Title

Whistleblowing in Europe? Regulatory Frameworks and Empirical Research

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Abstract

Both the prevention and prosecution of corporate crime suffer from the fact that criminogenic structures and fraudulent actions often remain undetected. For this reason, the State not only relies on sporadic information it obtains from informers but increasingly targets at activating company insiders to disclose any wrongdoing. In order to make up for the lack of information, the State pushes the development of both internal (private) and external (public) whistleblowing systems. The chapter compares whistleblowing regulations in European countries and (with) the USA. Additionally, it describes and analyses both types of institutionalised whistleblowing and their contradictory functions. In presenting empirical findings, moreover, the article shows the need to relativise the criminal-political potential of said systems.

Keywords: whistleblowing, corporate crime, compliance programs, crime control

Whistleblowing

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1. Terminological Approach and Differentiation

Whistleblowing is defined as the act of disclosing the misconduct of organisations, authorities, etc. by organisation members (Friedrichs 2010: 20-25). In scientific literature, the term usually refers to the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action (cf. Miceli et al. 2008: 6; Miceli et al. 2012: 925). It refers, therefore, to the conduct of informers, which expose hidden organisation-related or inner-organisational shortcomings to outsiders. In the context of white-collar crime these revelations mostly concern actions which allow the organisation unlawful advantages (corporate crime) or, alternatively, refer to crimes committed by individual employees at the expense of the organisation (occupational crime).

Whistleblowing typically involves persons that are or were directly connected to the organisation concerned – i.e. generally people who still are or at one time were employees of that organisation. However, they can also have obtained a special insight in irregular actions through other ways, e.g. as a customer or a business partner (cf. Hansson's study 2012). The reasons why insiders divulge their knowledge of illegal practices is irrelevant for the classification. If we only referred to whistleblowing as morally motivated reporting, the question would arise what to do with disclosures which are prompted by personal gain or for questionable purposes. Moreover, this would wrongly narrow the analytical field down to „ethical resisters" (cf. also Callahan and Dworkin 1992: 318-319).

Also characteristic for whistleblowing are the receivers of the disclosed information. If in a normal procedure the employee informs his immediate next in line, the whistleblower will avoid the regular official channels. Instead, he will either bypass his immediate superior and contact company management or the available special contact points within the organisation (internal revision, audit committee, ethic helpline, ombudsman, etc.), or he will pass his in-

formation on to authorities, law enforcement institutions, media or interest groups. In the first place it concerns internal, and in the second external whistleblowing (on this not always clearly applicable distinction cf. Miceli, Near and Dworkin 2008: 7-8; King 1999:316).

This chapter describes and analyses both types of (institutionalised) whistleblowing and their contradictory functions. Additionally, it compares whistleblowing regulations in European countries and (with) the USA. In presenting empirical findings, moreover, the chapter shows the need to relativise the criminal-political potential of said systems.

2. Comparison of Legal Frameworks

Whistleblowing, particularly in connection with social control of economic crime, has been institutionalised in some legal systems, especially in the Anglo-American countries (Miceli et al. 2008). However, over the past 20 years we have seen a similar, albeit often more hesitant, development in Europe. But there is, for instance, no uniformity in the legal positions among European states (for an overview of non-European industrial nations, cf. Vandekerckhove 2006). This becomes all the more clear in view of the entirely different legal treatment of the informers.

It is generally assumed that informers are very often afraid of retaliation and are, in fact, confronted with it frequently. Both have been empirically documented (cf. summarized Gobert and Punch 2000; Miceli et al. 2008; also Pemberton et al. 2012: 269-270; for Scandinavia cf. case histories from Bjørkelo et al. 2008; Hedin and Mänsson 2012).[1] The main legal question is, therefore, if whistleblowers should be protected through labour legislation or guaranteed anonymity. [2] The European legal systems, however, are relatively inconsistent in this respect.[3] Strictly speaking, even the conditions under which whistleblowing is permitted at all vary

[1] For, compared therewith, a relatively small percentage of retaliation in case of internal whistleblowing – 27 per cent when reported to management, 40 per cent when reported to company hotline – however: cf. ERC 2012a: 6.

[2] Leniency programs provide not only whistleblower protection, but also exemption from punishment for criminally involved informants. Due to its particular moral and judicial issues this special kind of regulation is disregarded here.

[3] In fact, the Scandinavian studies quoted in the text indicate that whistleblowers, although legally protected, may suffer serious personal consequences. Against „soft punishments“ by the social surroundings (isolation, stigmatization, etc.) the possibilities of legal safeguards must be small. In the end, long-term cultural transformation processes are required, in which whistleblowing is reinterpreted as a positive action.

(especially regarding the external variation).[4] And yet, on a national legal level, we find several different types which, as a rule, must be clearly distinguished from the situation in the US.

2.1. Activating and Protecting Forms of Regulation

In the United States whistleblowing is legally largely accepted ("activating type of regulation"). Internal corporate whistleblowing systems are very often prescribed by law, in which case companies must provide their employees with concrete contact points and reporting channels for whistleblowing and must guarantee that the employees will face no disadvantages (cf. e.g. Sec. 301 of the Sarbanes-Oxley Act – SOA). Apart from such explicit obligations there is at least an indirect legal pressure of implementation, as each organisation that disposes of a whistleblowing system will obtain a penalty bonus in case a corporate crime occurs (cf. § 8 B 2.1. (b)(5)(C) of the US Sentencing Guidelines). At the same time individual whistleblowers are legally protected in many social sectors. In the US the government guarantees this by means of special measures for organisations which have entered into a commercial relationship with the government (FAR - Federal Acquisition Regulation Part 3.9). In the Federal Administration, the Whistleblower Protection Act (WPA) prohibits any discrimination towards employees that disclose illegal events, mismanagement or abuse of power. Apart from the SOA (Sec. 806), multiple similar laws exist both on federal and state level. These warranties often equally apply (as in the FAR) to disclosures to government authorities. In various cases hotlines are offered to this end[5] and external disclosures are financially stimulated (e.g. through the False Claims Act (FCA) and the Dodd Frank Act).

In Great-Britain a "protectionist type of regulation" has been implemented. Here too, listed companies are obliged to install internal whistleblowing systems (Combined Code on Corporate Governance C.3.4.) – this, however, on a „comply or explain"-base, which allows organisations to deviate from regulations in case of related disclosures and explanatory statements. Apart from this, the 1999 Public Interest Disclosure Act (PIDA) is significant (see related Standard PAS 1998:2000). According to section 47 B, whistleblowers in any area of society – the only exceptions being the self-employed or those working for security – shall suffer no

[4] The fact that employees of an organisation are explicitly bound to report serious irregularities is absolutely unusual – apart from the situation of EU civil servants (cf. Art. 22a, 22b EU Regulations for Civil Servants as well as the Guidelines on Whistleblowing from 6.12.2012 - SEC(2012) 679 final). Mostly, the legal issue is whether whistleblowing is facilitated and if typical barriers are eliminated.

[5] Cf. for an arbitrary example: http://www.epa.gov/oig/hotline.html (accessed April 7, 2014).

detriment (if they report in „the public interest“). Concerning the accuracy of the allegation, it is no more assumed that the whistleblower acts in good faith.[6] Nevertheless, external whistleblowing is obviously regarded as objectionable. Contrary to internal whistleblowing behaviour, it is allowed only under additional requirements and is considered a less-then-ideal solution. In case the whistleblower yields publicity and was driven by self-interest, it is possible to sanction him by means of the Employment Law (section 43 G I (c) – cf. Gobert and Punch 2000; also Schmidt 2005: 154-155).

2.2. The Ambivalent Situation in Continental Europe

Whereas both the activating and protectionist types of regulation clearly or implicitly state that whistleblowing is principally or under certain conditions allowed, so far no such national parallel regulation has been implemented in, for example, Germany (“ambivalent type of regulation”). The government is, indeed, currently working on the implementation of corporate compliance programs (e.g. through §§ 25a, 25c KWG, 33 ch. 1 nr. 1 WpHG), however without specifically involving whistleblowing systems. Internal whistleblower contact points need therefore not be established. However, their implementation (voluntarily or in order to fulfil obligations in foreign states) is lawful if proceeded in accordance with certain data protection requirements (Maschmann 2013: 99-100: possibly confidential treatment of identity instead of anonymity for the whistleblower).[7] The individual internal reports by employees are allowed anyway. In contrast, the legality of external information is regulated very restrictively. Since this can harm legally protected company secrecy interests, the whistleblower might even incur a penalty (§ 17 UWG), if he had other means at his disposal or if he had dishonourable reasons (cf. Engländer and Zimmermann 2012). Moreover, labour law penalties are only prohibited in case of honourable intentions and even then only if the information proofs to be correct (or if the whistleblower acted in good faith) and there were no other options than to notify the authorities, the media, etc. (for the relevant legislation of the Federal Labour Court and the European Court of Human Rights cf. Maschmann 2013: 100). So far, the initiatives to implement an overall statutory authorization for whistleblowing have shown no results, nor can this

[6] This is the state of the Enterprise and Regulatory Reform Act 2013. For the former situation cf. Bowers 2012.

[7] These are ultimately requirements of the EU Data Protection Law. Cf. also the reservations of the French data protection authorities (http://cnil.fr/fileadmin/documents/en/CNIL-recommandations-whistleblowing-VA.pdf - accessed April 7, 2014) as well as the contemplations of the so-called Art.-29-Data Protection Group (WP 117, 00195/06/EU). For implementations in Belgium, Portugal and Spain cf. http://ec.europa.eu/justice/data-protection/document/national-policy/whistleblowing/index_en.htm - accessed April 7, 2014. Models that enable anonymous disclosing without explicitly encouraging it, however, are, e.g. in Germany, not criticized in practice.

be expected in the near future. In certain special cases (health and safety, corruption) and for certain professional categories (civil servants) the obligation of secrecy was lifted (§ 17 II ArbSchG; § 37 II Nr. 3 BeamtStG). In all other cases, external whistleblowing remains legally risky in Germany.

The situation in Italy resembles that of Germany (Guyer and Peterson 2013: 17) and the same goes for Austria, Poland and those European countries, where there is no or only a marginal regulation concerning whistleblowing.[8] A number of other states has chosen a further type of regulation, i.e. a "restricted protectionist type of regulation", which can be situated in between the other two European variants. From a legal point of view, this type basically ensures a fundamental protection to bona fide whistleblowers. However, this protection is partly only fragmentary and confined to the public service and/or specific reports on corruption. This is, for instance, the case for France (cf. Art. L 1161-1 French Labour Code; also Sankowicz and Henry 2012), but also for Belgium and the Netherlands, Romania and Ireland (cf. Hassink et al. 2007: 27; in more detail Vandekerckhove 2010), as well as for Norway and Sweden (Skivenes and Trygstad 2010: 1073; Hansson 2012: 4). In these countries the respective legal situations show major differences in the details and are in some instances closer to the British type of regulation and in others to the ambivalent type.

3. The Contradictory Instrumentalization of Whistleblowing

Whistleblowing is fundamentally different from traditional forms of reporting offences or in-company reporting. Today's Whistleblowing is not only an individual phenomenon, but also a subject and result of a certain control strategy. The more the State tries to stimulate company-insiders to report wrongdoings (see 3.1.), the more whistleblowing becomes an „element of a regulatory strategy" (Pemberton et al. 2012: 265). That's why the meaning and significance of whistleblowing can be better understood, if we analyse it in the context of general regulatory structures, which should enable to enforce economic law and economic penal law.

One approach in this regard aims at improving the state tools of enforcing criminal law. The other approach tries to strengthen self-control mechanisms within the organisations. Especially in the first case, detecting corporate crime obviously goes along with considerable difficul-

[8] Cf. compilation of Vandekerckhove (2010); also, specifically for Eastern Europe, the report on the legal position in that area: http://www.whistleblowing-cee.org/summing-study (accessed April 7, 2014).

ties (Shover and Hochstetler 2006) and a limited rate of success (Dyck et al. 2007). Corporate self-control, however, basically faces the same problem (Bussmann 2007). Therefore, both programs try to raise the information retrieval rate by reinforcing the recruitment of informers. Whistleblowing, which originally only occurred sporadically and was considered a purely „issue of conscience" – more precisely an exceptional form of behaviour of individuals motivated by moral courage[9] – is now stimulated systematically. Thus it is to become commonplace behaviour with as many company insiders as possible blowing the whistle on malpractices. Naturally, this process of normalisation, of institutionalisation and instrumentalisation occurs in different ways:

3.1. External Whistleblowing as Part of Public Corporate Control

The State traditionally relies on the steering effect of conventional mechanisms of sovereign law enforcement to guarantee compliance in the economy. The beginning of the 21st century, in particular, has seen a tentative rediscovery of the use of penal law (Snyder 2007) as a reaction to serious corporate crime and the crises at the financial markets (Snyder 2007) – although Europe has been more reluctant in doing so than countries overseas (cf. also Shover and Grabosky 2010). Along with this development, we have seen a growing cooperation between the Public and private institutions as far as crime control is concerned. Such Public-Private-Partnerships primarily aim at acquiring information about fraudulent actions which is needed for their prosecution, and for the acquisition of which the Public relies on the service of civilians. This is exactly where the growing relevance of external whistleblowing procedures becomes apparent. Public investigative authorities no longer only draw on information obtained by official control mechanisms or reported sporadically by individual informers of their own accord. On the contrary, they aim at enlarging the number of whistleblowers and witnesses by setting up reporting systems, thus facilitating public prosecution of, above all, corporate crimes (cf. Miethe and Rothschild 1994: 328, 341; Dugan and Gibbs 2009: 121).

At the point where potential informers are strategically encouraged to report wrongdoings, it becomes a real system. Easy acceptance when it comes to the receipt of disclosures, protection measures and financial incentives are the means by which a whistleblowing-system

[9] The intermediate results of a study which I am currently conducting with N. Herold and which is mainly based on qualitative interviews with whistleblowers, however, have already shown that ethical motives for reporting are by no means the rule and are, moreover, always intertwined with other motives (mostly downright practical ones and even with self-interest in mind) (cf. also Miceli and Near 2010: 77).

works.[10] The State does, in fact, partly rely on financial stimuli, although this is only relatively common in the US, where the informant can get a share of the fine (respectively the recovery) imposed on the enterprise (e.g. 42 U.S.C. § 1395b-5 or Security Exchange Act Sec. 21F as well as Callahan and Dworkin 1992: 280; Miceli et al. 2008: 164; Ebersole 2011: 135-144; Pope and Lee 2013: 598-602; Brink et al. 2013: 96).[11] In Europe, this hasn't been implemented yet (Guyer and Peterson 2013: 18). Although an award scheme has been under discussion,[12] Europe does not yet go beyond offering special and easily accessible channels for reporting irregularities, protecting whistleblowers, in some cases, by guaranteeing anonymity and / or by providing other forms of protection (see 2). This concept is already being rudimentarily implemented in places where the police or other authorities offer easy to use ways of refunding penal charges online (so-called „Internetwachen", German online police stations). Generally, irregularities can also be reported anonymously (cf. thereto in the healthcare system the printed papers of the German Federal Parliament BT-print. 17/13588). Other online reporting processes go even further in that they technically guarantee full anonymity (also as far as the computer identification is concerned), while public investigators can nonetheless steadily communicate with the whistleblowers. In Germany, this occurs using the so-called „Business Keeper Monitoring System" (Linssen and Pfeiffer 2009), regardless of the legal ambiguity of thus encouraged whistleblowing (above 2).

An even more radical form of instrumentalisation of whistleblowers is Private Law Enforcement. Here, corporate insiders are not only motivated to support law enforcement by disclosing information, but to take this over completely in lieu of the State. So-called civil penalties play a key role, which can be claimed by competitors, injured parties or individuals accordingly against organisations acting illegally. As this is also supposed to have a deterring steering effect, public crime prosecution becomes superfluous. This is based on the „punitive damages" and in particular the "multiple damages" which are prescribed by law in the US (e.g. in the part on civil law of the so-called RICO-Acts 18 U.S.C. § 1964(c)). In case of infringements of competition law, for example, injured parties should be encouraged, animated by the prospect of receiving an overcompensating proportion of any recovered damages, to systemat-

[10] Obligations to report (underpinned by sanctions) are a further technique of motivation. It can get a practical relevance in companies (3.2) due to Labour Law and corresponding requirements in the codes of conduct (thereto cf. Vandekerckhove and Tsahuridu 2010).

[11] See e.g. the case of the Swiss Bank UBS (http://articles.washingtonpost.com/2012-09-11/business/35494823_1_ubs-whistleblower-bradley-birkenfeld-report-tax-fraud - accessed April 7, 2014).

[12] Cf. the draft of a market abuse regulation of the EU from 20. 10. 2011 (KOM (2011) 651final), notably art 29 II, which provides a reward for whistleblowers, issued by the Member States.

ically file private actions, on the basis of their insider knowledge, thus virtually substituting public law enforcement (cf. Jones 1999).

European antitrust law has not adopted this model yet, albeit approximation can be observed (Basedow 2007). The form of private crime prosecution which comes closest to individual whistleblowing is, in fact, the so-called qui tam action under the False Claims Act. If employees have reasonable grounds for believing that their organisation is defrauding public authorities, they can, in accordance with this option, file actions on behalf of the State under „treble damages“ and a civil penalty. Prevailing plaintiffs receive a „relator's share“, the amount of which (15 – 30 per cent of the sum) depends on whether a state has joined the lawsuit, primarily, however, varies according to the quality of the information and the evidence merits of the insider (in detail Kölbel 2008; cf. also the instructive trial reports on several FCA-trials in Bucy 2004). In Europe where, so far, there has not been an equivalent of said US-institution, adopting it is only under discussion (Riley 2003; Home Office 2007).

3.2. Whistleblowing as an Element of Corporate Self Control

Yet again following the example of the US, European states have furthermore proceeded to urging organisations to guarantee their own compliance by way of internal self-control. Legal obligations or the prospect of milder punishment in case of a crime, encourage organisations to set up their own compliance programs in order to prevent corporate and occupational crime These programs triggered by the State, however, also show a reactive element. They include a set of tools allowing organisations to deal with violations which have already been committed – not only damages caused to the organisation but also non-compliances within the company which affect the outside world. For this purpose, companies either create their own in-house units or call upon external professional service providers (lawyers and consulting companies) for investigation (Williams 2005). Internal whistleblowing-systems are regularly connected with structures of this kind. As such, they serve as information channels offering employees (and to a certain extent also customers, subcontractors, etc.) easily accessible, risk-free disclosure channels by means of which detection units should increasingly be provided with reports on wrongdoings, necessary for initiating internal detection and handling processes (Miethe and Rothschild 1994: 328; Miethe and Rothschild 1999: 126; Berry 2004: 1-2; Miceli et al. 2008). In its quest to promote self-regulating structures, the State at all times intends corpo-

rate compliance programs to include said means of information disclosure (Pemberton et al 2012: 264).

Hence, the establishment of a compliance program usually involves the creation of a whistleblower disclosure procedure which guarantees anonymity, e.g. a contact point, a telephone hotline or an online portal. This has become commonplace in larger European organisations (Bussmann and Matschke 2008),[13] albeit to a lesser extent than in the US (latest findings on the nationwide existence: cf. Kaptein 2010; Weber and Wasielewski 2013). Even in Germany, where there are no according regulations (see 2), more than one third of the organisations have introduced an in-house whistleblowing system (PricewaterhouseCoopers 2010: 31; PricewaterhouseCoopers 2011: 70).[14] Business codes of the organisations often specifically demand that employees make use of this system (Hassink et al. 2007: 34, 36). Moreover, organisations generally guarantee that violations may be disclosed on a confidential basis. In addition, various financial stimuli to encourage the disclosure of wrongdoings are being considered (Wrase and Fabritius 2011).

3.3. Structural Incompatibilities of Public and Private Whistleblowing Systems

In Europe, as in most countries of the Western world, both law enforcement strategies are pursued, i.e. efforts to take legal action more effectively as well as stronger self-monitoring. Therefore internal and external whistleblowing systems are often found side by side. Sometimes both information channels are even initiated in parallel by the legal systems, though this rarely happens as clearly as it does in the United States. Over there, in case of an offence, the said FCA sees to it that in many branches employees are financially motivated to report externally and their employers even have a duty to inform them about this. At the same time, companies are legally and by order of the Sentencing Guidelines obliged to install internal whistleblowing systems (cf. Carson et al. 2008: 367). In Europe both systems seldom appear parallel in such a pronounced form. However, in principle the whistleblower's actions, whether within the company or externally, are at the same time activated – though not necessarily in the framework of an intentional political program, but definitely supported by objective structures. This duality, finally, is not particularly reasonable:

[13] Despite limitations due to data protection regulations (above footnote 7).

[14] According to the survey by Pittroff (2011), however, the organisation and extent of the systems varies amongst the 30 largest companies listed on the stock exchange in the Federal Republic of Germany.

That is due to the fact that the compliance programs and with them the internal reporting systems develop their own logic in the day-to-day corporate reality, which is very different from what the government expects to achieve by implementing whistleblowing regulation and from what initially legitimised it. From the point of view of the organisations these compliance measures give rise to several instruments of liability avoidance. From their point of view, the things that are most important from the perspective of regulation – i.e. the steering effect (in the sense of better compliance) – are of secondary importance whereas the handling of penal and other liability risks in the economic interest of the organisation is predominant.

This is especially noticeable in the reactive elements of the compliance program. As far as the regulatory aims are concerned these measurements should guarantee that violations within organisations are exposed and a public judicial process can be initiated (as this will most likely eliminate criminogenic organisational structure and implement prevention measures). But for a company, government involvement constitutes just one of several options: Reactive compliance measures can only be of need to a company if they manage to process the criminal offence with as little damage as possible and if they manage to reduce the economic disruption. For this reason, internal investigations are solely aligned with this logic of economic concerns – and not with disclosure or prosecution interests of the Public, victims or any third parties involved. In practice this generally results in damage management, which is entirely focused on the interests of the organisation involved (minimisation of sanction- and liability costs; reputation; avoidance of damage in business relationships; avoidance of irritations in personnel issues, etc.).[15]

When serious irregularities are internally exposed, the authorities are generally not consulted. The State is, therefore, only consulted on a highly selective and in a purely instrumental way, i.e. only in those rare cases where it would exceptionally bring about tactical advantages to the economic aims of the organisation.[16] In other cases, the official procedure, which is ruled by non-economic criteria and on which organisations barely have an influence, brings about too many disadvantages (fines, damage of image, administrative requirements, etc.). For this reason, companies tend to adhere to the "Culture of Secrecy" (Zedner 2006: 272) and deal

[15] It may sometimes also be a case of more neatly hiding a profitable but legally borderline action in future (cf. Miceli and Near 1995: 695; Schmidt 2005: 148-149).

[16] E.g. if exposure to the public cannot be avoided anyway; if the impression of solidarity must be avoided by means of clear dissociation; if severe sanctions against the company can be avoided through cooperation – or if responsibility can be shifted to the employees by an official complaint (specifically on that point: Laufer 1999: 1343).

with violations committed within the company "in common interest" discretely as an internal matter (Ziegleder 2007: 254-255; Williams 2005).

Thus, it is also imperative to try to prevent external whistleblowing as much as possible. Indeed, if an employee blows the whistle on internal wrongdoing outside the organisation, this will entail the very official procedures which organisations seek to avoid because of secondary and collateral damage. External whistleblowing represents a threat to corporate business interests (Barnett 1992; Williams 2005: 328; Schmidt 2005: 150 f.; Miceli et al. 2009) owing to its harmful economic effects organisations concerned are frequently confronted with (to this now the findings of Bowen et al. 2010). That is why companies need a technique which channels the potential willingness of the employee to impart with information from the outset within the boundaries of the companies' interests. This is precisely the possibility an internal reporting system offers, since it systematically turns any potential external whistleblowing into internal information (Callahan and Dworkin 1992: 334-335; Near and Miceli 1994: 66-67; Near and Miceli 1996: 509; Berry 2004: 1, 10-11; Schmidt 2005: 162; Hassink et al. 2007: 30; Miceli et al. 2009: 381, 385-386). Because of this, businesses install these systems and it is exactly why they urgently recommend their employees in (most of) their codes of conduct to only report any kind of malpractice internally (Ziegleder 2007: 250-251; Hassink et al. 2007: 35, 37). What is more, some British companies (primarily belonging to the National Health Service) even offer a reward for employees who keep silent instead of reporting misbehaviour to the outside world (so-called Gag Orders, cf. Guyter and Peterson 2013: 18).[17]

It appears, therefore, that internal whistleblowing is not serving its intended purpose as an early warning system to ensure "corporate hygiene" (Callahan and Dworkin 1992: 334). In contrast, it is actually functioning as a means of preventing captious internal corporate behaviour from being exposed and of handling corporate malpractice in the organisation's interest solely within the organisation. If internal corporate whistleblowing systems from a regulatory perspective aim at enforcing law, then this objective is partly undermined by corporate logic as the concerning systems are more likely to control information and steer the consequences of malpractices in accordance with the organisation's interests. More so: this is at the same time in stark contrast with the functions of external whistleblowing, of which the efficiency

[17] See for an exemplary case: www.telegraph.co.uk/health/healthnews/9869579/NHS-whistleblower-faces-ruin-after-speaking-out-about-patient-safety.html (accessed April 7, 2014).

decreases as internal whistleblowing (i.a. by the government) is accelerated and becoming more important:

Internal whistleblowing systems prevent what police and public whistleblowing facilities are institutionalised for: they prevent external reporting from which public corporate crime prosecution stands to benefit from (see 3.1). They block the influx of insider knowledge of wrongdoings which public prosecution bodies and companies compete against each other for. So, whereas the economic operators lose control over the handling of wrongdoings in case of external whistleblowing, the public sector loses power of control when information remains inside the organisation. In other words, when the government decidedly encourages and requires internal whistleblowing systems, it undermines at the same time its own power of enforcement (Kölbel and Herold 2010). To say that internal whistleblowing systems constitute a win-win situation for prevention, as is often stated, (for example Miceli and Near 1988: 278) and provide a higher level of corporate norm compliance (cf. only Miceli et al. 2009: 380), completely rules out the possibility of a contraindicated use of information from a regulatory point of view.

4. State of the art Empirical Research

Analysing the operational conflicts alone cannot provide the full picture of the actual effects. What the real consequences are when two functionally incompatible whistleblowing systems – a public system and a corporate one - expand and enter into downright competition with each other to obtain information from company insiders, can only be determined through empirical observation. This first of all requires information on the effectiveness of both systems (see 4.2.). Secondly, the decision criteria which influence a whistleblower to internally or externally impart with his information need to be reconstructed (4.1.).

4.1. The Decision of (Potential) Whistleblowers

4.1.1. Variants of Action

The first question to arise is what brings certain people to talk where others keep silent. Existing survey data show that most people tend to show solidarity with the organisation. Internal disclosures are clearly preferred and external whistleblowing is often only used as a last resort

(cf. Larmer 1992: 127; Callahan and Collins 1992: 942; Callahan and Dworkin 1994: 176; ERC 2012b: 2). Most external whistleblowing is, moreover, often preceded by failed internal attempts (for empirical evidence see e.g. Miceli et al. 2008: 9-10; Miceli and Near 2010, 77-78; ERC 2012b: 2; Brink et al. 2013: 95; in a European context: Bjørkelo et al. 2011; Hedin and Mänsson 2012).[18] Admittedly, the extent and rigidity of company loyalty differ in different cultures. It is, for instance, stronger in Asia than it is in the USA (cf. Brody et al. 1999; Martens and Kelleher 2005; cf. also Hassink et al. 2007: 29; Miceli et al. 2009: 381). Considering the conception of company loyalty in those countries, one can assume that more extensive reservations towards external whistleblowing also exist in Europe and due to the historical denunciation experiences especially in Germany (cf. amongst others Pittroff 2011: 12-13). Research to date (for a summary of cross-national research: cf. Vandekerckhove 2010b) has shown that this assumption is plausible (cf. specifically on France Katz and Lenglet 2010), it has not, however, been able to empirically confirm it (rather indications to the contrary by Jackson and Calafell Artola 1997: 1170-1171).

Apart from this question, many company employees who observe misconduct or wrongdoing keep this information to themselves anyway. According to the obviously heavily fluctuating available survey data approximately 50 per cent, if not more, of the employees with knowledge about any wrongdoing are so-called silent observers (summary Rothschild 2000: 421; Miceli et al. 2008: 22-23; Miceli and Near 2010: 80).[19] For a criminological analysis it is, therefore, important to know which factors persuade someone to take this quasi double-contraindicative decision: to start acting in the first place and, more than that, to report to an external channel.

4.1.2. Factors Affecting Whistleblowing Behaviour

Research papers about managerial, organisational and behavioural science to date have shown that the complex decision-making process (for a relevant model see Miceli and Near 1992, 48) is mostly affected by personal, situational and company specific circumstances (cf. Barnett 1992: 949; Miethe and Rothschild 1994: 325; Miceli and Near 1996: 511; Sims and Keenan 1998: 411; King 1999: 316-317; Hassink et al. 2007: 29). Bearing in mind that so far there is no proof for the fact that its findings can be applied to the situation in Europe, re-

[18] These findings are confirmed by my own interview study (footnote 9).

[19] These numbers are higher (53 to 65 per cent since 2000) if we include situations whereby the conventional disclosure to a superior constitutes a realistic and workable option (cf. ERC 2012b: 1).

search conducted predominantly in the US has drawn the attention to the following specific correlations:[20]

a) Most studies primarily looked at personal characteristics of whistleblowers which influenced the decision if and why they reported any wrongdoing. This, however, did not provide explicitly consistent findings. Age, a feeling of solidarity and the position in the organisation could partly be qualified as relevant factors. Internal whistleblowers appear to be more often long-time, high-ranking and higher educated employees, whereas external whistleblowers tend to be older (> 40) and better paid (cf. for Europe Bjørkelo et al. 2011, 216-217; for the USA Miceli and Near 1988: 268-269, 276-277; Miceli and Near 1996: 511-512; Miceli et al. 1991: 123; partly different findings Dworkin and Baucus 1998: 1290; Miethe and Rothschild 1999: 113). Concerning the influence of gender, there are different observations (greater willingness to testify by women in Mazerolle and Cassematis 2010: 134; for different results Miceli and Near 1988; Miceli and Near 1996). Religious orientation and / or social values also play a certain role (on weaker and inconsistent links: Sims and Keenan 1998: 416-417; Miethe and Rothschild 1999: 119; Mesmer-Magnus and Visvesvaran 2005: 290). On the whole, however, the differences in character between internal and external informants as well as silent observers are small (Miethe and Rothschild 1999: 113; Miceli and Near 2010: 82). This can hardly be surprising since most external whistleblowing only happens after internal whistleblowing has failed.

b) The situational context influences the decision, as the risks and benefits of disclosure differ depending on the individual case. Thus, qualitative and quantitative characteristics of any specific inner-organisational wrongdoing influence insiders' decisions. From the subjective point of view the persons who decide to take action interpret the grievance as more serious than the silent observers (cf. Miceli et al. 2008: 10). If the matter concerns issues of health and safety and if the person judges he disposes of sufficient insight and proof, he is more likely to proceed to external whistleblowing (Callahan and Dworkin 1994: 173; Dworkin and Baucus 1998: 1281-1282, 1296; Zipparo 1999: 284; Miceli et al. 2012, 939; Brink et al. 2013: 96). Wrongdoing by higher ranked staff members is less often disclosed than wrongdoing by lower or equally ranked colleagues (Skivenes and Trygstad 2010:

[20] For most studies it consisted of standardised (e-mail) interviews of the most diverse groups of people in the US (different categories of employees, students, etc.). The behaviour is frequently measured with case vignettes and scenarios and interpreted as an indication of the willingness to proceed to whistleblowing. The validity and generalisation of the findings are therefore limited (also the assessment by Miceli and Near 1988: 279; Dworkin and Baucus 1998: 1296; Hassink et al. 2007: 42).

1083; Mazerolle and Cassematis 2010: 135). Financial motivation can at least partially explain external whistleblowing (cf. Callahan and Dworkin 1992: 283-284; Dyck et al. 2007: 31; Carson et al. 2008: 361, 372; Pope and Lee 2013: 605) – especially if one considers the promised reward as a gratification for the result of the triggered enquiry (in depth Callahan and Dworkin 1992: 278-279, 283). To what extent external whistleblowing is hindered by a real or imagined fear of retaliation (whether by employer or informally) is largely unknown. Though many external whistleblowers indicate that they have barely been influenced by conceivable disadvantages or retaliation measures (Miceli et al. 2009: 380) – at least once they had decided to act (cf. die Meta-Analysis by Mesmer-Magnus and Viswesvaran 2005: 290) – silent observers are of course not included in these studies. Experimental studies with neutral test persons revealed (with inconsistent results) that the danger of dismissal generally did play a role at the beginning of the decision-making stage (cf. Callahan and Collins 1992: 945; Zipparo 1999: 284). On the other hand, the willingness to talk does not automatically increase when anonymity is guaranteed (Pope and Lee 2013: 605).

c) Lastly, organisational conditions constitute external factors which affect decisions and the scale of whistleblower behaviour, by either facilitating or hampering one of the two whistleblowing variants. Indeed, the complexity and lavishness of communication channels often increase with the size of an organisation, so that established whistleblowing channels are difficult to use or are even totally unknown (cf. Miceli and Near 1996: 511; Barnett 1992: 956; King 1999: 324; Zipparo 1999: 282-283; Miceli et al. 2009: 387). Internal communication channels are equally constrained in a bureaucratic, strongly authoritarian and hierarchic organisational structure (cf. Barnett 1992: 949-950; Miceli and Near 1996: 517; King 1999: 317). Companies where the unions are well represented generally have a higher level of willingness to proceed to external reporting, whereby it is not certain if the branch is a deciding factor (Barnett 1992: 956; Rothschild and Miethe 1999: 177). In contrast, internal whistleblowing is facilitated by means of well-directed support measures (easily accessible contact points) and encouragement from superiors, as well as an ethical business climate and / or one that is open to criticism (cf. Miceli and Near 1992: 150; Sims and Kennan 1998: 418; Zipparo 1999: 275; Hassink et al. 2007: 30; Miceli et al. 2009; Kaptein 2011). Appropriate specifications in the profession or business code, however, do not increase the willingness to report (Beets and Killough 1990).

4.2. The Results of Whistleblowing-Systems

Reporting procedures are not beyond critique. That whistleblowing borders on denunciation and is therefore morally and ethically questionable (to this discussion for example Carson et al. 2008) is a valid objection, which should be further elaborated in a different disciplinarian context. In contrast, the functionality of whistleblowing is definitely a criminological issue. It is, for instance, doubtful whether whistleblowing leads to the expected effects of disclosure and detection which compensates for its downside – i.e. the resource expenditure and the disruption of the interaction within the organisation. The nature of whistleblowing institutions inevitably entails a potentially explosive possibility of abuse (cf. Gobert and Punch 2000: 44-45, 49-50; Schmidt 2005: 158-159). Many informants might be less concerned with bringing wrongdoing out into the open than with discrediting certain persons, departments or companies (out of vengeance / competition) or with acquiring the advantages of the whistleblower status (i.e. the financial bonus, immunity under labour legislation, etc.). Under these circumstances the creditability of disclosures is highly questionable.

To judge the validity of this criticism, a systematic evaluation of whistleblowing institutions would be required. The focus would have to lie on the volume and the substance, the reliability and the usability of the acquired information. Companies, however, are reluctant to release evaluations of their internal systems, so that information in this respect is very limited. Miceli et al. (2008: 21) report parenthetically on revisions, which proved that an important part (though the number could not be established exactly) of internal disclosures could not be confirmed (likewise PricewaterhouseCoopers 2010: 34-35). Although data is sometimes collected on internal investigations which are triggered by internal whistleblowing (e.g.: Bussmann and Werle 2006: 1134-1135: 4 per cent; PricewaterhouseCoopers 2011: 70: 10 per cent), it remains unknown how much information would have been disclosed, if there hadn't been a suitable contact point (by means of an official communication or as a chance discovery). A more recent German study has revealed that company systems are of almost no importance as far as the exposure of malpractice is concerned; in fact, it turned out they are used for denunciations and general complaints (Boemke et al. 2012: 88; more positive results however from Hülsberg and Engels 2001: 15, 18). Recent surveys have also shown that compliance rates of the organisations benefit only marginally if at all from whistleblowing structures (Parker and Nielsen 2009; Simpson et al. 2013). On top of that, the limited amount of research available on this topic leads to the assumption that internal disclosures only rarely lead to the required

inner-organisational changes (summarized Skivenes and Trygstad 2010: 1085 with further references).

As far as governmental whistleblowing institutions are concerned, research data is also sporadic. This means that in this field the empirical base must be considered to be rather weak. However, in the following two examples it becomes apparent that the aforementioned criticism is not unfounded: First indications can be obtained from practical experiences in the US with the FCA and the qui tam trials (in more detail: Kölbel 2008). Here, the available findings (US DOJ 2012) make it clear that a financial incentive can to a certain extent act as motivation (see also 4.1.b). As it happens, a mentionable rise in the number of private claims from whistleblowers, which had already been allowed for a long time, only occurred when the obtainable relator's shares were raised to an attractive level, thereby offering the informer an attractive prospect of gain. In this respect, the stimulus generates without doubt a surplus of internal disclosures.[21] The number of people who decide to make a report and to file a complaint is nonetheless so small (still 400 to 650 per annum) that only a marginal amount of wrongdoing is unveiled. It seems that the circle of insiders is only partially activated by the rewards of the FCA. Moreover, the information supplied is often irrelevant, unusable or unsubstantiated, since only in 20 per cent to 25 per cent of the cases the government joins the private action or the actions are successful.

Another example which especially elucidates the aspect of guaranteed anonymity is provided by the experience of the police force of the Business Keeper Monitoring System in the German State Lower Saxony. Out of 1239 reports received there between the end of 2003 and 2007, 724 pre-investigations were started (mostly related to economic offences). However, initial suspicion that allows a formal criminal investigation was found in only 350 cases. An exorbitant 82.6 per cent of these investigations ended in a suspension because of insufficient evidence. Apart from the 8 procedures which were still pending by the end of 2008, there were only 39 convictions (Linssen and Pfeiffer 2009: 174-175). Hence, although the system yields a significant increase of private complaints registered by the police, these generated only a minor result. This had already been illustrated in an earlier evaluation study (4 convictions / sentences until December 2004 as opposed to more than 90 per cent dismissals for insufficient evidence) (cf. Backes and Lindemann 2006). A qualitative analysis of internal dis-

[21] Cf. also Dyck et al. (2007: 5), according to whom three times as many corporate crimes were uncovered through whistleblowing within the jurisdiction of the FCA compared to the rest of the economic systems.

closures that was carried out there, showed that there was a significant though not specified proportion of evidence which pointed at problematic motives like jealousy, revenge or frustration (cf. Backes and Lindemann 2006: 100-101).

5. Taking Stock and Legal Outlook

There is reason to believe that empirical research data available so far is only of limited use. The information gathered on cultural, organisational, situational and personal reasons potential whistleblowers have for disclosing any wrongdoing, albeit ample in quantity, is, for now, only preliminary. This is especially the case as there is no information yet on the interdependency and interaction of the different reasons. Nor can findings obtained in the US be readily applied to Europe. One general finding, however, becomes apparent: Institutionalised incentives to encourage whistleblowing behaviour, which aim at increasing the number of reports on violations, are currently only addressing a minority of potential whistleblowers. Moreover, the people it does mobilise and who report via its information channels, disclose information which only too often is of little use as these informers evidently represent the wrong target group (i.e. they are no real insiders with authentic knowledge of inner-organisational misbehaviour). At any rate, law enforcement authorities currently bring about only a moderate increase in the detection rate through their whistleblowing systems. And although it still needs to be fully determined whether the situation is significantly different for internal whistleblowing-systems, this is hardly likely to be the case (Pemberton et al. 2012: 271).

On the whole, therefore, the efficiency of the entire institution is, at present, often surprisingly weak. The expectations criminal policy has towards whistleblowing (3.1. and 3.2.) are barely fulfilled. Its actual relevancy – especially in Europe – remains disproportionate to the scope and intensity of the scientific debate on it. This is arguably the reason why even when internal and external whistleblowing are made use of side by side, their inconsistency and competition (see 3.3) have, to date, hardly become noticeable. The picture would be different if the willingness to report were to rise. Recent observations in Europe have shown that this does not depend on further technical improvement of hotlines and internet platforms or even on making report channels even more readily accessible and less prone to reprisal:

A large Norwegian survey (Skivenes and Trygstad 2010) showed that there was an exceptionally high proportion of employees in the public sector which reported observed wrongdoing internally or externally (76 per cent). 36 per cent of the employees took several internal attempts and 7 per cent reported outside the organisation. Despite the fact that the risk of suffering from any disadvantages increased with the intensity of the reporting behaviour, only a very small amount of informers (17 per cent) faced any form of reprisal. Inversely, a great number of them (64 per cent) observed intra-organisational changes as a result of their blowing the whistle (either were confirmed by the findings of Bjørkelo et al. 2011, 219-220). The authors of the survey see the reason for their remarkable findings in the employment market structures of northern European welfare states, in which employees feel more inclined to fight wrongdoings acting from the secure job positions they have in these countries. They especially highlight the largely institutionalised corporate management culture in Scandinavian countries, which is co-operative, informal and dialogic and thus enables employees to take an influence. Communicative and open corporate cultures of this kind facilitate internal whistleblowing and enable the appropriate handling of whistleblowing reports. Said interpretation is clearly supported by some of the above (4.1.c.) mentioned findings as well as, and especially by research which has shown that internal compliance programs generally only have a preventive effect in case they are integrated in a democratic, conformity- and value-oriented corporate culture (cf. e.g. Parker and Nielsen 2009).

Under these conditions, it might become more apparent that potential informers generally tend to be loyal to the organisation. When they have the choice, insiders will ever more noticeably choose to disclose their knowledge of malpractice internally, and will only go outside the organisation under certain circumstances: i.e. in case of inaccessibility and inefficacy of internal information channels (or when, in view of a specific case, internal remedy has to be discarded from the beginning). Hence, in the competition of internal and external systems, it would come, under these circumstances, to a (further) shift towards internal alternatives (cf. also the corresponding indications in manager surveys Barnett et al. 1993). The amount of information disclosed to the police and to company investigators would increase even further at the expense of the authorities. Consequently, the existence of external channels would, if at all, only be required in single cases (i.e. when self-regulation fails), albeit not necessarily anonymously.

In the light of American and European findings (see 4), it becomes clear that the ideal Norwegian conditions described above are exceptional. To date, corporate compliance and whistleblowing systems rarely function as described by Skivenes and Trygstad (2010). As far as the aspect of regulations is concerned, it is, therefore, still preferable not to leave action against wrongdoing solely in the hands of the non-juridical economic calculus of the companies. Instead, it is in the interest of the public to direct insider information on wrongdoing to public recipients. However, the number of competing internal information channels, though originally triggered by the State, is meanwhile growing steadily. This development cannot be stopped anymore. Attempts at countering it by installing anonymous external hotlines (see 3.1.) would presumable show only little result. Apart from the fact that such systems are ineffective and inferior, they also bare the risk of denunciation and abuse. For this reason, there have been calls in Europe to disregard these problematic whistleblowing channels, and to stick to the traditional public reporting channels (cf. e.g. Backes and Lindemann 2006).

Convincing decisions in this criminal-political question require an even closer look into the factors that influence whistleblower behaviour. Hence a clear need for further research is marked. But if we differentiate between whistleblowing systems and individual behaviour within these systems, and if we look closely at the latter, the main problem regarding here – i.e. whether whistleblowers need protection – is an issue which can be addressed immediately. Fully apart from the drawbacks which institutionalized systems of whistleblowing have shown, there is no justification for the fact that some legal systems reject clear legal safeguards even in case of commendable disclosure of real wrongdoing (see 2). A well-shaped external right to report is as appropriate as a differentiated set of instruments for protecting whistleblowers from reprisal. Therefore, there is a need for the development of a binding homogenous minimum standard in Europe, offering whistleblowing a firm basis whenever it occurs altruistically or at least without artificial triggers.

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