

## *Reporting to the Boss or the Authorities: the Ongoing Dilemma of the Whistle-Blower*

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### I. INTRODUCTION

The topic of this article can be introduced by mentioning two businesses: WorldCom and Enron, both based in the United States of America (US/USA), whose employees were alarmed by obscure practices of their companies and their difficult accounting situation.<sup>1</sup> These employees were whistle-blowers. The definition of whistle-blowing is “the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action”.<sup>2</sup> Although other definitions exist as well, this is the most common one.<sup>3</sup> In case of the aforementioned companies, no action was taken, neither by state authorities such as the Department of Justice nor by the companies themselves. As a result, WorldCom and Enron collapsed, harming the market and society.<sup>4</sup> The financial crisis of 2007-2009, coming only shortly after the one of 2000-2002, has reinvigorated the discussion on effectively regulating the financial markets.

The crisis of 2007–2009 demonstrated that globalised financial markets present significant risks to different actors. Again, the collapse of the market had not only financial, but also social consequences.<sup>5</sup> People in the US and Europe

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<sup>1</sup> Michael Neal, ‘Securities Whistleblowing under Dodd-Frank: Neglecting the Power of “Enterprising Privateers” in Favor of the “Slow-Going Public Vessel”’ (2012) 15 *Lewis & Clark Law Review* 1124, 1124–1126.

<sup>2</sup> Janet P Near and Marcia P Miceli, ‘Organizational dissidence: the case of whistle-blowing’ (1985) 4 *Journal of Business Ethics* 1.

<sup>3</sup> Consensus on the definition of whistle-blowing does not exist in the legal community. Richard Haigh and Peter Bowal, ‘Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis’ (2012) *Comparative Research in Law & Political Economy*, Research Paper No. 1974982.

<sup>4</sup> Lewis Simpson, *Crimes et Délits financiers* (Infini Découverte 2016) 81–93.

<sup>5</sup> Hilary J Allen, ‘The Pathologies of Banking Business as Usual’ (2015) 17 *University of Pennsylvania Journal of Business Law* 863.

lost their incomes, houses or retirement plans.<sup>6</sup> Additionally, the 2007–2009 crisis has highlighted the interconnectedness of national markets, since the US sub-prime mortgage crisis affected markets in other countries as well. Against this background, it was proposed that the regulation of financial markets should have an international, instead of national, character.<sup>7</sup> Indeed, the global financial crisis has demonstrated the need for fundamental reforms of the international financial and monetary system.<sup>8</sup>

Financial crimes are considered to be among the most difficult for the legal system to deal with, also because many financial wrongs are not strictly considered crimes.<sup>9</sup> Their detection is difficult due to their complex nature.<sup>10</sup> In addition, the development of new technologies and their influence on the financial and business sectors makes matters even more complicated.<sup>11</sup> Fast internet connections, complex computer structures, and algorithms are creating a sophisticated technological environment that has severe consequences on regulation.<sup>12</sup> These new technologies create new forms of crime, requiring additional techniques to detect them.<sup>13</sup> Whistle-blowing is one of these techniques, a kind of private justice where the whistle-blower can inform the authorities about illegalities and wrongdoings.<sup>14</sup> In

<sup>6</sup> Sher Verick and Iyanatul Islam, ‘The Great Recession of 2008-2009: Causes, Consequences and Policy Responses’ (2010) Institute for the Study of Labor (IZA) Discussion Paper No. 4934, 12–22 <<http://ftp.iza.org/dp4934.pdf>> accessed on 20 July 2018; Ebru Terazi and Secil Senel, ‘The Effects of the Global Financial Crisis on the Central and Eastern European Union Countries’ (2011) 17 *International Journal of Business and Social Science* 186, 187–192.

<sup>7</sup> Robert Kawadza, ‘Revisiting financial services sector transparency through whistle-blowing: the case of South Africa and Switzerland’ (2017) 61 *Journal of African Law* 83, 83–85.

<sup>8</sup> Timothy J Sinclair, ‘Institutional Failure and the Global Financial Crisis’ in Wyn Grant & Graham K. Wilson (eds), *The Consequences of the Global Financial Crisis- The Rhetoric of Reform and Regulation* (OUP 2012).

<sup>9</sup> Gary Wilson and Sarah Wilson, ‘Is “This Time” really different?: Reflections on Risk in Financial Impropriety and Criminal Liability Past and Present in Looking to the Future’ in Nic Ryder (ed) *White Collar Crime and Risk* (Routledge 2017).

<sup>10</sup> International Monetary Fund, ‘Chapter 3: Detecting Systemic Risk’ in *Global Financial Stability Report: Responding to the Financial Crisis and Measuring Systemic Risk* (2009) 2 <<https://www.elibrary.imf.org/abstract/IMF082/09833-9781616352080/09833-9781616352080/ch03.xml?rskey=4UK-9gE&result=28&redirect=true>> accessed on 20 July 2018.

<sup>11</sup> Maryke Silalahi Nuth, ‘Taking advantage of new technologies: For and against crime’ (2008) 24 *Computer Law & Security Report* 439.

<sup>12</sup> *ibid* 444–45.

<sup>13</sup> *ibid* 437–38.

<sup>14</sup> Joyce Rothschild and Terance D Miethe, ‘Whistle-blower Disclosures and Management Retaliation’ (1999) 26 *Work and Occupations* 108.

this sense, private justice is the use of private persons to detect, prove, and deter public harms.<sup>15</sup>

The consequences of the financial crises and the need to combat financial crimes have led states to adopt a more interventionist approach.<sup>16</sup> The European Union (EU) reacted to the crisis by adopting the Single Supervisory Mechanism (SSM) to regulate and supervise the banking sector.<sup>17</sup> USA has also enacted legislation, aiming at better regulating and controlling the financial sector. The Sarbanes-Oxley Act of 2002 was amended in 2010 by the Dodd-Frank Act.<sup>18</sup> The Dodd-Frank Act offers protection against retaliation and even financial rewards for the whistle-blower who reports to the Securities and Exchange Commission (SEC).<sup>19</sup> In addition, the USA Supreme Court, in its decision *Digital Realty Trust v Somers*, has clarified that a whistle-blower who reports internally and not to the SEC cannot rely on protection under Section 922 of the Dodd-Frank Act.<sup>20</sup> Conversely, the United Kingdom (UK), Ireland and France adopted a gradual or “three-tiered model” of disclosure.<sup>21</sup> Firstly, this includes measures to encourage internal whistle-blowing; secondly, whistle-blowing to independent authorities; and thirdly, if none of the above two respond, whistle-blowing is permitted to the public (including the media). For instance, the Public Interest Disclosure Act (PIDA) 1998 promotes this model in the UK.<sup>22</sup> PIDA incentivises internal whistle-blowing, as it requires the employee to comply with less requirements than is the case for external disclosure, to be given the protections outlined in PIDA.<sup>23</sup>

The different regimes concerning internal and external whistle-blowing create confusion for the employee involved, especially as far as his legal protection is concerned.<sup>24</sup> As mentioned above, the reporting channel determines the requirements under which the disclosure will be granted protection by relevant

<sup>15</sup> Pamela H Bucy, ‘Information as a commodity in the regulatory world’ (2002) *Houston Law Review* 905.

<sup>16</sup> Wilson and Wilson (n 9) 266.

<sup>17</sup> European Central Bank, *Guide to Banking Supervision* (Frankfurt 2014) 4.

<sup>18</sup> 18 U.S.C. (2002) and 15 U.S.C (2010), respectively.

<sup>19</sup> Jenny Mendelsohn, ‘Calling the boss or calling the press: a comparison of British and American responses to internal and external whistle-blowing’ (2009) *Washington University, 8 Global Studies Law Review* 723, 723-24.

<sup>20</sup> The analysis of this decision will follow later.

<sup>21</sup> Wim Vanderkerckhove, AJ Brown and Eva Tsahuridu, ‘Managerial responsiveness to whistle-blowing: expanding the research horizon’, in AJ Brown, David Lewis, Richard Moberly and Wim Vandekerckhove (eds), *International Handbook on Whistle-blowing Research* (Routledge 2014) 299–300. s 43C, 43D and 43E.

<sup>23</sup> Mendelsohn (n 19) 737.

<sup>24</sup> The legal protection of the whistle-blower may have different forms. The most common protection is against “penalisation” from his employer (labour law). In addition, the protection may be against civil or criminal liabilities or defamation.

legislation.<sup>25</sup> Consequently, this article juxtaposes advantages and disadvantages of internal and external whistle-blower protection. My main argument is that a whistle-blower should be legally protected, on equal terms, regardless whether he reports to his employer or the relevant authorities. To substantiate that claim, I adopt both an employee and company perspective and explain the trade-off that is to be made. In addition, the article will compare legislation in the UK, France, Ireland and the USA. This selection is based on the fact that all countries represent major financial centres that were influenced heavily by the financial crises.

This article is structured as follows. Part II presents an overview of relevant regulations related to a whistle-blower’s legal protection. Subsequently, Part III analyses the relation between whistle-blowing and secrecy, whereas Part IV discusses the prevention of retaliation against employee. In Part V, I present the advantages of external whistle-blowing. Indeed, internal whistle-blowing may sometimes be ineffective, which is considered in Part VI. I conclude by arguing that both channels of disclosure present significant advantages to society, and should thus be protected equally.

## II. WHISTLE-BLOWER’S LEGAL PROTECTION—AN OVERVIEW OF RELEVANT REGULATIONS

In this Part, I will provide an overview of applicable legislation in the UK, France, Ireland, and the US and subsequently conduct an analysis on the legal protection offered to the whistle-blower. The “European” model of whistle-blowing comes into contrast with the US model.<sup>26</sup> The relevance of this comparison also lies in the internationalisation and interconnectedness of financial markets, in addition to the important supervisory and regulatory powers the authorities on both sides of the Atlantic possess.<sup>27</sup> A financial institution based in the USA can have its branches in Europe and vice versa, which means that there effectively is a chance for US authorities to intervene in Europe and the other way around.<sup>28</sup> In

<sup>25</sup> These requirements differ from one national legislation to another. For instance, these requirements can be that the employee report in good faith, or he reasonably believes that the disclosed information is true.

<sup>26</sup> By “European” model I refer to the preference of states in Europe to favour internal reporting contrary to the tendency in the US for external whistle-blowing.

<sup>27</sup> Christina Parajon Skinner, ‘Whistleblowers and Financial Innovation’ (2016) *94 North Carolina Law Review* 861, 911–17.

<sup>28</sup> *ibid.*

light of this interconnectedness, better whistle-blowers' protection in the US will incentivise European employees to report there and vice versa.<sup>29</sup>

### A. THE UNITED STATES OF AMERICA (USA)

The Sarbanes-Oxley Act provided a legal regime for internal whistle-blowing in the USA.<sup>30</sup> The Sarbanes-Oxley Act came as a response to scandals such as those of WorldCom and Enron, which dramatically influenced the US financial markets and created hostility and distrust towards big corporations and the government.<sup>31</sup> One of the relevant provisions of the Sarbanes-Oxley Act about whistle-blowing is Section 806.<sup>32</sup> It specifies that internal whistle-blowing is an appropriate channel for disclosure, encouraging internal reporting and affording legal protection against retaliation.<sup>33</sup> Internal whistle-blowers are protected under the Sarbanes-Oxley Act if they bring a claim to Occupational Safety and Health Administration (OSHA) within 180 days of the alleged violations.<sup>34</sup> Nevertheless, Sarbanes-Oxley

<sup>29</sup> *ibid.*

<sup>30</sup> 18 U.S.C. (2002).

<sup>31</sup> Terry M Dworkin, 'SOX and Whistleblowing' (2007) 105 Michigan Law Review 1757, 1758.

<sup>32</sup> Timothy J Fitzmaurice, 'The Scope of Protected Activity Under Section 806 of SOX' (2012) 80 Fordham Law Review 2041, 2056.

<sup>33</sup> Dworkin (n 31) 1760.

Section 806 reads:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78L), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law

Sarbanes-Oxley Act, 18 U.S.C. (2002).

<sup>34</sup> Sarbanes Oxley Act, 18 U.S.C. §1514A.

is remarkable for the fact that rarely an employee wins a case under Section 806.<sup>35</sup> This turned the attention of whistle-blowers to the Dodd-Frank Act, which offers better legal protection and significant financial incentives.

The protection offered by the Dodd-Frank Act is made more attractive by its bounty programme.<sup>36</sup> The Dodd-Frank Act defines a whistle-blower as an individual who provides information relating to a violation of securities law to the SEC.<sup>37</sup> Section 21F prohibits retaliation against employees who report information about potential violations of federal securities laws.<sup>38</sup> In addition, the whistle-blower may be eligible to receive a financial reward that is between ten to thirty per cent of the monetary sanctions imposed in respect of the reported actions.<sup>39</sup> The whistle-blower as well as the information provided should meet certain criteria with regard to factors such as the significance of the information and the degree of assistance given, to be eligible for the financial reward.<sup>40</sup>

With regard to internal whistle-blowing under the Dodd-Frank Act, a recent decision of the US Supreme Court has indeed had negative repercussions.<sup>41</sup> The question the Supreme Court had to answer was the following: "Do the anti-retaliation provisions of Dodd-Frank protect a whistle-blower that reports internally and not to the SEC?" Paul Somers was working at the Digital Realty Trust Company; in 2014 he sued his employer because he was fired due to complaints he had made to senior management about violations of the Sarbanes-Oxley Act.<sup>42</sup> Despite his internal complaints, Somers failed to report to the SEC. Digital Realty dismissed him, as the Dodd-Frank Act does not protect the employee that reports

<sup>35</sup> Beverley H Earle and Gerald A Madek, 'The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change' (2007) 44 American Business Law Journal 1, 19–24.

<sup>36</sup> 15 U.S.C. § 78n (2012).

<sup>37</sup> 15 U.S.C § 78u-6 (2012).

<sup>38</sup> 15 U.S.C. § 78u-6(h) (2012).

"No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistle-blower in the terms and conditions of employment because of any lawful act done by the whistle-blower"

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j–1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

<sup>39</sup> 15 U.S.C § 78u-6 (2012).

<sup>40</sup> 15 U.S.C § 78u-6 (2012).

<sup>41</sup> *Digital Realty Trust Inc. v. Somers*, 138 US 767 (2018).

<sup>42</sup> Ilya Shaphiro, '*Digital Realty Trust v. Somers*: Hasn't *Chevron* deference gone too far?' (Harvard Law Review Blog, 17 October 2017) <<https://blog.harvardlawreview.org/digital-realty-trust-v-somers/>> accessed 26 April 2018.

internally but only the employee that reports directly to the SEC.<sup>43</sup> The Supreme Court in *Digital Realty Trust v Somers* held unanimously that internal whistle-blowing is not protected under the Dodd-Frank Act. It noted the following: “when a statute includes an explicit definition, we must follow that definition ‘...’ Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed”.<sup>44</sup>

It also clarified that the term was not worded ambiguously and as a result, the *Chevron* deference could not be applied.<sup>45</sup> The outcome of this decision is that the whistle-blower is protected under Dodd-Frank only when he reports directly to the SEC. A long history of allowing the citizens to enforce US laws justifies this preference.<sup>46</sup> The *qui tam* writ, dating back to Lincoln’s Presidency, is the first example where the USA government authorised citizens to sue, in the name of the USA government, individuals that committed fraud against federal economic interests.<sup>47</sup> The Internal Revenue Service (IRS) exercises the same practice, among other authorities.<sup>48</sup> To conclude, the US approach focuses on external whistle-blowing, fostering a culture of reliance and trust of reporting to the authorities.

Following the USA Supreme Court decision in *Digital Realty Trust v Somers*, the SEC voted, on 28 June, 2018, to propose amendments to the rules governing its whistle-blower program. These recent developments come in stark contrast with the corporate compliance culture created under Sarbanes-Oxley. USA employees

<sup>43</sup> Bradley J McAllister, ‘The impact of the Dodd-Frank Whistle-blower provisions on FCPA enforcement and modern corporate compliance programs’ (2017) 14 *Berkley Business Law Journal* 45, 51–52.

The conflict was between the definition of whistle-blower in section 21F(a)(6) and the requirements to qualify as a whistle-blower when an employee makes an internal disclosure under 21F(h)(1)(A)(iii). The USA Courts were divided on this issue before the decision of the Supreme Court.

<sup>44</sup> *Digital Realty Trust, Inc v Somers*, 138 US 767, 772 (2018).

Matt Reeder, ‘Proceeding legally: clarifying the SEC/Dodd-Frank Whistle-blower incentives’ (2017) 7 *Harvard Business Law Review* 270, 296–304. In *Asadi*, the Fifth Circuit concluded that the provision for whistle-blower protection applies to those individuals who provide information to SEC. In *Berman*, the Second Circuit had a different view considering that the wording is ambiguous and gave *Chevron* deference to the reasonable interpretation of the agency. The SEC had given an interpretative rule of the provision stating that internal whistle-blowers are protected from retaliation. Consequently, the Second Circuit followed the interpretation of the SEC protecting the internal whistle-blower under Dodd-Frank.

<sup>45</sup> The *Chevron* deference is an important principle of administrative law coined after the landmark case *Chevron USA, Inc v Natural Resources Defence Council, Inc* 468 US 837 (1984) where the Supreme Court created a legal test as to when the Court should refer to an agency’s interpretation for a specific issue. The interpretation of the agency should be reasonable; Congress has not given any specific answer to this question.

<sup>46</sup> Parajon Skinner (n 27) 39.

<sup>47</sup> David Freeman Engstrom, ‘Harnessing the Private Attorney General: Evidence from Qui Tam Litigation’ (2012) 112 *Columbia Law Review* 1244, 1246.

<sup>48</sup> Yehonatan Givati, ‘Of Snitches and Riches: Optimal IRS and SEC Whistleblower rewards’ (2018) 55 *Harvard Journal on Legislation* 106, 112.

may be discouraged to use internal reporting channels after this decision, since if they go internally, they will enjoy no legal protection. This approach may weaken the function of internal compliance regimes or other departments such as internal audit or risk management.<sup>49</sup>

## B. EUROPE

UK, Ireland and France have all adopted comprehensive legislation on the protection of whistle-blowers. These laws require whistle-blowers to report internally first and, if this is somehow not possible, externally. UK is a pioneer, among the European countries, having adopted its legislation on the protection of whistle-blowers as early as 1998. The PIDA provides different thresholds for protection, depending on the reporting channel the whistle-blower will choose.<sup>50</sup> The scheme is a three-tiered disclosure model.<sup>51</sup> Sections 43C, 43D and 43E of the PIDA constitute the first tier, also known as internal disclosures.<sup>52</sup> Section 43C requires the whistle-blower to report to his employer; Section 43D to the legal adviser; and Section 43E to the Minister of the Crown.<sup>53</sup>

Ireland enacted legislation on the protection of whistle-blowers in 2014, with the adoption of the Protected Disclosures Act (PDA).<sup>54</sup> The Irish legislation is modelled after PIDA, although some differences exist.<sup>55</sup> On the matter of internal reporting, PDA followed PIDA. The disclosure should be addressed to the employer or other responsible persons.<sup>56</sup> The purpose of the PDA is to encourage workers to report internally. If their voices are not heard, alternative channels for reporting are provided, including disclosure to a Minister, an authority or the public.<sup>57</sup>

France has recently adopted the Law of 9 December 2016 related to transparency, the fight against corruption and the modernisation of economic life,

<sup>49</sup> McAllister (n 43) 75.

<sup>50</sup> Jeremy Lewis, John Bowers QC, Martin Fodder and Jack Mitchell, *Whistle-blowing – Law and Practice*, (3rd edn, OUP 2017) 101.

<sup>51</sup> *Street v Derbyshire Unemployed Worker’s Centre* [2005] ICR 97.

<sup>52</sup> Lewis, Bowers, Fodder and Mitchell (n 50) 102.

<sup>53</sup> If the whistle-blower reports to his employer, under section 43C of PIDA, he will only have to prove good faith. On the contrary, if the worker reports to a prescribed person (such as a relevant authority), the whistle-blower, apart from proving his good faith, will have to prove that he reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and that the information disclosed, and any allegation contained in it, are substantially true.

<sup>54</sup> n 14 of 2014.

<sup>55</sup> Joanne Hyde, ‘The Protected Disclosures Act 2014: An Overview’ (2014) 11 *Irish Employment Law Journal* 114.

<sup>56</sup> Part 2 PDA, para 6.

<sup>57</sup> Lauren Kierans, ‘A whistle-stop tour of the Protected Disclosures Act 2014’ (2014) 4 *Law and Regulation, Accountancy Plus* 12.

commonly known as the Law Sapin II.<sup>58</sup> This new law establishes a unified legal regime for whistle-blowers in France.<sup>59</sup> In its Article 8, it analyses the reporting scheme that whistle-blowers should follow. The concerns, in the first place, should be addressed to the employer or another employee that has a superior position or to another person prescribed by the employer.

At the European level, the efforts of the Council of Europe and the European Court of Human Rights (ECtHR) are significant.<sup>60</sup> The ECtHR, in its landmark judgement *Guja v Moldova*, has established six criteria that should be examined to recognise an employee as a whistle-blower.<sup>61</sup> One of these criteria is the way of disclosing the information.<sup>62</sup> The ECtHR has ruled that the employee should report internally first and if this is impossible, he may address the authorities and, finally, the public.<sup>63</sup> This approach was confirmed by the ECtHR in its subsequent case-law, thus leaving no doubt that internal reporting is the favoured channel for disclosure.<sup>64</sup> At the level of the EU, the draft Directive presented by the European Commission on 23 April, 2018 proposes a stepped disclosure regime, similar to the ECtHR and as adopted by the countries discussed above.<sup>65</sup> Under Article 13, the person reporting externally shall qualify for protection only if one of five conditions is met. These conditions are related, inter alia, to the ineffectiveness of internal reporting mechanisms or the unavailability of internal reporting

<sup>58</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernisation of economic life, JORF n°0287.

<sup>59</sup> Disant Mathieu and Pollet-Panoussis Delphine, *Les lanceurs d'alerte* (Lextenso éditions LGDJ 2017) 3–4.

<sup>60</sup> Recommendation CM/Rec (2014)7, Protection of Whistle-blowers, adopted by the Committee of Ministers of the Council of Europe, 30 April 2014.

<sup>61</sup> *Guja v Moldova* App no 14277/04 (ECtHR 12 February 2008).

<sup>62</sup> *ibid* [73].

<sup>63</sup> *ibid* [73].

<sup>64</sup> *Heinisch v. Germany* App no 28274/08 (ECtHR, 21 July 2011); *Bucur and Toma v Romania* App no 40238/02 (ECtHR, 8 January 2013); Valérie Junod, ‘Lancer l’alerte: quoi de neuf depuis “Guja”?’ (2014) 98 *Revue trimestrielle des droits de l’homme* 459.

<sup>65</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting breaches of Union law COM (2018) 218 final <[https://ec.europa.eu/info/sites/info/files/placeholder\\_8.pdf](https://ec.europa.eu/info/sites/info/files/placeholder_8.pdf)> accessed on 10 May 2018.

structures.<sup>66</sup> The employee who reports internally has to satisfy less requirements to be legally protected than the employee who reports externally.<sup>67</sup>

From the above examples, it may be concluded that internal reporting is to be considered as the first important step the whistle-blower should take to be protected. The abovementioned national acts provide the possibility for external whistle-blowing, but legal protection is available only under stricter requirements. For instance, French law requires the employee to report internally, in the first place, and to report externally only if his employer did not respond to his concerns in a reasonable amount of time.<sup>68</sup> This preference for internal whistle-blowing aims to protect various interests. In the following subsections, an analysis of the advantages of internal whistle-blowing will be provided.

### III. WHISTLE-BLOWER AND INFORMATION SECRECY

An advantage of internal whistle-blowing is that information remains confidential and is not exposed to the authorities or the public.<sup>69</sup> Information, and more specifically financial information is an important component of the financial markets.<sup>70</sup> The importance of information is well-established. Thus, it needs to be protected.<sup>71</sup> In the business sector, this concept is translated to corporate secrecy that seeks to protect the interests of the corporation and in legal terms, is translated to the duty of professional secrecy or confidentiality.<sup>72</sup> The whistle-blower, by reporting internally does not breach his duty of professional secrecy, contrary to external whistle-blowing that exposes (confidential) information to the authorities

<sup>66</sup> The conditions are: (a) he or she first reported internally but no appropriate action was taken in response to the report within the reasonable timeframe referred to in Article 5; (b) internal reporting channels were not available for the reporting person or the reporting person could not reasonably be expected to be aware of the availability of such channels; (c) the use of internal reporting channels was not mandatory for the reporting person, in accordance with Article 4(2); (d) he or she could not reasonably be expected to use internal reporting channels in light of the subject-matter of the report; (e) he or she had reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by competent authorities; (f) he or she was entitled to report directly through the external reporting channels to a competent authority by virtue of Union law.

<sup>67</sup> Naturally, the draft Directive is not yet a legally binding document. The negotiations between the European Parliament and the European Council will decide on the final text.

<sup>68</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernisation of economic life, JORF n°0287, Article 8.

<sup>69</sup> Richard Moberly, ‘Confidentiality and Whistleblowing’ (2018) 96 *North Carolina Legal Review* 752.

<sup>70</sup> Rothschild and Miethe (n 14) 124.

<sup>71</sup> Bok Sissela, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Publishing 1989).

<sup>72</sup> Moberly (n 69) 751.

or the public.<sup>73</sup> Keeping the information inside the business is one of the major concerns to avoid harm for the whistle-blower and the corporation.<sup>74</sup>

In France, the duty of secrecy is protected under the auspices of criminal law.<sup>75</sup> The French criminal code, in Article 226-13, penalises the divulgence of confidential information by the employee who is in a position to have this information, because of the nature of his job.<sup>76</sup> In the UK, the duty of confidentiality was born in the *Tournier v National Provincial and Union Bank of England*.<sup>77</sup> In this case, the English Court of Appeal recognised that a duty of confidentiality exists between the bank and its customers. As a result, divulgence of confidential information is permitted only under certain conditions.<sup>78</sup> The Supreme Court of Ireland followed the opinion of the English Court of Appeal in *National Irish Bank Limited v Radio Telefis Eireann*, inserting the duty of confidentiality into the Irish legal order.<sup>79</sup>

Thus, the whistle-blower often risks breaching his duty of confidentiality and secrecy if he does not respect the procedural aspects of national legislation. For instance, if he reports to the authorities but cannot prove that the internal reporting systems were ineffective, the whistle-blower may face civil or criminal charges. In the UK and Ireland, the employee who breaches his duty of confidentiality would be liable for damages.<sup>80</sup> In France, he risks being held criminally liable as

<sup>73</sup> Moberly (n 69) 752.

<sup>74</sup> Moberly (n 69) 751.

<sup>75</sup> For instance, in Luxembourg, the duty of professional secrecy is protected under criminal law and the whistle-blower may be prosecuted for breaching his duty of professional secrecy, as was the case with “Luxleaks”. Concerning the “Luxleaks case”, the Luxembourg Cassation Court acquitted Mr Deltour for the charges related to his reporting as it recognised his status of whistle-blower as a justification. The Luxembourg Cassation Court used the case-law of the Strasbourg Court for the purposes of the whistle-blower status. See CSJ, cass, 11 Janvier 2018, n° 3912.

<sup>76</sup> Article 226-13 of the French Criminal Code.

<sup>77</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).

<sup>78</sup> *ibid* 471 (Bankes LJ) said: “At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits... In my opinion it is necessary in a case like the present to direct the jury what are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is the duty to the public to disclose; (c) where the interest of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.”

<sup>79</sup> *National Irish Bank Limited v Radio Telefis Eireann* [1998] 2 IR 465, 494.

<sup>80</sup> Breach of confidentiality constitutes breach of the employment contract. In addition, the employer has the right to sue the employee for breach of confidentiality and if successful, he can obtain monetary damages for the employee. See Tanya Aplin, Lionel Bently, Phillip Johnson & Simon Malynicz, *Gurry on Breach of Confidence* (OUP 2012).

the breach of professional secrecy constitutes a criminal offence.<sup>81</sup> However, in these cases, national laws provide protection for the whistle-blower. In the UK, PDA renders void any agreement of confidentiality between the employer and the employee that precludes the latter from making a protected disclosure.<sup>82</sup> In Ireland, PDA offers immunity from civil liability.<sup>83</sup> The French Law Sapin II, in Article 7, offers criminal immunity to the whistle-blower if he breaches his duty of professional secrecy.<sup>84</sup> However, the common point of these provisions is that protection is available only under strict requirements. One of the requirements is that the whistle-blower reporting externally should explain the reasons that prevented him from reporting internally. It is possible he will not be able to provide such reasons and in addition, he may not fulfil other requirements. Consequently, the whistle-blower has more chances to be in breach of his duty of confidentiality and secrecy if reporting externally than internally.

By reporting internally, the whistle-blower does not breach his duty of professional secrecy, as confidential information remains inside the organisation.<sup>85</sup> The whistle-blower does not risk any legal consequences by his employer. It is in the best interests of the corporation, at the same time, to maintain confidentiality and loyalty among employees.<sup>86</sup> In this regard, internal reporting is regarded as a new form of loyalty of employees towards the employer, characterised as rational loyalty by Wim Vandekerckhove.<sup>87</sup> The systems of national law analysed previously provide protection when the employee breaches his duty of secrecy by reporting, but only under certain strict requirements.<sup>88</sup> However, due to the technical aspects of the legislation involved,<sup>89</sup> the reporting employee risks breaching his duty of secrecy, as he may not be able to respect the strict requirements imposed. In that

<sup>81</sup> Article 226-13 of the French Criminal Code.

<sup>82</sup> s 43J.

<sup>83</sup> s 14.

<sup>84</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernisation of economic life, JORF n°0287 Article 7.

<sup>85</sup> Andrea Bather and Martin Kelly, ‘Whistleblowing: The advantages of self-regulation’ (2005) 82 Working Paper Series, Department of Accounting, University of Waikato 6.

<sup>86</sup> David Lewis, ‘Whistleblowing in a challenging legal climate: is it time to revisit our approach to trust and loyalty at the workplace?’ (2011) 20 Business Ethics: a European Review 80.

<sup>87</sup> Wim Vandekerckhove, Whistleblowing and organizational social responsibility: A global assessment (Aldershot: Ashgate 2006) 124–134.

<sup>88</sup> *ibid*.

<sup>89</sup> Technical aspects of the legislation are the requirements that the whistle-blower should comply for to be legally protected. They tend to be strict and not effective.

case, the employee can, as a last resort, invoke a public interest defence, where the Courts have to balance the interests of the company and the employer.

#### IV. PREVENTION OF EMPLOYER RETALIATION AND THE CORPORATION'S PUBLIC IMAGE

A clear internal whistle-blowing policy promotes good corporate governance, which is essential for a corporation's growth. Corporate governance is a regulating system, applied to an organisation to maintain good order and to treat correctly its affairs.<sup>90</sup> Corporate governance ensures an ethical environment in which business processes take place.<sup>91</sup> Reporting internally creates a stronger feeling of loyalty from the employee to his organisation.<sup>92</sup> By establishing internal whistle-blowing structures, the organisation has the opportunity to address misconduct internally, avoid legal costs, minimise damages to others and avoid any regulatory intervention and exposure. In some cases the employer can resolve a problem more quickly and efficiently than an external authority. This is particularly the case when the employee is mistaken about the employer's conduct or its legality and the employee can have his concerns allayed by the employer quite easily.

##### A. LEGISLATION IN THE UK, IRELAND, FRANCE, AND THE USA

The UK PIDA 1998 does not mandate the establishment of formal internal whistle-blowing structures. Instead, it remains at the discretion of the employer to do as such.<sup>93</sup> However, in July 2003 the Financial Services Authority introduced a new version of the Combined Code on Corporate Governance, which does contain a provision about whistle-blowing.<sup>94</sup> The Combined Code is not an Act of

Parliament as such, but all listed companies have to report on its implementation and consequently demonstrate that internal reporting structures exist.<sup>95</sup>

Irish legislation on protected disclosures has followed the same logic. Even though internal whistle-blowing is incentivised, the PDA 2014 does not oblige but invites the employer to set up internal reporting mechanisms as a sign of good corporate governance.<sup>96</sup> French law obliges legal persons that have more than fifty employees to establish appropriate internal reporting structures.<sup>97</sup> The whistle-blower should report internally to be legally protected. Reporting externally may happen under certain circumstances.<sup>98</sup> Finally, under Section 301 of the Sarbanes-Oxley Act, audit committees should develop reporting mechanisms for recording, tracking, and acting on information provided by the whistle-blower, going beyond merely encouraging companies to be more responsive to whistle-blowers' concerns.<sup>99</sup>

The employee who reports internally is protected against retaliation under the laws of the UK, Ireland, France and the USA. The benefit of legal protection is important when the whistle-blower uses an internal reporting channel.<sup>100</sup> In Ireland, the whistle-blower who reports internally is protected from unfair dismissal or any other type of "penalisation" such as harassment.<sup>101</sup> In addition, Irish law provides for civil and criminal immunity and identity protection.<sup>102</sup> UK law provides the whistle-blower the right not to suffer detrimental developments in his position, and grants the right to lodge a complaint to an employment tribunal if that would nevertheless be the case.<sup>103</sup> In addition, UK law protects the whistle-blower from unfair dismissal if he has made a protected disclosure.<sup>104</sup> The French

<sup>95</sup> Financial Reporting Council (FRC): 2005, <<http://www.frc.org.uk/corporate/combinedcode.cfm>> accessed 09 May 2018.

<sup>96</sup> Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (2018) 37.

<sup>97</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernization of economic life, JORF n°0287, Article 8.

<sup>98</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernization of economic life, JORF n°0287, Article 8.

<sup>99</sup> Tim V Eaton and Michael D Akers, 'Whistleblowing and Good Governance' (2007) 77 *The CPA Journal* 68.

<sup>100</sup> It has to be noted that the employee will not be immediately protected if he reports internally. Irish law demands that the employee reasonably believed that the information is correct to characterise his disclosure as a protected disclosure and allow him to be protected. Under French law, the whistle-blower should report in good faith and without having any personal interests. If he fulfils those criteria, he may be granted protection.

<sup>101</sup> Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (2018) 37.

<sup>102</sup> Protected Disclosures Act 2014, part 3.

<sup>103</sup> Public Interest Disclosures Act 1998, s 43K(2).

<sup>104</sup> Public Interest Disclosures Act 1998, s 43K(5).

<sup>90</sup> Ruth V Aguilera, Michel Goyer and Luiz Ricardo Kabbach de Castro, 'Regulation and Comparative Corporate Governance' in Mike Wright, Donald Siegel, Kevin Keasey and Igor Filatovtchev (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 31.

<sup>91</sup> Alex Knell, *Corporate governance: a practical implementation guide for unlisted companies* (CIMA publishing 2006) 6.

<sup>92</sup> Ravishankar Lilanthi, 'Encouraging internal whistle-blowing in internal organisations' (2003) Markkula Center for Applied Ethics, 7 <<https://www.scu.edu/ethics/focus-areas/business-ethics/resources/encouraging-internal-whistleblowing/>> accessed 03 May 2018.

<sup>93</sup> Kelly Bouloy, 'The Public Interest Disclosure Act 1998: Nothing more than a "Cardboard Shield"' (2012) 1 *Manchester Student Law Review* 3, 3-4.

<sup>94</sup> Financial Services Authority (FSA): 2003, *The Combined Code on Corporate Governance* (FSA, London) 52.

Law Sapin II equally protects the whistle-blower from unfair dismissal or any other type of “penalisation” from his employer.<sup>105</sup> The situation in the US is similar as well, following Section 806 of the Sarbanes-Oxley Act. Additionally, the US Department of Labour may authorise the Department of Justice to criminally charge those responsible for any form of retaliation.<sup>106</sup>

## B. BENEFITS FOR THE ORGANISATION

Organisations prefer internal whistle-blowing because the wrongdoing can be corrected internally and without any outside upheaval.<sup>107</sup> The corporation, by providing anonymity and thoroughly investigating the complaint, ensures that tensions do not arise among employees and frivolous complaints will be dropped.<sup>108</sup> Indeed, whistle-blowing has become an ever more important element of the corporate governance system.<sup>109</sup> The development of the concepts of corporate social responsibility, consumer protection and accountability has led corporations to pay more attention to ethical issues and, thus, the detection of these issues through internal reporting.<sup>110</sup>

Apart from the fact that the organisation will gain nothing when employees use external channels,<sup>111</sup> the establishment of effective internal reporting channels is a sign of commitment to integrity and social responsibility.<sup>112</sup> Striving towards good corporate citizenship and ethical business policies is a non-financial factor that positively affects investment decisions.<sup>113</sup> Internal reporting mechanisms are a signal for investors and the public that a corporation is giving priority to

<sup>105</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernization of economic life, JORF n°0287 Article 10.

<sup>106</sup> 18 U.S.C. (2002).

<sup>107</sup> Richard Moberly, ‘To persons or organisations that may be able to effect action’: whistle-blowing recipients’ in A.J. Brown, David Lewis, Richard Moberly and Wim Vandekerckhove (eds), *International research handbook on whistle-blowing* (Routledge 2014) 277.

<sup>108</sup> Eaton and Akers (n 99) 70–71.

<sup>109</sup> Teen Yuen Mak, ‘Whistle-blowing: recent developments and implementation issues’ (2007) 5 Global Corporate Governance Forum, 3.

<sup>110</sup> P-O Bornfelt, Markus Arvidson, Jonas Axelsson and Roland Ahlstrand, Whistle-blowing in the light of loyalty and transparency, Paper to the 7th Nordic Working Life Conference, Goteborg, Sweden, June 2014, 2.

<sup>111</sup> Christian Chamorro-Courtland and Marc Cohen, ‘Whistle-blower laws in the financial markets: lessons from emerging markets’, (2017) 34 Arizona Journal of International and Comparative Law 188.

<sup>112</sup> Jacqueline de Gramont, ‘The business case for speaking-up’ (Transparency International 2017) <[https://www.transparency.org/whatwedo/publication/business\\_case\\_for\\_speaking\\_up](https://www.transparency.org/whatwedo/publication/business_case_for_speaking_up)> accessed 4 September 2018.

<sup>113</sup> Ernst & Young, Is your nonfinancial performance revealing the true value of your business to investors? (2017) 22.

risk management,<sup>114</sup> and corporate social responsibility can offer considerable advantages to investors.<sup>115</sup> This commitment to enhance corporate social responsibility should be ensured by the organisation through incentives and secure channels for whistle-blowing.<sup>116</sup> A culture of openness should be developed, alongside a culture of informing the employees about internal reporting channels.<sup>117</sup>

## V. ADVANTAGES OF EXTERNAL WHISTLE-BLOWING

### A. EUROPE

UK, Ireland and France have all adopted legislation on the protection of external reporting by whistle-blowers as a second possible disclosure channel, in case the internal channels are not effective or responsive. For instance, Section 43F of the PIDA creates the opportunity to report to a prescribed person.<sup>118</sup> This provision sets out different requirements that the employee should fulfil to report correctly.<sup>119</sup> The Secretary of State designs the prescribed persons.<sup>120</sup> Irish law also considers reporting to a prescribed person as the second possible channel for disclosure.<sup>121</sup> The Minister for Public Expenditure and Reform is responsible for prescribing the relevant officials.<sup>122</sup> The French Law Sapin II, pursuant to Article 7, allows the employee to report to administrative or judicial authorities or professional orders, if the employer is not responsive.<sup>123</sup> For the banking and financial sector, the Law Sapin II designates two specific authorities that should be contacted: the Financial Markets Authority (Autorité des marchés financiers,

<sup>114</sup> de Gramont (n 112)

<sup>115</sup> Stelios Andreadakis, ‘Enhancing whistle-blower protection: it’s all about culture’ (2017) Selected Papers from the International Whistleblowing Research Network Conference in Oslo, 6.

<sup>116</sup> Stephen J Brammer and Stephen Pavelin, ‘Corporate Governance and Corporate Social Responsibility’ in Mike Wright, Donald Siegel, Kevin Keasey & Igor Filatotchev (eds), *The Oxford Handbook of Corporate Governance* (OUP 2013) 725.

<sup>117</sup> Those internal reporting channels can take the form of confidential hotlines or a special designated body, inside the organisation, that can receive whistle-blowers’ concerns. See Andreadakis (n 115); Harold Hassink, Meinderd De Vries and Laury Bollen, ‘A content analysis of whistle-blowing policies of leading European companies’ (2007) Journal of Business Ethics 37.

<sup>118</sup> Public Interest Disclosure Act 1998, United Kingdom.

<sup>119</sup> Lewis, Bowers, Fodder and Mitchell (n 50) 115–124.

<sup>120</sup> For the prescribed persons in the United Kingdom see: The Public Interest Disclosure (Prescribed Persons) Order 2014, no. 2418 <[http://www.legislation.gov.uk/uksi/2014/2418/pdfs/uksi\\_20142418\\_en.pdf](http://www.legislation.gov.uk/uksi/2014/2418/pdfs/uksi_20142418_en.pdf)> accessed on 20 July 2018.

<sup>121</sup> Protected Disclosures Act 2014, s 7.

<sup>122</sup> S.I No. 339&2014 – Protected Disclosures Act 2014 (Section 7(2)) Order 2014 <<http://www.irishstatutebook.ie/eli/2014/si/339/made/en/print>> accessed on 25 July 2018.

<sup>123</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernisation of economic life, JORF n°0287.



“AMF”) and the Prudential Control and Resolution Authority (Autorité de contrôle prudentiel et de résolution).<sup>124</sup> In addition, the ECtHR, in *Guja v Moldova*, considered whistle-blowing to the relevant authorities the second best solution if and only if the whistle-blower proves that he was not able to report internally.<sup>125</sup>

## B. USA

The USA Dodd-Frank Act, as analysed in Part II of this article, protects the whistle-blower who reports to the SEC (externally). Following the Supreme Court decision in *Digital Realty Trust, Inc. v Somers*,<sup>126</sup> the employee who reports internally cannot invoke legal protection under the Dodd-Frank Act.<sup>127</sup> The preference towards external reporting in the USA is justified by various interests, which I will present in the following Part.

## VI. INEFFECTIVENESS OF INTERNAL REPORTING SYSTEMS

A positive aspect of external whistle-blowing is that it may accelerate the process when the internal variant does not deliver any tangible results.<sup>128</sup> Research has shown that whistle-blowers choose to address an external recipient in case of the inactiveness or non-trustworthiness of an internal reporting system.<sup>129</sup> In that case, the whistle-blower might be afraid that either the institution will not respond to his concerns or that top management will cover-up the problem without resolving it.<sup>130</sup> Thus, it is the irresponsiveness of the institution itself that is driving the whistle-blower to blow the whistle outside the institution and potentially to the competent authorities.<sup>131</sup>

Apart from the apprehension that an institution might not react at all, the whistle-blower might also fear facing formal or “informal” consequences inside the institution.<sup>132</sup> These actions may come in the form of humiliation, discrimination, or threats.<sup>133</sup> The whistle-blower may not always feel safe from retaliation in his workplace, as often the top management is hostile to whistle-blowing.<sup>134</sup> The

term “retaliation” should be conceived widely and covers any form of action the employer can take against the employee. Scepticism over internal whistle-blowing was an evident concern of the early advocates of whistle-blower protection.<sup>135</sup> Indeed, many stories have demonstrated that the structures for internal whistle-blowing have been inadequate.<sup>136</sup> External whistle-blowing thus cures institutions’ inability and inappropriateness to facilitate or handle internal reporting.<sup>137</sup> The whistle-blower may also demonstrate the disregard of internal reporting systems to the relevant authorities.<sup>138</sup>

Another important advantage of external disclosure is that potentially incriminating evidence is less likely to be destroyed. Indeed, there will be no time for the employer to let evidence disappear.<sup>139</sup> Although authorities tend to demand institutions to solve minor problems without external intervention, this scenario is unlikely when it concerns the destruction of evidence of a crime, as it may have disastrous consequences for the public perception of the authority itself.<sup>140</sup> Perhaps unsurprising, attorneys and legal experts on whistle-blowing are advising future whistle-blowers to obtain the necessary evidence to be able to substantiate their claim when discussing with the authorities.<sup>141</sup> Social scientists have even argued that external whistle-blowing, without providing evidence, may be characterised as unethical.<sup>142</sup> As a result, the employee may resort to external whistle-blowing, after having obtained strong evidence of the wrongdoing, to be certain that his claim will be heard and the evidence will not be destroyed.<sup>143</sup>

<sup>135</sup> Randi L Sims and John P Keenan, ‘Predictors of External Whistleblowing: Organisational and Intrapersonal Variables’ (1998) 17 *Journal of Business Ethics* 419.

<sup>136</sup> Robert Vaughn, ‘The successes and failures of whistle-blower laws (EE publications 2012), 324. Kate Kenny, ‘Banking compliance and dependent corruption: towards an attachment perspective (2014) *Law and Financial Markets Review* 170.

<sup>137</sup> Vaughn (n 136) 324.

<sup>138</sup> *ibid* 324.

<sup>139</sup> Chamorro-Courtland and Cohen (n 111) 220.

<sup>140</sup> *ibid* 220.

<sup>141</sup> Terry Morehead Dworkin and Melissa S Baucus, ‘Internal vs. External whistle-blowers: a comparison of whistleblowing processes’ 17 (1998) *Journal of Business Ethics* 1281, 1284.

<sup>142</sup> Janet P Near and Marcia P Miceli, *Blowing the whistle* (Lexington books, New York, 1992).

<sup>143</sup> It should be noted that it is highly probable that the internal management will impede the collection of evidence and may transfer the employee to another position where he does not have access to the evidence he needs. See Dworkin and Baucus (n 141) 1285.

<sup>124</sup> Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernisation of economic life, JORF n°0287 Article 16.

<sup>125</sup> Lewis, Bowers, Fodder and Mitchell (n 50) 549.

<sup>126</sup> *Digital Realty Trust, Inc v Somers*, 138 US 767, 772 (2018).

<sup>127</sup> See Part 2.

<sup>128</sup> Moberly (n 107) 278.

<sup>129</sup> Mendelsohn (n 19) 741.

<sup>130</sup> Bucy (n 15) 946.

<sup>131</sup> Kate Kenny, ‘Censored: Whistleblowers and impossible speech’ (2017) 71 *Human Relations* 1025.

<sup>132</sup> Andreadakis (n 115) 64.

<sup>133</sup> *ibid* 64.

<sup>134</sup> Kenny (n 131) 16–27.

## VII. COMBINING INTERNAL AND EXTERNAL WHISTLE-BLOWING

The above analysis demonstrates that the whistle-blower is in a delicate position, as he cannot be sure whether to report internally or not.<sup>144</sup> The technical legal requirements are not always clear and the employee is not always in the position to understand them correctly.<sup>145</sup> Therefore, a good-faith attempt to correct wrongdoings may disappoint the employee, as he may not be protected at the end. When legislation denies protection to the employee on technical grounds, future whistle-blowers may be discouraged to report.<sup>146</sup> Hence, this article proposes that legislation should be clear and precise while, at the same time, less technical by adopting a more lenient approach. This means that the whistle-blower should be protected under the same requirements whether he reports internally or externally. This entails that internal reporting should not be preferred over external reporting. External reporting should be subject to the same requirements with regard to protection (or immunity) as internal reporting. This will enhance whistle-blowing and the protection of the whistle-blower. There should, of course, be certain limits and boundaries to ensure effective and honest whistle-blowing. It is up to the legislator to set these limits (for instance, prescribing a good faith requirement from the side of the whistle-blower).

It should be acknowledged that internal reporting channels are not always effective. Although legislation favours internal reporting mechanisms, their results are difficult to establish empirically.<sup>147</sup> A more lenient approach would allow the whistle-blower to report to the authorities even if the internal reporting channels are effective and legislation will offer him protection. A good precondition to granting protection should be that the employee believes that the recipient of his concerns will be able to effectively remedy the situation. Then, it is no longer highly relevant whether the recipient is internal or external.<sup>148</sup> The whistle-blower should not feel entrapped due to legislation entailing that he should report internally at first. Normally, the external recipient is an authority that has the obligation to receive and treat disclosures on wrongdoings.<sup>149</sup>

The core problem are the many different requirements a whistle-blower should fulfil to be protected from retaliation. According to the laws in the UK,

<sup>144</sup> Elletta Sangrey Callahan and Terry Morehead Dworkin, 'Who blows the whistle to the media, and why: organisational characteristics of media whistle-blowers' (1994) 96 *American Business Law Journal* 151, 168.

<sup>145</sup> Estelle Feldman, 'Whistleblower Protection' (2011) 24 *Annual Review of Irish Law* 9.

<sup>146</sup> Gerard Sinzdek, 'An analysis of current whistle-blower laws: Defending a more flexible approach to reporting requirements' (2008) 96 *California Law Review* 1633, 1661.

<sup>147</sup> Vaughn (n 136) 326.

<sup>148</sup> Moberly (n 107) 283.

<sup>149</sup> *ibid* 293.

Ireland and France, whistle-blowers' legal protection is more easily ensured by reporting internally. On the other hand, the recent developments in the US favour external whistle-blowing. The whistle-blower who reports to the SEC may enjoy protection under Dodd-Frank. If he reports internally, he may enjoy protection under the Sarbanes-Oxley Act. However, the protection of the Dodd-Frank Act is significantly more attractive than that of Sarbanes-Oxley.

Both reporting channels present significant advantages, but they are not complementary. The whistle-blower may opt for one channel over another, making his choice not only on legal grounds but also considering other arguments. In certain cases, an employee's choice is driven by pragmatic considerations<sup>150</sup> and not decided upon statutory requirements.<sup>151</sup> Additionally, the whistle-blower is not always in a position to follow the applicable statutory requirements. This article suggests that instead of creating a problematic situation for whistle-blowers, the fundamental goal should be to protect the messenger and to rectify wrongdoings, instead of introducing procedural steps that complicate this path.

<sup>150</sup> Callahan and Dworkin (n 144), 162–163.

<sup>151</sup> Dworkin and Baucus (n 141) 1299.