

# Whistleblowing without borders: the risks and rewards of transnational whistleblowing networks

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# Cross-border whistleblowing

- Examples:
- a worker may go directly to a person in a state other than where their employment contract is based.
- Information derived from a disclosure may be passed across national boundaries by authorities in one jurisdiction to authorities in another.
- The Wikileaks effect: Information may be disclosed on the internet, on a site hosted in a jurisdiction different to that inhabited by the whistleblower, and this information may be accessed by a person in a third State or multiple states.
- The Snowden effect: Information may be disclosed to traditional media outlets based in different jurisdictions. The concerns may engage and impact on multiple jurisdictions.

# The risks

- Information is being shared by regulatory agencies but is not being tracked.
- PIDA is limited and jurisdictionally: does not protect workers unless they have a UK employment contract.
- Worker unlikely to raise concerns if the regulators in question have a reputation for being ineffective or they are unlikely to be protected.
- Either way the concern will not be addressed leading to potentially detrimental consequences.

# The Rewards

- Pro-active responses reduce risk.
  - See: Savage & Hyde, The response to whistleblowing by regulators: a practical perspective Legal Studies [2014]
- Increased regulatory efficiency.
  - Regulators with oversight of organisations operating across jurisdictional boundaries should have the ability to deal with matters cross-border.

# Protection by the beneficiary jurisdiction

- Inadequacy of the worker's domestic provisions or complete lack of protection
- United States arguably leads the way on this: Foreign Corrupt Practices Act, False Claims Act but offers no protection for pre-detriment/ dismissal.
- Motivation could be two-fold:
  - Paternal: assisting workers in developing countries (for example) where there is a clear incentive to stop corruption.
  - Beneficiary state wants to protect its citizens/ trade/ business or other relationships.

# Protection by the regulatory agency?

- Current position in the UK suggests that regulators could and should do more.
- Regulatory agencies such as ACRC in South Korea are much more 'hands on.'
- Should these regulators offer protection and also punish the offenders?
  - Problem is jurisdictional reach.
  - Extradition is uncertain (particularly outside EU where EAW does not reach).
  - Foreign courts do not always uphold court orders from different jurisdictions (for example US courts have refused Norwich Pharmacal orders to disclose the identity of a wrongdoer in cases involving internet communications and publication outside of the home jurisdiction)

# Protection by organisations with contractual agreements

- Could this provide part of the solution for private sector matters at least in the interim?
- Many UK businesses (for example) have contracts with suppliers of goods and services abroad.
- Incentive for recipient business to act as failure to do so may result in at best, an impact on business reputation, at worse, serious loss of life or injury.
- Could this breach the terms of the contract and lead to penalties? Provides an incentive for an organisation in the other jurisdiction to treat the whistleblower well and to rectify the concern.
- We are moving more towards contractual recognition of whistleblowers (e.g. NHS in the UK) – could this be the next step?

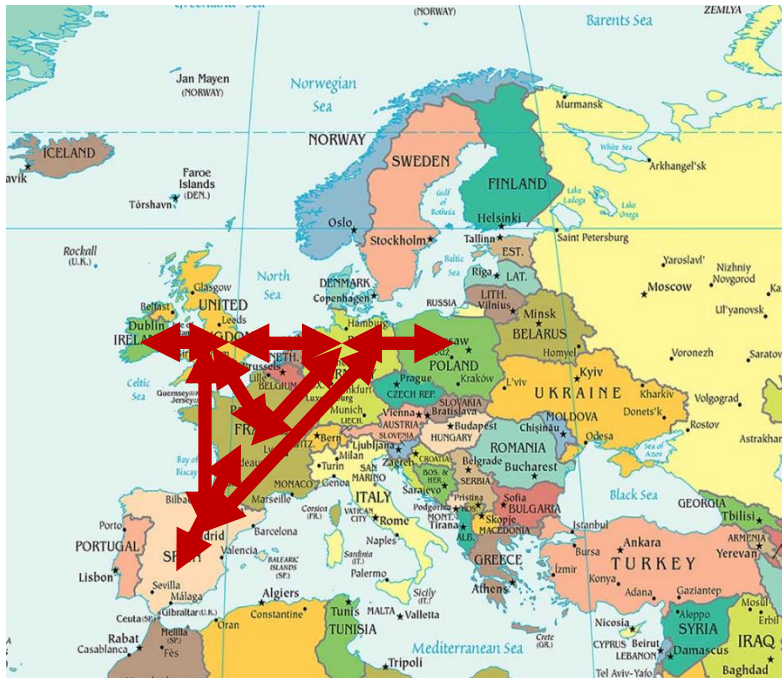
# Protection by international legal instruments

- ECtHR: *Guja v Moldova*, *Bucur and Toma v Romania*, *Heinisch v Germany*, *Rubins v Latvia*.
  - ECHR needs to be incorporated into domestic law (or at least sufficiently recognised).
  - Even with this – there are no guarantees (based on UK Employment Tribunal approach).
- EU – Charter for Fundamental Rights enhances protection.
- Bilateral agreements?
- New multilateral agreements (facilitated by international organisations)?



# Information sharing

- Information transferred to those best placed to use it.
- Either ad hoc or in accordance with set procedures.
- Either through a formal or informal process.



# Information sharing

- Can learn/ build on current examples of sharing: Europol and Interpol, THETIS, PRUM.
- Data protection and confidentiality – barriers which need to be effectively overcome.
- Technological barriers – file formats; metadata; hardware incompatibility.
- There is a need for shared terminology:
  - This is problematic: in the UK, domestic regulators (both local and national) fail to use the same systems or terminology (Hyde and Savage Local Authority Handling of Freedom of Information Requests: Lessons from a research project, [2013] 19 2 Web Journal of Current Legal Issues).
- Language

# Information sharing

- Standardisation through:
  - Memoranda of Understanding
  - Shared Information Technologies
  - EU Action to Standardise Information Shared
  - Bilateral and/or Multilateral Agreements, particularly governing data protection aspects

# Conclusion

- Information sharing is currently too 'ad hoc' in key areas of safety such as aviation.
- Rewards can far outweigh the risks but effective information sharing must be backed up by effective whistleblowing protections.
- Cross-border cases present particular problems for the protection of whistleblowers and for ensuring that concerns are addressed.

# What's next?

- **SLSA funded project: Sharing Information about Unsafe Transportation: Mapping International Networks**
- 1. What is the legal framework (national; supra-national (particularly EU); and international (e.g. through treaties or international organisations)) that governs the sharing of information between transportation regulators?
- 2. What are the policies and procedures that govern the sharing of information between transportation regulators?
- 3. How is information shared in practice between transportation regulators?

# Thank you

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