WHISTLEBLOWING AT WORK:
ETHICAL AND JURIDICAL ISSUES

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Anno Accademico 2006-2007
Autorizzazione alla consultazione della tesi di laurea

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progressivo verbale N° ..............................................
A mamma e papà
# TABLE OF CONTENTS

**Introduction** ................................................................................................................................. 1

**Chapter 1. Whistleblowing: a preliminary outlook** ........................................................................... 3

**Chapter 2. Whistleblowing: an ethical approach** ............................................................................. 11

**Chapter 3. United States Legislation** ............................................................................................ 21

- 3.1 The Sarbanes-Oxley Act ......................................................................................................... 22
- 3.2 Whistleblowing before the SOX ........................................................................................... 25
- 3.3 SOX complaints and investigations ....................................................................................... 27
- 3.4 SOX discovery and hearings .................................................................................................. 29
- 3.5 SOX Appeals ......................................................................................................................... 31
- 3.6 Proof of discrimination .......................................................................................................... 33
- 3.7 Protected Activities .............................................................................................................. 36
- 3.8 The “reasonable belief” standard .......................................................................................... 38
- 3.9 Adverse action ....................................................................................................................... 39
- 3.10 Damages ............................................................................................................................. 40
- 3.11 Attorney fees and costs ....................................................................................................... 43
- 3.12 Settlement of SOX complaints ............................................................................................ 44
- 3.13 Attorneys as whistleblowers ............................................................................................... 46
- 3.14 Audit Committees and Corporate Employee Concerns Programs ........................................ 48
- 3.15 Criminal Sanctions for Retaliation ..................................................................................... 51
Chapter 4. United Kingdom legislation

4.1 Events leading to the Public Interest Disclosure Act.

4.2 Adoption of the “Public Interest Disclosure Act” in 1998.

4.3 Characteristics of the Public Interest Disclosure Act.

4.4 Content of the Public Interest Disclosure Act.

4.5 Employers and workers preservation under the Public Interest Disclosure Act.

4.6 Effectiveness of the Public Interest Disclosure Act.

Chapter 5. Whistleblowing in Italy and Europe

5.1 The legislative decree 231/2001 and the Data Protection Codes.

5.2 Whistleblowing schemes in the European Union.

5.3 European data protection laws.

5.4 Balancing the conflicts between laws: the French case.

5.5 European opinion to conciliate SOX and E.U. Data Protection Law.

5.6 Whistleblowing, an instrument to modernise labour law.

Chapter 6. Famous cases of whistleblowing

6.1 Whistleblowing at Enron: Sherron Watkins’ experience.

6.2 Jeffrey Wigand: A Whistleblower against tobacco industry.

Chapter 7. Conclusions

Appendix

Bibliography
Introduction

Whistleblowing is a quite recent phenomenon, connected to huge scandals, such as the Enron and the WorldCom in USA and the Robert Maxwell’s and several accidents in Great Britain. Every one who tries to light up a mistake or misconduct internally or outside the organisation he works for, is a whistleblower.

As we will see, the decision to denounce incorrect behaviours involves ethical and psychological aspects, relationship with colleagues and top managers, families and, more generally, public opinion and social environment. This research’s aim is first to focus the differences concerning Whistleblowing in U.S.A. and Anglo-Saxon countries compared to Europe and Italy. Then some possible solutions in order to meet actual laws and a study concerning the new rules protecting whistleblowing are analysed.

 Particularly, the work is focused on corporate whistleblowers, on the decision to make disclosures over wrongdoing committed within the companies, especially by executives and top managers. Whistleblowing discipline is strictly connected to white collar crimes because employees of an organisation seem to be the first subjects suitable to point out any possible misconduct by executives.

First chapter gives a preliminary outlook on the matter, describing the origin of the term “whistleblower”, the interests characterising the discipline and the different kinds of whistleblowing. Then there is a short analysis of the ethical problems involving the choice of a whistleblower to disclose or not the wrongdoing he incurs during the performance of his work, and particularly the personal dilemmas between intellectual honesty and the sense of loyalty toward own employer.

In the following chapters, the third and the fourth, there is an analysis of whistleblowing legislation in U.S.A and in United Kingdom: in United States, particularly, there is an evaluation of the recent whistleblowing legislation included in the Sarbanes-Oxley Act referred
to corporate employees (in fact, in the American system, whistleblowing is largely diffused and exist also other legislations providing protection for governmental employees). Great Britain’s Public Interest Disclosure Act, indeed, is particularly interesting because it is a complete legislation covering all the aspects on the discipline.

In continental Europe whistleblowing is much less developed as there is not a specific legislation. However some European issues, with both legal and cultural problems obstructing a complete whistleblowing increasing in the European Union, are enounced: as a matter of fact contrasting laws are present in E.U. and a different attitude towards these issues is peculiar of our society.

Finally, in the sixth chapter, the experiences of Sherron Watkins and Jeffrey Wigand, two of the most famous whistleblowers in the world, are mentioned. By these events some of the issues described in the previous pages find their application in the practical and real life, and it’s given a concrete profile for the characteristics of the matter.
1. Whistleblowing: a preliminary outlook

Whistleblowing has not an official meaning, probably because there is not a common and shared knowledge on the matter so that, in each country, jurists and economists have a different vision of the problem and different perspectives about its application. The word whistleblower comes from the practices of English bobbies who were blowing their whistle when noticing somebody committing a crime, making law enforcers, and public in general, alert. This is the origin of the word and for this reason it refers to an activity that must be intended in a positive way and not as a sort of betrayal and disloyalty toward the company or the organisation which whistleblowers belong to. The expression “blowing the whistle” refers also to the action of a football referee when he stops the match because a foul has been committed.

The expression developed in the last years and now is perceived somehow in a positive way and somehow in a negative one. One thing is sure and widely accepted: there are situations where someone raises his voice to point out something, should it be a concern or a complaint, but he is unwisely ignored and the inertia to these alarms is often causing accidents that otherwise could be avoidable. A huge example is the explosion of shuttle Challenger\textsuperscript{1} in 1986, just 13 seconds after the taking off: the accident caused the death of the seven members of the crew. Millions of people around the world were watching the launch on television when the tragedy happened; a tragedy that could be prevented and should be avoided. The senior scientist Roger Boisjoly, an engineer working for Morton Thiokol, the manufacturer of the solid rocket boosters of the Shuttle, warned the space program agency about a fault in the designs of the project even the night before the launch, but his message, such as many others by whistleblowers, was tragically ignored.

However in the last years things have changed both from a cultural and a legal point of view,

\textsuperscript{1} It made its first flight back in 1983, and made another 9 flights until its tenth mission on January 28, 1986 when it disintegrated just after the launch.
because people are recognising the fact that, everywhere, who discovers a corruption, a fraud or other illegal and dangerous harm, can contribute to keep a safer environment, should he be able to refer to some authority what he knows. It’s not longer acceptable the climate of silence and of secrecy that in the past allowed companies and organisations to work with no control so that they could damage and endanger lives. The voice of the honest workers was largely overarched by executives’ pressures that gave employees the only chance to be silent. The real challenge is to create an alternative to silence which could allow to separate the message from the messenger, an alternative still difficult at present because of all the contrasting interests and the ingrained habits and attitudes.

Whistleblowing issues concern each worker or person and all the organisations; every company and public body can risk that something goes wrong: a poisoned food, polluted air or water, some unsafe means of transport or an incompetent doctor are just a few examples of the risks that could rise from the daily activity of any organisations. Who are the first to discover these hazardous situations, besides who usually work in or for the organisations? The problem is that the employees, who are in the best position to remove or reduce the risks, are also the ones who can lose more from whistleblowing. To solve this problem the first step should be taken by the organisations which must establish the ideal conditions for the employees, letting them believe that raising personal concerns about possible wrongdoing inside the company is acceptable and safe, without the risk of victimisation, lost of the job or any other possible damage to the career. When this does not happen, the workers will face a conflict between personal interest and a public’s one: while seeing their own career harmed, they won’t consider a priority a possible damage to consumers, passengers, patients, shareholders and everyone else who can have a relationship with the organisation.

It’s important to consider the faith that public opinion involved can have toward the organisations, that is why the recent scandals had a terrific effect on fiduciary markets. The public needs to receive a transparent communication, without any breakdown, particularly in the accounting field. The contrast with present law, culture and practice across the world is clear
and, unfortunately, this climate strongly discourages common and respectable people from questioning about wrongdoing they come across. Employees follow only a short-term personal interest instead of the long-term community’s one. The problem is enlarged due to the fact that this culture even marks the behaviour of these employees in their lives outside the company, for example keeping them quiet when noticing a crime.

The person incurring in a wrongdoing on his workplace has four different options: he can stay silent, he can blow the whistle internally, he can blow the whistle externally or he can disclose the information anonymously.

Silence represents the easier and more convenient option for the employee and it often appears a really reasonable choice. Maybe the employee will realise his suspicions are wrong and there is a clear and acceptable explanation for what he thought was a bad conduct, he could think to be wrong realising to be the only one concerned, while his colleagues, although also aware of the problem, keep silent, he could also think senior colleagues surely noticed the problem and decided to solve it internally. When there are not labour unions or they are no more independent inside the company, the employee is left without any kind of advice, help or guidance on the all possible ways he can try. So, most of times, especially in big organisations where internal relations are poor, the employee has also the burden of proof about the wrongdoing while it should be much more appropriate that the organisation itself, which has at its disposal more relevant instruments and resources, starts an investigation on the concern. There are some cases when the employee is not hold back by these aspects related to the workplace, but he gives up considering his personal and family interest. Because of the absence of any kind of guidance or assurance he can fear possible acts of retaliation, such as harassment, isolation and even dismissal.

The cost of silence is now too high and authorities are evaluating the promotion of whistleblowing for several reasons:

- consumers, shareholders and in general the community run important risks without full information and without the possibility and the instruments to protect their interests;
- managers and executives see their negligence justified;
- sensible executives and authorities lack the opportunity to block real problems.

Present reforms and debates are directed to improve the system, instead of trying to change the conduct of organisations’ both employers and employees.

The loss of confidence in organisations by public raised up clearly from the beginning of the ‘90s, and the main causes could be attributed to these incidents happened because wrongdoings did not come to light before the damage occurred and to the fact that rumours remained only rumours and didn’t arrive to suitable people. As far as to these problems are concerned in 1994 the Committee on Standards in Public Life\(^2\) was established in Great Britain, whose recommendations, initially directed to public bodies, are now applied to organisations in all sectors. In the Second and Third Reports there are precious messages in order to promote internal whistleblowing: “Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation. We observed in our First Report that it was far better for systems to be put in place which encouraged staff to raise worries within the organisation, yet allowed recourse to the parent department where necessary. An effective internal system for the raising of concerns should include:

- A clear statement that wrongdoing is taken seriously in the organisation and an indication of the sorts of matters regarded as wrongdoing;
- Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure;
- Access to independent advice;
- Penalties for making false and malicious allegations;

\(^2\) The Committee on Standards in Public Life is an advisory non-departmental public body of the United Kingdom Government. Present Prime Minister John Major established it in response to concerns about unethical conduct by some politicians. The First Report in 1995 established “The Seven Principles of Public Life”: Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership.
An indication of the proper way in which concerns may be raised outside the organisation if necessary."

This approach, aiming at creating safe means for concerns, is to be pursued because the only alternative is that concerns are not exposed and possible whistleblowers stay silent or feed rumours which can contribute to destabilise public confidence. The Committee then underlines the fact that in genuine and competitive markets there is a growing recognition that early reporting of suspected wrongdoing is in the interest of organisation itself; moreover, being a key aspect for a possible de-regulation, which would be impossible without the perfect transparency of the companies.

Companies thought for years that each complaint coming from the workforce should regard personal grievance because of the identification with the welfare of the company failed. This fallacy obviously influenced employees’ behaviour, causing damages to the company reputation also among the stakeholders.

Things are changing and now an increasing number of employers are establishing safe whistleblowing schemes within their companies: many of these are a response to recent legislation, but these policies are much more effective when the employer realises the importance to create an alternative to the “line management”, so that managers are taken off the total and unilateral control on information. Other benefits to the organisations from the introduction of a whistleblowing legislation come from the fact that it creates among workers the attitude of loyalty toward the organisation rather than towards their superior manager, and, in the meantime, dishonest managers are discouraged from abusing of their own position and authority to implement illegal conducts.

As everybody knows, a large number of employers not always acts in a responsible way and sets personal interests above the law; in such cases there is only an effective choice for the employees to prevent problems before a real damage is caused and the way is disclosing the

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concerns outside the company. However there are some problems from both an ethical and a legal point of view involving important aspects like confidentiality and secrecy. In addition, because of external whistleblowing, the relationships’ balance can be somehow compromised because businesses community, the state and the media react differently to the disclosing. The outside whistleblowing can lead to a regulatory intervention or just to adverse publicity; anyway in almost all the cases for the organisation there are negative consequences that would probably be cushioned if the company was directly told about the concern. Even from an ethical perspective the external whistleblowing not always seems to be the best way to tackle the problems, because the action by regulators and particularly the media are often aggressive, but the choice of a person to raise his concern outside the company is a strong evidence of a poor management, lack of leadership and not confident workplace.

The possibility to raise concerns outside the companies, even if reasonable and justified, was not granted in most legal systems until recently thanks to the introduction of new whistleblowing disclosures. This was happening because of the shared opinion on whistleblowing and because an outside one was often anonymous and brought without sufficient evidence. Now a change has to come, with a great advantage for the companies: when whistleblowing culture is spread within an organisation the employee is probably stimulated to choose the internal way because his confidence believing internal schemes to be genuine increases and because he has the legal alternative to show everything he knows outside. Moreover, when the law provides for external bodies like regulators, member of parliaments, shareholders or even in general the public, accounting procedures should be more transparent and legally respected because of possible sanctions responsible subjects can incur: so a sort of self-discipline spreads through the organisation and this promotes economic effectiveness, too.

The role of the media also can influence the whistleblower’s choice. The possibility to raise external disclosures to the media again is an essential tool to keep the conduct of organisations
under control. Not always the media are the best addressee, or the first one, because even the whistleblower thinks preferable first an internal solution⁴, but he still must have also the choice to use the vehicle of the media to give information on wrongdoing the most transparent possible for public opinion.

Until safe whistleblowing schemes to openly raise concerns are effective, anonymous disclosures seem to be the only possible alternative to silence. They are different from confidential disclosures because they are messages sent without any possibility of identifying or contacting the whistleblower and, unfortunately, without the possibility of verifying the reliability of the information. On the contrary, in case of a confidential disclosure the addressee knows the identity of the whistleblower but agrees with him not to reveal it.

For sure a problem is that anonymous disclosures often raise an important question, but, being part of their nature, they make any investigation on them more difficult; as a matter of fact ambiguous information generally can’t be clarified and interesting issues can’t be deepened. Moreover also the fact that the concern is anonymous makes investigators shift the their attention on the possible source of the disclosure, speculating about its identity and sometimes making it emerge anyway. When allegations are serious, also people reported will obviously try to find out who is the responsible and the pressure becomes high on the whistleblower and on his colleagues. Once the identity is discovered, the fact he acted anonymously is considered a sign of bad faith, shame or dishonesty and is used to jeopardise the whistlebower’s intention to act on behalf of the public interest.

Finally anonymous information gives to the recipient an unaccountable and unlimited power over it: just because of its anonymity, the body has an absolute discretion to decide whether to use or ignore or conceal the information and its decision isn’t questioned by the informant and by anyone else who even doesn’t know about the existence of some wrongdoing.

Whistleblowing can grow his value as thanks to the variety of options available for the

⁴ A perfect explanation of this concept is in Sherron Watkins’ case in paragraph 6.1.
employee, because he should be free to choose the most suitable way of disclosing according to the circumstances. Whistleblowing is a positive activity because it doesn’t regard personal grievances but it refers to the disclosure of wrongdoing which threatens or damages other people besides the employee.

Therefore the real aim of whistleblowing is not a personal revenge but it is to make different possible addressees aware about some risk or harm, so that it could be removed or reduced.
2. Whistleblowing: an ethical approach

In 1996, the English economist Gerald Vinten⁵ published his “Ode to Whistleblowing” on the magazine “Critical Perspectives on Accounting”⁶:

Blow the whistle, blow the fuse,

mortality, morbidity, unemployability,

about these muse.

Ignominy, disgrace, self-destruction,

among these choose.

Why should it be,

that the blower be blown up,

sacrificed on the altar of vindictive gregariousness,

that pseudo-loyalty born of schoolchild ethics?

Corruption, fraud, pollution, health and safety abuse, mismanagement, discrimination,

these are the seed beds from whose fertile soil springs the ethical triggers

which project the bearer into a world in which their virtue is controverted into vice,

tables turned, the biter is bit,

the informer informed on.

Why should it be?

The trauma to be endured, the excruciations,

these were noble acts,

acts so bold as to launch the bee-sting of career mortality.

The passing episode refused to pass, and became one’s own passing,

a transient informing that was destined to become one’s life obsession.

The law’s asinine protection a breached defence system,

⁵ Professor at Southampton Business School.
⁶ Vinten, G., Poem: Ode to Whistleblowing, Critical Perspectives on Accounting, v.7 n.6 p.614, December 1996.
leaving the supplicant powerless and devoid of human rights.

Through death comes transfiguration,
far better transfiguration precede death.

The whistleblower, the manager/directors’ best friend,
ally of sound corporate citizenship,
guardian of organisational values,
martyr and alienate not this greatest asset,
through this channel permit the expression of concerns at work,
use it to facilitate continuous improvement,
improve the lot of the workforce,
bring prosperity to posterity,
such is the happy ending so often denied.
Thus should it be!

This ode is a certificate made out on regard and respect of whistleblowing by a professor who has been studying whistleblowers’ matters for years, created on behalf of those people who bravely decide to show up a fraud and denounce malpractice making, putting themselves in a risky position, but it also contains some interesting issues on whistleblowers’ values and valence.

Whistleblowers’ role is strictly related to the analysis of the autonomy of people’s personal judgement inside and outside a company or an organisation. The attention should be put on individual skills, able to allow anyone to hold out against company’s pressures to ignore the ethical dilemmas he could face.

Several factors contribute to the whistleblowers’ behaviour, starting from the possible prevision of personal material advantages coming from the disclosure, up to more personal factors, such as a strong valuation of themselves being honest people; some studies on whistleblowers’ experiences emphasise the “rationality of the good man” as a frequent factor.
Calling this attitude rationality could seem a bit strange, because it brings people to make choices that are surely ethically appreciable, especially in the close future, but, from an economic point of view, also very damaging for whistleblower. These apparently insane choices have some reasons: whistleblowers pursue an immediate ethical and trusting aim that could lead to future important economic outcomes, too; in addition, for some people it’s more important to get a personal satisfaction acting in a moral and remarkable way and they think their economically irrational actions can also be compensated from a social point of view. This way of thinking (and acting) is correlated to the context where the person is born and educated: the family, relatives, teachers and other reliable people who could condition the personality of the whistleblower. However just Edwin Sutherland, in his studies\(^7\), uses to call into a case these aspects together with the context where the employee is working and the impunity’s standard of the society where he is living.

If just an economic balance of the interests is drawn up, it’s mathematically evident how almost no whistleblowers could exist because of the pressures on a worker in order to comply with company’s activities, also when illegal; the value of the obedience in the workplace is wide, and a behaviour not conforming often lead to unquestionable acts of retaliation towards the whistleblower, such as legal persecutions, mobbing, even firing, blacklisting and a wider ostracism involving the whole community whom the employee belongs to (in particular when this community is strictly connected to the organisation denounced). The paradoxical consequence is that the denounce of an organisational crime often leads to sanctions, both economic and social, much more relevant for the whistleblower than for the “guilty” company. Whistleblowing is an ethical matter for the person who is disclosing, but it becomes a social matter for the community.

Time magazine in 2002 decided to name “People of the Year” three whistleblowers\(^8\). In that

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\(^7\) The most famous and interesting for these matters is Sutherland, E.H., *White Collar Crime*, Holt Reinhart and Winston, New York, 1949.

\(^8\) More details in chapter 6, paragraph 6.1.
article Cynthia Cooper⁹, one of the three women on the cover of the edition, when asked what made her to denounce illegalities, she answered that they were the values and the ethics learned during her life, particularly some of her mother’s warnings, such as “don’t let someone influence you” or “always think to the consequences of your actions”. This is a clear example of how influent is in the society the role of fathers, mothers, teachers, university professors and companies’ managers who have the responsibility to contribute to the ethical and moral development of the community and of the country.

On the other hand, organisations adopt defensive tolls to protect their business and behaviour. “It’s just a few bad apples!”⁴⁰ is their most common answer when asked to give an explanation about unpleasant and illegal actions carried out by executive managers. When Edwin Sutherland coined the definition of ”white collar crimes”, it was because he understood that the financial illegal acts perpetrated in big companies couldn’t be just connected to the unscrupulousness of a few “bad apples”; on the contrary, even if these people could play an active list in the fraud (or in the crime in general) within the organisation, the initiatives thought to prevent similar risky situations have not to be directed against them, because the main instance should be how sane and likely honest people react when stressed; should they line up to the deviance of a few “bad apples” or do they find other ways to oppose this behaviour?! In the organisations’ contest the decision to blow the whistle is the reaction of a person who refuses to share everyone else’s illegal acts.

The aim of a company, and of a society, should be to create the preliminary assumptions for a social context where it should be possible to oppose any issues not complying with individual ethical values, but, in order to create this atmosphere, the top-management’s role is crucial; Sherron Watkins¹¹ in her interview on Time magazine says “The leaders set the tone”. The first and main way to create a corporate culture respecting the law is to protect who is blowing the

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⁹ Cynthia Cooper is an internal auditor and consultant and the whistleblower who exposed massive accounting fraud at WorldCom in 2002.
⁰ See the Canadian documentary movie The Corporation by Mark Achbar and Jennifer Abbott (2003).
¹¹ More details on Sherron Watkins’ experience at Enron in paragraph 6.1.
whistle: the Sarbanes-Oxley Act just provides some preservative dispositions on behalf of whistleblowers.

Provided that there is a culture deeply oriented to legality, and to an ethic way to manage a company trying to make business and money honestly, the companies themselves shouldn’t be afraid of losing neither the corporate cohesion nor employees’ attachment or productivity because of a law protecting people who expose and denounce illegalities they are witnesses. American studies found out that companies believe that a high-ethical level would keep top executives’ fidelity up to six times higher and that the large majority of employees not trusting their managers’ integrity, feel their work as oppressive, think to resign and don’t perform at the best level.

Therefore suitable laws and protections for whistleblowers create good assumptions to higher the bent to blow the whistle, but the decisive step must be a cultural transformation inside companies aiming at creating ethical behaviours. The two interventions together could really make the difference.

What is known for sure about whistleblowers is that opinion towards them varies substantially; they are considered as martyrs on behalf of public interest, as conscientious objectors, as ethical resisters, as informers, as licensed spies, as blackmailers, as people pursuing personal glory or fame. In a few words they are considered heroes or traitors, depending on different opinions\(^\text{12}\). On one hand, some people believe whistleblowing an ethical and praiseworthy act because it’s useful to bring to light abuses and necessary to avoid any kind of complicity with them; on the other hand, whistleblowers are seen as informers betraying both colleagues and the organisation they work for. In general the media give a total support to whistleblowing, but it’s within their organisations that whistleblowers have to face their enemies and detractors: inside the companies a “shoot the messenger” message is common and this strongly discourages people to expose frauds and keeps them silent for fear or for habit.

There are different ethical aspects related to whistleblowing that have to be taken into consideration, some of them of procedural nature and some others more substantial. The ethical main dilemma to solve for a whistleblower is to make a choice among different conflicts and values, such as the loyalty and the duties towards the organisation, the honesty due to public and professional associations, to the family and friends and, most of all, towards himself. In any case his honesty is put to a hard test. Conflicts and choices are subjective, depending on the characteristics of the place where the whistleblower is living, on his culture, on his reality and on his own background. The question then is not about which interest is believed to be the most important, but is focused on a matter of loyalty and, particularly, which is the level of loyalty a person has to show to the organisation he is working for. There are cases when the employee is totally loyal to the company, others when there are conflicts between personal goals and values and company’s ones; others when managers believe that faithfulness to the organisation should override personal ethical concerns and employees disagreeing should resign. Other authors\textsuperscript{13} even suggest a definition of loyalty based on acting in accordance with one’s own interests, which sometimes also means acting against one’s own wishes.

Probably the attitude towards whistleblowing, and employees’ perception about disclosing information against the corporation interest\textsuperscript{14}, has to be considered case by case; as a matter of fact it’s quite impossible to make a generalisation about whistleblowers and the circumstances when whistleblowing could be more diffused and more effective, but some authors\textsuperscript{15} are trying to select a number of circumstances when disloyalty against an organisation is justified.

It seems almost unanimously to be a grounded opinion that whistleblowing involves a little disloyalty against a company or an institute, although this disloyalty should also be considered in a positive way, because it means to be honest towards a wide category of people. As far as


\textsuperscript{14} Most of times a whistleblower is trying to help the organisation itself and makes his disclosure or concern in order to point out possible problems and to suggest the executives an intervention to remove the obstacles.

disloyalty is concerned it’s necessary to draw up some justifications. In an article\textsuperscript{16} published on “Business and Professional Ethics Journal” Richard De George\textsuperscript{17} makes a distinction between internal and external whistleblowing, where an internal whistleblowing doesn’t seem a disloyal choice because it aims at solving a problem without creating bad image consequences for the company; then the external one, which becomes necessary in several situations when the whistleblower should denounce internally any irregularities to the person who committed them; this one is acceptable just in three cases: when a serious harm is involved\textsuperscript{18}, when the whistleblower has already expressed his concerns to his superior and finally when he has tried through all the other channels within the organisation. The author adds two criteria that make whistleblowing, if not justified, at least morally required; more precisely when a whistleblower can show a convincing and supported evidence of the illegal act and when he has good reasons to believe that stating publicly will actually bring about a change and, as a result, prevent serious harm.

These criteria have been discussed and corrected for years up to the moment when five categories of disclosures believed acceptable were drawn:

1) a disclosure of information showing objectionable misconduct, otherwise not known or visible;

2) a disclosure made in the reasonable belief that it may demonstrates that there had been such misconduct;

3) the person is making the disclosure acts in good faith, without malice;

4) the disclosure is made in the public interest ensuring that the community has an effective civil service;

5) the disclosure is not specifically prohibited by law, otherwise considerations of national security or defence would not preclude it could be made.

\textsuperscript{16} De George, R.T., \textit{Ethical responsibilities of Engineers in Large Organizations. The Pinto Case}, Business and Professional Ethics Journal, v.1 n.6 p.175-185, Fall 1981.

\textsuperscript{17} University Distinguished Professor of Philosophy and Business Administration at the University of Kansas.

\textsuperscript{18} But this is an objectionable hypothesis because it’s solving a problem creating another one, that is to say which are the conditions to view a harm as serious.
The problem is that there are at least four different interests involved:

1) the interest of the whistleblower;
2) the interest of the person or people reported;
3) the interest of the company, which differs in case the reported person is one/some executives or an employee;
4) the interest of the public, which increases its value when a big company is involved (the cases of Enron and WorldCom are just the most famous examples).

Once again it’s evident how an analysis among these interests would lead to different ways of behaviour or judgement according to the subject whose interest is involved. Starting from point 4), the interest of public is much better granted by the widest transparency of the economic and financial world, so to allow common people to have a more precise information either to invest their money or not. In order to achieve more benefit on behalf of the public whistleblowing represents a precious instrument or, at least, the possibility of whistleblowing should make companies work with a wider transparency. However, on the other hand, there is the interest of the company to keep possible problems within the organisation: this could happen in case of internal whistleblowing when it’s the company itself the addressee of whistleblower’s concerns. But in this case another contrast is possible between the company and the person reported: if the person reported is a manager, the company’s interest could be to defend him from accusations or to ignore the whistleblower, making fruitless the report and protecting only the interest of the person reported.

Anyway the most controversial interest is the whistleblower’s one, because he is the one who faces the dilemma between being loyal to the company (and to the reportable person, most of the times a superior of him or among top managers) or honest to himself and the public. Once the employee who incurs in a reportable activity decides to blow the whistle, he becomes a victim of different reactions and rumours, because he gives priority to an interest instead of another one. Although the evolution of whistleblowing brought common public opinion to
appreciate who shows courage and bravery, the whistleblowers are widely marked by infamy and considered treacherous, especially by their colleagues and superiors.

Most probably who is not living a whistleblower’s situation, can’t realise the dilemma between choosing to be loyal or to be honest. From the outside it seems unbearable that a person who acts with a dishonest but self-serving conduct, may continue to be loyal to which he knows is an unfair company, but for a person working inside this reality all the feelings are empowered and the choice, which seems almost obvious to the majority of the observers, is on the contrary confused and difficult, first because of the risk to be fired with no guarantee to find a new job.

Loyalty depends on several factors, in particular on the capacity to trust one another; there is a shared opinion that loyalty is a feeling owed to a deserving person: legislation should be made, not to doubt the sense of loyalty towards superiors or authority, but in exceptional circumstances when a person holding a responsible office is somehow corrupted. In the Anglo-Saxon countries and in the USA there exists the proceeding of impeachment\textsuperscript{19} that states the fact that nobody can keep his office without a lawful conduct. This approach should also be applied to those people who want to be honest giving them all the support they deserve, while those who commit wrongdoing should be prosecuted. This should be valid even when a whistleblower discover and inform about a misconduct because of a sincere concern to protect or promote a public interest; and, as years of experiences in the field are demonstrating, he has nothing to gain charging wrongly; on the contrary being right often his life can be ruined.

Another aspect that should prevent from “labelling” whistleblowers as traitors is that whistleblowing is not a strategic project of retribution or revenge against a colleague, but it should be seen as the first step of a process within the company aiming at eliminating malfunctions. Whistleblowing must be considered as something useful, and even necessary, to the whole society to prevent damages from avoidable serious harms; if effectively applied it

\textsuperscript{19} It’s the incrimination of people keeping a public position when they commit determined unlawful acts during the performance of their work. This institute is considered so important in the Anglo-Saxon world and in the United States in particular, that even former Presidents Richard Nixon and Bill Clinton were subjects to impeachment.
could therefore be a part of a chain of actions leading dishonest and misguided people to recognise the damage they are causing to public and maybe to stop or recover it.

Whistleblowing represents an important example of peoples’ reaction to complex social problems that need a united and integrated response. As far as the complexity of the matter is concerned, a single person has not to be left alone and he should be guided and helped by policies and attitudes concerning the different forms of wrongdoing. As a matter of fact, an important help to whistleblower can come from the establishment of clear and appropriate rules regulating any response to wrongdoings’ reports.

Nobody can raise an objection on the fact that whistleblowers must face a dilemma when choosing whether to draw or not someone other’s attention to problems which put in trouble their consciences. From one point of view whistleblowing can be seen a as a failure’s example for the organisation because it passes over inconvenient behaviours and because some people set private personal advantages above the interests of all the others; meanwhile also for the society, because it promotes customs and practices which force to ignore corruption and because people incurring in wrongdoings - for fear, for apathy or just for un extreme egoistic prudence -, often don’t succeed in taking the responsibility to try to stop harmful attitudes and conducts. Again from an ethical point of view, whistleblowing is an incredible triumph, because people amazingly decide to risk infamy and even material consequences by following their conscience’s scruples.

The great challenge should be to establish structures that allow breaking through the corruption present in several big companies. In order to make them more efficient, a large number of agencies must be involved, from the Governments and the media to religious groups, foundations, associations which can create in the community the feeling that any corrupt practices have to be stopped just because they are wrong. Even the companies which should help and cooperate in changing bad habits, creating a more positive social climate, a better workplace and reinforcing their reputation through the community.


3. United States Legislation

The situation in the United States is quite different from United Kingdom and other states. Up to now there is not a unitary discipline about whistleblowing law. Legal protection is different both as far as the subject matter and as far as the state where the case arises.

During last years, a large variety of Acts has been providing whistleblowers with protection. The first U.S. law adopted specifically to protect whistleblowers, the Lloyd-La Fayette Act\textsuperscript{20}, dates back to 1912 and assured the federal employees the right to give information directly to the Congress. Several years later, a series of Acts was thought relating to specific sectors that provided whistleblowers with a particular protection: in 1972 the first U.S. environmental law, the Water Pollution Control Act (also called Clean Water Act), then the Safe Drinking Water Act (1974), in 1976 both the Resource Conservation and Recovery Act (also known as Solid Waste Disposal Act) and the Toxic Substances Control Act, and more the Energy Reorganization Act (1978), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund Law) in 1980 and the Clean Air Act in 1990. During this long period and until the 90’s protection for whistleblowers regarded environmental matters and, more precisely, it was applied just to government employees. On the contrary it was completely lacking a statute about corporate employees, and in particular employees of publicly traded companies.

Moreover, under the common law of a large number of states, whistleblowing cases are sometimes classified as retaliatory discharge, discharge in contravention of public policy or wrongful discharge and received and still go on receiving considerable treatment: an action for wrongful discharge represents only an exception to “at-will” doctrine, that consents the employer to fire employees for a good reason, any reason or no reason at all (and, in the same way, also an employee can quit for no reason). However, as the common law developed, courts

\textsuperscript{20} The Lloyd-La Follette Act in 1912 began the process of protecting civil servants in the United States from unwarranted or abusive removal by codifying “just cause” standards previously embodied in presidential orders.
started to deem differently certain reasons against public policy, and, as consequence, a rudimentary protection for employees started to be applied; it appeared evident, for example, how allowing employers to fire an employee who didn’t comply with an order violating the law could be an encouragement to the same employers to breach the law. Unfortunately not all state courts recognised a retaliatory discharge as a cause of action\textsuperscript{21}. Up to now, almost all states have tempered the “at will” rule (but only Montana has abrogated it) and about 20-25 states have enacted whistleblowing statutes with general application to private employees. Still there are differences between States about the quality of protection, the type of disclosure, the remedies and also the burdens of proof.

Also the pre-Sarbanes-Oxley federal approach to whistleblower protection is fragmentary: if a private company’s employee reports a violation of a federal statute, either internally or to a law enforcement agency, he may receive protection; this depends on whether the federal statute violated by the employer contains an anti-retaliation provision. The more effective component of federal whistleblower protection, however, guarantees that government employees are generally covered by civil service protections, such a protection was almost non-existent for corporate employees until 2002.

\textbf{3.1 The Sarbanes-Oxley Act}

On July 30, 2002, as a direct result of the national and international corporate scandals (Enron, WorldCom, Tyco International, Peregrine Systems are only the most famous), the Sarbanes-Oxley\textsuperscript{22} Act was enacted into law. Also if it is considered controversial, the

\textsuperscript{21} A clear example is Texas, the State where it would be held “Sherron Watkins v Enron” case if she had been fired.

\textsuperscript{22} Paul Sarbanes was the Democratic Senator of Wyoming, and Mike Oxley is a Republican representative from Ohio.
importance of this Act is extraordinary, so that President Bush defined it as “the most far reaching reform of American business practice since the time of Franklin Delano Roosevelt”\(^{23}\).

The Sarbanes-Oxley Act (SOX) is not a Whistleblowing law but it’s an Act that entirely reforms the business law, especially as far as serious regulations for corporations are concerned. It’s a wide ranging legislation that establishes new and improved standards for United States public company boards, management and public accounting firms.

Thinking to the Sarbanes-Oxley Act, Congress wanted to “play a crucial role in restoring trust in the financial markets” by ensuring that “corporate fraud and greed” would be “better detected, prevented and prosecuted”: the several provisions enacted by the Act aim at increasing oversight of corporate conduct, at inserting criminal penalties for investment fraud, at creating new professional responsibilities and, most of all, at promoting the formation of “audit committees” for publicly traded companies. In this set of rules Congress valued the opportunity of a whistleblower law to protect employees of these publicly traded companies\(^{24}\).

As a matter of fact, when some investigations into the corporate misconduct were carried out, it was immediately clear to the public that probably employees working in Enron and WorldCom had already identified a good part of the fraudulent practices that should have brought these companies to collapse. The key fact is that these employee (potential whistleblowers) lacked of a legal protection that contributed to the creation of a “corporate culture of silence”; as a consequence schemes were set up by the companies to hide financial problems and to deceive controls made by Government regulators and by the investment community.

Meanwhile public perception of whistleblowing has radically changed in these years, so that the same whistleblowers are no longer considered, in most cases, as troublemakers: the public opinion’s point of view changed so far that in 2002 *Time* quoted three whistleblowers as

\(^{23}\) Also in the Congress the feeling was almost the same. Republican Senator of Wyoming Mike Enzi, for example, have appealed this reform law as “earthshaking”.

\(^{24}\) In fact, if there was a federal protection for workers in a Government agency, it was lacking up to now a kind of preservation for companies’ employees.
“People of the Year”, and two of these\textsuperscript{25} are Cynthia Cooper and Sherron Watkins, two workers who had identified and tried to correct the real problems at WorldCom and Enron\textsuperscript{26}.

Sarbanes-Oxley Act is radically different from other U.S. whistleblower laws also because it’s not limited to provide unfairly dismissed employees with legal remedies, but forces the publicly traded corporations even to establish procedures to accept internal whistleblower complaints or confidentiality provisions, and, most of all, it contains a criminal prohibition against whistleblower retaliation.

There are four main protections contained in the SOX:

1) prohibition against employment discrimination and retaliation from the publicly traded companies, their contractors, subcontractors and agents, and the protection is on behalf of allegations of financial fraud or SEC (Securities and Exchange Commission) violations. Employees are entitled to a full “make whole” remedy and special damages, including reinstatement, back pay, legal costs and compensatory damages;

2) criminal penalties for discrimination against whistleblowers: employers who retaliate whistleblowers can be sentenced to 10 years of prison for intentionally interfering with the lawful employment or livelihood of a person who provides truthful information to a law enforcement officer related to the commission (or possible commission) of a federal offence;

3) corporate responsibility to listen and take into consideration whistleblower complaints; publicly traded companies must establish internal programs to receive and examine employees’ concerns about accounting and auditing matters;

4) whistleblowing attorneys: SOX established new rules for attorneys appearing and practising before the SEC. As a consequence they\textsuperscript{27} must report evidence of material

\textsuperscript{25} The third is Coleen Rowley, a former FBI agent who wrote a report after the attacks of 9/11 charging how FBI headquarter staff in Washington, D.C., had underestimated information in its knowledge.

\textsuperscript{26} The case of Sherron Watkins is more widely treated in chapter 6, paragraph 6.1.

\textsuperscript{27} In particular, Wall Street attorneys.
violation of securities law, breaches of fiduciary duties or similar violations to a corporation’s chief legal counsel, CEO or other entities mandated by the SEC itself.

3.2 Whistleblowing before the SOX

On May 6, 2002 the Senate Judiciary Committee unanimously reported its findings on the Enron scandal and meanwhile proposed a legislation reform on these matters. Few months later a corporate whistleblower protection provision was included in the final version of the Sarbanes-Oxley Act, with the Senate unanimous approval (by a 97-0 vote)\(^{28}\).

The Committee charged with the investigation on Enron scandal could found out that the company promoted a corporate culture discouraging and preventing employees from acting honestly and from reporting wrongdoing. An example of this behaviour appeared clear when Sherron Watkins tried to blow the whistle on the fraud: Enron’s board immediately asked for a legal advice about any possible risks for the company, and the relevant advice was to fire the whistleblower rather than Anderson, the accounting company engaged in the fraud (this seemed to be the best scenario for Enron, and more surprising it was legal!). From the inquiry other corporate whistleblowers who had to face retaliation came out: a financial advisor of Paine Webber\(^{29}\) was fired because of his recommendation to sell Enron stocks; another corporate risk assessment official complained he was fired for his continuous warning about Enron misconduct; an outside accountant lost prominently consideration having expressed his concern about Arthur Andersen financial practices\(^{30}\).

Therefore the Congress understood that corporate whistleblowers weren’t protected by the law, in particular considering that these people were “insiders” and often “firsthand witnesses to the fraud”; moreover they quite often were the only ones in the position to know “who knew

\(^{28}\) The Judiciary Committee’s whistleblower provision was approved by the full U.S. Congress on July 25, 2002, and enacted into law by President George Bush on July 30, 2002.

\(^{29}\) An American stock brokerage firm founded in Boston in 1880, and acquired in 2000 by Swiss Bank UBS AG.

\(^{30}\) See Senate Judiciary Committee Report, “The corporate and Criminal Fraud Accountability Act of 2002”.
what”. In 2002 there were current laws protecting many government employees acting on behalf of public interest by reporting wrongdoing, but that kind of protection was lacking in case of publicly traded company’s employees blowing the whistle on fraud with the aim of protecting the investors.

Since 1972 Congress has granted the U.S. Department of Labor (DOL) the jurisdiction to adjudicate whistleblower claims under the Federal Water Pollution Act. Thereafter Congress used that model to provide whistleblower employees with protection under environmental laws, the Energy Reorganization Act, the Surface Transportation Act, and the airline safety law.

For these fields the DOL established a four-steps procedure:

1) Occupational Safety and Health Administration (OSHA) conducts a preliminary investigation into the merits of the case and issues its preliminary findings;

2) parties are entitled to a “de novo” review of their claims before a DOL Administrative Law Judge;

3) Administrative Law Judge’s ruling is subject to an appeal within the DOL;

4) each party may seek judicial review of a final order of the DOL in the U.S. Court of Appeals for the circuit in which the violation of law occurred.

When Congress enacted the SOX, these DOL procedures were adopted according to the letter. Also other instruments drawn from these precedents laws were used, as the “reasonable belief” test. But the Congress also looked at some key provisions of the Whistleblower Protection Act of 1989 (WPA), that protect federal whistleblowers or people working for the Government who report agency misconduct. The standard of proof to demonstrate illegal retaliation is incorporated in the SOX directly from the WPA: this test, the “contributing factor” test, significantly lowered the burden of proof for whistleblowers, because it is sufficient for the worker to prove that the protected activity contributed some way to the realisation of a retaliating adverse action (employers would be required to demonstrate by “clear and convincing evidence” that they would have taken the same adverse action even if the employee did not blow the whistle).
A second procedural change, whereas, is unique to the SOX. Under prior DOL administered laws, an employee was required to adjudicate his or her claim within the DOL, regardless of the length of the same administrative process. To prevent this problem under the SOX, employees have the right to re-file their claims in federal district courts provided that they exhausted the administrative remedies and the DOL didn’t issue a final order within 180 days. This provision, which allows adjudicating whistleblower cases in a fair and timely manner, is mainly thought because these people blowing the whistle don’t only expose private harms but also hazards to the public.

### 3.3 SOX complaints and investigations

Under the Sarbanes-Oxley whistleblower protection law each employee, who alleges that he has been retaliated against because of his “blowing the whistle” on SEC violations or fraud on shareholders, must file a written complaint with the DOL within 90 days from the alleged discriminatory conduct.

Unlike a civil action filed in a federal court, in this whistleblower procedure, an employee isn’t obligated to serve his initial complaint to his employer; it’s the OSHA (Occupational Safety and Health Administration), after the filing of the complaint, to serve a copy of the complaint itself and of all the other relevant information connected to the case both to the worker and to the Security and Exchange Commission (SEC). This complaint must be written, in a simple way and including a full statement of the acts and omissions that constitute the violation, and the same complaint can be amended and implemented in a second time. Therefore there are not so constricting requirements as to the form of the complaint, and this is a signal of how the precision of the procedure is significant, because the first interest of this legislation is the coming out of any wrongful behaviour. Also the deadline confirms what just stated, because if on one side there are 90 days from the alleged discrimination to file a SOX action, on the
other side it is possible, under limited circumstances, to extend this deadline when fairness requires it. The term is forwarded also because of the beginning of the time running to file: this moment doesn’t coincide with the implementing of the adverse action of the employer, but with the date when the employee has “final and unequivocal notice” that the decision is made really to take an adverse action.

Other theories are used to enlarge the period for filing the complaint: equitable tolling, equitable estoppel, fraudulent concealment and continuing violation.

As far as the investigations of the Occupational Safety and Health Administration into the merit of the case are concerned, the period is 60 days from the filing of the complaint. From one point of view it could appear that these investigations have no importance as the action because it will be subject to a “de novo” review, but on the other side an employee can be entitled to an immediate reinstatement if prevailing. Moreover the OSHA investigations provide the parties with an initial discover on the case.

These investigations have to take into consideration this series of factors:

- the employee engaged in a protected activity or conduct;

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31 So the decision about the recurrence of an occurring larger deadline for complaining is left to the discretion of the judge.
32 As expressed in many court decisions: Delaware State College v Ricks, 449 U.S. 250, 259 (1980); English v Whitfield, 558 F.2d 957, 961 (4th Cir. 1988); Wagerle v The Hospital of the University of Pennsylvania, 93-ERA-1, D&O of SOL, at 3 (March 17, 1995). From Belt v United State Enrichment Corp, DOL 01-ERA-19, 15, 183: “In whistleblower cases, statutes of limitation...run from the date an employee receives final, definitive and unequivocal notice of an adverse employment decision. Final and definitive notice denotes communication that is decisive or conclusive, i.e. leaving no further chance for action, discussion or change. Unequivocal notice means communication that is not ambiguous, i.e. free of misleading possibilities....The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences”.
33 In Hill v DOL, 65 F.3d 1331, 1335 (6th Cir. 1995), the court delineated five factors in order to have applied equitable tolling: 1) whether the plaintiff lacked actual notice of the filing requirements; 2) whether the plaintiff lacked constructive notice; 3) the diligence with which the plaintiff pursued his rights; 4) whether there would be prejudice to the defendant if the statute were tolled; 5) the reasonableness of the plaintiff remaining ignorant of his rights.
34 In Prybs v Seminole Tribe of Florida, 95-CAA-15, D&O of ARB, at 5, is stated that “the doctrine of equitable tolling focuses on the question of whether a duly diligent complainant was excusably ignorant of his rights, whereas the principle of equitable estoppel focuses on the issue of whether the employer misled the complainant and thus caused the delay in filing the complaint.”
35 In Hill v DOL, the court also identified three factors that would be necessary to toll the limitations period based on fraudulent concealment: 1) wrongful concealment by the defendants; 2) failure of the plaintiff to discover the operative facts; 3) plaintiff’s due diligence until discovery of facts.
36 In fact OSHA’s legal findings are not admissible as evidence in an adjudicatory hearing. They are however very helpful in accessing potential weaknesses or strengths in the case.
37 The effectiveness is immediate, with no subjection to the exit of the eventual pending appeal.
- the employer (or the other person named in the complaint) knew or suspected that the employee engaged in a protected activity;
- the employee suffered an unfavourable personnel action;
- the circumstances were sufficient to raise the interference that the protected activity was a contributing factor in the unfavourable action.

If these conditions aren’t satisfied by employee’s complaint, he will be asked to supplement them by additional information. The person named in the complaint, on the contrary, has 20 days from the receipt of the notice of the complaint to submit a written statement with documents to set his position\(^{38}\).

After 60 days the OSHA must issue its written findings on the merit of the complaint that can be appealed within 30 days of receipt by written objections and a request for a hearing on the record\(^{39}\).

### 3.4 SOX discovery and hearings

The appeal to the OSHA findings is filed by each part with the Office of Administrative Law Judges of the Department of Labor: once filed, the case is assigned to a judge and docketed for a trial on the merits. This appeal must be filed within 30 days of the OSHA findings and consists of a formal request for a hearing on the record and the filing of objections to the notified OSHA findings. The case is heard “de novo” and claims of the parties can be adjudicated in a formal bench and, because the case is tried before a judge and not a jury, hearings are consequently less formal than a jury trial.

The Administrative Law Judge (ALJ) stands as a neutral hearing examiner, so the employer and the employee are both parties to the proceeding; as a consequence, the appeals filed by both

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\(^{38}\) No doubt it’s important to remember the burden of proof required to the employer.

\(^{39}\) It’s evident that the person who may eventually appeal to the OSHA findings in this situation is the employer, because in consequence of these preliminary findings the employee can also be entitled to the reinstatement.
parties are rounded up into one proceeding, and also multiple complaints are consolidated into one hearing. All the proceeding is thought to be the most expeditious possible, with the exception of good cause or unless the parties come to an agreement. The first hearing date should be set within 60 days of the notice filing of appeal, and time limits for eventual successful motions are really short (all these motions must be answered in 10 days). This broad discovery of the case is considered essential to protect the public interest.

The central part of the entire proceeding is definitively the hearing, because it is the body of evidence all future decisions will be made upon: moreover only in this phase there is a certain freedom in admitting the proofs and, after the closing of the hearing, this possibility is really limited. Instead, although similar to other courtroom trials, this hearing is not so formal: for example even non-attorneys have the right to represent the parties and telephonic evidence is often permitted (where necessary). There is never a jury and everything is left in the power of one administrative law judge, who has a very wide discretion in admitting testimonies and evidences. As for the hearsay rule evidence, it’s admissible if it bears satisfactory indicia of reliability, it is probative and its use is fundamentally fair.

After the hearing, the parties may file post hearing briefings, including findings of fact and conclusions of law: after this filing, ALJ will issue a recommended decision based on the whole record (and including findings of law and facts).

The Department of Labor and the SOX have special rules and procedures in relation to sanctions and involuntary dismissals: under the SOX if the employee is found to have filed a “frivolous” or “bad faith” complaint, the maximum sanction permitted is a $1,000 fee.

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40 These terms are fixed also considering the stricter terms scheduled by nuclear and environmental whistleblower laws, in which requirements’ time are also shorter than SOX ones. But these terms are so short that the time frame is very rarely met and that they don’t allow to the parts to have a full and fair presentation of the case.
41 The SOX refers to the Title 29 of Code of Federal Regulations, 1980.1067(d): “Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.”
42 A legal principle concerning the admission of evidence through repetition of out-of-court statements.
43 See Delaney v DOL, 69 F.3d 531 (1st Cir. 1995).
44 It’s the only one and maximum monetary sanction available against a complainant under the SOX and it consists in the attorney fees the respondent-employer has incurred. However, since 2000, when this provision has been incorporated in another whistleblower law, there are no reported cases in which a sanction was awarded.
All people appearing in a DOL proceeding are required to act with integrity and ethically, and it’s within the power of the judge to determine if the parties acted with misconduct and have to be sanctioned. He may dismiss a complaint if a party fails to comply with a lawful order or engages in other misconduct.\(^{45}\)

### 3.5 SOX Appeals

As to SOX whistleblower law, there are two stages of appellate review, one within the Department of Labor and the other within the federal courts.

The first term to be respected for an appeal is within 10 days of the decision’s issuance. In case the decision is appealed, the Administrative Review Board is vested with jurisdiction. Within 60 days of a final decision by this Board each party may seek a judicial review in the U.S. Court of Appeals for the circuit where the SOX violation occurred (the decisions of the appeals court can be subject to review by the U.S. Supreme Court).\(^{46}\)

So the Administrative Board Review must be involved within 10 days of the date of first degree decision, by a petition identifying findings, conclusion or orders for which exception is taken. Within 30 days of the filing of the petition the Review Board must decide whether taking the jurisdiction over the appeal or not and, if it doesn’t, the recommended decision of the ALJ becomes the final decision of the DOL. The appeal to U.S. Circuit Courts must be filed within 60 days of the date of the Review Board order.

Also the Courts of Appeals can issue a stay to prevent irreparable injury, because it has been stated that retaliatory discrimination or other retaliatory activities can cause an irreparable harm, although a financial injury alone doesn’t constitute an irreparable injury.\(^{47}\) In addition to this, if

\(^{45}\) Although the large discretion granted, the judge has to motivate an eventual dismissal of a complaint, because of the severity of this sanction.

\(^{46}\) It must be remembered that a decision by either OSHA or the Administrative Law Judge to reinstate an employee is immediately enforceable in U.S. District Court.

anyone fails to comply with a preliminary order of reinstatement or with a final order by the Department of Labor, the person in favour of which this order has been issued can file a claim for enforcement in federal district court. When this enforcement action is filed, the district court is not empowered to re-examine the merits of the case, but must simply perform a “ministerial” role in enforcing the order.

Thanks to the SOX the Congress has provided corporate whistleblowers with a unique procedural right: for example employees who exhaust their administrative remedies within the DOL can withdraw the DOL case and re-file the case, “de novo”, in federal district court. But this faculty is left only to employees, with the consequence that employers must defend themselves in the forum chosen by the claimant (no other DOL-administered whistleblower laws contain this election procedure).

In order to exercise this right the employee must follow scheduled actions: first of all he has to file the initial complaint at the DOL and he has to participate to DOL proceedings (if he engages in bad faith conduct to delay these proceedings he can lose his right to file in federal court); after participating in DOL proceedings for 180 days, the employee may withdraw his or her proceeding from the DOL and may file a claim in federal district court under the SOX.

The decision whether to file a claim in federal court or not is important, because DOL offers the employee different favourable options, as the less complex and costly procedure (e.g. the informality of the hearings), the deeper experience in deciding whistleblower cases (this way led DOL judges to recognise whistleblowers as “brave, dedicated and conscientious public-spirited citizens” who have become a “vital part of American society”\(^{48}\)) or the propitious feedback from the adjudication processes. On the other hand, however, a series of issues advises to file also at a federal court after the expiration of the 180-day period: the DOL lacks formal “subpoena powers”\(^{49}\), so a witness essential for the case may be cited only by the parties. If a party wants to

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\(^{49}\) A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter.
file a case also with the state whistleblower provision, he is obliged to remove his SOX case from the DOL, differently from the legitimate separation admitted within the federal court action; all DOL-administered corporate whistleblower laws don’t permit a private cause of action in federal court, instead of what is granted under the SOX, so the parties can gather all their cases in this forum; in federal court is possible a rule not applicable for DOL proceedings: it’s the Federal Rule of Civil Procedure 11 that permits sanctions be awarded against each party in a federal court action with no limitation (in DOL proceedings the maximum sanction applicable for misconduct is $1000). Finally, the decision to file a case in a federal court must be made on a case-by case basis.

3.6 Proof of discrimination

In 1989\textsuperscript{50} Congress created a new standard of proof applicable in whistleblower cases: the “contributing factor” test. When the Sarbanes-Oxley corporate whistleblower law was redacted in 2002, this standard was incorporated in the new law, to make easier for whistleblowers to win their cases. The standard of proof set for specific sectors of law is really significant, because usually shows society’s thought about a certain matter; as a matter of fact the standard serves for allocating the risk of error between the parties. Most civil cases are adjudicated on the “preponderance of evidence” standard, where the parties equally share the risk of error; instead, in SOX cases, the traditional standard has been modified to protect whistleblowers, reflecting new society’s interest to defend individuals who risk a remarkable adverse action for their bravery to blow the whistle.

During the years several judicial decisions have created a conflict a confusion about this standard, so that a statutory formula was enounced. The whistleblower must prove: a) he’s an employee covered under the SOX; b) he engages in activities protected by the SOX;

\textsuperscript{50}It was introduced in the Whistleblower Protection Act of 1989.
c) employer is aware of this protected activity; d) protected activity is a contributing factor in an adverse action taken by the employer. Once the employee demonstrated these elements as a “contributing factor”, the burden of proof is shifted to the employer who has to establish, by clear and convincing evidence, that he would have taken the same adverse action even if the employee hasn’t engaged in a protected activity⁵¹.

An element like the “animus” doesn’t have to be the primary reason for the adverse action, but it only needs to play a part in the overall motivation: a contributing factor is any factor that, alone or connected with other factors, affects in some way the outcome of the decision (this twists the existing whistleblower case law, which was requiring the protected conduct to be a significant, motivating, substantial or predominant factor in a personnel action)⁵².

As the burden of proof is shifted to the employer, he will have to demonstrate he would have acted in the same way by clear and convincing evidence. This standard requested to the employer establishes for his defence an evidence stronger than a mere preponderance of evidence: the level of proof needed to meet this standard is usually explained as highly probable⁵³.

To demonstrate that the protected activity is a contributing factor in an adverse action (being the heart of a SOX whistleblower case), it’s evident that employers extremely rarely admit this connection; the link can be proved either by direct or circumstantial evidence. A direct evidence, if believed, proves the existence of a disputed fact without interference and presumption, and it’s clear that obtaining such an evidence in an employment case is very

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⁵¹ In Peck v Safe Air International, 2001-AIR-3, D&O of ARB, p.6 (January 30, 2004), it’s well summarised by the Department of Labor Administrative Review Board this contributing factor: “If a complainant demonstrates, i.e. proves by a preponderance of the evidence, that protected activity was a contributing factor that motivated a respondent to take adverse action against him, then the complainant has established a violation (of the Act). Preponderance of the evidence is the greater weight of the evidence, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. Assuming a complainant establishes a violation of the Act, nonetheless may not be entitled to relief if the respondent demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event. Clear and convincing evidence is indicating that the thing to be proved is highly probable or reasonably certain.”

⁵² See Marano v Department of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993); Taylor v Express One International, 2001-AIR 2, R.D&O of ALJ, p.27 (February 15, 2002).

⁵³ See Colorado v New Mexico, 467 U.S. 310, 316 (1984); Duprey v Florida Power &Light, 2000-ERA-5, D&O of ARB, p.6, n.22 (February 27, 2003).
difficult, because it’s almost impossible that employers admit discrimination against employees and also more unusual the presence of the so-called “smoking gun” documents. In the large majority of cases circumstantial evidences are the only means available to prove the retaliation or not. There’s a SOX decision of 2004\textsuperscript{54} where different factors used to determine these circumstantial evidence are specified and listed:

- work performance: high quality work-performance prior to engaging in protected activity with a decrease thereafter, or presence/absence of previous complaints against the employee;
- timing: the proximity or not of an adverse action to the engagement in the protected activity;
- disparity of treatment between a whistleblower and a non-whistleblower;
- deviation from routine procedures: for example in the information to the employee of an adverse action, or the absence of warning before termination and transfer;
- attitude of supervisors towards whistleblowers;
- pretext, that is to say the failure of the company to prove allegations, contradictions or delays in explanation about the reasons for the adverse action; importance of the alleged offence;
- antagonism to protected activity: for example considering the employee whistleblower a “troublemaker”;\textsuperscript{54}
- object of complaint: the evidence that whistleblower’s concerns are correct and the impact of the problem denounced by the employee on public is significant;
- dishonesty regarding a material fact.

\textsuperscript{54} See Getman v Southwest Securities, 2003-SOX-8, D&O of ALJ, pp.15-18 (February 2, 2004).
3.7 Protected Activities

When the Senate Judiciary Committee drafted the SOX, it was immediately clear that this new law had to be broadly made out to be effective. In particular three issues emerging from the law reflect these intentions: first of all the law broadly defines the scope of potentially fraudulent conducts that is reportable under the SOX; second, the law protects employees’ disclosures rendered to a wide number of people and entities; third, the allegation of fraud or misconduct doesn’t need to be proven (in fact it has to be truthful on a reasonable basis).

The reportable violations under the SOX include any violations of rules and regulations of the Security and Exchange Commission, any violations of criminal and civil laws protecting investors and allegations of fraud under any federal law that may harm shareholders. So a wide range of disclosures is protected, in order to make the investors receive truthful information about a company’s financial condition and other material aspects concerning a corporation.

A clause, the SOX “participation clause”, aims at protecting employees who file, cause to be filed, testify, participate in or otherwise assist in a proceeding filed or to be filed relating to one of the alleged violations. This clause provision has to be interpreted to protect a wide range of behaviours. The federal law also admits the “one-party” taping of conversation made by the whistleblower in order to document wrongdoing or retaliation; this is seen from an employee’s defence point of view, even if in contrast with the important right to privacy of someone else. However who threatens or states an intention to disclose violations to the Government is excluded (this because it’s a clear evidence of bad faith).

Not each disclosure to any person regarding a SEC violation can be considered a protected activity. The Statute sets four categories of persons/organisations which an employee is permitted to blow the whistle upon, so there are possible reports to government officials,

\footnote{SOX, 18 U.S.C. (United States Code) \textsection 1514A(a)(2).}
internal reports, reports to Congress and conducts that initiate a proceeding under the securities laws: it clearly appears the extremely wide scope of protected activities.\(^{56}\)

Therefore the possibility to communicate directly to federal law enforcement or regulatory authority is explicitly protected by the SOX. Among these authorities SEC (Security and Exchange Commission), U.S. Attorney’s offices, U.S. Department of Justice and other government agencies involved in any manner in regulating publicly traded companies (e.g. the Public Company Accounting Oversight Board) are included. Also disclosures to federal regulatory agencies not directly connected with the security industry are protected when the disclosures are related to fraud against shareholders or other violations under the SOX. Moreover each contact with “any member of Congress or any committee of Congress”\(^{57}\) is protected (also this provision is directly modelled on other whistleblower laws).

Internal reports are explicitly protected too, in particular complaints to management officials who exercise supervisory authority over the whistleblower and also to any other person working for the employer with the authority to investigate, discover or terminate a misconduct. In addition also disclosures to other persons are protected, like Audit committee and auditors, Office of General Counsel, Chief Executive Officer of the company and Company-instituted “employee concerns” programs. But the most realistic assumption is that an employee, who discovers a potential problem, reports firstly to the management with a certain risk of discrimination or even of possible dismissal.

Meanwhile it’s clear that self-auditing work, together with relevant compliance concerns generated, is a protected activity. In fact, if a person’s task is to discover and report each non-compliance fact so that the employer could correct it, it’s obvious that they are the most suitable to meet violations. This is in general a consequence of a normal event: when a whistleblower wants to make a disclosure about a violation, he not always feels comfortable in discussing his

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\(^{56}\) As wide broad employees’ protection provisions as SOX are contained in the Occupational Safety and Health Act, the Fair Labor Standards Act, the Surface Transportation Assistance Act, the False Claim Act, the Federal Mine Safety Act, the Energy Reorganization Act and the environmental whistleblower laws.

\(^{57}\) SOX, 18 U.S.C. § 1514A(a)(C).
concerns with a supervisor, but he may often prefer raising his disclosures to the audit committee confidentially.

Moreover contacts with the media, Trade Unions, or citizen environmental organisations are protected by whistleblower laws; they are protected by the DOL whistleblower laws, more or less identical to the SOX, and this happens because the employee’s communication to the media usually comes out in the initiation of a regulatory proceeding. The same consideration stands as far as the concerns reported to co-employees, because even the complaints to co-workers may be considered the first step in reporting a violation.

Employees’ protection is so wide because an employer can’t discharge employees if he just suspects them to be engaged in a protected conduct. So employees are protected also if they don’t engage themselves in a protected activity but their supervisors believe they are.

Up to now it’s clear that whistleblowers protection is really wide, but not so as being almost totally comprehensive. A factor that can limit the engagement in protected activities is represented by the way employees act. In some circumstances their activity is considered outrageous or improper and in order to consider the “impropriety” courts must weight public interest and the employer’s one. Among unprotected conducts are included: dissemination of false and derogatory accounts of an employer’s management practices to non-governmental sources, the interference of a company’s business relationship with a customer or other conduct that interferes with job performances or disrupts the workplace. Also employee’s refusal to perform his job isn’t generally protected, with some exceptions like risks for safety and health or illegal consequences in performing the job.

**3.8 The “reasonable belief” standard**

With the SOX, an employee is not obliged to demonstrate the validity of the substantive allegations. The concern that results in the initial whistleblower disclosure needs only to be
based on the “reasonable belief” that the presumed violation occurred. The standard to determine whether an employee’s belief is reasonable or not, involves an objective assessment of the employee’s concern\(^{58}\). Moreover, in most jurisdictions, an employee’s motivation for filing a complaint is irrelevant and the employee himself is protected even when the safety allegations are likely trivial.

### 3.9 Adverse action

SOX totally prohibits adverse actions by the employer in retaliation for an employee’s engagement in protected activities. As far as the definition of what is intended as adverse action, the statute includes several kinds of discriminatory conduct. The law states that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and condition of employment”\(^{59}\) (based on the employee’s lawful protected activity). The case law, interpreting discriminatory conduct, reflects this wide definition including also disciplinary actions “even if no loss of salary is involved”\(^{60}\).

Adverse actions are generally divided in three categories: 1) tangible actions affecting terms and conditions of employment or also less obvious actions altering the quality of employee’s duties; 2) negative references or statements even if they don’t lead to the loss of employee’s job; 3) harassment on the job, where a tangible detriment of job is not required.

During the years, a lot of employer’s practices have been classified as illegal discrimination: elimination of a position, transfer or demotion, constructive discharge, blacklisting, reassignment in a less desirable position, negative comments affecting employment

\(^{58}\) In Halloum v Intel Corp., 2003-SOX-7, D&O of ALJ, p.10 (March 4, 2004): “A belief that an activity was illegal may be reasonable even when subsequent investigation proves a complainant was entirely wrong. The accuracy or falsity of the allegations is immaterial; the plain language of the regulations only requires an objectively reasonable belief that shareholders were being defrauded to trigger the Act’s protections.”

\(^{59}\) SOX, 18 U.S.C. § 1514A(a).

\(^{60}\) See Carter v Electrical District No.2, Case No.92-TSC-11, Sec. Dec. (July 26, 1995) citing DeFord v Secretary of Labor, 700 F.2d 281, 283, 287 (6th Cir. 1983), and others.
opportunities, denials of promotion, threats, intimidation or coercion, denials of parking and access privileges, refusals to rehire, layoffs and several others.

3.10 Damages

SOX includes two important sections concerning the awarding of damages. First, in cases discussed within the Department of Labor, SOX incorporates rules and procedures contained in the airline safety whistleblower law\(^61\): once the DOL determines that a violation has occurred, the Secretary of Labor has to order the person who committed such a violation to take specific steps to remedy the infraction, including affirmative action to abate the violation, the reinstatement of the employee, the payment of back pay, the restoration of the terms, conditions and privileges associated to the employment and the payment of compensatory damages to the complainant. Moreover SOX contains its own provision reflecting the airline safety whistleblower law; more particularly it quotes:

\[(c)\) REMEDIES-

1) IN GENERAL- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

2) COMPENSATORY DAMAGES- Relief for any action under paragraph (1) shall include:

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”

As it appears from the dispositions, SOX demonstrates the Congress’s interest to ensure

employees prevailing in corporate whistleblower cases to be properly compensated (reinstatement, back pay and compensatory damages). So the heart of whistleblower provisions is to ensure a “make whole” remedy, through all relief necessary to grant it; the amount of damages awarded is calculated as a consequence of any factors like the level of position held by the employee and the kind and entity of the adverse action, and can range from non-monetary relief to a multimillion-dollar award.

The most important remedy available to a whistleblower is reinstatement that is often the only realistic way to protect a career. Penina and Myron Glazer, authors of several whistleblowing studies, testify that is “extremely difficult, if not virtually impossible” for whistleblowers to find “comparable work in the same industry” after blowing the whistle. So one of the goals of reinstatement is to restore the employee as nearly as possible to the position he would have obtained if the discrimination had not occurred; employees should be reinstated in a “substantially equivalent” position only when the original position is no more available. The position can be a higher one should the record find he would have received a promotion if he had not disclosed (arguments about the no longer existence of the employee’s position have regularly been rejected).

In SOX and other whistleblower statutes, reinstatement is the automatic, preferred and usual remedy. However it’s evident that there are some cases in which the reinstatement, for several causes, is impossible: in these situations juries, courts or administrative agencies can award front pay as an alternative. Front pay may be awarded if there is an irreparable animosity between employer and employee or when it seems impossible to rebuild a productive and fair working relationship. On the other hand, different considerations can be evaluated on back pay: SOX statute leaves a court or the DOL the power to award a back pay, but the consequence is that the award is approximate and uncertain also because its calculation is difficult (it must be

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63 See for example Hobby v Georgia Power Company, 90-ERA-30, D&O of ALJ on Damages by ARB, pp.12-13 (February 9, 2001) and D&O of ALJ on Damages, pp.54-57.
determined what the employee would have earned if he hadn’t incurred in the adverse action). However, the back pay still represents the first remedy and is usually estimated and to be given until an offer of reinstatement is made.

Although reinstatement and back pay are usually the two most significant elements of a “make whole” remedy, courts and administrative agencies are usually authorised to award other damages (often by “equity”) in order to ensure an employee to be truly made whole. Among these forms of relief there are reimbursement for lost overtime, interest on the back pay award, restoration of all pension contributions, restoration of health and welfare benefits, restoration of seniority, provision of neutral references, restoration of parking privileges, provision of necessary certifications for the employee, prohibition of laying off an employee or terminating him in the future (except when a good cause exists), applicable promotions, vacation pay, salary increases, training, benefits and others. Damages are also fully available in a “refusal to hire” case, with a specific evaluation in respect of the other employment situations.

Finally SOX allows employees to obtain compensation also for special damages, resulting compensatory damages such as those for emotional distress caused by an employer’s retaliatory conduct, and also compensation for pain and suffering, mental anguish and lost future earnings. They are designed to be available as a compensation for harassment, humiliation, loss of professional reputation, ostracism, depression, threats, panic and other consequences of being discriminated. The most important concept about these special and compensatory damages is that they can’t be used to punish the employer, but only to make a wronged party whole. Alike, employer can’t be punished further if an employee doesn’t mitigate the damages (but this provision isn’t contained in the statute, and the failure to mitigate by the employee must be proven by the same employer).
3.11 Attorney fees and costs

Attorney fees and costs are part of the special damages if the employee wins a SOX whistleblower case. Under the statute, the employee prevailing in any action under the SOX shall be given a “compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees”\(^{64}\). SOX differs from other fee-shifting statutes, because it doesn’t leave the courts or the DOL the discretion to deny the payment of these reasonable attorney fees, which are part of the special damages owed to the employee. As for the determination of a reasonable attorney fee it is linked to the “lodestar” calculation that is defined by the U.S. Supreme Court simply as the product of multiplying a reasonable attorney fee rate by the number of hours reasonably expended on the litigation\(^{65}\). Once calculated the hours it took working on the case, it must be set a reasonable market rate for each attorney who worked on the case. In a school case of 1976\(^{66}\), 12 factors were named to be evaluate to determine a fair market rate, the so-called Johnson factors: the time and labor required, the customary fee, the novelty and difficulty of the questions, the skills and requirements to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance the case, the limitations imposed by the client or the circumstances (priority work that delays the lawyer’s other legal work is entitled to some premium), the amount involved and the result obtained, the experience, reputation and ability of the attorney (if a young attorney demonstrates skill and capability, he should not be merely penalised for being admitted recently to the bar), the “undesirability” of the case, awards in similar cases, whether the fee is fixed or contingent, the nature and length of the professional relationship with the client (also other factors not considered here may affect upon an attorney fee).

\(^{64}\) SOX, 18 U.S.C. § 1514A(c)(1) & (2)(C).


\(^{66}\) See Johnson v Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).
In any case, although it is possible that the amount of attorney fees is higher than the damage award, its calculation can’t come out in a second major litigation: in fact fee petition doesn’t need to achieve technical perfection. However, as a compensation, all costs reasonably incurred in pursuing the litigation are included, in particular all expenses incident to the litigation that are normally billed to fee-paying clients (e.g. postage, reproduction, travel, meals, lodging in hotels, paralegal expenses, law clerk time, supplemental secretary costs, arbitration costs, telephone costs, long-distance calls, messengers’ fees, certified mailings, gasoline, parking and, where previously established, expert witnesses fees).

3.12 Settlement of SOX complaints

In order to settle a SOX complaint, the parties to the case must obtain the approval of the Department of Labor, which must fix the terms of the agreement being in the public interest, fair, adequate and reasonable. This is an aspect that differentiates SOX cases from other administrative and civil legal actions, where parties are free to settle cases without being monitored by the government (also because settlements are often confidential); this can be explained by the particular interest connected with whistleblowing cases, that is to say to harm public about health and safety hazards. The risk is that employers could abuse of their strong bargaining position and insert in the settlement the so-called “hush-money” provisions, so to held back employees from witnessing in proceedings and also from denouncing violations of law.

To avoid this praxis from the case law, the following rules have been created:

- an agreement containing restrictions about the employee’s right to “blow the whistle” is fully void. The whole agreement is avoidable even if only one single part of the agreement contains an improperly restrictive clause;

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It consists in paying a certain amount of money to the whistleblower employee to keep him silent about employer’s misconduct.
- a decision to void an agreement and to demand the parties to proceed with the litigation is not subject to appeal under the collateral doctrine. Once the DOL voids an agreement, the parties must go back to the hearing process; therefore, if the parties want to challenge the DOL’s decision, they must wait until the case is heard or dismissed on the merits and then proceed to an appeal;

- if the agreement is voided due to restrictive or hush money terms, an employee is not required to return any monetary amount he obtained as a result of the settlement, and he may still pursue his whistleblower case. An employee’s retention of the settlement proceeds obtained from a voided agreement does not constitute a ratification of an illegal agreement.

Moreover, the employer who offers hush money agreements can be also liable in a separate discriminatory claim. However, in whistleblower cases, DOL aims at encouraging the settlements between the parties, with some conditions: for example the agreement can’t be submitted under seal and every amount of money obtained by the employee must be disclosed.

A settlement agreement approved by the Department of Labor constitutes an enforceable final order of the same Secretary of Labor itself, and a suit of contract breach based on a settlement agreement must be heard in a federal court.

The Sarbanes-Oxley corporate whistleblower protection law isn’t intended to obstruct employees’ protection; as a matter of fact other rules are helpful not to deprive the worker of his rights: in this sense it must be interpreted the favourable discipline about pre-emption. A SOX claim doesn’t prevent corporate employees from pursuing other federal legal remedies, even if they also file a claim under the same SOX itself. An opportune regulation was made on the arbitration: with the SOX, Congress just intended to give a minimum extent of protection in the context of publicly trade companies. It’s therefore evident that also an arbitration agreement couldn’t oppose this aim, and, as consequence, it wouldn’t preclude either an employee’s filing a claim with the Department of Labor or the OSHA (Occupational Safety and Health Administration) from pursuing a claim on behalf of an employee (all DOL proceedings can’t be pre-empted also by a private contractual agreement).
3.13 Attorneys as whistleblowers

One of the most unique and peculiar provision of the Sarbanes-Oxley Act surely is the one about the conduct of attorneys. Under the law, attorneys who represent publicly traded companies in proceedings before the SEC are now required to blow the whistle on misconduct: no other whistleblower law requires attorneys to blow the whistle on their own clients.

The main provision about this matter is Section 307 of the SOX, “Rules of Professional Responsibility for Attorneys”. From this revolutionary rule it appears that any attorney, who appears and practices in any way on behalf of a publicly traded company, has to report “evidence of a material violation of securities law or breach of fiduciary duty”. The attorney has the duty to report the wrongdoing either to the company’s Chief Legal Counsel or to the Chief Executive Officer; if they fail to take an appropriate remedial action, the attorney must then disclose his concern to the Company’s Audit Committee or to an equivalent body. The attorney who acts this way, accordingly to the statute, is protected from retaliation, too; it emerges clearly how the SOX tends to protect not only employees of a publicly trade company but also his agents and contractors (so, under this whistleblower law, attorney who works for a company as in-house or outside counsellor is considered as a protected employee).

The SEC rules of procedure governing the standards of attorneys’ professional conduct pay great attention on when, how and to whom a lawyer must reveal credible evidence of a material violation of federal securities law. The process used to report a material violation differs on the status of the lawyer as a “subordinate attorney”, who is an attorney under the direct supervision or direction of an attorney who is not the chief legal officer of a publicly traded company, should report evidences of a material violation under the Act to his supervising attorney. Should he believe that his supervising attorney failed to comply with the up-the-ladder reporting requirements, he can report the evidence to a superior level. The same procedure stands for
“superior levels”\textsuperscript{68}, General Counsel or Chief Executive Officer and finally the Audit Committee.

The “supervisory attorney” is the one supervising another attorney who is appearing and practising before the Commission in the representation of an issuer\textsuperscript{69}. When a subordinate reports him evidence of violation, he must carry out reasonable efforts to ensure the credibility of the report and the meeting of the requirements; then it’s his turn to report the evidence of a material violation to the Chief Executive Officer (CEO) or to the Chief Legal Officer (CLO). If he believes that reporting to them could be vain, he may directly report to either a Qualified Legal Compliance Committee (QLCC) or to the Audit Committee or to another independent committee.

A very controversial regulation enacted by the SEC permits (but not requires) lawyers to disclose confidential information to the SEC itself. Reports to the SEC are permitted in three different circumstances: first, attorney may reveal to the Commission if he believes it necessary to “prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interests or property of the issuer or investors”\textsuperscript{70}; second, if he believes it necessary to prevent the issuer in the course of a “Commission investigation or proceeding” from committing “perjury” or “subornation of perjury” or any “act proscribed in 18 U.S.C. 1001 (e.g. falsifies, conceals, covers up by any trick, scheme or device a material fact; makes false, fictitious or fraudulent statement or representation; makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry) likely to perpetuate a fraud upon the Commission”\textsuperscript{71}; third, if he believes it necessary to “rectify the consequences of a material violation by the issuer that caused or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney’s services were used”\textsuperscript{72}.

\textsuperscript{68} This “superiority” is to be intended restrictively to this argumentation.
\textsuperscript{69} For “issuer” it’s intended the employer whom complaint is referred.
\textsuperscript{70} 17 C.F.R. (Code of Federal Regulation) § 205(d)(2)(i).
\textsuperscript{71} 17 C.F.R. § 205(d)(2)(ii).
\textsuperscript{72} 17 C.F.R. § 205.3(d)(2)(iii).
When evidence of a material violation is reported to a Qualified Legal Compliance Committee (QLCC), it’s this one who has to inform the CEO and CLO about the report (unless it’s believed useless). In any case the committee determines whether an investigation is necessary or not: when it’s necessary, it notifies to the Audit Committee or to the Board of Directors and then begins the investigation. At the conclusion QLCC recommends the most appropriate remedial measures that must be adopted: if they aren’t adopted, the decision is to be communicated to the Commission.

Once evidence of a material violation is brought to the attention of the Chief Legal Officer, he must institute an inquiry to find out if a material violation occurred, is occurring or is going to occur and he must force the issuer to adopt an appropriate response. He must also advise the reporting attorney on the actions taken. Alternatively to these actions he has the option to refer the report to the QLLC, if it exists.

3.14 Audit Committees and Corporate Employee Concerns Programs

The Sarbanes-Oxley Act doesn’t limit its whistleblower protection provisions merely to providing a cause of action for wrongfully discharged employees. In fact, during Congress’ investigations on Enron, World Com and other corporate scandals of 2001-02, their concerns were not only about the extremely corrupt accounting practices that harmed a large quantity of innocent investors, but also about a culture of silence that permitted unethical and unreported corporate misconduct and real breakdown in corporate oversight that let on illegal conduct to go absolutely unpublished. Congress immediately understood the importance of whistleblowers in order to eliminate or, at least, to repress this problem; but it didn’t limit its action in giving a legal protection to these brave people. Congress definitely required publicly traded companies to create an “employee concerns” type program that would allow employees to report
questionable accounting or auditing matters with the confidence requested by particular circumstances.

Section 301 of the SOX demands that every publicly traded corporation has an independent Audit Committee and that these committees are expected to establish procedures for employees to provide confidential and even anonymous allegations regarding questionable accounting and auditing matters. The sanction for the companies which don’t comply with the requirements established by this section is the immediate de-listing as publicly traded company at the stock-exchange. Up to now the SEC has not yet adopted final rules regarding minimally acceptable procedures that audit committees must establish in order to comply with this rule; however it states that reasonable programs must provide at least three features as far as receipt, retention and treatment of complaints: first, that the employee can make “confidential” and anonymous complaints; second, that the employees are handled independently from the management of the publicly traded company; third, that complaints are investigated in a professional and effective manner. As a consequence of these new regulations the SEC now requests that each member of the audit committee has to be a member of the company’s board of directors, but also “independent”73 of the company. In addition each independent members of the audit committee is personally responsible for the compensation and the supervision of the work of any registered public accounting firm engaged with the purpose of auditing the company. Moreover each public accounting firm has to report directly to the audit committee, each audit committee has to independently establish the confidential and anonymous procedures requested by SOX Section 301 with the authority to engage independent contractors and advisors to carry out duties and finally each company has to provide appropriate funding for the audit committee.

The main function of this provision is to keep separate the audit committee from the whole board of directors, so it can exercise his role of supervision. It also has to favour the free flow of

73 SOX section 301 defines as “independent” an audit committee member who does not receive, other than for service on the board of directors, any consultant, advisory, or other compensation from the company, and as not being an affiliated person of the company, or any subsidiary thereof.
information by employees so to help to discover any possible corporate fraud. To make it
effective the audit committee has to actively promote and enforce a corporate culture that
courages whistleblowing and that prohibits retaliations: compliance programs set by section
301 are finally intended to build trust and confidence among employees so that they may utilise
established programs.

Unfortunately, the worst problem with American corporations is the “shoot the messenger”
mentality toward whistleblowers. There are a lot of reasons why whistleblowers are so
ostracised and mistreated either by corporate and governmental organisations. The most simple
thought is that the management instinctively can dislike whistleblowers, above all because
nobody enjoys being ethically questioned; and the first, common, consequence is an
overreaction: whistleblowers are often seen as a threat to the corporate mission and even
existence. In the past, whistleblowers were widely seen by both company and co-workers as
needlessly slowing down production, costing excessive amount of money and even disloyal and
traitors. Too often the existing employee-concerns programs themselves shored of this
mentality, because they were breaching employee’s confidentiality and sharing information to
company management or lawyers to attack the whistleblower74. The cause of these employee-
concerns programs’ failure is in large part due to the lack of independence, resources and
effective supervision; and this is the problem that section 301 of the SOX tends to remove.

Stephen Kohn, in various works75, gives ten suggestions for effective compliance:

1) to establish a company-wide code of ethics as well as policies and procedures that
   encourage whistleblowing and prohibit retaliation;

2) to provide for confidential and anonymous reporting;

3) to maintain independence of investigators and audit committees;

74 One of the most famous cases of whistleblowing retaliation involving employee-concerns programs is Charles Hill
v Tennessee Valley Authority, Case No. 87-ERA-23, RD&O of ALJ(July 24, 1991), where TVA retaliated Mr Hill
after discovering his concerns that compromised an operating license to the company.
75 Kohn, S.M., Concepts and Procedures in Whistleblower Law, Quorum Books, Westport, CT, 2000; Kohn, S.M.,
4) to investigate and keep track of each complaint;  
5) to follow-up with the employee-whistleblower (e.g. to provide feedback on the investigation and to request additional information);  
6) to publicise the procedures and policies and regularly remind all employees and management to follow the procedures;  
7) to incorporate the procedures into formal required training programs;  
8) to monitor and enforce compliance with the procedures;  
9) to avoid retaliation against employees who make complaints or who work as auditors;  
10) to create an effective relationship between the audit committee and company management.

3.15 Criminal Sanctions for Retaliation

The Sarbanes-Oxley Act doesn’t merely provide whistleblowers with a traditional employment discrimination remedy within the U.S. Department of Labor or a federal court. The Act contains two important enforcement-related provisions that actually criminalise retaliation against whistleblowers. The first provision, contained in Section 1107, amends the federal obstruction of justice statute and specifically criminalises retaliation against whistleblowers. The second provision, contained in Section 3(b)(1) of the Act, makes the violation of any of the whistleblowers protection provision within the SOX also a violation of the Securities Exchange Act of 1934. This provision also criminalises discrimination against whistleblowers and allows the SEC to independently enforce the whistleblower provision of the Act.

Within whistleblower federal law, discrimination against whistleblowers who provide truthful information to a federal law enforcement officer concerning the possible violation of any federal offence was criminalised. Any person retaliating a whistleblower could be subject to federal criminal prosecution and fines and could be imprisoned up to 10 years. The innovation
of the SOX is the enlargement of the penalty area to a wider range of conduct and the increase of the number of subjects admitted as possible receivers of the complaint-protected activity (not just only federal enforcement officers).

Section 3(b)(1) of the SOX says that a violation of any provision of the Sarbanes-Oxley Act shall be treated for all purposes as a violation of the Securities Exchange Act of 1934. Moreover any person who is violating any provision of the SOX shall be subject to the same penalties as for a violation of the Securities Exchange Act. And these penalties are really relevant, up to 20 years in prison and an up to $5,000,000 fine for each violation. The implications of this section are enormous when they give the SEC jurisdiction to investigate and to sanction any violation under SOX, because it subjects wrongdoers to potentially civil and criminal penalties, and because it authorises the SEC to implement existing regulations protecting whistleblowers.
4. United Kingdom legislation

In Europe there is a lower consideration than in the United States concerning Whistleblowers’ discipline. As far as we know, it seems that only in The United Kingdom there is, up to now, a legislation in this subject, surely due to the fact that Great Britain shares with the USA most of its legal principles and characterisations: as a matter of fact thinking to protect Whistleblowing is a concept born and developed almost all in the Anglo-Saxon world\textsuperscript{76}.

The birth of a legislation about whistleblowers originates from some accidents happened in the United Kingdom from the later 80’s; in those years, indeed, took place a series of events that forced British authorities to find out some ways to prevent their replication. From the inquiries into these crimes and disasters, the need to protect those people who could help to discover these episodes in advance, before they took place, became evident. Some events, like the Capsize of the Herald Free Enterprise in 1987, the Piper Alpha explosion in the North Sea in 1988\textsuperscript{77}, the Clapham Junction rail crash in 1989 or the Bank of Credit and Commerce International scandal of 1991 could have been in some way prevented and avoided if employees had revealed their concerns or information about facts they knew. It appeared obvious that some of these employees could have raised their concerning allegations should they be sure they would be protected or supported.

As a consequence, in 1998 it was enacted the Public Interest Disclosure Act (PIDA), a structure of legal protection for people who disclose information showing malpractice, wrongdoings or others similar matters: this protection is given, most of all, to prevent the whistleblowers from victimisation, dismissal and, in general, from any form of retaliation by the employers.

\textsuperscript{76} Also in Australia there is a legislation, and some of the major experts in this field, like Terry Morehead Dworkin and William De Maria are Australian.

\textsuperscript{77} Piper Alpha was a North Sea oil production operated by Occidental Petroleum Corporation. An explosion and consequent fires destroyed it on July 6, 1988, and caused the death of 167 men (up to now the world’s worst oil disaster). From the inquiry it was discovered that workers used to complain for the not adequate safety measures. For further information read: Douglas Cullen, W., The public inquiry into the Piper Alpha disaster (Cm 1310), 1990, HMSO (Her Majesty’s Stationery Office), London.
The main aim of the Act is the raising of concerns about crimes, civil offences of a relevant entity, violation of justice, danger to health, safety and environment and most of times about the acts made to cover up this kind of conducts.

### 4.1 Events leading to the Public Interest Disclosure Act

As previously pointed out, there were several events where the presence of a Whistleblowers’ Law could help to recover the situation in advance, so to avoid or, at least, to cut down crimes’ consequences.

*Herald of Free Enterprise’s Capsize.* A ferry for cars and passengers sank on March 6, 1987, a few kilometres out from the port of Zeebrugge, Belgium, from where it left to reach the port of Dover. Out of the 539 people, passengers and crew, on boards, 193 died in the accident. Because of someone’s negligence, the ship was sailing with the bow doors open, so the water flood the car deck. Quite suddenly the ship capsized, and a lot of people were trapped, dying of hypothermia caused by the ice cold water.

In July, just a few months of the same year later, a public inquiry was carried out, and Townsend Thoresen\(^\text{78}\) was punished: the investigation identified a disease of sloppiness and fault of negligence at every level of the corporation’s hierarchy\(^\text{79}\).

More particularly, from the inquiry it came out that the responsible for shutting the doors, Mark Stanley, wasn’t present when the ship left the port of Zeebrugge because on break from work and sleeping. However, it was incredible that anyone else had shut the bow doors instead of him or realised they were open: the First Officer should have been in the car deck when the ship sailed away, but he already left that area, and the Captain, from his position, couldn’t notice the problem.

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\(^{78}\) A famous ferry operator, part of the Peninsular and Oriental Steam Navigation Company (P&O Group).

\(^{79}\) The Charge of the prosecutor, in the first degree, was for corporate manslaughter.
One of the most relevant aspect of the inquiry was that, from the investigations, appeared that these kinds of problem have been happening in the company from several years and, in particular, it was found that in almost five previous occasions some of the crew staff tried to draw the attention on what was happening, but their legitimate concerns got lost in the middle levels of the company’s hierarchy.\(^{80}\)

*Clapham Junction rail crash.* On December 12, 1988, very close to Clapham Junction railway station, in South West London, there was a crash between three trains that involved and caused the death of 35 people; moreover about 500 people were injured.

The first reason of the disaster derives from the sloppy work practices; in this case an old wire, forgotten still connected to the supply end, created a false signal that showed a “green” light instead of “red”. Moreover, another fact that contributed to the accident was the lack, in the circuit, of a double switching that could prevent a single feed causing a crash. But the most important was the fact that British Management didn’t recognise the importance of re-signalling the Clapham Junction area and of making a project co-ordinated by a senior manager. On the contrary the big mistake was leaving this task to an unskilled middle-level staff, inadequate, stressed and not supervised.

The Hidden Inquiry into the case found that the supervisor, Mr Lippett, noticed the loose wiring in the junction box during an inspection made a couple of months earlier than the tragic event took place, but he didn’t tell anything because he didn’t want to “rock the boat”. This kind of self-censorship existing in organisations (and big corporations in particular) is one of the persisting problems that a whistleblowing legislation could help to remove.\(^{81}\)

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Maxwell’s Pensions Scandal. Robert Maxwell was a British media proprietor, a publisher and a Member of Parliament who, in his dishonest business practices, stole 400 million £ from the pension funds of his staff, trying to cover his business’ problems\(^\text{82}\). 

In 1985 Harry Templeton, a print worker on the Scottish Daily Record and the Sunday Mail, dailies owned by Maxwell’s Mirror Group, was appointed as trustee of the Mirror Group Pension Scheme. He often found Maxwell’s misuse of pension funds but he was the only one to challenge this practice used by his boss. The consequence was that Templeton was fired in 1988, and Maxwell prevented him from getting a new job in the print industry\(^\text{83}\). Then he made a “whistleblower’s claim” for unfair dismissal but Maxwell stopped it using a clause which kept the nature of wrongdoing secret.

Only in 1991, when Robert Maxwell died, all his illegal practices, included the stolen money from pension funds, were discovered. It’s clear that, if Harry Templeton has been protected by a Whistleblowers’ Legislation, this could be prevented\(^\text{84}\).

Wales Child Abuse scandal. In 1996 the Secretary of State of Wales asked for an investigation into the sexual abuse on children in care homes in North Wales during the ‘70s and the ‘80s: it came out that hundred of cases of children abuses happened between 1976 and 1990.

In September 2000 the Waterhouse Report-Lost in Care was published, in which appeared that Alison Taylor, a care worker who tried several times to blow the whistle but she didn’t have success. She tried to blow the whistle internally and to the appropriate authorities about the abusive regime present in different care homes but she was absolutely ignored. Subsequently

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\(^{82}\) It appeared later that Robert Maxwell’s empire was built on debt and deception, and that he “borrowed” millions to create his financial empire.

\(^{83}\) As a consequence, Harry Templeton had to create for himself a new career away from the printing industry, and his knowledge of pensions came useful. He became a financial advisor.

Alison Taylor lost her job as social worker and spent the next ten years fighting for justice. She has written a book about her story and has become a novels writer.

Bank of Credit and Commercial International fraud: BCCI was a bank founded in Pakistan in 1972. It quickly developed and soon was operating in 78 countries. It had a very particular structure because there were 248 managers and only 2 controlling them from the board of directors, at the chief of the bank: the structure of the bank was rigidly compartmentalised. Besides also the auditing system was very uncommon, with some holdings audited by a company, others audited by another company, and others audited by none.

In March 1991 the Bank of England asked Price Waterhouse, auditing company, to make an inquiry, in which BCCI was found guilty of an over 2 billion £ fraud and manipulation: in July of the same year the bank was closed down, with a million investors affected.

In 1992 an American Report and a British independent governmental inquiry were made: they proved that politicians were involved in the fraud and, above all, that the bank had created an autocratic environment in which nobody dared speak about own concerns and suspicions.

Dr. Bolsin and Bristol Royal Infirmary. Dr Stephen Bolsin was a consultant anaesthetist at Bristol Royal Infirmary from the ‘80s. He was immediately concerned about the high infant mortality rates in his unit, and also about how open-heart surgery on babies was usually conducted. Bolsin first raised his concerns with his colleagues anaesthetist and then with hospital managers but he was ignored; then he reported to the Health Service and the media.

When in 1995 the patient Joshua Loveday died, his parents complained to the General Medical Council and Bolsin supported their complaint. Consequently two cardiac surgeons and

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86 The most famous hit by this failure investors are the jewellers Garrards, Mappin & Webb, who were the responsible for maintaining the crown jewels and producers of the famous sailing trophy America’s Cup.
87 Authored by the senators John Kerry and Hank Brown.
88 Chaired by Lord Justice Bingham.
hospital’s chief executive were found guilty of professional misconduct. The Government also established the Kennedy Inquiry on the events related to the death of 29 babies in that unit and the Report stated that Doctor Bolsin was right in his concerns. Unfortunately, at that moment, Bolsin’s career was already compromised. The Report also stated that certainly, if Public Interest Disclosure Act was in force ten years earlier, Dr. Bolsin would have been protected.

Dr. Millar and British Biotech. Dr. Andrew Millar was the Director of Clinical Research for British Biotech, a leading UK biotech drug company. He was aware that preliminary results from trials on new drugs were not encouraging and was terrified by British Biotech’s public statements on the prospects of these drugs, misleading and too much optimistic. He raised anxiously his concerns with British Biotech’s directors, but they weren’t considered. Then one institutional investor asked him about his feelings on the new drugs and Dr. Millar expressed his fears. When his chiefs discovered it, Dr. Millar was dismissed for disclosing confidential information. Millar counter-sued for libel and wrongful dismissal and the litigation got much media attention and a Parliamentary inquiry.

In June 1999, just before Public Interest Disclosure Act came into force, British Biotech offered to settle for a reportedly substantial sum. This case shows how much the new legislation has changed the situation about whistleblowing.

There are other events that also contributed to force Great Britain to adopt a Whistleblowers’ legislation, like Piper Alpha explosion, the collapse of Barings Bank, the Arms to Iraq

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90 Also after the sentence Dr Stephen Bolsin felt his career in United Kingdom was over, so he moved to Australia, where he is the Director of Perioperative Medicine, Anaesthesia and Pain Management at Geelong Hospital in Melbourne.


92 See note 77.

93 From 1992 to 1995 Barings Bank was brought to the collapse by Nick Leeson; in that period he was named both Head of Settlement operations and Floor Manager for trading in Singapore International Monetary Exchange (SIMEX), and this double position allowed Leeson to report just to himself and not to be supervised. He made some dangerous operations in the East Market and then covered his losses creating a false account. From the inquiry it raised that a senior manager had noticed something wrong but failed to blow the whistle. For further information read: Rawnsley, J.H., Total Risk: Nick Leeson and the Fall of Barings Bank, HarperCollins, London, 1996.
Inquiry, Lyme Bay Canoeing disaster and fraud and corruption scandal in the European Commission.

4.2 Adoption of the “Public Interest Disclosure Act” in 1998

As a consequence of these series of tragic but most of all preventable events, from the first ‘90s in United Kingdom public opinion started to grow a need to make something to change what it was happening. So the Government started to work with the purpose to realise an act that primarily should follow two targets: first, to protect individuals who make certain disclosure of information on behalf of public interest; and to allow these individuals to have the power to eventually bring an action in respect of victimisation. But, moreover, the first effective objective of this new law should be to offer the organisations a tool to promote good governance, openness and fairness.

Also thanks to the unlimited work of the association “Public Concern at Work” starting from 1998 the Public Interest Disclosure Act (PIDA) is adopted, more precisely it came in force on July 2, 1999. This Act takes form of amendments to the Employment Rights Act of 1996, so that the relevant provisions formally take place into this 1996 Act: following Part 4 of the

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94 The Scott Report concerned the sale of arms to Iraq by British companies. This Report found out that an employee had written to the Foreign Office to inform them that munitions equipment was produced for Iraq. For further information read: Gulf Centre for Strategic Studies: Arms Sales to Iraq: Ministerial Evidence to the Scott Inquiry, Gulf Centre for Strategic Studies, London, 1994.
95 In March 1993 four children drowned when a canoe turned over. Some weeks before the tragedy, one instructor had written to the Managing Director extremely worried about safety’s standards but he was ignored.
96 Paul Van Buitenen was a Dutch assistant-auditor in the European Commission’s Financial Control Directorate, and in 1998 became the whistleblower who first drew the attention of some members of the European Commission to the irregularities, frauds and mismanagement within the Commission. As a result of his whistleblowing all Commission members resigned. He has been named “European of the Year” by Reader’s Digest magazine and by Australian Broadcasting Commission.
97 It’s an independent charity that, from 1993 represents the reference in the United Kingdom for everything is related to whistleblowing and provides assistance to both employers and employees.
99 This Act gave some important rights to the UK citizens, the most important are: to see particular details of the employment contract; the pay time off work for some public duties (for example the jury duty); to receive a written notice of dismissal and an appropriate notice period; to have a “protected” wage; the right to claim for unfair dismissal in certain cases, such as dismissal for pregnancy, for maternity, in relation to requests of flexible working, in relation to health, and others.
Employment Rights Act the part 4A called “Protected Disclosures” is inserted; this is section 1 of the PIDA, the most consistent. Following sections of the PIDA are inserted in other parts of the Employment Rights Act (ERA).

Public Concern at Work was strongly convinced that some communication breakdowns were absolutely relevant in many of the accidents, frauds and disaster that were causing death, serious injuries and losses, but weren’t consider enough to start a public inquiry because of their quite poor range.

In 1995 the member of Parliament Tony Wright\textsuperscript{100} was the first who suggests to provide a legislative framework to public interest whistleblowing in a promotional Ten Minute Rule Bill\textsuperscript{101} and asked Public Concern at Work and to Campaign for Freedom of Information\textsuperscript{102} to prepare a draft of law. His proposal found small favour. In 1996 another Labour Member of Parliament, Don Touhig\textsuperscript{103}, introduced a revised bill. Also this attempt got a small of success, however the leader of Opposition party, Tony Blair, stated that his future Government would have consider the Whistleblower’s legislation, starting from the basis of this Bill, and in 1997 the new Government asked again Public Concern at Work and Campaign for Freedom of Information to present a new Bill: the Conservative member Richard Shepherd\textsuperscript{104} introduced the Bill that is known as the Public Interest Disclosure Act.

After the check by the Department of Trade and Industry Minister Ian McCartney, the Bill could pass through Parliament for consultation and it was supported by all sides: this is unusual and depends in particular from its characterisation, alien to politics.

The Act has been modified (some sections have been also repealed) in the following years

\textsuperscript{100} Labour member of Parliament from 1992.
\textsuperscript{101} It’s a procedure in the British Parliament session through which it’s possible to introduce a bill in addition to the twenty normally scheduled.
\textsuperscript{102} A lobbying British group that works to eliminate unnecessary secrecy by UK Government.
\textsuperscript{103} A Welsh Labour Member of Parliament, elected for the first time in 1995.
\textsuperscript{104} A Scottish Conservative party politician, first elected in 1979.
through amendments, for example in the provision who was fixing a limit to monetary compensation. However the “corpus” of the Act is similar to the original one of 1998.

4.3 Characteristics of the Public Interest Disclosure Act

There are some general profiles that the Act pursues in its elaboration, and, first of all, it’s important to identify the kind of malpractice involved by the Act: it applies to every people at work who raise their concerns about crimes, civil offences (including negligence, breach of contract or of administrative law), miscarriage of justice, dangers to health and safety or to the environment, and also their cover up. It’s not relevant if the information disclosed is confidential, and the Act is enforced either the malpractice occurred in the UK territory or overseas.

The Act, besides employees, guarantees also workers in general, contractors, trainees, agencies staff, home-workers and every professional in the National Health Service (NHS)\textsuperscript{105}. Only self-employed (out of NHS), volunteers, the Intelligence Service and the Army are excluded. The PIDA provides different addressees to which disclosures can be made: a)\textit{Internal disclosures} are made in good faith and honestly to the employer, director or manager, and whistleblower gets protection if he has a reasonable suspicion that the malpractice has occurred, is occurring or is likely to occur; b)\textit{Regulatory disclosures} which are ones made to prescribed people, like the Health and Safety Executive, the Inland Revenue\textsuperscript{106} and the Financial Service Authority; c)\textit{Wider disclosures} are the disclosures made to police, to the media, to Members of Parliament and to other non-prescribed regulators, and other added requirements provide that they aren’t made for a personal gain and are of an exceptionally serious nature.

The tribunal checks if these provisions are satisfied and if the disclosure is reasonable before

\textsuperscript{105} Also the usual restrictions provided in terms on minimum qualifying period and age don’t find application in the Public Interest Disclosure Act.

\textsuperscript{106} Until 2005 a Department of English Government was responsible to collect direct taxation.
giving protection to the whistleblower. In order to decide the reasonableness it will consider the identity of the addressee of the disclosure, the seriousness of the concern, the real risk or danger, the eventual breach of a confidence agreement with the employer.

If a whistleblower is victimised or dismissed in breach of the Act, he can make a claim to an Employment Tribunal for compensation, and the awards recognised aren’t limited by the law and are based on the losses suffered, and, in case of firing, he has the right to recover his position at work as before dismissal.

The so-called gagging clauses and other similar agreements are void if they contrast with the Act. However the whistleblower loses the protection should he either breach duties prescribed by the Official Secrets Act or commit other secrecy offences.

The Act doesn’t provide for organisation to set particular whistleblowing procedures, but the Committee on Standards in Public Life points out some key elements for these procedures:

- clear statements that malpractice is taken seriously in the organization
- indication of the kind of matters regarded as malpractice
- respect for the confidentiality of staff raising concern
- opportunity to raise concerns outside the line management structure
- access to confidential advice from an independent charity
- indication of the proper way in which concerns may be raised outside the organization
- giving the access to organisation’s whistleblowing policy for staff of contracting firms
- penalties for the person who makes false allegation with malice
- effective promotion
### 4.4 Content of the Public Interest Disclosure Act

*Section 1 PIDA*

*Section 43A ERA. Meaning of protected disclosure*

A disclosure is qualified as defined in section 43B, in accordance with criteria of section 43C and 43H.

*Section 43B ERA. Disclosures qualifying for protection*

In this article are listed the kind of information subjected to protection once they meet other conditions later described in the Act. It’s a large range of information, connected to almost all malpractice, not considering if the person or the authority addressee of the disclosure was already aware of the information; however it must be considered that obviously not all information can be disclosed\(^\text{107}\).

The first paragraph is about the degree of the belief of the whistleblower that doesn’t need to be absolutely correct, but is enough that the belief of an occurring malpractice is reasonable\(^\text{108}\).

Successively it draws up a list of the activities about which the belief can be referred:

- a malpractice: it’s not made clear if this malpractice must be referred to a past, present or prospective activity, and it also doesn’t matter if whistleblowers’ concerns are about a well defined conduct or about a state of affairs.

- the failure to comply with a legal obligation: that is to say the breach of all statutory provisions, contractual obligations, common law obligation and administrative law provisions.

\(^{107}\) For example, from case law it’s evident how the breach of a highly secret manufacturing process can’t be disclosed without consequences (Aspinall v MSI Mech Forge, 2002, EAT/891/01)

\(^{108}\) The locution “tends to show” clearly confirms the fact that the belief has not be certain at all. “Reasonable belief” includes what the worker has seen or heard or what has been reported to him by others (Darnton v University of Surrey, 2002, EAT/882/01).
- private concerns: dismissal or victimisation of an employee in consequence of a raised concern in good faith is often the basis of a PIDA claim\textsuperscript{109}.

- miscarriage of justice: deals issues that can lead to a wrongful conviction\textsuperscript{110}.

- health and safety risks: if these risks could be a threat to workers or individuals in general\textsuperscript{111}.

- “cover ups”: this is a wide provision that qualifies all the information showing the deliberate concealment of information.

The second paragraph of this section is about the spatial context of the PIDA, which refers not only to offences arisen in the United Kingdom or under United Kingdom law, but also if the failure occurred elsewhere and the law applying is another country’s one.

The third paragraph constitutes a limitation to the disclosing of information, in fact the disclosure doesn’t qualify as protected if it is itself a crime.

The fourth paragraph must be read matched with section 43D, and regards the role of the lawyer who can’t be compelled in court to give evidence, except for eventual disclosures made on instructions of the worker-client.

\textit{Section 43C ERA. Disclosure to employer or other responsible person}

This section represents one of the hinges of the law, due to the fact that it specifies the role of the subjects prescribed by law accountable for the conducts in question: in this way these subjects know about the concern and can investigate around it. There is a distinction about the situations in which the worker is protected for whistleblowing to his employer and when he makes it to another person.

In first paragraph it’s mentioned the need of the requirement of “good faith”: there is good faith when the worker shows his worry honestly, also if negligently and without duty of care\textsuperscript{112}.

\textsuperscript{109} See Parkins v Sodexho, 2001, EAT/1239/00.

\textsuperscript{110} Examples are perjury or the failure to disclose evidence to the defence.

\textsuperscript{111} In this category are included patients of hospitals, train passengers (see the case on page 55, where, if this legislation was already in force, maybe the accident could be avoided), children in care, etc.

\textsuperscript{112} That’s the kind of conduct emerged in the case of Stephen Bolsin and the Bristol Royal Infirmary (see pages 57-58).
Obviously there is a lack of this necessary requirement if the disclosure is made on behalf of a not ethic aim.

As for the subjects addressees of the disclosure, it can be the employer or any person senior to the worker who has the responsibility over it (disclosures to colleagues, instead, are excluded from protection); or, if the failure is related only to a person who is not the same employer or if the responsibility for the matter is over a subject who is not the employer, the disclosure can be made to this subject. However, in this last case, if the worker is subsequently victimised, he could make his claim against the employer and not against the person whom disclosure was made against.

There is the possibility the organisation has a procedure allowing to raise a concern to a subject different from the employer: in this case a disclosure to this subject is treated exactly as it was directed to the same employer.

Section 43D ERA. Disclosure to legal adviser

This article enables a worker to seek legal advice about his concern and meanwhile it protects him behaving this way\(^{113}\). The lawyer will not be able to make a protected disclosure of the information received, but he will explain the client-whistleblower how to make it.

Section 43E ERA. Disclosure to Minister of the Crown

This section regards workers in Government bodies, who are protected if they disclose, again in good faith, to the sponsoring Department\(^{114}\) rather than to their direct employer. The bodies regarded by the section are those where one or more members are appointed by the same Minister, and it’s more than reasonable to believe that the Minister will promptly investigate to correct any possible malpractice.

\(^{113}\) This is the only case in PIDA in which the worker doesn’t need the good faith to be protected.

\(^{114}\) Department is what in the PIDA text is called “Minister”.
As in section 43C, worker’s claim for any eventual victimisation and retaliation will be against the worker and not against the Department to which the disclosure is made.

Section 43F ERA. Disclosure to prescribed person

This section protects the worker who makes a qualified disclosure to a person prescribed by an order from the Secretary of State for Trade and Industry\(^\text{115}\). It’s evident how disclosures made to these prescribed subjects enjoy of a particular protection; however also disclosures made to accidental regulators (like the police) are protected by the following sections.

By law it’s not certain, up to now, if it’s preferable to blow the whistle internally or to prescribed regulators; probably the safer approach for a worker is to contact firstly the regulator, which eventually will check the situation and will give the favourite solution for the matter.

As to the requirements to raise a concern according to this section, are requested: a) good faith; b) reasonable belief that the matter is one of those prescribed for that regulator; c) reasonable belief the information disclosed, and relevant allegations, are substantially true\(^\text{116}\).

Section 43G ERA. Disclosure in other cases

There is a series of circumstances when the whistleblower can make his disclosure in different ways, provided that these disclosures satisfy three tests:

1) the first concerns personal reason of the disclosing person: good faith, reasonable belief (also considering the eventual response already got internally or from a prescribed regulator) are requested, meanwhile the absence of personal gain.

\(^{115}\) Notable examples of some regulators prescribed by the Act are: HSE and relevant local authority for Health & Safety risks; OFTEL, OFGEM, OFWAT, Rail Regulator, Charity Commission for Utilities sectors; Financial Services Authority, HM Treasury (insurance), Occupational Pensions Regulatory Authority, Serious Fraud Office for Financial Services; Inland Revenue, Customs & Excise for Tax irregularities; National Audit Office, Audit Commission, Audit Scotland for Public finance; Department of Trade & Industry for Company law; Office of Fair Trading and relevant local authority for Competition & consumer issues; Environment Agency for Environmental issues.

\(^{116}\) This third requirement seems to set a higher burden on the whistleblower in respect of the requirements for internal whistleblower.
2) the second consists in three preconditions: a) the worker believes he will be victimised if he raises his concern internally or with a prescribed regulator\(^{117}\); b) the worker reasonably believes that a cover-up of the malpractice is likely to occur\(^{118}\); c) wider disclosures are protected when the concern has been previously raised internally or with a prescribed regulator\(^{119}\).

3) the third defines if the disclosure was reasonable in all the circumstances\(^{120}\) and a lot of aspects are considered to determine it:

- who knows the disclosure: can be the police, a professional body, a non-prescribed regulator, a union official, a Member of Parliament, the media, a shareholder, the relative of a parent at risk, a contracting party who can suffer a prejudice, etc.;
- the seriousness of failure;
- the state of failure (if actual or future the reasonability is presumed to be greater);
- if the disclosure of information breaches a duty of confidence that the employer has toward a third person (it will be important to determine if the breach causes an unjustifiable damage to this third party);
- if the whistleblower was known by one of the subjects (employer or prescribed regulator), whom has previously raised the concern to and if these subjects have acted to correct in some way the source of the concern;
- how much the employee, in his disclosing activity, adheres to the procedure set by the employer and by the law. The worker, differently from a grievance procedure\(^{121}\), doesn’t have to prove his case but only to raise the matter so that others could investigate (this makes a whistleblower more similar to a witness than to a complainant).

\(^{117}\) To avoid this condition is quite easy. Organisations should establish a whistleblowing procedure, ensuring that no victimisation could be made and stating that is acceptable for the organisation if a worker decides to go to a prescribed regulator. So far for the worker becomes more difficult to find a precedent of victimisation.

\(^{118}\) This case applies when there is not an appropriate regulator.

\(^{119}\) In all the situations scheduled under this provision, the tribunal should also consider the reasonability and the opportunity to choose an addressee of the disclosure rather than another one (ALM v Bladon, 2002, IRLR 807).

\(^{120}\) It’s notorious how this test is almost a formality when the information disclosed is not confidential.

\(^{121}\) A grievance differs from whistleblowing because seeks redress for a wrong suffered by himself, and doesn’t raise a concern about a risk or danger so that it could be investigated.
In accordance to this section, when the whistleblower discloses again with another person, he will not lose the protection if he comments why he considers unreasonable or inadequate the first response got from the employer or from the prescribed regulator.

**Section 43H ERA. Disclosure of exceptionally serious failure**

Some particular disclosures about “exceptionally serious failures” are protected\(^{122}\), although they lack of the conditions requested by the previous sections. This doesn’t mean that, where convenient, the worker isn’t invited to search a less damaging way, but this rule is inserted in the Act to avoid that, in these exceptional circumstances, a whistleblower could delay his action.

**Section 43J ERA. Contractual duty of confidentiality**

This is a central rule in the Public Interest Disclosure Act because it avoids any agreement between the employer and the worker if it clashes with the provisions of the PIDA, so to preclude the worker to make a protected disclosure: however these “gagging clauses” are hit by this rule only if they preclude this right to the worker\(^{123}\).

**Section 43K ERA. Extension of the meaning of “worker” etc. for Part IVA**

As far as the definition of a worker is considered in the Act, it includes more figures; as a matter of fact, along those people who are protected by the Act, we can find also employees or independent contractors who don’t fall in a professional or business/client relationship. In the same way agency workers\(^{124}\), home-workers, doctors, pharmacists and others of the National Health Service\(^{125}\), trainees, etc. are also protected.

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\(^{122}\) See also ALM v Bladon, 2002, IRLR 807.

\(^{123}\) This section is thought to contrast the clauses inserted in a work-contract by an employer to prevent the worker from contacting the prescribed regulator (as seen in section 43F).

\(^{124}\) In the case, it’s the agency to introduce the terms of employment for the employee who performs the work, and so it’s considered as an employer.

\(^{125}\) In the National Health Service there are usually independently contracting professionals, but, under this provision, Health Authority is deemed to be their employer.
Section 43L ERA. Other interpretative provisions

These provisions are to integrate the sections examined up to now. The first one states that, if a reward to a whistleblower is given by a regulator different from those prescribed under section 43F, that will not constitute an obstacle to protection: as a matter of fact, sometimes, statutory agencies give rewards in exchange of the information supplied.

The other integrative provision establishes that a worker keeps protection against retaliation even if the addressee of the disclosed information already knew it: this rule is made to avoid that a whistleblower in good faith could remain without help.

Section 2 PIDA. Right not to suffer detriment

This section protects employees and workers in general from dismissal or any form of victimisation by their employers. This section doesn’t give to workers the right to make a claim against a third party who victimises them (can be a colleague or a client of the employer). The worker is considered protected from the detriment by his boss, and this detriment must be intended either as an action or as an omission by the employer, like the failing to investigate the concern and to inform the whistleblower on any eventual progresses of the investigation. And moreover the threat of a detriment is considered as a detriment.

From the law text appears an inversion of the burden of proof, because it becomes a task for the employer to explain the reason of any detrimental action.

In the second paragraph, then, it’s stated that workers dismissed can’t claim under this section, but will make it under the following section 5 and 6 about unfair dismissal and

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126 In this case the worker could sue the employer for detriment.
127 Also to complain a detriment under this section the disclosure must be “real reason, the core reason, the causa causans, the motive for the treatment complained of” (Aspinall v MSI Mech Forge, 2002, EAT/891/01).
128 Examples are threatens to the whistleblower, the withdrawn of a better position previously offered to the whistleblower, etc.
129 See LB Harrow v Knight, 2002, EAT/0790/01.
redundancy: the only exception to this is when an employee brings a claim because his contract wasn’t renewed as a consequence of his protected disclosures.

Section 3 PIDA. Complaints to employment tribunal

Under this section a worker can make complaints to an employment court for detriments suffered in breach of Section 2 PIDA and of Section 47B ERA (Employment Rights Act), and the employer himself must explain why he subjected the worker to detriment.

This section is inserted in a provision of the ERA, from which derive the terms to make a claim that are three months from the fulfilment of the detriment act or the deliberate failure\(^\text{130}\) (or the last act of detriment if there is a plurality of failures). The term can be extended for a reasonable time if there is an impossibility to practice the claim. In case of omission of act causing detriment, time runs from the date when the employer decides not to act.

Section 4 PIDA. Limit on amount of compensation

The heading of this section is inappropriate, because it doesn’t exist a limit on award possible to be given to the whistleblower following the disclosure of information. In fact a tribunal, when it finds a victimisation to a worker due to his whistleblowing, can make an award of compensation. The amount of this compensation is set on what is “just and equitable in all the circumstances”, keeping in consideration a series of facts such as the infringement complained and the losses suffered by the worker due to the detriment: among these losses are included the expenses in which the worker has incurred and the loss of benefits he might have achieved. The worker has only to restrain his losses, for example searching a new job if the contract has been terminated. The court will consider this aspect in setting an award, taking into consideration obviously also if the worker has somehow contributed to the detriment.

\(^{130}\)See Miklaszewicz v Stolt Offshore (Court of Session) IRLR 2002 344.
Section 5 PIDA. Unfair dismissal

This important section makes the discharge because of a protected disclosing automatically unfair, with no consideration by the tribunal about the reasonableness and the opportunity of the firing; if reasons of dismissal are several, the automatic unfairness is present when it comes out that the disclosing of information is the main cause.\textsuperscript{131}

Moreover there is a distinction on the coverage of the matter based on the length of the worker’s employment: if he has been employed from at least one year the burden of proof remains with the employer, who will have to show that the main reason of the dismissal was legitimate; if the worker, instead, has been employed for less than one year he will have to prove what was the principal reason for his firing.\textsuperscript{132}

Section 6 PIDA. Redundancy

The whistleblower has also the right not to be selected for redundancy as consequence of making a protected disclosure; this provision is the consequence of the previous one, it’s thought just to prevent the unfair dismissal that recurs if redundancy is the principal reason for dismissal, if other employees in similar positions aren’t dismissed in the same circumstances and if the principal reason for dismissal is, as usual, making a protected disclosure.

Section 7 PIDA. Exclusion of restrictions on right not be unfairly dismissed

Under this provision there are no limitations to the right to claim for unfair dismissal and unfair selection for redundancy under the Public Interest Disclosure Act.\textsuperscript{133}

\textsuperscript{131} See Aspinall v MSI Mech Forge, 2002, EAT/891/01.
\textsuperscript{132} In case law there are some situations now deemed significant to demonstrate the “innocence” of the employer. For example anonymity of the concern makes almost impossible for the worker to show employer’s responsibility; and also in the case of several whistleblowers, when there are not consequences against the colleagues, it becomes difficult for the worker to establish his disclosure as causation of dismissal. See also Brothers of Charity Services Merseyside v Eleady-Cole (2002, EAT/0661/00).
\textsuperscript{133} Also the upper age limit and the minimum one-year qualifying period aren’t kept in consideration (it remains the difference about the burden of proof under section 5).
Section 9 PIDA. Interim relief

This provision concerns only employees and not other workers: if they are dismissed they have the chance to make a claim to get an interim relief. It’s a large discretion left to the court\(^\text{134}\) which makes a prevision of what will be the outcome of the trial: if the tribunal finds that employee is likely to win there will be an obligation for the employer to go on paying the salary. This is a situation that puts the employee in a strong position for a negotiate, too.

However, the probability to win interim relief claims is no doubt related to the kind of burden on the employee, depending in particular on the person whom the disclosure has been made to: it’s more probable to get success for disclosures to the employer or to a Minister of Crown than for those to a prescribed or non-prescribed person.

As to the procedure, the term for an interim relief claim is 7 days within the presumed unfair dismissal, and, after giving to the employer a notice of at least 7 days, the tribunal has to determine as soon as possible if it’s applicable\(^\text{135}\). When the tribunal, in this hearing, finds that the principal reason for employee’s firing was his making a protected disclosure, it asks the employer to re-employ the sacked employee: the employer can accept the court order or refuse it, with the consequence that the tribunal will make an order under that employee’s contract is deemed to continue until the full hearing. If, more reasonably, the employer is immediately willing and re-employs the employee, but the employee doesn’t accept re-engagement because he considers it less favourable, the tribunal decides if this refuse is reasonable or not\(^\text{136}\).

Section 10 PIDA. Crown employment

The effect of this section is to extend the provisions of this Act also to people employees, working for or in service of the Crown. It doesn’t apply, instead, to those in the Army and people working in National Security.

\(^{134}\) However this discretion shouldn’t permit to the tribunal “to prejudge issues which are properly for full hearing” (Parkins v Sodexho, 2001, EAT/1239/00).

\(^{135}\) This procedure is so peculiar that it can’t be postponed, except for exceptional circumstances.

\(^{136}\) If it is believed reasonable, employee’s contract will be deemed to continue until the full hearing; on the contrary no order is made until full hearing.
Section 11 PIDA. National Security

This is the provision (as amended by Employment Relations Act 1999) that excludes the application of the Public Interest Disclosure Act to all workers for the Security Service, the Security Intelligence Service and the GCHQ\textsuperscript{137}: this is an important exclusion because deprives these people from being protected against victimisation, also after they raised the concern internally.

Section 13 PIDA. Police officers

This section has been repealed by the Police Reform Act 2002 that reversed the content of the provision: initially, as to the original text of 1998 of the Public Interest Disclosure Act, police officers were excluded from the protection; instead, after this reform all police officers, included the civilian staff, are under the effect of the Act.

The reformation also introduced a new subsection 43KA in the Employment Rights Act related to the application of the PIDA to police.

Section 14 PIDA. Remedy for infringement of rights

This article aims at determine where the complaints under PIDA can be brought: the only place where these rights can be exercised is the employment tribunal. And this tribunal is qualified also for claims by workers intended in an extended way, not only for the employees.

The last four sections of the Public Interest Disclosure Act are less important and refer mainly to the interpretation and the jurisdiction of this Act.

\textsuperscript{137} The Government Communications Headquarters is a British intelligence agency responsible for providing intelligence signals and information to UK Government and armed forces.
4.5 Employers and workers preservation under the Public Interest Disclosure Act

There is a series of consequences coming from the introduction of this whistleblowing legislation, which forces employers and workers to different behaviours in order to cope with the new rules.

Employers should carry out some initiatives. The first thing to do is to introduce or renew an effective whistleblowing policy and then to promote the new policy among the staff\textsuperscript{138} so to make it well known through the organisation. Depending on the kind of activity of a company, it’s advisable to consult the prescribed regulator, for its area, in actuating its policy. It’s important for the employer to guarantee to everyone in his business, at every company level, that is “safe and acceptable” if workers raise their concern about malpractice\textsuperscript{139}; this can happen stating that, if a worker is raising a concern, the employer will deepen\textsuperscript{140} the concern instead of shooting the whistleblower. This shooting the whistleblower could be made not only by the employer, but also by employee’s colleagues or by managers or by other controllers who are in position to victimise the person who raises concern; the employer’s duty should be to avoid these behaviours ensuring a climate of collaboration in the company, and, introducing a whistleblowing policy, he can separate a messenger from a message so to investigate and understand any inefficiencies in his organisation.

Moreover the employer must take care in drafting confidentiality clauses, because the big risk for him is to find them without any value\textsuperscript{141}. And this matter is strictly linked with the non-opportunity for the employer to try to destroy or to hide some evidence of a malpractice, including eventual obstructions to employers to reveal it through the so-called “gagging

\textsuperscript{138} It can be convenient, at least for seniors and managers, to manage whistleblowing issues through appropriate training.

\textsuperscript{139} It’s evident how convenient and preferable for the employer is that the worker could raise the concern internally instead of making a wider disclosure to a non-prescribed regulator, because this obviously should cause more damages to the company.

\textsuperscript{140} As also provided by section 43G of the Act.

\textsuperscript{141} Because of provision under section 43J of the Act.
clauses”, as this issue is provided under the Act. Moreover the employer is advised against the suppression of evidence because one of the central sections of the Act, the 43B, states that also the reasonable suspicion of a cover-up constitutes a solid basis for a protected disclosure and even a disclosure to the media is particularly protected in this case.

On the other side, the whistleblower is really protected by the Act that covers most of the situations, but with some exceptions and limitations, related in most of cases to the person whom the disclosure is made, but not only. For example, the worker isn’t advised to misuse the Act with the aim of obtaining a settlement or improving his own position, because he should seriously risk to fail the “good faith test”, and consequently the whistleblower protection. Moreover, as to the subject to which is convenient to make the disclosure, a prudent worker should choose the ones prescribed under section 43C (employer or other responsible person), making the claim more probable to get success.

It’s evident how one of the greatest problems connected with whistleblowing is the fear the whistleblower has of possible victimisation, so he often would prefer to raise his concerns anonymously or not internally: this is quite unadvised because, on one side, the tribunal needs to understand if the worker suffered an act of retaliation in some way and, on the other side, a disclosure made internally or to a prescribed person is usually more protected and with a less burden of proof than a wider disclosure.

In those cases provided under section 43G or 43H, with the whistleblower making a public disclosure of information, he must take in consideration that it’s preferable for him to make the disclosure to the body having the duty to investigate on the presumed malpractice, and that, in the case the public interest is substantially equally protected by disclosing to two different bodies, he should choose the disclosure causing less problems to the employer to be sure to get a deeper protection.

\[142\] A wider disclosure may be also protected but it’s suggested to disclose firstly to ministers or prescribed regulators to get more consideration.
As to media disclosures, there are in particular some which more probably won’t have difficult to get protection, although they are wider disclosures: at first, not confidential information, but also confidential information where there was a cover-up of the malpractice and there is not a prescribed regulator, or if a less public disclosure was also made but failed to secure a reasonable response. At last, if the matter is exceptionally serious (see section 43G) and the whistleblower thinks that the media are the more appropriate recipient for the disclosure.

**4.6 Effectiveness of the Public Interest Disclosure Act**

Public Interest Disclosure Act’s importance is no doubt notable. In 2003 AIG Europe\(^\text{143}\), in its Boardroom Summary, quotes about the British whistleblowers’ legislation: “Not only does the UK now have the most far-reaching whistleblower protection laws in the world, but the media are highly sensitised to this issue. Errant companies face a real threat to their public image and reputation”. This is a great truth, because a so relevant protection given to the whistleblowers surely creates a terrible come-back of bad reputation for companies, which don’t take care of insiders’ concerns and, indeed, victimise the person who raises some issues. Employers are now not allowed to treat legitimate whistleblowers as they are troublemakers and to ignore their concerns. On the contrary they have to protect employees from possible detriments (most common are reassignment of duties, failure to grant a salary increase, unfair dismissal of the whistleblower).

The success of the Act is due also to other important aspects like the lack of limit to compensation for victimised whistleblowers and also the right to obtain an interim relief.

But the Act is innovative and successful also because takes in consideration also the interest of employers, giving them the great chance to adapt their company to those standards helpful to

\(^{143}\) AIG Europe is a member company of AIG, one of the world’s leading insurance and financial services organisation. Born in Germany almost 60 years ago, it now has expanded in 13 European countries, becoming one of the most comprehensive insurance network in Europe.
pursue legislation’s aims. The Whistleblowing Act doesn’t oblige companies to set up Whistleblowing policies and procedures but, implicitly, suggests them to comply it to minimise the risk eventually caused by an employee who could make a potentially embarrassing disclosure outside the company. The important consequence favourable to the employer is that the worker who fails to comply with the organisation’s whistleblowing policy won’t be protected by the Act. Another good consequence depending on the PIDA regards the directors who are in some way protected too; as a matter of fact an effective whistleblowing policy can help them from personal liability: the reference is to managers who fail to blow the whistle loudly or clearly\textsuperscript{144}.

Therefore the Act follows two main aims up: one is private and protects workers who report wrongdoings in their organisations from any form of victimisation and discrimination; the second is public and encourages people working in organisations and who, for several reasons, know in advance about some dangers, to raise their concern, so to avoid public disasters and so on. Often these workers are too scared to raise the alarm or they speak to wrong people or are ignored, and the Act intervenes in these situations protecting responsible whistleblowing. Act’s provisions determine who is in the position to be protected, what can be object of whistleblowing, the kind of protection and the different ways of whistleblowing (internally, outside the company, etc.).

The Public Interest Disclosure Act got immediately a notable success among a discrete number of applications. In particular the reference charity Public Concern at Work received in a year more than 700 requests of assistance in reason of a presumed activity prescribed under the whistleblowing Act. Out of the calls arrived to the charity, a little more than a half regards a public concern, that is a concern about a perceived danger or potential illegality affecting someone other than the caller; the other calls, instead, were about a private dispute in which the worker himself was involved.

\textsuperscript{144} For example, after the Barings Bank collapsed, the inquiry found the Group Risk Manager guilty and banned for five years because he noticed the malpractice but didn’t make an effective whistleblowing.
As to the public concern, the kinds of matters raised by whistleblowers are mainly either about financial malpractice or about safety (they together fill more than 60% of claims), while the others are about different issues like ethics, consumer, abuse in care and so on.

An interesting data that emerges from statistics is that people who raise a worry to Public Concern at Work usually (about 80% of the cases) have previously made it with other subjects: the most part with the same employer, some with regulators and only a minimum part with the media.

The effectiveness of the whistleblowing legislation in the United Kingdom seems to have reached a discrete success up to now, both because it matches one important need of the workers, and because it’s a good law, quite precise and complete, with an implementation that got a fast diffusion also thanks to the charities. The fact that these rules were inserted in the Employment Rights Act, and therefore in the work discipline, is no doubt important because centres one of the major anxieties of people, linked to the maintaining of the job: so being part of the Employment legislation appears appropriate. So the Public Interest Disclosure Act is to the forefront in this subject, and, even if it has already been modified and repealed in some sections, it is still one of the first and best examples of whistleblowers’ protection which several states continue to look at.
5. Whistleblowing in Italy and Europe

Although a law about the penal liability for the company was recently made, Italian legislation doesn’t include specific prescriptions about whistleblowing. If in the Anglo-Saxon area this matter has been known and developed from several years in Italy, and in continental Europe in general, this issue is not widespread yet. Both in the United Kingdom with the Public Interest Disclosure Act and in the United States with the Sarbanes-Oxley Act the impulse to a renovation of the corporate law with the introduction of specific provisions is due to some accidents that involved a huge number of people, a lot of interests and that provoked an extraordinary reaction among the media and on public opinion. In Italy this impulse should have been given by the scandals happened in the last ten years, from the Cirio’s problems to the climbing of Banca Antonveneta by the banker Giampiero Fiorani and to the recent crack of the international group Parmalat. In 2001 the legislative decree 231 was approved: this decree is named “Administrative responsibility of the companies”, but actually it regards the penal liability for the companies and for people who occupy a top position in these companies, first of all the executive managers. This decree provides the creation of suitable compliance programs in order to prevent and avoid illegal activities which are pointed out by the same decree. Out of these crimes there are fraud against the State or public bodies, bribery and corruption, market abuses and especially corporate crimes. Unfortunately this new law, although it’s important

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145 As previously noted in chapter 3, the first U.S. law providing protection for whistleblowers dates back 1912 with the Lloyd-La Fayette Act.
146 Cirio is an Italian Corporation specialised in food preserves, especially in the tomatoes’ sector, which reached an important position in the European market. Founded in 1856 by Francesco Cirio the company raised up to November 2001 when it was involved in a financial crack.
147 Banca Antonveneta, born as Banca Antoniana Popolare Veneta, is the ninth bank in Italy for dimension. Its headquarters are in Padova. It is famous because of the illegal attempt of acquisition by the Italian banker Giampiero Fiorani (see following note) in 2005. In November 2005 it was acquired by the Dutch bank ABN AMRO.
148 Giampiero Fiorani is an Italian banker born in 1959. He was C.E.O. of the Banca Popolare Italiana (former Banca Popolare di Lodi). He was arrested in 2005 for some frauds carried out when he was C.E.O. of the bank and he was inconceivably released in June 2006.
149 Parmalat S.p.A. is an Italian dairy and food corporation based in Parma. It became the leading global company in the production of UHT (Ultra High Temperature) milk but it almost disappeared after accusations of financial wrongdoings against the founder Calisto Tanzi on December 27, 2003. The company is still present in Europe, Latin and North America, Australia and South Africa and it is also specialised in milk derivatives and fruit juices.
because it considers, for the first time in Italy, a penal responsibility for the companies, it doesn’t involve any provision about the covering up of illegal behaviours: this is strictly related to whistleblowing issues, in order to encourage the discovery and the complaint of illegal activities. As to the protection of the whistleblowers could be interpreted the compliance programs provided by the decree: article 6 states these models should provide for information duties toward the body prescribed to watch over the working and the observance of the programs, and article 7 states programs to provide suitable measures able to promptly discover risky situations. However these provisions are lacking a sufficient level of concreteness and are not specifically stating about whistleblowing.

After the Parmalat accident a new debate was opened in Italy concerning the most appropriate activities to discover the existence of illegal conducts in advance and, as a consequence, to disincentive the employers to perpetrate them. Several Italian jurists and economists looked at the United States and to the tools the Americans promptly adopted just after the collapse of Enron and WorldCom company. One of the first talking about the possibility to introduce in Italy some kind of whistleblower protections is Luigi Zingales. On December 2003, he published an article introducing his own advice to adopt these provisions in Italy. The Parmalat crack created an enormous bewilderment to everyone both because of its entity and, most of all, for the image and the reputation of the company; when Enron and WorldCom went bankrupted Italians’ first reaction was to find fault with the stock options, with the avidity of American managers and executives and with the extreme complexity of the financial structures and operations through which these companies were acting. When the same thing happened in Parma, a small city which is a symbol of actual work and efficiency, and when it came out the enormous fraud perpetrated by Calisto Tanzi, a respected and estimated

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150 Luigi Zingales, born in 1963, is an Italian economist. He is Professor of Finance at the Graduate School Of University of Chicago. He is also member of the European Corporate Governance Institute, of the National Bureau of Economic Research and of the Center for Economic Policy Research.

151 Published on the web site www.lavoce.info.

152 Calisto Tanzi, born in 1938, is an Italian businessman notorious for embezzling an estimated eight-hundred million Euro from Italian company Parmalat S.p.A., whose he was founder and C.E.O., resulting in a great loss for the company.
entrepreneur, famous both locally and nationally for his connection to Christian values, a large number of certainties suddenly fell down. The diffusion through the whole world of these events (like the Robert Maxwell’s scandal\textsuperscript{153} in UK or Ahold\textsuperscript{154} in Holland) clearly shows how the apparent ethics of business operators is not sufficient to protect investors’ interest. For example, WorldCom Chief Executive Officer, Bernard Ebbers, was considered a good Christian, adored by his co-citizens, but meanwhile he altered the balances. So the necessity of new rules is evident, to regulate the market and to control more strictly the economic activities of the companies, especially when a large number of employees and investors is related to them.

As soon as the inquiry into Parmalat crisis began, the President of Consob\textsuperscript{155}, Lamberto Cardia, immediately asked for more powers for the commission, and the then Minister of Economy, Giulio Tremonti, made a law proposal to the Parliament for a new saving authority. Although these could be considered good and positive initiatives, they are not enough to prevent and eliminate scandals; the SEC in USA has even more powers than the Consob but it couldn’t really avoid larger scandals. Neither the reforms about corporate governance, introduced in USA after Enron and WorldCom events seem to be effective, as Enron before the collapse was following all the best conducts of corporate governance, having in the Board of Directors independent and qualified subjects.

What it’s raising unequivocally from these events is that the financial world is also based on fiduciary relationships and therefore it’s exposed to the abuses of individuals who can falsify balances, lie and deceive. And any control by outside authorities doesn’t manage to be effective and to focus on the problems if insider executives hide them. The only way for transparency is to break the conspiracy of silence, typical of the whole Italian society and not only of the

\textsuperscript{153} See about this case, page 56.

\textsuperscript{154} Ahold, (Koninklijke Ahold N.V., Royal Ahold N.V.), is a major international supermarket operator based in Amsterdam, Holland. Ahold is listed on Euronext Amsterdam, the New York Stock Exchange and the Frankfurt Stock Exchange. It was involved by a board level accounting scandal created in 2001 and 2002 and raised in 2003.

\textsuperscript{155} Consob is the Italian national Commission for the companies listed at Stock Exchange. Created in 1974, it is an independent administrative authority. Its mission is to protect investors, to control the effectiveness, the transparency and the development of the Italian market.
corporations’ field; moreover to reach this objective it is necessary to focus on those people inside the companies who have enough ethical principles to bring to the light illegal behaviours.

The main problem is not properly about the honesty of employees inside the companies but is connected to the fact that honesty doesn’t pay enough both economically and psychologically. Facing the evident social damages caused by these frauds, it doesn’t exist an adequate reward for the people who contributed to the raising of them. Who blows the whistle often gets the hate by the victims and, in addiction, has his career unequivocally compromised, because nobody likes to hire a “spy”. An emblematic example is the Director of the IT Office at Parmalat, Ugo Bianchi, who refused to destroy the electronic files of the company as he was commanded to; he made a socially appreciable act but he is not being rewarded for it, on the other hand his actions will make him less suitable to be hired in future: it’s clear that employers, when choosing an employee, will prefer a loyal one to a honest one. The same happens to Enron and WorldCom former employees: Sherron Watkins or Cynthia Cooper, who blew the whistle on the irregularities in their companies, are praised on the newspapers but it will be quite impossible for them to be hired by other private public limited companies.

If the problem regards the lack of fair money compensation for those employees who honestly denounce the fraud, the easier solution seems to be to increase it by law. For example the solution can be a reward for the whistleblowers who let emerge a financial fraud, with a compensation proportioned to the entity of the fraud itself, in addition to the compensatory damages and front pay for possible acts of retaliation by the employers. This could be also an ethically appreciable provision which gives a prize to brave and deserving people.

While jurists prospect a sort of prize for workers who denounce the erroneous book-values of companies whose balances are falsified, it’s necessary to identify who is the subject suitable to suffer the burden of this award. As a matter of fact market transparency is a public good to be protected, but the question is if it is more important than public security or tax evasion (and nobody is proposing awards for the people who charge a tax-evader or a criminal). A solution could be to suggest a sort of private prize coming from a mutual insurance taken out by public
traded companies, but it’s almost difficult, if not impossible, that the same companies, that wouldn’t hire a whistleblower (considering him a “spy”), accept to take out this mutual fund.

Unfortunately, in Italy there is not a correct development of whistleblowing as in other countries where this behaviour is by far and wider diffused, also because of the absence of any provision of some awards for the whistleblowers, even in case a public interest connected with the knowledge of this kind of news is involved. Anyway, also as a consequence to Parmalat crack, it’s necessary a revision of the law, because the subject is not very co-ordinated. At present the privacy duty to the worker is often interpreted too widely by the judges (art 2105 C.c., named “Duty of loyalty”); there is a penal prohibition only for those people who hold a determined office in the company’s organisation chart, a position that allows them to have knowledge of important information (art 622 C.p., named “Revelation of professional secret”); then the legislative decree 58/1998 prohibits to reveal a wide range of information to the public able to cause a market disturbance.

Moreover, the provision of some kind of compensation for people blowing the whistle opposes the fact that other companies’ refusal to hire a worker who in the past blew the whistle is already illegitimate, because it causes the “blacklisting”, a practice that has been avoided in all Anglo-Saxons countries for years.

Two main interests are crashing: on one hand the executives try to use the company as their own private good, on the other hand both the employees and the entire community aim at keeping company’s integrity as a tool to create wealth and welfare for the community. This is a source of discussion when considering the role of the companies and the role of the State, because, from a liberal point of view the public control has to be strictly limited in order to guarantee the owner the power to use (or abuse) his company as he wishes. Coherently to this aim new typologies of corporate governance (already existing, for example, in Germany) have been created: this leads to the introduction of a dual system of corporate governance (art. 2380 C.c.) where, together with the Board of Directors, expression of the owner (or of the majority where a single owner doesn’t exist), there is a “supervision counsel” representing company’s
investors (usually the banks) and the workers, meanwhile checks accounting and, in some way, company’s strategies. This system doesn’t get the success the legislator expected because of the bonds it puts on to the company’s administration.

To understand the opportunity to introduce a whistleblowing law also in Italy it’s useful to analyse the problems about law enforcement connected with corporate crimes. First of all it’s evident how the main characteristic of corporate crimes is the complex structure of the subject performing illegal activity, which needs the co-operation of many and different people. Then the benefits coming from these illegal actions aren’t distributed equally between the subjects involved in the realisation of crime and monetary and penal sanctions are given to people belonging to organisation with different roles and responsibilities. The plurality of people connected with these crimes is an element of weakness, both for the repression of the crimes and during the inquiries on the illegal actions: the collusion and the conspiracy of silence absolutely necessary to perpetrate the criminal activity can be broken with the diffusion of relevant information useful to the investigations. Obviously organisations have a lot of means to prevent the risks of a disclosure of illegal activity, for example through monetary benefits to the fraud’s performers or through a strategy aiming at socially sanctioning the person who reveals information favourable to the investigations.

There are several aspects to consider from an economic point of view when analysing the possibility of application of a whistleblowing law: the inclination to reveal useful information by companies’ employees is lower when the investigations aren’t still pointing out attention on the fraud they’re involved, most probably because they could have many benefits participating to the illegal activity compared to the danger to suffer some lawful sanctions. On the other hand, employees can change their position if they are provided with incentives to co-operate to the investigations once they begin or, at least, some rumours about possible embezzlements start to circulate. The possibility that employees co-operate before an investigation, can increase if the authorities could offer whistleblowers some kind of profits, from the annulment of penal and monetary sanctions to some award too. Even the companies’ attempt to “corrupt” employees,
through a conspiracy of silence that can rise when there is a certain “social climate”, can be avoided when employees are risking some penal sanctions.

A possible instrument could be the protection of people co-operating with justice authorities, as it has been used for years both by American and European antitrust authorities. In particular, the American Department of Justice was the first to adopt the “Leniency Programs”, that is to say specific programs created in order to reduce or cancel monetary and penal sanctions for people engaged in “cartel practice” activities. Although heavy sanctions were provided, without a high probability to come to a condemnation, there was a poor effectiveness in discouraging corporate crimes. They were first introduced in 1978 foreseeing a deduction of the punishment only when executive managers revealed information before the start of an investigation. Within these limits the effectiveness was not remarkable and they were modified in 1993 with the introduction of the possibility of a larger reduction and even the cancellation of the punishment if the co-operation was essential. Since 1996 the European Commission introduced similar instruments, then refined in 2002.

It’s evident how these sanction formalities could be applied also to the financial crimes, not replacing usual investigations but in addition to them, also because their utility increases when investigations are so deep to force guilty people to make a choice of field. The reductions allow a faster conclusion of the inquiry and a better knowledge of the facts through the testimonies brought by “insider people”. Moreover, because the reductions of punishment constitute a prize for honest employees, they also cut down the profit companies get by their illegal conducts, so to act as a deterrent for these behaviours.

However probably the most important aspect about this discipline is to create an adequate background in the society so to match the legal sanction to the social one that, in fiduciary markets, is almost more evident; finally the society has to contribute voicing a “social appreciation” to the co-operator for his behaviour.
5.1 The legislative decree 231/2001 and the Data Protection Codes

In Italy the legislative decree 231/2001 provides, within the fulfilment connected to the compliance programs and to the penal company responsibility, with some duties to inform on each company’s assets the internal body set to overlook the effectiveness of the program itself. Nevertheless in the decree nothing fixed about the kind of information that can constitute the object of these programs; the kind of this information can widely differentiate from simple anomalies of economic data to real facts of crime for which responsible people are chargeable. The American Sarbanes-Oxley Act completely differs from Italian situation providing with more specific duties about the regularity of the accounting management and prescribing incisive signalling modalities. This law obliges even the Italian and European multinational companies listed in American stock exchanges to create internal Audit Committees able to receive concerns about ethically suspect behaviours that can help to discover accounting illegalities.

As explained in chapter 3 in these “whistleblowing schemes” the protection for the person who shows his concerns prevails the reported person’s one. In the United States this displacement is due to the fear for serious financial cracks, but it’s hardly compatible with the European data protection rules, where a person, even when subject of whistleblowing, has the right to have his personal data protected. This leads the Italian companies listed in America (and even the subsidiaries of American corporations in Italy) to conciliate the SOX rules to ones provided by the “Privacy Code”\textsuperscript{156}, acknowledging European Union Data Protection Directive 95/46/EC of 24 October 1995, and this binds every company in Italy (and Europe). This Code releases the companies from the obligation to get the consent of the involved people when using personal data to conform to lawful rules or regulations, including European instructions. However this exemption doesn’t consent whistleblowing procedures comparable to the SOX ones where they are not taken in by national or E.U. (European Union) laws; on the contrary

\textsuperscript{156} The Privacy Code is the legislative decree 196/2003, named “Dispositions on the protection of the personal data”.
each extra-EU rule could easily elude the privacy rules. This incompatibility between American and European rules needs a previous intervention by a national authority (in Italy the “Privacy Guarantee”) to balance these different interests. As a matter of fact companies’ policies in accordance to the SOX create a high risk for the personal rights of people object of the report, so the Guarantee is making a prior checking in order to fix the borders in which the company can institute these procedures to report illegal actions and frauds.

Once this frame of legality is defined by the Guarantee, the company can receive reports about executives, managers or even employees towards which a private investigation is started. In these cases the company’s interest is to verify the facts in a private way more than to guarantee the informative transparency to the person object of the inquiry. Coherently with this vision, the Privacy Code, although strict, derogates if the company is pursuing a defence against negative legal consequences that involve itself from an administrative and penal point of view because of the facts committed, at least in part, in the interest of the company itself.

The protection of involved people’s rights is restricted only in the first phase when concerns are verified, but their rights become to be effective once the investigations come to a conclusion. The reported person can accede to the data plaint regarding him, he can ask for the correction of inaccuracies and even for the elimination of the same data once their conservation isn’t necessary anymore. On the other hand, the company, during the whistleblowing procedure, adopts all the security measures in order not to damage the reported person and not to expose him to unnecessary colleagues’ rumours.

5.2 Whistleblowing schemes in the European Union

The resultant matter is that companies falling within the scope of both the SOX, Italian and, in general, European Union, data protection legislation face an apparently inextricable dilemma: on one hand they can comply with their obligation under the SOX and consequently run the risk
of possible sanctions from E.U. authorities; on the other hand they can comply with European
data protection legislation breaking with the U.S. authorities. It came soon evident for European
authorities the necessity to set some guidelines in order to establish a valid European
whistleblowing scheme able to conciliate the SOX and E.U. principles. However the use of
these guidelines is just relative to the fields covered by SOX (for example accounting and
auditing matters, fight against bribery, banking and financial crimes), so up to now
whistleblowing schemes are not permitted with a wider range in Europe.

In some E.U. countries Corporate Governance Codes, providing the adoption of internal
Codes of Ethics and whistleblowing schemes, are enacted in order to lead companies not subject
to the SOX to implement whistleblowing. As previously said, British legislation is substantially
similar to the SOX\textsuperscript{157}: employees who make protected disclosures of information concerning
malpractice in the workplace cannot be victimised by employers. But in other countries, where
the adoption of whistleblowing schemes is not legally mandatory, companies may be induced to
set up schemes to comply with Corporate Governance Codes. This happens in Belgium where
no act sets protection for whistleblowers: however the Lippens Code of Corporate Governance,
enacted in 2004 for publicly traded companies, although it doesn’t provide such mechanisms,
states that “the board should set up an audit committee composed exclusively of non-executive
directors” which “should review the specific arrangements made, by which staff of the company
may, in confidence, raise concerns about possible improprieties in financial reporting or other
matters. If deemed necessary, arrangements should be made for proportionate and independent
investigation of such matters, for appropriate follow-up actions and arrangements whereby staff
can inform the chairman of the audit committee directly”\textsuperscript{158}.

So, although this Code doesn’t explicitly recommend the establishment of whistleblowing
schemes, it suggests considering whether such schemes could be necessary for the company; the
idea is to promote, as far as possible, good internal corporate governance.

\textsuperscript{157} See chapter 4 about the United Kingdom Legislation and the Public Interest Disclosure Act of 1998.
\textsuperscript{158} See Lippens Code of 2004, Appendix C “Audit committee”, paragraphs 5.2.9. and 5.2.9.
5.3 European data protection laws

International regulations on personal data protection date back to 1980\textsuperscript{159} and were developed with the 1995 European directive, which gives directions to European Union states in order to conform to these rules. This directive sets various core principles for valid processes of personal data. In particular people whose data are being processed must be informed of some aspects of the treatment: the identity of the data controller, the purpose of the processing, the names and the recipient of the data, their rights to access and to request rectification of their personal data. In general, personal data have to be collected and processed fairly and lawfully, for specific, explicit and legitimate purposes. Moreover, as a cause of legitimacy, there are three more hypothesis: first, the individual concerned has unambiguously given his consent; second, the processing must be necessary for compliance with a legal obligation; third, processing is necessary for the purposes of the legitimate interest pursued by the controller, provided that such aims are not overridden by the interest and the fundamental rights of the individual whose data is being processed (the balance of interests must be determined on a case by case basis). As to the treatment, personal data must be adequate, relevant and not excessive; they must be kept for no longer than necessary and must be accurate and updated. At all times they must be secure, especially while managed by a third party. The controller has to notify the competent national supervisory authority when carrying any processing operation and, for any reason, personal data should not be transferred outside the European Union area to a country where an adequate protection is not offered.

It appears clearly that these core principles show the evident conflict of interest with SOX whistleblowing schemes. This happens because, in a whistleblower case, if on one hand the data

\textsuperscript{159} International regulations on the matter include: the OECD (Organisation for Economic Co-operation and Development) Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data, September 1980; the Convention n.108 of the European Council for the Protection of Individuals with regard to Automated Management of Personal Data, January 1981; the ILO (International Labour Organization) Code of Practice on Protection of Workers’ Personal Data, October 1996; the UN Guidelines for the Regulation of Computerized Personal Data files, December 1990.
protection legislation aim at protecting both the whistleblower and the person accused of misconduct, on the other hand the SOX and other whistleblowing legislation, for their nature, only tend to focus on the protection of whistleblowers, not guaranteeing the respect of the rights of the individual whose conduct is reported. These principles concerning data protection could also lead to prohibit the collection of anonymous reports of alleged misconduct.

5.4 Balancing the conflicts between laws: the French case

The implementation of the SOX and whistleblowing schemes in Europe necessary raises different issues, varying according to each State’s rules. For example, in United Kingdom there were not specific issues while in Italy, France or Belgium there is now a larger discussion on the matter. So E.U. countries can be divided in two groups: United Kingdom and Ireland focused on the necessity to enhance good corporate governance and to define an effective protection to whistleblowers. On the contrary, other countries have for historical reasons a culture of isolation of whistleblowers, denying them any specific protection; therefore they focus mainly on the fundamental rights of people whose behaviour is reported.

An example of how this culture is typical of the continental Europe is the “McDonald’s” affair in 2005, when the French subsidiary of the American Corporation asked the competent authority, the CNIL (Commission Nationale de l’Informatique et des Libertés) the authorisation to establish anonymous whistleblowing schemes in pursuance of its parent company’s legal obligation under the SOX; the authority denied the permission to operate these schemes because opposing the French Data Protection Act. A reason why of this decision was that the possibility of making ethics alerts, particularly in an anonymous way, could reinforce the risk of slanderous accusations; in addition a person subject of a whistleblowing report is not informed

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160 The introduction of the Public Interest Disclosure Act of 1998 (see Chapter 4) in the United Kingdom follows this aim.
161 McDonald’s, CNIL Délibération, No. 2005-110 (26 May 2005).
162 It’s a 1978 Act modified in 2004 in order to conform to European Union directive.
at the time of the recording of his personal data, in order to give him any means to oppose the proceeding.

In response to these unavoidable conflicts, in 2005 the CNIL, as a result of discussions with the SEC and the European authorities, decided to adopt a document, the so-called “Guidelines” for the implementations of whistleblowing systems, in order to define the conditions under which whistleblower schemes can be lawful in France. This document allows to apply whistleblowing procedures if they are legitimate under the data protection laws and under the General Employment Code, too; furthermore the CNIL shows how to behave not to be in contrast with whistleblowing schemes, while a reported person’s rights are guaranteed. Companies setting up these schemes have to ensure the scope of these procedures is not general and indiscriminate and their use is not compulsory. Although it persists the recommendation not to encourage whistleblowing, CNIL gives companies directions in order to entrust an organisation specifically set up to deal with these matters, composed by a very small number of people, trained and bound by a duty of confidentiality.

As far as data are concerned, when they are unsubstantiated, their deletion must be immediate; when substantiated they must not be stored until a legal proceeding is started against the person indicated by the report or against the author of the abusive alert. When the data are recorded the person whom they are referred must be informed to, unless some protective measures have to be taken; the person can request the correction or the removal of the data but, in any case, can’t obtain the access to the information relating to third parties, like whistleblower’s identity.

Despite these Guidelines, in France many U.S. publicly traded companies implemented whistleblowing schemes which have a wider scope than the one provided by the SOX and allow the employees to make complaints about different issues, even not related to accounting and auditing matters. When the schemes are not based on obligations of internal control in the financial, accounting, banking and anti-bribery areas, the CNIL continues acting on a case by
case basis to establish the legitimacy of the purpose and the proportionality of whistleblowing system.

5.5 European opinion to conciliate SOX and E.U. Data Protection Law

After about ten years of co-existence European Union deemed necessary to intervene in the conflict of laws. The “European Union’s Article 29 Data Protection Working Party”\textsuperscript{163} adopted an “Opinion on the application of EU Data Protection rules to internal whistleblowing schemes in the field of accounting controls, auditing matters, fight against bribery, banking and financial crime”\textsuperscript{164}. The Opinion lists various requirements to be respected by whistleblowing programs in order to be compatible with the data protection legislation and, although it’s not binding, it strongly influences national data protection authorities and it gives a general frame of interpretation for the Member States. It’s important to remember that the scope of the document is limited to whistleblowing schemes in just few determined fields, that are the ones prescribed by the SOX; for the other fields of application (such as environmental damages, health and safety, etc.) the Working Party is now analysing whether to extend the Opinion or not.

As for the requirements suggested by the Working Party’s Opinion, the first is the legitimacy of the whistleblowing schemes which have to comply with the legal obligations imposed by the E.U. or by the Member States, and they even have to be necessary for the purpose of a legitimate interest pursued by the company (for example a proper corporate governance) and to ensure financial security in international markets. This condition stands unless these interests are not overridden by the ones for fundamental rights or freedom of the data subject. The SOX, like other foreign legal statutes, does not qualify legitimating data processing in Europe as a legal obligation, but as serving the purpose of a legitimate interest by laying down rules that

\textsuperscript{163} The reference is to the article 29 of the Data Protection Directive which provides the set up of a “Working Party on the Protection of Individuals with regard to the Processing of Personal Data”.

\textsuperscript{164} It’s the “Opinion 1/2006 of the Working Party Article 29”.

92
guarantee appropriate corporate governance in companies.

Again according to the “Opinion”, in some circumstances it’s advisable to limit the number of people eligible to report misconduct or of the people being object of the report. This necessity of qualification and proportionality relates also to the matter of the information which needs to be related with the purpose of the scheme (accounting controls, auditing, financial crime and anti-bribery). In addition it’s not encouraged anonymity in reporting, even if the reality shows that anonymity is often thought as the only way to blow the whistle and anonymous reports are accepted just under exceptional circumstances. In any case the identity of the whistleblower is processed under the strictest conditions of confidentiality and it is never revealed to third parties at all stages.

Obviously the main difficulties created by the conciliation of the two laws concerns the rights of the data subject. As a consequence, reported employees have to be informed as soon as possible, with two exceptions: the risk investigations are jeopardised or a gathering of evidence. However, a pre-condition is clear and completed information about the scheme are provided, in relation to the purpose, the functioning, the confidentiality, the right of access and so on.

The managers responsible for whistleblowing schemes should be entrusted to a specific internal organisation, strictly separated from other departments of the company and composed by trained people, hedged by a duty of confidentiality. When this department receives a whistleblowing concern, related data have to be communicated within the company only when necessary for the group organisation.

In the Opinion the conditions to ensure legitimate transfers of personal data to countries which do not ensure an adequate level of protection are no way mentioned; on the contrary, the trans-border transfer of personal data to non-EU countries is prohibited without a certain level of security. United States are among the countries without an adequate level of protection because they largely rely on a self-regulatory approach to privacy protection, rather than a real legislation with a central federal statute. So the transfer of personal data to U.S.A. is authorised only if one of these conditions occurs: the person whose data are processed gives his consent;
the US recipient of the data signs the “Safe Harbour Agreement”\textsuperscript{165}, according to which companies members agree to establish a set of rules similar to the European Union’s ones; a contract containing data protection safeguards to E.U. standards is signed between the transferor and the recipient; a multinational corporation, which intends to proceed to international transfers within the group, adopts a binding Codes of Corporate Conduct whose use is authorised by the countries in which the group is processing the data.

In conclusion European Union made an important step to give a solution to one of the problems standing in the way of the European implementation of whistleblowing procedures. An end is put on the concern of E.U. companies listed on US stock exchanges and E.U. subsidiaries of US listed companies. However many questions continue to be unsettled, such as the extension to other fields out of the SOX discipline or the consequences to schemes exceeding defined borders.

\textbf{5.6 Whistleblowing, an instrument to modernise labour law}

At the end of 2006 the Commission of the European Communities published a Green Paper with an evocative title “Modernising Labour law to meet the challenges of 21\textsuperscript{st} century”\textsuperscript{166}. This document wanted to “launch a public debate in the EU on how labour law can evolve” in order to achieve “sustainable growth with more and better jobs.” In order to be globally competitive it is evident how a modernisation of the labour law, through flexibility of workers and enterprises, is a key element. It’s important to remember that this adaptation has not made prejudice to workers’ rights to be protected on their workplace. Consultations were opened with the aim to guarantee employees the respect of their rights and, meanwhile, helping the development of the employment legislation in order to raise competitiveness.

\textsuperscript{165}Safe Harbour Agreement is a streamlined process for US companies to comply with the European Union Directive, developed by the U.S. Department of Commerce after consultation with EU.

\textsuperscript{166}The reference is COM (2206) 708 final of 22.11.2006.
The recent-born German organisation Whistleblower-Netzwerk e.V.\textsuperscript{167}, in co-operation with one UK’s first whistleblower support group\textsuperscript{168}, gave its response to the European Union “Green Paper” with the slogan “Europe needs more whistleblowing!”\textsuperscript{169}. In particular they both give an answer to two questions raised by the European Commission in the document: the questions 1, “what would you consider to be the priorities for a meaningful labour law reform agenda?\textsuperscript{169}, and the question 8, “is there a need for a ‘floor of rights’ dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?\textsuperscript{170}. In their opinion, an effective whistleblower legislation is both one of the priorities for a meaningful labour law reform and it should belong to the “floor of rights” dealing with the work conditions of all workers regardless the form of their work contract.

The two organisations have obviously motivated their answer giving a synthetic but complete description of the state of whistleblowing in Europe and of the several aspects to be considered in order to introduce a suitable legislation. First the definition of a whistleblower being a person who publicises, internally or externally to the organisation he is linked or belongs, a real or a strongly believed risk, abuse or legal infraction whose disclosure is in the public interest.

The great advantages of whistleblowing include the growing discovery of subjects who make unfair practices in business, so to promote a fair competition. More particularly, inside a company, the internal whistleblowing allows a more effective control and an earlier recognition of a developing risk: this is an advantage for public authorities because of the extremely lower costs and because of the attention is directed both to the relevant norms and even to the risks, before they turn into damage, abuses or illegality. In addition, whistleblowing doesn’t impose burdens on legally operating actors (this is a good anti-corruption instrument) and it is useful to

\textsuperscript{167} For further information see www.whistleblower-netzwerk.de.
\textsuperscript{168} This group is active since 1991. For further information see www.freedomtocare.org.
\textsuperscript{169} See COM (2206) 708, p.9.
\textsuperscript{170} See COM (2206) 708, p.12
discover information that otherwise would have kept secret. The possibility to supply public 
authorities with information in order to perceive risks and to prevent abuses helps to respect 
some principles contained in the Treaty of the European Union, such as the achievement of high 
levels of social, environmental, health and consumer protection. But, most of all, this project of 
a new law carries out the rights contained in the Articles 10 and 11 of the above mentioned 
Treaty related to the freedom of thought, conscience, opinion and information in the world of 
work, promoting liberty and motivation on the workplace.

Considering all the advantages of whistleblowing and the large quantity of accidents, 
distortions of competition, criminal affairs and environmental hazards, preventable should 
people involved come to speak up on them, it’s strange there are so few whistleblowing cases in 
Europe. The explanations can be connected with the ethical component of misguided loyalty 
and the culture of discretion, with the belief whistleblowing is a useless waste of time and with 
the fear of individual disadvantages and sanctions. It’s evident that European Union has to carry 
out a deep and wide research about all the aspects of the matter, co-ordinating a multitude of 
disciplines affecting the issue, like economics, competition and games theory, political science, 
polls, psychology, criminology, media & communication science and philosophy, but it is 
absolutely notable how this activity could be potential in the future.

In order to favour the development of whistleblowing both the Member States and the 
Community should emphasise through the media the advantages and the moral value of 
disclosing risks in the interest of the Community and the public, trying to widespread this 
message to young people aiming at changing attitudes and culture in a long term project. 
Campaigns and initiatives in public institutions, companies, associations and other social groups 
should be supported. At this point a new law can contribute decisively, and European Union 
appears as the most suitable subject in order to enhance a whistleblowing legislation, maybe 
developing from the still existing ones, like the Sarbanes-Oxley Act in U.S.A., the Public
Interest Disclosure Act in United Kingdom or other rules enforced in South Africa, Australia, Japan, Canada, South Korea and others.\footnote{171}

Discussions on a rising European whistleblowing legislation include the core elements of possible future regulations. First of all the wide area of application due to the fact that the new discipline must be understood in its cultural dimension: if the European Union, because of its limited competencies, can’t produce a whole coverage, Member States will have to take supplementary measures where necessary. A human connotation has also to be considered because these rights have to be provided to individuals and groups elsewhere; among people included and protected there should be all public and private employees, paid or volunteer. Each worker has to be included, even those entering an economic relationship through which their freedom of expression can be compromised. In addition, from an empirical point of view, the application has to be thought excluding disclosures made in promotion of strictly private interest; on the other side all kinds of risk and norm-relevant information that at least partially serve the public interest have to be covered. And also possible internal company regulations, like codes of conduct, providing with whistleblowing should enter the protection.

One of the most important issues should be the whistleblower’s faith in protection, which increases when it’s created an environment that makes whistleblowing easier and that respects the free choice of the whistleblower. Concerning the motivation of the person who discloses risks or abuses, excessive legal requests produce the opposite effect that makes people desist from disclosing: what it’s important should be the idea that any information will be profitable for benefits to the public interest, provided that the whistleblower honestly and consciously believes in the possibility of some risk or abuse and he can present some truthful facts as an evidence. Protection has to be enlarged even if the person thinks to supply news but the

\footnote{171 For example in Australia there are different legislations related to determined territories: Public Interest Disclosure Act of 1994 for Australian Capital Territory, Protected Disclosures Act of 1994 for New South Wales, Whistleblowers Protection Act of 1994 for Queenslands, Whistleblowers Protection Act of 1993 for South Australia, Public Interest Disclosures Act of 2002 for Tasmania. In New Zealand there is the Protected Disclosure Act of 2000 and in South Africa there is the Protected Disclosure Act of 2002.}
addressees already know them, or even when the addressee doesn’t know about the information but after having received the disclosure, he decides not to take subsequent measures.

Because of the factual complexity of the matter, the norms should be clear, simple and easy to be communicated and explained; rights and duties should be known and understood and the list of possible addressees has to be published. In order to help the potential whistleblowers, counselling and supporting organisations must be established by Member States authorities so workers have a precise knowledge of their rights and obligations. Recognised organisations should even be allowed to defend whistleblowers in court, collecting legal fees only in case of winning so to prevent whistleblowers from affording exceeding legal costs.

The form of the act of whistleblowing should be the less possible restrictive so to allow disclosures either written or oral; they should let be free either to choose to report openly, confidentially or anonymously, directly or via trusted intermediaries. All communications channels within the companies should be kept open, so to make the disclosures easier and, once the barriers of silence are lowered, open whistleblowing will consequently increase up to become a self-perpetuating process.

An aspect that has to be taken into consideration is a correct treatment of the disclosure, which has to be perceived, professionally and independently evaluated, analysed and acted upon minimising risks and/or stopping abuses. To guarantee a certain level of transparency, some criteria on the nature, duration and verification of the complaint should be established, proportionally to the threat disclosed and to the quality of information initially available. In respect of third parties’ rights, whistleblowers should receive confirmation about the receipt of the disclosure, the opening of an investigation, its probable duration, its progresses (with the due attention not to endanger the success of investigation itself) and the draft final investigation report with the possibility, at any time, to intervene with questions and suggestions. The entire process’ regularity has to be granted and favoured through dissuasive sanctions inflicted for obstructions, omission of investigations, false evidence, delay or distortion.
European future law should also leave the freedom of choice between internal and external whistleblowing to designated addresses with an equal treatment, even if somehow Member States may initially prefer and require disclosures inside the organisation. An external whistleblowing keeps a legal protection in case whistleblower believes the public interest is at risk, when a criminal activity took place, when internal procedures are lacking, have been exhausted or are reasonably inefficient; however, besides other rules, whistleblowing to criminal prosecutors or to Parliamentary Committees are anyway ensured. Finally, a whistleblower should have the option to address his concerns to the media or to the public in general; in this way he becomes responsible of protecting third parties’ rights (a responsibility otherwise falling on the addressees) but, sometimes, this could result the last chance when he doesn’t manage to get response from the institutional addressees.

Whistleblowers are granted some fundamental rights: first of all, the right to blow the whistle and to get an efficient reaction and evaluation; second, the right to refuse to give services that make him an accomplice to a crime; third, the right to be informed of his disclosures’ consequences.

Moreover protection to whistleblowers must be ensured through the application of other European legal instruments adopted in other fields, such as some elements of the Anti-discrimination Laws. In addition, there should be coverage even for the pre-whistleblowing phase (starting from justified refusals to give a service), for everyone supporting whistleblowers and a particular attention should be focused on all forms of repression (threats, mobbing, shortages of career and development perspectives). Protection and precaution have to be actually executed, analysing employees’ position within the company and possible relapses on

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workplace because of their whistleblowing. Employee’s monetary compensation should exceed the one for unjustified dismissal, because of the ethical value of whistleblowing, and should cover moral damages, too. Directive 2000/78/EC of 27 November 2000 “establishing a general framework for equal treatment in employment and occupation” can be extended to whistleblower legislation even for legal aid, burden of proof and victimisation.\textsuperscript{173}

Legal whistleblowing has to be distinguished by defamation or malicious rumours and, as a consequence, it has not to be sanctioned. Whistleblowers should obtain immunity from prosecution by administrative, civil or penal tribunals because they had access to documents, they made copies or they revealed classified material which otherwise could have been lost. Whistleblowing compensation is not lost even if the organisation goes insolvent and whistleblower goes unemployed: in these cases Government will compensate him in place of the company, as a public interest was directly served.

Any discriminatory hiring against whistleblowers is prohibited, since rules and agreements (for example confidentiality clauses) obstructing the effects of whistleblower legislation are void.

Another question is about possible rewards for people blowing the whistle; they are substantially legal, but the risk they can produce a counter-effect, like slandering or false whistleblowing, is real. The U.S. “False Claim Act”\textsuperscript{174} saves from these accidents, but further analyses are necessary to apply such instruments to European cultural and legal systems.

The last aspect of a whistleblower legislation is the necessity to evaluate it regularly so to understand the effectiveness of the application and to correct possible problems; it’s not utopian

\textsuperscript{173} Article 8 “Minimum requirements” 1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive. 2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

\textsuperscript{174} The False Claims Act, 31 U.S.C. § 3729 et seq., also called “Lincoln Law”, is an American federal law which allows people to file actions against federal contractors claiming fraud against the government. People filing under the Act stand to receive a portion (usually about 15-25 percent) of any recovered damages. Passed by Congress on March 2, 1863, it was amended to the present form on October 27, 1986.
the occurrence of technical mistakes or of unexpected scenarios and even the creation of new forms of retaliation. But, looking overseas, are evident the advantages that a whistleblowing working law can bring to our society.
6. Famous cases of whistleblowing

6.2 Whistleblowing at Enron: Sherron Watkins’ experience

On December 22, 2002, the widespread review Time Magazine chooses as “People of the Year” for 2002 three people jointly: the FBI’s Colleen Rowley, WorldCom’s Cynthia Cooper and Enron’s Sherron Watkins, titling the cover “The Whistleblowers”. This appears like a tribute to these three great women but also represents a signal of a new manner of thinking about the role of whistleblowers and what this could represent for the American society. These three characters are, against their will, strictly connected with three of the most relevant catastrophic events of the last years; without any doubt the 9/11 disaster and the bankruptcies of WorldCom and Enron have in common the different but always adverse impact they have on American “common people”. Both the air attacks to the World Trade Center and the collapse of the two big companies were events that mostly affected public, common people and the market. The impact was so relevant that it forced to re-consider the role of those people who most of all have the possibility to prevent, at least in part, these events.

Sherron Watkins was called a corporate whistleblower because of the letter she sent, in August 2001, to Kenneth Lay, at that moment Chairman of the Board of the Enron Corporation as well as its Chief Executive Officer\textsuperscript{175}; in her letter she made it clear that she was concerned about Enron’s unethical and illegal financial management practices.

After Enron collapse, in several seminars where Sherron Watkins was invited to talk about her experience on ethics matters, she used to compare her former boss Ken Lay to the character

\textsuperscript{175} This office was taken after the recent resignation of Jeffrey Skilling.
of the “emperor” in the famous Christian Andersen fairytale “The emperor’s new clothes”.

Just like the emperor, Ken Lay was unable to see company’s problems, being focused on himself, being a global ambassador of the company, flying around the world to enlarge Enron business in developing countries, meeting with heads of state, touting abroad Enron clean-burning energy solutions and, inside nation borders, pushing for energy deregulation and open markets. What he was doing didn’t clearly coincide with running his company as best as possible, so he left this task to other managers, particularly to former Chief Executive Officer Jeff Skilling.

During ’90s Enron hired the best and the brightest people it could recognise in the finance and in the accounting departments and at least a few of them were conscious that certain hedging structures were fraudulent. Michael Kopper, the first executive manager to be pleaded guilty of criminal charges, admitted that the “incriminated” Raptor structures were indeed fraudulent. The problem was that these structures were also discussed, explained and illustrated with several executives as Ken Lay and other components of the Board of Directors, and everybody approved their use. Who was asked why this could have happened, the answer was quite simple, being a consequence of Enron company reality: these models were incredibly complex and were shown to executives during the usual hurried meetings with experts celebrating the brilliance and the cleverness of the accounting theories behind the structure.

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176 Many years ago, there lived an emperor who was quite an average fairy tale ruler, with one exception: he cared much about his clothes. One day he heard from two swindlers named Guido and Luigi Farabutto that they could make the finest suit from the most beautiful cloth. This cloth, they said, also had the special capability to make invisible anyone who was either stupid or not fit for his position. Being a bit nervous about whether he himself would be able to see the cloth, the emperor first sent two of his trusted men to see it. Of course, neither of the two would admit that they could not see the cloth and so praised it. All the townspeople had also heard of the cloth and were interested to learn how stupid their neighbours were. The emperor then allowed himself to be dressed in these clothes for a procession through town, never admitting that he was too unfit and stupid to see what he was wearing. He was afraid that people would think that he was stupid. Of course, all the townspeople wildly praised the magnificent clothes of the emperor, afraid to admit that they could not see them, until a small child said: "But he has nothing on!" This was whispered from person to person until everyone in the crowd was shouting that the emperor had nothing on. The emperor heard it and felt that they were correct, but held his head high and finished the procession.

Moreover nobody at Enron would have asked questions about matters in which he wasn’t competent showing his lack of knowledge or intelligence, and the complex structures and the large number of finance and accounting experts acted as an important intimidator; so many fell victims to a group-think mentality accepting an accounting structure they didn’t understand.

Nearly all of the most questionable deals took place within 1997 and 2001 (the year when bankruptcy was declared), exactly the period when Wall Street considered Enron to be one of the most profitable and exciting companies. In late ‘90s Enron was considered “the place to be”, with stocks going up steadily every year, with 8,000 employees only in Houston and 20,000 employees overall, constantly encouraged and rewarded to think “outside the box”. Sherron Watkins was one of the about 30 vice-presidents at the date of collapse. She was hired into Jeff Skilling’s division in 1993 to work for the Chief Financial Officer Andy Fastow, certainly the most infamous man of Enron.

In 1993 Enron became partner of the California Public Employees’ Retirement System (CalPERS), a partnership called Joint Energy Development Investment Limited Partnership (JEDI). Watkins was entrusted to manage JEDI, which represented one of the several off balance sheet investment vehicles for Enron; out of them one part was legitimate and it was used to finance the construction or the acquisition of large international power plants or natural gas pipelines. She held that position until the end of 1996; at the beginning of the following year she joined Enron’s International Group, focusing primarily on the acquisition of energy-related assets around the globe. Working for that division she reminded one of the earliest corporate goals in Enron’s vision, that is to say “to become the premier natural gas pipeline in North America”.

Enron’s story starts in 1985 from a merger between two large US-regulated pipeline companies when Houston Natural Gas, that hired Ken Lay as President and CEO just a year before, merged with the InterNorth; a few months later Ken Lay came out on top of the merger and was named CEO of the renamed company Enron. With the U.S. deregulation of energy
markets the company, from the activity of delivering energies, started also to attend to brokering energy futures. In late ‘80s another leading figure, Jeff Skilling, was hired, initially as a consultant and later as the head of the Wholesale Trading and Merchant business; after the deregulation of both the gas and power markets, Skilling transformed Enron from a regulated pipeline business to an “energy trading shop” controlling over 25% of the US power and gas transactions. This transformation made Enron become the absolute leader in energy trading, so that other competitors had to move their trading operations to Houston, making the city of Texas the stock reference place as far as energy trading was concerned. In late ‘90s Enron started an aggressive acquisition strategy of energy assets in emerging deregulating countries, aiming at repeating elsewhere its North American success and not just in the energy field. For example, it moved into the international water sector acquiring Wessex Water in 1998. Sherron Watkins joined the Enron’s International Group in 1997 and worked on various acquisitions until early 2000 when she joined Enron’s Broadband Unit, a new business line for the company. While trying to replicate the US energy trading success in other countries of the world, the company was also looking for adding more products to the successful energy trading shop.

By 2001 Enron’s vision completely changed: from the original goal to become the premier natural gas pipeline and then the first natural gas major, the objective became to be the world’s leading energy company, until the beginning of 2001 when the self-branding goal was to be simply “The World’s Leading Company”. Probably, at that moment, this could be a realistic ambition, also due to the fact that Enron was the seventh largest company in US under the Fortune 500 list. However, what happened less than one year later shows how a lower profile would have been preferable: today Enron is only remembered as the largest bankruptcy in US history owing 67 billion dollars to creditors.

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178 On newspapers and economic reviews Houston began to be called the “Wall Street of energy trading”.
179 Wessex Water is a water supply and sewerage utility company serving parts of Southern England. Originally born as Wessex Water Authority, it was one of the regional water authorities established by the Water Act in 1993. It was later acquired by Enron, and after the colossus’ collapse it was sold to YTL power International of Kuala Lumpur.
In summer 2001 Sherron Watkins switched from one job to another at Enron for the last time, choosing less important position with Andy Fastow, so to better manage her career and her home life. During the years Watkins had been in leading positions, for example travelling on company jets to sell deals around the world (Chile, Peru, Panama, Philippines, Korea, South Africa, Guinea but also Hong Kong, London and Paris) and meeting clients in Beaver Creek for ski weeks or at prestigious golf tournaments. Obviously the ladder of her success inside the company meant a great cost of time and Watkins chose to change her job giving up potential advancement and bonuses in order to save more time for her family.

This decision severely changed her life. Her new role at Enron was to give priority to the assets that Enron had to sale; she reviewed book values, estimated market values, pondered over the potential gain or loss on sale, trying to determine where Enron should sell to raise cash in order to lower debts. During this work she fell into what would become the worst accounting fraud ever seen. Enron, inconceivably, allowed Andy Fastow to be in an evident conflict of interest: he was both Chief Financial Officer of the company and also General Partner of an investment partner company, the LJM, through which he raised over 400 million dollars of limited partner monies and was charged with maximising returns for limited partners. The big trouble was that LJM’s mission was to do business with Enron, and Fastow himself decided time by time between Enron and LJM what could be more profitable. When Sherron Watkins started her new job, she knew for the first time the “Raptors”, LJM vehicles to pay Enron a locked in value for those assets that previously were high stocked but at that moment were low priced, paying for them too high money: in summer 2001 these Raptors were owing Enron over 700 million dollars under hedge deals. Enron stocks were used to capitalise these Raptors and their value usually had a shortfall and were unable to fully cover the edge price owed to Enron:

Andrew Stuart Fastow was the Chief Financial Officer of Enron until the SEC opened an investigation into his conduct in 2001. He was one of the key figures behind the complex off-balance sheet special entities, in particular limited partnerships controlled by the company, used to conceal their massive losses. At that time Watkins’ daughter was only two years old.

LJM stands for Lea, Jeffrey and Michael, the names of Fastow’s wife and children. Fastow created it in 199, to buy Enron poorly performing stocks and stakes and to strengthen Enron’s financial statements.
Sherron Watkins wasn’t able to find other outside capital invested in the Raptors. In more than 10 years experience in the accounting field she perfectly knew that accounting couldn’t be so creative: Enron was basically hedging by itself. Her first immediate reaction was to leave the company and to find another job as fast as possible, but she also knew that she couldn’t leave Enron without a new job because she had to maintain her family. So she decided to meet Jeff Skilling, present Chief Executive Officer, to confront her concerns, but Skilling himself unexpectedly resigned on August 14, alleging personal reasons. Skilling’s decision to leave Enron made Sherron Watkins consider the question from another point of view: up to that moment she was trying to convince herself that the situation wasn’t so bad as she was imagining and that her concerns were exaggerated. Stock price was relatively steady around 45 dollars per share, that wasn’t absolutely comparable to the one of the past years, but Skilling seemed confident in Enron recovery and this was what he used to say talking of the good times ahead; moreover the California power crisis\textsuperscript{183} had hit Enron really hard (as Enron had been seen as the major bad actor) and a large amount of money for settlements in litigation was about to be used; the broadband division was failing by that time. But Enron mentality was always to be optimistic, to look ahead, to try and find new ways to make money. Only after Skilling resignation it looked impossible to believe, trust and hope in a positive conclusion, because Skilling had always been the mastermind of the company, its “front man”. Watkins wrote in her memo to Ken Lay that “the market can’t accept that Skilling is leaving his dream job”, and, obviously, neither Enron employees could make it.

Only two days after he quit, he told the Wall Street Journal that his “personal reason” was that he couldn’t sleep at night because of the stock price progress: in January it was about 80 dollars per share and in August it was trading at only 45 dollars, and Skilling was depressed and

\textsuperscript{183} The California electricity crisis (also known as the Western Energy Crisis) of 2000 and 2001 resulted from the gaming of a partially deregulated California energy system by energy companies such as Enron and Reliant Energy. The energy crisis was characterised by a combination of extremely high prices and rolling blackouts. Price instability and spikes lasted from May 2000 to September 2001. Rolling blackouts began in June 2000 and recurred several times in the following 12 months.
frustrated because he didn’t manage to raise it up. Moreover he personally had about 100 million dollars in the bank and decided to call in still rich. Watkins considered this behaviour pathetic and made a comparison with the Navy\textsuperscript{184}: it is like a navy battleship captain that, in the middle of an operative situation, tells he is tired and goes back to the land. This couldn’t be possible, he would be court marshalled, because a captain can’t abandon his crew. Anyway this was Jeff Skilling’s behaviour in August 2001. Watkins understood that Skilling knew Enron had hit an iceberg and was quickly taking on water, and chose to go home.

After Skilling’s resignation, Ken Lay stepped back from retirement and became again Chief Executive Officer: Watkins thought he didn’t have knowledge that he was getting into a “sinking ship”, so she wanted to let him know that the company had more than probably committed a relevant accounting fraud. She initially sent a one-page anonymous letter to Lay\textsuperscript{185}.

After resuming the new office Ken Lay first tried to stop the increasing rumours, by holding an all-employees meeting. In a room filled to capacity, Lay satisfied employees’ hope to hear good news announcing that everything was fine and that, if anybody was troubled or concerned, he could come forward. Watkins felt he was speaking about the memo and, unsatisfied by the meeting, she identified herself as the author of the memo to the head of human resources division and asked for a meeting with Mr Lay: she was afraid he could appoint wrong executives (the ones had been part of the fraud) to fill Skilling’s job and to continue the fraud.

The meeting was the very next week, with Sherron Watkins exposing more and more memos she had drafted to point out the problems of the company. She used a very direct and simple language to express her feelings, starting with “Has Enron become a risky place to work? For those of us who didn’t get rich over the last few years, can we afford to stay?”, and again with “Skilling’s abrupt departure will raise suspicions of accounting improprieties and valuation issues. Enron has been very aggressive in its accounting – most notably the Raptor


\textsuperscript{185} This constitutes the first Watkins act of whistleblowing, an internal anonymous whistleblowing. See Appendix C.
transactions.” She also commented Andersen’s statements saying, “I realise that we have had a lot of smart people looking at this and a lot of accountants including AA&Co. have blessed the accounting treatment. None of that will protect Enron if these transactions are ever disclosed in the bright light of day.”

When she met Ken Lay, she felt confident and optimistic. She expected an investigation and, most of all, the establishment of a crisis management team to face the difficulties that would have hit Enron once the accounting fraud has been revealed. On the contrary, what she thought didn’t happen, because no other top executives openly supported her statements and Ken Lay didn’t take into consideration what she was saying.

As to Sherron Watkins, she seriously wanted to help the company to survive (also because her researches for a new job didn’t come to a result). She kept trying to get upper management’s attention, and sent a second group of memos to Ken Lay with some ideas to slow down the crisis and to re-build investors’ confidence, but she was the last person whom they would accept help from.

Everyone tried to persuade her she was wrong, asking her how could one of the state best law firms and one of the United States best accounting firms have not been able to see all the problems. Watkins began to feel vulnerable and alienated because her colleagues too began steering clear of her, as she wanted to pull down the company. However, the main issue is that Sherron Watkins didn’t go first to the Securities Exchange Commission (SEC) or to the media by knowing possible consequences on the 20,000 Enron employees’ lives and many more.

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186 These are abstracts from the first memo Sherron Watkins sent to Mr Lay (Appendix C).

187 Vinson & Elkins (or V&E) is an international law firm with headquarters in Houston and offices in Dallas, Austin, Beijing, Shanghai, London, Tokyo, New York, Washington, Moscow, Dubai and Hong Kong. With annual revenues of over 500 million dollars and 750 attorneys, it is one of the largest law firms in the United States. The firm was started in Houston, Texas in 1917 by James A. Elkins and William A. Vinson, and it is known for its energy industry expertise. However, in recent years, it has also been recognised as a leader in many other practices including public finance, infrastructure development, international transactions, media law, mergers and acquisitions, private equity, class action defence, regulatory matters, professional liability, and complex commercial litigation.

188 Arthur Andersen LLP, based in Chicago, was once one of the so-called “Big Five accounting firms (with PriceWaterhouseCoopers, Deloitte & Touche Tohmatsu, Ernst & Young and KPMG) performing auditing, tax and consulting services for large corporations. In 2002 the firm voluntarily surrendered its licenses to practice as Certified Public Accountants in the U.S. pending the result of prosecution by the Department of Justice over the firm's handling of the auditing on Enron, the energy corporation.
stockholders’ should the company suddenly collapse. She knew that a whistleblower has to analyse the company’s situation before deciding his action: in a large entity fraud, where a lot of individuals are involved, who blows the whistle has to choose between the employer or the regulator, pondering which revelation could be the best for the community. In Enron case the best choice was to help Enron to do the right thing, being honest with the investors.

Obviously Sherron Watkins was highly frustrated by the events that hit Enron during the late fall of 2001 and was only after the discovery of her memos by Congress (in a box of subpoenaed documents from Enron) that she could get some sense of peacefulness, because for the first time something was confirming that she was right while everybody considered her a troublemaker. Despite some colleagues showed disappointment towards her, she received several letters and phone calls from other Enron employees who were grateful to her for the existence of her memos, so that those responsible would have less chance to avoid the consequences of their actions.

In the months and the years following Enron crack and the finding of Watkins’ memos, many articles on the reasons why she decided to blow the whistle were written. Some denigrated her behaviour, stating she had done it for money or for a promotion in Enron. Others argued that her actions were a sort of retaliation against a poor bonus Andy Fastow gave her in 1995. Maybe only few knew what her human and social background was: she grew up in a Christian community with strong principles, in a small town where everyone knew everyone else and where she was taught the matter of her actions; she was instructed on what is right or wrong and to choose what is correct. During her life she always acted thinking of the answer she would give if questioned about what she had done with the skills she has been given: the answer, which now she is proud to give, is that she has always been honest and has always acted with integrity.

When she first blew the whistle, Sherron Watkins was not aware of being a whistleblower until her memos started to be considered the “smoking guns”. In writing her memos she was only trying to help the company, by notifying the correct person the problem and passing on
him the responsibility. She made all she could firmly believing Ken Lay would have done the right thing. Probably she was too naive for the situation and for Enron reality, but it would be ungenerous to reproach her having trusted in her boss.

Before whistleblowing to Mr Lay, Sherron Watkins didn’t confer with anyone at Enron except Enron’s treasurer Jeff McMahon who worked previously with her in an accounting firm. Maybe due to their friendship he encouraged her in pursuing her intentions but later on, when everything had happened McMahon himself asked her about her expectations by sending her memos to Ken Lay. That’s how everyone inside Enron and living in the “Enron world” could consider the course of action Sherron Watkins started, but she didn’t talk to anyone, she spoke only with her mother, and then decide what was ethically correct in her opinion. Moreover she was not afraid to go to Mr Lay, because she was considering him a reasonable person, not a “shooter the messenger”. In hindsight, it’s easy to tell that probably, if Watkins had searched some allies in her actions, the things would have gone in a different way.

When she was aware that Ken Lay would not have asked for an investigation based on her concerns, she started to worry about her own position and consulted a lawyer to find out if her job was in danger. She was told that actual whistleblowing provisions were protecting employees only if they were asked to do something illegal. That wasn’t the case of Sherron Watkins, so she was preparing to be fired. As she thought the firing would have been a private matter, she was incredibly unprepared when the media circus exploded after the discovery and the publication of her memos.

At the end of 2001 she came to believe to hire a lawyer and she felt lucky when he accepted the case because a lot of whistleblowers aren’t often considered seriously, on the other hand they decide not to hire a lawyer thinking they have not committed something wrong or illegal. Sherron Watkins was convinced that in a whistleblower case a lawyer, outsider from the company, was absolutely necessary. As to her experience, lawyer’s advice not to speak to

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189 It’s important to remember that Sarbanes-Oxley Act didn’t exist at that time.
Enron’s lawyers and to cut radically with her former company was fundamental in a moment where camera crews were everywhere and she was summoned to testify before Congress\(^{190}\): it was a period when the media were determined to find heroes and villains and, against her will, she was elected as a heroine.

A lot of people asked her why she didn’t leave the company sooner. Answering to these issues, Sherron Watkins compared her former company to a country: sometimes someone can’t appreciate its action but nonetheless he will not give up his citizenship, so it’s not easy to leave a company like Enron. And it would have been absolutely useless to leave the company in 1996 when her concerns began to materialise. Jeff Skilling wasn’t the man Watkins believed suitable to lead the company in a difficult moment, in her opinion the right one was Ken Lay. In addition Sherron Watkins also thought that Ken Lay could have been wrongly advised by other executives who arrogantly and rashly continued lauding and supporting their “destructive” compliance programme.

Like other whistleblowers she talked to, she didn’t want to regret having been silent while Enron fraud was perpetrating. Other Enron former employees told Sherron Watkins they wish they had said something about what was happening, but for different reasons they didn’t. Watkins still now asserts that it’s highly improbable she will get another job in the private sector, but in her opinion her former colleagues are haunted by different demons: not to have been smart enough to discover the irregularities, not to have been quite brave to bring the fraud to the law and public opinion or even to have been in some way accomplices in crime. However being the whistleblower versus Enron caused serious problems in her social life: at the end of her staying in Enron everyone was steering clear of her, everyone was hostile and timorous about her future actions, no one even wanted to talk with her without the presence of a lawyer. She is still living in Houston and it’s quite common for her to meet former colleagues: things

\(^{190}\) The Congress was carrying out an investigation on Enron also based on Sherron Watkins memos and asked her to testify upon Congress on 2002, February 14.
haven’t changed, nobody stops to talk to her, probably because they think she could consider them cowards.

If she could go back, she would blow the whistle again but somehow in a different way: first she would find allies before coming out and, most of all, she would come to the decision to speak sooner. The signs that something was going wrong were evident, starting from the inflated expense reports up to nepotism and questionable accounting practices, but unconsciously she decided to ignore them. Probably she should have been more forceful and insistent, especially when Ken Lay hired the law firm\(^{191}\) that was implicated in the misdeeds.

The most important lesson Sherron Watkins thinks she received from all this experience is that her wish as an employee is to have a company that reflects her own value system, that is necessary to work without ethical half-measures and to make attention to all the signals that can cover up problems. She is convinced this must be taught to children who represent the future of the nation, who will be the future executives and, for this reason, they have to start to take responsibilities while young and not to cheat, because otherwise this would be also their behaviour in the future.

Following Enron collapse over 6,000 people lost their job and many more lost a great amount, where not all, of their retirement savings. Enron shareholders lost over 60 billion dollars. Several executives have been blamed and are serving time in prison: out of them Andy Fastow, that the large majority consider one of the most responsible of the bankruptcy, is due a six-year prison term thanks to his co-operation with the authorities.

The entity of Enron crash was so wide to bring out the Sarbanes-Oxley Act, which provides annual assessments of controls and accounting procedures, because this new law specifically aims at protecting investors from abuses occurred during last years. It broadly includes provisions about corporate fraud, accounting and securities laws; criminal fraud include every scheme or artifice to defraud shareholders; executives of publicly traded company have to

\(^{191}\) See note 187.
certify their financial status and are facing up to 20 years in jail should they knowingly or wilfully allow material misleading information into the financial statements. Thanks to this law, future executives will not be allowed to utilise as a defence the fact that they didn’t know about a problem.

To sum up the facts there are some issues emerging from Sherron Watkins’ story:

- the meaning of the word “whistleblower” usually generates a lot of negative feelings but in her case it is re-valued and is even connoted by a heroic sense. This is most probably a particular event, connected with the importance of the fraud and the large number of people involved by Enron collapse;

- Enron case has an outcome as unusual as favourable for the whistleblower. If whistleblowing usually involves the loss of job, home, marriage and so on, Sherron Watkins can be considered almost a privileged, because she kept her work at Enron as long as she wanted and she was later demanded as lecturer or speaker at business leadership conferences, graduate business schools and Christian groups, using Enron as an example of failed leadership;

- Sherron Watkins was the Enron whistleblower but other employees tried to blow the whistle on what was happening. For example Vince Kaminski, former Enron’s researcher, a bright and well-respected executive, first denounced the Raptors structures to his boss, Rick Buy, who was the Chief Risk Officer, but his concerns were paid off and his duties reduced, with the consequence that Andy Fastow appeared practically invincible. Also the treasurer of Enron, Jeff McMahon, pointed out the evident conflict of interest between Enron and Andy Fastow’s LJM but Jeff Skilling ended up the discussion by moving McMahon to a different department. These events show how difficult is to blow the whistle effectively and that just only in some cases it’s possible to change things in a corrupted reality;

- it’s important the way whistleblowing is made. To obtain more attention Sherron Watkins went directly to the Chairman and Chief Executive Officer, in order to try to
change radically the things; she went to Ken Lay and she spoke directly and quite aggressively, so that she could not be misunderstood;

- most people asked Watkins which, among the various accounting scandals, was the one that motivated her whistleblowing: surely it was when she was switched the position and immediately met the horrible accounting structure called “Raptors”. Most financial experts state that Enron was too over leveraged when Watkins acted and that her warnings were too late. However it’s remarkable how losses could be at least limited if, in Enron last days, the survival strategy would have been more rationally proactive instead of completely reactionary. This is put in evidence by the fact that in the last days Ken Lay had three choices: to perpetuate the fraud, to try a restatement with a crisis plan or, and this was the one Lay chose, to sweep the issues and expect the best;

- what happened at Enron was reasonably caused also by the environment of corruption and fraud inside the company. Ken Lay, in the “monumental” Enron Code of Ethics established a core set of values that included respect, integrity, communication and excellence; practically any communication could only be about good news. And Enron executives were the first to demonstrate that they didn’t give value to integrity: when you promote good performers who violate ethical issues you send an unequivocal message to all employees that the value system is secondary to make earnings or to win over new customers.

In conclusion, Sherron Watkins thinks that being a whistleblower can arouse a double loss, both of job and of reputation, because the risk is to be marked as a troublemaker. A shock to the system should derive from the introduction of an effective, independent and confidential reporting to third party, and the monetary damages because of unlawful termination should be so relevant for the companies to disincentive this conduct. Sherron Watkins tells she feels like “a lone fish in an ocean” because she recognises her story finished with an happy ending; she

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192 A “62 pages” Code explaining any kind of behaviour to be kept inside the company.
wasn’t vilified, she didn’t lose all the means to earn some income because of the lectures she is asked and the books she writes and she was not obliged to move her family to another city. Moreover Congressional reports and external auditors confirmed all her allegations and she was also named “Person of the Year” in 2002 by Time Magazine. But, although her case is maybe unique, in similar situations she would blow the whistle again.

6.2 Jeffrey Wigand, a man against the Tobacco Industry

On April 14, 1994, in the House of Representatives were held the so-called Waxman Hearings\textsuperscript{193}, in front of the Subcommittee on Health and Environment\textsuperscript{194}. During this hearing on the Regulation of Tobacco Products seven people among Chairmen, Presidents and Chief Executive Officers belonging the seven largest tobacco companies declared, under oath, they didn’t believe nicotine being an addictive. One of those was Thomas Sandefur, Chairman and Chief Executive Officer of the Brown and Williamson\textsuperscript{195}, at present the third largest tobacco company in the United States. The same Sandefur, one year earlier, had fired company’s Vice President of Research and Development, Jeffrey Wigand, alleging “communication problems”, but this is not the real cause why Jeffrey Wigand lost his job at Brown and Williamson.

Before joining Brown and Williamson, Jeffrey Wigand worked for several health care companies, like Pfizer\textsuperscript{196} and Johnson & Johnson\textsuperscript{197} and was also General Manager and Marketing Director at Union Carbide\textsuperscript{198} in Japan and Senior Vice President at Technicon Instruments\textsuperscript{199}. In December 1988 he was offered a job for the Brown and Williamson: it

\textsuperscript{193} From the name of the Member of Parliament who presided the subcommittee.
\textsuperscript{194} The above Committee is on Energy and Commerce.
\textsuperscript{195} Brown & Williamson was an American Tobacco Company producing cigarette brands. It was formerly headquartered in Louisville, Kentucky, until July 30, 2004 when R.J. Reynolds merged with it: from the transaction it was established a new publicly traded company, Reynolds American Inc..
\textsuperscript{196} Pfizer is a company founded in 1849 and headquartered in New York, at present it’s the world's largest research-based pharmaceutical company.
\textsuperscript{197} Johnson & Johnson is a global American pharmaceutical, medical devices and consumer packaged goods manufacturer founded in 1886 in New Brunswick, New Jersey.
\textsuperscript{198} Union Carbide is one of the oldest chemical and polymers companies in the United States.
\textsuperscript{199} Technicon Instruments is part of Technicon Corporation, which provides web-based software to manage product content, including complex CAD and product configurations.
seemed unusual to him that a tobacco company was looking for a bio-medic specialised in chemistry who had mostly worked in the health, but he was explained the company was trying solutions to reduce the toxicity of their cigarettes. To Jeffrey Wigand this appeared a good challenge and a work that could produce benefit for the community. In addition, it was a more than 300,000 dollars salary a year as Vice President of Research and Development (a sum of money that he had never earned in his life), so he accepted the job and he decided to move to Louisville, Kentucky.

His first meetings before and after the hiring at Brown and Williamson were with Alan Heard, the head of Research and Development for BAT industries (formerly British American Tobacco), the conglomerate owner of B&W (Brown and Williamson): Heard told Wigand the company wanted to develop a new cigarette that could compete with Premiere, a product by the competitor R.J. Reynolds Tobacco Company (RJR) characterised by a low level of tar. Wigand was attracted by the idea of such working and was proud to give proof of his research skills; moreover he was convinced that people will continue to smoke passively to any kind of legislation, so he was enthusiastic to provide smokers with something producing less risk for them: Wigand believed he could make the difference.

Only three months after the hiring, RJR withdrew Premiere from the market because the taste of the cigarettes resulted unpleasant and acrid to the public. Jeffrey Wigand is an instinctive person and immediately thought his position at B&W was not useful anymore, that there was no reason why a non-tobacco man should remain at the company. In addition, when he firstly made a tour of the lab, he was astonished due to the fact it was a very old dated one. Marie Brenner, on her article published on Vanity Fair quotes Wigand’s description: “The place looked like a high-school chemistry lab from the ‘50s with all sorts of old-fashioned smoking machines. There was no fundamental science being done.” It was almost inconceivable for a “man of science”, and his bewilderment increased as he knew about the absence of any

200 It was published on May 1996 issue.
toxicologist and any physicist in the staff: how could it be possible to study health tobacco aspects or fire safety without human and material means?!

Wigand was psychologically tried out, because while he was working for an important company who made him live in financial comfort, with a lovely house, with all insurance covered by the society (included a major medical insurance which allowed to get the best possible cares for his daughter’s health problems), at the same time he found himself working for a company where strange habits were widely diffused. In particular he early knew that B&W was aware of the dangers that company’s researches could cause and that they had organised an original method in order to avoid the disclosure or the discovery of sensitive information. The strategy implemented by Kendrick Wells, an attorney in legal department at B&W, was “to remove deadwood”201 and to make that employees didn’t make notes, memos or lists about company’s researches. Wigand also had to get used to company’s language, characterised by particular euphemisms like “increased biological activity” that, in reports, was a code to indicate cancer or other diseases.

About nine months after he was hired, Wigand was in Vancouver attending a meeting organised by BAT where top R&D executives of the subsidiaries had to discuss about health matters related to smoking and about the possibility to find a substitute for nicotine. From the meeting it was redacted 15-pages minutes, then distributed both to Wigand and to upper management: soon after Kendrick Wells called Wigand asking him to sign a 3-pages synopsis, a reduction of minutes previously distributed. The reason why B&W lawyers, like Kendrick Wells, were so concerned is that confidential files, evidences or other internal documents that could show some B&W tobacco products, such as Kools or Viceroyts, were unsafe, could have been produced in court as part of a lawsuit filed by a smoker or his surviving family.

Wigand describes B&W as “an incestuous society”202 where B&W people stayed always together, to dinners, to parties and so on, while B&W employees were about 500 in a city.

201 From Marie Brenner, The man who knew too much, Vanity Fair, May 1996.
Louisville, which it is not small (700,000 people of population). Many executives were smokers while, in private, they were often speaking about risks of smoking; the reason is that, at B&W, salary was good and benefits didn’t lack.

He started to update the dated scientific data, he bought new computer, he hired a physicist and a toxicologist and started studies on fire safety and ignition propensity. Wigand continued his studies believing they were the first held in the company and he continued to be inquisitive in the company, asking about eventual past studies on nicotine, pharmacology or biological studies or studies aiming to discover possible effect of nicotine on the central nervous system. Only when the paralegal Merrell Williams made public some documents about health researches conducted at BAT in Switzerland in the 1970s, Jeffrey Wigand understood that the top executives of the company knew about the health risks all along. Then he started to keep an extensive scientific diary, not conscious about how much it was going to be valuable (it’s not surprising that, when Dr. Wigand was fired, he never had back his scientific diary).

The pressure by the lawyers to intervene and to “sanitize” the documents grew up considerably: every time words as “less hazardous” or “safer” were eliminated. Wigand continued to complaint and he started to be accompanied by Kendrick Wells or other lawyers to major scientific meetings.

When working at B&W Wigand hoped to handle with executives like his former C.E.O at Johnson & Johnson James Burke, who used to enforce strict safety standards, such as in 1982 when he immediately recalled the shipments of Tylenol after a poisoning scare in 1982. And, at first, he believed Ray Pritchard was a man of honour, too, and he complained with him in private about Thomas Sandefur (later the company President) and about his concern that the project for a safer cigarette could be cancelled. In fact, having asked Sandefur about it, Wigand was told that he wouldn’t have to talk about safer cigarettes anymore, because this could have provoked problems with other products. As a consequence, Pritchard told Sandefur of Wigand’s complaints.
Wigand’s disapproval and also contempt for Sandefur rose in the following months because of some unpleasant considerations, such as the absolute ignorance about physical and chemical matters related to the products and, most of all, the avidity to make money without consideration of young people. In the above mentioned Marie Brenner’s article, Wigand relates a statement (not confirmed) by Sandefur: “You have to look at the age somebody starts smoking. If you don’t get them before they are 18 or 20, you never get him”. Obviously he got touched by Sandefur’s lack of interest and no sense of responsibility on the subject of teenagers and smoking and was really disturbed by it.

During his last year and a half of his staying at B&W, he began to be isolated and his problems on work were necessarily brought into private life (which has already a major additional problem related to his daughter Rachel’s serious illness). At work he started to be bad evaluated by B&W, accused to have also a difficulty in communication.

As he was told to abandon the idea to develop a new cigarette, he started to investigate the additives, the flavourings and the other compounds in B&W tobacco products. For example the glycerol, a chemical element used to keep the moisture of tobacco in the cigarettes, is normally harmless but its chemistry changes when burned in a cigarette because it creates “acrolein”, an extremely irritating substance, which has been proved interfere with the normal activity of the lungs and act like a carcinogen, even if it is not classified in this category. Despite the results on the researches on glycerol, the company continued to add glycerol to its products.

However another additive, the coumarin, led to the critical contrast between Jeffrey Wigand and Thomas Sandefur and compromised Wigand’s position at B&W. Coumarin is a flavouring that provides a sweet taste to tobacco products but is known to cause tumours to the livers of the mice. It was removed from B&W cigarettes but continued to be used in B&W’s Sir Walter Raleigh aromatic pipe tobacco. It was tried a transition to another similar flavour that would give the same taste without risking to cause the same diseases provoked by coumarin, but it was unsuccessful.
In the meantime news about potential damages by coumarin got worse: in his interview with Mike Wallace for the CBS programme “60 minutes” Wigand stated that he had received a report by independent researchers, part of a national toxic safety program, presenting the evidence that coumarin is really a carcinogen which causes various cancers. As soon as he knew about these data, Wigand decided to made out this substance immediately, but he was told that it could have been impossible because of the affecting of this action on sales, and he was advised to take care to his own business. But Wigand considered it inconceivable and prepared a memo for Thomas Sandefur indicating that he couldn’t, in conscience, continue with coumarin in a product as he was documented on lung-specific carcinogen. Sandefur replied Wigand to continue working on a possible substitute but, in the meantime, coumarin wouldn’t be removed not to affect the sales, and “that was his decision”\textsuperscript{203}.

As a consequence of the discussion had with Thomas Sandefur, Jeffrey Wigand wasn’t surprised when, on March 24\textsuperscript{th}, 1993, the newly promoted Chief Executive Officer Thomas Sandefur fired him, alleging poor communication skills and poor performance. However, when he was fired, Wigand’s contract was providing him severance pay and critical health benefits for his family, over all for his daughter’s very expensive daily health-care.

But some months after his firing, Wigand was cited by B&W and his severance and vital health benefits were cut off, because of an alleged violation of a confidentiality agreement. This event was devastating for Jeffrey Wigands’ life and had heavy consequences on his family, too. His job situation caused Wigand big stress and pressure on him was unfortunately widened to his family, which didn’t manage to support him. Wigand decided to sign a new, stricter, lifelong confidentiality agreement, so B&W settled the lawsuit and reinstated the critical health benefits.

Somehow the diatribe between Brown and Williamson and former Vice President of Research and Development Jeffrey Wigand echoed to Washington and attracted attention: in

\textsuperscript{203} From Jeffrey Wigand’s interview on CBS’ programme “60 minutes”, aired on February 4, 1996.
1994 the Food and Drug Administration\textsuperscript{204} was investigating the tobacco industry and questioned Dr. Wigand after notifying at B&W. Food and Drug Administration Commissioner David Kessler was interested to deepen knowledge about ammonia additives and nicotine-impact boosting. Even if being called to Washington raised his self-respect, unfortunately for Wigand, the investigation didn’t have immediate implications and, shortly afterwards, more problems came, probably connected to the fact that Wigand’s name started to circulate in anti-tobacco circles. At that time, he was believed an expert on the tobacco industry and even an ABC (American Broadcasting Company)’s law firm, Wilmer, Cutler & Pickering, hired him to defend the broadcast in a lawsuit filed by Philip Morris.

But, during April of the same year, he received two anonymous calls threatening him and his daughters. From Wigand’s diary, the first call: “Don’t mess with tobacco anymore. How are your kids?”; the second call: “Leave tobacco alone or else you’ll find your kids hurt. They’re pretty girls now.” Wigand was so frightened that started to carry a gun with him.

About one year earlier, in the spring of 1993, the journalist Lowell Bergman found a box containing some documents on the front steps of his house in Berkley, California. Bergman was an award-winning news producer at CBS (Columbia Broadcasting System) for the programme “60 minutes” and was specialised in investigative reporting on governmental and corporate misconduct. The box contained hundred of pages of material coming from the Philip Morris Company, with technical phrases, like “ignition propensity” that he couldn’t understand, so he asked his friend Andrew McGuire\textsuperscript{205} about someone who could explain him the sense of the papers. McGuire made Bergman the name of Jeffrey Wigand who had known during some meetings of a commission on fire safety in cigarettes in Washington to which some R&D tobacco companies’ responsible were part.

\textsuperscript{204} The Food and Drug Administration (FDA) is an agency of the U.S. Department of Health and Human Services responsible for regulating food, dietary supplements, drugs, biological medical products, blood products, medical devices, radiation-emitting devices, veterinary products, and cosmetics.

\textsuperscript{205} Director of Trauma Foundation at San Francisco Hospital.
Bergman tried for several weeks to contact Wigand in order to make sense on papers he had received and, particularly, he wanted not to talk with an anti-tobacco lawyer but with a chemist. In February 1994 he decided to go to Louisville and finally he convinced Wigand to talk to him. Since that moment Wigand’s life had changed as he was inspired to come forward as a whistleblower.

Wigand told Bergman he couldn’t talk about Brown and Williamson and accepted to analyse Philip Morris’ documents. After having read only few pages he discovered Philip Morris’ researches were much more advanced that B&W’s ones and, then, he found that Philip Morris was developing a project called Hamlet involving a fire-safe cigarette. And just some weeks later top executives of the seven largest tobacco companies testify, before Congress, that nicotine was not an addictive: in particular Sandefur’s attestation hurt Wigand who believed they were all liars, but he couldn’t express publicly his concerns for the risk to lose the medical insurance. He was in a moral outrage and started to drink again, like he had already made in the past.

It was in April that a lawyer from the Justice Department went to Louisville to take Wigand’s deposition on cigarette ignition but Wigand, who was also advised by a B&W’s lawyer, testified that there was no possibility to develop a safe cigarette and, as far as he knew, B&W didn’t commit fraud.

In January 1995 Jeffrey Wigand started to work as teacher with a 30,000 dollars per year salary and seemed to find some happiness. Meanwhile Bergman continued to push Wigand to talk, so Wigand showed him the confidentiality agreement he had signed with B&W. Bergman understood Wigand would need a lawyer and an anti-tobacco lawyer, Richard Scruggs, accepted to eventually represent him. In May Wigand went to New York with his wife to release a preliminary interview for “60 minutes”, but he didn’t tell her wife about it causing a further increase of tension in their marriage. Wigand released the interview and CBS’ staff started to edit the programme.
However there was the problem of the confidentiality agreement and the risk to be sued for Wigand, so Bergman had the idea to make Wigand’s statement possible to be aired on the programme. At this aim, Wigand was called to testify, in the State of Mississippi, in a lawsuit seeking reimbursement for the cost of smoking-related illness, so that he couldn’t refuse to answer all questions covered by his confidentiality agreement. But, before going to Mississippi, he was given a restrictive order by the State of Kentucky to release any kind of testimony which could violate the agreement signed with B&W.

Wigand’s dilemmas increased severally because going to Mississippi to release that deposition could mean a risk of being arrested as soon as he came back to Louisville: his decision was controversial, but, after lots of ethical doubts, he went to Pascagoula on November 25, 1995, and got the facts out answering to the questions by Ron Motley, the lead counsel for the plaintiffs, regardless of continuous interruptions by tobacco lawyers.

But, since September, other problems came up to block Wigand’s interview from being aired and his act of whistleblowing from reaching the public: the owner of CBS Corporation, Larry Tisch, was at the same time the President of the Lorillard tobacco company206 and, although he couldn’t have power over the quality of the programmes of the subsection CBS News, he managed to stop the broadcasting of the interview. Other CBS News executives were pressed by the fact that the possible airing of the interview to Jeffrey Wigand could create some problems with the present acquisition of the CBS Corporation by Westinghouse Electric207: as a matter of fact, the acquisition of the company could be compromised if CBS was sued by Brown & Williamson for “tortious interference” in making Jeffrey Wigand to break his confidentiality agreement. CBS News decided to air an alternative version of the show “60 minutes” on the tobacco industry without Wigand’s interview.

206 Lorillard Tobacco Company is the 18th oldest company in the United States and the third largest American tobacco company. It markets cigarettes under the brand names Newport, Maverick, Old Gold, Kent, True, Satin and Max.
207 The Westinghouse Electric Corporation was an organisation founded by George Westinghouse in 1886 as Westinghouse Electric & Manufacturing Company. The company purchased CBS in 1995 and was renamed CBS Corporation in 1997.
Bergman was wrathful with CBS News editors, as in Marie Brenner’s article\textsuperscript{208} he accused them for killing the show. He was disappointed for what was happening and he was really embarrassed to communicate Wigand, who had blown the whistle on the powerful tobacco industry compromising his career and destroying his family life, the network’s decision not to make public his interview.

Problems to Wigand were yet to come: Brown and Williamson had hired public relation man John Scanlon in order to deeply and completely sift Jeffrey Wigand’s life in order to discover any thing that could put in a bad light their former employee: this is the technique adopted by many organisations to defence against a whistleblower, to destroy the accuser. The entire life of Wigand was scrutinised and Brown and Williamson worked out a 500-page dossier titled “The Misconduct of Jeffrey S. Wigand in the Public Record”, divided into categories: Unlawful Activity; Possible False or Fraudulent Claims for Stolen, Lost or Damaged Property; Lies on Wigand’s Résumés; Wigand’s Lies About His Residence; Wigand’s Lies Under Oath; Other Lies by Wigand; Mental Illness. The final dossier was offered to Wall Street Journal.

Bergman was informed about the existence of this dossier and was scared about the possibility his whistleblower was a liar, because this fact would have made void any credibility of the show (Wigand was even defined “Master of Deceit\textsuperscript{209}” in B&W’s report). So he advised Richard Scruggs to hire the investigator Jack Palladino\textsuperscript{210} to make a check about B&W’s allegations in order to deny them. Wall Street Journal delayed the publication of the article on Jeffrey Wigand waiting for the response on the charges.

On February 1, 1996, Suein L. Hwang and Milo Geyelin, staff reporters of the Wall Street Journal, published an article regarding the smear campaign on Dr. Jeffrey Wigand. In this article it was described how B&W made out its retaliation paying a blue-chip private investigation firm to find out misstatements in Wigand’s past resumes, driver’s license applications and other

\textsuperscript{208} Marie Brenner, \textit{The man who knew too much}, Vanity Fair, May 1996.
\textsuperscript{209} CBS, “60 Minutes”, episode aired on February 4, 1996.
\textsuperscript{210} Jack Palladino is a private investigator best known for being hired by the Bill Clinton presidential election committee to find and discredit women Clinton had been intimate with.
complaints about personal purchases. In addition, B&W hired a scientific consultant to focus on Wigand’s dissertations.

However, through independent researches, Wall Street Journal found out that many of the serious allegations were characterised by scant or contradictory evidence and resulted to be untrue. The work by B&W was very deep, because evidence of past falsehoods were not restricted to the relevant subject of the testimony. Moreover it’s evident that probably a court would have not admitted all B&W’s evidences, but the company’s aim was to show Wigand as a pathological liar.

In particular Brown and Williamson used some statements recorded in a tape by Hindman Company, the Louisville firm paid by Brown and Williamson to help Wigand in finding a new job. From this tape containing an interview to Wigand on his past experiences, according to B&W, some lies by their former researcher were obviously raising.

An example of the incompleteness of the evidences blamed by the company is in an exhibit contained in the huge dossier: they charged Wigand had stated he was a “64 Olympian in judo”, “an alternate to the Munich Games” and a “1966 founder of the United States Judo Association” as well as “member of its Medical Committee”. B&W quoted a judo-association representative as saying the group was founded in 1954 and it didn’t have a medical committee. Although Wigand was not actually a competitor in the Olympic Games, he was at the Olympics in Tokyo in 1964 to spar with U.S. athletes and helped training the athletes for Munich in 1972. As to the statements over United States Judo Association, association’s former president Philip S. Porter supported Wigand by saying the association changed name several times up to the final just in 1966; in addition he stated several committees were established during the years, although he didn’t remember exactly about them. However he surely remembered Jeffrey Wigand to have been one of the earliest “black-belt” members.

Charges in report are several, such as the one about Wigand’s claim to have been a surgical nurse, but New York records were not certifying him as licensed or registered practical nurse. But also this charge was not accurate because the Human-Resources department of one of the
hospital listed by Wigand, Our Lady of Victory in Buffalo, confirmed he had worked there in
the 1960s as an operating-room technician, an unlicensed attendant standing by the surgeons,
and that in those years distinctions between nurses and attendants were quite undefined.

The heaviest blames regarded two facts Brown and Williamson investigators found out in the
files of Jefferson County District Court in Louisville. The first one was that Wigand had been
arrested and pleaded guilty to shoplifting a bottle of Wild Turkey whiskey at a local liquor store.
However the judge Deborah Deweese said Wigand wasn’t pleaded guilty after he completed 20
hours of volunteer work, and Richard Scruggs, Wigand’s lawyer, added the incident was a result
of a misunderstanding occurred when Wigand went to his car to retrieve some money to pay the
liquor.

The other charge was even more hard because it was regarding a complaint by Wigand’s
wife alleging spousal abuse: in the court documents was indicated Wigand should have attended
weekly anger-control counselling and continued psychotherapy to have the charge dismissed,
but it’s not clear if counselling was a requirement or not to dismiss the charge. B&W’s dossier
titled this episode “Wigand beats his wife” while Mr. Scruggs denied it, on the contrary stating
his client voluntarily went into counselling after a dispute with his wife.

Finally Wall Street Journal found almost all charges were at least contradictory and surely
not accurate, such as another one blaming Wigand to have falsely claimed the winning of a
YMCA National Service to Youth Leadership Award in 1971, alleging a statement by “Don
Keiser” who denied the existence of such award. B&W’s attempt to destroy Wigand’s
credibility seemed somewhat compulsory in this circumstance as the head of YMCA’s Teen
Leadership Program name was Don Kyzer (and not “Keiser”) and he stated he was never asked
about that award, and he added he arrived there in 1991 and that he couldn’t know about
eventual awards in the 1970’s. In addition, YMCA’s Buffalo executive John Murray said that in
1971 there was a Service to Youth Leadership Award to active volunteers but the files related to
the 1970’s were largely destroyed by a flood.
The smear campaign against Dr. Wigand, as far as aggressive and difficult to tolerate, didn’t touch his credibility. Just three days after the Wall Street Journal’s article denying B&W’s allegations against their former employee was published, and even after Dr. Wigand’s Mississippi testimony was made public, CBS reconsidered its position and allowed the show to run. On February 4, 1996, “60 Minutes” show including Jeffrey Wigand’s interview was finally shown with an incredible success of audience.

Jeffrey Wigand’s experience is an emblematic case of the dilemmas a whistleblower has to face when deciding to disclose a wrongdoing, and in particular it shows the large number of acts of retaliation a big organisation can enforce to protect its misconduct’s secrets. But it’s also the example of how important can be the role of insiders for the society. Jeffrey Wigand was the first whistleblower to come out from an important position with relevant information on tobacco industry. Not longer after Wigand’s interview another whistleblower came out from a tobacco company, Ian Udyess from Philip Morris. When asked about his role, Udyess stated his role was relatively minor, and that Wigand was the person with real courage.

Although he lost his job, the possibility of further career and, most of all, the unity of his family (the level of stress he suffered broke up his family and force Lucretia Wigand to ask for divorce), Jeffrey Wigand couldn’t have continued to work at Brown and Williamson after the discovery of such wrongdoing. In the famous interview at “60 Minutes” Mike Wallace asked: “You wish you hadn’t come forward? You wish you hadn’t blown the whistle?” Jeffrey Wigand answered: “There are times I wish I hadn’t done it. But there are times that I feel compelled to do it…If you asked me if I would do it again or if it, do I think it’s worth it. Yeah. I think it’s worth it…I think in the end people will see the truth.”

And Wigand’s behaviour is more and more remarkable because within 1993 and 1995 in the United States there wasn’t a whistleblowing legislation providing protection for corporate whistleblowers (Sarbanes-Oxley Act was enhanced in 2002), so his actions are fruits only of his bravery and of his ethical values, which prevailed on a more rational and economical satisfaction.
7. Conclusions

As a result of what has been analysed in this work, whistleblowing seems to be a useful necessity for our economic reality. The main aim of whistleblower provisions is to create some legal instruments to protect those individuals who disclose insider information about possible wrongdoing carried out within an organisation. The activity of whistleblowers points to bring out some information about events occurred in a company, events that public will not know, if a company’s employee would have not come out making a disclosure of this internal information.

In the Anglo-Saxon world, in particular in the United States, whistleblowing is well diffused, especially in the public sector where governmental employees have been given the opportunity to disclose information about wrongdoing for several years. However, also in the U.S., an important legislation regarding whistleblower protection for corporate employees is pretty recent and is essentially due to the huge corporate scandals which hit American society both from an economic and a moral point of view.

Shortly after Enron and WorldCom financial cracks, a new law has been carried out, which provides an entire reformation of the legislation in order to better protect the public. The Sarbanes-Oxley Act of 2002 is also known as the Public Company Accounting Reform and Protection Act and it is a prompt response to major corporate and accounting scandals. These scandals resulted in a strong decline of public trust in accounting and reporting practices, with tremendous consequences in the economic world. The entity of the cracks and the large number of people involved by the bankruptcies of these big corporations, forced Congress to a wide-ranging reform, directed to establish more enhanced standards for U.S. publicly traded companies’ boards, management and public accounting firms. Security and Exchange Commission was appointed to implement the new rules making companies to comply with the new legislation, which covers other relevant issues, such as corporate government and auditor independence.
The Act consists of eleven titles relating to the different sectors: Title VIII is called “Corporate and Criminal Fraud Accountability” and it describes specific criminal penalties for fraud by manipulation, destruction, alteration of financial records and interference with investigators; but it is relevant also because it provides certain protection for whistleblowers.

As a matter of fact, it was evident how the Security and Exchange Commission, which is given great power, couldn’t prevent anyway huge financial cracks. The problem was that “white collars” were not controlled in the ordinary administration of the company and they were free to commit wrongdoing by bringing out companies’ activity.

Anyway, in bigger companies, employees are given more chances of discovering the commission of a fraud or other crimes; and the more relevant and wide is the entity of the misconduct, the more people should be involved. The solution in order to prevent the commission of white collar crimes by companies’ executives is to raise the possibilities that these conducts are promptly discovered. So it is necessary a protection for whistleblowers who come out from the organisation disclosing the wrongdoing.

The first question is how is it possible that in big organisations frauds or other crimes are carried out without any advice by anyone. The answer is that sometimes it is really impossible to discover it if a manager has sufficient powers to commit it in secret; in most cases the wrongful conduct is discovered, but, anyway, potential whistleblowers risk too much by disclosing what they know.

The legislative intervention provides whistleblowers a protection against any form of retaliation their employers can perpetrate. The discipline provided by the whistleblower provisions of the Sarbanes-Oxley Act creates a completely new situation compared to the past. The SOX describes a precise procedure for complaints and investigations and terms to defence given to the employer are so strict to make the position of the employer himself difficult.

In addition, the range of whistleblower’s protected activities is wide, protection is given toward several kinds of retaliation by the boss. Damages awarded to the whistleblowers, if the law is correctly applied, provide them to recover the situation as it was before the complaint.
However the critical point regards the burden of proof that shifts from the employee to the employer who has to bring evidence of his innocence: this extremely strict provision follows the guidelines given by the whole Sarbanes-Oxley Act, which seems to be very punitive for companies, binding them to adopt lot of restrictions in order to avoid any further scandal. And even the sanctions that have to be applied to retaliating employers are really severe.

Therefore the American legislation creates a favourable instrument for whistleblowers who, for the first time, have a safe possibility to bring out illegal activities being protected by the law against retaliation; on the contrary probably this system is even too punitive for employers who have the burden to proof their innocence. That’s the way American society historically reacts to events that considerably hurt public conscience, with strong and efficient measures in order to avoid the repetition of bad events.

This is completely different from Italian and continental European culture: our society has always granted the presumption of innocence, and it’s difficult to bring the proof of misconduct. In Italy sanctions to white collar criminals are really lower than the American ones and not much enforced. The high percentage of impunity, connected with the possibility to retaliate employees who disagree with executives’ conduct, allows a corporate climate which unfortunately encourages the commitment of wrongdoing and it’s unusual to find a person who tries to bring out exploit of illegalities.

In Italy more protection is given to the presumed innocent (in this case the employer) rather than to victims or damaged people (in this case the public which could suffer the consequence of possible wrongdoings).

Moreover, whistleblowing, as it is regulated in the American legislation, contrasts with other European Union laws binding for Member States, such as the Data Protection Laws which compel to make knowledge people reported that their data are being processed: in a whistleblower case this involves to communicate the employer that someone complained somehow about his behaviour.
United Kingdom’s Public Interest Disclosure Act seems to be a more proportional legislation: it offers a complete provision of the aspects related to whistleblowing discipline, giving rights to people who want to come out and raise personal concerns without establishing too strict defensive duties to the employer; in the United Kingdom it’s even established a specific organisation, Public Concern at Work, to give advice to people having any kind of doubts about whistleblowing, such as the prescribed regulators or other addressees to whom is possible to disclose, the terms of whistleblowing and the range of protected activities and so on.

In conclusion whistleblowing is a phenomenon that in a democratic society has to be promoted because it protects people who, in conscience and with a praiseworthy behaviour, decide to make the community aware that some harm or some risk could damage them. People like Sherron Watkins and Jeffrey Wigand have absolutely to be helped. In a cultural context where corporations’ aim is often directed to profit without taking regard of third parties, a protection or even a prize has to be given to people who risk on their own damaging consequences to their career and family.

And the problem regards also the financial world, because it’s evident how the trust that people give to the companies will decrease if they risk losing everything as a consequence of big organisations’ cracks. Code of Ethics are not an efficient as executives themselves don’t take care of them; if whistleblowers are able to point out to the public the wrongdoing, transparency and financial ethical conducts are a logical consequence and top executives’ behaviour will be honest as the public has the possibility to scrutinise them.
Appendix A

SOX WHISTLEBLOWER STATUTE

Corporate and Criminal Fraud Accountability Act
Sec. 806, Sarbanes-Oxley Act of 2002
Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud
18 U.S.C. 1514

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES-No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal Law relating to fraud against shareholders, when the information or assistance is provided to or the investigations is conducted by-

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or
(C) a person with the supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION-

(1) IN GENERAL - A person who alleges discharge or another discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by-

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of a claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE-

(A) IN GENERAL - An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION- Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF- An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTES OF LIMITATION- An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) REMEDIES-

(1) IN GENERAL- An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
(2) COMPENSATORY DAMAGES- Relief for an action paragraph (1) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the
discrimination;

(B) the amount of back pay with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including
litigation costs, expert witness fees, and reasonable attorney fees

(d) RIGHTS RETAINED BY EMPLOYEE- Nothing in this section shall be deemed by
diminish the rights, privileges, or remedies of any employee under any Federal or State law, or
under any collective bargaining agreement.

Corporate Responsibility

Sec. 301, Sarbanes-Oxley Act of 2002

Audit Committee

15 U.S.C. 78f(m)(4)

(4) COMPLAINTS-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;

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding
questionable accounting or auditing matters.

Corporate Responsibility

Sec. 307, Sarbanes-Oxley Act of 2002

Rules of Professional Responsibility for Attorneys

15 U.S.C. 7245
Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting for minimum standards of professional conduct for attorneys appearing and practicing before Commission in any way in the representation of issuers, including a rule-(1) requiring an attorney to report of a material violation of securities law 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); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors, not employed directly or indirectly by the issuer, or to the board of directors.

Obstruction of Justice

Sec. 1107 of Sarbanes-Oxley

Retaliation Against Informants

18 U.S.C. 1513(e)

(d) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Sec. 3(b)(1) of Sarbanes-Oxley

Enforcement

15 U.S.C. 7202(b)(1)
(b)(1) A Violation by any person of this Act [the Sarbanes-Oxley Act], any rule or regulation of the Commission issued under this Act, or any rule of a Board shall be treated for all purposes in the same manner as a violation of the Security Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued there under, consisted with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.

Aviation Investment and Reform Act
for the 21st Century

Administrative Provisions

49 U.S.C. 42121(b)

[Incorporated by reference into 18 U.S.C. § 1514A(b)(2)(A) and (C)]

42121(b) Department of Labor Complaint Procedure. (1) Filing And Notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date of which such violation occurred, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; Preliminary Order.

(A) In general. Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the
Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary’s findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary’s findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation of the complainant may file objection to the findings or preliminary order, or both, and request a hearing of the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.

(i) **Required Showing by Complainant.** The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1), through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) **Showing by Employer.** Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) **Criteria For Determination by Secretary.** The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior
described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) **Prohibition.** Relief may not be ordered under subparagraph (A) if employer demonstrates by clear and convincing evidence that the employer would have taken the same personnel unfavorable action in the absence of that behavior.

(3) **Final Order**

(A) **Deadline For Issuance; Settlement Agreements.** Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief by this paragraph or denying the complaint. At any time before the issuance of a final order, a proceeding under this subsection may be terminated on the basis of the settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) **Remedy.** If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with a compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.
(C) *Frivolous complaints.* If the Secretary of Labor that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorneys fee not exceeding $1,000.

(4) *Review*

(A) *Appeal to Court of Appeals.* Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) *Limitation on Collateral Attack.* An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) *Enforcement of Order by Secretary of Labor.* Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) *Enforcement of order by Parties.*

(A) *Commencement of Action.* A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.
(B) **Attorney fees.** The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.
Appendix B

PUBLIC INTEREST DISCLOSURE ACT 1998

PART IV

PROTECTED DISCLOSURES

Meaning of “protected disclosure”

43A. In this Act a “protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Disclosures qualifying for protection

43B. (1) In this part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Disclosure to employer or other responsible person.

43C. (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than this employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Disclosure to legal adviser.

43D. A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

Disclosure to Minister of Crown.

43E. A qualifying disclosure is made in accordance with this section if

(a) the worker’s employer is

(i) an individual appointed under any enactment by a Minister of the Crown, or
(ii) a body any of whose members are so appointed, and

(b) the disclosure is made in good faith to a Minister of the Crown.

Disclosure to prescribed person.

43F. (1) A qualifying disclosure is made in accordance with this section if the worker

(a) makes the disclosure in good faith to a person prescribed by an order made by the
    Secretary of State for the purposes of this section, and

(b) reasonably believes

   (i) that the relevant failure falls within any description of matters in respect of
       which that person is so prescribed, and

   (ii) that the information disclosed, and any allegation contained in it, are
        substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or
    descriptions of persons, and shall specify the descriptions of matters in respect of which each
    person, or persons of each description, is or are prescribed.

Disclosure in other cases.

43G. (1) A qualifying disclosure is made in accordance with this section if

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it,

       are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the condition in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be

       subjected to a detriment by his employer if he makes a disclosure to his employer or in

       accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

Disclosure of exceptionally serious failure.

43H. A qualifying disclosure is made in accordance with this section if
(a) the worker makes the disclosure in good faith,
(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) the relevant failure is of an exceptionally serious nature, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Contractual duties of confidentiality.

43J. (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker’s contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

Exception of meaning of “worker” etc. for Part IVA.

43K. (1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who

(a) works or worked for a person in circumstances in which

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person’s business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

B5
(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made
(i) by a Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or
(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than
(i) under a contract of employment, or
(ii) by an educational establishment on a course run by that establishment;
and any reference to a worker’s contract, to employment or to a worker being “employed” shall be construed accordingly.

(2) For the purposes of this Part “employer” includes
(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,
(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and
(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section “educational establishment” includes any university, college, school or other educational establishment.

Other interpretative provisions.

43L. (1) In this Part
“qualifying disclosure” has the meaning given by section 43B;
“the relevant failure”, in relation to a qualifying disclosure, has the meaning given by section 43B(5).
(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

Right not to suffer detriment.

2. After section 47A of the 1996 Act there is inserted

“Protected disclosures”

47B. (1) A worker has the right not to be subjected to any detriment by any act, or disclosure any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to dismissal, this section does not apply where

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker’s contract”, “employment” and “employer” have extended meaning given by section 43K.

Complaints to employment tribunal.

3. In section 48 of the 1996 Act (complaints to employment tribunals), after subsection (1) there is inserted

“(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.”
Limit on amount of compensation

4. (1) Section 49 of the Act (remedies) is amended as follows

(2) At the beginning of subsection (2) there is inserted “Subject to subsection (6)”.

(3) After subsection (5) there is inserted

“(6) Where

(a) the complaint is made under section 48(1A),

(b) the detriment to which the worker is subjected is the termination of his worker’s contract, and

(c) that contract is not a contract of employment,

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A.”

Unfair dismissal.

5. After section 103 of the 1996 Act there is inserted

“Protected disclosure.

103A. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that employee made a protected disclosure.”

Redundancy.

6. After subsection (6) of section 105 of the 1996 Act (redundancy) there is inserted

“(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.”

Exclusion of restrictions on right not to be unfairly dismissed.
7. (1) In subsection (3) of section 108 of the 1996 Act (cases where qualifying period of employment not required), after paragraph (f) there is inserted

“(ff) section 103A applies,”

(2) In subsection (2) of section 109 of the 1996 Act (disapplication of upper age limit), after paragraph (f) there is inserted

“(ff) section 103A applies,”.

Compensation for unfair dismissal.

8. (1) In section 112(4) of the Act (compensation for unfair dismissal) after “sections 118 to 127A” there is inserted “or in accordance with regulations under section 127B”.

(2) In section 117 of that Act (enforcement of order for reinstatement or re-engagement)
(a) in subsection (2) after “section 124” there is inserted “and to regulations under section 127B”, and
(b) in subsection (3) after “and (2)” there is inserted “and to regulations under section 3127B”.

(3) In section 118 of that Act (general provisions as to unfair dismissal), at the beginning of subsection (1) there is inserted “Subject to regulations under section 127B,”.

(4) After section 127A of the 1996 Act there is inserted

“Dismissal as a result of protected disclosure.

127B. (1) This section applies where the reason (or, if more than one, the principal reason)
(a) in a redundancy case, for selecting the employee for dismissal, or
(b) otherwise, for the dismissal, is that specified in section 103A.

(2) The Secretary of State may by regulation provide that where this section applies any award of compensation for unfair dismissal under section 112(4) or 117(1) or 117(3) shall, instead of being calculated in accordance with the provisions of sections 117 to 127A,
consist of one or more awards calculated in such manner as may be prescribed by the regulations.

(3) Regulations under this section may, in particular, apply any of the provisions of sections 117 to 127A with such modifications as may be specified in the regulations.”

Interim relief.

9. In sections 128(1)(b) and 129(1) of the 1996 Act (which relate to interim relief) for “or 103” there is substituted “, 103 or 103A”.

Crown employment.

10. In section 191 of the 1996 Act (Crown employment), in subsection (2) after paragraph (a) there is inserted

“(aa) Part IVA,”.

National security.

11. (1) Section 193 of the 1996 Act (national security) is amended as follows.

(2) In subsection (2) after paragraph (b) there is inserted

“(bb) Part IVA,

(bc) in Part V, section 47B,”.

(3) After subsection (3) of that section there is inserted

“(4) Part IVA and sections 47B and 103A do not have effect in relation to employment for the purposes of the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.”

Work outside Great Britain.

12. (1) Section 196 of the 1996 Act (employment outside Great Britain) is amended as follows.
(2) After subsection (3) there is inserted

“(3A) Part IVA and section 47B do not apply to employment where under worker’s contract
he ordinarily works outside Great Britain.”

(3) In subsection (5), after “subsections (2)” there is inserted “, (3A)”. 

**Police officers.**

13. In section 200 of the 1996 Act (police officers), in subsection (1) (which lists provisions
of the Act which do not apply to employment under a contract of employment in police service,
or to persons engaged in such employment)

(a) after “Part III” there is inserted “, Part IVA”, and

(b) after “47” there is inserted “, 47B”.

**Remedy for infringement of rights.**

14. In section 205 of the 1996 Act (remedy for infringement of certain rights) after
subsection (1) there is inserted

“(1A) In relation to the right conferred by section 47B, the reference in subsection (1) to an
employee has effect as a reference to a worker.”

**Interpretative provisions of 1996 Act.**

15. (1) At the end of section 230 of the 1996 Act (employees, workers etc) there is inserted

“(6) This section has effect subject to sections 43K and 47B(3); and for the purposes of Part
XIII so far as relating to Part IVA or section 47B, “worker”, “worker’s contract” and, in
relation to a worker, “employer”, “employment” and “employed” have extended meaning
given by section 43K.”

(2) In section 235 of the 1996 Act (other definitions) after the definition of “position” there
is inserted

““protected disclosure” has the meaning given by section 43A,”.
Dismissal of those taking part in unofficial industrial action.

16. (1) In section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal of those taking part in unofficial industrial action), in subsection (1A) (which provides that the exclusion of the right to complain of unfair dismissal does not apply in certain cases)

(a) for “on 103” there is substituted “, 103 or 103A”, and

(b) for “and employee representative cases)” there is substituted “employee representative and protected disclosure cases)”.

Corresponding provision for Northern Ireland.

17. An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which states that it is made only for purposes corresponding to those of this Act

(a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament), but

(b) shall be subject to annulment in pursuance of resolution of either House of Parliament.

Short title, interpretation, commencement and extent.

18. (1) This Act may be cited as the Public Interest Disclosure Act 1998.

(2) In this Act “the 1996 Act” means the Employment Rights Act 1996.

(3) Subject to subsection (4), this Act shall come into force on such day or days as the Secretary of State may by order made by statutory instrument appoint, and different days may be appointed for different purposes.

(4) The following provisions shall come into force on the passing of this Act

(a) section 1 so far as relating to the power to make an order under section 43F of the 1996 Act,
(b) section 8 so far as relating to the power to make regulations under section 127B of the 1996 Act,

(c) section 17, and

(d) this section.

(5) This Act, except section 17, does not extend to Northern Ireland.
Appendix C

SHERRON WATKINS’ FIRST ANONYMOUS MEMO TO ENRON
C.E.O. KEN LAY

Dear Mr. Lay,

Has Enron become a risky place to work? For those of us who didn't get rich over the last few years, can we afford to stay?

Skilling's abrupt departure will raise suspicions of accounting improprieties and valuation issues. Enron has been very aggressive in its accounting--most notably the Raptor transactions and the Condor vehicle. We do have valuation issues with our international assets and possibly some of our EES MTM positions.

The spotlight will be on us, the market just can't accept that Skilling is leaving his dream job. I think that the valuation issues can be fixed and reported with other good will write-downs to occur in 2002. How do we fix the Raptor and Condor deals? They unwind in 2002 and 2003, we will have to pony up Enron stock and that won't go unnoticed.

To the layman on the street, it will look like we recognized funds flow of $800 million from merchant asset sales in 1999 by selling to a vehicle (Condor) that we capitalized with a promise of Enron stock in later years. Is that really funds flow or is it cash from equity issuance?

We have recognized over $550 million of fair value gains on stocks via our swaps with Raptor. Much of that stock has declined significantly--Avici by 98 percent from $178 million, to $5 million; the New Power Company by 80 percent from $40 a share, to $6 a share. The value in the swaps won't be there for Raptor, so once again Enron will issue stock to offset these losses. Raptor is an LJM entity. It sure looks to the layman on the street that we are hiding losses in a related company and will compensate that company with Enron stock in the future.
I am incredibly nervous that we will implode in a wave of accounting scandals. My eight years of Enron work history will be worth nothing on my resume, the business world will consider the past successes as nothing but an elaborate accounting hoax. Skilling is resigning now for "personal reasons" but I would think he wasn't having fun, looked down the road and knew this stuff was unfixable and would rather abandon ship now than resign in shame in two years.

Is there a way our accounting guru's can unwind these deals now? I have thought and thought about a way to do this, but I keep bumping into one big problem--we booked the Condor and Raptor deals in 1999 and 2000, we enjoyed wonderfully high stock price, many executives sold stock, we then try and reverse or fix the deals in 2001, and it's a bit like robbing the bank in one year and trying to pay it back two years later. Nice try, but investors were hurt, they bought at $70 and $80 a share looking for $120 a share and now they're at $38 or worse. We are under too much scrutiny and there are probably one or two disgruntled "redeployed" employees who know enough about the "funny" accounting to get us in trouble.

What do we do? I know this question cannot be addressed in the all-employee meeting, but can you give some assurances that you and Causey will sit down and take a good hard objective look at what is going to happen to Condor and Raptor in 2002 and 2003?
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Dopo cinque anni di studi mi sembra doveroso ringraziare tutte le persone che mi hanno aiutato e mi sono state vicine sia nei momenti più difficili ma soprattutto nelle numerose occasioni di gioia.

Innanzitutto un ringraziamento va alla mia relatrice, la professoressa Claudia Rimoldi, per la sua disponibilità e la sua gentilezza.

Un ringraziamento particolarissimo alla mia adorata zia Marina per il grande aiuto e la sua costante presenza, sia ora nella preparazione della mia tesi ma soprattutto in tutti i momenti importanti della mia vita.

Grazie a Viviana che mi fa sentire ogni giorno l'uomo migliore del mondo.

Grazie a Filippo e Letizia che sono le persone che ho più vicine e mi fanno sentire il loro affetto quando conta.

Grazie a mia nonna Rosida che mi mette sempre in cima ai suoi pensieri e alle sue preghiere.

Grazie a Marco, Matteo, Laura ed Edoardo, i miei amici da sempre e per sempre.

Grazie a Pietro, Marco, Marianna, Elisa e tutti gli altri compagni di università per gli stupendi cinque anni che abbiamo vissuto insieme.

Un grazie ancora più speciale a Pietro che mi ha fatto conoscere Mattia, Ale, Bruce, Rubens, Maria, Vale, Anna, Laura e tanti altri con i quali trascorro i momenti più festosi.

Grazie a tutta la mia meravigliosa famiglia fatta di mille zii e cugini.

E grazie soprattutto ad Enzo e Lidia, i migliori genitori che un figlio possa avere. Non mi hanno mai fatto mancare niente, hanno sempre creduto in me e quello che sono ora lo devo soprattutto a loro…grazie di cuore!!!