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Whistleblowing: chance or risk? – new tendencies in Europe

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Abstract

Since 2002 US law has been demanding the implementation of whistleblower procedures from public listed companies and enforced whistleblower protection. The US tax administration installed 2006 a whistleblower award system. US regulations concerning whistleblower hotlines are extending to Europe. European countries are enforced by international and European Institutions to introduce whistleblower protection by law and accept whistleblower procedures. An awarding system is in discussion. The European Court of Human Rights made a judgement that the freedom of expression is a higher good than the reputation of the employer. The European data protecting law protects the rights of accused persons as well as the rights of whistleblowers. It is necessary to consider a European whistleblower scheme which prefers internal whistleblowing. Clear procedures should protect whistleblower in good faith and the rights of the accused persons and the organization. External whistleblowing should only be protected in exceptional cases, when public interest is endangered and should only be protected in case of disclosure to authorities. Disclosure to media and political representatives is dangerous because improper use is possible. Whistleblowing for financial reasons is unethical and awarding is suspicious. Whistleblowing is a chance in the fight against corruption and crime with the risks of false accusation, unethical reasons and unethical use of information. Prospective regulations are necessary to avoid these risks.

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1. INTRODUCTON

This century started with the ENRON and WorldCom Scandal, with whistleblowers who became famous and got problems with their jobs. The Sarbanes Oxley Act (SOX)¹ introduced whistleblower protection and demand of whistleblower procedures in US listed companies. The implementation of such procedures in European subsidiaries of US listed companies brought problems with European data protecting regulations and the employers law in the different countries and attention should be paid to the rights of accused persons and the right of integrity of employers. After the bankruptcy of Lehman Brothers, the US Congress established whistleblower financial awarding by the Securities Exchange Commission (SEC).

In Europe various activities are discussed to enforce a European whistleblower protection framework, to make it easier to install whistleblower procedures and to give financial awards to whistleblowers. The European Court of Human Rights recently set the right of free expression under certain circumstances over the right of employers for employee's loyalty and the right reputation.

This paper will describe the US development and the new tendencies in Europe. Some results of my academic research in 2007² ¹ should complete the

¹ Hauser, Peter. "Die Stellung der Internen Revision in der österreichischen Versicherungswirtschaft und ihre Zukunftstendenzen einschließlich der Rolle im Whistleblowingprozess", *IIA Austria 2008*, pp. 147–155, hereinafter: Hauser 2008.

² One Hundred Seventh Congress of the United States of America, Second Session, January 23rd 2002. An act to protect

literary research. Milestones for a new whistleblower framework will be developed and at the end I will give a very personal answer to the question: is whistleblowing and its protection an acceptable chance for the fight against corruption, wrongdoing and crime or are the risks for data protection in general and protection of the possibly wrongful accused persons and organizations higher than the benefits of the disclosure.

2. DEFINITIONS

The most common definition of whistleblowing is goes back to 1985 and is in an adapted form still state of the art. Near / Miceli defines whistleblowing as “the disclosure by former or current organization members of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.”³ Transparency International adopted this definition more generally. Therefore whistleblowing is “the disclosure of information about a perceived wrongdoing in an organization, or the risk thereof, to individuals or entities believed to be able to effect action.”⁴ The more general definition includes also disclosure by persons in connection with the organization but not employed by it.

Wrongdoing is focused on white collar crime, corporate criminal behaviour and illegal corporate behaviour. In the recent definition of whistleblowing wrongdoing is not limited in illegal behaviour and may include also immoral and illegitimate practices, like misallocation of resources or firing employees arbitrary.⁵

Internal whistleblowing is the disclosure of any wrongdoing in an organization to an authority within the organization by a member of the organization or a person in the environment of the organization.⁶ My research in the Austrian insurance industry⁷ showed,

investors by improving the accuracy and reliability of corporate of corporate disclosures made pursuant to the securities laws and for other purposes – Sarbanes Oxley Act 2002, H.R. 3763, hereinafter: SOX.

³ Miceli, Marcia P., Near, Janet P. & Dworkin, Terry Morehead. (2008) *Whistleblowing in Organizations*, LEA's Organization and Management Series, Routledge Taylor & Francis Group, New York, p. 6.

⁴ Transparency International, Recommended draft principles for whistleblowing legislation, 2009, www.transparency.org

⁵ Miceli et al. *Ibidem*, pp. 4–5.

⁶ Aschauer, Paula, *Whistleblowing im Arbeitsrecht*, Linde Verlag Wien, 2012, p. 34.

⁷ Hauser. *Ibidem*, pp. 250–252.

that the disclosure to the direct superior was wanted by 88 % of the participants as contact point for the whistleblower. 75% accepted the next higher superior, 68 % Internal Audit, 64% the responsible member of the Management Board and only 50 % the CEO.⁸

External whistleblowing is the disclosure of any wrongdoing within the organization to an authority outside the organization or to the public. The research in the Austrian insurance business showed that 87% didn't accept a disclosure to the public under no circumstances. 63% denied a disclosure to the insurance supervisory authority and 58% to the statutory auditor.⁹

In many definitions the external whistleblower tries the disclosure first within the organization. When internal efforts to get wrongdoing corrected have failed, the public disclosure is from the standpoint of the whistleblower a continuing process. A nice example for this theory is Sherron Watkins, the Enron whistleblower. First she wrote a letter to the CEO (internal whistleblowing), after her letter became known outside she testified before US Congress (external whistleblowing).¹⁰

My research showed, that the determination between internal whistleblowing and external whistleblowing is not really exact. Only 9% of the respondents accepted disclosure to the worker's council generally (*Betriebsrat*), 23% accepted this disclosure in addition to a disclosure within in the chain of command. 36% accepted disclosure to the worker's council only under special circumstances and 32% didn't accept it at all.

Regarding disclosure to the chairman of the Supervisory Board¹¹ only 4% accepted a disclosure in any cases to him, 17% only in addition to a disclosure within the chain of command, 42% under special circumstances and 37% didn't accept a disclosure to the chairman of the Supervisory Board under no circumstances. In common sense the worker's council and the Supervisory Board are part of the internal organization but the responsible persons for the Austrian insurance industry had a different view. More precisely 46% of the members of the Management Boards didn't accept disclosure to the worker's council

⁸ In the research 1.276 Internal Auditors, Statutory Auditors, Members of the Supervisory Boards, Members of the Management Boards, registered managers and managers of direct subsidiaries were asked to participate and 22 % or 273 persons did it.

⁹ Hauser. *Ibidem*, p. 252.

¹⁰ Miceli et al. *Ibidem*, p. 8.

¹¹ In the Austrian dual Governance System the duties of the “Board of directors” are divided between the “Management Board” with the CEO on the top and the “Supervisory Board”.

and 52% refused disclosure to the chairman of the Supervisory Board.¹²

3. WHISTLEBLOWER DEVELOPMENT IN THE USA

Time Magazine declared three whistleblowers to “Persons of the Year” in 2002. Sherron Watkins, Enron, Cynthia Cooper, WorldCom and Coleen Rowly, FBI made their disclosures to authorities within the organizations.¹³ Cynthia Cooper, head of Internal Auditing, directly reporting to the CFO, reported doubts in the accountancy. The CFO and the statutory auditor denied her reasonable suspicion and the CFO interdicted any investigations. Cooper continued her work undercover and reported the result to the audit committee. This was the start of the end of WorldCom.¹⁴ The story of the whistleblowing ladies was important for new development of and new research about whistleblowing, about business ethics, about principles of accountancy and auditing, about responsibility of the statutory auditor as well as the internal auditor.

In 2002 the US Congress approved the Sarbanes Oxley Act (SOX) in answer to the scandals at the begin of this century. This paper is only focused on the regulations about whistleblower procedures (Sec. 301/4) and whistleblower protection (Sec. 806). SOX is valid for all companies who issue any securities which are or should be registered on a US securities exchange.¹⁵ SOX is also obligatory for subsidiaries of these companies inside and outside of the United States. Following Sec. 4/1 “each audit committee of an issuer shall establish procedures for A) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.” This US law brought problems with several national laws in Europe and also with the common law of the European Union especially related to data protection. SOX Sec. 806 is headed: “Protection for employees of publicly traded companies who provide

evidence for fraud.” No company, “officer, employee, contractor, subcontractor, or agent of such a company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee” to provide information or assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of SOX, of Security and Exchange Commission (SEC) rules, of any Federal law relating to fraud against shareholders. The information or assistance must be provided to a Federal regulatory or law enforcement agency, to any member or committee of Congress, to a person with supervisory authority for the employee or to a person working for the employer who has the authority to investigate, discover, or terminate misconduct.

SOX introduced whistleblower procedures and whistleblower protection. The Internal Revenue Code introduced whistleblower awards. The IRS (Internal Revenue Service), responsible for the collection and enforcement of taxes, pays money to people who blow whistle on persons who fail to pay the tax they owe. If the IRS uses the information it can award the whistleblower. Depending of the collected amount an award till 30 % is possible.¹⁶ IRS protect the identity of the whistleblower “to the fullest extent permitted by law”. If the disclosure of the identity is necessary by court, IRS has to do it.¹⁷

In May 2008 a senior vice president of the finance division of Lehman Brothers informed the senior management and highlighted in a discussion with the statutory auditor controversial transactions, which were later classified as the basis for administrative claims and claims against members of the senior management and the statutory auditor by the court examiner.¹⁸ In June 2008, the whistleblower lost his job as part of firm wide lay-offs and officially not in connection with his disclosure of wrongdoing.¹⁹

The response of the US Congress to the scandal round the bankruptcy of Lehman Brothers was the Dodd Frank

¹⁶ Internal Revenue Code, 26 U.S.C. Se. 7623 (a) and Sec. 7623 (b).

¹⁷ “IRS – Whistleblower – Informant Award”, available at: www.irs.gov/whistleblower-informant-award, 1. 9. 2012.

¹⁸ Valukas, Anton R. “Report of the examiner in re Lehman Brothers Holding Inc. et al”, *United States Bankruptcy Court Southern District of New York*, Chapter 11, Case No. 08-13555(JMP), Volume 1, Section I 15–27.

¹⁹ Clark, Andrew. “Lehman whistleblower lost job weeks after raising alarm. Auditor Ernst & Young blamed for taking virtually no action. Bank accused of laying off Mathew Lee in retaliation”, *The Guardian*, March 16 2010, available at: www.guardian.co.uk.

¹² Hauser. *Ibidem*, pp. 250–252.

¹³ Lacayo Richard, Ripley Amanda, Persons of the Year 2002. “The Whistleblowers”, *Time Magazine*, December 30, 2002, available at: www.time.com January 30, 2013.

¹⁴ Cooper, Cynthia. (2008) *Extraordinary Circumstances. The Journey of a Corporate Whistleblower*, John Wiley & Sons, Hoboken NJ.

¹⁵ US Security Exchange Act 1934, Sec. 3 15 U.S.C. 78c.

Act 2010.²⁰ This act brought regulations for whistleblower awards and repeated regulations for whistleblower protection. The act defines a whistleblower as any individual who provides information relating to violation of the securities laws to the Securities and Exchange Commission (SEC). The SEC shall pay an award to a whistleblower, if his information led to a judicial or administrative action which results in monetary sanctions exceeding 1.000.000.²¹ The information must be derived from the independent knowledge or analysis of the whistleblower, must be unknown to the SEC before, must not exclusively be derived from an allegation made in a judicial or administrative hearing, a government report, hearing, audit or investigation and must not be derived from the news in media. No award shall be made to whistleblowers who acquired the information as a member, officer or employee of a regulatory agency, the Department of Justice, a self regulatory organization, a Public Company Accounting Oversight Board or a law enforcement organization. Also no award shall be made to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action, for which the whistleblower wants to be awarded and to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws. The award can be till 30 per cent of the monetary sanctions.²² A whistleblower shall not be entitled to an award if he is knowing and wilfully makes any false, fictitious, or fraudulent statement or presentation, or uses any false writing or document knowing the document contains any false, fictitious, or fraudulent statement or entry. (Sec. 21 F h/3).

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower in providing information to the SEC. The SEC shall not disclose any information which could reasonably be expected to reveal the identity of a whistleblower unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding

²⁰ One Hundred Eleventh Congress of the United States of America at Second Session January 5 th, 2010. An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “to big to fail”, to protect the American taxpayers by ending bailouts, to protect consumers from abusive financial services practices, and for other purpose. Dodd – Frank Wallstreet Reform and Consumer Protection Act 2010, H.R.4173, hereafter Dodd-Frank Act 2010.

²¹ Sec. 922 Frank–Dodd Act 2010 amending Securities Exchange Act 15 U.S.C. 78a, Sec. 21 F, hereinafter: Sec 21 F a).

²² Sec. 21 F b) c).

instituted by the SEC. The SEC may make available all confidential information to the federal and state law enforcement authorities, the appropriate regulatory agencies, to self regulatory organizations, the Public Company Oversight Board, foreign security authorities and foreign law enforcement authorities, when the information is determined by the SEC to be necessary to accomplish the purpose of the act and to protect investors. (Sec. 21 F/h2)

The SEC makes an annual report on the Dodd – Frank Whistleblower Program. According to the report about the fiscal year 2012²³ SEC received 3.001 whistleblower tips. The most common complaint categories were Corporate Disclosures and Financials (18,2%), Offering Fraud (15,5%) and Manipulation (15,2%). During fiscal year 2012 SEC made its first award. 143 “covered actions” were posted.

4. RECENT EUROPEAN SITUATION

In UK exists since 1998 the “Public Interest Disclosure Act (PIDA).²⁴ It protects whistleblowers against unfair dismissal as long as certain criteria are met. Protected are essentially whistleblowing employees. If the employees honestly think what they’re reporting is true and they’re telling the right person, whistleblowing is protected. If there is a whistleblower procedure within the organization, it should be used. If the potential whistleblower feels he can tell the employer, he has to do. Only in the case, that the whistleblower feels, that a disclosure to the employer is not possible or makes not sense, the contact to a “prescribed person or body” is protected. A list of “prescribed persons” is published by the government. The whistleblower can report things that aren’t right, are illegal or anyone at work is neglecting their duties, including someone’s health or safety is in danger, damage of the environment, a criminal offence, the company isn’t obeying the law or covering up wrongdoing.²⁵

Whistleblowers are protected from unfair treatment even, if they blow the whistle on something that

²³ U.S. Securities and Exchange Commission: Annual Report on the Dodd–Frank Whistleblower Program, Fiscal Year 2012, November 2012, SEC office of the Whistleblower, available at: <http://www.sec.gov/whistleblower>, 8. 1. 2013.

²⁴ Parliament of the United Kingdom. An Act to protect individuals who makes certain disclosures of information in the public interest, to allow such individuals to bring action in respect of victimisation; and for connected purposes, chapter c 23, July 2nd, 1998, in force July 2nd, 1999 – Public Interest Disclosure Act 1998, hereinafter PIDA 1998.

²⁵ “Gov.uk,Guide:Whistleblowing”, available at: <https://www.gov.uk/whistleblowing> last update January 9, 2013.

happened abroad. This includes when a different country's law has been or will be broken. An US citizen, former police officer, joined an international security company under UK law. This company employed the staff of the US contingent of the "International Police Task Force – IPTF) on behalf of the State Department. The IPTF worked with the UNO in Bosnia. She found out, that IPTF officials were involved in white slave trade. She informed IPTF officials and UNO officials and was dismissed.²⁶ The whistleblowing was accepted by a UK court as "protected disclosure" and she got a compensation of Pounds 115.000.²⁷

The rules made by SOX are also to be followed by European subsidiaries of US American listed companies and of European companies listed at US exchanges. SOX is applicable to these companies but only concerning the whistleblower procedures. The whistleblower protection by SOX is not given to the foreign employees of these companies working outside the USA.²⁸

In execution of SOX a lot of "whistleblower hotlines" are established in companies in Europe. But a lot of European countries had problems with the request of companies to get information about wrongdoing, the request of whistleblowers for protection and the human rights of accused persons for data protection and the right of presumption of innocence. In France the National Commission for Data Protecting and Liberties stopped whistleblower hotlines when vital interests of a person like physical or moral integrity of persons were on stake. Vital interests include the infringement of intellectual property rights, confidentiality, conflict of interest, discrimination and sexual or psychological harassment.²⁹ Also German employment courts had problems with whistleblower hotlines. In Sweden the Stockholm Administrative Court confirmed in 2010 the position of the Swedish Data Protection Authority, that only company executives and persons in key positions can be reported through the hotline.³⁰

²⁶ Bolkovac, Kathryn & Lynn, Cari. *The Whistleblower. Sex trafficking, military contractors and one woman's fight for justice*, Palgrave Macmillan, New York 2011.

²⁷ Employment Tribunal South Hampton, *Bolkovac v DynCorp Aerospace Operations UK, ET*, Case no. 3102729/01 in Bowers John et al. (2007) *Whistleblowing. Law and Practice*, Oxford University Press, Appendix 9, 549–550.

²⁸ US Court of Appeals 1 st Circuit, *Canero v Boston Scientific Corporation*, January 5, 2006, 04–1801, 04–2291.

²⁹ Cooper, Daniel & Marttila, Helena. "Corporate whistleblowing hotlines and EU data protection laws", available at: <http://ipandit.practicallaw.com/1-366-2987?q=corporate+wistleblowing+hotline>, 9. 1. 2013, herinafter: Cooper-Marttila 6–7.

³⁰ Cooper-Marttila 7–8.

The European Union "Article 29 Data Protecting Working Party"³¹ described in excellent matter the European position to whistleblowing. Although the "Opinion 1/2006"³² is published 7 years ago. I think it is timely, modern, actual, helpful in the balance of positions and in principle pointing the right way. The Working Party has the opinion, that "whistleblowing is designed as an additional mechanism for employees to report misconduct internally through a specific channel". This channel should supplement the regular information and reporting channels. "Whistleblowing should be viewed as subsidiary to, and not a replacement for, internal management." The working party notes also, that the most of the existing regulations and guidelines on whistleblowing are providing specific protection to the whistleblower. These regulations and guidelines "never make any particular mention of the protection of the accused person." The Working Party "stresses that whistleblowing schemes entail a very serious risk of stigmatisation and victimisation of that person" and "will be exposed to such risks even before the person is aware that he/she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated."³³

The Working Party discussed also the question of whether whistleblowing schemes should make it possible to report anonymously rather than in an identified manner and under the conditions of confidentiality. Anonymity might not be a good solution because being anonymous does not stop others from successfully guessing who raised the concern, because it is harder to investigate the concern if people cannot ask following questions, because it is easier to organize the protection eventually granted by law, anonymous report can lead people to focus on the whistleblower suspecting he is raising the concern maliciously, because the organization runs the risk of developing a culture of malevolent reports and because the social climate within the organization could deteriorate.³⁴

The Working Party focused also on the rights of incriminated persons. First, the person accused in a

³¹ Article 29, Data Protecting Working Party, Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime. 00105/06/EN, WP 117, adopted on 1 February 2006, hereinafter: WP 117.

³² The Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory board on data protection and privacy. The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission.

³³ WP 117, pp. 6–7.

³⁴ WP 117, pp. 10–11.

whistleblower's report shall be informed about the entity responsible for the whistleblower scheme, about the facts he is accused, about the department within the organization which might receive the report and about the possibilities to exercise his rights of access and rectification.³⁵

The Working Party acknowledges that whistleblower schemes may be useful mechanisms to help an organization to monitor its compliance with rules and provisions relating to its corporate governance, in particular accounting, internal accounting controls, auditing matters, and provisions relating fighting against bribery, banking and financial crime and criminal law. But, "it is essential that in the implementation of a whistleblowing scheme the fundamental right to the protection of personal data, in respect of both the whistleblower and the accused persons, be ensured throughout the whole process of whistleblowing."³⁶

In this connection it may be helpful to look at the position of Internal Audit in the whistleblowing process, as the result of my research within the Austrian insurance business showed. 74% of the participants wanted Internal Audit looking for better solutions, 72% looking for weak points, 61% evaluating the report and 56% looking for consequences. Only 8% wanted Internal Audit looking for the identification of the whistleblower. 73% thought that internal whistleblowing should be protected in any case against punishment by criminal law, but only 31% voted for protection in civil law in any cases. Protection of external whistleblowing was accepted only by 21% in any cases and with no difference between criminal law and civil law.³⁷

5. NEW TENDENCIES

The former Secretary General of the United Nations wrote in his foreword to the "United Nations Convention against Corruption": "Corruption is an insidious plague that has wide range of corrosive effects on societies. It undermines democracy and the rule of law, lead violation of human rights, distorts markets, erodes the quality of life and allowed organized crime, terrorism and other threats to human security to flourish."³⁸ In Article 8/4 the Convention requests

that each State shall establish measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities." Article 12/1 requests, that each State shall enhance accounting and auditing standards in the private sector to prevent corruption involving the private sector. Therefore the enterprises shall have sufficient internal auditing controls and the accounts and required statements of the enterprises shall be subject to appropriate auditing and certification procedures.³⁹ Each State should establish 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 in accordance with the Convention against Corruption. (Art.33). Each State should encourage persons who participate or have participated in the commission of an offence in accordance with the Convention to supply useful information to the investigation authorities and work together with them. In this case the punishment may be mitigated ore the possibility of granting immunity should exist. (Art. 37).

In 2010 the Parliamentary Assembly of the Council of Europe recognised the importance of whistleblowers as "individuals who sound an alarm in order to stop wrongdoing" "as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors. Potential whistleblowers are often discouraged by the fear of reprisals, or the lack of follow up given to their warnings."⁴⁰ The Parliamentary Assembly recognised that most member States of the European Council have no comprehensive laws for the protection of whistleblowing like the United Kingdom or the USA. "Whistleblowing has always required courage and determination and whistleblowers should at least be given a fighting chance to ensure that their warnings are heard without risking their livelihoods and those of their families."⁴¹

The Parliamentary Assembly invites all member States to review their legislation concerning to the protection of whistleblowers, keeping in mind the

Crime, available at: www.unodc.org, hereinafter: UNODC 2005 Foreword.

³⁵ UNDOC 2005, Art. 1 & 2.

³⁶ Council of Europe. Parliamentary Assembly. Resolution 1729 (2010). Protection of "whistleblowers" hereinafter CE Res. 1729, 1, 2.

³⁷ WP 117, pp. 13–14.

³⁸ Hauser. *Ibidem*, pp. 255–259.

³⁹ WP 117, p. 18.

⁴⁰ UN Convention against Corruption, General Assembly Resolution 58/4 of October 31st, 2003, entered in force December 14th, 2005, UNODC – United Nations Office on Drugs and

⁴¹ Council of Europe. Parliamentary Assembly. Recommendation 1916 (2010) Protection of "whistleblowers", hereinafter CE Rec. 1916, 5.

following guidelines:⁴² The definition of protected disclosure shall include all bona fide warnings against various types of unlawful acts as serious human rights violations and as violation of individuals as subject of public administration, taxpayer, shareholder employee or customer. The legislation should cover both the public and the private sector. The legislation should codify employment law, criminal law and procedures and media law in particular protection of journalistic sources.

The Parliamentary Assembly requests that whistleblowing legislation should focus on providing a safe alternative to silence.⁴³ This should include that disclosures are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary and the identity of the whistleblower is only disclosed to avert imminent threats to the public interest (6.2.1). Anyone should be protected, who makes use of internal whistleblowing channels in good faith (6.2.2). Where internal channels do not exist, have not functioned properly or could be expected not to function properly, external whistleblowing, including through the media, should be protected (6.2.3). Any whistleblower shall be considered as having acted in good faith when he had reasonable grounds to believe the information disclosed was true, even it turns out that this was not the case, except he did pursue any unlawful or unethical objectives (6.2.4). Protection against any form of retaliation through an enforcement mechanism when investigate the whistleblower's complaint (6.2.5). Whistleblowing scheme shall also provide for appropriate protection against accusations made in bad faith (6.2.7).

In a study about "the effectiveness of whistleblowers"⁴⁴ PricewaterhouseCoopers Belgium came 2011 to the conclusion that the current whistleblowing rules within the EU institutions are not an effective instrument for fighting corruption and conflict of interest in EU institutions. "An adapted whistleblower framework needs to be established which has to have the right "checks and balances": avoiding misuse on the one hand and being perceived by the potential *bona fide*

⁴² EC Res. 1729 6. The citation is not complete. The selection was made by the author.

⁴³ EC Res. 1729 6.2. The figures within the text are the subpoints of this chapter.

⁴⁴ European Parliament, Directorate – General for Internal Policies, Policy Department, Budgetary Affairs, Corruption and conflict of interest in the European Institutions: the effectiveness of whistleblowers, study 2011, Authors PrivewaterhousCoopers Belgium, Responsible Administrator Helmut Werner, available at: <http://www.europarl.europa.eu/studies> Conclusions and recommendations viii.

whistleblower as credible on the other." This overall objective needs to be operationalized by the following sub-objectives: Encourage persons related to EU institutions to report wrongdoing, ensure adequate support, effective assessment, timely investigation and appropriate action and organise strong protection for bona fide whistleblowers whilst discouraging malicious whistleblowers.

Also in 2011 the European Commission presented a proposal for a Directive to amend the Directive 2002/87/EC about supplementary supervision of finance conglomerates.⁴⁵ The Commission proposes that the Member States shall ensure that effective mechanism to encourage reporting of breaches of the regulations are implemented in national law which are including specific procedures for the receipt of reports on breaches and their follow – up, appropriate protection for employees of institutions who announce breaches committed within the institution and protecting personal data concerning both the person who reports the breaches and the natural person who is allegedly reasonable for a breach. (Art. 70/ 1,2). Member States shall require institution have in place appropriate procedures to report breaches internally through a specific channel (Art. 70/3).

In November 2012 a lot of newspapers brought stories about the intention of the European Commission to enforce whistleblower awards in the Member States.⁴⁶ The exact description of the content of the intention was not available before the editorial deadline. Nevertheless high representatives of the German business life pointed out that they are strictly against whistleblower awards.⁴⁷

The judgement of the European Court of Human Rights from July 21 2011.⁴⁸ seems important for the future of whistleblowing protection within the 47 member States of the European Council. The applicant

⁴⁵ European Commission: Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, Com/ 2011/0453/final, Brussels 2011/0203(COD), hereinafter: EC proposal 2011/0203.

⁴⁶ E.g. for others Anger H., Fockenbrock D. & Keuchel J. "Prämie für Denunzianten?" *Handelsblatt*, 30. Oktober 2012, p. 1.

⁴⁷ E.g. The European Circle, Report, *Whistleblower – Prämie: EU fordert finanzielle Anreize für Informaten*, 6. 11. 2012, available at: www.european-circlereport.de.

⁴⁸ European Court of Human Rights, Fifth Section, Case of Heinrich v. Germany, Application no. 28274/08, Strasburg, July 21st, 2011, available at: <http://hudoc.echr.coe.int/sites/eng> hereinafter ECHR Heinrich 2011.

was working as a geriatric nurse in a nursing home. It belongs to a company which is majority-owned by the government of Berlin. In 2002 the “Medical Review Board of the Health Insurance Fund” established serious shortcomings in the daily care, caused by a shortage of staff. From 2003 to 2004 the applicant and her colleagues regularly indicated to the management that they were overburdened due to the staff shortage and therefore had difficulties carrying out their duties. Also services were not properly documented. In November 2004 the applicant’s legal counsel wrote to the management and pointed out that on account of lack of staff the patient’s hygienic care could not be guaranteed anymore. The counsel requests the management to act to avoid a criminal complaint or a public discussion. The management rejected the applicant’s accusation. In December 2004 the applicant’s lawyer lodged a criminal complaint against the company. January 2005 the Public Prosecutor’s Office discontinued the preliminary investigations against the nursing home. In January 2005 the nursing home dismissed the applicant on account of her repeated illness with effect as of March 2005. The applicant challenged the dismissal before the Berlin Labour Court. The applicant contacted the workers union and they issued a leaflet which topped with the criminal complaint against the nursing home. The applicant got the opportunity to give a statement to the leaflet, but she declined to do. The works council of the nursing home did not agree to the applicant’s dismissal. The employer dismissed her without notice. In February 2005 the Public Prosecutor reopens the investigation against the nursing home at the request of the applicant. She was heard as a witness but the investigation was again discontinued in May.⁴⁹

The Berlin Labour Court (*Arbeitsgericht*) established that the employment contract had not been terminated, because the termination was an unfair dismissal. The accusations against the employer by the workers union were polemical but had been based on objective grounds. The Berlin Labour Court of Appeal (*Landesarbeitsgericht*) quashed the judgement. The Court held the criminal complaint against the employer as disproportionate reaction. The applicant had not been acting within her constitutional rights but had breached her duty of loyalty towards her employer. The Federal Labour Court (*Bundesarbeitsgericht*) dismissed the applicant’s appeal, so did the Federal Constitution Court (*Bundesverfassungsgericht*).⁵⁰

The European Court of Human Rights found the applicant’s dismissal without notice disproportionately

severe. “Being mindful of the importance of the right of freedom expression on matters of general interest, of the right of employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other various interests involved in the present case, the Court comes to the conclusion that the interference with the applicant’s right to freedom of expression, in particular her right to impart information, was not “necessary in a democratic society”. The Court considers that the domestic courts failed to strike a fair balance between the need to protect the employer’s reputation and rights on the one hand and the need to protect the applicant’s right to freedom of expression on the other. Therefore has been a violation of the European Convention on Human Rights.⁵¹

6. CONCLUSION

The disclosure of wrongdoing within an organization to internal or external authorities is one way to avoid and defend wrongdoing especially corruption. Further additional possibilities are an ethic framework which is accepted and exercised on all levels of the organization and an organizations culture based on respect and faith.

The regulations in the USA including protection of whistleblowers, procedures for whistleblowing and whistleblower awarding are focused on disclosure of wrongdoing in accountancy, financial reporting and accountancy auditing as well as on share holder protection. The regulations are established for protection and awarding disclosure and disregard data protection, the rights of the accused persons and the rights of the accused organizations.

The European efforts to establish whistleblower protection should not be a copy of US regulations. All regulations should be seriously divided between internal and external whistleblowing. Very important aspects are the reasons of whistleblowing. Protected whistleblowing should be possible if the whistleblower makes the disclosure in good faith and in the conviction that the disclosed circumstances are true. The protection should be excluded if the whistleblower acts for personal reasons like revenge and malevolence. It should be excluded, if the whistleblower makes the disclosure to gain personal advantages. Therefore whistleblower awarding like it is established in the Frank–Dodd Act or is discussed by the European

⁴⁹ ECHR Heinrich 2011, pp. 6–26.

⁵⁰ ECHR Heinrich 2011, pp. 27–30.

⁵¹ ECHR Heinrich 2011, pp. 92–95.

Commission do not seem acceptable from an ethic view. If the whistleblower knows that the disclosed information is wrong, he should be punished.

Internal whistleblowing should be protected within the rules of the organization and also by law. Internal whistleblowing procedures like hotlines are helpful, but it is necessary that the organization has an appropriate procedure to handle whistleblower disclosure both in connection to the accused person and the whistleblower's information about the ongoing investigation. Anonymous whistleblowing does not seem ethical and should be banned to exceptional situations.

External whistleblowing should be restricted to cases of public interest in particular the security and health of human beings and serious interests of the country. Generally it should be protected, if internal whistleblowing was unsuccessful or seems unsuccessful because the persons on the top are involved. In these cases the disclosure should be restricted in information of authorities. These authorities should handle the information confidentially and respect data protection and the rights of accused persons as the rights of the whistleblower.

Disclosure to the media is as dangerous as disclosure to politicians. Both professions are working under special immunity and the rights of probably innocent accused persons are in danger to be sacrificed craving for sensation or political reasons.

My personal answer to the question "Whistleblowing: Chance or risk" is: Whistleblowing is a chance for fighting corruption and any wrongdoing in an organization, if there are strict restrictions. It is a risk, if the protection of personal data, the rights of the accused person and the confidentiality of the process are not guaranteed. If the community, organizations and persons are protected from the abuse of whistleblower regulations by whistleblowers with unethical intentions and are protected against users of the disclosed information for unethical purpose, the chance of whistleblowing could be higher than the risk.

7. SUMMARY

Whistleblowing is the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action. Internal whistleblowing is generally possible within the organization. Under certain circumstances internal whistleblowing is accepted also outside of the chain in command, as an academic research in the Austrian insurance industry

showed. External whistleblowing to authorities is only in extreme situations accepted and whistleblowing to the media is absolutely unwanted.

In 2002 after the break down of Enron and WorldCom, Time Magazine made three whistleblowers to "Persons of the Year". The US Congress enacted with SOX the necessity for listed companies to implement whistleblower procedures like hotlines and established whistleblower protection in disclosure of accountancy or audit wrongdoing. The whistleblower in the Lehman bankruptcy 6 years later was dismissed under the false pretences that his job was generally in a personal reduction program. In 2010 the Dodd – Frank Act established a whistleblower awarding program for disclosure to the SEC. Additional whistleblower protection was enacted.

In European countries there do not exist standardized and extended whistleblower protection by law except in UK. The European data protection law restricts the possibilities of whistleblower – processes and whistleblower protection with the right of accused persons for protection of their personal data. United Nations, European Council, European Commission and others regard whistleblowing as an important part of anti corruption politics. The Parliamentary Assembly of the European Council gave the advice to member states to enact a whistleblower protection. The European Commission proposes whistleblower protection in finance conglomerates and under certain circumstances whistleblower awarding. The European Court of Human rights brought the human right of free expression over the right of the employer of loyalty of the employees and in public interest the reputation of the employer.

The new tendencies should be noticed carefully. It might be helpful to strengthen the rights of whistleblowers in general but only within the organization. Only if internal whistleblowing makes no sense, a disclosure to authorities which should be forced to handle the disclosure confidentially, may be protected. Protection should be restricted to acting in good faith and unethical or false disclosure should be punished. The immunity of media and members of parliament are dangerous for ethical handling of disclosure. Whistleblowing for financial reasons is unethical and therefore, is whistleblower awarding unwanted.

The chances of whistleblowing are only higher than the risks, if there are strict regulations to avoid false accusations, to restrict unethical reasons for whistleblowers and restrict unethical use of the information.