



## 2018 OECD GLOBAL **ANTI-CORRUPTION & INTEGRITY FORUM**

# **Embracing the Challenges and Opportunities of Cross-jurisdictional Whistleblowing**

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Multi-national and globally engaged companies present challenges for regulators and law enforcement. As companies extend their global reach, regulators and law enforcement bodies must do the same. Effective oversight requires effective co-operation between global regulatory and law enforcement partners. Employees working for these organisations can provide a unique insight into corrupt practices and act as a valuable intelligence source for regulators and law enforcement bodies, particularly where the alleged misconduct extends beyond their jurisdictional research. Across Europe and the rest of the world, whistleblowing is gaining increased acceptance. Policy makers and civil society are seeing the value of supporting whistleblowing and strengthening protections for those who come forward.

The purpose of this paper is to critically assess the role of whistleblowers who raise cross-jurisdictional concerns. The paper will provide several case-study examples of cross-jurisdictional whistleblowing, highlighting the challenges faced by whistleblowers and recipient organisations. It also will highlight cross-jurisdictional initiatives to support and handle whistleblowing concerns. It will ultimately recommend several points of good practice to support policy makers, civil society and regulatory and enforcement bodies.

**Key words: whistleblowing – corruption – international co-operation**

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## **1. Introduction**

The rapid advancement in technology has allowed national and multinational organisations to grow beyond the confines of traditional geographical borders. As companies grow, anti-corruption agencies and regulators must adapt their oversight and detection capabilities to meet these challenges. At the same time, whistleblowers are increasingly using cross-border spaces to raise concerns to the media, whether it be due to favourable media partnerships, the location of online platforms, the promise of protection or the ease in which to disclose information. The problem is that many of these stories reach the media only once wrongdoing has reached a significant threshold or become systemic. The damage has already been done and whistleblowers risk unquantifiable levels of harm in the process as they might be in a legal vacuum or at least face an uncertain outcome if their identity was to become known.

Thus, a crucial question is if things could be handled differently? What if anti-corruption agencies and regulators could harness the power of whistleblowing concerns at an early stage, responding proactively, before cases escalate, elaborate corruption schemes take hold and before vast quantities of assets disappear? What if they could offer support and even protection to the whistleblower creating a culture whereby individuals feel empowered to speak up once they identify a corruption risk or potentially corrupt conduct? Could such proactive measures even harness a deterrent effect and contribute to corruption prevention? And could responsible communication with the whistleblower and handling of whistleblower concerns reduce the risk of retaliation against whistleblowers and need for subsequent protection?

The purpose of the aforementioned questions is not to create an unrealistic, idealistic utopia, but to challenge the often-held contention that whistleblowing can only ever end badly. Put simply, the dilemma is two-fold: anti-corruption bodies and regulators need to increasingly operate cross-border, but lack the resources (and sometimes the powers) to maintain effective and sustained oversight. Individuals who work for organisations which operate cross-border need support and protection but face a myriad of complex legal uncertainties.

Whilst more research is needed in order to develop solutions for all possible complex case scenarios, this paper attempts to lay the ground work by attempting to explore the position of whistleblowers beyond national boundaries. Based on research which is still at an early stage, it will highlight a number of key considerations for policy makers and anti-corruption agencies dealing with the issue of cross-border whistleblowing. Such are the level of complexities, conflicts of laws, policies and procedures that it would be impossible to provide a perfect, one-size-fits-all solution. There is a need to focus on practical, pragmatic joint-working arrangements with an emphasis of dealing with the issue

‘bottom-up’, whilst waiting for international solutions to be provided ‘top-down’, which could still take time.

This paper will argue that international dialogue is needed to determine the key foundational principles for whistleblowing in anti-corruption and its uses. The paper will use case-scenarios and examples to highlight potential problems and issues to consider in cross-jurisdictional whistleblowing. The paper will ultimately recommend several points of good practice to support policy makers, civil society as well as regulatory and enforcement bodies.

### 1.1 The rapid increase in whistleblower protection laws and policies

During the last decade, whistleblower protection has gained global recognition resulting in an ever-increasing number of countries introducing whistleblower protection laws and policies. At a European level, there have been strong efforts to introduce an EU-wide whistleblower protection law.<sup>1</sup> Moreover, this development can currently be witnessed not only in Europe<sup>2</sup> and South East Europe,<sup>3</sup> but also in Africa<sup>4</sup> and Asia. Regional bodies might soon also put the topic on their agenda. The East African Legislative Assembly, for example, expressed a plan to draft an EAC Whistleblower Protection Bill<sup>5</sup> and in 2017 the Asia-Pacific Economic Cooperation organised a workshop on whistleblower protection and started drafting guidelines for its member states.<sup>6</sup>

This surge in whistleblower protection laws is particularly fuelled by actors engaged in the prevention and fight against corruption and international standards or recommendations on reporting corruption. Amongst, the most prominent examples are:

- the United Nations Convention against Corruption (UNCAC), article 33;

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<sup>1</sup>Parliament Moving Forward on Whistleblower Protection: <https://www.greens-efa.eu/en/article/news/parliament-moving-forward-on-whistleblower-protection/> (accessed 02/02/2018).

<sup>2</sup> For example, Holland: Whistleblowers Authority Act 2016 and establishment of a whistleblowers authority, the ‘Huis Voor Klokkeluiders’: <https://huisvoorklokkeluiders.nl> (accessed 13/02/2018).

<sup>3</sup> For example, Albania (2016), <https://www.parlament.al/wp-content/uploads/2016/06/ligj-nr.-60-dt.-2.6.2016.pdf> (accessed 14/02/2018).

<sup>4</sup> For example, Tanzania: Whistleblowers and Witness Protection Act No. 20 of 2015.

<sup>5</sup> EALA, EALA Roots for Concerted Efforts in Combating Corruption <http://www.eala.org/index.php/media/view/eala-roots-for-concerted-efforts-in-combating-corruption> (accessed 14/02/2018).

<http://www.eala.org/index.php/media/view/eala-roots-for-concerted-efforts-in-combating-corruption>

<sup>6</sup> APAC, Report on APEC Workshop on Enhancing Whistleblower Protection in Corruption Cases, 2017 [http://mddb.apec.org/Documents/2017/SOM/SOM3/17\\_som3\\_014.pdf](http://mddb.apec.org/Documents/2017/SOM/SOM3/17_som3_014.pdf); (accessed 14/02/2018) <https://whistleblower.tier.org.tw/agenda.aspx> (accessed 14/02/2018).

- the Council of Europe Civil Law Convention on Corruption, article 9 and multiple recommendations on the protection of whistleblowers from the Council of Europe Committee of Ministers and General Assembly;
- the Recommendations IX i) – iii) on reporting foreign bribery of the OECD Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions<sup>7</sup>.

Following the reviews of such international standards<sup>8</sup> and increased pressure from civil society groups and other stakeholders, multiple states have, or are about to, strengthen whistleblower protection laws or policies. This development is, on the one hand, a great opportunity to reach more global protection of whistleblowers. The new laws and policies, even if they might still show gaps, can provide a first framework for whistleblowers and receiving agencies to operate in and be a baseline from which to develop. One of the most advanced states in terms of whistleblower protection, the Republic of Korea, also started with whistleblower protection provisions in its anti-corruption law and then gradually upgraded the legislation based on lessons learnt. If the core principle of whistleblower protection becomes recognised more globally, this will enable the next level of international dialogue.

On the other hand, the anti-corruption standards which fuel the current development were never set out to deal with all the other aspects of whistleblower protection, but only focused on the reporting of alleged corruption. Arguably, states are trying to develop effective whistleblower protection laws without a coherent, shared understanding of the most important foundational principles. Moreover, adopting a whistleblower protection law which only protects individuals for raising anti-corruption concerns may fail to allow other disclosures which, if investigated, could lead to anti-corruption concerns. For example, disclosures relating to poor food safety practices or harm to the environment could reveal that the catalyst for those breaches were the payment of corrupt bribes to safety inspectors. Ultimately, there is a danger that a mismatch in the way anti-corruption bodies handle concerns will result in individuals failing to obtain legal protection or that their concerns will simply not be addressed.

## **2. Does terminology matter?**

Despite its wide acceptance in everyday language, the term ‘whistleblower’ lacks a universally accepted definition (Lewis, 2001). The impact of this goes beyond mere application of language. The

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<sup>7</sup> OECD, Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, page 23 : [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

<sup>8</sup> OECD, Fighting the Crime of Foreign Bribery, <http://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf> (accessed 14/02/2018).

interpretation of what constitutes a whistleblower, the types of concerns which constitute whistleblowing speech and the circumstances which justify protection have a direct impact on national and international policy, on how laws are drafted and how procedures are implemented. The OECD defines whistleblowing as:

“Legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace.”<sup>9</sup>

The OECD definition provides a wide scope, capturing the disclosure of whatever kind of ‘wrongdoing.’ The Council of Europe follows a similarly wide approach, making reference to the disclosure of information “on a threat or harm to the public interest” without further defining the term ‘public interest.’

At a global level, in particular Article 33 of UNCAC plays a role and contributed to some recent efforts by states to move towards whistleblower protection. UNCAC does not seek to utilise or define the term ‘whistleblower’. Instead it focuses on the terminology ‘reporting persons’ which takes into account the fact that whistleblower may not translate easily into other languages. The Article identifies that states should:

“Consider measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption offences.”

Because the aim of UNCAC is to combat corruption, it is not surprising that the definition in art.33 is restricted to corruption offences. However, as a consequence the definition fails to cover information which would not amount to a corruption offence or wider issues concerning wrongdoing, as already noted above.

In addition, in receiving a whistleblower concern, anti-corruption agencies will often need to consider when it is prudent and proportionate to take action, according to their national legislation, where they may have a margin of discretion to act. The situation is further complicated because of the technical nuances of domestic laws. The precise drafting of legislation to prohibit certain categories can still be open to interpretation. The practical impact of the law when it is applied can look different to how it appears on paper. Determination of whether to take action may be also be against a backdrop of agencies needing to meet their own strategic targets set to combat national-centric priorities. As identified in the hypothetical case scenario below, the interpretation of wrongdoing and application in practice can result in negative consequences for whistleblowers.

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<sup>9</sup>OECD, *Committing to Effective Whistleblower Protection*, 2016, page 18: <http://dx.doi.org/10.1787/9789264252639-en> (accessed 11/02/2018).

## 2.1 Case scenario:

*A person raises a concern to an authority based in another jurisdiction on a matter they consider to be about wrongdoing and to be in the public interest based on their own belief and knowledge of legal principles in their own jurisdiction. It transpires that their disclosure does not fit within the definition of wrongdoing prescribed by law in that jurisdiction. The person fails to obtain protection and the authority does not investigate.*

What constitutes a whistleblower concern, how the public interest is defined and how applicable laws are interpreted and balanced against each other are all issues that require careful consideration by policy makers, agencies and courts to identify where the boundaries of protection should be drawn.

For example, Antoine Deltour, an employee of Price Waterhouse Coopers, made unauthorised disclosures of information on tax deals. Deltour was convicted, but the conviction was subsequently overturned on appeal when the court applied the European Court of Human Rights' standards to protect whistleblowers. To date, the leaks did not result in prosecutions of individuals for tax evasion. Instead, they resulted in wide-spread criticism of the international tax regime and inquiries on how the rules could be tightened. Likewise, the Panama Papers and Paradise Papers relate to disclosures concerning the use of off-shore tax havens. Arguably, these disclosures blur the traditional boundaries of whistleblowing speech when confined to illegal activities alone.

Vickers makes a distinction between 'watchdog whistleblowing' and 'protest whistleblowing' (Vickers, 2002, Lewis, 2001). Watchdog whistleblowing would cover concerns relating to wrongdoing or malpractice whereas protest whistleblowing allows individuals to raise concerns where, based upon their experience or expertise, they believe the information to be harmful to the public interest. Because the Strasbourg court does not distinguish between the different types of concern or confine itself to a rigid definition of the 'public interest' it allows scope for determination of whistleblower concerns on a case-by-case-basis weighing up the public interest value of the expression depending on the particular facts of the case before the court (for further discussion see Savage, 2016). Signatories to the European Convention of Human Rights must exercise caution before applying a rigid and restrictive definition of wrongdoing. Policy makers and anti-corruption agencies should consider the scope their own whistleblower protection laws and the impact on the implementation of policy and handling of whistleblower concerns.

## **3. Legal requirements to act on concerns: express versus 'implied'**

When whistleblower protection laws are drafted, some provide whistleblower protection, but do not establish statutory rules or procedures for organisations to handle whistleblower concerns.<sup>10</sup> In the United Kingdom, for example, the law allows individuals to make disclosures to prescribed persons under s.43F, Public Interest Disclosure Act 1998 (PIDA). The Serious Fraud Office and Financial Conduct Authority, both with a remit to investigate corruption related matters are prescribed, but they are not required under PIDA to do anything but report on the number of whistleblower concerns received and acted upon.<sup>11</sup> As extensive research by Savage and Hyde argues, this had led to inconsistent handling of whistleblowing concerns by regulators across the United Kingdom (Savage, Hyde 2014).<sup>12</sup> Prescription effectively creates an implied obligation to support whistleblowers, but without any legal consequences under PIDA if the regulators fail to do so. In contrast, the new Italian whistleblowing law places responsibility on the national anti-corruption authority, the Autorità Nazionale Anticorruzione (ANAC) to receive concerns, provide an anonymous communication platform and to issue administrative fines for retaliatory action.<sup>13</sup> In Australia, the Public Interest Disclosure Act 2013, part 3 contains detailed statutory obligations on the investigatory process. In Canada, whistleblower protection for public servants is reliant upon use of the agency Public Sector Integrity Canada to obtain an investigation and referral to an administrative tribunal for protection against retaliatory action.<sup>14</sup> The aforementioned information highlights the lack of consistency in how whistleblowers may be handled by recipient organisations. Where the law does not require anti-corruption organisations to respond to whistleblower concerns they may fail to do so. The whistleblower therefore has no further options unless they raise the concern to the media or wider public, increasing the risk of retaliation as a result.

Where the whistleblower law is procedurally rigid, requiring the whistleblower to raise a concern to a particular agency or organisation to obtain protection, this can create a particular problem for cross-border or extra-territorial whistleblowers as illustrated in the following hypothetical case scenario:

### 3.1 Case scenario

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<sup>10</sup> For example, the United Kingdom: Public Interest Disclosure Act 1998, the Republic of Ireland: Protected Disclosures Act 2014.

<sup>11</sup> Subject to reforms enacted as a result of the Enterprise and Regulatory Reform Act 2013.

<sup>12</sup> A point also highlighted by the National Audit Office, The Role of Prescribed Persons, 2014: <https://www.nao.org.uk/wp-content/uploads/2015/02/The-role-of-prescribed-persons.pdf> (accessed 13/02/2018). For further criticism of prescribed regulators see: Arron Philips and David Lewis, Whistleblowing to Regulators: Are Prescribed Persons Fit for Purpose? <http://eprints.mdx.ac.uk/14394/1/WhistleblowingReport.pdf> (accessed 12/02/2018).

<sup>13</sup> See further, ANAC website:

<https://www.anticorruzione.it/portal/public/classic/Servizi/ServiziOnline/SegnalazioneWhistleblowing> (accessed 12/02/2018).

<sup>14</sup> See further PSIC website: <http://www.psic-ispcc.gc.ca/eng> (accessed 12/02/2018).

*A lives and works in a jurisdiction which has a whistleblowing law allowing him to obtain protection if he raises a concern to the anti-corruption agency. A's company, however, is based at the other side of the globe, in a country without similar protection. The anti-corruption agency in A's jurisdiction lacks the resources to mount a joint investigation on a matter not affecting their home jurisdiction. The best place for A to raise his concern so that it may be acted upon is to the anti-corruption agency in the jurisdiction where the company is based, but if he does so he loses the right to whistleblower protection.*

This is just one of many examples which need to be considered if policy makers want to protect workers in the modern, international, globalised workspace. Policy makers should consider whether their domestic whistleblower protection law allows individuals to raise concerns extra-territorially. Anti-corruption bodies need to consider ways of joint working or effective information sharing which would allow the whistleblower to still obtain protection even where the whistleblower law only offers a procedurally rigid domestic disclosure route.

#### **4. Extra-territorial jurisdiction and difficulties**

Individuals working in foreign countries for companies based in their home jurisdiction may encounter difficulties in obtaining legal protection under the whistleblowing law in their home jurisdiction. The United Kingdom Public Interest Disclosure Act 1998, for example, requires workers to have a UK based employment contract. Ian Foxley, worked for the UK-based company GPT in Saudi Arabia. Foxley raised allegations of corrupt payments to the UK based authorities. Foxley was unable to bring an unfair dismissal claim under the UK's whistleblower law because he lacked a UK-based employment contract.<sup>15</sup> In another example, Jonathan Taylor, based in the United Kingdom, raised concerns alleging that the Dutch oil company he worked for, SBM, had paid bribes in several countries. He later provided information to authorities in the Netherlands, Brazil, the United Kingdom and the United States. Taylor's employment contract was based in Monaco. SBM brought legal proceedings for defamation against Taylor before the Dutch courts.<sup>16</sup>

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<sup>15</sup>FCPA, Whistleblower Ian Foxley Takes a Beating and Still Looks Himself: <http://www.fcpablog.com/blog/2014/12/17/whistleblower-ian-foxley-takes-beating-still-looks-himself-i.html> (accessed 01/02/2018).

<sup>16</sup>Vridj Nederland, The cover-up at Dutch multinational SBM: <https://www.vn.nl/the-cover-up-at-dutch-multinational-sbm/> (accessed 01/02/2018).

Whistleblower protection laws are generally reliant upon enforcement before the domestic courts or by domestic agencies. This presents difficulties if the whistleblower's employer is based in a different jurisdiction and fails to comply with a court order. If proceedings are sought in the employer's jurisdiction to obtain enforcement of the order, there is no guarantee that the courts will acknowledge the order. If extradition is sought, the country requesting extradition must have an extradition treaty in place. The jurisdiction wishing to grant extradition could refuse to extradite on the basis that the failure to comply with a court order for mistreatment of a whistleblower does not meet the test of dual criminality, meaning that something which is illegal in one jurisdiction may not be legal in the other.

Whilst the complexities of cross-jurisdictional whistleblowing can restrict access to whistleblower protection laws, they also reveal the potential for unknown risks for individuals who may be subject to prosecutorial action in another jurisdiction for activities relating to the raising of concerns. For example, an individual could risk breaching defamation, public or private secrecy laws in a different jurisdiction, even if they do not apply in the jurisdiction where they are based. Whistleblower protection laws are not the only consideration here, the public interest tests and exemptions applying to a myriad of different laws concerning disclosure create issues which must be considered by policy makers, prospective whistleblowers and the anti-corruption body themselves. There is no guarantee that an anti-corruption body which ordinarily provides safeguards to allow individuals to disclose documents to them will not encounter difficulties when documents are disclosed from another jurisdiction. In such a case it is highly likely that it is the whistleblower who will be placed in a precarious position as a result of the disclosure as illustrated in the hypothetical case scenario below:

#### 4.1 Case scenario:

*A works for a company operating in the United Kingdom and a country (X) based in another jurisdiction. He discloses documents to an anti-corruption body in the UK, however in disclosing the documents he is in breach of the law of Country X. A has a UK employment contract and thus can bring a claim under the Public Interest Disclosure Act 1998. However, because he is the subject of a criminal prosecution the proceedings must be suspended until the case has been dealt with. If A is convicted of a criminal offence he would lose his right to protection under PIDA as workers must not commit a criminal offence in making the disclosure.*

Whilst one would hope that a person in such a situation could assert art.13 European Convention of Human Rights, (the right to an effective remedy) there is no guarantee that a tribunal in the UK would hear the claim. Moreover, the suggested scenario highlights technical difficulties which would be extremely costly to rectify before the courts, particularly where more than one legal jurisdiction is

involved. It is suggested that anti-corruption bodies must seek to co-operate with each other at an early stage in order to avoid causing harm to the whistleblower's position.

It would be advisable for anti-corruption agencies to be proactive and prudent during the initial communication with a whistleblower. Where the whistleblower is in possession of documents, the anti-corruption body should, for instance, consider the potential impact of the individual disclosing these. If unsure about the impact and potential legal consequences, they should obtain advice depending on the jurisdiction in question and should consider whether it was necessary for the individual to disclose the documents asking whether it was possible to obtain the documents in another way, such as by search and seizure of the material in co-operation with an anti-corruption body based in the other jurisdiction. The following section will briefly identify potential problems for mutual legal assistance.

## **5. Mutual legal assistance and international co-operation**

If anti-corruption bodies are to harness the power of whistleblower concerns, they need to be able to share the information with counterparts based in other jurisdictions. The sharing of information through mutual legal assistance can present challenges. A report by UNODC focussing on mutual legal assistance suggests that the time taken to effectively respond to requests can depend on mutual assistance laws, processes in the requested county and the competent court. It is here where neighbouring countries or States with a 'similar legal, political or cultural background as the requested state' have an advantage.<sup>17</sup> The report also highlighted difficulties for information sharing. Although INTERPOL I-24/7 is used by many agencies it

"could not replace direct channels of communication with law enforcement authorities, agencies and services of other States. The scarcity of such channels beyond the regional context was a common feature among States parties."<sup>18</sup>

The aforementioned findings suggest that more work needs to be done to enhance joint working and information sharing practices. If anti-corruption bodies are to share whistleblowing concerns they need to do so effectively. If the aim of the whistleblower's disclosure is to raise a concern to prevent wrongdoing before it takes place or before consequences become more serious, there is a need for authorities to respond quickly. The establishment of joint-working practices and the introduction of domestic laws which are free from legal complexity help to provide a step in the right direction.

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<sup>17</sup>UNODC, *State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Co-operation*, Second Edition, 2017, page 241.

<sup>18</sup> *Ibid*, page 249.

In order to deal with anti-bribery investigations, the Australian Federal Police (AFP) have overseas liaison officers based in 33 countries working in partnership with foreign law enforcement.<sup>19</sup> Despite this the AFP note that the most common challenge in conducting international investigations is ‘obtaining evidence from abroad.’<sup>20</sup> Another example of good practice may be found in Sweden, which has adopted a flexible approach to mutual legal assistance by amending the Act on International Legal Assistance in Criminal Matters.<sup>21</sup> The amendments remove requirements for dual-criminality for ‘non-coercive matters’ and have removed other complexities such as statute-barred disclosures as a reason for refusal.

## **6. Understanding the value of whistleblower speech and accepting its potential limitations**

From the outset, anti-corruption bodies need to decide about the value of whistleblowing speech for their detection and oversight efforts and to adjust their handling of concerns accordingly. If they are to embrace the opportunities of cross-border whistleblowing, they need to consider whistleblowers as an intelligence source, an important tool used with other methods of intelligence gathering and detection. At an early stage, it can be unhelpful to consider cross-border whistleblowers as witnesses, providing oral and written testimony to build a criminal prosecution. Witness protection and whistleblower protection are two distinct mechanisms which should not be confused and do not need to be adopted in tandem unless the whistleblower agrees to later become a witness and faces retaliation as a result. There are several reasons why the two mechanisms should be kept separate, particularly in the context of cross-border whistleblowing.

In practical terms, whistleblowers risk their employment position and potentially their physical safety to raise their concerns. In the first instance, the aim of their disclosure is to provide a ‘tip off’ for anti-corruption bodies to act. A tip-off is often short, sharp and immediate. Treatment of the whistleblower as a witness will undoubtedly take more time, witness statements need to be drafted, checked and finalised. In order to be used at the prosecution stage, witness statements will often be submitted as evidence and the witness may be required to testify in open court. Court trials can be lengthy processes which can attract publicity. Prospective whistleblowers are most likely to be deterred from raising their concern in the first place if they must be immediately be treated as witnesses.<sup>22</sup> Most

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<sup>19</sup>OECD, Implementing the OECD Bribery Convention, Phase 4 Report: Australia: <http://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf> (accessed 14/02/2018).

<sup>20</sup> *Ibid.*

<sup>21</sup> OECD, Sweden Follow-up to the Phase 3 Report & Recommendations, 2014, page 25: <http://www.oecd.org/daf/anti-bribery/Sweden-Phase-3-Written-Follow-Up-Report-EN.pdf> (accessed 21/01/2018).

<sup>22</sup> There is also an issue with the quality of protection afforded to witnesses in contrast to whistleblowers, an OECD review into Portugal’s arrangements held that the witness protection was not sufficient to protect whistleblowers: OECD, Portugal: Follow-up to the Phase 3 Report and Recommendations, page 6:

importantly, whistleblowers attempting to raise their concerns on a confidential basis risk being exposed by the actions of the anti-corruption body or regulator, this can happen whenever an agency investigates concerns. In the United Kingdom, the Financial Conduct Authority (FCA) was recently criticised following an investigation by the Financial Regulation Complaints Commissioner for disclosing the identity of a whistleblower to the Royal Bank of Scotland during the course of an investigation. The FCA had assumed that the individual had consented to the disclosure of his identity without obtaining express authorisation. The FCA has adopted a new policy whereby individuals contacting the regulator as immediately asked “how they wish to be treated and the protection they require.”<sup>23</sup> Most importantly the FCA provides information on “information about the different ways in which they may wish to be treated and what that means for the information they provide.” It is submitted that if they do not do so already, it is good practice for anti-corruption bodies and regulators to provide explicit guidance to whistleblowers on how they will use the information and the impact that this may have on the whistleblower’s position.

### 6.1 Good faith vs bad faith

It is good practice for anti-corruption bodies and regulators to determine whether they are prepared to accept whistleblower disclosures made in bad faith and the potential impact of doing so. Bad faith disclosures can be made when a person makes a disclosure motivated for private reasons. They could be mixed up in the wrongdoing and are raising the concern in order to obtain a plea-bargain or undertaking that they will not be prosecuted for coming forward. They could be disclosing information they know to be false in order to get revenge against the alleged wrongdoer or organisation. They could also be motivated by revenge but the information disclosed is true. The British Standards Institute, Code of Practice on Whistleblowing provides an example of where an individual might seek revenge after a romantic affair had ended in acrimonious circumstances.<sup>24</sup> Anti-corruption bodies and regulators must therefore take care to not always equate bad faith disclosures with false reports.

It is extremely important that authorities determine the correct approach to deal with bad faith disclosures, especially if these originate from an individual based in another jurisdiction. If the agency is treating information originating from whistleblowers as an intelligence source, provided the information is true, the motivation for disclosure is less important. However, if the agency treats the

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<http://www.oecd.org/daf/anti-bribery/Portugal-Phase-3-Written-Follow-Up-Report-ENG.pdf> (accessed 02/02/2018).

<sup>23</sup>Financial Regulation Complaints Commissioner decision, <http://frccommissioner.org.uk/wp-content/uploads/FCA00286-FD-for-publication-160118.pdf> (accessed 14/02/2018). See also, British Regulator Told to Apologise to RBS Whistleblower: <https://www.reuters.com/article/britain-fca-whistleblower/british-regulator-told-to-apologise-to-rbs-whistleblower-idUSL8N1PB6BM> (accessed 14/02/2018).

<sup>24</sup><https://shop.bsigroup.com/forms/PASs/PAS-1998/> (accessed

whistleblower as a witness, the motivation for making the disclosure will likely be of relevance if there is a criminal trial. Bad faith disclosures are likely to weaken the prosecution case where defence advocates can seek to test the motivation of the whistleblower to challenge the accuracy of their testimony.

Whilst good faith remains an important consideration in several of the international definitions of whistleblowing, legislators and policy makers are starting to appreciate the value of not requiring disclosures to be made in good faith. In 2013, for example, the United Kingdom Parliament enacted new legislation to remove the term ‘good faith’ from evidential requirements listed in the Public Interest Disclosure Act 1998.<sup>25</sup> Employment Tribunals are now required to consider good faith only at the remedies stage of the tribunal proceedings whereby they may apply a 25% reduction on the settlement awarded if a finding of bad faith is made. In the Republic of Ireland which may be arguably described as influenced by the UK legislation but with more comprehensive coverage and clearer substantive provisions, legislators did not include good faith at all. A distinction can be made between laws which only provide whistleblower protection and laws which also regulate the disclosure and handling of whistleblower concerns.

## 6.2 Anonymous reporting

Anti-corruption bodies should consider whether it is appropriate to receive concerns on an anonymous basis. Online platforms which offer anonymity are being introduced in jurisdictions as the technology progresses.<sup>26</sup> It should be noted that there is a distinction between anonymous and confidential whistleblowing. Anonymity can mitigate the risk of exposure of the whistleblower but can result in difficulties when the individual later attempts to obtain legal protection for detrimental treatment or dismissal. On a practical level, it will be difficult for the whistleblower to assert that they raised the concern without providing proof that they disclosed information to the authorities. Their employer can also deny that they had knowledge of the whistleblower’s identity in an attempt to escape liability for causing harm. Anti-corruption bodies should therefore assess whether the communication methods offered are compliant with applicable laws and should exercise caution when receiving concerns from outside of their jurisdiction. As a practical suggestion, agencies and regulators can offer individuals a reference number as proof of contact where they do not feel able to disclose their identity.

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<sup>25</sup> Enterprise and Regulatory Reform Act 2013.

<sup>26</sup> For example, the Italian whistleblowing law provides for an anonymised online platform using TOR, see further: <http://ehoganlovells.com/rv/ff00355f331f8f75eb9bbf116a4e972b1178e388> (accessed 15/02/2018).

### 6.3 Adapting exemplars of good practice to reflect domestic state realities

Many jurisdictions which provide examples of ‘good’ whistleblower protection laws are not readily applicable in states where anti-corruption bodies, regulators, public and private sector organisations lack the resources or capacity to effectively deal with whistleblower concerns. Even in well-developed democratic societies the establishment of one agency to handle concerns may not be the best option. For example, Public Sector Integrity Canada received criticism for its failure to investigate concerns and protect whistleblowers. In other jurisdictions there have been efforts to implement a central whistleblower agency to co-ordinate the handling of whistleblowing concerns.

## 7. Conclusion

This paper has provided an introductory analysis into the various complexities surrounding cross-border whistleblowing. More in-depth research is required to fully appraise the issues and will be carried out, inter alia, in the coming months as part of a research project funded by the Open Society Initiative for Europe assessing the situation and impact of whistleblowing and unauthorised disclosures in multiple European countries. From the preliminary research it is evident that whilst waiting for international solutions to this very complex issue, anti-corruption bodies can utilise a range of practical steps to support whistleblowers who raise concerns. This is particularly important where an individual who raises the concern is based in another legal jurisdiction and the domestic law applicable to the jurisdiction of the anti-corruption body may not apply. Early stage intervention is key, it is much easier to deal with the concern proactively by treating the whistleblower as a source of intelligence and the more care the anti-corruption body can take to handle the concern the better. Whistleblower protection laws most often apply when the individual needs to obtain legal protection for suffering some form of detrimental treatment or dismissal. Whistleblowers will often not need to use these laws unless things go wrong. Anti-corruption bodies can utilise practical steps to help ensure that things do not.

From the outset, the anti-corruption bodies and regulators should aim to provide clear practical guidance on their website which explains how whistleblowers can contact their organisation, what will happen to the concern and any legal protection which may apply. They should exercise caution in providing advice or instructions which only apply to individuals raising concerns domestically and should consider providing different advice where concerns are received from outside of the jurisdiction. This is particularly important where the domestic whistleblower protection law requires individuals to take procedurally rigid steps to raise concerns.

The agency should consider offering a range of communication methods to be contacted by the individuals and the potential impact of these for cross-jurisdictional whistleblowers. Secure drop-boxes may offer a good way of obtaining disclosed documents and may be consistent with the national law of that jurisdiction, but they may also place whistleblowers raising concerns from other jurisdictions at risk of prosecution. Clear and prominent guidance should be issued to inform individuals who use such a service of the potential risks. Two-way communication platforms may be preferable because they allow the recipient agency to request further explanation where the concern raised is unclear. It also allows for the whistleblower to be updated on progress of the investigation.

The anti-corruption body should aim to be prudent with the information obtained and later utilised as part of an investigation. They can reduce risks by not requiring whistleblowers to disclose documents where to do so may render the individual in breach of the law and should consider whether it is more appropriate to obtain the documents through co-operation with anti-corruption bodies based in the jurisdiction in question.

Anti-corruption bodies and regulators can also employ tactics as part of the investigation process to minimise exposing the whistleblower to harm. They should not disclose that they are acting on information originating from a whistleblower unless they have been authorised to do so by person disclosing the information. They should exercise caution when acting on information which is only known by a small number of individuals so as not to expose the whistleblower's position. Investigators could deliberately widen the scope of the investigation and/ or include the whistleblower as one of those investigated in order to shield the individual from exposure as the source.

More broadly, anti-corruption agencies and regulators should aim to share good practice on whistleblowing and work towards a shared understanding on how to deal with whistleblower concerns. In particular, it would be advisable to develop baseline standards which acknowledge international good practice but also allow for differences in legal institutional frameworks. Policy makers at a national level should consider whether their domestic laws are sufficiently robust to protect and encourage whistleblower concerns from outside of the jurisdiction. More widely, on an international level development of international initiatives, for example the work to introduce an EU-wide whistleblower law presents very positive step in the right direction.

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