

# Considerations for Assessing Corporate Wrongdoings – a Hungarian Approach to Whistleblowing

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## I The Problem<sup>1</sup>

Misconduct committed within and to the benefit or detriment of a company<sup>2</sup> or (public) institution,<sup>3</sup> although it often falls under one of the offences contained in Act C of 2012 on the Criminal Code ('Criminal Code'), rarely results in criminal proceedings.<sup>4</sup> This does not mean that such forms of conduct occur only sporadically. Investigating and proving these crimes, however, is unusually difficult,<sup>5</sup> and, as such, latency in this area is especially high.<sup>6</sup>

Nonetheless, these activities' global pervasiveness and the social and economic damage they cause<sup>7</sup> justify why some of the issue's legal ramifications and its institutional framework should be explored, along with certain expected (or, at least, desirable) developmental trends.

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<sup>1</sup> Though the use of the term 'whistleblowing' is not widespread in Hungarian academic literature, it generally refers to publicizing a wrongdoing that occurred in either the private or public sector.

<sup>2</sup> In this study, the term company is used in the legal sense, and we do not use it in a manner analogous with e.g. the term 'undertaking' (*vállalkozás*) in § 8:1(1)(4) of Act V of 2013 on the Civil Code or 'business association' (*gazdasági társaság*) in § 3:88(1). Notwithstanding § 685(c) of Act IV of 1959 on the Civil Code or § 459(1) of the Criminal Code, the term 'economic operator' (*gazdálkodó szervezet*) is no longer used in effective Hungarian civil law.

<sup>3</sup> Because (public) institutions are concerned with managing governmental tasks and less with profit, they clearly cannot be grouped with companies. This writing aims to highlight abuses in the public sphere, too, but for the sake of simplicity we will only use the term 'company' throughout its length.

<sup>4</sup> For instance active economic corruption has become known 1684 times in 2014, but only 351 times in 2015. Cf. Prosecutor General's Report to Parliament in 2015. 6. (source: <[http://ugyeszseg.hu/pdf/ogy\\_besz/ogy\\_beszamolo\\_2015.pdf](http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2015.pdf)> accessed 26 June 2017).

<sup>5</sup> Janin Pascoe, Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 (2) *Common Law World Review* 144–173, 146.

<sup>6</sup> David Lewis, A. J. Brown, Richard Moberly: 'Whistleblowing, its Importance, and the State of Research' in A. J. Brown, David Lewis, Richard Moberly, Wim Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Edward Elgar Publishing 2014, Cheltenham) 33.

<sup>7</sup> Philipp Schneider, 'Mennyire lehet eredményes egy compliance program, ha a dolgozókat frusztráció vagy bosszú-és megtorlásvágy vezérli?' (2014) 62 (6) *Belügyi Szemle* 107–125, 107. In connection with corruption offences see Hollán Miklós, *A korrupciós bűncselekmények az új büntetőködében* (HVG-ORAC 2014, Budapest) 32–34.

An outcome of globalisation is that companies operate across borders. This means that the foundations of a Hungarian approach cannot be established without analysing foreign legal instruments (mainly from the English-speaking world) or literature concerned with the practical and academic aspects of the topic.

We must note at the outset that this subject cannot be examined simply from a legal or criminal law perspective; to understand it necessitates an *interdisciplinary* approach. Fully comprehending the operational mechanisms of the forms of misconduct to be discussed, especially in relation to the operational principles of multinational corporations, requires a knowledge of company, employment, and administrative law. Additionally, non-legal know-how – such as financial and, increasingly, IT proficiency – is progressively necessary.

It is already evident that handling such activities within the traditional national criminal framework (investigative authority, prosecution, criminal court) is becoming a less and less reassuring prospect. The causes for this can be found in the previously-mentioned interdisciplinary nature, the axioms of the globalized economic system, and the phenomenon of a near-permanently unfolding digital revolution. In today's so-called Big Data Era, when neither borders nor technology can block the flow of data or halt its processing, it is difficult to fight crime with traditional tools.<sup>8</sup> The fact that, in increasingly information-based societies, a company's greatest assets are information and data – which, due to the digital revolution, can easily be appropriated using illegal tools – only expands this problem.

Corporations' interests are threatened not just by behaviours that fall within the scope of criminal law but also by those in the purview of other legal fields, as well as potentially lawful but morally objectionable acts. To prevent, uncover, and handle such deeds, *corporate compliance activities* offer an effective solution in the most general respects. In the interest of brevity, this study will concentrate on wrongdoing that can be classified as criminal, a preventive strategy that is a subcategory of compliance known as *whistleblowing*, and possible reactions to misconduct.

Our position is that the heading of *corporate wrongdoing*<sup>9</sup> covers primarily and in the strictest sense the crimes included in the table below. It is worthwhile emphasising a point that often seems almost marginal in the academic literature on the subject, that abuses committed *at the expense* of corporations often have a practical significance that is at least analogous to that of behaviours conducted *for their benefit*. To this latter category we must add that abuses undertaken to the benefit of the company can also ultimately come to harm it.<sup>10</sup> Furthermore, it can be conceded that the matters detailed in this work cannot be considered as conclusively settled, nor do they constitute an exhaustive list. We have simply identified activities which

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<sup>8</sup> See Nagy Tibor: 'Big Data – új (m)érték a büntetőeljárásban' in Vókó György (ed), *Tanulmányok Polt Péter 60. születésnapja tiszteletére* (HVG-ORAC 2015, Budapest) 186–194.

<sup>9</sup> See Alexandra Webster, 'Developments in Whistleblowing' (2015) 16 (1) *Business Law International* 65–75, 65.

<sup>10</sup> To highlight the subject's complexity, we note that a crime committed for the benefit of a company can also be directly or indirectly advantageous to the perpetrator. For example, (s)he may achieve a sales target with the aid of bribery and subsequently receive a higher commission or a promotion.

are criminal in nature and appeared to us as the most consequential. Finally, we must state that classifying a crime as being to the ‘benefit’ or ‘detriment’ of a corporation is not an exclusive categorization; it is possible for an offence to belong to both groupings.

<b>Crimes Committed to the Benefit of the Company</b>	<b>Crimes Committed to the Detriment of the Company</b>
Active Corruption (Criminal Code § 290)	Defamation (Criminal Code § 226)
Active Corruption of Public Officials (Criminal Code § 293)	Passive Corruption (Criminal Code § 291)
Active Corruption in Court or Regulatory Proceedings (Criminal Code § 295)	Theft (Criminal Code § 370)
Abuse of a Function (Criminal Code § 299)	Embezzlement (Criminal Code § 372)
Failure to Report a Crime of Corruption (Criminal Code § 300)	Fraud (Criminal Code § 373)
Extortion (Criminal Code § 367)	Information System Fraud (Criminal Code § 375)
Budget Fraud (Criminal Code § 396)	Misappropriation of Funds (Criminal Code § 376)
Breach of Accounting Regulations (Criminal Code § 403)	Breach of Trade Secrecy (Criminal Code § 413)
Fraudulent Bankruptcy (Criminal Code § 404)	Illicit Access to Data (Criminal Code § 422)
Breach of Business Secrecy (Criminal Code § 418)	Breach of Information System or Data (Criminal Code § 423)

According to estimates by corporate wrongdoing experts, the damage caused by corporate crime on the global level reaches 5% of companies’ revenue.<sup>11</sup> This number on its own should justify companies undertaking effective countermeasures against wrongdoings, whether using the instruments of criminal law or other measures. According to a recent Hungarian survey, however, 94% of responding companies had no ‘ethical infractions’ in the last 5 years. Only of 53.9% of participating Hungarian corporations had a so-called Code of Ethics, though the international rate for this is 81%. Just 28.5% have a dedicated channel (ethics hotline), while globally this index is at 60%. Only 18% of companies check for conflicts of interest. The risk of data loss, which is made increasingly dire by technological development, is less and less recognised by Hungarian companies each year. While in 2012 36.4% of corporate chiefs thought that an exiting employee will never leave with the company’s data assets, this same metric in 2016 was 61.3%. This change goes against formal logic.

The numbers above show that the standards for combating corporate wrongdoing in Hungarian-owned companies do not correspond with international norms. It would then

<sup>11</sup> See Association of Certified Fraud Examiners, *Report to the Nations on Fraud and Abuse. 2016 Global Fraud Story* (source: <<http://www.acfe.com/rtn2016/about/executive-summary.aspx>> accessed 26 June 2017).

logically follow that there is a distinct possibility that the relative loss in turnover due to these abuses also exceeds the global average. This would indicate the presence of a whole host of disadvantages; the identification of these, however, is beyond the scope of our present effort.

The dilemma can therefore be formulated as follows: There exists a category of crimes which causes quantitatively and socially remarkable damage and currently falls outside of the reach of standard criminal law tools. In fact, because of the above-mentioned reasons, it often might not even be effective to approach this category with such instruments.<sup>12</sup> Keeping this in mind, the primary intent of the present study is to discover which institutions, if any, are able to reduce the damage caused by corporate wrongdoing.

Today, corporate *internal investigations* or Hungarian *employers' whistleblowing systems* may be placed among the traditional institutions of criminal law or, if viewed chronologically, *before* these. We will examine how general prevention strategies can succeed within a company through responsible corporate governance and the establishment and operation of an appropriate compliance control environment, and what responsibilities corporate leadership has to owners and, potentially, other stakeholders<sup>13</sup> in this respect.

## II The Concept and Types of Whistleblowing

Based on the English scholarship available to us, our position is that the phenomenon of whistleblowing cannot be reduced to a single and exact concept. Instead, it is only possible to grasp some of its specific characteristics.<sup>14</sup> In 2014, a cross-continental group of researchers released the *International Handbook on Whistleblowing Research*. It defines a whistleblower as 'an organisational or institutional 'insider' who reveals wrongdoing within or by that organisation or institution, to someone else, with the intention or effect that action should then be taken to address it'.<sup>15</sup> However, this general definition, according to many, could require further categorisation. It could also potentially be amended with several substantive elements.

For instance, Daniel Westman delineated three subcategories: active, passive, and embryonic whistleblowing. *Active* whistleblowing refers to individuals who make an actual disclosure, while *passive* covers employees who refuse to carry out their employer's orders when they believe these to be illegal. *Embryonic* whistleblowing can be both active and

<sup>12</sup> In connection with corruption crimes, see Finszter Géza 'A korrupció nyomozása' (2011) 59 (11) *Belügyi Szemle* 75–97; Tóth Mihály: 'Lehet-e még újat mondani a kriminális korrupcióról?' in Tóth Mihály, Herke Csongor (eds): *Tanulmányok dr. Földvári József professzor 75. születésnapja tiszteletére* (PTE ÁJK 2011, Pécs) 154–173; Kóhalmi László, 'A korrupcióprevenció lehetőségei az üzleti szektorban' (2016) 63 (5) *Magyar Jog* 290–298.

<sup>13</sup> In the English-speaking world, stakeholders are persons or groups to which a company owes responsibility, though they cannot be regarded as owners.

<sup>14</sup> Günter Schirmer, Sandra Coliver: 'Resolution 2060 on Improving the Protection of Whistle-blowers' (2015) 54 (6) *International Legal Materials* 1130–1134, 1131.

<sup>15</sup> Lewis, Brown, Moberly (n 6) 33.

passive, though the individual is removed from his or her position prior to disclosure due to a lack of trust.<sup>16</sup>

Robert Vaughn distinguishes between legal and illegal whistleblowing.<sup>17</sup> The basis of this differentiation – less candidly referred to as *direct* or *indirect* whistleblowing – is whether the addressee of the disclosure has a right to initiate proceedings or sanction. An example of a situation where this is not the case occurs when whistleblowing is conducted through the media.<sup>18</sup>

Amanda Leiter divides whistleblowing into *hard* and *soft* variants. Under the second category she includes employee declarations which do not conflict with any company rules, legal or moral, though, according to the discloser's position, they refer to arbitrary or reckless activities.<sup>19</sup> Finally, the most commonly used categorisation fits whistleblowing into *internal* and *external* forms. The former contains when the disclosure takes place within one of the company's internal forums. The external whistleblower, however, divulges to an entity independent from the company. We can also speak of a *mixed* whistleblowing system if the announcer can turn to both internal and external forums.<sup>20</sup>

### III Reflections on Whistleblowing around the Globe

Though reviews of global perspectives are usually placed at the end of academic studies, this work, unconventionally, will present this section prior to discussing the Hungarian regulations. The reason for this is not only that this area of regulation is still in its infancy in Hungary. Our view is that identifying the most important characteristics of whistleblowing – an effort which aims to go beyond its simple definition – can only be undertaken through an overview of examples from around the globe.

#### 1 USA

The cradle of (modern) whistleblowing is undoubtedly the United States. Not only is it true that America has the most extensive body of regulation relating to the field, as well as the

<sup>16</sup> Daniel P. Westman, *Whistleblowing: The Law of Retaliatory Discharge* (The Bureau of National Affairs 1991, Washington DC) 19–20.

<sup>17</sup> Robert G. Vaughn, *The Successes and Failures of Whistleblower Laws* (Elgar Publishing 2012, Cheltenham) 11.

<sup>18</sup> James Fisher, Ellen Harshman, William Gillespie, Henry Ordower, Leland Ware, Frederick Yeager: 'Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries' (2000) 19 (3) *Dickinson Journal of International Law* 117–143, 128.

<sup>19</sup> Amanda C. Leiter, 'Soft Whistleblowing' (2014) 48 (2) *Georgia Law Review* 425–497, 436.

<sup>20</sup> James N. Alder, Mark Daniels, 'Managing the Whistleblowing Employee' (1992) 8 (1) *The Labour Lawyer* 19–70, 27; Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law* (Quorum Books 2001, Westport, Connecticut) 23.

most comprehensive academic coverage,<sup>21</sup> but it was here that whistleblowing went through its greatest transformations, often as a result of historical circumstances. Initially, the whistleblower was viewed as a ‘spy’ or ‘informer’, and his or her disclosure was more likely to be considered treacherous than benevolent.<sup>22</sup> With the passage of time, the term turned increasingly neutral, while the literature started to depict the whistleblower as a simple ‘informant.’<sup>23</sup> Lately, in no small part thanks to the corporate scandals resulting from such disclosures, the whistleblower grew into an object of public admiration. As Yale professor Jonathan Macey mentions in one of his writings, *TIME Magazine*, referring to those who provided effective aid to the authorities in locating certain terrorists after the 9/11 attacks, declared 2002 to be the Year of the Whistleblower.<sup>24</sup> According to another analysis, the appearance of whistleblowers as characters in cartoons, movies, and children’s tales signifies the role’s – or at least the issue’s – popularity.<sup>25</sup>

As part of a short historical review, we may note that certain – perhaps at first glance quite radical – commentators view whistleblowing as nearly contemporaneous with the US Declaration of Independence (1776): The Congress of the newly independent union passed a law making reporting fraud and other abuses a universal civic duty on 30 July 1778, after the crew of a warship approached the lawmakers to report the cruel treatment to which their captain subjected them.<sup>26</sup> Others believe the first ancestor of true whistleblowing legislation was the 1863 False Claims Act, a federal legislation which offered a share of the fine imposed on those reported to the whistleblower himself, typically as a result of Civil War corruption (also referred to as *qui tam lawsuits*).<sup>27</sup> This latter rule can also be viewed as a predecessor to today’s whistleblowing rules because it set out guidelines for the protection of the discloser.<sup>28</sup>

<sup>21</sup> Beyond a legal analysis, the issue is also examined from an ethical perspective by Michael L. Rich, ‘Lessons of Disloyalty in the World of Criminal Informants’ (2012) 49 (3) *American Criminal Law Review* 1493; Quorum Books 2001, Westport, 1539, 1498; Quorum Books 2001, Westport, 1507.

<sup>22</sup> Orly Lobel, ‘Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems’ (2012) 54 (1) *South Texas Law Review* 37; Quorum Books 2001, Westport, 52, 40.

<sup>23</sup> Mary-Rose Papandrea, ‘Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment’ (2014) 94 (2) *Boston University Law Review* 449–544, 483.

<sup>24</sup> Jonathan Macey, ‘Getting the Word Out about Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading’ (2006–2007) 105 (8) *Michigan Law Review* 1899–1940, 1901.

<sup>25</sup> Roberta Ann Johnson, ‘Whistleblowing and the Police’ (2006) 3 (1) *Rutgers University Journal of Law and Urban Policy* 74–83, 74.

<sup>26</sup> See Shawn Marie Boyne, ‘Whistleblowing’ (2014) 62 (Supplement) *The American Journal of Comparative Law* 425–455, 425, and Dan Meyer, David Berenbaum, ‘The Wasp’s Nest: Intelligence Community Whistleblowing & Source Protection’ (2015) 8 (1) *Journal of National Security Law & Policy* 33–72, 33.

<sup>27</sup> Pamela H. Bucy, ‘Why Punish? Trends in Corporate Criminal Prosecutions’ (2007) 44 (4) *American Criminal Law Review* 1287. ‘Disloyalty in the World of Criminal Informants’ 1305, 1293. Kathleen Clark, Nancy J. Moore, ‘Financial Rewards for Whistleblowing Lawyers’ (2015) 56 (5) *Boston College Law Review* 1697. ‘Disloyalty in the World of Criminal Informants’ 1775, 1698.

<sup>28</sup> Macey (n 24) 1904.

The construction of a veritably modern federal whistleblowing regime was initiated in the 1970s mainly due to the Watergate scandal, which brought down President Richard Nixon.<sup>29</sup> After a number of efforts that yielded partial results, the era's two most significant legal achievements are the 1978 Civil Service Reform Act (CSRA) and the Whistleblower Protection Act (WPA) from 1989.<sup>30</sup> The last-mentioned unambiguously forbade the intimidation of the discloser and any retribution for disclosure.<sup>31</sup> The next period saw the introduction of several laws protecting the whistleblower.<sup>32</sup>

According to Roberta Ann Johnson, who authored a monograph on whistleblowing, the gradual spread of public interest disclosures is fundamentally the result of five factors: changes in bureaucracy (especially efforts to increase transparency), the legal environment encouraging and offering effective protection to disclosers, institutional whistleblower protections, and the perception, which could be described as cultural, that the whistleblower is no longer viewed as a hostile 'informer' but an individual acting on the interests of society.<sup>33</sup>

Following the Enron and WorldCom scandals, a new milestone was reached with the Sarbanes-Oxley Act of 2002 (SOX).<sup>34</sup> At the theoretical level, this law viewed whistleblowing as an essential element of responsible corporate management. In the vein of this conceptualisation, it intended to strengthen whistleblower protection, encouraged anonymous announcements, prescribed criminal law sanctions against those persecuting disclosers, and clarified the lawful channels for disclosure. Nonetheless, it was the target of much criticism, focusing on the high financial cost of its implementation and its discriminatory character in relation to smaller and foreign companies.<sup>35</sup>

The Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act), which amended the SOX Act, was passed in 2010 following the 2007 start and 2008 global deepening of the Great Recession and the election of Barack Obama. A relevant innovation in this legislation allowed the whistleblower to receive 10-30% of the fine imposed on the employer. This created financial incentives for would-be whistleblowers. At the same time, as immediately noted by academia, this measure could have greatly increased the number of opportunistic employees who made unsupported

<sup>29</sup> Stephen Coleman Tily, 'National Security Whistleblowing vs. Dodd-Frank Whistleblowing: Finding a Balance and a Mechanism to Encourage National Security Whistleblowers' (2015) 80 (3) Brooklyn Law Review 1191–1218, 1196.

<sup>30</sup> Norm Keith, Shane Todd, Carla Oliver, 'An International Perspective on Whistleblowing' (2016) 31 (3) Criminal Justice 14–36, 15; Terry Morehead Dworkin, A. J. Brown, 'The Money or the Media? Lessons from Contrasting Developments in US and Australia Whistleblowing Laws' (2012) 11 (2) Seattle Journal for Social Justice 653–713, 654.

<sup>31</sup> Macey (n 24) 1905.

<sup>32</sup> Boyne believes the 1998 Military Whistleblowing Protection Act or the National Transit System Security Act as examples of these. See Boyne (n 26) 449–450.

<sup>33</sup> Roberta Ann Johnson, *Whistleblowing – When It Works – And Why* (Lynne Rienner Publishers 2003, Boulder) 4.

<sup>34</sup> For a Hungarian account of the Enron scandal, see Kecskés András, 'Az Enron botrány és az üzleti jog rohadt almái' (2008) 55 (6) Magyar Jog 429–440.

<sup>35</sup> Terry Morehead Dworkin, 'SOX and Whistleblowing' (2006–2007) 105 (8) Michigan Law Review 1757–1780, 1758.

claims.<sup>36</sup> Partly due to this feature, the Obama era saw a spike in whistleblowers sanctioned for unlawful disclosures.<sup>37</sup>

In 2010, two controversial events occurred relating to the broader concept of whistleblowing. The first was the case of Chelsea (formerly Bradley) Manning. Manning leaked more than 700 000 classified documents to the operators of the WikiLeaks website and was consequently sentenced to 35 years of imprisonment in 2013. However, President Obama, in one of his last official acts, pardoned her in January 2017 and discounted her sentence by 29 years.<sup>38</sup> The second affair was that of former NSA and CIA officer Edward Snowden, who revealed classified information on American intelligence agencies and subsequently fled to Russia.

## 2 The United Kingdom

The first modern whistleblowing rules in the UK can be found in the Public Interest Disclosure Act 1998 (PIDA). This legislation allows employees to report their public or private sector employers' abuses in both internal and external forums. If the employee faces any discriminatory treatment, the employer must prove that this was not due to his or her disclosure.<sup>39</sup> The British regulations, according to the results of a comparative study, enabled disclosure to a much wider degree than its US counterparts. As such, crimes were not the only grounds on which disclosures could be made according to the 1998 Act; failures to comply with legal obligations, dangers to health and safety, and environmental damage could also lawfully warrant announcement.<sup>40</sup> Nonetheless, the unanimous academic consensus is that the PIDA was unable to fulfil the hopes associated with it even after 15 years, because, as it lacked effective protection for whistleblowers, it did not give sufficient encouragement.<sup>41</sup> Parliament's response to the criticism was the Enterprise and Regulatory Reform Act 2013 (ERRA), which partially amended the PIDA. On one hand, the new law restricted the number of abuses which could be uncovered via whistleblowing, and, on the other, it presupposed good faith on the whistleblower's part.<sup>42</sup>

<sup>36</sup> Meghan Elizabeth King, 'Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley' (2011) 48 (3) *American Criminal Law Review* 1457–1483, 1463.

<sup>37</sup> Meghan Jason Zenor, 'Damming the Leaks: Balancing National Security Whistleblowing and the Public Interest' (2015) 3 (3) *Lincoln Memorial University Law Review* 61–90, 89–90.

<sup>38</sup> Source: <[https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html?\\_r=0](https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html?_r=0)> (accessed 26 June 2017).

<sup>39</sup> Keith, Todd, Oliver (n 30) 18.

<sup>40</sup> Elletta Sangrey Callahan, Terry Morehead Dworkin, David Lewis, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest' (2003–2004) 44 (3) *Virginia Journal of International Law* 879–912, 885.

<sup>41</sup> Webster (n 9) 66.

<sup>42</sup> Jeanette Asthon, '15 years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger?' (2015) 44 (1) *Industrial Law Journal* 29–52, 35.



### 3 France

Implementing the 95/46/EC Data Protection Directive, the French legislature first passed rules on public interest disclosures in 2004. This is when it introduced the institution of anonymous whistleblowing, which decreed that whistleblowers should turn to the independent and external National Commission on Informatics and Liberty (*Commission nationale de l'informatique et des libertés, CNIL*).<sup>43</sup> Simultaneously, the rules set out to guarantee free speech at the workplace, though that requirement can incidentally also lead to the failure of the public interest disclosure.<sup>44</sup>

Three laws were passed in 2013 with regard to public interest disclosures. These laid out new rules aiding transparency in relation to activities with high health or environmental risks and the pursuits of public figures, as well as fraud and economic crime.<sup>45</sup>

### 4 Supranational Developments

The Council of Europe began planning whistleblowing recommendations in 2010. As a part of this effort, a commission explored the subject, chiefly by reviewing US regulations. Based on the commission's report – which gave a concrete definition of whistleblowing – the Committee of Ministers passed Recommendation CM/Rec(2014)7. This document called for the creation of relevant regulations within member states, and it noted that these regulations should give due consideration to human rights. After this, especially due to the previously-mentioned Snowden affair, events started to speed up. Two reports were completed in January and May 2015, to facilitate safeguards for whistleblowers. These recommended setting up whistleblowing regimes in both the public and private sectors, the establishment of independent authorities to monitor these regimes, and taking steps to ensure the protection of whistleblowers who are exposed to domestic persecution.<sup>46</sup>

The European Court of Human Rights (ECtHR), too, had to address issues related to whistleblowing, albeit in an employment law context. In *Heinrich v Germany*, the applicant worked in a nursing home of which the Berlin government was a majority owner. Downsizing caused the staff to be overwhelmed, and the proper quality of care could no longer be maintained. In 2004, the discloser, via a legal adviser, notified the management in writing that this was the case and called on them to remedy the situation. The leadership refused, and in December 2004 the lawyer made a criminal complaint against the company. In January 2005, the nurse was laid off – supposedly due to a periodically recurring illness. The nurse attacked the dismissal in a labour court. The investigation of the nursing home was restarted in February 2005 and the carer cited as a witness, but the probe was halted in May. The Berlin Labour

<sup>43</sup> Robert Flanigan, Sébastien Ducamp, 'Implementing Whistleblowing Procedures in France' (2006) (1) *Revue de Droit des Affaires Internationales (International Business Law Journal)* 117–125, 119.

<sup>44</sup> This is highlighted in Björn FASTERLING, David Lewis, 'Leaks, legislation and freedom of speech: How can the law effectively promote public-interest whistleblowing?' (2014) 153 (1) *International Labour Review* 71–92, 89.

<sup>45</sup> Keith, Todd, Oliver (n 30) 18.

<sup>46</sup> Schirmer, Coliver (n 14) 1131.

Court ruled that employment could not be considered terminated, because it was ended illegally. The appellate court, however, struck down the first instance decision because it viewed the employee's reaction as disproportionate vis-à-vis the harm which prompted it. As such, the nurse was not exercising a constitutional right but breaching a duty arising from employment. The Federal Labour Court similarly rejected the appeal, as did the Federal Constitutional Court. Subsequently, the nurse turned to the ECtHR, which ultimately validated her claim and stated that the discloser utilised a constitutional right when reporting misconduct at her place of employment (and acted, fundamentally, as a whistleblower would). Based on this decision, public interest disclosures can now be fitted into the catalogue of human rights.<sup>47</sup>

## 5 Further International Examples

While a comprehensive international account is, of course, beyond the scope of this work, we wish to include a few further instances of instructive whistleblowing regulation from other nations.

The majority of European countries possess whistleblowing regimes, though these are not equally developed. In the *Netherlands*, for example, an independent ombudsman exists for handling disclosures since 2011. *Romania* already accepted whistleblowing safeguards in 2004, while *Slovenia's* 2010 anti-corruption law contains provisions protecting disclosers as well.

A common characteristic of larger Asian countries is that they pioneer regional and local solutions instead of national whistleblowing regulations. In *China* there is no comprehensive framework, but there are guidelines which can help qualify retaliation against a public interest discloser as a criminal act. Certain types of misconduct in *India* – such as corruption or abuse of power – mandate the application of employee protection mechanisms, and the details of these must be publicised on companies' websites. *South Korea* established a state-operated system that allows anonymous disclosures relating to corruption in the public sector. The most developed regulatory framework belongs to *Japan*, where disclosing workers receive protection from dismissal and other sanctions, though the American system of financial incentives was not adopted.<sup>48</sup>

Finally, while there is no room for a detailed description in this study, we must mention the significant results achieved in connection with whistleblowing in *Australia* and *New Zealand*.<sup>49</sup>

<sup>47</sup> *Heinrich v. Germany*, no. 28274/08, 21 July 2011. See Peter Hauser, 'Whistleblowing: chance of risk? – new tendencies in Europe' (2013) (1) *European Insurance Law Review*, 51–59, 57–58.

<sup>48</sup> Keith, Todd, Oliver (n 30) 18.

<sup>49</sup> For Australia, see David Lewis, 'Whistleblowing Statutes in Australia: Is It Time for New Agenda?' (2003) 8 (2) *Deakin Law Review* 318–334.; Pascoe, Welsh (n 5) 144–173. For New Zealand, see Catherine Webber, 'Whistleblowing and the Whistleblowers Protection Bill 1994' (1995) 7 (4) *Auckland University Law Review* 933–957.

## IV The Evolution of the Hungarian Regulatory Framework

While examining the relevant Hungarian rules, it becomes evident that its roots reach back to the middle of the socialist period – to the time of the so-called ‘soft dictatorship’. Then, after a brief legislative detour, the lawmaking initiatives of the most recent period opened a fundamentally new chapter in the story of reporting abuses.

### 1 The Beginnings

The nearly analogous – although not entirely accurate – Hungarian terminology for whistleblowing may be the categories of *public interest discloser* or *company discloser* (*közérdekű bejelentő* and *vállalati bejelentő*, respectively). The first appearance of these was in legislation in effect from 1977 until Hungary’s 2004 EU accession: *Act I of 1977 on Public Interest Disclosures, Recommendations, and Complaints*. According to § 4(1) of this law, ‘a public interest disclosure highlights circumstances, errors or deficiencies, the remedying of which serves the interests of the community or society as a whole. It draws attention to behaviours or facts which are illegal, contrary to socialist morals or the principles of socialist economy, or otherwise offend or endanger the interests of society’. The addressee can be a state agency, a company, an institution, an association, an oversight body, etc. (Act I of 1977, § 2). It must be highlighted that this law already emphasised the protection of the discloser, and, as such, allowed anonymous reports. If, however, it became clear that the discloser acted in bad faith, his or her identity had to be revealed [Act I of 1977, § 15(3)].<sup>50</sup>

### 2 The Regime of Act CLXIII of 2009

The next step was *Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments*. This was not at all akin to the previous regulation, but, as the relevant parliamentary memorandum states,<sup>51</sup> it utilized certain solutions from the U.S. It can be emphasised that the law’s general Explanatory Memorandum referred to, on the one hand, the Hungarian Constitutional Court’s position on fair trial [primarily to decisions 6/1988. (III. 11.) and 14/2004. (V. 7.)]. On the other, it mentioned *expressis verbis* the *whistleblowing phenomenon*, which it defined as ‘an employee of an organisation, who sets aside his/her personal interests, acts to avert harm (prevention) threatening others (the community in a narrow or broad sense) by revealing an irregularity (misconduct) detected at his/her place

<sup>50</sup> Of the academic legal literature of the era, cf. Aczél György, ‘A közérdekű bejelentésekről, javaslatokról és panaszokról szóló 1977. évi I. törvényről’ (1977) 25 (5) *Magyar Jog* 374–386. After the democratic transition Vass György, ‘Panasz, törvény; panasztörvény, avagy úton a petíciós jog kiteljesedése felé’ (1997) 47 (1) *Magyar Közigazgatás* 20–26.

<sup>51</sup> *Infojegyzet* (2013) 26. 3. (made by Samu Nagy Dániel; source: [http://www.parlament.hu/documents/10181/59569/Infojegyzet\\_2013\\_26\\_kozerdeku\\_bejelentések.pdf/ca01a3dd-abca-446a-a12a-60ec33ea7f69](http://www.parlament.hu/documents/10181/59569/Infojegyzet_2013_26_kozerdeku_bejelentések.pdf/ca01a3dd-abca-446a-a12a-60ec33ea7f69)> accessed 26 June 2017).

of employment'. The law prescribed a procedural fine ranging from HUF 50,000 to 500,000 for offenders (or, with regard to legal persons, from HUF 100,000 to 5 million) [Act CLXIII of 2009 § 11(1)]. For a person making an unfounded claim, the sanction may be between HUF 50,000 and 300,000 (a falsely disclosing organisation can receive a penalty stretching from HUF 200,000 to 1 million). Furthermore, echoing its American forerunner, § 16(1) of the 2009 Act states that 'if the Authority imposed a fine due to a failure to fulfil the requirement of a fair procedure, the Authority's president may award the discloser 10% of the fine'. As can be discerned from the quote above, § 4 of the law intended to establish a Public Procurement and Advocacy Authority (according to the preamble, to increase efficiency in combating corruption), but this never materialised.

### 3 Developments in the 2010s

Primarily because of the legal guarantee it offers, it is necessary to highlight Article XXV of the Fundamental Law of Hungary, according to which '[e]veryone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power'.

The current legal environment was created by *Act CLXV of 2013 on Complaints and Public Interest Disclosures* ('the complaint law'), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors.

According to the definition in § 1(3), a disclosure 'calls attention to a circumstance, the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal'. The public interest disclosure must be evaluated within thirty days [complaint law, § 2(1)].

Moreover, the general Explanatory Memorandum – in addition to referring to the above-quoted passage from the Fundamental Law – also notes that '[a] characteristic of the new regulation is that it supports anti-corruption measures in the private sector in addition to those in the public sector, and thus it allows organisations to formulate distinct procedures for handling disclosures and to enter into agency contracts with lawyers for the receipt of disclosures (discloser protection lawyer):<sup>52</sup> The goal of this legal institution is for 'the principal (typically a business organisation) to engage the discloser protection lawyer within a tripartite legal relationship to receive, in its name, disclosures relating to the principal, either from its employees or external partners' (detailed Explanatory Memorandum).

A similarly novel solution is the creation of *whistleblowing systems* sketched out in §§ 13–16, in connection with which the law 'records the most important guarantees for the operation of the system (finality, entry into a data protection register, the prohibition on processing special personal data, the requirements for terminating data handling, notification of employees, and containment of misuse). That legal persons in a contractual relationship with

<sup>52</sup> For more on this, see Papp D. Gábor, 'A közérdekű bejelentő védelme' (2013) 52 (4) *Ügyvédek Lapja* 23–27.

the employer (subcontractors, suppliers) can also make reports in the whistleblowing system is an important requirement, as this aids the more comprehensive information of management' (detailed Explanatory Memorandum). What is more, § 14(6) decrees that 'persons having a legitimate interest in making a whistleblower report or in remedying the conduct concerned' may also make reports.

## V Significant Theoretical and Practical Issues in Whistleblowing

In this section, we will highlight the most notable characteristics that must be considered during the legal regulation of whistleblowing and the creation of whistleblowing systems. Our primary aim is not to evaluate the Hungarian legal environment, however, but to present common questions within a broader perspective.

### 1 Who Can Blow the Whistle?

The first obvious question which may arise is *who* is entitled to make a disclosure. According to the main rule, natural persons (or the representatives of legal persons) employed or in other employment-oriented legal relationships with the company have standing. Thus, according to general opinion, a personal qualification is necessary. In addition to the above-referenced § 14(6), a clause which expands the category of qualified persons, it may also be possible to make an exception based on *chronology*: On the basis of an overriding interest, it is possible for a person previously employed by the company to disclose, too, although his or her legal relationship might have been terminated already at the time of the disclosure.<sup>53</sup>

### 2 The Object of Whistleblowing

Dividing whistleblowing according to its object is primarily based on whether the misconduct to be disclosed is legally or morally objectionable. If the issue in question happens to be unlawful, it must be decided whether the given activity or omission violates or compromises criminal law rules or, perhaps, another field of law (e.g. regulatory offences). According to the correct position, which we already quoted, public interest disclosures may also play a role in the previously-mentioned cases, as well as in civil law-related detriments such as negligence or violations of personal rights (e.g. those concerning reputation). Nonetheless, the most common forms of misconduct pertain to malfeasance in connection with financially valuable data. The future of whistleblowing will, increasingly, lie in criminality of this nature.<sup>54</sup>

<sup>53</sup> In the subject's Hungarian literature, this is explicitly referred to by Sente Zoltán, 'A bennfentes informátorok (whistleblower-ek) alkalmazásának lehetőségei a korrupcióellenes küzdelemben' (2010) 2 (1) Közigazgatástudományi Közlöny 19–20.

<sup>54</sup> Callahan, Dworkin, Lewis (n 40) 903–904.

### 3 The Areas of Whistleblowing

The establishment of a whistleblowing system, as demonstrated by the effective Hungarian legal environment, can occur within both the private or public sector. In connection with the latter, the only criterion that must be noted is that such a system, due to parallelism, may sometimes conflict with disciplinary regulations in a given field, hence special attention must be paid to harmonisation.<sup>55</sup> This can be particularly relevant in policing.<sup>56</sup>

### 4 The Direction of Disclosure

When speaking of the direction of disclosure, we intend to differentiate between whether it should occur internally, within the company's own regime, or if it is to be targeted towards an external forum. Academic literature indicates that both solutions can have drawbacks. If the only available option is external whistleblowing, this can easily turn into fertile ground for retaliation against the discloser. On the other hand, if the opportunity is exclusively external, it can serve as a path for a disappointed employee's vendetta, perhaps after failing to receive a much-anticipated promotion. This can result in a damaged reputation, which is an essential factor in determining a company's competitiveness.<sup>57</sup> Keeping this in mind, our position is that a combination of internal and external whistleblowing may be the most effective solution. The Hungarian complaint law is thus especially forward-thinking in its introduction of a 'middle man', the discloser protection lawyer.

### 5 Is a Criminal Complaint Mandatory?

If the internal investigation conducted as a result of whistleblowing yields suspicions of a crime, the question arises whether the company has a *duty to make a criminal complaint*. § 16(3) of the complaint law states a fairly clear rule pertaining to this point: 'If the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements shall be taken to ensure that the case is reported to the police.' Our attitude in relation to this solution is highly sceptical. Although § 171(1) of Act XIX of 1998 on Criminal Procedure states that '[a]nyone may lodge a complaint concerning a criminal offence,' the main rule in Hungary's system of criminal law is that an absolute duty to this effect only exists under exceptional circumstances. Consequently, establishing this duty in connection with misconduct of *any severity* hardly seems justified. On our part, to increase the efficiency of investigations, *we would endorse legislative amendments that would allow exceptions from the ex officio principle by considering it a factor against prosecution*

<sup>55</sup> Cf. e.g. Act CXCV of 2011 on Public Officials §§ 155–159.

<sup>56</sup> E.g. chapter 15 of Act XLII of 2015 on the Service Status of Professional Members of Law Enforcement Agencies (*Hszt.*)

<sup>57</sup> King (n 36) 1483.

*if a lesser non-violent offence was uncovered through an employer's whistleblowing system, if it can be handled 'in-house,' and if a criminal procedure in connection with the matter does not serve a pressing social interest.* It should be noted that the timeliness of criminal proceedings would also improve if, for example, a small-scale workplace embezzlement did not necessarily warrant the use of the state's punitive powers.

## 6 Protecting and Countering the Whistleblower

The complaint law already states in its preamble that the protection of public interest disclosers must be ensured as much as possible. Furthermore, § 11 includes the guarantee that all measures disadvantageous for the whistleblower and arising as a result of the disclosure will be unlawful (notwithstanding cases of bad faith), even if they would otherwise be legal. § 12(3) extends forms of assistance contained in Act LXXX of 2003 on Legal Aid to whistleblowers as well.

It must be noted that § 257 of Act IV of 1978 (the previous criminal code) criminalised the initiation of any disadvantageous measures against a person making a public interest disclosure up until 31 January 2013 (the offence of 'persecution of a public interest discloser'). This act is now only a regulatory offence (as per § 206/A of Act II of 2012 on Regulatory Offences, Regulatory Offences' Procedure and the Regulatory Offence Registry System). Determining which field of law should criminalise an act dangerous to a given society is fundamentally a legislative prerogative. Instead of undertaking such an endeavour, our position is that it is efficiency which must be increased in relation to both criminal and regulatory offences. Perusing the anonymised decisions available from the judiciary's database, we were only able to find a single case where judicial proceedings have been carried through to completion due to persecution of a public interest discloser, and that case ended in an acquittal.<sup>58</sup> This ascertains that procedural efficiency must somehow be increased.

## 7 Incentivizing the Whistleblower

This is a widespread solution in English-speaking countries, and, as we have seen, Hungarian lawmakers have also toyed with the idea of introducing whistleblower rewards in 2009, thus providing motivation for disclosures.<sup>59</sup> Due to the present circumstances in Hungary, however, the introduction of such a system will presumably be delayed – at least until

<sup>58</sup> The procedure was started based on a substitute legal action at the Csongrád City Court, and it was concluded on 20 January 2009 with an acquittal contained in decision 2.B.94/2008/10. When this verdict was appealed, the Csongrád County Court upheld it in decision 1.Bf.96/2009/2, delivered on 18 March 2009. When the appellant turned to the Supreme Court, the highest court in the land maintained both rulings from Csongrád on March 18, 2010.

<sup>59</sup> For the latest American solutions, see Kathryn Hastings, 'Keeping Whistleblowers Quiet: Addressing Employer Agreements To Discourage Whistleblowing' (2015) 90 (2) Tulane Law Review 495–527, 497–500.

whistleblowing regimes are so common and developed that it can be assumed that the majority of claims are authentic reports of abuse and not simply venal and baseless allegations.

## 8 Abusing Whistleblowing

To conclude this section, we may declare that a position which would not only support penalising courses of action against whistleblowers (either with tools meant for felonious or petty offences) but would also create the possibility – if a *sui generis* case is established and in addition to liability for damages – of sanctioning bad-faith whistleblowers involved in severe instances of abuse, would be a respectable one to hold.

## VI Summary and Recommendations

Our present study offered guidance on how to counter corporate wrongdoing more effectively. In this instance, we gave a detailed description of whistleblowing, a form of reporting corporate wrongdoing. While we could not cover all of the phenomenon's aspects, we set out to give a general but thorough overview of the issue. Finally, we must attempt, as completely as possible, to answer our initial question: How can systems reporting and exploring corporate wrongdoing be made more effective?

1. Our position is that the proposition, which states that at least some companies must be *legally required* to set up and run whistleblowing systems, needs to be considered and debated carefully. It is possible that a threshold could be established based on revenue or the number of employees, and the establishment of a system could be mandated once this threshold is reached. Another workable approach would be to compel it for all businesses that do not have SME status.<sup>60</sup>

2. It is also worth considering making certain *benefits* conditional on the establishment of control systems, such as tax breaks (e.g. on corporate and dividend tax) or more lenient legal consequences if wrongdoing committed to the company's benefit (or in its name) is uncovered.

3. Contemplating the popularization of disclosure and *best practices from the United States or Western Europe* seems inevitable. Even the best-constructed whistleblowing system will remain ineffective if it is not used by employees.

4. To provide legal guarantees, it is necessary to prescribe in law an internal regulatory requirement relating to internal investigations.<sup>61</sup>

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<sup>60</sup> SMEs are micro, small and medium-sized enterprises. Support for their development is detailed in § 2 of Act XXXIV of 2004.

<sup>61</sup> E.g. in a manner analogous with § 24(3) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.



5. Furthermore, we recommend that if an internal investigation leads to suspicions of illegal activity, *making a criminal complaint should not be generally mandatory*. In practice, it is often the difficulties associated with criminal proceedings (witness duty, legal and travel costs) that deter corporate leadership from establishing a whistleblowing system. The desired goal of legal policy would be advanced if managements could decide freely on whether to report certain crimes – though, naturally, such liberties would solely exist in relation to non-violent offences and only below a certain monetary threshold. Nonetheless, such a measure would increase the number of companies operating control mechanisms, and these companies would be more likely to communicate the regime’s usefulness to their employees.

6. Today, the rules of criminal law and procedure allow for more exceptions from the principle of *ex officio*. Keeping this in mind, it would not be unreasonable to suggest that punishment for certain low-value financial misdeeds by an employee at the expense of the company should be *conditional* on a criminal complaint being made by the company.<sup>62</sup> For example, it would be practically convenient for both companies and the authorities to avoid prosecuting a minor embezzlement case uncovered by an internal investigation to which an employee confessed and for which he or she perhaps even already given recompense.

7. Finally, our stance is that the key to all problems arising in connection with whistleblowing systems is *the individual*. As such, it is useful in order to increase awareness and develop conscious employee behaviours to have annually recurring and mandatory training sessions, as these can provide up-to-date information on the current legal environment and continuously-changing corporate mechanisms.

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<sup>62</sup> For a high number of crimes, this possibility would be automatically precluded due to the communal nature of the legal object. Such would be the case for the corruption offences.