



A CHANGE OF DIRECTION

FOSTERING WHISTLEBLOWING IN EUROPE
IN THE FIGHT AGAINST CORRUPTION

Set of Recommendations

EUROPEAN COMMISSION INTERNAL SECURITY FUND

PROJECT “A CHANGE OF DIRECTION”

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The goal of “A Change of Direction” is to enable prospective whistleblowers to benefit from better and more updated information about their legal rights and obligations, access to safe and reliable channels to report wrongdoing, and adequate organizational support.

This project aims to contribute to curbing corruption risks within government institutions and corporations, reinforcing a culture of accountability and trust, and helping the formation of new “partnerships” between employees and citizens, and governments and corporations within European institutions and at the level of individual countries.

In the drafting of the Policy Survey¹ on the current situation on whistleblowing (WB) regulation in Europe two general considerations, which are relevant for this recommendations document, have emerged. They concern:

- i. the need to supplement legal provisions with socio-political action aimed at enhancing the – currently quite unsatisfactory – implementation of legal rules with a suitable public ethics (which targets both the general perception of whistleblowers and fosters a broader culture of anti-corruption).
- ii. the current presentation of WB as an *extrema ratio*, rather than one of the best practices to counteract corruption (in fact we think that this point is interestingly related to the first one, because legal protection seems appropriate exactly in response to this *extrema ratio* logic, whereas a more comprehensive approach to WB requires socio-political action that goes beyond the mere establishment of legal rules). Social norms are, in fact, among other things, behavioural regulators. We calibrate our behaviour against prevailing social norms and practices, norm compliance being rewarding and norm violation being aversive, marking certain behaviour, culture or social roles as meaningful or valuable.

¹ Policy Survey for the project “A Change of Direction. Fostering Whistleblowing in Europe in the Fight against Corruption” (EUROPEAN COMMISSION INTERNAL SECURITY FUND - GA: HOME/2014/ISFP/AG/EFCE/7233).

Following a standard account of whistleblowing analysis,² we can identify four sets of constraints (and of correlative recommendations) faced by whistleblowers who decide to report episodes or practices of corruption: institutional, legal, cultural, and personal constraints.

(1) Institutional Constraints

The first set pertains to the institutional governance. Even when proper disclosure systems are in place, the culture of the organization may discourage whistleblowing. A suggestive list of constraints might include:

- When whistleblowers fear reprisals, or are demoted in their jobs, or face the threat of sanction from higher authorities or colleagues. In such circumstances the required cooperation from authorities and colleagues is missing.
 - Failure to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should, view the material.
 - Reporting to the workgroup who the whistleblower is, what the allegations are, and whom they are about.
 - As a first step, asking the person who is the subject of the disclosure about the allegation.
 - Forwarding the disclosure through the chain of command so that too many people end up knowing about the matter.
 - Allowing personal biases about the personality of the whistleblower to influence the assessment of a disclosure.
 - Not taking seriously the concerns expressed by a whistleblower about the possibility of reprisal.
 - Ignoring potential conflicts of interest when deciding who should assess or investigate the disclosure.
 - Allowing political considerations to influence the assessment of a disclosure or the findings of an investigation.
 - Delaying the investigation for as long as possible so any evidence of wrongdoing can be altered or destroyed.

² See the Policy Survey produced within the project 'A Change of Direction'.

(1.1) Recommendations

The absence of a culture where employees are trained and encouraged to perceive and report misconduct at workplace may represent a serious constraint. Such a culture requires that employees be aware of a culture of transparency and accountability in an institutional setting; that proper communication and trainings are imparted to them with regards to procedures of disclosures and their rights while disclosing; that employees feel confident and free when they do resort to reporting malpractices.

Institutional Annual reports highlighting the number of corruption cases reported through disclosure channels, the status on action taken, the treatment meted out to the whistleblower needs to be properly presented and be available in the public domain for scrutiny. Such reporting not only ensures a public scrutiny and accountability on the part of the institution and its commitment to transparency and publicity but also ensures that employees within the organization willing to share disclosures will feel more confident in reporting misconduct.

Organizations and civil society should then publish annual reports regarding the status of the whistleblowing policy, its implementation, the number of cases that arise, the response and action taken on disclosures and complaints on retaliation. Such reports should be widely shared and should be a measure of the evaluation of the performance of an organization and an institution. Proper action should be taken on erring institutions that fail to protect or support disclosure processes, or impede such processes through various institutional mechanisms and means.

(2) Legal Constraints

- In the absence of proper disclosure guidelines or insufficiently defined set of procedures the whistleblowers are at sea regarding the channels and the procedures for disclosure and the authority to whom such disclosure is to be channelized to.
- The defined terms of disclosure are often vague and unclear or poorly defined. The potential whistleblower while accessing such documents is confused regarding the standing of higher officials vis-a-vis any disclosure. This does not provide any useful guidance to any potential whistleblower

because they are unaware whether under such arbitrary and vague regime taking recourse to whistleblowing would be the ideal sort of action to take.

- The absence of proper defined roles and responsibility of the adjudicating authority or the key members responsible for handling disclosures. Such absence of clear defined roles confuse potential whistleblowers from revealing information of import.
- Absence of mechanisms to treat anonymous cases of whistleblowing. Unknown disclosures are often treated as suspect in conditions whereby legislation requires that a potential whistleblower reports to a given authority regarding her allegations. Such a legal requirement denies the possibility of important disclosures to come to public light especially when prior experience or the existing culture within an institutional set up forewarns the potential whistleblower of the possibility of personal risk, professional injury, or bodily harm.
- Lack of proper constitutional protection to disclosures both anonymous and public. Such lack not only discourages whistleblowing within both private and public institutional settings regarding corruption of import but also exposes whistleblowers to threat of sanction and personal injury.
- The range of disclosures protected under legislation also limits whistleblowing. Certain legislations often categorize between legitimate and non-legitimate whistleblowing. They narrow down the scope of whistleblowing to only certain cases of corruption, or limit it to information which can already be accessed through right to information laws. These legislations do not cover cases of human rights abuses, or excesses that result from executive secrecy in affairs of national security, corruption in bilateral negotiations etc. While certain spheres of executive and state action should be out of bounds of public knowledge due to the legitimate concerns of national security, or negotiations with foreign countries on sensitive issues of import, often the secrecy privileges that protect such executive action harbor power excesses and abuses without any correlative checks. In the absence of constitutional controls such abuses can only be brought to light through conscientious actions of whistleblowers. Efforts by legislation to categorize genuine conscientious acts of disclosures as threat to national security or to treat them as suspect only thwart possibilities of ensuring democratic accountability by those who are the most prone to abuse of power.

(2.1) Recommendations

The law should recognize and create spaces for dissent and whistleblowing from within the executive branch that deals with national security.

Whistleblowing protection should cover disclosures against all forms of governmental and non-governmental officials regardless of their office. Absent such regulations often the most powerful actors go scot free. Disclosures against those at the highest seats of power, in absence of legislation covering such offices as subject of disclosure, is subjected to high risk with increased threat of sanction.

The burden of proof should lie on the employer rather than the whistleblower. In circumstances where legislations lay the burden of proof for allegations of misconduct on the whistleblower it doubly burdens them. First, in the risk associated with the process of disclosure, often in an environment that discourages reporting any wrongdoing. Second, if the whistleblower is also burdened with demonstrating that the allegations labelled are true it risks the possibility of exposing them to reprisals.

There should be penalties for individuals, institutions, and organizations not complying with whistleblowing regulations.

There should be some form of legal and financial support to whistleblowers in cases of a protracted legal battle.

Certain legislations regulate retrospective reporting by setting a timeline within which any disclosure of corruption is considered worthy of investigation. Such a limitation affects those cases where an employee comes across an instance of wrongdoing in the past, but given the duration of the incident, cannot report it for legal consideration. The time period requirement restricts retrospective reporting and actions against errant agents.

Aside from the considerations regarding the potential incentive effect of the inversion of the burden of proof, we should however consider also the risk that an excessive burden could be put on the employer, for instance by exposing an obnoxious — yet not corrupted — boss to blackmailing or other forms of retaliations. In response to doubts arising from proposals of ‘inversion’, it must be highlighted that investigating authorities should follow due diligence in reviewing reports of corruption. Thus, while the asymmetry envisaged in the inversion of the burden accords a presumption in favor of the whistleblower meant to alleviate the expected fear of possible retaliation from the employer, and thus creating a safer climate for possible reports, any legislative

proposal should clearly identify those instances of malicious whistleblowing, that is *mala fide* disclosures whose aim is to damage somebody, and punish it accordingly.

Policies and laws that protect whistleblowing should be clear and not arbitrary, the terms and concepts involved should be properly defined leaving no space for ambiguity, offices that deal with whistleblowing disclosures should be properly identified, and support structures put in place, the role of key actors, their names, offices, and contact details should be properly displayed and disseminated through the media and other channels in order to make whistleblowers aware of the offices they can approach, the persons in charge, and their rights and obligations in the face of disclosures. The disclosure channels for reporting should be multiple and varied, right from within the organization to those outside it. Whistleblowers should have the opportunity to access any of these channels at any time they deem fit. Organisations should be mandated to file a status report on action taken on the disclosure and on any claims of retaliation that emerges from within it. A public body should be constituted that acts as a watchdog that keeps a close eye on the status and the approach on an institution with respect to whistleblowing. The legislation should not require that only disclosures done in good faith will be considered for action. All disclosures, independent of their motivations, should be put through thorough and detailed investigation. Protection should be extended to the whistleblower even when the disclosures do not lie within their work sphere but rather is related to other spheres. Protection from retaliation should also be extended to media houses who are investigating cases of corruption or misdeeds based on the information provided to them by a whistleblower.

(3) Cultural Constraints

The reception of acts of whistleblowing in society: An environment where whistleblowing is seen as a threat to institutional stability, undermining loyalty to an institution and peers, defying established social norms of conduct and behavior, standing apart from the group, as an attempt by a single alienated individual limits the possibility of individuals considering whistleblowing. It discourages any such act where the possible repercussions of defying social norms are supposed to be greater than any benefit perceived by the individual. Cultures where group behavior and loyalty is accorded primacy over individual acts of conscience would render any act of whistleblowing as deviant and thus suspect.

The role that media and civil society discourses play in encouraging whistleblowing: The mechanism of reporting acts of whistleblowing along with the debates and discourses on whistleblowing in a society can impact actions of individuals considering such behavior in the long run based on available evidence of wrongdoing within their institutional settings.

In an institutional cultural setting where obedience is given primacy over any acts of dissent, where critical attitudes are thwarted whistleblowers would face tremendous obstacles in realizing their goals. In fact whistleblowing would be an act of courage that goes against an already accepted and avowed public culture of silence and acceptance of authority.

Institutional cultural settings whereby the corrupt find it easy to move up the ladder, where nepotism and red-tapism are acceptable behavior resorting to a deviant behavior in form of whistleblowing is difficult given the personal benefits that can be accrued from corrupt behavior. Especially, in situations where most employees are complicit in wrongdoing (i.e., cases of systemic corruption) a failure to act in accordance with an established and accepted way of functioning does not only mean personal loss in terms of income but also means being singled out, isolated, and risk ire of authority figures that can compromise life, career, and earnings in the longer run.

In cultures where both retail and institutional corruption is systemic whistleblowing is largely disincentivized, i.e. the personal incentives to deviate from established and somewhat accepted practice is higher and exit costs quite high to bear for an individual. Rather it is economically rational for individual to contribute to the same corruption (for non-complicity being highly costly) even though it might be rational for the overall system to reduce corruption.

(3.1) Recommendations

Early education on moral values, and the importance of reporting crime should be implemented in all schools across EU member states. Educational initiatives should teach from the basis for a “non-cooperative” approach to crime, in the process raising awareness about the impact of surveillance, corruption, and crime and the impact it has on the rights and liberties of citizens, on the allocation of social and public resources.

It is necessary to build up an organizational culture, common to public and private offices that encourages reporting. Informants are model citizens of the EU, and thus it is paramount to change the negative connotations associated with informants. Informants are not traitors. Those who say nothing perpetuate the obstruction of justice.

NGOs and other associations that deal with crime and corruption should be legally authorized by member states to be able to keep whistleblower information confidential, so as to protect the whistleblower from further harm. In this way, NGOs and associations can also provide further services to victims in the form of legal or psychological help both during and after the incident.

Acknowledging the value of the informant: The work that whistleblowers do is a part of a much larger context than bringing an end to the current crime being committed. Whistleblowing protects the economy, the environment, politics, and various social groups from harm.

Whistleblowing should be a pillar of institutional European culture. EU institutions should publicize whistleblowing as best-knowledge exchange in all EU member states. Whistleblowing should also be a pillar of EU civil society. It is necessary to promote initiatives and networks containing stakeholders who support sharing practices, projects, and workshops that focus on cultural integrity and protect informants.

(4) Personal Constraints

The personal constraints derive largely from the legal, institutional, and cultural constraints, but need to be elucidated in their own light. Though there might be other constraints like self-interest, obedience to authority, having a group solidarity feeling, personal friendly relations with the culpable agent, political ideals etc. that might demotivate individuals from speaking out, here we are concerned largely with the impact that policies and workplace culture might have on individual motivations.

In the absence of proper disclosure mechanisms and channels of protection revelations can come at a huge cost for an individual which most potential whistleblowers might not want to bear. Whistleblowers can face protracted legal battles, psychological stress, financial burden, professional loss, inability to be employed in the future, threats of persecution, loss of trust from colleagues and friends, fear of being isolated and singled out, and living in palpable fear. All this can have tremendous impact on the individual to warn future actors against considering similar moves. This is to say that absent legal or public support puts unfair burdens not only on conscientious acts of whistleblowing but also preclude such disclosures from occurring in the future.

Especially when whistleblowers are targeted by the very state that ideally should protect them and legal guidelines are misused to harass and prosecute them a culture of silence and complicity is

promoted among others. The signal from the state is clear that rather than the wrongdoer those exposing the wrongdoing will be targeted. In such circumstances speaking truth is a dangerous act that is perilous which only those willing to stake their all can undertake.

(4.1) Recommendations

Disclosures should not be conditional on whether whistleblowers act out of the best possible intent. More specifically, the very subject of disclosures should be made matter of inquiry independently of personal motives, although the nature of the intent should be considered in further evaluation of reports containing false information. When this is the case, it is crucial for the investigating authority to discern between leaks made with malicious intent from those believed to be true by the whistleblower, which holds a lower degrees of culpability. Thus, the good faith requirement should not be designed to preempt the activity of disclosure, but to provide a safety check exclusively against malicious leaks. In either case, disclosures that do not reveal any wrongdoing should be concealed and any trace of them should be destroyed.

The act of whistleblowing is not merely a procedure, but an action that personally affects the lives of the informants. Every whistleblower policy must take this into account in order to limit risks for the informant. Informants who partake in whistleblowing about serious crime can often face emotional and behavioral changes brought on by the consequences of their brave choice to report a crime. Thus, we must increase support services for whistleblowers. This requires not only an extensive system of procedures that encourage reporting, but also channels of disclosures (both public and anonymous), support systems in form of advisory groups that whistleblowers can approach in need of help, offices that they can approach when they face or fear retaliation that aid with legal and financial support. Confidentiality of the informant needs to be protected, the burden of proof to establish that a certain action against an employee is not a retaliation for their disclosure should lie on the employer rather on the employee. All employees should have proper training regarding the disclosure channels that are in place and regarding the rights they have in case they choose to disclose.