

Fair game or foul play?

▶ Tackling the rising tide of global whistleblowing

Global whistleblowing survey 2014

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Introduction

Despite Edward Snowden and Chelsea Manning bringing whistleblowing into the public consciousness, many corporations appear to have no internal procedures to handle employee concerns, according to a global survey by Freshfields Bruckhaus Deringer.

The Snowden and Manning revelations generated worldwide media interest, while recent whistleblowing cases involving companies like GlaxoSmithKline (GSK) have proved the private sector is not immune. Yet a Freshfields survey of more than 2,500 middle- and senior-level managers has found that a significant proportion of companies don't appear to have a formal whistleblowing policy in place, despite the legal and financial risks of an employee taking their concerns to a regulator or the press.

Investigations launched on information provided by whistleblowers saw GSK agree to a \$3bn settlement after pleading guilty to promoting its drugs for unapproved uses, while a multinational bank paid almost \$2bn to avoid prosecution following allegations of money-laundering. Yet almost a quarter of those polled (24.1 per cent) said their company has no formal whistleblowing procedure, and almost three in 10 (29.4 per cent) said their company actively discourages whistleblowing. This is despite almost half of those polled (46 per cent) saying they would consider blowing the whistle 'if relevant', and more than one in 10 (11.8 per cent) saying they have been involved in whistleblowing.

The survey also reveals that:

- ▶ the majority of respondents (64.4 per cent) would report a colleague if they suspected them of committing a criminal offence;
- ▶ more than a quarter (26 per cent) said they would go straight to a regulator if the wrongdoing wasn't handled properly by their company; and
- ▶ more than one in five (21.5 per cent) said they thought the average employee would expect managers to treat whistleblowers less favourably.

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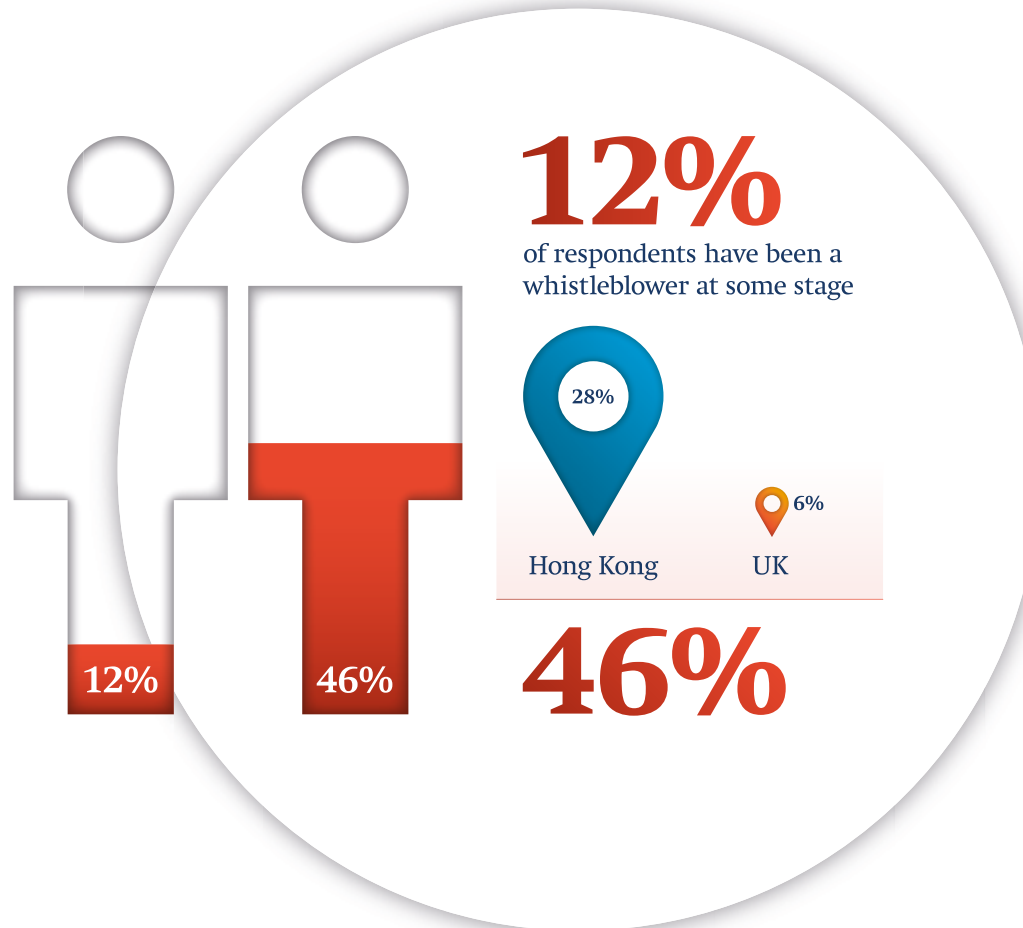
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Whistleblowing: the cultural gap

In Europe, fewer respondents have experience of blowing the whistle than those in Asia. More than a third of French respondents say they would never consider airing their concerns. And the channels whistleblowers would use to air their concerns also vary according to geography. So what's behind these regional variations?

More than one in 10 global respondents (11.80 per cent) have been a whistleblower at some stage, with 13.1 per cent saying they have experienced a colleague whistleblowing. But almost three in 10 respondents polled in Hong Kong (27.9 per cent) said they have been a whistleblower, compared to just 6.2 per cent in the UK. More than a third of respondents in France (36.9 per cent) and almost a quarter in Germany (23.2 per cent) said they would never consider becoming a whistleblower, compared to just 8.4 per cent in the US.



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Why the reluctance in Europe?

These differences are partly the result of local corporate culture says Adam Siegel, a dispute resolution lawyer and Freshfields' US managing partner. 'The Snowden and Manning cases mean whistleblowing is now part of the vernacular in the US,' he says. 'Although people's opinion of what Snowden did is informed by their politics, whistleblowing comes up in conversation more than it did before. People are desensitised now to the idea that you shouldn't be a tattle-tail.'

By contrast, the Snowden and Manning cases haven't had the same impact in France. 'There is a cultural gap in France compared to the US or the UK,' says Gwen Senlanne, one of Freshfields' Paris-based employment, pensions and benefits (EPB) partners. 'French companies are probably less inclined to implement whistleblowing policies and the idea of reporting on someone else is not well received in France. It's something people tell their children not to do when they're growing up. The most common situation where we see whistleblowing policies being implemented is when multinational corporations based in the UK or US decide to extend their policies to their French affiliates. It's relatively rare in our experience to see the initiative for a whistleblowing policy come from a French company.'

This cultural reluctance applies in Germany too, says Boris Dzida, an EPB partner in Freshfields' Hamburg office. German Workers' Councils give employees a conduit to report wrongdoing to management, but 'whistleblowing' has negative connotations that are rooted in the country's past.

'Under the Nazis or Communism in East Germany, "whistleblowers" were seen as people who reported you to the regime,' he says. 'I've been at one townhall meeting where management announced that they wanted to implement a whistleblowing policy, and the chairman of the council got up and said: "I don't want this company to introduce a Nazi system.'"

The Snowden and Manning cases

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Internal or external?

The survey also reveals disparities in the way respondents would report wrongdoing in different jurisdictions. Over a quarter of those polled in the UK (26.6 per cent) said they would tell a more senior colleague, while almost one in 10 (9.3 per cent) respondents in Hong Kong said they would report it to an external organisation.

This may be explained by local employment laws, says Caroline Stroud, Freshfields' global head of EPB. 'One reason why UK employees would go to a senior colleague first, before approaching the regulator, is that the protections for whistleblowers in our legislation are stronger if you've tried to address the problem through internal channels first,' she says. 'If a whistleblower doesn't go down this route, he or she risks losing the available protection against detriment or dismissal.'

Local legal differences play a role in Asia too, according to EPB partner Kathleen Healy. 'A number of jurisdictions in Asia have employment laws that are lighter-touch, and that don't offer employees much in the way of legal protection on matters such as dismissal,' she says. 'That's not the case in Europe and the United States, so it's possible employees in Asia use whistleblowing to raise concerns in a way that doesn't expose them to the risk of recrimination for having raised concerns.'

'There's an exceptionally high rate of whistleblowing in Indonesia. The difficult thing to quantify is whether there's a real issue with offences being committed there, or whether it's a place where employees become whistleblowers if they have a problem.'

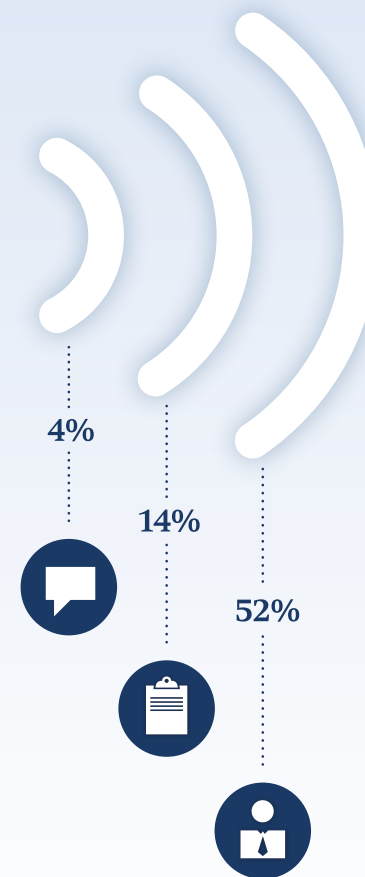
Who would you go to?

The average employee says

4% say they would go to the media, 14% to a regulator and 7% to an external organisation, though 52% say they would go to their direct boss

The employer's view

23% of those working in HR would encourage employees to go direct to the media or social media



What's driving whistleblowers?

Regulators in the US, Hungary, Indonesia and South Korea offer financial rewards as an incentive to whistleblowers. But only 9 per cent of respondents to the Freshfields survey said that financial incentives would trigger them to report suspected wrongdoing and 40 per cent said that paying whistleblowers could encourage false claims.

The majority of those polled (64.4 per cent) said that if they suspected someone within their organisation of criminal wrongdoing they would report them, compared to less than one in 10 who said they would report someone if they were offered a financial incentive.

Even in the United States, where regulators offer incentives to encourage whistleblowing, almost three in 10 respondents (28.5 per cent) said they didn't think the sums on offer would be likely to encourage whistleblowing. In October 2013 the Securities and Exchange Commission paid one anonymous informant \$14m, yet only 13.2 per cent of respondents in the US said they would blow the whistle if they were paid to do so.

Do incentives send the wrong signal?

In fact, many of those polled said they believed financial incentives could have unintended consequences. More than four in 10 (41.4 per cent) said that the offer of payment could encourage false claims, and almost one in five (19.5 per cent) said they could encourage secrecy within an organisation. This tallies with recent findings by the UK whistleblowing charity Public Concern at Work, which revealed that employees believe financial rewards taint perceptions of whistleblowers' motives.

'I think there is a perception among some people in the US that many whistleblowers are disgruntled employees and are not truly motivated to help their company by preventing other employees from engaging in wrongdoing', says Adam Siegel. 'But I think our regulators decided they'd rather offer significant incentives and encourage people to come forward, taking upon themselves the burden of identifying and following up on what appear to be the most meritorious allegations.'

'The incentives on offer are so large that lawyers will agree to represent whistleblowers on a contingency basis. This means it's a lot easier to be a whistleblower, because you're not dealing with the regulators, your lawyer is.'

13.2%

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Investigations on the rise

The willingness of a majority of respondents to blow the whistle where they suspect criminal behaviour underlines the importance to companies of a robust whistleblowing policy. Investigations into corporations – and sanctions against them – have increased dramatically in recent years. Global antitrust fines in seven key jurisdictions last year (including the US, EU, Japan, Brazil and South Africa) surpassed \$4.2bn – a 10 per cent rise on 2012.

In the US and UK, companies in certain regulated sectors such as financial services are now required or expected to have whistleblowing policies. But even where there is no mandated procedure, a whistleblowing policy can offer critical protection to a company accused of criminal wrongdoing.

‘A robust whistleblowing policy can help insulate a company from criminal sanctions,’ says Caroline Stroud. ‘It gives the business the opportunity to investigate wrongdoing internally and deal with it properly before the regulators get involved. And if a company is charged with a corporate offence, it can make the defence that it had adequate procedures in place.’

The regulatory burden on businesses is rising around the world, with regulators increasingly co-operating across international borders. In the past three years, 34 countries have amended or announced plans to amend their anti-bribery and corruption laws, including China, India, Indonesia and Brazil. Nine of the top 10 penalties under the US Foreign Corrupt Practices Act have been levied on non-US companies, while the UK’s Serious Fraud Office has co-operated with investigations in 30 jurisdictions and dealt with more than 850 international requests for assistance.

‘There was a recent case in which a DAX30 telecoms company bought a subsidiary in Hungary, and this subsidiary was involved in corruption in Macedonia,’ says Boris Dzida. ‘The US authorities fined the company \$95m because there was some link to the US. It shows how quickly companies can incur large liabilities for wrongdoing anywhere in the world.’

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Whistleblowing policies – should employees be encouraged to inform?

Almost a quarter of respondents said their company did not have a whistleblowing policy in place, and close to one-fifth of those polled said their company's policy is not adequately communicated to employees. Those businesses without effective procedures are putting themselves at risk of more than criminal sanctions.

The survey found that a surprising number of companies don't have a whistleblowing policy – and many of those that do fail to publicise them effectively to their employees. Almost a quarter of those polled (24.1 per cent) said that their company doesn't have a whistleblowing procedure in place, while almost one in 10 (8.6 per cent) said whistleblowing is never mentioned in the workplace because it's not something their company wants to encourage.

Although almost half of those polled (46.9 per cent) said their organisation encourages whistleblowing, in France nearly one-fifth of respondents (19.1 per cent) said their organisation actively discourages it, compared to just one in 20 (5.2 per cent) of respondents in Hong Kong. More than one in five German respondents (21.4 per cent) said their company does not have a whistleblowing policy and has no plans to implement one.

37%

believe senior management would treat them less favourably or look to terminate their employment if they blew the whistle

40%

say their organisation discourages or actively discourages whistleblowing



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The reputational risk

Companies without whistleblowing policies are not just exposing themselves to the risk of criminal sanctions, even in those countries without a strong whistleblowing culture. 'Companies without whistleblowing policies are putting themselves at considerable reputational risk,' says Boris Dzida. 'In 2006, a German engineering company suffered from a bribery and corruption scandal in which an internal investigation uncovered suspicions that its managers had paid officials around the world over a billion euros for contracts. The brand sustained enormous damage. There is also a liability risk for company boards and management. In the same year, a German railway company got into trouble for breaching German data protection laws and at least two board members, including the CEO, lost their jobs as a result.'

More than one in 10 respondents (11.3 per cent) said that their company's whistleblowing procedures have never been reviewed. But almost a third (31.6 per cent) said the discovery of wrongdoing within their organisation would encourage a review of whistleblowing procedures, while nearly one fifth (19.5 per cent) said media attention on whistleblowing would motivate a similar review.

The 'secret' policies

But the survey also found that many companies with robust whistleblowing policies are failing to properly inform their employees about it. Almost one in five of those polled (19.9 per cent) said their company's whistleblowing procedure isn't well publicised.

'It is vital that corporations communicate their whistleblowing policies properly,' says Caroline Stroud. 'A failure to do so could damage a company's defence against corporate criminal charges. The ability for people to blow the whistle is an issue driven by corporate culture – employees need to feel able to raise their concerns in a timely manner. I don't think whistleblowing policies need to be updated that often – a policy can be as simple as telling employees that if they have concerns they are encouraged to raise them with their manager, or informing them of a whistleblowing hotline number.'

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Whistleblowing: the risks of retaliation

A significant proportion of respondents said that the average employee would expect to see their career damaged if they blew the whistle. But with many countries offering explicit legal protection for whistleblowers, are they right?

Several countries, including the US and UK, now have laws that protect whistleblowers from disciplinary or retaliatory action from their employers. But a high proportion of respondents said they thought the average employee would fear reprisals – or even lose their job – if they blew the whistle.

More than one in five of those polled (21.5 per cent) said that in their opinion the average employee would expect their managers to treat whistleblowers less favourably, and that raising concerns about suspected wrongdoing would affect their bonuses or hinder their chances of promotion. More than one in 10 (15.2 per cent) said they thought the average employee would believe their managers would look for a way to terminate their employment.

Are employees protected?

In France, where legal protections for whistleblowers are quite limited, almost a quarter of respondents (24.4 per cent) thought employees would believe they could lose their jobs. And even in countries where whistleblowers do have legal protection, the proportion who thought employees would expect managers to try to fire them were high – 10.4 per cent of respondents in the US, and 9.4 per cent in the UK.

In the US, whistleblowers have protection regardless of whether they raise an issue internally or go direct to a regulator, while in the UK they must generally raise it first internally. But even in jurisdictions where whistleblowers are not protected, companies that seek to discipline them could expose themselves to considerable risk.

‘Compared to other countries, the level of protection for whistleblowers is relatively limited in France. It is also quite recent with a law that was passed in December 2013,’ says Gwen Senlanne. ‘However, our employment laws are amongst the most protective of employees in the world and if an employee was disciplined or their employment terminated for reporting illegal behaviour it would be considered unfair and the employee would be entitled to substantial damages.’

Role of the European Convention on Human Rights

In some cases, whistleblowers in Europe could be protected under the European Convention on Human Rights, according to Boris Dzida. ‘In Germany, an employee who goes directly to the regulators instead of looking for an internal solution can be fired,’ he says.

‘But there was an interesting case here a few years ago when an employee at an old people’s home went straight to the regulator to report a problem with hygiene. She was fired and an employment tribunal in Berlin upheld her dismissal because she didn’t try to address the problem internally. But the European Court of Human Rights ruled that this was against her right to freedom of speech. Germany had to pay her damages and it triggered a change in German case law. Now you have to take this principle into account if the whistleblowing is in the public interest.’

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The survey reveals that whistleblowing is considered a low priority for most companies – and is falling even lower.

Fewer than one in 10 of those polled around the world (7.1 per cent) said that whistleblowing was a priority for their organisation 12 months ago, and even fewer, 6.5 per cent, said it was a current priority. The top concerns relate to strategic growth and revenue generation, which 42.3 per cent of respondents said was a current priority; followed by retention of talent (39.2 per cent); cyber security (31.8 per cent); and risk from competitors (31.2 per cent).

‘You would have thought people would be very aware of the issue of whistleblowing after the recent high-profile cases involving Edward Snowden and Chelsea Manning,’ says Caroline Stroud. ‘But looking through the survey results, you have to wonder why companies are not doing more. The lack of priority given to whistleblowing suggests businesses are not aware of the potential damage to their operations and reputation if these issues are not identified and acted on early enough. If you look at recent cases, the real scandals have come where people haven’t spoken up.’

‘It’s really surprising it’s such a low priority,’ agrees Boris Dzida. ‘You only need to consider the consequences of a bribery and corruption problem, where fines can run into tens, possibly hundreds, of millions of dollars, to realise how important this is.’



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