

## **New EU law will strengthen protection for whistleblowers—will the UK follow?**

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**Commercial analysis: The European Commission has published plans for a new law to protect whistleblowers as pressures grow in the UK to reform the legal protections here. Mary Inman, partner with US law firm Constantine Cannon, says it is time the UK and Europe offered whistleblowers a safety net in the form of whistleblower rewards to compensate for the huge personal and financial cost that can come from speaking out.**

### **Can you explain why you set up a specialist whistleblower team in London?**

I became aware that there was a growing number of British whistleblowers who wanted to make use of US programmes to report concerns.

While the fraud must have a US nexus, it doesn't have to happen in the US and the whistle blower doesn't need to be a US citizen or resident. So far, British people lead the way in providing the most tip-offs from outside the US to the Securities and Exchange Commission (SEC)—438 between 2011 and 2017—ahead of Canadians, Chinese and Australians.

I also represented Andrew Patrick, the first British whistleblower to expose a UK company for evading US import duties. He became only the second British national to receive a financial reward under the whistleblower provisions of the False Claims Act after filing his claim in a US court. The case settled, and he received 18% (\$162,000) of the \$900,000 settlement.

### **How effective has the UK's Public Interest Disclosure Act 1998 (PIDA 1998) been in the past 20 years?**

[PIDA 1998](#) was a pioneering piece of legislation in the protection of UK whistleblowers, but, 20 years on, it is in need of updating. One of the main complaints is that there is no requirement for the employer to investigate the concerns being raised or, where appropriate, to self-report to the regulator.

Whistleblowers are the original canaries in the coal mine. But, unfortunately, rather than examine the conduct the whistleblower exposed, it is human nature to become defensive and lash out at the person who holds up the mirror to internal behaviour.

Instead, we should applaud those who tell us the hard truths that others are too scared to tell us. Yet, too often, the whistleblower faces retaliation or is sacked, and their only recourse is to sue their employer for unfair dismissal and claim compensation for detrimental treatment. But by that stage, their careers and personal lives may be in tatters. Meanwhile, the wrongdoing they sought to expose is often left unaddressed, with the employer succeeding in its diversionary tactic of shooting the messenger to drown out the message.

### **The European Commission's draft Directive published proposals for a new law to protect whistleblowers who report breaches of EU law. How important is a pan-European approach?**

As the LuxLeaks whistleblower Antoine Deltour's situation illustrates, European whistleblowers are increasingly engaged in cross-border work within the EU, which makes it difficult to know where to report and, if they do, what (if any) protections might apply. Only 10 out of 28 Member States have comprehensive measures in place. A minimum standard for whistleblower protections throughout the EU will provide certainty and thereby encourage more whistleblowers to come forward with vital information.

The draft Directive points to scandals such as LuxLeaks, Dieselgate, the Paradise and Panama Papers and Cambridge Analytica, which only came to light because insiders leaked vital information and documents, often at great risk to themselves.

The Commission praised the UK for having ‘one of the most advanced systems of whistleblowing protection in the EU, but this Directive, with its greater protections, highlights the gaps in the UK’s legislation.

## **What additional benefits does the Directive provide?**

It widens the reach of the protections to cover more people than the current UK legislation does. It includes not only employees but also the self-employed, freelancers, consultants, contractors, suppliers, volunteers, unpaid trainees, job applicants and office holders, such as judges, who are currently outside [PIDA 1998](#)’s protections because they are not classed as ‘workers’.

It includes practical supports, such as providing internal whistleblowers with access to free advice, to aid whistleblowers through the daunting process of reporting wrongdoing. Employers must designate a person or department responsible for receiving and following up on reports within a maximum of three months. If not, the person raising the concerns can ‘go public’ with them.

Finally, Member States must designate a competent national authority to handle external whistleblower reports and thereby ensure that an official government authority is charged with reviewing and acting upon complaints.

## **Where are the gaps in the EU Directive?**

There is no requirement for companies to self-report potential crimes reported internally. There are no provisions to offer rewards for reporting and incurring the enormous risks imposed by speaking out, but there are penalties for ‘malicious or abusive’ reports, which will give companies an avenue for harassing whistleblowers.

There are insufficient confidentiality protections for whistleblowers and no protections for EU citizens blowing the whistle to non-EU authorities, such as the SEC or Interpol. It also fails to specify damages, compensation or other relief available to whistleblowers.

## **Will it apply post-Brexit?**

The proposed law must be adopted by both the European Parliament and the Council to become effective. This may only come into effect post-Brexit, but it is likely to form part of fundamental EU standards in any trade deal, so it may be applicable to the UK.

## **How do the domestic and European forms of legislation compare with the US programmes?**

The most effective whistleblower laws have twin aims—protecting whistleblowers against retaliation, while also ensuring the wrongdoing they expose is investigated and redressed. UK law focuses only on whistleblower protection, whereas the US programmes and European Directive seek to do both.

Under the US programmes, whistleblowers are empowered to report to the government and receive a financial reward if their information leads to a successful prosecution of the wrongdoer. Each of the four US agencies with whistleblower programs (SEC, Internal Revenue Service, Commodity Futures Trading Commission and Department of Transportation) have an Office of the Whistleblower, charged with receiving and acting upon whistleblower reports.

Under the US False Claims Act (US FCA), whistleblowers are endowed with the extraordinary power to initiate a lawsuit in the government’s name where they have information about fraud against the

US government, including federally funded US programs. After investigating the whistleblower's allegations, the government can intervene in and take over prosecution of the lawsuit. If the government declines to intervene, the whistleblower is allowed to continue with the lawsuit on the government's behalf.

More than 30 US states and six cities similarly have their own US FCA statutes that allow whistleblowers with information about contractors submitting false claims for payment to the state/city or its agencies to launch lawsuits on their behalf.

The SEC's programme is seen as the gold standard, where whistleblowers submit a tip to the agency and can be rewarded with between 10% and 30% of the penalty imposed on the target/defendant. They can also remain anonymous, even to the authorities, with only their lawyers knowing their real names.

Since it was set up in 2010, wrongdoers have been ordered to pay over \$1bn as a result of whistleblower tips, and 53 whistleblowers have been awarded more than \$262m. In March 2018, three whistleblowers collectively received \$83m, the SEC's largest ever award.

## **Is it time the UK introduced incentives/rewards? What are the pros and cons of this approach?**

UK and European papers are littered with stories of whistleblowers whose personal and professional lives have been ruined by their efforts to expose wrongdoing in the public interest. In addition to losing their jobs with the employer they exposed, whistleblowers often become permanently unemployable because they are routinely blacklisted in their industry.

Even if a UK whistleblower is one of the lucky few to defy the odds and succeed with a retaliation claim before the employment tribunal—veteran employment lawyers say only about 4% succeed—such an award would only redress the harm caused by that particular employer in that employment setting. It would not address retaliation by future employers, life-long career loss or the attendant physical and emotional harms whistleblowers suffer.

Whistleblower reward systems seek to compensate whistleblowers for such career detriment and personal hardship, and in so doing seek to provide a safety net to encourage whistleblowers to take the plunge, despite the barriers, and report wrongdoing.

In this way, instead of being called rewards, whistleblower financial incentives could more aptly be described as insurance. Whistleblower rewards seek to right the imbalance of the current status quo where whistleblowers bear all of the costs of reporting and larger society reaps all of the rewards. Insurance in the form of whistleblower rewards also helps raise public awareness of the importance of speaking out—improving the perception of whistleblowers as civic-minded truth-tellers and removing the stigma of whistleblowers as snitches.

The argument I regularly encounter in the UK—that whistleblowers should report because it is the 'right thing to do' and not for financial gain—ignores the huge personal and financial sacrifices whistleblowers face, and the role rewards play as a vital safety net (as opposed to winning the lottery).

The notion that financial rewards help whistleblowers overcome the traditional, considerable barriers to reporting, and thereby bring wrongdoing to light, has been borne out by multiple studies in the US, which show that reporting rates for fraud are higher in jurisdictions and industries where rewards are available.

In light of a recent EU survey in which 81% of Europeans indicated they did not report corruption they had witnessed or experienced, the UK would be wise to employ whistleblower rewards as a tool to counteract this disturbing trend of concealing corruption.

While critics of financial incentives note they can lead to false reporting, evidence suggests false reporting has been quite limited in programmes with whistleblower rewards, and can be mitigated by other legislative means such as adopting sanctions for perjury, defamation and information fabrication and for submitting frivolous claims.

## **Do other jurisdictions apart from the US offer rewards?**

In Canada, the Ontario Securities Commission (OSC) has a whistleblower reward programme modelled on the SEC's Office of the Whistleblower. Rewards are between 5% to 15% of recovered funds, but are capped at \$5m CAD.

Whistleblowers are not required to report internally before reporting to the OSC. But the rewards are limited to reports of securities-related misconduct, including insider trading, front-running, manipulation of financial statements and other types of financial fraud by companies traded on the Toronto Stock Exchange.

Canada also has an Offshore Tax Informant Program that allows the Canada Revenue Agency to make financial awards to individuals who provide information related to major international tax avoidance schemes.

In South Korea, whistleblowers who report violations of public interest relating to health and safety, the environment, consumer protection or fair competition, can receive between 4% and 20% of recovered funds, capped at around \$1m.

In Ghana, the Whistleblower Act 2006 allows individuals to blow the whistle on public and private entities engaged in unlawful acts, and receive monetary rewards of 10% of recovery or an amount set by the attorney general in consultation with the inspector-general of police. The inability of whistleblowers to report anonymously, and a distrust of the reporting authorities charged with maintaining confidentiality, have contributed to Ghanaians' underutilisation of the Act.

Nigeria and Malaysia also offer rewards. In addition, the following countries offer rewards for antitrust whistleblowers with information about the existence of cartels—Austria, Hungary, Pakistan, Slovak Republic, South Korea and the UK through the Competition and Markets Authority informant reward scheme up to £100,000.

## **Are pressures for reform of PIDA 1998 growing?**

In June 2018, in conjunction with [PIDA 1998](#)'s 20th anniversary, Middlesex University's Whistleblower Research Unit held a conference entitled 'Twenty years of PIDA—what should the next decade bring?' There was a strong consensus among the speakers and attendees that [PIDA 1998](#), while advanced for its time in 1998, was no longer fit for purpose and has been surpassed by more state-of-the-art legislation such as Ireland's Protected Disclosures Act 2014.

In July, a new all-party parliamentary group on whistleblowing was created under the co-chairmanship of Stephen Kerr MP and Baroness Susan Kramer, with the campaign group WhistleblowersUK as secretariat. Among the topics the group is poised to examine is the need for increased whistleblower protections in the UK.

*Interviewed by Grania Langdon-Down.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*