

‘Whistleblowers in Modern Corporate Governance: Changing the Mind-set and the Culture in the Boardroom’

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Introduction

Michael Woodford, former CEO of Olympus, was sacked in October 2011 when he exposed a huge fraud of £1.7 billion, designed to conceal losses on securities investments and inflate the company's worth in financial statements. The roots of the fraudulent activities date back almost twenty years ago. Olympus's share price has fallen dramatically and a domino of lawsuits began.

As a result, the issue of whistleblowers and their role in modern corporate governance came back in the regulatory agenda worldwide. Despite the extensive reforms in the regulatory framework internationally and the widespread initiatives at national level, there are still calls for further reforms because, as most of the recent cases involving whistle-blowing reveal, whistle-blowers did not get sufficient protection or at least the level of protection guaranteed by the relevant legislation. In addition, there are concerns that if there is no improvement, the pre-existing ‘culture of silence’ will prevail again and whistle-blowers will not be adequately encouraged and motivated to step up and blow the whistle. Another worrying fact has to do with the incredible efficiency with which corporate executives defeat employees in whistle-blower claims, which questions the effectiveness of the legislative framework for protecting and empowering whistle-blowers.

The Department of Labour has issued merit findings in just 21 whistle-blower complaints, 1,211 complaints were dismissed and the rest found themselves outgunned by their employers' legal teams. IWN, the online reporting arm of the Centre for Public Integrity, writes that it has identified “63 former employees at 20 financial institutions who say they were fired or demoted for reporting fraud or refusing to commit fraud”.² The companies also routinely engaged in efforts to muzzle and isolate employees who were brave enough to report fraud. In some cases, even institutions that were later found guilty and punished with massive fines by the federal government were still able to wriggle out of

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² ‘Financial Whistle-blowers Suffered Systemic Retaliation En Route to 2008 Collapse’, (2011), available at: <http://www.sarbanes-oxley-whistleblower.com/blog/2011/11/28/financial-whistleblowers-suffered-systemic-retaliation-en-route-to-2008-collapse>

retaliation claims by former employees.³ It is really worrying to see that the ‘list of shame’ contains names, such as Citigroup, Countrywide Financial, Washington Mutual, Wells Fargo, and Ameriquest.

Corporate boardrooms are susceptible to fraud and the cure seems to be two-fold: firstly, the right incentives for auditors, employees and directors to safeguard their companies against fraud and mismanagement; and secondly, an injection of ethics to corporate executives, in order to effectively promote the success of the company. The rules of the corporate governance game need to be changed and it remains to be seen whether corporate boards are willing to become a bit more ethical and ‘enlightened’ or whether whistle-blowers should be given more incentives to call attention to possible wrongdoing within their companies and at the same time enough protection against retaliation. Legal protection can be further strengthened and more emphasis can be given to enforcing the rules, but equally important is the business culture and the working environment, where the potential whistle-blowers operate, so that legal support is complemented by encouragement and motivation. Only if the fear of dismissal, retaliation or victimization disappears, the culture of silence will be replaced by a culture of openness. As it will be shown, companies should be given the opportunity to show with evidence their commitment to the fight against corruption and their willingness to support the establishment of this new culture. As Micheal Woodford has argued, “I’m not superman. I can’t change opinion in Japan in such a profound way. That has to come from within”.⁴

The paper will commence by examining the role of whistle-blowers in modern corporate governance, and the rationale behind the attempts to regulate their conduct and provide protection. Then, the focus will shift towards the US and the UK legal and regulatory frameworks, with view to assess their effectiveness and determine whether and to what extend a reform is necessary. The third section will present three case studies from the US, Japan and the UK, in an attempt to highlight the pathology of the existing system and the need for changes beyond the letter of the law. Building on the findings of the previous two sections, the fourth section will argue that the missing piece of the jigsaw of efficient whistle-blower protection is a new corporate culture and a set of recommendations will be provided for changing the mind-set in the boardrooms of modern corporations.

³ Ibid.

⁴ J. Soble and L. Lucas, ‘Woodford abandons bid to lead Olympus’, Financial Times, 6 January 2012.

Whistle-blowers in Modern Corporate Governance

Employees are in the centre of whistleblowing regulation, as they are usually the first to identify or to know when something is wrong within their company. Their access to information and their inside knowledge of their company makes them an extremely valuable asset not only for fraud and mismanagement reporting purposes but also as an early warning mechanism.⁵ At the same time, the key for successfully tackling the problem of corporate mismanagement and corruption is the establishment of strong bonds and sufficient communication channels between employees and management. Encouragement and protection are the two main pillars, on which an efficient legal framework should be based. Employees frequently have second thoughts about speaking their concerns aloud either because they feel that this would breach their duty of loyalty to their company or even worse because they fear that their job would be at risk.

Since the 1970s when the term was initially used by activist Ralph Nader as an alternative to derogatory terms, such as informant or snitch, numerous attempts have been made to provide a comprehensive definition without great success. For the purposes of this paper, a whistle-blower is an employee, who discloses information about their employer's policies and practices involving irregularities, improprieties or wrongdoing.⁶ Although whistleblowing can be an effective system of internal monitoring and reporting based on employees-watchdogs, it has to be highlighted that there are limitations. Employees have the right to freedom of speech and disclosure of information can be seen as part of their right to self-development and autonomy, but they should be careful not to breach their employer's right to enjoy the trust and confidence of their employees.⁷

There is always a balancing exercise⁸ performed and, provided that there are considerations that make the disclosure necessary, such as protection of public interest, these considerations tip the balance in favour of whistle-blower protection. Of course, it can also be argued that fraud or internal irregularities are not directly related to the protection of public interest, but, as history has shown, the impact of corporate scandals is rather far-reaching and affects different groups of citizens and the public as a whole. It cannot be denied that there is

⁵ L. Vickers, *Protecting Whistle-blowers at Work*, (The Institute of Employment Studies, 1995), 1

⁶ R. Johnson, *Whistleblowing, When it Works and Why*. (Lynne Rienner Publishers, 2002), 3-4

⁷ E. Barendt, *Freedom of Speech*, (2nd ed., OUP, 2007). See also

⁸ During the passage of the Public Interest Disclosure Bill in the House of Lords, Lord Nolan talked about a 'delicate balance between public interest and the interests of employers'. See Hansard HL, 5 June 1998, col 614, available at: <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/612/612ap10.htm>

public interest in effective management and the accountability of public affairs and private business. Whistle-blowing goes far beyond the narrow boundaries of corruption, criminal activity and violations of the law or administrative regulations and can include information about abuse of authority, risks to health and safety, risk to the environment and cover up of waste of public funds or similar cases of gross mismanagement. Therefore, protection should be afforded to all whistle-blowers, because their conduct contributes towards the protection of their colleagues as well as the public, the improvement of legislation and the proper functioning of a democratic society. The achievement of such goals presupposes the strong commitment to the encouragement and the protection of the legitimate interests of those who have courageously been willing to come forward with their concerns.

The design of a robust and efficient system of whistle-blower regulation has been a challenging task for national legislators and there is lack of uniformity as to the methods employed, the choice of prevention techniques, motivation tools and enforcement mechanisms internationally. The three main areas that most of the legislative initiatives have in common and are arguably essential in the quest for an optimal model of regulation are whistle-blower protection from retaliation practices or unfair dismissal, encouragement of potential whistle-blowers and finally filtering and evaluation of whistle-blower allegations.

Starting with the third one, it is an onerous task for the authorities to be able to identify credible whistle-blowers and distinguish them from opportunistic ones. There are numerous examples of whistle-blowers, who fail to support their allegations with evidence, and inevitably the regulators are becoming increasingly unconvinced and disbelieving. As a result, credible whistle-blowers are likely to slip through the cracks, particularly given the limited resources available.⁹ Despite the difficulties in filtering and evaluating whistle-blower credibility, the effectiveness of whistle-blowers as a crime detection and accountability mechanism cannot be undermined. It has been shown that whistle-blowers have enabled regulators in the US to successfully obtain additional judgments of \$20.75 to \$21.27 billion more than would have been obtained without their assistance, while the total amount of penalties imposed within the period from 1978 to 2012 is \$70.13 billion.¹⁰ In addition, between 1996 and 2004 employee whistle-blowers were found to have exposed more cases of

⁹ See S. Kedia and S. Rajgopal, 'Do SEC's Enforcement Preferences affect Corporate Misconduct?' (2011), *Journal of Accounting and Economics* 51(3), 259-278 and H. Markopolos, *No One Would Listen: A True Financial Thriller*, (John Wiley & Sons, 2010)

¹⁰ A.C Call, G.S. Martin, N.Y. Sharp and J.H. Wilde, 'The Impact of Whistle-blowers on Financial Misrepresentation Enforcement Actions', (2014). pg. 5, available at: <http://ssrn.com/abstract=2506418>.

misconduct than outside monitors.¹¹ Being part of the company and having easier access to insider information is a determining factor for the exposure of cases of misconduct, as there is a 15% higher likelihood that corporate financial misconduct comes to light when employees are the ones who blow the whistle.

Externals, such as auditors, regulators or investors, closely monitor the company's performance and behaviour, but the increasing complexity of modern corporations¹² in combination with the limited and restricted access of publicly available information make it difficult for stakeholders to identify financial misconduct.¹³ On the other hand, employees have easier access to insider or sensitive information, but they lack the ability to enforce appropriate reporting behaviour or directly levy penalties against their company. Most of the times, blowing the whistle allows external parties, such as regulators, auditors and institutional investors, to access information about an alleged misconduct and involve the authorities.¹⁴ For the SEC, the whistle-blower program is one of 'the most powerful weapons in [its]...enforcement arsenal', as it helps 'identify possible fraud and other violations much earlier than might otherwise have been possible'.¹⁵ Therefore, employees play an integral role in monitoring corporate behaviour¹⁶ and in countries, such as the US, there is a long tradition of promoting whistle-blower activity, which is seen as complimentary to the operation of external monitors on financial reporting activities.¹⁷ More specifically, the False Claims Act in 1863 stipulated that individuals, not affiliated with the government, who are to initiate or file actions against federal contractors claiming fraud against the government, will be rewarded with a percentage between 10% and 30% of any award or settlement amount.

¹¹ A. Dyck, A. Morse and L. Zingales, 'Who Blows the Whistle on Corporate Fraud?', (2010), *The Journal of Finance* 65(6), 2213, 2226.

¹² L. Zingales, 'Want to Stop Corporate Fraud? Pay off Those Whistle-blowers', (2004) *Washington Post*, January 18, 2004, B02.

¹³ J.L. Hobson, W.J. Mayew and M. Venkatachalam, 'Analyzing Speech to Detect Financial Misreporting', (2012), *Journal of Accounting Research* 50(2), 349-392. See also Public Company Accounting Oversight Board, 'Observations on Auditors' Implementation of PCAOB Standards relating to Auditors' Responsibilities with respect to Fraud', PCAOB Release No. 2007-001, January 22, 2007, available at: http://pcaobus.org/Inspections/Documents/2007_01-22_Release_2007-001.pdf

¹⁴ Call, Martin, Sharp and Wilde (n. 9), 10.

¹⁵ U.S. Securities and Exchange Commission, 'SEC Awards More than \$14 Million to Whistle-blower', Washington, D.C. October 1, 2013, available at: <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.VCOoXGd0yw7>

¹⁶ Dyck, Morse and Zingales, (n. 11), 2214-5.

¹⁷ See C.L. Becker, M.L. Defond, J. Jiambalvo and K.R. Subramanyam, 'The Effect of Audit Quality on Earnings Management' (1998), *Contemporary Accounting Research* 15(1), 4-24; J.M. Karpoff, D.S. Lee, and G.S. Martin, 'The Consequences to Managers for Financial Misrepresentation', (2008), *Journal of Financial Economics* 88, 193-215; B. Xie, W.N. Davidson and P.J. DaDalt, 'Earnings Management and Corporate Governance: The Role of the Board and the Audit Committee', (2003), *Journal of Corporate Finance* 9(3), 295-316; F. Yu, 'Analyst Coverage and Earnings Management', (2008), *Journal of Financial Economics* 88(2), 245-271.

This is related to the second important element of whistle-blower regulation: the encouragement and motivation of potential whistle-blowers. Employees often possess private information about wrongdoings in their company and who is responsible for them.¹⁸ Encouraging them to come out of the shadows, blow the whistle and share this valuable information would be the most efficient and cost-effective way for companies to stop, mitigate the effect or prevent the wrongdoings. As such, internal whistleblowing is a blessing in disguise for both companies and the society as a whole, because it is brings to the surface and exposes corporate misconduct that harms corporate and social welfare.¹⁹

Of course it is worth noting that encouraging whistle-blowers is as challenging as ensuring their protection under any circumstances. There is an ongoing academic debate in the US and in Europe about the proper incentives and, as it will be discussed in the next section, the use of financial rewards. Some whistle-blowers have indicated that moral preferences, rather than financial incentives, drive their whistle-blowing decisions.²⁰ Moral motivation is an important determinant of whether an employee blows the whistle or remains silent and thus knowing more about the factors that moderate this relationship can help companies to design a better incentive strategy to achieve their goal of encouraging internal reporting.²¹ At the same time it has also been shown that personal morality could influence whistleblowing decisions less when employers offer them financial incentives to blow the whistle.²² Irrespective of their motivation, according to a 2011 survey, 99.5% of self-identified whistle-blowers said they blew the whistle because it was the ‘right thing to do’.²³

Although whistle-blowers perceive their actions as legitimate and necessary either from an ethical or a corporate governance perspective, they need to feel safe and that their company will protect them from retaliation practices. 74% of employees, who felt that they

¹⁸ Labaton Sucharow, ‘Wall Street in Crisis: A Perfect Storm - A Survey of the US Financial Services Industry’, July 2013, available at: <http://www.labaton.com/en/about/press/Wall-Street-Professional-Survey-Reveals-Widespread-Misconduct.cfm>; Labaton Sucharow, ‘Ethics and Action Survey’, December 2011, available at: <http://www.labaton.com/en/about/press/upload/ethics-and-action-survey.pdf>; Labaton Sucharow, ‘Wall Street Fleet Street Main Street: Corporate Integrity at a Crossroads – A US & UK Financial Services Industry Survey’, July 2012, available at: <http://labaton.com/en/about/press/upload/us-uk-financial-services-industry-survey.pdf>. According to them, approximately one-quarter to one-half of surveyed workers and executives report having observed workplace misconduct in the prior 12 months.

¹⁹ J. Koskinen, ‘Statement on IRS Whistleblower Program’, August 2014, available at: <http://www.irs.gov/pub/whistleblower/Koskinen%20whistleblower%20statement%20-%20version%20082014%20%282%29.pdf>.

²⁰ M. Miceli, J. Near and T. Dworkin, *Whistleblowing in organizations*, (Routledge, 2008), 195.

²¹ *Ibid.*, 152.

²² B. Frey and R. Jegen, ‘Motivation Crowding Theory’, (2001) *Journal of Economic Surveys* 15(5), 589, 592. See also S. Bowles and S. Polania-Reyes, ‘Economic Incentives and Social Preferences: Substitutes or Complements?’ (2012) *Journal of Economic Literature* 50(2), 368-425

²³ Ethics Resource Center, ‘Inside the Mind of a Whistle-blower’, (2012), pg. 5, available at: <http://www.ethics.org/files/u5/reportingFinal.pdf>

could question the decisions of management without fear of retaliation, went ahead and raised their concerns, but only 51% of those, who feared retaliation, did report.²⁴

The term retaliation should be widely construed and cover any action related to public humiliation, harassment, discrimination, threat, demotion, reprisal, punishment, retribution, blacklisting, suspension, and dismissal. In addition, companies should be prepared to show zero tolerance to such practices of any kind against employees who found the courage to raise a concern. No whistle-blower legislation should allow exceptions, because lack of full support to whistle-blowers would mean covering up and fostering misconduct and wrongdoing. The aim of companies and legislators is to promote a culture where honest disclosures are respected, valued, and even rewarded. Retaliation and other practices, which are intended at 'shooting the messenger' should be considered and thus treated as misconduct as well; a second form of misconduct or a continuation of the initial one.

A further problem in relation to the phenomenon of retaliation against whistle-blowers is their difficulty to prove that they were actually retaliated against as their companies claim that the measures in question, including dismissal, blocked career progression or disciplinary were taken due to performance-related reasons and not in retaliation for whistleblowing. Surveys in the US and Australia in the 1990s returned disappointing results as to the companies' attitude towards whistle-blowers, as in the US almost 90% of these employees in the end lost their jobs or were demoted, while there were lawsuits initiated against 27% of them.²⁵ In Australia, 20% were dismissed and 14% were demoted; 14% were transferred (to another town, not just within the department); 43% were pressured to resign; and 9% had their position abolished.²⁶ Such high percentages serve as evidence of a certain pattern of behaviour through which companies were sending a clear message to potential whistle-blowers that the response will be crushing in intensity. Interestingly, even when the employee remains in the company, the variety of informal retaliation tactics is remarkable, including isolation, removal of normal work, inspections, repeated threats of disciplinary action and referral for psychiatric assessment/treatment.²⁷

Once an overview of the role of whistle-blowers in modern corporate governance is provided, along with the challenges the regulation of their conduct involves, the analysis will now cover the actual rules and the approach adopted by two countries with long legislative

²⁴ Ibid, pg. 7.

²⁵ J. McMillan, 'Legal Protection of Whistle-blowers' in S. Prasser, R. Wear and J. Nethercote (eds) *Corruption and Reform: The Fitzgerald Vision*, (University of Queensland Press, 1990)

²⁶ J. Lennane, 'What Happens to Whistle-blowers, and Why?', (2012) *Social Medicine*, Vol 6, No 4, 249, 250.

²⁷ Ibid., 251.

tradition and a record of successful regulatory initiatives. The next section will focus on the legislative framework, which exists in both the United States and the UK, in an attempt to determine whether there are efficient rules in place and, if yes, whether there is a need for wider or more extensive reform and in which areas.

The Challenge of Whistle-blower Regulation: The US and the UK Systems of Protection

The American and British models of whistle-blower law are very different with respect to what they protect, how they protect it, and the preferred avenue of reporting. While each system has positive elements and its application has brought substantial benefits, both models have flaws, which call for immediate attention.

The American system gives greater protection to external reports, while the British system fiercely protects internal reports. While an internal report ensures that the corporation has a chance to remedy the misconduct before it is publicly released, an employer who receives a report might be able to retaliate against the whistle-blower without sanction. Thus, while external reporting might be perceived as ‘airing out’ the corporation's dirty laundry, such a report might also ensure that a corporation takes its internal complaints seriously, and that it has a sound procedure for receiving them.²⁸

Another fundamental difference lies on the rewards given by the US authorities to the whistle-blowers, who come forward with original information about corporate misconduct method. This method has been traditionally employed by the US government for enhancing the effectiveness of whistleblowing and for encouraging whistle-blowers to speak out. The whistle-blower can receive a share of any malpractice uncovered. The UK response to this method is that whistle-blowers need to be ‘assured that if they act reasonably to protect the legitimate interests of others who are being threatened or abused, the law will not stand idly by should they be vilified or victimised’.²⁹ The UK government’s intention was to introduce a public interest measure, not to offer protection to those making wild allegations or simply ‘gold-digging’.³⁰ To quote the words of Wall LJ in *Babula v Waltham Forrest College*, the aims of the legislation is to ‘encourage responsible whistleblowing’.³¹

²⁸ J. Mendelsohn, ‘Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing’, (2009), 8 Wash. U. Global Stud. L. Rev. 723, 723. See also O. Lobel, ‘Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations’, (2009) 97 California Law Review 433

²⁹ Lord Borrie, Public Interest Disclosure Bill, Column 891, 11 May 1998, available at: <http://www.publications.parliament.uk/pa/ld199798/ldhansrd/vo980511/text/80511-20.htm>

³⁰ J. Bowers QC, M. Fodder, J. Lewis and J. Mitchell, *Whistleblowing: Law and Practice*, (2nd ed., OUP, 2012), 5.

³¹ [2007] ICR 1026 at para 81.

i) Whistle-blowing in the US

In the US, there have been anti-retaliation provisions, included in federal statutes regulating terms and conditions of employment, such as antidiscrimination laws, health and safety laws, minimum wage and maximum hour laws, and pension laws, since the 1930s.³² Although these statutes were generally aimed at protecting employees when they report to a government agency (external reporting), the US Courts have consistently decided that the relevant provisions should be interpreted broadly to protect both internal and external reporting.³³ Gradually, there were more individualized whistle-blowing statutes³⁴ introduced for the protection of information of concern outside the workplace to the public at large. The focus is once more on external reporting, leaving the main responsibility for the protection of employees who make internal reports to the courts. The first specialised piece of legislation was the Whistle-blower Protection Act introduced in 1989 to protect public employee whistle-blowers, who report 'information which they reasonably believe evidences a violation of law, rule or regulation, a gross waste of funds, gross mismanagement, abuse of authority or a substantial and specific danger to public health and safety'.³⁵

The most recent legislative initiatives of the US Congress, namely the Sarbanes-Oxley Act of 2002 (SoX), the Tax Relief and Health Care Act of 2006 (TRHCA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), support the same strategy in relation to whistle-blowing and are aimed to further reinforce the legislative framework. For instance, section 806 SoX prohibits retaliation against employees of publicly traded companies or employees of nationally recognized statistical rating organizations who reveal 'questionable accounting or auditing matters'. The TRHCA also follows the tradition of the False Claim Act offering monetary incentives to prospective whistle-blowers. The mandatory bounties are up to 30% of the total proceeds as long as the amounts identified

³² Among others, the National Labor Relations Act 1935, the Fair Labor Standards Act 1938, the Age Discrimination in Employment Act 1967, the Occupation Safety and Health Act 1970 and the Civil Rights Act 1964.

³³ J Mendelsohn, 'Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing' (2009) 8 Wash. U. Global Stud. L. Rev. 723, 731. See also Robert G. Vaughn, 'State Whistle-blower Statutes and the Future of Whistle-blower Protection', (1999), 51 ADMIN. L. REV. 581.

³⁴ Among others, the Water Pollution Control Act 1948, the Clean Air Act 1955, the Clean Water Act 1972 and the Federal Mine Health and Safety Act 1977.

³⁵ While this statute *prima facie* allows both internal and external reporting, exceptions were recognized to its scope, inherently limiting the protection afforded to many types of internal reports. See R.G. Vaughn et al., 'The Whistle-blower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistle-blowers', (2003) 35 George Washington Int'l Law Review 857, 874-5 See also B. D. Fisher, 'The Whistle-blower Protection Act of 1989: A False Hope for Whistle-blowers', (1991) 43 Rutgers L. Rev. 355

through the involvement of the whistle-blower (taxes, penalties, and interest) exceed the amount of \$2 million.

The scope for financial sanctions has now been extended by the Dodd-Frank Act. Whilst the False Claim Act only applies to financial fraud committed against the government, the Dodd-Frank applies to a much broader range of financial fraud committed by a business which is required to report to the SEC or the Commodity Futures Trading Commission (CFTC). Section 922 of Dodd-Frank offers monetary incentives to prospective whistle-blowers, who come forward with original information regarding financial improprieties or other misconduct that leads to a successful court action. The incentives are between 10% and 30% of monetary sanctions over \$1 million, which are collected via civil or criminal proceedings, as long as they are stemming from investigations facilitated by whistle-blowers' information, documentation, or cooperation³⁶.

The first issue that arises when examining the US whistle-blower protection regime is that it emanates from several different sources, including the Constitution, and a long list of federal statutes, making the law, in itself, far from uniform and hard to find. In terms of content and orientation, unlike UK law, which specifically discourages wider disclosures and external reports³⁷, the US model is clearly external reporting orientated. Dodd-Frank requires the CFTC and the SEC to establish whistle-blower offices that provide a formal venue where whistle-blowers can voice their complaints and share evidence with the regulators. The idea that there are offices, where complaints can be made and evidence can be presented, can significantly change the public perception about whistle-blowing. Whistle-blowers are encouraged not just to step up and give a fight against a company or a multinational corporation on their own, but to do it through official channels. In this way, they get the support, advice and expertise from the competent authorities and they can be assured that their complaint will be processed.³⁸

For the US government this is a strategic choice and reflects the essence of its whistle-blowing programme. This approach has been criticised for taking for granted that

³⁶ Bowers et. al, (n. 30), 368. See also R.L. Ensign, 'SEC to Pay \$30 Million Whistle-blower Award, Its Largest Yet'. The Wall Street Journal, September 22, 2014, available at: http://www.wsj.com/articles/sec-to-pay-30-million-whistleblower-award-its-largest-yet-1411406612?mod=rss_whats_news_us&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fxml%2Frss%2F3_7011+%28WSJ.com%3A+What%27s+News+US%29&utm_content=FaceBook

³⁷ L. Vickers, 'Whistling in the Wind', (2000) 20(3) Legal Studies 428, 430. See also L. Vickers, *Freedom of Speech and Employment*, (OUP, 2002), 116.

³⁸ R. Wortley, P. Cassematis and M. Donkin, 'Who Blows the Whistle, Who Doesn't and Why', in A. Brown (ed), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, (Australian National University, 2008).

internal reports would be futile or that the internal reporting procedure is inherently unfair. It is true that sometimes the flow of information may be restricted, and there may be attempts to 'kill the messenger'.³⁹ The wrongdoer's success in resisting change, suppressing information, and retaliating depends on his or her organizational influence. Thus, it is when the regulator should intervene and create the right environment for the company to take the message seriously and not harm the messenger. When whistles are blown externally first or concerns are not raised, then unjustified harm can be done to the reputation of the organisation and those it serves. There are significant benefits for companies to operate in and support a system in which the whistle is not, in the first instance, blown externally and employees have an alternative to silence.⁴⁰ Frederick Elliston has famously said that 'dedicated and highly principled employee[s] ... will not embarrass their company by washing their dirty linen in public'.⁴¹ In this way, companies would be encouraged to take internal whistle-blowing seriously, adopting a long-term perspective and showing sufficient commitment to the re-shaping of their internal culture.⁴²

Regarding the offering of financial incentives, at first glance it may appear that such incentives can open the floodgates to thousands of complaints based on insufficient evidence and mere allegations or rumours. However the rationale is different, as the government aims at determining and highlighting the key role that whistle-blowers have on the outcomes of judicial or administrative actions and thus improving the public understanding of the enforcement process. Cheryl Eckard, former GlaxoSmithKline employee, was awarded \$96 million from a total fine of \$750 million, while in the case of Pfizer Inc, six whistle-blowers shared various sums, with two receiving \$51.5 million and \$29 million from a total of \$102 million distributed between them.⁴³

Bounty awards and financial incentives have also heavily criticised and concerns have been raised regarding the effectiveness of such a strategy, the threats of frivolous claims, the misinterpretations over ambiguous behaviour which might not be fraudulent, the incurring of unnecessary administrative costs on courts and agencies and last but not least their morally

³⁹ E.S. Callahan and T.M. Dworkin, 'Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistle-blowers', (1994) 32 Am. Bus. L.J. 151, 165.

⁴⁰ R. Calland and G. Dehn, 'Conclusion: Whistleblowing Around the World', in R. Calland and G. Dehn (eds) *Whistleblowing around the world: Law, Culture and Practice*, (IDASA, 2004), 201.

⁴¹ F. Elliston, J. Keenan, P. Lockhart and J. Van Schaick, *Whistleblowing: Managing Dissent in the Workplace*, (Praeger, 1985), 135.

⁴² Ibid.

⁴³ Bowen, (n. 30), pg. 369.

corrupting effects.⁴⁴ Offering financial incentives for prosocial behaviour, such as whistleblowing, changes how individuals perceive the decision and makes them more self-interested and less other-regarding. Specifically, offering financial incentives to encourage whistle-blowing could cause market norms of self-interest to govern whistle-blowing decisions rather than ethical norms, thereby decreasing the perceived moral obligation employees feel to blow the whistle.⁴⁵

Another serious issue has to do with the overall regulatory tradition of the US. In the United States, whistle-blowing laws have a longer history and a wider range of alternatives are available, reform suggestions are continuously made and the more recent proposals include for instance allowing payments of bounties even in cases involving non-monetary sanctions and the empowering of whistle-blowers to litigate against fraudsters even if the SEC remains inactive.⁴⁶

A further concern is that supporting external reporting to the authorities undermines internal procedures and does not allow companies to change their structures and their mindset. Transparency and accountability are terms that are included in almost all corporate governance documents internationally and they are meant to operate as guiding principles in the process of the ethical transformation of modern corporations. Change always come from the inside and, in spite of the influential role that the SEC and the CFTC play as watchdogs, companies should be left to choose their own path, based on their priorities and their long-term strategy. After the introduction of SoX, the percentage of whistle-blowers dropped significantly compared to before SoX and this is a clear indication that establishing a robust whistle-blower system can be achieved through top-down state regulation. Rules must be supported by an ethical culture that each company needs to advocate to its employees and this is an issue that has not been adequately addressed by the relevant rules. As a result, whistleblowing will end up becoming an endless pursuit of financial rewards disconnected from the core of whistle-blowing protection: the establishment of a robust system of 'checks and balances' within the company for the detection, exposure and elimination of misconduct,

⁴⁴Y. Feldman and O. Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality', (2010), *Texas Law Review*, Vol. 88 No. 6, 1151, 1155.

⁴⁵ See above (n. 22)

⁴⁶ G.C. Rapp, 'Mutiny by the Bounties? The Attempt To Reform Wall Street By The New Whistleblowing Provisions of the Dodd-Frank Act', (2012), *Brigham Young University Law Review*, Vol. 2012 No. 1, 73, 74-5. and R. Moberly, 'Sarbanes-Oxley's Whistle-blower Provisions-Ten Years Later' (2012), *South Carolina Law Review*, Vol. 64 No. 1, 51.

malpractice and potential dangers, and the he respective interests of employers and employees.⁴⁷

ii) Whistle-blower protection in the UK

Moving to the UK, it has been argued that '[i]n stark contrast to the USA, the UK is a virtual legislative desert when it comes to whistle-blower statutes'⁴⁸, simply because whistle-blower protection in the United Kingdom is governed in principle by a single statute, the Public Interest Disclosure Act 1998 (PIDA). By virtue of the Act, whistle-blowers are given protection if they suffer detriment at the hands of their employers because they have spoken up raising their concerns.

PIDA has rightly been described by the Council of Europe as 'forward-looking legislation'⁴⁹ and one of the most comprehensive laws of its kind.⁵⁰ After all, it is the PIDA, rather than US rules, which has been substantively replicated around the world.⁵¹ The European Court of Human Rights' judgment in *Heinisch v Germany*⁵² can be read as broadly similar to UK domestic statutory interpretation with the balancing of employer/employee interests in the light of public interest considerations and the need to encourage potential whistle-blowers to speak out without fear of reprisals.

Reference should be made to the increase in the number of claims from 157 in 1999 to 1,761 in 2009 and 2,500 in 2011/2012 and the submission of over 9,000 claims alleging victimization.⁵³ Claims, which were successful at hearing, range from 2.8% in 1999/2000, though the number of claims disposed of in this period was small, to 8.47% in 2005/2006.⁵⁴ It is worth noting that the gradual increase in the number of claims does not necessarily indicate

⁴⁷ D. Lewis, 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistle-blowers Adequately Protected?', (2008), *Journal of Business Ethics*, Vol. 82 No. 2, 497, 498.

⁴⁸ M. Cover and G. Humphreys, *Whistleblowing in English Law*, in G. Vinten (ed.), *Whistle-blowing-Subversion or Corporate Citizenship?*, (St Martin's Press, 1994) 93

⁴⁹ Council of Europe, Resolution 1729 'Protection of "whistle-blowers"', 29 April 2010 (17th Sitting), section 3, available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm> See also Evelyn Oakley & Anna Myers, *The UK: Public Concern at Work*, in Richard Calland and Guy Dehn (eds.), *Whistleblowing Around the World: Law, Culture and Practice*, (IDASA Publishers, 2004) pg. 173

⁵⁰ P. Omtzigt, 'The Protection of "Whistle-blowers"', Report to the Parliamentary Assembly of the Council of Europe, Doc. 12006, 14 September 2009, para 37, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302&lang=EN>

⁵¹ For example, in South Africa, Japan, Ireland and the Netherlands. See W. Vanderkerchove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment* (Ashgate, 2006), 293-4

⁵² Application No 28274/08 [2011] IRLR 922 (ECHR).

⁵³ Public Concern at Work, 'Where's Whistle-blowing Now? 10 Years of Legal Protection for Whistle-blowers', (2010), PCAW Survey Research Paper, available at: http://www.pcaw.org.uk/files/PIDA_10year_Final_PDF.pdf, See also P. Yeoh, 'Whistleblowing: Motivations, Corporate Self-Regulation, and the Law', (2014) *International Journal of Law & Management* 56(6), 459, 466.

⁵⁴ J. Ashton, '15 years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We still Shooting the Messenger', (2015) *I.L.J.*, 44(1), 29, 38.

more instances of malpractice in the workplace, but may serve as evidence of increased awareness of whistle-blowing and an indication that more people are prepared to speak out and take action if they perceive they have been mistreated as a result of their disclosure.

In an attempt to evaluate PIDA, from the early years of its application there were concerns that the level of knowledge of the whistle-blowing law among employees was unacceptably low, while the protection offered to whistle-blowers has been overall insufficient. The major criticism was related to the fact that PIDA, albeit indispensable, only provides a remedy when workers' rights have already been detrimentally affected and does not set out to encourage whistleblowing. To put it simply, it merely aims to protect those who raise a particular type of concern in a specified way and it only indirectly encourages employers to have effective whistleblowing arrangements in place and to treat whistle-blowers well.⁵⁵ As a result, whistle-blowers remain vulnerable to victimization and hence unsurprisingly more than half of the one in four employees aware of misconduct in their workplaces kept silent.⁵⁶ Concerns have also been raised that whistle-blowers in practice have been silenced through compromise and severance agreements, even though any gag clauses on PIDA-protected disclosures are void.

It would appear that PIDA only provided wavering protection to whistle-blowers as it failed to directly challenge the anti-whistleblowing culture. Its gaps and uncertainties have created serious limitations in quelling the fears of whistle-blowers with the consequence of discouraging whistle-blowers from coming forward.⁵⁷ As too many whistle-blowers were facing employer retaliations and others were of the opinion that speaking up may be futile or dangerous, not only the concerns about ineffective protection were increasing, but also a wall of corporate silence was created, hampering important corrective actions.⁵⁸

In response to these criticisms, the UK through the Enterprise and Regulatory Reform Act 2013 has tried to enhance whistleblowing protection and boost the effectiveness of PIDA. It is still early to make conclusive assessments, but there has still been growing disquiet that, after more than 15 years in force, the PIDA is not working as it should. With whistle-blowing scandals seemingly emerging on a regular basis, more reforms need to be initiated. Despite

⁵⁵ David Lewis 'Ten years of Public Disclosure Act 1998 claims: What Can We Learn from the Statistics and Recent Research?' (2010) 39(3) *Ind Law J* 325, 328.

⁵⁶ C. Hobby, *Public Interest Whistleblowing: Twelve Years of the Public Interest Disclosure Act 1998*, (Institute of Employment Rights, 2010), 55.

⁵⁷ K. Bouloy, 'The Public Interest Disclosure Act 1998: Nothing More than a "Cardboard Shield"', (2012), *The Manchester Review of Law, Crime and Ethics*, Vol. 1 No. 1, 1-18?

⁵⁸ Yeoh, (n. 53), 466.

the socio-political impetus, the broad cross-party, union and industry support¹⁰ and the international approbation, the PIDA has effected little, if any, change in the corporate culture. Simply put, the PIDA and the amendments effected by the ERRA have not demolished the wall of corporate silence and thus the aspirations of the business community for openness and transparency are not yet being achieved. In this sense, it is submitted that the PIDA should not be abolished and the changes made by the ERRA are definitely towards the right direction, but it is obvious that there is something missing. The public interest would be better served by a more proactive approach promoting the reporting of perceived malpractice including giving workers a positive right to raise concerns and imposing a statutory duty on organisations to establish effective procedures for hearing and managing such concerns.⁵⁹

As it becomes apparent, despite the fragmentation and the weak enforcement of the regulatory framework, there are a substantial number of initiatives undertaken and legal documents in force, which can serve as evidence of the willingness of the governments and authorities of both countries to address the issue of whistle-blowers protection. There is always room for improvement, but the foundation is there and this groundwork done cannot be disregarded. However, a closer look at the rules and the design of the legislative framework reveals that none of the two manages to strike the right balance between the government's aims and the actual protection-encouragement of whistle-blowers. This inadequacy is confirmed by the findings of the next section, which highlight a disquieting truth about the future of the whistle-blowers themselves: instead of being rewarded or becoming role models for their colleagues and wannabe whistle-blowers, they have been pushed out from their companies and have ended up becoming authors and consultants. The next section will focus on three exemplary cases of whistle-blowers, namely Cynthia Cooper from WorldCom, Michael Woodford from Olympus and Gary Walker from NHS, as all three of them did not have the recognition and the career progression that they were hoping to have when they decided to step up and blow the whistle. Their stories will allow us to go beyond the actual provisions about whistle-blowers and identify what we really need to add or to change in the existing set of rules.

Whistle-blowers and the Reality Check: 3 Case Studies from the Headlines

In the vast majority of cases, whistle-blowers are never the same again after they blow the whistle; they suffer a career loss and often loss of their family and relationships. They are

⁵⁹ Lewis (n. 47), 504.

taught to be loyal, and breaking that loyalty to do what is perceived is right is often a tough ethic quandary to face.⁶⁰ Cynthia Cooper, famous for her role in the exposition of the scandal in WorldCom, in the question whether she would blow the whistle again, her reply was ‘Yes, I would. I really found myself at a crossroads where there was only one right path to take’.⁶¹

WorldCom was once the fifth most widely held stock in the country and was listed as No. 1 for return to shareholders over a 10-year period. Scott Sullivan, the CFO, was once the highest-paid in the country and he received the CFO Excellence Award for his work.⁶² Cynthia Cooper, vice president of internal audit, and her team discovered that the company was involved in a multi-billion-dollar fraud. Inflated profits, questionable accounting practices and misallocated expenses paved the way for the largest accounting fraud in history. When Cooper went to the company’s auditing firm, Arthur Andersen, to inquire about the creative accounting fix, she was told that there was nothing to be concerned about in the company’s accounts, while Scott Sullivan advised her to mind her own business and to back off. Unfortunately for him, her job was to handle operational audits, check the company’s budget standards and to evaluate performance, so the more she was digging, the more evidence she was finding. Enron’s recent collapse and Arthur Andersen’s key role in it was another source of concern for Cooper, who could not unquestionably rely on the accounting firm’s audits and the CFO’s reassurances. Once their findings were definite, Cooper and her team reported them internally working their way up the chain of command up until David Meyers, WorldCom’s controller, resigned and Scott Sullivan was terminated following an audit-committee meeting of WorldCom’s board of directors.⁶³

She has received hundreds letters and e-mails of encouragement from strangers. Her response was: ‘I’m not a hero. I’m just doing my job’.⁶⁴ However, none of the senior executives of WorldCom personally thanked. There were even colleagues, who stopped talking to her or other employees, who were of the opinion that she should have stayed quiet, allowing the company to make its way out of the problems and avoid bankruptcy.⁶⁵ Cynthia

⁶⁰ F. Alford, *Whistleblowers: Broken Lives and Organizational Power*, (Cornell University Press, 2002).

⁶¹ Amanda Ripley, Q & A: Whistle-Blower Cynthia Cooper, Time Magazine, Feb. 4, 2008, available at: <http://www.time.com/time/arts/article/0,8599,1709695,00.html>

⁶² D. Carozza, ‘Extraordinary Circumstances: An Interview with Cynthia Cooper’, Fraud Magazine, March April 2008, available at: <http://www.fraud-magazine.com/article.aspx?id=210>

⁶³ S. Pulliam and D. Solomon, ‘How Three Unlikely Sleuths Exposed Fraud at WorldCom Firm’s Own Employees Sniffed Out Cryptic Clues and Followed Hunches’, Wall Street Journal, Oct. 30, 2002, available at: <http://www.wsj.com/articles/SB1035929943494003751>

⁶⁴ R. Lacayo and A. Ripley, ‘Persons of the Year: Cynthia Cooper, Coleen Rowley and Sherron Watkins’, Time Magazine, 22 December 2002, available at: <http://tigger.uic.edu/~rramakri/Readings/Accounting-Profession/Time%20persons%20of%20the%20year%20-%2012%2022%2002%20-%20Time.htm>

⁶⁵ Ibid

Cooper stayed with the company for more than two years after the fraud was uncovered and until it successfully emerged from bankruptcy. When she left, apart from the book she wrote on the 'Extraordinary Circumstances' she had to deal with in WorldCom, she shared her experience as an ethics speaker and consultant.⁶⁶

Crossing the Atlantic, we find Gary Walker, former chief executive of the United Lincolnshire Hospitals NHS Trust. The second whistle-blower case involves a compromise agreement he was forced to sign and a 'gagging' clause⁶⁷, according to which he would not discuss all the patient safety-related issues that he was warning his superiors about. More specifically, Gary Walker was for years raising concerns in relation to patient safety using evidence about rising death rates and a high number of safety incidents. He was sacked for gross professional misconduct over alleged swearing at a meeting, but he claims that his dismissal came as a natural outcome of his decision to ignore government targets for non-emergency operations as there were more urgent cases and his refusal to prioritise patients 'whatever the demand'.⁶⁸ He accepted a lucrative payment, mostly because he wanted to be able to support his family in case he was unable to find future employment, but two years later he decided to break this agreement.

Walker broke his gag following the failure of the 222-page Robert Francis report into Mid-Staffordshire to identify and hold accountable those who were responsible for the death of up to 1,200 patients. He went on to speak about his concerns over patient safety and the circumstances leading to his sacking from the NHS, despite the threat that if he went ahead with the interview, he would be in breach of the compromise agreement and that he might be forced to repay the settlement he had received as well as the Trust's legal costs.⁶⁹

'I would expect that whistle-blowers simply want an apology and a job that is comparable to the one they were forced from'.⁷⁰ Having this central message, Gary Walker sent a letter to Rt Hon Jeremy Hunt MP, Secretary of State for Health, as his last resort to get some kind of redress. In response to the letter, a Department of Health spokesperson talked about creating an open and honest culture where patients and staff are listened, outlawing

⁶⁶ L. Hunt, 'The Challenges Women Whistle-blowers Face', (2010) *International Business Research* Vol. 3, No. 2, 3

⁶⁷ It is worth mentioning that pursuant to s. 43 J of the Employment Rights Act 1996, any gagging clause in a contract is void and this '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'.

⁶⁸ House of Commons - Health Committee, *After Francis: Making a Difference*, (STO, 2013), 63

⁶⁹ J. Faragher, 'Gary Walker Whistleblowing Case: Time for an NHS Culture Change?', *Personnel Today*, 18 Feb 2013, available at: <http://www.personneltoday.com/hr/gary-walker-whistleblowing-case-time-for-an-nhs-culture-change/>

⁷⁰ <http://www.garywalker.org.uk/?p=569>

gagging clauses in contracts and training every NHS manager and leader. No apology and no redress for Mr Walker, who has been acting as Commissioner for Public Concern at Work's UK-wide review into workplace whistleblowing as well as advisor to a variety of organisations and speaker at national/international conferences.

The third and final whistle-blower case is from Japan and the central figure is Michael Woodford, who in just six months managed to become the first non-Japanese president and chief operating officer of Olympus Corporation and get fired! An article in a Japanese magazine accusing Olympus of financial statement fraud made Woodford to unroll the thread and uncover financial statement fraud through a series of suspicious transactions. Woodford asked for details regarding the transactions in question, but he did not receive any clear response to his questions. He then insisted, because although the dubious deals totalling \$1.6bn had been approved by the Olympus board, they had not been adequately reported in the company's consolidated statements and the beneficiaries of some payments were not identified in Olympus's books. There were even rumours about the involvement of the Yakuza organized crime syndicate.⁷¹

Woodford blew the whistle and was dismissed following a public statement by the company that the reason behind his dismissal was that 'his management style caused a significant divergence between him and other executives'.⁷² An investigation conducted by Olympus confirmed Woodford's allegations about massive overpayment for assets and lavish fees as well as a fraudulent attempt to cover up previous bad investments by a series of Olympus presidents, dating back to the 1980s. Olympus sued 19 executives and board members and the Tokyo Stock Exchange imposed a \$1.28m fine for 'falsifying financial records to conceal losses'.⁷³ 'Whistles tend to get blown by policemen in the pursuit of a thief. Or they are sounded by referees to stop play so they can upbraid a player (...) I wasn't a cop and I wasn't the referee. I was a player who saw members of his own team not following the rules'.⁷⁴

Woodford received a £10m settlement at an employment tribunal in London, and he has become a very popular public speaker, sharing his experience and promoting his book. He was also Commissioner for the Public Concern at Work review together with Gary

⁷¹ 'Ethics, Emotions and the Need to "Do the Right Thing"', (2012) *Strategic Direction*, Vol. 28 Iss 8 25, 26.

⁷² K.T. Greenfield, 'The silencing of Michael Woodford', (2012) *Bloomberg Businessweek*, February 20-26, 68, 72, available at: <http://www.bloomberg.com/bw/articles/2012-02-16/the-story-behind-the-olympus-scandal#p1>

⁷³ *Ibid* at 73

⁷⁴ M. Woodford, *Exposure: Inside the Olympus scandal: How I went from CEO to Whistleblower*, (Penguin Group, 2012), 233.

Walker. As it was very rightfully argued, ‘the likelihood of him taking a senior executive position in a large corporation, Japanese or otherwise, is slim. Salvation will have to come from elsewhere.’⁷⁵

This very last point is the common characteristic of all three case studies discussed above and it is the source of serious concerns regarding the real effectiveness of the whistle-blower regulatory framework worldwide. In theory, whistle-blowers are protected and there is a wide range of provisions dealing with encouragement, retaliation and overall protection. Despite the gaps, the criticism for being a ‘convoluted patchwork’⁷⁶ and the different regulatory strategies adopted in different countries, the rules seem to be fit for purpose. However, an examination of the stories of whistle-blowers reveals a surprising and alarming fact: none of the three whistle-blowers (together with many others, not examined in the present paper⁷⁷) is currently working for their companies or is employed by another company in the same industry or not. They all left their companies and they were involved in public speaking and consultancy, while some of them wrote books sharing their experiences or were appointed as members of committees and commissions as experts. It is true that they became really famous, they made money and they raised awareness through their experience, but none of them is doing the same job that they were doing when they decided to blow the whistle. Although it would be more reasonable to expect them to receive numerous job offers from companies wishing to use them as role models for their employees, this was not the case. They were not even appointed as part of a PR-driven strategy by companies interested in sending a message to their investors or customers that they take corruption very seriously and showing their commitment to promoting transparency and whistle-blowing.

Reflecting on the three case studies and the experience coming from the UK, the US and Japan, it becomes apparent that the perception that the existing legislative framework is effective is false. As mentioned in section 1, the aim of whistleblowing legislation is two-fold: protection and encouragement of whistle-blowers. The case studies indicate that the existing rules have failed in both fronts. Whistle-blowers are not adequately protected and they end up being excluded from the job market and isolated by the business community. Michael Woodford in his book vividly argues that ‘the road to becoming a whistle-blower was a lonely one and sets you apart. You become an island. There are times when some

⁷⁵ M. Gwyther, ‘Japan: The Descent of the Rising Sun’, *Management Today*, 2012, Nov 1. available at: <http://www.managementtoday.co.uk/go/news/article/1155926/japanthe-descent-rising-sun/>

⁷⁶J. Mendelsohn, ‘Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing’, (2009) 8 Wash. U. Global Stud. L. Rev. 723, 724.

⁷⁷ Among others, Sherron Watkins, Peter Sivere, Graham Pink, Oliver Budde and Eric Ben-Artzi.

people are on the island with you, but generally speaking you remain like Robinson Crusoe, or Tom Hanks talking to a basketball'.⁷⁸

In addition, encouragement is defective as well, because the more similar stories are publicised, the less corporate executives or employees would be tempted to become whistle-blowers. If people like Woodford, Cooper and Walker are essentially deprived from doing the job they love and they are good at, because they are seen as trouble-makers or sources of complications, then very few employees will go down the same road knowing that their fate is sealed. Jake Adelstein in the afterword of Woodford's book highlights the pathology of the system: 'as a society we may laud honesty and integrity, but when someone actually stands up for those principles, we think to ourselves, 'what a nutter'. (...) there is no such thing as a society immune to corruption and hypocrisy. Loyalty triumphs over principles, lawsuits and money muzzle the naysayers, and intimidation keeps people quiet'.⁷⁹

The US Department of Labour has issued merit findings in just 21 whistle-blower complaints, 1,211 complaints were dismissed and the rest found themselves outgunned by their employers' legal teams.⁸⁰ According to IWN, the online reporting arm of the Centre for Public Integrity, companies are routinely engaged in efforts to muzzle and isolate employees who were brave enough to report fraud. In some cases, even companies that were later found guilty and punished with massive fines by the federal government were still able to wriggle out of retaliation claims by former employees.⁸¹ It is really worrying to see that the 'list of shame' contains names, such as Citigroup, Countrywide Financial, Washington Mutual, Wells Fargo, and Ameriquest.

It goes beyond the scope of the present paper to determine whether there is indeed hypocrisy or not. What is clear and needs to be underlined is that there are a few pieces missing to complete the jigsaw of whistle-blower regulation and these pieces are not concerned with the letter but with the spirit of the law. It has been mentioned in almost all recent initiatives (reports, recommendations, consultation papers) that a new culture needs to be brought in the corporate boardrooms. Changing the mind-set is a really difficult undertaking and it takes time and strong will. The next section will focus on this new culture that will replace the existing culture of fear, silence and oppression, providing insights and a straightforward way to achieve such a radical change.

⁷⁸ Woodford (n. 74), 38

⁷⁹ Ibid., 236.

⁸⁰ 'Financial Whistle-blowers Suffered Systemic Retaliation En Route to 2008 Collapse', (2011), available at: <http://www.sarbanes-oxley-whistleblower.com/blog/2011/11/28/financial-whistleblowers-suffered-systemic-retaliation-en-route-to-2008-collapse>

⁸¹ Ibid.

A New Culture in the Boardroom: Changing the mind-set

In 2010, the Corporate Executive Board released details of its survey of 500,000 employees in over 85 countries which found a direct relationship between a culture of integrity in the workplace and lower incidents of misconduct.⁸² Employees in high-integrity cultures are 67% less likely to observe significant instances of business misconduct, such as accounting irregularities and insider trading, than those at companies with low-integrity cultures. In other words, corporate cultural integrity not only reduces employee misconduct, but can greatly improve business performance overall. Employee comfort in speaking up was also found to be most strongly correlated with a higher level of long-term shareholder return and lack of fear of retaliation was identified as a key element in ensuring comfort.⁸³ The more companies are encouraging whistle-blowers to speak up, the stronger their organisational ethos of integrity becomes.

As it was shown in section 2, legislation prescribes the process of internal whistleblowing and the available channels of communication. In the event that the internal route cannot serve its purpose or proves to be ineffective, because employers do not facilitate the communication of whistleblowing concerns, fail to protect those who speak up or are themselves involved in the wrongdoing or its cover-up, regulatory bodies, where they exist, are usually considered the most appropriate alternatives. Such bodies have the authority and power to deal with the issue and they need such information to carry out their functions effectively.⁸⁴ The first step has been made. 'A few years ago, the term 'whistle-blower' called to mind odd and sporadic anecdotes about one or two courageous individuals who dared confront and expose wrongdoing within political and corporate halls'.⁸⁵ The emergence and exposure of more and more stories involving whistle-blowers have overhauled whistleblowing and it has been a valuable addition in the regulatory tools available for the combat of corruption and the strengthening of corporate accountability.

Nevertheless, the case studies discussed in section 3 do not leave any room for complacency. These individuals took a considerable risk in exposing wrongdoings and were

⁸² Corporate Executive Board, 'Research Reveals That Integrity Drives Corporate Performance: Companies with Weak Ethical Cultures Experience 10x More Misconduct Than Those With Strong Ones', 15 September 2010, Press Releases, available at: <http://news.executiveboard.com/index.php?s=23330&item=50990>

⁸³ Ibid.

⁸⁴ Council of Europe, Recommendation CM/Rec(2014)7 and Explanatory Memorandum, 'Protection of Whistleblowers', Committee of Ministers, 30 April 2014, pg. 13, available at: <http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282014%297E.pdf>

⁸⁵ G.D Kachroo, 'Foreword' in F.D. Lipman, *Whistleblowers: Incentives, Disincentives, and Protection Strategies*, (Wiley, 2012), xiii

arguably acting against their self-interest, since their jobs and their future were obviously in jeopardy. Yet they did the right thing, even though they did not get the recognition they deserved from their companies and their superiors. Michael Woodford comments in his book that ‘life is not always filled with happy endings’⁸⁶, but this realisation should be the basis for the improvement of the law. The area that needs attention is the corporate culture, because rules do not exist in a vacuum and the environment where the rules operate is as important as the rules themselves.

The United States, following the same regulatory model, decided to build on the existing SoX regime and complemented it with the 2010 Dodd-Frank Act. Recognising the defects of the system and acknowledging that if the whistle-blowing mechanisms were set in motion on time, most of the financial disasters of the 21st century would have been prevented, the Dodd-Frank Act authorized the whistle-blower program to reward individuals, who offer high-quality original information that leads to an SEC enforcement action in which more than \$1 million in sanctions is ordered. The Act also included enhanced anti-retaliation employment protections for whistle-blowers and provisions to protect their identity, including no disclosure provisions. Just one year later in August 2012 the first whistle-blower, who helped the SEC stop a multi-million dollar fraud, received the first pay-out.⁸⁷ Is it a positive development and evidence of successful law reform or just another Michael Woodford who chose truth over self?

In approaching such questions, reference should be made in the cultural element and the modus operandi of each business community around the world. Laura Goldman, a money manager, who claims that to have figured out the Madoff fraud in about 45 minutes, justified her not blowing the whistle in this way: ‘People are not Mother Teresas. They are not going to the SEC unless there is something in for them’⁸⁸. The other side of the coin is that there is always the danger that employees do not raise a minor concern early, but prefer to wait until it escalates to a point that might be eligible for a financial reward or a bigger financial reward. In the UK, consultation has shown that a rewards system is not the proper regulatory tool, as it is inconsistent with the UK business culture and philosophy, it undermines the moral stance of a genuine whistle-blower and it will inevitably result in the negative portrayal

⁸⁶ Woodford (n. 74), 210.

⁸⁷ Available at: <http://www.sec.gov/news/press/2012/2012-162.htm>

⁸⁸ S. Dubner, ‘Would a Fraud Bounty Have Exposed Madoff Years Ago?’, Freakonomics, February 26, 2009, available at: <http://freakonomics.com/2009/02/26/would-a-fraud-bounty-have-exposed-madoff-years-ago/>

of whistle-blowers.⁸⁹ The prevailing view was that rewards are not a substitute for strong legal protection. There is no reason why whistle-blowers should not be recognised and rewarded in the workplace via remuneration structures, promotion or other recognition mechanisms including by society at large.⁹⁰

In general, even if we accept that this system is suitable for the United States and it will bring the results that its creators anticipate, the pursuit for a better whistle-blower protection regime should not stop. The area that needs attention is the corporate culture, because rules do not exist in a vacuum and the environment where the rules operate is as important as the rules themselves. There will always be a gap between the ‘letter’ of the law and the norms of society in any legislation which aims to change human behaviour.⁹¹ Companies should step in at this point and build a bridge that would allow employees to cross the Rubicon and blow the whistle, if they come across potential law violations or significant risk exposures of the companies. A recent UK survey research on 1,000 whistle-blowers showed that some 83% of respondents blow the whistle at least once but mostly internally compared to 15% raising their concerns externally. This is encouraging, as it shows that the government has managed to pass the message to the business community about the significance of relying on internal reporting. However, the next findings support the assumption that the real problem is not on the rules, but within the companies. 75% of the respondents maintained that nothing was done about the wrongdoing, with 65% receiving no response from management, while the most likely response was demotion and dismissals.⁹²

What needs to be changed is illustrated in the following incident, as presented by Patrick Burns, Director of Communications of Taxpayers against Fraud Education Fund: ‘I once asked a room full of compliance officers if their company had ever made an internal whistle-blower “employee of the month” or given them a raise. The room burst out laughing’.⁹³

The focus should be in the culture and not solely on the rules for another reason. Research on whistleblowing in many jurisdictions consistently shows that one of the main

⁸⁹ Public Concern at Work, ‘The Whistle-Blowing Committee: Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK’, November 2013, pg. 14, available at: <https://www.tuc.org.uk/sites/default/files/Whistleblowing%20Commission%20Report%20Final.pdf>

⁹⁰ Ibid.

⁹¹ J. Ashton, ‘15 years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We still Shooting the Messenger’, (2015) I.L.J., 44(1), 29, 49.

⁹² PCAW/University of Greenwich, ‘Whistleblowing - The Inside Story: A Study of the Experiences of 1,000 Whistle-blowers’, (2013), PCAW/University of Greenwich Survey Research Paper, pg. 4, available at: www.pcaw.org.uk/cms/sitecontent/view/id/127/highlight/inside+story

⁹³ Lipman (n. 85), 1.

reasons for not reporting concerns is that whistle-blowers do not believe that it will make a difference. In fact, American surveys of federal employees repeatedly found that the fear of retaliation is only the second reason why some half a million employees choose not to blow the whistle. The primary reason is that they do ‘not think that anything would be done to correct the activity’.⁹⁴ According to the Association of Certified Fraud Examiners (ACFE), this perception does not reflect reality, because tips were the source of information for more than 40% of reported instances of occupational fraud.⁹⁵ The SEC confirms this approach, stating that ‘even if a whistle-blower’s tip does not cause an investigation to be opened, it may still help lead to a successful enforcement action if the whistle-blower provides additional information that substantially contributes to an ongoing or active investigation’.⁹⁶

In the Francis Report, the term ‘culture’ appears 294 times. Apparently, culture has become a buzzword and this positive, because this is where all the attempts and initiatives should focus on: how to change the existing culture. However, neither the Report nor any of the recently published documents provide specific and clear guidance on how this change will be achieved and this is something that needs to be addressed. Instead of reproducing the same general recommendations that lead to the creation of ineffective paper policies and allow companies to do just the minimum amount required in order to comply with the law, this paper puts forward a more practical solution without the need to replace the existing rules in their entirety. A suggestion that will overcome any disincentives to blowing the whistle, provide sufficient protection to whistle-blowers and will motivate all potential whistle-blowers to raise their concerns, as it will not be a daunting career-ending decision anymore.⁹⁷

A provision based on section 7 of the UK Bribery Act 2010 should be added in the existing set of rules. Section 7 of the Bribery Act 2010 introduces a new offence by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage. The available defence for a company, should an offence be committed, is to prove that it has adequate procedures in place to prevent bribery. Section 7 is an innovative

⁹⁴ See T. Devine, ‘Whistleblowing in the United States: The Gap between Vision and Lessons Learned’, in *Whistleblowing Around the World: Law, Culture and Practice*, in G. Dehn and R. Calland (eds.), (British Council, 2004),

⁹⁵ Association of Certified Fraud Examiners, ‘Report to the Nations on Occupational Fraud and Abuse’, 2012 Global Fraud Study, pg. 14, available at: https://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf. Similar results were also reported in the 2010 Global Fraud Study, pg. 16, available at: http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf

⁹⁶ U.S. Securities and Exchange Commission (n.14).

⁹⁷ Lipman (n. 85), 3.

regulatory tool, which basically shifts the burden of proof away from the authorities towards the core of the problem, the companies themselves.

The example of the Bribery Act was chosen for a variety of reasons. First of all, it was recently introduced in the UK to update and enhance UK law on bribery, a burning issue with international implications that is closely related with corruption, same as whistle-blowing. Secondly, the 2010 Act represents an example of national law inspired by international initiatives and standards, more specifically the 1997 OECD anti-bribery Convention. Thirdly, it has received positive comments and it is regarded as being among the strictest legislation internationally, not only in terms of penalties, but notably because it introduces a new strict liability offence for companies which are failing to prevent bribery.

A similar approach, if adopted in the context of whistle-blower protection, would effectively kill two birds with one stone. On the one hand, companies will not be able to hide behind their commitment to fight corruption and encourage internal whistle-blowing; they would have to provide apt evidence, not empty promises, that they have strong, up-to-date and effective policies and systems. On the other hand, the whistle-blowers themselves will eventually stop being side-lined or seen as liabilities, but they will have to be integral parts of their companies' anticorruption and whistle-blower protection strategy. Or, if we want to take this further, whistle-blowers, such as Cynthia Cooper, Michael Woodford and Gary Walker, will get hundreds of e-mails and calls for being appointed by companies, which will be willing to change their culture (and comply with the new requirement).

Unfair treatment and victimisation or retaliation tactics have an adverse impact on the lives of whistle-blowers. There are several stories about lives being destroyed because they tried to do the right thing: people losing their jobs; being financially ruined; brought to the brink of suicide; and family lives being shattered.⁹⁸ The wider victims are companies and the business society, undermined by a culture of silence, hypocrisy and lack of transparency and accountability. At stake are also the future of whistle-blower legislation and the effectiveness of corporate governance principles, which stands diminished each time whistle-blowers are treated unfairly or are being victimised. Tackling this issue and changing the mind-set of modern corporations should be a priority for anyone who cares about the future of business. The rationale behind the introduction of a section 7-type rule is not to unduly burden companies with another box-ticking exercise, but to target these individuals, who treat

⁹⁸ Department of Health and The Rt Hon Jeremy Hunt, 'Francis Report: Update and Response', Oral Statement to the Parliament, 11 February 2015, available at: <https://www.gov.uk/government/speeches/francis-report-update-and-response>

whistle-blowers as ‘snitches’⁹⁹, troublemakers and backstabbers’¹⁰⁰. This requirement goes beyond mere compliance with the law. Companies will be expected to send a strong message to their employees and stakeholders that the company is built on ethical foundations and is truly committed to promote a culture of openness with whistleblowing protection being one of the key components.

It will be the responsibility of the senior management and the board of directors to ensure that all internal and external actors are aware and familiar with the relevant policy and commitment to establishing a new culture, and the consequences of breaching the provisions of the policy. In this way, companies of all sizes will have the opportunity to design and implement a zero tolerance policy against mistreatment of whistle-blowers throughout their operations over and above inadequate box-ticking systems not supported by a suitable corporate culture and values embedded in the company. Finally, emphasis must be given to the effective implementation of these policies. Companies may believe they have effective implementation of their policies, but it is easy to be over-confident about this. Therefore, it is of paramount importance to ensure that the board, management, agents, employees and stakeholders understand the requirements of the policy and that there are adequate internal controls to monitor all parameters of its implementation. A robust ‘checks and balances’ system involves a two-tier arrangement: a) proper documentation and filing of the concerns raised, their handling and the outcomes and b) periodic reports to senior management and possibly the board on the issues raised, the actions taken and the promptness with which inquiries were dealt.¹⁰¹

The main objective of adding such a requirement in the existing legislation is not to penalise and harm the reputation of well-established and successful corporations that experience an isolated incident involving allegations for mistreatment of a whistle-blower. A full defence will be provided, recognising the fact that no regulatory regime will be capable of eradicating certain behaviours at all times. Additionally, a defence should also be available so that companies are encouraged to set up the right mechanisms for supporting internal whistle-blowing and protecting whistle-blowers against any illegal or unethical action. The

⁹⁹ G. Campbell, ‘Snitch or Savior? How the modern cultural acceptance of Pharmaceutical company employee external whistleblowing is reflected in Dodd-Frank and the affordable care act’, (2013), University of Pennsylvania Journal of Business Law, Vol. 15 No. 2, 565.

¹⁰⁰ See above (n. 98). See also Sir Robert Francis QC, ‘Freedom to Speak Up: An independent review into creating an open and honest reporting culture in the NHS Report’, 11 February 2015, pg. 9, available at: https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

¹⁰¹ Transparency International UK, ‘The 2010 UK Bribery Act: Adequate Procedures: Guidance on Good Practice Procedures for Corporate Anti-Bribery Programmes’, July 2010, pg. 56, available at: <http://www.transparency.org.uk/our-work/publications/10-publications/206-adequate-procedures-checklist-pdf>

question of adequacy of internal procedures will ultimately depend on the facts of each case, as consideration needs to be given to a number of relevant factors, such as the company's previous conduct and the seriousness of mistreatment under consideration.

'Only if the good intentions of any law are matched by a change in culture can a safe alternative to silence be created'.¹⁰² The corporate culture is what will determine the employee's willingness to blow the whistle and raise their concerns. Change of culture takes time and requires a tremendous amount of effort, especially if the departing point is a 'no blame' culture, where individuals are used as scapegoats¹⁰³. The onus rests primarily on the shoulders of directors and managers, who need to show leadership and pave the way for the creation of an environment where employees feel safe to raise concerns, where there is greater accountability of managers and leaders (when necessary) and where disciplinary action is taken against individuals, who are found to have mistreated employees that have raised concerns or have blown the whistle.

Employees can be reluctant to speak up and raise concerns for fear of being discriminated against, disbelieved, bullied, seen as disloyal or disrespectful, and for fear that blowing the whistle will negatively affect their career progression or their future in the company. Such mentality can only be removed when there are proper protection mechanisms in place as well as examples that these mechanisms are in fact working properly. For instance in the UK and US health sector there have been several initiatives to encourage whistle-blowing ('Stop the Line', 'If in doubt speak out' or 'Don't walk by'). These attempts have contributed in raising awareness, but they must be supplemented by additional initiatives with view to normalising the raising of concerns. 'Normalisation cannot be achieved by process and procedure alone. Process and procedure need to sit within a culture that inspires confidence that raising concerns will be dealt with in an appropriate way'.¹⁰⁴ If whistle-blowers have suddenly been subject to critical appraisals and poor performance processes, a negative perception of whistle-blowers as 'troublemakers' is reinforced, setting back attempts to change the culture, while at the same time other employees are deterred from coming forward with concerns for fear they too will end up being performance managed.

Before concluding, changing the mind-set is a one-way street for achieving effective whistle-blower protection. A new culture needs to be instilled in the corporate boardrooms

¹⁰² G. Dehn and R. Calland, 'Whistleblowing - The State Of The Art: The Role of the Individual, Organisations, The State, the Media, The Law and Civil Society' in G. Dehn and R. Calland, *Whistleblowing Around the World; Law, Culture and Practice*, (IDASA, 2004), 14.

¹⁰³ Sir Robert Francis QC(n. 100), 95

¹⁰⁴ Ibid 99.

and then transmitted to the rest of the company. Research undertaken by the Financial Conduct Authority (FCA) showed that the introduction of financial incentives for whistle-blowers would be unlikely to increase the number of quality disclosures made.¹⁰⁵ The general feeling is that we need to aim for better protection for all whistle-blowers rather than financial rewards for a few. The introduction of an additional duty to companies to actively promote whistle-blowing and be able to provide evidence if required is the key for this ethical transformation to take place. Section 7 of the Bribery Act 2010 can be used as an example and it can serve as the missing link in the process of normalisation of whistle-blowing and adequate safeguarding of whistle-blowers rights.

Concluding Remarks

Whistle-blowers! Are they heroes or villains? Benevolent songbirds or venomous snakes? Examples to follow or disloyal and treacherous spies? Defenders of ethics or squealers and stool pigeons?¹⁰⁶

The real question is not related with which the correct answers to the above dilemmas are – this is a matter of perspective. The real question is how we can ensure that all potential whistle-blowers will indeed blow the whistle on improper activities, because at the end of the day this is an absolutely voluntary and deeply personal decision.¹⁰⁷ As this article argues, the answer to this (difficult) question lies in the culture of ethics within a company and the industry in general. Such culture should determine or at least influence ‘what employees perceive to be the public interest or a matter of conscience ahead of the interests of their employing business or institution’.¹⁰⁸ In order for whistle-blowing to be considered as and to actually become an accountability mechanism for modern corporations, then employees should not be left on their own fraught with conflicting values, responsibilities, and loyalties. It is a rather onerous task to provide clear lines of demarcation on cases involving ethical

¹⁰⁵ Financial Conduct Authority and Prudential Regulation Authority, ‘Financial Incentives for Whistle-blowers’, July 2014, Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee, pg. 1, available at: <http://www.bankofengland.co.uk/pr/Documents/contact/financialincentivesforwhistleblowers.pdf>

¹⁰⁶ R.T. Beggs, ‘Whistle-blower Law and Ethics’, in P. Salkin, *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, (2nd ed., American Bar Association, 2008), 188

¹⁰⁷ See M.P. Miceli and J.P. Near, *Blowing The Whistle: The Organizational and Legal Implications for Companies and Employees*, (Lexington Books, 1992), 103-138.

¹⁰⁸ See L. Lofgren, ‘Whistle-blower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?’, (1993) 38 South Dakota Law Review 316. See also D.P. Westman, *Whistleblowing: The Law of Retaliatory Discharge*, (BNA Books, 1991) 19–20

dilemmas, but employees need to be given a way to tackle with this 'ethical conundrum' involving a confrontation between the whistle-blowers' self-interests and the consequences of remaining silent in a working environment.¹⁰⁹ Ethics and morality are to a large extent subjective and are inherently dependent on each person's background, education and beliefs, but the decision on whether one becomes a whistle-blower or not should not be left to made on the basis of such a balancing exercise. It is indeed a personal decision, which needs to be taken following a careful consideration of all the relevant factors and information. Therefore, employees should be allowed to make an informed decision without any pressure or coercion from their employers and colleagues. This informed decision should be in line with the business culture and the corporate ethics that each company has developed and maintains.

As it becomes apparent, it is of paramount importance that all employees are not only informed about their company's position on whistle-blowing or on reporting, but also about the fact that they have an ethical commitment to report any wrongdoing they may come across. The basis of their commitment is not merely their personal perspective on ethics, but primarily their company's perspective. This approach does not reject altruism and selflessness, which can act as strong incentives for a number of individuals, however a further reinforcement of the need to do what is right should be provided. If an ethical corporate culture has been established and is deeply embedded in the company, then there is not much need for monetary rewards. It has been suggested that 'virtue may be its own reward, but for many, money is more gratifying'¹¹⁰. There is nothing wrong with the approach adopted by the US federal government and a few states to provide financial incentives as a form of encouragement instead of merely providing remedies.

Despite the strong support that this approach finds in the US legal order, ethics and corporate culture should be instead promoted as more efficient means to achieve the same result than financial incentives. Sometimes large rewards may be seen as a way to offset the significant personal and financial risks faced by whistle-blowers, but once again this is not what the whistle-blowing legislation was designed for. The relevant provisions should not aim to offer incentives only, but to provide adequate protection as well, otherwise the underlying rationale would bear huge resemblance to the one behind bounty hunters, who are after the monetary reward and their end justifies the means. By the same token, the whistle-blowing legislative framework should be designed to deter employees, who are using the

¹⁰⁹ Beggs (n. 106), 189.

¹¹⁰ E.S. Callahan and T.M. Dworkin, 'Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act', (1992), 37 Villanova Law Review. 273, 336.

whistle-blower mechanism improperly or for the wrong purposes, such as self-interests, political or other considerations.

As mentioned earlier, the most accurate way to describe the regulatory framework in place is fragmentation, as a considerable number of provisions can be found in different pieces of criminal, employment, corporate and anti-corruption legislation. This reveals that there is indeed a clear intention and willingness to legislate on this area of law, but at the same time there is an evident difficulty in coordination and in devising a uniform method of regulating whistleblowing. Section 7 of the Bribery Act offers an alternative perspective and can be used as a roadmap for legislators and authorities around the world to strengthen the existing set of rules and stimulate the much-awaited change of culture in relation to transparency, accountability and whistle-blowing.

Only a new corporate culture can eliminate or at least ameliorate the disincentives to whistle-blowers. In the new era, blowing the whistle on corporate misconduct will not amount to ostracism in the workplace and the prospect of vindication will not be small and distant any more.¹¹¹ This is the only way to preserve the legacy of Michael Woodford, Cynthia Cooper, Gary Walker and so many other whistle-blowers, who did not get the appropriate recognition, but pointed us towards the right direction for finding the right path, so that whistle-blowers in the future do not find themselves at a dead end when deciding to blow the whistle.

¹¹¹ D. M. Becker, 'Speech by SEC Staff: Remarks at the Practising Law Institute's Ninth Annual Institute on Securities Regulation in Europe', US Securities and Exchange Commission, January 25, 2011, available at: <http://www.sec.gov/news/speech/2011/spch012511dmb.htm>