



WHISTLEBLOWER-NETZWERK E.V. ALLERSEELENSTR. 1N 51105 KÖLN

Nefndasvið Alþingis  
Austurstræti 8-10  
150 Reykjavík, Iceland

WHISTLEBLOWER-NETZWERK E.V.  
ALLERSEELENSTR. 1N  
51105 KÖLN

WWW.WHISTLEBLOWER-NETZ.DE  
INFO@WHISTLEBLOWER-NETZ.DE

FON 0221 - 169 2194  
FAX 03212 - 105 7460

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## Response of Whistleblower-Netzwerk e.V., Germany, to the request of The Parliament of Iceland, Thor Saari, MP, to comment on “The Icelandic Modern Media Initiative”

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## 1. Executive Summary

The following paper has been prepared in reply to the request of the Parliament of Iceland to Whistleblower-Netzwerk e.V., Cologne, Germany, to comment on the proposal for an Icelandic Modern Media Initiative (IMMI).

Whistleblower-Netzwerk very much supports the ideas of IMMI and especially welcomes the idea of better source and whistleblower protection that already is part of IMMI.

To achieve the results desired by IMMI and to avoid and deter future wrongdoing (as the one that led Iceland and the rest of the world into the crisis which we are currently in) this paper strongly recommends to widen the approach of IMMI with respect to whistleblowing.

### We recommend:

- that the concrete implementation measures of IMMI should go beyond the pure protection of (external/media) whistleblowers;
- to encourage whistleblowing by implementing already available recommendations for best practice whistleblowing legislation like those drafted by Transparency International;
- to apply homogenous whistleblowing policies and legal standards which cover all forms of disclosures of wrongdoing and not just corruption throughout the private and the public sector;
- to similarly address all three major obstacles currently hampering whistleblowing i.e. the fear for reprisals, the fear that no change can be achieved and psychological factors like false loyalty and culture of silence;
- to include incentives and at least certain elements along the model of the USA Federal False Claims Act;
- to create a national Whistleblowing Ombudsman to document and evaluate processes of the whistleblowing legislation, policies and practice, to support individual whistleblowers and to assure a good quality of investigative procedures;
- to create a national Whistleblowing Fund for compensating whistleblowers and victims of false allegations and for financing e.g. scientific research and educational initiatives;
- to take further initiatives to spread the ideas of IMMI and whistleblowing enhancements throughout the world.



## 2. About Whistleblower-Netzwerk e.V.

Whistleblower-Netzwerk e.V. (whistleblower-network) is a non-profit German NGO which tries to promote whistleblowing and whistleblower-protection by addressing the related cultural, political and practical questions and also by offering support and counseling for individual whistleblowers. Germany currently offers only a very weak legal protection and no support for whistleblowers. A lot of the members of our network have their own whistleblowing experience while others are e.g. journalist or lawyers.

## 3. Introductory remark

We feel humbled by the invitation of the parliament of Iceland to comment the proposal for an initiative to strengthen freedoms of expression and information freedom in Iceland, as well as to provide strong protections for sources and whistleblowers. We encourage the parliament and the people of Iceland to follow the general path described in the current proposal and sometimes to even go beyond it. It is our firm conviction that the issues addresses here are and will stay key issues of mankind in the 21<sup>st</sup> century. Implementing the proposal will enable Iceland to lead the world by example on the way to a peaceful society with more democratic and individual rights and to realize economical benefits without exploitation of the environment or underprivileged groups.

In the following remarks we concentrate on the strengths of our network, i.e. our expertise in the area of whistleblowing. Whistleblowers are also an important source for media and especially investigative journalism. When it comes to protecting whistleblowers by anonymity effective communications protection is a prerequisite. Finally there is also a strong link to freedom of information acts as the whistleblowers and the public need access to information about public interests issues for the purposes of validation and proof. Consequently we will also comment some of these themes.

Please take into account that this paper was drafted within approximately one week and that the whole work of whistleblower-network is done by volunteers who are not native English speakers. Another and perhaps the most serious restriction of this paper is that we do not possess detailed information about the culture and the political and legal system of Iceland nor do we speak or understand Icelandic.

The proposals and comments made here are based on several years of extensive experience and work in Germany, exploitation of international scientific literature and knowledge exchange with other whistleblowers and whistleblower-organizations from around the world, but they will certainly need to be adapted to the specifics of Iceland, a task for which we are lacking sufficient competence.



## 4. Comments on the whistleblowing chapter of the proposal

### 4.1. Definition and importance of whistleblowing

In line with the attached recommended draft principles for whistleblowing legislation issued by Transparency International (attached as Annex 1, to which a lot of whistleblowing experts from around the world - including us - contributed) we understand Whistleblowing as the disclosure of information about a perceived wrongdoing in an organization, or the risk thereof, to individuals or entities believed to be able to effect action. As mentioned in that document:

*“Whistleblowers can play an essential role in detecting fraud, mismanagement and corruption. Their actions help to save lives, protect human rights and safeguard the rule of law. To protect the public good, whistleblowers frequently take on high personal risks. They may face victimization or dismissal from the workplace, their employer may sue (or threaten to sue) them for breach of confidentiality or libel, and they may be subject to criminal sanctions. In extreme cases, they face physical danger.*

*The whistleblower’s right to speak up is closely related to freedom of expression, freedom of conscience and to the principles of transparency and accountability. It is increasingly acknowledged that effective protection of whistleblowers against retaliation will facilitate disclosure and encourage open and accountable workplaces. International convention commit the signatory countries to implementing appropriate legislation and ever more governments, companies and non-profit organizations are willing to put related regulations in place.”*

### 4.2. Forms of whistleblowing

Whistleblowing can be done to the public via classic media, internet or other means and here the concepts informant and whistleblower are quite alike. But this is just one form of external whistleblowing. Whistleblowing can also be done to other addressees and thus one can distinguish:

- internal whistleblowing (i.e. to an addressee within the organization to which the whistleblower belongs – typical case employee to hierarchy or employer),
- external whistleblowing to public authorities (i.e. Whistleblowing as expression of the right to petition to the state and its bodies) and
- external whistleblowing to third parties or the general public via media or other means.

Different forms of whistleblowing can also be distinguished by the knowledge about the whistleblowers identity into:

- open whistleblowing (the identity is known to everybody),
- confidential whistleblowing (there is someone knowing the identity which is not disclosed to other concerned parties or the public) and
- anonymous whistleblowing (in theory nobody but him is aware of the identity of



the whistleblower).

Often like in the context of media source protection anonymity and confidentiality are not clearly separated in discussions, e.g. if the journalist knows the identity of his source but should protect it this is a case of confidential whistleblowing often referred to as protection of anonymity.

### **4.3. Need for homogenous and universal whistleblowing policies**

We would like to stress the importance of homogenous whistleblowing policies throughout all different forms of whistleblowing, all types of organizational relationships and forms of employment and all branches of the public and private sectors. Whistleblowing could happen anywhere!

Looking at international examples beside cases of whistleblowers who managed to stay anonymous we find whistleblowers known by their names in the military like Daniel Ellsberg and Alexander Nikitin in science like Mordechai Vanunu and Arpad Pusztai in health care like Jiang Yanyong and Brigitte Heinisch in the police force like Frank Serpico and Cowleen Rowley in tax-administration like Klaus Förster and Jennifer Long, in the financial sector like Harry Markopoulos and Andrea Fuchs but also in any other business or public administration like Mark Felt, Paul van Buitenen, Satyendra Dubey, John Githongo, Sherron Watkins or Jeffrey Wigand. Looking at their stories from different countries and different areas we find huge similarities if it comes to the sacrifices they were forced to bring in attempting to serve the public good.

There are also a lot of cases from very different countries and in very different areas where there were no whistleblowers or where whistleblowers have not been heard and did not become that prominent. In Germany the train accident at Eschede or the breakdown of the ice ring hall in Bad-Reichenhall were deadly events where warnings had been ignored. For Iceland and the rest of the world the costs of not having and/or not listening to whistleblowers became also evident in the recent banking scandals. The sinking of the Herald of Free Enterprises and the Shipman case were other such events which at least

lead Britain to establish quite a good whistleblower protection law called Public Interest Disclosure Act in 1998.

### **4.4. Whistleblower-protection requires more than just media source protection**

From the text of the current proposal we get the impression that it focuses on external public whistleblowing via media aiming to protect sources. This seems to be a natural first approach when talking about a "media initiative". However, just implementing even an almost perfect right for the media to protect its sources will not be sufficient to exploit all benefits of whistleblowing and would not help the employee which still could be fired just because he dared to state to his employer that one of his superiors is breaking the law and thus would still be better off staying silent.



It is important to understand that normally nobody starts with the idea of going to the media and blowing the whistle publicly. Typical whistleblowers are very loyal to the organization they belong to and at first are confident that the issue they raise will be solved right after they raised it to the competent internal body or their hierarchy. And this is exactly what we sometimes see and would like to see in all cases as it means that problems could be solved as early as possible and with minimal costs and minimal negative side effects. As anybody can only learn from mistakes solving a problem at the lowest level also allows the concerned organization to make best use its innovative potentials.

However frequently whistleblowers - after their first reporting - realize that the addressee does not react as expected. Then starts a process of escalation climbing up the internal hierarchy which could involve external (controlling) public authorities and might finally end up in the media.

In each of those steps the whistleblower will hope that the addressee will react by starting to solve the problem but often will just learn that the addressee only sees the whistleblower as a problem-creator. After each step the whistleblower will need to reconsider between the choices of neglect (stay silent at least from now on), exit (leave the organization) or voice (escalate his/her whistleblowing to the next level).

Media usually are only at the very end of such a very long process and it also needs to be acknowledged that in those cases confidentiality and anonymity of sources frequently does not work anymore. Having had a case of internal whistleblowing or someone asking critical questions a company exposed for wrongdoing in the media will know whom to "thank" for this and find a way to do it even if there is no hard proof that the internal whistleblower was the media source.

It is also important to realize that not every whistleblower even if he/she would like to, will have the chance to attract the attention of journalists and media. There are a lot of prerequisites like good timing, nation/regional relevance, type of media, type/importance of wrongdoing, celebrity/sex/crime and blood factor, availability of investigative resources and will at the media ...

When it comes to protecting confidentiality/anonymity of sources by the media one should also bear in mind that even if the channels through which the information went would not allow tracing it back to the whistleblower/source the content of the information still might reveal the whistleblowers identity or allow an educated guess about it. Keeping anonymity might be quite easy for issues of a general systematic nature that appear in several places and with a lot of people (i.e. potential sources) involved or knowledgeable. However, normally wrongdoers try to limit the number of people involved and knowing and in all these situations it is much harder to avoid that the sources can be traced or guessed, especially if one of the "suspects" already earlier asked questions or made critical remarks. As mentioned above even a guess might be enough to expose the whistleblower to reprisals.



#### 4.5. The need to encourage reporting

International research on whistleblowing has shown that there are a lot of situations where whistleblowing would be needed to protect the public interests but does not take place, in Iceland you had your own experiences in that respect.

Research also revealed that fear of repression/reprisals (which whistleblower protection is aiming to reduce) is only one of three major reasons why whistleblowing does not take place. Another reason is the feeling of the potential whistleblower that even by speaking out he/she would not be able to achieve anything. And finally often whistleblowing does not take place due to a wrong understanding of loyalty and/or a culture of silence within organizations.

Whenever someone does not raise an issue that should be raised the concerned organization and/or society as a whole is deprived of its chance to know, react in time and/or to start an innovative process. When this concerns information that would be relevant to the public non-whistleblowing also limits democratic processes as democracy as the ruling of the people has the prerequisite of knowledge by the people. It is important to realize that a policy that wants to make use of the full potential of whistleblowing should not be limited to pure whistleblower-protection but also needs to deal with the other above mentioned issues currently hindering whistleblowing and needs to encourage potential whistleblowers to report.

#### 4.6. Hurdles to overcome

Doing that is not an easy task as all organizations have a tendency to put organizational interests over individual interests to view the own organization more positive as it is, to split up responsibilities and thus diffuse accountability, to limit external control and influence, to promote and expect hierarchical obedience within the organization and to visibly discourage those daring to speak up. The American social-psychologist Stanley Milgram described these issues in his book "Obedience to Authority" stating that his

*"experiments revealed something more dangerous than anger: the capacity for man to abandon his humanity, indeed, the inevitability that he does so, as he merges his unique personality into larger institutional structures. This is a fatal flaw nature has designed into us, and **which in the long run gives our species only a modest chance of survival.** It is ironic that the virtues of loyalty, discipline, and self-sacrifice that we value so high in the individual are the very properties that create destructive organizational engines of war and bind men to malevolent systems of authority. Each individual possesses a conscience which to a greater or lesser degree serves to restrain the unimpeded flow of impulses destructive to others. But when he merges his person into an organizational structure, a new creature replaces autonomous man, unhindered by the limitations of individual morality, freed of human inhibition, mindful only to the sanctions of authority."*

*"The dilemma posed by the conflict between conscience and authority inheres in*



*the very nature of society (even without Nazi Germany)."*

*"Authoritarianism may give way to democratic practice, but authority itself cannot be eliminated as long as society and organizations exist."*

*"Often **voices of morality were raised** against the action in question, but the typical **response of the common man was to obey orders** risking to become an instrument in destructive processes."*

*"Here we learn a powerful lesson in the functioning of organizations: defection of a single individual is of little consequence he will just be replaced; the only danger to organizational functioning resides in the possibility that a **lone defector will stimulate others**. Therefore **he must be isolated, or severely punished** to discourage imitation."*

Therefore protection of whistleblowers and even more encouragement of whistleblowing and another whistleblowing culture are very difficult but very worthy tasks to undertake.

To avoid frequent misunderstandings we would like to state that encouraging of whistleblowing is neither equivalent to the promotion of snitching nor does it mean that legitimate private, business/trade or state secrets should no longer deserve protection.

Snitches do not need encouragement nor do they need protection as contrary to whistleblowers they normally do not have a conflict with the authorities within organizations but try to be at their service which typically will guarantee them more support than whistleblowers can ever get.

#### **4.7. Protecting legitimate secrets**

Bringing legitimate private, business/trade or state secrets in line with a supportive whistleblowing policy is a more complex issue as here there are really conflicting interests. The following list tries to elaborate some of the key principles of the kind of legislation we are aiming for:

1. There are legitimate secrecy and privacy interests that need some legal protection.
2. Not all claimed secrecy and privacy interests are legitimate (i.e. deserve protection).
3. Privacy issues (e.g. health, sexual issues and private communications) deserve a strong level of protection, but that same level should not automatically also be given to those operating in the public field (i.e. administration/politics) or on the private or public market (with the aim of gaining money). In pure privacy issues some minor illegal activities may perhaps still deserve to be considered as protected secrets and neither state nor businesses should be allowed to spy them out.
4. Everything involving public officials or (even partly) public money (all areas where a private person is free to choose to engage with public bodies like in tendering) should fall under freedom of information laws without someone being able to



claim business secrecy - the only valid exemptions must be interpreted restrictively and be derived from massively overriding legitimate private interests to avoid disclosure. The handling in areas where private data is obligatorily provided to the state because of laws (e.g. in the area of social security, statistics) should be different. In those areas freedom of information acts should only apply where a overriding public interest in the disclosure can be demonstrated.

5. As a general rule business secrets should never protect illegal activities by hindering their disclosure to the public.
6. It has to be noted that giving a body the status of a legal entity (juridical person) is a privilege and that this privilege can be overridden by public interests while for a natural person freedom of activity and data privacy are human rights.
7. Whistleblowers deserve full and effective protection if they raise issues inside their organization.
8. Derived from the monopoly of powers the state and/or its authorities must always (even in the first step) provide well known and easy accessible contact and input points for whistleblowers and citizens to petition (even anonymously) including an enforceable legal right for an adapted reaction (i.e. investigation and proper follow up to claims and allegations where the volume of research/investigation resources is depending on the relevance of the issue) that is controllable by courts. Nobody should ever be disadvantaged for petitioning.
9. Whistleblowers in the situations mentioned in points 7 and 8 should also be protected if their claim is wrong as long as they did not know that (good faith protection). The protection should extend to minor violations of laws necessary to document the wrongdoing (e.g. violation of intellectual owner/creators-rights, violation of accessing rules)
10. Public whistleblowing however should be protected only under more restrictive conditions, i.e. if the whistleblower used internal (7) and state steps (8) before and has illegally not been heard or mistreated or if his/her going public was in the public interest. Where there is no legitimate secret (see 5) the whistleblower can of course not be sanctioned for informing the public, i.e. in that case the limitations mentioned in the first phrase do not apply.
11. If the whistleblower went to the state and was mistreated and then goes public, or if the state authorities did not keep secrecy (which they to a certain extend should, as the whistleblowing situation is not freely chosen by the secret owner - see 4) the owner of the violated legitimate secret should under certain conditions (i.e. that balancing private and public interest its denial would be seen as unjust) be able to claim (some but not necessary full) compensation from the state while the whistleblower who followed the above rules should not be liable.
12. Media should have a well protected right and duty (if they fail they need to compensate the whistleblower and there should also be penal sanctions) to keep their sources confidential (consequently laws should exclude activities and any form of pressure against the media and journalists to reveal their sources) and should be allowed to publish whatever they get - but this media protection needs



to be distinguished from the whistleblowing-protection mentioned above. I.e. if the whistleblower went to the public/media without respecting the rules mentioned above the media should still be protected by law while the whistleblower would be only protected via his anonymity.

To summarize: Providing protection and access to independent state/authorities (including members of parliament) investigations for whistleblowers does not enter into conflict with legitimate privacy interests as they - but not the illegitimate ones - need to be protected by the state.

When it comes to independence it has to be noted that it is frequently claimed but rarely exist. The Court of Justice of the European Union in a recent judgment in case C-518/07 made some statements on the standards necessary of independent supervisory authorities which should also be met for the authorities that serve as addressees for whistleblowers. Especially for public service whistleblowers that means that there should always be a potential addressee clearly outside and independent from their normal hierarchy - but with sufficient powers to end wrongdoings.

#### **4.8. Means of whistleblower protection**

The following paragraphs try to elaborate on some of the most important elements of whistleblower protection through national, i.e. the new Icelandic laws we are encouraging you to agree on. We think that good whistleblower protection needs to be based on a combination of a multitude of tools and approaches.

The basic idea is that the whistleblower should not face any disadvantages for blowing the whistle. This includes measures to avoid that harm can be done, to make doing harm illegal and to undo the disadvantages that did take place despite of all protective measures to the maximum possible extend.

##### 4.8.1. Anonymity

One important strategy of avoiding harm is disclosing the whistleblowers identity and thus making him/her immune against attacks and discrimination. Someone who is not known and cannot be guessed (see above) is save. While laws can always be broken and circumvent anonymity that works 100% means that the whistleblower is 100% save against discrimination. Therefore laws should always try to support and strengthen the possibilities of whistleblowers to disclose anonymously or confidentially. Like the TI-paper states: "the law shall ensure that the identity of the whistleblower may not be disclosed without the individual's consent, and shall provide for anonymous disclosure."

But there are also problems as there are a lot of non-legal threats to anonymity and confidentiality, based on the communication channel, on the information content and also on the discipline and reliability of the whistleblower himself and of all those knowing his identity to keep it secret forever.



But even anonymity that works 100% has some deficits in relation to the big aims and principles whistleblowing stands for. Anonymity is a necessary and important tool but not the optimal approach. One problem of anonymity is related to the fact that answering questions, providing feedback and counseling and especially legally supporting his/her request for change becomes more difficult for the whistleblower. There are some electronic or low-tech means to enable the opening of a back-communication-channel with anonymous whistleblowers that should be encouraged, but someone stating his/her case openly will always be in a better situation for supporting it, especially if one thinks that someone who is anonymous will not be able to sue the other party for not doing a proper investigation and/or not implementing the necessary changes to stop wrongdoing.

Another problem is that people tend to base their judgments on the merits of a case also on their assumptions of the reliability/motives/trustworthiness of the persons arguing the case. While someone who blows the whistle openly has a chance to demonstrate his ethical and correct approach (but at the same time the risk of unfair personal attacks) the anonymous whistleblower does not have this chance and risks to see his case weakened by negative rumors about his identity which he cannot destroy.

Anonymity also means that there is no whistleblowing hero who leads society by his good personal example. No one who can be praised or honored even if sometimes that would be well deserved. Finally whistleblowing is much about requesting and assuring accountability and in a way this is a contradiction to anonymous whistleblowing basing protection on non-accountability.

#### 4.8.2. Public support

In some case massive media and/or public attention could also become an umbrella under which the whistleblower gains a certain level of protection. This happens when due to the public attention of the case and the whistleblower any form of discrimination would be detected by the public and the public or parts of it would be ready to show solidarity and to fight for the whistleblower and against the discriminator, making the discriminators potential costs for discrimination (e.g. loss of reputation of market access or similar) far to high to take the risk. Prerequisites for this form of protection however are strong and rarely fulfilled. Another problem with this form of protection is time as usually media attention decreases over time.

#### 4.8.3. Cultural protection

The last example in a way already referred to the optimal form of protection whistleblowers could get which we call cultural protection. In the ideal situation there should be a common cultural agreement within and outside of organizations to accept critical remarks, take them serious and follow them up, thank the critics for the chance to learn, respect their opinions and their concerns even if they later on show to be unfounded. In short, a culture of discourse, constructive criticism, free speech and democracy based on a strong ethical foundation. Where ever such a culture is alive whistleblowers would be an honored species protected through solidarity and anyone aiming to discriminate them would be under huge pressure and without any support.



This is a very idealistic approach, however a society should strive to come as close to it as possible and any legal or state activities should keep this final goal in mind.

#### 4.8.4. Legislative protection

Protecting whistleblowers through legislation is also not an easy task. Perhaps the most important issue here is that the legislator and the government sends a clear signal "We want more whistleblowing to uncover, deter and hinder wrongdoing, we stand firm on the side of the whistleblowers!"

It should also be kept in mind that whistleblowing legislation will never be a perfect shield and that therefore the legislator needs to stay on that issue and right from the beginning needs to implement reporting and evaluating measures. There needs to be a commitment to amend legislation where ever it is necessary and to close loopholes. As the TI-paper states it is also of critical importance that: "the design and periodic review of any whistleblowing legislation involves key stakeholders, including trades unions, business associations and civil society organizations."

Apart from pure protective norms stating that whistleblowers should not be discriminated against, legislation also needs to have elements to correct reprisals and make whistleblowers whole again. Here pure classical civil law mechanisms are not sufficient. E.g. a whistleblower in a small butchery will not be sufficiently protected by just having a claim of keeping his job and damages against the company or its owner if the issue at stake is of such an importance that the company will close down (either because of state intervention or through the market because of complete loss of reputation) e.g., if he speaks out about the long time use of rat-meat in sausages. Thus if society wants workers to speak out in such situations measures like financial compensations by the state, support in job search and/or qualification for other jobs are also needed.

In the attached TI-proposal there are many more concrete recommendations which elements whistleblower-protection legislation should have. We strongly endorse to implement all of them through dedicated legislation applying the same standards with broad subject matter and broad coverage. The message mentioned above should be given as clear as possible and this cannot be done if it is contradicted by specific conditions, exemptions and specific delays of patchwork legislation.

### **4.9. Means of protecting those wrongly accused**

This is an issue which in the current state of the TI-paper in our view has not been treated sufficiently. However it is of crucial importance when it comes to acceptance of the new whistleblowing legislation and also to ensure that this legislation does not create new victims.

It is important that whistleblowers come forward even if they are not 100% sure that there is a risk or wrongdoing and also if they can not fully proof their allegations. Therefore - as the TI-paper states - good faith disclosures need to be protected. On the



other hand any whistleblowing policies should also make clear that deliberately false allegations can and will be sanctioned in civil and penal law thus deter misuse of whistleblowing rights.

But still sometimes disclosures might lead to allegations against people/organizations that are not guilty and/or not responsible for wrongdoings. Best protection also for these accused can be achieved through thorough but speedy investigations by independent authorities detecting false allegations and defamations. So here interests of good faith whistleblowers and accused are quite similar.

It is important that such investigations always respect the human rights, data protection and procedural rights of all parties involved as well as the assumption of innocence which is an important part of the rule of law.

But even with all these measures sometimes damages for someone wrongly accused might still happen. As the damages currently experienced by whistleblowers these should be considered as sacrifices for a public good. The whistleblower brings sacrifices for the peoples right to know as does the wrongly accused. The whistleblower however should not be hold responsible as long as he acted in good faith. Consequently legislation should provide for at least some form of compensation by the state in cases where good faith but still wrong accusations lead to massive damages with the accused. If the state or other investigative bodies however fail to adhere to legal standards of protecting rights and doing investigations they should be fully responsible vis-à-vis the wrongly accused.

#### **4.10. Whistleblowing encouragement by increasing the chance to stop wrongdoing**

Protecting whistleblowers against any form of losses is important but not sufficient. Whistleblowers are coming forward to achieve change in relation to something they perceive as wrongdoing or danger for public goods. So it is of utmost importance to give them a fair chance to achieve this change.

First step in that process must always be that the potential whistleblowers know that there is a proper addressee to whom they can address their disclosure. But they will only turn to this addressee if they trust in him that he will listen and if necessary act to fix the issue they raise. Consequently it should become good practice to offer several addressees to the whistleblower and leave him the choice.

Often and in the ideal situation the whistleblower has already enough trust into his organization and his superiors and their willingness and power to achieve change. Then these are perfect addressees. Any activities within organizations enabling their personal and/or using external bodies for implementing best practice internal whistleblowing policies like the ones laid down in the Whistleblowing Recommendations of the British Standard Institute should therefore be encouraged.



But the whistleblower might also come to the conclusion that the issue is hot and needs attention of someone really outside and independent from his own organization. Here the state needs to provide such addressees and empower them to conduct the type of investigations and follow up measures which are necessary.

In any case the whistleblower should be kept informed about the outcome of those processes and have a chance to comment and provide further input throughout them.

If the whistleblower is not convinced that the investigation was done properly he also should be given a right to challenge it, either through e.g. an ombudsman system and/or in court. In the Netherlands and in Hungary currently new laws are entering into force which also foresee that the whistleblower can claim full or partly reimbursement for cost (e.g. legal costs) occurring for him throughout these kind of processes. We recommend to follow that path.

#### **4.11. Incentives for whistleblowers**

Encouragement of whistleblowers could even go further by offering them the chance to achieve personal advantages from their whistleblowing. The most prominent form how that could be done is the method used e.g. in the USA federal False-Claims Act, giving – under certain conditions – the whistleblower the right to claim damages and reimbursements in the name of the states budget (qui tam) and assuring him a certain percentage of the recovered money.

In Germany currently there does not seem to be a cultural acceptance to such a bounty-system often viewed as promoting paid state informants just like they existed in former Eastern Germany and during the Nazi-System. On the other hand looking at the experiences in the USA one has to acknowledge that the incentives of the False-Claims-Act work. Not only because offering benefits might make whistleblowing more attractive for potential whistleblowers but also because it lead to the creation of a specific group of specialized lawyers who take these cases based on contingency fees. The huge amounts of money involved in some of these cases allow a very professional type of legal and investigative support for whistleblowers, a support they lack in any other of the current whistleblowing legislations. It also need to be acknowledged that the False Claims Acts allow the state and federal budgets in the US to recover several billions of US-\$ per year and that this also leads to massive deterrence effects for future wrongdoers. Concerning cultural prejudices against such systems it is interesting to note that from 1.4.2010 with Hungary even an ex-soviet-block state implements elements of the False-Claims model into its new national anti-corruption law.

Another example of a very successful incentive based whistleblowing system is the one used by the European Commission and certain member states of the European Union when it comes to fighting cartels and others breaches of competition law. Here companies who step out and tell first can be exempted from sanctions, which enabled the competition authorities to cover detect and sanction important competition law violations and to recover hundreds of millions of Euro annually since these rules have



been implemented.

In this paper we do not recommend to implement a False Claims Act system as we can not judge if it would be accepted by the Icelandic people. However it is certain that the clear and proofed successes and financial benefits of such systems need careful consideration and good arguments for not implementing them.

#### **4.12. Creating a Whistleblowing Fund and a Whistleblowing Ombudsman**

The solution we envisage for Germany and which we proposed also for the European Union (see Annex 2) tries to take the cultural concerns into account by avoiding to give whistleblowers an enforceable legal right to a certain sum or percentage of money but rather taking up some of the ideas of the False-Claims-Act by measuring the financial benefit of each whistleblowing case as such and allocate some of the money gained from it to a public Whistleblowing Fund which should be enabled to do qui tam cases on its own and profit from them. In cases where the Whistleblowing Fund would find it appropriate it should then be possible to hand out payments to whistleblowers, e.g. to compensate for losses which can not be recuperated in other ways.

Establishing a Whistleblower Fund would also foster the pivotal aim of promoting whistleblowing and its cultural acceptance. The Whistleblowing Fund and a respective Whistleblowing Ombudsman administrating it, would be entitled to hear complaints about mistreatments of whistleblowers and/or deficits in investigations and for example could be entitled to spend money on promoting research about whistleblowing or on developing educational material that could be used in schools or universities to teach the benefits and importance of whistleblowing.

The Fund and the Ombudsman could also play their role in collecting data and establishing a counseling infrastructure for potential whistleblowers. It is expected that after a considerable investment during the first years of implementation of such a system it will become more than cost neutral just on the basis of avoiding costs of wrongdoings and damages to public goods.

### **5. International dimension**

Apart from the benefits Iceland could realize by implementing the proposed whistleblowing legislation on a national scale there are also reputation benefits Iceland could gain thanks to IMMI by placing itself into the role of the best practice country in the world when it comes to freedom of press, free speech and whistleblowing protection. It will then be considered as a safe haven by those, often quite brilliant brains who are sanctioned for speaking out elsewhere in the world and could become the place for innovations in science and technology. To enhance this process it should also be envisaged to grant asylum to whistleblowers who need to escape from other countries just as the USA offered asylum to the Swiss whistleblower Christopher Meili in the past.



It is our strong hope that Iceland will not keep the ideas of IMMI for itself but make them available to an international audience. Iceland could play a vital role in advocating freedom of press, free speech and whistleblowing in any political and legal discussions on an international scale. There are certain international legal conventions this work could build on like for example the decisions and instruments of the Council of Europe or the UNCAC and other entities which at present already recommend some forms of whistleblower protection. It would be important to get more such instruments, involve more multi- and international organizations (like EEA, ILO, EU and UN) and give those instruments a legally more binding character which most of them currently lack.

As whistleblowing always involves the possibility to address an independent body this should also apply for whistleblowers that want to disclose breaches of international treaties and laws by their home country. Iceland should thus engage in implementing such whistleblowing-clauses in any future international treaties of which it would like to become part. Another initiative in that sense could be to propose the creation of specific offices at the UN or the ICJ that would be empowered to accept and independently investigate whistleblower claims in relation to international laws. Thus whistleblowing also in this area could prove its power as a simple and universal tool to discover and thus deter breaches of laws and humanity.

## 6. List of Annexes

### Annex 1:

Transparency International, **Recommended draft principles for whistleblowing legislation**, December 2009 (for additional material and further links see also: [http://www.transparency.org/global\\_priorities/other\\_thematic\\_issues/towards\\_greater\\_protection\\_of\\_whistleblowers](http://www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers))

### Annex 2:

Whistleblower-Netzwerk e.V., Freedom to care, Explicit: **Europe Needs More Whistleblowing!**, A Response to the Green Paper "Modernising Labour law to meet the challenges of the 21<sup>st</sup> century", Mai 2007 (also available at: [http://www.whistleblower-netzwerk.de/WB\\_EUGB\\_EN\\_final.pdf](http://www.whistleblower-netzwerk.de/WB_EUGB_EN_final.pdf))

Please do not hesitate to contact us if there are any further questions.

With best regards from Whistleblower-Netzwerk e.V.

Guido Strack – 1. Vorsitzender

## Recommended draft principles for whistleblowing legislation

Whistleblowers can play an essential role in detecting fraud, mismanagement and corruption. Their actions help to save lives, protect human rights and safeguard the rule of law. To protect the public good, whistleblowers frequently take on high personal risks. They may face victimisation or dismissal from the workplace, their employer may sue (or threaten to sue) them for breach of confidentiality or libel, and they may be subject to criminal sanctions. In extreme cases, they face physical danger.

The whistleblower's right to speak up is closely related to freedom of expression, freedom of conscience and to the principles of transparency and accountability. It is increasingly acknowledged that effective protection of whistleblowers against retaliation will facilitate disclosure and encourage open and accountable workplaces. International conventions<sup>1</sup> commit the signatory countries to implementing appropriate legislation and ever more governments, companies and non-profit organisations are willing to put related regulations in place.

The principles take experience with existing whistleblowing legislation into account. They are meant to be guiding principles which should be adapted to individual countries' specific contexts and existing legal frameworks. These principles are still under review and any contribution to their further development is welcome.

These principles were developed by the Transparency International Secretariat with the support of experts and practitioners from around the world, namely:

- Canadians for Accountability
- Members of the secretariat of the Council of Europe's Parliamentary Assembly (PACE) and the Council's Group of States Against Corruption (GRECO)
- International Federation of Journalists (IFJ)
- Federal Accountability Initiative for Reform (Canada)
- Government Accountability Project (USA)
- Integrity Line (Switzerland)
- Representatives of the International Chamber of Commerce (Anti-Corruption Commission)
- National Whistleblowers Center (USA)
- Open Democracy Advice Centre (South Africa)
- Project on Government Oversight (USA)
- Public Concern at Work (UK)
- Risk Communication Concepts (Germany)
- Whistleblower Network (Germany)
- TI chapters from Bulgaria, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia

The consultation took place in the context of the European Commission co-funded project "*Blowing the whistle harder – Enhancing Whistleblower Protection in the European Union*". This is not a formal TI Policy Position.

### Definition

1. *Whistleblowing* – the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.

### Guiding principles

2. *Disclosure of information* – whistleblowing legislation shall ensure and promote the disclosure of information in order to avert and sanction harm.

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<sup>1</sup> E.g. The UN Convention against Corruption (UNCAC) (article 33), the Council of Europe Civil Law Convention on Corruption (article 9), the Inter-American Convention Against Corruption (article 3), the African Union Convention on Preventing and Combating Corruption (article 5), the Anti-Corruption Action Plan for Asia and the Pacific (pillar 3), the Southern African Development Community Protocol Against Corruption (article 4), etc.

3. *Protection of the whistleblower* – the law shall establish robust and comprehensive protection for whistleblowers, securing their rights and ensuring a safe alternative to silence.

### **Scope of application**

4. *Broad subject matter* – the law shall apply to disclosures covering wrongdoing including, but not limited to, criminal offences, breaches of legal obligation, miscarriages of justice, danger to health, safety or the environment, and the cover-up of any of these.
5. *Broad coverage* – the law shall apply to all those at risk of retribution, including both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, contractors, trainees, volunteers, temporary workers, former employees, job seekers and others). For the purpose of protection, it shall also extend to attempted and suspected whistleblowers, those providing supporting information, and any individuals closely associated with the whistleblower.
6. *Requirement of good faith limited to honest belief* – the law shall apply to disclosures made in good faith, limited to an honestly held belief that the information offered at the time of the disclosure is true. The law shall stop short of protecting deliberately false disclosures, allowing them to be handled through the normal labour, civil and criminal law mechanisms.

### **Disclosure procedures**

7. *Incentivise internal reporting* – the law shall encourage the establishment and use of internal whistleblowing systems, which are safe and easily accessible, ensure a thorough, timely and independent investigation of concerns and have adequate enforcement and follow-up mechanisms.<sup>2</sup>
8. *Ease of external reporting* – at all times, the law shall provide for easy external disclosure, including, among others, to regulatory bodies, legislators, professional media and civil society organisations. If there is a differentiated scale of care in accessing these channels<sup>3</sup>, it shall not be onerous and must provide a means for reporting on suspicion alone.
9. *National security* – where disclosure concerns matters of national security, additional procedural safeguards for reporting may be adopted in order to maximise the opportunity for successful internal follow-up and resolution, without unnecessary external exposure.
10. *Whistleblower participation* – the law shall recognise the whistleblower as an active and critical stakeholder to the complaint, informing him or her of any follow-up and outcomes of the disclosure and providing a meaningful opportunity to input into the process.
11. *Rewards systems* – depending on the local context, it shall be considered whether to include further mechanisms to encourage disclosure, such as a rewards system or a system based on *qui tam* which empowers the whistleblower to follow up their allegations.<sup>4</sup>

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<sup>2</sup> For a guide to the establishment and operation of internal whistleblowing systems, see *PAS Code of practice for whistleblowing arrangements*, British Standards Institute and Public Concern at Work, 2008.

<sup>3</sup> For example, see Public Interest Disclosure Act (UK).

<sup>4</sup> Under *Qui Tam*, a citizen can sue on behalf of the government. Such a provision is used in the US False Claims Act.

## **Protection**

12. *Protection of identity* – the law shall ensure that the identity of the whistleblower may not be disclosed without the individual's consent, and shall provide for anonymous disclosure.
13. *Protection against retribution* – the law shall protect the whistleblower against any disadvantage suffered as a result of whistleblowing. This shall extend to all types of harm, including dismissal, job sanctions, punitive transfers, harassment, loss of status and benefits, and the like.
14. *Reversed burden of proof* – it shall be up to the employer to establish that any measures taken to the detriment of a whistleblower were motivated by reasons other than the latter's disclosure. This onus may revert after a sufficient period of time has elapsed.
15. *Waiver of liability* – any disclosure made within the scope of the law shall enjoy immunity from disciplinary proceedings and liability under criminal, civil and administrative laws, including libel, slander laws and (official) secrets acts.
16. *No sanctions for misguided reporting* – the law shall protect any disclosure that is made in honest error.
17. *Right to refuse* – the law shall allow the whistleblower to decline participation in suspected wrongdoing without any sanction or disadvantage as a result.
18. *No circumvention* – the law shall invalidate any private rule or agreement to the extent that it obstructs the effects of whistleblower legislation.

## **Enforcement**

19. *Whistleblower complaints authority* – the law may create an independent body (or appoint an existing one) to receive and investigate complaints of retaliation and/or improper investigation. This may include the power to issue binding recommendations of first instance and, where appropriate, to pass on the information to relevant prosecutorial and regulatory authorities.
20. *Genuine day in court* – any whistleblower who believes he or she has suffered injury to his or her rights shall be entitled to a fair hearing before an impartial forum with full right of appeal.
21. *Full range of remedies* – the law shall provide for a full range of remedies with focus on recovery of losses and making the complainant whole. Among others, this shall include interim and injunctive relief, compensation for any pain and suffering incurred, compensation for loss of past, present and future earnings and status, mediation and reasonable attorney fees. The law shall also consider establishing a fund for compensation in cases of respondent insolvency.
22. *Penalty for retaliation and interference* – any act of reprisal or interference with the whistleblower's disclosure shall itself be considered misconduct and be subject to discipline and personal liability.

## Legislative structure, operation and review

23. *Dedicated legislation* – in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.
24. *Whistleblowing body* – the law shall create or appoint a public body to provide general public advice on all matters related to whistleblowing, to monitor and review periodically the operation of the whistleblowing framework, and to promote public awareness-building measures with a view to the full use of whistleblowing provisions and broader cultural acceptance of such actions.
25. *Publication of data* – the law shall mandate public and private bodies of sufficient size to publish disclosures (duly made anonymous) and to report on detriment, proceedings and their outcomes, including compensation and recoveries, on a regular basis.
26. *Involvement of multiple actors* – it is critical that the design and periodic review of any whistleblowing legislation involves key stakeholders, including trades unions, business associations and civil society organisations.
27. *Protection of media sources* – nothing in the law shall detract from journalists' rights to protect their sources, even in case of erroneous or bad faith disclosures.

Transparency International is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it. [www.transparency.org](http://www.transparency.org)

### Contact:

Transparency International Secretariat  
Anja Osterhaus  
Alt Moabit 96, 10559 Berlin, Germany  
Tel: 49-30-3438 20-722, Fax: 49-30-3470 3912  
e-mail: [aosterhaus@transparency.org](mailto:aosterhaus@transparency.org)

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# Whistleblower-Netzwerk e.V.

[www.whistleblower-netzwerk.de](http://www.whistleblower-netzwerk.de) \* [info@whistleblower-netzwerk.de](mailto:info@whistleblower-netzwerk.de)



Taunusstr. 29a  
51105 Köln  
Deutschland

&

## Freedom to Care

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[www.freedomtocare.org](http://www.freedomtocare.org)  
[freedomtocare@aol.com](mailto:freedomtocare@aol.com)

PO Box 125  
West Molesey  
Surrey KT8 1YE  
United Kingdom

&



Arild Aspøy  
Rådgiver

Per-Yngve Monsen  
Rådgiver

Andreas Høstmælingen  
Rådgiver

[info@explicit.no](mailto:info@explicit.no)  
[www.explicit.no](http://www.explicit.no)

**explicit** DA  
Mikkel Revsvei 51  
0688 Oslo  
Tlf.: 418 46 483  
Org.nr 990 542 821

A Response to the Green Paper

## "Modernising Labour law to meet the challenges of the 21st century"

COM (2006) 708 final of 22.11.2006  
[http://ec.europa.eu/employment\\_social/emplweb/news/news\\_en.cfm?id=189](http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=189)

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A Response to the Green Paper

## “Modernising Labour law to meet the challenges of the 21st century”

COM (2006) 708 final of 22.11.2006

### Europe Needs More Whistleblowing!

#### 1. The questions of the Green Book (Questions 1 & 8):

The following statements are intended to answer to questions 1 and 8 of the Green Paper. In our view, an effective Whistleblower Legislation should be one “of the priorities for a meaningful labour law reform” and it belongs to the “floor of rights’ dealing with the working conditions of all workers regardless of the form of their work contract”.

#### 2. Whistleblower (Definition)

A Whistleblower is:

- A person or group of persons who;
- publicizes internally and/or externally to the organization with which s/he is linked
- perceived (real or at least honestly believed) risks, abuses and legal infractions
- whose disclosure is in the public interest

#### 3. The Many Advantages of Whistleblowing

- Whistleblowing increases the risk of discovery for those who employ unfair practices in competition, thus promoting fair competition. At the company level, internal whistleblowing enables effective controlling and efficient early recognition of developing risks. The difference to regulation by public authorities is that it verifies conformity with relevant norms at a much lower cost and that it applies equally to all relevant norms and risks.
- It serves as an early warning system that reveals risks before they turn into damage, abuse or illegality.
- Whistleblowing imposes no burdens on legally operating actors while it is an excellent anti-corruption tool and can discover insider information that would otherwise remain secret. The Commission has used this tool successfully in the realm of competition law for a long time. Now it is time to apply it throughout the Internal Market.

- It supplies information to the public and to public authorities that enable them to perceive risks and stop abuses. Thus it prompts the goals of Articles 2 and 3 of the Treaty to achieve high levels of social, environmental, health and consumer protection.
- Finally, it is a realisation of the rights enshrined in the EU Charter of Fundamental Rights Articles 10 and 11 of freedom of thought, conscience, opinion and information in the world of work, boosting liberty and motivation at work.
- It is closely linked to the rights to petition, to access documents, to all democratic rights because decisions always depend on information.

#### **4. There is Too Little Whistleblowing**

Considering all these advantages, it is surprising that only a suboptimal amount of whistleblowing takes place. All over Europe, many serious accidents, distortions of competition, criminal affairs, and environmental hazards could have been prevented, or resolved earlier, if people e.g. those professionally involved had spoken up. There must be circumstances that kept people silent. First scientific studies indicate three possible explanations:

- there is the ethical component of misguided loyalty and the culture of discretion
- the belief that Whistleblowing is a waste of time because it changes nothing
- Fear of individual disadvantages and sanctions.

#### **5. Whistleblowing needs to be explored more thoroughly**

Scientific investigation into the advantages, methods, difficulties, protections for, and results of whistleblowing is at its beginning. The EU should commit itself more strongly to this research in order to better realize the untapped potential of whistleblowing in the future. It has to be found out which factors and motives lead or hinder people to blow the whistle and to show civil courage. It is also important to evaluate the experience of whistleblowers with protection and enabling mechanisms and how those can be improved. A multitude of disciplines will contribute to such research; economics, competition theory, games theory, legal scholarship, political sciences, polling, psychology and social psychology, crime prevention, occupational medicine, media and communication science, philosophy. Technology, informatics for example, can be used to protect anonymous whistleblowers.

#### **6. Breaking through the Barriers of Silence**

Member States and the Community should emphasize the advantages and the moral justification of whistleblowing in a publicity campaign. A broad approach is best here, going

beyond labour law to promote those who disclose risks in the interests of the Community and the public at large. Children should be taught the difference between disloyal rratting and morally necessary disclosures in order to change attitudes and cultures in the long term. Ongoing campaigns and initiatives in public institutions, companies, associations and other social groups should be supported. It is important to find public and private leaders who promote whistleblowing within their organisations and report transparently on their dealings with whistleblowers.

#### **7. The Law's Responsibilities**

Law can contribute decisively to breaking through the barriers of silence and promoting whistle blowing. In the mid term there need to be European laws based on best practices as this subject is very relevant to the Internal Market.

This standard should be developed on the back of existing national (UK: PIDA, USA: SOX, Whistleblower-Protection-Acts, False-Claim-Act; rules in force in South Africa, Australia, Japan, Canada, South Korea etc.), international (UN Convention Against Corruption, OECD Recommendations, Council of Europe Recommendations, internal rules of international organisations such as the UN and EU) systems of rules that should be catalogued and critically examined for their practical effect. Practical effect means that more whistleblowing takes place, that the barriers of silence are lower, that reports are followed up, and that whistleblowers receive effective and permanent protection against reprisal.

#### **8. Core Elements of Future Norms**

Some essential demands on a future European regulation will be discussed in closing, as a contribution to the development that we demand.

##### **8.1. Wide Area of Application**

We have shown that whistleblowing is universally applicable and that it must be understood in its cultural dimension. Rules of limited application cannot do justice to whistleblowing. The limited competences of the EU make it desirable for Member States to take supplementary measures where necessary.

##### **8.1.1. Personal Application**

Basically, whistleblowing is a human right that should be enjoyed by individuals and groups everywhere. The hierarchy of competences within the EU and the terms of reference of the present Green Paper place an accent on labour and business law. Within those domains, a wide area of application should be chosen.

The following persons should be covered and protected; all who are employed whether privately or publicly, directly or via an intermediary, paid or volunteer, full or part time.

Coverage should include all those who have been, are presently in, or in the process of entering an economic relation through which pressure on their freedom of expression can be exerted.

#### **8.1.2. Factual Application**

The promotion of strictly private interests through disclosures may be excluded from protection. But all kinds of risk and norm-relevant information that at least partially serve the public interest should be covered. If there are internal company regulations (e.g. codes of conduct) blowing the whistle in relation to those is also covered.

#### **8.1.3. Temporal Application**

Preparations i.e. the acquisition and collection of information should be covered. Disclosures about abuses that existed before the legislation comes into force should also be protected.

#### **8.1.4. Duty to Blow the Whistle**

The duty to report and to provide information does not conflict with whistleblowing. Internal company regulations however must be in line with the laws and should be based on consensus with staff.

But whistleblowing depends very much on the whistleblower's faith in protection. The better alternative to hardly enforceable duties lies in creating an environment that makes whistleblowing easier and respecting the free choice of the whistleblower. Mandatory whistleblowing could also be misused as a justification for police state repression forcing citizens to "talk."

#### **8.2. Modest Standards for the Whistleblower's Motivation**

Excessive demands on the moral purity of the whistleblower's motives will only be dissuasive, what matters is the information's benefit to the public.

#### **8.2.1. Protection of Good Faith**

The whistleblower discloses a possible risk or abuse. It is sufficient that s/he honestly and consciously believes in this possibility and the truth of the facts s/he presents. An error based on mere negligence thus does not exclude protection.

#### **8.2.2. Novelty**

Again, the whistleblower's subjective view is decisive. If s/he believes that the primary or secondary addressees of the disclosure are not yet in full possession of the information, there should be complete protection. The same applies if from his/her perspective there is still need for effective reaction in relation to the risk or abuse. In those cases thus a lack of novelty can not lead to a reproach.

#### **8.2.3. Motivation**

Limiting whistleblowing protection to cases of pure altruism would prevent it in many situations. It is sufficient if there is no proof that motives were completely egotistical. Reasons of conscience should be covered.

#### **8.3. Clear, simple norms and comprehensive communication**

For all of the factual complexity, it is necessary to formulate norms that are clear, simple, and easy to communicate and explain. Rights and duties should be known and understood, potential addressees need to be published and all this information must regularly be publicized in promotional campaigns in order to extend whistleblowing in practice. The statute should include obligations to educate people about its content and to publish statistics on its application.

#### **8.4. Counselling and Support for Whistleblowers**

The Member States must ensure that actual and potential whistleblowers can be counselled on their rights and obligations by public or private organisations in confidentiality and without incurring costs. Councillors should be placed under a rule of silence, empowered to give legal advice, they should enjoy the right to protect their clients and to refuse to testify against them.

Recognized whistleblowers organisations with qualified staff should be allowed to defend whistleblowers in court. In order to remove the risks of excessive legal costs, these organisations should be allowed to collect fees only when they win the case.

The establishment of funds to support whistleblowers is encouraged.

#### **8.5. Forms of Whistleblowing**

Once again, a wide area of application is indicated. In principle, whistleblowers are well advised to write down their disclosures, but oral communications should be covered as well.

The whistleblower should be allowed to choose freely between open, confidential and anonymous disclosures, made directly or via trusted intermediaries. In order to boost whistleblowing, all communication channels should be opened. As confidence is encouraged and the barriers of silence lowered, open whistleblowing will increase and become a self-perpetuating process.

#### **8.6. Efficient Response to Disclosed Content**

Whistleblowing will only take place when the disclosed information is perceived, professionally and independently evaluated, analysed, and acted upon with a view to minimizing risks and stopping abuses.

#### **8.6.1. Independent, Professional Evaluation of Disclosures**

The content of received disclosures should be completely and professionally evaluated. The independence of the addressees and evaluators should be guaranteed. If from his/her view doubts about these guarantees arise, the whistleblower has the right to turn to other addressees without fear of reprisals.

#### **8.6.2. Transparent Evaluation Process**

Criteria for the nature, duration and verification of the evaluation should be established. Verification should be proportional to level of threat that was disclosed, but also to the quality of the information initially available and should in general include a duty to own initiative investigations.

With full respect for the rights of third parties, whistleblowers should receive confirmation of receipt of their disclosure, the opening of an investigation, and its probable duration. As long as the success of the investigation is not endangered, its progress should be reported to the whistleblower. S/he should see the draft final investigation report and be allowed to comment on it (the comments becoming an annex of the official report). S/he should have the right to question the final report on his/her choice through mediation or judicial review. S/he might involve whistleblower organisations in doing this. Should these reviews invalidate the final report, there is the right to recover court and other costs.

#### **8.6.3. Sanctions for Obstructing Investigations**

Member States and the Community should provide dissuasive sanctions for obstruction of or omission of investigations, false evidence, delay, or distortion. Possible sanctions include sacking, exclusion from public tenders, obligation to pay damages and criminal penalties. The same should apply to attempts to penetrate behind protections of the whistleblower's identity or breaches of her/his confidence.

#### **8.6.4. Protection for Third Parties' Rights**

All evaluation processes should fully respect the rights of third parties, especially to due process, judicial review and data protection.

#### **8.7. Addressees**

##### **8.7.1. Optional Priority of Internal Whistleblowing**

The whistleblowing law should leave the choice between internal and external whistleblowing to designated public or governmental addressees to the whistleblower and treat both forms equally.

Insofar as that is essential for protection of third parties' rights (such as the protection of commercial or technical secrets) and as the efficient reaction to disclosures (as described

above) remains assured, Member States may require disclosures must be made inside the organisation initially.

External whistleblowing must remain protected in those cases in which the whistleblower believes that important community interests are at stake or that criminal activity has taken place, when trustworthy internal procedures are lacking or have been exhausted, or where there are reasoned doubts about the efficiency of the reactions.

#### **8.7.2. Designating Public/Governmental Addressees**

The Member States designate government bodies to which disclosures may be addressed. At least one agency must be named and must fulfil the duties of information evaluation. Specific criteria for choosing a public addressee may also be promulgated.

The personal, regulatory and financial independence as well as sufficient resources of these addressees have to be assured, even if the whistleblowing concerns public institutions or people active therein.

#### **8.7.3. Criminal Prosecutors and Parliaments**

Independently of other rules, whistleblowing to criminal prosecutors and parliamentary petition committees remains assured. They are to protect the rights of third parties.

#### **8.7.4. Public Whistleblowing**

A Whistleblower factually can always address the public or the media. This possibility of external whistleblowing can not be legally excluded from whistleblower protection.

Here s/he becomes personally responsible for protecting legitimate secrets and rights of third parties. That responsibility falls on the addressees in the cases of internal and external whistleblowing to designated public or governmental addressees.

Where there are no legitimate secrets to protect (in covering up criminal activities for instance) the whistleblower incurs no responsibility. This is also true when lack of an adequate response drive the whistleblower into the public domain as a last resort. If the whistleblower was unaware of the secrecy of disclosed information, or if it was not in fact secret, there should be no negative repercussions. This remains true as long as the legitimate interest to keep the secrecy does not exceed the interest in avoiding the risk or abuse to which the whistleblowing pointed.

Finally, it is important to remember that in a democratic society all decisions by public and governmental bodies are subject to public review.

## **8.8. The Right to Blow the Whistle and Supporting Rights**

### **8.8.1. Right to Blow the Whistle**

In the cases described there is a right to blow the whistle and a right to an efficient reaction and evaluation.

### **8.8.2. Right to Refuse Service**

The whistleblower may refuse to render services that would make him or her an accomplice to a crime, an act threaten the health of humans or the environment, or an act that is against his or her conscience. The duty to render other services of equal value remains untouched.

### **8.8.3. Right to Be Informed**

It is in everybody's interest to avoid a multitude of unnecessary investigations into ill-founded allegations. Therefore the potential whistleblower should inform himself or herself thoroughly and collect evidence systematically. This applies to information to which they already have legitimate access to the extent to which whistleblowing itself is legitimate. Application to consult public or government records in this connection before or after the whistleblowing should be treated as in the public interest.

## **8.9. Whistleblower Protection**

Along with lowering the barriers of silence and ensuring effective evaluation, protecting whistleblowers from reprisals is important to achieving the goal of increased whistleblowing. This protection must work in everyday life and not just on paper. Only then will potential whistleblowers gain the confidence to reveal their valuable information.

### **8.9.1. Antidiscrimination Law as a Model**

Directives 2000/43/EC, 2000/78/EC, 2002/73/EC und 2004/113/EC provide elements that can be used for the protection of whistleblowers.

### **8.9.2. Ban on Discrimination**

The principle must be that those whistleblowers who follow the legal rules of the statute under consideration must be free of all direct and indirect discrimination and of all other disadvantages in connection with their disclosure. There should be coverage during the pre-whistleblowing phase and for justified refusals to render service. There should be protection for persons supposed to be whistleblowers, and for those who aid and support whistleblowers. All forms of repression should be covered, including threats, mobbing and shortages of career and development perspectives.

### **8.9.3. Precaution and Protection**

Public and private employers have the responsibility to protect whistleblowers against reprisals from third parties (such as colleagues, customers, clients). If they fail their duty to protect the whistleblower, they are liable to compensate him/her for damages.

They must take concerns expressed by him or her seriously and consult on feasible protective measures such as transfers to another department. S/he is to be protected against long term career damage by persons who have a negative attitude towards whistleblowers.

### **8.9.4. Effective and Dissuasive Sanctions**

Discrimination triggers extensive claims for compensation on the whistleblower's part. These claims may be for restoration of the state of affairs before the discrimination began and/or for monetary compensation. The level of monetary compensation should exceed that for unjustified dismissal and be sufficient to offset all damages, including moral damages, to the whistleblower and his/her family.

In addition, those responsible for the repression will be sanctioned in accordance to what was written above about obstruction of investigations.

There should be a right to be protected under preliminary injunctions and the right to respond to unbearable situations by refusing to render service or by terminating one's employment.

### **8.9.5. Transparent Sanctions**

After judicial proceedings have been terminated, whistleblowers and their organisations shall have access to court records. They shall have the right to publicly criticize verdicts.

### **8.9.6. Legal Aid, Burden of Proof, and Victimization**

Articles 9 through 11 of Directive 2000/78/EC should apply to legal aid, burden of proof, and victimization for whistleblowers who have acted in conformity with the legislation.

### **8.9.7. Support for Research into Occupational Diseases**

The Community and the Member States should support research into the adverse effects of repression against whistleblowers and their families, including psychological and psychosomatic problems. This will help to improve protection for whistleblowers and to set levels of compensation correctly.

### **8.9.8. Partial Immunity for Whistleblowers**

Legal whistleblowing has nothing to do with defamation or malicious gossip and cannot be sanctioned as such.

Whistleblowers will enjoy immunity from prosecution by administrative, civil or penal tribunals for obtaining access to documents, making copies, or revealing classified material, provided

that their was the reasonable belief that the material would be destroyed or suppressed during the course of an open investigation or that these actions were necessary in order to end a significant abuse. The right to exploit the material commercially is excluded.

The finding that there has been an obstruction of the investigation or that there have been reprisals against the whistleblower eliminates all civil counter-claims against the whistleblower. If such measures are undertaken by governmental departments or agencies, criminal liability for breach of official secrets or for disloyal statements is also eliminated. Insult is not legitimated by the fact related protection of whistleblowing. Insult occurring at the occasion of whistleblowing is therefore not covered by the partial immunity rules of the whistleblower protection law.

#### **8.9.9. Compensation Under Insolvency**

Whistleblowing may lead to the organisation's insolvency (and thereby to the whistleblower's unemployment) or to other situations in which it is unable to pay due compensation to the whistleblower. In these cases in which public interest has been directly served it is for the government to compensate him or her in place of the organisation, as if s/he had been discriminated because of the whistleblowing. In the other cases, the whistleblower and his/her family retain the claim to the minimum income.

#### **8.9.10. Discriminatory Hiring**

Discrimination against ex-whistleblowers while hiring staff is to be prohibited. The same fits for activities supporting such discrimination.

#### **9. Blocking Escape Clauses**

Rules and agreements that obstruct the effects of whistleblower legislation, such as special confidentiality clauses, will be void.

#### **10. Rewards for Whistleblowers**

Rewards for blowing the whistle will be legal, but offering attractive rewards in advance risks triggering false whistleblowing that ends up in denunciation. On the other hand it is legitimate to materially or immaterially appreciate and compensate the whistleblower after his often difficult undertaking.

The "False Claims Act" in the USA has led to substantial savings in the public sector. The Community and the Member States should investigate if and how such a mechanism could be adapted to the European culture and legal systems. One possible approach might be to combine effective and full compensation for the individual with collective action for the benefit of public whistleblower-support funds.

#### **11. Evaluation**

Whistleblowing legislation should be evaluated at regular intervals. Further protective and anti-abusive clauses may be added as necessary. Evaluation should be centred on the question of practical effectiveness. It needs to look for societal and economic consequences but also for effects on motivation and practical experience of whistleblowers.

The facts of life for whistleblower laws is that their initial passage creates a mandate, but technical mistakes, unanticipated scenarios, and ingeniously creative new forms of retaliation mean they must be a work in progress for several generations of refinement, if there is to be any realistic hope of meeting their potential. The worst scenario is a whistleblower law that doesn't work. It creates a false sense of rights, generating a class of reprisal victims who place the final nail in their own professional coffins by seeking to enforce the dysfunctional rights.