

**THE CURRENT STATE OF WHISTLEBLOWER LAW IN EUROPE:  
A REPORT BY THE GOVERNMENT ACCOUNTABILITY PROJECT**

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**AMERICAN BAR ASSOCIATION SECTION OF LABOR & EMPLOYMENT LAW  
INTERNATIONAL LABOR & EMPLOYMENT LAW COMMITTEE**

Midyear Meeting  
Hotel Exedra ~ Rome, Italy  
May 5-9, 2013

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**Whistleblowing Becomes a Cross-Border Phenomenon**

Wednesday, May 8, 2013  
8:45am-9:45am

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## I. INTRODUCTION: THE “FOR CAUSE” EMPLOYMENT TERMINATION TRADITION IN EUROPE DOES NOT PROTECT EFFECTIVE WHISTLEBLOWING

In stark contrast to the United States, few European countries have laws directly protecting whistleblowers.<sup>1</sup> For the past two decades, the US has attached whistleblower protection provisions to virtually every major piece of legislation in which federal dollars will be spent, or which are intended to protect the public from financial loss, nuclear radiation, aviation disasters, unsafe trucks on the road, and a wide variety of other harms. For most of the federal whistleblower statutes, the U.S. Department of Labor is assigned to investigate and make findings, and thereafter either the whistleblower or the employer may appeal the decision administratively, and more often, judicially. Instead of this type of US comprehensive whistleblower protection regime, most European Union nations have only a patchwork of whistleblower protections found in employment, criminal, media, and anti-corruption laws.<sup>2</sup> EU whistleblowers largely rely on their attorneys to advocate a creative concoction of various treaties, regulations, and statutes for protection from retaliation, often with little success. Currently, only six countries in Europe have any type of dedicated whistleblower legislation—United Kingdom (UK), Norway, Netherlands, Hungary, Romania, and Switzerland. Of these six countries, only two, UK and Norway, have dedicated whistleblower protection laws that extend to all workers, in both the public and private sectors, including contractors and consultants.<sup>3</sup>

One of the likely reasons for the slow development of whistleblower protection laws in Europe compared with the United States is the vast difference in legal culture as to protection of employees from unfair termination of their employment. In the U.S., an “at will” regime governs in which an employee can be terminated for any reason or no reason at all unless a specific statutory exception to the rule exists. In most European countries, however, the “for cause” rule governs, such that an employee can be terminated only for good cause. Thus, because whistleblowing need not involve any misconduct, there would not be just cause to fire the whistleblower. For examples, in France “the employer must have a real and serious cause (*cause réelle et sérieuse*) for the termination of the employment agreement and must comply with all applicable dismissal procedures.”<sup>4</sup> In Spain, “the law, motivated by a desire to ‘protect society’,

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<sup>1</sup>The definition of “whistleblower” outside of the United States is itself a subject of debate. In a whistleblower case tried by the Government Accountability Project in Tunisia in the Administrative Tribunal for the African Development Bank, the interpreters halted the proceedings to resolve a dispute over the proper translation of the term “whistleblower.” One of the translators provided me with the definition “stool pigeon or snitch.” The other believed the correct translation was “one who shines the light of truth.” An attitudinal rift exists within Europe as well as to which of these two definitions is more accurate.

<sup>2</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 12 (2012).

<sup>3</sup>SUZANNE MULCAHY, TRANSPARENCY INTERNATIONAL, MONEY, POLITICS, POWER: CORRUPTION RISKS IN EUROPE 43-45 (2011), available at [http://issuu.com/transparencyinternational/docs/corruption\\_risks\\_in\\_europe?mode=window&backgroundColor=%23222222](http://issuu.com/transparencyinternational/docs/corruption_risks_in_europe?mode=window&backgroundColor=%23222222).

<sup>4</sup>MOQUET BORDE & LOVELLS, DOING BUSINESS IN FRANCE (1997) § 12.04 2-12.

\*\*\* the employer may only validly and correctly cancel the agreement by invoking one of the causes recognized at law. These legally recognized causes for dismissal are culpable breach on the part of the worker (disciplinary dismissals), those arising from objective circumstances (ineptitude of the worker and operational needs of the company)”.<sup>5</sup> In the United Kingdom, “[w]arnings are usually required to make a dismissal for misconduct fair, and the ACAS Code suggests that only in cases of gross misconduct should there be a dismissal for a first offence.”<sup>6</sup> In Germany, for employers with more than 10 employees, and for employees who have worked at least six months, “[t]ermination protection means that the employer may only terminate the employment relationship with ordinary notice if the termination is ‘socially justified’. The reasons for the termination must be based on the employee's person, his or her conduct, or on compelling business reasons. The reasons must be given at the time the termination notification is served.”<sup>7</sup>

However, the rule that being a whistleblower may not involve any misconduct to justify a termination comes with significant limitations and ignores the realities of effective whistleblowing. The “for cause” protection may be viable for a whistleblower that makes purely internal complaints within a company or government agency, but it seldom will protect external whistleblowing to government regulators. This is due the practical requirement of providing regulators with the employer’s proprietary documents or information. The most effective and socially useful whistleblowing requires the whistleblower to provide evidence supporting his allegations, but under the laws of many European countries, an employee is obligated to never externally disclose such information. Because unauthorized disclosure of the employer’s proprietary information is considered serious misconduct and good cause to terminate the employee, the reality is that under current law, employees who engage in effective whistleblowing have no legal protections from a retaliatory termination of their employment.

Legal and web research suggests several conclusions as to the current state of European whistleblower law. (1) Because of the globalization of financial markets, many European companies and banks must be listed on the New York Stock Exchange, and thus are subject to U.S. securities laws. Consequently, the whistleblower protection provisions of both U.S. Sarbanes Oxley Act of 2002<sup>8</sup> and the Dodd Frank Act of 2012<sup>9</sup> will increasingly be forced on Europe, like it or not. This may result in the lessening of European resistance to enacting whistleblower law. (2) Germany, as the financial and banking powerhouse on the continent, has been moving very slowly on leading the recalcitrant European nations to enact dedicated whistleblower statutes; a resistance which is significantly driven by considerations of “data privacy” and not wanting whistleblowers to be able to appropriate company documents and give them to regulators or the press. (3) Key European nations are essentially in a defensive posture against the push for whistleblower rights by the European Union, Council of Europe, and European Court of Human Rights.

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<sup>5</sup>FERNANDO POMBO, *DOING BUSINESS IN SPAIN* (1997) § 15.06 1-15.

<sup>6</sup>BARBARA FORD, *DOING BUSINESS IN THE UNITED KINGDOM* (1997) § 40.05 3-40.

<sup>7</sup>BERND P. RUESTER, *BUSINESS TRANSACTIONS IN GERMANY* (1997) § 28.07 3-28.

<sup>8</sup>18 U.S.C. § 1514 (2002).

<sup>9</sup>12 U.S.C. § 5333 (2012).



The Parliamentary Assembly of the Council of Europe (PACE) found that the lack of comprehensive whistleblower laws in Europe is largely due to “deeply engrained cultural attitudes, which date back to social and political circumstances, such as dictatorship and/or foreign domination, under which distrust towards ‘informers’ of the despised authorities was only normal.”<sup>10</sup> A major obstacle to enacting whistleblower laws in Europe is the conflict between protecting corporate and governmental proprietary information and data (privacy and personal data) and proposed whistleblower reporting regimes, which typically result in the release of private and official information.

The next five sections of this report (II-VI) offers an overview of the current whistleblower protection schemes—or lack thereof—in the European Union, United Kingdom, France, Germany, and Italy. Section VII highlights a few current and pressing issues in European whistleblower laws, like the use of gag orders. Section VIII offers a quick summary and analysis of the whistleblower protections available in international administrative tribunals.

## **II. EUROPEAN UNION**

Whistleblowers who are assigned to work for the European Union itself seek protection through two mechanisms. If individuals are covered employees by the Staff Regulations of Officials of the European Communities (i.e. a European Union Official), the whistleblower may find protection from retaliation under Articles 22a and 22b.<sup>11</sup> European Union Officials now have an affirmative duty to report certain information and make certain disclosures of illegal activity, fraud, corruption, etc.<sup>12</sup> The other mechanism for European whistleblower protection is Article 10 of the European Convention on Human Rights.

### **A. European Court of Human Rights Approach**

“There is no country where whistleblowers—whether they are reporting a human rights violation or other wrongdoing—do not at times face retaliation. The European Court of Human Rights then plays a crucial role as, in all of the Council of Europe countries, a whistleblower may be able to bring a case under the European Convention on Human Rights [ECHR].”<sup>13</sup> Although some whistleblowers have used other Articles within the ECHR, in practice, whistleblower cases have focused on Article 10<sup>14</sup>, on the basis that their employer interfered with their freedom of expression.<sup>15</sup>

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<sup>10</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 12 (2012).

<sup>11</sup>Staff Regulations of Officials of the European Communities, Articles 22a and 22b (2004).

<sup>12</sup>*Id.*

<sup>13</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 6 (2012).

<sup>14</sup>For full text of Article 10, see Appendix 3.

<sup>15</sup>*Id. See also*, Heinisch v. Germany, App. No. 28274/08, Eur. Ct. H.R. (2001)..

The Parliamentary Assembly of the Council of Europe (PACE) has explained the current state of ECHR whistleblower jurisprudence this way:

The ECtHR has held that “Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can apply to relations governed by private law [...] and that “member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals”<sup>16</sup>

Article 10 is a restricted right, so interference with a whistleblower’s freedom of expression is permitted, provided that: - it is prescribed by law; - the interference pursues a legitimate aim (such as protecting the reputation or rights of others, or preventing the disclosure of information received in confidence) and - it is “necessary in a democratic society”. This last criterion is normally the most complex issue to resolve.

In *Steel and Morris v. UK*,<sup>17</sup> the court held that “‘necessary’, within the meaning of Article 10.2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision..... The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10’.

It is established that ‘what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’ [...] In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts....” (*Sunday Times (no. 1) v. the UK*, 26 April 1979, § 62, Series A no. 30).<sup>18</sup>

Although Article 10 of the ECHR is not a specific whistleblower protection scheme, but Article 10 has proven to be a moderately successful approach for whistleblowers in countries that have accepted ECHR jurisdiction, notwithstanding that their national laws do not provide for whistleblower protections.<sup>19</sup> It is unclear what the remedies are for a violation of Article 10, however, Article 13 of the ECHR provides for the right of an “effective remedy” before national authorities for violations of rights under the Convention.<sup>20</sup>

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<sup>16</sup>Fuentes Bobo v. Spain, App. no. 39293/98, Eur. Ct. H.R. (2000).

<sup>17</sup>Steel and Morris v. UK, App. No. 68416/01, Eur. Ct. H.R. (2005).

<sup>18</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 6-7 (2012). (citing *Sunday Times (no. 1) v. the UK* (26 April 1979, § 62, Series A no. 30)).

<sup>19</sup>See, e.g., *Heinisch v. Germany* (no. 28274/08, 21 July 2001).

<sup>20</sup>EUROPEAN CONVENTION ON HUMAN RIGHTS art. 13.

Perhaps the most celebrated case of a whistleblower successfully using the ECHR Article 10 is *Heinisch v. Germany*.<sup>21</sup> Mrs. Heinisch had been dismissed as a nurse in Germany after disclosing mistreatment of elderly patients in a state operated nursing home. She spent seven years exhausting the German legal system—where she found no relief from retaliation. The European Court of Human Rights unanimously concluded that there had been a violation of Article 10. The Court wrote:

93. Being mindful of the importance of the right to freedom of 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".

94. The Court therefore considers that in the present case 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.

95. There has accordingly been a violation of Article 10 of the Convention.<sup>22</sup>

The Court awarded €10,000 non-pecuniary damage, but refused to award pecuniary damages.<sup>23</sup>

## **B. Protection Afforded European Officials or Civil Servants**

Officials, or civil servants, within the European Union institutions have an obligation to report fraud, corruption, and other illegal activities under Articles 22a and 22b of the Staff Regulations of Officials of the European Communities.<sup>24</sup> However, it is less than clear as to the effectiveness of protections these officials will enjoy when fulfilling this obligation to report. These Articles were added in 2004 to better address whistleblowing in the European Union. Article 22a imposes a reporting obligation on officials who become aware of facts which give rise to a reasonable suspicion of illegal activity that is detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities. Fraud and corruption are mentioned as examples of illegal activity, but the obligation is not limited to such cases. The institution is prohibited from taking action to the detriment of a whistleblower (either the original whistleblower or a "secondary" whistleblower) who has acted reasonably and honestly.

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<sup>21</sup>*Heinisch v. Germany* (no. 28274/08, 21 July 2001).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Staff Regulations of Officials of the European Communities, Articles 22a and 22b (2004). For full text of Articles 22a and 22b, see Appendix 4.

Article 22b extends the same protection to an official who further discloses information to one or more of five office-holders, provided that both of the following conditions are met:(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed sufficient time for appropriate action.

The original whistleblower can choose whether to by-pass his normal chain of command and go directly to the top management of the institution, or to OLAF. A “secondary” whistleblower must report to OLAF. Further disclosure is not an obligation, but attracts immunity under certain conditions.<sup>25</sup>

European Officials may ask for protective measures under Staff Regulation Article 24, where compensation for damages suffered may be sought.<sup>26</sup> Although the Staff Regulations Articles 22a and 22b supply some protections for whistleblower activity, the regulations apply only to EU officials and address only a fraction of what would typically be defined as whistleblowing activity.<sup>27</sup> Many now advocate that the existing rules on whistleblowing in EU Institutions need complete revision, especially due to the inartful drafting and ambiguity of the Staff Articles 22a and 22b.<sup>28</sup>

### **III. UNITED KINGDOM**

#### **A. UK Leadership in European Whistleblower Protection**

The United Kingdom is clearly the leader in whistleblower protection in Europe. The UK was one of the first European states to legislate on the protection of ‘whistleblowers’ and its law was even described as “the most far-reaching whistleblower law in the world.”<sup>29</sup> The decision to legislate at the time came after a series of avoidable tragic accidents, following which inquiries revealed that staff had been aware of the danger but had not felt able to raise the matter internally.<sup>30</sup> These events ultimately culminated in the United Kingdom enacting the Public Interest Disclosure Act (PIDA) in 1998, which added to, and amended, the Employment Rights

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<sup>25</sup>IAN HARDEN, ASIA-EUROPE FOUNDATION, PROTECTING WHISTLEBLOWERS-ASIAN AND EUROPEAN PERSPECTIVES: THE ROLE OF THE EUROPEAN OMBUDSMAN AS A PROTECTOR OF THE PUBLIC INTEREST 6-7 (2008).

<sup>26</sup>Staff Regulations of Officials of the European Communities, Articles 24 (2004).

<sup>27</sup>IAN HARDEN, ASIA-EUROPE FOUNDATION, PROTECTING WHISTLEBLOWERS-ASIAN AND EUROPEAN PERSPECTIVES: THE ROLE OF THE EUROPEAN OMBUDSMAN AS A PROTECTOR OF THE PUBLIC INTEREST 48 (2008).

<sup>28</sup>BJÖRN ROHDE-LIEBENAU, EUROPEAN PARLIAMENT: BUDGETARY SUPPORT UNIT, WHISTLEBLOWING RULES: BEST PRACTICE; ASSESSMENT AND REVISION OF RULES EXISTING IN EU INSTITUTIONS 8 (2006).

<sup>29</sup>COUNCIL OF EUROPE: PARLIAMENTARY ASSEMBLY, THE PROTECTION OF WHISTLE-BLOWERS 11 (2009).

<sup>30</sup>COUNCIL OF EUROPE: PARLIAMENTARY ASSEMBLY, THE PROTECTION OF WHISTLE-BLOWERS 11 (2009).

Act of 1996. These additions and amendments include defining protected disclosures, providing the right not to suffer detriment because of disclosures, and providing remedies for the infringement of rights (including interim relief and compensation).<sup>31</sup>

## **B. Public Interest Disclosure Act of 1998**

The most sweeping change in PIDA was the addition of ERA 1996, Sections 43A-43L. This section defines a ‘protected disclosure,’ which triggers all protections and remedies available to a whistleblower. PIDA covers both private and public sectors, including the hybrid of public sector functions that are outsourced to private contractors.<sup>32</sup>

The whistleblower must show that he/she 1) made a protected disclosure, 2) followed the correct procedures, and 3) suffered detriment from making the protected disclosure.<sup>33</sup> The statutory scheme provides:

At least 1 of the following 3 preconditions has to be met: The worker has a reasonable belief that he/she will be subject to a detriment by his/her employer if he/she makes the disclosure to his/her employer; The worker has a reasonable belief that evidence will be concealed or destroyed if he/she makes the disclosure to his employer; and The employer or regulator has done nothing to investigate or correct the wrongdoing.

Moreover, a whistleblower will be protected if allegations: Have been disclosed to the right regulator; have been made by the subject element in good faith; are not aiming at personal gain; and are reasonably believed to be true.

Once the worker fulfills the preconditions requirements, the disclosure must pass a test of reasonableness.<sup>34</sup>

Unlike the predominant regime in the United States where the federal government and states have created specialized agencies to investigate and process whistleblower complaints, PIDA does not and a whistleblower may bring his retaliation claim directly to a UK Employment Tribunal.<sup>35</sup> The final decision of the Employment Tribunal is reviewable by the higher UK

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<sup>31</sup>Public Interest Disclosure Act of 1998. For text of sections of PIDA, see Appendix 5. For more on PIDA, see Jenny Mendelsohn, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 WASH. U. GLOBAL STUD. L. REV. 723 (2009).

<sup>32</sup>G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 17 (2010).

<sup>33</sup>See Public Interest Disclosure Act of 1998.

<sup>34</sup>EUROPEAN PARLIAMENT: POLICY DEPARTMENT BUDGETARY AFFAIRS, CORRUPTION AND CONFLICT OF INTEREST IN THE EUROPEAN INSTITUTIONS: THE EFFECTIVENESS OF WHISTLEBLOWERS 46 (2011). For exact requirements based on type of employee, qualified disclosures, etc, see UK PIDA (1998). See Employment Rights Act of 1996 43A-43L.

<sup>35</sup>See, e.g., ELAINE KAPLAN, *THE INTERNATIONAL EMERGENCE OF LEGAL PROTECTIONS FOR WHISTLEBLOWERS* 40 (2001).

courts, but the existence of Employment Tribunals allows cases can be litigated far more quickly and easily.<sup>36</sup> The relief sought typically includes injury to feelings; lost wages, and reinstatement. Temporary reinstatement during the pendency of the case is also possible, as with many US whistleblower laws.<sup>37</sup>

The number of whistleblower claims under PIDA has substantially increased in the UK. “In the first ten years of PIDA’s operation, the number of claims made under it annually increased from 157 in 1999 to 1,761 in 2009 . . . . Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won.”<sup>38</sup> The average compensation in UK whistleblower claims in the first ten years, based on available information, was £113,000, with a total known compensation of £9.5 million.<sup>39</sup>

#### IV. FRANCE

Accounts and assertions of what whistleblower protections are available in France are conflicting. Both the World Law Group<sup>40</sup> and Transparency International<sup>41</sup> maintain that France has no specific whistleblower protection. However, a G20 report asserts that the 2007 French Anti-Corruption Act provides basic protections for both public and private whistleblowers through a diverse variety of sanctions against retaliators.<sup>42</sup> It seems clear, however, that France has no specific whistleblower protection regimes, but may have various laws that provide more protection for whistleblowers than many other European countries.

As to normative values of the law, as distinct from actual causes of action, the French Labour Code states:

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<sup>36</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 41 (2012).

<sup>37</sup>See, e.g., G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 13, 17 (2010). See also, VINCENT KETER AND LOUISE SMITH, WHISTLEBLOWING: THE PUBLIC INTEREST DISCLOSURE ACT OF 1998 5 (2009).

<sup>38</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 20 (2012).

<sup>39</sup>*Id.* For current case law interpretation of UK’s whistleblower protection scheme, see *BP plc v. Elstone et al*, 2010 IRLR 558 (21 Mar 2010); *Cavendish Munro Professional Risks Management v. Geduld*, 2010 IRLR 38 (6 Aug 2009); *Kuzel v. Roche Products*, 2008 EWCA Civ 380 (17 Apr 2008); *BOP*; *Babula v. Aaltham Forest College*, 2007 EWCA Civ 174 (7 Mar 2007); *Bolton School v. Evans*, 2006 EWCA Civ 1653 (15 Nov 2006); *Cream Holdings Ltd et al v. Banerjee et al*, 2004 UKHL 44 (14 Oct 2004); *Parkins v. Sodexho Ltd*, 2002 IRLR 109 (22 June 2001).

<sup>40</sup>WORLD LAW GROUP, GLOBAL GUIDE TO WHISTLEBLOWING PROGRAMS 35 (2012).

<sup>41</sup>SUZANNE MULCAHY, TRANSPARENCY INTERNATIONAL, MONEY, POLITICS, POWER: CORRUPTION RISKS IN EUROPE 48 (2011).

<sup>42</sup>G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 19 (2010). (citing *Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption*, Art. 9, *JORF* 14 Novembre 2007). See also, WIM VANDEKERKHOVE, EUROPEAN WHISTLEBLOWER PROTECTION: TIERS OR TEARS? 12 (2010).

No one can be prohibited to access a recruiting procedure or an internship or a period of training in a company, no employee can be sanctioned, dismissed or be subject to, direct or indirect, discriminatory measures, especially concerning salary, training, reclassification, appointment, qualification, professional promotion, relocation or renewal of contract, if he or she has disclosed, in good faith, either to its employer, or to the judicial or administrative authorities, *corruption-related offences* that he or she would have discovered in exercising his/her functions. Any termination of contract which would be a result of this, any disposition or any contrary act would be void.<sup>43</sup>

Although this section extends to both the private and public sectors in France, this section of the French Labour Law only applies to cases of reporting corruption-related crimes.<sup>44</sup> In addition, the Statut général des Fonctionnaires<sup>45</sup> provides some protection to public officers, and France's Code du Travail provides some protection measures for employees who report health, safety, or sexual harassment issues.<sup>46</sup>

French industry argues that enhanced whistleblower protections are not necessary in France because French corporations have open operations and vigilant fraud reporting systems.<sup>47</sup> “In France, works councils, staff representatives and trade unions fulfill the role of listening to workers and transmitting information. At any time, they may request explanations of accounts or on the operation of the business. They can be places for the collection and passage of information.”<sup>48</sup> At the same time, French courts have invalidated internal whistleblowing programs on data protection grounds, i.e. privacy, and access to documents to substantiate the whistleblower's claim is thereby limited. The concern has been that whistleblowing protection regimes are viewed as too broad in scope and could harm the vital interests of the company, or the physical and/or moral integrity of the managers and/or employees the whistleblower has named as wrongdoers. Fair procedures and strong “due process” protections are the cornerstones of French jurisprudence and whistleblower protection provisions, such as anonymous hotlines, are regarded cautiously as threats to the rights of the accused managers and employees. Similarly, there are strong concerns that whistleblower legal regimes may encourage slanderous denunciations in the workplace.<sup>49</sup>

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<sup>43</sup>French Labour Code Article L 1161-1. For full text of Article L 1161-1, see Appendix 6.

<sup>44</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 14 (2012).

<sup>45</sup>For full text of Article 11, see Appendix 7.

<sup>46</sup>See France Code Du Travail, Article L 1152.

<sup>47</sup>PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 14 (2012).

<sup>48</sup>*Id.*

<sup>49</sup>G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 28 (2010) (citing Sullivan & Cromwell, *Whistleblowing: Revised French Procedures* (2010)). For more on conflict between SOX and French law, see Ian L. Schaffer, An

## V. GERMANY

German society shares cultural norms that are antithetical to the promotion of protections for whistleblowing. The late Hoffmann von Fallersleben—author of the German national anthem—said: “The greatest rogue in the whole land is, and will remain, the informer.”<sup>50</sup> When the topic of whistleblower protection arises, this quote is often used to block any discussion to enact whistleblower law.<sup>51</sup>

Although Chancellor Angela Merkel committed to enact and implement specific protections for whistleblowers by 2012 at the Seoul Summit in November 2010, Germany still has no specific whistleblower protection laws in place.<sup>52</sup> Instead, German whistleblowers rely on a patchwork of constitutional statutory provision which may provide indirect protection, including Articles 4 and 5 of the German Constitution.<sup>53</sup> According to the G20 Action Plan:

In Germany, at the constitutional level, the legal framework protecting whistleblowers is taken from Art. 20(3) of the German Constitutional Law. Art 4 of the *Grundgesetz*, guaranteeing the freedom of conscience, of information and expression, and the right to petition, that includes the right to address requests or complaints to government agencies, as well as the general freedom of action and the right to report offences to the public prosecutor also form part of the framework. This, along with the provisions contained in the Labour Law forbidding discrimination caused by a permitted exercise of rights, has been considered to contain the basic protections for whistleblowers.<sup>54</sup>

Germany has also implemented an anonymous hotline to report some violations of the law,<sup>55</sup> but this access for reporting has not been coupled with protections against whistleblower

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International Train Wreck Caused in part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws, 75 *FORDHAM L. REV.* 1829 (2006).

<sup>50</sup>See GUIDO STRACK, *WHISTLEBLOWING IN GERMANY* 1, available at [http://www.whistleblower-net.de/pdf/WB\\_in\\_Germany.pdf](http://www.whistleblower-net.de/pdf/WB_in_Germany.pdf).

<sup>51</sup>*Id.*

<sup>52</sup>See, e.g., WORLD LAW GROUP, *GLOBAL GUIDE TO WHISTLEBLOWING PROGRAMS* 39 (2012); EUROPEAN PARLIAMENT: POLICY DEPARTMENT BUDGETARY AFFAIRS, *CORRUPTION AND CONFLICT OF INTEREST IN THE EUROPEAN INSTITUTIONS: THE EFFECTIVENESS OF WHISTLEBLOWERS* 31 (2011). See also, G20, *G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS* 28 (2010).

<sup>53</sup>See GERMAN CONST. art. 4 & 5. For text of Articles 4 and 5 of the German Constitution, see Appendix 8.

<sup>54</sup>G20, *G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS* 18 (2010). For more, see Germany, see GUIDO STRACK, *WHISTLEBLOWING IN GERMANY* 7-9, available at [http://www.whistleblower-net.de/pdf/WB\\_in\\_Germany.pdf](http://www.whistleblower-net.de/pdf/WB_in_Germany.pdf). See also, BERND WASS, *NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW COUNTRY REPORT: GERMANY*, available at [http://www.jil.go.jp/english/events\\_and\\_information/documents/clls08\\_waas.pdf](http://www.jil.go.jp/english/events_and_information/documents/clls08_waas.pdf).

<sup>55</sup>G20, *G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS* 21 (2010).



retaliation if anonymity is destroyed. Although there is some case law in Germany that “confirms that employees who report misconduct by the employer in good faith cannot be dismissed for this reason,” employees are still hesitant to move forward without specific protections against whistleblower retaliation.<sup>56</sup>

## VI. ITALY

Although there are rules and provisions fragmented in several acts and codes that can be applied to whistleblowing, Italy has no specific whistleblower protection laws in place.<sup>57</sup> The cultural barriers to overcome in Italy include the view of whistleblowing as often approximating treason.<sup>58</sup> Internal reporting mechanisms in Italy are also fragmented. “In the public sector, there is little to no consideration of internal reporting. While civil servants have a generalized duty to report wrongdoing, significant reports are rare as are sanctions for non-reporting.”<sup>59</sup> In the private sector, some large companies have established whistleblowing procedures, often in order to comply with the U.S. Sarbanes-Oxley Act.<sup>60</sup>

Italy has seen recent effort to protect whistleblowers, especially proposed amendments to Italy’s Anti-Corruption Bill that would protect some forms of public sector whistleblowing.<sup>61</sup> The amendment reads, “[A] public servant who reports illicit conduct discovered in the course of his duties may not be sanctioned, dismissed or subjected to any discriminatory measure, direct or indirect, affecting his working conditions for reasons directly or indirectly related to whistleblowing.”<sup>62</sup> The law would not protect private sector employees.

Currently, Italian whistleblowers must rely on a patchwork of protection provisions from the Code of Criminal Procedure and assorted labor laws, but their fate is left to the broad discretion of judicial authorities in deciding if the alleged acts of retaliation are justified.<sup>63</sup> In tension with whistleblower protection is the fact that “Italy has famously well-developed mechanisms for the protection of ‘informatori’, based on Article 203 of the Code of Criminal Procedure and other measures foreseen in a Law of 13 February 2001 on ‘collaborators of justice’ and ‘pentiti’ (‘repenting’ former members of organised criminal groups).”<sup>64</sup>

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<sup>56</sup>G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 27 (2010) (citing decisions by the German Federal Constitutional Court of 2 July 2001 and the Federal Labour Court of 3 July 2002).

<sup>57</sup>See, e.g. WORLD LAW GROUP, GLOBAL GUIDE TO WHISTLEBLOWING PROGRAMS 57 (2012).

<sup>58</sup>ANJA OSTERHAUS AND CRAIG FAGAN, TRANSPARENCY INTERNATIONAL, ALTERNATIVE TO SILENCE: WHISTLEBLOWER PROTECTION IN 10 EUROPEAN COUNTRIES 34 (2009).

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS 10 (2010) (citing 47 Draft amendment no. 2.0.3 to Bill No. 2156). PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 15 (2012).

<sup>63</sup>ANJA OSTERHAUS AND CRAIG FAGAN, TRANSPARENCY INTERNATIONAL, ALTERNATIVE TO SILENCE: WHISTLEBLOWER PROTECTION IN 10 EUROPEAN COUNTRIES 34 (2009).

<sup>64</sup>Council of Europe: Parliamentary Assembly, The protection of whistleblowers 16 (2009).

## VII. SUMMARY OF CURRENT EUROPEAN WHISTLEBLOWER ISSUES

### A. Implementing specific whistleblower protection schemes

The European Union does not serve as a federal government as in the U.S., where enactment of broad based whistleblower protections requires only a majority of a single legislature. The single most pressing issue key to European whistleblower protection is in enactment of uniform law by the member national states. The Council of Europe has advocated a set of principles to guide this legislation.

### B. Reward/Bounty programs

Currently, there are no bounty or reward programs available in the European Union, UK, France, Germany, or Italy to give potential whistleblowers incentives to blow the whistle. In fact, the UK is the only European country that has given serious consideration to the idea of implementing U.S.-style whistleblower reward/bounty programs. The Home Office of the UK presented arguments for and against enacting a reward/bounty program similar to the U.S.'s qui tam under the False Claims act in its "Asset Recovery Action Plan."<sup>65</sup> However, no such program has been enacted in the UK.

### C. Gag Orders

In the UK, whistleblowers are being paid to stay silent. Gag orders—especially among NHS employees—has been a pressing issue in the UK.<sup>66</sup> However, just recently the UK banned gagging clauses, which have been used predominantly in NHS settlements and severance packages. It remains to be seen whether this practice will continue or be curtailed by the UK's ban and appointment of a new position of chief inspector of hospitals.<sup>67</sup>

## VIII. WHISTLEBLOWER PROTECTIONS IN INTERNATIONAL ORGANIZATIONS: INTERNATIONAL ADMINISTRATIVE TRIBUNALS

### A. Overview

Employees of international organizations such as the United Nations, World Bank, International Monetary Fund and scores of other, compose what is commonly called the

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<sup>65</sup>See, HOME OFFICE, ASSET RECOVERY ACTION PLAN (2007), available at <http://www.lccsa.org.uk/assets/documents/consultation/asset-recovery-consultation.pdf>.

<sup>66</sup>See, e.g., The Bureau, *NHS whistleblowers: Doctors gagged after attempts to expose malpractice*, THE BUREAU OF INVESTIGATIVE JOURNALISM, Aug. 2, 2010, available at <http://www.thebureauinvestigates.com/2010/08/02/nhs-whistleblowers-paid-to-keep-mouth-shut-2>.

<sup>67</sup>See, e.g., Press Association, *Ban on NHS Gagging Orders: Jeremy Hung, the health secretary, says constraints on departing staff speaking out are hiding health service's failures*, THE GUARDIAN, Mar. 14, 2013, available at <http://www.guardian.co.uk/society/2013/mar/14/ban-on-nhs-gagging-orders>.

“international civil service.” Because the United States is a major contributor to almost all international organizations, one of the strings attached to that funding in recent years has been the requirement that whistleblower protection policies be instituted. As with any civil service, employment law within these organizations follows the norms of public administration, rather than private employment law. Thus, employment discrimination cases in international organizations are generally governed by the discrimination law applicable to government administration. Similarly, the whistleblower policies of these organizations mirrors the laws of the United States, particularly the Whistleblower Protection Act, 5 U.S.C. §2302(b)(8). The “administrative tribunals” of these organizations adjudicate employee claims of whistleblower retaliation.<sup>68</sup>

French legal traditions form the basis for employee protections from retaliation in international organizations, most notably the general principles and equality in the French *Conseil d' tat*. As explained by Brian D. Patterson,

The concept of general principles of law features prominently in French administrative law, the body of municipal law that has been more influential than any other upon the jurisprudence of international administrative tribunals. Taking the concept far beyond that seen in the ICJ [International Court of Justice], France's Conseil d' tat has adopted many general principles of law to protect individual rights from the power of the administrative state, and to enforce the rule of law in the absence of legislative or constitutional constraints. These principles include equality before the law, essential individual liberties, and the judicial review. \*\*\*

Additionally, general principles of due process and equality were derived by the *Conseil d' tat* from the natural law philosophy of the Enlightenment \*\*\*. Derived as they are from natural law, these principles have carried moral as well as legal connotations. Without this natural law element, the principle of equality in the hands of an administrative court could never reach beyond a rule of evenhandedness in government administration, a rule of equal treatment in the most literal sense.<sup>69</sup>

Thus, the principle of whistleblower protection fits easily within the framework of employee rights within international organizations. However, the prohibitions in French and European law to external disclosure of the employer’s confidential and proprietary information were also long respected in these organizations. Whistleblower protection therefore had to be forced upon these organizations as condition of funding by the United States.

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<sup>68</sup>Surveys of the whistleblower policies of the World Bank and the regional development banks around the world can be found on the international program pages of the Government Accountability Project in Washington, D.C. See, *Regional Development Banks*, GOVERNMENT ACCOUNTABILITY PROJECT, <http://www.whistleblower.org/program-areas/international-reform/regional-development-banks>.

<sup>69</sup>Brian D. Patterson, *The Jurisprudence of Discrimination as Opposed to Simple Inequality in the International Civil Service*, 36 GA. J. INT'L & COMP. L. 1, 16-17 (2007).

## **B. Reasons for the Existence of Administrative Tribunals to Adjudicate Employee Discrimination and Retaliation Claims**

International governmental organizations (IGOs) have immunity from employee suits. That immunity prevents employees from filing suit in national courts. Consequently, a body of international law mandates that, in exchange for this immunity, IGOs must have independent bodies adjudicate employee claims, and this independent function is served by a variety of administrative tribunals. In *Waite and Kennedy*<sup>70</sup>, the European Court of Human Rights held that continued enjoyment of immunity by IGOs requires the availability of “reasonable alternative means” to protect the legal rights of employees. Several national courts have ruled similarly. As explained by August Reinisch in his article *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*,

The jurisdiction of administrative tribunals is usually seen as complementary to the immunity enjoyed by the respondent international organization. Because an international organization enjoys immunity in disputes brought by private parties, including staff members, it has to provide an alternative judicial or quasi-judicial recourse to justice. Thus, it establishes administrative tribunals or submits to the jurisdiction of existing administrative tribunals. This correlation is usually regarded as the consequence of a policy goal of providing staff members with access to a legal remedy in order to pursue their employment-related rights. But it is increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice.<sup>71</sup>

Thus, IGOs such as the United Nations are legally required to provide for “the orderly, judicial or quasi-judicial settlement of staff disputes”. *Id.* The International Court of Justice (ICJ), in the *Effect of Awards Case*, held in an advisory opinion that it would “hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals \*\*\* that [the UN] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.”<sup>72</sup>

## **C. The History and Growth of Administrative Tribunals**

The oldest existing tribunal is the International Labour Organization Administrative Tribunal (ILOAT) established in 1946 as the successor to the League of Nations Tribunal (1927 to 1946). While ILOAT is an organ of the ILO, other international government organizations (IGOs) have agreed to using the ILOAT rather than creating their own administrative tribunals. The ILOAT now adjudicates employment claims from 49 different IGOs, including some United Nations specialized agencies such as the Food and Agricultural Organization (FAO), UNESCO, and the World Health Organization (WHO), as well as Interpol and the World Trade

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<sup>70</sup>Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. (1999).

<sup>71</sup>August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285 (2008).

<sup>72</sup>Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47 (July 13).

Organization (WTO). The United Nations Administrative Tribunal (UNAT)<sup>73</sup> was created in New York in 1949 to adjudicate complaints against UN Secretariat and several other UN agencies including the UN Children's Emergency Fund (UNICEF), and the International Maritime Organization (IMO), the International Civil Aviation Organization. More recently, the United Nations Dispute Tribunal (UNDT) was created to cope with the growing number of employee complaints. All tribunals (except the UNDT) have panels of at least three judges, for example the ILOAT and the UNAT have seven judges of different nationalities, but adjudicate cases in panels of three.

Up until 1988 the European Court of Justice (ECJ), and later the Court of First Instance, adjudicated cases filed by employees of the various organizations of the European Union. Those cases are now heard by the Civil Service Tribunal, which was established in 2005. Other IGOs that have created their own tribunals are World Bank (WBAT), the Asian Development Bank (AsDBAT), the African Development Bank (ADBAT), the Inter-American Development Bank (IDBAT), and the International Monetary Fund (IMFAT). There are also administrative tribunals and appeals boards for the Council of Europe, NATO, and the Organisation for Economic Co-Operation and Development (OECD). All now have whistleblower protection policies enforceable in the administrative tribunals.

#### **D. The Continuing Reluctance of Administrative Tribunals to Make Findings of Whistleblower Retaliation**

Due to the prevalence of European legal norms by the many European judges sitting on administrative tribunals, there is a clear reluctance make findings of fact that a staff member has been the victim of whistleblower retaliation by his or her supervisors. The tribunal judges do not like to rule that a named manager is a retaliator. Instead, these tribunals prefer to find alternative less professionally impugning legal grounds upon which to grant relief to the whistleblower. If the whistleblower can attain full relief by a finding of "abuse of discretion" or violation of "due process," that will more likely be the basis of relief adopted by the tribunal. As explained by Judge Robert A. Gorman,

I should mention that in the United States, an employer's decisions are almost totally beyond the reach of judicial or arbitral bodies, absent its violation of a statute or a governmental regulation or a precise public policy. Abuses of discretion in employment relations must simply be tolerated. \*\*\* Another substantive principle of the two Tribunals' jurisprudence also would, I suspect, be absolutely startling to U.S. employer representatives \*\*\*. The Tribunals have held that there are certain conditions of employment that are so "fundamental and essential" that the Bank is forbidden to change them to the detriment of the staff members.<sup>74</sup>

Judge Gorman has further explained that "due process of law" can be a sufficient grounds to invalidate almost any wrongful act against an employee: "in only the [World Bank] Tribunal's

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<sup>73</sup>The UNAT now functions as an appellate body.

<sup>74</sup>Robert A. Gorman, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, 25 COMP. LAB. L. & POL'Y J. 423, 436 (2004).

second judgment, filed in 1981 – [the holding was] that it was appropriate for the Tribunal to fashion ‘due process’ requirements as an inherent element of workplace relations. \*\*\*There is thus a common answer to the question what is fair treatment? that transcends cultural differences.”<sup>75</sup>

## IX. CONCLUSION

The need for specific whistleblower legislation is becoming evident as European countries, corporations, leaders, and citizens continue to realize the crucial role of whistleblowers in increasing accountability and strengthening the fight against corruption and mismanagement. Until potential whistleblowers in Europe can be assured that they will be protected from retaliation vis-à-vis specific whistleblower laws, potential whistleblowers will continue to remain silent in Europe—ultimately costing European society in the form of poor care in nursing homes, dioxin-laden livestock feed, inadequate emergency services in hospitals, rotten meat, and mad-cow disease.<sup>76</sup>

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<sup>75</sup>Gorman, 439-40.

<sup>76</sup>Mark Worth, *Are German Lawmakers Finally Listening to the Whistles?*, TRANSPARENCY INTERNATIONAL (Mar. 26, 2012), <http://blog.transparency.org/2012/03/26/are-german-lawmakers-finally-listening-to-the-whistles>.

## APPENDICES

### APPENDIX 1: COMPARISON TABLE FOR SPECIFIC EUROPEAN WHISTLEBLOWER PROTECTIONS

	<b>European Union</b>	<b>United Kingdom</b>	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<b>Specific Whistleblower Protection Scheme?</b>	Yes, but limited to EU Officials and certain specific circumstances	Yes	No	No	No
<b>Source of Protection:</b>	Staff Regulations of Officials of the European Communities, Articles 22a & 22b	PIDA 1998 & ERA 1996	N/A	N/A	N/A
<b>Main Forum/Venue:</b>	European Anti-Fraud Office Investigates, then appropriate venue, if any	Employment Tribunal  (Reviewable by UK higher courts)	N/A	N/A	N/A
<b>Claims available Against National Government?</b>	Yes	Yes	N/A	N/A	N/A
<b>Claims Available Against Private Corporations?</b>	Yes, theoretically	Yes	N/A	N/A	N/A
<b>Relief Available?</b>	Yes (compensation)	Yes (compensation, including injury to feelings; interim orders; & reinstatement)	N/A	N/A	N/A
<b>Whistleblower Bounty or Reward Programs?</b>	No	No, but current issue	No	No	No

**APPENDIX 2: ALTERNATIVES TO SPECIFIC WHISTLEBLOWER PROTECTION LEGISLATION**

	<b>Europe, in general</b>	<b>France</b>	<b>Germany</b>	<b>Italy</b>
<b>Alternatives to Specific Whistleblower Protection?</b>	Yes  European Convention on Human Rights.	Yes, but limited  French Criminal Code, Labour Law, & Data Protection Law	Yes, but limited  Constitutional & Labor Law	Yes, but extremely limited  Code of Criminal Procedure, Labor Laws, & witness protection
<b>Main Source of Protection:</b>	ECHR Art. 10	Public Sector: Statut général des Fonctionnaires, Article 11  Public & Private Sector: Article L-1161-1; created by Act no. 2007-1598 of 13 Nov. 2007 (art. 9) <i>(only for corruption-related disclosures)</i>	Articles 4 & 5 of the German Constitution  German Labor Law <sup>77</sup>	Code of Criminal Procedure, Article 203 (witness protection)  Italy Labor Law
<b>Main Forum/Venue:</b>	European Court of Human Rights	French Court System	German Constitutional Courts	Italian Court System
<b>Relief Available?</b>	Yes (ECHR, Art. 13 provides for effective remedy)	Public: protection Private (L-1161-1): Any breach of employment contract null and void	Protection of fundamental rights	Currently, only witness protection for

<sup>77</sup>For more information on Employment Discrimination Law options in Germany, see BERND WASS, NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW COUNTRY REPORT: GERMANY, available at [http://www.jil.go.jp/english/events\\_and\\_information/documents/clls08\\_waas.pdf](http://www.jil.go.jp/english/events_and_information/documents/clls08_waas.pdf).



**APPENDIX 3: THE EUROPEAN CONVENTION ON HUMAN RIGHTS,  
ARTICLE 10**

**ARTICLE 10**

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## **APPENDIX 4: STAFF REGULATIONS, ART. 22A & 22B**

### **ARTICLE 22A**

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct. Information mentioned in the first subparagraph shall be given in writing. This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

### **ARTICLE 22B**

1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed the OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

## **APPENDIX 5: SECTIONS OF PUBLIC INTEREST DISCLOSURE ACT OF 1998**

### **PUBLIC INTEREST DISCLOSURE ACT 1998**

An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes. [2nd July 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Protected disclosures.

After Part IV of the Employment Rights Act 1996 (in this Act referred to as “the 1996 Act”) there is inserted—

#### **PART IVA PROTECTED DISCLOSURES**

##### **43A Meaning of “protected disclosure”.**

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

##### **43B Disclosures qualifying for protection.**

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

#### **43C Disclosure to employer or other responsible person.**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

#### **43D Disclosure to legal adviser.**

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

#### **43E Disclosure to Minister of the Crown.**

A qualifying disclosure is made in accordance with this section if—

(a) the worker’s employer is—

(i) an individual appointed under any enactment by a Minister of the Crown, or

(ii) a body any of whose members are so appointed, and

(b) the disclosure is made in good faith to a Minister of the Crown.

#### **43F Disclosure to prescribed person.**

(1) A qualifying disclosure is made in accordance with this section if the worker—

(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

**43G Disclosure in other cases.**

(1) A qualifying disclosure is made in accordance with this section if—

- (a) the worker makes the disclosure in good faith,
- (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
- (c) he does not make the disclosure for purposes of personal gain,
- (d) any of the conditions in subsection (2) is met, and
- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
- (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
- (c) that the worker has previously made a disclosure of substantially the same information—
  - (i) to his employer, or
  - (ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

- (a) the identity of the person to whom the disclosure is made,
- (b) the seriousness of the relevant failure,
- (c) whether the relevant failure is continuing or is likely to occur in the future,
- (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
- (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
- (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in

subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

#### **43H Disclosure of exceptionally serious failure.**

- (1) A qualifying disclosure is made in accordance with this section if—
  - (a) the worker makes the disclosure in good faith,
  - (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
  - (c) he does not make the disclosure for purposes of personal gain,
  - (d) the relevant failure is of an exceptionally serious nature, and
  - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

#### **43J Contractual duties of confidentiality.**

- (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
- (2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

#### **43K Extension of meaning of “worker” etc. for Part IVA.**

- (1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—
  - (a) works or worked for a person in circumstances in which—
    - (i) he is or was introduced or supplied to do that work by a third person, and
    - (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
  - (b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,
  - (c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made—

(i) by a Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or

(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment; and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and

(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section "educational establishment" includes any university, college, school or other educational establishment.

#### **43L Other interpretative provisions.**

(1) In this Part—

"qualifying disclosure" has the meaning given by section 43B;

"the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 43B(5).

(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."

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**Right not to suffer detriment.**

After section 47A of the 1996 Act there is inserted—

**47B Protected disclosures.**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker’s contract”, “employment” and “employer” have the extended meaning given by section 43K.”

## **APPENDIX 6: FRENCH LABOR CODE, ARTICLE L. 1161-1**

### **ARTICLE L1161-1**

Created by Act No. 2007-1598 of 13 November 2007 - art. 9 Official Journal of 14 November 2007 in force on or before March 1, 2008

No person may be excluded from a recruitment process or access to a course or a training period in a company, no employee may be sanctioned, dismissed or be directly discriminatory, or indirectly, in particular as regards remuneration, training, reclassification, assignment, qualification, classification, promotion, transfer or renewal of contract for having reported or testified in good faith, or his employer, either judicial or administrative authorities of corruption which he was aware in the exercise of its functions.

Any breach of the employment contract that would result, any provision or act contrary is null and void.

In case of a dispute concerning the application of the first two paragraphs, since the concerned employee or applicant for a job, an internship or a training period in a company establish facts from which it may be presumed that he reported or evidence of corruption, it is for the defendant, in light of these elements, to prove that its decision is justified by objective factors foreign to the statements or testimony of the employee. The judge as his conviction after ordering, if necessary, all investigative measures it deems necessary.

## **APPENDIX 7: STATUT GÉNÉRAL DES FONCTIONNAIRES, ARTICLE 11**

### **ARTICLE 11**

Modified by Law n ° 2011-525 of May 17, 2011 - art. 71

Officials have, on the occasion of their functions and in accordance with rules established by the Penal Code and special laws, protection organized by the local authority that employs the date of the facts or facts that have been attributed that is defamatory to the official.

When an officer was prosecuted by a third party service error and that the conflict of jurisdiction has not been raised, the public authority must, to the extent that a personal negligence in the exercise of its functions n ' is not attributable to the official, the cover of civilian convictions against him.

The public authority is required to protect employees against threats, violence, assault, slander, defamation or outrage they may suffer in connection with their duties, and repair, if necessary, the injury is resulted.

The public authority is required to provide protection to the official or former official in the case where it is the subject of criminal proceedings in connection with facts that do not have the character of a personal fault.

The public authority is subrogated to the rights of the victim to get the perpetrators of threats or attacks the return of monies paid to the official concerned. It has also, for the same purpose of direct action that can be exercised if necessary by way of a civil action in the criminal courts. The provisions of this Article shall apply to non-tenured public officials.

## **APPENDIX 8: GERMAN CONSTITUTION, ARTICLES 4 & 5**

### **ARTICLE 4 [Faith, Religion, Conscience, Creed]**

(1) Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render war service involving the use of arms. Details are regulated by a federal statute.

### **ARTICLE 5 [Expression]**

(1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.

(3) Art and science, research and teaching are free. The freedom of teaching does not release from allegiance to the constitution.

## APPENDIX 9: ADDITIONAL READING MATERIALS

### Essential Secondary Source Reading Material

1. PAUL STEPHENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST (2012).
2. BJÖRN ROHDE-LIEBENAU, EUROPEAN PARLIAMENT: BUDGETARY SUPPORT UNIT, WHISTLEBLOWING RULES: BEST PRACTICE; ASSESSMENT AND REVISION OF RULES EXISTING IN EU INSTITUTIONS (2006).
3. G20, G20 ANTI-CORRUPTION ACTION PLAN: ACTION POINT 7: PROTECTION OF WHISTLEBLOWERS (2010), available at <http://www.oecd.org/general/48972967.pdf>.
4. SUZANNE MULCAHY, TRANSPARENCY INTERNATIONAL, MONEY, POLITICS, POWER: CORRUPTION RISKS IN EUROPE (2011).
5. ANJA OSTERHAUS AND CRAIG FAGAN, TRANSPARENCY INTERNATIONAL, ALTERNATIVE TO SILENCE: WHISTLEBLOWER PROTECTION IN 10 EUROPEAN COUNTRIES (2009).

### European Whistleblower Hotlines & Data Protection Laws

1. DONALD C. DOWLING, JR., GLOBAL WHISTLEBLOWING HOTLINE TOOLKIT: HOW TO LAUNCH AND OPERATE A LEGALLY-COMPLIANT INTERNATIONAL WORKPLACE REPORT CHANNEL (Nov. 2011).
2. Marisa Anne Pagnattaro and Ellen R. Peirce, Between a Rock and a hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws, 28 BERKLEY J. EMP. & LAB. L. 375 (2007).
3. ARTICLE 29 DATA PROTECTION 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 (2006).
4. Ian L. Schaffer, An International Train Wreck Caused in part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws, 75 FORDHAM L. REV. 1829 (2006).

### Recommended Principles for Whistleblowing Legislation

1. Transparency International, Recommended Draft Principles for Whistleblowing Legislation (2009), available at [http://www.transparency.org/files/content/activity/2009\\_PrinciplesForWhistleblowingLegislation\\_EN.pdf](http://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf)