

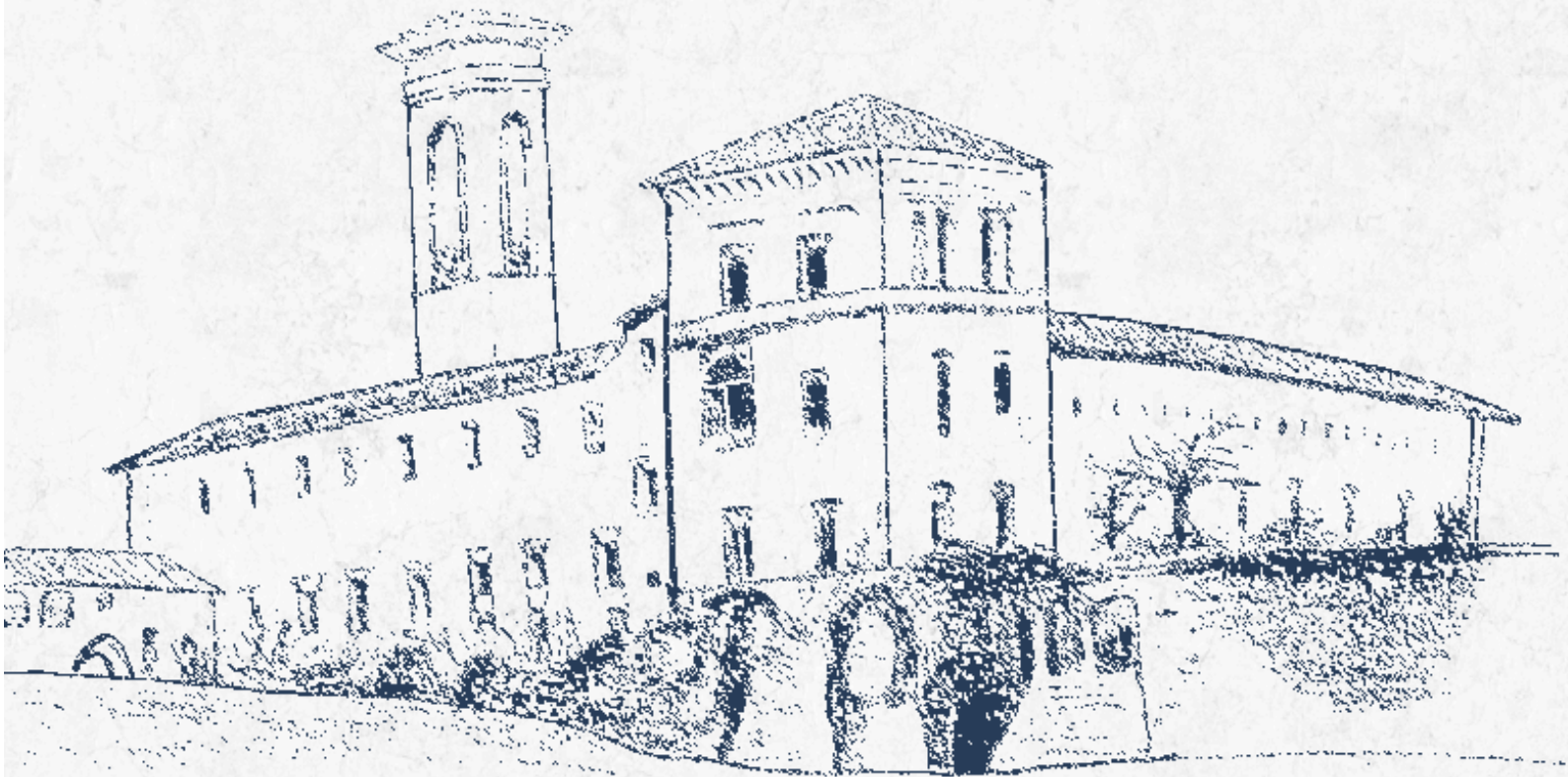
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# Cross-border Concerns: Perils and Possibilities

Richard Hyde and Ashley Savage \*

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## 1. Introduction

Whistleblowing laws tend to be territorial. However, concerns disclosed by whistleblowers can cross national boundaries, affecting members of the public in more than one country and requiring a response by regulators and governments in multiple States, particularly where the worker operates in an industry that is globalised and operates transnationally. Two examples of such industries are explored in this piece, aviation and food. One can easily think of others. Surface transportation, such as shipping and road haulage, energy production and financial services are all capable of posing risks to the public in countries throughout the world. The need to address a concern, in order to reduce the risk to the public, whilst protecting the whistleblower from suffering detriment or dismissal raises particular issues in cases involving these transnational concerns. This article attempts to outline these issues, and consider how they can be best addressed, in the long term, by policymakers and, in the more immediate future, those advising whistleblowers.

The article begins by outlining the existence and prevalence of cross-border concerns, before considering the special issues that they raise for whistleblowers and their advisors. The authors then examine two case studies to illustrate the issues faced by those who wish to disclose a cross-border concern. We conclude by providing policy guidance intended to ensure that cross-border concerns are handled in a consistent manner that

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enables issues to be raised and adequately addressed, ensuring that both the public and whistleblower are protected.

## 2. The Need to Raise Cross-Border Concerns

Society is increasingly globalised, with multinational companies and complex international supply chains providing goods and services for consumers throughout the world. Means of transportation criss-cross the globe, passing over and through multiple jurisdictions whilst travelling between different points on the earth's surface. This transnational network can pose risks to individuals in multiple jurisdictions, meaning that those who wish to avert those risks may require that either a national authority different from the one governing the jurisdiction within which they are situated, or numerous national authorities, take action.

Information from employees is important to regulators who are not able to establish at all times whether businesses are complying with their regulatory obligations. Information derived from inspections provides a snapshot of compliance by businesses; information from consumers tends to relate to visible non-compliance. Staff are present at all times, and have greater information about business practice. Where the non-compliance is in a different jurisdiction, regulators are particularly unable to access information about non-compliance.

Whistleblowers need regulators to act. When making a disclosure, whistleblowers want regulators to address the risk to the public which led to their disclosure. If a disclosure is not addressed, then the act of communication by the whistleblower does not achieve full value, as it does not lead to a change in practice that results in a reduction in risk to the public. Therefore, where a regulator in a third country is best placed to address the concern, it is necessary for the information to be communicated to that regulator, either directly, or transferred by a national regulator to a regulator in a third country. If there are barriers to making an effective disclosure, these should be lowered so that disclosure of non-compliance is encouraged. Where the act of whistleblowing results in action to ensure compliance with regulatory requirements, this may have the effect of encouraging future disclosures from those who have information valuable to regulators<sup>1</sup>.

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<sup>1</sup> For further consideration of why whistleblowers may choose not to disclose see M. Miceli, J. Near, T. Dworkin, *Whistleblowing in Organizations*, Routledge, New York, 2008

The authors are currently in the process of conducting a large scale project to examine the responses of regulators to whistleblowing disclosures. The aim of this project is to determine whether or not regulators are effectively dealing with whistleblowing concerns and, if they are not, whether this presents a barrier to the expression rights of individuals. As part of the evidence gathering process, freedom of information requests were used to ask questions about the sharing of disclosures by regulators<sup>2</sup>. Whilst analysing the data produced by this research it became evident that data obtained from whistleblowing disclosures is often shared with regulators in other jurisdictions<sup>3</sup>. The theoretical need for cross-border concerns reflects the empirical reality.

Between 2007 and 2010 the Civil Aviation Authority shared concerns with the aviation authorities in France, Ireland, Spain, Switzerland, Tanzania and the United States. In one case, sharing of information led to a legal case in Ireland. In the food sector, data demonstrated that information about concerns is shared between local and national regulators, and between national bodies. This information can relate to food contaminated with dangerous microorganisms, or which does not comply with hygiene standards.

Such sharing poses interesting questions for those interested in whistleblowing, and may suggest a need for either more direct disclosures to non-national bodies in a position to address concerns or for greater governance of the sharing of information derived from disclosures made by whistleblowers, or both. The need for further exploration of cross-border concerns is a central theme of this article, which seeks to consider some of the issues faced by a whistleblower who takes the risk of making a disclosure.

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and A. Brown (Ed.), *Whistleblowing in the Australian Public Sector*, Australian National University, Canberra, 2008.

<sup>2</sup> For further information detailing the methodology as well as preliminary findings see: A. Savage, R. Hyde, *Using Freedom of Information Requests to Facilitate Research*, in *International Journal of Social Research Methodology*, forthcoming doi: 10.1080/13645579.2012.742280; A. Savage, R. Hyde, *Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project*, in *Web Journal of Current Legal Issues*, vol. 19, n. 2, 2013, <http://ojs.qub.ac.uk/index.php/webjcli/article/view/240>.

<sup>3</sup> Between 2007 and 2010 the Civil Aviation Authority shared 18 concerns with foreign regulators. The Food Standards Agency shared 76 out of 82 concerns, although some were shared with a local authority within the jurisdiction, and between 2008 and 2011 notified European partners of 1505 breaches of food regulation (European Commission, RASFF 2012 Annual Report [http://ec.europa.eu/food/food/rapidalert/docs/rasff\\_annual\\_report\\_2012\\_en.pdf](http://ec.europa.eu/food/food/rapidalert/docs/rasff_annual_report_2012_en.pdf)).

### 3. Issues Facing Whistleblowers and their Advisors

Four issues must be considered by whistleblowers, and those advising them, when deciding where to disclose a concern that crosses boundaries; protection of identity; protection of employment; protection of expression; and other legal risks from disclosure.

#### *Protection of Identity*

Where an individual discloses a concern to a regulator it is important for that regulator to take steps to prevent identifying details from disclosure. Regulators must ensure that the information that they hold (which will often, although not always, include information about the identity of the whistleblower) is used in a way that does not reveal the identity of the whistleblower<sup>4</sup>. Whilst regulators in receipt of a consumer complaint may approach a business with the information and ask for action to be taken to bring the business into compliance<sup>5</sup>, a more subtle approach must be taken when responding to information derived from whistleblowing, in order to prevent direct and indirect revelation of the identity of a whistleblower. A regulator sharing information should take steps to monitor the transfer of information and ensure that steps are taken to maintain confidentiality.

#### *Employment Protection*

In the United Kingdom, workers who raise concerns may complain about detriment or dismissal using Part IVA of the Employment Rights Act 1996 (as amended). The worker must be employed under a UK contract and must take into account the different levels of protection offered by PIDA depending on the person to whom a disclosure is made. Whilst PIDA initially envisages disclosures should be made internally, in order to qualify for protection disclosures to regulators prescribed by the Secretary of State need not satisfy as stringent a test as those made to other bodies,

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<sup>4</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, article 17 requires data shared within the EU is appropriately protected and article 25 requires that information shared outside the EU must only be shared with a party that provides an adequate level of protection of the information.

<sup>5</sup> R. Hyde, *Responding to Incidents of Food Borne Illness: An Empirical Study*, PhD Thesis, University of Nottingham, Nottingham, 2013, 136.

such as the media. This has the effect of privileging disclosures made to the regulators listed in the prescribed persons list<sup>6</sup>. The regulators listed do not include regulators in a foreign jurisdiction. The burden to be discharged by a whistleblower in order to demonstrate that he or she has made a protected disclosure is greater if a transnational disclosure is made. The logic of the stepped disclosure regime pushes the UK worker towards making a disclosure to the national regulator, even where the regulator abroad may be equally, or better, placed to address the concern raised. If the UK regulator has no plausible connection with the concern, then the disclosure may not be protected, as the whistleblower cannot show reasonable belief that “the relevant failure falls within any description of matters in respect of which that person is so prescribed”<sup>7</sup>.

#### *Protection of Freedom of Expression*

Workers and their advisers need to be mindful as to the jurisdiction in which they are making the disclosure. The following section identifies that there are differences in the expression rights available whether the worker is making the disclosure in the United Kingdom or in the United States. Where an individual has the opportunity to make a disclosure in either jurisdiction workers or their advisers need to be acutely aware of the differences<sup>8</sup>.

In the United Kingdom, citizens are protected by article 10 of the European Convention on Human Rights (ECHR). The Convention is incorporated into the Human Rights Act 1998 (HRA) (UK). Article 10 provides the right to freedom of expression subject to restrictions in accordance with the law and necessary in a democratic society<sup>9</sup>. Any restrictions must be judged on proportionality grounds. Upon entering a work relationship, citizens agree to a contractual limitation of their expression rights. However, this restriction is not absolute and will be dependent on the nature of the employment, the substance of the

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<sup>6</sup> Public Interest Disclosure (Prescribed Persons) Order 1999 schedule 1 (as amended).

<sup>7</sup> See *Dudin v Salsbury District Council*(2003) ET 3102263/03.

<sup>8</sup> It should be noted that there are additional available protections for employees working in the financial sector. See further Sarbanes-Oxley Act 2002 111 Stat 745 and Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 124 Stat 1376.

<sup>9</sup> The categories of information which justify restriction are listed in article 10(2).



information communicated and the circumstances in which the communication was made<sup>10</sup>.

To date, the European Court of Human Rights (ECtHR) has dealt with very few cases involving whistleblowing. *Guja v Moldova* involved the head of the press department in the Moldovan Prosecutor General's Office<sup>11</sup>. He leaked two letters to the press alleging that the Moldovan Parliament had exerted pressure on the Prosecutor General to discontinue criminal proceedings against four police officers. When Guja was dismissed he sought reinstatement and eventually applied to the ECtHR for relief. The Court developed a new framework for assessing whistleblowing cases, suggesting that the public interest in the information, the channels available for disclosure, the authenticity of the information, the detriment to the employer, the good faith of the employee and the sanction applied to the employee should be taken into account to determine whether the treatment of the whistleblower was proportionate.

The ECtHR found in favour of Guja noting that he did not have an appropriate official avenue to raise his concern. The Court was keen to stress that the action taken to dismiss Guja could have a "serious chilling effect" on other employees raising concerns in the future<sup>12</sup>. Whilst the ECtHR are not bound to follow the precedent set by *Guja v Moldova*, the framework for considering whistleblowing claims was used to determine the subsequent case of *Heinisch v Germany*<sup>13</sup>. The applicant, who worked in a home for the elderly, had repeatedly raised concerns relating to staffing levels. Heinisch became unwell and subsequently made a criminal complaint regarding the issues in the home. She was then dismissed, the organisation citing her repeated illness as a justification. The ECtHR upheld her complaint, identifying that whilst conducting the proportionality test it must weigh up the employee's right to freedom of expression "by signalling illegal conduct" or wrongdoing on the part of the employer against the latter's interests<sup>14</sup>.

In the United Kingdom, Section 6 of the HRA 1998 provides that public authorities, including courts and tribunals are required to act compatibly with Convention rights. It is therefore submitted that the aforementioned

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<sup>10</sup> See generally, *Vereniging Rechtswinkels Utrecht v Netherlands* (Application no 11308/84), *Glaserapp v Germany* (Application no 9228/80) *Rommelfanger v Germany* (1989) D & R 151, *Ahmed v UK* [1998] ECHR 78.

<sup>11</sup> (2008) (Application no 14277/04).

<sup>12</sup> *Ibid.* [95].

<sup>13</sup> (2011) (Application no. 28274/08).

<sup>14</sup> *Ibid.* [65].

case law offers an additional layer of protection to whistleblowers, alongside the protection afforded by PIDA. Section 6 HRA 1998 is beneficial to employees working in public authorities but can also be beneficial to employees working in private organisations. Section 6 allows for ‘indirect horizontal effect’ meaning that an employee can take a private employer to the employment tribunal and may argue their claim on art.10 grounds. The tribunal will need to take into account relevant decisions of the ECtHR by virtue of s.2 HRA 1998. This means that whistleblowers who choose to disclose in the UK may receive additional protection by virtue of the ECtHR’s analysis.

The current position in the United States is different. Whilst it has been argued by academics that the First Amendment of the United States Constitution offers considerable scope for protection, perhaps going beyond that afforded by the ECtHR, public employees are in a weak and uncertain position. The First Amendment prohibits Congress from making laws prohibiting the free exercise of speech. In comparison to art.10 ECHR, the First Amendment does not categorise a list of restrictions. Instead, the Supreme Court has developed an extensive body of case law determining what speech should be protected and in what circumstances. The Court has also extended the reach of the First Amendment to include Federal and State governments and public officials. Because there is not an equivalent provision to s.6 HRA 1998 it should be noted that courts are not obliged to consider the expression rights of a private employee in a case against their employer unless the state has passed law prohibiting employees from expression or requires employers to sanction expression<sup>15</sup>.

The key case regarding whistleblowers expression is *Garvetti v Ceballos*<sup>16</sup>. The respondent, Ceballos, was a district attorney who was contacted by a defence attorney concerned about accuracy of an affidavit used to obtain a search warrant critical to a pending criminal case. Examining the affidavit Ceballos found a number of inaccuracies which he raised with his supervisors who rejected the concerns, so and the case proceeded to trial. At trial Ceballos was called to give evidence for the defence. Post-trial Ceballos claimed that he suffered retaliatory action for raising his

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<sup>15</sup> See *Hudgens v National Labour Relations Board* 424 US 507 and E. Volokh, Freedom of Speech and Workplace Harassment in 39 *UCLA Law Review*, 1992, Vol 39, 1791, which notes at 1816 that “private employers may certainly regulate their employee’s speech because they are not bound by the 1<sup>st</sup> Amendment” but this “does not mean that the government may force the employer to do it.”

<sup>16</sup> 547 U.S. 410.

concerns and, after unsuccessfully filing a grievance, sued his employer. The case reached the Supreme Court where emphasis was placed on Cellabos' position as a public servant. Similar to the ECtHR jurisprudence, the court identified that his expression rights were restricted as a consequence of him entering public employment. The court identified that public servants can enjoy a level of free speech protection in the course of their employment and as private citizens. However, the court held that the communication in question was pursuant to Cellabos' job role and therefore could not be given First Amendment protection. In justifying their reasoning the court focussed heavily on the distinction between Cellabos as a private citizen and as a public employee.

The reasoning in *Garvetti* is significant. It identifies that public employees in the United States are unlikely to obtain First Amendment protection if they uncover wrongdoing as part of their employment duties. Furthermore, where servants have professional obligations to report wrongdoing they are unlikely to obtain protection. Whilst the ECtHR recognises contractual limitations on expression rights it does not make as clear a distinction between the individual speaking as a private citizen or public employee. If the ECtHR were tasked with considering Cellabos' position, his expression rights would most likely be upheld using the *Guja* framework because the position of employment and detriment to the employer are only two considerations in a detailed analysis which places considerable importance on the public benefit of the speech communicated and the potential "chilling effect" of speech restriction. United States citizens working in the United Kingdom, without a UK contract of employment (and thus no PIDA protection) could still enforce art.10 claims before the UK courts. In contrast, UK citizens working for US public authorities would struggle to obtain First Amendment protection and those working for private organisations would not have access to First Amendment protection unless the matter to be decided by the courts involves a law which is in conflict with the protection.

#### *Potential Risks of Disclosure*

If a whistleblower makes a disclosure in a different jurisdiction, he or she must be aware about the risk of infringing laws in both jurisdictions. Data Protection and Breach of Confidence are two areas of important concern. Workers and their advisors must be aware that the data protection regimes in Europe and the United States are fundamentally different. A disclosure made from a European organisation to a United States

organisation is likely to lead to a breach of the law without careful consideration of the legal provisions. Moreover, with regard to breach of confidence, workers and their advisors need to have a good understanding of the differences between the UK and US approaches, failure to do so is likely to result in a breach of the confidentiality agreement. The main issues are briefly outlined below.

### *Data Protection*

As identified above, the European Union has a Data Protection Directive. In the United Kingdom, the Data Protection Act 1998 was specifically drafted to be consistent with the Directive. The Act has eight principles which relate to the fair and lawful processing of data. In particular the eighth principle identifies that personal data cannot be transferred to a country outside the European Economic Area unless that country or territory ensures an adequate level of data protection. This so called ‘third country disclosure’ makes the situation very difficult for whistleblowers who wish to raise a concern to a regulator outside of the EEA.

The United States does not currently have a comprehensive data protection law which is consistent with the Data Protection Directive. To attempt to address these concerns the EU negotiated with the United States to develop the “Safe Harbor Principles”. The EU must enter into an agreement with the US organisation identifying that it can meet the principles before information is shared. This effectively means that a whistleblower would need to identify whether the US regulator or enforcement agency has an agreement in place before disclosing the information.

The directive also has detrimental consequences for information sharing between regulators. By preventing information sharing where the third country regulator does not meet the threshold, the Data Protection Directive and associated national implementing legislation has the potential to impede regulators attempts to share information. Therefore, it is essential that an agreement to safeguard data is entered into in order that information sharing can take place and the concern addressed.

*Breach of Confidence*

Individuals who enter into employment will most likely agree to a confidentiality clause as part of signing an employment contract<sup>17</sup>. Those who do not agree to an express term still owe an implied duty of confidence to their employer. Whistleblowers are at risk of breaching this confidence if they disclose information. In the United Kingdom there is a defence to a breach of confidence action where it can be argued that the disclosure was in the public interest. For example, *Lion Laboratories v Evans and Others* provides that publication of confidential information would be acceptable in situations where it could be proved that there was a serious and legitimate interest in the information being put into the public domain<sup>18</sup>. In *Beloff v Pressdram* the court expanded this test providing situations whereby it may be acceptable to breach confidence: “breach of the country’s security, or in breach of the law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity”<sup>19</sup>.

In the US, trade secrets are protected by State law. However, most state laws on the subject are the same, with 47 states adopting the Uniform Trade Secrets Act. This provides that the actual or threatened misappropriation of a trade secret may be subject to an injunction. However, trade secrets protection is unlikely to prevent a whistleblowing disclosure, as federal courts have held that “disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees”<sup>20</sup>. Despite the restriction in this dictum to former employees, a court is unlikely to treat a disclosure by a current employee differently<sup>21</sup>.

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<sup>17</sup> It is recognised that public servants may have additional responsibilities not to disclose by signing the Official Secrets Act 1989. The common law offence of Misconduct in Public Office has been increasingly used to prosecute individuals who leak information.

<sup>18</sup> [1985] Q.B. 526, 534.

<sup>19</sup> [1973] 1 All ER 241, 260.

<sup>20</sup> *McGrane v Readers Digest* (1993) 822 F.Supp 1044, 1052 S.D.N.Y.

<sup>21</sup> *Lachman v Sperry-Sun Well Surveying Company* (1972) 457 F.2d 850 (10<sup>th</sup> Circuit CA) provides that the court, in a contract suit, “will never penalize one for exposing wrongdoing.” Many states have also recognised a common law public policy exception for whistleblowers, see further National Whistleblowers Center website [http://whistleblowers.nonprofitsoapbox.com/index.php?option=com\\_content&task=view&id=743&Itemid=161](http://whistleblowers.nonprofitsoapbox.com/index.php?option=com_content&task=view&id=743&Itemid=161) (accessed August 23, 2013).

#### 4. Cross-Border Concerns in the Aviation Sector

The regulation of civil aviation provides multiple avenues for agency co-operation, as well as creating jurisdictional hurdles. Workers could be ground and maintenance staff based in a fixed location observing concerns with aircraft flying to another jurisdiction, airport security staff, baggage handlers and others. Pilots and accompanying flight crew together with the cabin crew regularly cross borders. Where an international flight crosses jurisdictional boundaries, it is vital that regulatory authorities work closely, sharing information which could have significant value to regulatory agencies across jurisdictions. Whether it be the Air India crash in 1985 where 329 people lost their lives due to failures to detect explosive devices hidden in luggage<sup>22</sup>, the Colgan Air Flight 3407 which crashed as a result of pilot fatigue<sup>23</sup> or the horrific outcome of the 9/11 attacks, regulation of the aviation industry presents a myriad of challenges.

In the United Kingdom, all forms of civilian air travel are regulated by the Civil Aviation Authority. In the summer of 2012, the authors made a Freedom of Information Act (UK) request to the CAA asking whether concerns were being referred to foreign aviation authorities and subsequently whether the concerns were monitored by the CAA. The responses indicate that many of the outcomes of whistleblower concerns passed to regulators based outside of the domestic jurisdiction have been recorded as ‘not known’<sup>24</sup>. The CAA requests to be kept informed by the recipient authority but the matter is not followed up if updates are not provided. Whilst it is positive to see that information is shared between the CAA and other regulatory agencies across the globe, the lack of further monitoring of what happens to the information is troublesome. Referrals place reliance on the recipient to deal with the concern effectively; if they do not address the issue the whistleblower will not be aware of the inaction and will be deterred from making further disclosures, perhaps to another aviation authority or to the media. The lack of monitoring also brings the protection of any whistleblower into question, inspection or enforcement action could take place without the

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<sup>22</sup> Anno, *On this Day, 23rd June 1985*, no date, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid\\_2518000/2518857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid_2518000/2518857.stm) (accessed August 23, 2013).

<sup>23</sup> M. Wald, *Pilots set up for fatigue, officials say*, in *New York Times*, 14<sup>th</sup> May 2009, A25.

<sup>24</sup> 14 out of a total of 18 referrals were not tracked by the CAA.

whistleblower being aware that the concern has been referred or that the recipient authority will take action which will expose their position.

As a member of the European Union, the United Kingdom is part of a European-wide regulatory scheme governed by the European Aviation Safety Agency (EASA). The agency is tasked with the audit and review of national aviation regulators. Considerable emphasis is placed on the need to share information between aviation authorities both in the European Union and beyond. In 2011 the EASA signed a Memorandum of Co-operation with the International Civil Aviation Organisation (ICAO). The ICAO is a UN mandated organisation tasked to promote high standards in aviation safety and to harmonise regulatory and inspection procedures. The agreement stipulates the conducting of “regular dialog on safety matters of mutual interest” and providing mutual access to databases containing information relevant to safety<sup>25</sup>. Article 6 of the treaty deals specifically with the protection of confidentiality. Article 6 (1) allows for a party to the agreement to designate portions of information which it considers to be exempt from disclosure. Further provisions deal with the handling of classified information and allow a party to verify the protection measures put in place by the other party.

An EU system is currently in place for the reporting of “occurrences” which if not dealt with could lead to an accident<sup>26</sup>. Pilots, designers of aircraft, those involved in the ground-handling of aircraft (such as de-icers or baggage handlers), maintenance engineers and airport managers are all required by EU legislation to report occurrences<sup>27</sup>. Other employees may be “encouraged” by member states to voluntarily report<sup>28</sup>. The responsibility for the collection and storage of this data rests with the Member State which can designate the task to the national aviation authority, an investigatory authority or an independent body established for the purpose. National databases must be compatible with EU software and data shared on the European Central Repository. The system is supported by the European Co-ordination Centre for Accident and Incident Reporting Systems.

The Directive which governs occurrence reporting has a number of measures relevant to whistleblowing. Article 8 identifies that, regardless of the classification or serious incident, the names and addresses of

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<sup>25</sup> See EU-ICAO Joint Committee Decision 2013/310/EU [2.1].

<sup>26</sup> For a list of occurrences which trigger reporting see Directive 2003/42/EC on occurrence reporting in civil aviation Annex I and II.

<sup>27</sup> (Directive 2003/42/EC, article 4.

<sup>28</sup> Ibid.

individual persons shall never be recorded. Whilst it may be seen that the provision offers a degree of protection to whistleblowers, it is submitted that there are policy reasons for encouraging confidential rather than anonymous reporting. In the United Kingdom it would be difficult for a worker to prove that they were dismissed or suffered detriment as a result of their disclosure if they are unable to prove it was they who raised the concern with the Civil Aviation Authority. Confidential reporting also allows for those responding to concerns to go back to the whistleblower for further information. If the contact details of whistleblowers are being obtained but are held separately to the national occurrence reporting system, problems may still arise.

Aviation authorities must ensure that there a link between the contact details stored and the occurrence reported and that any subsequent updates make it onto the database. Article 9 relating to voluntary reporting requires that information obtained must be “disidentified”. This is defined in Article 2 as “removing from reports submitted all personal details pertaining to the reporter and technical details which might lead to the identity of the reporter, or of third parties, being inferred from the information.” It is suggested that whilst this provision, in principle, may provide a layer of protection for whistleblowers, it is problematic. The success of “disidentifying” information will be largely dependent on the organisation where the worker is based. If the person works for a large organisation with 1000 people “disidentification” may protect the identity of the whistleblower. However, if the employee works in an office with only three other people it is not likely to work. Regardless of any “disidentification”, the concern itself may identify the whistleblower. Moreover, it should be noted that those who have mandatory reporting obligations will not have their contact details recorded but there is no provision to disidentify the information.

Most interestingly, Article 8 of the Directive identifies that: “In accordance with the procedures defined in their national laws and practices, Member States shall ensure that employees who report incidents of which they may have knowledge are not subjected to any prejudice by their employer”. It is extremely difficult, if not impossible, for the Civil Aviation Authority to comply with this provision. Part IVA of the ERA 1996 offers a means of obtaining compensation for detriment and dismissal suffered as a result of raising concerns. Neither PIDA nor any other available UK legislation offers statutory powers to the CAA to take any action if a whistleblower suffers prejudice. Although they can take enforcement action against the air industry for safety issues, they cannot prevent an employer from taking reprisals against a whistleblower.



Workers with UK contracts can obtain statutory protection under s.43F ERA 1996 for raising their concerns to the CAA, which is designated as a “prescribed person”. Workers in the United Kingdom could potentially raise concerns with the Federal Aviation Administration and receive protection as a wider disclosure under s.43G ERA 1996 but would face more stringent evidential requirements than if they made their disclosure to the CAA. In contrast, in the United States, section 42121, Aviation Investment and Reform Act for the 21st Century , 2000, provides sector specific protection from discharge or discrimination to those employees who make a disclosure to the Federal Aviation Administration. The section does not require an employee to have a United States employment contract, nor does it specify that the company or organisation must be based in the US. It instead refers to “airline employees”. This may be seen as advantageous for those who do not have a UK employment contract and who wish to raise their concerns and obtain protection for doing so. However, the provision is limited to disclosures made to the Federal Aviation Administration.

This section has identified that information sharing is taking place between aviation authorities and that information obtained from whistleblowers is being shared. The use of an online reporting system is beneficial for the wide scale monitoring of aviation safety occurrences, however, by entering the concern onto the system it is suggested that there is considerable proximity between the whistleblower, the concern and the intended recipient. Direct referrals from one aviation authority to another seem to be advantageous, yet the value of the concern is potentially diminished where referrals are not monitored further. In relation to the United States and United Kingdom, employees from both jurisdictions would be best placed to raise concerns to their home aviation authority in order to obtain employment protection. This may not be the best place to go to get the concern addressed.

## 5. Cross-Border Concerns in the Food-Sector

The food sector is increasingly globalised and the recent “horsemeat scandal” is an illustration of this<sup>29</sup>. Meat was slaughtered in Romania, processed in France, packaged in Ireland and sold in the UK, where it was discovered to be horse rather than beef. Both businesses, through supply chain management, and regulators, face the challenge of ensuring that the regulations of the country, or countries, where the food is to be placed on the market are complied with. One method of ensuring that regulation is complied with is through encouraging whistleblowing by those who are aware of the conditions in which food is prepared. For this reason food businesses need to have dedicated policies and procedures for overseas whistleblowers, allowing them to report concerns to executives in the businesses home country<sup>30</sup>. However, whistleblowers may choose not to use such systems, and instead to report to regulators. Such regulators then need to be able to share information with each other in order that the data reaches the regulator best able to address a concern.

A challenge for a potential cross-border whistleblower in the food sector is the complex topography of the regulatory landscape. The powers to investigate and address breaches of food safety and hygiene regulation are widely distributed in the US between Federal, State and Municipal authorities. At the Federal level, the Department of Agriculture is responsible for the regulation of Meat, Poultry and Egg products and the Food and Drug Administration responsible all other food. In the UK responsibility lies with both national and local authorities and, in two-tier local authority areas, different local authorities are responsible for food safety and hygiene and food standards. In the EU supra-national authorities have responsibility for food regulation across the 28 member states. It is challenging for the whistleblower to identify which body is best placed to address their concern, particularly in circumstances where they are not ordinarily subject to that regulatory regime. This is also a challenge for those regulators that wish to share information with regulators in a foreign state.

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<sup>29</sup> See BBC News, Horsemeat Scandal BBC, 2013, <http://www.bbc.co.uk/news/world-europe-21457188> (accessed July 8, 2013) and the FSA, Horsemeat Timeline, Food Standards Agency, 2013, <http://www.food.gov.uk/enforcement/monitoring/horsemeat/timeline-horsemeat/#.UdqmgKx-4qw> (accessed July 8, 2013).

<sup>30</sup> Katy Askew, Talking tech: Horsemeat scare shows need to improve tests, traceability, just-food.com, 2013, [http://www.just-food.com/analysis/horsemeat-scare-shows-need-to-improve-tests-traceability\\_id122229.aspx](http://www.just-food.com/analysis/horsemeat-scare-shows-need-to-improve-tests-traceability_id122229.aspx), (accessed July 8, 2013).

Powers necessary to address a concern are distributed between different authorities. In the UK, the power to seize and destroy food that poses a risk to the public is held by local authorities, except where the food is found in a slaughterhouse or cutting plant, where the power is held jointly by a local authority and the FSA. Where food poses a risk to the public in more than one local authority, information must be shared between authorities. In the UK, there are arrangements for the sharing of information about health risks derived from concerns expressed by whistleblowers. This can be shared between local authorities through the use of a Food Alert for Action, where authorities need to take some action, or Food Alert for Information, where steps have been taken to ameliorate the risk to consumers, issued by the FSA<sup>31</sup>. Before a Food Alert for Action or for Information can be issued, information must be transmitted from the receiving authority to the Food Standards Agency, which has the responsibility for transmitting the data to third parties<sup>32</sup>.

The EU has adopted a unified system to share information. Information is shared through the Rapid Alert System for Food and Feed ("RASFF") database<sup>33</sup>, which contains detail about food which poses a risk to consumers. In the UK the FSA is responsible for uploading data on to the database, including information derived from whistleblowing disclosures.

The sharing of information between the EU and US is governed by bilateral arrangements made between the Health and Consumer Protection Directorate General of the European Union (DG-SANCO) and the US Food and Drugs Administration (FDA)<sup>34</sup>. The agreement provides that information about food risks may be shared between the DG-SANCO and the FDA, although information may be withheld where disclosure would compromise "national security; commercial, industrial or professional secrecy; the protection of the individual and of privacy; or the [Regulators] interests in the confidentiality of their proceedings".

Under these bilateral agreements, the information is shared at a national and supra-national regulator level, and therefore not necessarily shared directly between the receiving regulator and the regulator able to respond

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<sup>31</sup> For information about Food Alerts see FSA, Alerts, Food Standards Agency, 2013 <http://www.food.gov.uk/enforcement/alerts/> (accessed July 9, 2013).

<sup>32</sup> Food Standards Act 1999 section 6(1)(b).

<sup>33</sup> RASFF, DG-SANCO, no date, [http://ec.europa.eu/food/food/rapidalert/index\\_en.htm](http://ec.europa.eu/food/food/rapidalert/index_en.htm), (accessed August 23, 2013)

<sup>34</sup> See FDA, FDA - DG SANCO Implementation Plan, 2005, <http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107560.htm> (accessed August 23, 2013).

to the concern. The concern will have to be transmitted through the national sharing channels on both sides of the Atlantic in order to reach the regulator best placed to address the concern. In particular, the information must be uploaded onto the RASFF database in order to be shared with the FDA, and must be actively shared with the US authorities by DG-SANCO. Sharing is not mandatory except where “food or feed which has been the subject of a notification under the rapid alert system has been dispatched to a third country”<sup>35</sup>. A person making a disclosure to a food regulator in the UK about a risk in the US is not guaranteed that the authorities in the US best placed to address the concern will have access to the data. This may lead to some delays whilst the information is transmitted, preventing immediate action to address the concern.

Further, the agreement between the FDA and DG-SANCO does not provide for arrangements for monitoring the use of information transferred by the national bodies. There is no requirement for reporting the steps taken in response to a shared concern. Therefore, as seen above in the consideration of information sharing in the aviation sector, the originator of the information becomes remote from the concern shared.

Given the delays arising from information sharing arrangements, a potential whistleblower may wish to make a disclosure directly to the regulator in the country where he or she is not located. However, this may prejudice the protection of the consumer, both from unintended disclosure and from dismissal or detriment. For a UK whistleblower, a disclosure to a US regulator would be a third step disclosure. Therefore, in order for the disclosure to be a “protected disclosure”, and for any dismissal or detriment to give rise to a remedy, the conditions in section 43G ERA 1996 must be satisfied. As noted above, these conditions are more stringent than the requirements of section 43F, which apply when the disclosure is made to a local authority or to the Food Standards Agency. Whilst a disclosure to an international regulator may be protected under PIDA, protection will be harder to secure than for a disclosure to a national regulator.

In the US, State and Federal Whistleblowing Protection Acts contemplate disclosure to a governmental agency within the national jurisdiction before protection can be afforded. At a State level, for example, the Maine Whistleblowers Protection Act provides protection to an employee who makes a disclosure to a public body, which is limited to the executive or

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<sup>35</sup> See Regulation 178/2002 article 50(4). Sharing of concerns will take place where food has been exported to the US, but may not if the supply chain is more complex.

legislative branches of state government or to regional or municipal bodies. A disclosure to an international regulator would not be protected under the Maine Act. At a federal level, the Food Safety Modernisation Act only gives protection to disclosures made to “the employer, the Federal Government, or the attorney general of a State.” A disclosure to an international regulator would not fall within the scope of the protection. Therefore, in the US a disclosure to a regulator outside the jurisdiction will not give the employee protection in the event that they suffer dismissal or detriment.

Further, whilst both US and UK food authorities have policies in place to protect the identity of confidential sources<sup>36</sup>, there may be authorities that are best placed to address the concern that do not have such procedures in place. If the whistleblowing concern is one which can best be addressed by a regulator without arrangements in place to protect the whistleblower, it may be that the disclosure is not made for fear that the whistleblower will suffer detriment. Alternatively, the investigative steps taken by one of the regulators may be better suited to exposing the non-compliance, perhaps via laboratory tests available to the regulator. In such cases the protective framework found in national law may mean that the whistleblower is incentivised to make the disclosure to the regulator not best placed to deal with the non-compliance.

In cross-border cases in the food sector, the potential whistleblower must balance the ability of the recipient to address the concern with the ability of the recipient to protect the identity of the whistleblower and, in the event that the identity is discovered, to enable the whistleblower to obtain a remedy for resulting detriment or dismissal. As can be seen, this balance is particularly difficult to strike in the food sector, with a complex architecture governing the sharing of information between regulatory bodies possibly impinging on the expeditious sharing of information in order that concerns can be addressed. This must be balanced against the benefits in terms of employment protection if the individual discloses to a regulator within his or her own jurisdiction.

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<sup>36</sup> See, e.g., FDA, Investigations Operations Manual, 2012, <http://www.fda.gov/downloads/ICECI/Inspections/IOM/UCM150576.pdf> (accessed July 9, 2013), [5.2.9] and FSA, Whistleblowing Policy, 2012, <<http://www.food.gov.uk/enforcement/regulation/whistleblowing#.UdwI8ax-4qw>> (accessed July 9, 2013).

## 6. Conclusion

Having briefly examined the need for cross-border concerns, and shown, in sections two to four, that situations of cross-border risk cause particular problems for whistleblowers and their advisors, four preliminary recommendations are advanced. These recommendations are intended to address some of the issues identified above, and to help whistleblowers and their advisors when they seek to make disclosures where the risk may arise overseas.

First, whilst some memoranda of understanding governing information sharing do exist, regulatory bodies who are not in a position to share information through Memorandum of Understanding mechanisms should give consideration to entering into such memoranda. These memoranda would allow a level of common procedure in information sharing to be adopted. This will lead to more concerns being addressed, as information should reach the regulators able to deal with them.

Second, and relatedly, the regulators sharing information should put in place procedures to monitor the use of information that has been shared. Such monitoring allows regulators to identify whether the information has led to action to abate the risk, and to keep the whistleblowing informed about the results of his or her disclosure. Monitoring can be put in place on an ad hoc basis, or incorporated into a MoU governing information sharing. The latter is preferable, as it creates a stable and clear method for providing feedback on the use and effect of information derived from whistleblowing disclosures.

Third, greater automation in sharing should also be considered. By increasing the accessibility of information about regulatory non-compliance the chances that the problem will be addressed are improved. The EU has already begun to seek technological solutions to data sharing through systems such as RASFF. However, this system does not extend beyond the EU, and therefore cannot be accessed by street-level regulators in non-EU countries who may be best placed to address the concern. Therefore further developments may need to take place in this area. A database solution that perhaps provides a model for information sharing is the THETIS database<sup>37</sup> created pursuant to the Paris Memorandum of Understanding on Port State Controls<sup>38</sup>. Here, a number

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<sup>37</sup> See Paris MoU inspection database, [http://www.parismou.org/Inspection\\_efforts/Inspections/Inspection\\_database\\_search/](http://www.parismou.org/Inspection_efforts/Inspections/Inspection_database_search/) (accessed July 9, 2013).

<sup>38</sup> See in particular Annex 3.

of maritime countries, both inside and outside the EU (in particular the Russian Federation), provide information about possible regulatory violations by maritime transportation in order that States where the vessels may dock can take necessary action. The information uploaded may be derived from whistleblowers.

Sharing information through such technological solutions can lead to concerns about the protection of the identity of whistleblowers, particularly where information is widely available. This concern could be addressed by the receiving authority not uploading identifying information onto the database. However, this may impede the ability of the regulator in a third state to address the concern, particularly if further information is required in the course of the investigation. The EU Prum Decision seeks to ameliorate such difficulties in the context of DNA data sharing through the use of a two-step process<sup>39</sup>. The first step is data matching, which shows whether information held by a third state may be of interest because it matches a crime scene stain or sample taken from a person. The second step is the provision of information about the person who provided the sample to a third state body interested in it. A similar two – step procedure could operate in the sharing of whistleblowing concerns. Regulators who need to take action to address the concern could contact the uploading regulator to access further information that they hold, perhaps including information about the whistleblower, which will only be disclosed where the uploading authority are satisfied that identifying information will be protected.

Finally, whistleblowers should not be potentially disadvantaged because they raise the concern with a regulator in another jurisdiction, particularly where that regulator is best placed to address the concern. As seen above, under UK legislation disclosures to non-national regulators are treated as third step disclosures, requiring the whistleblower to demonstrate, amongst other things, that he or she believed the information contained in the disclosure was substantially true and that it was reasonable in all the circumstances to make the disclosure to the recipient. Similarly, disclosures by a worker in the US will not be protected if they are not made to a regulator in that country. In order to address this problem, which may have the effect of deterring disclosures to the regulator best placed to address the concern, whistleblowing protection laws should protect disclosure made to foreign regulators. In the UK the prescribed

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<sup>39</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

persons list made under section 43F(2) should be amended to include regulators performing substantially the same functions as the domestic regulators listed in schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 1999.

Inevitably in this article it has not been possible to examine the situation of all cross-border whistleblowers. Indeed, its primary recommendation is that further research is needed in this important area, both with regard to information derived from whistleblowers and information sharing in general. With the increasingly internationally integrated regulatory environments, the need to share information, including concerns about wrongdoing, is rising. This must be done in a way that allows concerns to be addressed and risks to be abated, whilst protecting the person making the disclosure. This article is the beginning, not the end, of the consideration of this task.





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