provision.

*Article 22a (96)*

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct. Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

*Article 22b (96)*

1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:
  - (a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
  - (b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed the OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.
2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.
3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

*Article 23 (24)(96)*

The privileges and immunities enjoyed by officials are accorded solely in the interests of the Communities. Subject to the Protocol on Privileges and Immunities, officials shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force. When privileges and immunities are in dispute, the official concerned shall immediately inform the appointing authority. The laissez-passer provided for in the Protocol on Privileges and Immunities shall be issued to officials in grades grade AD 12 to AD 16 and equivalent grades. Where the interests of the service so require, this laissez-passer may be issued, by special decision of the appointing authority, to officials in other grades whose place of employment lies outside the territory of the Member States.

*Article 24 (8) (96)*

The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties. They shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause the damage and has been unable to obtain compensation from the person who did cause it.

*Article 24a (8) (96)*

The Communities shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests. Such training and instruction shall be taken into account for purposes of promotion in their careers.

*Article 24b (96)*

Officials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials.

*Article 25 (8) (96)*

Officials may submit requests concerning issues covered by these Staff Regulations to the Appointing Authority of their institution. Any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the grounds on which it is based. Specific decisions regarding appointment, establishment, promotion, transfer, determination of administrative status and termination of service of an official shall be published in the institution to which the official belongs. The publication shall be accessible to all staff for an appropriate period of time.

*Article 26 (96)*

The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- (b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed. The communication of any document to an official shall be evidenced by his signing it or, failing that, shall be effected by registered letter to the last address communicated by the official.

An official's personal file shall contain no reference to his political, trade union, philosophical or religious activities and views, or to his racial or ethnic origin or sexual orientation. The precedent paragraph shall not however prohibit the insertion in the file of administrative acts and documents known to the official which are necessary for the application of these Staff Regulations. There shall be only one personal file for each official. An official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them. The personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium. It shall, however, be forwarded to the Court of Justice of the European Communities if an action concerning the official is brought.

*Article 26a (96)*

Officials shall have the right to acquaint themselves with their medical files, in accordance with arrangements to be laid down by the institutions.





Excerpts from

*The Committee on Standards in Public Life (CSPL), Getting the Balance Right - Implementing Standards of Conduct in Public Life, 10<sup>th</sup> Report, London 2005*

## Whistleblowing

4.31 Whistleblowing is the "pursuit of a concern about wrongdoing that does damage to a wider public interest" [Public Concern at Work, 22/96/05]. It is therefore part of the continuum of the communication process which begins with raising a wrongdoing with a line manager, but goes beyond that if the line manager does not deal with it or is not the appropriate person to be approached [Guy Dehn 15.06.04 508]. As the Committee noted in its Third Report [15, page 48], the essence of a whistleblowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course. Effective whistleblowing is therefore a key component in any strategy to challenge inappropriate behaviour at all levels of an organisation. It is both an instrument in support of good governance and a manifestation of a more open organisational culture.

4.32 This is the first time the whistleblowing issue has been examined by this Committee since the Public Interest Disclosure Act became law, giving protection from victimisation to those who have raised issues of concern.

4.33 The Public Interest Disclosure Act 1998, which came into force in 1999, provides whistleblowers with statutory protection against dismissal and victimisation. The Act applies to people at work raising genuine concerns about crime, civil offences, miscarriage of justice, and danger to health and safety or the environment. It applies whether or not the information is confidential and extends to malpractice overseas. The Act distinguishes between **internal disclosures** (a disclosure in good faith to a manager or the employer is protected if the whistleblower has reasonable suspicion that the malpractice has occurred or is likely to occur), **regulatory disclosures** and **wider disclosures**. Regulatory disclosures can be made in good faith to prescribed bodies such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Wider disclosures (e.g. to the police, the media, and MPs) are protected if, in addition to the tests for internal disclosures, they are reasonable in all the circumstances and they meet one of three conditions. Provided they are not made for personal gain these conditions are, that the whistleblower:

- reasonably believed he would be victimised if he raised the matter internally or with a prescribed regulator;
- reasonably believed a cover-up was likely and there was no prescribed regulator; or
- had already raised the matter internally or with a prescribed regulator.

4.34 In the first three years of the Act, employees lodged over 1,200 claims alleging victimisation for whistleblowing. Two thirds of these claims were settled or withdrawn without any public hearing. Tribunals reached full decisions in 152 cases [16]. This has raised issues about whether it should be necessary for there to be legal protection for those raising concerns, or whether this should be tackled beforehand in the form of creating an

organisational culture which promotes openness in the work place, so that these concerns are raised before it becomes necessary to invoke legislation.

4.35 Firstly, it is important to reiterate that the Act is a statutory 'backstop' to ensure that employees who follow prescribed procedures for raising concerns are not victimised or suffer detriment as a result. Where an individual case reaches the point of invoking the Act then this represents a failure of the internal systems in some respect. Either the employee has failed to follow the procedure (for whatever reason) or the procedures themselves have failed. In our view, therefore, any case where the Act is invoked should initiate a review of the whistleblowing procedures in that organisation.

4.36 Secondly, it is important to distinguish between the popular media-driven definition of a successful 'whistleblower' taking his or her 'story' directly to the press or other (nonregulator or non-prescribed) external bodies and 'real' internal whistleblowing. Successful whistleblowing, in terms of a healthy organisational culture is when concerns are raised internally with confidence about the internal procedures and where the concern is properly investigated and, where necessary, addressed. During the course of our inquiry there were a number of high profile 'so called' whistleblowing cases involving government departments. It is not for this Committee to comment on individual cases. However, just as where the invoking of the Act should trigger a review of whistleblowing procedures in an organisation, so should the unauthorised disclosure of information by those who cite public interest reasons. Such reviews should in no way be seen or taken as any admission of culpability by the organisation involved. A review is critical in such circumstances to demonstrate to other employees the commitment to 'living out' effective whistleblowing procedures and to learn whether there were issues of organisational culture which may have contributed to the unauthorised disclosure.

*"What I tend to see, obviously from a journalist's point of view, is what reaches the media. It is when the whistleblowing arrangements do not work within an organisation then they sort of explode into the public domain"*

[Douglas Fraser, Political Editor of the Sunday Herald, 17.06.04 1262].

4.37 The evidence the Committee received indicates that public service leaders do recognise the importance of proper whistleblowing procedures and the integral part this plays in a healthy organisational culture:

*"We have not gone so far as to teach Welsh schoolchildren the declension of, 'I brief, you leak, he, she or it blows the whistle'. I think the issue is that we believe that whistleblowers, without being artificially stimulated or encouraged to blow the whistle, have adequate protection if they do see something that they believe should have the whistle blown on it, to do what they should do at that point, which is to blow the whistle"*

[The Rt Hon Rhodri Morgan AM 7.07.04 2426].

*"Perhaps I should just say that I think - and would like to say unambiguously - that the right of people to whistleblow, using the appropriate channels, is fundamental and absolutely important... ...Anyone working in the public sector who has a problem of this nature must feel that they can make their point known in an appropriately protected and safeguarded way"*

[Sir Jon Shortridge 7.07.04 2427].

*"I think the existence of whistleblowing will often highlight a lack of maturity in an organisation in terms of being able to deal with contentious issues in an effective, straightforward and sensible way. I do feel with other things that this [your] Committee has promoted that the focus on whistleblowing and the approach that has been developed over the last five/ten years has resulted in good progress"*

[Sir Alan Langlands, 13.07.04 2877].

4.38 Public Concern at Work, the leading campaigning charity in the whistleblowing area, provided the Committee with comprehensive evidence, which repays careful reading [Public Concern at Work 22/96/01-15; Guy Dehn, Anna Myers, 15.06.04]. They warned of the dangers of a prescriptive 'one size fits all' approach to whistleblowing policies because of the wide differences in the size, function, and constitution of public bodies and because the uncritical adoption of model procedures can lead to an unwitting tick-box approach to governance.

4.39 Public Concern at Work drew our attention to variable practice on whistleblowing, both among regulators and across the public sector. We were told that "There are a lot of differences" in the way in which regulators regard whistleblowing. While some, like the Audit Commission and the Financial Services Authority, have embraced the concept and communicated it very effectively, others have not [Guy Dehn 15.06.04 605].

4.40 This differential approach can be confusing and where the concept is not effectively communicated, disadvantageous to the challenge of inappropriate behaviour. It underlines the importance of our recommendation for public bodies to share good practice across organisational and sector boundaries. Regulators are not exempt from this. Indeed, as we pointed out in Chapter 1, cross-fertilisation is one of the principles of strategic regulation.

## RECOMMENDATION

**R37. All regulators should review their procedures for handling whistleblowing by individuals in bodies under their jurisdiction, drawing upon best practice (for example the Audit Commission and Financial Services Authority).**

4.41 There is also a differential approach across the public sector. A key determinant of the effectiveness of the whistleblowing arrangements in a public body is the willingness of the board to demonstrate leadership on this issue. This means reviewing procedural arrangements, the extent to which they are trusted, awareness levels throughout the organisation, and reviewing how people who used the procedures were treated [Guy Dehn 15.06.04 630].

4.42 It is therefore of concern that the Audit Commission has found that only 50 per cent of the employees in the local government and health bodies which have used the Commission's self-assessment tools were aware of the Public Interest Disclosure Act, and the protection this affords an employee making a disclosure concerning fraud and corruption [Audit Commission, 22/85/04].

4.43 Public Concern at Work emphasised key elements of good practice for organisations to ensure their whistleblowing arrangements are fit for purpose and integral to their organisational culture. This Committee emphatically endorses this good practice which can be summarised in four key elements:

- (i) Ensuring that staff are aware of and trust the whistleblowing avenues. Successful promotion of awareness and trust depend upon the simplicity and practicality of the options available, and also on the ability to demonstrate that a senior officer inside the organisation is accessible for the expression of concerns about wrongdoing, and that where this fails, there is recourse to effective external and independent oversight.
- (ii) Provision of realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity. While requests for confidentiality and anonymity should be respected, there may be cases where a public body might not be able to act on a concern without the whistleblower's open evidence. Even where the whistleblower's identity is not disclosed, "this is no guarantee that it will not be deduced by those implicated or by colleagues."
- (iii) Continual review of how the procedures work in practice. This is a key feature of the revised *Code on Corporate Governance*, which now places an obligation on the audit committees of listed companies to review how whistleblowing policies operate in practice. The advantage of this approach is that it ensures a review of action taken in response to the expression of concerns about wrongdoing; it allows a look at whether confidentiality issues have been handled effectively and whether staff have been treated fairly as a result of raising concerns.
- (iv) Regular communication to staff about the avenues open to them. Creative approaches to this include the use of payslips, newsletters, management briefings and Intranets, and use too of Public Concern's helpline, launched in 2003 and available through subscription.

#### RECOMMENDATION

**R38. Leaders of public bodies should reiterate their commitment to the effective implementation of the Public Interest Disclosure Act 1998 and ensure its principles and provisions are widely known and applicable in their own organisation. They should commit their organisations to following the four key elements of good practice i.e.**

- (i) Ensuring that staff are aware of and trust the whistleblowing avenues;
- (ii) Provision of realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity;
- (iii) Continual review of how the procedures work in practice; and
- (iv) Regular communication to staff about the avenues open to them.

## Conclusion

4.44 Embedding the Seven Principles of Public Life into organisational culture is a common thread that runs through this report. Our analysis and recommendations in Chapters 2 and 3 are specifically designed to introduce proportionate arrangements to do just this in the area of public appointments by government departments and in the conduct of councillors in local government.

4.45 In this final chapter we have reviewed some of the key generic components that can be applied more widely in all public sector bodies to enhance their governance arrangements in an effective and proportionate manner. Inevitably much of this concerns learning and drawing upon good practice in specific areas for more general application across the public sector. This is not always straightforward. While it appears that many of us can readily recognise a healthy organisation with ethical behaviour at the heart of its culture (i.e. part and parcel of everyday operations) we all find it more difficult to describe the constituents parts which have made it so.

4.46 However intangible the issue of culture appears, the Committee believes that it is critical to delivering high standards of propriety in public life in a proportionate and effective manner. Learning from good practice must play a central role and we have identified three key areas for improvement:

- **Training and development.** We were particularly impressed with the innovative experienced based learning techniques pioneered by the Audit Commission which help organisations reach their own determinations of their strengths and weaknesses and allow the solutions to come from within rather than imposed from outside. The tools have the added benefit of allowing benchmarking against similar organisation and, if widely used, will provide useful aggregate data on ethical culture across the public sector.
- **Governance** of propriety in managing conflicts of interest. A very real challenge faces public bodies in how to involve people with current and relevant expertise in non-executives roles, while at the same time ensuring no conflict or perception of conflict between public and private interests. Continual vigilance, openness and a risk based approach can help organisation achieve this balance. Two recent reports [13 and 14] have wide applicability and we recommend that the best practice so described should be adopted by all public bodies; and
- **'Whistleblowing'** - or more accurately - a culture that encourages the challenge of inappropriate behaviour at all levels. We have sought to distinguish between the 'media' driven definition of whistleblowing and the role it can play internally in a healthy ethical organisational culture. Here, more than in any other area we have considered, the principle of Leadership is paramount if organisations are to truly 'live out' the procedures that all have in place. The statutory framework (Public Interest Disclosure Act 1998) is a helpful driver but must be recognised as a 'backstop' which can provide redress when things go wrong not as a substitute for cultures that actively encourage challenge of inappropriate behaviour. We have recommended that leaders of public bodies should commit themselves to follow the elements of good practice developed by Public Concern at Work, the leading organisation in this field.

Excerpts from

*The Committee on Standards in Public Life (CSPL), Getting the Balance Right - Implementing Standards of Conduct in Public Life, 10<sup>th</sup> Report, London 2005*

**Whistleblowing**

4.31 Whistleblowing is the "pursuit of a concern about wrongdoing that does damage to a wider public interest" [Public Concern at Work, 22/96/05]. It is therefore part of the continuum of the communication process which begins with raising a wrongdoing with a line manager, but goes beyond that if the line manager does not deal with it or is not the appropriate person to be approached [Guy Dehn 15.06.04 508]. As the Committee noted in its Third Report [15, page 48], the essence of a whistleblowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course. Effective whistleblowing is therefore a key component in any strategy to challenge inappropriate behaviour at all levels of an organisation. It is both an instrument in support of good governance and a manifestation of a more open organisational culture.

4.32 This is the first time the whistleblowing issue has been examined by this Committee since the Public Interest Disclosure Act became law, giving protection from victimisation to those who have raised issues of concern.

4.33 The Public Interest Disclosure Act 1998, which came into force in 1999, provides whistleblowers with statutory protection against dismissal and victimisation. The Act applies to people at work raising genuine concerns about crime, civil offences, miscarriage of justice, and danger to health and safety or the environment. It applies whether or not the information is confidential and extends to malpractice overseas. The Act distinguishes between **internal disclosures** (a disclosure in good faith to a manager or the employer is protected if the whistleblower has reasonable suspicion that the malpractice has occurred or is likely to occur), **regulatory disclosures** and **wider disclosures**. Regulatory disclosures can be made in good faith to prescribed bodies such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Wider disclosures (e.g. to the police, the media, and MPs) are protected if, in addition to the tests for internal disclosures, they are reasonable in all the circumstances and they meet one of three conditions. Provided they are not made for personal gain these conditions are, that the whistleblower:

- reasonably believed he would be victimised if he raised the matter internally or with a prescribed regulator;
- reasonably believed a cover-up was likely and there was no prescribed regulator; or
- had already raised the matter internally or with a prescribed regulator.

4.34 In the first three years of the Act, employees lodged over 1,200 claims alleging victimisation for whistleblowing. Two thirds of these claims were settled or withdrawn without any public hearing. Tribunals reached full decisions in 152 cases [16]. This has raised issues about whether it should be necessary for there to be legal protection for those raising concerns, or whether this should be tackled beforehand in the form of creating an

organisational culture which promotes openness in the work place, so that these concerns are raised before it becomes necessary to invoke legislation.

4.35 Firstly, it is important to reiterate that the Act is a statutory 'backstop' to ensure that employees who follow prescribed procedures for raising concerns are not victimised or suffer detriment as a result. Where an individual case reaches the point of invoking the Act then this represents a failure of the internal systems in some respect. Either the employee has failed to follow the procedure (for whatever reason) or the procedures themselves have failed. In our view, therefore, any case where the Act is invoked should initiate a review of the whistleblowing procedures in that organisation.

4.36 Secondly, it is important to distinguish between the popular media-driven definition of a successful 'whistleblower' taking his or her 'story' directly to the press or other (nonregulator or non-prescribed) external bodies and 'real' internal whistleblowing. Successful whistleblowing, in terms of a healthy organisational culture is when concerns are raised internally with confidence about the internal procedures and where the concern is properly investigated and, where necessary, addressed. During the course of our inquiry there were a number of high profile 'so called' whistleblowing cases involving government departments. It is not for this Committee to comment on individual cases. However, just as where the invoking of the Act should trigger a review of whistleblowing procedures in an organisation, so should the unauthorised disclosure of information by those who cite public interest reasons. Such reviews should in no way be seen or taken as any admission of culpability by the organisation involved. A review is critical in such circumstances to demonstrate to other employees the commitment to 'living out' effective whistleblowing procedures and to learn whether there were issues of organisational culture which may have contributed to the unauthorised disclosure.

*"What I tend to see, obviously from a journalist's point of view, is what reaches the media. It is when the whistleblowing arrangements do not work within an organisation then they sort of explode into the public domain"*

[Douglas Fraser, Political Editor of the Sunday Herald, 17.06.04 1262].

4.37 The evidence the Committee received indicates that public service leaders do recognise the importance of proper whistleblowing procedures and the integral part this plays in a healthy organisational culture:

*"We have not gone so far as to teach Welsh schoolchildren the declension of, 'I brief, you leak, he, she or it blows the whistle'. I think the issue is that we believe that whistleblowers, without being artificially stimulated or encouraged to blow the whistle, have adequate protection if they do see something that they believe should have the whistle blown on it, to do what they should do at that point, which is to blow the whistle"*

[The Rt Hon Rhodri Morgan AM 7.07.04 2426].

*"Perhaps I should just say that I think - and would like to say unambiguously - that the right of people to whistleblow, using the appropriate channels, is fundamental and absolutely important... ...Anyone working in the public sector who has a problem of this nature must feel that they can make their point known in an appropriately protected and safeguarded way"*

[Sir Jon Shortridge 7.07.04 2427].

*"I think the existence of whistleblowing will often highlight a lack of maturity in an organisation in terms of being able to deal with contentious issues in an effective, straightforward and sensible way. I do feel with other things that this [your] Committee has promoted that the focus on whistleblowing and the approach that has been developed over the last five/ten years has resulted in good progress"*

[Sir Alan Langlands, 13.07.04 2877].

4.38 Public Concern at Work, the leading campaigning charity in the whistleblowing area, provided the Committee with comprehensive evidence, which repays careful reading [Public Concern at Work 22/96/01-15; Guy Dehn, Anna Myers, 15.06.04]. They warned of the dangers of a prescriptive 'one size fits all' approach to whistleblowing policies because of the wide differences in the size, function, and constitution of public bodies and because the uncritical adoption of model procedures can lead to an unwitting tick-box approach to governance.

4.39 Public Concern at Work drew our attention to variable practice on whistleblowing, both among regulators and across the public sector. We were told that "There are a lot of differences" in the way in which regulators regard whistleblowing. While some, like the Audit Commission and the Financial Services Authority, have embraced the concept and communicated it very effectively, others have not [Guy Dehn 15.06.04 605].

4.40 This differential approach can be confusing and where the concept is not effectively communicated, disadvantageous to the challenge of inappropriate behaviour. It underlines the importance of our recommendation for public bodies to share good practice across organisational and sector boundaries. Regulators are not exempt from this. Indeed, as we pointed out in Chapter 1, cross-fertilisation is one of the principles of strategic regulation.

## RECOMMENDATION

**R37. All regulators should review their procedures for handling whistleblowing by individuals in bodies under their jurisdiction, drawing upon best practice (for example the Audit Commission and Financial Services Authority).**

4.41 There is also a differential approach across the public sector. A key determinant of the effectiveness of the whistleblowing arrangements in a public body is the willingness of the board to demonstrate leadership on this issue. This means reviewing procedural arrangements, the extent to which they are trusted, awareness levels throughout the organisation, and reviewing how people who used the procedures were treated [Guy Dehn 15.06.04 630].

4.42 It is therefore of concern that the Audit Commission has found that only 50 per cent of the employees in the local government and health bodies which have used the Commission's self-assessment tools were aware of the Public Interest Disclosure Act, and the protection this affords an employee making a disclosure concerning fraud and corruption [Audit Commission, 22/85/04].

4.43 Public Concern at Work emphasised key elements of good practice for organisations to ensure their whistleblowing arrangements are fit for purpose and integral to their organisational culture. This Committee emphatically endorses this good practice which can be summarised in four key elements:



- (i) Ensuring that staff are aware of and trust the whistleblowing avenues. Successful promotion of awareness and trust depend upon the simplicity and practicality of the options available, and also on the ability to demonstrate that a senior officer inside the organisation is accessible for the expression of concerns about wrongdoing, and that where this fails, there is recourse to effective external and independent oversight.
- (ii) Provision of realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity. While requests for confidentiality and anonymity should be respected, there may be cases where a public body might not be able to act on a concern without the whistleblower's open evidence. Even where the whistleblower's identity is not disclosed, "this is no guarantee that it will not be deduced by those implicated or by colleagues."
- (iii) Continual review of how the procedures work in practice. This is a key feature of the revised *Code on Corporate Governance*, which now places an obligation on the audit committees of listed companies to review how whistleblowing policies operate in practice. The advantage of this approach is that it ensures a review of action taken in response to the expression of concerns about wrongdoing; it allows a look at whether confidentiality issues have been handled effectively and whether staff have been treated fairly as a result of raising concerns.
- (iv) Regular communication to staff about the avenues open to them. Creative approaches to this include the use of payslips, newsletters, management briefings and Intranets, and use too of Public Concern's helpline, launched in 2003 and available through subscription.

#### RECOMMENDATION

**R38. Leaders of public bodies should reiterate their commitment to the effective implementation of the Public Interest Disclosure Act 1998 and ensure its principles and provisions are widely known and applicable in their own organisation. They should commit their organisations to following the four key elements of good practice i.e.**

- (i) Ensuring that staff are aware of and trust the whistleblowing avenues;**
- (ii) Provision of realistic advice about what the whistleblowing process means for openness, confidentiality and anonymity;**
- (iii) Continual review of how the procedures work in practice; and**
- (iv) Regular communication to staff about the avenues open to them.**

## Conclusion

4.44 Embedding the Seven Principles of Public Life into organisational culture is a common thread that runs through this report. Our analysis and recommendations in Chapters 2 and 3 are specifically designed to introduce proportionate arrangements to do just this in the area of public appointments by government departments and in the conduct of councillors in local government.

4.45 In this final chapter we have reviewed some of the key generic components that can be applied more widely in all public sector bodies to enhance their governance arrangements in an effective and proportionate manner. Inevitably much of this concerns learning and drawing upon good practice in specific areas for more general application across the public sector. This is not always straightforward. While it appears that many of us can readily recognise a healthy organisation with ethical behaviour at the heart of its culture (i.e. part and parcel of everyday operations) we all find it more difficult to describe the constituents parts which have made it so.

4.46 However intangible the issue of culture appears, the Committee believes that it is critical to delivering high standards of propriety in public life in a proportionate and effective manner. Learning from good practice must play a central role and we have identified three key areas for improvement:

- **Training and development.** We were particularly impressed with the innovative experienced based learning techniques pioneered by the Audit Commission which help organisations reach their own determinations of their strengths and weaknesses and allow the solutions to come from within rather than imposed from outside. The tools have the added benefit of allowing benchmarking against similar organisation and, if widely used, will provide useful aggregate data on ethical culture across the public sector.
- **Governance** of propriety in managing conflicts of interest. A very real challenge faces public bodies in how to involve people with current and relevant expertise in non-executives roles, while at the same time ensuring no conflict or perception of conflict between public and private interests. Continual vigilance, openness and a risk based approach can help organisation achieve this balance. Two recent reports [13 and 14] have wide applicability and we recommend that the best practice so described should be adopted by all public bodies; and
- **'Whistleblowing'** - or more accurately - a culture that encourages the challenge of inappropriate behaviour at all levels. We have sought to distinguish between the 'media' driven definition of whistleblowing and the role it can play internally in a healthy ethical organisational culture. Here, more than in any other area we have considered, the principle of Leadership is paramount if organisations are to truly 'live out' the procedures that all have in place. The statutory framework (Public Interest Disclosure Act 1998) is a helpful driver but must be recognised as a 'backstop' which can provide redress when things go wrong not as a substitute for cultures that actively encourage challenge of inappropriate behaviour. We have recommended that leaders of public bodies should commit themselves to follow the elements of good practice developed by Public Concern at Work, the leading organisation in this field.