



# THE PROTECTION OF WHISTLEBLOWERS IN EUROPE

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## **The Protection of whistleblowers in Europe**

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Whistleblowing is the act of disclosing information from a public institution or private organisation with the purpose of revealing cases of corruption or secrecy that are of immediate or potential danger to the public interest. When systems of public control and accountability fail, whistleblowing is a measure of last resort against corruption and unrestrained secrecy, and should then be granted legal protection. This study argues that the European Union should stand up for the legal protection of whistleblowers and encourage their contribution towards more transparent institutions and economic transactions. To this purpose, it outlines a set of policy recommendations for the introduction of a European Directive in this field.

*Keywords:* Whistleblowing, Dissent, Corruption, Refugees protection.

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## **La protezione dei 'Whistleblowers' in Europa**

Daniele Santoro\*

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Il whistleblowing (il 'dare l'allerta') è l'atto di rendere pubbliche informazioni o materiale confidenziale da parte di personale dipendente di amministrazioni pubbliche o private allo scopo di rivelare episodi di corruzione o uso illecito del segreto governativo che sono di danno potenziale o immediato al pubblico interesse. Quando i sistemi di controllo e responsabilità pubblica si inceppano, il whistleblowing rappresenta una misura di ultima istanza contro corruzione e uso incontrollato di tali informazioni, e per tale motivo a coloro che lanciano l'allerta dovrebbero essere garantita protezione a livello giuridico. Questo articolo argomenta che l'Unione Europea dovrebbe elaborare delle misure legislative atte a garantire tale protezione e incoraggiare l'attività di denuncia dei whistleblower nell'ottica di una maggiore trasparenza sia nell'ambito delle amministrazioni pubbliche che nel settore economico.

*Parole chiave:* Whistleblowing, Dissenso, Corruzione, Protezione dei rifugiati.

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## Introduction

Whistleblowing is the act of disclosing information from a public institution (such as a government) or private organisation (such as a corporation) with the purpose of revealing cases of corruption or secrecy that are of immediate or potential danger to the public interest. According to its advocates, when systems of public control and accountability fail, whistleblowing can be a measure of last resort unrestrained secrecy. Even more importantly, whistleblowers have a crucial role in exposing cases of public and private corruption, thus they should then be granted legal protection. Critics have contested this argument arguing that whistleblowers undermine rather than strengthen democracy. The protection of whistleblowing is provided by some governments through independent agencies that provide a channel through which employees and applicant for government employment may make confidential disclosures. While some legal protections can be also found in some European countries in the attempt to curb corruption, a European legal framework is absent, leaving often whistleblowers unprotected under the European law. In this report we will address the role of whistleblowing both in revealing cases of illegitimate state secrecy and in fighting corruption, and propose some policy guidelines towards an European Directive on this matter.

### 1. What is Whistleblowing?

We can identify two kinds of whistleblowing: government whistleblowing; and whistleblowing as an anti-corruption measure, both within the public and the private sector.

Government whistleblowing arises when an individual within or outside the institution, reveals information that pertains to public interest. In doing so the person often violates the confines of legal duty but fulfils the duty of upholding just institutions by revealing democratic violations that arise due to secrecy. Government whistleblowing stands testimony to the fact that often institutional and constitutional checks might not be sufficient to control excesses that result from secrecy, that dissent of the kind that reveals secret information strengthens democratic institutions when the information is of public interest. Despite this crucial role in making the operations of governments more transparent, in many countries blowing the whistle carries high personal risk, especially when legal protection is absent, or control on information and defamation laws act as a deterrent. Moreover, in some cases whistleblowing does also carry connotations of betrayal, particularly when these charges take the form of legal prosecution under treason laws. Edward Snowden, Julian Assange and Chelsea Manning are exemplary cases in this regard. However, many politicians and commentators have argued that this way of thinking is wrong.<sup>1</sup> Law-abiding citizens should not be worried to be subjected to investigations or surveillance when they have nothing to hide. Limitations of these practices should not come primarily from the remote fear of potential threat to rights, but from the threats to national security. This was the case in the immediate aftermath of September 11, when a new political

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<sup>1</sup> For a discussion of this point, see Adam Moore, "Privacy, Security, and Government Surveillance: WikiLeaks and the New Accountability," *Public Affairs Quarterly*, 25, 2011: 141-156. See also Solove, Daniel J. "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy." *San Diego Law Review*, Vol. 44, 2007.

agenda was set to limit civil liberties to an extent formerly inconceivable. This shift was primarily enacted through an anti-terrorism legislation, such as the US Patriot and Homeland Security Acts.

In Europe, the rights of whistleblowers against governments have been upheld in some important judicial decisions. To be sure, no major judgment in this matter has ever been issued by the European Court of Justice, but we can find some landmark cases in the European Court of Human Rights. The most important case of government whistleblowing is *Bucur and Toma v. Romania* (40238/02, 8.1.2013), concerning the criminal conviction for public irregular telephone tapping procedures.<sup>2</sup>

#### **Bucur and Toma v. Romania (40238/02, 8.1.2013)**

##### *Facts*

Constantin Bucur was an employee in the Romanian Intelligence Service (SRI) responsible for recording the wiretapped telephone communications, including those of journalists and politicians. Believing that this activity was unlawful, he consulted about with the head of his department, receiving just but a reprimanded. Consequently, he approached a Parliament Representative in order to find a proper channel of disclosure in the House of Representatives. He was suggested instead of contacting the press. In May 1996 he held a press conference in which he released some audio cassettes containing telephone communications of several journalists and politicians. In July 1996, he appeared in front of a military court indicted for having collected and transmitted secret information, in violation of Article 19 of the Romanian National Security Law, and having disclosed and illegally used information obtained in the exercise of its functions relating to the privacy of others (Article 21 of the same Act). Bucur defended his actions by arguing that the disclosed information did not constitute state secrets but rather evidence of attempted political manipulation by the SRI. In April 1997 Micea Toma, a journalist who had been wiretapped, was heard by the court, claiming that his rights had been violated. In October 1998, the military court sentenced Bucur to two years of imprisonment for theft and illegal disclosure of secret information or information relating to privacy, honor and reputation. The case was appealed, but the Romanian Supreme Court dismissed the appeal. Bucur and Toma applied to the European court of Human Rights. Bucur claimed that his criminal conviction interfered with his freedom to expression under Article 10 of the European Convention of Human Rights, and that the lack of impartiality in the military court violated his right to a fair trial under Article 6 (para. 121). Toma claimed that the government violated their Article 8 right to respect for private and family life and correspondence because personal conversations at their home had been made public.

##### *Decision*

The court judged that while the Government's aim in granting to national security was legitimate, interference was not necessary in a democratic society when the information imparted was of such significant public importance. The court also concluded that Bucur had legitimate grounds for believing that the information he disclosed was true and that the public interest in disclosing illegal conduct outweighed the interest of maintaining public confidence in the SRI, and that Bucur had acted in good faith 8).

(Source: [right2info.org](http://www.right2info.org). Case report available at:  
[http://www.right2info.org/cases/plomino\\_documents/r2i-bucur-and-toma-v.-romania](http://www.right2info.org/cases/plomino_documents/r2i-bucur-and-toma-v.-romania) )

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<sup>2</sup> Another important case is *Guja v. Moldova* (14277/04, 12 February 2008) in which the Grand Chamber considered the dismissal of a civil servant who had leaked information revealing political pressure on the judiciary in a corruption case.

Beside disclosures of government's information, we also said that whistleblowing is also important in fighting corruption. Corruption has two main unwelcome consequences: it deprives local and national constituencies from funds that could be used for service, infrastructure, education, and cause an uncontrolled rise in public expenditure, exacerbating inequalities; moreover, it prompts generalised distrust in public institutions and their capacity to enforce fair rules.<sup>3</sup> Tendency to corruption are often linked to the lack of institutional control, which allows elite powers to manipulate and privatise resources for their benefit. When public officials and private actors engage in practices of corruption, often the only appeal to justice depends on those conscientious individuals bearing witness and providing testimony to the wrongs done. Whistleblowers who share information with competent authorities unveil the secrecy that feeds corruption. Therefore, the crucial function of whistleblowers is to reveal information that would be otherwise not available to either concerned authorities or the public. Current laws at domestic, European, and international level tend to provide some protection for whistleblowers who in the private and public sector that report cases of corruption. In the next section we will briefly review them.

## **2. An Ethics of Whistleblowing**

The growing role of whistleblowers in exposing government lack of accountability has raised a debate among political theorists, legal scholars, policy-makers, activists, and even in judicial decisions over the moral right to blow the whistle. Since the category of whistleblowing does not have a precise categorisation in many legislations, defining the criteria of legitimacy is quite crucial to identify also the legal right to its protection. Here are some criteria that we may find from a short review of the debate.

### *Adequate information backed by evidence*

Since blowing the whistle implies leaking confidential information, the potential whistleblower should be sure that the act will be successful in reaching his target, let it be the public opinion, law enforcement authorities or some special committee deputed to assess the truthfulness of the information. Moreover, the revelation should be as informative as possible, and the whistleblower should provide only information that he knows to be truthful, including supporting evidence for what he is reporting.

Whistleblowing comes also in different forms: it can be anonymous, when the identity of the whistleblower is left undisclosed, or disclosed only internally to the organisation the whistleblower is a member of. Depending on the nature of the information being disclosed and

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<sup>3</sup> The Italian Court of Auditors estimate that the cost of corruption to Italian economy amounts to 60bln euros per annum. The same amount projected at EU level provides an estimate of 120bln euros loss. However, it must be noted that these estimates are based on the corruption perception indexes. The real amount of the damage to private and public sectors could be sensibly higher. For the method of calculation of the cost of corruption, see the Transparency International's overview by country, available at <http://www.transparency.org/research/cpi/overview> (accessed on September 2, 2015).

the risk blowing the whistle carries on, anonymity is sometimes crucial to protect the whistler. Yet, some contend that identity should be revealed when the leak of information is of political nature as opposed to reporting cases of corruption. In either case, partly because of the absence of an adequate protection, the enactment of legal guarantees of whistleblowers have become an urgent matter in the last years. Since cases of whistleblowing may differ depending on the nature of the wrong being disclosed, we need first to properly distinguish their features.

### *The good faith test*

Many political theorists and legal scholars claim that his intention should be in good faith, that is the whistleblower should leak information only when he or she does it for moral reasons.<sup>4</sup> This can mean two things: first, the whistleblower should believe in the supreme value of truth and have a moral intention to disclose injustice. However, this principle might be too demanding. For instance, when people who want to reveal sensible information are left alone without adequate protection, or are even isolated in their work environment because they are not ‘trusted’, they may consider the consequences of ruining their life in the name of an abstract principle. This is an important consideration that people in flesh-and-blood have the right to make when they decide to expose a wrong, and even themselves.

Perhaps, we can say something different: a good way to test the moral intention of the whistleblower is not to ask if he or she is ready to ruin his/her life in the name of an abstract principle of truth or justice, but rather how much bad consequences she/he is ready to accept. Moreover, we shouldn’t be too moralistic in believing that to be moral one should also be pure in his intentions. For instance, if an employee knows that his boss is part of a ring of corruption, and he is resentful against him because – say – he didn’t obtain a promotion, he may decide to blow the whistle on his boss. Some people would say that he was not moral because he did it instrumentally. But, one may also say that she/he after all reported a wrong, and he put himself at risk.

Here is a test that can perhaps help to understand what is the minimum level of morality she should expect from whistleblowers: we can say that the potential harm the whistleblower may suffer by disclosing the information should be higher than any individual benefit he may receive from it. The test may be difficult to run in some cases, but still it gives us an idea of what we can reasonably mean by saying that, in order to have moral right to blow the whistle, the potential whistleblower should act in good faith.

We said that a second important feature of whistleblowing is that the information being leaked must be relevant. What does it mean exactly? For instance, consider employee leak information of a corrupted boss through internal channels of disclosures (say, the corporation

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<sup>4</sup> See Richard Moberly & Lindsey E. Wylie, “An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics”, in David Lewis & Wim Vandekerckhove (eds), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, p. 42. The UK Public Interest Disclosure Act has recently removed ‘good faith’ from the requirement of disclosures. See <http://www.theguardian.com/money/work-blog/2013/jun/25/whistleblowing-public-interest-edward-snowden>

office deputed to reviews cases of corruption). In such case, we should say that this information should be relevant to the interests of the corporation, not necessarily the interests of the all stake-holders or citizens at large. But consider now a government whistleblower like Chelsea Manning or Edward Snowden. Who did they reveal the information to? Both contacted a public disclosure channel, that is they ultimately wanted to make information available to the public. So, in the first case nobody would really raise an objection: the employee is indeed protecting the interests of his/her firm, and perhaps (but not always) the interests of stake-holders and citizens more in general. The second instance is more complicated, for the government whistleblower that leaks secret government information does damage the institution he works for.

Many believe therefore that we should only grant protection to whistleblowers of the first kind, and treat those of the second kind as traitors or spies. The question is open, but here is another proposal we should keep in mind. When government whistleblowers leak information, what we should look at is not only their moral intention, but whether they contribute to the interests of the community, nation or state they are members of. Call it public interest.

#### The public interest

What is public interest? In a very general way it is an interest that every member of a community has a stake in.<sup>5</sup> Some interests are private, like properties one owns, but the right to property is in the public interest: it is something everybody cares about. My privacy is a private interest, but the right to privacy is a public concern.

So, let's say that something is the public interest when he cannot be guaranteed by law unless everybody has the same access to the right. When the employer reports a case of corruption, he may contribute to the interests of the company he works for, but certainly cannot act against the public interest. Likewise, when the whistleblower leaks secret information of state wrongs, he must do it knowing that those information might be relevant to the public at large. For instance, they can be information concerning now a state intrudes in people's private data.

#### *Anonymity. Pros and Cons*

One last point before concluding this section: since anonymity is a complex matter, we should be careful in saying that only whistleblowers who go public should have a right to legal protection. Many believe that the moral whistleblower that is entitled to legal protection only

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<sup>5</sup> On public interest, see Barry, Brian. 1990 [1965]. *Political argument: A reissue with a new introduction*. New York: Harvester Wheatsheaf; Bok, S. (1984), *Secrets: on the Ethics of Concealment and Revelation*, Pantheon Books; Downs, A. (1962). *The public interest: Its meaning in a democracy*. *Social Research*, 29, 1-36; Flathman, R. J. (1966). *The public interest: An essay concerning the normative discourse of politics*. New York: John Wiley; King, S., Chilton B.S., Roberts, G. E. (2010) *Reflections on Defining the Public Interest*, *Administration & Society* 41(8) 954–978; Held, Virginia. 1970. *The public interest and individual interests*. New York: Basic Books; O'Flynn, I (2010), "Deliberating About the Public Interest" *Res Publica* 16:299–315.

when he does is out of his conscience or declares publicly his/her infringement of the law.<sup>6</sup> The first is the case of the so-called conscientious objection, the second is the case of civil disobedience.

Conscientious objection is that declared - for instance - by doctors that refuse to procure abortion because of their religious or moral beliefs. Civil disobedients are those who judge a law to be unjust and are ready to go to prison by breaking that law. Political opposers to war conscription during the Vietnam war, or Gandhi's passive disobedience in occupying the streets are example of civil disobedients. Many believe that whistleblowing should be either a form of conscientious objection or a form of civil disobedience. What these arguments have in common is that a moral whistleblower should come to public. Is it really so?

Consider the case of those who criticise or gossip about someone else behind their shoulders but would never do it in front of the person they gossip about. We condemn this behaviour partly because we find coward or immoral to criticise someone without that person knowing it and being able to reply. The same we may say the whistleblower who remained anonymous, like Chelsea Manning for instance. If a whistleblower is in good faith, then he must be read to confront the legal consequences of breaking the law, even when he thinks that the law is unjust. The reason behind this though is that the whistleblower is just a civil disobedient, who faces legal justice in order to bring public attention to his disclosures and in force of a superior sense of moral justice Perhaps this is right, but consider again what we said before: a potential whistleblower is morally justified in leaking confidential information when he accepts to expose himself to the risk of being sanctioned, fired, or even arrested. Does it mean that he must do it? Not necessarily, even more when his/her anonymity is precious for being able to leak information of public interest. Recall the case of Ed Snowden: this NSA officer started to collect documents proving the illicit activities of his agency a year and half before becoming public. Keeping himself undercover was crucial to exposing the violations of his agency. He was undercover because he was serving the public interest of informing citizens that their rights were being violated by their own government.

Moreover, anonymity is often important to prevent forms of retaliation against whistleblowers. This is particularly true in the case of those who report episodes of corruption and even more for those very criminals who decide to become informants of the police by revealing information on the crimes of the organisation they work for. Thus, to conclude: anonymity is not necessarily a way to avoid facing justice; it is often a way for the whistleblower to defend his/her personal and professional safety against potential retaliation.

Shall the law protect anonymous whistleblowers? We can answer this question by distinguishing between full and partial anonymity. Fully anonymous is the whistleblower who leaks information through channels that keep his/her identity secret. The Wikileaks digital platform is for instance one of these channels. Partial anonymity is when the identity of the

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<sup>6</sup> For a discussion of the anonymity and transparency involved in public interest disclosures, see Frederick A. Elliston, "Anonymity and Whistleblowing", *Journal of Business Ethics*, Vol. 1, No. 3 (Aug., 1982), pp. 167-177; Robert G. Vaughn, *The Successes and Failures of Whistleblower Laws*, Edward Elgar Publishing Limited, 2012, chapter 8: incentives.

whistleblower is known to the public officials (the police, prosecutors, press etc....) or to the review committee of a company, but it is not divulged. Sometimes full anonymity is necessary when there are not proper channels of information disclosure and no legal protection is given to the whistleblower. But, when these channels are available, we could say that it is a duty of the whistleblower to go through them. Sometimes, even when these channels are available, the whistleblower may not trust them. In that case, it is open to discussion whether he has the right of 'going public' and contact the press or other organisations that could help him to bring attention to his disclosure. In general, we should say, a legal protection should be given to whistleblowers both when no channels of disclosure are available, and at least to those who report through channels when these are available.

Summing up, we have so far introduced and analysed the concept of whistleblowing and we have said that if whistleblowers are morally justified, then there should be legal protection for them. We now turn to the legal aspects of this phenomenon. We will first review the existing legislation on the matter, and finally propose some arguments and recommendations for the introduction of legal protection at EU level.

### **3. The Current State of Whistleblowing Legislation**

Several international conventions have been signed regarding the protection of subjects disclosing information on corruption. Three appear to be most relevant for our discussion.

First is the United Nations Convention against Corruption (UNCAC, Merida Convention)<sup>7</sup> which states that "each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention." (Article 33)

Second, we have the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in 1997<sup>8</sup> recommends member countries to provide accessible channels and appropriate measures to allow reports of bribery, and appropriate sanctions for those found guilty. In particular, the Convention recommends to put in place accessible channels for the reporting of suspected acts of bribery of foreign public officials in international business transactions, and appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities (article 9). Notice that the Convention also requests companies "to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting"

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<sup>7</sup> See: <https://www.unodc.org/unodc/en/treaties/CAC/>.

<sup>8</sup> See: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

(Article 10, section C — clause (v)). It must be noticed however that these are just general recommendations that hardly find strict legal enforcement.<sup>9</sup>

### *Whistleblowing in the European Union*

At European level, the legal landscape appears to be quite scattered. Perhaps the most important legal document is the Strasbourg Convention (“Council of Europe Civil Law Convention on Criminal Corruption”) which calls for an extension of the protection granted to informants in criminal investigations to those cooperating with investigating authorities in white-collar crimes and to those who provide testimony to the offence (Art. 22). The convention refers also the establishment of safeguards against ‘unjustified sanctions’ and invites EU member states to enact laws against “any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”<sup>10</sup>

At state level, only 5 of the 28 EU Member States (less than the 20%) have a legislation regulating disclosing procedures and forms of protection for whistleblowers. These members are Luxembourg, Romania, Slovenia, UK, and Ireland.<sup>11</sup> Less than 54% of EU-member states have only partial legislation,<sup>12</sup> and almost a third of EU-member states, have no legislation, or very weak forms of protection.<sup>13</sup> This clearly indicates an inadequate legal protection afforded to whistleblowers in the majority of EU member states.<sup>14</sup> So far the Commission has done little on this front, despite the recent attention called upon this issue by the European Parliament, and the new Juncker commission seems so far to have taken no position in such regard.

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<sup>9</sup> In an important study by Transparency International — the Global Corruption Barometer — provides the extent of corruption (and specifically ‘bribery’) perception. The 2013 Barometer states the perception of bribery of more than 114,000 respondents in 107 countries. Among the key findings, across the world, an average of 27% of the people interviewed (1 in 4) declared having paid a bribe in the last 12 months when interacting with key public institutions and services (Police, Judiciary, Registry, Land Medical institutions, Education, Tax, Utilities), with the highest percentage (31%) in cases involving the police and the judiciary (24%). Moreover, the survey found that the 53% of people think that corruption has increased during the past two years.

<sup>10</sup> Council of Europe - Civil Law Convention on Criminal Corruption. The Convention was adopted on 27 January 1999 and entered into force on 1 November 2003. See: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=174>

<sup>11</sup> Daniele Santoro, Manohar Kumar, Martina Turola, et al., “Blowing the Whistle on Corruption. Campaign for an European Directive in Defence of Whistleblowers, Summary Report, p. 12. Available on line at:

[http://www.restartingthefuture.eu/assets/files/WhistleblowingReport\\_Restarting%20the%20Future.pdf](http://www.restartingthefuture.eu/assets/files/WhistleblowingReport_Restarting%20the%20Future.pdf).

<sup>12</sup> The list includes: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Latvia, Malta, Netherlands, Poland, Sweden. In such cases, the procedures of disclosure are not are not always clear.

<sup>13</sup> This list includes Croatia, Bulgaria, Finland, Greece, Lithuania, Portugal, Slovakia, Spain.

<sup>14</sup> Transparency International, *Whistleblowing in Europe 2013 Report*, p. 8, available at: [http://www.transparency.org/whatwedo/publication/whistleblowing\\_in\\_europe\\_legal\\_protections\\_for\\_whistleblowers\\_in\\_the\\_eu](http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu)

The matter is even more urgent if one considers that also within the European Institutions there is a substantial lack of internal oversight bodies. Last March 2015, the European Ombudsman, Emily O'Reilly, has criticised seven European Union institutions for failing to update their internal whistleblower rules, over 1 year after they were meant to be in place. These rules, which EU bodies were obliged to have put in place by January 2014 – have been adopted so far only by The European Commission and European Court of Auditors, while the European Parliament, the Council of the European Union, the Court of Justice of the European Union, the European

External Action Service, the European Economic and Social Committee, the Committee of the Regions, and the European Data Protection Supervisor are yet to do so.<sup>15</sup> The absence of proper legislation means that often whistleblowers have to resort to external support of conventions, treaties etc.<sup>16</sup> The situation appears even paradoxical if we consider that, while EU whistleblowers have little protection within the European institutions, the internal regulations of those same institutions require officials to report fraud, corruption or other information about illegal activities.<sup>17</sup> Among those who have reported Paul Van Buitenen and Marta Andreasson are examples of whistleblowers who have come forward to report cases of irregularities and lack of financial systems of accountability within the European institutions.

### *Best Practices in the United States*

Interestingly enough, some of the best practices about whistleblowing disclosures against corruption come from the United States, where a legal protection for whistleblowers was already granted under the False Claim Act (1863).<sup>18</sup> New measures were put in place under the Whistleblower Protection Act (1989) which protects federal whistleblowers who report cases of misconduct in the Government. The purpose of the Act is “to protect for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by ... mandating that employees should not suffer adverse consequences as a result of prohibited

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<sup>15</sup> On this subject, see also the European Union Integrity System Report by Transparency International, *European Union Integrity System*, available at:

<http://www.transparencyinternational.eu/european-union-integrity-system-study/the-euis-report-latest-news/>

<sup>16</sup> For instance, Guyer and Peterson, two experts in the field, write that “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.” See Guyer, T. M. & Peterson, N.F. (2013), *The Current State of Whistleblowing Law in Europe: A Report by the Government Accountability Project*. Available at:

<http://www.whistleblower.org/sites/default/files/TheCurrentStateofWhistleblowerLawinEurope.pdf> (accessed on September 1, 2015).

<sup>17</sup> See Articles 22a and 22b of the Staff Regulations of Officials of the European Communities, which establish a clear duty of officials within the EU institutions to report cases that are “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.”

<sup>18</sup> And subsequently updated under the Sarbanes-Oxley Act 2002.

personnel practices” (Section 2, (a)).<sup>19</sup> The Act appoints a special bureau, the Office of Special Counsel, an independent federal investigative and prosecutorial agency, whose basic authority come from federal statutes in addition to the Whistleblower Protection Act.<sup>20</sup> The OSC’s primary mission is to protect federal employees and applicants from the consequences of being forced to engage prohibited personnel practices, especially retaliation for whistleblowing.<sup>21</sup>

Along with the OSC activities under the Whistleblower Protection Act, the Dodd-Frank Act,<sup>22</sup> introduced an important set of measures designed to hold Wall Street accountable and prevent another financial meltdown. A core element of this reform was a strong whistleblower protection, which corporations vehemently opposed.

The US best practices highlight two aspects EU should take in granting proper protection to whistleblowers. First, protection should be granted at the European level in order to commit those Member States where legislation does not exist to take action, and those where legislation is granted (whether partially or fully) towards a path of integration. Second, a framework law should establish effective incentives that would increase the number of disclosures, as well as motivate potential whistleblowers to report. Among these measures, one is particularly important: this is the so-called *qui tam* rule, which establish a premium payable to whistleblowers for reporting cases of corruption. The premium is calculated as a percentage of the amount retrieved following the report. The rule applies only in some cases, for instance under the False Claim Act cited above.

#### **4. A European Directive on Whistleblowing**

The overview of the legal landscape shows that e whistleblower protection at EU level and in single member states is indeed inadequate under many respects. Legislation, when it exists, does not provide sufficient protection for potential whistleblowers to feel safe in exposing themselves.

Second, the conventions and statutes we have reviewed so far apply only to whistleblowers that report corruption, and say nothing about disclosures involving governments’ secret information. The reason probably lies in the tendency of the governments not to be subjected to

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<sup>19</sup> “Blowing the Whistle on Corruption”, p. 16.

<sup>20</sup> Civil Service Reform Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA).

<sup>21</sup> See OSC website at <https://osc.gov/Pages/about.aspx>. Consider that Edward Snowden’s leaks are not protected under such act because he did not reveal a misconduct in the activities of the NSA, neither he appealed to the OCS. Quite the contrary, Snowden has been accused of stealing government’s property, namely classified documents created as part of the surveillance activity under the Patriot and Homeland Security Acts. A Military Whistleblower Protection Act was also enacted in 1998, and subsequently revised in 2013. This Act provides protection to lawful disclosures by internal channels of illegal activity by members of the US Army. However, Manning, who was a military, did not follow the procedures guaranteed by the Act, so he could not find protection under this law. His leaking were charged instead under the Espionage Act.

<sup>22</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173) signed by Barack Obama on July 2010.

unrestrained control over their powers. Yet, blowing the whistle on state crimes is not less relevant to citizens than corruption. Knowing whether government's acts made on behalf of its citizens is a basic principle of transparency every democracy should honour. Moreover, since we citizens rightly demand transparency in financial transactions, business and public administration, we are equally entitled to the same demand towards our governments.

Third, the issue concerning the competence of European institutions is crucial for the prospects of feasible legislating measures towards the protection of whistleblowers within the Union, also because the credibility of the European Union on this matter depends on the capacity of its own institutions to be subjected to the same principle of transparency.

In the light of these considerations, we hold that democratic institutions should protect whistleblowers, political and civic, and ensures around them a perimeter of rights for their safeguard. This, we hold, is a political duty the European Union should uphold as a consequence of its commitment to the promotion of human rights. We in fact believe that the right to protection of whistleblowers corresponds to a fundamental human right that cannot be conditional on the policy and legislation of the individual states.<sup>23</sup>

The establishment of legal provisions at EU level in defence of whistleblowers will also reflect the globalised dimension of corruptive as well secretive practices, whose impact exceeds beyond national borders. Illicit financial flows impact poor countries who have no say in the policy process, and cannot seek redress. Likewise, where no measures of accountability are in place to prevent the abuse of mass surveillance, citizens remain unaware of the extent to which their privacy and fundamental rights (including freedom of speech and movement) are endangered. The revelations by Edward Snowden made it manifest that the worldwide scope of these abuses were not just the product of fiction writers.

A European directive on whistleblowing would suggest that the member states and the European institutions are willing to take a stance on these matters. So far little has been done, as we recalled in the previous section, perhaps partly because of the little interest governments have in identifying a legal category that would ensure protection also of those government whistleblowers who reveal controversial undisclosed information. However, the urgency of more effective measures against corruption, both domestic and international is part of the EU agenda, and an effective protection of civic whistleblowers should be part of that agenda. The challenge is then to convince the governments and European institutions that an overarching legislation in defence of whistleblowers would contribute to public interest, over and beyond the concerns about security governments may have in this matter. The members of the European Parliament should promote a directive that addresses this crucial gap. In the following section I

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<sup>23</sup> In a public statement on the whistleblower Edward Snowden, the UN Human Rights High Commissioner Navi Pillay asked every country to protect the rights of those who uncover abuses and stressed the need to respect the right for people to seek asylum. Navi Pillay's statement on Snowden's affair on July 2013, available at: <http://rt.com/news/un-chief-snowden-protection-048>.

discuss a set of recommendations for a European Directive on the Protection of Whistleblowing.<sup>24</sup>

#### The general principles of a European Directive on Whistleblowing

The Charter of Human Rights of the European Union provides a framework for the protection of whistleblowing in virtue of its reference to citizens' right to participation, freedom of expression and their right to information.<sup>25</sup> Failing to create institutional and legal channels for whistleblowing would violate the right to free speech of the employees. This aspect overrides the clause of confidentiality required under employment contracts. If the information pertains to public interest, then it is in the interest of the citizens at large to know. If such information is not provided, then not only their right to know is being violated, but also their possibility of participating in matters of grave import is being denied. Therefore, it is a duty of the state to both protect and facilitate channels of whistleblowing.

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

#### *A call for a coordinated action. Some policy recommendations*

Whistleblowers are subjected to discrimination, bullying, dismissal, detention, even physical threats. Whistleblowers must be protected against such kinds of retaliation in all Member States and within European Institutions. To this purpose:

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<sup>24</sup> A longer list of this recommendations were formulated for the campaign *Restarting the Future* promoted by the Italian NGO Libera.

<sup>25</sup> This is the opinion of Transparency International's expert Mark Worth. See: 'Most of Europe has no whistleblower protection', Deutsche Welle, accessed on Nov 30, 2014, available at: <http://www.dw.de/most-of-europe-has-no-whistleblower-protection/a-16942870>.

- the Directive should ensure full confidentiality in the workplace, granting that the whistleblower's identity attends to strict procedures of consent request;
- the Directive should ensure that each private and public organisation organise mandatory whistleblower trainings in the workplace, and provide educational projects in schools with the support of civil society organisations;
- moreover, the Directive should ensure that media organisations and the press that come in possession of leaked information should not be subjected to investigation, nor should be forced to reveal the identity of the whistleblower.

Whistleblowing is substantially discouraged in absence of procedures that ensure effective and accessible reporting mechanisms. Since uncertainty is an obstacle to disclosures, private and public entities should ensure that their revelations will be given due course, and all the necessary support be provided to facilitate their work.

To this purpose, the Directive should operate on three fronts:

- First, it should request member States to pass legislation for public and private organisations to the purpose of establishing internal disclosure channels. Corporate codes of conduct must formulate clear formal procedures and identify a dedicated office for disclosures. Public and private organisations should also inform their employees on whistleblowing policies. Along with this, public and private organisations should devise procedures that, in case of sanctions against an employee who has blown the whistle, requires employers to prove that these sanctions were not related to the employee's reports.
- Second, the Directive should request Member States to establish a national authority for whistleblowing, external to the workplace, the whistleblower can appeal when internal reviewing committees reveal ineffective in conducting preliminary investigation. Such authorities should also have the power to promote action against officials in absence of due diligence investigation within the public or private organisation, when sufficient evidence is collected of a potentially unlawful conduct by these officials. The national authorities should also guarantee the availability of anonymous reporting, such as a free-toll number or web portals that can receive and investigate claims. These channels should always guarantee full confidentiality of data and identity, including but not limited to data encryption. The Directive should include the possibility of *awards* for whistleblowers that have not taken part to misdeeds, and explore suitable measures for sentence mitigation for those who decide to disclose wrongdoings they helped commit, depending on the seriousness of the offence.
- Third, since coordination at European level is essential, a competent *European Authority for Whistleblowing* should be establish to monitor the whistleblowing policies and legislative implementation within the Member States and in European Institutions; coordinate national authorities in Member States, and build an open access European database collecting the data at national and European level.

- Finally, measures should be envisaged within the Directive to recognise the right to asylum to those whistleblowers seeking protection abroad.<sup>26</sup>

### *Recent Developments in the European Parliament*

In an important Resolution adopted last 25 November 2015 (2015/2066(INI)), also the European Parliament called on the European Commission to propose to propose, by June 2016, an EU legislative framework for the effective protection of whistleblowers.<sup>27</sup> The proposal reflects some important recommendations set out above. In particular, the EU Parliament stressed that “it is not acceptable that citizens and journalists can be subject to prosecution rather than legal protection when, acting in the public interest, they disclose information or report suspected misconduct, wrongdoing, fraud or illegal activity.” (144)

Notably, the Parliament mentioned the US legislation recommending the Commission to consider a range of tools for ensuring such protection against unjustified legal prosecution, economic sanctions and discrimination, while also ensuring the protection of confidentiality and trade secrets; draws attention, in this connection, to the example of the US Dodd-Frank Act, which both remunerates whistleblowers for providing the authorities with original information and protects them from legal prosecution and job loss, bearing in mind that such remuneration should not be a stimulus for publishing business-sensitive information. (145)

In the Resolution, the Parliament proposed the institution of an independent European body responsible for collecting this information and carrying out investigations, and of a pan-European whistleblower common fund to provide whistleblowers with financial assistance, stressing that protection should be granted to whistleblowers “in case they inform the public after the competent authorities at national or EU level were notified, after no reaction within one month.”

### **Conclusion**

In this report we argued that whistleblowing protection is essential to the democracy in the European Union. Even more, given shared commitment to democracy and human rights, we urge European institutions to join the effort to promote these proposed measures. Such protection is essential both in the fight against corruption, and for the protection of government whistleblowers who report cases of crimes and law infringements committed by States under secrecy laws. Especially for what concerns the anti-corruption policies, the European Union has an institutional duty to look beyond the existing mechanisms in fighting corruption. Since actual

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<sup>26</sup> This matter is highly sensitive, as it involves again Snowden’s position. While on the run from Hong Kong where he had hidden himself soon after the revelations came out in public, he sought protection in several European countries, including France and Italy, which rejected the request. See: <http://newsinfo.inquirer.net/438825/italy-france-deny-asylum-for-snowden>. For an informed assessment of the asylum legislation in Europe, see Marco Cellini, “The European Refugees Crisis: How to Address it”, available on this website.

<sup>27</sup> European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0408+0+DOC+PDF+V0//EN>

whistleblowing mechanisms, where they exist, are designed exclusively as protective measures, they appear insufficient to contrast a phenomenon whose magnitude is often hard to calculate. Incentive schemes have revealed to be effective in supporting the efforts in fighting corruption. For instance, US best practices are exemplary cases of how to incentivise whistleblowing disclosure done in the public interest. Our recommendation is advocate at EU level a common legislation that incorporates the lesson of these practices.

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