BLOWING THE WHISTLE ON CORRUPTION


RESTARTING THE
FUTURE

CAMPAIGN FOR AN EUROPEAN DIRECTIVE IN DEFENCE OF WHISTLEBLOWERS

REPORT

TABLE OF CONTENT

Acknowledgments

This summary report was commissioned by Libera and Gruppo Abele as part of the Restarting the Future Campaign towards an European Directive on Whistleblowing.

Daniele Santoro, Manohar Kumar, Martina Turola, Leonardo Ferrante and Francesco Quarta contributed to this report.

We thank Chiara Felli and Jasmin Hasić for their help of the elaboration of the data, as well as Federico Anghelé, Elisabetta Bosio, Angela Gennaro, Francisco Milan Martinez and Eugenio Orsi of Restarting the Future for the technical support.

Special thanks to Anna M. Buzzoni who contributed pro bono advice to the policy proposal on whistleblowing.

INTRODUCTION

Corruption drains resources from local and national constituencies, causing an uncontrolled rise in public expenditure and a distrust in the justness and efficiency of democratic institutions. It raises grave concerns of justice since funds, meant for public use, are diverted from their intended beneficiaries. A handful of elite powers and forces control resources thus enhancing and often exacerbating existing inequalities. The incentives for corruption often exist when individuals, within positions of authority, have the power to manipulate and use resources for their benefit, with the knowledge that they would not be caught in the process. Despite such grave stealing of resources due to corrupted officials, justice prevails often due to the act of conscientious individuals raising their voice, or bearing witness and providing testimony to the wrongs done. It is only through the act of leaking and revealing information thanks to individuals working within the same organisation, that a sense of justice can prevail. Concealed - as they are - in shrouds of secrecy, corruption often can only be revealed through the active intervention of the whistleblowers who, by sharing information with the competent authorities or by revealing them to the public opinion, seek to remove the cancerous growth of corruption or illicit practices within an organisation.

Democratic institutions should not only protect acts of whistleblowing but also encourage and incentivise them. It is only when the 28 countries of the European Union will recognize as a duty to provide important legal as well policy safeguard and incentives for whistleblowing, that hard cases of corruption - which escapes normal institutional scrutiny - can be eradicated. We believe that the right to protection of whistleblowers and witnesses of justice corresponds to a fundamental human right that can not be conditional on the policy and legislation of individual States. It is not coincidental that in her public Statement on the whistleblower Edward Snowden, UN Human Rights High Commissioner Navi Pillay has called on all countries to protect the rights of those who uncover abuses and stressed the need to respect the right for people to seek asylum.[1]

For these reasons, Restarting the Future calls upon the European Commission, the Members of the European Parliament, and the European Council to take immediate action to promote a Directive on the protection of whistleblowers and witnesses of justice. The goal of the present policy proposal is to argue for a strong legislation on whistleblowers' protection by looking at the current legislation among different European States and compare, it with international best practices, and understand the loopholes that might exist and propose suggestions for reform.

1. WHY WE NEED A EUROPEAN DIRECTIVE ON WHISTLEBLOWING

Corruption does not merely affect domestic constituencies but, often its impact is felt beyond national borders. An increasingly globalised scenario in terms of trade, finance, people and information means that domestic policies can have repercussions beyond its originally intended participants. When corruption has an international dimension, often those who are affected by corruptive practices have no say in the policy process, or cannot seek redress. This has been exemplified in the PRISM revelations by Edward Snowden, where surveillance policy of NSA impacted the privacy rights of individuals worldwide. Similarly, corrupt actions by multinational corporations or transnational actors cannot be controlled through domestic policies, but require a coordinated effort of various State actors. In the absence of such transnational effort, acts of corruption cannot be reined in. At Restarting the Future, our conviction is that an European Directive on whistleblowing would suggest that the

[1] See Navi Pillay's Statement on Snowden's affair on July 2013, available at: http://rt.com/news/un-chief-snowden-protection-048.

Member States, and also European Institutions, are willing to take a tough stance on corruption, that individual appropriation of public office for personal ends will not be tolerated, and that the socio-economic rights of citizens are guaranteed. In the light of its prominent role in championing the protection of human rights, European Union should ensure a substantive enjoyment of rights, which means that all obstacles that impinge upon their enjoyment should be removed. Corruption, by subtracting important resources, threatens some of the basic rights. We thus urge the Members of the European Parliament to promote a directive that addresses this crucial gap.

The Protection of Whistleblowers as a Duty of State

Whistleblowing is the act of disclosing information from a public institution or private organization with the purpose of revealing cases of corruption or secrecy that are of immediate or potential danger to the public interest.[2] Whistleblowing is essential in preventing corruption because of the role insiders play in revealing important information that is not available to either concerned authorities or to the public. Those in power tend to manipulate resources to serve their own self-same ends, often in the knowledge that their activities would go unnoticed. A whistleblower reveals the fact of the corruption and suggests that the given institution or the public officials within it have strayed away from their defined function. Even within the context of private firms an act of corruption breaks the trust that the customer places in them.

Corruption negatively impacts society, polity and by breaking the social trust, or faith placed in an institution. The social terms of cooperation and the contract that binds an institution to either its shareholders, trustees or to the public at large is undermined through an act of corruption. Against practices of corruption, an act of whistleblowing seeks to shine a spotlight over the wrongs done and in the process, it upholds the social trust and forms of co-existence that illegal acts of corruption seek to destroy. A defence of whistleblowing is not only a defence of what is right, but also of the trust that binds human co-existence, the fabric that holds societies and institutions together.

Society and polity is not only judged on the basis of their upholding of justice or punishment of injustice, but also the way it treats its dissenters, the space it provides for their expression and the way they are protected and in some instances even celebrated. The treatment meted out to whistleblowers tests the liberality of political institutions, and how it treats acts of legitimate dissent. As a major defender of the rights of dissenters at home and abroad, the European Union should stand up for the right of those in Institutions to dissent and blow the whistle to uncover acts of corruption. Therefore, whistleblowers should be given protection and incentives because they stand up to defend not only the social terms of cooperation but also ensure that citizens' basic rights are not violated. In the absence of such information, it would be difficult to ascertain cases of gross violations. Thus in circumstances where public systems of public control and accountability are not able to detect acts of corruption, only blowing the whistle can reestablish public accountability and grants the respect of basic rights. This being the case, whistleblowing will fall under the same category of human rights' defenders. It is only when a guarantee against criminalisation and threats is extended to whistleblowers that whistleblowing can be undertaken fearlessly. The act of whistleblowing thus should be recognised as protecting substantive rights and in this regard proper safeguards should be extended to whistleblowers.

---

[2] See Santoro and Manohar Kumar, "A justification of Whistleblowing", unpublished manuscript, available with the authors. Similarly, Transparency International defines whistleblowing as "the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these."See Transparency International, *Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU*, 2013 Report, pag. 87.

Whistleblowing is a fulfillment of moral duty of the individual who is bound to the society through a pact of consent. In doing so, the employee overcomes the narrow confines of legal duty and fulfills the moral duty of upholding justice.[3] It is the duty of the State to protect those who fulfill their moral duty, beyond the confines of their professional duty, and reveal institutional and democratic deficits. In the absence of proper guarantees of protection, not only will such moral acts be less forthcoming, but also the trust in democratic institutions to correct wrongs will wane. This will also lead to a decline in the trust in democracy in the long run. Individuals and citizens will not trust the State in protecting their fundamental rights when such revelations are not acted upon, and when whistleblowers are not provided with their due. It is in the interest of democracy that citizens trust the institutions that govern them; a threat to whistleblowers would be symptomatic of a larger threat to democratic institutions in the long run. Only a strong whistleblower protection legislation would make it binding on all State actors and institutions to facilitate channels of dissent of the kind that strengthens democracy.

The EU as a policy promotes freedom of speech and expression. The European Charter of Human rights provides a framework for the protection of whistleblowing in virtue of its appeal to citizens' right to participation, freedom of expression and their right to information.[4] Failing to create institutional and legal channels for whistleblowing would violate the right to free speech of the employees. This aspect overrides the narrow requirements of maintaining the confidentiality clauses usually required under employment contracts. If the information pertains to public interest, then it is in the interest of the citizens at large to know. If such information is not provided, then not only their right to know is being violated, but also their possibility of participating in matters of grave import is being denied. Therefore, it is a duty of the State to both protect and facilitate channels of whistleblowing.

Such a duty we believe ought to be extended also to those kinds of revelations that might pertain to national security in conditions where information concealed is of vital public interest. Indeed, corruption does not only nestle in the appropriation of public funds for personal benefit, but also where public institutions and public platforms are utilised to serve certain vested interests or interests that run contrary to the interests of democracy at large and interests of public in particular. In this regard if certain information which is concealed on the grounds of national security or due to rationale of emergency should be shared with the public if it is in their interest to know. Whistleblowing on information of this sort should be accorded the same protection and whistleblowers should not be tried for treason or espionage, rather the information should be utilized to act against erroneous officials. The classification of information under the heading of national security does not mean that it should be off bounds of public especially if the information consists of grave wrong-doing, or is used to protect officials involved in gross human rights violations. This is particularly the case when the information consists of illegal and unauthorised instances of data mining and privacy rights violations, and when information reveals democratic deficits of the kind where normal constitutional checks and balance do not work. In all these cases, the burden of justification for classifying information should be on the classifying authority, and not on the whistleblower.

[3] Kumar, M. (2013), "For Whom the Whistle Blows? Secrecy, Civil Disobedience, and Democratic Accountability", unpublished PhD dissertation, available at http://eprints.luiss.it/1277/1/20131217-kumar.pdf

[4] This is the opinion of Transparency International's expert Mark Worth. See: 'Most of Europe has no whistleblower protection', Deutsche Welle, accessed on Nov 30, 2014, available at: http://www.dw.de/most-of-europe-has-no-whistleblower-protection/a-16942870

2. THE LEGAL LANDSCAPE

International Conventions on Whistleblowing

The need for whistleblower protection has been recognised in numerous international conventions against corruption. The United Nations Convention against Corruption (UNCAC, Merida Convention) signed in 1993[5] by 173 parties States that "Each State Party shall consider incorporating into its domestic legal system appropriate 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 offences established in accordance with this Convention." (Article 33) However, the convention does not recognise an outright right of protection, as the term 'shall consider incorporating' suggests, and does not make it mandatory for the State actors to engage in whistleblowers' protection. In fact such safeguarding function depends on the discretion of the State actors, and can be overridden by other considerations.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in 1997[6] recommends Member countries to provide easy accessible channels and appropriate measures to be in place for bribe reporting, and that appropriate action be taken against those who violate the institution's norms. Those persons reporting in good faith should be provided with due protection. Specifically, the Convention recommends:

- "to put in place easily accessible channels for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles;

- appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles;

- appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions" (article IX).

Moreover, the Convention urges companies "to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting" (Article X, section C - clause (v)).

[5] The Convention was on enacted on 14 December 2005. See: https://www.unodc.org/unodc/en/treaties/CAC/.

[6] The Convention was adopted by all 34 OECD Member parties plus seven non-Member countries: Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa. See: http://www.oecd.org/corruption/oecdantibriberyconvention.htm

The Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption, adopted on 6 November 1997 by the Committee of Ministers of the Council of Europe - Committee of Ministers[7] recommends an influence free space for those officials in charge of investigating corruption, and that individuals aiding authorities in combating corruption not be used as a shield to protect corrupt officials but on the contrary they should be extended protection.

Similarly, Article 22 of the Council of Europe Civil Law Convention on Criminal Corruption (the Strasbourg Convention) stresses the need to protect the witnesses of justice and witnesses; such protection is extended to those who report criminal offences; those cooperating with investigating authorities or those who provide testimony to the offence. The convention on civil corruption mentions the need for protection against 'unjustified sanction' for those employees who report wrong-doing based on reasonable suspicion. The Convention invites each party Member to implement domestic laws for the appropriate protection against "any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."[8]

Recommendation No. 10 E of the Committee of Ministers to Member States on Codes of Conduct for Public Officials, adopted on 11 May 2000, Article 12, also requires reporting where public officials are asked or required to undertake action contrary to the law. At the same time they should also report wrong-doing on part of other employees. Those reporting based on reasonable suspicion should not face prejudicial action owing to their justified action of reporting cases of corruption. Thus the "public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in a good faith".[9]

The 2003 Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption [10] "recommends that clear rules should be established in both the public and private sector on whistleblowing and reporting as one of the ten principles for improving the fight and prevent against corruption"[11], urging Member States to introduce, among others, common standards for the protection for whistleblowers. In particular, the Commission recommends to make more effective the

[7] Resolution (97) 24, Council of Europe, Committe of Ministers on the Twenty Guiding Principles for the Fight against Corruption, adopted on 6 November 1997 - 101st session of the Committee of Ministers, available at: https://wcd.coe.int/ViewDoc.jsp?id=593789.

[8] Council of Europe - Civil Law Convention on Criminal Corruption. The Convention was adopted on 27 January 1999 and entered into force on 1 November 2003. See: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=174

[9] Article 12 of Recommendation No. 10 E of the Committee of Ministers to Member States on Codes of Conduct for Public Officials, adopted on 11 May 2000. See: https://wcd.coe.int/ViewDoc.jsp?id=353945

[10] Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee on a on a comprehensive EU policy against corruption (COM(2003)317) dated 28.05.2003. , The text is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0317:FIN:EN:PDF

[11] Ibid., p. 25; see also p. 18.

criminal law instruments of definitions, incriminations and sanctions of these specific form of crimes.

Among these measures, the Additional Protocol to the Criminal Law Convention on Corruption [12], approved on 15 November 2003, and entered into force in 2005, prescribes that each Party Member to adopt legislative -as well as other - measures that each State may find necessary to establish in curbing bribery of domestic arbitrators. Among these measures, the Protocol includes the introduction of criminal offences under its domestic law, for acts of promising, offering or giving, committed intentionally, directly or indirectly, any undue advantage to an arbitrator exercising his/her functions under the national law (Article 2); the request or receipt by an arbitrator of any undue advantage for himself or herself or for anyone else, the acceptance of an offer or promise of such an advantage, to act or refrain from acting in the exercise of his or her functions (Article 3). The Protocol requires also that each Party Member shall adopt legislative and other measures to prevent acts of bribery involving an arbitrator exercising his/her functions under the national law (Article 4), domestic (Article 5) and foreign jurors (Article 6).

A brief survey of the international legal landscape suggests that most have recommended stringent regulations against corruption and emphasised on strong penalties and punishment in case charges of corruption are proven. In addition these landscapes also recognize that strong anti-corruption laws might not deter would be wrongdoers in the absence of mechanisms that aid in discovering the wrongs that are done. Thus, mechanisms and various controls should be in place to check corruption, while at the same time whistleblowing, when done in good faith and the public interest, ought to be recognised as legitimate. These conventions also recommend various safeguards for protection of whistleblowers from retaliation both personally or professionally. Some conventions also demand providing incentives for whistleblowers so that many individuals can come out in the open about stories of corruption. Yet these statutes are mere recommendations that the participating nations need not strictly adhere to. EU countries, some of them which have been at the forefront of these conventions, fare very differently in terms of whistleblower protection legislation. In the next section we will analyse the legal landscape in different EU countries. This analysis will also give us a good understanding of the distance that separates reality from the idea of improved mechanisms for fighting corruption. In fact as we will see that the reality of the EU is really murky in terms of its stance on corruption and protection of the rights of the whistleblowers. It is this consideration that requires serious rethinking on the part of the law makers in the European Union.

The Legal Landscape on Whistleblowing legislation in Member States and within EU institutions

Only 5 out of the 28 EU country Members (less than the 20%) have a comprehensive legislation, which regulates procedures and guarantees for prospective whistleblowers. These Members are Luxemburg, Romania, Slovenia, UK, and Ireland.[13]
Less than 54% of EU-Member States have only partial legislation. In these cases, the filing procedures and guarantees for would-be whistleblowers are not always clear, with the unwelcome effect that prospective whistleblowers are dis-incentivi-

[12] Additional Protocol to the Criminal Law Convention on Corruption CETS No. 191 . For more details on the protocol, see http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=191

[13] Ireland is the most recent EU Member to adopt a comprehensive legislation, the Protected Disclosures Act (14, 2014), adopted last July. See: http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0014.pdf

sed. Often, having a partial legislation is like having no legislation, since lack of transparency undermines the practice of disclosing information and the trust prospective whistleblowers would place in that practice. In the absence of strong legislations and implementation whistleblowers would be uncertain whether it is worth the risk to put themselves in a personal disadvantage in order to blow the whistle on corruption. Often the threats to personal security, or job security disincentivizes potential whistleblowers from taking the risk. Partial legislations merely acts as a smokescreen behind which the act of corruption can be carried on. The list of EU-countries with partial legislation includes: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Latvia, Malta, Netherlands, Poland, Sweden.

Finally, almost a third of EU-Member States, have no legislation, or very weak forms of protection. This list includes Croatia, Bulgaria, Finland, Greece, Lithuania, Portugal, Slovakia, Spain.

Transparency International has also pointed to the inadequate legal protection afforded to whistleblowers in the majority of EU Member States.[14] Yet, while the European Parliament has called attention on the Commission to look at European level whistleblower protection legislation in recent reports, the previous European Commissioner for Home Affairs, Cecilia Malmström declared last year in a plenary debate at the European Parliament in Strasbourg that the Commission does not intend to promote a legislation on Whistleblowing for the time being.[15] Of course it is our hope that the new Commission will take a different approach to the matter, and more urgently so if one considers that also within the European Institutions there is a significant problem regarding the protection for EU whistleblowers, and the absence of internal rules is of particular concern in some of the EU's oversight bodies.

The "European Union Integrity System"[16] of Transparency International reports that among the nine institutions assessed and despite the legal obligation to do so since 2004, only one - the Commission - has effective mechanisms in place to protect internal whistleblowers, having put its own guidelines in place in 2012.

The issue concerning the competence of European institutions is crucial for the prospects of feasible legislating measures towards the protection of whistleblowers within the Union. Further clarification is needed as the matter involves both political and legal issues. The absence of proper legislation means that often whistleblowers have to resort to external support of conventions, treaties etc. if they try to raise a voice against corruption. As mentioned by Guyer and Peterson "EU whistleblowers largely rely on their attorneys to advocate a creative concoction of various treaties, regulations, and statutes for protection from retaliation, often with little success."[17] While this is true for legislation for the different EU States, Articles 22a and 22b of the Staff Regulations of Officials of the European Communities creates an obligation for officials within the EU institutions to report fraud, corruption and other

[14] Transparency International, *Whistleblowing in Europe 2013 Report*, p. 8, available at: http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_-the_eu

[15] See: http://euobserver.com/justice/121873. See also Carl Dolan's opinion (Transparency International) on this Statement: http://www.transparencyinternational.eu/2013/10/malmstrom-no-new-eu-anti-corruption-legislation/

[16] Transparency International, *European Union Integrity System*, available at: http://www.transparencyinternational.eu/european-union-integrity-system-study/the-euis-report-latest-news/

[17] Guyer, T. M. & Peterson, N.F. (2013), *The Current State of Whistleblowing Law in Europe: A Report by the Government Accountability Project*. Available at http://www.whistleblower.org/sites/default/files/TheCurrent-StateofWhistleblowerLawinEurope.pdf

illegal activities based on reasonable suspicion of illegal activity that is 'detrimental to the interests of the Communities or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities.'[18] The EU Institutions should not take action against the whistleblower: both primary and secondary. Protection is also extended to officials who come to posses knowledge of the revelation and immunity and protection can be sought by them along with compensations for damages. Yet now many advocates suggest a revision of whistleblowing laws in EU institutions due to the 'inartful drafting and ambiguity of the Staff Articles 22a and 22b'[19].

The analysis above suggests that whistleblower protection legislation in the EU Member States is indeed dismal. While there are differences across Member States but the overall picture paints a sorry State of affairs: such legislation, if it exists is indeed partial, which being less stringent does not provide enough protection for the would be whistleblower to feel safe in carrying out their function. In order to understand the overall landscape over whistleblowing protection laws we need to compare the state of the laws in EU Member States with that of non-EU nations, and even try and understand some of the best practices that exists in terms of counter corruption laws. In addition such analysis of best practices would also aid in drafting a direction for the directive.

Bribery Laws in the EU Member States

Transparency International Assessment of the Anti-Bribery Convention (2013) suggests the following figures based on the level of enforcement.

Active Enforcement: 4 countries with 26.2% of the world export: US, Germany, United Kingdom, Switzerland.

Moderate Enforcement: 4 countries with 6.1% of world export: Italy, Australia, Austria, and Finland.

Little or No Enforcement: 20 countries with 26.9% of world export: Japan, Netherlands, South Korea, Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Czech Republic, Luxembourg, Chile, Israel, Slovak Republic, Greece, Slovenia, New Zealand, Estonia.

Policy proposals from Transparency International recommends that, since bribery always takes place in secrecy, the protection and facilitation of whistleblowing is crucial, by creating accessible reporting channels that can ensure confidentiality. In particular, effective reporting channels and procedures must be established for protecting whistleblowers both in private and public sectors in all the Parties to the Convention, by providing independent reporting channels to build enough trust to receive reports from whistleblowers and from companies that have been victims of extortion and solicitation of bribes. Recently, several Parties to the Convention have taken meaningful steps to improve reporting channels and whistleblower protection (such as Australia, Italy, Netherlands and South Korea), although there are serious shortcomings in more than half of the Parties.[20]

---

[18] Ibid., pp. 11.

[19] Ibid., pp. 12.

[20] Fritz Heimann, Sophia Coles, et al., *Exporting Corruption. Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, availalbe at: http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd.

One of the most accurate studies on the magnitude of corruption in a EU Member State is a report published in 2011 by Transparency International. The 3-volume report, *Corruption in the UK*,[21] examines twenty three sectors and institutions. The survey found that 53.4% of respondents believed that corruption had increased in the UK during the past three years, and only 2.5% felt that corruption had decreased (either a little or a lot). Moreover, 48.1% of respondents believed that the government was not effective in tackling corruption, against the 25.9% of those who believed the contrary fact (25.9% were unsure). Most importantly, the 92.7% of respondents claimed they would have liked to report corruption, but only 30.1% knew how to do so. In the UK, 12 different agencies have (partial) responsibility for anti-corruption activities, in addition to 40 police forces, but it is unclear whether they "share information, collaborate on investigations, or share good practice on corruption prevention".[22]

In 2009 alone, there were 10,090 prosecutions under the 2006 Fraud Act, with no indication as to how many may have included some elements of corruption. According to a study survey conducted by Transparency International, the amount of money laundered through the UK each year is estimated to be £48 billion (2% of UK GDP).[23] 27% of people contacted thought that UK companies report their performance better than it is.[24] In addition: 71% of UK citizens think corruption is a major problem in the UK; 64% of people think corruption is part of the UK's business culture; 33% of people think that bribery or abuse of power is widespread among the police.[25] The annual cost of fraud in the UK is estimated around £73bn[26], and "internal fraudsters are now reported to be responsible for 53% of detected economic crime [in the UK public sector]."[27]

The Legal Landscape in Non EU-countries: US and India

United States

In the US, legal protection to whistleblowers was originally granted under the False Claim Act (1863), and gradually reinforced under subsequent legislation, including the Sarbanes-Oxley Act (2002). A major step in whistleblower's protection came from the Whistleblower Protection Act, since 1989, a public law which protects federal whistleblowers who report cases of misconduct in the Government. The purpose of the Act is "to protect for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by … mandating that employees should not suffer adverse consequences as a result of prohibited

---

[21] Available at: http://www.transparency.org.uk/publications/15-publications/81-corruption-in-the-uk-overview-policy-recommendations

[22] Source: Transparency International UK, available at: http://www.transparency.org.uk/corruption/statistics-and-quotes/uk-corruption

[23] Paper Trail, Money Laundering Bulletin, 01/06/11, available at: : http://www.moneylaunderingbulletin.com/legalandregulatory/practicefindings/paper-trail-2247.htm?origin=internalSearch

[24] See Ernst and Young, "Navigating today's complex business risks Europe, Middle East, India and Africa Fraud Survey 2013", p. 22, available at: : http://www.ey.com/Publication/vwLUAssets/Navigating_-todays_complex_business_risks/$FILE/Navigating_todays_complex_business_risks.pdf

[25] Source: The European Commission, Special Eurobarometer 374: Corruption, (2012) pgs. 123, 32, 134, available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf

[26] Source: The National Fraud Authority, 'Annual Fraud Indicator', (March, 2012) p. 3, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118530/annual-fraud-indicator-2012.pdf

[27] See: PricewaterhouseCoopers , "Fraud in public sector increases as cuts bite", 13 April 2011, available at: http://pwc.blogs.com/press_room/2011/04/fraud-in-public-sector-increases-as-cuts-bite.html.

personnel practices" (Section 2, (a)). The Act established a federal bureau, the Office of Special Counsel, an independent federal investigative and prosecutorial agency, whose basic authority come from three federal statutes in addition to the Whistleblower Protection Act. These are the Civil Service Reform Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.[28]

Along with the OSC activities under the Whistleblower Protection Act, the Dodd-Frank Act, Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173) signed by President Barack Obama in July, 2010, introduced an important set of measures designed to hold Wall Street accountable and prevent another financial meltdown. A centerpiece of that reform was a strong whistleblower protection. Corporations tried to kill the law through the back door by lobbying the Securities and Exchange Commission to pass rules that would limit the protections for whistleblowers and the effectiveness of the law.

It must be noted that whistleblowers' disclosures are also protected and rewarded by IRS. Prior to 1996 the payments where made from appropriated funds.[29] In 1996, section 1209 of the Taxpayer Bill of Rights 2 (PL 104-168) expanded the purposes for which the IRS may pay awards, adding "detecting underpayments of tax" as a basis for making an award and changed the source of funds from IRS operating funds to proceeds of amounts collected from the taxpayer (other than interest). Before the 2006 amendments to section 7623, awards to whistleblowers were discretionary, and IRS policy determined the amount.

Finally, the Foreign Corrupt Practices Act of 1977 (FCPA),[30] designed for the specific purpose of fighting foreign bribery[31], protects whistleblowers who report cases of bribery of foreign officials done by corporations which operate and conduct trade business in the United States.[32] The FCPA showed to be very effective in several cases involving multinational corporations.[33]

India

In India, the Whistleblowers protection Act enforced in 2011[34] empowers public officials to make public interest disclosure to the competent authority. While it requires disclosures of the identity of the complainant but the said identity should be

---

[28] See OSC website at https://osc.gov/Pages/about.aspx.

[29] *Fiscal Year 2013 Report to the Congress on the Use of Section 7623, pp. 2,* available at http://www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf

[30] Text avaialble at: http://www.justice.gov/criminal/fraud/fcpa/.

[31] See *A Resource Guide to the U.S. Foreign Corrupt Practices Act* , available at: http://www.justice.gov/criminal/fraud/fcpa/guidance/

[32] Ibid., pp. 82-87.

[33] A list of penalties inflicted include: Siemens - $ 800 million penalty for bribery; Chevron Oil - $ 30 million in fines for illegal payments in the framework of Iraq Oil for Food Program Insurance; Daimler, A. G. - $ 185 million of penalty for bribery Russia, China and 20 other countries; ENI S.p.A. (Netherlands) - $ 125 million penalty for bribery in construction business.

[34] The Whistleblowers Protection Act , 2011 available at http://www.indiacode.nic.in/acts2014/17%20of%202014.pdf.

kept secret, yet if the investigation requires revealing the name of the complainant such can only be done by their consent. Revealing the identity otherwise is penalised. The act is limited since the competent authority is merely a recommendatory body and cannot initiate action against corrupt officials. There is a timeline of seven years within which the complaints have to be made, while false and frivolous complaints invite penalty. The act requires, that if victimised, whistleblowers should be reinStated.

There are severe limitations of the act through: i) the act does not define properly "disclosure" and "victimization". [35]There are no criminal penalties for physical victimization. ii) the power of the competent authority is mere that of recommendation. iii) Anonymous complaints and disclosures made to the media are not counted as admissible. iv) The act does not include disclosure related to defence and security issues or those with international relations that deals with friendly States or proceedings of the State and the cabinet. v) The private sector is not covered in the act. vi) There are no internal mechanisms for blowing the whistle. vii) The Prime Minister and the Chief Ministers of the State are not covered under the act. viii) Human rights violations, and acts that impact environment or health are not included within the act. ix) External acts of whistleblowing is not allowed (the one done by those outside the public offices).

In 2004 a Central Vigilance Commission (CVC) was designated to receive and act on complaints by whistleblowers by means of a Government Resolution. In 2010 the Public Interest Disclosure Bill was passed, with the purpose of reinforcing the provisions of the Commission. Between 2004 and 2008 only 1,354 complaints have been filed, with the number of complaints actually dwindling every year. There is no data whether any significant step was initiated since the vigilance commission in India which receives the complaints cannot initiate action (see Table below).[36] In fact according to CVC's own data "between 2004 and 2008, there were 946 cases in which the department did not comply with the CVC's recommendation on penalty".[37] And an analysis of the new whistleblowers protection act shows that the scenario might not be much different in the near future either. It is also thus difficult to find the monetary value of the corruption that has been exposed. The new act also does not incentivize the act of whistleblowing, and in the absence of proper witness protection, as well ill-defined terms of victimization and disclosures, as well as not legalizing anonymous acts of whistleblowing or leaking to the media it seems that such acts would be minimal. At the same time the act does not cover human rights abuses or corruption in private sector.

Moreover, since the provisions of the 2010 Bill are similar to those of the 2004 Resolution, it is unlikely that a significant change in the number of persons willing to disclose acts of corruption would raise.[38]

YEAR	NUMBERS OF COMPLAINTS

[35] Christine Liu (2014), *'India's whistleblower protection Act- An important step but not enough'* available at http://ethics.harvard.edu/blog/indias-whistleblower-protection-act-important-step-not-enough.

[36] *PRS Legislative brief, The public interest disclosure and protection to persons making the disclosures bill, 2010*. The report is availale at : http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20-Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf.

[37] ibid.

[38] *Law Resource India, The Public Interest Disclosure and Protection to Persons Making the disclosures bill, 2010*. Available at https://indialawyers.wordpress.com/2011/02/11/.

2005	412
2006	338
2007	328
2008	276

Table 1: Number of whistleblower complaints under 2004 Resolution Source: Annual reports of Central Vigilance Commission (CVC)[39]

In addition according to data on corruption by the initiative 'I paid a bribe'[40] suggests that as of December 4, 2014 there have been 32,832 reports of retail corruption over 794 cities in India. Bribes have been paid in 20,392 cases while there have been 2,594 cases of bribe fighting and 889 honest officers. According to the data trends, instances of bribes in Police are the highest, followed by stamps and registration, municipal service, customs, excise and service tax. These statistics merely represent those cases reported by the citizens. The actual amounts are bound to be manifold times since the lack of knowledge of such initiative among the population as well as the non-reporting of many other cases of corruption.

This section along with the previous one tried to analyse the flaws in the legal protection channels for whistleblowing in contexts of both EU and non-EU countries. As expected the costs of corruption is quite high, while the checks, whatever exists, are not sufficient to curtail those practices. It is in this regard to overcome such instances of corruption and to bring back the money to the purpose to which it is meant for we need a strong directive against corruption, which means we also need a strong whistleblowing protection legislation. The section that follows presents some recommendations for a strong directive on whistleblowing.

[39] Available at http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf.

[40] For more discussion on this case see the appendix.

3. THE EXPECTED IMPACT OF AN EUROPEAN DIRECTIVE ON WHISTLEBLOWING

US data from the US Internal Revenue Service (IRS), SEC (US Stock Exchange, under the Dodd-Frank Act), and False Claim Act (which regulate the US Federal Contracts) offer an interesting point of comparison to evaluate the possible impact that a Directive on the protection of whistleblowers might have in Europe. The rationale behind this comparison is twofold: firstly, the United States anti-corruption legislation provides incentives for potential whistleblowers, such that the amount retrieved by blowing the whistle can be traced back to the premiums paid to whistleblowers (the "Qui Tam" rule)[41]; second, US provides the most extensive set of data available on the issue.

Despite the differences between the US and EU legal systems, we suggest that the economic impact of a legislation on Whistleblowing in Europe can be assessed from insights on the US data. Although we provide an analysis for specific sectors where data abound (the health-care sector in particular), the disaggregated data for different sectors was collated to provide a figure of the impact of whistleblowing protection across sectors.

Our indicators for the US whistleblowing protection laws are: the number of reported cases of corruption and fraud; the number of completed court procedures related to the corruption for those sectors; number of whistleblowers who address the problem of corruption in those sectors.

Dodd-Frank Act

Under the Dodd-Frank Act,[42] the Security a d Exchange Commission Office of the WhistleBlower (OWB) started operating in August 2011. The Commission has an incentive scheme for whistleblowers, such that, if a whistleblower is qualified as a deliverer of the information to the Commission, s/he can expect protection and can receive a great reward in exchange. However, in order to "qualify", the original information submitted by the whistleblower has to lead to the successful implementation of the penalty and sanctions against the person who has been reported.[43]

Since the inception of the Commission, the number of reports increased considerably, from 334 cases in 2011, to 3,238 in 2013 (table 2), with an increasing trend in 2014 (table 3). In particular, since August 2011 the Commission has granted awards to 15 whistleblowers. During Fiscal Year 2013, the Commission paid over $14 million "in recognition of their contributions to the success of enforcement actions pursuant to which ongoing frauds were stopped in their tracks" for the fiscal year 2013 for a total of 3,238 tips, complaints, or referrals received, with the most common complaint being were Corporate Disclosures and Financials (17, 2%), Offering Fraud (17, 1%), and Manipulation (16, 2%)." Moreover, since the inception of the whistleblower program, "the Commission has received whistleblower tips from individuals in sixty-eight (68) countries outside the United States. In Fiscal Year

---

41 In common law, the *Qui Tam* rule stands for a writ whereby an individual who collaborate in prosecuting a fraud, is entitled to receive an award consisting in a percentage of the penalty. Its name is due to the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*", that is "He who brings a case on behalf of our lord King as well as for himself."

42 See the 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available at: http://www.sec.gov/whistleblower/reportspubs/annual-reports/annual-report-2013.pdf.

43 Notice that "[u]nder the program, individuals who voluntarily provide the Commission with original information that leads to a successful enforcement action resulting in monetary sanctions of over $1,000,000, may be eligible to receive an award equal to 10-30% of the monies collected by the Commission or in a related action", Ibid. p. 5.

2013 alone, the Commission received whistleblower submissions from individuals in fifty-five (55) foreign countries".[44]

As of September 2014, an additional $ 1.932 mln have been awarded to 9 whistleblowers. Some of the whistleblower awards authorized by the Commission during Fiscal Year 2014 were paid after September 30, 2014. Thus, any payments made after the end of the fiscal year are not reflected in the above chart. Notice that, on September 22, 2014, the Commission authorized an award of more than $30 million to a whistleblower who provided original information that led to a successful SEC enforcement action; Commission's largest award to date.

Table 2: Number of whistleblower reports 2011-2013 under the Dodd Frank Act (financial sector).

	2011	2012	2013
Number of whistleblowers	334	3001	3238
The most common complaint categories		Corporate Disclosures and Financials (18,2%)	Corporate Disclosures and Financials (17,2%)
		Offering Fraud (15,5%)	Offering Fraud (17,1%)
		Manipulation (15,2%)	Manipulation (16,2%)

[44] Ibid., p. 10.

FISCAL YEAR	NUMBER OF WHISTLEBLOWERS	NUMBER OF AWARDS	AWARDS PAID IN $
2011	334	0	0
2012	3001	1	45.739,16
2013	3238	4	14.831.965,64
2014	3620	9	1.932.863,92

Table 3: Details on awards paid to whistleblowers under the DoDD Frank Act. The number of reports increases has increased in 2014.

As we noted in section 2, whistleblowers are also rewarded by the authority of the IRS. Prior to 1996 the payments where made from appropriated funds.[45] Section 1209 of the Taxpayer Bill of Rights 2 (PL 104-168), 1996 expanded the scope of the awards by 'adding "detecting underpayments of tax" as a basis for making an award and changed the source of funds from IRS operating funds to proceeds of amounts collected from the taxpayer (other than interest)".[46] Awards to whistleblowers was discretionary and amounts determined by the IRS policy prior to the 2006 amendments to section 7623; the IRS policy had a framework through which the contribution of the information could be assessed towards the collection of the proceeds from a taxpayer. The awards allowed were to the tune of 1%, 10%, or 15% of the proceeds. While the cap on awards was set at at $10,000,000, but it was waived 'under "special agreements" with a whistleblower'[47]. A new framework was set for the considering the submissions of the whistleblowers. To this end a Whistleblower Office was created under the IRS under a new section 7623(b) of The Tax Relief and Health Care Act of 2006 (section 406) (PL 109-432).

Several conditions must be met for a whistleblower to qualify for the award under section 7623(b). To qualify for the award the information provided by the whistleblower must:

• "Relate to a tax noncompliance matter in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000;

• Relate to a taxpayer, and for individual taxpayers only, one whose gross income exceeds $200,000 for at least one of the tax years in question."[48]

If the information provided meets the above Stated criterion and leads to administrative and judicial action against the errant party 'that results in the collection of tax, penalties, interest, additions to tax, or additional amounts'[49], the whistleblower is paid an award of at least 15 percent, but not more than 30 percent, of the total collection that results from such an administrative or judicial action. The percentage of

[45] *Fiscal Year 2013 Report to the Congress on the Use of Section 7623, pp. 2,* available at http://www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf.

[46] Ibid.

[47] Ibid.

[48] Ibid, p. 3.

[49] Ibid. p. 3.

award decreases to 10 percent when allegations are based on information access from public information sources (such as government audit reports).[50] In case the action was planned and initiated by the whistleblower then the Whistleblower office can reduce the percentage of the award. The awards take a long time to mature after the information has been filed by the whistleblower; payments can only be made when the appeal rights of the taxpayer is exhausted and the 'statutory period for the filing of a claim for refund has expired or been waived by the taxpayer'[51]. The first awards were paid by the IRS in FY 2011 under the 2006 amendments. Since then the practice has followed and nine awards have been paid under the revised law (there has been no segregation of these awards from others in order to protect taxpayer and whistleblower privacy). Interestingly, most of the awards paid during taxpayers can challenge the findings of the IRS at each administrative and judicial stage; taxpayers have greater incentives to appeal if the disputed amount is higher. The higher the litigation time the greater the wait for the whistleblower to get the reward.

Table 4 below shows the data on whistleblowing reports for the quinquennium 2009-2013. The data for 2013, there are more or less the same number of cases of the previous year. the FY2013 were claimed under the pre 2006 law. In this same fiscal year the IRS paid 122 awards, totaling $55 million. Based on the data the number of payments for the FY 2014 under section 7623 (b) program is not projected to grow dramatically. This is due to the fact that the

[50] Ibid., p. 3.

[51] Ibid, p. 1.

	2009	2010	2011	2012	2013
Awards paid	110	97	97	128	122
Collections over $2,000,000	5	9	4	12	6
Total Amount of awards paid	5.851.608 $	18.746.327 $	8.008.430 $	125.355.799 $	367.042.420 $
Amounts collected	206.032.872 $	464.695.459 $	48.047.500 $	592.498.294 $	367.042.420 $
Awards paid as a % of the amounts collected	2,80%	4%	16,70%	21,20%	14,60%

Table 4: IRS data on awards paid to whistleblowers in the quinquennium 2009-2013.

The number of claims received by IRS in the fiscal period 2007-2013 has also increased significantly:

	Pre 2007	2007	2008	2009	2010	2011	2012	2013	TOTAL
Total Claims Received	1177	1463	1923	6991	13155	8084	9239	9268	51390
Claims Open	799	1373	1060	2025	6253	2308	3095	5417	22330

Table 5: Claims by fiscal year 2007-2013. Notice the substantial increase within the 2011-2013 period.

It is worthwhile to note that a single whistleblower submission has often multiple claims associated with it, and also the fact needs to be taken into account that there is no separate track of submissions and claims before 2013.

False Claim Act

Table 6 below shows the total number of reports made under the False Claim Act for the triennium 2011-2013. The number includes both the whistleblowing reports that led to an award (Qui Tam) and those who were not awarded (non Qui Tam).

FISCAL YEAR	NEW MATTERS		SETTLEMENTS AND JUDGMENTS			RELATOR SHARE AWARDS
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM	TOTAL	TOTAL
2011	124	635	241.225.995 $	2.818.208.454 $	3.059.434.449 $	559.068.137 $
2012	143	652	1.608.112.862 $	3.326.763.911 $	4.934.876.773 $	432.016.817 $
2013	93	753	829.912.477 $	2.979.370.977 $	3.809.283.454 $	387.825.711 $
TOTAL	**360**	**2040**	**2.679.251.334 $**	**9.124.343.342 $**	**11.803.594.676 $**	**1.378.910.665 $**

Table 6: Reports filed under the False Claim Act for the triennium 2011-2013.[52]

Tables 7 and 8 below shows the fraud statistics for the two sectors under the False Claim Act where the impact of whistleblowing disclosure is most significant. These are respectively the 'health and human services' and 'defence' sector.

1.378.910.665$

FISCAL YEAR	NEW MATTERS		SETTLEMENTS AND JUDGMENTS			RELATOR SHARE AWARDS
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM	TOTAL	TOTAL
2011	37	417	178.147.545 $	2.270.301.404 $	2.448.448.949 $	470.547.135 $
2012	25	415	557.273.967 $	2.526.345.731 $	3.083.619.698 $	287.201.947 $
2013	22	500	61.354.329 $	2.615.643.504 $	2.676.997.834 $	318.029.245 $
TOTAL	**84**	**1332**	**796.775.841 $**	**7.412.290.639 $**	**8.209.066.481 $**	**1.075.778.327 $**

Table 7: False Claim Act: reports filed under the 'health and human services' sector.

[52] Notice that "New Matters" here refers to "newly received referrals, investigations, and qui tam actions", while "Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices". See the *Fraud Statistics Overview* for the False Claim Act, available at: http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf

FISCAL YEAR	NEW MATTERS		SETTLEMENTS AND JUDGMENTS			RELATOR SHARE AWARDS
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM	TOTAL	TOTAL
2011	19	46	29.484.345 $	111.630.570 $	141.114.915 $	9.195.127 $
2012	15	57	2.000.000 $	166.636.739 $	168.636.739 $	20.847.673 $
2013	12	77	665.654.874 $	47.118.462 $	712.773.336 $	7.246.939 $
TOTAL	**46**	**180**	**697.139.219 $**	**325.385.771 $**	**1.022.524.990 $**	**37.289.739 $**

Table 8: False Claim Act: reports filed under the 'defense' sector.

In the following table we will use the data from the IRS and False Claim Reports and interpolate them to evaluate the potential impact of a strong whistleblowing legislation in the EU.[53] To this purpose, we took the aggregate of the sum of all the amount recovered due to the revelations by the whistleblowers. This amount is then divided by the population of the country to calculate the per capita saving that is achieved due to a stronger whistleblowers' protection legislation. It is assumed then that a similar legislation in the EU will approximately create a similar kind of savings per capita.

United States			
Fiscal Year	2011	2012	2013
US Population	310.543.897	312.805.598	317.297.725
IRS Amount collected	48.047.500 $	592.498.294 $	367.042. 420 $
False Claim Acts Amount Collecte	3.059.434.449 $	4.934.876.773 $	3.809.283.454 $
Total Amount	3.107.481.949 $	5.527.375.067 $	4.176.325.874 $
Per capita savings	10,006$	17,670$	13,162 $

Table 9: US aggregated savings (IRS and False Claim) for the triennium 2011-2013

Table 9 shows that, in presence of robust protection laws and proper incentives, the number of disclosures in the United States has significantly increased the per capita savings during the last triennium, for the sectors considered under the legislations we have analysed.

EU-28 estimate			
Fiscal Year	2011	2012	2013
EU-28 Population	504.961.522	504.582.506	505.674.965

[53] In our calculation we did not include the data of the amounts collected via the Dodd Frank Whistleblower Program. In fact, the Annual Report to Congress on the Dodd-Frank Whistleblower Program disclose only the number of the awards paid to whistleblowers and the amount paid for each award. Although we know that the amount of each award corresponds to percentage between the 10% and 30% of the sum collected thanks to the disclosure, no mention of the exact percentage for each award is given in the report.

Total Amount	5.052.644.989,132 $	8.915.972.881,02 $	6.655.693.889,33 $
Per capita savings	10,006$	17,670$	13,162 $

Table 10: EU-28 estimate based on US per capita savings for the triennium 2011-2013

Table 10 shows a coarse-grained estimate of the potential savings on corruption costs for the EU for the same triennium 2011-2013 based on the per capita savings from the US data retrieved above. Although further work is needed to provide more accurate estimates, a comparison with US data suggests that the magnitude of potential savings in Europe is not negligible. The savings due to incentivising whistleblowing comes to the tune of around $ 7 billion for the EU. These figures are only a small portion of the entire cost of corruption suffered by the European Union. A study done by the The European Commission for Home Affairs estimates that the EU loses hit at least $162 Billion (€120 Billion) each year,[54] while a related study by Hertie School of Governance pegs the losses at € 323 billion[55]. Yet, the indication of the potential savings due to an effective protection and incentivisation of whistleblowing shows that, where laws on whistleblowing protection and incentivisation are enacted, the trend on savings is positive. Where this can be shown by looking at partial yet actual data for the US, our conviction is that the same trend should be expected for the European Union. To this effect, we call for a directive on whistleblowers' protection that not only incentivise acts of whistleblowing but also provides adequate protection to those who reveal acts of corruption. Such a directive should try to overcome the gaps in the scattered legal landscape of European Member States. In this context the next section provides a list of directive that should be incorporated in an European Directive on Whistleblowing.

[54] See: http://www.havocscope.com/tag/corruption/

[55] See: http://www.againstcorruption.eu/wp-content/uploads/2013/03/ANTICORRP-Policy-Paper-on-Lessons-Learnt-1_protected1.pdf.

4. OUR RECOMMENDATIONS FOR AN EUROPEAN DIRECTIVE ON THE PROTECTION OF WHISTLEBLOWING

1. A coordinated European strategy to standardize minimum requirements for whistleblowers protection

Whistleblowers must be protected against retaliation in all Member States and within European Institutions. Discrimination, bullying, dismissal, detention, even homicide: whistleblowers need full protection against retaliation. Each Member State, EU Institutions and public or private entity can extend the minimum requirements imposed by the Directive and must remove potential conflicts with other legislations and norms.

Therefore, the Directive should:

(1.1) Fully protect confidentiality in the workplace. Disclosure of whistleblower's identity must be done upon his/her explicit consent, with no exceptions.

(1.2) Establish the burden of proof on the employer. In the event of sanctions taken against an employee who has blown the whistle, it is the employer's duty to demonstrate that these sanctions are not related to the employee's role as whistleblower.

(1.3) Ensure whistleblower protection even when disclosure is not directly related to the whistleblower's specific field of work or job duties but also to other fields and sectors.

(1.4) Ensure whistleblower protection and no sanctions for misguided reporting.

(1.5) Guarantee whistleblower protection and thorough investigation even when information reported is partial.

(1.6) Establish a national authority for whistleblowing, external to the workplace, which the whistleblower can turn to in case internal whistleblower structures and procedures were ineffective.

(1.7) Foresee special protection measures in case the safety of the whistleblower and his/her family is in danger. This should be guaranteed by the State and have allocated budget.

(1.8) Guarantee award criteria for whistleblowers that have not taken part to misdeeds, and explore suitable measures for sentence mitigation for those who decide to disclose wrongdoings they helped commit, depending on the seriousness of the offence.

(1.9) All public officials be brought under the ambit of the whistleblower protection laws and protection be provided to whistleblowers even if it concerns wrongdoing on the part of the higher echelons of authority.

2. The creation of reporting channels which are safe, reliable, clear, easy to approach and guaranteed in all Member States and within EU Institutions

Whistleblowing is discouraged when legislations do not establish clear rules and procedures, competent authorities, effective and accessible reporting mechanisms. Uncertainty is a risk and an obstacle. Public and private entities must guarantee availability of and access to these mechanisms. Ambiguous laws and directives often end up aiding those who can manipulate power to suit their ends. This can work against acts of whistleblowing and even disincentivise it, for the potential whistleblower will not be aware to which side of the law they would fall to if they decide to blow the whistle. It is thus required that rules that regulate reporting and revealing information should be robust and be made well known to all the employees along with the assurance that their revelations will be given a due hearing, and all necessary support be provided to facilitate their work.

The Directive should:

(2.1) Guarantee internal whistleblowing procedures. National laws as well as corporate codes must indicate clear formal procedures, internal contact persons who are independent and competent, and dedicated offices.

(2.2) Ensure the widest possible access to information on whistleblowing policy. Every employee must be informed also through the publication and dissemination of the internal whistleblowing policy in the workplace.

(2.3) Establish an external whistleblowing national authority, independent and unbiased, which can be addressed and take action should the internal mechanisms be deemed ineffective by the whistleblower.

(2.4) The authority should not merely have a recommendatory function but should be able to initiate action against erroneous officials.

(2.5) Define suitable forms for anonymous reporting on the whole European Union territory and within the EU Institutions.

(2.6) Guarantee the availability of several national reporting channels, for instance a single free-toll number or web portals which can receive and investigate claims. These channels should always guarantee full confidentiality of data and identity, including but not limited to data encryption.

(2.7) Anonymous acts of leaking information to the media or on the internet should also be protected and the information that comes in the public domain should be investigated for the charges levelled.

(2.8) Media houses that come in possession of leaked information should not be subjected to investigation, nor should be forced to reveal the identity of the whistleblower.

3. The promotion of a European culture of integrity, transparency and condemnation of corruption and bribery

The Directive should encourage Member States and EU Institutions to take actions targeted to promote, support and encourage disclosure of corruption, thus promoting attitude change. Minimum criteria and suitable resources are required at national and European level in order to:

(3.1) Organise mandatory whistleblower trainings at the workplace.

(3.2) Create educational projects in schools with the support of civil society organisations.

(3.3) Provide institutional support to anti-corruption initiatives.

4. The establishment of a European Authority for Whistleblowing

Coordination at European level is essential. A competent European Authority for Whistleblowing should:

(4.1) Monitor the implementation and progress of the whistleblowing policy in Member States and within EU Institutions.

(4.2) Coordinate national authorities in Member States.

(4.3) Implement the policy within European institutions.

(4.4) Build a European database, open and accessible while respectful of confidentiality and anonymity, based on the data collected at national and European level.

The recommendations made above aim to work towards a common future of transparency, accountability and a corruption free environment which also encourages enhanced citizens participation in policy making. Such participation will only be possible where information is available in the public domain and those who reveal such information are celebrated and honored. In the absence of such accountability mechanisms, and where the institutional checks fail, vested power interests will have a free play which will be detrimental to the overall democratic project of the European Union. Corruption, as we have mentioned before, does not only have a domestic or a national dimension but often moves beyond boundaries and tends to affect people beyond borders. It is only when a coordinated strategy is built by Member States of the EU that the cancer of corruption can be controlled. To this end

the directive should ensure that all kinds of public officials be brought under the scanner and none should be exempted from the ambit of the directive. It is only when this is done that potential whistleblowers can reveal information without any fear of oppression. Only when dissent is allowed a free space that democracy flourishes and the trust of the people in its institutions is maintained.

Conclusion

The risk that corruption carries for the value and procedures of democracy is a common opinion. While European Union has devoted significant attention to policies and instruments apt to combat corruption, still the losses that accrue to the public expenditure are considerable. Corruption occurs because the incentives exist, for individuals or groups, without the risk of getting caught or facing punishment. It is only when individuals are aware that they will not catch the eye of the law enforcement agencies, or when they can play around it, that corruption becomes possible. It is in this regard that, in addition to strengthening the existing legal system and enforceability measures, that the EU has an institutional duty to look beyond existing mechanisms. Among these, there are those mechanisms which safeguard individual action that contributes to uncover cases of corruption by bringing it in the public light or the attention of competent authorities. But when whistleblowing mechanisms are designed exclusively as protective measures, they appear insufficient to contrast a phenomenon whose magnitude is often hard to calculate. Incentive schemes have revealed to be effective in supporting the efforts of governments, the judiciary, law enforcements agencies to fight corruption. US best practised are exemplary attempts to incentivise whistleblowing disclosure done in the public interest.

Our recommendation is to start a prompt and effective action towards an European directive that incorporates the lesson of these practices; otherwise, in the absence of strong protective laws and incentives, potential whistleblowers will often refrain from revealing information fearing retribution to life, property and their own job.

In the light of the shared commitment to democracy and human rights, we urge European institutions to join the effort to promote these proposed measures to protect whistleblowers, with the conviction that an European directive on these matters will enhance citizens' participation in combating corruption, and favour their role as democratic agents, and not merely as beneficiaries.

APPENDIX - RETAIL CASES OF CORRUPTION: THE I PAID THE BRIBE INITIATIVE

In this policy document we have mostly dealt with instances of institutional and corporate corruption or those dealing with individual or corporate tax fraud. While institutional cases of corruption affect citizens in a larger way in terms of siphoning of funds meant for public expenditure, but individuals are also affected in their day to day life in their interaction with individuals based in these institutions where often public services can only be accessed through payment of bribes. It is only when a sum of amount is paid that citizens can get their work done when institutions are corrupt in dealing with individuals. Often the magnitude of corruption and bribery in these retail kinds of corruption goes unnoticed because there is no way of ascertaining the amount until and unless the errant officials in charge are caught. Due to the non-accounting of such an important aspect of corruption the figures of corruption are often low. It is in this regard civil society initiatives that seek to ascertain the magnitude of retail corruption needs to be studied and appreciated. In this part we will highlight one such initiative in India: I paid a bribe.

I paid a bribe[56] is an initiative by Janaagraha that seeks to collect information regarding instances of retail corruption and in the process to harness the collective energy of the citizens in order to tackle it. In the process the website seeks to calculate the market price of corruption. Citizens can contribute information regarding circumstances when they had to pay bribes for getting their work done, or when they did not have to pay bribes due to new governance structures or if they happened to meet an honest official. Citizens do not need to provide personal information to the website. The assumption is that citizens who provide information on corruption whether through their collusion or through resistance are already change agents whose energy could be harnessed for making a difference. The information provided in the site provides information regarding the nature, patterns, types, location, frequency and the value of retail corruption occurring within India and twelve other countries. Such information, as collected, provides a snapshot of the various kinds of corruption that occurs and that inhibit the functioning of citizens and affect their lives. The information is used by Janaagraha to argue for betterment of 'governance systems and procedures, tightening law enforcement and regulation and thereby reduce the scope for corruption in obtaining services from the government'.[57]

The website seeks to collate information that could be utilized to inform citizens regarding the pervasiveness of bribe related exchange. The information is required to help citizens avoid bribe related situations and engage in debates and dialogues to initiate systemic change. An analysis of the structures and institutions that abet corruption creates a systemic understanding that can lead to demand for better and transparent systems and argue for 'more consistent standards of law enforcement and better vigilance and regulation.'[58] The website also provides a platform where citizens can air their views on how to reduce corruption and such views are taken up by Janaagraha and used to pressurize public officials both at the local as well as the national level. Such knowledge base would can also be used to design new systems and develop new rules if and when such opportunities of collaboration are open with the State. Thus, Janaagraha does not aim to merely confront the State with charges of corruption but seeks to complement it and provide constructive suggestions and if

[56] See: http://www.ipaidabribe.com/.

[57] *ibid*

[58] *ibid*

possible work along with it. The idea is that there are honest officials within the system who need to be supported and complemented for their efforts.

The website does not seek to initiate solutions for individuals' cases of corruption and thus does not help citizens on a day to day basis with initiating legal litigation. It is not a prosecuting agency and believes that tackling individual cases of corruption does not bring about change, rather the effort should be more systemic. The website merely provides information to citizens and well- meaning public officials who want to participate in the change making process. The assumption behind such an initiative is that corruption has grown to such an extent because citizens have tolerated corruption as a necessary element in their interaction with public services. Even if they feel burdened by it they have not initiated any process of change. Thus, the website seeks to provide a channel whereby the genuine frustration of the citizens can be provided with a necessary outlet, not only for venting out their frustrations but also to create a constructive space for dialogue for change.

The website also provides ways through which individuals can deal with situations where they are exposed to a possible situation of payment of bribes. In addition they also prescribe solutions in case citizens intend to initiate prosecution proceedings against public officials.

The website believes that corruption is not a product of the decline of social values or value systems or that a certain group of people (in this case Indians) are more corrupt than other group of people. For them corruption is a result of poorly designed governance systems and thus it is born out of 'systems failure'. They do not look at crime from a moral perspective but largely an economic one, since for them corruption is a matter of calculation and where the incentives to draw unfair benefits out of the existing system is higher than the costs or the penalties associated then people generally tend to be corrupt. Corruption thus has nothing to do with the inherent nature of the human being in question but how they react to the incentives or lack thereof in their interaction with the governance structures.

Janaagraha defines corruption according to the following mathematical equation:

C=M+D-A

(C= Corruption; M= Monopoly; D= Discretion; A= Accountability)

Instances of corruption are high in cases where the officials or institutions have monopoly, and high discretionary powers but substantive measures of accountability are missing or are not enforced. Thus corruption can be reduced when the monopoly and discretionary powers are curbed and better structures of accountability developed.

The website elicits between 25 to 50 reports on bribe every day and almost 20 questions regarding how to tackle instances of corruption. The most recurrent cases of bribe relate to RTO office or with traffic policemen or related to driving licenses but the payment is often less. Higher magnitude of bribes occur in land related cases but its recurrence is not often. The website is replete with individual testimonies where people were exposed to a situation of bribe and whether they did pay or refused to do so or met an honest official.

Two success stories for I paid a bribe has been regarding the decline in rent seeking behavior in the transport offices regarding issuance of driving licenses in Bangalore through designing better systems and filling up the loopholes in it. Similar efforts in departments of land registration have yielded better results.