Criminal Law: Description and Evaluation of the Whistleblower Systems in Switzerland and the United States

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<td>Anti-Money Laundering Act (Swiss)</td>
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<td>Art.</td>
<td>Article</td>
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<tr>
<td>BBl</td>
<td>Bundesblatt (Reports of the Swiss Federal Council to the Swiss Federal Assembly)</td>
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<td>BGE</td>
<td>Bundesgerichtsentscheid (Decision from the Swiss Federal Supreme Court)</td>
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<td>BK</td>
<td>Berner Kommentar (Bernese commentary on specific Swiss laws)</td>
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<td>BPI</td>
<td>Bribe Payers Index</td>
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<tr>
<td>BSK</td>
<td>Basler Kommentar (Basle commentary on specific Swiss laws)</td>
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<td>CHF</td>
<td>Swiss Francs</td>
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<td>CFR</td>
<td>Code of Federal Regulations (US)</td>
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<td>CIA</td>
<td>Central Intelligence Agency (US)</td>
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<td>CO</td>
<td>Code of Obligations (Swiss)</td>
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<td>COSO</td>
<td>Committee of Sponsoring Organizations of the Treadway Commission</td>
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<td>CPI</td>
<td>Corruption Perceptions Index</td>
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<td>CSRA</td>
<td>Civil Service Reform Act (US)</td>
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<tr>
<td>DOJ</td>
<td>Department of Justice (US)</td>
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<td>ECHR</td>
<td>European Court on Human Rights</td>
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<td>ed.</td>
<td>edited / Editor(s)</td>
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<tr>
<td>e.g.</td>
<td>Exempli gratia (Latin, English: for example)</td>
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<tr>
<td>et al</td>
<td>Et al (Latin, English: and others)</td>
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<td>etc.</td>
<td>Et cetera (Latin, English: and so forth)</td>
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<td>f. / ff.</td>
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<tr>
<td>FBI</td>
<td>Federal Bureau of Investigation (US)</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>FDA</td>
<td>Food and Drug Administration (US)</td>
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<td>Fed.Cir.</td>
<td>United States Court of Appeals for the Federal Circuit</td>
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<td>FedPerA</td>
<td>Federal Personnel Act (Swiss)</td>
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<td>FedPerO</td>
<td>Federal Personnel Ordinance (Swiss)</td>
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<td>FFCA</td>
<td>Federal False Claims Act (US)</td>
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<td>FLRA</td>
<td>Federal Labor Relations Authority (US)</td>
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<td>GECS</td>
<td>Global Economic Crime Survey</td>
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<td>G20</td>
<td>Group of Twenty (International forum for the governments and central bank governors from 20 major economies)</td>
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<tr>
<td>H.R.</td>
<td>House of Representatives (US)</td>
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<tr>
<td>i.e.</td>
<td>Id est (Latin, English: that is)</td>
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<td>IRC</td>
<td>Internal Revenue Code (US)</td>
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<td>IRS</td>
<td>Internal Revenue Service (US)</td>
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<td>MSPB</td>
<td>Merit Systems Protection Board (US)</td>
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<td>NGO</td>
<td>Non-Governmental Organization</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OPM</td>
<td>Office of Personnel Management (US)</td>
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<td>Office of Special Counsel (US)</td>
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<td>PCAOB</td>
<td>Public Company Accounting Oversight Board (US)</td>
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<td>PSDPA</td>
<td>Public Servants Disclosure Protection Act (Canada)</td>
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<td>Pub.L.</td>
<td>Public Law (US)</td>
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<td>PWC</td>
<td>Price Waterhouse and Coopers</td>
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<td>SEA</td>
<td>Securities Exchange Act (US)</td>
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SEC  Securities and Exchange Commission (US)
SFAO  Swiss Federal Audit Office
SOX  Sarbanes Oxley Act (US)
SR  Systematische Rechtssammlung des Schweizer Bundesrechts (Systematic and official compendium of Swiss Federal Law)
Stat.  United States Statutes at Large
UBS  Formerly: Union Bank of Switzerland (ceased to be a representational abbreviation)
UK PIDA  United Kingdom Public Interest Disclosure Act (UK)
UN  United Nations
US  United States of America
USD  United States Dollars
vs.  Versus
WPA  Whistleblower Protection Act (US)
I. Introduction

Since the persistent financial crisis in Europe and throughout the rest of the world, stories of major scandals, corruption, and political and corporate wrongdoing regularly headline the news. Many of these stories were disclosed by people who reported inside information that was not intended for the public. The detection and reporting of grievances is not a new phenomenon; however, the term ‘whistleblowing’ has become widely known in recent years due to these media-relevant cases. Today, whistleblowing is not only a regular topic in the media, but is also controversially discussed in politics, legal theory, and legislation. There is a fine line between justified and unjustified whistleblowing, and the interests of employees, employers, and the public do not always converge.¹

Persons involved in whistleblowing are confronted with divergent interests. This applies first at the level of the specific organization concerned: In order to ensure proper conduct of business and to take into account ethical considerations, it is important that its shortcomings are identified. At the same time, secrecy is one of the obligations to be observed in an employment relationship. The organization has a legitimate interest that potentially damaging information is not placed outside the organization’s domain, as this is often associated with financial losses and/or legal disadvantages for the organization. On the other hand, the whistleblower has an (constitutionally protected) interest in being able to express his opinion unhindered and freely. Depending on the case, the whistleblower may also have a personal interest in protecting himself or any third party by disclosing information against infringements.²

Whistleblowers are taking a great risk in their actions. According to the motto ‘ignore the message, shoot the messenger’, they receive rarely gratitude for disclosing and reporting

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² Müller, p. 254; Botschaft über die Teilrevision des Obligationenrechts vom 20. November 2013, p. 9514.
grievances, but are, on the contrary, punished in a variety of ways. Thus, in recent years, many countries have taken steps to strengthen whistleblowers’ rights in order to protect whistleblowers from retaliation.

This paper describes and evaluates the whistleblower systems in Switzerland and the US. The analysis of the two systems shows that whistleblowing has many points of contact including labor law, criminal law, data protection law, and corporate law.

The paper is organized as follows: Chapter II provides an introduction to whistleblowing. It presents a definition and describes the characteristics and types of whistleblowing, and outlines the process and the significance of whistleblowing. Chapter II closes with a short description of whistleblowing legislation, in particular with regard to whistleblower protection, and a presentation of whistleblower best practices based on international standards. These standards are then used to evaluate the whistleblowing systems of Switzerland and the US in chapters III (Switzerland) and IV (US).

Chapter III describes and evaluates the whistleblowing system in Switzerland. The chapter starts with the facts of a famous whistleblowing case in the Canton of Zurich. After the explanation of the Swiss whistleblowing legislation, the case ruling is presented. The chapter concludes with the presentation of gaps between the Swiss whistleblowing system and international best practices.

The US whistleblowing system is described and evaluated in chapter IV. The beginning outlines the characteristics of the whistleblower case of Bradley Birkenfeld. Bradley Birkenfeld received the highest compensation ever paid out to a whistleblower. The chapter then explains US whistleblowing legislation and the court ruling of the aforementioned case. Finally, the gaps between the US whistleblowing system and international best practice standards are illustrated.

The paper ends with a summary and conclusion in chapter V.

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3 Müller, p. 252.
For the sake of simplicity, only male pronouns were used in this paper. However, all explanations apply equally to both sexes.
II. Introduction to Whistleblowing

A. Definition and Characteristics of Whistleblowing

1. Definition of Whistleblowing

The term ‘whistleblowing’ originates from the US and is generally used as a metaphor for people who do not simply accept grievances, but also call attention to them. The German language has no equivalent translation for the terms ‘whistleblowing’ or ‘whistleblower’. Instead, expressions such as ‘denunciators’ or ‘snitches’ are used, which, however, do not do justice to the original meaning because of their negative connotation.4

A widespread definition for the term whistleblowing in specialized literature is given by Near/Miceli: “The disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.”5

2. Characteristics of Whistleblowing

According to the above definition by Near/Miceli, the term whistleblowing is defined by three characteristics.

Firstly, the whistleblower must be a person of the organization or a person close to the organization. The whistleblower must therefore be an ‘insider’ with a certain proximity to the organization in question. Due to his (insider-) position, the whistleblower receives privileged access to organization-internal information and knowledge.

However, it is not necessary for the whistleblower to have the same (contractual) relationship with the organization at the time the information is obtained and the time the information is

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5 Near/Miceli, p. 4.
disclosed. The whistleblower can therefore be a current or a former insider of the organization. In addition and unlike a crown witness, the whistleblower is not a (co-) perpetrator.  

Secondly, the facts which are brought forward by the whistleblower are based on illegal, immoral, or illegitimate practices of the organization. Hence, whistleblowing comprises a broad subject area that includes violations of codified law, breaches of rules, principles, and values specified by the organization; as well as violations of professional standards and moral concepts of particular individuals and societies.

The question regarding the recipient of the message defines the third and last essential characteristic of whistleblowing. Based on the definition by Near/Miceli, one can only speak of whistleblowing, when the disclosure of the relevant information is not done over the organization’s official channel, but in another way. It is imperative that the information regarding illegal, immoral, or illegitimate practices is passed on to persons who have the required status within an organization and are actually able to influence the behavior of the organization or are able to impose sanctions and penalties.

3. Types of Whistleblowing

Whistleblowing may occur in various ways. The different forms depend on the recipient of the notification (i.e. internal or external whistleblowing), the type of disclosure (i.e. anonymous, confidential and open whistleblowing) and the imputation of the grievance (i.e. personal and impersonal whistleblowing). Each type of whistleblowing has specific advantages and disadvantages for the person disclosing the grievances and the organization concerned.

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6 Berndt/Hoppler, p. 2624.
7 Berndt/Hoppler, p. 2624.
8 Rieder, Whistleblowing als interne Risikokommunikation, p. 11.
9 Leisinger, p. 27f.
a) External and Internal Whistleblowing

External whistleblowing is the disclosure of illegal, immoral, or illegitimate practices to an external body that is not closely linked to the organization. In particular, authorities, stakeholders, professional associations, trade unions, the media, the police, or the public may be considered as external bodies.\(^{10}\)

Due to the disclosure of information to external organizations, pressure is exerted upon the company from the outside to remedy the grievances. As a result, organizations often suffer serious damage, especially negative effects on their image. However, in some cases the reporting of illegal, immoral, or illegitimate practices to an external body is indispensable, especially if the organization is aware of the unlawful situation but refrains from actions.

In the case of internal whistleblowing, illegal, immoral, or illegitimate practices are reported within the organization, but outside the usual chain of command and hierarchy levels.

Internal whistleblowing also includes the disclosure of information to organization-external individuals or companies, which are explicitly designated by the organization as a point of contact for disclosure (e.g. company attorney, external audit, ombudsman, external phone hotline, etc.).\(^{11}\)

Since the information remains within the organization, it is possible to remedy the grievances directly and without external pressure. If internal whistleblowing is applied correctly, it can be used as a kind of early warning system, which allows the organization to take targeted countermeasures. The above-described disadvantages of external whistleblowing can thus be avoided. Furthermore, internal whistleblowing has less conflict potential with regard to a breach of loyalty towards one's employer.\(^{12}\)

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\(^{10}\) Rieder, Whistleblowing als interne Risikokommunikation, p. 26-27.

\(^{11}\) Mezger, p. 7.

\(^{12}\) Weibler/Feldmann, p. 506.
b) Anonymous, Confidential and Open Whistleblowing

Regardless of whether the whistleblowing is internal or external, the information disclosure can be made anonymously, confidentially, or openly.\(^\text{13}\)

In the case of anonymous whistleblowing, the whistleblower is reporting the grievances without revealing his identity. The major advantage of anonymous whistleblowing is the protective function towards the person reporting the illegal, immoral, or illegitimate practice. However, the anonymity of the whistleblower complicates the clarification of the reported incident, since the person who disclosed the information is usually no longer available for inquiries.\(^\text{14}\) In addition, it is much easier to spread possible untruths or accuse certain people and organizations of a wrongdoing and thus damaging the reputation of the opposing parties in an anonymous environment.

In the case of confidential whistleblowing, the whistleblower will only disclose the information if the organization guarantees the confidentiality of his identity.

In the event of open whistleblowing, the whistleblower fully reveals his identity.

Concerning the credibility of the allegations communicated in the context of whistleblowing, open whistleblowing is preferred. A whistleblower with a known identity can clarify possible ambiguities and thus contribute to a rapid settlement of the incident in question.\(^\text{15}\)

c) Personal and Impersonal Whistleblowing

In the case of impersonal whistleblowing, the grievance is disclosed without naming a responsible person or organization. Personal whistleblowing explicitly exposes the person or organization responsible for the possible illegal, immoral, or illegitimate practice. Thus, personal whistleblowing personally affects other members of the organization. The differentiation between the two types of whistleblowing is important because the personal

\(^{13}\) Imbach Haumüller, p. 14.

\(^{14}\) Rieder, Whistleblowing als interne Risikokommunikation, p. 27.

\(^{15}\) Weibler/Feldmann, p. 506.
rights of the accused person or organization need to be protected. This may not be the case for impersonal whistleblowing as no responsibility can be assigned to a specific person or organization.\textsuperscript{16}

\section*{B. The Process of Whistleblowing}

After the discovery of the grievance, a certain amount of time usually elapses while the whistleblower carefully considers his potential actions and the possible consequences before finally arriving at the final act of ‘blowing the whistle’. According to Miceli/Near the process of whistleblowing is structured in five phases:

1. the triggering event;
2. the conflict;
3. the act of whistleblowing;
4. the reaction; and
5. the evaluation.\textsuperscript{17}

\subsection*{1. The Triggering Event}

Before whistleblowing takes place, an activity or omission that is perceived by at least one member of an organization to be questionable must occur. Such a triggering event might be, for example, the discovery of an internal memorandum that refers to illegal, immoral, or unethical practices by the organization.\textsuperscript{18}

\subsection*{2. The Conflict}

The second phase of the whistleblowing process follows the occurrence of a triggering event. In most cases, the potential whistleblower will not be able to remedy the grievances he discovered by himself. Hence, he must decide whether to share his knowledge with others,

\textsuperscript{16} Rieder, Whistleblowing als interne Risikokommunikation, p. 28.

\textsuperscript{17} Miceli/Near, Blowing the Whistle, p. 58ff.

\textsuperscript{18} Miceli/Near, Blowing the Whistle, p. 58.
and thus draw attention to the discovered grievances, or whether he should stay silent. Consequently, the whistleblower will collect further information and evaluate the chances, risks, costs, and benefits of either option (i.e. to disclose the information or to be silent).\textsuperscript{19}

If the whistleblower decides to blow the whistle, at least three choices must be made: whether to identify oneself, whether to report wrongdoing to someone within the organization (versus an outsider), and whether to act with others or to blow the whistle alone.\textsuperscript{20}

3. \textbf{The Act of Whistleblowing}

In the third phase, the whistleblower takes action by reporting the perceived wrongdoing to at least one party – the complaint recipient.\textsuperscript{21}

Depending on the whistleblower’s decision in the previous, second phase, the notification is made, for instance, to a superior of the whistleblower, to a higher or specially established entity in the organization, or to an external body.\textsuperscript{22}

4. \textbf{The Reaction}

Following the disclosure of the information, members of the whistleblower’s organization and outsiders who know about the complaint will react to the whistleblowing and to the whistleblower. Depending on the specific constellation, the reactions of the environment and the persons involved can vary significantly. In general, internal whistleblowing is more likely to be accepted by colleagues than reporting to external bodies.\textsuperscript{23}

\begin{flushleft}
\textsuperscript{19} Imbach Haumüller, p. 21.

\textsuperscript{20} Miceli/Near, Blowing the Whistle, p. 61.

\textsuperscript{21} Miceli/Near, Blowing the Whistle, p. 72.

\textsuperscript{22} Imbach Haumüller, p. 22.

\textsuperscript{23} Imbach Haumüller, p. 22.
\end{flushleft}
5. **The Evaluation**

In the last phase of the whistleblowing process, the whistleblower analyzes his actions and the reactions in his environment. Depending on his satisfaction or dissatisfaction with the outcome, the whistleblower makes decisions concerning future activities; if the wrongdoing was not corrected, he may make another report to take further action, or remains silent if the correctional measures were satisfactory.\(^{24}\)

C. **The Significance of Whistleblowing**

The news is filled with stories of political and corporate wrongdoing, corruption, bribery and other scandals. Many of these cases have been brought to light by people who disclosed inside information not intended to become public.

Whistleblowers are important players in national and global efforts to fight misconduct, fraud and corruption. In other words, in environments where the reporting of wrongdoing is not supported or protected, the risk of corruption, criminal offences, breaches of legal obligation, miscarriages of justice, specific dangers to public health, safety or the environment, abuse of authority, unauthorized use of public funds or property, or gross waste or mismanagement is significantly heightened.\(^{25}\)

Those who report wrongdoings often take on high personal risk – they may be blacklisted, harassed, fired, sued, arrested, threatened or, in extreme cases, assaulted or killed. In some countries, whistleblowing is even associated with treachery or espionage. By disclosing information about such grievances, whistleblowers have helped save countless lives and billions of dollars in public funds and private assets, while preventing emerging scandals and tragedies from worsening.\(^{26}\)

\(^{24}\) Miceli/Near, Blowing the Whistle, p. 88.


1. Bribery, Corruption, and Economic Crime

Bribery and corruption have a long-term corrosive impact on economic growth, equality, and the quality of a country’s governance and institutional environment. Both bribery and corruption are likely to adversely affect long-term economic growth through their impact on investments, public expenditures, taxation and human development.

They do not only affect economic development in terms of economic efficiency and growth, but also affect equal distribution of resources across the population, increase income inequalities, undermine the effectiveness of social welfare programs and the efficiency of state institutions, and ultimately result in lower levels of human development.\(^{27}\)

Economic crime costs companies not only billions of dollars, but apart from a direct financial loss, companies also suffer intangible damage: the public’s loss of trust in business in general, damage to the particular firm's reputation, loss of management time, and damage to the firm’s business relationships (which will lead again to a direct financial loss as customers look for other business partners). Moreover, economic crime also threatens the morale of the employees of the affected company.\(^{28}\)

In order to fight bribery, corruption, and economic crime, and thus to minimize the negative effects of these felonies, governments and supranational bodies have defined and implemented laws, guidelines and standards. International and independent organizations such as Transparency International, the United Nations (UN), or the Organization for Economic Co-operation and Development (OECD) monitor the dimensions and the development of these crimes (see forthcoming subchapters), give advice for improvements and inform governments, non-profit organizations and the public on their findings.

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\(^{28}\) Bussmann, p. 2.
a) Bribe Payers Index

One of the most acquainted criterions to measure the perception of bribery is Transparency International’s Bribe Payers Index (BPI).

For the latest Bribe Payers Index (2011), more than 3,000 business executives worldwide were asked by Transparency International about their views on the extent to which companies from 28 of the world’s leading economies engage in bribery when doing business abroad. The score (index) for each country is based on the views of the business executives who had come into contact with companies from that country. The 28 countries and territories in the BPI were selected based on the value of their exports, the value of their foreign direct investment outflows, and their regional significance; the index includes all G20 countries. 29

Transparency International’s BPI shows that there is no country among the 28 major economies whose companies are perceived to be wholly clean and that do not engage in bribery. 30

Switzerland ranks first together with the Netherlands with a score of 8.8 on a 10-point scale. Thus, companies from these two countries are seen as less likely to engage in bribery than the other countries ranked, but there is still room for improvement (refer to Appendix 1). Belgium, Germany, and Japan follow closely behind with a score of 8.7 (Belgium) respectively 8.6 (Germany and Japan). The US, as the world’s biggest economy, has a score of 8.1 and closes out the top ten. 31

Companies from China (6.5) and Russia (6.1) are perceived to be most likely to engage in bribery abroad.

30 Transparency International, BPI, p. 4.
31 Transparency International, BPI, p. 5.
Comparing the results over time, the index shows no significant improvement in the scores between 2008 and 2011. When looking at changes on a country-by-country basis, no country has seen a change in score of more than one point on the index.\(^{32}\)

In addition, the BPI reflects business executives’ views on the likelihood of bribes being paid by companies in 19 different business sectors. The results indicate that bribery is perceived to be common across all sectors, with no sector scoring above 7.1. Agriculture and light manufacturing are perceived to be the least bribery-prone sectors, followed by civilian aerospace and information technology. The construction sector and public works contracts rank last, as they did in 2008.\(^{33}\)

**b) Corruption Perceptions Index**

Transparency International’s Corruption Perceptions Index (CPI) is a combination of surveys and assessments of corruption, collected by a variety of reputable institutions, and is the most widely used indicator of corruption worldwide. Countries/territories are scored and ranked by expert opinions from around the world on how corrupt a country’s public sector is perceived to be.\(^{34}\)

The CPI covers perceptions of public sector corruption in 168 countries. On a scale from 0 (perceived to be highly corrupt) to 100 (perceived to be very clean), Denmark ranks first for the second year running (91 points), with North Korea and Somalia as the worst performers, scoring just 8 points each. Switzerland ranks seventh with a score of 86. The US scored 76 points and is ranked sixteenth. Overall, two-thirds of the 168 countries on the 2015 CPI scored below 50 (refer to Appendix 2). According to the results, more than 6 billion people live in a country with a serious corruption problem. In comparison to the year 2014 and

\(^{32}\) Transparency International, BPI, p. 5.


despite the fact that corruption is still rife globally, in 2015 more countries’ CPI scores improved than declined.\(^{35}\)

Top performers share key characteristics: high levels of integrity among people in power; access to budget information so that the public knows where money comes from and how it is spent; high levels of press freedom; and judiciaries that do not differentiate between rich and poor and that are truly independent from other parts of government.\(^ {36}\)

The lowest ranked countries are characterized by conflict and war, weak public institutions like the police and the judiciary, a lack of independence in the media, and poor governance.\(^ {37}\)

c) Economic Crime

According to Price Waterhouse and Coopers’ (PwC) Global Economic Crime Survey 2016 (GECS), more than a third of the 6,000 respondents have experienced economic crime in the past 24 months. For the first time since the global financial crisis of 2008/2009, the results of the GECS 2016 show that the incidence of economic crime has declined (albeit marginally, by 1 percent). However, it is possible that this small decrease is in fact masking a worrying trend: economic crime is changing significantly, but detection and controls programs are not keeping up with the pace of change. Moreover, the financial cost of each fraud is increasing.\(^{38}\)

The most pervasive economic crimes reported by the respondents to the GECS were asset misappropriation (64 percent), bribery and corruption (24 percent), procurement fraud (23 percent) and accounting fraud (18 percent). All showed a slight decrease compared to the 2014 statistics. One crime, however, has been on a steady increase everywhere since it first


\(^{38}\) Price Waterhouse and Coopers, GECS 2016, p. 8.
appeared in 2011: Cybercrime has now jumped to second place with 32 percent (refer to Appendix 3).³⁹

While the global trend of economic crime rates was steady and some regions reported lower rates of economic crime, Western Europe, the Middle East, and Africa showed significant increases in 2016 compared to the last GECS in 2014 (refer to Appendix 4).⁴⁰ In 2014, more than one in three Swiss organizations (37 percent) reported being victimized by economic crime.⁴¹ Almost the same percentage applies for US companies, where 38 percent of the companies reported being affected by economic crime.⁴²

One percent of the GECS 2016 respondents (primarily from North America and Asia-Pacific) reported losses in excess of USD 100 million, 14 percent of respondents suffered losses of more than USD 1 million and nearly a quarter (22 percent) of respondents experienced losses of between USD 100,000 and USD 1 million (refer to Appendix 5).⁴³ According to a study from KPMG, Swiss companies lost more than CHF 3,587 millions over the last five years (2012 – 2016) due to economic crime. The real figure, however, is believed to be much higher.⁴⁴ The costs of economic crime affecting companies in the United States is nearly impossible to estimate – according to the Federal Bureau of Investigation (FBI), white-collar crime alone is estimated to cost the US more than USD 300 billion annually.⁴⁵

Financial services are perceived to be the industry most threatened by economic crime (48 percent), followed by government and state-owned businesses (44 percent), the retail and consumer sector (43 percent), and the transportation and logistics sector (42 percent).⁴⁶

⁴³ Price Waterhouse and Coopers, GECS 2016, p. 11.
⁴⁴ KPMG, Fraud Barometer.
Over three quarters (76%) of the GECS respondents reported that they rely on their internal audit function for assuring compliance. 54 percent rely on management reporting, 42 percent on monitoring whistleblowing hotline reports and 40 percent on their external audit.\footnote{Price Waterhouse and Coopers, GECS 2016, p. 36.}

d) Whistleblowing as an Instrument to Counter Corruption and Economic Crime

As already stated above, whistleblowers play an essential role in exposing corruption, fraud, mismanagement, and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment and the rule of law. Thus, many governments, corporations, and other organizations have recognized the role of whistleblowing in corruption- and fraud-fighting efforts, enacted whistleblower protection laws, and put whistleblower procedures in place.\footnote{Transparency International, International Principles, p. 2-3.}

D. Whistleblowing Legislation

1. Whistleblower Protection and the Fight against Misconduct, Corruption and Fraud

The absence of effective protection can pose a dilemma for whistleblowers: They are often expected to report corruption and other crimes, but doing so can expose them to retaliation. Whistleblower protection is therefore essential to encourage the reporting of fraud, corruption, and other wrongdoing. This applies to both public and private sector environments.\footnote{OECD, G-20 Anti-Corruption Action Plan, p. 4.}

Encouraging and facilitating whistleblowing, in particular by providing clear guidance on reporting procedures and effective legal protection, can help authorities monitor compliance and detect violations of anti-corruption laws, and help businesses prevent and detect bribery and fraud in commercial transactions.\footnote{OECD, G-20 Anti-Corruption Action Plan, p. 4.}
a) **Scope of Whistleblower Protection**

(1) **Coverage of Persons Afforded Protection**

At present, most whistleblower protection laws do not apply to both public and private sector employees. While some countries expressly exclude certain categories of public sector employees from protection (for instance, those in the army or in the intelligence services), other countries subordinate public sector employees, who are engaged in particularly sensitive areas of work, to special whistleblower protection provisions. In addition, the scope of coverage of protected persons varies, and may include just public servants and permanent employees, or may be extended to a wider range of persons, including consultants, contractors, temporary employees, former employees, and volunteers.\(^{51}\)

(2) **Good Faith and Reasonable Grounds**

A principal requirement in most whistleblower protection legislation is that the disclosures be made on ‘reasonable grounds’ and in ‘good faith’.\(^{52}\) The determination as to whether a disclosure was made on reasonable grounds and in good faith is part of national legislation and courts. Under US law, for instance, the test for determining whether a purported whistleblower had a ‘reasonable belief’ is based on whether “"[...]a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government[...]"\(^{53}\) evidence the wrongdoing. South African courts have asserted that ‘good faith’ is a finding of fact: “*The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is.*”\(^{54}\) In consequence, individuals who deliberately make false disclosures should not be afforded protection. Some

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\(^{51}\) OECD, G-20 Anti-Corruption Action Plan, p. 9.

\(^{52}\) OECD, G-20 Anti-Corruption Action Plan, p. 8.


\(^{54}\) Tshishonga vs. Minister of Justice and Constitutional Development and Another (JS898/04) [2006], para 204.
laws expressly refer to this (e.g. South Korea) and impose a criminal penalty for making a false disclosure.55

(3) Subject Matter of Protected Disclosures

One of the main objectives of whistleblower protection laws is to promote and facilitate the reporting of illegal, immoral, or illegitimate practices.56 Hence, whistleblower legislation should provide a clear definition of the scope of disclosures that are afforded protection. Some countries explicitly list violations of safety and environmental laws (e.g. Japan), and some countries set minimum thresholds on the extent of the wrongdoing before whistleblower protection may be triggered (e.g. the US).57

b) Mechanisms for Protection

Whistleblower protection laws should provide comprehensive protection against retaliatory or discriminatory personnel action.58

Many whistleblowers have difficulties in proving that retaliation they receive was a result of their disclosure. Therefore, some countries lower the burden of proof whereby the employer must prove that the conduct taken against the employee is unrelated to his whistleblowing. In the US, for example, a purported whistleblower must first establish that he:

1. had a reasonable belief of misbehavior (the employee [i.e. whistleblower] does not have to be correct, but the belief must be reasonable to a disinterested observer);
2. disclosed conduct that meets a specific category of misconduct set out in the law;
3. made the disclosure of the wrongdoing to the ‘right type’ of party;
4. reported the misconduct to a person other than the wrongdoer;

56 Banisar, p. 22.
5. made a report that is either outside of the employee’s obligations and course of duties or communicated outside of normal channels; and 
6. endured a personnel sanction, the agency’s failure to take a personnel action, or the threat to take or not to take a personnel action.59

If each of these elements can be established by the whistleblower (i.e. employee), the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same action in absence of the whistleblowing.60

Further, the protection of the identity of the whistleblower by law may preserve the whistleblower from retaliatory measures and provide a strong incentive for the whistleblower to come forward. However, a number of countries exclude anonymous disclosures arguing that investigative difficulties may arise with anonymous reporting (e.g. Brazil).61

2. **Sources of Whistleblower Protections**

   a) **International Law**

   The source of whistleblower protection is established at the highest level in international law. All major international treaties concerning corruption have recognized whistleblower protection. The international legal framework against corruption requires countries to incorporate appropriate measures into their domestic legal systems to provide protection for persons who report any facts concerning acts of corruption on reasonable grounds and in good faith to the competent authorities. Moreover, several international soft law frameworks, such as the ‘OECD Recommendation on Improving Ethical Conduct in the Public Service’ or the ‘OECD Anti-bribery Recommendation’ also provide for the protection of whistleblowers. In addition, the protection of whistleblowers was also reinforced by important international jurisprudence concerning human rights law. For example, in 2008, the European Court of

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59 OECD, Committing to Effective Whistleblower Protection, p. 20-22; OECD, G-20 Anti-Corruption Action Plan, p. 11.
60 OECD, G-20 Anti-Corruption Action Plan, p. 11.
61 OECD, G-20 Anti-Corruption Action Plan, p. 11.
Human Rights ruled that the dismissal of a public servant who released unclassified documents revealing political manipulation of the judiciary system was a violation of article 10 of the European Convention of Human Rights.\textsuperscript{62}

b) Domestic Law

Legal provisions regarding whistleblower protection can be found in numerous sources of domestic law.

On the one hand, whistleblower protection can be set out in dedicated legislation, such as, for instance, the United Kingdom’s Public Interest Disclosure Act (UK PIDA) or Japan’s Whistleblower Protection Act (WPA). On the other hand, whistleblower protection may also be provided for in a country’s criminal code; for example, the Canadian Criminal Code prohibits retaliation against employees who provide information about a crime. Likewise, the United States Federal Criminal Code was amended by the Sarbanes-Oxley Act to impose a fine and/or imprisonment for retaliation against a whistleblower who provides truthful information about the commission or possible commission of any federal offence to law enforcement authorities.\textsuperscript{63}

Sectoral laws, such as anti-corruption laws, competition laws, employment laws, accounting laws, environmental protection laws, and company and securities laws, may also make provisions for whistleblower protections. Under these sources of law, protection may only be afforded for the reporting of specific offences or to specific persons. For example, the United States Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) protects whistleblowers who provide information to the Securities and Exchange Commission (SEC) relating to a possible violation of securities law that is about to occur, is ongoing, or has occurred.\textsuperscript{64}

\textsuperscript{62} OECD, Committing to Effective Whistleblower Protection, p. 20; OECD, G-20 Anti-Corruption Action Plan, p. 16-17.

\textsuperscript{63} OECD, G-20 Anti-Corruption Action Plan, p. 6.

\textsuperscript{64} OECD, Committing to Effective Whistleblower Protection, p. 21-22; OECD, G-20 Anti-Corruption Action Plan, p. 6.
Whistleblower protections for public sector employees may also be set out in specific laws. For example, Canada’s Public Servants Disclosure Protection Act (PSDPA) provides protection from reprisals for public servants who disclose wrongdoings in or relating to the public sector. In addition, public service codes of ethics and conduct may provide for whistleblower protections within the public sector.65

Thus, a wide range of sources of law may serve as the basis for providing whistleblower protections. Rather than the more piecemeal approach of sectoral laws, which often only apply to certain employees and to the disclosure of certain types of wrongdoing, the enactment of comprehensive and stand-alone legislation would contribute to ensuring legal certainty and clarity. In addition, this approach would also allow for the same rules and procedures to apply to both public and private sector employees.66

E. Whistleblowing Best Practices

1. OECD

The OECD has developed guiding principles and a compendium of best practices to provide options in various contexts for decision-makers designing and implementing whistleblower protection rules in line with the G20 Guiding Principles for Whistleblower Protection Legislation.67

The guiding principles can apply to both public and private sector whistleblower protection, and are broadly framed. To supplement these principles, and to set out more specific and technical guidance, the OECD has outlined a non-exhaustive menu of examples of best practices.68

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67 OECD, Whistleblower Protection, p. 4.
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<th>Guiding Principle</th>
<th>Example of Best Practice</th>
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| 1  | An effective institutional framework and clear legislation are in place to protect from disciplinary or discriminatory action employees who disclose on reasonable grounds and in good faith certain suspected acts of wrongdoing or corruption to competent authorities.                                                                 | • Requirement or strong encouragement for companies and organizations to implement control measures to provide for and facilitate whistleblowing (e.g. through ethics and compliance programs, internal controls, fraud risk management, distinct anti-corruption programs, etc.).
<pre><code>|                                                                                                                                                                                                                                                                                                                                                  | • Enactment of dedicated legislation in order to avoid a fragmented approach to establishing whistleblower protection and to ensure legal certainty and clarity.                                                                 |
</code></pre>
<p>| 2  | The legislation outlines the scope of protected disclosures and provides a clear definition of the persons afforded protection under the law.                                                                                                                                                                                                             | • Protected disclosures include, for example: a violation of law, rule, or regulation; an abuse of authority; a substantial and specific danger to public health or safety; gross mismanagement; a gross waste of funds; or types of wrongdoing that fall under the term ‘corruption’, as defined under domestic law.  |
|                                                                                                                                                                                                                                                                                                                                                  | • Private and public sector employees are afforded protection, including not only public servants and permanent employees, but also temporary employees, contractors, volunteers, consultants, and former employees etc.                                                                                                                                                                                                 |</p>
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<th>Guiding Principle</th>
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<td>3</td>
<td>The legislation ensures that whistleblower protection is comprehensive and robust.</td>
<td>• The confidentiality of both parties, the whistleblower and the respondent, is ensured during the complete process.</td>
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<td>• Protection from any form of retaliatory or discriminatory personnel action, as for example, demotion, dismissal or suspension and protection from any other significant change in responsibilities, duties, or working conditions.</td>
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<td>4</td>
<td>The legislation encourages the use of protective and easily accessible whistleblowing channels and clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption and other wrongdoings.</td>
<td>• Strong encouragement for organizations and companies to establish internal whistleblowing and reporting channels.</td>
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<td>• Specific reporting channels and additional safeguards for dealing with state secrets-related disclosures or national security.</td>
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<td>• Protection afforded to reporting and disclosures made directly to law enforcement authorities.</td>
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<td>5</td>
<td>The legislation ensures that effective protection mechanisms are in place, including by providing for a full range of remedies, and by entrusting a specific body that is accountable for and empowered with the responsibility of receiving and investigating complaints of improper investigation and/or retaliation.</td>
<td>• Appointment of an accountable whistleblower complaints unit responsible for investigating and prosecuting discriminatory, disciplinary, or retaliatory action taken against whistleblowers.</td>
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<td>• Rights of whistleblowers to have a ‘genuine day in court’.</td>
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The implementation of whistleblower protection legislation is supported by awareness-raising trainings and communications. In addition, the effectiveness of the framework is periodically evaluated.

- Changing cultural perceptions and public attitude towards whistleblowing and promoting awareness of whistleblowing mechanisms.
- Monitor, collect and assess data in order to review the effectiveness of the whistleblowing framework.


2. Transparency International

Transparency International, the most recognized international non-governmental organization fighting corruption, has also outlined principles, which should serve as guidance for formulating new and improving existing whistleblower legislation.

The guideline ‘International Principles for Whistleblower Protection’ consists of 30 principles (refer to Appendix 6). The principles (below mentioned in brackets) are structured in eight areas and have been developed by government officials, whistleblower experts, academia, research institutes and NGOs from all over the world:

1. Guiding Definition (definition of whistleblowing);
2. Guiding Principle (protected individuals and disclosures);
3. Scope of Application (threshold for whistleblower protection);
4. Protection (protection from retribution, preservation of confidentiality, burden of proof, knowingly false disclosures, waiver of liability, right to refuse participation in wrongdoing, preservation of rights, anonymity, personal protection);
5. Disclosure Procedures (reporting within the workplace, reporting to regulators and authorities, reporting to external parties, disclosure and advice tools, national security/official secrets);
6. **Relief and Participation** (range of remedies, fair hearing – genuine ‘day in court’, whistleblower participation, reward systems);

7. **Legislative Structure, Operation and Review** (dedicated legislation, publication of data, involvement of multiple actors, whistleblower training);

8. **Enforcement** (whistleblower complaints authority, penalties for retaliation and interference, follow-up and reforms).\(^{69}\)

Transparency International’s guideline ‘International Principles for Whistleblower Protection’ represents a comprehensive and detailed framework for whistleblower protection. Compared to the OECD guiding principles, the guideline from Transparency International is more precise, quotes detailed examples and provides for a much broader protection of the whistleblower.

\(^{69}\) Transparency International, International Principles, p. 3-11.
III. Whistleblowing in Switzerland

A. Introduction Case: Esther Wyler and Margrit Zopfi

The case of Esther Wyler and Margrit Zopfi is likely the most famous whistleblowing case in Switzerland from recent years. Both women worked for several years as controllers in the social welfare office of the city of Zurich. Their task as controllers included, among other things, examining and checking social welfare files and reporting any deficiencies.

In 2007, Zopfi noted that about 80 percent of the files had not been adequately addressed – the files were not processed according to the internal guidelines. Nevertheless, the social welfare funds were still paid to the beneficiaries. When Zopfi realized that this was not just an individual case, but rather pointed to an entire system that showed considerable deficiencies, she repeatedly reported her discoveries to her superiors and work colleagues. Contrary to her expectations, the situation did not change. Moreover, her superior began to exclude Zopfi from meetings, increasing her discontent. Thus, her despair grew. She was of the opinion that the public must know what was going on in the social welfare office, since the social welfare funds were financed by taxes. However, she was also aware of the fact that she would breach an official secret and thus could lose her job. Nevertheless, she decided to inform the public anonymously. Zopfi handed over a number of anonymized files to the Weltwoche journalist Alex Baur. She chose Baur because he had already written some critical articles about social welfare practices in Switzerland.70

Before Baur’s second article was published in Weltwoche magazine, Esther Wyler joined Zopfi and confirmed to him the grievances in the social welfare office of the city of Zurich. In October 2007, Zopfi and Wyler were arrested due to a suspicion of breach of an official secret. In January a report of the Council Control Committee (German: Geschäftsprüfungskommission) was published, in which the situation in the Zurich social welfare office was severely trivialized, and the two women decided to go public.

In April 2008, Zopfi and Wyler were dismissed without notice. Monika Stocker, the Head of the Social Department of the city of Zurich, resigned in the summer of 2008.\textsuperscript{71}

The legal dispute and the court decision of this case are presented in chapter III.C. after the description of the legal framework with regards to whistleblowing in Switzerland.

B. Swiss Legislation

Switzerland has no dedicated law related to whistleblowing. Thus, when solving questions and problems in this area, it is necessary to apply the provisions and principles of existing law – primarily the provisions of the Swiss Code of Obligations (CO) and the Federal Personnel Act (FedPerA).

1. Private Law

a) Provisions of the Swiss Code of Obligations

The various duties an employee has towards his employer are stipulated in article 321 to article 321(e) CO. In particular, article 321(a) section 1 CO, in which the fiduciary duty and the duty of care are described, is of high relevance in connection with whistleblowing:

“The employee must carry out the work assigned to him with due care and loyally safeguard the employer’s legitimate interests.”\textsuperscript{72}

The extent to which the fiduciary duty applies depends to a large extent on the position of the employee in the organization. In general, a much greater degree of loyalty is expected for executive employees than for ordinary workers.\textsuperscript{73}

\textsuperscript{71} SRF, „Der Preis der Wahrheit – Whistleblowerinnen im Konflikt“, documentary broadcasted on 9 December 2015; Tagesanzeiger Online from 11 January 2011, „Zopfi und Wyler einstimmig verurteilt“.

\textsuperscript{72} Article 321(a) section 1 CO.

\textsuperscript{73} Imbach Haumüller, p. 42.
Out of general fiduciary duty arises various rights and duties, which are relevant for the legal assessment of whistleblowing: the duty of safeguarding of interests and the obligation to report.\(^4\) In addition, article 321(a) section 4 CO determines the duty of confidentiality.

(1) **The Duty of Safeguarding of Interests**

The employee is obliged to refrain from activities that could be detrimental to the employer in any way. In particular, the employee is obliged to refrain from disclosing information to third parties that jeopardize the reputation of his employer.\(^5\) This obligation exists in principle even if the relevant information is demonstrably true and if the disclosure is made to the authorities. An exception exists only where such notification is necessary to protect important interests.\(^6\) Case law in Switzerland provides that the employee must first try company-internal methods to induce the employer to remedy the grievances. The company shall then have the possibility to remediate the grievances before attention is drawn to the authorities or the public.\(^7\) Therefore, the risk of breaching the duty of safeguarding of interests is very high with external whistleblowing.

(2) **The Obligation to Report**

For an employee, the fiduciary duty is primarily a duty of omission – the employee has to refrain from all actions and expressions that adversely affect the employer. However, in certain circumstances, this fiduciary duty gives rise to an obligation to report internally any incidents or irregularities to the detriment of the employer in order that the latter may take the requisite action.\(^8\) Yet the obligation to report only exists in a narrow extent and cannot be understood as a general reporting obligation by the employee.\(^9\) Case law in Switzerland

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\(^{4}\) Imbach Haumüller, p. 43.

\(^{5}\) BSK OR, No 5 to Art. 321(a) CO.

\(^{6}\) Imbach Haumüller, p. 43.

\(^{7}\) Streiff/Von Kaenel, No 14 to Art. 321 CO.

\(^{8}\) OECD, Committing to Effective Whistleblower Protection, p. 185.

\(^{9}\) ZK OR, No 11 to Art. 321(a) CO.
assigns the obligation to report generally only to employees with a supervisory role and executives.\textsuperscript{80}

Article 321(a) CO is discretionary law and may be excluded, substantiated, and expanded within the boundaries of the legal system.\textsuperscript{81} Against this background, it should be pointed out that especially large Swiss companies extend the obligation to report through the implementation of specific company directives, so that the employees are obliged to report any grievances (e.g. whistleblowing directive).\textsuperscript{82}

In addition to article 321(a) CO, obligations to notify may also be included in provisions of special legislation. Article 321 section 3 of the Swiss Criminal Code, which regulates the professional secrecy, and article 47 section 5 of the Swiss Banking Act, which regulates the Swiss banking secrecy, are examples of provisions where employees are obliged to report any grievances to the authorities. Furthermore, article 9 section 1 of the Swiss Anti-Money Laundering Act (AMLA) obliges the financial intermediary (and its employees) to file a report with the Money Laundering Reporting Office Switzerland if it knows or has reasonable grounds to suspect that assets involved in the business relationship are connected to criminal offences specified in article 9 section 1 (a-c) AMLA.\textsuperscript{83}

(3) The Duty of Confidentiality

Article 321(a) section 4 CO reads as follows: “For the duration of the employment relationship the employee must not exploit or reveal confidential information obtained while in the employer’s service, such as manufacturing or trade secrets; he remains bound by such duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer’s legitimate interests.”\textsuperscript{84}

\textsuperscript{80} Rehbinder, Schweizerisches Arbeitsrecht, No 127.
\textsuperscript{81} Streiff/Von Kaenel, No 17 to Art. 321.
\textsuperscript{82} Imbach Haumüller, p. 45.
\textsuperscript{83} Imbach Haumüller, p. 46.
\textsuperscript{84} Art. 321(a) section 4 CO.
The duty of confidentiality applies to all events and facts that the employee becomes aware of in the course of his employment, and which the employer wishes to keep secret. It is irrelevant how the employee obtained the information – whether within the scope of his work activities, by chance, or even by illegal acts.\textsuperscript{85}

The duty of confidentiality prevents any external disclosure of facts likely to harm an employer’s reputation, even if the facts amount to illegal acts.\textsuperscript{86} The Federal Supreme Court of Switzerland nevertheless recognizes an employee’s right to report irregularities externally in the event of overriding public or private interests (e.g. protection of public health or safety), and subject to the principle of proportionality.\textsuperscript{87}

Thus, the question frequently arises as to whether the employer’s particular interest in maintaining confidentiality or the overriding public or private interests enjoys superior protection. Based on current case law, the burden of proof in this context (i.e. the superiority) is usually with the employee. Therefore, the risk lies with the employee as to whether his assumption can be substantiated or not.\textsuperscript{88}

In general, it can be said, whenever an employee turns directly to an external body (authorities or the public) to report grievances, he is in conflict with the duty of confidentiality pursuant to article 321(a) section 1 CO. According to case law, the employee should follow a ‘tiered’ reporting procedure, first approaching his supervisor or a specialist internal body and only then, if no action is taken by the employer, going to the competent authority. If there is also no response from the authority, the employee is entitled, as a last resort, to put the case before the public.\textsuperscript{89}

\textsuperscript{85} Streiff/Von Kaenel, No 12 to Art. 321(a) CO.

\textsuperscript{86} OECD, Committing to Effective Whistleblower Protection, p. 185.

\textsuperscript{87} BGE 127 III 310.

\textsuperscript{88} Imbach Haumüller, p. 49.

\textsuperscript{89} OECD, Committing to Effective Whistleblower Protection, p. 185.
b) **Consequences Following a Breach of Duty**

The consequences of a breach of duty depend on the dimension of the misconduct. In serious cases, the employment can be terminated without notice according to article 337 CO. Other consequences may be: ordinary termination of employment (article 335 CO) or claim for compensation (article 321(e) section 1 CO). In addition, the employer can claim a contractual penalty, if one has been agreed upon.90


c) **Obligations of the Employer and Consequences**

The employer has a general duty of care vis-à-vis his employees according to article 328 CO: "Within the employment relationship, the employer must acknowledge and safeguard the employee’s personality rights, have due regard for his health and ensure that proper moral standards are maintained[...]."91 With regard to whistleblowing, there is a particular obligation to protect the employees from interferences by co-workers, supervisors, or third parties.92

The employee may claim for compensation or satisfaction (German: Genugtuung) if the employer violates his duty of care. However, according to article 8 of the Swiss Civil Code, the burden of proof lies with the employee, and thus, it is the employee who must ultimately prove that the employer violated his duty of care. Therefore, providing evidence that retaliatory measures were taken by the employer (e.g. mobbing) may be relatively burdensome and difficult for a whistleblower.93

In addition to sanctions from private law, the employer may also face sanctions from public law, such as warning letters, fines and, in exceptional cases, the closing of the company.94

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90 Streiff/Von Kaenel, No 3 and No 8 to Art. 321(a) CO.
91 Art. 328 CO.
92 Portmann/Stückli, Schweizerisches Arbeitsrecht, No 416ff.
93 Imbach Haumüller, p. 53.
94 Streiff/Von Kaenel, No 19 to Art. 328 CO.
d) External vs Internal Whistleblowing

(1) External Whistleblowing

The Swiss Federal Supreme Court assessed the extent of an employee’s fiduciary duty and duty of confidentiality in its decision ‘BGE 127 III 310’. According to the Federal Supreme Court, the employee can justify a breach of his fiduciary duty only if there are higher-value interests of third parties or the public and he has kept to the principle of proportionality. Thus, in accordance with the principle of proportionality, the employer must always be given the opportunity to remedy any grievances. The employee may abstain from an internal reporting only, if the employer himself is involved in the wrongdoing, or has knowledge of the misconduct but does not react to it, or an overriding public interest regarding the grievance exists.95

This implies, in particular, that the employee always has to choose the most considerate measure of eliminating a grievance.96 Hence, the employee should follow the above-mentioned tiered reporting cascade: [1] reporting to the employer; [2] reporting to the authorities; [3] reporting to third parties or the public.97

Direct reporting to the public, in particular to the media, without a previous engagement of the competent authorities, may only be permitted in exceptional circumstances, in particular where the life or health of a large number of persons is directly endangered and the imminent danger may only be averted through an immediate notification of the public.98

(2) Internal Whistleblowing

The legal basis of the right to report in the context of internal whistleblowing is primarily the fundamental right of freedom of expression according to article 16 section 1 and section 2 of

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95 Imbach Haumüller, p. 58.
96 BK OR, No 9 to Art. 337 CO.
97 Imbach Haumüller, p. 57.
98 Rieder, Whistleblowing als interne Risikokommunikation, p. 197.
the Swiss Federal Constitution and according to article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, even if whistleblowing is protected by the freedom of expression, the employer’s interests must strictly be observed, since the fiduciary duty pursuant to article 321(a) section 1 CO works as a ‘filter’ to the freedom of expression.\textsuperscript{99} Thus, the reporting of alleged grievances to the employer is only in accordance with the fiduciary duty if the disclosure is actually in the interest of the employer, does not constitute a breach of the fiduciary duty of the employee, and will not entail damages to the employer.\textsuperscript{100}

The fiduciary duty also implies that a reporting must be based on a justified suspicion. Reports that are not based on a concrete indication or several indications will rarely be in the interest of the employer and may disturb the industrial peace (German: Betriebsfrieden).\textsuperscript{101} A disturbance of the industrial peace would, for example, be seen in the reporting of isolated incidental infringements (e.g. turning up late, not wearing a badge etc.).\textsuperscript{102}

The current Swiss private law does not have a general obligation for companies to set up an internal reporting system for whistleblowers. However, Swiss companies that are listed at a US Stock Exchange (for Swiss companies, this is usually the New York Stock Exchange) must comply with the Sarbanes-Oxley Act (refer to chapter IV.B.2.e.) and thus must have implemented an internal whistleblowing reporting office. In recent years, Swiss companies increasingly acknowledge that internal whistleblowing can provide significant benefits to businesses when grievances are detected at an early stage and without involving the authorities. Grievances can be remediated at an early stage and without major damages, be it a direct financial loss or damage to the reputation of the company.\textsuperscript{103} Not least in light of the proportionality principle, which is of great importance with regards to the permissibility of

\textsuperscript{99} Rieder, Whistleblowing als interne Risikokommunikation, p. 94.
\textsuperscript{100} Rieder, Der Umgang mit Whistleblowing aus arbeitsrechtlicher Sicht, p. 6.
\textsuperscript{101} Rieder, Der Umgang mit Whistleblowing aus arbeitsrechtlicher Sicht, p. 7.
\textsuperscript{102} Imbach Haumüller, p. 62.
\textsuperscript{103} Imbach Haumüller, p. 59.
external whistleblowing, Swiss companies are well advised to actively promote internal reporting.¹⁰⁴

When implementing an internal whistleblowing system, the employer must ensure that the whistleblowing process does not violate the personal rights of employees and protects both the reporting employee and the employees affected by the disclosure. Furthermore, the employer must ensure that the data processing is proportionate and that data protection principles are adhered to.¹⁰⁵

e) Whistleblower Protection

If an employee decides to report a potential grievance, he is at risk of facing retaliation measures by the employer, his colleagues, or his superiors. The most serious retaliation measure is dismissal by the employer. Furthermore, the employee may face alternate sanctions, for example degradation, relocation, or mobbing.¹⁰⁶

Though Switzerland has no specific legislation regarding whistleblower protection, the protection against dismissal pursuant to article 336 CO and the duty of care according to article 328 CO provide for some protection of the whistleblower.¹⁰⁷

In the case of dismissal, an employee can argue that it is wrongful (article 336 CO) or without just cause (article 337 CO), depending on whether ordinary notice has been given (statutory or contractual) or the dismissal is with immediate effect.¹⁰⁸

With regard to the ordinary termination, article 335 section 1 CO stipulates that an indefinite employment relationship can be terminated by either contracting party. Since no special reasons are required for the legality of the dismissal, both parties can terminate the

¹⁰⁴ Imbach Haumüller, p. 61.
¹⁰⁵ Rieder, Der Umgang mit Whistleblowing aus arbeitsrechtlicher Sicht, p. 28.
¹⁰⁶ Imbach Haumüller, p. 63.
¹⁰⁷ Rieder, Whistleblowing als interne Risikokommunikation, p. 204.
¹⁰⁸ OECD, Committing to Effective Whistleblower Protection, p. 185.
employment relationship at any time. Therefore, it is quite easy for the employer to dismiss the whistleblower when the notice period is observed.\(^\text{109}\)

Article 336 CO establishes the basis for an abusive dismissal. The dismissal due to justified whistleblowing is not explicitly stated as a fact. The corresponding catalog, however, is not conclusive according to practice and doctrine, and the overall circumstances and facts of each individual case are justified by an assessment. In practice, providing the evidence for an abusive termination for a whistleblower is not easy. Even in the event that proof can be provided, the whistleblower has no right to recover his present position.\(^\text{110}\)

In either case (wrongful dismissal or termination without just cause), the dismissal cannot be reversed, but the former employee is entitled to court-ordered damages not exceeding six months’ salary. In the event of injury to an employee’s health, a complaint to the Cantonal Labor Inspectorate is also possible.\(^\text{111}\)

f) **Internal Control**

Although Swiss private law does not provide for an implementation of a whistleblowing system, implementing a reporting framework is still relevant for a company. In accordance with article 716(a) section 1 CO, the board of directors must not only ensure an effective internal control, but also ensure that the risk management and compliance functions are appropriately organized and executed.

Internal control includes all principles and procedures established by the management, which are intended to ensure that the company's business is conducted in a duly and efficient manner, its assets are safeguarded, negligent conduct is prevented or detected, accounting is complete and accurate, and reliable financial information is available in a timely manner.\(^\text{112}\)

\(^{109}\) Art. 335 CO.

\(^{110}\) Müller, p. 266-268.

\(^{111}\) OECD, Committing to Effective Whistleblower Protection, p. 185.

\(^{112}\) Imbach Haumüller, p. 302.
If one or more of the above-mentioned internal control objectives cannot be achieved, for example due to a tortious act or systematic misbehavior within a certain business unit, a defect or possible grievance must perforce exist that needs to be redressed through an adjustment or reinforcement of the internal control system. However, in order to be able to react to the existing maladministration, the management and the board of directors must first known the facts. Thus, the information constitutes an essential basis for the functioning of an internal control framework.\textsuperscript{113}

When evaluating, implementing, or enhancing an internal control system, (Swiss) companies often apply the COSO\textsuperscript{114}-framework. The COSO-framework comprises five core elements: [1] risk assessment, [2] control environment, [3] control activities, [4] information and communication and [5] supervision.\textsuperscript{115} Regarding the fourth core element – information and communication – it is essential for a company that information is promptly recorded, assessed and processed, and subsequently communicated correctly to internal and external stakeholders. The internal communication, top-down and bottom-up within the hierarchies, contributes to a better understanding of the employees’ roles and tasks within the company and facilitates the implementation of new processes and procedures.\textsuperscript{116} Furthermore, internal communication also implies that employees have the possibility to report potential grievances in a safe and standardized way to their employer.

\section*{2. Public Law}

Federal administration staff is not subject to the provisions of the Swiss Code of Obligations, but to the Federal Personnel Act (FedPerA) and the Federal Personnel Ordinance (FedPerO). In analogy to article 321(a) section 1 CO, the federal administration staff may not be in breach of the provisions on the duty of care and fiduciary duty:

\textsuperscript{113} Imbach Haumüller, p. 302.

\textsuperscript{114} COSO: Committee of Sponsoring Organizations of the Treadway Commission.

\textsuperscript{115} COSO, p. 18.

\textsuperscript{116} Pfaff/Rund, p. 69.
“The employees have to carry out the work assigned to them with care and safeguard the legitimate interests of the Confederation and their employer.”

In addition, the federal administration staff is subject to professional secrecy, business secrecy and official secrecy (German: Amtsgeheimnis), according to article 22 section 1 FedPerA.

The federal public law provides for a dual structure regarding whistleblowing regulation:

First, article 22(a) FedPerA lays down the conditions under which federal employees have the right (article 22[a] section 4 FedPerA), or obligation (article 22[a] section 1 FedPerA), to make a disclosure and indicates to whom it can be made.

Federal administration staff has the right to report any irregularities that they have noted in connection with their work. The concept of irregularity is not defined by the law and is construed broadly in practice. It specifically covers waste of state resources, project mismanagement, and failure to comply with the rules of conduct applying to federal employees (relating, for example, to acceptance of gifts and other benefits, granting of expenses and allowances, management of conflicts of interest, pursuit of a secondary activity, etc.). In such cases, the law provides for only one external reporting channel, the independent Swiss Federal Audit Office (SFAO).

Federal administration staff are obliged to report any offences automatically prosecutable of which they have knowledge or which are reported to them in the course of their duties. The Swiss Criminal Code specifies whether a criminal offence is to be automatically prosecuted; this is the case, for example, for forgery of documents, active and passive bribery, and numerous offences against property. The duty to report covers not only offences committed by federal administration staff, irrespective of grade or position, but also by the public at large.

\[117\] Art. 20 section 1 FedPerA.

\[118\] OECD, Committing to Effective Whistleblower Protection, p. 184.
The law does not specify the reporting channel. Therefore, a whistleblower may make his disclosure to his supervisor, the prosecuting authorities or the SFAO.  

Second, the provision in article 22(a) section 5 FedPerA stipulates that the act of reporting in good faith may not be detrimental in any way to the whistleblower's position.  

With regard to the concept of good faith, the intention is not to require the whistleblower to produce in-depth clarification or irrefutable evidence, but solely to prevent the practice of whistleblowing being deflected from its purpose for the sake of defamation. The existence of reasonable suspicion suffices for such notification and corresponding whistleblower protection.

In the case of retaliatory dismissal, a federal employee can demand reinstatement to his previous position or, if this is impossible, assignment to an equivalent position. However, pursuant to article 34(c) section 1 and section 2 FedPerA, a whistleblower is at liberty to forgo reassignment or reinstatement and opt instead for financial compensation ranging between six and twelve months’ salary. In addition, a federal employee can require his employer to take protective or corrective action for other forms of retaliation, such as, for example, denigration, bullying, assignment to duties, or a position not matching the whistleblower’s qualifications. In each case, a whistleblower can always refer his employer’s decisions to the Federal Administrative Court under an appeals procedure that is free of charge.

Disclosure of information to the public or the media constitutes a breach of official trust pursuant to article 320 of the Swiss Criminal Code and does normally not qualify for protection; hence whistleblowers are in principle liable to disciplinary action and/or prosecution. However, the court recognizes the legitimacy of external disclosure (i.e. to the

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119 OECD, Committing to Effective Whistleblower Protection, p. 183.  
120 OECD, Committing to Effective Whistleblower Protection, p. 184.  
121 Imbach Haumüller, p. 77; OECD, Committing to Effective Whistleblower Protection, p. 184.
media or public) if it is justified by an overriding interest and respects the principle of proportionality.\textsuperscript{122}

C. Introduction Case – Court Decision

In 2009, Margrit Zopfi and Esther Wyler were acquitted at first instance from the district court in Zurich. Although the district court acknowledged that Zopfi and Wyler had violated the official secret, the court considered that the only way to address the grievances was to go public. In January 2011, the Supreme Court of Zurich overruled the decision of the district court and found the two women guilty of violating the official secret. They were sentenced to a conditional fine of twenty daily rates of 80 Swiss francs each and had to bear the costs of the proceedings to the amount of 11,000 Swiss francs. In December 2011, the Swiss Federal Supreme Court confirmed the decision of the Supreme Court of Zurich and rejected the complaint of Zopfi and Wyler. Essentially, the Federal Supreme Court provided in its decision the following reasoning:

The act of whistleblowing was not the only possible way to achieve the objective of significantly strengthening the fight against the misuse of social welfare and the related controls. The complainants (i.e. Zopfi and Wyler) could have addressed themselves to various bodies outside the hierarchy of the social welfare department in which they were active in order to report their perceptions and experiences. The judgment of the Supreme Court of Zurich explicitly expressed the fact that there were alternatives to the public (i.e. Weltwoche magazine). A suitable alternative would have been the legal department. This was also apparent to the complainants, especially since, according to their statements, they had intervened successfully in the legal department with regards to another specific case. Other suitable external reporting bodies would have been the Ombudsman and the Council Control Committee.\textsuperscript{123}

\textsuperscript{122} OECD, Committing to Effective Whistleblower Protection, p. 184.

\textsuperscript{123} BGE 6B_305/2011.
D. Gaps to Best Practice

Current legislation in Switzerland provides for legal uncertainty with regards to whistleblowing. Employees face difficulties determining the extent to which an obligation to notify or right to report internally exists, and under which conditions external reporting is permitted. Generally, internal whistleblowing is considered permissible, whereas external whistleblowing is associated with high legal uncertainty and is practically inadmissible. Due to the lack of legal clarity and legal certainty, the protection of whistleblowers in Switzerland is insufficient.

The existing legal framework does not provide adequate protection against retaliation. The fact that the burden of proof regarding an inadmissible retaliation or a breach of the employers’ duty of care is transferred to the employee (i.e. whistleblower) constitutes a considerable risk for the person concerned.

Furthermore, Swiss (private) law does not provide sufficient protection in the case of dismissals. Even if a termination is abusive, the whistleblower is only entitled to a compensation of a maximum of six months’ wages. This is in a disproportion to the risk the whistleblower takes on, since, in practice, the compensation often amounts to only two to three monthly wages.124

On 10 December 2010, the Swiss Federal Council proposed a major legislative initiative designed to clarify the whistleblowing system in the private sector through a partial revision of the Swiss Code of Obligations. The proposal by the Federal Council was discussed extensively and was returned by the parliament in September 2015. In particular, the recommendations for the improvement of protection against dismissal were assessed very differently and have led to negative response from the parliament.125

Whistleblowing is also not addressed in the area of self-regulation – neither the corporate governance guidelines ‘Swiss Code of Best Practice’ from Economiesuisse nor the ‘Corporate

124 Ledergerber, p. 132.

Governance Directive’ from the Swiss Stock Exchange set out whistleblowing-principles for Swiss companies.\textsuperscript{126}

Compared to the ‘Guiding Principles’ from the OECD and the ‘International Principles for Whistleblower Protection’ from Transparency International, the current Swiss whistleblowing legislation does not meet the international benchmarks on the following points:

- Retaliation against employees who report in good faith is not explicitly forbidden and sanctioned – dismissals of employees who report in good faith remain valid and cannot be challenged by the employee;
- Whistleblowers are not explicitly protected from all forms of attempted, indirect, direct, or threatened retaliation such as harassment, discrimination, or disadvantages at the workplace;
- The compensation for unfair dismissal and other forms of retaliation does not reflect the negative consequences and severe personal risks the whistleblower may face. In addition, there is no right of reinstatement in the case of an abusive termination;
- Persons retaliating against whistleblowers are not subject to adequate penalties;
- Anonymous reports are not explicitly permitted and protected;
- Even as a last resort, direct reports to the public, i.e. the media, external organizations, and/or directly to the public, are not permissible;
- The possibility of reporting to the public depends on a formality (i.e. tiered approach) and not on the seriousness of the suspected or actual misconduct;
- In cases of persistently unaddressed wrongdoing that could affect the public interest, or grave personal or public danger, it is not possible to directly inform the public without first informing the employer or the authorities;

\textsuperscript{126} Economiesuisse, Swiss Code of Best Practice; Swiss Exchange (SIX), Richtlinie Corporate Governance (RLCG).
- Reports to public authorities are almost impossible if the employer has an internal reporting mechanism in place, even if the whistleblowers’ reports are not adequately followed up upon and are not investigated in a timely and thorough manner. Furthermore, the employee bears the burden of proof and the risk of violating the law;

- Reports to public authorities are only permitted in the case of an immediate threat to the environment or the life, health, or safety of the public. However, if there is an internal reporting system in place, reports to the public authorities are not allowed even in the case of an immediate threat to the environment or the life, health, or safety of the public. This implies that in practice, if an employee reports an imminent mortal danger to the internal reporting mechanism and nothing happens, he is not allowed to turn to the competent authorities.¹²⁷

¹²⁷ Ethics and Compliance Switzerland (ECS), p. 3-12.
IV. Whistleblowing in the United States of America

A. Introduction Case: Bradley Birkenfeld

In October 2001, Bradley Birkenfeld, a US citizen domiciled in Switzerland, began working as a director in the private banking division of UBS in Geneva, Switzerland, handling private banking relationships, primarily clients located in the United States.

In May 2005, Birkenfeld noticed a three-page legal-document on UBS’s internal company computer system that contained prohibitions completely at odds with the Bank’s actual banking practices with its US clients. That same day, Birkenfeld notified his immediate superiors at UBS of the issue. The next month, in June 2005, he formally reported the matter to certain high-ranking officials at UBS who were responsible for compliance and legal matters and asked for clarification; however, he did not receive any feedback. In October 2005, Birkenfeld resigned from UBS.128

In early 2006, Birkenfeld and UBS entered into a severance agreement over a disputed bonus award that had been due to him but was not paid out by the Bank. While his employment dispute with UBS was being resolved, Birkenfeld voluntarily contacted the US Internal Revenue Service (IRS), as well as the US Department of Justice (DOJ), and offered to provide authorities at both agencies with various sensitive information regarding UBS and its private banking practices. Birkenfeld sought full immunity from potential prosecution, however, which was not granted by the authorities. Still, he provided the US government authorities with extensive information, privileged documents, and investigative strategies about UBS’s private banking practices.129

Due to Birkenfeld’s failure to be completely forthcoming about his own conduct at UBS during his meetings with DOJ prosecutors, the US government sought his indictment in April

128 Sentencing Memorandum of Defendant Bradley Birkenfeld, Case No. 08-60099, p. 4.
129 Sentencing Memorandum of Defendant Bradley Birkenfeld, Case No. 08-60099, p. 3-5.
2008. Shortly afterwards, Birkenfeld was placed under arrest at Logan International Airport in May 2008, when he landed in Boston flying in from Geneva.\textsuperscript{130}

The disclosure of Swiss banking information to the US authorities had a major impact in the financial sector in Switzerland and abroad:

- In 2009, UBS agreed to pay a USD 780 million penalty to avoid criminal prosecution and turned over account information regarding more than 4,500 US clients;
- In 2014, Credit Suisse pleaded guilty in helping US citizens evading taxes and paid USD 2.6 billion in penalties;
- US agencies soon followed the trail of hidden money to banks in Israel, India, Liechtenstein, Luxembourg, Singapore, the Caribbean and around the world;
- IRS officials say the amnesty program has helped recover more than USD 7 billion in unpaid taxes.\textsuperscript{131}

The legal dispute and the court decision of this case are presented in chapter IV.C. after the description of the legal framework with regards to whistleblowing in the United States.

B. US Legislation

The United States has a pioneering role in the field of whistleblowing legislation. Whistleblower protection laws date back over 150 years. The US has a lengthy legal practice at federal and state levels, as well as extensive case law jurisprudence.

Due to a large number of individual state regulations, the legal protection of whistleblowers may vary from state to state. However, there are protection standards at the federal level that

\textsuperscript{130} Sentencing Memorandum of Defendant Bradley Birkenfeld, Case No. 08-60099, p. 7.

exert significant influence on the US whistleblowing jurisprudence (e.g. Federal False Claim Act, Whistleblower Protection Act, Dodd-Frank Act, Sarbanes-Oxley Act).

Thus, this paper will focus on the analysis of federal whistleblowing legislation, in particular the SEC Whistleblower Program and the Sarbanes-Oxley Act.

1. The Principles of US Labor Law

a) The At-Will-Doctrine

American labor law is characterized by the so-called ‘at-will-doctrine’. Following the employment-at-will-doctrine, both parties (i.e. the employer and the employee) have the freedom to terminate the employment relationship at any time and without particular reasons or observance of a specific period, unless otherwise agreed.\textsuperscript{132} Due to this extensive freedom to dismiss, the employer is basically free to immediately terminate the employment relationship of a whistleblower. However, over time, US case law provided for exemptions to the at-will-doctrine.\textsuperscript{133}

b) Exemptions to the At-Will-Doctrine

(1) The First Amendment

The First Amendment to the Declaration of Independence guarantees the freedom of speech and provides for considerable protection of whistleblowers. Based on the constitutionally guaranteed freedom of speech, whistleblowers are protected from retaliation if the reported information is of public interest. An employee may claim for damages (German: Schadensanspruch) or reinstatement to his previous position if his freedom of speech has been breached.\textsuperscript{134} However, the First Amendment jurisprudence relating to whistleblowing is only

\textsuperscript{132} Graser, p. 16

\textsuperscript{133} Botschaft über die Teilrevision des Obligationenrechts vom 20. November 2013, p. 9562.

\textsuperscript{134} Graser, p. 32.
applicable for public sector employees and has been limited significantly by the US Supreme Court over the years.\textsuperscript{135}

(2) \textbf{The Public Policy Exemption}

The ‘public policy exemption’ is an exception to the at-will-doctrine and is based on a decision from the Supreme Court of California in the year 1959 in the case of ‘Peterman vs Teamsters’. The public policy exemption prohibits the dismissal and discrimination of employees (i.e. whistleblowers) who are, in particular, active in the private sector, and who: [1] refuse to carry out illegal acts, [2] exercise their legal rights, or [3] exercise their civil duty. Thus, following the public policy exemption, the invalidity of the at-will-doctrine is based on abuse of rights.\textsuperscript{136}

Within the scope of the public policy exemption, employees concerned may claim for compensation but not for reinstatement.\textsuperscript{137}

c) \textbf{Specific Whistleblowing Legislation}

The principle of the employment-at-will doctrine, together with the public policy exemption and the federal jurisprudence of the First Amendment, represent the main pillars of the legal situation at the federal level with regards to the protection of whistleblowers.

In addition to the relevant provisions at the federal level, whistleblower protection laws for federal and private-sector employees have been significantly expanded in the United States by industry-specific federal statutes, such as, for example, the Department of Defense Authorization Act, the FDA Food Safety Modernization Act, the Energy Reorganization Act, or the Occupational Safety and Health Act.\textsuperscript{138}

\textsuperscript{135} Imbach Haumüller, p. 114-115.

\textsuperscript{136} Imbach Haumüller, p. 113.

\textsuperscript{137} Graser, p. 43.

\textsuperscript{138} Norm/Shane/Carla, p. 15.
In particular (and importantly for the introduction case), the Secretary of the Treasury is allowed to pay awards under the IRS informant program. In December 2006, the Tax Relief and Health Care Act (of 2006) made fundamental changes to the program, adding whistleblower appeal rights and removing the ‘discretionary’ provision of the award. Based on the Internal Revenue Code (IRC) section 7623(b), the IRS Whistleblower Office is allowed to award people who blow the whistle on persons who fail to pay the tax that they owe, up to 30 percent of the additional tax, penalty, and other amounts it collects.

2. Whistleblowing at Federal Level

a) Federal False Claims Act

The Federal False Claims Act (FFCA) was established in the year 1863 and goes back to the American Civil War. The FFCA has nowadays one of the strongest whistleblower protection provisions in the United States and is the most important ‘tool’ against fraudulent practices in the federal administration.\textsuperscript{139} For instance, the DOJ obtained more than USD 4.7 billion in settlements and judgments from FFCA cases in fiscal year 2016.\textsuperscript{140} Under the FFCA, any persons or entities with evidence of fraud against federal programs or contracts may file a so-called ‘qui tam-lawsuit’ and sue the wrongdoer on behalf of the United States Government. If the government declines to join the lawsuit, the private plaintiff may proceed on his own.\textsuperscript{141} Furthermore, the private person has the right to be a party on his own to the proceedings, even when the government joins the lawsuit.

The lawsuit must be confidentially filed under seal in a federal district court with a written disclosure statement of substantially all material evidence and information in the plaintiff’s possession. The government has to decide within 60 days if it will join the case.\textsuperscript{142}

\textsuperscript{139} Ledergeber, No 124.
\textsuperscript{141} 31 U.S.C Section 3730(a)(1).
\textsuperscript{142} 31 U.S.C Section 3730(b)(2).
The FFCA also provides financial incentives for private plaintiffs: for cases which are joined by the government, the initial whistleblower may receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.\textsuperscript{143} To be eligible to recover money under the FFCA, the private plaintiff must file a qui tam lawsuit, merely informing the government about the violation is not enough.

Under Section 3730(h) of the FFCA, any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent in furtherance of an action under the FFCA is entitled to all relief necessary to make the employee whole. Such relief may include: [1] reinstatement, [2] double back pay, and [3] compensation for any special damages including litigation costs and reasonable attorneys' fees.\textsuperscript{144}

b) Civil Service Reform Act

With the enactment of the Civil Service Reform Act (CSRA) in the year 1978, for the first time a comprehensive law for the protection of whistleblowers was established.

Soon after his election and following incidents like the Watergate scandal coupled with the consensus public opinion of the Vietnam War, President Jimmy Carter initiated a reform of the public administration. On the one hand, the federal administration was reorganized, and three new agencies were created: the Office of Personnel Management (OPM), the Federal Labor Relations Authority (FLRA), and the Merit Systems Protection Board (MSPB). On the other hand, protection measures for federal employees, who reported illegal behavior, mismanagement, waste of public funds and resources, concrete threats to the public safety, and health or abuse of sovereign powers were defined and implemented.\textsuperscript{145}

\textsuperscript{143} 31 U.S.C. Section 3730(d)(1).

\textsuperscript{144} 31 U.S.C. Section 3730(h)(1) and (2).

\textsuperscript{145} Westman, p. 15ff.
Whistleblowers were intended to be protected from retaliation by the MSPB; however, the protection measures did not succeed in practice, as references were partly not investigated in a timely manner or the identity of the whistleblowers was disclosed.\footnote{Westman, p. 49f.}

These shortcomings led to the enactment of the Whistleblower Protection Act in 1989 by the US Congress.

c) **Whistleblower Protection Act**

The Whistleblower Protection Act (WPA) had the goal to enhance whistleblower protection and to rectify the shortcomings of the CSRA that became evident in practice.

The WPA explicitly prohibits a federal agency from discriminating or penalizing employees who disclose information that they reasonably believe evidences a violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.\footnote{5 U.S.C. Section 1201.}

In case of discrimination following a notification under the WPA, the affected employee has the possibility to address a complaint to the MSPB or to the United States Office of Special Counsel (OSC). Both agencies have the duty to investigate the complaint within a specific time-period and to inform the complainant on the status of the investigation.\footnote{5 U.S.C. Section 1221(c)(2).}

In the event of the whistleblower prevailing in the complaints procedure, he is entitled to reimbursement of expenses including the costs of legal representation, reinstatement, damages, and, if wished for, transfer of office.\footnote{5 U.S.C. Section 1221.}

In the year 2012, President Barack Obama enhanced the WPA, ensuring that employees serving in the intelligence community (FBI, CIA) or who are eligible for access to classified
information can also effectively report waste, fraud, and abuse while protecting classified national security information.\footnote{The White House, p. 1.}

\subsection*{d) Dodd-Frank Act}

The Dodd-Frank Wall Street Reform and Consumer Protection Act, or better known as the Dodd-Frank Act, was signed into law on 21 July 2010 by President Barack Obama as a response to the financial crisis of 2008/2009. The Dodd-Frank Act is a major piece of reform legislation covering commodities and securities actions worldwide and has brought the most significant changes to the regulatory landscape in the US financial industry since the regulatory reform that followed the Great Depression. The act is meant primarily to promote the financial stability of the United States by improving accountability and transparency in the financial system.\footnote{Pub.L. 111-203; Norm/Shane/Carla, p. 15.}

The Dodd-Frank Act replicates the FFCA provisions regarding financial incentives for potential whistleblowers who report violations of stock exchange regulations of the Securities and Exchange Commission. Based on section 992 of the Dodd-Frank Act, the existing Securities Exchange Act (SEA) from the year 1934 was amended by a new section, 21F, and complemented with additional protection regulations and financial incentives for whistleblowers.\footnote{15 U.S.C. Section 78u-6.}

\subsubsection*{(1) SEC Whistleblower Program}

On 25 May 2011, the SEC adopted rules to implement the Dodd-Frank Act’s whistleblower program.

According to 15 U.S.C. Section 78u-6(a)(6) of the Dodd-Frank Act, a whistleblower is “\textit{[...]any individual who provides, or 2 or more individuals acting jointly who provide,}...
information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”

Under the rules, only natural persons, not entities, can be whistleblowers. The individual (i.e. whistleblower) does not need to be an employee of the subject entity – in other words, the individual could be, for example, a competitor, an unaffiliated academic, a consultant, or an aggrieved spouse. The whistleblower may submit information anonymously but must be represented by counsel. However, the identity of the whistleblower has to be revealed to the SEC before ultimately collecting an award.

The SEC pays awards to eligible whistleblowers who voluntarily provide original information to the Commission that lead to a successful enforcement action.

According to 17 CFR Section 240.21F-4 of the SEC final rules and regulations, a submission of information is deemed not to have been made ‘voluntarily’ if the whistleblower first provides information to the Commission (or any other authority listed below under [2] and [3]) only after a request, inquiry, or demand that relates to the subject matter of the submission is directed to the whistleblower or anyone (e.g. an attorney) representing the whistleblower: [1] by the Commission; [2] in connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board (PCAOB) or any self-regulatory organization or [3] in connection with an investigation by Congress, any other authority of the federal government, or a state attorney general or securities regulatory authority. In addition, a submission is not considered voluntary if the person (i.e. the whistleblower) is required to report the original information to the SEC as a result of a pre-existing legal duty, a contractual duty that is owed to the SEC, or to one of the other above-mentioned authorities, or a duty that arises out of an administrative or judicial order.

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154 15 U.S.C. Section 78u-6(d)(2); Latham & Watkins LLP, p. 3.
155 17 CFR Section 240.21F-4 of the SEC final rules and regulations.
The term ‘original information’ as defined in 15 U.S.C. Section 78u-6(a)(3) of the Dodd-Frank Act means information that is provided to the SEC for the first time, and which is: [1] derived from the independent knowledge or analysis of the whistleblower; [2] not already known to the SEC from any other source, unless the whistleblower is the original source of the information; and [3] not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, investigation, or audit, or from the news media, unless the whistleblower is a source of the information. A whistleblower can still satisfy the original information requirement if he provides new information that materially adds to the information that the SEC already possesses.\textsuperscript{156}

15 U.S.C. Section 78u-6(b)(1) of the Dodd-Frank Act gives the SEC the power to give whistleblowers, who voluntarily provide original information regarding a violation of securities laws that leads to a successful SEC enforcement, 10 to 30 percent of monetary sanctions over USD 1 million.

Excluded from the Dodd-Frank award provision are according to 15 U.S.C. Section 78u 6(c)(2) of the Dodd-Frank Act: 

\textit{[A] Any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of an appropriate regulatory agency; the Department of Justice; a self-regulatory organization; the Public Accounting Oversight Board; or a law enforcement organization. [B] Any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section. [C] Any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1). [D] Any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.\textsuperscript{157}}

\textsuperscript{156} 15 U.S.C. Section 78u-6(a)(3).

\textsuperscript{157} 15 U.S.C. Section 78u 6(c)(2).
Once a whistleblower establishes his eligibility for an award, the SEC has the discretion to determine the amount of the payout within a range set by the statute of between 10 to 30 percent of the aggregate monetary recoveries by the SEC, US Department of Justice, US bank regulators, US self-regulatory organizations, and US state attorneys general in criminal cases.

The following factors may increase a whistleblower’s award percentage:

- the significance of the information provided;
- the degree of the whistleblower’s assistance;
- the law enforcement interest in deterring violations of securities laws; and
- the whistleblower’s participation in internal compliance systems.\(^\text{158}\)

The following factors may decrease a whistleblower’s award percentage:

- the whistleblower’s culpability;
- any unreasonable reporting delay by the whistleblower; and
- the whistleblower’s interference with internal compliance systems.\(^\text{159}\)

Whistleblowers may also receive an award for reporting qualifying information to an organization’s internal compliance system even if the organization, and not the whistleblower, eventually reports the information to the SEC. In addition, a whistleblower who first reports to the organization’s internal compliance system will be treated as if he had reported to the SEC at that earlier internal reporting date, so long as the whistleblower later reports to the SEC within 120 days after making the internal report. This implies that even if, in the interim, another whistleblower makes a submission to the SEC, the whistleblower who reported internally will be considered first in line for an award. Thus, the award provisions may motivate whistleblowers to use internal reporting mechanisms instead of reporting to external bodies.\(^\text{160}\)

\(^{158}\) 15 U.S.C, Section 21F(c)(1); Latham & Watkins LLP, p. 7.

\(^{159}\) 15 U.S.C, Section 21F(c)(1); Latham & Watkins LLP, p. 7-8.

\(^{160}\) Latham & Watkins LLP, p. 3.
The Dodd-Frank Act also significantly expands remedies and anti-retaliation employment protections for whistleblowers. According to the provisions, “no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower.”\(^{161}\) A whistleblower is protected if he provides the information in a manner described in 15 U.S.C Section 21F(h)(1)(A) and possesses a reasonable belief that the information he is providing relates to a possible securities law violation that has occurred, is ongoing, or is about to occur.

Furthermore, anti-retaliation protection applies even when the information provided does not relate to an actual violation of law and whether or not the whistleblower ultimately qualifies for an award.\(^{162}\)

e) Sarbanes Oxley Act

At the beginning of the twenty-first century, corporate scandals involving companies such as WorldCom and Enron, as well as the 2008/2009 financial crisis, led the US government to undertake a major overhaul of its financial regulatory legislation in an effort to improve corporate responsibility and restore investor confidence in US financial markets.\(^{163}\)

On 30 July 2002, President George W. Bush signed into law the Sarbanes-Oxley Act (SOX). SOX consists of a comprehensive set of rules and regulations for improving corporate governance, tackling corporate fraud, and enhancing accounting reliability. For this purpose, important whistleblower provisions regarding the protection of employees of publicly traded companies who disclose corporate fraud were also incorporated into SOX.\(^{164}\)

SOX covers the topic of whistleblowing in four sections: [1] Section 301 requests the implementation of internal reporting possibilities and bodies; [2] Section 307 requires a

\(^{161}\) 15 U.S.C, Section 21F(h)(1)(A).

\(^{162}\) Latham & Watkins LLP, p. 9.

\(^{163}\) Norm/Shane/Carla, p. 15.

\(^{164}\) Norm/Shane/Carla, p. 15.
compulsory notification for lawyers and authorized representatives; [3] Section 806 contains the provisions regarding whistleblower protection; and [4] Section 1107 includes criminal provisions.

(1) **Section 301 SOX**

Section 301 of SOX obliges companies to have systems in place for receiving and handling reports of dubious accounting or auditing practices. In particular, "each audit committee shall establish procedures for – [A] the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and [B] the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."\(^{165}\)

As stated in Section 301(4)(B) SOX, it must be ensured that such complaints can be made on a confidential and anonymous basis.

Neither SOX nor the Final Rules of the SEC ‘Standards relating to listed Company Audit Committee’ prescribe standard solutions with regards to the reporting system – each company is free to define and implement individual reporting procedures, but must fulfill the requirements of SOX and the SEC. Thus, the wording of Section 301(4) SOX gives a great scope for interpretation. In this respect, the lack of clear rules allows companies to argue that any kind of effort which is directed in the prescribed direction is sufficient for compliance with Section 301(4) SOX.\(^{166}\)

In principle, an employee has the possibility to report to an external body – there is no provision in SOX as to whether a notification has to be made internally or externally. Hence, this may result in employees directly reporting to external authorities due to the financial incentives based on Dodd-Frank Act, instead through the existing internal reporting lines.\(^{167}\)

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\(^{165}\) Section 301(4)(A) and (B) SOX.

\(^{166}\) Daub, p. 19.

\(^{167}\) Imbach Haumüller, p. 181.
Section 307 SOX

Section 307 SOX required the SEC to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of issuers. According to Section 307(1) SOX an attorney is required to report evidence of a material violation of securities laws or breach of fiduciary duty, or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof). Thus, an internal reporting duty ‘up the ladder’ exists for (in-house and external) attorneys.\textsuperscript{168} If the chief legal counsel or chief executive officer do not appropriately respond to the evidence (i.e. adopting appropriate remedial measures or sanctions with respect to the violation), the attorney is required to report the evidence to the company’s audit committee of the board of directors or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the company, or to the board of directors.\textsuperscript{169}

Based on the SEC’s Final Rule ‘Implementation of Standards of Professional Conduct for Attorneys’ (SEC’s Final Rule), attorneys may also, under certain circumstances, report directly to the SEC (i.e. to an external body). However, there is no obligation to notify the SEC in case of a material violation of securities laws or breach of fiduciary duty or similar violation by the company. Initially, the draft of Section 205.3(d) of SEC’s Final Rule provided for a duty to report for attorneys. Yet the SEC’s Final Rule stipulates a right to report, mainly due to potential conflicts with the professional duties of an attorney: the professional secrecy of US attorneys, the ‘Attorney-Client Privilege’, is deeply rooted in the US. In addition, the ‘Work-Product Doctrine’ also provides significant protection regarding the disclosure of documents. On an international level, the duty to report was also incompatible with local law.

\textsuperscript{168} Section 307(1) SOX.

\textsuperscript{169} Section 307(2) SOX.
(e.g. an in-house attorney at a Swiss bank is bound to the Swiss bank secrecy and, thus, may not report any information to outside bodies).\footnote{Section 205.3(d) of SEC’s Final Rule: Implementation of Standards of Professional Conduct for Attorneys; Imbach Haumüller, p. 186-187.}

(3) **Section 806 SOX**

Section 806 SOX is the actual core of the whistleblower protection provisions incorporated into SOX. As Section 806 SOX is applied to all companies listed on an US stock exchange, the US whistleblower legislation obtained for the first time extensive whistleblower protection provisions for employees active in the private sector.\footnote{Fitzmaurice, p. 2050-2051.}

Under Section 806 of SOX, an employee engages in protected whistleblower conduct by providing information that he reasonably believes is a violation of:

- federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343), bank fraud (18 U.S.C. Section 1344), or securities fraud (18 U.S.C. Section 1348);
- any provision of federal law relating to fraud against shareholders; and
- any rule or regulation of the SEC.\footnote{Section 806(a)(2) SOX.}

In the event of a notification, the protection provisions under Section 806 SOX apply only if the reporting has been made to persons and/or bodies specifically designated by the law, that is: [1] any federal regulatory or law enforcement agency; [2] any member of Congress or any committee of Congress; or [3] a person with supervisory authority over the employee. A previous internal reporting of the grievances is not required.\footnote{Section 806(a)(1) SOX.}

Section 806(a) SOX prohibits an officer, employee, agent, contractor, or subcontractor of a publicly traded company (or of its subsidiary) from retaliating against an employee who
disclosed information that he reasonably perceived to be a potential or actual violation of conduct. Whistleblowers who still suffered retaliation and prevailed are entitled to:

- reinstatement;
- back pay with interest (i.e. lost wages and benefits);
- compensation (including ‘make-whole’ compensation, ‘special damages’ for emotional distress and loss of professional reputation, and attorneys’ fees and costs);
- ‘affirmative relief’ (e.g. a letter of apology and formal posting of the decision).174

(4) **Section 1107 SOX**

In addition to the prohibition to take retaliatory measures against whistleblowers under section 806 of SOX, section 1107 of SOX also contains criminal provisions on the protection of whistleblowers. Section 1107 of SOX makes it a crime for a person to knowingly retaliate against a whistleblower for disclosing truthful information relating to the commission or possible commission of any federal offense. Possible penalties are fines and/or imprisonment up to ten years.175

(5) **Extraterritorial Application of SOX**

The question as to whether and to what extent the provisions of SOX also have extraterritorial effects is not entirely clarified. It is questionable if the whistleblowing provisions under SOX also apply for employment relationships outside the US. For example, the question arises whether employees of companies listed on an US stock exchange but with headquarters abroad are also covered by the whistleblower protection provisions of section 806 SOX.176

174 Section 806(c) SOX.
175 Section 1107(e) SOX.
176 Imbach Haumüller, p. 195.
In the decision ‘Ruben Carnero vs Boston Scientific Corporation’ on 5 January 2005, the United States Court of Appeals had for the first time the opportunity to examine the extraterritorial effect of section 806 SOX. The United States Court of Appeals concluded that employees of a foreign subsidiary of an US-based public company cannot rely on the whistleblower protection provisions of section 806 SOX.¹⁷⁷

However, the issue regarding the extraterritorial application of SOX is heavily discussed and not yet fully clarified. Today, the implementation of the provisions under section 301 SOX offers the fewest problems for foreign companies listed on an US stock exchange; however, there are still potential conflicts with foreign law that remain open. The same complexity arises more or less with the other whistleblower provisions under SOX; thus, assessing the extraterritorial application of SOX would go beyond the scope of this paper.

C. Introduction Case – Court Decision

During the investigation, Bradley Birkenfeld was charged with fraud for withholding crucial information from federal investigators, including details of his top client, Igor Olenicoff, a Florida based billionaire property developer. In particular, Birkenfeld was convicted for participating in UBS's illicit cross-border business, for aiding and abetting tax fraud, and for lying to US authorities about his own misconduct. As a result of the investigation by the DOJ, he was sentenced on 21 August 2009 to 40 months in prison by the Southern District Court of Florida.¹⁷⁸

Birkenfeld was given early release after two and a half years in prison.

On Tuesday, 11 September 2012, the IRS announced that Birkenfeld would receive a USD 104 million whistleblower award for providing comprehensive information used during the enforcement activities against UBS.

¹⁷⁷ Ruben Carnero vs Boston Scientific Corporation, 433 F.3d 1 (1st Cir. 2005); Imbach Haumüller, p. 196.

Birkenfeld submitted a claim under section 7623(b) IRC requesting an award based on the compensation from the fine that UBS paid under its deferred prosecution agreement, collections from the data turned over under both that agreement and the subsequent John Doe summons settlement, and collections from the thousands of individuals who reported themselves under the IRS voluntary disclosure initiative. Under section 7623(b) IRC, whistleblowers are entitled to awards of between 15 and 30 percent of the additional tax, penalty and other amounts the IRS collects, with no maximum dollar amount.

Although Birkenfeld would have been entitled to up to 30 percent of the collected proceeds that arose from the information he provided (the IRS collected more than USD 7 billion in unpaid taxes), the USD 104 million payout was calculated only on the monies the IRS received directly from UBS as a result of the deferred prosecution agreement with the DOJ.

Under section 7623(b)(3) IRC, the Whistleblower Office may reduce or deny an award if “[...]the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions[...]; if such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.”179

Despite his criminal conviction, the IRS did not deny any award for Birkenfeld. Although he was found to be a criminal participant in UBS’s wrongdoing, the IRS considered Birkenfeld a low-level employee of the bank when evaluating the whistleblower’s role in planning or initiating the actions that led to the underpayment. According to the IRS, he did not create the plan nor did he benefit directly from the taxes saved.180

Furthermore, many law experts in the US believed, that due to the high-profile case, the IRS did not want to scare off potential whistleblowers if Birkenfeld ended up empty-handed and with nothing more to show than a criminal record.181

179 Section 7623(b)(3) IRC.
180 Coder, p. 4.
D. Gaps to Best Practice

Like in many other legal and economic aspects, the United States assumed a pioneering role in the development of whistleblower legislature. Specific regulations regarding the protection of whistleblowers were enacted very early on, at both the federal level as well at individual state level.

There is broad public acceptance in the United States with respect to employer notifications. The long-standing legal and institutional practice has resulted in a public awareness that does not associate whistleblowing with denunciation, but rather as a selfless defense of the common good.182

Today, the United States has comprehensive and dedicated laws on whistleblower protection. The US legislator provides for both the public sector as well as the private sector, provisions regarding whistleblower protection and whistleblower reward.

Due to the multitude of whistleblower protection provisions, it is not easy to maintain an overview of the different regulations. Moreover, the legal protection of whistleblowers varies according to the subject and the state in which the events take place. This leads to a complexity in the US legal system, which is exacerbated by the fact that the different legal systems in federal law and within the various individual states are inconsistent and partly contradictory.183

The large number of legal sources due to case law makes a unilateral regulation with respect to whistleblowing more difficult and leads to lack of clarity and confusion in the field of whistleblower protection.184

A potential drawback to US whistleblower regulation and in particular to its whistleblower reward system is that it is inconsistent with most foreign whistleblowing legislation. In

182 Graser, p. 15.
183 Ledergerber, p. 73f.
184 Graser, p. 104f.
addition, the extraterritorial application of US whistleblower policy is partly in contradiction to European and national legislation, especially with regard to data protection and labor law.\textsuperscript{185}

Transparency International assessed the status of whistleblower protection rules in each of the G20 countries, evaluating whistleblowing laws for both the private and public sectors. Each country’s laws were assessed by an international team of experts drawn from civil society and academia against a set of 14 criteria, developed from five internationally recognized sets of whistleblower principles for best legislative practice. The US legislative regime was rated the best out of the G20 countries. Only four out of the 14 criteria were assessed as ‘somewhat or partially comprehensive’, while the remaining ten criteria were assessed as ‘very or quite comprehensive’ (refer to Appendix 7).\textsuperscript{186}

\textsuperscript{185} Miceli/Near, Whistleblowing in Organizations, p. 172f.

\textsuperscript{186} Transparency International, Whistleblower Protection Laws in G20 Countries, p. 63.
V. Summary and Conclusion

The disclosure of grievances by a member of an organization (e.g. an employee) to persons within the organization, authorities, or the public is regarded as whistleblowing. Such grievances are not only considered to be illegal or illegitimate practices, which infringe current law, rules, and standards but also immoral practices that negatively affect moral concepts and values of the organization or the public.

Whistleblowing is a complex phenomenon and has several points of contact with various types of law. The reporting of a wrongdoing comprises a concrete balancing of interests, in which the whistleblower either gives priority to his sense of responsibility or to an untroubled professional existence without the fear of possible reprisals. A whistleblower therefore acts between the conflicting priorities of accountability and risk-taking.

Many indicators show that the risk posed by economic crime is increasing. Bribery, corruption, and fraud pose a major threat to the economy and the society. Even though the US and especially Switzerland score relatively well in the specific evaluations (i.e. Bribe Payers Index, Corruption Perceptions Index), these crimes cost the US and Swiss people billions of dollars and Swiss francs.

Whistleblowers have been recognized to play a significant role in exposing bribery, corruption, fraud, or mismanagement and thus protecting the public interest. Hence, in the past five years, more OECD countries have put in place dedicated whistleblower protection laws than in the previous quarter century. The protection of whistleblowers has been regarded to promote a culture of integrity and accountability in both private and public institutions.187

Whistleblower protection provisions can be established at the highest level in international law, in dedicated domestic law or in parts of domestic sectoral laws. To date, not many countries have a dedicated whistleblower protection law, and if a country has one, the provisions do often not apply to both public and private sector employees. Fragmented

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187 OECD, Committing to Effective Whistleblower Protection, p. 11.
provisions (i.e. provisions in various sectorial laws) have the disadvantage of being less comprehensive and limiting the scope of disclosures that are afforded protection.

Since retaliation for whistleblowing generally appears in the form of direct and indirect disciplinary actions (e.g. unfair dismissal, denial of promotion, or contract renewal), discrimination or harassment, best practices for whistleblower protection focus on the protection of the whistleblower’s employment status.

International standards on whistleblower protections are provided by intergovernmental organizations, most notably by the OECD and by well-known NGO’s, in particular Transparency International. Effective whistleblower protection provisions (i.e. best practices) ensure anonymous disclosures and protect the informant, provide for clear rules regarding internal disclosure procedures, and set clear and comprehensible rules for external whistleblowing, indicating when the circumstances necessitate reporting to the authorities, third parties, the media, or the public.

Under the current Swiss legislature, employees have a lack of clarity as well as a lack of predictability as to whether and to what extent grievances may or should be reported. Since Swiss law does not explicitly regulate whistleblowing, the legal questions that arise in the context of whistleblowing must be answered within the different fields of law (i.e. criminal law, labor law, data protection law, etc.).

Swiss law does not provide explicit whistleblower protection provisions. Persons concerned would have to consider the generally applicable provisions of the employee's fiduciary duty and duty of confidentiality (article 321[a] CO), the employer’s duty of care (article 328 CO), and, where applicable, the recent court decisions. Consequently, employees face difficulties determining the extent to which an obligation to notify or right to report internally exists, and under which conditions external reporting is permitted. In addition, it is often not possible for the persons reporting the grievances, to demonstrate that they have been sanctioned in an abusive or inadmissible manner due to their disclosure of the maladministration.
In the area of public law, it becomes apparent that the strict regime of concealment of internal processes is slowly reversed on both, the federal level as well as on the level of the cantons. With the explicit authorization of the federal government's employees to contact the SFAO in case of detected grievances, the federal administration formally established an internal reporting system (article 22[a] FedPerA).

In May 2003, National Councilor Remo Gysin submitted a motion to parliament to improve the protection of whistleblowers and to regulate the phenomena of whistleblowing by law. Even though the majority of the parliament recognized the need for a legislative change, the parliament could not agree on a legislative proposal. More than 10 years later, in September 2015, the draft law has been sent back to the Federal Council for revision.

In contrast to Switzerland, the topic of whistleblowing was discussed in the US at a very early stage. Already in 1863, people were able to sue companies that were allegedly involved in fraudulent practices based on the False Claims Act. However, due to the US legal system, which is based on case law, a uniform regulation with regard to whistleblowing did not evolve.

Today, the provisions regarding whistleblowing are partly contained in special laws (e.g. the Whistleblower Protection Act), and, in other cases, the provisions are quasi an annex or section to specific laws (e.g. SOX). This multitude of legal sources entails that it is often difficult for whistleblowers to get an overview of the relevant legal provisions and to assess the potential legal consequences in the event of a disclosure.

In order to incentivize individuals who possess information about unlawful or immoral activities, the US legislator has developed whistleblowing programs, which encourage individuals to come forward in the detection of wrongdoing by providing various incentives, including financial rewards. The allocation of monetary rewards has brought forward some prominent whistleblower cases in the US in recent years. However, the use of financial incentives in order to encourage reporting is still subject of controversial debate. The
promotion of whistleblowing by providing financial incentives might also entail the risk that employees engage in ‘spying’ within their organization/company.

I believe that whistleblowing can be an effective tool for detecting illegal, immoral, or illegitimate practices, but the definition and implementation of legal provisions and the introduction of internal warning systems is not enough. The corresponding provisions must be known to the employees. This implies that employees know their rights and obligations and are aware of the specific processes in case of a notification. Thus, the alleged whistleblower may assess possible consequences beforehand. In order to avoid the abuse of whistleblowing, checks and controls must be integrated into the whistleblower process.
Abstract

The disclosure of grievances by a person of an organization to persons of the organization, an authority, or the public is defined as whistleblowing. People who disclose ‘inside information’ regarding alleged misconduct play an essential role in the fight against corruption, bribery, fraud, and mismanagement. By exposing and reporting the wrongdoing, the whistleblowers often take on high personal risk. Internal and external whistleblowing, however, will only take place if the persons concerned do not have to fear retaliation for their reporting. For this reason, whistleblower protection provisions are required. Intergovernmental organizations and NGOs, together with whistleblower experts, academia and government officials have defined whistleblower protection provisions in order to provide national legislators guidance and to help ensure effective whistleblower protection.

In Switzerland, the basis of its current legal situation causes the situation of whistleblowers to have considerable legal uncertainty. To date, Swiss private law does not contain specific provisions relating to whistleblowing. Notifications are, in principle, only permitted when the person disclosing the information acts in accordance with the so-called ‘cascade system’ (i.e. ‘tiered’ approach) developed by the Swiss Federal Supreme Court and the principle of proportionality. Even if the conditions for the admissibility of a notification have been met, this usually does not effectively protect the person concerned from retaliation.

In contrast to Switzerland, the US has a multitude of specific whistleblower legislations, on both the federal as well as on the state level. The best-known policies relating to whistleblowing are the Whistleblower Protection Act, the Federal False Claim Act, and the Sarbanes-Oxley Act. The legal protection of whistleblowers varies according to the subject and the state in which the events take place. This leads to a complexity in the US legal system, which is exacerbated by the fact that the various legal provisions in federal law and within the various individual states are inconsistent and partly contradictory. Nevertheless, the US whistleblower protection system has been rated the best out of the G20 countries by independent organizations.
Appendix

Appendix 1: Bribe Payers Index 2011

Scores based on business executives’ responses when asked how often firms, with which they have a business relationship, from a given country engage in bribery (0 = always; 10 = never).

<table>
<thead>
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<th>Rank</th>
<th>Country / Territory</th>
<th>Bribe Payers Index Score</th>
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<td>Netherlands</td>
<td>8.8</td>
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<tr>
<td>1</td>
<td>Switzerland</td>
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<td>India</td>
<td>7.5</td>
</tr>
<tr>
<td>19</td>
<td>Turkey</td>
<td>7.5</td>
</tr>
<tr>
<td>22</td>
<td>Saudi Arabia</td>
<td>7.4</td>
</tr>
<tr>
<td>23</td>
<td>Argentina</td>
<td>7.3</td>
</tr>
<tr>
<td>23</td>
<td>United Arab Emirates</td>
<td>7.3</td>
</tr>
<tr>
<td>25</td>
<td>Indonesia</td>
<td>7.1</td>
</tr>
<tr>
<td>26</td>
<td>Mexico</td>
<td>7.0</td>
</tr>
<tr>
<td>27</td>
<td>China</td>
<td>6.5</td>
</tr>
<tr>
<td>28</td>
<td>Russia</td>
<td>6.1</td>
</tr>
<tr>
<td>-</td>
<td>Average</td>
<td>7.8</td>
</tr>
</tbody>
</table>

Appendix 2: Corruptions Perceptions Index 2015

*The perceived levels of public sector corruption in 168 countries (0 = highly corrupt; 100 = very clean).*

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country / Territory</th>
<th>Corruption Perceptions Index Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Denmark</td>
<td>91</td>
</tr>
<tr>
<td>2</td>
<td>Finland</td>
<td>90</td>
</tr>
<tr>
<td>3</td>
<td>Sweden</td>
<td>89</td>
</tr>
<tr>
<td>4</td>
<td>New Zealand</td>
<td>88</td>
</tr>
<tr>
<td>5</td>
<td>Netherlands</td>
<td>87</td>
</tr>
<tr>
<td>5</td>
<td>Norway</td>
<td>87</td>
</tr>
<tr>
<td>7</td>
<td>Switzerland</td>
<td>86</td>
</tr>
<tr>
<td>8</td>
<td>Singapore</td>
<td>85</td>
</tr>
<tr>
<td>9</td>
<td>Canada</td>
<td>83</td>
</tr>
<tr>
<td>10</td>
<td>Germany</td>
<td>81</td>
</tr>
<tr>
<td>10</td>
<td>Luxembourg</td>
<td>81</td>
</tr>
<tr>
<td>10</td>
<td>United Kingdom</td>
<td>81</td>
</tr>
<tr>
<td>13</td>
<td>Australia</td>
<td>79</td>
</tr>
<tr>
<td>13</td>
<td>Iceland</td>
<td>79</td>
</tr>
<tr>
<td>15</td>
<td>Belgium</td>
<td>77</td>
</tr>
<tr>
<td>16</td>
<td>Austria</td>
<td>76</td>
</tr>
<tr>
<td>16</td>
<td>United States</td>
<td>76</td>
</tr>
<tr>
<td>18</td>
<td>Hong Kong</td>
<td>75</td>
</tr>
<tr>
<td>18</td>
<td>Ireland</td>
<td>75</td>
</tr>
<tr>
<td>18</td>
<td>Japan</td>
<td>75</td>
</tr>
<tr>
<td>21</td>
<td>Uruguay</td>
<td>74</td>
</tr>
<tr>
<td>22</td>
<td>Qatar</td>
<td>71</td>
</tr>
<tr>
<td>23</td>
<td>Chile</td>
<td>70</td>
</tr>
<tr>
<td>23</td>
<td>Estonia</td>
<td>70</td>
</tr>
<tr>
<td>23</td>
<td>France</td>
<td>70</td>
</tr>
<tr>
<td>...</td>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>167</td>
<td>North Korea</td>
<td>8</td>
</tr>
<tr>
<td>167</td>
<td>Somalia</td>
<td>8</td>
</tr>
<tr>
<td>-</td>
<td>Average</td>
<td>43</td>
</tr>
</tbody>
</table>

Appendix 3: Types of Economic Crime Experienced

The most pervasive economic crimes reported by the respondents to the CECS.

<table>
<thead>
<tr>
<th>Type of Economic Crime</th>
<th>2016</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset misappropriation</td>
<td>64%</td>
<td>69%</td>
</tr>
<tr>
<td>Cybercrime</td>
<td>32%</td>
<td>24%</td>
</tr>
<tr>
<td>Bribery &amp; Corruption</td>
<td>24%</td>
<td>27%</td>
</tr>
<tr>
<td>Procurement fraud</td>
<td>23%</td>
<td>29%</td>
</tr>
<tr>
<td>Accounting fraud</td>
<td>18%</td>
<td>22%</td>
</tr>
<tr>
<td>Human Resources fraud</td>
<td>12%</td>
<td>15%</td>
</tr>
<tr>
<td>Money Laundering</td>
<td>11%</td>
<td>11%</td>
</tr>
<tr>
<td>IP infringement</td>
<td>7%</td>
<td>8%</td>
</tr>
<tr>
<td>Insider trading</td>
<td>7%</td>
<td>4%</td>
</tr>
<tr>
<td>Tax fraud</td>
<td>6%</td>
<td>6%</td>
</tr>
<tr>
<td>Mortgage fraud</td>
<td>6%</td>
<td>7%</td>
</tr>
<tr>
<td>Competition / anti-trust law infringement</td>
<td>4%</td>
<td>5%</td>
</tr>
<tr>
<td>Espionage</td>
<td>2%</td>
<td>3%</td>
</tr>
<tr>
<td>Other</td>
<td>11%</td>
<td>14%</td>
</tr>
</tbody>
</table>

Appendix 4: Reported Economic Crime by Region

*Reported economic crimes by region by the respondents to the CECS.*

<table>
<thead>
<tr>
<th>Region</th>
<th>Reported Economic Crime in 2016</th>
<th>Reported Economic Crime in 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>57%</td>
<td>50%</td>
</tr>
<tr>
<td>Western Europe</td>
<td>40%</td>
<td>35%</td>
</tr>
<tr>
<td>North America</td>
<td>37%</td>
<td>41%</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>33%</td>
<td>39%</td>
</tr>
<tr>
<td>Asia Pacific</td>
<td>30%</td>
<td>32%</td>
</tr>
<tr>
<td>Latin America</td>
<td>28%</td>
<td>35%</td>
</tr>
<tr>
<td>Middle East</td>
<td>25%</td>
<td>21%</td>
</tr>
<tr>
<td>Global</td>
<td>36%</td>
<td>37%</td>
</tr>
</tbody>
</table>

Appendix 5: Financial Impact of Economic Crime

Estimated financial impact through incidents of economic crime over the last 24 months reported by the respondents to the CECS.

<table>
<thead>
<tr>
<th>Financial Impact (Loss)</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>USD 100 million or more</td>
<td>1%</td>
</tr>
<tr>
<td>USD 5 million to &lt; USD 100 million</td>
<td>4%</td>
</tr>
<tr>
<td>USD 1 million to &lt; USD 5 million</td>
<td>9%</td>
</tr>
<tr>
<td>USD 100,000 to &lt; USD 1 million</td>
<td>22%</td>
</tr>
<tr>
<td>USD 50,000 to &lt; USD 100,000</td>
<td>17%</td>
</tr>
<tr>
<td>Less than USD 50,000</td>
<td>36%</td>
</tr>
</tbody>
</table>

Appendix 6: Transparency Internationals’ Principles for Whistleblower Legislation

*Transparency International has defined the following principles to serve as guidance for formulating new and improving existing whistleblower legislation:*

<table>
<thead>
<tr>
<th>#</th>
<th>Principles</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Definition of whistleblowing</td>
<td>Whistleblowing: The disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organizations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action. Whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorized use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these. A whistleblower is any public- or private sector employee or worker who discloses information and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees.</td>
</tr>
</tbody>
</table>
| 2  | Protected individuals and disclosures | All employees and workers in the public and private sectors need:  
- accessible and reliable channels to report wrongdoing;  
- robust protection from all forms of retaliation; and  
- mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing. |
<p>| 3  | Scope of Application            | Protection shall be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed. Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed. |
| 4  | Protection from retribution      | Individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation and other job sanctions; punitive transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and threats of such actions. |
| 4  | Preservation of confidentiality  | The identity of the whistleblower may not be disclosed without the individual’s explicit consent. |
| 4  | Burden of proof on the employer  | In order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower’s disclosure. |</p>
<table>
<thead>
<tr>
<th></th>
<th>Principles</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Knowingly false disclosures</td>
<td>An individual who makes a disclosure demonstrated to be knowingly false is subject to possible employment/professional sanctions and civil liabilities. Those wrongly accused shall be compensated through all appropriate measures.</td>
</tr>
<tr>
<td>4</td>
<td>Waiver of liability</td>
<td>Any disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law.</td>
</tr>
<tr>
<td>4</td>
<td>Right to refuse participation in wrongdoing</td>
<td>Employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution or discrimination if they exercise this right.</td>
</tr>
<tr>
<td>4</td>
<td>Preservation of rights</td>
<td>Any private rule or agreement is invalid if it obstructs whistleblower protections and rights. For instance, whistleblower rights shall override employee ‘loyalty’ oaths and confidentiality/nondisclosure agreements (‘gag orders’).</td>
</tr>
<tr>
<td>4</td>
<td>Anonymity</td>
<td>Full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.</td>
</tr>
<tr>
<td>4</td>
<td>Personal protection</td>
<td>Whistleblowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.</td>
</tr>
<tr>
<td>5</td>
<td>Reporting within the workplace</td>
<td>Whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers’ disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers’ retaliation complaints (including a process for disciplining perpetrators of retaliation).</td>
</tr>
<tr>
<td>5</td>
<td>Reporting to regulators and authorities</td>
<td>If reporting at the workplace does not seem practical or possible, individuals may make disclosures to regulatory or oversight agencies or individuals outside of their organization. These channels may include regulatory authorities, law enforcement or investigative agencies, elected officials, or specialized agencies established to receive such disclosures.</td>
</tr>
<tr>
<td>5</td>
<td>Reporting to external parties</td>
<td>In cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, individuals shall be protected for disclosures made to external parties such as the media, civil society organizations, legal associations, trade unions, or business/professional organizations.</td>
</tr>
<tr>
<td>5</td>
<td>Disclosure and advice tools</td>
<td>A wide range of accessible disclosure channels and tools should be made available to employees and workers of government agencies and publicly traded companies, including advice lines, hotlines, online portals, compliance offices, and internal or external ombudspersons. Mechanisms shall be provided for safe, secure, confidential or anonymous disclosures.</td>
</tr>
<tr>
<td>#</td>
<td>Principles</td>
<td>Comments</td>
</tr>
<tr>
<td>----</td>
<td>------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>5</td>
<td>National security/official secrets</td>
<td>Where a disclosure concerns matters of national security, official or military secrets, or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution, and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosure to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (i.e. to the media, civil society organizations) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.</td>
</tr>
<tr>
<td>6</td>
<td>Range of remedies</td>
<td>A full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering. A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.</td>
</tr>
<tr>
<td>6</td>
<td>Fair hearing (genuine ‘day in court’)</td>
<td>Whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum, with full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective.</td>
</tr>
<tr>
<td>6</td>
<td>Whistleblower participation</td>
<td>As informed and interested stakeholders, whistleblowers shall have a meaningful opportunity to provide input to subsequent investigations or inquiries. Whistleblowers shall have the opportunity (but are not required) to clarify their complaint and provide additional information or evidence. They also have the right to be informed of the outcome of any investigation or finding, and to review and comment on any results.</td>
</tr>
<tr>
<td>6</td>
<td>Reward systems</td>
<td>If appropriate within the national context, whistleblowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistleblower), employment promotion, or an official apology for retribution.</td>
</tr>
<tr>
<td>7</td>
<td>Dedicated legislation</td>
<td>In order to ensure clarity and seamless application of the whistleblower framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.</td>
</tr>
<tr>
<td>#</td>
<td>Principles</td>
<td>Comments</td>
</tr>
<tr>
<td>----</td>
<td>----------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>7</td>
<td>Publication of data</td>
<td>The whistleblower complaints authority should collect and regularly publish (at least annually) data and information regarding the functioning of whistleblower laws and frameworks (in compliance with relevant privacy and data protection laws). This information should include the number of cases received; the outcomes of cases (i.e. dismissed, accepted, investigated, validated); compensation and recoveries (maintaining confidentiality if the whistleblower desires); the prevalence of wrongdoing in the public and private sectors; awareness of and trust in whistleblower mechanisms; and time taken to process cases.</td>
</tr>
<tr>
<td>7</td>
<td>Involvement of multiple actors</td>
<td>The design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organizations, business/employer associations, civil society organizations and academia.</td>
</tr>
<tr>
<td>7</td>
<td>Whistleblower training</td>
<td>Comprehensive training shall be provided for public sector agencies and publicly traded corporations and their management and staff. Whistleblower laws and procedures shall be posted clearly in public and private sector workplaces where their provisions apply.</td>
</tr>
<tr>
<td>8</td>
<td>Whistleblower complaints authority</td>
<td>An independent agency shall receive and investigate complaints of retaliation and improper investigations of whistleblower disclosures. The agency may issue binding recommendations and forward relevant information to regulatory, investigative or prosecutorial authorities for follow-up. The agency shall also provide advice and support, monitor and review whistleblower frameworks, raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing. The agency shall be provided with adequate resources and capacity to carry out these functions.</td>
</tr>
<tr>
<td>8</td>
<td>Penalties for retaliation and interference</td>
<td>Any act of reprisal for, or interference with, a whistleblower’s disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties.</td>
</tr>
<tr>
<td>8</td>
<td>Follow-up and reforms</td>
<td>Valid whistleblower disclosures shall be referred to the appropriate regulatory agencies for follow-up, corrective actions and/or policy reforms.</td>
</tr>
</tbody>
</table>

## Appendix 7: Rating of US Legislative Regime against International Principles

### Rating:
1. *Very or quite comprehensive*
2. *Somewhat or partially comprehensive*
3. *Absent / not at all comprehensive*

<table>
<thead>
<tr>
<th>#</th>
<th>(Best Practice) Criterion</th>
<th>Description</th>
<th>Rating Public Sector</th>
<th>Rating Private Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Broad coverage of organizations</td>
<td>Comprehensive coverage of organizations in the sector (e.g. few or no ‘carve-outs’)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Broad definition of reportable wrongdoing</td>
<td>Broad definition of reportable wrongdoing that harms or threatens the public interest (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>Broad definition of whistleblowers</td>
<td>Broad definition of ‘whistleblowers’ whose disclosures are protected (e.g. including employees, contractors, volunteers and other insiders)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>Range of internal / regulatory reporting channels</td>
<td>Full range of internal (i.e. organizational) and regulatory agency reporting channels</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>External reporting channels (third party / public)</td>
<td>Protection extends to same disclosures made publicly or to third parties (external disclosures e.g. to media, NGOs, labour unions, Parliament members) if justified or necessitated by the circumstances</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td>Thresholds for protection</td>
<td>Workable thresholds for protection (e.g. honest and reasonable belief of wrongdoing, including protection for ‘honest mistakes’; and no protection for knowingly false disclosures or information)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>Provision and protections for anonymous reporting</td>
<td>Protections extend to disclosures made anonymously by ensuring that a discloser (a) has the opportunity to report anonymously and (b) is protected if later identified</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>Confidentiality protected</td>
<td>Protections include requirements for confidentiality of disclosures</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>#</td>
<td>(Best Practice) Criterion</td>
<td>Description</td>
<td>Rating Public Sector</td>
<td>Rating Private Sector</td>
</tr>
<tr>
<td>----</td>
<td>---------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>9</td>
<td>Internal disclosure procedures required</td>
<td>Comprehensive requirements for organizations to have internal disclosure procedures (e.g. including requirements to establish reporting channels, to have internal investigation procedures, and to have procedures for supporting and protecting internal whistleblowers from point of disclosure)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>Broad retaliation protections</td>
<td>Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action, harassment)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td>Comprehensive remedies for retaliation</td>
<td>Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was not related to disclosure)</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>12</td>
<td>Sanctions for retaliators</td>
<td>Reasonable criminal, and/or disciplinary sanctions against those responsible for retaliation</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>13</td>
<td>Oversight authority</td>
<td>Oversight by an independent whistleblower investigation / complaints authority or tribunal</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>14</td>
<td>Transparent use of legislation</td>
<td>Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements)</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Resume

Olivier Stulz

Born on 8 June 1979

Studies: Business Administration

Degrees: Master of Arts in Management

Field of business activity: Senior Manager at Geissbühler Weber & Partner AG

2016/2017 Executive Master of European and International Business Law M.B.L. – HSG at the University of St. Gallen.

Statement

I hereby declare

- that I have written this paper without any help from others and without the use of documents and aids other than those stated above,

- that I have mentioned all the sources used and that I have cited them correctly according to established academic citation rules,

- that I am aware that my work can be electronically checked for plagiarism and that I hereby grant the University of St. Gallen copyright in accordance with the Examination Regulations in so far as this is required for administrative action.

Zurich, 17 July 2017

Olivier Stulz