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Whistleblowing Around The World

- A Comparative Analysis of Whistleblowing in 23 Countries -

I. Introduction

Whistleblowing has become an omnipresent topic during the last decade, touching on almost every field of the law. Yet whistleblowing is much more than a theme of legal interest. It is an issue that raises the attention of the broader public. The stories of Julien Assange, Bradley (now Chelsea) Manning and Edward Snowden first hit the front pages of newspapers around the globe and then led to a political aftermath. Notwithstanding the popularity of the topic, whistleblowing also raises several legal questions that have not yet been answered properly in every jurisdiction. The aim of the conference and of this report is to allow researchers, judges and legislators around the world to learn from each other by comparing different approaches to whistleblowing and especially by presenting different legal solutions to real life problems that are basically the same everywhere on our planet. Comparative analysis may thus prove to be the “Vorrat an Lösungen” (stock of solutions) that German legal scholar and writer Ernst Zitelmann saw in it in 1900.1

A global comparison of different approaches to whistleblowing can be achieved successfully only in a team, as no single person is able to gather in-depth knowledge of more than twenty jurisdictions within a reasonable period of time. Therefore, we asked leading experts on whistleblowing from jurisdictions around the world to kindly help us in our task. At this point, we would above all like to express our gratitude to all contributors for their quantitatively and qualitatively impressing replies.

Before we start our survey, we would like to outline on our methodology: Firstly, we sent a questionnaire of about 20 questions to the national experts. The structure of the questionnaire and the questions we asked are basically the same as the subheadings of this report. The exact wording and structure of our questionnaire can be derived from the tabula we attached to this

1 Zitelmann, Deutsche Juristen-Zeitung 1900, p. 329, 330 (right column).
report. Secondly, our task was to categorize the answers received to make them comparable. Therefore, we prepared the said tabula. It contains our questions and the answers we received. To allow for comparability, we did not take into consideration too much detail but tried to categorize the contributions. For instance, we used the term “good faith requirement” for limitations to whistleblower protection that stem from either a whistleblower making allegations erroneously or his\(^2\) motivation. We are perfectly aware that this categorization is quite imprecise and that the jurisdictions surveyed find quite different solutions to these legal challenges. However, we feel that this was the only way to achieve comparability at all. We tried to give more precise information on the solutions various jurisdictions opted for in this report. Also, at least some of the country reports we received are going to be published in a volume. Readers who are interested in the details of the solution a jurisdiction found for a certain problem will hopefully be satisfied there.

In this report, we will at first take a look at the status quo of whistleblowing in the various jurisdictions (see below at II.). Afterwards, we will commit ourselves to the questions who is protected as a whistleblower (see below at III.), what kind of behaviour is protected (see below at IV.) and what the level of protection offered is (see below at V.). A short summary concludes (see below at VI.).

II. Whistleblowing: A well-known phenomenon not yet fully understood

1. Professional coverage of whistleblowing

Whistleblowing is a well-known phenomenon in all the jurisdictions we surveyed. It has also been the topic of international consultations in relatively recent times, particularly by the United Nations, the Organisation for Economic Cooperation and Development, the G-20, the International Chamber of Commerce, the Council of Europe, the Organisation for Security and Cooperation in Europe and the International Labour Organisation.\(^3\) Interest in the topic is

\(^{2}\) To improve legibility, we opted to use the masculine term only, although whistleblowers of course can be female or of another (third) sex (as recognized e.g. in Australia, Germany and India) as well.

massively gaining ground around the world. Several comparative legal analyses are already available. This development was originally triggered by the global fight against corruption in the wake of the early 2000s recession and particularly the US-American Sarbanes-Oxley Act, but attention increased in recent times due to the disclosures made by Edward Snowden. He revealed a global-scale intrusion into the privacy of citizens by secret services in a scale unheard of and virtually unimaginable before. On this canvas, the professional discussion of whistleblowing has become much more sophisticated in the last couple of years in many countries.

It comes hardly as a surprise that countries having special legislation on whistleblowing in force for quite a while now, such as Canada, the Netherlands, the UK or the USA, also feature a notable body of case law and literature on the topic. Exceptions are Japan and South Korea: Although Japan may pride itself of a very sophisticated piece of legislation since 2004, neither jurisprudence nor commentators have paid much attention to whistleblowing to date. Similarly, in South Korea two acts are in force since 2008 and 2011, respectively. Nevertheless, there is still only a manageable amount of case-law and literature on the topic.

On the other hand, professional coverage of whistleblowing has become much more intense in countries that were historically not much interested in the topic. Examples for this development are Austria, Belgium, the Czech Republic (discussing legislative proposals from about 2012 onwards), France (which established new rules on whistleblowing in 2013), Germany (discussing the topic since the late 1990s and more intensely after several legislative proposals were made in 2009 and again in 2012), Italy and Malta (which enacted new rules on whistleblowing in 2013). Nonetheless, whistleblowing is not yet fully understood and there is not yet an international consensus on what whistleblowing exactly is and how it should be treated.

2. The legal basis for the protection of whistleblowers


While in some countries special legislation on the protection of whistleblowers is in force, other countries do not know any legal protection of whistleblowers at all. In some countries, protection is granted by means of administrative procedures, while others rely heavily on the protection granted by the courts. The Netherlands take yet another approach in the private sector by relying on a non-binding code of conduct setting best practices for employers.

One of the most sophisticated acts on the protection of whistleblowers still is without doubt the Public Interest Disclosure Act, enacted by the UK in 1998. This act covers the public sector as well as the private sector. It contains detailed rules on what a whistleblower is allowed to report, how to report and whom to report to. The act also protects whistleblowers against unfair dismissal and other forms of detriment. Another very sophisticated statute is the Japanese Whistleblower Protection Act of 2004, resembling the British archetype in many ways, but going beyond it in some respect (e.g. the allocation of the burden of proof). Malta also established a high level of protection by enacting the Protection of the Whistleblower Act in 2013. This act also covers the public and the private sector. However, experience with the act is limited as it is still so new. South Korea has the Protection of Public Interest Reporters Act in force since 2011 (another act applying to the public sector is in force since 2008), which as well resembles the UK act in many ways. The UK act also has been the blueprint for special legislation in force in the Netherlands since 2001 in the public sector.

Special legislation also is in force in Austria, Belgium, Canada, France, Germany, Italy, Romania, Singapore, Slovenia, South Korea and the USA. The scope of whistleblower protection legislation differs in these jurisdictions. A number of countries protect whistleblowers by means of special statutes in the public sector only. This includes Italy, the Netherlands, Romania and, in principle, Belgium and Canada. However, regional laws in Belgium (Flanders) and Canada (Manitoba) cover the private sector as well.

Several other countries do not draw a separation line between the public and the private sector but protect whistleblowers in certain situations only. France is a good example for this approach. Art. 1161 Code du travail (Labour Code) protects employees blowing the whistle. The act does not differentiate between employees employed in the private or in the public sector. Since 2013, French law additionally covers whistleblowing in the context of the protection of the environment as well as reports concerning a conflict of public interests. Similar legislation exists in Austria and Germany: Austria protects whistleblowers in the
public sector (§ 53a Beamten-Dienstrechtsgesetz [Public Servants Act]) and persons reporting violations of laws protecting the environment (§ 9b Umweltinformationsgesetz [Environmental Information Act]). Germany protects whistleblowers in the public sector (e.g. § 67 (2) Nr. 3 Bundesbeamtengesetz [Federal Public Servants Act]), persons reporting breaches of work place security standards (§ 17 (2) Arbeitsschutzgesetz [Work Place Security Act]) and has whistleblower protection laws in force in public health care (§§ 81a, 137d, 197a Sozialgesetzbuch 5 [Social Security Code 5]). In the USA, a piecemeal legislation on the protection of whistleblowers is in force, covering areas such as capital markets (Sarbanes-Oxley Act, Dodd-Frank Act), health services and consumer products. Although the USA established one of the first modern laws on the protection of whistleblowers, the False Claims Act of 1863, there is no general law on the protection of whistleblowers in force yet. However, the piecemeal legislation in force in the USA is extensive. Singapore also features more than a dozen rules protecting whistleblowers in certain situations. In Slovenia, whistleblower protection legislation is part of an act on the prevention of corruption. Similar legislation is prevalent in Cyprus and in the public sector in South Korea.

In almost all the jurisdictions we surveyed, whistleblowers are protected by general laws to a certain extent. Often whistleblowing is perceived as behaviour falling into the scope of the fundamental right of freedom of expression. This right is guaranteed by the Universal Declaration of Human Rights (Art. 19) as well as by the Charter of Fundamental Rights of the European Union (Art. 11), the European Convention on Human Rights (Art. 10) and by many constitutions. However, almost all jurisdictions surveyed balance this right against the legitimate protection of public interests or business secrets. Whistleblowers are often bound by a contractual or statutory duty of loyalty which limits their right to blow the whistle, as it obliges them to confidentiality to a certain extent. Some jurisdictions additionally protect whistleblowers by means of the fundamental right to equality (e.g. Poland).

In parts of Europe, whistleblowing is regulated by statutes on data protection as well. These statutes usually strike a balance between the right of the accused person to be informed of the source of information relating to them and the interest of the whistleblower to have his identity kept secret. This kind of regulation is known in the Czech Republic, Finland, France, Germany and Italy. It should be existent in other Member States of the EU as well, as the data
protection legislation in these countries is based on the Data Protection Directive of the EU\(^5\) that other Member States also have to implement according to Art. 288 (3) of the Treaty on Functioning of the European Union (TFEU).

The same applies to antidiscrimination legislation in the EU. According to the rapporteurs, several Member States protect whistleblowers reporting discrimination by means of domestic antidiscrimination legislation (e.g. France, UK). Rules of this kind should be prevalent in all of the Member States, as all of them have to implement the EU Directives on antidiscrimination. The Directives allow discriminated persons to complain to the employer about discrimination. They prohibit the employer to make use of any kind of retaliation following the complaint against the person complaining or persons supporting that person.\(^6\)

This mechanism can easily be qualified as a special kind of whistleblower protection in the field of antidiscrimination legislation.

In the fields of the prevention of money laundering, the protection of health and safety at work and of the environment, there are also EU Directives obliging certain persons to blow the whistle (see below at IV.6.).

In some countries, however, whistleblowers are primarily protected by administrative procedures. For instance, Brazil does not have special legislation on the protection of whistleblowers in force, but employees can report to the Labour Attorney’s Office, which protects employees and can take action against employers in form of administrative fines or lawsuits. In France, the Commission Nationale de l’Informatique et des Libertés (CNIL) – the national data protection authority – issued several administrative decisions governing whistleblowing.\(^7\) This action was triggered by the requirement of Section 301 (4) of the US-American Sarbanes-Oxley Act that subsidiaries of companies listed in the USA have to allow for anonymous whistleblowing by their employees. The CNIL decided that anonymous whistleblowing is permissible with respect to certain breaches of the law only and that several other conditions have to be met to ensure that such a system is compatible with data protection law. This point of view was later, at least in principle, endorsed by the French

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\(^{5}\) Directive 95/46/EC.


Cour de cassation (Supreme Court). 8 In these French proceedings, data protection law turned out to be an ambiguous instrument, however: Although aiming at a protection of whistleblowers on the one hand, the CNIL also had to take into consideration the legitimate interests of the persons accused. Although it managed to strike a balance accepted by the Cour de cassation (Supreme Court), the outcome is highly problematic for subsidiary companies of companies being subject to the Sarbanes-Oxley Act. The situation in Italy seems to be very similar.

The strong position of the Cour de cassation (Supreme Court) in the regulation of whistleblowing is not an exemption, but rather the rule: The courts generally play an important role in the protection of whistleblowers. Jurisdictions featuring special legislation on whistleblowing usually also have a substantial body of case-law interpreting the statutes. The UK is a good example for this. 9 Also in Japan, it was the courts that established whistleblower protection at first by means of general rules before the legislator took action in 2004. However, the existence of special legislation and supplementary case-law is not necessarily to the benefit of the whistleblower: In the USA, courts have shown a tendency to restrict the rights of whistleblowers by interpreting the legal bases of whistleblower protection restrictively. 10 The legislator therefore extended the scope of the relevant acts repeatedly to counterbalance this unwillingness of the courts to grant protection.

In jurisdictions not having special whistleblower protection in force, two patterns can be discerned: In most jurisdictions of this kind, very little or virtually no case-law on whistleblowing seems to exist. This finding is to be treated with some caution, however, as whistleblowing is not always and everywhere given the same meaning and sometimes whistleblowing is not identified as such, e.g. in dismissal cases. On the other hand, case-law is the bedrock of whistleblower protection in some jurisdictions not featuring special legislation on whistleblower protection or knowing special legislation of limited scope only.

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8 Cour de cassation (France), No. 08-17191, Judgement (Chambre sociale) of 8 December 2009.
This seems to be the case e.g. in Austria, Canada (before special laws entered into force), Croatia, France, Germany and Italy. In Austria, courts balance the right to freedom of expression and the duty of loyalty of employees in dismissal cases. Before various acts on whistleblower protection entered into force in Canada, the Supreme Court held that an employee was allowed to blow the whistle “up the ladder”, i.e. that he was allowed to report the issue to his immediate superior. In another case, the court struck a balance between the right to freedom of expression and the duty of loyalty of public sector employees. In France, the Cour de cassation (Supreme Court) issued a judgement on a decision of the CNIL on anonymous whistleblowing. In this case, a French subsidiary of a company that was listed in the USA and that was thus subject to the Sarbanes-Oxley Act had implemented a whistleblowing system allowing for anonymous reports. The French subsidiary based the system on a decision of the CNIL that allowed whistleblowers to report, amongst other violations of the law, insider trading and infringements of antidiscrimination legislation.

The Cour de cassation held that such a system was in principle compatible with French law but that the scope of the system had to be limited to auditing, financial reporting and corruption. A similar development can be observed in Italy, leading to calls for an amendment of data protection legislation in 2009. In Croatia as well as in Germany, judgements of the European Court of Human Rights (ECtHR) played an important role in the development of whistleblower protection:

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  Balenović v. Croatia, the applicant in 2000 alleged to have found out that her former employer, the national oil company of Croatia, lost about 20 million Euros a year to fraudulent haulage providers who transported petrol from refineries to petrol stations on behalf of the company. Moreover, she claimed to have discovered that the company would be able to make an additional profit of about 35 million Euros a year by running its own fleet of road tankers. On 19 January 2001, she reported these facts to her immediate superior. One day later the company issued a public call for tenders for haulage services. In reaction to this, the applicant sent a letter to the general director of the company, repeating her allegations. When she did not receive any

11 Supreme Court (Canada), No. 30090, Case Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, Judgement of 24 November 2005.
12 Supreme Court (Canada), No. 17451, Case Fraser v. Public Service Staff Relations Board, Judgement of 10 December 1985.
14 Cour de cassation (France), No. 08-17191, Judgement (Chambre sociale) of 8 December 2009.
reply, she complained to the chairman of the supervisory board. The chairman met her and listened to her allegations but did not do anything to improve the situation. In April 2001, a newspaper published a series of articles on the issue. The applicant was quoted in these articles, accusing some of the managers of the company of corruption and nepotism. Shortly after these articles had been published, the applicant was summarily dismissed. The courts of Croatia held that the dismissal was justified as the applicant had acted contrary to the interest of the employer, was not under a civic duty to report crimes and that she had violated internal rules of the employer concerning communication with the media. In May 2001, the applicant filed a criminal complaint with some of the managers of the company. However, she claimed in the proceedings at the ECtHR to have informed the police of the facts of the case as early as in February 2001. The applicant argued that Croatia had violated her rights under Articles 9 (freedom of thought), 10 (freedom of expression) and 14 (right to non-discrimination) as guaranteed by the European Convention on Human Rights (ECHR). The ECtHR held that whistleblowing was covered by the right to freedom of expression only. In assessing whether the applicant had suffered a violation of that right, the court found that the Croatian courts pursued legitimate aims by confirming the dismissal as lawful, namely the protection of the reputation and the rights of others (i.e. the managers and the company). The ECtHR then considered whether the dismissal was necessary in a democratic society, which is required by Article 10 ECHR to justify an interference with the right to freedom of expression. The court held that “the applicant's freedom of expression, in particular her right to publicise her criticism of the business policy of the national oil company, as well as to impart information on alleged irregularities within the company, and, more importantly, the right of the public to receive that information, must be weighed against the requirements of the protection of the reputation and the rights of others…” The ECtHR stresses that “that Article 10 [ECHR] does not guarantee wholly unrestricted freedom of expression and that the exercise of this freedom carries with it ‘duties and responsibilities’. Therefore, whoever exercises that freedom owes ‘duties and responsibilities’, the scope of which depends on his or her situation, the (technical) means he or she uses and the authenticity of the information disclosed to the public.” Assessing the facts of the case in the light of these parameters, the court concluded that the dismissal was not disproportionate to the legitimate aim pursued and thus
could be regarded as being necessary in a democratic society. The complaint therefore was held inadmissible.\textsuperscript{15}

- In\textit{ Heinisch v. Germany}, the applicant had been working as a geriatric nurse for her former employer, a state-owned company offering health care services. As an employee, she was working in a geriatric nursing home where the patients generally depended on special assistance. In 2002 and 2003, a supervisory authority, acting on behalf of the public health care system, detected serious shortcomings in the care provided as well as inadequate documentation of care, and accordingly threatened to terminate the service agreement with the applicant's employer. In 2003 and 2004, the applicant and her colleagues regularly indicated to the management of the employer that they were overburdened on account of staff shortages and therefore had difficulties carrying out their duties. They specified the deficiencies in the care provided and also mentioned that services were not properly documented. By the end of 2004, the applicant fell ill due to overwork and consulted a lawyer. The legal counsel wrote to the management of the employer, claiming that due to a lack of staff, the basic hygienic care of the patients could no longer be guaranteed for and that the management and the employees were risking criminal responsibility. The management rejected these accusations. In reaction to that statement, the lawyer lodged a criminal complaint against the management of the employer, also to avoid criminal responsibility of the applicant, claiming that the employer knowingly failed to provide the high-quality care announced in its advertisements and hence did not provide the services paid for (i.e. committed fraud) and was putting the patients at risk. In January 2005, the public prosecutor's office discontinued the preliminary investigations against the employer. Two weeks later, the employer dismissed the applicant, on account of her repeated illness. The applicant reacted by contacting her friends and her trade union. They issued a leaflet demanding the revocation of the dismissal. The leaflet also informed of the facts reported above. One of the leaflets came to the knowledge of the employer who only then learned that a criminal complaint had been lodged against him. In February 2005, after hearing the works council and the applicant, the employer dismissed her without notice on suspicion of having initiated the production and dissemination of the leaflet. A new leaflet was

\textsuperscript{15}ECtHR, No. 28369/07, Case Balenović v. Croatia, Judgement (Chamber) of 30 September 2010.
subsequently issued reporting of this dismissal. Moreover, the whole situation was reported in a TV programme and in two articles published in different newspapers. Meanwhile, the public prosecutor’s office had resumed preliminary investigations at the applicant’s request. These investigations were again discontinued some months later. The applicant sought protection against the dismissals at the labour courts. The first instance held that the dismissal without notice had not been justified as the leaflet – the content of which was attributed to the applicant – was covered by her right to freedom of expression and did not amount to a breach of her duties under the employment contract. However, the appellate court as well as the Bundesarbeitsgericht (Federal Labour Court) and the Bundesverfassungsgericht (Federal Constitutional Court) held that the dismissal without notice had been justified, since the applicant had based the criminal complaints on facts that she could not prove. The applicant’s reaction also was held to be disproportionate as she had not attempted to have the allegations investigated internally and as she had provoked a public discussion of the issue. The ECtHR held that there had been an infringement of the applicant’s right to freedom of expression but that this infringement had been prescribed by Section 626 Bürgerliches Gesetzbuch (Civil Code), i.e. the rule allowing for employees to be summarily dismissed. Nevertheless, the ECtHR concluded that the infringement had not been necessary in a democratic society: On the one hand, employees were under a duty of loyalty, reserve and discretion. According to the court, a disclosure therefore should be made in the first place to the person’s superior or other competent authority or body. Only as a last resort, information could be disclosed to the public. On the other hand, the court considered whether the applicant had had any other effective means of remedying the wrongdoing which she intended to uncover. The ECtHR also weighed the authenticity of the information disclosed. A state was allowed to answer proportionately to defamatory accusations made in bad faith. Other factors to be included were the potential damage suffered by the employer if the information was revealed and the potential damage suffered by third parties or the public if it was not revealed. Finally, the motivation of the whistleblower had to be taken into account. Striking a balance between these factors, the court finally held that the interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”.16

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16 ECtHR, No. 28274/08, Case Heinisch v. Germany, Judgement (Chamber) of 21 July 2011.
The *Heinisch* case triggered a political discussion in Germany on whether to protect whistleblowers by a special statute or not. Although all political parties agreed that whistleblowing could be a valuable instrument to fight corruption and to prevent harm to people and although the opposition parties made legislative proposals, no steps were taken by the governing coalition in the end. The German experience is similar to that of the Czech Republic, where legislative proposals were made in 2012 but also did not yield a statute. Also in Singapore, proposals to regulate whistleblowing were not pursued to the end.

### III. Who is protected?

The first question legislators willing to improve their legal systems have to answer is who should profit of a statute, i.e. who should be protected as a whistleblower and whether a person should also be protected as a supporter of a whistleblower or as a witness proving his allegations.

#### 1. Who qualifies as a potential whistleblower?

There are huge differences between the jurisdictions we surveyed as to who qualifies as a whistleblower. These differences take their root in the legal basis of whistleblowing in the various jurisdictions. Legal systems that protect whistleblowers by fundamental rights – such as the right to freedom of expression – tend to protect everyone, at least in principle. However, as whistleblowing in many jurisdictions is governed first and foremost by labour legislation, employees are the group of persons who are mainly protected in most countries (e.g. Austria, Croatia, Estonia, Finland, France, Germany, Italy and Poland). But even in countries featuring special legislation, the personal scope of whistleblower protection varies. Some countries protect public sector employees and civil servants by means of special legislation only (e.g. Canada [with broader legislation in force in some provinces], Cyprus, Italy, the Netherlands, Romania), while employees in the private sector are not included or covered by general rules only. Legislation in the UK protects “workers”, which includes a broader range of persons than the term “employee” (e.g. agency workers, self-employed persons). A similar broad definition of “employee” is in force in Malta, including former employees and volunteers. Japan takes an intermediate stance, as it features special rules for employees only, but extends protection to agency workers in the enterprise of the host
employer insofar as they are allowed to report to him rather than to their contractual employer. As far as special legislation is applicable, some countries such as Singapore, Slovenia and the USA do not have any restrictions in force concerning the person that blows the whistle. South Korea even covers anyone by its 2011 act that at the same time covers a very broad range of situations.

2. The protection of supporters

Whistleblowers do not always operate on a stand-alone basis. Sometimes they have to cooperate with others to be able to make their disclosures. Whistleblowers working in a team for instance may have to retrieve information from colleagues to verify and/or prove a wrongdoing. Whistleblowers also may hesitate to disclose information and may need exhortation by others to pluck up their courage and finally blow the whistle. The *Heinisch* case reported above is a good example, as it was the friends of the whistleblower and her trade union who issued a leaflet that finally persuaded the whistleblower to insist on further investigations by the public prosecutor and to disclose information through the media. If supporters of a potential whistleblower are not protected, he may shy from a disclosure because he fears a detriment for his relatives or friends. Whistleblowing also might be suppressed on a preliminary stage because information a potential whistleblower requires to fully understand the facts of a case and to recognise a wrongdoing might never reach him.

Although the need for a protection of supporters of whistleblowers is rather obvious, legal response so far has been chastening. Hardly any of the jurisdictions we surveyed have special provisions for the protection of supporters of whistleblowers in force. A notable exemption is Belgium, which features a special rule for supporters of whistleblowers in the public sector. In some jurisdictions (Brazil, Canada, Poland, private sector in Belgium) supporters of whistleblowers have to rely on the rather wobbly ground of any general rule applicable in their specific case. All the other jurisdictions we surveyed do not seem to deal with the problem specifically at all, with the exception of EU Member States having to implement antidiscrimination Directives that also protect supporters of persons reporting discrimination against retaliation by the employer (see above at II.2.) and South Korea that treats supporters and witnesses in principle just like the whistleblower.

3. The protection of witnesses
This is all the more surprising as most of the jurisdictions surveyed protect persons who affirm a whistleblower’s allegations, at least if this happens in court trials. If a person confirms the allegations disclosed by whistleblowing in a court trial (i.e. as a witness), this person is protected by the general laws protecting witnesses in most countries. However, this also reveals a gap in the protection of witnesses: Hardly any jurisdiction we surveyed expressively protects witnesses giving testimony not in a court trial, but in proceedings outside such a trial, e.g. an internal investigation conducted by the employer. Notable exemptions are – again – Belgium, which protects witnesses in the public sector, and South Korea, that protects supporters in general (see above at III.2.). France also expressively protects witnesses in this situation, at least if they give testimony on certain wrongdoings, including environmental and health and safety issues, corruption, or a conflict of interest in the public sector (Article 1132-3 Code du travail [Labour Code]). Canada also has special legislation in force for witnesses, at least in the public sector. Some provinces extend this protection to the private sector as well.

IV. What kind of behaviour is protected?

Once a legislator has established whom he wants to protect as a whistleblower, he needs to ask himself what kind of behaviour shall be protected. Again, the jurisdictions surveyed vary widely with respect to the facts a whistleblower may disclose and the circumstance under which a disclosure qualifies as a disclosure protected by the law.

1. Should anonymous whistleblowing be permitted?

An especially ambiguous instrument is anonymous whistleblowing. Comparative analyses conducted earlier\(^\text{17}\) have led to the conclusion that anonymous whistleblowing is considered by some to offer particularly strong protection for whistleblowers, while others perceive it as an invitation to denunciators. Critics also point out that the protection of whistleblowers by anonymity is far from perfect as their identity could be revealed by the facts they disclose, which may be known to one person or very few people only. If the identity of the whistleblower is revealed, he also cannot be protected against retaliation properly, as he

cannot prove that it was actually him who blew the whistle and that he is facing detriment in retaliation for the disclosure he made. The Article 29 Working Party – an assembly of data protection authorities from the Member States of the EU based on Article 29 of the Data Protection Directive – also identifies obstacles to anonymous whistleblowing based on data protection legislation.\(^\text{18}\)

Irrespective of these arguments, most of the countries we surveyed allow anonymous whistleblowing or at least do not prohibit it (Austria, Belgium, Brazil, Cyprus, Czech Republic, France, Germany, Italy, Romania, Singapore, Slovenia, UK, USA). However, many of these countries restrict anonymous reporting in some respect: In Austria, anonymous whistleblowing is not permitted or prohibited by law, but it is used by the public prosecutor’s office since 2013. In Belgium, anonymous reporting is excluded in certain proceedings including an ombudsman, but it seems to be allowed in other situations. In France, anonymous whistleblowing is not forbidden, but according to the CNIL, anonymous whistleblowing may not be promoted, a company must encourage whistleblowers to reveal their identity and information gathered anonymously must be treated with special care, i.e. suspiciousness. In Germany, anonymous whistleblowing is not prohibited, but an anonymous whistleblower will not be protected by the fundamental right to freedom of expression according to the *Bundesarbeitsgericht* (Federal Labour Court),\(^\text{19}\) as in the judges’ eyes, expressing one’s opinion necessarily includes revealing one’s identity. In Romania, only disclosures of persons identifiable shall be inquired. However, exceptions apply to the labour inspection, which has to investigate facts disclosed anonymously as well. On the other hand, Section 301 (4) *Sarbanes-Oxley Act* (USA) expressively obliges companies to enable anonymous whistleblowing.

In some countries, the legal assessment of anonymous whistleblowing seems to be somewhat opaque (Croatia, Estonia, Japan, the Netherlands, Poland, Portugal). In Japan, anonymous whistleblowing is not expressively prohibited. However, an employer who has received a complaint is obliged to give the whistleblower within 20 days information on the measures he has taken to stop the reported wrongdoing. This implies that the employer needs to be able to

\(^\text{18}\) Article 29 Working Party, Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime ("WP 117"), p. 11.

\(^\text{19}\) *Bundesarbeitsgericht*, No. 2 AZR 235/02, Judgement (Second Senate) of 3 July 2003, para. 34.
identify the whistleblower. In the Netherlands, anonymous whistleblowing is not expressly permitted or prohibited. However, it is accepted in practice in certain situations.

Some countries deny anonymous whistleblowers special protection (Canada, Malta, South Korea). In Canada, anonymous whistleblowing is seen as a breach of the whistleblower’s duty to loyalty. In Malta, the law point-blank denies anonymous whistleblowers protection. Nevertheless, a unit receiving an anonymous report is allowed to inquire the facts of the case. In South Korea, the authorities acting as addressees of a report are allowed not to inquire into anonymous reports.

2. Does internal reporting prevail?

Needs a whistleblower to make use of internal reporting before he is allowed to report to third parties? The answer given to this question varies in the jurisdictions we surveyed: Some countries oblige the whistleblower expressively to report internally or at least such a duty is likely to be necessary to be recognised and protected as a whistleblower by the courts (Cyprus, Estonia, Malta). Some countries differentiate between whistleblowing in the public sector and in the private sector. It is not uncommon for jurisdictions to oblige public sector employees and civil servants to report internally, while no such rule exists for private sector employees. Regulations of this kind are to be found in Belgium, Canada, Croatia, Singapore and Slovenia. Some countries require whistleblowers to report internally at first in principle, but allow external whistleblowing in exceptional cases (Austria, Germany, Japan, UK). In the UK, the law stipulates that exceptions may apply for instance if the whistleblower has to fear retaliation, if evidence is likely to be destroyed following an internal complaint or if an earlier internal reporting did not yield any effect. A very similar rule exists in Japan, where whistleblowers may also report to external instances directly if the life of a person is at danger. The Netherlands also feature rules comparable to those in force in Japan and the UK. The ECtHR seems to endorse a similar view in the Heinisch case. French law does not expressively require whistleblowers to report internally before appealing to third parties, but it encourages them to do so. Finally, there are countries that in principle do not require internal reporting (Brazil, Italy, South Korea, USA, also Romania, but in this country, work rules may oblige employees to report internally at first and the same seems to apply to Italy).
Especially controversial is whistleblowing via the media. Whistleblowers like Edward Snowden were not alone criticised for the disclosures they made, but also for the way they made these disclosures. If information is made public via the media, it is impossible to bring the genie back into the bottle – even for the whistleblower. An uncontrollable escalation of the situation then becomes likely. On the other hand, whistleblowing via the media is extremely efficient as there is no way for officials or superiors to put a lid on a wrongdoing. In striking a balance between these considerations, only very few countries expressively ban whistleblowing via the media (Malta and Belgium, the latter only in the public sector). Some countries do not restrict whistleblowing via the media (Brazil, Croatia, Romania, also Slovenia, unless information is classified), while others acknowledge whistleblowing via the media in severe cases only (Canada, Germany, Finland, Japan, Poland, UK, also the Netherlands under the best practices applicable in the private sector and possibly also Italy, although the courts seem to take a generous position in this country towards whistleblowing via the media). The latter also seems to be the point of view endorsed by the ECtHR in the Heinisch case. In some countries the legality of whistleblowing via the media is unclear (Austria, France, Portugal, USA). Nevertheless, in some of these countries it seems to be accepted de facto at least (Cyprus, Estonia, Singapore). In South Korea, whistleblowing via the media is not prohibited, but the protection of the whistleblower will not be granted by special legislation but by general rules of labour law – if applicable – only.

3. Who bears the risk of misapprehension?

Another challenge legislators and judges around the world have to overcome is in how far a person should be protected as a whistleblower if the allegations turn out to be untrue. Two approaches to this problem can be identified in the various jurisdictions: Some countries deny whistleblowers protection if their allegations turn out to be false, irrespective of whether they acted in good faith, i.e. believed the facts to be true (Croatia, Portugal, probably also Belgium, although it precludes only “dishonesty” from whistleblowing in the public sector, indicating that the whistleblower must report false information intentionally). In Singapore, a whistleblower has to make proper inquiries to ensure that the information he reports is correct. Although such a rather restrictive regime is capable to prevent an abuse of whistleblowing systems and to guarantee a high quality of the information reported, most countries do not opt for this solution.
In most countries, whistleblowers are subject to what we wish to call a “good faith requirement”, i.e. they have to make their allegations in good faith (Austria, Brazil, Canada, Germany, France, Italy, Japan, Malta, the Netherlands, Poland, Romania, Slovenia, South Korea, UK, USA). But what does “good faith” exactly mean? On the one hand, good faith may relate to the motivation of the whistleblower, the relevance of which we are going to investigate in the next chapter (see below at IV.4.). In the context of misapprehension, a whistleblower lacks good faith if he reports false information although he should have known better. This does not generally preclude the erroneous reporting of false information from the scope of whistleblower protection, but it obliges potential whistleblowers to consider whether their allegations actually are correct. The difficulty now is to determine what a whistleblower must do to yield protection. The jurisdictions we surveyed use different criteria to draw a separation line, but the effect is comparable: In Brazil and Germany for instance, a whistleblower must not act intentionally (i.e. give false information away knowingly), but he may lose protection even if he only acts reckless or thoughtless. Similarly, a whistleblower loses protection in Italy if he gives away false information because of gross negligence on his part. Japan and the UK require the whistleblower to act in a “reasonable belief” that the information he relays is actually true. South Korean legislation takes a similar position, although mere negligence seems to suffice to deny a whistleblower protection in this country. The ECtHR in the Heinisch case somewhat cryptic held that a whistleblower “who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.”

4. Is the motivation of the whistleblower relevant?

Closely linked with, yet distinguishable from the “good faith requirement” is the motivation of the whistleblower. If a whistleblower tells the truth – not because he wants to stop a wrongdoing, but to harm the perpetrator for personal reasons (e.g. envy or hate) – should the law protect him? Only very few countries declare the motivation of a whistleblower as being irrelevant for the level of protection granted (Austria, Brazil and Belgium [public sector]).

Most of the other jurisdictions surveyed take the motivation of a whistleblower into consideration. In many jurisdictions, the motivation of a whistleblower is considered in

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20 ECtHR, No. 28274/08, Case Heinisch v. Germany, Judgement (Chamber) of 21 July 2011, para. 67.
establishing whether he acted in “good faith” (Belgium [private sector], Canada, Croatia, France, Italy, Japan, Malta, Poland, Portugal, Romania, Slovenia, Singapore, South Korea, UK). Motives recognised as harmful to whistleblower protection are, for instance, a striving for personal gain (Malta, South Korea), revenge (Portugal) or maliciousness (Singapore). Italy prohibits insulting comments and disclosure of information with the sole aim to harm the employer, but it protects satire as part of the right to freedom of expression.

However, the rule that the motivation of the whistleblower is to be taken into consideration is far from being self-evident: An argument can be made that it is irrelevant for which reason a whistleblower acts, as long as the information he discloses is correct or at least he was justly convinced that it is correct. The motivation of a whistleblower therefore can be seen as a barrier to abuse and denunciation at best, as a means to prevent the establishment of an Orwellian society. Nevertheless, it is hardly convincing to declare the motivation of a whistleblower to be the “predominant criterion” in judging whether a whistleblower deserves protection or not, as for instance the German Bundesarbeitsgericht (Federal Labour Court) did in 2003.21

5. What kind of information may a whistleblower report?

Whistleblowing always verges on denunciation, i.e. the passing of information not to end a wrongdoing or a danger but to harm someone else. One way to limit the risk of such an abuse of whistleblowing systems is to limit the scope of such a system to certain wrongdoings or certain aspects of life.

Many of the jurisdictions we surveyed endorse such an approach. Three categories of jurisdictions can be identified:

- Countries belonging to the first group limit whistleblowing to illegal conduct (Brazil, Malta, Poland, Romania, Slovenia [covering “corruption”, corruption being interpreted as any breach of the law], probably also Croatia and Cyprus, both covering “corruption”, as well as Japan, that attaches a list of acts to the Whistleblower Protection Act the breaches of which a whistleblower may report [the list names about 400 acts at the time of the preparation of this report]). This means that only

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21 Bundesarbeitsgericht, No. 2 AZR 235/02, Judgement (Second Senate) of 3 July 2003, para. 29.
information relating to breaches of a law may be reported. Whistleblowers reporting unethical, but not illegal conduct are not protected in these jurisdictions.

- Countries belonging to the second group allow whistleblowers to report certain breaches of the law and in addition to that also dangers that are not necessarily breaking any rules yet (France, the Netherlands, UK, USA). In France, for instance, the CNIL allows whistleblowers to report illegal conduct from the fields of accounting, finance, corruption and discrimination. Contrariwise, it does not accept whistleblowing systems that cover any illegal activity. However, certain groups of persons (works council, staff delegates) are also entitled by law to report dangers to health and safety or the environment. In the UK, the law protects whistleblowing with respect to breaches of the law, a miscarriage of justice, danger to the health and safety of an individual or the environment and the destruction of evidence relating to any of these issues. Similar regulations exist in the USA, depending on which act is applicable. Italy also seems to belong to this group of countries.

- Countries belonging to the third group do not only allow whistleblowers to report illegal activity or dangers, but also to relay information on unethical behaviour or breaches of codes of conduct. Canada as an example allows the reporting of any illegal activity and of dangers to life, health and the environment. However, it also allows whistleblowers to report a misuse of public funds (which certainly is a nuisance to every taxpayer but not necessarily illegal) and even severe breaches of codes of conduct, which usually do not have the quality and binding force of a law created by the state. Singapore has legislation in force that is similar to that of Canada, but it also allows whistleblowers to report unethical conduct.

Another strategy to make an abuse of whistleblowing systems harder is to impose temporal restrictions to the facts that a whistleblower may report. Incidents that happened in the past, do not have any effects in the present and are unlikely to happen again do not necessarily deserve the attention of internal investigators, public prosecutors or even the media. Nevertheless, only very few jurisdictions make use of this regulatory technique. Most of the jurisdictions we surveyed do not impose any temporal limits on the whistleblower at all (Austria, Brazil, Germany, France, Italy, Malta, Singapore, UK, probably also Japan and the Netherlands). But there are exceptions: In Croatia, a whistleblower does not have the right to relay information on past incidents unlikely to happen again. In Canada, a whistleblower reporting mere dangers that were imminent in the past would possibly not qualify for
protection. Also, in Canada, information on a reprisal of employees has to be disclosed within 60 days after the day on which the whistleblower knew, or ought to have known, that the reprisal was taken (Section 19.1 (2) Public Servants Disclosure Protection Act).

6. Is there an obligation to blow the whistle?

Protecting whistleblowers is the first step to a reporting-friendly legal environment. Obliging persons to blow the whistle means leaping ahead. There are only a handful of countries amongst those we surveyed that oblige persons to blow the whistle and all of them limit such an obligation to a rather limited number of persons or irregularities.

This does not really come as a surprise: Blowing the whistle often is a decision that requires careful consideration, a lot of courage and also a pure conscience. As there are still many wrongdoings that pass undiscovered or are discovered by other means than whistleblowing, one may assume that a lot of people refrain from blowing the whistle although they could do so. The causes for this may lie in a fear of retaliation, but sometimes people also have personal reasons not to report an incident. Especially in some continental European countries, whistleblowing is still perceived as denunciation, even if the behaviour that is reported is actually illegal. This is especially true for Germany, which had its fair share of state supported denunciation in the 20th century: First in National-Socialist Germany, later in the German Democratic Republic. However, this phenomenon is by no means limited to Germany, as a line from the French literature proves: “En France, dénonciation renvoie à Occupation”22 (“In France, denunciation evokes memories of occupation [by Germany, implemented by means of the Vichy-regime]”).

Bearing this in mind, there are still some countries obliging certain persons to blow the whistle. In Italy, for instance, certain civil servants are obliged to report criminal offences. In the private sector, Italy also allows employers to oblige employees to blow the whistle who are performing controlling tasks. Certain anti-fraud and anti-mafia rules also exempt entities featuring legal personality from liability for criminal offences committed by their senior managers if there is a model in force obliging personnel to report irregularities to the body supervising the managers and if a failure to comply with this duty to blow the whistle can be

sanctioned. Cyprus, Estonia, the Netherlands and South Korea take a similar approach, obliging personnel working in the public sector to report corruption. Japan orders public servants to report crime related to their office and similar rules exist in Austria as well as Estonia. Germany obliges anyone to report to the responsible authorities intentions of others to commit a serious crime (e.g. murder) that becomes known to him. Noncompliance with the obligation constitutes a crime in itself. A similar rule is in force in Estonia, the Netherlands and, although restricted to the most serious crimes against peace, humanity, state defence etc., in Poland.

An obligation to blow the whistle is prevalent throughout the EU in specific situations, as a duty to report health and safety at work irregularities is to be found in a Directive of the EU.\(^23\) According to that rule, every employee has a duty to report any serious danger to and any severe irregularity concerning health and safety at work to the employer. Another Directive of the EU obliges certain persons conducting or counselling financial transactions to report to certain authorities if they suspect customers of laundering money.\(^24\) A person putting the environment at an immediate danger of pollution is also obliged to inform the responsible authorities immediately so that they can take the necessary measures to prevent a damage under yet another EU Directive.\(^25\) As the Member States of the EU are obliged to implement these rules according to Art. 288 (3) TFEU, similar obligations should exist in the domestic law of every Member State.

V. What is the level of protection offered?

In the preceding chapters, we sketched out who is protected by whistleblowing statutes and what kind of behaviour qualifies as protected disclosure. In the following chapter, we will discuss the level of protection offered. From a whistleblowers’ point of view, a high level of protection is desirable of course. But also from an institutional perspective, the effectiveness of a whistleblowing system depends heavily on the level of protection granted, as a low level of protection will discourage whistleblowers and therefore will render the system ineffective.

1. The kind of reprisal whistleblowers are protected against

\(^{23}\) Art. 13 (2) (d) Directive 89/391/EEC. In Canada, certain employees are also obliged to report breaches of health and safety at work standards.

\(^{24}\) Artt. 20 ff. Directive 2005/60/EC.

\(^{25}\) Art. 5 (2) Directive 2004/35/EC.
A first distinction can be made according to what kind of reprisal whistleblowers are protected against. In most jurisdictions (Belgium, Canada, Finland, France, Germany, Italy, Japan, Malta, the Netherlands, Poland, Romania, Slovenia, South Korea, UK, USA, possibly also Brazil), whistleblowers are protected against any kind of detriment, including discrimination, dismissal or any other disadvantage inflicted upon them because they reported a wrongdoing. Some jurisdictions differentiate, however: Cyprus protects whistleblowers in the public sector as just described, but it is unclear whether whistleblowers in the private sector are protected against reprisal in this country by means of civil law. They are protected by means of criminal law however, as an employer sanctioning a whistleblower may commit a crime. In Singapore, protection is granted against unfair treatment. Nevertheless, there does not seem to be a specific protection against dismissal in force in the Asian city-state. Some countries (Croatia, Estonia) lacking special legislation on whistleblowing protect whistleblowers against unfair dismissal only via the general rules applicable. A special case is Austria: In this country, protection by the courts so far has been granted against summary dismissals only. Given the Austrian system of dismissal protection, it is possible that a whistleblower is not protected against a retaliatory ordinary dismissal at all, subjecting him to the arbitrariness of his employer.

2. The burden of proof in dismissal cases

Even the best theoretical protection against reprisal is of no use to a whistleblower if he cannot obtain legal protection in practice due to the distribution of the burden of proof, especially in a dismissal case. A whistleblower will hardly ever be able to establish positively in a court trial the he has been dismissed because he blew the whistle. Nevertheless, some jurisdictions (Brazil [allowing for a reverse of the onus of proof], Poland, possibly also the Netherlands) attribute the burden of proof to the whistleblower seeking protection.

Contrariwise, most jurisdictions put the employer for the reasons stated above under an onus of proof to establish that he did actually not dismiss a whistleblower in an act of retaliation for blowing the whistle (Canada, Croatia, Cyprus, Finland, France, Portugal, Romania, Singapore, Slovenia, South Korea, possibly also Italy). Some countries allow a reverse of the onus of proof though: In the UK for instance, an employer usually will put forward in a court trial that he dismissed the whistleblower for reasons not related to the disclosure of
information. The whistleblower then will have to challenge this claim. A similar rule is in force in Germany. In Malta, every party will have to prove whatever she alleges, which in civil actions seems to be a principle of procedure law in most jurisdictions.

Japan takes a very sophisticated approach, differentiating between the addressees of a report: If a whistleblower reports internally, he will only have to prove that he acted having a reasonable belief of a wrongdoing. If a whistleblower reports externally, he will have to prove that all the requirements of the Whistleblower Protection Act are fulfilled.

An intricate case is Belgium: In this country, it is possible for an ombudsman to start an inquiry and the result of this inquiry will mainly depend on what proof he can find. In Flanders the burden of proof has been shifted under certain conditions to the employer by a special statue enacted in 2012. Outside the scope of this act, protection is especially strong for civil servants, as employers vis-à-vis them have to give a reason for any measures they take. A civil servant therefore should be able to establish quite easily that he was retaliated against for a disclosure he made – unless the employer gives false reasons, of course. However, this provision does neither cover contractual workers in the public sector nor employees in the private sector. In the private sector, the burden of proof in dismissal cases depends on whether the dismissal is without notice (onus of proof lies with the employer) or with notice (onus of proof depends on whether the whistleblower is a blue collar or a white collar worker). However, statutes protecting all employees against bullying may lead to a reverse in the burden of proof as well.

3. Whistleblowing and collective action

Potential whistleblowers operating on a stand-alone basis can be more easily discouraged from whistleblowing than people who can rely on the support of a collective. Collectives of this kind can e.g. be trade unions, consumer protection groups or even collectives forming specifically for the purpose of supporting whistleblowing (such as Commissie Adviespunt Klokkenluiders [Whistleblower Advice Centre] in the Netherlands or Public Concern at Work in the UK). Collective action needs not necessarily take the form of a suit filed on behalf of a whistleblower or even in the form of a class action. Collective action also would be e.g. supporting a whistleblower financially or by advising him. While many countries we surveyed allow trade unions, antidiscrimination organisations or employee representatives to
support employees in court trials or even to sue on their behalf, none seem to have special laws in force yet that would improve the collective supporting of whistleblowers.

4. Financial incentives for whistleblowers?

While collective action may help whistleblowers to find the courage to blow the whistle knowing that they can rely on others, another promising way to improve whistleblowing is to set financial incentives for whistleblowers. This is not a new concept: The US-American False Claims Act relied entirely on the financial interest of the whistleblower as early as 1863. If certain conditions are met, this act allows anyone to charge a suit on behalf of the state against contractors committing fraud at the cost of the public. To encourage suits to the benefit of the public, the claimant is allowed to keep a part of the sum he is able to retrieve from the fraudulent contractor. However, the US took another step ahead in setting financial incentives for whistleblowers in 2010. In this year, the Dodd-Frank-Act was signed. Section 922 Dodd-Frank Act allows the Securities and Exchange Commission (SEC) to award to a whistleblower who discloses information that leads to an SEC enforcement action 10-30% of the sum the SEC recovers as sanctions, provided that the sanction exceeds US-$ 1 million. The act led to some spectacular disclosures. Well-remembered is the case of Bradley Birkenfeld: In 2009, he disclosed that the UBS, one of the giant Swiss banks, helped US citizens with tax evasion. The UBS faced a fine amounting to US-$ 780 million. In 2012, Birkenfeld received an award amounting to US-$ 104 million.

European countries in general are less willing to reward whistleblowers financially. Legislators in Europe seem to stress the downside of financial incentives: They do have the potential to encourage people to act solely for personal gain. Thus, they are able to create an atmosphere of mistrust, surveillance and denunciation that evokes memories of some of the gloomiest periods in European history. Nevertheless, the European Commission in 2011 decided to follow the example of the US. In Article 29 (2) of its proposal of a “Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse)”26 (MAR), the Commission suggested that the Member States of the EU should be allowed to set financial incentives for whistleblowers in the fields covered by the proposed regulation, i.e. financial services and markets. Some time ago, the MAR has been

26 COM(2011)651.
approved by the European Parliament without amendments concerning Art. 29 (2). It is now pending in the Council of the European Union, waiting for approval by the Member States.

Although there are no mandatory financial incentives prescribed in the jurisdictions of the Member States of the EU yet and the MAR is still waiting for approval, there are some Member States allowing employers to oblige personnel to blow the whistle contractually (Czech Republic, France, Romania). The UK is the most “daring” when it comes to financial incentives for whistleblowers so far, as even some public services make use of this instrument already.

However, a different form of incentive is made use of in practice within the EU: Especially in the field of antitrust regulation, whistleblowers revealing cartels they were involved in themselves may expect to be treated as key witnesses and spared from at least the harshest sanctions. It comes as no surprise that the European Commission has a whistleblower system for this kind of disclosures available.27 In Austria, a similar rule is to be found in the Strafprozessordnung (Code of Criminal Procedure) for certain crimes the whistleblower is involved in as well.

Asian countries, on the other hand, seem to be even more reluctant to reward whistleblowers financially than European ones: Singapore, although being one of the hotspots of the global financial industry, does not know financial rewards for people reporting irregularities, notwithstanding that it has several acts on whistleblowing in force and therefore can be considered as featuring a quite advanced jurisdiction in this respect. Japanese legislation does neither allow nor prohibit financial incentives, but in practice, they do not seem to be used. An exemption is South Korea: Financial rewards are generally not permitted. However, they may be awarded by the responsible authorities to whistleblowers who prevented damage to public property or whose report helped to recover such property on the basis of the special legislation in force.

VI. Summary

27 Available at http://ec.europa.eu/competition/cartels/leniency/leniency.html (as at 8 June 2014).
Our comparison has shown that although whistleblowing is treated quite differently around the world in detail, some general patterns can be identified that are prevalent in many of the jurisdictions we surveyed. This refers to the personal scope of rules on whistleblower protection as well as to the facts that may be reported and the proceedings these facts may be reported in. Although the jurisdictions we surveyed feature a lot of differences in that respect, they also share a lot of commonalities. This does not really come as a surprise, as people around the globe are in the end – notwithstanding cultural peculiarities – just people and therefore everywhere quite similar. Therefore, the legal challenges to legislators and judges are quite similar everywhere in the world as well.

However, our report also reveals that the level of development of the legal order in the countries we surveyed is still very different. Leading jurisdictions are the UK, Japan and South Korea, which have very sophisticated statutes on whistleblowing in force for several years now. The USA, although being probably the first nation to actively encourage whistleblowing by means of the False Claims Act of 1863, still lacks a generally applicable statute on whistleblowing, although the USA do have detailed acts in force covering many fields of life. Many EU jurisdictions made progress in establishing modern rules on whistleblower protection during the last years. This includes, amongst others, Italy, Malta and Romania. However, improvement is still possible and desirable in many other EU Member States. This is especially true for Germany. The German legislator has repeatedly proven to be unwilling or incapable of tackling the problem, leaving this difficult task to the courts. The courts, however, are not the right instance to regulate whistleblowing in a coherent manner, as they only have to decide the individual case at hand.

Finally, there is room for improvement even in the most advanced jurisdictions: Firstly, the protection of supporters and witnesses of whistleblowers can and should be improved. Although witnesses are protected if they give testimony in court trials in most jurisdictions, they are usually not protected if interviewed in private investigations or at least the legal situation is unclear. The protection of supporters is even less reliable. A notable and encouraging exception in this respect is South Korean legislation, which may serve as an archetype for other jurisdictions. Secondly, the role of collectives in the protection of whistleblowers needs to be clarified. In none of the jurisdictions we surveyed, collectives such as trade unions, consumer protection groups or even whistleblower associations such as Public Concern At Work are properly accounted for. Although at least trade unions do have
certain rights in some jurisdictions, these rights are usually not awarded with special respect to whistleblowing, but as an acknowledgement of the role of trade unions in the field of employment in general. This situation needs to be improved, as collectives could be able to further improve the protection of whistleblowers and thus to encourage whistleblowing to the benefit of all. Thirdly, financial incentives for whistleblowers are a topic that requires attendance. The USA are leading in this respect, having centuries of experience with this regulatory technique and having refurbished it in the wake of the financial crisis by means of the *Dodd-Frank Act*. However, financial incentives for whistleblowers do have a downside as they increase the risk of denunciation for opportunistic reasons. A broad discussion of the desirability of financial incentives for whistleblowers is overdue and a clear decision needs to be made, as otherwise employers might opt for this instrument in a legal environment that is still very murky.