1. INTRODUCTION

There are many definitions of whistleblowing but the one most widely accepted in the literature is the following: “the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action”¹

For the purposes of this submission it is assumed that whistleblowing benefits modern society.² This is especially the case if it is internal and allows wrongdoing to be speedily rectified. External disclosures serve the public interest by allowing pressure to be exerted on those who refuse to


² See generally the Parliamentary Assembly of the Council of Europe report entitled ‘The protection of whistleblowers’ 2009 which called for a conference on this subject. (http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm)
acknowledge wrongdoing or to rectify it. It almost goes without saying that whistleblowing is important not only in relation to fraud and corruption but also as regards other types of wrongdoing, for example, breaches of health and safety and anti-discrimination laws etc. It is therefore unfortunate that some EU countries and organisations have whistleblowing measures which only apply to corruption/financial irregularities while others have more general legislation and procedures covering other forms of wrongdoing.

Whistleblowing policies and procedures do not exist in a vacuum and have to be seen in the context of what else is going on at the workplace. If whistleblowing arrangements are to have a positive impact there must be a culture of openness where top management encourages, facilitates (and perhaps rewards) the reporting of wrongdoing by anyone who is aware of

---

3 In a survey of the UK FTSE Top 250 companies conducted in 2010, of the organisations supplying information about the types of issue reported, 78% mentioned harassment/bullying, 69% cited financial irregularities, 60% identified discrimination and 45% indicated malpractice. See: Lewis, D (with Kender, M) 2010 A survey of whistleblowing/confidential reporting procedures used by the FTSE top 250 firms. SAI Global and Middlesex University. 34 pages.

4 The US False Claims Act 1989 Act applies to all companies holding shares or debt securities which are registered with the Securities and Exchange Commission. It offers whistleblowers 15-30% of what the government is able to recover on frauds as a result of the information the whistleblower has provided. Between 1986 and 2007, £5.6 million has been awarded in judgments. The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 has enhanced the whistleblower provisions of the False Claims Act and the Sarbanes-Oxley Act 2002. In particular, Section 922 of Dodd-Frank authorizes the Securities & Exchange Commission (SEC) to award "bounties" to any individual who provides original information to the SEC that results in significant monetary sanctions. See generally: Vandekerckhove, W. 2010 "Whistleblowing. Perennial Issues And Ethical Risks". In Aras, G. & Crowther, D (eds.), Handbook of Corporate Governance and Social Responsibility: 521-538. Farnham: Gower.
The need for such a culture is universal and thus applies to both the public and private sectors in Member States and as well as the EU institutions.

It is vitally important to acknowledge that staff may face a range of conflicting loyalties and may be unwilling to speak out because they fear that they will suffer reprisals. Research shows that another main reason why people are reluctant to blow the whistle is that they think that nothing will be done to rectify the alleged wrongdoing. Perhaps one of the best ways to encourage staff to raise concerns is for organizations to demonstrate by their actions that reports are properly investigated and any necessary remedial action taken. In particular, publicising examples of successful

---

5 Thus many employers make their whistleblowing procedures available to non-employees. For example, contactors, suppliers and even members of the public. See Lewis, D 2006 'The contents of whistleblowing/confidential reporting procedures in the UK: some lessons from empirical research'. Employee Relations. Vol.28 No.1 pages 76-86 & Lewis, D(with Kender, M) 2010 (note 3 above).

6 For example, staff may feel loyalty to their colleagues, their manager, their union, their family, consumers and wider society as well as the employing organisation. See: Lewis, D 2011 'Whistleblowing in a changed legal climate: is it time to revisit our approach to trust and loyalty at the workplace?' Business Ethics: a European Review Issue 1 pages 71-87.

whistleblowing will reinforce the view that the organization values this activity.  

2. ISSUES ARISING FROM THE CURRENT ARTICLE 22 AND PROPOSED AMENDMENTS

2.1 THE DUTY/RIGHT TO REPORT

In Member States, certain workers (for example, senior managers) are required to act solely in the interests of their employer and specific legislative obligations are imposed on citizens to report suspicions about terrorist activities, money laundering and serious risks to health and safety. However, there are two main difficulties with imposing a general duty on all staff to report wrongdoing. First, individuals may be so worried about failing to fulfil their obligation that they raise trivial matters or serious concerns without having reasonable grounds for doing so. Second is the problem of enforcement. In the interests of fairness, staff must normally be treated consistently in like

---

8 The "Whistling While They Work" project found that: "The most important reasons nominated by employees for reporting wrongdoing, when motivated by the circumstances to do so, were confidence that action would be taken on their report, followed by knowledge and confidence in the process they were meant to follow."

9 Art.22a uses the phrase "shall without delay inform". See generally on this issue: Tsahuridu, E & Vandekerckhove, W. 2008. Organisational whistleblowing policies: making employees responsible or liable’. Journal of Business Ethics. 82 :1, 107-118

10 This word is not defined in Art.22. It goes without saying that requiring wrongdoing to be "serious", "significant" etc introduces a level of uncertainty that may deter individuals from raising concerns.
circumstances. However, if one person reports wrongdoing does the employer really want to spend time inquiring if this could have been done earlier or by other people? In the author’s opinion, it is appropriate to have a right to report together with an expectation that staff will raise concerns but not to impose a duty which may be extremely problematic to enforce.

2.2 WHO SHOULD RECEIVE REPORTS?

The most appropriate person to contact will depend on the seriousness and sensitivity of the issues involved and who is suspected of wrongdoing. Thus it is in accordance with good practice that individuals are given a choice of internal recipients of concerns. In the 2010 UK FTSE research, 68% of respondents indicated that line managers were the initial point of contact and the Head of Department was identified by 10%. 5% mentioned the Head of Human Resources and the same number pointed to the company secretary and ‘hotlines’. Significantly, 24% identified an external provider as an initial recipient of a concern, which is four times higher than in the 2007 FTSE study.

---


12 As regards alternative recipients, the human resource department was identified by 51% of respondents, the Head of Department and an external provider were both mentioned by 28%, the Chief Executive by 26%, the Head of Legal Services by 18% and the company secretary by 7% of organisations. See: Lewis, D (with Kender, M) 2010 (note 3 above).
It is in the interests of an organization to suggest appropriate external addressees - staff need to know where to turn if they are dissatisfied with how their concern has been handled internally. However, it is also possible that whistleblowers will be unhappy with the response of external recipients. Since they cannot be expected simply to drop the matter, it should be recognized that approaches to politicians and the media are a legitimate last resort. Thus in Guja v Moldova \(^{13}\) the European Court of Human Rights held that external reporting to a newspaper could be justified in the particular circumstances.

Perhaps because EU companies might face sanctions as a result of failure to comply with the requirements of the US Sarbanes-Oxley Act 2002 \(^{14}\) there has been increasing use of ‘hotlines’. In the 2010 UK FTSE survey, 75% respondents indicated that

\(^{13}\) Application no. 14277/04. In this case Guja was Head of the Press Department in the Prosecutor General’s Office and pressure was exerted by a high ranking politician. Bearing in mind the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of workers towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the applicant’s case, the Court concluded that the interference with the applicant’s right to impart information was not “necessary in a democratic society”. Accordingly, there had been a violation of Article 10 of the European Convention on Human Rights.

\(^{14}\) In particular, Section 301(4) which states: “Each audit committee shall establish procedures for-(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters”.
they had a telephone ‘hotline’ dedicated to the reporting of concerns. 35% were provided internally and 65% externally. 15

2.3 HOW SHOULD CONCERNS BE RAISED?

Article 22a mentions that information must be provided in writing. In this respect it should be noted that in the 2010 UK FTSE study the largest single preferred mechanism was the telephone, which was cited in 88% instances. E-mail was mentioned by 55% of respondents, oral reporting by 45%, with paper reports cited in 35% of cases. 16

2.4 ANONYMITY AND CONFIDENTIALITY

From an organisation’s perspective, anonymous disclosures are less desirable than confidential ones as the former are likely to be more difficult to investigate. In addition, the nature of the information and/or process of investigation may well mean that people can guess the whistleblower’s identity. Nevertheless anonymous reporting of wrongdoing is better than no reporting. 17 Promises of confidentiality may also be problematic as recipients of concerns may have a legal

15 See note 3 above.
16 See note 3 above.
17 See Transparency International draft principle 12 at http://www.transparency.cz/pdf/TI_Recommended_draft_principles_for_whistleblowing_legislation_Nov_09.pdf. In the 2010 UK FTSE survey, 86% of respondents stated that their procedure allowed a concern to be reported anonymously and 98% said that their procedure specified that confidentiality would be maintained. See footnote 3 above.
obligation to report certain types of wrongdoing to the police or other authorities. Thus it would be realistic to provide that confidentiality will be maintained as far as possible and for detailed arrangements to be made that facilitate confidential reports and regulate the behaviour of their recipients.\textsuperscript{18}

2.5  HONEST BELIEF AND THE ISSUE OF MOTIVE.

Since it will be difficult to establish that a belief is honest if there are no reasonable grounds for it, whistleblowers should only be required to “honestly believe” that specified types of wrongdoing have occurred, are occurring or were likely to occur.\textsuperscript{19} It is problematic to require that an allegation contained in the information must be substantially true.\textsuperscript{20} Neither the word “allegation” nor “substantially” are defined so a potential whistleblower may not be certain that they will be protected against prejudicial effects. It is suggested that it would be consistent with the

\textsuperscript{18} For example, see Schedule 2 of Ireland’s Prevention of Corruption Act 2001 which is devoted to ensuring the confidentiality of communications.

\textsuperscript{19} It is worth noting that in the Fifth Report of the Shipman Enquiry (UK) Lady Justice Smith suggested that serious thought should be given to applying the concept of “reasonable suspicion”. See: Safeguarding Patients: Lessons from the Past - Proposals for the Future. 2004. Command Paper Cm 6394

\textsuperscript{20} Art.22b(1)(a).
human right to freedom of expression if honesty was presumed unless the contrary is shown.  

Some legislation (for example, in the UK) and employer procedures require disclosers to act in good faith. In the writer’s opinion, this is undesirable both as a matter of principle and practice. As a matter of principle, it is objectionable because it focuses attention on the motive of the messenger instead of the message being conveyed. Indeed, if serious wrongdoing has occurred, is occurring or likely to occur, why is it relevant that the discloser is only revealing it out of malice? In the author’s view, the behaviour of the messenger should only be relevant if he or she knowingly or recklessly provides false information. In relation to practice, it may difficult to advise a potential whistleblower that they will be protected if doubt may be cast on that person’s motive for disclosing. Indeed, the possibility of motivation being examined might deter some important disclosures, for example, in relation to a serious crime.

21 For example, Schedule 1 paragraph 3(7) of Ireland’s Prevention of Corruption Act 2001 states that “it shall be presumed, until the contrary is proved, that the employee concerned acted reasonably and in good faith”.

22 See Section 8A of Ireland’s Prevention of Corruption Act 2001

23 In Street v Derbyshire Unemployed Workers Centre, the UK Court of Appeal acknowledged that “a failure or refusal by an employer to remedy a perceived failure of duty and/or injustice to a worker is often likely to engender in him an understandable resentment or antagonism that may grow if the matter is not remedied quickly”. It therefore stated that employment tribunals should only find a lack of good faith when they are of the opinion that the “dominant” or “predominant” purpose of making the disclosure was for some ulterior motive.
2.6 PENALISATION

There is plenty of evidence that whistleblowers suffer reprisals from colleagues and third parties as well as their managers.\(^{24}\) Protection should be provided against all forms of detriment, including threats or attempts to retaliate, and where penalties have been suffered victims should be fully compensated. Where detriment is alleged the burden should be on the alleged perpetrator to prove that any adverse action was “in no sense whatever” on the grounds of reporting a concern.\(^{25}\) In addition, retaliation (or knowingly allowing others to retaliate) against whistleblowers might be made a criminal offence\(^{26}\) and staff guilty of victimisation should be exposed to disciplinary sanctions.

Given that negative interference can occur at any stage of the whistleblowing process, the protected activity cannot just be the making of a disclosure\(^{27}\) but should cover people who are intending, preparing or attempting to make such a disclosure.


\(^{25}\) This is the test used in anti-discrimination cases and was applied by the UK Employment Appeal Tribunal in the context of whistleblowing in Fecitt v NHS Manchester [2011] IRLR 111. See also Transparency International draft principle 14(footnote 17 above)

\(^{26}\) See Section 8A of Ireland’s Prevention of Corruption Act 2001.

\(^{27}\) Part IVA of the Employment Rights Act 1996 (UK) only protects those who have made a protected disclosure whereas Section 8A of Ireland’s Prevention of Corruption Act 2001 makes it an offence to penalize a person for “giving notice of intention to communicate.” an opinion.
In addition, protection should also be afforded to “those providing supporting information, and any individuals closely associated with the whistleblower”.\textsuperscript{28}

2.7 FEEDBACK

It is good practice to provide feedback to those who report wrongdoing.\textsuperscript{29} Potential whistleblowers will be encouraged to hear that disclosures lead to investigation and remedial action where necessary. In addition, if feedback is not provided a person might assume that an internal report has not been taken seriously and may choose to make a more damaging external disclosure.

2.8 THE IMPLEMENTATION AND MONITORING OF WHISTLEBLOWING ARRANGEMENTS

Before policies and procedures are put in place it is good industrial relations practice to engage in full consultation/negotiation with trade unions.\textsuperscript{30} This will ensure that worker representatives understand what the organisation is trying to achieve, have an opportunity to endorse the particular arrangements and understand their relationship to other

\textsuperscript{28} See Transparency International Draft principle 5 (footnote 17 above). For an example of legislative protection for third parties see Section 9(1) of the Whistleblower Protection Act 1993 (South Australia).

\textsuperscript{29} See British Standards Institution Whistleblowing arrangements Code of Practice. 2008 and the UK empirical research findings referred to in footnote 5 above.

\textsuperscript{30} See British Standards Institution Whistleblowing arrangements Code of Practice. 2008.
workplace procedures.\textsuperscript{31} As well as having an advisory and advocacy role, it may well be useful to designate union officials as alternative recipients of disclosures.

There is no point in having whistleblowing procedures if staff are not aware of their existence or understand how to invoke them.\textsuperscript{32} There are many ways of publicising whistleblowing arrangements to workers \textsuperscript{33} but this in itself will not be sufficient. Training will need to be provided for managers and other recipients in how to handle disclosures and staff will need to be trained in why and how they should raise concerns.\textsuperscript{34}

It is also good practice to monitor and review procedures on a regular basis \textsuperscript{35} and union or other staff representatives should be involved in these processes. Analyses should be undertaken of the number and types of disclosures, the nature

\textsuperscript{31} The “Whistling While They Work” project found that “there is a modest positive relationship between the comprehensiveness of an agency’s procedures and the proportion of staff members who report the serious wrongdoing they observe.” See Brown, A. (Ed). 2008. (footnote 7 above)

\textsuperscript{32} The “Whistling While They Work” project found that: “The most important reasons nominated by employees for reporting wrongdoing, when motivated by the circumstances to do so, were confidence that action would be taken on their report, followed by knowledge and confidence in the process they were meant to follow.” See footnote 7 above.

\textsuperscript{33} Empirical research in the UK (see note 3 above) reveals that the following methods are all used to publicise whistleblowing arrangements: the induction programme, intranet web pages, printed policy statements, employee handbooks, posters, the internet, contracts of employment, email and newsletters.

\textsuperscript{34} See generally the 2006 study for the European Parliament Budgetary Control Committee entitled "Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions". 2006. IPOL/D/CONT/ST/2005_58

\textsuperscript{35} See British Standards Institution Whistleblowing arrangements Code of Practice. 2008.
of investigations and their outcomes, the remedial actions taken, incidences of victimisation etc and recommendations for improvement should be made when appropriate.

Lastly, the EU and Member States might be encouraged to create a specialist public interest disclosure agency. At the very least such a body is needed to educate citizens about the legitimacy of reporting concerns in a democratic society and to ensure that advisory and counselling services are available. Inevitably cost will be an inhibiting factor. However, if resources were made available, a public interest disclosure agency might be empowered to receive disclosures, arrange for their investigation by an appropriate authority and protect whistleblowers from reprisals.

3. CONCLUSION: THE ADVANTAGES OF TREATING WHISTLEBLOWING AS A DISCRIMINATION ISSUE.

At European Union level it is clear that the justification for anti-discrimination measures is a human rights one.\(^{36}\) While it can be argued that whistleblowing is different to other forms of discrimination in that it involves choices rather than

\(^{36}\) For example, the preamble to both Council Directive 2000/43/EC (on “the principle of equal treatment between persons irrespective of race or ethnic origin.”) and Council Directive 2000/78/EC(“Establishing a general framework for equal treatment in employment and occupation.”) refers to the importance of respecting human rights.
inherent characteristics, this is not always the case because in some situations individuals have a duty to disclose information. According to Honeyball and Bowers: “It is of the essence of all discrimination that a person, or group of people, is treated differently from others in a similar position (or how they themselves would otherwise have been treated) for a reason which should not be considered to be a relevant consideration”. On this basis it seems appropriate to treat whistleblowing as a discrimination issue. As noted above, there is considerable evidence that whistleblowers are stigmatised and made to feel less valued as citizens. Even if no actual harm is suffered, whistleblowers should not be treated unfairly as a result of exercising the human right to freedom of expression. In the author’s view, the human rights arguments which justify EU Directives dealing with discrimination could usefully be extended to whistleblowers. Indeed, a whistleblowing initiative at EU level would also provide a much needed opportunity to reconcile the demands of privacy contained in the Data Protection Directive 95/46/EC with the principle of freedom of expression.


38 Some of the specific benefits of placing whistleblowing under a general anti-discrimination umbrella at EU level are outlined in Appendix 1

39 Directive 95/46/EC applies to whistleblowing arrangements because they are highly likely to involve the collection, registration, storage, disclosure and destruction of data related to an identifiable individual. See generally: Lewis,D. 2011 “Whistleblowing and data protection
In addition to the matters previously discussed, for example burden of proof and penalisation, some of the specific benefits of placing whistleblowing under a general anti-discrimination umbrella at EU level would be as follows:

(1) In terms of coverage, one of the major attractions would be that protection could be afforded in fields other than employment. The extension of rights would send an important general message about the desirability of having a culture of openness.\footnote{For example, the effect might be to encourage patients to raise concerns about their medical treatment, parents about schools, students about colleges and universities and members of the public about the provision of services by central and local government.}

(2) Another significant gain would be the outlawing of discrimination at the point of hiring. It is acknowledged that unlawful behaviour in the recruitment process is relatively easy to conceal. Nevertheless, the EU has thought it necessary to regulate this activity as regards discrimination on the grounds of sex, sexual orientation, race, religion and belief, disability and trade union membership.

(3) Specific mention of liability for harassment would obviously be beneficial to whistleblowers since it allows attention to focus on either the purpose or effect of unwanted conduct. Such provision would also avoid the need to persuade a court or tribunal that the violation of dignity or the creation of an "intimidating, hostile, degrading, humiliating or offensive environment" constituted a detriment. Similarly, applying the concept of victimisation would strengthen the protection afforded to whistleblowers.

(4) Related to the issue of victimisation are provisions which specifically deal with relationships which have come to an end. Even though it might be difficult to show that the discrimination "arises out of and is closely connected to the relevant relationship", specific protection against post-employment reprisals...
would be a welcome addition to the whistleblowers’ armoury.\footnote{See generally: Lewis, D. 2005 ‘Providing rights for whistleblowers: would an anti-discrimination model be more effective?’ \textit{Industrial Law Journal} Vol.34 No.3 pages 239-252.}