

A CRITICAL ANALYSIS OF WHISTLEBLOWER PROTECTION IN THE EUROPEAN UNION

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Abstract: *Whistleblower protection is an important anti-corruption instrument. Countries around the world, including European Union member states, have dealt differently, if at all, with systems for protecting public employees who reveal information that leads to corruption investigations and prosecutions. Such systems work best when their legal framework is well articulated and consistently enforced. The success of public sector anti-corruption fight depends on whistleblower protection, especially in countries where public sector corruption is systemic and endemic such as it is in the Eastern EU members. This paper presents an overview of the main whistleblower protection issues in the European Union, including some of the current good practices.*

Keywords *whistleblower protection, public corruption, anti-corruption*

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1. INTRODUCTION

Whether it is in the public or private sector, corruption often is hard to detect. Therefore, inside information is critically important, especially when employees or others who know about corrupt behavior voluntarily provide this information. Their testimony facilitates the investigation and resolution of corruption cases.

However, employees who reveal inside information are vulnerable to retaliation. Without protection from retaliation, many would-be “whistleblowers” will remain silent, thereby depriving anti-corruption investigators of the inside information they need. This is why whistleblower protection must be part of any anti-corruption strategy. Creating such a system, however, is a challenge for any country because effective whistleblower protection requires a well-synchronized legal framework of penal, administrative, procedural and management rules. In other words, protecting whistleblowers and fighting corruption requires harmonizing a variety of interests and means.

Worldwide, some countries have taken the right steps in this direction, but most have ignored the issue. International conventions such as the UN Convention against Corruption (UNCAC) provide the base for whistleblower protection systems since it requires signatory states to evaluate their own legal systems and find ways to improve them. Whistleblower protection systems need constant reevaluation and adjustment. After

all, they are complex. To be effective, whistleblower protection systems must establish adequate channels for reporting corruption, strong protection against retaliation, disclosure mechanisms and remedies for their violation (TIA, Report, 2013, p.6).

Their complexity is but one obstacle; but there are many. For example, sometimes differing understandings or definitions of the term “whistleblower” can be a problem, as can happen when authorities in different countries interact on transnational corruption cases.

Not surprisingly, therefore, the European Union member countries face the same challenge as countries elsewhere. EU members are dealing very differently with the whistleblower protection system since there is no EU legal text to impose standards, limits and deadlines for implementation.

In fact, only four EU members have legal frameworks intended to ensure protection for whistleblowers and their families. The rest are at different stages of implementing a system or have not even started to create one.

2. INTERNATIONAL EFFORTS TO ENSURE WHISTLEBLOWER PROTECTION

During the past decade, international discussions about the establishment of a whistleblower protection system have taken place in politics, academia and civil society. The main argument favoring whistleblower protection was that the protection would encourage transparency in public and private sector, thereby discouraging corruption.

International efforts to promote such a system have been vigorously sustained by some governments, intergovernmental organizations, and NGOs alike. The result has been the creation of international and national legal rules to serve as guides or models for creating effective whistleblower protection systems. For instance, the United Nations Convention against Corruption (UNCAC), the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the International Principles for Whistleblower Protection developed by Transparency International provide legal guidance for developing whistleblower protection systems.

Thus, in countries such as the United States, the United Kingdom, Australia, South Africa, and South Korea, legislation directed at corporate corruption and its enforcement have forced companies to collaborate with authorities and to comply with the legal requirements to avoid sanctions. Reference points for public sector whistleblower protection include the Federal Whistleblower Protection Act (1989) in the US, the Public Interest Disclosure Act (PIDA) in the UK, the Public Disclosure Act (PDA) in South Africa, the Act on the Protection of Public Interest Whistleblowers (ACRC) in South Korea, and the Public Interest Disclosure Act of 1994 in Australia.

Article 33 of UNCAC specifically states that any state party to the Convention has the obligation to incorporate in its domestic legal system rules that will ensure protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to authorities information regarding corrupt practices. For

signatory states, this provision represents the starting point for whistleblower protection since Article 32 of the Convention separately covers the protection of witnesses (Tib Report, 2013, p.8).

However, parties to the Convention have poorly addressed this obligation. In fact, no party to the Convention has a flawless whistleblower protection system.

The causes for concern are several. The United Nations and Transparency International have made recommendations and advanced principles on how to create a protection system for whistleblowers. The system must provide the following: a broad definition of “whistleblowing”; threshold qualifications for whistleblower protection; protection for whistleblowers; procedures for disclosing information possessed by whistleblowers; penalties for violations; legislative oversight and administrative processes; and adequate resources and powers for investigations and enforcement.

Confidentiality and anonymity are extremely important. The whistleblower protection system has to ensure that no one will disclose a whistleblower’s identity outside the organization where they reported their information without the whistleblower’s consent. Besides confidentiality, anonymity is a key aspect of whistleblower protection. However, no system can guarantee whistleblowers complete anonymity because whistleblowers are usually subject to be called as witnesses in judicial proceedings against persons accused of corruption and sometimes disclosing the circumstances of the alleged corruption will provide enough information for others to guess the whistleblower’s identity.

The system’s institutional design also is vital. National authorities have to make the effort to organize and supervise the functioning of the structures specially created to advise and protect whistleblowers.

Other requirements include specifying the rights and immunities that whistleblowers have; defining a “good faith” disclosure of information; establishing media and other public rights to the information provided by whistleblowers; defining what constitutes a breach of confidentiality or the secrecy of material documents; and setting the amount of compensation or other rewards payable to whistleblowers.

European regional and national whistleblower-protection legislation fails to address these issues adequately. Twenty-seven EU member states have ratified the UN Convention; yet, they have not fully complied with its requirements. Moreover, the majority of national whistleblower-protection laws do not satisfy the EU’s Charter of Fundamental Rights. And most EU members have ignored the standards and guidelines issued by the UN, the Council of Europe, the OECD and Transparency International. This modest and incomplete compliance is the result of a cumulus of political, social and historical factors that have prevented the creation of whistleblower protection systems. However, in recent years, a few EU members have developed whistleblower legislation.

3. WHISTLEBLOWER PROTECTION’S LEGAL FRAMEWORK AND ITS ENFORCEMENT IN THE EU

The lack of political will remains a critical factor undermining national whistleblower protection initiatives. For example, in 2013, Bulgarian government

officials promised to consider whistleblower protection for public and private workers but no draft law has been forthcoming so far. The same is true in Poland, Lithuania, Spain, Austria and Germany. In these countries, government officials and political party leaders have repeatedly failed to find a need to consolidate whistleblowers' rights. (TIC Report, 2013, p.13)

On the other hand, the Netherlands, Luxembourg, Belgium, Ireland and Greece have slowly moved forward in protecting whistleblowers. This suggests that the barrier to mustering the political will to protect whistleblowers is surmountable.

Overcoming that barrier probably will require changing public perceptions of whistleblowers. In general, the public views whistleblowers not as persons fighting for the common good but as *snitches* or *moles* (France, Portugal) that have an ulterior motive for reporting wrongdoing (Cyprus). Yet, whistleblowers have to be prepared to lose everything, including being fired or forced to retire and, almost invariably, ostracized. Compared to political will, which public pressure can bend, the public's mentality is much harder to change. Educating the public about the benefits of whistleblowers, however, can reshape its perception of whistleblowers. Media plays an important part in this respect.

During the last couple of years, pressure from international organizations, NGOs, civil society, political leaders and the media have forced European governments to change their attitude towards whistleblower protection. It seems that now, more than ever, the times are ripe for EU members' national governments to create or strengthen their whistleblower protection systems. These systems can overcome two major obstacles: whistleblowers' fear of retaliation and their fear that their disclosure of corruption will be futile. Indeed, a comprehensive legal framework and vigorous enforcement is essential to overcome these obstacles.

Transparency International has classified the EU members according to their whistleblower legal framework. According to TI, Luxembourg, Romania, Slovenia and the United Kingdom are the only EU members that have created comprehensive or almost comprehensive whistleblower protection. The rest of the EU members have partial or none-to-very-limited whistleblower protection provisions. Most of these countries have partial provisions. Only a few have none-to-very-limited provisions (Spain, Portugal, Slovakia, Greece, Lithuania, Finland and Bulgaria).

Among the four members that excel in whistleblower protection, the United Kingdom has proven its commitment with a comprehensive legal framework. The Public Interest Disclosure Act (PIDA) is considered one of the best in Europe and in the world. Enacted in 1998, the PIDA covers most employees in the public and private sectors. It even protects contractors, trainees and British workers based overseas. The law requires the employer to prove that any action taken against an employee is not related in any way to his or her being a whistleblower. The persecuted employee can claim not only material damages such financial losses but also moral damages on the grounds of injury to their feelings. (TIC Report, 2013, p.10)

In 2004, Romania passed a law specially for protecting whistleblowers from retaliation. Unfortunately, the Whistleblower Protection Act (Law no. 571/2004) refers only to public employees and, thus, TI ranks it as an "almost comprehensive" legal text.

However, it has an innovative provision that gives equal protection to employees who are disclosing information directly to the media, activists and other third parties instead of their employers.

Slovenia and Luxembourg have passed meaningful whistleblower protection provisions in accordance with international standards. In 2011, Luxembourg public and private sector employees who report corruption, influence peddling and abuse of office benefit from protection against retaliation from their employers. The burden of proof is on the employer, and employees may appeal to a labour court, which is similar to the UK's law.

In 2010, Slovenia opted for an anti-corruption law that covers public and private sector whistleblower protection. The rules follow many international standards that concern confidentiality, internal and external disclosure channels, a broad range of remedies, the burden of proof for employers, pecuniary sanctions for retaliators and special assistance for whistleblowers. (TIC Report, 2013, p.11)

Besides the four comprehensive legal frameworks, the Swedish law stands out because it gives everyone the right to disclose information to the media, including national security information. Employees can make disclosures to third parties after first informing their employers. Anonymous sources are highly protected, even from the government.

The Netherlands has had an independent body, the Commission for Advice and Information on Whistleblowing, since 2012. Its role is to assist whistleblowers from both the public and private sectors, provide information to public and private employers about whistleblowers rules for their risk-management strategy, and assess and promote the whistleblower protection system at national level. The National Ombudsman has the power to investigate complaints of retaliation and to assist whistleblowers financially.

These various laws have been models for other EU countries, some of which have made progress toward their own system. Despite strong opposition, Italy passed its first laws protecting public sector whistleblowers so long as they do not commit libel or defamation. After scandals concerning public health issues, France established specific rules for protecting whistleblowers who disclose information exposing health or environmental risks. In 2013, Belgium passed legal rules protecting whistleblowers.

Still, these EU members and many others have only partially responded to whistleblower protection international standards. For instance, most of their laws do not provide guidance and ample protection to whistleblowers.

Enforcement is also lacking. Even the EU members that have whistleblower protection sometimes fail to enforce it promptly.

The slow pace of EU members in developing a meaningful legal framework for whistleblower protection or their ignorance of the matter mirrors the passive attitude of the European Commission. It continues to postpone the 2013 European Parliament call for a European Whistleblower Protection Program covering both the public and the private sector. (TIC Report, 2013, p.24)

However, we believe that the anti-corruption war has intensified during the last decade, including in the EU, and this will inevitably spur more countries to create a common legal framework for whistleblower protection. The question is not if, but when.

CONCLUSION

Whistleblower protection is a vital anti-corruption instrument. Unless protected, employees will not have the courage to serve the common good by disclosing corrupt practices in the public or private sector.

Unfortunately, European countries, including European Union members, fail to address this matter properly. The majority of EU members do not have in place a national legal framework to ensure whistleblower protection.

Legal models and good practices exist around the world, including among the EU members. However, the absence of political will and public pressure is preventing the majority of EU members from taken the steps in the right direction. So far, their attitude also mirrors the passivity of the European Commission. It remains reluctant to create a European Whistleblower Program that will reform EU legislation and thereby force EU members to comply with international standards and requirements.

International pressure will eventually lead to the creation of an EU legal framework to protect whistleblowers. However, the anti-corruption fight demands action, not delay. We believe that the time to act is now.

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