Corporate Wrongdoing and Whistleblower Regimes: Evaluation and Suggestions for Reform.

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ACKNOWLEDGEMENTS

I would not know it at the time, but the events that led to this thesis being written were set in motion in 2014. My boss at the time Giancarlo Spagnolo was furious over a note issued by the Financial Conduct Authority and Prudential Regulation Authority, arguing against implementing whistleblower reward programmes in the UK financial sector. That 7-page note, lacking any references to available research, contained numerous inaccurate statements which in aggregate suggested that whistleblower reward programmes are ineffective. Giancarlo wanted to write a response to the note and put me on researching the topic, gathering available evidence and reviewing objections and thoughts on these programmes. Many years later, that resulted in a paper. Over the coming years, we continued to publish research reports, briefs, and papers on the topic. We were somewhat perplexed over the negative attitude of many to these programmes and the continued lack of interest to implement them in the EU. While significant empirical evidence was available for their effectiveness, this was apparently not enough for them to be considered a serious policy option. This Thesis is a continuation of this research and explores the origins of whistleblower laws, their performance, and what we know about optimally designing reward programmes. It aims to bridge the gap between academia, policymakers, and agency personnel to improve and expand the toolkit available for ensuring regulatory compliance.

This Thesis would have been impossible without my family, friends, and loved ones. My gratitude is infinite for my fortune in this sphere of life. Relating to the work, I am most grateful to my excellent supervisor, Stelios Andreadakis. I was a unique case, having researched the topic for many years before starting my PhD. Stelios' approach to this circumstance was perfect, providing the appropriate guiding nudges where necessary and teaching me to think more like a lawyer. I appreciate your support during this journey. I owe much gratitude to others I have spoken with during the years, such as Stephen Kohn – I don't think I would have written this Thesis if it were not for your enthusiasm about the topic that I only came to share after understanding it in greater detail. Bradley Birkenfeld, for your bravery and no-bullshit attitude, and for showing the impact whistleblowing can have, despite having to suffer at the hands of petty prosecutors. I also, of course, owe a lot of gratitude to my friend, mentor, and co-author Giancarlo Spagnolo, and all our discussions over a beer in Kyoto, Berkeley, Cambridge, Barcelona, Amsterdam, Riga, Madrid, Szczecin, that impressed upon me the importance of becoming a plumber.

List of Abbreviations

AML —— Anti-Money Laundering.
AMLA —— Anti-Money Laundering Act.
APPS —— Act to Prevent Pollution from Ships.
BSA —— Bank Secrecy Act.
CFTC —— Commodities Future Trading Commission.
DoJ —— Department of Justice.
DoL —— Department of Labor.
DPA —— Deferred Prosecution Agreement.
ECtHR —— European Court of Human Rights.
EPA —— Environmental Protection Agency.
EPPO —— European Public Prosecutors Office.
FATF —— Financial Action Taskforce.
FCA —— False Claims Act.
FinCEN —— Financial Crimes Enforcement Network.
FIU —— Financial Intelligence Unit.
GAAP —— Generally Accepted Accounting Principles.
IFRS —— International Financial Reporting Standards.
IRS —— Internal Revenue Service.
KYC —— Know Your Customer.
MER —— Mutual Evaluation Reports.
NDA —— Non-Disclosure Agreement.
NPA —— Non-Prosecution Agreement.
NRA —— National Risk Assessment.
OECD —— Organisation for Economic Co-operation and Development
OSG ——Organisational Sentencing Guidelines.
OSHA —— Occupational Safety and Health Administration.
OWB —— Office of the Whistleblower.
PCAOB —— Public Company Accounting Oversight Board.
PID —— Public Interest Disclosure.
PIDA —— Public Interest Disclosure Act.
S&L —— Savings and Loans.
SAR —— Suspicious Activity Report.
SEC —— Securities and Exchange Commission.
SOX —— Sarbanes-Oxley Act.
TFEU —— Treaty on the Functioning of the European Union.

PREFACE

Morality makes stupid. – Custom represents the experiences of men of earlier times as to what they supposed useful and harmful - but the *sense for custom* (morality) applies, not to these experiences as such, but to the age, the sanctity, the indiscussability of the custom. And so this feeling is a hindrance to the acquisition of new experiences and the correction of customs: that is to say, morality is a hindrance to the creation of new and better customs: it makes stupid.

- *Friedrich Nietzsche, Daybreak, 1881.*[1]

When considering this Preface, I thought of what its most valuable contribution to this Thesis could be, and concluded that it would be to address the two common concerns brought up when discussing whether to pay whistleblowers to aid law enforcement. The first line of concern argues that rewards are not in tune with our legal culture, are legally reprehensible, and point out that the Nazis and the Soviet Union used informants extensively. This argument typically appeals to intuitions about sound legal principles and argues that monetary incentives run counter to the spirit of the current legal culture. The second concern is that economic incentives provide a wrong reason to do something that should be done out of duty or selflessness, and that providing financial incentives would taint the reputation of all whistleblowers. There is an aversion toward 'unclean' motivations introduced by rewards and a distaste for catering to lesser motivations. The same persons frequently make these two points together, occurring in different variations from the schematic outlined here. An illustrative example of how they are often expressed together comes from a 1998 statement by US Senator Harry Reid:

> 'What I want to prohibit the [Internal Revenue Service] from doing in the future is continuing with a program that I refer to as the 'Reward for Rats Program.' This is a program where the IRS, in effect, has a contingent fee, much like a lawyer gets in a personal injury case. They say, 'If you have somebody who will snitch on a neighbor, an ex-wife, or business partner, and this will lead to our collecting money, then we will give you part of that money.' I believe anyone who owes money to the Internal Revenue Service should pay it. But I think it should be collected in a way that is *in keeping with the American system*, not go into people's personal lives, where you have a wife—former wife or former husband who just completed a long divorce, and the IRS contacts one of them and says, 'Hey, if you can give us a little information on your ex-spouse, then we will give you part of the money we collect.' [...] Such informants, most of the time, are not acting in some sense of *civic duty*. They don't act from *a selfless interest* in the Nation's well-being.'[2]

Reid is not alone in this sentiment. In 2013, Public Concern at Work conducted a study that assessed UK employees' attitudes toward rewarding whistleblowers and found that they were predominantly negative. The concerns raised were summarised under six headings: one related to 'inconsistent with the culture and philosophy of the UK',[3] three reasons related to

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[1] Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality*, in Maudemarie Clark and Brian Leiter (eds) *Cambridge Texts in the History of Philosophy*, (first published 1881, Cambridge University Press, 9th Printing, 2006) 19.

[2] Harry Reid, 'Senate Comments' 144 Cong. Rec. S4398 (May 6, 1998). Author's italics.

[3] Public Concern at Work, 'The Whistleblowing Commission: Report on the effectiveness of existing

the moral character and credibility of paid whistleblowers, including 'undermines the moral stance of a genuine whistleblower,' 'could undermine credibility of witnesses in future criminal or civil proceedings,' 'could result in the negative portrayal of whistleblowers'. One concern was more general about culture/legal culture: 'would be inconsistent with current compensatory regime in the UK.'[4] More recently, an impact assessment by the EU Commission before the introduction of the EU Whistleblowing Directive noted that providing rewards may make whistleblowing 'appear as a commercial transaction, which may discredit whistleblowers in general'.[5] It also noted that the stakeholders that had been consulted, including whistleblowers themselves, were also against rewards at the EU level 'taking into account also the particularly negative perceptions of whistleblowers in some national contexts, which date back to social and political circumstances resulting in distrust towards 'informers''.[6] The impact assessment also alluded to the fact that such rewards 'might be considered as running counter to ECtHR case law'.[7] I have heard objections along the two lines mentioned above at conferences, on Zoom calls, in person, expressed by academics, prosecutors, enforcement agency staff, family, and whistleblower advocates. A preface is unlikely to revert these entrenched intuitions, but, if anything, this Thesis hopes to show the value of so doing. It aims to show that the morality, as expressed above, is a hindrance to the creation of new and better customs. The remainder of this preface makes some points to blunt these intuitions.

Concerning the first line of concern, this is typically not as straightforward as is often suggested. Incentives are utilised to elicit information frequently, even from guilty persons, such as under plea bargaining. Bounties are put on the heads of terrorists, which does not engender much criticism. More importantly, the UK has used informant rewards in enforcement since the 8th century, which was only discontinued in 1951, making the 'legal culture' argument less striking. Rewards were also used in the Roman empire, have always been used in the US to some extent, and were even endorsed by Abraham Lincoln. This 'legal culture' argument appears to stem from a concern of creating an informant society, akin to those in many authoritarian regimes. We must distinguish, however, the tool from the purposes it is used for. The Soviet and the Nazi regimes, like contemporary democracies, also had tax collectors, police, and public bureaucrats that brutally suppressed opposition and were designed to serve the purposes of those regimes. That does not mean that tax collectors or police are inherently flawed. There are also significant differences between informing in a democratic society and informing under a dictatorship. First, under the former, laws are democratically enacted and (at least in theory) supported by a majority of the population.

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arrangements for workplace whistleblowing in the UK' (November 2023) 14 <https://www.tuc.org.uk/sites/default/files/Whistleblowing%20Commission%20Report%20Final.pdf> accessed 19 September 2024.

[4] Ibid 14

[5] European Commission, 'Commission Staff Working Document: Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting breaches of Union law' (2018) 36 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0116&from=EN> accessed 19 September 2024.

[6] Ibid 36.

[7] Ibid 37. Another expression of the sentiment that rewards run counter to our legal culture comes from the Ninety-Fourth Report of the Law Reform Committee of South Australia, 'Relating to qui tam and penal actions and common informers' (1985) 6, where they state that one reason to abolish *qui tam* is that 'The idea of citizens acting in their private capacity suing for reward for offences which have not personally aggrieved them is *repugnant to modern views of 'fair play'*. It is the State's responsibility to enforce penal laws and today, unless a person is affected by another's unlawful conduct, it is not considered his business to prosecute the offender.' Authors italics. This is a common idea that underlines the 'legal culture' argument, and it is that law enforcement should be solely in the hands of public bureaucrats and prosecutors, not private citizens. Although this is a correct description of *qui tam*, it is an incorrect description of how most reward programmes function today.

Law-making is also constrained by constitutions and fundamental rights of individuals who enjoy due process and legal representation. Second, punishment is proportional if you are informed on, unlike under authoritarian regimes where simply not tolling the party line could lead to a death sentence or life imprisonment. The reward programmes discussed in this Thesis are not indiscriminate *carte blanche* regimes as they typically are in authoritarian states; instead, they are designed for specific regulatory areas and apply only to severe wrongdoing. What should be asked, instead, is why almost every authoritarian state relied significantly on informants and how such systems can be structured to serve the aims of democratic societies while preserving judicial safety.

Concerning the second line of concern, this Thesis shows how appealing to purer motivations has not worked to a satisfying degree in combating corporate wrongdoing and that people typically don't engage in self-harming behaviour, which whistleblowing mostly is. When whistleblowers are recognised in statute as important to enforcement, the legislative response has more typically been to protect them if they suffer retaliation. Yet, experience and prior legislation have shown this is, in most cases, insufficient for employees to come forward. Wrongdoers have a range of carrots and sticks that can be leveraged to dissuade whistleblowing under a protection regime, and these regimes have also failed in practice to remedy whistleblowers effectively.

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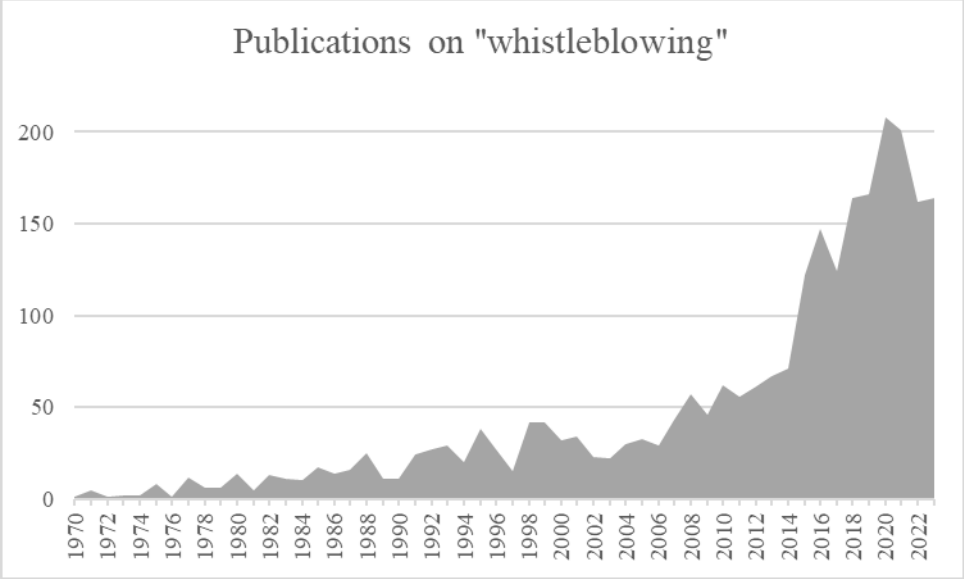
INTRODUCTION

A. Background

Whistleblowing is no new phenomenon, but during the last thirty years we have seen a plethora of laws aiming at regulating, protecting, and rewarding whistleblowing have been adopted in dozens of culturally and geographically dispersed jurisdictions. Simultaneously, published research on the topic of whistleblowing has grown significantly in the same period. Figure 1 shows the annual number of research papers published containing variations of the word 'whistleblowing'.[8]

Figure 1



The most salient development in recent years is the adoption of the Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. Its aim is explicit, as provided in Article 44 in the Preamble, which states that 'Effective protection of reporting persons as *a means of enhancing the enforcement of Union law* requires a broad definition of retaliation, encompassing any act or omission occurring in a work-related context and which causes them detriment.'[9] The 40-page Directive in the Official Journal of the European Union mentions 'enforcement' 31 times. With the transposition of this Directive, the ambition is that all 27 EU Member States will have harmonised protection for whistleblowers. Yet, how effective are whistleblower protections in enhancing enforcement? More generally, how should whistleblower laws be designed to effectively enhance enforcement of law? This Thesis aims to answer these questions, and, in the process, it will elucidate the history of how whistleblowers have been used in enforcement and assess the performance of other enforcement mechanisms. It differentiates between two broad conceptions of how to utilize whistleblowers in enforcement: regimes aiming to protect whistleblowers versus those aiming

[8] Search result from Web of Science for: 'whistleblower OR whistleblowing OR whistleblow OR whistle-blowing OR whistle-blower OR whistle-blow OR whistle blower OR whistle blowing OR whistle blow' on 8 June 2024.

[9] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law Author's emphasis.

to reward them.

In the last decades, whistleblowing has become a topic devoted significant public and legislative attention. Yet, while the term 'whistleblowing' is relatively new, the practice that this term denotes is as old as history. We can even find a case of whistleblowing, with many of its attendant ethical dilemmas, in Plato's dialogue, the *Euthyphro*. Socrates is awaiting his trial on charges of corrupting the youth outside the courthouse in Athens when he encounters Euthyphro.[10] Euthyphro explains that his father had a servant who, in a drunken rage, had killed a slave. The father tied the servant's hands and feet, threw him in a ditch and 'sent a man to inquiry from the priest what should be done.'[11] The tied-up servant died before the messenger had come back from the priest, leading Euthyphro to report his father for allowing a slave to die due to negligence. This is a typical feature of whistleblowing situations: there is a duty to the wrongdoer, a father in this case, but it could be another family member, employer, nation, or any other person or entity to whom we owe some duty. Another feature of this case is that Euthyphro could be accused of reporting his father to obtain access to the inheritance, as the punishment for murder was death. This is self-interested whistleblowing disguised as a genuine concern for the good or the 'pious', in the case of this Socratic dialogue.

Whistleblower procedures have existed in various forms throughout history. In Renaissance-era Venice, citizens could anonymously submit complaints directly to the government by dropping notes into the 'lion's mouths' (Bocche dei Leone), which were post-boxes scattered around the city.[12] The use of paid informers in law enforcement dates back to Roman times and was used as early as the 7th century in England until the ability of informants to claim a reward was abolished almost entirely with the Common Informers Act of 1951.[13] The historical use of informers usually took the form of *qui tam*, short for the Latin phrase '*qui tam pro domino rege sequitur quam pro se ipso*', which translates to 'who sues as well for the king as for himself'.[14] When statutes are enforced by a *qui tam* mechanism, any person can bring a violator to court, and, if successful, the person obtains part of the penalties and recoveries from the violator. Under historical *qui tam*, private citizens gained standing because they sued for the King, which was the damaged party. Reward programmes that provide a private right of action for whistleblowers occupy a middle ground between private and public law. While whistleblowers enforce public law under a reward regime, the litigation looks like two parties disputing under private law. In fact, prosecutors or agencies may have nothing to do with the enforcement of the rules that they are responsible for enforcing.

Much of what we today call 'whistleblowing' was historically referred to as informing, denouncing, delating, or reporting. The term 'whistleblower' is believed to originate with the British police in the 19th century, who blew the whistle on public dangers, and sports referees blowing the whistle on rule violations.[15] In modern times, whistleblower laws often become

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[10] 'SOCRATES: What is your case, Euthyphro? Are you the defendant or the prosecutor? EUTHYPHRO: The prosecutor. SOCRATES: Whom do you prosecute? EUTHYPHRO: One whom I am thought crazy to prosecute. SOCRATES: Are you pursuing someone who will easily escape you? EUTHYPHRO: Far from it, for he is quite old. SOCRATES: Who is it? EUTHYPHRO: My father.' Plato, John M. Cooper (ed), *Plato: Complete Works* (Hackett Publishing Company, 1997) 3.

[11] Ibid 4.

[12] Ioanna Iordanou, *Venice's Secret Service: Organizing Intelligence in the Renaissance* (Oxford University Press 2019).

[13] J. Randy Beck, 'The False Claims Act and the English Eradication of Qui Tam Legislation' (2000) 78 North Carolina Law Review 539.

[14] Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th edn by the Publisher's Editorial Staff, West Publishing Co. 1990) 29.

[15] Merriam-Webster, 'Whistleblower: A History' (2024) <https://www.merriam-

a part of employment law – regulating the valid basis for which employers can fire employees. The predominant form of lawmaking has been focused on employee protection or 'anti-retaliation' legislation, which prohibits employers from retaliating against those who raise concerns. David Lewis succinctly summarises some of the most popular recent definitions of whistleblowing, including a person who 'overrides the *organization he serves*', 'an open disclosure about significant wrongdoing directly perceived in a particular *occupational role*', 'the reporting by *employees* or former employees of illegal, irregular, dangerous or unethical practices by employers', and 'the disclosure by *organization members* (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action'.[16] Yet there is little historical or even practical justification for narrowly defining whistleblowers as employees or employee-like. As Chapter 2 explains, this specific connotation only became popular in the 1970s,[17] and was reinforced after organisational failures in the advent of the neoliberal and new public management revolution in the 1980s.[18] Protection laws are only logical if we operate with an employee-centric definition of whistleblower. Otherwise, there would be no job or salary to protect. Simultaneously, the most vulnerable whistleblowers are those who blow the whistle on their employer.

Beyond protection laws, there has also been an increase in programmes that provide monetary rewards to whistleblowers. Scholars have suggested introducing rewards in numerous regulatory areas, including competition law,[19] workplace safety,[20] environmental violations,[21] anti-money laundering,[22] political corruption,[23] and tax evasion.[24] Many are also drawing attention to what they argue is a contemporary underenforcement of corporate crime,[25] with some suggesting that expanding whistleblower reward programmes can aid in solving this issue.[26] Although lawmakers in the US instinctively turn to reward programmes in almost every enforcement area that involves economic crimes, such programmes are essentially unheard of in Europe. Outside of the US, reward programmes are often incorrectly seen as fringe programmes, contributing a valuable whistleblower on some rare occasions.

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webster.com/wordplay/whistle-blower-blow-the-whistle-word-origins> accessed 19 September 2024.

[16] David Lewis, 'Is a public interest test for workplace whistleblowing in society's interest?' (2015) 57 International Journal of Law and Management 141, 143-144. Author's italics.

[17] See Chapter 2(C)(1).

[18] See Chapter 2(C)(2) and (D).

[19] William E. Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels', (2001) 69 George Washington Law Review 766. More recently with respect to the issue of algorithmic collusion, see Aleksandra Lamontanaro, 'Bounty Hunters for Algorithmic Cartels: An Old Solution for a New Problem' (2020) 30 Fordham Intellectual Property, Media, and Entertainment Law Journal 1259.

[20] Jarod S. Gonzalez, 'A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing' (2010) 14 Employee Rights and Employment Policy Journal 325.

[21] Barton H. Thompson Jr, 'The Continuing Innovation of Citizen Enforcement' (2000) 2000 University of Illinois Law Review 185. See also Emily Becker, 'Calling Foul: Deficiencies in Approaches to Environmental Whistleblowers and Suggested Reforms' (2015) 6 Washington and Lee Journal of Energy, Climate, and the Environment 65.

[22] Giancarlo Spagnolo and Theo Nyreröd, 'Money Laundering and Whistleblowers' (2021) SNS Research Report, 2, <https://snsse.cdn.triggerfish.cloud/uploads/2021/11/money-laundering-and-whistleblowers.pdf> accessed 19 September 2024. See also Giovanni Scarcella, 'Qui Tam and the Bank Secrecy Act: A Public-Private Enforcement Model to Improve Anti-Money Laundering Efforts' (2021) 90 Fordham Law Review 1359.

[23] Aaron R. Petty, 'How Qui Tam Actions Could Fight Public Corruption' (2006) 39 University of Michigan Journal of Law Reform 851.

[24] Dennis J. Ventry, 'Whistleblowers and *Qui Tam* for Tax' (2008) 61 Tax Lawyer 357, 361.

[25] Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (The Belknap Press of Harvard University Press, 2014).

[26] John C. Coffee Jr. *Corporate Crime and Punishment: The Crisis of Underenforcement*, (Berrett-Koehler Publishers, 2020) on underenforcement in the US.

This is not the experience in the US, which one area illustrates well. Fraud against the government in the US has been enforced with a *qui tam* mechanism since 1863 under the False Claims Act (FCA), and *qui tam* recoveries under the False Claims Act accounted for 85% of all recoveries in 2023.[27] This means that the detection work done by the Department of Justice (DoJ) only accounted for a mere 15% of recoveries.

If designed well, reward programmes can be revolutionary for enforcement and not mere fringe programmes. Since the first steps were taken to provide rewards outside of the procurement fraud context in the US, much due to the success of the FCA, there has not been a single instance of rolling back a reward programme. Instead, they have been expanded to more regulatory areas (tax evasion 2006, securities fraud 2010, auto safety 2015, anti-money laundering 2020) and modified to increase generosity toward whistleblowers (larger rewards, presumptively favourable conditions toward whistleblowers, etc.). In a speech on 7th March 2024, the US Deputy Attorney General, Lisa Monaco, announced that the DoJ was aiming to fill in the gaps created by the sector-specific focus of the present programmes, noting that, while these programmes have proven indispensable, 'they resemble a patchwork quilt that doesn't cover the whole bed. They simply don't address the full range of corporate and financial misconduct that the Department prosecutes. So, we are filling these gaps.'[28]

Internationally, some countries have adopted reward programmes in various forms. For competition offences in Bulgaria, Slovenia, and the UK; for tax in India, Canada, the UK, Ghana, and South Korea; for securities fraud in Pakistan and Canada; for corruption in Thailand, Nigeria, and South Korea – to mention a few. These programmes are also expanding to other forms of wrongdoing such as environmental violations. The whistleblower platform of China's Ministry of Environmental Protection received an astonishing 618,856 whistleblower reports in 2017.[29] Despite this volume of claims, in 2020 the Ministry of Ecology and Environment issued a guiding opinion to all localities suggesting that they implement whistleblower rewards for the reporting of 'illegal behaviours in the ecological environment'.[30] In the US, laws against pollution by ships have been enforced with a whistleblower reward programme. The Act to Prevent Pollution from Ships (APPS) is one of the few criminal statutes that authorise whistleblower rewards of up to 50% of the money collected by prosecutors. In 2021, the National Whistleblower Centre reviewed the last 100 cases under APPS and found that rewards to whistleblowers were paid in 76 out of those cases, meaning that whistleblowers were the actual means of detection.[31] Compare this to countries lacking an effective means of detecting and eliciting insider information. In October of 2022 Swedish state media reported that over 160 chemical leaks had been discovered in Swedish oceans, yet no one had been convicted.[32]

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[27] Department of Justice, Civil Division, 'Fraud Statistics' (2024) <https://www.justice.gov/opa/media/1339306/dl?inline=> accessed 19 September 2024. 712 qui tam cases generated $2.3 billion in recoveries in 2023, whereas 500 non-qui tam cases generated a mere $356 million.

[28] Department of Justice, 'Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime' (March 7, 2024) <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations> accessed 19 September 2024.

[29] Yunpeng Yang and Weixin Yang, 'Does Whistleblowing Work for Air Pollution Control in China? A Study Based on Three-party Evolutionary Game Model under Incomplete Information' (2019) 11 Sustainability 1, 2.

[30] Ministry of Ecology, China, 'The Ministry of Ecology and Environment issued opinions to guide local governments to implement the reporting and reward system for violations of ecological environment' (27 April 2020) <http://www.gov.cn/xinwen/2020-04/27/content_5506465.htm> accessed 19 September 2024.

[31] A detailed list of the most recent 120 APPS cases is published at KKC, 'Cases under the Act to Prevent Pollution from Ships (APPs)' <https://kkc.com/laws-statutes-and-regulations-2/cases-under-the-act-to-prevent-pollution-from-ships-apps/> accessed 19 September 2024.

[32] SVT Nyheter, 'Över 160 kemikalieutsläpp i svenska hav – men ingen dömd' (11 October, 2022)

Given the increased reliance on whistleblowers for various enforcement efforts, it becomes imperative to understand what drives effective whistleblower laws. One could argue that effective whistleblower laws hold the promise of increased detection and deterrence of wrongdoing, reduced reliance on costly and ineffective paperwork compliance regimes, enhanced transparency and accountability, ensure fair competition in markets, as well as increased trust in financial markets. Designed well, they can also boost innovation and reduce the cost of capital, promote democratic values and public participation in compliance, and punish those who seek to obtain unfair advantages. This Thesis aims to understand how to design effective whistleblower laws and programmes, with a particular focus on the EU context. To do so, it first seeks to clarify the need for enhanced enforcement. This is done in the next section and more extensively in Chapter 1.

B. Enforcement of Corporate Wrongdoing in the EU

There are reasons to think that fraud detection in the EU is lacking, which is frequently emphasised by reports by the European Audit Office and the European Public Prosecutor Office (EPPO). In its 2022 annual report, the EPPO noted that 'if we truly want to improve the protection of the financial interests of the EU, the level of detection of EU fraud must increase!',[33] and in its second annual report from 2023, the EPPO noted about VAT fraud that: 'There are no obvious victims who would report such crimes – therefore detection can be rather low.'[34] A 2017 survey of EU Member States found that 81% of those who experienced or witnessed corruption did not report it.[35] In the context of taxation, many countries have significant 'tax gaps', i.e., a gap between what a country estimates it should collect in taxes versus what it actually collects. This gap is quite substantial even in developed countries. One estimate from 2018 found that the then EU-28 average tax gap as a percentage of 2015 GDP was 7.7%, compared to the US at 3.8%.[36] In dollar amounts, the same authors found the average tax gap in the EU-28 to be $50.7 billion per Member State. Another 2019 study, based on 2015 data and focusing on domestic tax evasion, estimates the European tax gap to be around €825 billion a year.[37] The European Commission estimated that the VAT gap in the EU amounted to €140 billion in 2018, varying significantly between EU countries.[38] Based on 2014 data Gabriel Zucman estimated that assets held offshore for tax evasion purposes amounted to 8% of the financial wealth of households, or around $7.1 trillion,[39] excluding other assets such as real estate, gold, art, and yachts, which may put the

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<https://www.svt.se/nyheter/inrikes/over-160-kemikalieutslapp-avslojade-pa-svenska-hav-men-ingen-domd> accessed 19 September 2024.

[33] European Public Prosecutor's Office (EPPO), 'Annual Report 2022' 4 <https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf> accessed 19 September 2024.

[34] European Public Prosecutor's Office (EPPO), 'Annual Report 2023' 4 <https://www.eppo.europa.eu/sites/default/files/2024-03/EPPO_Annual_Report_2023.pdf> accessed 19 September 2024.

[35] European Commission, 'Special Eurobarometer 470: Corruption.' (2017) 93 <https://europa.eu/eurobarometer/surveys/detail/2176> accessed 19 September 2024.

[36] Konrad Raczkowski and Bogdan Mroz, 'Tax gap in the global economy' (2018) 21 Journal of Money Laundering Control 567, 570.

[37] Richard Murphy, 'The European Tax Gap' (a report for the Socialist and Democrats Group in the European Parliament, 2019) <https://www.socialistsanddemocrats.eu/sites/default/files/2019-01/the_european_tax_gap_en_190123.pdf> accessed 19 September 2024.

[38] European Commission, 'Study and Reports on the VAT Gap in the EU-28 Member States' (2020) <https://ec.europa.eu/taxation_customs/vat-gap_en> accessed 19 September 2024.

[39] Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* (The University of Chicago Press 2015) 35.

true figure closer to 10% of all household wealth.[40] Other studies try to calculate the size of the 'shadow economy' which includes 'all economic activities which are hidden from official authorities for monetary, regulatory, and institutions reasons.'[41] A 2016 study considering 157 countries estimated that the average size of the shadow economy between 1999 and 2013 was 33.77%.[42] A 2018 study estimated the size of the shadow economy of 158 countries to be 31.9% between the years 1991 to 2015.[43] For European countries, the estimated size of the shadow economy was 20.2% between 2010 to 2015.[44]

Some US whistleblower reward programmes are today targeting European citizens who provide information on corporate misconduct by EU corporations in return for large rewards. The US is currently fining European corporations billions annually, and often the violations they are fined for only a tangential connection to US jurisdiction.[45] The reason the US has such an extraterritorial reach—being able to fine corporations for violations that had little to do with the US—is that many European corporations cross-list their shares on US Stock Exchanges. This is done through sponsored American depository receipts, which require the cross-lister to file certain reports with the Securities and Exchange Commission (SEC), which exposes them to US laws governing listed corporations.[46] Corporations which cross-list on major US Exchanges enjoy an average 70 to 120 basis point reduction in the cost of capital,[47] and a valuation premium of 37%.[48] Some argue that one contributing factor to this listing premium is the more stringent enforcement and reporting requirements in the US, which increases trust in financial statements.[49] The principle of *nemo debet bis vexari pro una et eadem causa* (No one should be tried twice in respect to the same matter) would prevent the US authorities from dolling out fines if EU corporations were first fined in the EU. For this to be possible, however, violations must be detected by EU authorities first. While a step in the right direction, the Whistleblowing Directive, this Thesis argues, is not going to be the driver of enforcement needed to ensure the integrity of the internal market and competitiveness of the EU going forward. There are compelling reasons for the EU to

[40] Ibid 45.

[41] Leandro Medina and Friedrich Schneider, 'Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?' (2018) IMF Working Paper WP18/17 <https://www.imf.org/en/Publications/WP/Issues/2018/01/25/Shadow-Economies-Around-the-World-What-Did-We-Learn-Over-the-Last-20-Years-45583> accessed 19 September 2024.

[42] Mai Hassan and Fredrich Schneider, 'Size and Development of the Shadow Economies of 157 Countries Worldwide: Updated and New Measures from 1999 to 2013' (2016) IZA DP No. 10281, 29, <https://docs.iza.org/dp10281.pdf> accessed 19 September 2024.

[43] Medina and Schneider (n 41) 4.

[44] Ibid 58.

[45] Typically for violations of the Foreign Corrupt Practices Act (FCPA). An early example includes a $1.6 billion fine against Siemens in 2008. Numerous European banks were also fined in the US in the aftermath of the Global Financial Crisis. In 2019 the Swedish telecommunications company Ericsson was fined $1 billion for FCPA violations. These fines have also been criticized by European top brass, see Euractiv, 'Hollande criticises huge US fines for European companies' (13 October 2016) <https://www.euractiv.com/section/global-europe/news/hollande-criticises-huge-us-fines-for-european-companies/> accessed 19 September 2024.

[46] Sponsored American Depository Receipts requires the lister to file certain information with the SEC and comply with US securities laws. Numerous European countries have been fined billions for listing in the US and then violating various laws, most prominently the Foreign Corrupt Practices Act.

[47] Luzi Hail and Christian Leuz, 'Cost of capital effects and changes in growth expectations around U.S. cross-listings' (2009) 93 Journal of Financial Economics 428.

[48] Craig Doidge, Andrew Karolyi, and René M. Stulz, 'Why are foreign firms listed in the U.S. worth more?' (2004) 71 Journal of Financial Economics 205. For an overview and discussion of the impact of enforcement of securities laws on valuations, see John C. Coffee, Jr. 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229.

[49] Ibid.

consider reward programmes in specific regulatory areas, as this Thesis will argue.

Whistleblowing can be considered a form of private enforcement, where private individuals bring evidence to enforcement agencies or prosecutors, or even serve as plaintiffs themselves. Although private enforcement is more common in the US than in the EU, the Commission has recently been pushing for more initiatives that encourage private enforcement. The Whistleblowing Directive is one such effort, but also prior when adding protections to specific instruments, such as the Anti-Money Laundering Directives (Directive 2005/60/EC, Art 27), the Market Abuse Regulations (Regulation (EU) No 596/2014, Art 32), and within financial services.[50] Directive (EU) 2020/1828 'on representative actions for the protection of the collective interest of consumers' was adopted due to a concern that lack of effective enforcement would reduce consumer confidence in the EU internal market.[51] What the Directive calls 'representative actions' effectively corresponds to US class actions, which allow consumers to collectively seek redress from an infringing party. Prior to these initiatives, the Commission also followed the US example in adopting leniency programmes to combat competition offences – a highly successful tool; in the period 2010-2017, 23 out of 25 cartels investigated were the result of leniency applications, and only two were the result of the Commission's work on detection.[52] The Commission may therefore be more susceptible to reward programmes to combat corporate wrongdoing than it would have been a decade ago.

While this Thesis tries to consider the general benefits of whistleblowers to the detection of corporate wrongdoing to retain generalizability across regulatory areas, this is not without its problems. 'Corporate Wrongdoing' is not a unified concept with a clear extension and is moreover confusing as corporations are social constructions that lack agency. That said, there are today numerous rules and regulations that corporations must comply with, violations of which constitute a form of wrongdoing. This is what the term seeks to capture in the present context. There are benefits to restricting the scope of consideration to corporate wrongdoing, even without employing a precise definition. First, it excludes several unique issues that can arise concerning whistleblowing on violent crimes, in the public sector, and on national security matters. Second, it is more effective in isolating a unique motivational component: economic gain, which makes assumptions about individual behaviour less contentious. Third, it isolates a unique feature that many other crimes lack, namely the fact that we are rarely even aware that they have been committed. A violent offence immediately creates victims with an incentive to go to the police and report it, which is often not the case with corporate or economic crimes. To even discover that a crime was committed, someone must report it, or the entity must be audited for the violation to be detected. Finally, this limitation is also justified with respect to Chapter 2, which finds that contemporary whistleblower laws were primarily aimed as a response to organisational wrongdoing. Still, whistleblower programmes do not have to target corporate offences only; they can target individuals engaging in tax evasion or money laundering, for example. Umbrella terms, such as economic, white-collar, or corporate crime, also mask substantial heterogeneity. Bid-rigging and price-rigging have different characteristics from money laundering, which is different from procurement fraud,

[50] Carl Fredrik Bergström, 'EU rulemaking in the internal market after the financial crisis' in *Legal Accountability in EU Markets for Financial Instruments: The Dual Role of Investment Firms,* Carl Fredrik Bergström and Magnus Strand (eds) (Oxford University Press 2021) 16.

[51] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[52] European Court of Auditors 'Special Report: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' (2020) < https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/ > accessed 19 September 2024.

which in turn is different from non-compliance with environmental regulations, which is different from VAT or sales tax evasion. However, what unifies these forms of wrongdoing is that actors engaging in them are sensitive to incentives, such as frequency of audits and severity of sanctions. This is not always the case with crimes of passion. Chapter 1 will elucidate definitional issues further.

C. Theoretical Background

This Thesis can be characterised as following in the tradition of pragmatism, legal realism, and new legal realism, with elements of thought from socio-legal studies and empirical legal studies. The legal realism movement emerged in the early 20th century and understood judicial decision-making as a 'social rather than exclusively legal process',[53] emphasising that to understand how law works it needs to be studied on the ground 'in action'. Legal realism was also associated with the American pragmatists John Dewey, William James, and Charles Sanders Pierce (approx. 1860s – 1950s). Early pragmatists advocated extending a form of scientific attitude toward all areas of inquiry. In an early essay, John Dewey urged a turning away, in the words of Richard Posner, 'from conceiving of legal decisions as the outcomes of a process of deduction from rules taken as given toward focusing on the economic and other social consequences of legal decisions.'[54] The early philosophical pragmatists were keen on turning away from the tradition originating in Plato, where foundations can be established, morality is unified by principles that can serve as ultimate guide for practical decision making, and where terms such as 'moral', 'knowledge', 'truth', 'justice', can be essentially defined. Descartes was the person perhaps most associated with the view that if knowledge cannot be firmly founded, all we are left with is radical scepticism. Cartesian views such as these would come to influence intellectual life cross-disciplinary for centuries to come. The American pragmatists questioned whether such a firm foundation was possible, and later neo-pragmatists, such as Richard Rorty, denied the possibility of founding beliefs in such a way as well as the usefulness of it.[55] Truth was not correspondence to reality to the early pragmatists, but, as James quipped, 'what's good in the way of belief'. While the later Wittgenstein and Nietzsche had discredited various versions of foundationalism and representationalism,[56] both lacked the pro-social and moral orientation of the early American

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[53] Jeffrey Omari, Pablo Rueda-Saiz, and Richard Ashby Wilson, 'New Legal Realism at 20: Rethinking Law in an Era of Populism and Social Movements' (2024) SSRN Working Paper, 8, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771109> accessed 19 September 2024.

[54] Richard A. Posner, 'Legal Pragmatism' (2004) 35 Metaphilosophy 147, 148.

[55] More modern forms of pragmatism, such as Rorty's neo-pragmatism, can be viewed as accepting the postmodern critique of essentialism and related Platonic ideas while retaining the moralistic and reformist ambitions held by the early pragmatists. See here 'I have argued in various books that the philosophers most often cited by cultural leftists – Nietzsche, Heidegger, Foucault, and Derrida – are largely right in their criticism of Enlightenment rationalism. I have argued further that traditional liberalism and traditional humanism are entirely compatible with such criticisms. We can still be old-fashioned reformist liberals even if, like Dewey, we give up on the correspondence theory of truth and start treating moral and scientific beliefs as tools for achieving greater human happiness, rather than as representations of the intrinsic nature of reality.' Richard Rorty, *Achieving our Country*, (Harvard University Press 1997) 96.

[56] Wittgenstein famously came to Cambridge and authored his book and PhD Thesis *Tractatus logico-philosophicus* (1921), arguing for a 'picture theory of language' – a purely representationalist model and a product of the dominance of Gottleib Frege and Bertrand Russell after the linguistic turn early in the 20th century. In his subsequent major work, *Philosophical Investigations*, the now later Wittgenstein had turned against his previous representationalist views. In the preface to the *Investigations*, Wittgenstein attributes this shift in attitude to discussions he had with Frank Ramsey, an intellectual powerhouse in his own right, but more importantly a self-identified pragmatist. Wittgenstein writes: 'For since I began to occupy myself with philosophy again, sixteen years ago, I could not recognize grave mistakes in what I set out in that first book. I was helped to realize these mistakes – to a degree which I myself am hardly able to estimate – by the criticism which my ideas encountered from Frank Ramsey, with whom I discussed them in innumerable conversations

pragmatists.[57]

Legal realism was primarily focused on the decisions of judges, courts, and the formal legal system and was a reaction to the narrow focus of doctrinal methodology on statutes and judgments. New legal realism (originating in around 2004) has a similar pragmatic attitude but is more expansive and interdisciplinary, realizing that social science today is vastly more advanced and methodologically self-aware than it was in the early 20th century, and its 'capacity to provide evidence that can resolve core policy disputes make the case [for using social science to understand law] even more compelling than it was a hundred years ago'.[58] Howard Erlanger and colleagues write that the question the pragmatists ask 'is not whether law succeeds or fails according to some end posited as good by the theorist-investigator. Like a good social scientist, it suspends judgments to better understand that which goes on between the means and the ends (the 'betweenness' problem). It seeks a qualitative theory of the translation costs, if you will, of law's movement from institution to institution.'[59] New legal realism is committed to a 'bottom-up' approach – studying how the law works for people and how its aims are realised or transformed by mediating institutions such as regulatory agencies. This includes utilising qualitative methods developed by disciplines such as history, but to not prioritise qualitative over quantitative methods. Instead, new legal realists typically seek to 'combine both in developing a new synthesis for social science studies of law'.[60] This can entail qualitative work that identifies an issue and then tests it with quantitative methods in a separate study or a mixed-methods study.

More specifically on the approach of this Thesis, Gregory Shaffer describes two core interacting dimensions of new legal realism: 'one focused on the empirical study of how law actually works in relation to social and political forces, and the other focused on law as a method of pragmatic problem-solving, however those problems may be conceived. The first dimension is empirical and backward-looking, the second pragmatic and forward-looking. The first studies how law operated in the past by using quantitative and qualitative methods, although potentially complemented by present-oriented, experimental ones. The second applies experiential knowledge from practice to engage new factual contexts and new perceptions of problems.'[61] Chapters 1 and 2 of this Thesis are backward-looking, assessing how regulators have tried to tackle the issue of corporate wrongdoing and the history of whistleblower laws aiming to do the same. Chapters 3 and 4 are oriented toward the past and present, assessing how protection regimes and reward regimes have performed in recent times. Finally, Chapter 5 is forward-looking, aiming to expand on what we know about designing effective reward programmes and how they can be developed and improved.

Beyond this general approach, this Thesis also considers rational choice theory as important for whistleblower's decisions. While rational choice theory is a common assumption in empirical legal studies and law and economics,[62] I will argue that it has been insufficiently appreciated as a core motivational component in the whistleblower context. Rational choice theory holds that individuals are rational agents seeking to maximize their

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during the last two years of his life' Ludwig Wittgenstein, *Philosophical Investigations*, (first published 1953, 4th edn, Wiley-Blackwell 2009) 4.

[57] See here Rorty, 'They [James and Dewey] wrote, as Nietzsche and Heidegger did not, in a spirit of social hope.' Richard Rorty, *Consequences of Pragmatism*, (University of Minnesota Press, Minneapolis, 1982) 161.

[58] Omari et al (n 53) 9.

[59] Howard Erlanger, et al. 'Is It Time for a New Legal Realism?' (2005) Wisconsin Law Review 335, 358.

[60] Ibid 340.

[61] Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) Legal Studies Research Paper Series No.2015-54 1, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605198> accessed 19 September 2024.

[62] Omari et al (n 53) 10.

expected utility, a model that dates to a seminal 1968 paper by Gary S. Becker.[63] In short, the model says that 'a criminal act is preferred and chosen if the expected benefits from committing a crime exceed the expected costs'.[64] This Thesis assumes that expected utility considerations applies to both whistleblowers and corporate wrongdoers. For whistleblowers, this implies that an employee will report a violation if the expected benefits from so doing exceed the expected costs. Protection laws, I later argue, insufficiently appreciate this core motivational feature. Yet, rational choice theory is not uncontroversial. A first line of concern has been with respect to violent offences, where it has been exceedingly difficult to prove that higher criminal sanctions increase deterrence (which this model predicts).[65] This concern is mitigated by limiting our consideration to corporate crime – an area where this model has the most *prima facie* plausibility since these crimes are often not impulsive and require long-term planning. A second line of concern has been with respect to higher compliance rates than what this model predicts – given current levels of audits, we should expect less compliance than we observe. Therefore, it has been argued that beyond maximising economic utility, other concerns, such as legitimacy of the rules, social pressure, psychology, and culture, also affect compliance levels. While these certainly do play a role, this Thesis will assume that expected utility theory is a good starting point and model for individual behaviour.[66] Moreover, this Thesis subscribes to the idea that most desirable outcome of criminalization is that the law has *ex ante* deterrence effects (general deterrence), in contrast to the form of deterrence generated *ex post* (specific deterrence).[67] This is because prosecution is expensive and absent its deterrence effect is an economic 'deadweight loss for society'.[68] This Thesis also takes it that an enforcement regime should seek to maximize benefits and reduce costs and that it is possible to determine features of an enforcement regime that have negative (positive) effects on these two aims. This is not a point argued normatively, but when deciding whether to expand auditing regimes versus incentivising whistleblowers, or when discussing specific design issues of whistleblower regimes, it does so with an eye to maximizing benefits and minimizing costs.

This Thesis will not seek to establish a complete justification for its theoretical underpinnings. There is one aspect, however, of the influence of pragmatism as a general approach that also has had an impact on the topic of whistleblowing. Although the US has experimented extensively with reward programmes, they are almost unheard of in Europe. Reward programmes are characteristic of the American pragmatist approach, urging us to 'get things done', and utilising methods effective to achieve ends. The absence of reward programmes in Europe is likely due to historical reasons, which this Thesis considers in some depth, but may also be because of the influence of Kant's moral philosophy. Nietzsche and the early pragmatists were critical of Kant's moral philosophy, which claimed that general principles can guide us in practical decision-making.[69] When acting and adopting moral

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[63] Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.

[64] Henry N. Butler, Christopher R. Drahozal, and Joanna Shepherd (eds), *Economic Analysis for Lawyers* (3rd edn, Carolina Academic Press 2014) 384.

[65] Aaron Chalfin and Justin McCrary, 'Criminal Deterrence: A Review of the Literature.' (2017) 55 Journal of Economic Literature 5.

[66] There is also some empirical evidence that people pursue expected utility in this context, see e.g., Henrik Jacobsen Kleven et al. 'Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark' (2011) 79 Econometrica 651, finding that taxpayers do respond in a way largely consistent with this theory.

[67] For a discussion see Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in *Handbook of Procurement*, Nicola Dimitri, Gustavo Piga, and Giancarlo Spagnolo (eds) (Cambridge University Press 2006) 264-265.

[68] Ibid 265.

[69] See here Richard Rorty noting that Kant is 'somebody who helped us get away from the idea that morality

principles, he encouraged us to consider what a particular principle would entail if it were raised to be a common law – a practice that considers hypothetical consequences. Richard Posner notes, however, that 'The consequences that concern the pragmatist are actual consequences, not the hypothetical ones that figure prominently in Kant's moral theory.'[70] The early pragmatists would not have resisted policies because they contradicted some general principle, but instead, they encouraged testing what works best in reality. Appealing to people's better nature and encouraging them to act selflessly out of duty is morally reassuring, yet often fails. Nietzsche highlights this point in a humorous remark: 'Kant was, like all good Germans from the earliest times, a pessimist: he believed in morality, not because it is demonstrated through nature and history, but despite its being steadily contradicted by them.'[71] If people do not think they will get caught, they steal and lie and typically don't act out of duty. If whistleblowing entails enormous personal costs, it will remain rare, even if one could argue that reporting is a duty. Indeed, assuming that people maximize their utility, the economist's view of crime concludes that given the costs of whistleblowing, 'the surprising part is not that most employees do not talk; it is that some talk at all'.[72] While it is impossible to quantify the significance of Kant's moral philosophy for Europe's reluctance toward rewards, it may go some way toward explaining the absence of reward programmes in Europe despite their introduction in dozens of culturally and geographically dispersed countries. The influence of the early pragmatists in America may explain some of why reward programmes came to be so widely adopted in the new world but not in the old.

D. Methodology

The primary aim of this Theis is to assess the *external consistency* and assumptions of lawmakers when introducing whistleblower regimes. Much legal research deals solely with *internal consistency*: whether a verdict of one court is consistent with that of another or whether a verdict is consistent with statutory intent.[73] Such questions may be briefly considered in passing, but the main aim is to review whether the external effects of whistleblower regimes are consistent with lawmakers' expectations and to suggest reforms to improve outcomes. This task involves understanding what problems whistleblower laws aim to solve, how whistleblower programmes are administered, how employees perceive wrongdoing at the workplace, what enforcement alternatives there are, what the best examples of successful programmes are and what features of these programmes drive their success. In choosing a methodology, a case study approach was determined to be the most amendable for the research question(s). John Creswell defines a case study as follows: 'a qualitative design in which the researcher explores in depth a program, event, activity, process, or one or more individuals. The case(s) are bounded by time and activity, and researchers collect detailed information using a variety of data collection procedures over a sustained period of time.'[74] A case-study approach has numerous advantages for the present Thesis. First, the flexibility of data utilisation allows for a broad scope of assessment of

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is a matter of divine command, but who unfortunately retained the idea that morality is a matter of unconditional obligations.' Richard Rorty, *Philosophy as Cultural Politics*, (Cambridge University Press 2007) 187.

[70] Richard A. Posner *Law, Pragmatism, and Democracy*, (Harvard University Press 2003) 6.

[71] Friedrich Wilhelm Nietzsche, *The Dawn of Day*, (first published 1881, The MacMillan Company 1911) 11.

[72] Alexander Dyck, Adair Morse, and Luigi Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65 Journal of Finance 2213, 2216. This quote appears on page 28 in a prior working paper, but not in the published version.

[73] See Wendy Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) SSRN Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763266> accessed 19 September 2024.

[74] John W. Creswell and J. David Creswell, *Research Design* (5th ed, SAGE Publications 2018) Glossary.

various forms of evidence. This is especially important as, rather than producing new empirical evidence, this Thesis aims to utilise the unprecedented number of publications on the topic in recent years. Second, a case-study approach is amendable to a view of law held by new legal realists, as it invites other evidential sources than statutes and decisions. Third, due to whistleblower laws being products of best practices and modelled on prior laws, case studies of multiple laws allow the plausible identification of features that enable them to produce desirable outcomes.

While experiments and empirical research are viable approaches, there are two main reasons they were not desirable. Regarding experimental evidence, extensive literature on whistleblowing has already emerged, dealing with various issues. However, one potential issue with laboratory experiments is their external validity – i.e., how well the findings translate outside the lab. While laboratory experiments are excellent for isolating variables of interest, the whistleblowing context presents numerous issues. Primarily, it is challenging to impress upon lab participants the various costs of whistleblowing. This can lead to overreporting in lab settings, which is rarely observed in real life. As for empirical evidence, several robust studies also identify the causal impact of introducing whistleblower programmes.[75] With this in mind, the most valuable contribution in the context of this law Thesis was determined to be an aggregating approach, with prior research acting as a form of data in the style of a large literature review.

There are two main sources of evidence this Thesis will utilise. The first is the hundreds of studies that have been published on whistleblowing in recent years and other findings that are relevant to the broader context. Behavioural science, for example, has discovered numerous counterintuitive facts about human behaviour in the last decades, something that legal scholars are paying increased attention to.[76] One typical response to tackling crime is increasing the severity of sanctions, yet social science has provided evidence that this is only effective in some circumstances. Benjamin van Rooij and Adam Fine note that 'Study after study finds that punishment only deters crime if the punishment is inevitable. The more certain the punishment, the likelier offenders are to get caught, prosecuted, convicted, and made to pay a fine or do the time, the likelier the punishment will deter.'[77] We tend to call for stricter punishment for almost any offense, and we often conflate what we think is morally correct with what is effective.[78] To design effective laws that achieve desired results, it is important to take findings in social science research into account.[79] The variety of research on whistleblowing is exceptionally broad, with papers emerging from varying disciplines such as economics, sociology, psychology, organisational studies, economics, finance, and law. The plethora of studies on whistleblowing in recent years warrants more of a synthesising approach: aggregating knowledge from various disciplines to obtain insights for future lawmaking. Not creating any new empirical insights puts the onus on the author to be

[75] Although surprisingly few on protection laws, the rigorous research on reward programmes is reviewed in Chapter 4.

[76] In the whistleblowing context see, for example, Orly Lobel, 'Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 South Texas Law Review 37, 52: 'Policymakers must take the lead in learning about existing and evolving insights that emerge from behavioral and organizational research. Administrative agencies must view part of their role to be assisting in the implementation of best practices in the art and science of designing compliance and reporting systems.' And also Ibid 40: 'The law of whistleblowing has been the subject of heated debates and is, as one commentator succinctly put it, 'riddled with loopholes'. At the same time, a wealth of recent research about individual and institutional reporting behaviors can offer insights into the optimal design of reporting systems.'

[77] Benjamin van Rooij and Adam Fine, *The Behavioral Code* (Beacon Press 2021) 32.

[78] Ibid 43

[79] Ibid 11 notes that 'Law school curricula have almost entirely ignored the behavioral revolution that has rocked fields like economics and ethics.'

as exhaustive as possible concerning existing research. The second source of evidence is administrative data on whistleblower programmes. Numerous agencies provide detailed information on how many whistleblowers contact them each year, what kind of offence they allege, why a whistleblower claim is rejected, and how much whistleblowers are rewarded. This data is used primarily in the case studies in Chapters 3 and 4. Court decisions, agency deliberations and rule promulgations, and various committee and parliamentary proceedings are also considered throughout.

Case study methodology has been criticised as generalising from a single case is often difficult.[80] Various cultural, economic, and social factors can affect the outcomes of a specific programme studied in a case study – achieving credible generalizability is, therefore, difficult. Yet, generalisability is one aim of this Thesis. It aims to enable lawmakers outside of the US to introduce effective whistleblower laws. Numerous case studies on various whistleblower laws have been considered, which have been recognised to improve generalisability.[81] Local factors that may influence generalisability are also discussed in length in Chapter 5. Case study methodology has also been criticised for lacking rigour, as case studies can be less systematic, allow equivocal evidence, and biased views can influence results.[82] Although these flaws cannot be completely eliminated, the author has ensured to be as exhaustive as possible with regard to the evidence.

The case studies are also paired with what is best characterised as comparative methodology, and the case studies are also undertaken for the sake of comparison. While comparative methodology is notoriously hard to rigidly define,[83] elements of this Thesis have characteristics of what has been called the 'better law'[84] and law-in-context approaches used by comparativists.[85] For comparative research more broadly, 'it is the aim of the research and the research question that will determine which methods could be useful'.[86] A significant part of this Thesis goes into considering how to improve enforcement in the EU and elsewhere by reviewing laws utilised in the US.[87] This requires understanding how these laws developed

[80] Arya Priya, 'Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application' (2020) 70 Sociological Bulletin 94, 102.

[81] Ibid 103 notes on remedying generalizability issues: 'If hypotheses generated from a case study are found to hold water or replicate through multiple similar cases, this can help the researcher in moving towards theory building or generalisation'.

[82] Robert K. Yin, *Case Study Research: Design and Methods* (3rd ed, SAGE Publications 2003) 10.

[83] This is due to the open-endedness and large degree of discretion regarding methods, as many comparativsts believe that 'there is no one methodological paradigm, [therefore] a plurality of methods can be practised' Esin Örücü, 'Methodological Aspects of Comparative Law' (2007) VIII European Journal of Law Reform 29, 31.

[84] Ibid 31.

[85] Mark Van Hoecke describes the law-in-context method as being open to a wider range of sources, including 'data from historical, sociological, anthropological, psychological, etc. research, or even carry out such research oneself; one may set up a large interdisciplinary comparative project in which several non-legal disciplines are brought together.' Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method 1, 17.

[86] Ibid 1.

[87] This is characteristic of comparativist approaches, Edward J. Eberle notes that the purpose of comparative law is 'looking to other, foreign legal systems for illumination and insight in the hope that wisdom and understanding are to be gained, either from a foreign legal system or our own' Edward J. Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger Williams University Law Review 51, 57. Esin Örücü writes that 'in law reform by legislators or the courts, comparative law is a provider of a pool of models, foreign law being used to modernise and improve the law at home. Looking preferably to the legal systems which are socio-culturally and legal-culturally similar, the comparatist is led to systems that share the same problem but deal with the problem in different ways, better ways or more efficient ways. This task will determine the methodology to be used.' Örücü (n 84) 31-32.

in the US,[88] and what could make them not work elsewhere. The reward programmes in the US are unparalleled elsewhere, and understanding local factors that may be driving their success is crucial for implementing them successfully elsewhere.[89] Protection laws – the EU's chosen method to combat corporate wrongdoing – are also considered and compared both between each other and with respect to reward programmes. When comparing the two, numerous practical restrictions and decisions must be made due to a range of factors such as data and research availability – something that involves, from a methodological point of view, a subjective element that is difficult to entirely eliminate.[90]

While the US is a common law country and EU Member States are primarily operating under the umbrella of the civil tradition, numerous developments have lessened the significance of this difference, such as the emergence of transnational legal orders.[91] The EU has also adopted a range of legal tools from the US, such as leniency programmes in competition law. More specifically, the focus of comparison is the effect of Public Interest Disclosure legislation adopted in the UK, Australia, and Ireland on detection and deterrence of corporate wrongdoing. These are all common law countries and are comparable on that basis. Australia and the UK have also utilised *qui tam* enforcement historically but discontinued the practice. Public Interest Disclosure laws were also selected because the EU Directive was heavily influenced by the UK's Public Interest Disclosure Act of 1998, whose explicit aim is to enhance enforcement of EU law. Laws in other countries are also briefly considered throughout. Although making a thorough analysis of these countries' legal history and tradition goes beyond the scope of this Thesis, it is worth mentioning that data from the implementation of whistleblower rules and the application of reward programmes provides invaluable information and allows a more spherical overview of the legal space as well as the identification of issues and promising aspects that can be adopted by other jurisdictions.

These methodological choices are found in different forms throughout this Thesis. Chapters 1 and 2 have comparative and historical elements. Chapter 1, sections A and B, provides background on the enforcement of laws governing corporate conduct. The comparative element tries to contrast typical forms of ensuring compliance: audits and self-regulation, with utilising whistleblowers in enforcement. By comparison and as a complement, utilising whistleblowers looks appealing. This is also justified by three case studies: securities fraud, money laundering, and taxation. These are three areas where i)

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[88] Ibid 3 notes: 'When one tries to improve one's own legal system, be it as a legislator or as a scholar, it has become obvious to look at the other side of the borders. However, importing rules and solutions from abroad may not work because of a difference in context. Hence, a more thorough contextual approach may be required'. Edward J. Eberle note that it is not enough to compare words on the page, but that the comparativist 'need to excavate the underlying structure of law to understand better what the law really is and how it actually functions within a society. To do this, we need to explore the substructural forces that influence law. These can be things like religion, history, geography, morals, custom, philosophy or ideology, among other driving forces.' Eberle (n 88) 52.

[89] For comparative research, this is typically important as it may reveal historical conditions or institutions that are irreplicable and unique to the country of study, see e.g. O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) The Modern Law Review 1, 12: 'Anyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share?'.

[90] Other restrictions include choices based on the capabilities of the researcher as well as time/cost constraints. It is widely recognised that while these discretionary elements of design choice should be recognised and thoroughly contemplated, eliminating subjectivity in comparative research in its entirety is almost impossible. For an illuminating discussion see Simone Glanert, 'Method?' in Pier Giuseppe Monateri (ed), Methods of Comparative Law (Edward Elgar 2012) 61-81, and in particular 65-70.

[91] Membership in global organisations such as the OECD or Financial Action Taskforce (FATF) mandate that certain rules be transposed in states that are members. For more on transnational legal orders see Terence C. Halliday and Gregory Shaffer, 'Transnational Legal Orders' (2015) Legal Studies Research Paper Series No. 2015-56 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605625> accessed 19 September 2024.

persistent failures in ensuring compliance arise, ii) expensive paperwork regimes have developed whose effectiveness is hard to quantify, and iii) utilising whistleblowers appear comparatively more effective than other methods used. Chapter 2 takes a historical approach and is explanatory and seeks to understand what historical conditions led to the development of different practices for solving a similar issue. Chapter 3 is structued i best characterised as stricter case studied together with comparisons and contrasts, Chapter 4 consist solely of case studies, and Chapter 5 is comparative and concluding, considering what features of reward programmes are important and how to think about local cultural elements during legal transplantation.

E. Outline of Thesis

Chapter 1, *Corporate Wrongdoing and Contemporary Enforcement*, is an introduction to the topic of corporate wrongdoing and, in particular, how laws in this domain have been enforced during the last decades. The Chapter deals with how persistent and damaging corporate wrongdoing is, highlighting comparative examples with other categories of wrongdoing. It argues that the tendency in the last decades have been to introduce audit hierarchies and self-regulation that have proven expensive and have questionable effectiveness, which is then illustrated by three shorter case studies on securities fraud, anti-money laundering, and taxation. Finally, the Chapter argues that whistleblowers can complement the present enforcement regime in numerous ways: overcoming issues associated with evidence tampering and destruction, reducing information acquisition costs, aiding in mitigating selective enforcement and regulatory capture, encouraging public participation in law enforcement, and increasing uncertainty for wrongdoers by introducing ambiguity in the probability of detection.

Chapter 2, *The History of Whistleblower Laws*, outlines the history of informing or 'whistleblowing', the various whistleblower practices and laws that have existed in disparate cultures and at different times. It concludes that there are two distinct motivations for whistleblower laws. Their first historical use was primarily instrumental: the King wanted information on those who did not pay tax or customs duty and provided informants with a bounty if they dragged these people to court. This is the origin of *qui tam* enforcement of statutes, which is much more instrumental and does not pay much attention to the wellness of informants. The notion of 'whistleblower' and protections only became popular in the late 1970s and has a strong connection with the employment rights movement. Lawmaking in this domain has exclusively been reactionary: scandals causing death, destruction, and loss where employees did not come forward or were retaliated against led to public outcries that whistleblowers need protection. Apart from the US, very few countries choose to utilize rewards and instead whistleblower protection legislation has in most countries become a part of employment law. This Chapter makes a distinction between protection regimes and reward regimes, which are then addressed separately in the remaining Chapters.

Chapter 3, *The Design and Performance of Protection Laws*, is a review of the design and performance of whistleblower protection laws and has two fundamental sections. The first section contains four case studies of the design and performance of some whistleblower law, including the UK's Public Interest Disclosure Act (1998), the US's Sarbanes Oxley Act (2002), Australia's Public Interest Disclosure Act (2013), and Ireland's Public Interest Disclosure Act (2014). The first two were selected as they served as a role model for future legislation, and the latter two were chosen because they were adopted with international best practices in mind. Data availability was also considered, along with cultural and historical comparability. With respect to these laws, this section considers the legal outcomes for whistleblowers in retaliation cases under these laws, as well as administrative data on their use. The second section of the Chapter is concerned with fundamental design issues regarding

the ability of protections to incentivise reporting of severe corporate wrongdoing. Among other things, it contains an analysis of available surveys on the prevalence of retaliation and observed wrongdoing, raises issues regarding informal retaliation, non-disclosure agreements, and the context of employment law as a limiting factor for eliciting valuable information.

Chapter 4, *The Design and Performance of US Reward Programmes*, contains three in-depth case studies of US reward programmes: the False Claims Act (FCA), and the programmes managed by the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC). It outlines the fundamental design features of these programmes and reviews their performance. Considering administrative and empirical evidence, the Chapter concludes that these programmes have been highly effective in improving the detection and deterrence of corporate wrongdoing.

Chapter 5, *Designing Effective Reward Programmes*, is structured into three substantial sections. It considers objections that these programmes incentivise meritless claims, crowd out intrinsic motivation, and undermine internal reporting structures. While the Chapter concludes that these concerns are by and large exaggerated and do not constitute a compelling case against the introduction of reward programmes, considering these objections yields relevant insights into optimal design. The Chapter argues that some design features are crucial for the success of these programmes, and outlines best practices regarding reward sizing, thresholds for rewards, and numerous other design aspects.

CHAPTER 1: CORPORATE WRONGDOING AND CONTEMPORARY ENFORCEMENT

Present Enforcement	Detection Mechanism	Key Weaknesses
Securities Fraud	External audits, PCAOB oversight	Audit capture, layered oversight insufficient
Money Laundering	KYC, SARs, FATF audits	False positives, paperwork burden, low coverage
Taxation	Random audits, IRS scrutiny	Costly audits, crowd-out, low perceived fairness
Environmental Violations	EPA inspections, state audits	Inspection evasion, weak enforcement follow-up
Procurement Fraud	Contract oversight, random reviews	Internal reporting failures, oversight evasion
Antitrust (Cartels)	EC leniency programmes, investigations	Reluctance to self-incriminate, detection failure

Whistleblower potential	Whistleblower Potential	Whistleblower Evidence
Securities Fraud	High - exposes complex fraud schemes	SEC programme shows substantial recoveries and deterrence
Money Laundering	High - insiders reveal deliberate evasion	AML Act of 2020 and FinCEN reports confirm strong insider value
Taxation	High - better info than random audits	IRS programme reveals significant recoveries post-2006 reforms
Environmental Violations	High - especially in pollution and emissions	APPS (US) demonstrates whistleblower-led case detection (76%)
Procurement Fraud	Very High - cornerstone of FCA success	Around 80% of recoveries via whistleblowers under the FCA
Antitrust (Cartels)	High - cartel insiders trigger most enforcement	Leniency and insider reporting are main discovery sources

Structural Weakness	Whistleblower Potential
Low motivation for employees to report	Monetary incentives
Selective enforcement	Reduced discretion
Expensive investigations	Reduced information acquisition costs
Psychological insensitivity to damages	Supplanted by monetary incentive
Evidence destruction/tampering	Insider information

A society grows great when old men plant trees in whose shade they shall never sit.

- Greek Proverb

A. Introduction

On the 6th of February 2023 an earthquake shook Turkey and Syria that is estimated to have killed 52,000 people. Luca Dal Zilio and Jean-Paul Ampuero write, 'The ultimate reason for the devastation was clear in the mangled ruins: unreinforced brick masonry, low-rise concrete frames, lift slab, and non-ductile concrete. Severe damage was amplified because most existing buildings are low-rise brick structures that are constructed very close to each other. Such devastation is reflected in the saying: earthquakes do not kill people, buildings do.'[92] Others quickly pointed out that 'This is a disaster caused by shoddy construction, not by an earthquake.'[93] In the aftermath, hundreds of arrest warrants were issued over the collapsed buildings,[94] many targeting those who were responsible for the shoddy constructions. The total monetary costs are estimated at around $84 billion – with around $71 billion attributed to housing loss.[95] Non-compliance and lack of enforcement in the construction industry contributed substantially to the damages of this disaster. Some had acted inversely to the Greek proverb; they had sown seeds of death and hoped never to reap

[92] Luca Dal Zilio and Jean-Paul Ampuero, 'Earthquake doublet in Turkey and Syria' (2023) 4 Communications Earth & Environment 1, 2.

[93] David Alexander, Professor of emergency planning, cited in Associated Press, 'Turkey's lax policing of building codes known before quake' (*AP News* , 10 February 2023) <https://apnews.com/article/politics-2023-turkey-syria-earthquake-government-istanbul-fbd6af578a6056569879b5ef6c55d322> accessed 19 September 2024.

[94] Jon Henley, 'Turkey arrests building contractors as earthquake death toll mounts' (*The Guardian*, 12 February 2023), <https://www.theguardian.com/world/2023/feb/12/turkey-arrests-building-contractors-earthquake-death-toll-mounts> accessed 19 September 2024.

[95] TÜRKONFED, '2023 Kahramanmaraş Earthquake Pre-Assessment & Status Report' 7 (2 February 2023) <https://turkonfed.org/Files/ContentFile/turkonfed2023kahramanmarasearthquakepre-assessmentstatusreport021223-9583.pdf> accessed 19 September 2024.

the consequences.

Corporate crime kills and injures many times more people than interpersonal violence,[96] and in 2020 John Braithwaite noted that 'The U.S. pharmaceutical industry accounts for more deaths than all the deaths caused by street crime in the United States'.[97] Monetarily, it is estimated that 'the total economic cost of corporate crime is perhaps as much as 20 times the cost of 'mainstream' crime'.[98] While detrimental, there is no broadly accepted definition of 'corporate crime', and it is difficult to know the extent of it. This is because these crimes often generate no immediate victims, and it is difficult to infer from detected cases of wrongdoing to its prevalence. Research suggests that it is considerably more common than what public statistics suggest, and there are no signs of a declining trend in recent decades. Using data from large firms' internal investigations, Eugene Soltes shows that the actual amount of offending is orders of magnitude larger than commonly assumed.[99] Alexander Dyck and colleagues estimate that in normal times, only one in three corporate frauds are detected and that, on average, 10% of large-publicly traded firms are committing securities fraud annually.[100] Other studies that use proxies for corporate crime suggest that in the US some of the most concerning crime categories have been on the rise since the great financial crisis of 2008.[101] A 2022 survey by Ernst and Young found that standards have dropped significantly in recent years, with 42% of board members agreeing that unethical behaviour in senior or high performers is tolerated in their organizations (up from 34% in 2020) and 34% agreeing that it is easy to bypass business rules in their organizations (up from 25% in 2020).[102]

This is despite a longstanding recognition of the damages caused by corporate wrongdoing. In *Principles of Criminology*, one of the most influential criminologists of the 20th century, Edwin H. Sutherland, wrote, 'The danger from robbery or kidnaping is clearly realized, for they involve direct sensory processes and are based on social relations which have existed for many centuries. Theft by fraudulent advertisements and prospectuses is a recent development, and affects persons who may be thousands of miles away from the thief. Codes of behavior have not been developed in regard to this behavior. These white-collar criminaloids, however, are by far the most dangerous to society of any type of criminals from the point of view of effects on private property and social institutions',[103] and that 'White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale'[104] Sutherland noted historical examples of

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[96] David Whyte, 'Victims of Corporate Crime' in Sandra Walklate (ed), *From Handbook of Victims and Victimology* (Routledge 2007) 446-463.

[97] John Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful' (2020) 1 Journal of White Collar and Corporate Crime 62, 63.

[98] Whyte (n 97) 446. See also Mark A. Cohn, 'Measuring the Costs and Benefits of Crime and Justice' (2000) 4 Criminal Justice 263, 295: 'If the estimates are to be believed, corporate crime causes tangible losses far in excess of tangible losses associated with street crimes.'

[99] Eugene Soltes, 'The frequency of corporate misconduct: public enforcement versus private reality' (2019) 26 Journal of Financial Crime 923.

[100] Alexander Dyck, Adair Morse, and Luigi Zingales, 'How Pervasive is Corporate Fraud?' (2024) 29 Review of Accounting Studies 736.

[101] See, for example, Dorothy S. Lund and Natasha Sarin, 'Corporate Crime and Punishment: An Empirical Study' (2022) 100 Texas Law Review 285.

[102] Ernst and Young, 'Global Integrity Report 2022: Tunnel vision or the bigger picture?' (2022) 11 <https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/assurance/assurance-pdfs/ey-global-integrity-report-2022.pdf> accessed 19 September 2024.

[103] Edwin H. Sutherland, *Principles of Criminology* (4th ed, Lippincott Company 1947) 37. The identification of white-collar criminals as the 'by far most dangerous to society' appears also to have been present in the 1939 edition, see Kohn 2023 (n 299) 277.

[104] Edwin H. Sutherland, 'White-Collar Criminality' (1940) 5 American Sociological Review 1, 5.

this, one being the 'Swedish Match King' Ivar Kreuger, who operated a massive Ponzi scheme and stole $250 million, while the criminals who received most attention at the time only had managed to rack up $130,000 in burglaries and robberies.[105] While Sutherland's description of white-collar crime may make it seem like a rather new invention, there are ancient examples of similar fraud. [106]

Due to not generating immediate victims, corporate crime often goes undetected for extended periods. Bernie Madoff's ponzi scheme lasted for over 17 years, while studies on cartels suggest that their average duration is about 8 years,[107] although some last for decades. Recent investigations into anti-money laundering non-compliance have revealed its prolonged and nearly ubiquitous presence in large banks.[108] The Dieselgate scandal revealed that Volkswagen cars had been on the roads for years that emitted up to 40 times more than emissions standard allowed.[109] While the scandal broke in 2015, a PowerPoint presentation by a top technology executive on how to cheat emissions tests was available as early as 2006.[110] More recently, the Cum-Ex and Cum-Cum scandal, the largest tax theft in European history estimated to have cost European taxpayers more than €55 billion,[111] went on between at least 2001 and 2012 despite hundreds, if not thousands, of persons being involved in these schemes,[112] including almost all large German banks.

Identifying fraud and wrongdoing from the outside is nearly impossible: even otherwise intelligent people are often fooled. The Savings and Loans banks were held out as models by prominent figures, such as the former Chair of the Federal Reserve Alan Greenspan,[113] and Bernie Madoff's Ponzi scheme was the largest 'hedge fund' in the world that money kept pouring into. In an accounting fraud involving Satyam Computer Services of India, the founder and the firm had received multiple awards for excellence and entrepreneurship, including the 'Global Peacock Award' for global excellence in corporate accountability. Less than five months after receiving the reward, Satyam 'became the centerpiece of a 'massive'

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[105] Ibid 5.

[106] One of the earliest known financial frauds stories that is told in varying forms dates back to 360 B.C and talks about Hegestratos, a merchant from Greece, who persuaded a purchaser of corn to pay in advance for a shipment, promising to pay it back with interest when the cargo was delivered. If Hegestratos refused to pay back the loan, the creditor could take the boat used for transportation as well as the cargo. Hegestratos plan was to keep the loan, sink the empty boat, and sell the corn – yet his plan failed as the crew and passengers caught him in the act and he drowned trying to escape. Other early cases of fraud include using concrete infill instead of solid marble in the building of a temple. See Peter Johnstone, 'Serious white collar fraud: historical and contemporary perspectives' (1998) 30 Crime, Law and Social Change 107.

[107] Margaret C. Levenstein and Valerie Y. Suslow, 'Breaking Up Is Hard to Do: Determinants of Cartel Duration' (2011) 54 The Journal of Law & Economics 455, 463.The average cartel duration in their sample was 8.1 years.

[108] Spagnolo and Nyreröd SNS Report (n 22).

[109] Steven R H Barrett et al, 'Impact of the Volkswagen emissions control defeat device on US public health.' (2015) 10 Environmental Research Letters 2.

[110] Jack Ewing, 'VW Presentation in '06 Showed How to Foil Emissions Tests' (*New York Times*, 26 April 2016) <https://www.nytimes.com/2016/04/27/business/international/vw-presentation-in-06-showed-how-to-foil-emissions-tests.html> accessed 19 September 2024.

[111] European Parliament, 'The Cum-ex files – Information Document' (26 November 2018) <https://www.europarl.europa.eu/committees/en/cum-ex-scandal-financial-crime-and-the-l/product-details/20181114CHE05361> accessed 19 September 2024.

[112]See Christoph Spengel, 'Statement at the Public Hearing of the Subcommittee on Tax Matters of the European Parliament on the Cum-Ex/Cum-Cum Scandal' (24 February 2021) <https://www.europarl.europa.eu/cmsdata/230392/Christoph%20Spengel%20statement.pdf> accessed 19 September 2024.

[113] William K. Black, *The Best Way to Rob a Bank is to Own One: How Corporate Executives and Politicians Looted the S&L Industry* (Texas University Press 2005) 234.

accounting fraud.'[114] Elizabeth Holmes of Theranos was hailed as the female Steve Jobs.[115] From 1995 until the beginning of 2000, Enron was rated the most innovative large company in Fortune magazine's Most Admired Companies survey.[116] In 2019, Abraaj Group, the largest private equity firm in the Middle East at the time with $14 billion of assets under management, 'wrecked private equity' and 'eroded institutional investor confidence' after the firm was charged with fraud.[117] The firm was previously one of the world's most celebrated private equity firms.[118]

There is no shortage of anecdotes of corporate wrongdoing, failed enforcement, and lack of deterrence. The enforcement of environmental regulations in the US serves as an example. British Petroleum (BP) was responsible for the largest oil spill in history at the Mexican Gulf's Deepwater Horizon oil drilling rig in 2010, when around 5 million barrels of oil were released into the ocean.[119] Before the spill, senior BP managers had been warned by internal investigations that the company repeatedly disregarded environmental and safety rules and risked a serious accident if this did not change. Allegedly, the company delayed inspections to cut production costs, ignored safety standards by neglecting ageing equipment, and falsified inspection records. Officials at the Environmental Protection Agency (EPA) had already considered debarring BP from bidding on government contracts before 2010,[120] and a 2004 report found a pattern of intimidating workers who raised environmental and safety concerns.[121] Since the 2010 spill, US regulatory agencies have fined BP and its subsidiaries over 80 times for environmental violations.[122] This pattern of recidivism is not unique. Concerning Volkswagen (VW) and Dieselgate, Benjamin van Roij and Adam Fine note that 'The company had used defeat devices all the way back to 1973, when it was first caught and ordered to pay a $120,000 fine to the EPA. Dating back to 1999, the company had been installing cheating devices in its Audi engines that would reduce pollution when it recognized the car was being tested. Later, in 2005, VW had to pay a $1.1 million fine to the EPA for emissions cheating in Golfs, Jettas, and New Beetles.'[123]

Nor are these mere anecdotes. As mentioned above, obtaining reliable estimates on non-compliance levels in a regulatory area is difficult and expensive, but not impossible. One agency that did this in a statistically valid way was the EPA in early 2002. What they found,

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[114] Madan Bhasin, 'Corporate Accounting Scandal at Satyam: A Case Study of India's Enron' (2013) 1 European Journal of Business and Social Sciences 25, 32.

[115] Daniel Thomas, 'Theranos scandal: Who is Elizabeth Holmes and why was she on trial?' (*BBC News*, 4 January 2022) <https://www.bbc.com/news/business-58336998> accessed 19 September 2024.

[116] Paul M. Healy and Krishna G. Palepu, 'The Fall of Enron' (2003) 17 Journal of Economic Perspectives 3, 3.

[117] Matthew Martin and Nicolas Parasie, 'The Firm That Wrecked Private Equity for the Middle East' (*Bloomberg*, 1 August 2019) <https://www.bloomberg.com/news/articles/2019-08-01/the-firm-that-wrecked-private-equity-for-the-middle-east?embedded-checkout=true> accessed 19 September 2024.

[118] Dan Primack, 'Private equity's biggest Ponzi scheme' (*Axios*, 29 November 2021) <https://www.axios.com/private-equity-ponzi-scheme-simon-clark-abraaj-807e5bef-b341-4b93-ab55-5f4cf3e2c7c5.html> accessed 19 September 2024.

[119] See Marcia K. McNutt et al, 'Review of flow rate estimates of the Deepwater Horizon oil spill' (2011) 109 Proceedings of the National Academy of Sciences 20260. Another highly recommended reading that covers BP's questionable behavior is Garrett (n 25) 117-122 and 128-146.

[120] Abrahm Lustgarten, 'EPA Officials Weigh Sanctions Against BP's U.S. Operations' (*ProPublica*, 28 November 2012) <https://www.propublica.org/article/epa-officials-weighing-sanctions-against-bps-us-operations> accessed 19 September 2024.

[121] Abrahm Lustgarten and Ryan Knutson, 'Years of Internal BP Probes Warned That Neglect Could Lead to Accidents' (*ProPublica*, 7 June 2010) <https://www.propublica.org/article/years-of-internal-bp-probes-warned-that-neglect-could-lead-to-accidents> accessed 19 September 2024.

[122] See Good Jobs First, 'Violationtracker' (2022) <https://www.goodjobsfirst.org/violation-tracker> accessed 19 September 2024.

[123] Van Rooij and Fine 2021 (n 78) 202.

outlined in a 2022 book by Cynthia Giles,[124] was rather discouraging. With respect to regulations concerning organic chemical manufacturing, around 34.3% was non-compliant (112 inspections), among ethylene oxide manufacturers around 49.2% was non-compliant (67 inspections), and with respect to municipal combined sewer requirements under the Clean Water Act, around 61.4% was non-compliant (214 inspections).[125] Giles outlines other facts about environmental compliance in the US, including that: 'at least 70% of the largest 25 coal-fired power companies were in serious violation of the Clean Air Act', with respect to petroleum refineries, the 'EPA has entered into 37 Clean Air Act settlements with US companies that refine over 95% of the nation's petroleum refining capacity', and with respect to cement manufacturing plants: 'all of the top five, and nine of the top 10 cement manufacturers in the US – responsible for 82% of the total US production – entered into enforcement agreements with EPA for serious Clean Air Act violations'.[126] Similar stories of non-compliance and recidivism can be told of other regulatory areas, including antitrust, securities fraud, pharmaceutical lab studies, money laundering, and taxation.

The remainder of this Chapter is structured as follows. The section *Literature Review on Enforcement of Corporate Crime* reviews literature relating to enforcement of corporate wrongdoing, deterrence, and sanctions. Section C, *Liability, Detection, and Deterrence*, outlines typical ways corporations are held liable for wrongdoing and discusses the two main ways to ensure compliance: audits and self-regulation, as well as concerns raised regarding their effectiveness. The section *Three Case Studies*, briefly reviews three regulatory areas: securities fraud, money laundering, and taxation. Each case study intends to show some weaknesses of audits and self-regulation, and emphasises the difficulties faced when attempting to ensure corporate compliance. Finally, the section *Benefits of Whistleblowers,* shows how whistleblowing can remedy many of the identified issues. How our moral psychology presents difficulties that rewards to whistleblowers can overcome, and how similar incentives, such as leniency programmes in competition law, have proven highly effective.

B. Literature Review on Enforcement of Corporate Crime

The study of policy effectiveness in the area of crime detection and deterrence has a long history, primarily with respect to conventional crimes.[127] In the area of corporate wrongdoing research is less unified, primarily due to the diversity of violations, its relative recency, and the lack of a unified object of study. The notion of "white collar crime" was first introduced by Sutherland at a Presidential Address in 1939 to the American Sociological Society, where he defined white collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation".[128] This is a first approximation of an intuitive object of study, yet it suffers from deficiencies. As John Braithwaite notes, "The requirement that a crime cannot a white collar crime unless perpetrated by a person of 'high social status' is an unfortunate mixing of definition and explanation, especially when Sutherland used the widespread nature of white collar crime to refuter class-based theories of criminality".[129] In

[124] Cynthia Giles, *Next Generation Compliance: Environmental Regulation for the Modern Era* (Oxford University Press 2022).

[125] Ibid 56-57.

[126] Ibid 57, see also 57-59 which outline further compliance failures.

[127] An extensive review of the literature is Lawrence W. Sherman et al, 'Preventing Crime: What Works, What Doesn't, What's Promising' (1998) which was a reported requested by Congress on crime prevention strategies within local law enforcement and communities. The data and evaluations of programme effectiveness in the areas of corporate wrongdoing pales in comparison to the hundreds of studies and programme data on various preventative measures that this 750-page report reviews.

[128] John Braithwaite, 'White Collar Crime' (1985) 11 Annual Review of Sociology 1, 3.

[129] Ibid 3.

dealing with the issue of definitional deficiencies, Braithwaite suggests that researchers simply proceed to study violations of specific laws (tax, environment, antitrust), and recommends that we keep Sutherland's definition while "partition the domain into major types of white collar crime which do have theoretical potential".[130] Others have suggested that we should partition white collar crime into occupational and corporate crime, where they define occupational crime as "consist[ing] of offenses committed by individuals for themselves in the course of their occupations and the offenses of employees against their employers", and corporate crime as "the offenses committed by corporate officials for the corporation and the offenses of the corporation itself".[131] Definitional issues remain a problem in the corporate crime and enforcement literature, as many enforcement tools do not neatly target a predefined category of crime. Inspectors at a factor may detect both occupational and corporate crime, and whistleblower programmes can target both crimes committed by individuals for their own gain and corporate crimes.

A second issue in corporate crime and enforcement research is the lack of data on offenses. Oftentimes corporate offenses do not create immediate victims, and the victims are often unaware that they are victims. Studying criminal law and enforcement is much simpler, as victims typically immediately report violations to the police. To gain useful data, students of corporate crime would ideally have to proceed like a statistician to obtain random samples through audits to determine the prevalence of violations in a given regulatory area. This is difficult, costly, and we must assume that audits always detect the violations under study. Measuring the deterrent effects of enforcement and sanctions regimes therefore becomes incredibly difficult.[132] A further difference is that in contrast to conventional crime, corporate wrongdoing is often dealt with through regulation and administrative institutions whose characteristics, self-beliefs, and motivations are not the same as police and criminal prosecutors. Early literature in the 1970s found that "from the top administrator to the junior inspector, most officers of regulatory agencies never saw themselves as law enforcers"[133] Corporate wrongdoing is typically handled through negotiated settlements and compliance measures instead of a strict prosecutor/court/criminal dynamic.

Prevention is the most desirable outcome of enforcement policies, as by preventing violations, victims do not suffer, and we avoid the costs associated with prosecution and containment of criminals. This is achieved by two levers: a form of violation detection (whistleblowers, audits, self-regulation), and a form of sanction (fines, licence/permit withdrawal or barring companies from bidding on public contracts). This Thesis deals primarily with detection, but it is worth commenting on sanctions as well. Although deterrence is intuitive enough of a concept, just how exactly it works and through what mechanisms has proven difficult to identify. The evidence that more severe sanctions increase deterrence is not clear, for example, even in the conventional crime literature.[134] For the corporate wrongdoing literature, it has been even more problematic to study deterrence, and for a long time the evidence on whether sanctions deterred were equivocal with few studies

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[130] Ibid.

[131] Clinard, M., and Quinney, R. 1973. *Criminal Behavior Systems: A Typology*. New York: Hold, Reinhart & Winston, 274.

[132] In a study that sheds some insights on how effective deterrence would look like for corporate offenses, Nathan H. Miller suggests that it would entail an immediate spike in detected cases post-enactment of a new detection-regime, for detected cases to eventually drop below the mean number of detected cases pre-enactment. While a good benchmark for policy assessment, such data would also be consistent with wrongdoers becoming better at hiding their offenses. See Nathan H. Miller, "Strategic Leniency and Cartel Enforcement." (2009) 99 American Economic Review 750.

[133] Braithwaite 1985, 9-10.

[134] See Aaron Chalfin and Justin McCray, 'Criminal Deterrence: A Review of the Literature' (2017) 55 Journal of Economic Literature 5.

being able to find deterrence effects for sanction severity.[135] There are a range of factors that lead to organisational wrongdoing and the absence of it, such as different organizational cultures and the fear of reputational damages to the firm and individuals, which are typically harder to quantify. These are also mediated through a range of contextual factors, such as company size, industry type, financial health, degree of competition, and local cultural factors.[136] Even today, the evidence of deterrence of sanctions remain scattered at the level of specific violations, with few generalizable results that can help inform a general enforcement approach to corporate wrongdoing.

With the proliferation of regulations and regulatory agencies in the last hundred years, a significant amount of research has been accumulated in specific regulatory areas on specific violations. Enforcement areas of note are competition offenses,[137] environmental violations,[138] anti-money laundering,[139] and taxation.[140] Numerous studies in these fields aim to understand what enforcement policies are effective at detecting and deterring violations, and these are discussed throughout this Thesis in their relevant contexts. There are other strands of literature that this Thesis builds on, including the regulation and governance literature[141] and cost-benefit analysis of enforcement policies.[142] Mainly, however, it contributes to our understanding of whistleblower policies aimed at enhancing enforcement, primarily reward programmes, which there is presently no comprehensive study on.[143] In contrast to the equivocal evidence on deterrence for many sanction regimes, this Thesis presents numerous rigorous studies and administrative data which shows that whistleblower reward programmes are effective deterrents of corporate wrongdoing. As such, it contributes to our understanding of effective regulatory governance and also has practical applications for enforcement agencies.

C. Liability, Detection, and Deterrence

1. The present liability regime

As noted, the term 'corporate wrongdoing' does not have an agreed-upon definition,[144] and what it takes for something to constitute corporate wrongdoing or corporate 'crime' differs significantly between jurisdictions. For an organisation to be held criminally liable in the UK, the 'Identification Principle' requires prosecutors to identify an executive officer's directing mind and will. The US instead utilises the principle of *respondeat superior*, according to which an employee's action can cause the employer to be criminally liable even if an executive did not direct the employee. It suffices that the actions were taken in the interest of

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[135] Sally S. Simpson and Christopher S. Koper, 'Deterring Corporate Crime' (1992) 30 Criminology 347, 350, and Peter C. Yeager, 'The Elusive Deterrence of Corporate Crime' (2016) 15 Criminology & Public Policy 439.

[136] Yeager n (135) at 440.

[137] Numerous studies are reviewed in this Thesis, primarily in Chapter 1(C)(3),

[138] Giles (2022).

[139] Numerous studies are reviewed in this Thesis, primarily in Chapter 1(B)(2).

[140] Numerous studies are reviewed in this Thesis, primarily in Chapter 1(B)(3) and Chapter 4(C).

[141] See, e.g. David Levi-Faur et al, 'Regulatory Governance: History, Theories, Strategies, and Challenges' (2021) Oxford Research Encyclopedia of Politics, and Levi-Faur 2005, Braithwaite 2008, 2011.

[142] See, e.g., Richard A. Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers' (2000) 29, The Journal of Legal Studies 1153.

[143] Some attempts for policy assessment in this regard is Nyreröd and Spagnolo (X).

[144] See Schell-Busey et al, 'What Works? A Systemic Review of Corporate Crime Deterrence' (2016) 15 Criminology & Public Policy 387, 388-9 for a discussion of this ambiguity, noting that it has existed all the way since Edwin Sutherland coined the phrase 'white-collar crime'. Often-suggested synonyms are: 'work-related crimes', 'occupational crimes', 'corporate crime', and 'business crime'.

the organisation.[145] The domain of actions by employees that expose a company to liability is, therefore, significantly larger in the US than in the UK, and many forms of wrongdoing that would be classified as corporate wrongdoing in the US would not do so in the UK. Some argue that the identification principle makes it difficult to prosecute large companies for wrongdoing and, more generally, that it is a very demanding liability standard. The UK has moved to expand its liability regime, starting under Section 7 of the 2010 Bribery Act, which made a relevant commercial organisation guilty of failure to prevent bribery if a person of that organisation bribed another person with the intention to obtain or retain business for the commercial enterprise.[146] This form of liability was expanded again in the Criminal Finances Act of 2017, section 45 of which relates to failure to prevent the facilitation of tax evasion offenses.[147] Today, there is a debate on expanding this form of vicarious liability to other forms of offences.[148] Failure to prevent regimes typically also comes with a defence for a corporation: if proper routines and internal controls were implemented and observed during the time of violations, then the corporation will receive more lenient treatment. For example, Section 7(2) of the Bribery reads: 'it is a defence for C [Relevant Commercial Organisation] to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.' This is a form of incentivised self-regulation that will be discussed later.

Concurrently with a rise in the popularity of 'failure to prevent' models, there has been a rise in the number of negotiated settlements or non-trial resolutions.[149] In the US, these are called deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[150] Under these agreements, corporations typically pay a fine and agree to certain conditions in return for avoiding prosecution. These have become popular for a range of reasons, including that prosecuting large corporations can be incredibly resource-intensive and risky for both parties and that a conviction can have wide-ranging repercussions, including for innocent employees. A formal conviction can be an existential threat to many corporations, which is avoided with negotiated settlements.[151] Typically, the only punishment under a negotiated

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[145] See Miriam Baer, 'When the Corporation Investigates Itself' (2018) Brooklyn Law School Legal Studies, Research Paper No.533 5, and Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 330-331.

[146] See Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 Law and Financial Markets Review 57, 59.

[147] Ibid 60. Sec 45(2) reads: 'It is a defence for B [Relevant Body] to prove that, when the UK tax evasion facilitation offence was committed—

(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.'

[148] See, e.g.: HL Bill 172, the 'Economic Crime and Corporate Transparency Bill', which reads: 'It is a defence for the relevant body to prove that, at the time the fraud offence was committed—

(a) the body had in place such prevention procedures as it was reasonable in all the circumstances to expect the body to have in place, or

(b) it was not reasonable in all the circumstances to expect the body to have any prevention procedures in place.'

[149] These have previously been unique to the US, but are now starting to become adopted more broadly, see Jennifer Arlen, 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.' (2019) New York University School of Law, Law & Economics Research Paper Series, Working Paper No.19-30, and OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention' (2019) <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf> accessed 19 September 2024.

[150] Garrett (n 25) is one of the better sources on the development and use of NPAs and DPA in the US.

[151] Formal convictions can trigger collateral sanctions such as debarment, see e.g., Arlen 2019 (n 149) 2. In the case of Arthur Andersen, a formal conviction meant they were not allowed to audit public companies which was effectively a death sentence for the firm.

settlement is a fine and an order to improve internal controls or install a monitor. These settlements risk turning the decision to violate the law into a pure economic utility calculation, where fines become a 'cost of doing business.' Deterrence under such a regime requires a high probability of detection to offset reduced existential risk, and here, whistleblower incentives become attractive both for independent reasons and because of audit deficiencies.[152]

Corporate wrongdoing is unique in that, while it is typically individuals and rarely all or even a larger part of the corporation engaging in wrongdoing, the corporation can be liable for actions of its employees or for failing to prevent actions by its employees. An enforcement agency would find it difficult to audit consultant invoices to detect bribe payments for every corporation doing business abroad, screen transactions for every bank, or verify every line item in the financial reports of every publicly traded company. Additionally, there are cases where assigning responsibility within an organisation is exceedingly difficult. It would be unfair to prosecute a Chief Executive Officer (CEO) for actions by employees in many circumstances. While this thesis cannot consider all the intricate details of corporate prosecution, the vital thing to note is that pressures such as these have led to fewer personal criminal prosecutions, substituted by more 'second-order rules' together with layered audits and enforcement in the forms of large fines for the corporation. This can be seen as a compromise between 1) the inability of traditional approaches, such as the Identification Principle, to adequately deter corporate wrongdoing and 2) the perceived unfairness of prosecuting someone for a crime they did not personally commit. Yet, these second-order rules can be costly, and their effectiveness is often tricky to empirically measure. The following two sections review the two main ways to ensure compliance with rules: auditing and self-regulation.

2. Audits

Auditing is as old as history. Around 1750 BC, King Hammurabi of Babylon started auditing medical clinicians, and if they performed poorly, there were often serious consequences.[153] Financial audits are as old as accounting, which can be found in almost all historical societies. In modern times, auditing has become an institutionalised, ritualised, and widespread practice. Today, audit is the primary way to detect regulatory violations in close to every jurisdiction and regulatory area. Taking the US as an example, the Occupational Safety and Health Administration (OSHA) carried out 33,393 inspections in 2019,[154] between 2007-2018 the median number of annual inspections by the US Environmental Protection Agency was 17,181,[155] between 2010 through 2018 the Internal Revenue Service (IRS) examined 0.63% of individual tax returns filed and 1% of corporation returns filed, and in fiscal year 2020 the IRS closed 509,917 tax return audits.[156] This is just a small part of all

[152] Arlen 2019 (n 149) notes that the UK and France, who both have introduced non-trial resolutions in recent years, both lack incentive programmes for whistleblowers and that without a tangible threat of detection these sorts of resolutions can be counterproductive.

[153] Graham Copeland, 'A Practical Handbook for Clinical Audit' Clinical Governance Support Team (March 2005) 3 <http://qualitarischioclinico.asppalermo.org/documenti/riferimenti%20bibliografici/AUDIT/Practical%20Clinical%20Audit%20Handbook.pdf > accessed 19 September 2024.

[154] US Department of Labor 'Occupational Safety and Health Administration (OSHA) Enforcement' <https://www.osha.gov/enforcement/2020-enforcement-summary> accessed 25 September 2022.

[155] US Environmental Protection Agency, 'EPA's Compliance Monitoring Activities, Enforcement Actions, and Enforcement Results Generally Declined from Fiscal Years 2006 Through 2018' (Report No. 20-P-0131, 31 March 2020) <https://www.epa.gov/sites/default/files/2020-04/documents/ epaoig 20200331 20-p-0131 0.pdf>, accessed 19 September 2024.

[156] IRS, '2020 Data Book' (2020) Internal Revenue Service (IRS) 33, <https://www.irs.gov/pub/irs-prior/p55b--2021.pdf> accessed 19 September 2024.

audits conducted in the US, as many more are undertaken by state-level auditors and in many other regulatory areas. Close to every country utilizes audits or inspections to detect infringements. Policymakers' responses to various forms of wrongdoing, as we will see, have typically been to increase audits, fines, or provide incentives for self-regulation.

Much academic work has also been myopic in its view of audits as the only lever a regulatory agency can push to increase detection of regulatory non-compliance. In the context of environmental compliance, Elinor Benami and colleagues write that 'The standard economic explanation of compliance hinges on deterrence: Facilities are deterred from violating environmental regulations if compliance is cheaper than the expected sanction. This deterrence model emphasizes two policy levers: the frequency of inspections to enhance the probability of detection and the magnitude of sanctions.'[157] Michael Best and colleagues write that 'In modern tax systems, audit is to some extent the sole instrument through which the revenue authority can detect and deter tax evasion'.[158] When describing the dominant models of taxpayer behaviour, Jason DeBacker and colleagues write that their key argument 'is that illicit tax behavior is shaped by audit probability and penalty'.[159] While this is largely true in practice, the actual policy levers are *increased detection* and level of sanctions, as detection can be achieved by other means. The ubiquity of the assumption that detection can only be achieved through audits is somewhat surprising,[160] as employees consistently prove to be one of the most essential sources for detecting fraud and wrongdoing. The Association for Certified Fraud Examiners (ACFE) has since 1996 conducted surveys on how occupational fraud is detected and tips (primarily from employees) are by far the most common way of detection. In their 2020 survey, they found that 43% of the time, occupational fraud is detected through a tip, internal audit in only 15% of cases, and management review in 12% of cases.[161]

It is also unclear how strong the deterrent effects of audits are. The regulatory area where the deterrence effects of audits have been studied the most is, by far, taxation. While there has historically been a debate regarding the effects of audits on future compliance, by now, the debate has been, by and large, settled empirically: audits do improve compliance in future periods. In one of the most extensive studies, Arun Advani and colleagues found that audits have a large and persistent impact on reported tax liability, reaching around 26% on average by the fourth year following the audited year.[162]A study of Italian self-employed workers found that reported income increased by 8.4% after audits, but when the taxpayer was found to be compliant, audits had no effect on future tax compliance.[163] Another study found that

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[157] Elinor Benami, Daniel E. Ho, and Anne McDonough, 'Innovations for environmental compliance: emerging evidence and opportunities' (2020) Policy Brief, Stanford Institute for Economic Policy Research (SIEPR), <https://www.acwa-us.org/wp-content/uploads/2020/01/Daniel-Ho-SIEPR-Policy-Brief-SNC-Jan-2020.pdf> accessed 19 September 2024.

[158] Micheal Best, Jawad Shah, and Mazhar Waseem, 'The Deterrence Value of Tax Audit: Estimates from a Randomized Audit Program' (2021) Working Paper 22, <https://www.mazharwaseem.com/static/uploads/PakAudit_April2021.pdf> accessed 19 September 2024.

[159] Jason DeBacker, et al, 'Once Bitten, Twice Shy? The Lasting Impact of IRS Audits on Individual Tax Reporting' (2014) Proceedings. Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association 1, 4.

[160] Although this is understandable given the theoretical background which had focused on audits and sanctions as the two main deterrents of wrongdoing.

[161] ACFE, 'Report to the Nations: Global Study on Occupational Fraud and Abuse' (2020) <https://acfepublic.s3-us-west-2.amazonaws.com/2020-Report-to-the-Nations.pdf> accessed 19 September 2024.

[162]Arun Advani, William Elming, and Jonathan Shaw, 'The Dynamic Effects of Tax Audits' (2023) 105 The Review of Economics and Statistics 545, 545.

[163] Gabriele Mazzolini, Laura Pagani, and Alessandro Santoro, 'The deterrence effect of real-world operational tax audits on self-employed taxpayers: evidence from Italy' (2021) 29 International Tax and Public

IRS audits have a strong positive effect on compliance with state individual income tax as well as federal income tax. This suggests that federal audits have a spillover effect, i.e., general deterrence of state-level tax non-compliance.[164] Other studies also find higher reported income in periods after an audit.[165]

Still, even if we limit ourselves to taxation, the effects of audits are heterogeneous across several characteristics of taxpayers, and the picture is significantly more complicated than a general pro-deterrence effects of any audit. One negative effect of audits is the 'bomb-crater effect', i.e., when taxpayers reduce their compliance after an audit. This may be explained by the fact that taxpayers try to make up for losses in subsequent periods or that they believe that the probability of audit in future periods will be lower after being audited (gambler's fallacy).[166] Jason DeBacker and colleagues studied the impact of audits on corporate taxpaying behaviour ten years after an audit.[167] They found that audited firms tend to reduce their effective tax rate by .7 of a percentage point in the subsequent period, which corresponds to 8% of the average tax paid. Moreover, firms tend to continue to reduce their effective tax rate for a few years in a strategic way: firms that are reaudited after ten years may reduce their effective tax rate by up to 3 percentage points by year 6 after the first audit (equivalent to a 35% reduction in tax payments on average) but increase their effective tax rate after that – which is consistent with responding to an increased risk of being audited in subsequent years.[168] A study in 2021 exploited a randomised audits programme in Pakistan to assess how much evasion audits uncover and how much evasion it prevents by changing behaviour. They found that audits uncover substantial evasion but do not deter future tax evasion.[169] Studies exploiting random audits similarly report mixed results, with some finding a significant effect of audits on future behaviour, while others finding a null effect.[170] A 2006 study considered VAT tax evasion in Argentina and Chile and found that, on average, their control group of non-audited firms had better compliance than audited firms after enforcement – suggesting a negative effect of audits on future tax compliance.[171] Sebastian Beer and colleagues studied 7500 self-employed US taxpayers and found that, in aggregate, taxable income is estimated to increase by about 15% one year after an operational audit.[172] However, this aggregate number masks substantial heterogeneity: taxpayers who received an additional tax assessment (i.e., a judgment that the taxpayer should pay more) reported around 64% higher taxable income in the year after the audit. In contrast, taxpayers who received no additional tax assessment reported approximately 15% *lower* taxable income than if the audit had not occurred. One explanation may be that the audit did not detect the misreporting – leading to a belief that audits are ineffective, which encourages understatement of income in subsequent years. Alternatively, the effect may be driven by 'overly compliant taxpayers who correct

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Finance 1014.

[164] Liucija Birskyte, 'Effects of Tax Auditing: Does the Deterrent Deter?' (2013) 8 Research Journal of Economics, Business, and ICT 1.

[165] See e.g. DeBacker et al 2014 (n 159). See also experimental evidence in Matthias Kasper and Matthew D. Rablen, 'Tax compliance after an audit: Higher or lower?' (2023) 207 Journal of Economic Behavior and Organization 157.

[166] Although some have questioned the existence of this effect, see Matthias Kasper and James Alm, 'Does the Bomb-crater Effect Really Exist? Evidence from the Laboratory' (2022) 78 FinanzArchiv 87.

[167] Jason DeBacker et al, 'Legal Enforcement and Corporate Behavior: An Analysis of Tax Aggressiveness after an Audit' (2015) 58 The Journal of Law & Economics 291.

[168] Ibid 294.

[169] Best et al (n 158).

[170] Best et al (n 158) 5.

[171] Marcelo Bergman and Armando Nevares, 'Do Audits Enhance Compliance? An Empirical Assessment of VAT Enforcement' (2006) 59 National Tax Journal 817, 821.

[172] Sebastian Beer, et al. 'Do Audits Deter or Provoke Future Tax Noncompliance? Evidence on Self-employed Taxpayers' (2020) CESifo Economic Studies 248.

their reporting behaviour in response to an audit.'[173] Finally, Kotsogiannis and colleagues found that face-to-face audits are effective and have a pro-deterring effect, while narrow-scoped desk-based audits have a counter-deterrent effect, leading to a sizable reduction in corporate taxable income.[174] The former, while effective, are also more expensive.

The tax domain is not representative of all regulatory governance, and the intricacies of audits, detection, and deterrence multiply quickly if we consider audits in other regulatory areas. Another area where audits are prevalent and research available is environmental violations. In the case of the US, the Environmental Protection Agency (EPA) conducts interviews with site representatives, reviews records and reports, takes photographs, collects samples, and observes facility or site operations.[175] It is difficult to accurately measure the effects of audits on environmental violations as 'the relative impacts of different monitoring and enforcement tools vary across pollution media, industrial context, and time period.'[176] Yet, there are studies on the deterrence effects in some areas such as environmental and health and safety violations. John Mendeloff and colleagues considered OSHA re-violations with respect to health and safety standards and found that re-violation rates were higher than assumed.[177] Moreover, they found that firms were more likely to re-violate health standards that were classified as involving higher hazard. While possibly reflecting more differences than only inspection rates, the authors found that it is unlikely that variations in inspection rates had a significant impact on re-violations.[178] Earlier studies also found that increased enforcement spending led to modest improvements in compliance. One study from 1990 used data on injuries and OSHA inspections for 6842 manufacturing plants between 1979 and 1985,[179] finding that a 10% increase in enforcement activities would reduce injuries by 1% for large, frequently inspected firms. The authors also compared this to the findings of prior studies of what a 10% increase in enforcement activity generates in terms of reductions in injuries and noted that two studies found no significant impact, one between 0.15 – 0.36%, one 0.20%, and one between 0.48% – 0.73%.[180] A 1984 study of pollution control policies and oil spills in the US found that an increase of 10% in monitoring hours by the Coast Guard was estimated to lead to a 3.1% reduction in the volume of spills and that increasing monitoring by 10% would lead to a 2.1% increase in detected spills.[181] A 1997 study on the pulp and paper industry assessed the effectiveness of the EPA in reducing the time that manufacturing plants remain in a state of non-compliance and found that a 10% increase in monitoring activity leads to a 0.6-4.2% reduction in violation time and a 10% increase in enforcement activity results in a 4-4.7% reduction in violation time.[182] Monitoring includes

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[173] Ibid 261.

[174] Christos Kotsogiannis et al. 'Do tax audits have a dynamic impact? Evidence from corporate income tax administrative data.' (2024) 170 Journal of Development Economics 103292.

[175] US Environmental Protection Agency, 'How We Monitor compliance' (2022), <https://19january2021snapshot.epa.gov/compliance/how-we-monitor-compliance_.html> accessed 19 September 2024.

[176] Wayne B. Gray and Jay P. Shimshack, 'The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence' (2011) 5 Review of Environmental Economics and Policy 3, 20.

[177] John Mendeloff et al, 'The re-occurrence of violations in occupational safety and health administration inspections' (2021) 15 Regulation and Governance 1454.

[178] Ibid 1472.

[179] John T. Scholz and Wayne B. Gray, 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment' (1990) 3 Journal of Risk and Uncertainty 283.

[180] Ibid 297.

[181] Dennis Epple and Micheal Visscher, 'Environmental Pollution: Modelling Occurrence, Detection, and Deterrence' (1984) 27 The Journal of Law & Economics 29.

[182] Louis W. Nadeau, 'EPA Effectiveness at Reducing the Duration of Plant-Level Noncompliance' (1997) 34 Journal of Environmental Economics and Management 54.

inspections and tests, whereas enforcement activities include administrative orders, legal actions, and penalties used to compel compliance. In short, relatively minor improvements from increasing spending on enforcement.

The perception that the only lever that can be pushed to increase compliance is increasing the number (or quality) of audits and/or increasing sanctions is slowly changing with the widespread adoption of whistleblower laws. This is for good reasons, as audits also have systemic issues that can be illustrated with amusing anecdotes. One in this regard is that the SEC had raided Madoff's office twice but only visited the eighteenth and nineteenth floors where legitimate business went on, whereas the Ponzi scheme was operating from the seventeenth floor.[183] It would be easy to conclude that Madoff was in fact not running a scheme. Another amusing story was testing for chloride levels at a desalination plant in Israel.[184] As sampling was not random but occurred at a specific time each morning, the workers at the plant would adjust the chloride levels to be compliant when the sample was taken. For the rest of the day, the drinking water would have much higher chlorine levels. All this with management's full knowledge. Finally, Volkswagen's defeat devices had a similar effect: ensuring compliance during the inspection but during normal circumstances, the cars emitted much more than standards allowed. In short, audits can generate false negatives not only in an ad hoc way but systematically.

3. Self-regulation

After several scandals in the 1980s, US regulators started to look for ways to incentivize compliance. One idea was to have corporations police themselves: to provide them fine reductions if they self-reported violations and have internal controls to avoid violations.[185] A seminal event for self-regulation was the introduction of the US Organizational Sentencing Guidelines (OSG), which emerged in response to the military procurement scandals that led to the 1986 revision of the False Claims Act.[186] After these scandals, 'fifty-five contractors agreed to adopt ethics codes and internal ethics officers, in a largely successful effort to fend of federal regulators'.[187] The regime that the US Sentencing Commission eventually adopted after a comment period between 1987 and 1991 provided substantial incentives to establish internal compliance structures, which were lobbied for hard by the Business Roundtable.[188] Today, firms spend astronomical amounts on hotlines, internal compliance programmes, and employee training to prevent misconduct. This may not be because such self-regulatory behaviour leads to less wrongdoing, but rather that firms that are found to have engaged in

[183] Van Rooij and Fine (n 78) 36.

[184] See Sue Surkes, 'Two desalination plants faked water quality data to cut costs' (*The Times of Israel*, 3 September 2019) <https://www.timesofisrael.com/two-desalination-plants-faked-water-quality-data-to-cut-costs-report/> accessed 19 September 2024, and 'Sue Surkes, 'Desalination plant that lied about salts to save cash escapes criminal probe' (*The Times of Israel*, 12 December 2019) <https://www.timesofisrael.com/two-desalination-plants-faked-water-quality-data-to-cut-costs-report/> accessed 19 September 2024.

[185] Arlen and Kahan (n 145) 326 where they write of 'duty-based corporate liability' and 'policing duties', where 'corporations are effectively subject to duties to adopt an effective compliance program, self-report, or cooperate.'

[186] See Chapter 2(B)(2) and Chapter 4(B) of this Thesis.

[187] Kimberly D. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 Washington University Law Quarterly 487, 497.

[188] Ibid 498. Industry groups also adopted internal policies in the aftermath of scandals in the 1970s and 1980s, Chen and Soltes note that these efforts 'helped assuage legislators who had sought to more heavily regulate and penalize firms for dishonest practices. Self-policing appealed to business leaders as a way to avoid the cost and disruption of additional regulation. It also eased the investigative burden on regulators, and many people believed it would successfully deter wrongdoing', see Hui Chen and Eugene Soltes, 'Why Compliance Programs Fail – and How to Fix Them' (*Harvard Business Review*, March-April 2018 Issue), <https://hbr.org/2018/03/why-compliance-programs-fail> accessed 19 September 2024.

wrongdoing are exposed to greater liability if they have not spent enough on self-regulation.[189] These programmes typically require the immediate disclosure of a violation to the regulator in exchange for a fine reduction. The appeal of self-regulatory programmes is immediate: they are cheap to implement for resource-constrained supervisors, and trusting organizations to police themselves is less adversarial than methods such as unannounced audits.

Yet, it is difficult and expensive to distinguish window dressing programmes from effective self-regulation, and there is scant evidence that these programmes have been effective.[190] A literature review of the OSG from 2003 found that internal compliance structures are largely window dressing and none of the analysed studies 'supported the hypothesis that the internal compliance structures recommended by the OSGs have a deterrent effect on organizational illegality.'[191] An updated review published in 2012 noted that since the 2003 review, 'studies conducted to date still do not clearly indicate that internal compliance programmes are an effective deterrent to fraud or illegal conduct.'[192] A more recent literature review from 2021 that considered a broader set of compliance management systems also found little evidence that they improve corporate behaviour, although some studies conclude modestly in their favour.[193] As mentioned earlier, several regulatory areas have seen an expansion of regulatory frameworks to prevent certain violations. Not complying with these frameworks risks substantial fines.

Other public commitments by corporations are similarly dubious. Practically all large firms today have a code of ethics, yet these often do not prevent managerial behaviour that contradicts them.[194] A recent example comes from an evaluation of commitments by large publicly traded firms. In August 2019, the Business Roundtable (BRT), an association of chief executive officers of America's leading companies, redefined the purpose of a corporation to promote 'An Economy That Serves All Americans'.[195] This shift entailed a commitment by 181 CEO signatories to lead their companies 'for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders.' The consultancy firm KKS Advisors created a quantitative stress test of corporate purpose to assess whether the signatories outperformed similar firms, focusing on corporate behaviour during Covid-19 and inequality. One key conclusion and takeaway of their report was: 'BRT Signatories' 'Purpose-Washing' Unmasked: Since the pandemic's inception, BRT Signatories did not outperform their S&P 500 or European company counterparts on this test of corporate

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[189] Ibid.

[190] For a review, see Benjamin van Rooij and Adam Fine, 'Preventing Corporate Crime from Within: Compliance Management, Whistleblowing and Internal Monitoring' (2020) Legal Studies Research Paper Series No. 2020-10, University of California Irvine School of Law, 5-19.

[191] Krawiec (n 187) 513.

[192] Justin Blount and Spencer Markel, 'The End of the Internal Compliance World as we Know it, or an Enhancement of the Effectiveness of Securities Law Enforcement - Bounty Hunting under the Dodd-Frank Act's Whistleblower Provisions' (2012) 17 Fordham Journal of Corporate and Financial Law 1023, 1044.

[193] Cary Coglianese and Jennifer Nash, 'Compliance Management Systems: Do They Make a Difference?' in Benjamin van Rooij and Daniel Sokol (eds) *The Cambridge Handbook of Compliance*, (Cambridge University Press 2021) 571-593.

[194] There are also numerous examples where firms perpetuate fraud in violation of other publicly stated commitments or codes of conduct, see Theo Nyreröd and Giancarlo Spagnolo, 'Surprised by Wirecard? Enablers of corporate wrongdoing in Europe' (2021) SITE Working Paper No 54, <https://swopec.hhs.se/hasite/abs/hasite0054.htm?_ga=2.224472602.1209486705.1663934132-812718899.1655722486> accessed 19 September 2024.

[195] Business Roundtable, 'Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'' (2019) <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> accessed 19 September 2024.

purpose.'[196]

B. Three Case Studies

1. Securities fraud

One of the first legislative attempts to curtail stock manipulation was after the 1929 stock crash in the US, which led to the Securities Exchange Act of 1934 that introduced mandatory audited financial statements for publicly offered securities. External auditing of publicly traded companies has been promoted to increase trust in financial statements and, therefore, in the fundamental economics of a corporation. Regulators and investors have relied upon corporate financial statements to make sense of bank liabilities, risks and economic exposure.[197] In *United States v. Arthur Young,* the Supreme Court observed that: 'The SEC requires the filing of audited financial statements to obviate the fear of loss from reliance on inaccurate information, thereby encouraging public investment in the Nation's industries. It is therefore not enough that financial statements ***be*** accurate; the public must also ***perceive*** them as being accurate.'[198] Fraud in this area has several distortive and detrimental effects, including inducing socially wasteful investment by creditors (attracting financing on fraudulent premises), distorting management decisions as they try to mask fraud, interfering with competitors' ability to learn from disclosures by the fraudulent firm and produce contagion post-discovery and costly adjustments by shareholders to new information.[199] Today, auditing of public companies is a concentrated market with four big auditors: Ernst & Young, PricewaterhouseCoopers (PwC), Deloitte, and Klynveld Peat Marwick Goerdeler (KPMG).

Many have questioned the effectiveness of audits in detecting and deterring wrongdoing. Consider, for example, the 'Savings and Loans' (S&L) crisis in the 1970s and 1980s. William K. Black was a regulator at the time and noted that 'Every S&L control fraud succeeded in getting at least one clean opinion from a top- tier audit firm (then called the 'Big 8'). They generally were able to get them for years.'[200] The scandals at Enron, WorldCom, Global Crossing, Tyco, which led to the introduction of SOX, also led to the demise of Arthur Andersen, the auditor of Global Crossing, WorldCom and Enron. PwC also settled a $225 million lawsuit with the Tyco investors for failing to uncover $5.8 billion in accounting overstatements.[201] In the case of WorldCom, investors lost upwards of $175 billion and 17,000 workers were dismissed.[202] Questionable accounting practices at Lehman Brothers also contributed to the firm's rapid collapse in 2008,[203] triggering a domino effect throughout

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[196] KKS Advisors, 'Covid-19 and Inequality: Test of Corporate Purpose' (20 September, 2020) 7, <https://www.kksadvisors.com/tcp-test-of-corporate-purpose-september2020> accessed 19 September 2024.

[197] Prem Sikka, 'Financial crisis and the silence of the auditors' (2009) 34 Accounting, Organizations, and Society 868, 869.

[198] *United States v. Arthur Young and Co*, 465 US 805, 819 n. 15 (1984) (emphasis in original).

[199] Urska Velikonja, 'The Cost of Securities Fraud' (2013) 54 William & Mary Law Review 1887, 1945.

[200] Black (n 113) 2.

[201] Francesco Guerrera, 'PwC settles Tyco lawsuit for $225m' (*Financial Times*, 7 July 2007) <https://www.ft.com/content/90c2350e-2c0f-11dc-b498-000b5df10621> accessed 19 September 2024.

[202] Daniel Kadlec, 'WorldCon: Nailed for the biggest bookkeeping deception in history, a fallen giant gives investors another reason to doubt corporate integrity' (*Time,* 8 July 2002) <http://content.time.com/time/classroom/glenfall2002/pdfs/Business.pdf> accessed 19 September 2024.

[203] In late 2007 and early 2008 Lehman used off-balance sheet devices to create a misleading picture of the firm's financial condition, see Anton R. Valukas, 'Report of the Examiner in the Chapter 11 proceedings of Lehman Brothers Holdings Inc' 732, 853-884, <https://web.stanford.edu/~jbulow/Lehmandocs/menu.html> accessed 19 September 2024.

the global financial system and leading to broad market declines. Several firms, including Lehman Brothers, Bear Stearns, Carlyle Capital Corporation, and numerous others, received unqualified audit opinions just weeks before experiencing significant financial problems.[204] Despite many obvious signs of distress, auditors gave a clean bill of health to almost all distressed banks,[205] while taking millions in audit and non-audit fees.[206] In relation to the post-2008 Irish Banking Crisis, banks received unqualified audit opinions in some instances not more than six months before being rescued.[207] More recently, the Big Four auditors have also been criticised with respect to the collapse of Wirecard in 2019,[208] Evergrande in 2021,[209] and numerous other less-publicised scandals.[210] One audit firm fired an employee/whistleblower who was unwilling to provide audits that were satisfactory to clients because he suspected laundering billions of dollars.[211] In the case of Wirecard, the Financial Times reported that one whistleblower had warned E&Y in 2016 that senior managers at Wirecard may have committed fraud, and one had attempted to bribe an auditor.[212] Wirecard shares declined from $100 to $1.6 in nine days, and the firm had to lay off 730 employees.[213]

Numerous explanations have been given for these failures. One problem is that there is a mismatch between the public's perception of audits' ability to detect fraud and how the auditing industry perceives its role as fraud detectors.[214] An auditor's fraud detection ability is not as extensive as it is widely believed,[215] and auditors themselves do not see this as their primary job. Some argue that the auditing industry itself is the issue, which has become a highly concentrated market,[216] where the supervisors are paid by the supervised, firms pay the same auditing firms for non-auditing services,[217] and some suspect that similar market dynamics have played out as with credit rating agencies leading up to the 2008 crisis.[218] Calls

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[204] Sikka 2009 (n 197) 869-870.

[205] Prem Sikka, 'The corrosive effects of neoliberalism on the UK financial crises and auditing practices: A dead-end for reforms' (2015) 39 Accounting Forum 1, 2.

[206] Sikka 2009 (n 197) 870.

[207] Commission of Investigation into the Banking Sector in Ireland, 'Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland' (March 2011) VI.

[208] For a discussion of the Wirecard case and auditor's responsibility, see Sebastian Mock, '*Wirecard* and European Company and Financial Law' (2021) 18 European Company and Financial Law Review 519.

[209] See, for example, Jean Eaglesham, 'China Evergrande Auditor Gave Clean Bill of Health Despite Debt' (*Wall Street Journal*, 24 September 2021) <https://www.wsj.com/articles/china-evergrande-never-got-auditor-warning-despite-big-debt-load-11632475800> accessed 19 September 2024.

[210] E&Y with respect to NMC Health, Thomas Cook and Luckin Coffee; PWC with respect to Angola's state oil company and Satyam Computer Services; KPMG with respect to Abraaj Group; Deloitte with respect to Tingo Group, to name a few cases.

[211] E&Y was also ordered to pay $10.8 million to a whistleblower who was unjustly fired, see *Rihan v. EY Global Ltd and Others* (QB-2017-005208).

[212] Olaf Storbeck, 'Whistleblower warned EY of Wirecard fraud four years before collapse' (*Financial Times*, 30 September 2020) <https://www.ft.com/content/3b9afceb-eaeb-4dc6-8a5e-b9bc0b16959d> accessed 19 September 2024.

[213] Reuters, 'Wirecard lays off more than half of remaining staff in Germany' (*Reuters*, 25 August 2020) <https://www.reuters.com/article/us-wirecard-accounts-idUSKBN25L1LD> accessed 19 September 2024.

[214] Micheal Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1999), see also Patricia J. Arnold and Prem Sikka, 'Globalization and the state-profession relationship: the case the Bank of Credit and Commerce International' (2001) 26 Accounting, Organizations, and Society 475, 482.

[215] Ibid Chapter 2.

[216] Before there were eight large accounting firms, amounting to the 'Big Eight'. Today after a set of mergers, acquisitions, and the demise of Arthur Andersen, we only have the 'Big Four'. See e.g.: OECD 'Policy Roundtables: Competition and Regulation in Auditing and Related Professions' (2009) <https://www.oecd-ilibrary.org/finance-and-investment/competition-and-regulation-in-auditing-and-related-professions_b1887167-en> accessed 19 September 2024.

[217] Sikka 2015 (n 205), and Arnold and Sikka (n 214) 483.

[218] Famously, credit rating agencies provided inflated ratings of bundled securities due to a fear that if they

to further incentivise whistleblowers have been rare outside the US when suggesting reforms, although their value is being increasingly recognised.[219]

The securities context illustrates a range of issues with supervision and enforcement. The standard in this case is the International Financial Reporting Standards (IFRS) for 166 jurisdictions, while in the US, it is the Generally Accepted Accounting Principles (GAAP).[220] The organisations issuing these standards have little inherent motivation in ensuring compliance, but nations that adopt IFRS or GAAP usually have an enforcer like the financial supervisory authority, such as the SEC in the US. In addition to financial supervisory authorities, several countries also have audit inspectorates, such as the Public Company Accounting Oversight Board (PCAOB) in the US, established by the Sarbanes-Oxley Act of 2002, whose function is to audit public auditors. A modern publicly traded corporation is, therefore, embedded in an expansive surveillance structure with a multitude of layers of audits. At first, there are internal control functions and self-regulation, such as SOX mandating that executives certify that, to their knowledge, the financial statements contain no material omissions. Internal auditors/compliance then ensure that financial statements are prepared in accordance with the correct standards. Both management and internal compliance can have significant incentives to misrepresent numbers. The financial statements are then sent to the public auditor, such as a Big Four firm, who, as mentioned above, frequently fails to detect significant errors and fraud by the company. As a result, these auditors are also audited by the PCAOB and other audit inspectorates. This constitutes at least three layers of audits and enforcement to ensure that financial statements are compliant. Still, the best available estimates for the post-SOX climate in the US is that between 10-15% of publicly traded companies engage in some form of corporate fraud,[221] and many in recent years have argued that securities fraud is as relevant as ever.[222] In short, despite close to a hundred years of learning, significant issues remain. The tendency to layer audits and have auditors audit other auditors is another feature of modern regulatory regimes.

2. Money laundering

Money laundering is the purposeful moving of money to disguise its origins, and it typically involves three stages: placement (getting the money into the financial system), layering (moving the money around to obscure its origins), and integration (withdrawing or investing the money in such a way that it has an apparent legitimate origin). It is a derivative offence; it requires what is called a predicate offence, such as drug sales, human trafficking, corruption, or tax evasion, that generates money that must be laundered to be used freely within the financial system.[223] Money laundering enables corrupt politicians to freely use

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did not, issuers would turn to one of their competitors who would provide their desired rating. It is easy to imagine a similar dynamic with respect to auditing firms with respect to unqualified audits.

[219] One exception that suggested whistleblowers specific policy proposals, including an obligation to review whistleblower claims, and possibly rewards, is Katja Langenbucher et al, 'What are the wider supervisory implications of the Wirecard case?' (2020) Document requested by the European Parliament's Committee on Economic and Monetary Affairs 12 <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)651385> accessed 19 September 2024.

[220] Issued by the International Accounting Standards Board (IASB) in the case of IFRS, and by the Financial Accounting Standards Board (FASB) and the Government Accounting Standards Board (GASB) in the case of GAAP.

[221] See Dyck et al *How Pervasive* (n 100) 27.

[222] In the 4th edition of the book *Financial Shenanigans* from 2018, eminent forensic accountant Howard M. Schilit notes that 'While accounting shenanigans have been a scourge to investors since time immemorial, the last quarter century has been particularly brutal.' Howard M. Schilit, *Financial Shenanigans* (4th ed, Mc Graw Hill Education 2018) 4.

[223] Article 2 of the sixth EU AML Directive stipulates 22 categories of criminal activities that constitute

money stolen from taxpayers, criminals to buy luxury apartments and grow their businesses, and human traffickers to expand and use the proceeds of their crimes carefree. The goal of Anti-Money Laundering (AML) legislation is to make it difficult for criminals to use their profits, seize their assets, and ideally deter predicate crimes. It was in the late 1980s that politicians came to believe that to tackle drug cartels, the international community should go after their money. Mostly due to US pressure, a global standard setter for AML named the Financial Action Taskforce (FATF) was created, and in 1989, it issued its first recommendations to countries on how to combat money laundering.

To understand the logic behind the global AML regime, it is important to understand its supervisory and enforcement structure. The FATF is a membership-based organisation and currently has 39 members, including two regional organisations, the European Commission and the Gulf Co-Operation Council, representing most major financial centres at the international level. It frequently issues recommendations that its members must comply with. To assess compliance with the recommendations, members carry out National Risk Assessments (NRAs) and are subjected to Mutual Evaluation Reports (MERs). Member states then adopt laws that put certain requirements on entities covered by the AML rules. They must assess risks and conduct due diligence along various axis: the customer in question (is this person on a sanctions list/politically exposed person?), the nature of the jurisdiction (is it on the FATF's grey list?), the nature and structure of the business (cash-intensive business? Use of shell companies?) as well as collect documents such as copies of passport and certifications of residency. Then, each transaction must be similarly scrutinised, and certain transactions over a monetary threshold are automatically reported to the Financial Intelligence Unit (FIU). Compliance by covered entities serves two main functions: financial institutions do not onboard customers with high money laundering risk, and suspicious customers/transactions within the bank are reported to the FIU. These rules governing financial institutions is often called the 'preventative', or 'administrative' global AML framework or regime, and it can be characterised as follows:

Supervisor	**Compliance Mechanism**	**Objective**
FATF	MERs, NRAs	Compliance ▼
National supervisors	Audits/fines	Compliance ▼
Covered entities	Risk-based KYC, etc.	Detect money laundering

The FATF's hypothesis appears to be that compliance by member states, national supervisors, and covered entities is sufficient for the achievement of the objectives of the policy regime, namely, to discover money laundering, provide evidence for prosecutions that allow asset seizures, and ideally deter predicate offences. Yet, after thirty years of efforts to tackle money laundering, there is little to no evidence that this global regime detects or deters money laundering to any significant degree. While there are few reliable recent estimates, in 2011, the United Nations Office on Drugs and Crime estimated that between 2.1 to 4% of global GDP is laundered annually, while less than 1%, probably around 0.2%, of the proceeds of crime laundered via the financial system are seized and frozen.[224] This is despite substantial efforts, as in the EU, for example, there are now six Directives that aim to combat the

predicate offenses. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

[224] UNODC, 'Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes.' (2011) Research Report, United Nations Office on Drugs and Crime (UNODC), <https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf> accessed 19 September 2024.

problem.[225] Non-compliance with this preventative regime has also been challenging to ensure, as almost all large European banks have been fined for either sanctions evasion or AML deficiencies.[226] A 2020 report on AML compliance and supervision by the European Banking Authority concluded that 'In several cases, banks continued to be in breach of the same legal provision many years after a fine had first been imposed but were not challenged by the respective competent authority.'[227]Academics have also raised numerous issue with the AML regime, and there is no methodology for assessing its effectiveness empirically. In a 2020 article, Ronald F. Pol offers a summary of the criticism of the last decades, citing over 22 articles that have 'identified gaps between the intentions and results of the modern anti-money laundering effort, including its core capacity to detect and prevent serious profit-motivated crime and terrorism.'[228] Moreover, around 80-90% of the Suspicious Activity Reports (SARs) sent to FIUs are useless.[229] Yet, it constitutes a significant administrative burden as in the US alone, the Financial Crimes Enforcement Network (FinCEN) obtained 1,426,741 SARs from depository institutions in 2021.[230] Compliance for both FATF members and covered entities is also costly.[231] In addition, money launderers can circumvent the current

[225] Council Directive 91/308/EEC, Directive 2001/97/EC, Directive (EU) 2015/849, Directive (EU) 2018/843, Directive (EU) 2018/1673.

[226] In 2018: MagNet Bank 47 million forints, in 2017, the Bank of Ireland €3.1 million, Deutsche Bank £163 million. In 2015 Barclays bank £72. Since 2016, the US has issued AML-related fines on eight occasions to banks with headquarters in European countries for an aggregate amount of $1.7 billion (*Violationtracker.com*). In Sweden, a country with nine million inhabitants, most of its largest banks have been fined for AML violations: Handelsbanken ($3.3 million) and Nordea ($4,8 million) in 2015, SEB ($96 million SEK) and Swedbank ($380 million) in 2019. In terms of scale, what has been called the largest money laundering scandal in history started to unravel in 2018, when it was discovered that around $230 billion of suspicious funds had been transferred through Danske Bank's Estonian branch.

[227] European Banking Authority, 'On Competent Authorities' Approaches to the Anti-Money Laundering and Countering the Financing of Terrorism Supervision of Banks.' (2020) EBA/Rep/2020/06 18.

[228] Ronald Pol, 'Response to money laundering scandal: evidence-informed or perception-driven?' (2020) 23 Journal of Money Laundering Control 103, 103.

[229] A former head of Europol remarked that '95% of suspicious activity reports sent to the FIUs are junk' see SNS/SHOF Finance Panel, 'Money Laundering and the Financial Sector—Talk with Europol's Former Head' (*Seminar at the Centre for Business and Policy Studies (SNS),* 2 February 2019) <https://www.sns.se/en/articles/sns-shof-finance-panel-money-laundering-and-the-financial-sector-talk-with-europols-former-head/> accessed 19 September 2024.

A report including interviews with past and present heads of financial intelligence units concluded that 80–90% of suspicious reporting is of no immediate value to active law enforcement investigations, see Nick J. Maxwell and David Artingstall. 'The Role of Financial Information-Sharing Partnerships in the Disruption of Crime' (*Royal United Services Institute for Defence and Security Studies* (RUSI), 17 October 2017), <https://rusi.org/explore-our-research/publications/occasional-papers/role-financial-information-sharing-partnerships-disruption-crime> accessed 19 September 2024.

[230] FinCEN, 'SAR Filings by Industry' (2022) Financial Crimes Enforcement Network (FinCEN), <https://www.fincen.gov/reports/sar-stats/sar-filings-industry> accessed 19 September 2024.

[231] For the mutual evaluation reports, which often exceed 200 pages, FATF sends investigators (at least three) to the member country to assess compliance. It took 16 days of on-site visits by eight and ten evaluators for Italy and Spain to complete their MERs, see Petrus C. van Duyne, Jackie Harvey, and Liliya Gelemerova 'A 'Risky' Risk Approach: Proportionality in the ML/TF Regulation' in Colin King, Clive Walker, and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan 2018) 345-374. Then there are other costs incurred by the members. Markus Forsman notes that for Sweden's 2017 MER, to even enable an assessment of technical compliance, 'Swedish authorities wrote a 334-page document that was submitted to the FATF together with hundreds of translations of acts, ordinances, instructions, strategies, process descriptions, decisions, written communications, brochures and so on.', see Markus Forsman '30 Years of Combating Money Laundering in Sweden and Internationally—Does The System Function as Intended?' (2020) 1 Sveriges Riksbank Economic Review 24, 30. For covered entities, the costs are substantial. Estimates vary, but one study concluded that spending on AML-KYC compliance information technology (IT) and operations by the financial industry will reach $10.7 billion globally in 2021, see Celent, 'IT and Operational Spending in AML-KYC: 2021 Edition' (14 December 2021) <https://www.celent.com/insights/428901357>

framework with relatively low costs. Trade-based money laundering is one such example, and while some have suggested expanding the framework to fright carriers, this may lead to more costs and few verifiable benefits.[232] To summarise, no evidence exists that the institutional context premised on top-down audits has achieved lawmakers' policy objectives.

Here is an area where whistleblowers could serve a much greater function in enforcement than they presently do. Whistleblower programmes could provide large rewards to those who report financial and other institutions that fail to keep the appropriate records, conduct the proper KYC, or file mandatory SARs. This would effectively be a means of policing second-order rule compliance within covered entities. The US recently passed such a programme in the Anti-Money Laundering Act of 2020 (AMLA), which provides for awards to whistleblowers who bring forward information about violations of the Bank Secrecy Act (BSA), which covers SARs/KYC/record keeping and other obligations for covered institutions. This approach would be desirable if the AML regime, when complied with by financial institutions, would effectively achieve its policy objectives: to detect money laundering and deter perpetrators of predicate offences. Yet, it remains an open question to what extent the current regime does so, what effects increased compliance would have on these objectives, and at what costs.

There are, however, other options of utilising whistleblowers to obtain direct information relating to the predicate offense that are not reliant on the AML regime. One recent suggestion is to provide witness protection, leniency, and large rewards to whistleblowers who provide information on laundered money and the related predicate offence.[233] Such a system would not rely on the AML regime to produce evidence enabling asset seizures and confiscations but rather reward whistleblowers close to the predicate offence perpetrator. An example of who such a regime would target was Alexander Perepilichnyy, a financial adviser who helped launder the money for individuals involved in a large tax theft in Russia. Perepilichnyy later fell out with those he aided and turned whistleblower by providing bank statements that led to the freezing of $11 million related to this tax fraud.[234] Perepilichnyy later died while jogging near London in 2012, and some believe he was killed in retaliation for blowing the whistle. A reward scheme would target persons like Perepilichnyy and others involved in the infrastructure that facilitates money laundering (financial advisers, real estate agents, tax advisors, lawyers, etc). However, rewards are likely insufficient in this context, given the often revenge and violence-prone characteristics of predicate offenders. In addition to rewards, leniency for money laundering offences but not for any other offences[235] and witness protection could be a suitable incentive framework in this context. The US recently introduced the Kleptocracy Asset Recovery Rewards Program, offering rewards up to $5 million ‘for information leading to seizure, restraint, or forfeiture of assets linked to foreign government corruption’.[236] The design of such a programme will be discussed in further detail in Chapter

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accessed 19 September 2024.

[232] See Chapter 11 in John A. Cassara, *Trade Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (John Wiley and Sons 2016).

[233] See Theo Nyreröd, Stelios Andreadakis, and Giancarlo Spagnolo, ‘Money laundering and sanctions enforcement: large rewards, leniency, and witness protection for whistleblowers’ (2023) 26 Journal of Money Laundering Control 912.

[234] Bill Browder, *Freezing Order* (Simon & Schuster 2022) 39.

[235] Money laundering is a derivative offense and a ‘victimless crime’ in that it does not produce immediate victims, see Brigitte Unger, ‘Offshore activities and money laundering: recent findings and challenges’ (*EU Directorate-General for Internal Policies, Study for the PANA Committee*, 2017) 30 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/595371/IPOL_STU(2017)595371_EN.pdf> accessed 19 September 2024.

[236] US Treasury, ‘U.S. Departments of Treasury and Justice Launch Multilateral Russian Oligarch Task Force’ (16 March 2022) <https://home.treasury.gov/news/press-releases/jy0659> accessed 19 September

5.

3. Taxation

In many cases, whistleblowers can serve as a tool for audit selection. The benefit of this is that whistleblowers will already have identified the crucial issues and provided evidence on what amount was underreported and when, saving the auditors/inspectors time. Taxation is given as an example here as there is a significant body of research, primarily experimental, on the comparable effectiveness of whistleblowers versus traditional audits in detecting and deterring tax evasion. We already know empirically that whistleblowing has a positive effect on tax compliance. Niels Johannesen and Tim B. M. Stolper considered the effects of a leak of customer information from LGT Bank in Liechtenstein.[237] While this paper concerns leaking information and not whistleblowing through designated channels, they found that this leak led to a significant decrease in the use of criminal offshore banking services. This suggests that the leak had a general deterrent effect on the industry's customers, most likely as a consequence of an increase in the perceived risk of detection.[238] Another study, which explored the effects of the introduction of a whistleblower hotline and reward programme in Israel in February 2013, found similar results.[239] The policy was introduced concurrently with a large media campaign attracting attention to the hotline. The authors found a significant increase in tax collections in sectors with a high risk of tax avoidance. They attribute this to the deterrent effects of the hotline in conjunction with the large media campaign, as the tax revenue returned through the hotline itself was insignificant.

Beyond empirical work, numerous experimental studies document whistleblowing's positive effects on tax compliance compared to other tax compliance regimes. Hui-Chun Peng conducted a laboratory experiment examining the effects of whistleblowing versus random audits, finding that in the whistleblower treatment, only 9.2% declared zero income, contrary to 38% in the random audit treatment. Moreover, 38% of subjects declared their full income in the whistleblower treatment, whereas in the random audit treatment, only 25.2% did.[240] While individuals in the random audit treatment reported significantly lower income after being audited, possibly explained by the 'bomb-crater effect,' in the whistleblower treatment, they declared significantly higher income.[241] Cécile Bazart and colleagues similarly considered random audits versus a regime in which audits are based on how many denouncements an individual receives. They found that, on average, 16.8% evade taxes in the whistleblower-based audit scheme versus 38.13% under the random audit scheme. In the final round of their game, the difference was even starker, with a mere 13.75% evading taxes in the whistleblower scheme contrary to 43.35% in the audit-based regime.[242] David Masclet and colleagues found that, compared to a baseline treatment involving semi-random audits,[243] a treatment involving peer-reporting generated 30% higher tax collections. Moreover, those

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2024.

[237] Niels Johannesen and Tim B. M. Stolper, 'The Deterrence Effect of Whistleblowing' (2021) 64 Journal of Law & Economics 821.

[238] Ibid 823.

[239] Eli Amir, Adi Lazar, and Shai Levi, 'The Deterrent Effect of Whistleblowing on Tax Collections' (2018) 27 European Accounting Review 939.

[240] Hui-Chun Peng, 'The whistleblowing mechanism and tax evasion: an experimental study with private income-level information' (2023) 30 Applied Economics Letters 1.

[241] Ibid 4.

[242] Cécile Bazart, Mickael Beaud, and Dimitri Dubois, 'Whistleblowing vs. Random Audit: An Experimental Test of Relative Efficiency.' (2020) 73 KYKLOS 47.

[243] Semi-random in the sense that if you declare less income, your probability of being audits increases (bottom 50% of declared income is audited 20% of the time, whereas top 50% is audited 10% of the time), ibid 4.

who reported their peer's tax evasion paid a penalty to do so and gained no material benefits – suggesting a moral motivation to report/punish lawbreakers.[244] An earlier study by Ludger Breuer compares four different regimes: one with a random audit (1 in 24, around 4% probability of being audited), one with whistleblowing but no rewards, one with lower rewards, and one with large monetary rewards. He found that in the audit regime, subjects declared on average 36.38% of their income in the first round and 25.21% in the second round. In the whistleblower but no reward regime, subjects report 69.82% of their total income in the first round and 59.62% in the second. In the smaller reward treatment, subjects report 69.49% of their total income in the first and 73.47% in the second round. For large rewards, he found that subjects, on average, reported 85.67% of their income in the first round and 90.21% in the second round.[245]

Farrar and colleagues conducted an experiment where participants were asked whether they would report a friend who had understated his taxes by $500,000.[246] They tested three different interventions that tax authorities could use: offering a cash award ($150,000), a moral suasion message (i.e., highlighting the societal good in paying taxes), or a prosocial reward (offering a donation to the whistleblower's charity of choice of $150,000). They also test the effect of interactions (i.e., a cash award and moral suasion) on the tendency to report tax evasion to determine the most effective approach. They found that the most effective intervention is a cash award together with a moral suasion message, while a cash award alone is more effective than a prosocial reward and a moral suasion message combined. Philipp Chapkovski and colleagues conducted an experiment to see whether whistleblowing reduces ingroup cooperation by undermining trust and willingness to cooperate.[247] Participants report a gross income to the tax authority, and if they get caught underreporting, they must pay a fine. When participants are informed that they need to cooperate in the game's second phase, the number of full non-compliers declines from 18% in the no-whistleblower scenario to 3.5%.[248] While they found some indication that whistleblowing could reduce ingroup cooperation, the effect is not statistically significant.[249] Michele Bernasconi and colleagues conducted an experiment in the tax context, finding that with perfect information, whistleblowing increases compliance rate by 20%—22% compared to a random audit scheme.[250] Moreover, participants tend to blow the whistle a lot more on 'top earners', whose compliance rate under the whistleblower treatment is 47.5% greater than under a random audit scheme.[251] This evidence suggests that whistleblowing is vastly superior to random audit schemes in the lab setting. Translating these enforcement benefits outside the lab and taxation context could yield substantial enforcement benefits.

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[244] David Masclet, Claude Montmarquette, and Nathalie Viennot-Briot 'Can Whistleblower Programs Reduce Tax Evasion? Experimental Evidence.' (2019) 83 Journal of Behavioral and Experimental Economics 1, 8.

[245] Ludger Breuer, 'Tax Compliance and Whistleblowing – The Role of Incentives' (2014) The Bonn Journal of Economics 2.

[246] Jonathan Farrar, et al. 'An investigation of the influence of guilt, awards, and a moral message on tax whistleblowing decisions.' (2024) 31 Advances in Taxation 135.

[247] Philipp Chapkovski, Luca Corazzini, and Valeria Maggian, 'Does Whistleblowing on Tax Evaders Reduce Ingroup Cooperation?' (2021) 12 Frontiers in Psychology 1.

[248] Ibid 5.

[249] Ibid 10.

[250] Michele Bernasconi, Luca Corazzini, and Tiziana Medda 'Whistleblowing and tax evasion: Experimental evidence' 11 Economic and Political Studies 316.

[251] Ibid 321. Participants are divided into four income brackets and other participants can observe reported income. When participants have imperfect information, whistleblowing is less effective at increasing compliance, Ibid 331. The authors take this to suggest that whistleblowing can be particularly effective at increasing compliance among high-income earners.

C. Benefits of Whistleblowers

1. General enforcement benefits

While the previous section focused on three specific regulatory areas, similar stories can be told about other enforcement areas, such as pharmaceutical fraud, environmental violations, and procurement fraud. In Chapter 4, more specific evidence will be provided on reward programmes and their effectiveness. This section will provide a general overview of the various mechanisms that make whistleblowers so potent in detecting and deterring corporate wrongdoing. It will not discuss how or through which legal mechanisms to further involve whistleblowers in enforcement, as the rest of the thesis is dedicated to answering that question. Each paragraph in this section makes a separate point on the value of whistleblowers.

Whistleblowers overcome some of the issues associated with evidence tampering and destruction. If evidence is destroyed or tampered with, audits will be ineffective and generate false negatives, yet whistleblowers can help by recovering destroyed evidence or testifying that evidence was destroyed. In a 2004 paper, Chris William Sanchirico noted that 'According to many judges and practitioners, evidence tampering is hardly confined to blockbuster events. Documents that should be produced in response to a discovery request are regularly shredded, altered, or suppressed. Witnesses frequently lie to investigators, deposers, and courts. Fact finders are routinely misled by the fabrication or destruction of evidence.'[252] While the belief in the ubiquity of evidence tampering was widespread (at least in 2004), the empirical evidence at the time may not have been what many took it to be,[253] evidence tampering remains a significant problem. For example, we can turn to Enron and its accounting firm, Arthur Andersen. In October of 2001, Enron warned Andersen about a possible accounting scandal, and within a month, a 'crisis-response' group was formed at Andersen. On October 8, a lawyer at Andersen noted that an SEC investigation was highly probable, and just days later, a partner at the firm urged Andersen personnel to comply with its document retention policy, writing that: 'if it's destroyed in the course of normal policy and litigation is filed the next day, that's great. . .we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable.'[254] After this, close to two tons of documents were shipped to Andersen's main office in Houston for shredding. In March of 2002 the SEC filed a charge of obstructing an official proceeding in the District Court for the Southern District of Texas, in which the jury found Andersen guilty – and since federal rules do not allow convicted felons to audit public companies, this was a death blow to Andersen.[255] Section 802 of SOX made it a crime to manipulate evidence, punishable by fines and/or imprisonment for a maximum of 20 years.[256] Some other examples

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[252] Chris William Sanchirico, 'Evidence Tampering' (2004) 53 Duke Law Journal 1215, 1218.

[253] Ibid 1129-1239 reviewed the evidence as of 2004.

[254] Story told and quotation cited in Elizabeth K. Ainslie, 'Inducting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 American Criminal Law Review 107, 108.

[255] The story did not end there, however. After the Court of Appeals for the Fifth Circuit affirmed the District Court's decision, the case came before the Supreme Court who unanimously overturned it, as it did not find that someone 'knowingly … corruptly, persuaded another person … with intent to … cause' the destruction or alteration of documents. Justice Scalia noted that 'we all know that what are euphemistically termed 'record-retention programs' are, in fact, record-destruction programs, and that one of the purposes of the destruction is to eliminate from the files information that private individuals can use for lawsuits and that Government investigators can use for investigations.' see *Arthur Andersen LLP v. United States,* 544 US 696 (2005) 17.

[256] See 18 U.S.C § 1519 'Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.'

of evidence destruction include Credit Suisse in a tax evasion case,[257] a UBS tax evasion case,[258] HSBC in a money laundering case,[259] and is widespread in some areas such as competition offenses.[260]

Whistleblowers can also reduce information acquisition costs, which is typically one of the main obstacles for resource constrained prosecutors' offices and enforcement authorities. John Coffee Jr. notes:

> 'The initial barrier to white collar prosecutions of the corporation or its officers is the cost of acquiring information. Suppose prosecutors want to investigate whether high-ranking executives were aware of serious risks associated with a new product but still marketed the product aggressively, despite this knowledge. Where do prosecutors begin? If prosecutors just send out subpoenas for all records and emails broadly relating to this topic, they may be swamped with millions of documents that they cannot absorb or assess. To be sure, they can use the grand jury, but this is no panacea either. Information overload may make such an investigation slow, costly, and infeasible.'[261]

Numerous studies show that directly incentivizing insiders can reduce these and related costs. Andrew C. Call and colleagues found that when whistleblowers are involved in enforcement actions for financial misrepresentation, penalties for firms and employees are higher, and there is less time to discovery—i.e., the period from the end of the violation period to the beginning of regulatory proceedings.[262] Another study by Aiyesha Dey and

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[257] Credit Suisse 'subverted disclosure requirements, destroyed bank records, and concealed transactions involving undeclared accounts by limiting withdrawal amounts and using offshore credit and debit cards to repatriate funds' Eric Holder, 'Attorney General Eric Holder Announces Guilty Pleas in Credit Suisse Offshore Tax Evasion Case' (19 May 2014) <https://www.justice.gov/opa/speech/attorney-general-eric-holder-announces-guilty-plea-credit-suisse-offshore-tax-evasion> accessed 19 September 2024.

[258] In 2008, after the DoJ had warned UBS that it was being investigated, the whistleblower Bradley Birkenfeld gathered evidence of what they were doing internally, which was 'circling the wagons, destroying incriminating evidence that pointed to illicit relationships with American clients' Bradley C. Birkenfeld, *Lucifer's Banker*, (Republic Book Publishers 2020) 180.

[259] A junior employee at HSBC's Mexican affiliate, HBMX, had 'fabricated records of mandatory monthly meetings by the Communication and Control Committee' at the direction of the HBMX's Money Laundering Deterrence Director, see U.S. State Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, 'U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History' (2012) 53 <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/PSI%20REPORT-HSBC%20CASE%20HISTORY%20(9.6).pdf > accessed 19 September 2024.

[260] Christopher R. Leslie, 'How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence' (2021) 4 University of Illinois Law Review 1199, 1219-1228 which details numerous methods used by cartel members, including: specific instructions on how to delete metadata and download files directly to memory sticks, hiding market allocation data at grandma's house, creating fake trade associations and 'published a false agenda that contained such matters as animal rights and environmental issues', falsifying travel report to obscure the actual purpose of meeting other cartel members, and even 'destroying documents that document how they destroy documents'.

[261] Coffee (n 26) Chapter 7. Similar concerns have been raised by practitioners, see Former Attorney General Eric Holder who remarked that 'investigating these [financial fraud] cases after the fact is incredibly resource-intensive, often requiring large teams of investigators and prosecutors to sift through millions of documents or terabytes of data – sometimes in foreign languages – over multiple years'. Eric Holder, 'Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law' (14 September 2014) <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> accessed 19 September 2024.

[262] Andrew C. Call, et al, 'Whistleblower and Outcomes of Financial Misrepresentation Enforcement Actions' (2018) 56 Journal of Accounting Research 123, 163-4. Due to not being able to ascertain if the whistleblower information was used by the enforcement agencies, they consider potential whistleblower involvement in enforcement actions.

colleagues found that greater financial incentives for whistleblowers increase the percentage of cases in which the Department of Justice (DoJ) intervenes by 3.2% and the percentage of settled cases by 3%.[263] If the DoJ intervenes, it is generally an indication that the complaint is well-founded.

Whistleblowers can also aid in mitigating selective enforcement and regulatory capture. Auditors and regulators rely on imperfect information and must utilize some degree of discretion in choosing who and what to audit, which 'may lead to enforcement that reflects regulators' personal objectives rather than the social goals of the regulation'.[264] If a regulator is captured, it may lead to selective audits and enforcement that benefits the auditors' friends and damage competitors. If there is an obligation to follow up on whistleblower reports or if whistleblowers have the right to litigate the case themselves, such as under the federal and state FCAs, then who to audit or file against is not as dependent on regulatory discretion. Insiders are also knowledgeable of their industry and the risks that certain technologies or financial instruments pose.[265] For this reason, supervisory authorities often hire from the industry they supervise, and those who supervise are often hired by the industry. Regulated firms can offer regulators lucrative jobs in the future in return for lenient treatment. Paying insiders for their information can help avoid conflict of interest issues in these contexts. A previous regulator now employed by the industry would understand the reward programme at his or her former employer. Such a person is more likely to be an asset to the regulator, which could deter bad actors (those who attempt to bribe regulators), as their value would be diminished if the bad actors engage in offences that are reportable for a reward.

Whistleblower regimes encourage public participation in law enforcement. Even when laws are enacted against corporate or more economical forms of crime with obscure damages, the public's attention is usually only stretched to the point of enactment of laws purporting to solve the issue, less to the implementation and even less to the enforcement of the subsequent regulations. In the context of environmental crimes, but more broadly applicable, Barton H. Thompson writes that:

> 'Public underenforcement may be intrinsic to the political process by which laws are passed and implemented. Public awareness of an environmental problem is high at the time that a legislative cure is passed, enabling environmental advocates to overcome the focused opposition of regulatory targets and achieve a stronger statute than standard public choice theory would otherwise predict. After passage of the statute, however, public saliency declines, while regulatory opposition remains high. Thus, the balance of political power shifts toward industry in the implementation and enforcement of the statute.'[266]

Private enforcement allows citizens to not only take part in the legislative process through

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[263] Aiyesha Dey, Jonas Heese, and Gerardo Pérez, 'Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers' (2021) 59 Journal of Accounting Research 1689, 1692.

[264] Esther Duflo, et al, 'The Value of Regulatory Discretion: Estimates from Environmental Inspections in India' (2014) NBER Working Paper 20590 1, 2.

[265] Consider the case of algorithmic cartels, of which former Chair of the Federal Trade Commission (FTC) stated that 'the inner workings of these tools are poorly understood by virtually everyone outside the narrow circle of technical experts that directly work in the field.' Maureen K. Ohlhausen, 'Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing' (23 May 2017) 2 <https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf> accessed 19 September 2024.

[266] Barton H. Thompson Jr., 'The Continuing Innovations of Citizen Enforcement' (2000) 2000 University of Illinois Law Review 185, 191.

their elected representatives, but also in enforcing democratically enacted rules, which can itself be viewed as beneficial from the perspective of democratic governance and civil society engagement. Rewards for whistleblowers can help balance out the asymmetric power between public policy aims and industry power.

Whistleblower programmes can help reduce the gambler's fallacy and similar effects by introducing ambiguity in the probability of detection.[267] While detection is achieved through successful whistleblower reports, deterrence can only be achieved by modifying the perceived probability of being detected. A policy can effectively deter wrongdoing while leading to no additional detection at all, so long as there is the perception that the likelihood of detection has increased. When this occurs, however, beliefs typically become more in line with reality after some time when subjects realize there is little additional detection, and the deterrence effects therefore diminish. Under most audit regimes, the probability of being audited is typically known. With respect to the IRS, for example, it is public information what percentage of filings are audited depending on income bracket. In other areas, industry associations, accountants, and other professionals can provide similar information on audit frequency. Introducing incentives for whistleblowers can by itself deter ambiguity-averse persons from engaging in wrongdoing. Perhaps ironically, the most famous paper that showed that some people are ambiguity averse and prefer choices where the risk is clear is a 1961 paper by Daniel Ellsberg, who is a famous whistleblower.[268] The form of ambiguity introduced by large incentives is also likely to have a disproportional effect on those prone to commit economic crimes. This is because those who are more prone to engage in economic crime, risking reputations, fines, and jail time, are also likely to view large monetary incentives to whistleblowers as an effective motivator.

2. Moral psychology and financial incentives

Corporate wrongdoing is also unique from the point of view of moral psychology. While causing more damage than violent crimes, our moral heuristics are poorly attuned to these damages, and as a result, we typically fail to recognize their significance and scale. If we had done so, whistleblowing would likely be much more prevalent than it is. There are compelling evolutionary reasons why we are so poorly attuned to these damages. What social scientists have discovered in the last decades is that our moral judgments are more arbitrary and heuristic-based than previously believed when rationalist models of moral reasoning were more popular.[269] If our moral judgments were derived from reasoning, we would have been better able to judge corporate wrongdoing as detrimental as it is, while we typically are not. These findings can help explain divergent intuitions in thought experiments such as the

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[267] There is also some evidence that ambiguity can deter evasion, see e.g. Arthur Snow and Ronald S. Warren JR, 'Ambiguity about audit probability, tax compliance, and taxpayer welfare.' (2005) 43 Economic Inquiry 865.

[268] Daniel Ellsberg, 'Risk, Ambiguity, and the Savage Axioms' (1961) 75 The Quarterly Journal of Economics 643. In this paper Ellsberg advanced the following propositions: "(1) certain information states can be meaningfully identified as highly ambiguous; (2) in these states, many reasonable people tend to violate the Savage axioms with respect to certain choices; (3) their behavior is deliberate and not readily reversed upon reflection", Ibid 669. In short, some reasonable people are uncomfortable with uncertainty and prefer choices when risks are known, even if this entail less expected utility. In the context of this thesis, if audit probability is transparent, it will be less likely to deter than when detection is more ambiguous, e.g., in cases where there are financial rewards for whistleblowers.

[269] See Jonathan Haidt, 'The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 Psychological Review 814., and Jonathan Haidt, *The Righteous Mind,* (Penguin Books 2012). Earlier work assumed that moral reasoning progressed toward higher levels of sophistication, and that moral judgments were the outcomes of moral reasoning with different levels of sophistication. A representative view of this position can be found in Lawrence Kohlberg, 'The Claim to Moral Adequacy of a Highest Stage of Moral Judgment' (1973) 70 The Journal of Philosophy 630.

Trolley Cases,[270] where many people make seemingly arbitrary differences depending on whether a certain situation elicits a strong emotional response or not. One implication of this research is that violence that is 'up close and personal' has been around for a long time in our evolutionary linage, and our survival depended on cooperation and individual restraint, which would select for violence-aversion as a primitive response to personal violence.[271] More distant and impersonal harms typically fail to trigger an alarm-like personal response, and most corporate wrongdoing is of this nature. Successful and sustained corporate wrongdoing often plays upon our inability to recognize damages that are distant to us geographically and/or temporally, damages that are probabilistic, or damages that are spread out across time or persons, or when the social consensus is in favour or neutral toward the wrongdoing.[272]

Numerous examples of corporate wrongdoing also illustrate that the propensity to blow the whistle is only tangentially connected with the total harm caused. Dieselgate is one such example. Beyond the environmental damages caused by this widescale non-compliance, excess diesel emissions were associated with 38,000 premature deaths in 2015.[273] Although there was outrage over this scandal, it was far from equivalent to the outrage that would have been caused had these harms been of a more up-front and personal nature. In the case of Dieselgate and many other corporate scandals, violations persisted for years without anyone coming forward. This is typically explained by the fact that employees fear retaliation, yet that by itself is unlikely to be an adequate explanation for every single employee. It is also likely that many employees did not see certain violations as particularly severe. Paying 10% less in taxes may not seem like such a significant violation, but at the aggregate level, it can have significant effects on public finances. That many forms of corporate wrongdoing are perceived as non-severe is problematic because the most persistent finding in the literature is that whistleblower intention is positively correlated with subjects' perception of how severe the wrongdoing is.[274] Financial rewards can provide an incentive in contexts where forms of wrongdoing fail to engage with a sense of morality that encourages reporting.

Our psychology as hypothetical observers of organizational wrongdoing and

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[270] Judith Jarvis Thomson, 'Killing, Letting Die, and the Trolley Problem' (1976) 59 The Monist 204, 207-208.

[271] Joshua Greene, 'The Secret Joke of Kant's Soul' in W. Sinnott-Armstrong (ed) *Moral Psychology*, (MIT Press 2007) 11.

[272] Thomas M. Jones, 'Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model' (1991) 16 The Academy of Management Review 366, where he incorporates these features into a model to understand the 'moral intensity' of organizational wrongdoing.

[273] Susan C Anenberg et al., 'Impacts and mitigation of excess diesel-related NO_x emissions in 11 major vehicle markets.' (2017) 545 Nature 467.

[274] See Jawad Khan et al, 'Examining Whistleblowing Intention: The Influence of Rationalization on Wrongdoing and Threat of Retaliation' (2022) 19 International Journal of Environmental Research and Public Health, 1752 (9 out of 20), Jessica Mesmer-Magnus and Chockalingam Viswesvaran, 'Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation' (2005) 62 Journal of Business Ethics 277, P.G Cassematis and R. Wortley, 'Prediction of Whistleblowing or Non-reporting Observation: The Role of Personal and Situational Factors' (2012) 117 Journal of Business Ethics 615, 627, Janet P. Near, 'Does type of wrongdoing affect the whistle-blowing process' (2004) 14 Business Ethics Quarterly 219, Sean Valentine and Lynn Godkin, 'Moral intensity, ethical decision making, and whistleblowing intention' (2019) 98 Journal of Business Research 277, 283, and Masaki Iwasaki, 'Relative Impacts of Monetary and Non-Monetary Factors on Whistleblowing Intention: The Case of Securities Fraud' 22 University of Pennsylvania Journal of Business Law 591. This has also been found in experimental settings, see Paul Andon et al, 'The Impact of Financial Incentives and Perceptions of Seriousness on Whistleblowing Intention' (2016) 151 Journal of Business Ethics 165, 175, Yuval Feldman and Orly Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality' (2010) 88 Texas Law Review 1151, 1190, and Jeffrey V. Butler, Danila Serra, and Giancarlo Spagnolo 'Motivating Whistleblowers' (2019) 66 Management Science 605.

whistleblowing is also deceptive in another regard. We may think we would blow the whistle had we worked at Volkswagen, but that is far from certain. One feature we frequently engage in is discounting future pleasure and pain. If asked today whether you prefer soda over water for tomorrow's dinner, you may say water. Yet, when faced with the actual choice, many who chose water earlier would instead pick the soda. Miriam Baer illustrates how this kind of discounting can work in the whistleblower context:

> 'An employee might genuinely believe that she will 'do the right thing' when faced with a difficult situation sometime in the future. The costs of foregoing a promotion, exposing a fraud, or refusing to conceal a bribe will all look far less daunting when perceived as something that *might* occur in the distant future. By the same token, the benefits of rising within the company, attaining greater responsibility, and making more money will also appear less pressing when forecasted abstractly in future time periods.'[275]

Our self-exalting views of ourselves and what we would do in a typical whistleblower situation are, therefore, most likely incorrect. Most of us would succumb to bribes, moral self-delusion, or fears of retaliation rather than do something heroic.

3. Insights from leniency programmes

Finally, there is one regulatory area that has utilised insider incentives in a structured manner for decades: leniency programmes in antitrust/competition law. Cartels impose substantial costs on consumers: a 2020 paper estimates that cartel overcharges since 1990 are at least $64 trillion worldwide.[276] Cartels are also difficult to detect, and recidivism in this crime category is rampant.[277] The golden standard is direct evidence of a cartel agreement, for example, an agreement on certain prices. Yet, evidence of this kind is easy to hide or destroy, so prosecutors must often resort to primarily two other forms of circumstantial evidence: communication evidence and economic evidence.[278] The former involves evidence that two potential colluders 'met or otherwise communicated, but does not describe the substance of their communications',[279] while the latter, economic evidence, can be conduct-related, e.g., simultaneous and identical price increases, or structural, e.g. high market concentration and homogenous products, but can also relate to industry performance, such as abnormally high profits, a history of competition law offences, and stable market shares.[280] Economic evidence is almost always ambiguous[281] and consistent both with collusion and independent actions in response to exogenous factors such as global supply chain issues, increased commodity prices, and new regulations. Economic evidence alone is, therefore, typically not sufficient to prove guilt; evidence of coordination is often needed.[282] Insider

[275] See Miriam H. Baer, 'Reconceptualizing the Whistleblower's Dilemma' (2017) 50 University of California, Davis, Law Review 2215, 2263. Emphasis in original.

[276] John M. Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2019' (2020) 54, SSRN Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682189> accessed 19 September 2024.

[277] John M. Connor, 'Recidivism Revealed: Private International Cartels 1990-2009' (*Competition Policy International*, 5 November 2010), <https://www.competitionpolicyinternational.com/recidivism-revealed-private-international-cartels-1990-200/> accessed 19 September 2024.

[278] OECD, 'Policy Roundtables: Prosecuting Cartels without Direct Evidence' (2006) <https://www.oecd.org/daf/competition/37391162.pdf> accessed 19 September 2024.

[279] Ibid 10.

[280] Ibid 21.

[281] Ibid 10.

[282] With respect to US case law, see Joseph E. Harrington, 'Detecting Cartels' (2005) Working Paper No. 526, John Hopkins University, Department of Economics, <https://www.econstor.eu/bitstream/10419/72037/1/504388991.pdf> accessed 19 September 2024.

information is therefore important in the cartel context, and this is an area where incentivising insiders has come a long way.

In the EU, the European Commission and national competent authorities are responsible for enforcing antitrust violations under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission published its first 'Leniency Notice' in 1996,[283] which encouraged cartel members to report the cartel in return for leniency. Under leniency programmes, the first reporting cartel participant does not receive any fines in return for full cooperation (although they may be sued for damages by private parties), while all other cartel participants pay a full or partially reduced fine. Their specific design differs between jurisdictions, and there is a debate on how to optimally design them.[284] Leniency programmes have been effective at reducing trust among participants in collusive agreements, and over the 2010-2017 period, 23 out of 25 cartel investigations were the result of leniency applications: only two resulted from the Commission's own detection work.[285] The DoJ describes its leniency programme as 'its most important tool for detecting cartel activity'.[286] Leniency programmes follow the same logic as whistleblower reward programmes: they utilise incentives to elicit insider information. The reward for the firm in this case is that they receive a reduced fine while competitors pay a full or partially reduced fine, often amounting to several hundred million euros.

Empirical studies also highlighted the benefits of leniency programmes. A 2005 study described by Catarina Marvão found that the introduction of the 1996 leniency programme is positively correlated with the number of words in the decision and the gravity of the infringement,[287] and that the size of the reduced fine is larger after introducing the leniency programme. Steffen Brenner found evidence indicating that agencies are better informed about cartel conduct than they would have been absent leniency programmes, and that investigation and prosecution becomes faster by about 1.5 years.[288] Leniency programmes differ from reward programmes and protection laws in two important respects: they are aimed at corporations and not individuals, and they do not offer positive incentives. Still, they operate by a similar principle, and have been so successful that they are now considered a model that could be expanded to other regulatory areas.[289]

Numerous countries have introduced reward programmes for individual whistleblowers that offer significantly smaller discretionary rewards, usually capped at around $100,000.[290] There is little evidence in favour of their effectiveness. Although this could be due to data unavailability, there is little evidence more generally in favour of the effectiveness of lower

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[283] Commission Notice on the non-imposition or reduction of fines in cartel cases (C 207, 18/07/1996).

[284] See, e.g., Evgenia Motchenkova and Giancarlo Spagnolo, 'Leniency Programs in Antitrust: Practice vs Theory' (2019) Competition Policy International, CPI Antitrust Chronicle, <https://research.vu.nl/ws/portalfiles/portal/74162827/CPI_Motchenkova_Spagnolo.pdf> accessed 19 September 2024.

[285] European Court of Auditors 2020 (n 52) 18.

[286] Department of Justice, Antitrust Division, 'Leniency Program' (2023) <https://www.justice.gov/atr/leniency-program> accessed 19 September 2024.

[287] Catarina Marvão, 'The EU Leniency Programme and Recidivism' (2015) 48 Review of Industrial Organization 1, 3.

[288] Steffen Brenner, 'An empirical study of the European Corporate Leniency Program.' (2009) 27 International Journal of Industrial Organization 639.

[289] See Emmanuelle Auriol, Erling Hjelmeng, and Tina Søreide, 'Corporate criminals in a market context: enforcement and optimal sanctions' (2023) 56 European Journal of Law and Economics 225.

[290] For an overview see Giancarlo Spagnolo and Theo Nyreröd, 'Financial Incentives to whistleblowers: a short survey.' in Daniel Sokol and Benjamin van Rooij (eds), *Cambridge Handbook of Compliance* (Cambridge University Press 2021).

discretionary rewards.[291] Nonetheless, theory has suggested that rewards can be effective,[292] and experimental evidence suggests the same: Bigoni and colleagues (in an experimental setup where experiment participants act as firms) found that prices fall to the competitive level in their reward treatment,[293] and Hamaguchi and colleagues found that providing firms rewards has a significant impact on dissolving cartel activities.[294]

D. Conclusion

This Chapter began by introducing the topic of corporate wrongdoing, with the *Introduction* noting its extensive damages, prolonged nature, and significant recidivism rates across numerous regulatory areas. The section *Liability, Detection, and Deterrence* focused on recent trends in how regulators have attempted to curb corporate wrongdoing. The main ways to detect corporate wrongdoing is through audits, and the main way to deter offences is through incentivised self-regulation, under which corporations self-report violations in return for leniency or sentence reductions. This section was also critical of the centrality of these two forms of response to instances of corporate wrongdoing, and noting as in the introduction, that whistleblower reward programmes are by and large absent in the EU. The section *Three Case Studies* aimed to strengthen the argument that audits and self-regulation are insufficient to tackle corporate wrongdoing, and that whistleblower incentives can serve as a helpful complement. Each case study aimed to bring out a particular deficiency. The case study on securities fraud aimed to show how layers of audits have evolved, with auditors auditing other auditors. Despite this, auditing failures remain prevalent, even by Big Four auditors auditing large publicly traded companies. The case study on money laundering aimed to show how layers of audits and supervisors have emerged, with no evidence of these being effective at detecting and deterring money laundering. Finally, the case study on taxation took a different approach and showed how a significant amount of literature, particularly experimental lab studies, has shown whistleblower regimes to be more effective at ensuring compliance than random audit-based regimes. The last section, *Benefits of Whistleblowers*, outlined some of the main ways that smarter incentives for whistleblowers can aid in improving detection and deterrence of corporate wrongdoing. These include reducing issues associated with evidence tampering and destruction, reducing information acquisition costs, introducing ambiguity in the probability of detection, and mitigating selective enforcement. This section also highlighted how corporate wrongdoing typically is not perceived as severe and how a lack of a moral incentive can be supplanted with a financial one. Finally, it provided one example of a regulatory area where structured insider incentives have been successfully utilised: competition law.

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[291] This will be considered in depth in Chapter 5.

[292] What has been called 'courageous' leniency programmes, see Giancarlo Spagnolo, 'Optimal Leniency Programs' (2000) FEEM Working Paper No. 43, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=235092> accessed 19 September 2024.

[293] Maria Bigoni et al. 'Fines, Leniency and Rewards in Antitrust' (2012) 43 RAND Journal of Economics 368.

[294] Yasuyo Hamaguchi, Toshiji Kawagoe, and Aiko Shibata, 'Group size effects on cartel formation and the enforcement power of leniency programs' (2009) 27 International Journal of Industrial Organization 145.

CHAPTER 2: THE HISTORY OF WHISTLEBLOWER LAWS

The Table below contains a summary of the significant laws and events discussed in this Chapter.

Whistleblower Laws / Events	Cause
Roman Reward Provisions for Informers	Informers (*delatores*) were rewarded for reporting corruption, adultery, or tax evasion; common during the Empire.
Qui Tam in England (7th Century–1951)	No centralised prosecutors; relied on private enforcement and incentivised reporting with rewards.
Venetian Bocche dei Leone (1442 - 1797)	Citizens could anonymously report corruption and wrongdoing; designed to enforce civic integrity.
Naval Whistleblowers (US, 1776, Esek Hopkins Case)	Revolutionary-era whistleblowers reported naval misconduct; led to early US legal protection (1778 resolution).
False Claims Act (US, 1863)	Civil War contractor fraud; law enacted to empower citizens to sue fraudsters on behalf of the government.
False Claims Act Amendment (US, 1943)	Abuse of FCA lawsuits during WWII; government sought more control and reduced whistleblower rewards.
Common Informers Act (UK, 1951)	Abolished centuries-old qui tam-style informant rewards; passed in response to abuses and nuisance lawsuits.
Environmental Whistleblower Laws (US, 1970s–80s)	As part of Clean Air Act and Clean Water Act amendments; to report environmental violations like illegal dumping.
Restrictions to Employment-at-Will Doctrine (US, 1960s–1980s)	Courts began recognizing exceptions to protect employees fired for whistleblowing or refusing to break the law.
Civil Service Reform Act (US, 1978)	Post-Watergate reforms to promote ethical government and protect civil servants who reported wrongdoing.
False Claims Act Amendment (1986)	Massive defense contracting fraud in the 1980s (e.g., $400 hammers); reforms enhanced rewards and protections.
State-Level False Claims Acts (US, especially 2000s onward)	Encouraged by the success of the federal FCA; states aimed to combat Medicaid fraud and recoup losses.
Whistleblower Protection Act (US, 1989)	Series of high-profile whistleblower cases exposing government misconduct during the 1980s.
Queensland Reforms (Australia, 1990s)	Fitzgerald Inquiry into police corruption prompted protective legislation for whistleblowers.
OECD Anti-Bribery Convention (1997)	Global concern over transnational corporate bribery; led to focus on whistleblower protections.
Public Interest Disclosure Act (UK, 1998)	Triggered by disasters like the Clapham Rail Crash and BCCI scandal; need for safe reporting channels.
UN Convention Against Corruption (2003)	Explicitly recommended whistleblower protection as a tool for fighting public and private corruption.
Sarbanes-Oxley Act (US, 2002)	Corporate fraud scandals (Enron, WorldCom); retaliation against internal whistleblowers like Sherron Watkins.
Dodd-Frank Act (US, 2010)	2008 Financial Crisis; highlighted SEC's failure to act on tips; Obama's reform agenda pushed rewards and protections.
G20 Commitments on Whistleblower Protection (2010–2011)	Post-crisis push for transparency and anti-corruption among the world's largest economies.
EU Whistleblowing Directive (2019/1937)	Patchy protections in Member States; influenced by international norms (OECD, UN), and EU-level fraud cases.

A. Introduction

To better understand how whistleblowers can be utilised to detect and deter corporate offences, it helps to understand the history of how whistleblowers have been used in law enforcement. This Chapter explores how lawmakers came to introduce whistleblower laws and, in the process, elucidates numerous design issues and failures that modern lawmakers can learn from. Using informants in enforcement goes back longer than one may think. This Chapter starts by considering *Informants Under Qui Tam,* which outlines the earliest known uses of informants in enforcement in England and the US, as well as a unique case of utilising whistleblowers in Venice. The second section, *Inventing the Whistleblower*, describes how informants became despised after World War II, how the word 'whistleblowers' was rehabilitated, and how political and economic factors such as neoliberalism and the emergence of regulatory capitalism created a need for more audit functions, of which whistleblowing is one. The section *Early Whistleblower Laws* outlines how lawmaking progressed in the US and internationally, identifying some of the crucial developments in this period. The section *Scandals and the Great Financial Crisis* describes how continuous corporate scandals led to the introduction of more whistleblower laws and how the great financial crisis spurred lawmaking. The final section, *Modern Protection Laws*, discusses how increased pressure by international organizations and the development of best practices led more countries to introduce protection laws. The section ends with a discussion of the EU Whistleblowing Directive.

B. Early History of Informing and Qui Tam

1. *Qui tam* in England

While England is the country that experimented most and earliest with *qui tam* enforcement, there are known instances of this practice dating back to Roman times. Enforcement by private citizens called *delatores*, who received a substantial cut of the defendant's property as a reward for successful prosecution, were common in the Roman empire.[295] This system of private prosecution was used in place or due to a lack of public prosecutors and adequate administration of law.[296] What is believed to be the earliest use of *qui tam* enforcement in England comes from the decrees of Wihtred, King of Kent, issued in the 7th Century, and was used to enforce a prohibition on labouring during the sabbath: 'If a freeman works during the forbidden time, he shall forfeit his healsfang, and the man who informs against him shall have half the fine, and [the profits arising from] the labour.'[297] Little is known about *qui tam* enforcement until the 14th century, when it became more prominently used and was motivated by limited public enforcement resources and the difficulty of implementing national policies over numerous geographically separated local jurisdictions.[298] There was also a concern about the lack of local enforcement of statutes that enforcement officials themselves were violating. As was the case with the 1318 Statute of York, which required uniform prices for certain consumer goods. Parliament was concerned that if local officials themselves were selling goods at excessive prices, they would not want to enforce the statute. If a local official were caught selling regulated items, informers could report the offence and cash a reward.[299] Because *qui tam* cases were also suits on behalf of the king, informants gained access to the royal courts, which typically only considered matters involving the king.[300]

Another use of this enforcement mechanism comes from the Ordinance of Labourers of 1349. Considered to be the start of English labour law, this ordinance by King Edward III was issued after the Black Death when an estimated 30-40% of the population had died, resulting in a shortage of labourers who demanded more pay for their work.[301] To combat the 'excessive pay' to workers, King Edward issued the following ordinance:

> 'Item, that no man pay, or promise to pay, any servant any more wages, liveries, meed, or salary than was wont, as afore is said; nor that any in other manner shall demand or receive the same, upon pain of doubling of that, that so shall be paid, promised, required, or received, to him which thereof shall feel himself grieved, pursuing for the same; and if none such will pursue, then the same to be applied to any of the people that will pursue; and such pursuit shall be in the court of the lord of the place where such case shall happen.'[302]

Qui tam enforcement of statutes in England became more widely used in the 1500s and 1600s, predominantly for economic crimes. M.W. Beresford obtained data on informations

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[295] Amy Richlin, 'Approaches to the sources on adultery at Rome' (1981) 8 Women's Studies 225, 232. See also Beck (n 13) 566.

[296] W. W. Flint, 'The Delatores in the Reign of Tiberius, as Described by Tacitus' (1912) 8 The Classical Journal 37, 37.

[297] F. L. Attenborough, *The Laws of the Earliest English Kings* (Cambridge University Press 1922) 27. Healsfang means a fine in substation for other punishment.

[298] Beck (n 13) 567. Beck's article is warmly recommended as the best introduction to the use and eventual abolishment of *qui tam* in England.

[299] Ibid 568.

[300] Unknown Author, 'The History and Development of Qui Tam' (1972) Washington University Law Quarterly 81, 85. Strangely, the paper has no recognized author.

[301] Informers were also called 'promoters' at the time, see Charles Doyle, 'Qui Tam: The False Claims Act and Related Federal Statutes' (2021) Congressional Research Service Report (R40785).

[302] Ordinance of Labourers 1349 (23 Edw. 3).

submitted and the alleged offense for a sample of 26,243 cases between the years 1519-1659.[303] The majority of offences were related to marketing (11,809), customs and foreign trade (6,805), and manufacturing (1,458). Less common infringements are categorised as ecclesiastical (1,114), labour code (917), agrarian (892), political Lent (364 cases), guns, archery, horses (220 cases), exchanges (208), and miscellaneous (1,237 cases). Marketing, the largest category by far, included offences like ingrossing grain, illegal sale of animals, sale outside markets and fairs, forestalling, regrating, and illegal wool deals.[304]

For periods in England's history, some persons took on the job to be law enforcers full-time, travelling the country and hiring people to aid them. G.R. Elton describes the predicament of one such person named George Whelplay,[305] who tried to make a career as an informer in 1538-43. Whelplay reported on such matters as a person who had put imported ribbons up for sale in Northampton contrary to the act 19 Henry VII, c. 21, woollen kerseys that did not comply in length and breadth to the conditions laid down by the act 27 Henry VIII, c. 12, victuals being exported without a license, and the exporting of lead and malt without payment of duty.[306] Often, he was only successful when he managed to confiscate the goods with little resistance from the lawbreaker.

Qui tam enforcement was extended to so many laws that it affected almost the whole population, including working on Sundays, observing religions other than what the Church of England endorsed, illegal sale of liquor, and numerous other laws. This led to informers becoming successively more despised by the population, who perceived themselves as harassed by the common informers. Figures such as Edward Coke, a widely praised jurist of the 16th century, had called the common informer 'viperous vermin'[307] and that they 'doth vex and pauperise the subject and the community of the poorer sort, for malice or private ends and never for love of justice'.[308] Jonathan Swift, the author of Gulliver's Travels, described them as a 'detestable race of people'.[309] A set of opportunistic informers had also emerged that selected statutes under which recoveries were easy to obtain and violations easy to prove, which does not necessarily coincide with public enforcement interests. Perjury, blackmail, and entrapment had also been issues.[310]

By 1951, informers had become universally despised, and the Common Informers Act (1951) was introduced, which removed the right of informers to claim a part of the penalty under 48 Acts. In October 1951, one commentator wrote about the Act: 'Writing an obituary notice is normally a sad and painful duty but where the subject of the notice is the common informer that duty becomes an extremely pleasant task.'[311] Members of Parliament had almost universally bad appraisals of the informers, calling them 'unnatural creature of statute', 'a parasite who is legally empowered to sue for money which he has not worked', and a 'malodorous type'.[312] Some members even had to explain the reason for their historical use: that law enforcement could not be secured without informers and that it was not until 1856

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[303] M.W Beresford, 'The common Informer, the Penal Statutes and Economic Regulation' (1957) 10 The Economic History Review 221.

[304] Ibid 231.

[305] G. R. Elton, 'Informing for Profit: A Sidelight on Tudor Methods of Law-Enforcement' (1954) 11 The Cambridge Historical Journal 149.

[306] Ibid 152-3.

[307] J. LI. J. Edwards, 'Statutes and Statutory Instruments, Common Informers Act, 1951' (1951) 14 The Modern Law Review 462, 462.

[308] Cited in Beresford (n 303) 221.

[309] Edwards (n 307) 462.

[310] Australia *qui tam* 1985 (n 7) 4.

[311] Edwards (n 307) 462.

[312] Beck (n 13) 606.

that all areas of the country had a police force.[313]

2. *Qui Tam* and whistleblowing in the US

Qui tam enforcement was also introduced in the American colonies, as Charles Doyle chronicles,[314] including in Massachusetts (1686) with respect to fraud in the sale of bread, Connecticut (1672) for 'permitting a night-time disorderly assembly under one's roof', New York (1664-1719) for an officer's failure to perform duties for the prevention of piracy, and in Virginia (1759) for peddling without a license. Whistleblowing was also to become of significance early in the founding of the US. Ten whistleblowers aboard a boat named Warren presented evidence to Congress that the character and actions of their commander, the highest-ranking naval officer, made him unsuitable to lead. Despite being a man of substantial power, the naval officer was suspended and eventually removed from the U.S. Navy – with John Hancock himself signing the resolution and ordering it to be served to the naval officer.[315] Through his substantial influence and resources, the naval officer retaliated against the whistleblowers and succeeded in jailing two of them. These two then wrote to the Continental Congress pleading for financial aid to defend themselves, which the Congress agreed to provide them with. In 1778, the Continental Congress signed one of the first pro-whistleblowing laws in the US.[316]

> 'That it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.'

The next seminal event for whistleblowing in the US came during the Civil War when the Union Army was suffering defeat and losses, investigative committees in both houses of the US Congress reported on 'the grossest frauds upon the government',[317] as contractors had taken the situation's urgency and turned it into a profit-making opportunity. The government was sold ships with rotten hulls that had been freshly painted and sold as new vessels to the Navy, barrels of sawdust that were supposed to contain gunpowder, infantry boots made of cardboard which wore out after a mile of marching, uniforms that disintegrated when they became wet, and the same mules were sold repeatedly to Army quartermasters.[318]

In January 1863, Senator Henry Wilson introduced a bill 'To prevent and punish frauds upon the Government of the United States',[319] more commonly known as the False Claims Act (FCA). This bill allowed any citizen with knowledge of fraud against the government to sue on the government's behalf and keep half of the recoveries. The penalty for each false claim made to the government was $2,000 and double damages.[320] The bill offered whistleblowers who pursue the case in court 50% of the damages and recoveries obtained,[321]

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[313] Ibid 605.

[314] Doyle (n 301) 3.

[315] Stephen Kohn tells this story in Stephen Kohn, *Rules for Whistleblowers: A Handbook for Doing What's Right* (The Rowman & Littlefield Publishing Group 2023) xvi – xviii.

[316] Journals of the Continental Congress, '1774-1789' (30 July 1778) 732.

[317] Sen. Jacob M. Howard, Congressional Globe, Senate, 37th Congress, 3rd Session, 956.

[318] James B. Helmer Jr, 'False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots' (2013) 81 University of Cincinnati Law Review 1261, 1264.

[319] A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, Bills and Resolutions, Senate Bill 467, 37th Congress, 3rd Session.

[320] Patricia Meador and Elizabeth S. Warren, 'The False Claims Act: A Civil War Relic Evolves into A Modern Weapon' (1998) 65 Tennessee Law Review 455, 459.

[321] Note that, due to the double damages, the intention was that the wrongdoer fully recovers the

with a statute of limitations on claims of three years. Another important reason for the use of private enforcement was that law enforcement in 1863 was understaffed,[322] and alternative ways to control fraud were considered but rejected in 1861 as expensive and administratively unfeasible.[323] In a memorable passage from the Senate records, Senator Howard remarked that:

> 'The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator [...] In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.'[324]

Abraham Lincoln signed the bill into law on March 2, 1863. By the time of World War II, the Federal Bureau of Investigations and the Department of Justice (DoJ) had seen their resources expanded and now filed more criminal indictments, giving rise to a unique kind of war profiteering. Due to lacking a bar on where *qui tam* relators obtained information on fraud against the government, aware litigators were standing outside courthouses waiting for criminal charges to be filed, after which they took the information and filed a civil FCA suit based on the same information.[325] Some also took information from preexisting congressional investigations and filed *qui tam* suits.[326] This meant that some relators cashed in substantial amounts while offering no additional information to the government, which came to be called 'parasitic lawsuits'.[327] In *United States ex rel. Marcus v. Hess*, the Supreme Court held that parasitic suits were permitted under the FCA. In *Hess*, the US had indicted contractors for collusive bidding and fined them $54,000. Morris L. Marcus had taken the information from the indictment and copied it almost *verbatim* into a *qui tam* suit in which he recovered $315,000. Congress now believed that their investigative capacities were sufficient to detect fraud, and in conjunction with parasitic suits that also embarrassed the DoJ, they decided to significantly limit *qui tam* actions by amending the FCA in 1943, banning whistleblower suits if the government had 'any knowledge' of the wrongdoing. If the government intervened, the relator would only be entitled to 'reasonable compensation' of no more than 10% of the proceeds.[328] These amendments caused the *qui tam* provisions to fall almost entirely out of use, as suits were quickly dismissed due to the 'any government knowledge' eligibility requirement.[329]

Contracting fraud in the US took a new turn in the 1980s as the Reagan administration

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Government's losses in addition to the whistleblower rewards.

[322] Mr. Van Nuys from the Committee on the Judiciary commented on the 1863 FCA in a statement from 1943: 'the office of the Attorney General was not staffed sufficiently to handle the many matters which arose and was not possessed of investigative facilities now at the disposal of that office.' Beck (n 13) 559.

[323] Jennifer Brechbill, Stephaine L Carman, and Natalie Theresa Sinicrope, 'Setting a rogue to catch a rogue: the changing face of Lincoln's law' (*Hogan Lovells US LLP*, 22 August 2016) <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/setting_a_rogue_to_catch_a_rogue_the_changing_face_of_lincolns_law.pdf?la=en> accessed 19 September 2024.

[324] Howard (n 317) 955-956.

[325] Helmer (n 318) 1267.

[326] J. Morgan Phelps, 'False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial' (1999) 49 Catholic University Law Review 249.

[327] Beverly Cohen, 'KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law' (2011) 116 Dickinson Law Review 77, 82.

[328] Robert L. Vogel, 'Eligibility Requirements for Rewlators under *Qui Tam* Provisions of the False Claims Act' (1992) 21 Public Contract Law Journal 593, 597.

[329] See Phelps (n 326) 255 and Helmer (n 318) 1271.

boosted defence spending to wear down the Soviet Union. The DoJ's fraud detection and prosecution capacities proved inadequate to deal with the increasing fraud that a sudden increase in spending entailed. Among other questionable expenditures, the Air Force paid Lockheed Corp. $7,622 for a coffee machine to be used aboard cargo planes, Lockheed-California Co. $640 apiece for 54 toilet seats, and Boeing $748 for a pair of duckbill pliers.[330] In 1985, General Electric pleaded guilty to fraudulent billing of more than $800,000 in labour costs.[331] The same year, pentagon auditors concluded that General Dynamics Corp. had charged the government $244 million more than it should have in the preceding twelve years.[332] By 1985, four of the largest defence contractors had been convicted of criminal fraud,[333] approximately half of the hundred largest defence contractors, including nine of the ten largest, 'were under investigation for multiple fraud offenses',[334] and a Senate report found that 'available Department of Justice records show most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected'.[335]

In response, Congress attempted to revitalize the FCA with amendments in 1986, increasing the penalties to treble damages and between $5000 and $10,000 for each false claim,[336] compared to the $2,000 fine that remained since 1863.[337] To undo some of the damages done by the 1943 amendments' attempts to prevent parasitic suits, Congress removed the bar on realtors bringing cases with 'any prior government knowledge'; instead, *qui tam* relators are only barred from bringing cases based on information publicly available in the media, arising from criminal, civil or administrative hearings, unless the relator is the 'original source' of that information. The amendments also lowered the burden of proof for relators to a civil standard, and realtors could now remain a party even if the government intervened and would receive 25 to 30% if they litigated the case themselves and 15 to 25% if the government intervened. Protection against retaliation was also provided, and attorney's fees became recoverable by successful realtors.

The foregoing emphasis on fraud in defence procurement should not obscure another equally important area for *qui tam* actions under the FCA: medical fraud, which today makes up most actions and recoveries. In 2020, national health expenditure in the US was $4.1 trillion, accounting for 19.7% of GDP.[338] Medicare spending came in at $829.5 billion, and Medicaid spending at $671.2 billion. Medical service providers bill the government for procedures and treatments under these programmes if a citizen qualifies for them, and fraudulent billing of treatments has led to thousands of *qui tam* actions. In the DoJ's fraud statistics, *qui tam cases* categorized under Health and Human Services brought back $32 billion between 1987-2018, while *qui tam* cases classified under Department of Defense only

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[330] Unknown Author, 'Hill Enacts Pentagon Procurement 'Reforms' (*CQ Almanac 1985*, 41st ed., 164-72. Washington, DC: Congressional Quarterly, 1986). <https://library.cqpress.com/cqalmanac/document.php?id=cqal85-1147520> accessed 19 September 2024.

[331] Ibid.

[332] Ibid.

[333] Helmer (n 318) 1272.

[334] See Joseph Sherick, 'Department of Defense Inspector General Joseph Sherick at the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce', *Hearings on Federal Securities Laws and Defense Contracting*, House of Representatives, 99th Congress, 1st session (1985).

[335] Robert Salcido, 'Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False claims Act' (1995) 24 Public Contract Law Journal 237, 252.

[336] Meador and Warren (n 320) 460.

[337] Helmer (n 318) 1273.

[338] Centers for Medicare & Medicaid Services, 'NHE Fact Sheet', <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet> accessed 19 September 2024.

brought back $5.9 billion in the same period.[339] Although the FCA was initially motivated by procurement fraud in the military, the FCA's ability to fight other kinds of fraud against the government has likely led to its sustained support.

3. Venice

Qui tam is of particular interest to this Thesis due to the use of monetary rewards. Yet, another episode of structured use of informants is illuminating and comes from The Republic of Venice, one of Europe's major commercial and maritime powers founded in 697. The Republic's use of informants is outlined in a book by Ioanna Iordanou.[340] Starting in 1442, the Council of Ten (one of the Republic of Venice's governing bodies between 1310 – 1797) had already created a formal register for secret denunciations.[341] The practice of gathering information submitted by the public became more systematized and institutionalized in the sixteenth and seventeenth centuries. Whereas previously, informants had left information casually in public places, 'by the second half of the sixteenth century, the authorities started to install wooden postboxes in prominent locations about the city and in the Veneto, where Venetians could deposit them'.[342] The Council of Ten took great care in handling the complaints, guaranteeing secrecy in dealing with them 'since revealing the denunciator's credentials, especially in the early stages of ensuring investigations, could have serious repercussions for both the individual and the case being investigated'.[343] Informants, or *denuncianti*, oftentimes demanded to be compensated for their information if it was proven legitimate. The Council of Ten even provided the option of an informant nominating a third person 'whom the [Council of Ten] could approach in order to offer the warranted compensation.'[344] This system of informing became a pastime for the Venetians, who would report 'on anyone and anything that could pose a threat, from compulsive gamblers and suspicious outsiders to alleged heretics and foreign ambassadors. So fixated were Venetians on their denunciations that they even paid for the services of professional scribes, as some of the documents' immaculate penmanship reveals'.[345] This fervour had generated a flood of worthless tips, which the government unsuccessfully tried to curtail by mandating that anonymous denunciations had to be signed by three witnesses.[346] Instead of having the intended effect, the practice of submitting and handling information that had started in 1442 'assumed immeasurable proportions, surviving until the fall of the Venetian Republic in 1797'.[347]

B. Inventing the Whistleblower

1. From 'Informers' to 'Whistleblowers'

While the US had remained relatively isolated from the events on the continent during World War II, this was not the case for the UK and Europe. The word 'informant' had been predominantly used under English and American *qui tam*, but the connotation this term had earned on the continent after their abuses in the Soviet Union and Nazi Germany was substantially different. History can help explain why the rehabilitation of 'whistleblower' was

[339] Department of Justice, Civil Division, 'Fraud Statistics' (2018) <https://www.justice.gov/civil/page/file/1080696/download> accessed 19 September 2024.

[340] Iordanou (n 12).

[341] Iordanou (n 12) 73.

[342] Iordanou (n 12) 74.

[343] Iordanou (n 12) 73 – 74.

[344] Ibid 74.

[345] Ibid 74.

[346] Ibid 75.

[347] Ibid 75.

necessary for informing to become palatable in Europe again. Early after the end of World War II, retroactive legislation was introduced in Eastern Germany to punish 'denunciators' who had informed Nazi authorities of persons with anti-Nazi sentiments. One victim of an informer named Göttig had written 'Hitler is a mass murderer! He is guilty of starting the war. His picture belongs here. Long live the red army!'[348] on a sheet attached to the wall of a lavatory. He was reported to the office manager by a person named Puttfarcken, who had seen him exit the bathroom. The office manager, in turn, reported the matter to the police, leading to the arrest of Göttig, who was brought to trial before the supreme regional court in Kassel, where Puttfarcken served as a witness for the prosecution. Göttig was sentenced to death on 20 May 1942 for preparing to commit high treason.[349] After the war, the Göttig case was heard by a jury court in Erfurt-Nordhausen, who ruled that Göttig's actions had not constituted high treason according to German criminal code at the time, and that the case was an example of a 'purely judicial murder', aided by Puttfarcken's report. Puttfarcken testified that he did not know Götting, nor had any feeling of hatred toward him, but merely wanted to distinguish himself as a member of the NSDAP. The court rejected Puttfarcken's defence and ruled that he had intentionally aided and abetted judicial murder. On May 7th, 1946, Puttfarcken was sentenced to life imprisonment with a lifetime deprivation of civil rights.[350]

The use of informers was also widespread in the Soviet Union. At one time, it was reported that the KGB had recruited as many as eleven million Soviet citizens as informers – one out of every eighteen adult citizens, including almost every Russian Orthodox bishop.[351] Recruiting informers and blackmailing citizens for information has been a preferred method in counterintelligence states, where security and intelligence services permeate society. Hannah Arendt writes on denouncing in Soviet:

> The consequence of the simple and ingenious device of 'guilt by association' is as soon as a man is accused, his former friends are transformed immediately into his bitterest enemies; in order to save their own skins, they volunteer information and rush in with denunciations to corroborate the nonexistent evidence against him; this obviously is the only way to prove their own trustworthiness.[352]

Informing under authoritarian regimes often acted both as a sword and a shield. The level of paranoia and profoundly corrosive effect on social relationships caused by using informants in this way has led to sustained scepticism regarding whistleblowers, particularly in Germany and in former Soviet states. Coming out of World War II, Europe and especially England and Germany, emerged with a suspect attitude toward 'informers' or 'denouncers', because of their opportunistic behaviour under English *qui tam* laws and their use by authoritarian regimes. This scepticism toward whistleblowers has persisted, as evidenced by a report by Transparency International on ten former Soviet states.[353]

Calls for protecting 'informers' would likely have gained little political traction in the

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[348] See Andrew Szanajda, 'The Prosecution of Informers in Eastern Germany, 1945-51' (2012) 34 The International History Review 139, 143.

[349] Ibid 143.

[350] Ibid 144.

[351] Robert W. Pringle, 'Andropov's Counterintelligence State' (2000) 13 International Journal of Intelligence and Counterintelligence 193, 196.

[352] Hannah Ardent, *The Origins of Totalitarianism* (first published 1951, Harcourt Brace & Company 1973) 323.

[353] Transparency International, 'Alternative to Silence: Whistleblower Protection in 10 European Countries' (2009) <https://www.transparency.org/en/publications/alternative-to-silence-whistleblower-protection-in-10-european-countries> accessed 19 September 2024.

aftermath of World War II.[354] Whistleblower laws, however, would remerge some decades later with the revival of the concept of 'whistleblower', which can largely be attributed to the civil rights activist Ralph Nader. While the term is believed to have originated in 19th century England to denote police officers who blew the whistle to warn the public of potential harm and sports referees who blew the whistle on rule violations, the term did not become widely used until the late 1970s. In one of the earliest uses, a 1971 article in New Science criticised the British Computer Society's new Code of Conduct, lamenting that it 'contain secrecy clauses that effectively prohibit Nader style whistle-blowing to call public attention to harmful practices.'[355] In 1971, Nader helped with the organisation of a conference on professional responsibility in Washington D.C., whose proceedings were later printed.[356] If there was an event or person that sparked this new notion of whistleblowers as heroes of the public interest, it would have been this conference and the person would have been Nader.[357] It was also here that the modern concept of whistleblowing as being associated with employees was created, as Nader and colleagues defined whistleblowing as 'an act of a man or woman who, believing that the public interest overrides the interest of the *organisation he serves*, blows the whistle that the organisation is involved in corrupt, illegal, fraudulent or harmful activity'.[358] While this narrative of the emergence of the modern concept of 'whistleblowing' is the standard account in the literature, Thomas Olesen argues that a set of trends that sped up in the 1960s and 1970s, such as increased individualization, declines in trust in authorities, changing perceptions of loyalty, and a growing awareness of the complexities and dangers in human production, also aided in the crystallization of the concept of whistleblowing.[359] Academic interest in whistleblowing increased in the 1980s and whistleblowing started to become an area for research. Numerous papers were now written on the topic, from surveys in sociology that highlighted the severity of retaliation against whistleblowers, to articles on the FCA's 1986 amendments,[360] and papers on the ethics of whistleblowing.[361] This also aided in creating a recognition that whistleblowing is often in the public interest and that certain forms of this practice should be encouraged and protected.

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[354] Some have attempted to distinguished between whistleblowing and informing more generally, Peter B. Jubb notes that 'That broad association which juxtaposes the whistleblower with, say, the corrupt individual turned informer is quite undesirable' and that 'Judicious usage can help isolate whistleblowers from other informers, and clarify that legitimate whistleblowing merits encouragement because of its social benefits' see Peter B. Jubb, 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21 Journal of Business Ethics 77, 77. This Thesis does not consider definitional issues, yet notes that it is difficult to rigidly define and differentiate 'whistleblower' and 'informant'.

[355] Joseph Hanlon, 'Single minded service' (*New Scientist*, 9 December 1971).

[356] Ralph Nader, Peter J. Petkas, and Kate Blackwell, 'Whistle Blowing: The Report of the Conference on Professional Responsibility' (Grossman Publishers, 1972).

[357] Mark Worth, ''An Unheard of Dream': Ralph Nader's 50 Years in Whistleblowing' (*Whistleblower Network News*, 1 December 2021) <https://whistleblowersblog.org/features/an-unheard-of-dream-ralph-naders-50-years-in-whistleblowing/> accessed 19 September 2024.

[358] Ralph Nader, et al, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Grossman, 1972) cited in Eva E. Tsahuridu and Wim Vandekerckhove, 'Organisational Whistleblowing Policies: Making Employees Responsible or Liable?' (2008) Journal of Business Ethics 107, 107. Author's emphasis.

[359] Thomas Olesen, 'The Birth of an Action Repertoire: On the Origins of the Concept of Whistleblowing' (2021) 179 Journal of Business Ethics 13.

[360] See e.g. Richard J. Oparil, 'The Coming Impact of the Amended False Claims Act' (1989) 22 Akron Law Review 525.

[361] Richard T. DeGeorge, *Business ethics* (1st ed, Collier Macmillan Publishers 1981) stipulated conditions for when whistleblowing was obligatory versus merely permissible, sparking a debate that would last decades (see e.g., W. Michael Hoffman and Mark S. Schwartz, 'The Morality of Whistleblowing: A Commentary on Richard T. De George' (2015) 127 Journal of Business Ethics 771, arguing for revisions to De George's conditions for permissible/obligatory whistleblowing).

2. The neoliberal revolution

Section D will describe the numerous protection laws that cropped up since the 1970s, but first, it is important to note that the emergence of whistleblower laws did not occur in a social, economic, and cultural vacuum. Other developments contributed to the increased adoption of these laws, including the neoliberal turn, New Public Management (NPM), and regulatory capitalism. David Levi-Faur describes the phases leading up to regulatory capitalism.[362] During Laissez-Faire Capitalism between the 1800s and 1930s, business could be understood as both steering and rowing social functions. In the 1940s – 1970s, we start to see the development of 'Welfare Capitalism', in which the state both steers and rows. In the 1980s until now, we have what Levi-Faur calls 'Regulatory Capitalism', in which the state steers and business rows. Under this analogy, the state steers by creating boundaries of corporate behaviour through regulations. This shift entailed the outsourcing of fundamental services provision, giving the state less insight into production and compliance, coupled with profit-driven incentives not to provide the quality contracted for.[363] Writing of NPM, Micheal Power, in his *The Audit Society: Rituals of Verification*, notes that it 'represents a programmatic commitment to state withdrawal as a direct service provider, in favour of a more regulatory role through accounting, audit, and other instruments.'[364]

It is not a coincidence that auditing as an institutionalised practice has expanded significantly since states entered regulatory capitalism. Power writes of an 'audit explosion' that started in the 1980s,[365] and that the title that the 'audit society' motif 'refers to a collection of systematic tendencies and dramatises the extreme case of checking gone wild, of ritualized practices of verification whose technical efficacy is less significant than their role in the production of organizational legitimacy'.[366] As Chapter 1 argued, this institutionalised form of auditing has issues controlling outcomes and tends to become more obsessed with controlling control functions. As Power already noted in 1997, 'The abstract system tends to become the primary external auditable object, rather than the output of the organization itself, and this adds to the obscurity of the audit as a process which provides assurance about systems elements and little else.'[367]

The need for regulation and audits was also impressed upon by two persons perhaps most emblematic of the neoliberal turn: Margaret Thatcher and Ronald Reagan and their mantras of deregulation and privatisation. While privatisation increased in the US from the 1980s onward, actual regulatory spending under Reagan increased by 10%.[368] When the Thatcher government shifted the provision of nursing home beds from the public to the private sector, it also set up 200 nursing home inspectorates to upgrade the industry's oversight. This was later consolidated into a Social Care Inspectorate of 2600 inspectors under the Blair government.[369] During the deregulation and privatisation fervour in the UK, several regulatory agencies emerged, with John Braithwaite noting 'When British

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[362] David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 The ANNALS of the American Academy of Political and Social Science 12, 16.

[363] 'Neoliberal values of small government drive much of the commitment to the NPM, in particular the creation of quasi-markets and the introduction of contracting between newly separated service providers and purchasers.' Power (n 214) 43.

[364] Power (n 214) 52.

[365] Power (n 214) 14.

[366] Power (n 214) 14.

[367] Power (n 214) 85.

[368] John Braithwaite, *Regulatory Capitalism: How it works, ideas for making it work better* (1st ed, Edward Elgar Publishing 2008) 9, citing P.N Tramontozzi and K.W. Chilton *US Regulatory Agencies Under Reagan, 1960-1988* (Center for the Study of American Business, Washington University, 1989).

[369] Ibid 9.

telecommunications was deregulated in 1984, Oftel was created to regulate it (now Ofcom); Ofgas was born for the regulation of a privatized gas industry in 1986, OFFER for electricity in 1989 (now combined in Ofgem), OfWat for water in 1990, and the Office of the Rail Regulator (mercifully not Ofrails!) appeared in 1993'.[370] The number of regulatory agencies and spending increased substantially in the 1990s to ensure that firms were adequately steered and did not row off in any direction they pleased.

Yet, this does not mean that organisational control issues are unique to the governance structures that neoliberalism and NPM are fond of. Many of the issues that arise in a capitalist system had their equivalents in the planned Soviet economy, and whistleblowers were used much more widely than as a mere anti-oppositional tool to discover dissenters. Nicholas Lampert studied what was referred to as 'participation from below' in the Soviet Union.[371] Managers had to meet planned production targets, which in a centralized management system 'nourishes a pervasive tendency to indulge in false reporting about the organisation's performance', [372] that led to 'report-padding': effectively accounting fraud. Embezzlement, false reporting, report-padding, forgery, and bribery were all issues within this planned economy, even though severe embezzlement and bribery carried the death sentence.[373] Whistleblowers did submit information on various forms of wrongdoing, such as a manager at the Urals precision alloys factory allocating state housing to friends and family instead of their workers,[374] and report-padding by managers at the Grodno house-building combine, which had won them the challenge 'Red Banner of the USSR Ministry of industrial Construction' for which they were awarded extra bonuses.[375] The issues with whistleblowing we observe today are echoes of the past: managers who were singled out often had the backing of powerful figures, retaliated against the reporting employees,[376] and put the focus on the character of the whistleblower instead of the alleged wrongdoing.[377]

It is, therefore, not necessarily the case that the neoliberal model is inherently more in need of localised control functions than a planned economy. Still, what neoliberalism reacted to, the 'inefficiencies of the welfare state', can also be understood as cost and quality control issues in state goods and service provision. When moving from a welfare state to a neoliberal one, a lesson is that outsourcing government functions to private firms and simultaneously reducing supervision and regulation is bound to create some disasters. Yet, as audits are often expensive, only affect a small sample of the total population, and have uncertain deterrence effects on future rule violations, whistleblowers can play a more important auditing function than when the government retained full control of production and distribution. The following sections of this Chapter will illustrate how the emergence of regulatory capitalism highlighted

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[370] John Braithwaite, 'The Regulatory State?' in Robert E. Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press 2011) 9.

[371] Nicholas Lampert, *Whistleblowing in the Soviet Union* (MacMillan 1985).

[372] Ibid 3.

[373] Ibid 20.

[374] Ibid 69.

[375] Ibid 73.

[376] As retaliation against the Urals precision alloys factory whistleblower, Ibid 70 notes: 'they set up an exam to test [the whistleblower's] knowledge of the safety regulations. And, of course, they failed him.' They then dismissed the whistleblower from his duties and offered him 'the choice of a number of worse-paid jobs, including yard-keeper and cleaner'.

[377] In trying to demonise the Urals precision alloys factory whistleblower, Ibid 71 notes: 'In fairness one should say that the city committee and the management studied the biography of this rank and file electrician as if it was the life story of a renowned general, with the difference only that what interested them was not the details of his military feats, but any facts, features and particulars that might in the slightest way compromise him'. The immediate supervisor of the Grodno house-building combine whistleblower 'forbade her to make use of any materials, even those that she needed simply in order to carry out her normal duties' and engaged in 'petty false finding', Ibid 74.

the need for insider information, which, together with numerous scandals in which public interest whistleblowers were retaliated against, created the sense that whistleblower protections were highly sensible.

C. Early Whistleblower Laws

1. Developments in the US

The US would continue to introduce various forms of protection in both the private and public sectors. One salient event for public sector protections came after the Watergate scandal of 1972 and the demise of the Nixon administration. A 1978 Senate Committee noted the existence of a manual by the Head of Nixon's White House Personnel Office, the 'Malek Manual', written by a Nixon aide named Alan May.[378] This document was used to 'assist Nixon appointees in understanding the bureaucracy and in placing politically favorable individuals into key agency positions.'[379] The techniques described in the manual were intended to put the focus on the employee bringing the allegations and not on the allegations themselves. It condoned covert threats to fire, transfer, or demote employees.[380] Leading up to the passing of legislation protecting whistleblowers, numerous other cases involving retaliation against federal employees had also come to light, including at the Food and Drug Administration, the Indian Health Service Hospital in Shiprock, New Mexico, and the General Services Administration.[381] In response, the Ethics in Government Act and the Civil Service Reform Act (CSRA) were passed in 1978. The CSRA established the Office of Special Counsel (OSC), tasked with investigating and prosecuting allegations of prohibited personnel practices or other merit system violations,[382] and the Merit Systems Protection Board (MSPB) was tasked with adjudicating whistleblower cases. In 1984, the MSPB reported that CSRA had little effect on the number of whistleblowers, and employees continued to fear reprisals.[383] The response was the enactment of the Whistleblower Protection Act in 1989, intended to improve protections, prevent retaliation against federal employees, and eliminate wrongdoing in the government.[384]

In the private sector, another lesser-known legislative response involving incentivising whistleblowers came after the Savings and Loans (S&L) crisis in the 1980s. William K. Black wrote a seminal book on the topic and was a regulator when what he called 'control frauds' spread through the S&L industry. S&Ls are financial institutions that take in savings deposits and issue mortgages and loans. In the 1970s in the US, many of these associations provided fixed-rate mortgages with thirty-year maturities and were therefore sensitive to interest rate hikes.[385] Hikes was precisely what happened under Federal Reserve Chair Paul Volker, who raised the discount rate in 1979 from 9.5% to 12%. This created a situation in which many S&Ls had outstanding loans at lower rates than they could borrow at. By mid-1982, the S&L industry had lost about $150 billion in the market value of its mortgages.[386] As a result of this impossible situation, several S&Ls were effectively bankrupted, but many did not file for

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[378] United States Senate Committee on Governmental Affairs, 'The Whistleblowers: A Report on Federal Employees who Disclose Acts of Governmental Waste, Abuse, and Corruption' (1978) 95th Congress, 2nd Session.

[379] Ibid 26.

[380] Ibid 27.

[381] Ibid 28-35.

[382] Senate Report. 108-392 – Federal Employee Protection of Disclosures Act. 108 Congress, 2nd Session, S.2628, Calendar No. 782 Report. 2004.

[383] Ibid.

[384] Ibid.

[385] Black (n 113) 24.

[386] Ibid 24.

bankruptcy and instead engaged in numerous questionable accounting and acquisition practices.[387] Over 1,000 S&L insiders were eventually convicted of felonies, and the best estimate of the S&L debacle's cost was $150-175 billion in 1993 dollars.[388] The response was to enact the Financial Institutions Reform, Recovery, and Enforcement Act in (1989), and the Financial Institutions Anti-Fraud Enforcement Act in (1990). The latter offered rewards to whistleblowers up to $1.6 million if they made a confidential declaration to the DoJ that resulted in recoveries.

The use of *qui tam* also expanded in the US in this period. Since the federal FCA only covers fraudulent claims against the federal government, it leaves a substantial part of state-level spending unprotected by the *qui tam* enforcement mechanism. Several states would introduce their own state-level FCAs, starting with Michigan in 1977. As of December 2021, 32 states had introduced their own FCAs covering state spending, an overwhelming majority of which allow for *qui tam* suits.[389] Some cities, such as Chicago and New York City, have even passed their own version of the federal FCA.[390] The federal FCA's success led Congress in 2005 in the Deficit Reduction Act to create incentives for states to establish their own FCAs by offering an additional 10% of Medicaid fraud recoveries to states that enact FCAs sufficiently similar to the federal law.[391]

The recognition of the importance of whistleblowing would also come from another area of common and discrimination law, described by Stephen and Micheal Kohn in a 1986 paper on the availability of protections in the US.[392] The 'at will' doctrine in the US says that absent an employment contract, an employee at will can be fired for any or no reason at all.[393] This effectively means that employees could be fired for blowing the whistle on important matters for the public. An entirely unconstrained at-will doctrine would imply, for example, that employees asked to testify about crimes committed by their employer could be fired at will. This issue had been recognised long before under the Fair Labor Standards Act (1938), which reads that 'it shall be unlawful for any person to':

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[387] Ibid 23.

[388] Ibid xv, 62.

[389] In chronological order: Michigan 1977 (The Medicaid False Claims Act), California 1987 (California False Claims Act), Illinois 1992 (Illinois Whistleblower Reward and Protection Act), Tennessee 1993 (Medicaid False Claims Act), Florida 1994 (Florida False Claims Act), Texas 1995 (Medicaid Fraud Prevention Act), Louisiana 1997 (Louisiana False Claims Act), Nevada 1999 (Submission of False Claims to State or Local Government), Delaware 2000 (Delaware False Claims and Reporting Act), District of Columbia 2000 (District of Columbia False Claims Act), Hawaii 2000 (Hawaii False Claims Act), Massachusetts 2000 (Massachusetts False Claims Act), Virginia 2002 (Virginia Fraud Against Taxpayers Act), New Hampshire 2004 (New Hampshire False Claims Act), New Mexico 2004 (New Mexico Medicaid False Claims Act), Indiana 2005 (Indiana False Claims and Whistleblower Protection Act), Montana 2005 (Montana False Claims Act), New York 2005 (New York False Claims Act), Oklahoma 2007 (Oklahoma False Claims Act), Rhode Island 2007 (The State False Claim Act), New Jersey 2008 (New Jersey False Claims Act), Connecticut 2009 (Connecticut False Claims Act), Minnesota 2009 (The Minnesota False Claims Act), North Carolina 2009 (North Carolina False Claims Act), Colorado 2010 (Colorado Medicaid False Claims Act), Iowa 2010 (Iowa False Claims Act), Georgia 2012 (Taxpayer Protection False Claims Act), Washington 2012 (Medicaid Fraud False Claims Act), Maryland 2015 (Maryland False Claims Act), Vermont 2015 (Vermont False Claims Act), Alaska 2016 (Alaska Medical Assistance False Claim and Reporting Act), Puerto Rico 2018 (False Claims to Government of Puerto Rico Programs, Contracts, and Services).

[390] Christina Orsini Broderick, 'Qui Tam Provisions and the Public Interest: An Empirical Analysis' (2007) 107 Columbia Law Review 949, 956.

[391] Hollie Parrish, 'The Cost of Qui Tam Suits: An Empirical Analysis of State False Claims Act' (2018) 42 Journal of the Legal Profession 277, 282.

[392] Stephen M. Kohn and Michael D. Kohn, 'An Overview of Federal and State Whistleblower Protections' (1986) 4 Antioch Law Journal 99.

[393] Ibid 108.

> '(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to Chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee'[394]

Starting in 1959, California was the first state to make a 'public policy exception' to the at-will doctrine.[395] Between 1959 and 1986, at least 28 additional states recognised public policy exceptions to the at-will doctrine, although what exceptions were made differed between states.[396] Typically, they aim to make an exception for when an employee is exercising some form of right, such as when Indiana limited their exception to cases 'where the employee is discharged solely for exercising a right conferred on him by statute, constitution, or other positive law'.[397] These public policy exceptions are broad, covering all private employees, although simultaneously narrow, covering only very specific forms of whistleblowing. A patchwork of different forms of protections had also been introduced in several regulatory areas, including under the Occupational Safety and Health Act (1970), the Safe Drinking Water Act (1974), the Clean Air Act (1977), the Federal Mine Health and Safety Act (1977), and the Energy Reorganization Act (1978).[398] Many US states also introduced their own whistleblower protection laws, usually as part of their labour codes. As early as 1999, Robert Vaughn listed over a hundred state statutes that protect whistleblowers.[399]

Yet, scandals would persist. In the late 1990s and early 2000s, a series of corporate scandals in the US shocked the markets, sending stock prices tumbling at a range of large firms, including Enron, WorldCom, Tyco, Adelphia, Sunbeam, Qwest, Xerox, and Global Crossing.[400] Most of these disasters involved accounting fraud, and the most scrutinised firm became Enron, which was initially a natural gas company that turned into a multinational firm with a complex business structure that operated broadly in the energy business and offered many products. Enron's trading business used mark-to-market accounting, which required estimating the incomes and costs of long-term contracts for up to 20 years. To manage risks and hedge certain assets, some firms use special purpose entities. Enron used hundreds of these, often for pure accounting reasons and not their intended purpose.[401] For years Enron had 'reported profits that did not exist and kept losses off its balance sheet using complex entities'.[402] Two whistleblowers, Sherron Watkins, the Vice President of Corporate Development at Enron, and Cynthia Cooper, the Vice President of Internal Audit at WorldCom, were named 'Persons of the Year' by Time magazine in 2002. As a result of these scandals, Congress enacted the Sarbanes Oxley Act, Section 806 of which protects employees of publicly traded firms from retaliation for blowing the whistle on what they reasonably believe to be violations of federal law relating to fraud against shareholders, any SEC rule or regulation, and federal bank, wire, mail or securities fraud. Section 1107 of the

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[394] 29 U.S.C. § 215(a)(3).

[395] Ibid 108, the landmark case was *Peterman v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)

[396] Ibid 109-110.

[397] Kohn and Kohn (n 392) 108.

[398] Congressional Research Service, 'Compilation of Federal Whistleblower Protection Statutes' (25 April 2024) <https://crsreports.congress.gov/product/pdf/R/R46979> accessed 19 September 2024.

[399] Robert G. Vaughn, 'State Whistleblower Statutes and the Future of Whistleblower Protection' (1999) 51 Administrative Law Review 581, 582-3.

[400] Stelios Andreadakis, 'Regulatory or Non-Regulatory Corporate Governance: A Dilemma Between Statute and Codes of Best Practice' (2008) 4 Journal of Contemporary European Research 253, 254.

[401] Healy and Palepu (n 110) 11.

[402] Garrett (n 25) 22.

act makes retaliation against whistleblowers a crime. This law became a role model for international lawmaking and will be discussed in more detail in the next Chapter.

2. Developments outside of the US

There were also lesser-known developments in whistleblower law outside of the US. One example is Australia. The state of Queensland had a corruption problem centred within its police force, which came to light through investigative journalism based on whistleblower information.[403] A public inquiry was set up to investigate misconduct allegations, resulting in the Fitzgerald Report of 1989, which became the impetus for legislative reform. The report concluded that some Queensland police had aided criminals by selectively enabling gambling and prostitution by persons who paid them off. Honest police were silenced, and a cabal within the Queensland police, 'the brotherhood', would punish whistleblowers by subjecting them to false complaints, punitive transfers, and providing them with the worst rosters and duties.[404] In the report's aftermath, numerous high-ranking politicians were charged with crimes, and the Queensland Police Commissioner was charged with corruption. The Report concluded that 'There is an urgent need [...] for legislation which prohibits any person from penalizing any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities.'[405] Queensland enacted interim protection provisions in 1990, and the senate of South Australia passed the Whistleblower Protection Act in 1993, which came into effect in September of 1993,[406] while Queensland and New South Wales introduced whistleblower protections in 1994. Attempts to implement public interest disclosure legislation at Commonwealth level go back to a 1994 Senate Select Committee into Public Interest Whistleblowing.[407] However, the preparation of specific legislation was abandoned in 1996 after an election in which a new coalition government came to power.[408] Section 16 of the 1999 Public Services Act provided some protection for whistleblowers.[409] In 2004, Part 9.4AAA was inserted into the Corporations Act of 2001, providing private employees some protections. While some bills containing narrow whistleblower provisions were adopted, it would take until 2013 for the first standalone whistleblower protection legislation to be enacted at the Commonwealth level. The Public Interest Disclosure Act of 2013 protects public sector employees and largely implemented the Government's response to a committee report from 2009.[410]

The neoliberal turn would also cast its shadow over the UK. In the 1980s and 1990s, a series of disasters took place in the UK that many recognised could have been prevented if employees had spoken out earlier or were listened to when they did speak out.[411] One of these was the Bank of Credit and Commerce International (BCCI), registered in Luxembourg with headquarters in Karachi and London. BCCI's business effectively consisted of a Ponzi

[403] G.E Fitzgerald, 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (1989) Report of a Commission of Inquiry Pursuant to Orders in Council, 2.

[404] Ibid 286.

[405] Ibid 134.

[406] Report of the Senate Select Committee on Public Interest Whistleblowing, 'In the Public Interest' (1994) paras 4.37, 4.38.

[407] Ibid.

[408] House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Whistleblower protection: a comprehensive scheme for the Commonwealth public sector' (25 February 2009) ix.

[409] A J Brown, 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation' (2006) Griffith University <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/138180/Public-Interest-Disclosure-Legislation-in-Aust-Nov-06-Full-Paper1.pdf> accessed 19 September 2024.

[410] Mary Anne Neilsen, 'Public Interest Disclosure Bill 2013' (2013) Parliamentary Library, Law and Bills Digest Section, Bills Digest No. 125, 4.

[411] Lucy Vickers, 'Whistling in the Wind: The Public Interest Disclosure Act 1998' (2000) 20 Legal Studies 428.

scheme, and they engaged in every kind of financial crime imaginable. When BCCI was shut down in July of 1991, depositors lost millions of pounds of their savings. Another disaster occurred in July of 1988 when an explosion at the oil platform Piper Alpha, located in the North Sea, killed 167 men. A public inquiry was requested, and Honorary Lord Cullen was charged to hold it. The Cullen Report criticised Occidental Petroleum, the platform's owners, claiming that the company had a superficial attitude to the risk of major hazards, failed to devise and operate safe systems, and even when such were in place, they were frequently broken.[412] The Report also criticised the Department of Energy's supervision and inspections as superficial and noted that the Department suffered from under-manning that affected not only the frequency but also the depth of inspections.[413] Other disasters in the UK, such as the MS Herald Disaster of 1987, the Barlow Clowes scandal of 1988, the Clapham Rail Crash of 1988 that killed 35 and injured 500, the scandal at Maxwell pensions that started to unravel in 1992, and the Barings Bank failure in 1995, also contributed to a sense that if persons had spoken up earlier, these scandals could have been prevented.[414] The response was the introduction of the Public Interest Disclosure Act (PIDA) in 1998, which aimed to protect employers from detrimental treatment or victimisation and covers both the private and public sectors. This legislation is one of the most important ones still in operation, as it also has served as a model for many other whistleblower laws that were to follow.

Internationally, this period also saw increased recognition of whistleblowers as a form of labour right. One of the earliest advocates for whistleblower protection is the International Labour Organisation, which in 1963 and 1982 posited what it considered invalid reasons for termination of employment. The Termination of Employment Recommendation of 1963 (R119) states in paragraph 3(c) that one of these is 'the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations.' This recommendation was superseded by a new convention in 1982 (C158), stating in Article 5 (c) 'the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.'

D. Scandals and the Financial Crisis

1. The US and UK

The Financial Crisis of 2007-2008 started from the US, where a housing bubble had grown due to a range of factors, including increased subprime lending and predatory loan practices.[415] These loans were securitised into 'mortgage-backed securities', and a web of derivatives had emerged around them that banks had significant exposure to. Credit rating agencies, responsible for the prudent assessment of assets and their risk, rated these securities as far less risky than they were, and analysts who raised concerns over the ratings were sidelined.[416] When the quality of the loans underwriting these securities became known, they quickly dropped in value.[417] While the crisis started in the US, repercussions were felt worldwide after the collapse of Lehman Brothers in September 2008. This was also a turning

[412] Kenneth Miller, 'Piper Alpha and The Cullen Report' (1991) 20 Industrial Law Journal 176, 182.

[413] The Hon Lord Cullen, 'The Public Inquiry into the Piper Alpha Disaster' (1990) Department of Energy, paras 15.49.

[414] See Vickers (n 411), and David Lewis, 'The contents of whistleblowing/confidential reporting procedures in the UK: Some lessons from empirical research' (2006) 28 Employee Relations 76, 77.

[415] See, e.g. Anthony Sanders, 'The subprime crisis and its role in the financial crisis' (2008) 17 Journal of Housing Economics 254.

[416] Maurice Mullard, 'The Credit Rating Agencies and Their Contribution to the Financial Crisis' (2012) 83 The Political Quarterly 77.

[417] Ibid.

point for many countries, as it was recognised that many of these issues could have been prevented if whistleblowers came forward or were listened to when they did. The response by Congress was the Dodd-Frank Act of 2010,[418] a massive bill at 849 pages, in which protecting and incentivising whistleblowers was believed to be part of the solution. A 2009 White Paper from President Obama's Department of Treasury suggested that whistleblower protections should be expanded and that the Securities and Exchange Commission (SEC) should provide monetary incentives to whistleblowers who provide information that leads to significant enforcement actions.[419] In the final draft of Dodd-Frank, whistleblowers who gave information to the SEC, were eligible for 10-30% of the recoveries in actions where fines exceed $1 million. Pressure on the SEC to incentivise whistleblowers also came from another direction: Bernie L. Madoff's Ponzi scheme in which investors had lost billions. Madoff admitted guilt in December of 2008, but a whistleblower named Harry M. Markopolos alerted the SEC in 2000, 2001, and 2005 that the returns Madoff claimed to generate were impossible to obtain.[420] The lack of action on the part of the SEC led to criticism of the agency and fertilised the ground for new practices when dealing with whistleblowers.

It did not take long after the enactment of the UK's PIDA in 1998 until a series of scandals in UK banking would revitalise the debate on employees not coming forward with information on wrongdoing. One of these scandals was not an isolated event but a common banking practice. Financial missselling is the selling of products in the retail financial sector to customers who do not need them, often to customers who lack knowledge and must rely on the expertise and advice of the seller. This form of misselling had occurred since the 1980s in the UK with respect to pension schemes, identity protection insurance, and payment protection insurance.[421] One form of misselling that drew scrutiny was that of 'payment protection insurance', a form of insurance intended to cover those unable to pay their debts on products such as mortgages and credit card balances due to illness, unemployment, or disability. This insurance was aggressively sold and marketed and was highly profitable for the banks. The problem was that several barriers were erected to prevent people from claiming the insurance, such as contract exclusions or administrative obstacles, and many people who purchased them either did not need them or were unsuitable. As of January 2011, British banks and financial institutions had paid out £37.5 billion in compensation to customers who were wrongly sold the insurance, which some have called 'the U.K.'s biggest financial scandal by far'.[422]

Another event after the financial crisis that put whistleblowers under the spotlight was a case from Halifax Bank of Scotland (HBOS) in 2004. Paul Moore, then Head of Group Regulatory Risk at HBOS, raised concerns about the bank's risk-taking three years before the financial crisis. He was subsequently fired by the chief executive James Crosby with the reasoning that 'he did not fit in' and replaced by a person with no risk management experience at all. HBOS then collapsed during the financial crisis of 2008 and merged with Lloyds Bank, and many took this to substantiate Moore's claim that the bank had been taking excessive risks. During the then Prime Minister Gordon Brown's question time in the House of Commons, David Cameron commented on Brown's decision to appoint Crosby to what was

[418] The Dodd–Frank Wall Street Reform and Consumer Protection Act (2010).

[419] Department of Treasury, 'Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation' (2009).

[420] For an exposition of the story, see Donald C. Langevoort, 'The SEC and the Madoff Scandal: Three Narratives in Search of a Story' (2009) Michigan State Law Review 899.

[421] Andromachi Georgosouli, 'Payment Protection Insurance (PPI) Misselling: Some Lessons from the UK' (2014) 21 Connecticut Insurance Law Journal 261, 262.

[422] Frances Coppola, 'The U.K.'s Biggest Financial Scandal Bites Its Biggest Bank – Again' (*Forbes*, 31 July 2019) <https://www.forbes.com/sites/francescoppola/2019/07/31/the-u-k-s-biggest-financial-scandal-bites-its-biggest-bank-again/?sh=5b54bc4e7e20> accessed 19 September 2024.

then called the Financial Services Authority: 'Sir James Crosby, the man who ran HBOS and whom the Prime Minister singled out to regulate our banks and to advise our Government, has resigned over allegations that he sacked the whistleblower who knew that his bank was taking unacceptable risks. Does the Prime Minister accept that it was a serious error of judgment on his part to appoint him in the first place?'.[423]

The many questionable practices in UK banking led to the 2013 Parliamentary Commission on Banking Standards, which was intended to evaluate professional standards and culture within the sector.[424] The 503-page report had numerous testimonies on the plight of whistleblowers, with variations on the word 'whistle' or 'whistleblower' occurring 116 times in the document, also noting the limited or non-existent role played by whistleblowers in the banking scandals. The LIBOR case,[425] for example, involved four large banks, 78 individuals, and lasted for nearly 20 years—yet no one blew the whistle.[426] The report also notes that while legal protection already existed under PIDA 'blowing the whistle remains daunting',[427] and that employees feared the consequences of speaking out, citing one study on Barclays Wealth America, which found it had a 'culture of fear' that was 'actively hostile to compliance'.[428]

Recognising the need to protect and incentivize whistleblowers within UK banking, the Commission called on the regulator to research the impact of providing financial incentives to whistleblowers to expose wrongdoing and promote integrity and transparency in financial markets.[429] In 2014, the Financial Conduct Authority and the Prudential Regulation Authority (PRA) rejected financial incentives to whistleblowers in a 7-page note,[430] for reasons that many have criticised as faulty and lacking evidential support.[431] The Financial Conduct Authority's final response to the report was merely to introduce some new requirements for firms, including appointing a senior manager as their whistleblowers' champion, having internal whistleblowing arrangements, and telling UK-based employees about the Financial Conduct Authority's and the PRA's whistleblowing services.[432]

2. Ireland

Although a bill entitled the Whistleblower Protection Bill was published in March of 1999 by the Irish Labour Party in response to corruption scandals,[433] it would take until 2014 for a stand-alone law to be enacted. In a 2014 debate in the Oireachtas (Ireland's National

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[423] HC Deb 11 February 2009, vol 487, cols 1360-1361.

[424] Report of the Parliamentary Commission on Banking Standards, 'Changing banking for good' (2013) Volume II: Chapters 1 to 11 and Annexes, together with formal minutes.

[425] The London Interbank Offered Rate (LIBOR) is a benchmark interest rate at which banks provide short-term loans to one another. A scandal came to light in 2013 when it was discovered that several large financial institutions had been colluding to manipulate this rate for profit.

[426] Ibid 137.

[427] Ibid 372.

[428] Ibid 366.

[429] Ibid 376.

[430] Financial Conduct Authority and Prudential Regulation Authority, 'Financial Incentives for Whistleblowers' (2014) <https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf> accessed 19 September 2024.

[431] Theo Nyreröd and Giancarlo Spagnolo, 'Myths and numbers on whistleblower rewards' (2021) 15 Regulation and Governance 82, 86.

[432] Financial Conduct Authority, 'FCA introduces new rules on whistleblowing' (*FCA*, 6 October 2015) <https://www.fca.org.uk/news/press-releases/fca-introduces-new-rules-whistleblowing> accessed 19 September 2024.

[433] Lauren Kierans, 'An Empirical Study of the Purpose of the Irish Protected Disclosure Act 2014 (Volume I)' (PhD Thesis, May 2019) 34, <https://repository.mdx.ac.uk/download/5a08292719782710f055bf62e1ad26873e45116c6864732b3fe7ebced7b66f5d/2161287/LKierans%20thesis%20volume%20I.pdf> accessed 19 September 2024.

Parliament), numerous organisational issues were brought up to support the need for legislation protecting whistleblowers.[434] Most prominently, an incompetence scandal had emerged within the Irish national police service, also called the Garda Síochána. Two officers, Maurice McCabe and John Wilson, had disclosed irregularities, incompetence, and mismanagement within the force, leading to an investigation entitled the *Guerin Report*.[435] McCabe was subjected to a smear campaign by senior Garda officials, including being falsely reported for child sexual abuse. Several other whistleblower stories were also cited as reasons for introducing legislation. In an Oireachtas debate,[436] Deputy John McGuinness pointed to two cases: one concerning a whistleblower at the State training agency who had blown the whistle on dodgy training practices, and another concerning front-line nurses who were afraid to make complaints to their supervisors because examples had been set where others had lost their jobs. In the same debate, Deputy James Bannon referred to a report on the banking crisis in Ireland, which also raised the issue of the need to listen to whistleblowers.[437] Deputy Brendan Ryan cited one case of a Red Cross employee losing his job after blowing the whistle on €160,000 of unspent charitable donations and the case of a woman who lost her employment at a hospital after highlighting questionable practices. The result was the Irish Public Disclosure Act (2014), which provides broad protections against retaliation for public, private, and not-for-profit employees who speak up about wrongdoing. The Central Bank Supervision and Enforcement Act (2013), a response to the financial crisis, also provided a new best practice on whistleblowing standards.[438] Part 5 of this Act outlines the protections afforded to persons reporting breaches, including banning various forms of retaliation and protection from civil liability.

E. Modern Protection Laws

1. International organisations

While some countries introduced legislation protecting whistleblowers due to local circumstances, another factor that started to grow in importance was pressure from international organisations and non-governmental organisations (NGOs). Starting around 2000, numerous international organisations and NGOs began to encourage the adoption of legislation protecting whistleblowers. Principle 4 in The Organisation for Economic Co-operation and Development's (OECD) Recommendation on Improving Ethical Conduct in Public Service (1998) states that public servants should know their rights, obligations, and what protections will be available when they expose wrongdoing.[439] Article 22 of the Council

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[434] Oireachtas, Dáil Éireann debate - Thursday, 20 Feb 2014 Vol. 831 No. 3.

[435] Seán Guerin, 'Report to an Taoiseach, Enda Kenny TD: on a Review of the Action Taken by An Garda Síochána Pertaining to Certain Allegations Made by Sergeant Maurice McCabe' (May 2014). <http://cdn.thejournal.ie/media/2014/05/guerin-report-2.pdf> accessed 19 September 2024.

[436] Oireachtas (n 434).

[437] The report referred to is Commission of Investigation into the Banking Sector in Ireland (n 207) where para 5.5.6 reads:

> 'The very limited number of warning voices was largely ignored. Attempts by banking insiders during the Period to send cautionary signals to market participants about escalating property values were dismissed as ill-informed and wrong. Doubters (the few that identified themselves as such to the Commission) in the main grew unsure over the years when nothing seemed to go wrong. It also appears that some stayed silent in part to avoid possible sanctions. The Commission suspects, on the basis of discussions held with a wide number of people, that there may have been a strong belief in Ireland that contrarians, non-team players, fractious observers and whistleblowers would be informally (though sometimes even publicly) sanctioned or ignored, regardless of the quality of their analysis or their place in organisations.'

[438] Houses of the Oireachtas, 'Report of the Joint Committee of Inquiry into the Banking Crisis' (Volume 1: Report, January 2016).

[439] OECD, 'Recommendation of the OECD Council on Improving Ethical Conduct in the Public Service

of Europe's Civil and Criminal Law Conventions on Corruption (1999) states that each party to the Convention should adopt measures as may be necessary to protect those who report or give testimony on the bribery of public officials. Article 9 of the Civil Law Convention on Corruption (1999) states that countries party to the convention should enact laws for protection against unjustified sanctions against employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities. The United Nations Convention Against Corruption (2005) includes several articles relating to whistleblowing. Article 8(4) states that each State Party should 'establish measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities', and Article 13(1)(d) encourages measures to promote and protect the freedom to seek, receive, publish, and disseminate information corning corruption. Article 33 recommends protection against the unjustified treatment of persons reporting in good faith to competent authorities concerning offences described in the Convention.

Section IX of the 2009 OECD Anti-Bribery Recommendation recommends easily accessible channels for reporting suspected acts of bribery of foreign officials to law enforcement authorities, that appropriate measures are in place to facilitate such reporting, and that appropriate measures are in place to protect employees who report suspected violations in good faith.[440] In November 2010, G20 leaders identified whistleblowers as essential in their global anticorruption agenda, and in 2012, the G20 published a compendium of best practices and guiding principles for legislation on the protection of whistleblowers.[441] In 2010, the Parliamentary Assembly of the Council of Europe issued Resolution 1729 on the Protection of Whistleblowers.[442] Article 3, an early paragraph motivating the resolution, states, 'A series of avoidable disasters has prompted the United Kingdom to enact forward-looking legislation to protect whistleblowers who speak up in the public interest'. Article 4 of the Resolution also notes that although many countries have rules covering different aspects of whistleblowing in laws governing employment relations, criminal procedures, the media, and specific anti-corruption measures, there remains a lack of comprehensive laws protecting whistleblowers. Article 6 invites member states to review their legislation concerning whistleblower protection and recommends that whistleblowing legislation should be comprehensive, focus on providing a safe alternative to silence, reversing the burden of proof to the employer in case of alleged retaliation, and that the impact of legislation on the effective protection of whistleblowers should be monitored and evaluated regularly by independent bodies.

In 2009, Transparency International published a document entitled 'Recommended draft principles for whistleblowing legislation',[443] outlining 27 principles of good legislation that remain best practice until this day. Studies in 2013 and 2014 took a comparative approach, assessing the adequacy and comprehensiveness of whistleblower laws and applying the

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Including Principles for Managing Ethics in the Public Service.' (1998) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0298> accessed 19 September 2024.

[440] OECD, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (2009) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378> accessed 19 September 2024.

[441] G20, 'Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (2012) <https://www.oecd.org/corruption/48972967.pdf> accessed 19 September 2024.

[442] Parliamentary Assembly of the Council of Europe, 'Protection of 'whistle-blowers'' (2010) Resolution 1729.

[443] Transparency International, 'Recommended Draft Principles for Whistleblowing Legislation' (2009) <https://www.transparency.ee/files/recommended_draft_principles_for_whistleblowing_legislation_nov_09.pdf> accessed 19 September 2024.

notions of 'best practices' and 'international standards'.[444] Other organisations have also cropped up in support of whistleblowers. Public Concern at Work, a UK-based whistleblower charity established in 1993, has been lobbying for effective whistleblower protection ever since. The National Whistleblower Center was established in the US in 1988 and has also been a persistent advocate for effective whistleblower laws. Unions have also been pushing whistleblower legislation, including Eurocadres, a trade union consisting of six million professionals and managers actively lobbying for the EU Whistleblower Directive.[445]

2. The EU Directive

This history leads us to the primary concern of this Thesis, the European Union Directive (2019/1937) on protections of persons reporting breaches of Union law, which was also inspired by scandals local to the EU and its institutions. While the EU had been moving toward protections for a long time,[446] the need to protect whistleblowers became more salient each year leading up to 2019. In December of 2008, Paul Van Buitenen alleged fraud and mismanagement within the EU Commission led by Jacques Santer. His whistleblowing led to the fall of the Santer Commission in 1999 and eventually to the Commission introducing its own whistleblowing policy.[447] Scandals such as the Lux Leaks, Panama Papers, Swiss Leaks, and the Football leaks did play a role in its adoption, with the rapporteur Virginie Rozière noting that these leaks have 'helped shine a light on the great precariousness that whistle-blowers suffer today'.[448] The Maltese journalist and writer Daphne Caruana Galizia was killed in a car bomb in 2017 after having written about corruption within the Maltese government, sparking substantial outrage and turmoil for years within Maltese politics. Other scandals, such as Dieselgate and Cambridge Analytical, were also cited as the impetus for this Directive.[449] The first draft of the Directive was initially justified with reference to protecting the Union's financial interest,[450] and was also partially a response to the EU Trade Secrets Directive (2016/943),[451] which was seen to not only provide legitimacy for valid trade secrets but for nearly everything that an organisation could argue was a part of how it ran its

[444] Mark Worth, 'Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU' (*Transparency International*, 2013) assessed the adequacy of whistleblower protection laws in 27 countries, finding that only four countries had 'advanced' legal protections for whistleblowers. See also Simon Wolfe et al, 'Whistleblower Protection Laws in G20 Countries: Priorities for Action' (2014) <https://news.griffith.edu.au/wp-content/uploads/2014/06/Whistleblower-Protection-Rules-in-G20-Countries-Action-Plan-June-2014.pdf> accessed 19 September 2024, which similarly considered and compared whistleblower protections, finding significant gaps between and within countries, mentioning both 'best practice' and 'international standards'.

[445] Wim Vandekerckhove, 'European whistleblower protection: tiers or tears?' in David Lewis (ed) *A Global Approach to Public Interest Disclosure* (Edward Elgar 2010).

[446] Vigjilenca Abazi, 'The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?' (2020) 49 Industrial Law Journal 640, 642. Noting also that the Commission was unsure whether it had the legal basis to propose a law on the matter, Ibid 640.

[447] Vandekerckhove 2010 in David Lewis (ed) (n 445).

[448] European Parliament, 'Protecting whistle-blowers: new EU-wide rules approved' (Press Release, 16 April 2019) <https://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved> accessed 19 September 2024.

[449] European Commission, 'Whistleblower protection: Commission sets new, EU-wide rules' (Press Release, 23 April 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3441> accessed 19 September 2024.

[450] European Parliament, 'Resolution of 14 February 2017 on the role of whistleblowers in the protection of EU's financial interests' (2016/2055(INI)).

[451] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

operations.[452]

It also became clear from two European Court of Human Rights (ECtHR) cases that employees had insufficient protections in some countries. One of these is that of *Heinisch v. Germany* in which a geriatric nurse had been fired after she and her colleagues had been indicating to management that they were overburdened due to staff shortages and as a result had difficulties carrying out their duties.[453] The ECtHR held that Germany had violated Article 10 of the European Convention of Human Rights. In another ECtHR case, *Guja v. Moldova*,[454] the Court also ruled that Moldova had violated Article 10 of the same convention by dismissing a public servant who revealed information on attempts by high-ranking officials to influence the judiciary. Many member states had already enacted whistleblower laws prior to the EU Directive. In localized forms for the public sector in the Netherlands starting in 1999, Romania in 2004, in Belgium in limited form since 2005, France in 2007, and Germany in 2008.[455] These were typically limited, sector-specific, and only protected the reporting of specific offences. In 2013, Sweden appointed a special investigator to assess the protection of employees who report wrongdoing.[456] That decision refers to *Guja v. Moldova, Heinisch v. Germany,* the Council of Europe's Civil Law Convention on Corruption (1999), and the International Labour Organisation as reasons for reviewing whistleblower protections in the country. Sweden adopted a broad whistleblower law that became effective in 2017.[457] When drafting its Protected Disclosure Act of 2014, Ireland also relied on numerous documents that outlined 'best practices', such as Article 33 of the UN's Convention against Corruption (2005), Transparency International (2009), Resolution No. 1729 of the Parliamentary Assembly of the Council of Europe (2010), the G20 anti-corruption plan (2010), and OECD guidelines (2011).[458] Other European countries, including Italy and France, adopted protection laws in 2017[459] and 2016,[460] respectively.

While some EU countries had introduced protection laws, the need to introduce a unified framework across the EU was recognised.[461] The Directive's Impact Assessment noted that numerous international organizations 'have consistently called for an EU-wide legislation on the protection of whistleblowers acting in the public interest.'[462] Early debates were concerned with whether to use a sector-by-sector approach or introduce broad horizontal protections.[463] An immediate roadblock to any horizontal protections was that there was scarce justification in any Treaty for horizontal EU-level rules on whistleblowing, with the Impact Assessment

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[452] See Wim Vandekerckhove, 'Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection' (2021) 179 Journal of Business Ethics 1.

[453] *Heinisch v Germany* App no 28274/08 (ECtHR, 21 July 2011).

[454] *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008).

[455] Vandekerckhove 2010 in David Lewis (ed) (n 445). This was not only a European phenomenon, Japan also introduced its Whistleblower Protection Act of 2004 in response to a range of local corporate scandals, see Stelios Andreadakis and Scott Morrison, 'Whistleblowers under the Spotlight: The cases of Japan and the UK' (2016) 3 European Journal of Comparative Law and Governance 353.

[456] Kommittédirektiv 2013:16 'Stärkt skydd för arbetstagare som slår larm'.

[457] Prop. 2015/16:128 'Ett särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden'.

[458] Department of Public Expenditure and Reform, 'Statutory Review of the Protected Disclosures Act 2014' (2018) <https://assets.gov.ie/277102/0748b905-ec4e-43e6-ad9f-391d3d4e6ee8.pdf> accessed 19 September 2024.

[459] Italy: Law 179/2017.

[460] France: Law no. 2016-1691.

[461] For an illuminating discussion and criticism of the legal bases of this Directive, see Dimitrios Kafteranis, 'The future of the Whistle-blowing Directive: criticising its legal bases' (2021) 1 Queen Mary Law Journal 65.

[462] European Commission Impact Assessment (n 5) 1. Including Transparency international, Eurocadres, the European Public Service Union, and the European Federation of Journalists.

[463] European Commission, 'Communication on further measures to enhance transparency and the fight against tax evasion and avoidance' (2016) Document 52016DC0451, 10.

stating: 'There is no legal basis in the Treaties specifically allowing the EU to regulate whistleblower protection in general'.[464] Instead, respecting subsidiarity came about through arguing that many forms of wrongdoing had a cross-border impact. Appeal could therefore be made that the legal basis lies in articles in the Treaty of the Functioning of the European Union (TFEU) that relate to improving the enforcement of EU Law and protecting the internal market.[465] Subsequently, the focus came to be on 'enforcement' and corporate wrongdoing. A 2016 communication highlighted that 'Often, when issues come to the fore – car emissions testing, water pollution, illegal landfills, transport safety and security – it is not the lack of EU legislation that is the problem but rather the fact that the EU law is not applied effectively.' Suggesting that 'a stronger focus on enforcement' would better serve the general interest.[466] The Impact Assessment noted that recent scandals 'illustrate how insufficient protection of whistleblowers in a given Member State can have a negative impact not only on the functioning of EU policies in that Member State, but also a spill-over effect on other Member States and the EU as a whole, considering that violations of EU law reported by whistleblowers typically are of a cross-border nature or, even when purely national, have a cross-border impact'.[467] So when the issue of subsidiarity was addressed, it was stated that 'The *rationale* for an EU initiative aimed at reinforcing whistleblower protection would be to improve enforcement of EU law so as to enhance the proper functioning of the internal market and the implementation of certain EU policies and to safeguard the financial interests of the Union and the EU budget at large'.[468] The Impact Assessment then lists areas of EU law 'where the necessity of introducing EU whistleblowing rules as an enforcement tool of EU law is proven',[469] including the protection of the EU budget, public procurement, environmental protection, product safety, consumer protection, public health, transport safety, and data protection.

Finally, the Impact Assessment states that the main factors contributing to underreporting are fear of retaliation, lack of sufficient protection at national and at the EU level, lack of effective implementation, and low awareness and socio-cultural factors.[470] The UK's PIDA was held out as a role model as early as 2009 in a committee affair,[471] and in the context of stressing the importance of whistleblowing 'as an opportunity to strengthen accountability, and bolster the fight against corruption and mismanagement, both in the public and private sectors', notes that the UK's PIDA 'appears to be the model in this field of legislation as far as Europe is concerned'.[472] The final version of the Directive shares most aspects of the UK's PIDA. Article (4) deals with personal scope and, in brevity, it applies to 'reporting persons working in the private or public sector who acquired information on breaches in a work-related context'. Article 5 defines the central terms of the Directive. Art 5(2) ''information on breaches' means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or

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[464] Ibid 30.

[465] Ibid 31 mention Articles 292, 50, 325, and 114. In fact, it was finally adopted with reference to twelve separate legal bases, Kafteranis (n 461) 68.

[466] Ibid 2, citating 'EU Law; Better Results through Better Application' (2017) 60 Official Journal of the European Union 10.

[467] Ibid 3.

[468] Ibid 29. Emphasis in original.

[469] Ibid 15.

[470] Ibid 10.

[471] Council of Europe, Committee on Legal Affairs and Human Rights, 'The protection of 'whistle-blowers'' (September 2009) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302> accessed 19 September 2024.

[472] Ibid.

was in contact through his or her work, and about attempts to conceal such breaches' The Directive also prohibits the waiving of rights through contracts, with Article 24 reading: 'Member States shall ensure that the rights and remedies provided for under this Directive cannot be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement.' The scope of the Directive is rather impressive, with Preamble 48 in the Directive establishing that all enterprises with more than 50 workers must establish internal reporting channels. As around half of all employed persons in the EU are employed at firms with more than 50 employees, this effectively means that half of all employed persons in the EU will now be able to utilise these channels.[473] Article 27 requires member states to annually submit information to the Commission on '(a) the number of reports received by competent authorities, (b) the number of investigations and proceedings initiated as a result of such reports and their outcomes, (c) if ascertained, the estimated financial damage, and the amounts recovered following investigations and proceedings, related to the breaches reported'. It has been noted that there is no requirement to make this information publicly available. This is unfortunate as it will reduce transparency and the ability to compare, contrast, research, and improve these programmes.

F. Conclusion

This Chapter has described the history of whistleblowing laws, starting in Section B by outlining the earliest uses in Roman times, English *qui tam*, and how the Republic of Venice utilised informants for hundreds of years. It also outlined how *qui tam* enforcement became despised in the UK after this enforcement mechanism was extended to numerous mundane offences, such as practising the wrong religion and working on Sundays. Section C further described how abuses of informants under authoritarian regimes led to a generalised suspicion of the practice, particularly in Europe. The concept of a whistleblower was invented in the 1970s, and it isolated the pro-social and valuable aspects of drawing attention to organisational dangers. This was also the first-time whistleblowers became defined as employee or employee-like in character, which paved the road for whistleblowing law to become a part of employment law. The notion of whistleblowers as valuable to the public interest became further recognised after organisational scandals within the neoliberal and new public management governance systems that outsourced service and goods provision to private actors, which created principal-agent problems. Section D described some of the various scandals which many recognised could have been prevented if employees spoke out. It also noted the persistence of these scandals in the public and across the private sector. Typically, sector-specific laws emerged in this period, protecting whistleblowers in restricted ways. Section E also showed how scandals that led to calls for whistleblower protections continued and how the 2008 Financial Crisis was a central factor leading many to adopt or reconsider improving their whistleblower laws. Finally, Section F described how international organisations had recommended whistleblower protections starting in around 2000. It moreover described in detail the history leading up to the adoption of the EU Whistleblowing Directive. The Directive was justified by reference to a need to protect the internal market and enhance enforcement of EU law and took a broad horizontal approach which has led to over a hundred million EU citizens today being, in theory, covered by protection laws.

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[473] See Eurostat, 'Large enterprises generate just over one third of employment' (2019) <https://ec.europa.eu/eurostat/cache/digpub/european_economy/bloc-3b.html?lang=en> accessed 19 September 2024.

CHAPTER 3: THE DESIGN AND PERFORMANCE OF PROTECTION LAWS

> 'At Berkshire, the main source of information for me about anything that's being done wrong at a subsidiary is the hotline. We get 4,000 or so communications on the hotline a year, and most of them are frivolous-the guy next to me has bad breath or something like that. There are a few serious ones, and our internal audit team looks at them. A lot of them come in anonymous, probably most of them, some of them Becky (the internal auditor) refers back to the companies, probably most of them, but anything that looks serious, I will hear about that. That has led to action more than once. We spend real money investigating some of those. It has uncovered certain practices that we would not at all condone at the parent company. It's a good system. I don't think it's perfect. I'm sure they have an internal audit and hotline at Wells Fargo. I don't know the facts, but I would bet a lot of communications came in on that. I don't know who did what at any given time. It was a huge, huge, huge error if they were getting – and I'm sure they were - some communications, and they ignored them or sent them back to somebody down below.'
>
> Warren Buffet, 2017 Berkshire Hathaway Annual Meeting.[474]

A. Introduction

Berkshire Hathaway had been an owner of Wells Fargo since the late 1980s, but in 2016 the bank had gotten itself into trouble. Wells, starting in around 2010, had employed a cross-selling strategy that aimed at opening 8 accounts for each customer. Pressure on sales personnel to achieve this lofty target led to the unauthorized opening of over 2 million unused or unnecessary accounts, which later caused Wells to settle with the DoJ for $3 billion.[475] Buffet was right about Wells receiving a lot of complaints in their internal hotline. A review of the supervision of sales practices at Wells by the US Office of the Comptroller of the Currency concluded that Wells had received 700 whistleblower complaints related to employees gaming the sales incentive plans and that Wells, therefore, missed several opportunities to perform comprehensive analysis and take more timely action. Whereas this scheme started around 2010, the fraud only became widely known in late 2016.[476] This Chapter is on whistleblower protections but also on the more comprehensive reporting structure that was adopted by the EU Directive. By 'protection regimes', this Thesis refers, more broadly, to best practices as they have developed since the UK's Public Interest Disclosure Act 1998. One main feature of best practices today is recommending a 'three-tiered' structure. First, employees should raise concerns internally if this is feasible. In the

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[474] Ingrid R. Hendershot, 'Berkshire Hathaway Annual Meeting Notes' (2017) <https://s3.amazonaws.com/static.contentres.com/media/documents/27a31266-254e-4ff2-a328-cf6bf00c35c4.pdf> accessed 19 September 2024.

[475] Department of Justice, 'Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization' (21 February 2020) <https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices> accessed 19 September 2024.

[476] Office of the Comptroller of the Currency, 'Lessons Learned: Review of Supervision of Sales Practices at Wells Fargo' (2017) 5 <https://www.occ.gov/publications-and-resources/publications/banker-education/files/lessons-learned-review-of-sup-of-sales-practices-at-wells-fargo.html> accessed 19 September 2024.

Wells case, the bank was ordered by the Occupational Safety and Health Administration (OSHA) to reinstate and pay numerous whistleblowers they had fired for complaining about the accounts,[477] including the fired branch manager who received $5.4 million in back pay, compensatory damages, and attorneys' fees. Second, if raising the concern internally is ineffective, employees should raise them with the regulator or appropriate agency. Third, if the regulator is unresponsive, the final step is to go to journalists or make it public in other ways.

Some other features of protection regimes were established in international 'best practices' on whistleblower protections by two reports in 2013 and 2014,[478] which have been widely endorsed and implemented internationally, including in the EU Directive. There are around 14 essential pillars of international best practices for protection: 1) broad coverage of organisations, 2) broad definition of reportable wrongdoing, 3) broad definition of whistleblowers whose disclosures are protected (although typically limited to employees, contractors, volunteers), 4) a range of internal/regulatory reporting channels, 5) external reporting channels, 6) workable thresholds for protection (e.g. honest reasonable belief of wrongdoing), 7) provisions and protections of anonymous reporting, 8) confidentiality protection, 9) requirement of internal disclosure procedures, 10) broad protection against retaliation, 11) comprehensive remedies for retaliation, 12) sanctions for retaliation, 13) oversight authority, 14) transparent use of legislation (annual reporting).[479] While there are some differences between the recommendations of international organisations and NGOs,[480] these 14 pillars tend to be by and large agreed upon.

This Chapter is structured into two substantial sections. The first section, *Design and Performance of Select Protection Regimes,* considers some select protection regimes in detail. It starts by considering the UK's PIDA (1998) and the US's SOX (2002). These two were some of the earliest laws and served to inspire future lawmaking, including best practices. PIDA (1998) was also the first step toward 'public interest disclosure' laws, which were to become influential in other countries. Two protection regimes that considered the experiences embodied in the best practices and have been providing administrative data are Australia's PIDA (2013) and Ireland's PIDA (2014), which are then reviewed. The second substantial section, *Issues with Protection Laws*, reviews structural issues with prior laws and the philosophy behind best practices relative to these regimes' effectiveness in detecting and deterring severe corporate wrongdoing. It is structured into five sections, each dealing with an issue surrounding protection regimes and their ability to detect and deter corporate wrongdoing.

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[477] Including another branch manager in California that was ordered to be reinstated and compensated with $577,500 in back wages, damages, and attorneys' fees. See US Department of Labor, 'OSHA Orders Wells Fargo to Reinstate Social Whistleblower; Pay $577K in Back Wages, Damages, and Attorneys' Fees' (21 July 2017) <https://www.dol.gov/newsroom/releases/osha/osha20170721> accessed 19 September 2024. As well as another branch manager who lost his job after reporting to superiors and an ethics hotline, see US Department of Labor, 'OSHA Orders Wells Fargo to Reinstate Whistleblower, Fully Restore Lost Earnings in Banking Industry' (3 April 2017) <https://www.dol.gov/newsroom/releases/osha/osha20170403> accessed 19 September 2024.

[478] Worth (n 444) and Wolfe et al (n 444).

[479] See Wolfe et al n (444) 5 for these recommendations. Worth (n 444) 9 was another influential report on best practices identified similar 'fundamental elements of whistleblower legislation' including 'broad definition of whistleblowing/whistleblower/retribution protection, internal reporting mechanisms, external reporting mechanisms, whistleblower participation, reward system, protection of confidentiality, anonymous reports accepted, no sanctions for misguided reporting, whistleblower complaints authority, genuine day in court, full range of remedies, penalties for retaliation, involvement of multiple actors'.

[480] See, for example, Wim Vandekerckhove and David Lewis 'The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines' (2012) 108 Journal of Business Ethics 253, 257.

B. Design and Performance of Selected Protection Laws

1. UK's Public Interest Disclosure Act (1998)

PIDA was one of the earliest whistleblower laws that enshrined whistleblower protections within employment law, covering both private and public employees, which would become a model for future laws. It is, therefore, worth commenting on how whistleblower protection became a part of employment law. From the 1960s, workers' statutory rights became more salient in employment relations in the UK, and in 1971, the right to claim unfair dismissal was introduced, followed by additional rights such as maternity leave, non-discrimination, and equal pay irrespective of gender.[481] Employment tribunals were called industrial tribunals until 1998 (although unrelated to the enactment of PIDA),[482] and started to crop up in the later 1960s after their introduction in s.12 of the Industrial Training Act (1964).[483] A 1986 tribunal recommended that what it called 'labour tribunals' should adjudicate all disputes arising between employees and employers due to their employment contracts or any other statutory claim they may have against each other in their capacity as employer and employee.[484] The tribunals comprise three members with equal voting rights: one professional judge, one lay member appointed by the Trades Union Congress, and another appointed by the Confederation of British Industry. The first appellate level has since 1976 been the Employment Appeal Tribunal. When PIDA was introduced in 1998 it was against a backdrop of scandals and expansion of employment law, and it was decided to make PIDA a part of wider employment legislation.[485]

Under PIDA, the bar for 'qualifying disclosure' is not particularly high; it suffices that a worker has a reasonable belief 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'.[486] There is also a 'public interest' bar that is not statutorily defined. Courts have had to interpret this and have typically held that even more minor violations are in the public interest. In the 2002 decision *Parkins v Sodexho*, the Employment Appeals Tribunal held that 'an allegation of breach of an employment contract, in relation to the performance of duties' comes within the letter of the law under 43(b). This decision brought 'what can be viewed as essentially a private contractual employment law issue into the ambit of protected disclosure legislation'.[487] To close this loophole, the Enterprise and Regulatory Reform Act (ERRA) of 2013 clearly intended to bring PIDA back in line with its original public interest disclosure purpose. Thus, it inserted 'is made in the public interest' in 43B. Case law post-ERRA suggests that defining what constitutes the public interest may not be that easy. In *Chesterton v Nurmohamed*, the whistleblower had made protected disclosures alleging that his employer was deliberately misstating £2-3 million of costs and liabilities which adversely affected the salary of himself and 100 other managers. The Employment Tribunal held that the interest of 100 managers did qualify as the 'public interest', and the employer's subsequent appeal, alleging that the Tribunal erred in concluding that 100 managers was sufficient for the matter to be in the public interest, was dismissed. Indeed, the Employment Tribunal in *Chesterton v Nurmohamed* appear to suggest a much less demanding standard: 'it is our view that where a section of the public would be affected,

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[481] Susan Corby, 'British employment tribunals: from the side-lines to centre stage' (2015) 56 Labor History 161, 163. There are also differences between Scotland and England/Wales due to civil law differences.

[482] Ibid 163.

[483] Ibid 164.

[484] Royal Commission on Trade Unions and Employers' Associations, Chaired by Lord Donovan. Report. Cmnd 3623. London: HMSO, 1968, col 1287.

[485] HC Deb 11 April 1998, vol 589, col 890.

[486] See Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 CA (para 35).

[487] Jeanette Ashton, 'When is whistleblowing in the public interest? 'Chesterton Global Ltd. & Another v Nurmohamed' leaves this question open' (2015) 44 Industrial Law Journal 450, 451.

rather than simply the individual concerned, this must be sufficient for a matter to be in the public interest.'[488] The two features that disclosing almost any actual (or even potential) legal infringement affecting a very small part of the public makes the scope of protections (in theory) very broad.

It is difficult to access judgments by employment tribunals under PIDA, as typically only employment appeals tribunals provide easily accessible judgments. To obtain judgments from employment tribunals, researchers must physically visit and request the documents. Some researchers have done so, and their findings suggest a disappointing picture. A 2021 study collected all employment tribunal cases between 2015-2018 that claimed Public Interest Disclosure and that went to a preliminary hearing or beyond in England and Wales, amounting to only 603 cases,[489] which is rather low given the prevalence of retaliation.[490] A 2020 report by a UK All Parliamentary Group found that only 12% of whistleblowers whose cases go to preliminary hearing at Employment Tribunals in England and Wales are successful.[491] PIDA also appears to have been inadequate when it comes to detecting severe corporate wrongdoing, which was discussed in Chapter 2(D)(2), which outlined numerous corporate failures that occurred since the passing of PIDA, including insurance misselling, the LIBOR scandal, and excessive risk-taking prior to the financial crisis, and parliamentary inquiries concluding that cultures actively against compliance were thriving in some large corporations. In fact, amongst the EU-28, corporations headquartered in the UK have, in aggregate, received the largest fines in the US between 2000 to 2020.[492]

Under PIDA there are over 60 'prescribed persons' which are public bodies, ranging from the Bank of England to the Care Inspectorate and the Civil Aviation Authority. These are obligated to take in public interest disclosure claims and release annual statistics on how many claims they receive. The annual claims received by prescribed persons were compiled for the reporting period 1 April 2018 to 31 March 2019 by the Department for Business, Energy & Industrial Strategy (BEIS).[493] Aggregating the numbers in this report, we find that around 31,050 disclosures were made in this reporting period. As reporting is not standardised between prescribed persons, this total number contains disclosures that would not qualify as protected disclosures under PIDA, one whistleblower can be the originator of multiple disclosures, and as claims are often anonymous, they can come from the public, customers, and other non-employees. For this reporting period, three prescribed persons accounted for 26,777 (83%) of all disclosures: the Care Quality Commission (8,878, 85% of which were related to adult social care services), the Older People's Commissioner for Wales (6,963), and HM Revenue and Customs (10,836).[494] Around half of all disclosures to prescribed persons therefore concerned adult and elderly care services and are also unlikely to have been submitted by employees. Assuming 31,050 claims annually, given that the UK's

[488] [2015] UKEAT/0335/14/DM.

[489] Laura William and Wim Vandekerckhove, 'Fairly and Justly? Are Employment Tribunals Able to Even Out Whistleblowing Power Imbalances?' (2023) 182 Journal of Business Ethics 365.

[490] See Section C(1) of this Chapter.

[491] All Parliamentary Group for Whistleblowing, 'Making whistleblowing work for society' (2020) 3 <https://www.appgwhistleblowing.co.uk/_files/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf> accessed 19 September 2024.

[492] Nyreröd and Spagnolo *Surprised by Wirecard?* (n 194).

[493] Department for Business, Energy & Industrial Strategy, 'Whistleblowing Prescribed Persons Annual Reports 2018/19 Part 1 (A-H).' (2020a) <http://data.parliament.uk/DepositedPapers/Files/DEP2020-0013/PP_Annual_Reports_2018-19_-_Part_1.pdf> accessed 19 September 2024. Department for Business, Energy & Industrial Strategy, 'Whistleblowing Prescribed Persons Annual Reports 2018/19 Part 2 (I-Z).' (2020b) <http://data.parliament.uk/DepositedPapers/Files/DEP2020-0013/PP_Annual_Reports_2018-19_-_Part_2.pdf> accessed 19 September 2024.

[494] Ibid BEIS 2020a at 23, 45, and BEIS 2020b at 41.

population was around 66.5 million in 2018,[495] this would amount to around 0.047% of the UK's population, or around 3.1 in 6646 persons, submitting public interest disclosures in this reporting period. If we do not consider cases involving adult and elderly care, that number is closer to 1.5 in 6646.

2. US's Sarbanes-Oxley Act (2002)

SOX's explicit purpose was to 'protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws' and, when introduced, was hailed as a landmark law by several senior academics and whistleblower advocates.[496] Whistleblower protection under SOX is limited and only applies to employees of publicly traded firms,[497] and protections are only granted if employees turn to a federal regulatory or law enforcement agency, any member of Congress or any committee of Congress, or internally to a person with supervisory authority over the employee.[498] Actions must be filed within 90 days after a violation occurs. Whistleblowers file retaliation claims with the Occupational Safety and Health Administration (OSHA), a regulatory agency under the Department of Labor (DoL), who proceeds to investigate. If the claim is substantiated, the OSHA can order the whistleblower to receive back pay, be reinstated, and be paid attorney's fees. If there is no decision within 180 days of filing, the claimant may then file in federal district court.[499] The OSHA decisions can be appealed to an Administrative Law Judge (ALJ) who would hold a *de novo* evidentiary hearing.[500] The ALJ's decision can in turn be appealed to the Administrative Review Board. SOX has a burden of proof standard in which the employee must show that the whistleblowing was a 'contributing factor' in the retaliation suffered, in contrast to other more demanding burdens of proofs.[501] The employer, in turn, must prove by clear and convincing evidence that it would have taken the same action even if the employee had not engaged in the protected activity.[502] SOX was also one of the first whistleblower laws that required establishing internal reporting procedures. Section 301 of the Act requires that audit committees establish procedures for 'the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters', and 'the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.'[503] Notably, this section fails to specify what an adequate treatment or retention of complaints would amount to, and some argue that this provision 'creates a 'black hole' of sorts, in which anonymous

[495] Office for National Statistics, 'Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2018.' (2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018> accessed 19 September 2024.

[496] Richard Moberly, 'Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later' (2012) 64 South Carolina Law Review 1, 9-10.

[497] SOX Sec 806.

[498] SOX Sec 806.

[499] Beverley H. Earl and Gerald A. Madek, 'The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change' (2007) 44 American Business Law Journal 1, 5.

[500] Moberly 2012 (n 496) 9.

[501] SOX refers to the burden of proof standards set out in 42121(b) in Title 49 U.S.C, according to which make a whistleblower must make 'a prima facie showing' that the whistleblowing 'was a contributing factor in the unfavorable personnel action alleged in the complaint'. If successful, the employer in return must show 'by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior'. In *22-660 Murray v. UBS Securities, LLC (02/08/2024)* the supreme court held that whistleblowers need to prove that their protected activity (whistleblowing) was a contributing factor in an adverse personnel action, but they do not need to prove that the employer acted with 'retaliatory intent'.

[502] 29 C.F.R. § 1980.104(e)(4). See also Moberly 2012 (n 496) 8-9.

[503] SOX Section 301, amending Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

complaints flow in, but there is no description of what to do with the complaints once they arrive.'[504]

Empirically, the results of SOX were highly disappointing in its early years, with one study from 2007 that reviewed all the DoL determinations, consisting of over 700 separate decisions from hearings and administrative investigations, found that only 3.6% of SOX whistleblowers won relief through the initial administrative process and that only 6.5% won appeals through the process.[505] From the Act's effective date until the end of 2011, employees had merely won 1.8% of the 1,260 cases decided by OSHA, and between fiscal years 2006 to 2008, OSHA did not decide a single case in favour of a SOX claimant, while during the same time found for employers in 488 straight decisions.[506] But even when whistleblowers win under SOX, they are often worse off than if they had not filed a complaint. One illustrative case is *Welch v. Cardinal Bankshares Corp*. Although Welch won, while waiting for the disposition of his case, he had been forced to sell his farm and move to a smaller house, both he and his wife had depleted their savings, and owed their lawyer $90,000.[507]

3. Australia's Public Interest Disclosure Act (2013)

Australia is an interesting case because the states within the Commonwealth started to experiment with protected disclosure legislation in the early 1990s. By 2013, experience at the state level that could inform law-making was widespread. Numerous Australian states have their own whistleblower laws covering state employees as well as their own Ombudsman that release annual reports on the number of claims received and related statistics.[508] Australia's PIDA is, therefore, more likely to be designed to obtain its objectives. What is unique about Australia's PIDA is that it covers only Commonwealth employees, amounting to 350,300 persons as of June 2023.[509] Claims under PIDA are investigated by the Ombudsman, the Inspector-General of Intelligence and Security (IGIS), or an agency prescribed by PIDA rules to be an investigative agency for the purposes of the Act. The number of these agencies varies but hovers around 160-170. The Commonwealth Ombudsman is tasked with issuing annual reports on PIDA. The PIDA scheme is broad, covering not only contravention of law but also compliance with the Australian Public Service (APS) Code of Conduct.[510] This Code states that an employee must, among other things, 'behave honestly and with integrity in connection with APS employment', 'act with care and diligence in connection with APS employment', 'when acting in connection with APS employment, treat everyone with respect and courtesy, and without harassment'.[511] While

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[504] Miriam A. Cherry, 'Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law' (2004) 79 Washington Law Review 1029, 1071.

[505] Richard Moberly, 'Unfulfilled Expectations: An Empirical Analysis of why Sarbanes-Oxley Whistleblowers Rarely Win' (2007) 49 William & Mary Law Review 65, 65.

[506] Moberly 2012 (n 496) 29.

[507] Earl and Madek (n 499) 25.

[508] New South Wales Ombudsman, 'PID Steering Committee – Annual Reports' (2024) <https://www.ombo.nsw.gov.au/Find-a-publication/publications/public-interest-disclosures-annual-reports-pid-steering-committee/public-interest-dislosure-steering-committee-annual-report> accessed 19 September 2024.

[509] Australian Bureau of Statistics, 'Public sector employment and earnings' (2024) <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/employment-and-earnings-public-sector-australia/latest-release#data-download> accessed 19 September 2024.

[510] Commonwealth Ombudsman, '2020-21 Annual Report' (October 2021) 33. <https://www.ombudsman.gov.au/__data/assets/pdf_file/0024/132459/Final-OCO-annual-report-2020-21_WEB-READY.pdf> accessed 19 September 2024.

[511] Australian Government, 'Ethics, Integrity and Professional Standards Policy Manual' (2024) <https://www.dfat.gov.au/about-us/publications/corporate/ethics-integrity-and-professional-standards-policy-manual/Chapter-3-values-and-codes-of-conduct#section-3-3> accessed 19 September 2024.

this thesis only considers private sector whistleblowing, Australia is nonetheless a very instructive example that can be replicated in the private sector as we will see in the next section.

Figure 2 below outlines the aggregated data reported by the Ombudsman and requires some explanation. PIDs stand for the number of Public Interest Disclosures received, and in parenthesis is the number of total agencies that reported receiving PIDs in the given period, i.e. 48 out of 191 covered agencies reported receiving PIDs in the reporting period 2013-2014. One PID may contain multiple allegations, which are therefore separated in the table. Additionally, some reports may not qualify as PIDs, these are categorized as No-PIDs. Section 48 of the Act allows agencies to utilise discretion not to investigate PIDs. This can be because the discloser is not a public official or that the disclosure does not concern serious conduct. Finally, each year, a certain number of investigations are completed, resulting in recommendations for actions, and the number of alleged reprisals is also reported.

Figure 2[512]

Reporting Period	PIDs	Allegations	No-PIDs	s 48	Investegations	Recommendations	Alleged Reprisals
2013-2014	378* (48/191)	NA	286 (52/191)	91	NA	NA	NA
2014-2015	639 (58/185)	NA	520 (48/185)	235	NA	NA	NA
2015-2016	612 (69/175)	707	182 (28/175)	145	NA	NA	NA
2016-2017	684 (57/176)	809	227 (34/176)	106	NA	NA	NA
2017-2018	737 (NA)	894	354 (NA)	147	313	207	16
2018-2019	457**(NA)	792	342 (NA)	180	289	146	17
2019-2020	359 (NA)	657	357 (NA)	117	228	159	36
2020-2021	333 (NA)	558	400 (NA)	105	190	114	27
2021-2022	257 (NA)	739	428 (NA)	339***	176	130	52
2022-2023	249 (NA)	447	439 (NA)	66	169	131	24

It is helpful to consider some specific years in additional detail. In the first report from 2014, they had 378 disclosures that met the requirements to constitute a PID,[513] even though this reporting period only covered six months.[514] In this first year of reporting, the Department of Defence (DoD) received 181 disclosures and the Department of Immigration and Border Protection 61 disclosures (DIBP). The DoD includes the Australian Defence Force, reservists and cadets, and DIPS includes many contracted service providers. The Ombudsman notes, however, that the DoD had similar reporting levels under a previous law and that both the DoD and DIBP have been active in 'awareness-raising and training for staff and contracted service providers'.[515] These agencies also engaged in a range of other measures such as 'integrating other mandatory and voluntary reporting requirements to fit within the PID scheme', 'adopting a broad definition of 'supervisor' to allow public officials to report a PID to a person within their line management or, in the case of Defence, their chain of command', and 'having in place an appropriate network of authorised officers to ensure that public officials can readily access an authorised officer.'[516] These two agencies also

[512] * This reporting period only covers 6 months.

** The large reduction was due to an adjustment regarding how they classified PID report at the Australian Post.

*** Page 37 in this report reads: 'This increase reflects that one agency exercised discretion not to investigate 230 allegations in one PID.' Yet, this is an inconsistent use of language. This should only amount to 1 PID, hence a more accurate reflection is that 138 PIDs were not investigated due to s 48 this reporting period. This makes it likely that what is in fact referred to when s 48 is invoked to not investigate a PID is allegations and not the PIDs themselves.

[513] Commonwealth Ombudsman, '2013-2014 Annual Report' (October 2014) 69.

[514] Ibid 73.

[515] Ibid 71.

[516] Ibid 71.

established a 'community of practice' with other covered agencies 'to raise awareness and share better practice in managing PIDs'.[517] Yet these were not the only agencies to engage in some form of training, as 74% of agencies reported conducting PID-specific awareness training.[518] The reports also comment on what kind of conduct the reports are concerned with. Take 2020-2021 as an example. For this reporting period, 190 investigations were finalised, 53 of these resulted in one or more findings of disclosable conduct, and 114 resulted in at least one recommendation that action be taken. What kind of conduct was alleged in these PIDs? Wastage of Commonwealth resources (3%), abuse of public office/position (4%), conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons (3%), maladministration (13%), contravention of a law of the Commonwealth, state, or territory (24%), and conduct that may result in disciplinary action (51%).[519]

This distribution suggests that the act predominantly incentivised reports regarding minor workplace misconduct, an interpretation also supported by a 2016 review of the act, which concluded that 'The PID Act is seen as a cumbersome, legalistic mechanism that complicates minor workplace disputes. Similarly, a case load of PIDs mainly concerned with personal employment-related grievances seems to have caused the value of PID, as an essential source of information for agencies, to be discounted.'[520] Some changes were implemented in 2023 as a response to this report. Reporting work-related conduct is now only covered by the PID act if the conduct constituted reprisal or 'is of such a nature it would undermine public confidence in, or has other significant implications for, an agency (or agencies)'.[521] It is more difficult to obtain data on the outcomes of whistleblower retaliation claims in the Australian context. A review from September 2017 that considered both public and private whistleblower laws in Australia was provided evidence suggesting that 'whistleblower protections remain largely theoretical with little practical effect in either the public or private sectors',[522] and that this is due in large part to the near impossibility of current laws of protecting whistleblowers from reprisal, holding those responsible for reprisal to account, effectively investigating alleged reprisals, and whistleblowers being able to seek redress for reprisals. Still, even with these issues, this is the most comprehensive and well-developed whistleblower protection regime considered. Although few claims concern grand corruption, it is still an effective reporting structure and is taken seriously by the Ombudsman as a governance and control instrument. This is also evidenced by the fact that training exercises were set up early, and, in contrast to almost every whistleblower programme, the number of reports received in the first year was substantial. Most other programmes have a significant lag period before any meaningful number of reports come in. If, as is the expected outcome of the transposition of the EU Directive, most EU Member States will have deficient implementation and reporting, Australia's Ombudsman would serve as a useful resource for outlining best practices and learning from prior mistakes.

4. Ireland's Protected Disclosures Act (2014)

Ireland's PIDA is another useful example as its design is close to that of the EU Directive

[517] Ibid 71.

[518] Ibid 76.

[519] Ibid 36.

[520] Philip Moss AM, 'Review of the Public Interest Disclosure Act 2013' (15 July 2016) 19 <https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF> accessed 19 September 2024.

[521] Ombudsman, 'Public Interest Disclosure Scheme: Changes to the PID Scheme' (July 1, 2023) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0041/299588/Summary-of-Key-Changes-to-PID.pdf> accessed 19 September 2024.

[522] Parliamentary Joint Committee on Corporations and Financial Services, 'Whistleblower Protections' (September 2017) ix <https://apo.org.au/sites/default/files/resource-files/2017-09/apo-nid106806.pdf> accessed 19 September 2024.

and aimed to be the 'gold standard' in whistleblowing law at the time.[523] It was heavily influenced by the best practices, outlined in the introduction of this Chapter. Article 22 of the Act obligates public bodies and the Central Bank to publish annual reports on the number of public disclosures made, most of which are publicly available. More than two hundred public bodies reported under Article 22 of the Act.[524] The reporting is not unified, and the reports vary significantly in detailing the contents of the disclosures as well as actions in response to them. As of 2023, Ireland had a population of around five million and had a GDP of $609 billion. A 2018 statutory review of the PIDA, based on reports from 212 public bodies, revealed that the total number of disclosures received was 16 in 2014, 134 in 2015, and 220 in 2016.[525] Due to having 212 reporting agencies, with the vast majority reporting no protected disclosure, the graph below is non-exhaustive and reports on the PIDs received by some select agencies reporting on received disclosures in regulatory areas this thesis has focused on.

Figure 3: Annual PIDs received by agencies.[526]

Reporting Year	CBI	EPA	CCPC	SIPO	Revenue	HSE	OCAG	Total
2015	1	NA	0	NA	NA	20	9	**30**
2016	44	NA	0	0	1	37	4	**86**
2017	79	1	0	1	0	78	7	**166**
2018	113	3	0	1	NA	52	11	**180**
2019	200	0	4	1	1	61	21	**288**
2020	202	0	2	0	1	54	21	**280**
2021	231	1	0	1	2	65	NA	**300**
2022	245	4	0	0	13	56	NA	**318**

After this sampling, it was determined that issues relating to inconsistencies between agency reporting, most agencies receiving no reports, an exhaustive review of all 212 agencies would be time-consuming and provide little to no further insights. Some other evidence on how whistleblower's fare in court is available. Lauren Kierans analysed case law under Ireland's PIDA. The reviewed 156 decisions between July 2014 and July 2020, finding that 137 cases were unsuccessful (88%) and a mere 19 successful (12%),[527] and an astonishing 78% of the unsuccessful cases were lost on the merits.[528] Breaking down this category in turn, Kierans found that '53% (57) were lost as it was found that there was no unfair dismissal or penalisation, and 45% (48) were lost as it was held that no protected disclosure had been

[523] Lauren Kierans, 'Whistleblowing Litigation and Legislation in Ireland: Are There Lessons to be Learned?' (2024) 53 Industrial Law Journal 1.

[524] Statutory Review of the Protected Disclosures Act 2024 (n 458) 18.

[525] Ibid 18.

[526] For simplicity, the reports published in 2015 concerns PIDs received in the prior year. Reporting periods differ, however. Up until 2019, the CBI's reporting period was 1 July to 30 June the next year, while the EPA reported 1 January to 31 December every year. The abbreviations are the following, and the reports can be found at the provided links: Central Bank of Ireland (CBI): <https://www.centralbank.ie/regulation/protected-disclosures-whistleblowing/reports-on-protected-disclosures-archive>, Environmental Protection Agency (EPA): <https://www.epa.ie/who-we-are/corporate-compliance/protected-disclosures/>, Competition and Consumer Protection Commission (CCPC) : <https://www.ccpc.ie/business/about/governance/protected-disclosures-annual-reports/>, Standards In Public Office Commission (SIPO): <https://www.sipo.ie/reports-and-publications/protected-disclosures/>, Revenue (Irish Tax and Customs): <https://www.revenue.ie/en/corporate/statutory-obligations/protected-disclosures/index.aspx>, Revenue (Irish Tax and Customs): <https://www.revenue.ie/en/corporate/statutory-obligations/protected-disclosures/index.aspx>, Health Service Executive (HSE): <https://www.hse.ie/eng/about/who/protected-disclosures/>, Office of the Comptroller and Auditor General (OCAG): <https://www.audit.gov.ie/en/search/?q=protected+disclosure+report> accessed 19 September 2024.

[527] Kierans (n 523) 20.

[528] Ibid 21.

made'.[529]

C. Issues with Protection Laws

1. Evidence of reduced retaliation or wrongdoing.

This section considers supplementary evidence, primarily surveys, to understand how prevalent observed wrongdoing and retaliation are and whether there has been a documented decline in retaliation rates since the emergence of protection laws in the 1980s. It is typically difficult to obtain unbiased samples of whistleblowers as it is a relatively rare phenomenon, and those who most identify as whistleblowers are also likely to have already suffered retaliation to some degree. The results of studies and surveys on retaliation rates, the percentage of employees would report retaliation, and what percentage of employees expects retaliation, therefore vary considerably.[530]

A 1987 survey gathered data by contacting self-identified whistleblowers, primarily from whistleblower support groups, and found that 83 out of 84 whistleblowers had experienced retaliation.[531] In a 1993 study of 35 current and ex-Queensland public sector workers who had made disclosures and contacted the support group Whistleblowers Australia in the 1990-1993 period, all 35 had experienced retaliation.[532] A survey of public employee whistleblowers in Australia found that 71% had experienced official or formal reprisals, while around 97% had experienced unofficial or informal reprisals.[533] Similar non-random sampling is a problem in more recent studies on the False Claims Act. Dyck et al 2010 reported that in 82% of the whistleblower cases in their study, the employee was fired, quitted under duress, or had their responsibilities altered.[534] In a 2021 study, Aiyesha Dey and colleagues gathered a sample of 5,138 FCA lawsuits and found that around 80% of the whistleblowers report having suffered retaliation; more than 35% report being fired.[535] As both these studies are on the False Claims Act that does offer protection to employees (and comparably the most exhaustive remedies),[536] it is worth noting that, even if the sample is biased, a percentage of 80% retaliation may still be seen as significant. A 2021 study by Kate Kenny and Marianna Fotaki used a convenience sample of 92 persons with 70% from the US and 16% from the UK, and found that 64% of whistleblowers were formally blacklisted, 21% informally blacklisted via word of mouth, and 29% had not been blacklisted. Moreover, 67% of whistleblowers had experienced a drop in their earnings, 63% had been dismissed, and the average unemployment duration for those who left their roles and spent time out of work was three and a half years.[537]

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[529] Ibid 21.

[530] Moberly 2012 (n 496) 23-25 notes the large discrepancies between studies in the context of whether SOX succeeded in encouraging disclosures. This section provides a more up-to-date and exhaustive review.

[531] Karen L. Soeken and Donald R. Soeken, 'A Survey of Whistleblowers: Their Stressor and Coping Strategies' in *Whistleblowing Protection Act of 1987* (Washington, DC: Supt. of Docs., Congressional Sales Office, US GPO. Vol. 1st sess. 1987) <https://www.whistleblower-net.de/pdf/Soeken.pdf> accessed 19 September 2024.

[532] K Jean Lennane, ''Whistleblowing': a health issue' (1993) 307 British Medical Journal 667.

[533] William De Maria and Cyrelle Jan, 'Eating Its Own: The Whistleblower's Organization in Vendetta Mode' (1997) 32 Australian Journal of Social Issues 37, 45.

[534] Dyck, Morse, and Zingales 2010 (n 73) 2216.

[535] Dey et al (n 263) 1722.

[536] The False Claims Act states that relief should include: 'reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, compensation for any special damages sustained as a result of the discrimination, including litigations costs and reasonable attorney's fees' 31 U.S.C § 3730 (h)(2).

[537] Kate Kenny and Marianna Fotaki, 'The Costs and Labour of Whistleblowing: Bodily Vulnerability and Post-disclosure Survival' (2023) 182 Journal of Business Ethics 341.

Other studies utilise larger random samples. A 1999 study obtained a random sample by issuing a survey to several occupational categories in the US, such as petrochemical plant workers, personnel in an administrative unit within a university, employees in nonprofit organizations, and nurses in Nevada.[538] They found that around 66% of whistleblowers suffered retaliation (for both internal and external whistleblowing) and that retaliation can also be quite severe. A study by Near and colleagues from 2004 obtained 3,288 survey replies from an organisation that employs about 10,000 people at a military base in the US and found that 37% of whistleblowers had suffered retaliation.[539] Military personnel, beyond any other protections granted, were also offered protections under the Military Whistleblower Protection Act of 1988. Rodney Smith reports the result of a survey of 7,663 employees in 304 public sectors agencies four Australian jurisdictions between 2005 and 2007. The study estimates that 20-25% suffered retaliation, and that when whistleblowers suffer retaliation managers are likely to be involved.[540] Notably, all four of these jurisdictions had already introduced some sort of whistleblower protection laws by 2005.

A 2019 questionnaire issued to 17,778 respondents in 46 public, private, and not-for-profit organisations found that 81.6% of whistleblowers experienced some form of informal repercussions such as stress, impacted performance and isolation, while 48.8% experienced at least one type of formal repercussions, such as negative performance appraisal, or being reassigned to less desirable duties.[541] Another important source on the prevalence of retaliation comes from the Ethics Resource Centre, which surveyed employees since 1994 to understand how they view ethics and compliance at work. These surveys use random sampling, and many are also longitudinal – providing some unique insights into the prevalence of retaliation across time. A 2007 Ethics Resource Center survey issued to randomly selected US state government employees found that 18% of whistleblowers experienced retaliation, and 34% who observed misconduct chose not to report it because they feared retaliation from management.[542] A 2013 survey by the Ethics Resource Center, with a sample consisting of randomly selected employees almost entirely in the for-profit sector, found that 22% experienced retaliation, 34% feared payback from senior leadership, 30% worried about retaliation from a supervisor, and 24% said their co-workers might react against them.[543] Perhaps surprisingly, the same organization behind this study later found a remarkable trend in another 2021 survey.[544] The percentage of employees experiencing retaliation after blowing the whistle in the US increased to 44% in 2017 and to a remarkable 79% in 2020. This study also considered retaliation in Mexico, Brazil, France, Germany,

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[538] Joyce Rothschild and Terance D. Miethe, 'Whistle-Blower Disclosures and Management Retaliation' (1999) 26 Work and Occupation 107, 120.

[539] Janet P. Near, et al, 'Does Type of Wrongdoing Affect the Whistle-Blowing Process?' (2004) 14 Business Ethics Quarterly 219, 227.

[540] Rodney Smith, 'The Role of Whistle-Blowing in Governing Well: Evidence From the Australian Public Sector' (2010) 40 The American Review of Public Administration 704, 705-715.

[541] A.J Brown et al, 'Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government' (Brisbane: Griffith University, August 2019) 24 <https://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf> accessed 19 September 2024.

[542] Ethics Resource Center, 'National Government Ethics Survey: An Inside View of Public Sector Ethics' (2007) 27 <https://assets.corporatecompliance.org/Portals/1/Users/169/29/60329/ERC's%20National%20Nonprofit%20Ethics%20Survey.pdf> accessed 19 September 2024.

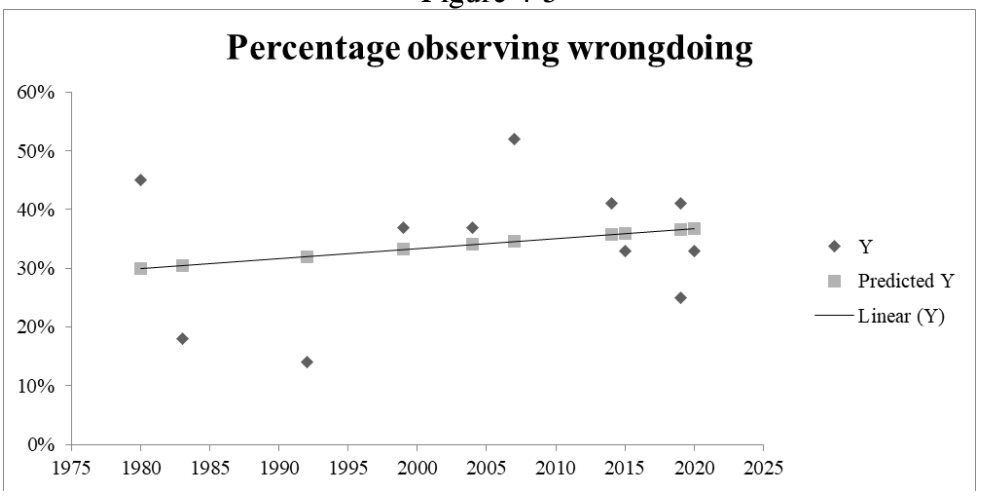
[543] Ethics Resource Center, 'National Business Ethics Survey of the U.S. Workforce' (2013) 27.

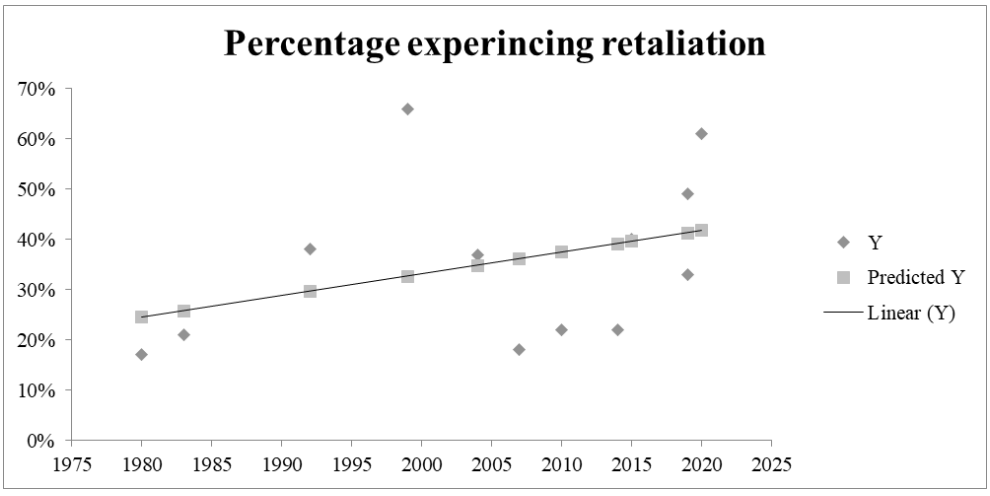
[544] Global Business Ethics Survey, 'The State of Ethics & Compliance in the Workplace: A Look at Global Trends' (2021) Ethics & Compliance Initiative 22 <https://www.ethics.org/wp-content/uploads/2021-ECI-GBES-State-Ethics-Compliance-in-Workplace.pdf> accessed 19 September 2024.

Spain, the UK, China, India, and Russia and found that the global median of employees who experienced retaliation because of whistleblowing was 40% in 2015, 33% in 2019, and 61% in 2020. While the US is above the global median, it is worth noting that the UK is also well above the median in all these years (63% in 2015, 66% in 2019, and 74% in 2020). In this survey, employees in the US and the UK, two countries with the most experience in whistleblower laws, report higher retaliation rates than Russia, Brazil, Mexico, and Spain.[545] While it may be tempting to dismiss this survey as methodologically flawed in some way, the Ethics Resource Center is the organisation most experienced with issuing surveys of this kind. Still, these results should be taken cautiously due to being inconsistent with other findings. It may also be that employers retaliated against employees who complained about non-compliance with COVID-19 distancing rules at the workplace, which led to a substantial increase in retaliation in 2020.

Taking the mean of these studies, between 1980 and 2020, an average of 38% observed misconduct and 35% experienced retaliation. Plotting the randomly sampled studies reveals no downward trend in either observed misconduct or retaliation since the 1980s.[546]

Figure 4-5





[545] This is somewhat surprising. In Transparency International's Corruption Perception Index of 2021, the US ranked 27 and the UK 11, while Russia ranked 136, Mexico 124, and Brazil 96 out of a total of 180 countries. <https://www.transparency.org/en/cpi/2021> accessed 19 September 2024.

[546] Miceli et al (1999) for years 1980, 1983, 1992, Rothschild and Miethe (1999), Near et al (2004), Ethics Resource Center (2007), Smith (2010), Ethics Resource Center (2014), Brown et al (2019), global average from GBES (2015), GBES (2019), GBES (2020).

Unfortunately, we can only draw very limited conclusions from this comparison and numerous caveats are necessary. Sampling issues, survey design differences, varying definitions of what constitutes retaliation (conflating formal/informal), and heterogeneity between countries and sectors are some of the key factors underlying the diverse results obtained on the prevalence of retaliation. Moreover, prior to the introduction of protection laws, there is typically little to no data on the number of whistleblowers and even less data on the proportion of whistleblowers that suffer retaliation, which makes it difficult to study the effect of these laws on retaliation rates. What can be concluded, however, is that there has been no documented decline of retaliation rates since the flurry of lawmaking that we have seen in the last decades, which may lead one to conclude with Kate Kenny that 'almost twenty years of anti-retaliation legislation has not made much difference'.[547]

Ancillary studies and data also support this trend, and since the early advent of protection laws in the 1980s, some have noted that it is difficult for the law to completely protect employees.[548] An international study from 2021 on whistleblower protection laws in 37 countries found that 'Eighty-nine per cent of countries had fewer than 15 publicly reported whistleblower retaliation cases (33 out of the 37 countries in this study). Fifty-nine per cent had *no* reported whistleblower decisions at all (22 out of 37).'[549] The fact that 59% of countries with protection laws had no reported whistleblower decision suggests that employees either do not blow the whistle or, if they are retaliated against, choose not to rely on available legal remedies. These findings are also in line with a much earlier 1987 study,[550] looking primarily at protection statutes passed in the states of Maine (1983), Connecticut (1982), and Michigan (1981). The authors argue that whistleblowers in the early years of these laws were not seeking protection under these statutes but more often chose common law remedies.[551] They also note how the number of whistleblowing cases in these three states did not increase relative to comparable states without whistleblowing statutes.[552]

To enhance enforcement, protection laws must either encourage more whistleblowers to come forward or deter corporate wrongdoing by increasing their expectations of the same. While studies projecting the benefits of implementing whistleblower protections rely on the assumption that these laws will increase the number of whistleblowers, few studies quantify how significant that increase has been. This is problematic on its own, but more so in light of the concerns discussed in the following sections, casting doubt about the ability of protection laws to detect and deter profit-motivated wrongdoing.

2. Informal forms of retaliation

Current protection laws typically only compensate formal, work-related forms of retaliation, which is often only a part of the damages. Informal forms of retaliation such as bullying, verbal threats, and being treated as a persona non grata are often common as well and can be

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[547] Kate Kenny, *Whistleblowing: Toward a New Theory* (Harvard University Press 2019) 29.

[548] As early as 1988, in an article criticizing prior federal whistleblower protection laws covering public servants, Thomas Devine and Donald Aplin noted that 'Even with strong legal protection, many whistleblowers will pay for their integrity with their careers', Thomas M. Devine and Donald G. Aplin, 'Whistleblower Protection - The Gap between the Law and Reality' (1988) 31 Howard Law Journal 223, 239.

[549] Samantha Feinstein et al, 'Are whistleblowing laws working? A global study of whistleblower protection litigation' (2021) International Bar Association and Government Accountability Project, emphasis in original, 11 <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55> accessed 19 September 2024.

[550] Terry Moreheard Dworkin and Janet P. Near, 'Whistleblowing Statutes: Are They Working' (1987) 25 American Business Law Journal 241.

[551] Ibid 263.

[552] Ibid 254.

even more detrimental to the whistleblower.[553] For example, Debra Jackson and colleagues conducted a qualitative study of 17 nursing whistleblowers, interviewing them about what was most salient about their experiences as whistleblowers.[554] They clustered their findings into four themes: 'Leaving and returning to work – The staff don't like you', 'Spoiled collegial relationships – Barriers between me and my colleagues', 'Bullying and excluding – They've just closed ranks', and 'Damaged inter-professional relationships – I did lose trust in doctors after that'. A more recent study conducted twenty-two semi-structured interviews with whistleblowers, using a similar approach. The predominant forms of stress and mental health problems stemmed from social aspects at work and subtle forms of retaliation that would be difficult to prove or remedy in court.[555] Heungsik Park and David Lewis also found the negative emotional health effect associated with whistleblowing to be particularly severe.[556] Anti-retaliation compensation today often inadequately accounts for these damages, which are often more significant than the absence of paychecks. Moreover, the law cannot regulate how the future of interpersonal relationships should develop and is, therefore, unlikely to ever be able to solve this issue.

Blacklisting is another form of a more informal kind of retaliation. Some have raised the concern that employers may base hiring decisions not on the productivity of the prospective employee but on the probability that he or she will become a whistleblower.[557] Leora F. Eisenstadt and Jennifer M. Pacella suggest extending retaliation protections to job applicants by amending anti-retaliation statutes to include employer discrimination in the hiring process.[558] However, this does not appear to be an adequate solution, as most employers would claim they rejected an applicant on other grounds, and it would be difficult to prove pre-employment retaliation against prospective employees.

3. Non-disclosure agreements and hush money.

It is important to note that retaliation is merely one option that punishes employees after they insist on reporting wrongdoing, more importantly is to ensure that information never leaves the organisation in the first place. One method is to employ extensive Non-Disclosure Agreements (NDAs), which continue to be an obstacle to whistleblowing, as it has done for decades. In two famous US cases from the mid-1990s, *Brown & Williamson Tobacco Corp v. Wigand* and *Baker v. General Motors*, NDAs were used to silence whistleblowers and even enforced by courts.[559] Although almost every modern whistleblower law stipulates that NDAs

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[553] For an overview of literature that distinguishes formal and informal retaliation, see Brita Bjørkelo and Stig Berge Matthiesen, 'Preventing and Dealing with Retaliation Against Whistleblowers' 131-133, in David Lewis and Wim Vandekerckhove (eds), *Whistleblowing and democratic values* (International Whistleblowing Research Network 2011).

[554] Debra Jackson et al, 'Trial and retribution: A qualitative study of whistleblowing and workplace relationships in nursing' (2010) 36 Contemporary Nurse 34.

[555] Kate Kenny, Marianna Fotaki, and Stacey Scriver, 'Mental Health as a Weapon: Whistleblower Retaliation and Normative Violence' (2019) 160 Journal of Business Ethics 901.

[556] Heungsik Park and David Lewis, 'The negative health effects of external whistleblowing: A study of some key factors' (2018) 55 The Social Science Journal 387, 393.

[557] Jef De Mot and Murat C. Mungan, 'Whistle-blowing and the incentive to hire' (2024) 62 Economic Inquiry 1292.

[558] Leora F. Eisenstadt and Jennifer M. Pacella, 'Whistleblowers Need Not Apply' (2018) 55 American Business Law Journal 665, 710.

[559] In the General Motors case, a Michigan state court enforced an NDA with a former employee prohibiting him from testifying about the dangers of the design of GM fuel tanks in a product liability suit. In the Brown & Williamson case, the firm obtained a temporary restraining order against a former executive and researcher which prohibited him from disclosing information about the dangers of smoking. See Jodi L. Short, 'Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers' (1999) 60 University of Pittsburgh Law Review 1207, 1207.

will be unenforceable if a person turns to the proper channels, they are still widely used to silence whistleblowers. One example of this is from Theranos, the infamous Silicon Valley-based blood-testing company that engaged in fraudulent behaviour, overstating the accuracy of their blood testing machine and its ability to perform various tests. One employee turned whistleblower had to sign an NDA before even being interviewed for the job at Theranos, and another when she resigned. This whistleblower then spoke to a Wall Street Journal reporter and, shortly after, received a letter from Theranos lawyers accusing her of revealing trade secrets.[560] Although it is unlikely that the NDAs signed by Theranos employees would have been enforceable if they went to the appropriate channels, such as the regulatory agency, Lauren Rogal notes that 'Even if an NDA ultimately proves unenforceable, it still serves the employer's interests in chilling disclosures. In many enforcement suits, the employer's goal is probably not to obtain damages – most workers are effectively judgment-proof – but to intimidate the target and other potential whistleblowers'.[561]

The peculiar thing about the intimidation of whistleblowers in this case is that it occurred in California in around 2015, a state that had over three decades of experience in whistleblower laws at the time. In 1984, California added section 1102.5 to its Labour Code, protecting whistleblowers from retaliation. California's legislature also amended this law numerous times, for example, in 2003 in response to the Enron and WorldCom scandals, and California was one of the earliest adopters of a state-level FCA in 1987. Despite this, Theranos was actively using NDAs to silence employees. The issue is also much broader. A survey conducted in 2017 found that 57% of workers in the US were 'definitely or probably bound by an NDA' with 8.5% not knowing if they were bound or not.[562] In the finance sector, after the passing of Dodd-Frank, a survey from 2015 found that one in four Wall Street employees had signed confidentiality agreements that restricted them from reporting securities violations to the SEC.[563] Recognising these issues, the SEC has gone one step further and bars restrictions on employee whistleblowing under Rule 21F-17. Sean Kessy, a former chief of the SEC whistleblower office, stated that the SEC is 'actively looking for examples of confidentiality agreements, separat[ion] agreements, employee agreements that … in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the commission or you're not going to report anything to a regulator.' […] if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it.'[564] In 2015, the SEC settled with a firm that had required its employees to sign confidentiality agreements that imposed pre-notification requirements before contacting the SEC – thereby identifying the whistleblower and creating a bargaining situation with the possibility of dissuading external reporting.[565]

As Kessy states, some benefits are usually conditional on signing the NDA, which often amounts to offering money in return for silence. There are recent examples of this from Europe. Howard Wilkinson was an internal whistleblower who was instrumental in

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[560] Lauren Rogal, 'Secretes, Lies, and Lessons from the Theranos Scandal' (2021) 72 Hastings Law Journal 1663, 1668.

[561] Ibid 1693.

[562] Natarajan Balasubramanian, Evan Starr, and Shotaro Yamaguchi, 'Bundling Employment Restrictions and Value Capture from Employees' (2021) SSRN Working Paper, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403> accessed 19 September 2024.

[563] Survey cited in Jennifer M. Pacella, 'Silencing Whistleblowers by Contract' (2018) 55 American Business Law Journal 261, 272.

[564] Richard Moberly, Jordan A. Thomas, and Jason Zuckerman, 'De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank's Whistleblower Provisions' (2014) 30 ABA Journal of Labor & Employment Law 87, 91.

[565] SEC, 'SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements' (2015) <https://www.sec.gov/news/press-release/2015-54> accessed 19 September 2024.

unravelling the Danske Bank scandal – the largest money laundering scandal in history, with $230 billion of illicit assets believed to have been laundered through the bank's Estonian branch. Wilkinson was offered a severance agreement that would give him an undisclosed sum of money for not speaking about what he knew unless speaking was 'required by law',[566] nor was he allowed to even acknowledge the existence of this NDA. Wilkinson's identity was illegally leaked, and he was identified as the whistleblower who had internally alerted the bank to AML deficiencies.[567] The Wilkinson case is far from the only one.[568] Likely, most European countries will not ban non-disclosure agreements, but they will be unenforceable, as with Australian corporate whistleblower protections, Ireland's PIDA (Section 23), and the UK's PIDA (43J). We should expect that NDAs and severance agreements will be used by wrongdoing employers to silence whistleblowers. If they are not strictly illegal and the cost of writing an unenforceable NDA is close to zero it 'is to a company's advantage to widely use illegal NDAs, as they will stop or intimidate a large amount of whistleblowing'.[569]

Benefits conditional on signing an NDA is a part of a wider issue, which is that wrongdoing employers who stand a lot to lose in case of whistleblowing also have a significant incentive to bribe potential whistleblowers – whether that be with bonuses, paid time off, stock options, or other incentives. In contrast to retaliation, it is not illegal for an employer to engage in bribing, and we are unlikely to know the prevalence of employees who accept bribes in return for silence as they would be unwilling to admit it. We do know that this happens with some frequency, however, and when the offer is made and contrasted with the alternative of organisational retaliation, it can be difficult to turn it down.[570] Some empirical evidence is consistent with this form of bribing being common to the point where it is not only identifiable but has a statistically significant effect on willingness to report. Andrew C. Call and colleagues looked at the role of stock options to rank-and-file employees and the discovery of misreporting.[571] Utilising a sample of 784 cases involving 663 unique firms from the US, they found that stock option grants to rank-and-file employees are significantly larger in violation years (2.49%) relative to the years before (2.17%) and after

[566] See Howard Wilkinson and Stephen M. Kohn, 'Testimony on Danske Bank and money laundering allegations' Public Hearing on Combatting money laundering in the EU Banking Sector (21 November 2018).

[567] KKC, 'Howard Wilkinson exposed a $230 billion money laundering scheme — the largest in history.' <https://kkc.com/whistleblower-case-archive/howard-wilkinson/> accessed 19 September 2024.

[568] In another recent case at the North East Ambulance Trust, we learned that: 'in return for taxpayer-funded payments of more than £40,000, two staff members were asked to sign gagging agreements that seek to limit them from making further reports about their concerns to the authorities — including the Care Quality Commission regulator and the police'. See David Collins et al, 'NHS ambulance service doctored documents to cover up truth about deaths' (*The Sunday Times*, 21 May 2022) <https://www.thetimes.co.uk/article/the-999-cover-up-that-shames-the-nhs-mlmjcv6zv> accessed 19 September 2024. A 2023 lawsuit alleged that the former chief compliance officer at FTX bribed whistleblowers and their lawyers who tried to expose the fraud at the company, see Jeff Dale, 'Lawsuit: Ex-FTX CCO bribed whistleblowers into silence' (*Compliance Week*, 29 June, 2023), <https://www.complianceweek.com/whistleblowers/lawsuit-ex-ftx-cco-bribed-whistleblowers-into-silence/33257.article> accessed 19 September 2024.

[569] Stephen M. Kohn, 'Memorandum: Implementation of the European Union Whistleblower Protection Directive (2019/1937)' (2020) Kohn, Kohn and Colapinto, LLP, 18 <https://kkc.com/wp-content/uploads/2020/08/Kohn-EU-Directive-Implementation-Memo.pdf> accessed 19 September 2024.

[570] Consider also here Miriam Baer, arguing that 'When the firm visibly amplifies its compliance effort and moves from a non-credible to a credible compliance program, wrongdoers respond by redoubling their efforts to evade detection and substitute less detectable crimes for more visible ones. Consistent with these avoidance efforts, Complicits [complicit employees] do everything possible to limit the proliferation of information. They hide information from Innocents [innocent employees], or otherwise convert Innocents into Complicits by threatening subordinates or bribing employees in exchange for their assistance and silence.' Baer 2017 (n 273) 50.

[571] Andrew C. Call, Simi Kedia, and Shivaram Rajgopal, 'Rank and file employees and the discovery of misreporting: The role of stock options' (2016) 62 Journal of Accounting and Economics 277, 278.

the misreporting (1.67%). This evidence is consistent with the hypothesis that firms engaging in financial reporting violations provide employees performance-based incentives such as stock options to facilitate and remain silent about violations. Similarly, Yoojin Lee and colleagues studied New York's FCA,[572] finding that its introduction had a stronger effect in motivating rank-and-file employees with fewer stock options to come forward compared to other employees. Here, the logic is the same: if employees have stock options, their interests are more aligned with that of the management, and they are less likely to blow the whistle.

4. Anonymity and internal reporting.

Another issue with protection regimes, as they are typically implemented, is that they can easily create situations that make it difficult to blow the whistle externally. Anonymity, for example, is one feature that has been hailed as important. While anonymity is necessary and important for whistleblowers, most whistleblower situations are more organic – they start with an employee observing wrongdoing and immediately reporting it, identifying themselves to supervisors without conceiving of themselves as whistleblowers.[573] Numerous studies have documented how whistleblowing is typically a protracted process, and that most whistleblowers first raise their concerns not knowing or classifying themselves as whistleblowers.[574] A survey in the UK by Wim Vandekerckhove and Arron Philips looked at where whistleblowers turn in their first, second, third, and fourth attempts at whistleblowing and found that whistleblowing often entails numerous attempts at internal whistleblowing. In the first whistleblower report, 89.6% (778 persons) reported internally and only 8.6% (75 persons) externally. Only 484 out of 868 reported a second time, in which 72.3% (350 persons) reported internally and 23.8% (115 persons) externally. While external reporting was more common in the third attempt (35.9%, compared to 59.9% reporting internally), only 142 out of 868 persons ever reported a third time. Only 22 out of 868 ever reported a fourth time, and this time around half reported externally and half internally.[575] This is also consistent with other results, such as a 2010 study based on data from Australia (where protection laws were the books) which found that 97% of whistleblowers report internally first, and only 12% ever report to an external body.[576] When whistleblowers report internally, they rarely choose anonymous hotlines. A 2007 study found that public employees in the US chose to report to superiors in 55% of cases, higher management in 21% of cases, and hotlines a mere 1%.[577] A 2013 study of employees in the for-profit sector found that 82% had reported to their supervisor, 52% to higher management, 32% to human resources, 16% to hotline/helpline, and only 9% to a governmental or regulatory agency.[578] A 2021 study by

[572] Yoojin Lee et al, 'The Intended and Unintended Deterrence Effects of Tax Whistleblower Laws: Evidence from New York's FCA' (2022) SSRN Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4207078> accessed 19 September 2024.

[573] Consider Rothschild and Miethe (n 538) 199 findings from a survey: 'In almost no case did the individual accurately anticipate the retaliation and severe personal consequences that would follow their report. In this sense, it would be more accurate to depict the prototypical whistle-blower as organizationally naïve; in other words, they truly believe that the organization wants its practices to be in line with its mission, rather than particularly altruistic or vengeful.' See also Kohn 2023 (n 315) 33: 'In almost every instance, employees tagged as whistleblowers started out simply doing their jobs. A truck driver tells a dispatcher that his brakes need maintenance, a teacher questions why new textbooks never arrived, an engineer refuses to certify that bolts can stand up to reasonable stress – the list is nearly endless.'

[574] Wim Vandekerckhove and Arron Philips, 'Whistleblowing as a Protracted Process: A Study of UK Whistleblower Journeys' (2019) 159 Journal of Business Ethics 201, 204.

[575] Ibid 209.

[576] Smith (n 540) 712.

[577] Ethics Resource Center 2007 (n 542) 30. The total percentage exceeds 100% as respondents were asked to select all that applied to them.

[578] Ethics Resource Center 2013 (n 543).

Aiyesha Dey and colleagues found that whistleblowers who report internally at first turn to top management in 34% of cases, direct supervisors 38% of cases, and hotlines in only 2-4% of cases.[579] Finally, Transparency International Ireland asked 878 employees regarding where they would raise their concerns, with 52% saying they would report to 'A line manager in your organisation' and 34% to 'Senior Management in your organisation'.[580]

Emphasising the importance of anonymity should not obscure the fact that this option will be immediately excluded for many who blow the whistle – and then strong protections or rewards may be necessary to incentivise reporting. Moreover, the EU Directive leaves it to Member States to decide whether 'legal entities in the private and public sector and competent authorities are required to accept and follow up anonymous reports of breachers which fall within the scope of this Directive.'[581] An undesirable outcome from a public policy perspective is 'effective' internal whistleblowing channels and poor protections.[582] Yet that is a very possible outcome. The EU Directive has increased the demand for services offering compliance solutions such as whistleblower channels. These service providers are paid by the firm and have a strong incentive to retain whistleblowers in their system and ensure they do not report externally and cause reputational damages or enforcement actions. Internal channels may, therefore, end up being weaponised in the service of corporate secrecy rather than serving the policy objective of enhancing enforcement of law.[583] Something resembling this was the case with Wells Fargo, as mentioned in the introduction to this Chapter – where those who utilised internal reporting channels were fired. Wells is far from an isolated incident, however. Numerous whistleblowers had complained about the borrowing practices that led up to the Financial Crisis of 2008, yet these whistleblowers suffered the usual fate: being fired or demoted.[584]

If management is not genuine about taking whistleblowing and corporate wrongdoing seriously, it typically matters little if internal channels are available. As Benjamin van Roiij and Adam Fine note, whistleblowing 'works when non-anonymous higher-level employees report on misconduct of their subordinates (rather than the reverse), when there is sufficient organizational support to take action, and if there is external oversight to ensure that problems are addressed effectively. Yet the worst cases, those where we need whistleblowers the most, will often involve misconduct by higher-level employees, will occur when there is limited internal support for taking action (and maybe even outright resistance), and when there is an absence of effective external oversight.'[585] Without robust external incentives, these dynamics are incredibly difficult to overcome, and the protection framework does not adequately address this problem.

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[579] Dey et al (n 263) 1716.

[580] Transparency International Ireland, 'Speak Up Report 2017' (2017) 38, <https://transparency.ie/resources/whistleblowing/speak-report-2017> accessed 19 September 2024.

[581] Preamble para 34, although if someone reports anonymously and is retaliated against, that person should enjoy protections. Article 6(2) of the Directive reads 'Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.'

[582] In the US, some companies delegate the responsibility for managing internal compliance channels to their general counsel and in so doing 'the company can use attorney-client privilege to hide information from the government' Kohn 2023 (n 315) 180.

[583] See, e.g. Erik Mygind du Plessis, 'Speaking truth through power: Conceptualizing internal whistleblowing hotlines with Foucault's dispositive' (2022) 29 Organization 544, 561.

[584] See Micheal Hudson, 'Whistleblowers ignored, punished by lenders, dozens of former employees say' (*The Center for Public Integrity*, 22 November 2011), <https://publicintegrity.org/inequality-poverty-opportunity/whistleblowers-ignored-punished-by-lenders-dozens-of-former-employees-say/> accessed 19 September 2024. See also Moberly 2012 (n 496) 26-7.

[585] Van Rooij and Fine (n 78) 197.

In general, if most employees act in their own self-interest when deciding whether to blow the whistle, a bargaining situation is dangerous due to the leverage wrongdoers have under a protection regime. An experimental study Sebastian Krügel and Matthias Uhl found that participants did not report wrongdoers even if they only incurred a minor loss for so doing.[586] In their experimental setting, an internal whistleblower system where whistleblowers incur costs may even be counterproductive for detecting wrongdoing.[587] An experiment by Ernesto Reuben and Matt Stephenson found that individuals were willing to report overstated income when reporting was cost-neutral, but when groups could select their members, individuals who report are generally not invited which led to the facilitation of dishonest groups where 'lying is prevalent and reporting is nonexistent'.[588] This can be particularly problematic, as without external incentives no self-interested actor benefiting from overreporting their income would risk being excluded by reporting others. Schmolke and Utikal found that disadvantaged players (employees) were always likely to report (71%),[589] suggesting that if the wrongdoing negatively effects the employee that is already a sufficient incentive for reporting. This suggests that most people do act by and large to maximize their own utility, as predicted by rational choice theory. Problematically, then, is that wrongdoing managers have a range of methods to ensure that it will not be rational for employees to blow the whistle under a protection regime.

5. Employment law as a limiting factor

This gets us to a final issue with protection laws and how they have evolved since the UK's PIDA, effectively becoming a part of employment law in most countries. The main issue with incentivising employees in the context of employment law is that, typically, there is zero correlation between the value of the information provided and the compensation received by the whistleblower. Instead, compensation is based on prior salary and other factors. This gives someone who was retaliated against due to a minor workplace dispute as much incentive to pursue his or her case as someone who was retaliated against for trying to stop another Madoff-like Ponzi scheme. Meanwhile, in cases of severe wrongdoing, there is a strong incentive for management to keep the information internal. This can be done by leveraging carrots and sticks in various ways, as discussed in this Chapter.

From this perspective, protection measures, contrary to the objectives of the EU Directive, do not look as if they were designed to produce enforcement outcomes at all. To put it differently and tying this to the ethics underlying protections in employment law,[590] there is a tension between viewing protections as *intrinsically* valuable, protecting the rights of individuals and employees, or *instrumentally* valuable in enhancing enforcement. An intrinsic view hold that protecting whistleblowers is justified on grounds of it being a duty or a right obtained in virtue of one's employment – not necessarily what instrumental benefits such protections bring in terms of enhancing enforcement. Indeed, employment law has much of its origins in the labour/worker *rights* movements that date back to the 19th century. The

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[586] Sebastian Krügel and Matthias Uhl, 'Internal whistleblowing systems without proper sanctions may backfire' (2023) 93 Journal of Business Economics 1355, 1369.

[587] Ibid 1376. If participants knew that the wrongdoers would be severely punished if reported on, however, they blew the whistle significantly more frequently.

[588] Ernesto Reuben and Matt Stephenson, 'Nobody likes a rat: On the willingness to report lies and the consequences threreof' (2013) 93 Journal of Economic Behavior & Organization 384.

[589] Klaus Ulrich Schmolke and Verena Utikal, 'Whistleblowing: Incentives and Situational Determinants' (2018) SSRN Working Paper 21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198104> accessed 19 September 2024.

[590] Early whistleblower laws were even more explicitly Kantian, stipulating that to qualify for protections, disclosures had to be made in 'good faith'. With respect to UK's PIDA, this condition was present until the Enterprise and Regulatory Reform Act (2013) which removed the good faith requirement.

intrinsic motivation is often couched as a means of righting a wrong (retaliation) and restoring an equilibrium between employer and employee, which invites the language of remedies for rights violations. As we saw in Chapter 2, most debates leading up to the enactment of modern whistleblower protection laws are mixing these two justifications: cases of retaliation elicit a sense of injustice, rights violations, and indecency, and cases of severe wrongdoing that could have been prevented if employees came forward leads lawmakers to think that we should incentivise insiders to come forward as a means of enhancing enforcement. Protections not only avoid the controversial question of rewards but also have other virtues, such as being easily implementable as a part of employment law. That has the benefit of encompassing a vast number of people without considering what might be required to incentivise individuals to report specific crimes in specific regulatory areas. The aim of being broad and encompassing is admirable. Yet, broad prescriptions lack attention to the particular circumstances of different industries and varieties of wrongdoing, whose characteristics ideally should inform policy in many contexts. We have now also understood that protections are not sufficient to detect and deter serious profit-motivated crime, and therefore, a horizontal approach where it becomes tempting to understand whistleblowing as an employment law issue must be supplemented with sector-specific legislation – including rewards and leniency in some cases – to achieve significant enforcement outcomes.

The reasonable belief standard intended to favour whistleblowers also appears to have two unintended consequences. First, whistleblowers may submit low-quality reports to shield themselves. Second, this would have the effect that prosecutors or others who receive such reports would view them as less valuable. Mechtenberg and colleagues conducted an experiment that provided some limited support to both of these unintended consequences. They found that under a whistleblower protection regime, employees make more non-meritorious reports and that prosecutors choose to investigate these claims to a lesser degree compared to a treatment without protections.[591] This finding rings true because of the low success rate under effectively all protection laws considered in this Chapter. In contrast to the belief-based standard, reward programmes are fact-based in the sense that a reward is only provided if a fine is issued or money is recovered, which requires the whistleblower to not only suspect wrongdoing but to provide evidence that leads to fines.

D. Conclusion

Protection laws have been on the books meaningfully for around thirty years, and they have had a rough start to their existence by any metric. It is perhaps suitable to cite a paper published in 1995, exactly thirty years ago, by Robert Howse and Ronald J. Daniels, which anticipated these issues when they wrote that even under favourable statutory conditions:

> '[S]erious evidentiary and interpretative obstacles exist in judicial or regulatory surveillance of employer treatment of an employee *ex post* an act of whistleblowing. In some instances, action taken by the employer that an employee attributes to revenge may have legitimate corporate purposes, or it may be cloaked under legitimate corporate purposes. A presumption that any *ex post* treatment of an employee that is sub-optimal from the perspective of that employee's interests constitutes retaliation would risk constraining otherwise efficient business decisions. Conversely, placing too great a burden of proof on the employee to show a retaliatory intent could easily lead to under-sanctioning retaliatory acts that can be more-or-less masked as normal personnel policies.

[591] Lydia Mechtenberg, Gerd Muehlheusser, and Andreas Roider, 'Whistleblower protection: Theory and experimental evidence' (2020) 126 European Economic Review 1, 11. Although further analysis suggests that prosecutors in their experiment may underestimate the value of reports under a protection regime, Ibid 13.

> Even assuming that the right balance could be struck, in most instances, deterring the more subtle forms of retaliation would involve on-going judicial scrutiny of micro-decisions within corporations - at a considerable cost to the whistleblower, the corporation, and the public purse.'[592]

By and large, these ominous predictions turned out to be right. It has proven incredibly difficult to protect whistleblowers by law, nor is there compelling evidence that protection laws have been effective at detecting and deterring wrongdoing. However, absence of evidence is not evidence of absence, and protection laws likely did succeed in detecting and deterring some wrongdoing. At the very least, they have provided remedies to some who were retaliated against. Moreover, we do not know how effective internal channels have been, although this Chapter raised concerns regarding their effectiveness at curbing severe corporate wrongdoing. While perhaps not as effective as anticipated, these laws arguably have their rightful place as rights-ensuring legislation within employment law that puts reasonable limits to the at-will doctrine. One could argue that employers should not be able to fire employees for reporting wrongdoing, or for testifying against them, regardless of whether there is little public interest in the disclosure. Their design, however, is fundamentally flawed from the perspective of enhancing enforcement of severe corporate wrongdoing. There are no mechanisms for preventing bribery by employers, which is an entirely rational response by a wrongdoing corporation. Nor does remedies or compensation scale with 'how much' a disclosable matter is in the public interest, which exerts downward pressure on the quality of claims. There is no reasonable expectation that all damages can be remedied. Even remedying formal forms of retaliation has proven difficult under present laws, but if we also account for the informal retaliation, the decision to blow the whistle would have to be based on a superordinary sense of justice (which it often is).

The reward programmes discussed in the coming Chapter are no blanket solution or replacement to protection regimes. As presently designed, reward regimes only cover severe wrongdoing and would only enable a small percentage of whistleblowers to obtain rewards. Protection regimes must, therefore, be improved upon separately, and here, Australia is a good role model for how detailed we should expect administrative reporting to be. One feature that enabled the success of the Australian PID scheme is the commitment from the Ombudsman. The amount of training, education, and awareness raising with which they promoted their PID scheme is incomparable to any other regime. EU Member states should also review how NDAs are formulated and emphasise that an NDA cannot limit an employee's ability to blow the whistle. Following up on reporting processes and ensuring adequate documentation for improvements and research are commendable responses. Other low-effort campaigns with significant effects are investing in informational campaigns – although that presupposes adequate protections. Encouraging whistleblowing in a context where they are not protected can be highly questionable from a moral perspective. Many issues with protection laws, however, as Section C argued, are not due to their idiosyncratic implementation in disparate jurisdictions but stem from the fact that most whistleblower regimes are an extension of employment law that focuses on remedies. Protection laws are therefore plagued by regime-level issues (e.g. employment law context, no correlation between compensation and value of information, informal retaliation) and local implementation issues (e.g. employees don't know about protections, no information on procedures, no reporting by agencies that could drive local improvements). Still, if protection

[592] Robert Howse and Ronald. J Daniels, 'Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy' in Ronald J. Daniels and Randall Morck (eds) *Corporate Decision-Making in Canada* (University of Calgary Press 1995) 525-549, 533. Emphasis in original.

laws and retaliation reports become mere grievance channels, they will lose all credibility. Striking a balance here is very difficult, as Howes and Daniels noted thirty years ago.

CHAPTER 4: THE DESIGN AND PERFORMANCE OF US REWARD PROGRAMMES

A. Introduction

This Chapter reviews and evaluates three US reward programmes. Reward programmes are not unique to America or Anglophone nations. Yet, there is little to no research on non-US programmes, and they typically lack transparent legislative history, evidence, or experience to review. There are some exceptions, such as South Korea, which has whistleblower reward programmes dating back to 2002,[593] Canada for offshore tax evasion since 2014 and securities fraud since 2016.[594] These and other programmes will be considered when reviewing the optimal design of reward programmes in Chapter 5. This Chapter conducts in-depth reviews of three US reward programmes, outlines the primary reasons for their design, and evaluates their performance. This will later enable the identification of crucial design features that have driven their success and are likely essential to transplanting them successfully in other jurisdictions. The Chapter is structured into four sections: the *False Claims Act* (Section B), the *IRS Programme* (Section C), and the *SEC Programme* (Section D). It also briefly discusses other US reward programmes in Section E.

B. The False Claims Act

1. The 1863 Act

Before considering the modern performance of the False Claims Act, it is useful to recall some of its history outlined in Chapter 2. In January 1863, Senator Henry Wilson introduced a bill 'To prevent and punish frauds upon the Government of the United States',[595] known as the False Claims Act (FCA 1863). This bill allowed any citizen with knowledge of fraud against the government to sue on the government's behalf and keep half of the recoveries. The penalty for each false claim made to the government was $2,000 as well as double damages.[596] The bill offered whistleblowers who pursue the case in court 50% of the damages and recoveries obtained,[597] with a statute of limitations on claims of three years.[598] This *qui tam* initiative was, as discussed in Chapter 2, primarily a response to fraud in military procurement. Another important reason for the use of private enforcement was that law enforcement in 1863 was understaffed,[599] and alternative ways to control fraud were considered but rejected in 1861 as expensive and administratively unfeasible.[600] There is surprisingly little information available on FCA actions between 1863 and 1943, yet it is widely reported that there were few cases in the decades after,[601] during which the False Claims Act also remained largely unchanged.[602]

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[593] Managed by the Anti-Corruption and Civil Rights Commission.

[594] The Offshore Tax Informant Program (2014), and The Ontario Securities Commission Reward Programme (2016).

[595] A Century of Lawmaking for a New Nation (n 319).

[596] Meador and Warren (n 320) 459.

[597] Sec 7. Note that, due to the double damages, the intention was that the wrongdoer fully recovers the Government's losses in addition to the whistleblower rewards.

[598] Sec 8.

[599] See Mr Van Nuys from the Committee on the Judiciary commented on the 1863 FCA in a statement from 1943: 'the office of the Attorney General was not staffed sufficiently to handle the many matters which arose and was not possessed of investigative facilities now at the disposal of that office.' Beck (n 13) 559.

[600] Brechbill et al (n 323).

[601] Marc S. Raspanti and David M. Laigaie, 'Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act' (1998) 71 Temple Law Review 23, 24.

[602] Philips & Cohen, 'False Claims Act' (2023) <https://www.phillipsandcohen.com/false-claims-act-history/> accessed 19 September 2024.

2. The 1943 Amendments

Chapter 2 also noted that the FCA was significantly amended in 1943 after numerous scandals highlighted the perverse incentives it created. Due to lacking a bar on where qui tam relators obtained information on fraud against the government, aware litigators were standing outside courthouses waiting for criminal charges to be filed, after which they took the information and filed a civil FCA suit based on the same information.[603] Some also took information from pre-existing congressional investigations and filed qui tam suits.[604] This meant that some relators cashed in substantial amounts while offering no additional information to the government, something that came to be called 'parasitic lawsuits'.[605] In *United States ex rel. Marcus v. Hess*, the Supreme Court held that parasitic suits were permitted under the FCA. In *Hess*, the US had indicted contractors for collusive bidding and fined them $54,000. Morris L. Marcus had taken the information from the indictment and copied it almost *verbatim* into a qui tam suit in which he recovered $315,000.[606] Congress decided to significantly limit qui tam actions by amending the FCA in 1943, banning whistleblower suits if the government had 'any knowledge' of the wrongdoing. If the government intervened, the relator would only be entitled to 'reasonable compensation' of no more than 10% of the proceeds.[607] These amendments caused the *qui tam* provisions to fall almost completely out of use, as suits were quickly dismissed due to the 'any government knowledge' eligibility requirement.[608]

3. The 1986 Amendments

Numerous procurement scandals following 1943 highlighted the need for improved enforcement. The response by Congress was to try and revitalise the FCA, and in 1986, it was amended by increasing the penalties to treble damages and between $5000 and $10,000 for each false claim,[609] compared to the $2,000 fine that remained since 1863.[610] To undo some of the damages done by the 1943 amendments' attempts to prevent parasitic suits, Congress removed the bar on realtors bringing cases with 'any prior government knowledge', instead, *qui tam* relators are only barred from bringing cases based on information publicly available in the media, arising from criminal, civil or administrative hearings, unless the relator is the 'original source' of that information. Under the prior statute, companies could submit vague information to the government, ensuring that *qui tam* actions would be barred under the 'any prior government knowledge' requirement.[611] It was also unlikely that the fraud would be investigated by overburdened federal agencies that did not have time or resources to investigate and prosecute fraud.[612] The amendments also lowered the burden of proof for relators to a civil standard, and realtors could now remain a party even if the government intervened. Appeals courts had taken the applicable standard of proof in FCA cases to be 'clear and convincing evidence', and the amendments clarified that the applicable

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[603] Helmer (n 318) 1267.
[604] Phelps (n 326).
[605] Cohen (n 327) 82.
[606] *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)
[607] Vogel (n 328) 597.
[608] See Phelps (n 326) 255 and Helmer (n 318) 1271.
[609] Meador and Warren (n 320) 460.
[610] Helmer (n 318) 1273.
[611] James B. Helmer Jr. and Robert Clark Neff Jr., 'War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation' (1991) 18 Ohio Northern University Law Review 35, 49.
[612] Ibid.

standard should be the less strict 'preponderance of the evidence'.[613] The amendments also clarified a split among the US courts of appeal on how to interpret what it meant to 'knowingly' defraud the government.[614] Some courts had taken this to require specific intent to defraud. The 1986 amendments clarified the standard to be less strict and defined 'knowing' and 'knowingly' as meaning that a person, with respect to certain information, '(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.'[615] The Major Fraud Act of 1988 amended the FCA again by adding that the court had the discretion to reduce the award if the person who brought the action 'planned and initiated the violation of section 3729 upon which the action was brought'.[616] Moreover, if a person who brought an action was convicted of criminal conduct in relation to the 3729 violation, then he or she shall be denied any award, but without inhibiting the ability of the Department of Justice to pursue the case independently.[617]

After filing, the DoJ has 60 days to review the filing and decide whether to join the suit or not, and the complaint shall not be served on the defendant until the court orders to do so.[618] If the government joins, it takes primary responsibility for the lawsuit, and the whistleblower (relator) is eligible for 15-25% of the proceeds of the action or settlement of the claim.[619] If the government declines to intervene, the whistleblower (relator) is eligible for 25-30%.[620] The FCA also provides significant relief in case of retaliatory actions: reinstatement with the same seniority, double back pay and interest on back pay, compensation for special damages, litigation costs, and reasonable attorneys' fees.[621] While the DoJ is the prosecutor, they work with the regulatory agency that oversees the given government agency or entity that has been defrauded, as well as with the relevant US Attorney's Office, of which there are 93 nationwide, which are responsible for enforcing federal laws throughout the country. The DoJ also cooperates with the Office of Inspector General (OIG) with oversight of the defrauded agency. These offices are responsible for auditing and fraud investigation and are attached to various government functions. For example, most civil recoveries under the FCA concern healthcare, in which case the DoJ works with the Office of Inspector General for the US Department of Health and Human Services (OIG-HHS).

The 1986 amendments also introduced a seal period,[622] meaning that suits are submitted 'under seal' and remain under seal for 60 days, during which the defendant is unaware of filing. The purpose of the seal period is to allow the government to investigate the claims out of public view, as well as to avoid compromising a criminal investigation.[623] Typically, the DoJ asks for an extended seal period, and it rarely spans just 60 days.[624] During the seal

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[613] Ibid 44.

[614] Ibid 45.

[615] Ibid 45.

[616] Public Law 100-700 – Nov.19, 1988. Sec 9(a)(3).

[617] Ibid.

[618] 31 U.S.C § 3730(b)(2). See Anthony J. Casey and Anthony Niblett, 'Noise Reduction: The Screening Value of Qui Tam' (2014) 91 Washington University Law Review 1169, 1177.

[619] 31 U.S.C § 3730(d)(1).

[620] 31 U.S.C § 3730(d)(2).

[621] 31 U.S.C § 3730(h)(2).

[622] Robert Fabrikant and Nkechinyem Nwabuzor, 'In the Shadow of the False Claims Act: 'Outsourcing' the Investigation by the Government Counsel to Relator Counsel During the Seal Period' (2007) 83 North Dakota Law Review 837, 844.

[623] Ibid 838.

[624] Laurie E. Elkstrand, 'Information on False Claims Act Litigation' Letter to U.S. Rep. F. James Sensenbrenner and Rep. Chris Cannon, and Sen. Charles E. Grassley (31 January 2006) <https://www.gao.gov/assets/a94000.html> accessed 19 September 2024.

period, relator's counsel can act as an arm of the government, conducting research, participates in interviewing fact witnesses, and review documents produced by the defendant. If requested, relators counsel can also engage in settlement negotiations with defense counsel.[625] If whistleblowers violate the seal requirements by discussing the case with the press or other parties they risk having their case dismissed.[626]

4. Performance

The FCA is unique compared to other reward programmes. One alleged benefit of the FCA is that private individuals can dispense justice through the courts, bypassing possibly captured regulators who otherwise might not pursue the case for personal or arbitrary reasons.[627] The IRS and SEC programmes instead do not grant a private right of action but retain full discretion over their enforcement actions. These programmes are better understood as public enforcement aided by private information, or what has been called 'Cash for Information' programmes.[628] Some have raised the concern that giving citizens the ability to act as public prosecutors effectively gives them the state's power while lacking the necessary prosecutorial discretion and instead acting in their own interest.[629] Indeed, giving private citizens the right to enforce public statutes is *de facto* to give citizens the power of the state – a power that has to be exercised with care, discretion, proportion, and prudence – which private citizens may lack. The FCA is also a controversial programme since, without public oversight, it can incentivize meritless suits, suits aimed at extracting settlement fees, and other actions that do not serve the purposes of public enforcement.

While this is the typical description of actions under the FCA, the practical reality is that the public retains close to full enforcement discretion for FCA actions. For example, the DoJ have a gatekeeping role and retains broad discretion to disallow relators to pursue their claims if they deem them meritless or in other ways unsuitable. This has led some to claim that the value of bypassing possibly captured agencies is undermined by the DoJs broad discretion to ban relators from pursuing claims, and some have accused the DoJ of declining or sitting on politically charged cases.[630] However, empirical evidence suggests that the DoJ rarely invokes its authority to terminate cases.[631] The only situation in which the FCA can be characterized as an instance of private enforcement is when the DoJ declines to intervene and does not prohibit the whistleblower from bringing the case. In practice, it is not the FCA cases that most resemble private enforcement that are the most successful. The vast number of recoveries from FCA suits are where the government intervenes. In 2020, for example, settlements and judgments where the DoJ intervened amounted to $1.5 billion, whereas the suits they declined to intervene in generated less than $200 million in settlements and judgments.[632] Similar discrepancies can be found for each year throughout the FCA's history.

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[625] Fabrikant and Nwabuzor (n 622) 843.

[626] Jonas Heese, Ranjani Krishnan, and Hari Ramasubramanian, 'The department of Justice as a gatekeeper in whistleblower-initiated corporate fraud enforcement: Drivers and consequences' (2021) 71 Journal of Accounting and Economics 101357, 4.

[627] David Freeman Engstrom, 'Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under The False Claims Act' (2013) 107 Northwestern University Law Review 1689, 1690.

[628] David Freeman Engstrom, 'Bounty Regimes' (2018) in Jennifer Arlen (ed) *Research Handbook on Corporate Crime and Financial Misdealing,* (Edward Elgar 2018).

[629] See, for example, Australia Law Commission (n 7) 6: 'The idea of citizens acting in their private capacity suing for reward for offences which have not personally aggrieved them is repugnant to modern views of 'fair play'. It is the State's responsibility to enforce penal laws and today, unless a person is affected by another's unlawful conduct, it is not considered his business to prosecute the offender.'

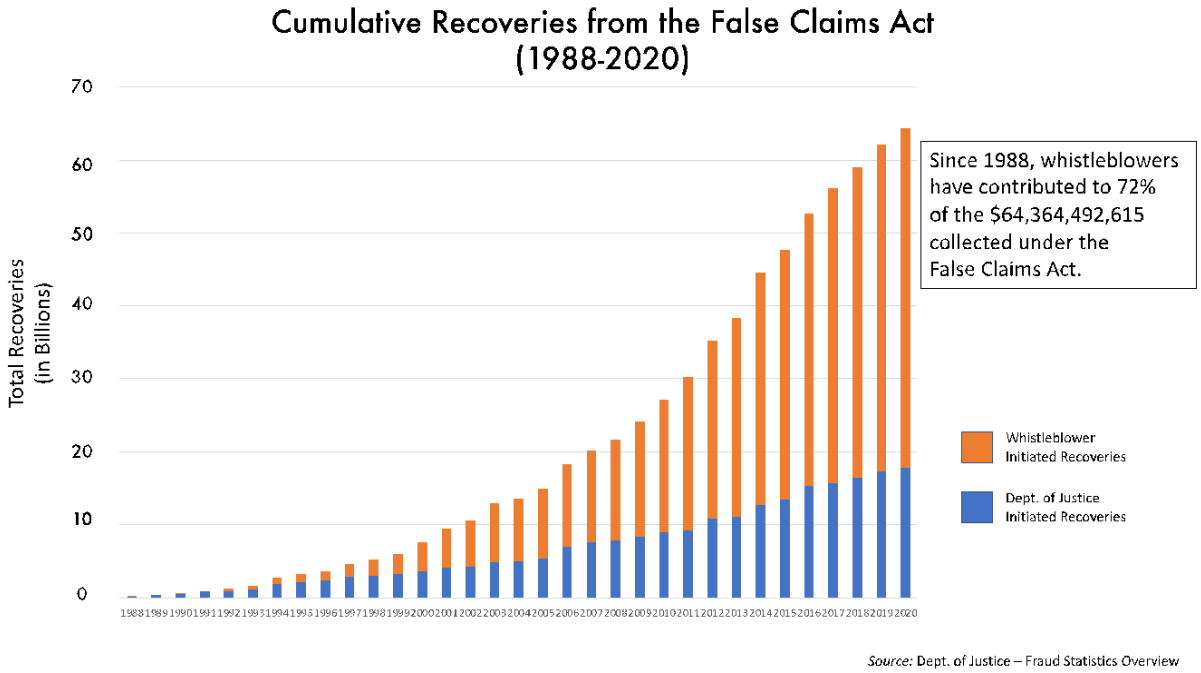
[630] Engstrom 2013 (n 627) 1714.

[631] Engstrom 2013 (n 627) 1717.

[632] Department of Justice Civil Division, 'Fraud Statistics – Overview' (2023)

While the DoJ actions generate most recoveries, the agency only intervenes in about 25% of the cases – primarily in health and defence cases.[633] When the DoJ intervenes, the impact is significant as intervened cases generate recoveries 90% of the time, while litigants who go at it independently generate recoveries in a mere 10% of cases.[634] According to data considered by David Freeman Engstrom, intervened cases generated around 94% of the total recovery, and declined cases a mere 6%.[635] This is important for two reasons. First, a lot of compelling empirical evidence and data in favour of reward programmes comes from studies on the FCA. This makes understanding its design imperative for replicating its success. Secondly, strictly importing the FCA is likely to be highly controversial – more so than Cash for Information Programmes (already prevalently used, although ad hoc), and unworkable in many legal cultures. Suppose it were the cases that the DoJ declined that drove its success. In that case, the gap between exporting these programmes would be significantly larger as it is more controversial to implement where agencies want to retain complete litigation/enforcement discretion. Yet, data on the use of the FCA suggests that its success is not contingent on the recoveries by private litigants in declined cases – quite the opposite, it is when private information serves a role in public enforcement that it is the most effective, similar as under Cash for Information programmes. This is important to appreciate Figure 6 below.[636]

Figure 6



This graph speaks to the potential of whistleblowers in enforcement, and it also illustrates

<https://www.justice.gov/media/1273591/dl?inline=> accessed 19 September 2024.

[633] Engstrom 2013 (n 627) 1719

[634] Engstrom 2013 (n 627) 1721.

[635] Engstrom 2013 (n 627) 1722.

[636] Figure is from Theo Nyreröd and Stephen M. Kohn, 'Whistleblowing in the EU: the enforcement perspective' in Lauren Kierans, David Lewis, and Wim Vandekerckhove (eds), *Selected papers from the International Whistleblowing Research Network on 17th of September 2021* (September 2021) <https://mural.maynoothuniversity.ie/15140/1/Selected%20papers%20from%20the%20International%20Whistleblowing%20Research%20Network%20conference%20at%20Maynooth%20University.pdf> accessed 19 September 2024.

why the US has successively sought to incentivize whistleblowers in numerous other regulatory areas. While this figure illustrates the FCA's enforcement potential, it does not consider deterrence effects, which are arguably more important. Numerous studies also show that the FCA has been effective at deterring wrongdoing. Alexander Dyck and colleagues compared whistleblowing in the healthcare sector where rewards are available through the False Claims Act, with non-healthcare sectors where they are not and found that employees detect 41% of fraud cases in the healthcare sector, whereas that number is only 14% for other sectors.[637] Jetson Leder-Luis empirically measured the costs and benefits of private enforcement under the FCA.[638] His analysis pairs a novel dataset on whistleblower filings and their allegations with large samples of Medicare claims data from the period 1999–2016. Considering only specific deterrence, the results suggest that $1.9 billion worth of whistleblower settlements generated cost savings that exceeded $18 billion over five years. Meanwhile, public expenditure on FCA healthcare lawsuits was around $108.5 million in FY2018, suggesting that the FCA is highly cost-effective.

Gerald J. Lobo and colleagues looked at the staggered adoption of state-level FCAs to determine their effect on bank loan contracting terms.[639] They found that after a state introduces a general FCA, interest spreads and the number of general and financial covenants are significantly reduced. The likelihood of collateral requirements is also lowered. On average, loan interest spreads are reduced by 17 basis points after FCA exposure.[640] To understand the mechanism behind these findings, they show that financial reporting quality and auditor quality increase after exposure to a state FCA. Like many other studies, they also found that the loan cost reduction is greater for riskier firms. They also conducted a series of robustness tests, concluding against alternative explanations.[641] In another study of a state-level FCA, Yoojin Lee and colleagues considered a 2010 amendment to New York's FCA that extended it to tax violations.[642] They found that corporate tax collections increased by $291 million (7.7%) after introducing the FCA.[643] They also found that these effects are stronger for firms that grant fewer stock options to rank-and-file employees. As discussed previously, those with more stock options have interests that are more aligned with management. Federal tax avoidance is also reduced in their sample, which suggests spillover effects or general deterrence.[644] They also examine the impact of New York's FCA on specific tax strategies and found, among other things, that it reduces the probability of a 'Double Irish with a Dutch Sandwich' – which has been a popular way to reduce US taxes on foreign earnings. Other findings include a reduction in special purpose entities (often used to avoid taxes) and a reduced number of relationships with tax planning New York banks.[645]

Several US states, including New York, have also extended their FCAs to cover sales tax evasion. In a famous case under New York's False Claims Act, *People of New York v. Sprint Nextel Corp*, Sprint ended up paying a $330 million fine, with $63 million paid to the whistleblower.[646] In 2010, the state of New York revamped its False Claims Act to include

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[637] Dyck et al (n 73) 2247.

[638] Jetson Leder-Luis, 'Can Whistleblowers Root Out Public Expenditure Fraud? Evidence from Medicare' (2023) The Review of Economics and Statistics 1. Early View.

[639] Gerald J. Lobo et al, 'Do Corporate Whistleblower Laws Affect Bank Loan Contracting?' (2022) SSRN Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4001014> accessed 19 September 2024.

[640] Ibid 3.

[641] Ibid 26.

[642] Yoojin Lee et al (n 572).

[643] Ibid 28.

[644] Ibid 30.

[645] Ibid 6.

[646] NY Attorney General's Office, 'A.G. Underwood And Acting Tax Commissioner Manion Announce

tax evasion, it now 'permitted the state, local governments, and whistleblowers to bring enforcement actions against businesses with net income or sales exceeding $1 million and alleged damages exceeding $350,000.[647] This appears to have been an effective intervention to increase tax collections. According to Violationtracker.org,[648] between 2000 and 2021, the AG issued penalties in cases where the primary offence was 'tax violations' on 21 occasions. Before 2010, the number of penalties was 3 (in 2000, 2003, and 2005) for $32,829. Between 2012 and 2021, 18 penalties were issued; 10 of these cases were filed by whistleblowers under the NY False Claims Act, and 8 actions were the result of AG investigations or other means. The 10 whistleblower actions generated $421,810,000 in recoveries, whereas non-whistleblower actions generated $55,830,000. Excluding the Sprint fine, 9 whistleblower cases generated $91,810,000 in recoveries.

Studies have also found positive firm-level effects of the FCA. Heese and colleagues studied the FCA using a sample of 554 lawsuit-firm observations between 2002 – 2012 against publicly traded companies.[649] They found that cases in which the DoJ intervened had positive longer-term effects, such as a reduced likelihood of weak internal controls by 11.5 percentage points, as well as an increased likelihood of improvement in employee relations by around 13 percentage points.[650] They also found that firms with DoJ intervention had an approximately 46% lower likelihood of future whistleblower allegations.[651] Other concerns have also proven not to materialise. The significant incentives provided under the FCA: large recoveries, that plaintiffs are paid attorney's fees by defendants if successful, and that the DoJ may even intervene and pursue the case while retaining a part of the recoveries, could lead to excessive litigation and 'filing mills', i.e. law firms and plaintiffs gambling on large recoveries by submitting numerous low-value claims.[652] David Kwok obtained data through Freedom of Information Act requests to assess the prevalence of filing mills. He found that law firms with more than one case filed improved the rate of DoJ intervention in subsequent filings, from around 24% in their 1st case to over 35% in the 5th case.[653] Judging by this data, there appear to be few filing mill law firms – instead, filings improve over time.

The FCA has also been praised by DoJ staff. An Associate Attorney General said in 2014 that whistleblower reward laws are 'the most powerful tool the American people have to protect the government from fraud',[654] and an Assistant Attorney General stated in 2020 that 'whistleblowers continue to play a critical role in identifying new and evolving fraud schemes

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Record $330 Million Settlement With Sprint In Groundbreaking False Claims Act Litigation Involving Unpaid Sales Tax' (2018) <https://ag.ny.gov/press-release/2018/ag-underwood-and-acting-tax-commissioner-manion-announce-record-330-million> accessed 19 September 2024.

[647] Dennis J. Ventry, 'Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States' (2014) 59 Villanova Law Review 425, 428.

[648] Violationtracker is an open database on corporate misconduct, containing over 512,000 civil and criminal cases from more than 400 US agencies, with data staring from 2000. Filters used were Offense Type: 'False Claims Act and related', State or Local Agency: 'New York Attorney General', <https://www.goodjobsfirst.org/violation-tracker> accessed 19 September 2024. Each case was reviewed to determine if the FCA action emerged from whistleblower information or not.

[649] Heese et al (n 626) 7. They also classified the type of whistleblower allegations for 502 claims and found that the two categories by far include overbilling (325, 65%) and contract violation (133, 26%), Heese et al (n 626) 8.

[650] Ibid 15.

[651] Ibid 16.

[652] Dawid Kwok, 'Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?' (2013) 42 Public Contract Law Journal 225, 226.

[653] Ibid 244.

[654] Stuart Delery, 'Assistant Attorney General Stuart Delery Delivers Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement.' (2014) US Department of Justice, Office of Public Affairs, <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th> accessed 19 September 2024.

that might otherwise remain undetected'.[655] Studies also suggest that FCA enforcement is highly cost-effective; Jack A. Meyer found that benefits to costs exceed 20:1,[656] while Thomas L. Carson and colleagues estimated the benefits to costs to be between 14:1 and 52:1.[657] In summary, the FCA has been highly successful by any metric.

C. The IRS Programme

1. The pre-2006 Programme

Tax rewards in the US go back to 1873 and were codified in 1954 and meaningfully amended in the year 2006. While the IRS programme saw some adjustments throughout the years, this section will focus on how the programme functioned in the years before the 2006 amendments. Under this programme, whistleblowers could receive 15% if information directly led to recovery, 10% if it indirectly led to recovery, and a mere 1% if it led to an investigation but the information was unrelated to the recovery.[658] Rewards were capped at $10 million, IRS Services Offices assessed whistleblower claims, and rewards were entirely at the IRS's discretion. In 2005, five decentralised 'Informants' Claims Examiner' units in different states processed whistleblower claims.[659] A report on the pre-2006 programme found that these offices dealt with whistleblower claims in an unstructured way, had basic control issues, frequently failed to justify the award size, and frequently omitted why a reviewer rejected a claim.[660] The report attributed many issues with the programme to a lack of 'centralized and active management oversight.'[661]

Under this regime, appealing a no-reward decision was possible, but only indirectly through judicial review under the Tucker Act, 'which gives the Court of Federal Claims jurisdiction to hear contract claims against the U.S. in excess of $10,000'.[662] Section 6103 of the Internal Revenue Code prohibits the IRS from sharing confidential information about taxpayers. This confidentiality requirement also affects the possibility of succeeding when appealing. In *Krug v. United States,*[663] a no-reward decision was appealed to the Court of Federal Claims, which employs an abuse of discretion standard of review, under which a whistleblower must prove that the IRS 'abused its discretion by acting arbitrarily and unreasonably in making or denying an award'.[664] Although Krug provided information that caused the IRS to initiate an investigation that resulted in recovery of millions, the Court of Federal Claims held that the IRS had not abused its discretion in refusing to pay the reward. The IRS had given spurious reasons for denying the reward and claimed that the real reasons

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[655] Department of Justice, 'Justice Department Recovers Over $3 Billion from False Claims Act Cases in Fiscal Year 2019.' (2020) US Department of Justice, Office of Public Affairs.

[656] Jack A. Meyer, 'Fighting Medicare & Medicaid Fraud' (2013) prepared for Taxpayers Against Fraud Education Fund, <https://www.taf.org/resources/roi-from-fca-partnerships/> accessed 19 September 2024.

[657] Thomas L. Carson, Mary Ellen Verdu, and Richard E. Wokutch, 'Whistle-Blowing for Profit: An Ethical Analysis of the Federal False Claims Act' (2008) 77 Journal of Business Ethics 361, 369.

[658] Treasury Inspector General for Tax Administration, 'The Informants' Rewards Program Needs More Centralized Management Oversight' (2006) Reference Number: 2006-30-092 2.

[659] Ibid 1.

[660] Ibid.

[661] Ibid 9.

[662] Denise M. Farag and Terry Morehead Dworkin, 'A Taxing Process: Whistleblowing Under the I.R.S Reward Program' (2016) 26 Southern Law Journal 19, 31.

[663] *United States v. Krug*, No. 16-4136 (2d Cir. 2017).

[664] Michelle M. Kwon, 'Whistling Dixie about the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions' (2010) 29 Virginia Tax Review 447, 454. A bill introduced in the senate in 2023 proposed to change the standard from abuse of discretion to a *de novo* review, which would allow for a comprehensive reassessment of administrative records, see IRS Whistleblower Program Improvement Act of 2023 S.625.

could not be revealed because of taxpayer privacy laws. According to Michelle M. Kwon, it was presumably section 6103 that prevented Krug from obtaining the true reasons behind the denial of his claim.[665] More generally, whistleblowers had no success in appealing reward decisions prior to 2006: Terri Guiterrez concluded that between 1941 through 1998, the IRS won all the total 19 cases filed by informants for redeterminations of claims for rewards.[666]

2. The 2006 Amendments

The Tax Care and Healthcare Relief Act of 2006 substantially amended the IRS programme. The 2006 amendments intended to bring the IRS reward programme in line with the design of the FCA, including encouraging the utilisation of outside attorneys and advisors of whistleblowers, which was believed to be a key behind the success of the FCA.[667] It followed the recommendations of a report by the Treasury Inspector General for Tax Administration (TIGTA) and created the Office of the Whistleblower (OWB), a centralized unit which processes whistleblower tips and decides whether to assign the case to a specific service office or investigate the claim itself.[668] The Office also decides how much to pay whistleblowers, previously a task that was decentralized and delegated to directors at the service district office level.[669] These amendments greatly improved the programme, which had not been salient to the public nor advertised by the agency.[670] One of the most important features of the 2006 amendments was adding Section 7623(b) and renaming the prior section 7623 to 7623(a). While rewards remain discretionary under 7623(a), rewards are mandatory under 7623(b) in the range of 15-30% of collections but require that the tax matter exceeds $2 million in value or that the taxpayer has an annual income of at least $200,000. Moreover, claims under 7623(b) can be appealed to the Tax Court within 30 days of the reward determination.[671]

Following the FCA, this programme also reduced the reward for those who 'planned and initiated' the wrongdoing. The IRS will determine the extent to which a whistleblower planned and initiated the wrongdoing into three categories: primary (reduced by 67-100%), significant (34-66%), or moderate (0-33%).[672] The extent of involvement in planning and initiation includes considering factors such as whether the whistleblower was the sole decision-maker or one of several contributing planners and initiators and to what extent the whistleblower was acting under the direction and control of a supervisor, whether the whistleblower took steps to hide the actions at the planning stage, whether the whistleblower committed any misconduct, the extent to which the whistleblower knew or should have known that tax noncompliance could result from the course of conduct, the extent to which the whistleblower acted in furtherance of the noncompliance, and the whistleblower's role in soliciting others to participate in the wrongdoing.[673] The IRS does not allow anonymous submissions but is strictly confidential when handling information that could reveal the whistleblower's identity.[674]

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[665] Michelle M. Kwon, 'Whistling Dixie about the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions' (2010) 29 Virginia Tax Review 447, 455.

[666] Terri Gutierrez, 'IRS Informants Reward Program: Is it Fair?' (1999) August 23, Tax Notes.

[667] Sec 406(b).

[668] Ventry (n 24) 361.

[669] Ibid.

[670] In fact, IRS staff were told to not advertise or encourage the submission of information in return for a reward, see Kwon (n 665) 453.

[671] Sec 406(b)(4).

[672] §301.7623–4(c)(3)(iii).

[673] §301.7623–4(c)(3)(iv).

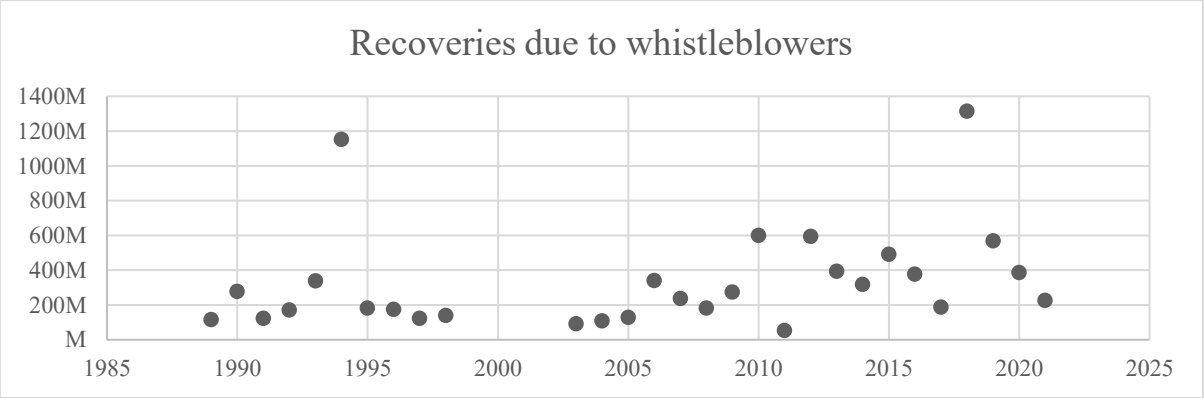
[674] Kohn 2023 (n 315) 9: 'The IRS treats whistleblower information under the same legal standard they use to handle other taxpayer information. These rules are among the strictest secrecy requirements governing any

3. Performance

Before the 2006 amendments, there is some information on the relative value of whistleblowers. TIGTA compared how well audits based on whistleblower information performed versus their main way of selecting returns for audit. Most returns are selected for audits using the Discriminant Index Function (DIF), a mathematical technique that classifies tax returns for examination. For 1996-1998, examinations initiated due to whistleblower information generated $946 in recommended adjustments per hour, whereas DIF-selected examinations generated $548. Whistleblower-initiated examinations were also more accurate, with a mere 12% leading to a no-change return compared to 17% for DIF-selected examinations.[675]

In the IRS case, data prior to the 2006 amendments is available, allowing for a pre-post assessment of its effect on recoveries. Annual reports by the IRS report how much was recovered due to whistleblower information, 'amounts collected' (2003-2021) and 'taxes recovered as a result of informant information' (1989-1998), which is what Figure 7 below reports on. Whistleblower rewards as a percentage of recoveries were significantly lower prior to the 2006 amendments, and inflation should also be considered. Figure 7 below is recoveries due to whistleblower information, deducting the award paid to the whistleblower and adjusted for inflation in 2022 dollars.

Figure 7



For the 14 years we have data on the programme prior to the 2006 amendments,[676] the average adjusted recoveries per year were around $251 million, whereas the same average between 2007 – 2022 was around $413 million – an increase in recoveries of 64,5%. Two countervailing factors are challenging to account for. First, the 2006 Amendments directed the IRS to establish the Office of the Whistleblower. This likely meant more resources were spent on whistleblower claims, so recoveries increased along with administration costs. Second, and likely more salient, are the deterrence effects of the mandatory and large rewards introduced by the 2006 amendments, as even small increases in deterrence can generate large additional revenues. While a 64% increase in recoveries is impressive, it could be argued that the IRS programme is least well suited to represent the potential of reward programmes in enforcement. Under-resourcing has been a persistent issue with respect to the IRS whistleblower programme, which is partially responsible for the long delays until rewards are paid.[677] However, even with resources, the tax context is mired with procedural rules and

federal agency'.

[675] TIGTA (n 658) 4.

[676] Gutierrez (n 666).

[677] See, for example, CPA Practice Advisor 'IRS Whistleblower Program Recovered $472 Million from Tax Cheats in 2020' (31 December 2020) <https://www.cpapracticeadvisor.com/2020/12/31/irs-

appeals rights that can cause decades of delays. In theory, it can take up to 30 years before an award is paid out if all the appeals rights of the taxpayer and the whistleblower are exhausted.[678] In practice, it takes on average 8 years between the submission of a claim and a reward being paid out for 7623(b) claims, although this time has varied historically. In the FY2021 report, out of 20 awards paid out under 7623(b), 10 awards had been paid out 12 years or later from when the IRS first received the claim.[679] During this period, communication from the IRS is often non-existent due to the taxpayer's rights. Finally, unlike the SEC programme and the FCA, whistleblower protections were only added to section 7623 in 2019.[680] While Chapter 3 concluded with scepticism that such protections would be a significant driver of enforcement, they can provide near-term relief, which is especially important if the costs are taken upfront and the benefits lie on average 8 years into the future.[681] It remains to be seen whether this will increase recoveries going forward. While an effective programme, relative to total enforcement, it has not performed as well as the FCA or SEC programme. Moreover, there are no empirical studies on the IRS whistleblower programme – although experimental and empirical research on tax evasion more generally have found that reward programme deter tax evasion.[682]

Another unique feature of the IRS programme is that the agency's annual reports contain detailed data on numerous lesser-known aspects of reward programmes. When the IRS receives a Form 211 submission,[683] they are identified as either stand-alone, master, or related claims. If the submission only mentions one taxpayer, it is counted as a stand-alone claim. If multiple taxpayers are identified, a 'master' claim is used to identify the submission and related claims numbers are used to identify all taxpayers within the master claim. Taking 2021 as an example, when the IRS received 14,045 claims in total, we see that most claim numbers issued are for related claims.

Figure 8

whistleblower-program-recovered-472-million-from-tax-cheats-in-2020/42020/> accessed 19 September 2024.

[678] See Appendix 1 for an outline of this scenario.

[679] IRS Whistleblower Office, 'Fiscal Year 2021 Annual Report' (2022), accessed <https://www.irs.gov/pub/irs-pdf/p5241.pdf> accessed 19 September 2024.

[680] Pub. L. 116–25.

[681] Wisanupong Potipiroon considered the combined effect of protection and rewards and suggest they are complementary, see Wisanupong Potipiroon, 'Reward Expectancy and External Whistleblowing: Testing the Moderating Roles of Public Service Motivation, Seriousness of Wrongdoing, and Whistleblower Protection' (2024) Public Personnel Management, 25, Early View.

[682] See Chapter 1(C)(3).

[683] This is the official form used by whistleblowers for claiming an award, entitled 'Application for Award for Original Information'.

2021	Related	Master	Stand Alone	Total
Oct	341	103	119	**563**
Nov	532	174	162	**868**
Dec	1084	274	269	**1627**
Jan	1651	401	489	**2541**
Feb	909	331	477	**1717**
Mar	636	162	191	**989**
Apr	572	197	268	**1037**
May	457	177	295	**929**
Jun	530	198	322	**1050**
Jul	553	186	301	**1040**
Aug	875	196	335	**1406**
Sep	140	56	82	**278**
Total	**8280**	**2455**	**3310**	**14045**

The total number of claims therefore does not represent the total number of individuals that submitted information to the IRS. Another unique source provided by the annual reports since 2013 is data on the reason why a whistleblower claim was closed in a fiscal year.[684]

Figure 9

Reasons for Closure of Claims	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Award Paid in Full	130	238	204	761	367	423	510	593	645	396
%	2%	4%	2%	4%	3%	3%	3%	6%	5%	3%
Unclear/Non Specific/No Actionable Issue	1807	514	5633	12395	8259	8262	8524	5074	4402	8193
%	27%	8%	53%	59%	57%	64%	51%	48%	35%	71%
"No Change" Related	220	181	287	1443	845	573	850	1820	770	194
%	3%	3%	3%	7%	6%	4%	5%	17%	6%	2%
Issues Below Threshold for IRS Action	963	662	1116	2413	1572	1405	1235	697	1432	1415
%	15%	10%	11%	11%	11%	11%	7%	7%	11%	12%
Information Already Known	847	271	1165	1372	0	557	127	47	54	21
%	13%	4%	11%	6%	0%	4%	1%	0%	0%	0%
Statute of Limiations related	429	294	710	959	894	436	524	403	746	640
%	7%	5%	7%	5%	6%	3%	3%	4%	6%	6%
Other	2199	4360	1500	1781	2508	1177	4885	1998	4535	746
%	33%	67%	14%	8%	17%	9%	29%	19%	36%	6%
Total	6595	6520	10615	21124	14445	12833	16655	10632	12584	11605

For the years data is available, between 2-6% of claims are annually closed because awards were paid in full. That is a small percentage, which could lead one to think it generates too many frivolous claims. Yet, looking further at the data suggests that most claims can be dismissed without much administrative work – the categories 'Unclear/Non-Specific/No Actionable Issue' as well as 'Issues Below Threshold for IRS Action' likely consists of claims that can be rejected almost at a first glance. The one category where substantially more time is likely spent is on cases resulting in 'No Change', a category that includes 'Claims where the IRS took action on the whistleblower's information and either the entire action resulted in no change or action resulted in changes but not on the issues raised by the whistleblower.'[685] This constitutes around 3-7% of closures annually.

[684] Figure 6 contains stylized facts for ease of exposition. Complete data is available in Appendix A.
[685] IRS OWB FY22.

D. The SEC Programme

1. The pre-2011 Programme

An SEC whistleblower programme existed before the Dodd-Frank Act, as a little obscure Section 21A(e) enacted by the Insider Trading and Securities Fraud Enforcement Act of 1988.[686] This piece of legislation was a reaction to the stock market crash, or 'Black Monday', on the 19th of October 1987, when the Dow Jones Industrial Average dropped 22.6%. It was believed that improving enforcement of securities laws was essential to restoring investors' confidence.[687] That programme only gave the SEC the authority to provide payments relating to insider trading,[688] and a 2010 found that it had paid out a mere $159,537 to a total of five claimants throughout its entire 20-year existence.

2. The 2011 Programme

The modern SEC programme was created by Section 922 of the Dodd-Frank Act (The Dodd–Frank Wall Street Reform and Consumer Protection Act), enacted on July 21, 2010, and amended the Securities Exchange Act of 1934. Occupying a mere ten pages in the 849-page act, Section 922, by and large, mirrors what was believed to be successful features of the FCA and IRS programmes. Some of these features are worth commenting on. The protections and relief under Dodd-Frank are quite generous: reinstatement with the same seniority, two times back pay, compensation for litigation costs, expert witnesses, and reasonable attorney fees.[689] The statute of limitations for bringing an action alleging retaliation is also quite generous: no more than six years after the violation or no more than '3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation'.[690] Regulatory and law enforcement employees are barred from obtaining an award,[691] as well as any whistleblower who is convicted of a criminal violation related to the action.[692] Whistleblowers can be anonymous if they are represented by an attorney,[693] but has to disclose their identity prior to obtaining an award.[694] If a whistleblower wants to dispute a no-reward decision, the programme allows for appeals of determinations within 30 days after the Commission reaches a final judgment.[695] It only allows appeals of no-reward decisions and not appeals arguing that the reward paid was not proportional to the information provided or for other reasons should be greater (i.e., the wrong percentage in the 10-30% range was selected). Dodd-Frank established an 'investor protection fund' which is financed entirely by monetary sanctions paid to the SEC by securities law violators and out of which whistleblowers are paid.[696] If this fund runs low and a reward cannot be paid, the remainder of the reward is paid from the sanctions collected in the specific action on which the award is based.[697] When designing the rules implementing this statute, the SEC's responses to public comments provide insight into how they reasoned about design.

One issue is how to deal with culpable whistleblowers, which is commented on in the

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[686] Pub L. No.100-704.

[687] SEC Office of Inspector General, 'Assessment of the SEC's Bounty Program' (Report No. 474, 29 March 2010) 1.

[688] Ibid 2.

[689] Sec 922h(1)(C).

[690] Sec 922h(1)(B)(iii).

[691] Those barred are listed in Sec 922c(2)(A).

[692] Sec 922c(2)(B).

[693] Sec 922d(2)(A).

[694] Sec 922d(2)(B).

[695] § 240.21F-13

[696] 15 U.S.C § 78u–6(g).

[697] 15 U.S.C § 78u–6(g)(3)(B).

design of several rules. Rule 240.21F-15, for example, is entitled 'No amnesty' and states that Section 21F does not provide amnesty or immunity to whistleblowers for their misconduct. Although 'all of the commentators urged the Commission to adopt a liberal approach to granting amnesty to whistleblowers',[698] and one commentator noted that those with high-quality information may be deterred from coming forward if they are concerned about their liability, the SEC adopted the rule as proposed.[699] There is a concern that those who possess the best information are often culpable to some extent, while any general amnesty rule would be complicated to formulate. If imprecise, it could enable the entrapment of others and subsequent reporting along with amnesty and a reward. That said, this is not an impossibility in terms of design as amnesty for specific types of offences can be included, as can be necessary in some contexts.[700]

In Rule 21F-16, 'Awards to Whistleblowers who Engage in Culpable Conduct', the SEC proposed that any monetary sanctions that the whistleblower is ordered to pay 'or that an entity is ordered to pay if the entity's liability is based substantially on the conduct that the whistleblower directed, planned, or initiated'[701] should not count toward meeting the 1$ million threshold or be taken into account when calculating the size of the whistleblower reward. In short, whistleblowers should not receive or qualify for rewards based on violations they directed, planned, or initiated. As with the 'No Amnesty' rule, critics pointed out that culpable persons have the best information and that this rule would be insufficient to motivate them to come forward, leading to delays in detection.[702] Some even contended that the Commission did not have the statutory authority to limit rewards in this way,[703] as the statute only states that no award shall be made 'to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section'.[704] Others commented that awarding culpable whistleblowers would incentivise wrongdoing, provide incentives to conceal fraud until its severity reaches the $1 million threshold, and harm internal compliance programme.[705] While the SEC chose to adopt the rule as proposed, its reasoning is insightful and recognises the need for a balancing act. The SEC noted that a *per se* exclusion of culpable whistleblowers would be inconsistent with Section 21F and the original spirit of the False Claims Act, which was 'premised on the notion that one effective way to bring about justice is to use a rogue to catch a rogue',[706] and that 'This basic law enforcement principle is especially true for sophisticated securities fraud schemes.' Yet, not limiting culpable whistleblowers' award eligibility would 'create incentives that are contrary to public policy'.[707] According to the SEC, the final rule incentivises less culpable individuals to come forward with information on illegal conduct involving others while limiting awards based on the whistleblower's culpable conduct. Amnesty and culpable conduct, more generally, will be discussed in detail in Chapter 5.

Another issue that may not be immediately recognisable as a problem is the voluntariness of whistleblower disclosures. Rule 21F-4(a) initially proposed that whistleblower reward eligibility should be contingent on providing the information 'voluntarily', defined as providing the Commission information 'before receiving any request, inquiry, or demand

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[698] SEC, 'Securities Whistleblower Incentives and Protections' (2011) 76 Federal Register 34349.
[699] Ibid 34349.
[700] This topic is discussed in further detail in Chapter 5(D).
[701] Ibid 34349.
[702] Ibid.
[703] Ibid 34349.
[704] Sec 922c(2)(B)
[705] Ibid 34350.
[706] Ibid.
[707] Ibid.

from the Commission, Congress, any other Federal, state or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission was relevant'.[708] The initial proposed rule moreover covered formal and informal requests. Nor would information have been provided 'voluntarily' if the documents the whistleblower provided 'were within the scope of a prior request, inquiry, or demand to the whistleblower's *employer*, unless the employer failed to make production to the requesting authority in a timely manner'.[709] Finally, providing information would not be considered voluntary if the whistleblower had a legal or contractual duty to report the violation. These restrictions were intended to encourage the earliest possible reporting of violations to reduce the probability that any event could occur which would cause the information to be submitted non-voluntarily. According to this rule, if a whistleblower's employer had received any formal or informal request from any of the entities mentioned above, that could make any further submission by the whistleblower, unbeknownst to him or her, non-voluntary. The SEC agreed with critics who pointed out that such a broad construction of 'voluntary' may deter high-quality submissions. In response, they changed the rule such that only requests that were 'directed to the whistleblower or to his or her personal representative'[710] would make any future submission non-voluntary. These prior requests also have to relate to the subject matter of the whistleblowing, i.e., a prior request does not make any future whistleblowing claim on an unrelated matter non-voluntary.

The SEC does not only pay rewards for its own successful enforcement actions. Under Dodd-Frank, the SEC is authorised to pay awards not only in 'covered actions', which is defined as an action 'brought by the Commission under the securities laws that result in monetary sanctions exceeding $1 million',[711] but also 'related actions' which include actions by 'The Attorney General of the United States, an appropriate regulatory authority [...], a self-regulatory organisation, or a State Attorney General in connection with a criminal investigation'.[712] Recoveries in 'related actions' can be substantial: in 2021, one whistleblower received a $70 million award 'arising out of related actions by another agency'.[713] Sanctions in related actions do not replenish the Investor Protection Fund, as only sanctions 'collected by the Commission' are deposited into the fund.[714] The related-action clause is powerful. Stephen Kohn gives the example of a $70 million reward paid to a whistleblower 'for reporting violations of a law that were *not* covered under the Securities Exchange Act, that was *not* investigated by the SEC, and whose penalties were *not* collected by the SEC.'[715] The reward was further paid 'based on a violation of law that had *no* provision authorizing the payment of any money to a whistleblower'.[716] Thus, whistleblower rewards under Dodd-Frank extend much further than one may imagine. If a whistleblower provides the SEC evidence which leads to an agency other than the SEC issuing a fine, the whistleblower is still eligible for a reward in that related action. However, the $1 million

[708] Ibid 34306.

[709] Ibid 34306. Author's emphasis.

[710] Ibid 34307.

[711] 15 U.S.C. 78u–6(a)(1).

[712] 'Appropriate regulatory authorities' are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. See SEC (n 698) 34328 referring to the definition in Sec 3(a)(34) of the Exchange Act (1934) where the term 'appropriate regulatory agency' is defined with respect to municipal securities dealers, see SEC, 'Whistleblower Program Rules' (2020) 85 Federal Register 70898.

[713] SEC, 'SEC Surpasses $1 Billion in Awards to Whistleblowers with Two Awards Totaling $114 Million' (2021, Press Release) <https://www.sec.gov/news/press-release/2021-177> accessed 19 September 2024.

[714] 15 U.S.C § 78u–6(g)(3)(A). There are other sources of deposits, but not from related actions.

[715] Kohn 2023 (n 315) 193. Emphasis in original.

[716] Kohn 2023 (n 315) 193. Emphasis in original.

threshold must be reached by penalties issued by the SEC or Commodities Futures Trading Commission (CFTC).[717]

3. The 2020 Amendments

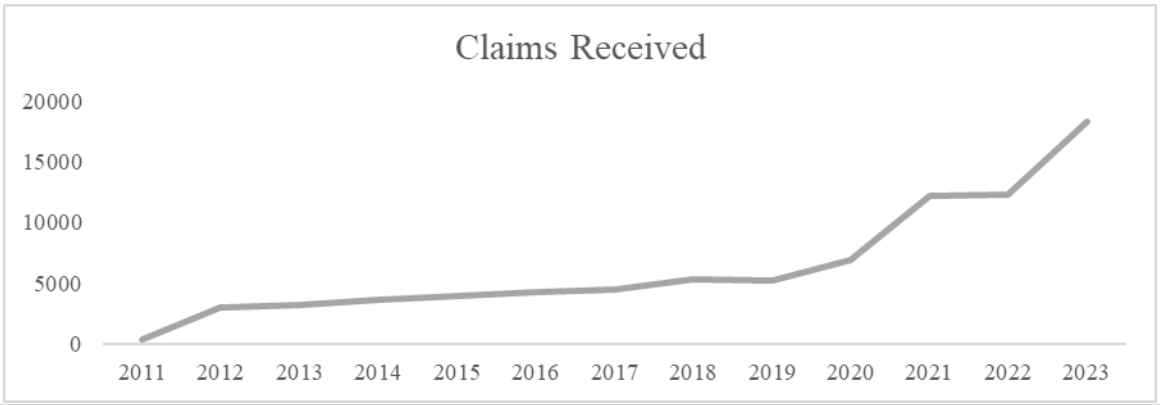
The SEC changed some of its rules in 2020. One change was modifying rule 21F-4(d)'s definition of 'Action' by expanding the scope of award eligibility to cover Deferred Prosecution Agreements and Non-Prosecution Agreements entered into by the DoJ. They considered that Congress did not intend for whistleblower rewards to be contingent on what procedural vehicle had been selected to resolve an enforcement matter.[718] The SEC also accepted a new paragraph under rule 21F-6, according to which, if the monetary sanctions collected are $5 million or less, whistleblowers are presumptively entitled to the maximum statutory amount of 30% if there are no negative award factors.[719] According to the Commission, this rule will 'save the majority of meritorious whistleblowers time and effort in explaining what they believe is the appropriate Award Amount in their award applications and in any subsequent response the whistleblower might file in response to a preliminary determination.'[720] This is a significant change, as it covers most awards paid out historically and likely will cover most awards in the future. It is also significant from the perspective of legal transplantation, as the SEC concluded that for these cases, 'experience with the program demonstrates that there is no significant programmatic value in expending time and effort weighing minor increase or reductions to the Award Amount'.[721] Expending hours on minor issues for exact percentage rates may cost more than simply paying the statutory maximum, which likely also allows for faster payments to whistleblowers as well as an increased incentive for whistleblowers who fall into this category.

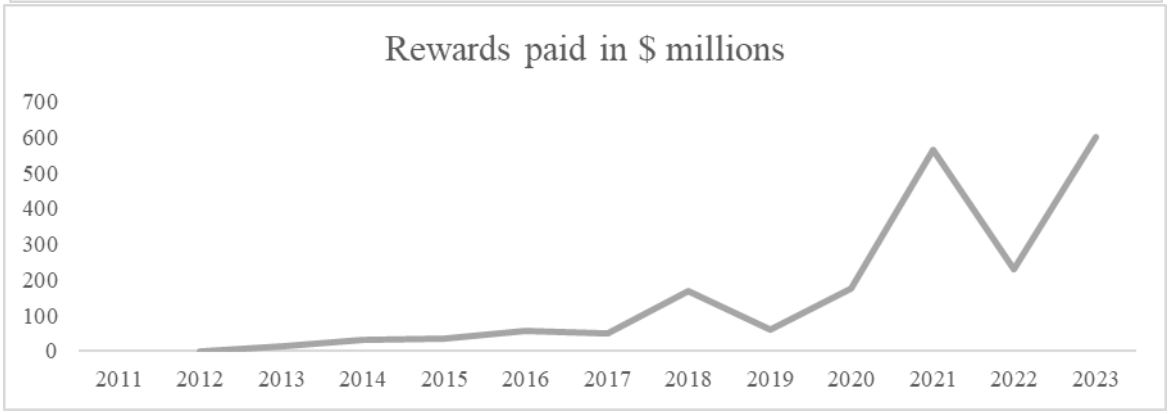
4. Performance

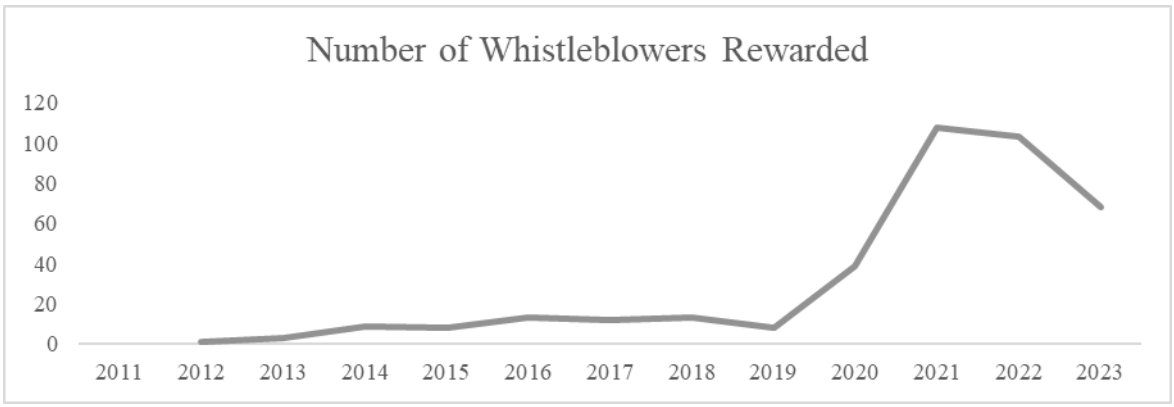
Despite its relatively short existence, the SEC programme has generated a significant amount of data and empirical studies that allow for the assessment of its performance. There are some incongruities in the administrative data, but not on a scale that would invalidate the trends they show.[722] Starting with the simplest form of descriptive data, the graphs below show the amounts paid to whistleblowers, the number of claims the SEC receives annually, and the number of whistleblowers who receive rewards.

Figures 10-12

[717] Kohn 2023 (n 315) 194.
[718] SEC (n 712) 70901.
[719] SEC (n 712) 70911.
[720] SEC (n 712) 70911.
[721] SEC (n 712) 70911.
[722] In earlier reports. The Office of the Inspector General also found deficiencies in OWB's data management, which led to inaccurate and incomplete data. See SEC Office of Inspector General, 'SEC's Whistleblower Program: Additional Actions Are Needed To Better Prepare for Future Program Growth, Increase Efficiencies, and Enhance Program Management' Report No. 575 (19 December 2022) 16.





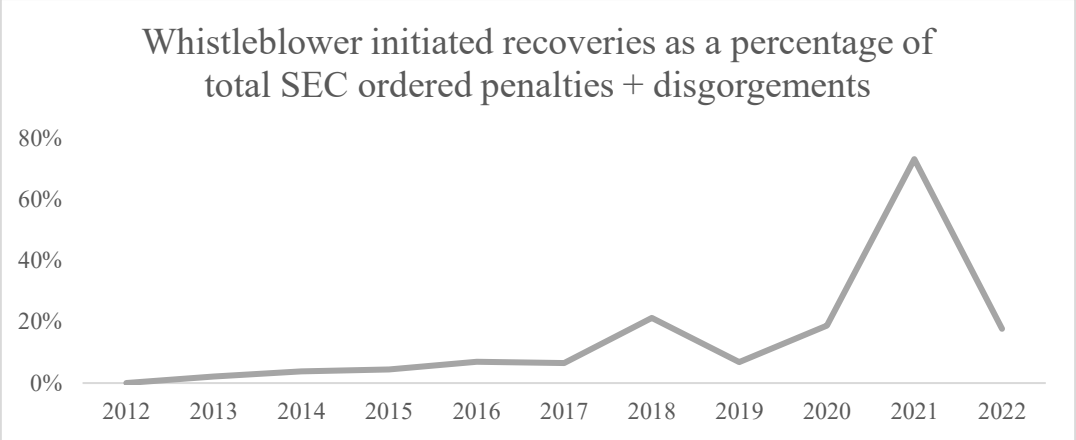


This data tells us relatively little about the programme's success, but other comparisons do. In annual reports, the SEC discloses how much in disgorgement and penalties it ordered in the prior fiscal year.[723] Since introducing Dodd-Frank, the agency has ordered between $2.8 billion and $6.4 billion in penalties and disgorgements annually. We know that since the inception of the WB programme until the FY 2022 report, 'information from meritorious whistleblowers have resulted in orders for more than $6.3 billion in monetary sanctions'.[724] We also know that the average percentage pay whistleblowers have received throughout the programme's history is around 20%. Using this information, we can assess how important whistleblowers have been relative to all other enforcement activities at the SEC, as shown in the graph below.

Figure 13

[723] This information is disclosed in the annual SEC Agency Financial Reports and the SEC Division of Enforcement Reports <https://www.sec.gov/reports> accessed 19 September 2024.

[724] SEC OWB FY2022 1.



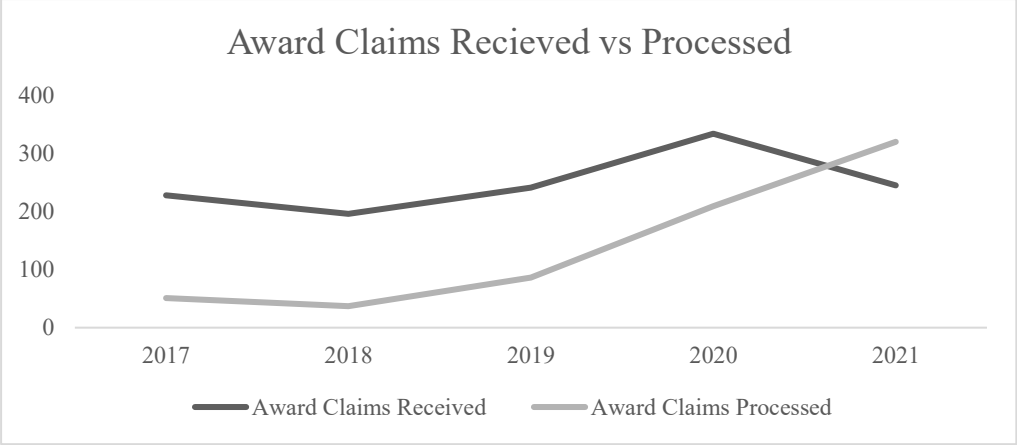
Throughout the programme, whistleblower information aided in 14,7% of ordered penalties and disgorgement; in the last five years, it aided in 24,09%. There are, however, compelling reasons to believe that the programme's first five years are not representative of its potential or indicative of its future performance. This is primarily due to the process from submitting the tip to obtaining an award. After a tip is submitted, it is reviewed by staff as a 'matter under inquiry', during which staff has 60 days to decide whether to proceed to the next step and open an 'informal investigation'. The SEC can then choose to proceed with a 'formal investigation', which can lead to the final step, the 'enforcement action'. This final step is the only public proceeding in this process and involves the SEC filing a complaint in court or an order instituting an administrative proceeding.[725] The median 'time to file', i.e., complete an investigation and file an enforcement action, was 21.6 months in FY2020 (a five-year best at the time).[726] Larger and more complicated cases, typically also involving larger fines and correspondingly larger rewards, also take longer to reach the enforcement action stage. After the SEC successfully brings an enforcement action, they publish the action under the 'Notice of Covered Action' section and whistleblowers have 90 days to apply for a reward. The average processing time for these award applications is then around two years. This implies that the median time from submitting a tip to obtaining a reward is around four years. The SEC has also had a significant backlog of reward claims to process, which the agency has only started to remedy in recent years. The Office of Inspector General (OIG) reviewed how many award claims the OWB received versus how many it processed for the years 2017 – 2021, as reproduced below.[727]

Figure 14

[725] For more details, see Urska Velikonuja, 'Reporting Agency Performance: Behind the SEC's Enforcement Statistics' (2016) 101 Cornell Law Review 901, 925.

[726] SEC, Division of Enforcement. '2020 Annual Report' (2021) 6 <https://www.sec.gov/files/enforcement-annual-report-2020.pdf> accessed 25 September 2024.

[727] SEC Office of Inspector General 2022 (n 722) 11.



This graph shows that compared to how many award claims they received, only a fraction (around 25%) were processed in 2017 and 2018. In 2020 and 2021, substantially more claims were processed, and these were both record years in terms of payments to whistleblowers. In their FY2020, the OWB noted that that year alone 'represent 31% of the total dollars awarded to all whistleblowers and 37% of the individual award recipients since the beginning of the program'.[728] The momentum increased, as in FY2022, the SEC published 163 notices of covered actions and provided 103 awards.[729] This contrasts with the programme's slow initiation when a mere 34 awards were paid out during the first five years.[730] This administrative data suggest that the programme has been successful and, *ceteris paribus*, that it is likely to perform even better in the future. Another factor that lends support to increased effectiveness over time is the perception of the programme. There are numerous reward programmes that could be described as 'paper programmes', which encourage the submission of information but rarely if ever pay rewards and are mismanaged in other ways.[731] When numerous high-dollar rewards are paid out it attracts more attention and is evidence that the agency is serious about paying whistleblowers, which in turn is likely to incentivise more to come forward.

The data discussed above only concerns how well the programme has detected violations and how significant this detection mechanism has been compared to other enforcement initiatives. Yet, deterrence is arguably as important but is only achieved through behavioural changes in response to the programme. Several empirical studies have found that the SEC programme did deter securities violations. Vishal Baloria and colleagues studied the effects of Dodd-Frank by examining investors' responses to events relating to the proposed regulations, focusing on firms that lobbied against the implementation of Dodd-Frank's whistleblower provisions.[732] They found that excess stock returns among lobbying firms were greater than for similar non-lobbying firms, an effect that is also more pronounced for lobbying firms with weaker existing whistleblowing programmes. This suggests that investors expected Dodd-Frank to benefit firms with weak whistleblowing programmes and those that lobbied against the Act. Moreover, they found that Dodd-Frank is value-increasing for the

[728] SEC OWB, '2020 Annual Report to Congress' (2021) 2 <https://www.sec.gov/files/2020_owb_annual_report.pdf> accessed 19 September 2024.

[729] SEC OWB, 'SEC Whistleblower Office Announces Results for FY 2022' (2022) <https://www.sec.gov/files/2022_ow_ar.pdf> accessed 19 September 2024.

[730] Baer 2017 (n 273) 2217.

[731] This will be discussed in the next Chapter, including examples.

[732] Vishal Baloria, Carol Marquardt, and Christine Wiedman, 'A Lobbying Approach to Evaluating the Whistleblower Provisions of the Dodd-Frank Reform Act of 2010' (2017) 34 Contemporary Accounting Research 1305.

average US firm. Vishal Baloria and colleagues studied the deterrent effects of Dodd-Frank's whistleblower provisions by examining its impact on aggressive financial reporting.[733] They measured aggressive reporting using the absolute value of abnormal accruals and found a significant reduction in abnormal accruals (approximately 11%) following the introduction of Dodd-Frank. They also found that reductions in aggressive reporting are more significant for firms with weaker internal reporting programmes, where employees are more likely to go directly to the SEC as internal reporting is less likely to succeed. A 2020 study by Jacob Raleigh assessed the effects of Dodd-Frank's whistleblower provision on reducing insider trading by corporate insiders, finding that for a sample of firms that lobbied against Dodd-Frank's whistleblower provisions, the profitability of insider purchases was significantly reduced post-Dodd-Frank relative to the profitability of other insiders. Similar results are obtained for insiders within firms with weak internal whistleblower programmes, which are more likely to be sensitive to the new regulation, and for other analyses of insider transactions.[734] A 2022 study by Philip G. Berger and Heemin Lee found that exposure to Dodd-Frank reduced the likelihood of accounting fraud by 12-22% relative to a control group of firms that were already exposed to whistleblower rewards under state-level False Claims Acts.[735] Finally, a 2022 study by Qingjie Du and Yuna Heo examined the effect of Dodd-Frank's whistleblower provisions on state-level corruption in the US. They start by establishing that political corruption has substantial negative effects on how much firms invest and go on to show how this negative effect became insignificant after Dodd-Frank's whistleblower provisions. They also found that this effect was more pronounced in states with high corruption.[736] In summary, there is significant empirical evidence in favour of the effectiveness of the SEC programme in deterring violations.

Less important due to possible bias, but yet important from a perspective of transplanting reward regimes, is the bi-partisan support the programme has received from SEC staff. Testimonies by practitioners have been highly positive of Dodd-Frank's whistleblower provisions. Mary Jo White, former Chair of the SEC, stated of the programme that 'it has rapidly become a tremendously effective force-multiplier, generating high-quality tips and, in some cases, virtual blueprints laying out an entire enterprise, directing us to the heart of an alleged fraud.'[737] In another set of remarks, White commented that 'we also continue to receive higher quality tips that are of tremendous help to the Commission in stopping ongoing and imminent fraud, and lead to significant enforcement actions on a much faster timetable than we would be able to achieve without the information and assistance from the whistleblower.'[738] Similar sentiments about the programme have been expressed widely by

[733] Christine I. Wiedman and Chunmei Zhu, 'Do the SEC Whistleblower Provisions of Dodd-Frank Deter Aggressive Financial Reporting?' (2020) SSRN Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105521> accessed 19 September 2024.

[734] Jacob Raleigh, 'The Deterrent Effect of Whistleblowing on Insider Trading' (2023) Journal of Financial and Quantitative Analysis, Early Access.

[735] Philip G. Berger and Heemin Lee, 'Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?' (2022) 60 Journal of Accounting Research 1337.

[736] Qingjie Du and Yuna Heo, 'Political corruption, Dodd-Frank whistleblowing, and corporate investment' (2022) 73 Journal of Corporate Finance 1.

[737] Mary Jo White, 'Remarks at the Securities Enforcement Forum.' (9 October 2013) <https://www.sec.gov/news/speech/spch100913mjw> accessed 19 September 2024.

[738] Mary Jo White, 'The SEC as the Whistleblower's Advocate.' (30 April 2015). <https://www.sec.gov/newsroom/speeches-statements/chair-white-remarks-garrett-institute> accessed 19 September 2024.

high-ranking officials.[739,740]

E. Other US Programmes

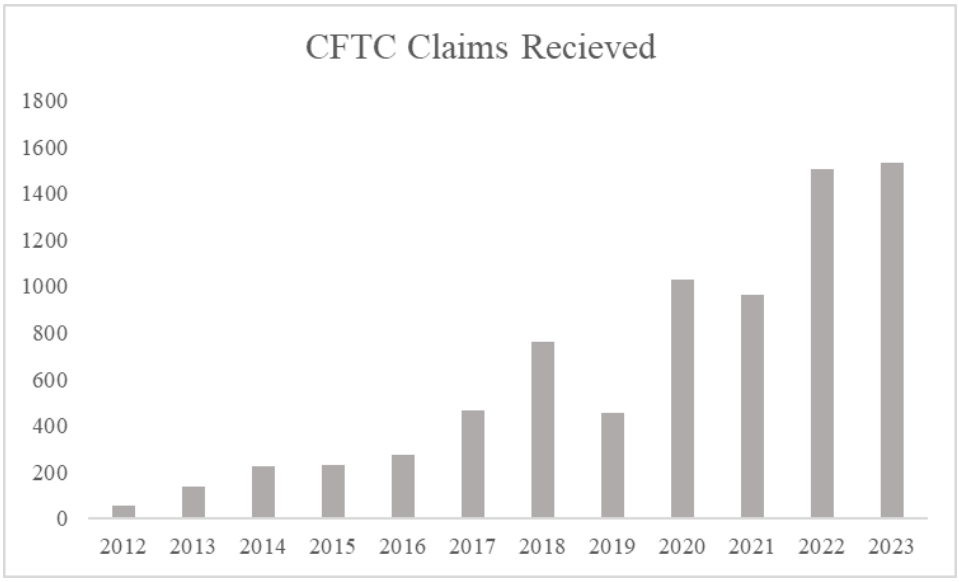
Section 748 of Dodd-Frank also established another reward programme at the Commodity Futures Trading Commission (CFTC). The CFTC regulates financial derivatives, including futures, swaps, and some options. Notable enforcement actions involving whistleblowers include against Vitol, Inc. Vitol, whom the CFTC sanctioned with a $95 million fine in 2019, and Swiss-based Glencore International A.G., which the agency sanctioned with a $1.18 billion fine in 2022 for 'manipulative and deceptive conduct based on foreign corruption in the U.S. and global oil markets.'[741] As with many other programmes, the CFTC initially received relatively few claims which then grew significantly as the agency started issuing awards and the programmes became more widely known.

Figure 15

[739] Jane Norberg, the former head of the SEC's Office of the Whistleblower, stated that 'the total award amount demonstrates the invaluable information and assistance whistleblowers have provided to the agency and underscores the program's extraordinary impact on the agency's enforcement initiatives.' See SEC, 'Annual Report to Congress on the Dodd-Frank Whistleblower Program' (2016) Securities and Exchange Commission (SEC), Office of the Whistleblower, 3. In comments from 2020, former SEC Chairman Jay Clayton stated that the programme 'has been a critical component of the Commission's efforts to detect wrongdoing and protect investors in the marketplace.' Jay Clayton, 'Strengthening our Whistleblower Program' (*SEC*, 23 September 2020) <https://www.sec.gov/newsroom/speeches-statements/clayton-whistleblower-2020-09-23> accessed 19 September 2024.

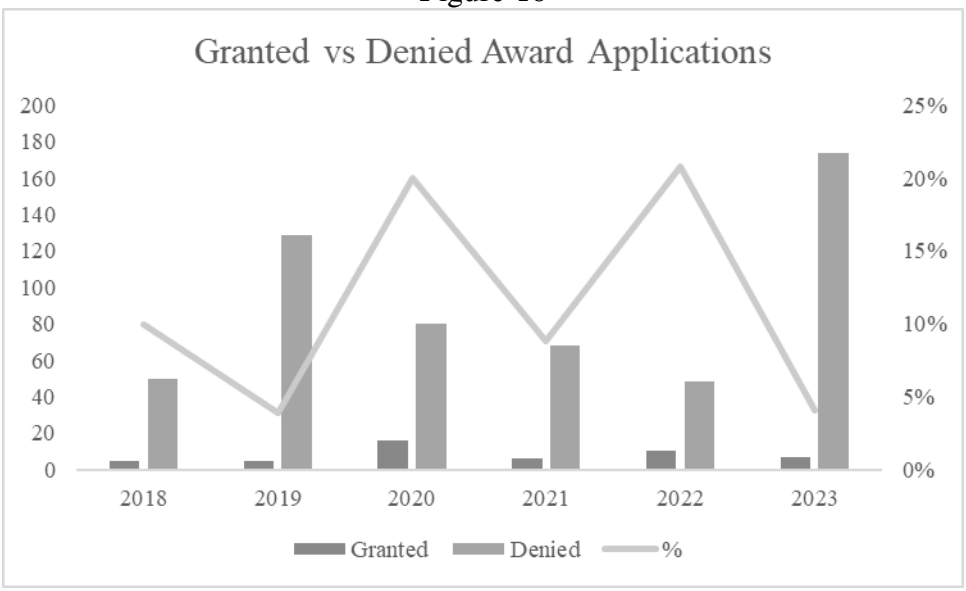
[740] Prior SEC Commissioners' comments on the programme include Hester M. Peirce, who stated: '[the whistleblower program has] become an integral part of our enforcement program'; Elad L. Roisman: 'to call this program a success is an understatement'; Allison Herren Lee: 'the Commission's whistleblower program has enabled us to identify and pursue fraudulent conduct, ongoing regulatory violations, and other wrongdoing that would otherwise have gone undetected'; Caroline A. Crenshaw: 'whistleblowers are of tremendous value to the agency. They are a critical part of our enforcement program'. See Stephen M. Kohn and Mary Jane Wilmoth, 'The 100 Whistleblowers Who Changed Wall Street.' (*The National Law Review*, 28 September 2020) <https://www.natlawreview.com/article/100-whistleblowers-who-changed-wall-street> accessed 19 September 2024.

[741] Kohn 2023 (n 315) 164.



In 2019 they received 117 award applications, with the same number hovering around 140-150 applications up until 2023 when it doubled to 301. The CFTF believes this spike was likely due to the agency offering a record $200 million reward in the prior fiscal year.[742] As of FY2017, the CFTC had issued a total of four awards totalling approximately $11 million.[743] By the end of FY2023, the CFTC had granted awards of $350 million. Since 2018, reliable data is available on how many award applications the CTFC received in a given fiscal year as well as how many it granted versus denied. Between 5% – 20% of award claims are granted in this period.

Figure 16



Beyond this administrative data, there is little empirical evidence on the CFTC programme and is therefore only considered in brief.

[742] Commodity Futures Trading Commission, 'Whistleblower Program & Customer Education Initiatives: 2023 Annual Report' (October 2023) 9.

[743] Commodity Futures Trading Commission, 'Annual Report on the Whistleblower program and Customer Education Initiatives' (October 2017) 4.

In the context of money laundering and sanctions evasion, the Anti-Money Laundering Whistleblower Improvement Act of 2022 implemented a Dodd-Frank-like programme managed by the Financial Crimes Enforcement Network (FinCEN). As of today, no award has been paid. The Vehicle Safety Act of 2015 also instituted a 10-30% reward regime, which requires whistleblowers to first report the complaint internally, although that requirement can be waived under certain conditions.[744] As of today, no award has been paid.

As the programmes discussed in this Chapter only cover some specific forms of wrongdoing, the DoJ introduced a new pilot programme on August 1, 2024, to fill the gaps left open by the specific focus of prior reward programmes.[745] In what could be the broadest expansion of reward programmes in US history, the new pilot programme covers numerous offences, including domestic bribery, crimes 'involving private or other non-public health care benefit programs' not covered by the FCA, violations by 'financial institutions, insiders, or agents' for schemes involving money laundering, and anti-money laundering and anti-money laundering violations.[746] This development is too recent to comment on.

F. Conclusions

This Chapter considered three reward programmes in the US. Section B, *The False Claims Act*, began with considering the law that inspired further use of reward programmes in the US. While we know little about its performance between 1863 and the mid-20th century, its modern rendition, since amended in 1986, has proven incredibly effective in enhancing the detection and deterrence of fraud against the government. Numerous sources support this conclusion: administrative data shows that as of 2023, around 85% of all fraud against the government is detected and prosecuted with the help of whistleblower information. Numerous rigorous empirical studies are also available, which found significant detection and deterrence effects of the federal and state-level FCAs. Finally, cost-benefit estimates suggest that the FCA has been highly cost-effective and has been widely praised by enforcement staff at the DoJ. Further, it is not necessarily idiosyncrasies of private enforcement in the US that have driven this success. Instead, it appears to function best when private persons aid the government with information, and the government prosecutes the case. This is promising, as the model can be exported more widely.

Section C, *The IRS Programme*, detailed another long-standing reward programme dating to 1872. The Section focused on modern renditions of the programme, describing its use before the significant 2006 amendments and what led it to be revised. It concluded that the 2006 amendments did increase the share of recoveries due to whistleblowers. It also commented on how the IRS processes claims and presented aggregated agency data to better understand the programme. Finally, it noted the particularities of the tax context, which allows for various appeals and is typically shrouded in tax secrecy, which has presented difficulties for whistleblowers. Unfortunately, and likely partially due to tax secrecy, there are no empirical studies on the performance of the tax programme or the effect of the 2006 amendments.

Section D, *The SEC Programme*, reviewed the most significant development in the US reward context for some time when Dodd-Frank extended protections to securities violations. This Section noted the paltry results of the pre-2010 programme and focused on how the SEC reasoned in designing and implementing the rules for the programme and the relative importance of the whistleblower programme compared to total enforcement efforts. Finally, it reviewed the numerous empirical studies on the programme, which found significant

[744] 49 U.S.C §30172 (c)(2)(E).

[745] Department of Justice, 'Department of Justice Corporate Whistleblower Awards Pilot Program' (1 August 2024) <https://www.justice.gov/criminal/media/1362321/dl?inline> accessed 19 September 2024.

[746] Ibid 5.

detection and deterrence effects. The programme has also been praised bi-partisanly by the SEC Commissioners.

Section E, *Other US Programmes*, briefly reviewed some other developments, including expanding rewards to money laundering and a new pilot programme that aimed to fill the gaps created by the sectorial focus of the programmes discussed in this section.

CHAPTER 5: DESIGNING EFFECTIVE REWARD PROGRAMMES

A. Introduction

The previous Chapter has shown how valuable whistleblowers and reward programmes can be in combating corporate wrongdoing. Yet, that is not universally true as numerous countries presently have programmes in place, many of which are performing poorly. Even if we look at the US where they today function well, that was not always the case. The FCA was amended in 1943 to reduce the maximum reward from no more than 50% to no more than 25% of recovered money if the relator litigated the case, or 10% if the government litigated the case.[747] Between 1943 and 1986, these changes, together with a public information bar, led to the *qui tam* provision falling almost completely out of use.[748] With the 1986 amendments, the FCA went from entirely impotent to the main driver of enforcement in this area. The pre-2011 SEC programme only paid out $159,537 to five claimants in its 20-year history, and the Bank Secrecy Act had a reward programme capped at $150,000 of which it is unknown whether any rewards were paid out. There are also numerous reward programmes internationally with rewards around $100,000,[749] yet there is little to no evidence that these have been effective. Ineffective reward programmes have also been introduced in the US with respect to wildlife protection laws. The Lacey Act, which was passed in 1900, was amended in 1981 to provide rewards for whistleblowers. Rewards are discretionary and there is no cap on how much whistleblowers can receive. The agencies responsible for implementation are the US Fish and Wildlife Service and the National Oceanic Atmospheric Administration. While the Fish and Wildlife Services paid a handful of rewards, they were in token amounts and the NOAA has paid zero awards in the programme's 40-year existence.[750] Nor are the amount paid related to recoveries or fines issued, and rewards can be paid even if there are no collected proceeds.[751] These examples suggest that any rushed transplantation of a reward regime is unlikely to be successful unless the implementers understand what design dimensions have driven the success of the US programmes considered in Chapter 4.

The final question this Thesis seeks to answer is what we know about optimally designing reward programmes. This is important not only for countries looking to adopt reward programmes but also for the numerous countries looking to optimise their current programmes, many of which have been adopted in developing countries. While Nigeria has debated introducing bills providing whistleblower protections on numerous occasions, they have not yet become law.[752] In 2016, however, the country introduced a whistleblower corruption incentive scheme, offering 2.5 – 5% the of money recovered as a reward.[753] The programme was successful in its initial years, as a 2018 review found that 1983 tips were received and 623 investigations completed, resulting in the recovery of over $378 million.[754] Since 2018, the programme appears to have lost its momentum. A 2021 survey of 7000

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[747] Doyle (n 301) 8.

[748] Phelps (n 326) 255.

[749] Particularly in competition law, Spagnolo and Nyreröd (n 274) review some of these, including Bulgaria, Slovakia, South Korea, and the UK.

[750] Kohn 2023 (n 315) 189.

[751] Kohn 2023 (n 315) 190.

[752] Ejemen Ojobo, 'A Review of the Effectiveness of the Nigerian Whistleblowing Stopgap Policy of 2016 and the Whistleblower Protection Bill of 2019' (2023) 67 Journal of African Law 487.

[753] African Centre for Media & Information Literacy (AFRICMIL), 'One Year of the Corruption Anonymous (CORA) Project' (2018) <https://whistleblowingnetwork.org/WIN/media/pdfs/Fraud-corruption-ME-NA-Nigeria-Whistleblower-report-2018.pdf> 11 Accessed 19 September 2024. Nigeria has around 218 million citizens and an annual GDP of around $500 billion.

[754] Ibid 46.

respondents indicated that most whistleblowers submitted tips for personal gain but would not submit tips if there was insufficient legal backing from the Federal Government.[755] Numerous instances of reprisals against whistleblowers have also been documented,[756] along with complaints about undue delay in rewards and accusations that the programme is being used to go after political opponents.[757] In a survey of professionals and students in Nigeria,[758] Oliver Nnamdi Okafor and colleagues found that while most were positive toward the reward programme, 15% of respondents perceived the programme as highly successful and 63% as promising.[759] While 22% perceived the whistleblower programme as unsuccessful, many were sceptical of the institutions and judiciary managing it, and numerous respondents 'decried a strikingly low level of whistleblowing program awareness among the citizenry'[760] Hence, that verdict may not be about the programmes in themselves but about the institutions and surrounding climate for whistleblowers.

Ghana's Revenue Authority offers rewards for information on under-declaration of taxes, smuggling or diversion of goods, under-invoicing, non-issuance of VAT invoices, alteration and falsification of records, and failure to register for tax purposes.[761] Rewards for information leading to recoveries of less than $163,000 are capped at $1633, and recoveries above are capped at $16,336.[762] In 2022, the Ghana Revenue Authority 'launched an enhanced Informant Award Scheme', which yielded GH₵ 421 million ($27 million) and $93 million in tax revenue.[763] In Kenya, a bill is currently being debated that would give the Ethics and Anti-Corruption Commission the authority to develop whistleblower policies along certain guidelines—effectively, to develop regulations.[764] The bill, entitled The Whistleblower Protection Bill, proposes that a public entity shall offer whistleblowers monetary awards if their disclosure leads to the arrest and conviction of an accused person or where money or public assets are recovered. Rewards are offered of 10% of the money recovered, or 10% of the value of the assets recovered – with no mention of a cap on rewards.[765] Brazil is another country that has experimented with reward programmes starting in 2018, providing 5% rewards to whistleblowers. The precise nature of this programme is unknown, and it appears to have been introduced in an *ad hoc* fashion.[766] Nor is administrative data available on its use. In 2024, however, a scandal ensued at the giant retailer Lojas Americanas after they reported a $3.88 billion accounting 'error' which subsequently reduced their market cap by 92%.[767] The response was the introduction of a programme modelled almost entirely on that

[755] Doyin Ojosipe, 'AFRICMIL Launches Survey on Five Years of Whistleblowing Policy in Nigeria' (2021, December 10) African Centre For Media & Information Literacy < https://www.africmil.org/africmil-launches-survey-on-five-years-of-whistleblowing-policy-in-nigeria-2/ > accessed 19 September 2024.

[756] Ojobo (n 752) 492.

[757] Ojosipe (n 755).

[758] Oliver Nnamdi Okafor, et al, 'Deployment of whistleblowing as an accountability mechanism to curb corruption and fraud in a developing democracy' (2020) 33 Accounting, Auditing & Accountability Journal 1335.

[759] Ibid 1346.

[760] Ibid 1354.

[761] Ghana Revenue Authority, 'GRA Informant Award Scheme' < https://gra.gov.gh/news/portfolio/gra-informant-award-scheme/ > accessed 19 September 2024.

[762] Ibid.

[763] Ghana Revenue Authority, 'Annual Report 2022' (2023) 6 < https://gra.gov.gh/wp-content/uploads/2023/08/GRA-2022-Annual-Report.pdf > accessed 19 September 2024.

[764] Kenya Gazette Supplement No. 225 (Senate Bills No. 51, 24th November, Nairobi) Art 29.

[765] Ibid Article 29.

[766] Law No. 13,608/2018. See also Adriane Garcel Chueire Calixto and Sergio Fernando Moro 'Combating Corporate Fraud in Brazil and the Potential Impact of Bill No. 2581/2023' (2024) 6 Journal of Law and Corruption Review 1, 25.

[767] Fabiane Ziolla Menezes, 'Americanas: Brazil's biggest accounting scandal, one year later' (*The Brazillian Report*, 11 January 2024) < https://brazilian.report/business/2024/01/11/americanas-accounting-

of the SEC,[768] which was approved by the Senate Constitution and Justice Committee in June 2024. India also has a tax reward programme, which, in fiscal year 2022-2023, paid around $3 million in rewards to whistleblowers.[769] In summary, the widespread adoption of these programmes warrants a better understanding of design pitfalls to amend present laws and to improve pending bills.

The rest of this Chapter is structured into three sections. Section B deals with *Administrative, Legal, and Cost-Related Issues* and discusses concerns that whistleblower reward programmes generate too many frivolous claims and incentivise bypassing internal compliance programmes. Section C considers issues relating to *Motivational Misalignments*: that reward programmes crowd out intrinsic moral motivations, encourage entrapment, or undermine 'genuine' non-rewarded whistleblowers who, in turn, would be disincentivised from blowing the whistle. These sections are structured as responses to objections by illustrating how various design mechanisms can avoid possible adverse effects. Section D, *Statutory Design c*onsider issues such as the threshold for rewards, reward sizing, culpable individuals, the role of attorneys, agency discretion and appeals, as well as public perception and enforcement climate. Section E, *Additional Implementation and Design Features* covers related topics not dealt with in prior sections. Finally, Section F outlines boundary conditions for effective reward programmes.

B. Administrative, Legal, and Cost-Related Issues

1. Administrative burden – many poor claims.

It has been argue that whistleblower reward programmes generate an administrative burden, 'a flood of poor quality tips',[770] introduce 'a complex, and therefore costly, governance structure',[771] or that certain forms of incentives will 'swamp the reviewing agency with low-quality information'.[772] Variations of this argument raise concerns that sifting through low quality claims may be more costly than what the quality claims generate in terms of improved detection and deterrence. To adequately address this concern would require complete knowledge of the costs of these programmes and their benefits in terms of improved detection and deterrence, yet that is difficult to estimate. In 2017, the SEC Whistleblower Office reported having around 30 employees, merely 0.83% of all SEC employees.[773] In 2022, the IRS's Whistleblower Office had 47 full-time employees, a merely 0.059% of all.[774] Although these Offices provide central functions for the whistleblower programmes, there is significant coordination between the whistleblower offices and enforcement divisions,[775] which makes it difficult to quantify the exact full-time equivalents related to whistleblower claims.

Due to the difficulties of precisely assessing their costs, we must rely on comparative

scandal-one-year-later/> accessed 19 September 2024.

[768] Bill No. 2581/2023.

[769] Directorate General of Goods and Services Tax Intelligence (DGGI). 'Performance/Annual Report of Financial Year 2022-23' (2023) 40 <http://dggi.gov.in/performance> accessed 19 September 2024.

[770] Dave Ebersole, 'Blowing the Whistle on the Dodd-Frank Whistleblower Provisions' (2011) 6 Ohio State Entrepreneurial Business Law Journal 123, 135.

[771] Financial Conduct Authority and PRA (n 430) 2.

[772] 'Our analysis suggests that the worries of agency capture and a reduced quantity of information under the [Dodd-Frank Act] are overemphasized. The more vexing concern will be an over-provision of tips relative to a mechanism that imposes some cost on the whistleblowers. This over-provision will swamp the reviewing agency with low-quality information.' Casey and Niblett (n 618) 1175. See the original paper for context, as the argument is not used to outright reject reward programmes but to comment on optimal design.

[773] SEC OWB FY 2017 14.

[774] IRS OWB FY 2022 13.

[775] The SEC writes, for example, that 'OWB's work is also furthered by a number of support staff', SEC OWB FY21 7. The IRS also coordinates with the 'operating divisions', IRS OWB FY22 13.

examples and anecdotal evidence to gain any insight. As with most government programmes, there are frivolous and opportunistic submissions under reward programmes.[776] In their report for FY 2014, the SEC wrote that it denied an individual's claim for award in connection with 143 different Notices of Covered Actions. In total, this individual had submitted 196 claims.[777] In 2020 the SEC adopted rule amendments that codified the procedures for barring applicants to improve the efficiency of the award determination process.[778] Rule 21F-8(e) now permanently bars applicants that make three or more frivolous award applications, the SEC believed that based on historical experience this rule would 'have a meaningful impact in terms of freeing up staff resources'.[779] A cursory view of the data on the IRS programme may encourage the view that there is a significant administrative burden, as only 2-5% of claims closed each year are due to rewards being paid in full.[780] Yet, this all depends on how long it takes to review the claims. What the same data shows is that the categories 'Unclear/Non-Specific/No Actionable Issue' as well as 'Issues Below Threshold for IRS Action' likely consist of claims that can be rejected almost at first glance, and these constitute around 70% + of claims closed each year. The category where significantly more time is likely spent is 'No Change' closures, i.e. cases where an investigation was initiated, but no additional taxes were collected due to the whistleblower's information. This category of closures hovers between 2% – 7%, although with one outlier year at 17%. While giving us some insight, it is difficult to assess the comparative effectiveness or how much time it takes to reject claims to get a more precise picture.

Comparatively, the IRS and SEC programmes do not look that burdensome. In the last years these two programmes receive around 15,000 whistleblower claims annually, respectively. Compare this to Suspicious Activity Reports mandated under the Bank Secrecy Act submitted to FinCEN, an agency much smaller than the IRS and SEC. FinCEN receives over 1.5 million such reports annually from depository institutions alone.[781] Many government programmes that involve filing claims or applications also have similar 'low' success rates. The average success rate for applicants to the US Social Security Disability Insurance Program is around 22%.[782] Every programme has a fair share of misinformed and vexatious applicants, from opportunistic submissions to fraudulent insurance claims and social security fraud. The sustained existence of such programmes is due to the added benefit despite such claims. What is unique about the reward programmes considered in Chapter 4 is that numerous empirical studies have found evidence that they detect and deter wrongdoing.

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[776] South Korea, for example, restricted rewards to internal whistleblowers as they received a lot of frivolous claims that generated a waste of resources, see The Anti-Corruption and Civil Rights Commission (ACRC), 'Annual Report 2015' (2016) 56. <https://www.clean.go.kr/board.es?mid=a20401000000&bid=10&tag=&act=view&list_no=693&nPage=24> accessed 19 September 2024.

[777] SEC OWB FY2014 15.

[778] SEC Federal Registry 2020 (n 712) 70939.

[779] SEC Federal Registry 2020 (n 712) 70939.

[780] See Chapter 4(C)(3).

[781] As of 2023 FinCEN has around 300 employees, the SEC 4807, and the IRS around 79,070. At FinCEN, administrative limitations appear to have been a significant issue as were shown in the 'FinCEN Files', a leak of SARs to BuzzFeed News and the International Consortium of Investigative Journalists. Many took the leaked documents to show that banks had been laundering money for criminals while FinCEN stood idly by, see BuzzFeed News, 'The FINCEN FILES' (20 September 2020) <https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks> accessed 19 September 2024. While some of this reporting raise legitimate concerns, it should be viewed in the light of an agency with 300 employees receiving millions of SARs annually.

[782] Office of Retirement and Disability Policy, 'Annual Statistical Report on the Social Security Disability Insurance Program, 2020' (2020) <https://www.ssa.gov/policy/docs/statcomps/di_asr/2020/sect04.html> accessed 19 September 2024.

Such compelling evidence for deterrence of an intervention seeking to curb wrongdoing is almost unheard of. If administrative issues become a problem, they can be addressed by minor adjustments, such as threshold adjustments for claims, banning of frivolous submitters, fining fraudulent submitters, requiring submitters to identify themselves, imposing a fee for each submission, or in extreme cases, limiting rewards to internal whistleblowers.

2. Bypassing internal compliance

It has been argued that reward programmes encourage whistleblowers not to report internally at first but to report externally directly to cash a reward.[783] David Ebersole writes that 'external reporting undermines the effectiveness of internal corporate compliance systems, which are often responsive and effective in stemming fraud. Further, internal compliance systems can be more efficient than external reporting in avoiding delay in correcting financial misstatements and increasing the accuracy of management's assessment of internal controls.'[784] This concern has also been fuelled by a 2018 Supreme Court decision, *Digital Realty Trust, Inc v. Somers*, on the definition of 'whistleblower' in Dodd-Frank.[785] The court held that, as 'whistleblower' is defined with regard to the anti-retaliation provisions, the statutory language suggested that only an employee reporting externally to the SEC would be classified as a whistleblower. This would encourage employees to report externally directly to qualify for protection. Some have also argued that Dodd-Frank's whistleblower provisions undermine Section 404 of SOX, which requires public companies to establish internal systems for whistleblower reports.[786]

Available data suggest that reward programmes have not discouraged internal reporting. In 2018, 83% of those who received a reward under the SEC programme had first 'raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.'[787] An earlier review by the National Whistleblower Center of 126 *qui tam* filings between January 1st 2007 and January 24th 2011 found that 90% had first reported internally or contacted a supervisor.[788] Dey and colleagues did not find that stronger monetary incentives reduced whistleblowers' willingness to report internally at first,[789] and a smaller study of pharmaceutical whistleblowers under the FCA found that 18 out of 22 had first tried to solve the matter internally before filing suit.[790] They also found that when these whistleblowers did file a lawsuit, it was typically the response to the company that led them to do so. These studies support the view that internal whistleblowing/compliance channels are not undermined and that reward programmes provide recourse to those who tried to solve the problem internally but met resistance.

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[783] See Ebersole (n 770).

[784] Ibid 137, footnotes omitted. The only evidence cited for the claim that 'internal corporate compliance systems are often responsive and effective' is a 2010 report now unavailable entitled 'Corporate Governance and Compliance Hotline Benchmarking Report Network', seemingly from the organization Navex which is itself a provider of internal hotlines. For some evidence contrary to these claims see, see again Chapter 1 of this Thesis and in particular Section (B)(3).

[785] *Digital Realty Trust, Inc v. Somers, 583 U.S. (2018)*.

[786] Ronald H. Filler and Jerry W. Markham, 'Whistleblowers – A Case Study in the Regulatory Cycle for Financial Services' (2018) 12 Brooklyn Journal of Corporate, Financial & Commercial Law 311.

[787] SEC OWB FY2018 at 17.

[788] National Whistleblower Center, 'Comments and Legal Guidance Concerning Proposed Rule 240.21 F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act Reply to February 15th Letter from Chamber of Commerce.' (March 2011).

[789] Dey et al (n 279) 1717.

[790] Aaron S Kesselheim, David Studdert, and Michelle M Mello, 'Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies' (2010) 19 New England Journal of Medicine 1832.

A related concern is that employees will postpone internally reporting on violations until they become severe enough to reach a certain threshold for reward eligibility (say, $1 million) to then report directly to the regulator and cash a reward. This scenario is not optimal if the employee could have reported the infringement internally so that it could be remedied earlier. An experimental study by Leslie Berger and colleagues suggests this can be a real effect of reward programmes.[791] They constructed a vignette detailing how an employee at a company observes fraud against the government for a value of $800,000 and can choose to report this immediately or delay reporting. They manipulated the threshold to obtain a reward under two different conditions: in the eligible condition, the threshold to obtain a reward is $700,000, and in the ineligible condition, $900,000. The reward is 30% of the value of sanctions/recoveries in both conditions. Study participants would then judge the likelihood of this employee reporting the fraud now or later. They found that in the ineligible condition, participants judged it more likely that reporting would be strategically delayed to let the sanction become severe enough to exceed the threshold for reward.[792] This provides some limited experimental evidence that this effect can become a reality.

Although this topic has received significant attention, such a focus would only be warranted if self-regulation had proven effective and rewards undermine that effectiveness, yet there is little evidence of either. Indeed, the opposite could be argued to be more plausible: external rewards incentivise taking self-regulation seriously and provide an option to employees when self-regulation is not taken seriously by the employer. Others have compellingly argued that instead of undermining internal compliance, external reward programmes complement and have synergistic effects beneficial to compliance mechanisms.[793] Moreover, suppose the wrongdoing is severe enough that a whistleblower can cash a reward (a fine exceeding $1 million in the case of the SEC). In that case, arguably, it is in the public interest that the regulator finds out, as self-regulation at that point had already failed to curtail the wrongdoing. Opportunistic delays in reporting are factored into the reward decision. If the whistleblower is opportunistic and did not report internally, it is one factor counting toward a reward closer to 10% than 30%. It may also be difficult to demand another standard, such that whistleblowers must report immediately when they discover a violation, as there are several legitimate reasons to delay reporting, such as having enough time to gather evidence.[794] To conclude: there is no evidence that reward programmes have undermined self-regulation or internal controls.

C. Motivational Misalignments

1. Crowd out and motivational externalities

It has been argued that what motivates whistleblowers are not calculations of costs and benefits but rather morality and strong emotion. In a survey of 127 external whistleblowers in South Korea, Heungsik Park and David Lewis found that their main motivator was morality as assessed by the belief in moral values, followed by emotion, with cost-benefit calculations being the least important determinant of external whistleblowing.[795] The conclusion by the authors is that 'This result suggests that improving monetary incentives would not be of much

[791] Leslie Berger, Stephen Perreault, and James Wainberg, 'Hijacking the Moral Imperative: How Financial Incentives Can Discourage Whistleblower Reporting.' (2017) 36 AUDITING: A Journal of Practice & Theory 1.

[792] Ibid 10.

[793] Blount and Markel (n 192) 1054 – 1057.

[794] Howse and Daniels (n 592) 535.

[795] Heungsik Park and David Lewis, 'The motivation of external whistleblowers and their impact on the intention to blow the whistle again' (2019) 28 Business Ethics: A European Review 379, 386.

help in encouraging employees to report illegal activity in the workplace to authorities concerned'.[796] Empirically, that conclusion has turned out to be wrong, but it is important to understand why. As discussed in Chapter 1, the most successful corporate crimes do not elicit strong emotions or engage with a sense of morality in a way that encourages reporting on that basis. Whistleblowing is almost always self-sacrificing in some sense, which makes it more analogous to charity than anything else. Emotion and morality would likely be better determinants of this charitable giving than cost-benefit calculations. The sample selection issue here is rather straightforward: no one who utilizes a cost-benefit analysis would blow the whistle in a country without reward programmes as there are only costs and few benefits. However, by rewarding whistleblowers, you invite a whole new set of people – utility maximisers – who would otherwise not blow the whistle or give to charity. This Thesis has suggested throughout that in the whistleblower context as elsewhere, most people in most contexts are seeking to maximise their expected utility.

However, there is a corollary concern regarding the potential of external incentives to crowd out intrinsic motivation once these utility maximisers are invited.[797] It is not a surprise that the question should be raised concerning whistleblower reward programmes where the motivation of non-incentivized whistleblowers is typically moral and intrinsic and financial incentives are examples of what previous research has found to crowd out this sort of intrinsic motivation.[798] One well-cited review of the empirical literature in this field derived psychological conditions under which the crowing-out effect appears. 'External interventions *crowd-out* intrinsic motivation if the individuals affected perceive them to be *controlling*. In that case, both self-determination and self-esteem suffer, and the individuals react by reducing their intrinsic motivation in the activity controlled.' In contrast, 'External interventions *crowd-in* intrinsic motivation if the individuals concerned perceive it as *supportive*. In that case, self-esteem is fostered, and individuals feel that they are given more freedom to act, thus enlarging self-determination.'[799] Under these descriptions, it is unclear whether whistleblower rewards would have a crowd-in or a crowd-out effect. They could have a crowd-in effect, being perceived as a way of supporting something that would be costly without monetary compensation. Rewards are also optional,[800] so they are less likely to be perceived as controlling. They could also crowd-out intrinsic motivation if they are perceived as making a moral choice a selfish one, undermining intrinsic motivation and the public's perception of their whistleblowing.

Even outside of the whistleblowing context, it remains ambiguous as to whether monetary and non-monetary incentives crowd out intrinsic motivation, what in many studies is termed Public Service Motivation (PSM).[801] Concerning whistleblowing specifically, there is no

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[796] Ibid 387.

[797] Some who have raised this possibility in the whistleblower context is Lobel (n 77) 46 and Feldman and Lobel (n 274).

[798] Social psychology had empirically through surveys identified various forms of crowding out and the inappropriateness of using external rewards to modify behaviour, see seminally Mark R. Lepper and David Greene (eds), *The Hidden Costs of Reward: New Perspectives on the Psychology of Human Motivation*, (Psychology Press 2018). These findings were later criticized as being overgeneralizing, as some argued that rewards only have very limited effect on intrinsic motivation occurring only under restrictive and easily avoidable conditions, see Jude Cameron, 'Detrimental Effects of Reward: Reality or Myth?' (1996) 51 American Psychologist 1153.

[799] Bruno S. Frey and Jegen Reto, 'Motivation Crowding Theory' (2000) 15 Journal of Economic Surveys 589, 594-595.

[800] One whistleblower explicitly declined his rewards as he thought the SEC were too soft on those he blew the whistle on, see Jana Kasperkevic, 'Deutsche Bank whistleblower rejects award because SEC 'went easy' on execs' (*The Guardian*, 18 August 2016) <https://www.theguardian.com/business/2016/aug/18/desutsche-bank-whistleblower-turns-down-award> accessed 19 September 2024.

[801] See Namhoon Ki, 'The Effectiveness of Monetary Rewards in the Public Sector and the Moderating

evidence that large external rewards crowd out intrinsic motivation. In a field study of employees at government agencies in Thailand, Wisanupong Potipiroon studied the disclosure of grand corruption activities and the moderating effect of PSM and found that persons with high PSM place more value on the prospect of receiving rewards (both monetary and non-monetary) for their whistleblowing than those with low PSM, supporting the crowding-in hypothesis.[802] Feldman and Lobel found evidence consistent with a crowding out hypothesis for rewards at $1000 but found no crowding out effect of larger rewards at $1 million.[803] Another study found a crowd-out effect of rewards, but that study considered lower rewards in a field experiment in Afghanistan where teachers reported coworker's absence for rewards.[804] The rewards in this study were a mere $1.30 per report and, therefore, entirely disanalogous to the US-style programmes.[805] An experiment conducted as a part of a PhD thesis concluded that crowding out occurred when there was a cap on rewards and the fraud was minor.[806] When fraud levels increased and rewards remained capped, the likelihood of whistleblowing also increased.[807] Other experimental studies did not find crowding out of intrinsic moral motivation. A study that replicated Feldman and Lobel's experiments did not find a crowding out effect.[808] Another experimental study by Jeffrey Butler and colleagues found no moral crowding out of financial incentives.[809] Another study did find a minor crowd-out effect,[810] but this study assessed the joint influence of both a revenge motive and a financial reward on intention to report tax fraud. Moreover, financial rewards did increase intention overall in this study.

To constitute a compelling argument against reward programmes, crowd-out must be significant enough to negate the benefits of introducing rewards. This contradicts numerous empirical studies that found substantial increases in detection and deterrence. Yet there is something we can learn from the crowd-out literature, and that is that smaller rewards for reporting petty crimes appear to be able to crowd out intrinsic motivation. This seems reminiscent of the reasons why *qui tam* in England became so despised and eventually was abolished.[811] To conclude, this concern has been overstated, and there is no evidence that the programmes considered in Chapter 4 have had a crowding-out effect.

2. Credibility of witnesses

Another concern is that providing large rewards to whistleblowers may compromise their credibility as witnesses.[812] In a discussion of this issue with respect to cartels, the Government Accountability Office noted in a 2011 report that 'Even in the civil context, where the government's burden of proof at trial is lower than in the criminal context, DOJ's Civil

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Effect of PSM (PSM-Reward Fit or PSM Crowding Out): A Survey Experiment' (2022) 54 Administration and Society 277.

[802] Potipiroon (n 681).

[803] Feldman and Lobel (n 274).

[804] Stefano Fiorin, 'Reporting Peers' Wrongdoing: Experimental Evidence on the Effect of Financial Incentives on Morally Controversial Behavior' 21 Journal of the European Economic Association 1033.

[805] Ibid, this sum corresponded to about 2 hours of work.

[806] Lucas Martins Dias Maragno, 'The Counterproductivity of Monetary Rewards: how financial incentives crowd-out whistleblower intentions' (2019) PhD Thesis 118 <https://repositorio.ufsc.br/bitstream/handle/123456789/215374/PPGC0204-T.pdf?sequence=-1> accessed 25 September 2025.

[807] Ibid 120.

[808] See Breuer (n 245) 7.

[809] Butler et al (n 274).

[810] Jonathan Farrar, Cass Hausserman, and Marina Rennie, 'The influence of revenge and financial rewards on tax fraud reporting intentions' (2019) 71 Journal of Economic Psychology 102.

[811] See Chapter 2(B)(1).

[812] Financial Conduct Authority and PRA (n 430) 3.

Division and IRS officials have concerns about witness credibility and generally do not use whistleblowers to substantiate their cases because of these concerns'.[813] The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement was specifically concerned that jurors may 'not believe a witness who stands to benefit financially from success enforcement action against those he implicated.'[814] To this day, reward programmes are absent in US antitrust enforcement, although US Senators have attempted to introduce them.[815]

It is perhaps understandable that this concern is brought up in this context as it has a closely related problem in criminal law. While relatively rare elsewhere, the US tend to offer various forms of incentives in return for testimony, a practice that American judges have justified pragmatically: that the number of witnesses without incentives would be low as they fear retaliation for testifying, mistrust the police, or fear being labelled as snitches.[816] These forms of incentives are understandably controversial, as testimony by incentivised witnesses has proven to lead to an unacceptable level of convictions of innocents.[817] Typically, however, these incentives are in the form of leniency or reduced sentences as in criminal law it is against the rules of professional responsibility to provide direct payments to witnesses, although they can be reimbursed for costs associated with their testimony.[818] These forms of incentives are not analogous to those discussed in this Thesis, and not because they are not monetary. It is useful to distinguish between *ex ante* and *ex post* incentives to informants/witnesses. The former offers incentives for information leading to the discovery of wrongdoing or conviction, while the latter may be offered to a person in return for serving as a fact witness during trial *after* the crime has been discovered (*ex post*).[819] As Miriam Baer points out, *ex post* incentives entail that the government already knows something about the crime and has leverage on the person they offer a deal.[820] *Ex ante* incentives to provide physical evidence appear to be the least controversial form of incentives.[821] Whistleblower reward programmes discussed in this Thesis concern incentives of this kind, although situations can arise where the evidence provided by a whistleblower is insufficient and the person is asked to testify. In these cases, a conflict of interest can arise, and the defendant's attorney could argue that the witness is unreliable because he or she stands to gain substantially in the event of a conviction.[822]

Yet, the author knows of no case where a whistleblower filed a claim and obtained a

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[813] United States Government Accountability Office (GAO) 'Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection' (July 2011) 39.

[814] Ibid 39.

[815] Senators Amy Klobuchar, 'To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.' (2020) SIL21191 6C1. S.L.C.

[816] Caleb Linton, 'Like Putting Lipstick on a Pig: Why the History of Crime Control Should Compel the Prohibition of Incentivized Witness Testimony Under Fundamental Fairness Principles' (2023) 113 The Journal of Criminal Law and Criminology 391, 396.

[817] Ibid 406.

[818] For an insightful discussion of this issue, see Saul Levmore and Ariel Porat, 'Asymmetries and Incentives in Plea Bargaining and Evidence Production' (2012) 122 The Yale Law Journal 690. The American Bar Associations Model Rules of Professional Conduct 'forbid compensation to fact witnesses absent specific statutory authorization' Ibid 696.

[819] Ibid 698

[820] Baer 2017 (n 273) 2247.

[821] Levmore and Porat (n 818) 714 notes that this may be because physical evidence is 'subject to a chain of control, or otherwise tested' and is therefore 'less corruptible than are fact witnesses'.

[822] Ibid 701.

reward by merely acting as a fact witness. The whistleblower and their attorney must build the case with solid physical evidence. A good whistleblower case is built on information that can be verified, for example, through emails, phone calls, and other documentation, which reduces the need for prosecutors or enforcement staff to rely solely on testimonial evidence for their case. Another way to remedy this issue, should it arise, is to provide a reward to the first reporting person and leniency to a second person who can testify.[823] The concern over witness credibility also feeds into another often-noted externality of reward programmes: that they encourage entrapment, blackmail, and the fabrication of evidence to obtain a large reward. There is, however, no known case of a whistleblower obtaining a reward based on fabricated evidence. The main reason for this is likely that a whistleblower who fabricated evidence against his or her employer typically goes to court against a well-resourced organisation. Moreover, the risks in case of losing are substantial, as information is submitted under penalty of perjury, punishable with jail time.

D. Statutory Design

1. Reward threshold and size

As a reminder, the SEC has a threshold of sanctions exceeding $1 million, and for mandatory rewards under 7623(b) the IRS has a $2 million threshold. One may argue that the False Claims Act has no threshold for claims, yet it in effect has. Whistleblowers cannot proceed *pro se* and lawyers must assess the likelihood that pursuing a case is at least going to be economically break-even. There are several reasons for imposing thresholds for rewards. First, no thresholds may encourage submissions of all kinds and variety. Second, due to resource constraints, enforcement agencies and prosecutors must prioritise cases, and information leading to smaller fines/recoveries may not be desirable. Third, in the context of corporate wrongdoing, more minor concerns are typically better dealt with internally in the organisation. Fourth, the margin between administrative costs and societal benefit decreases as reward size and offence severity decrease. Fifth, if rewards are sourced from the fines/recoveries, these will be lower and subsequently the reward as well, yet lower rewards are more likely to be ineffective and may crowd out motivation.

Thresholds also increase the lowest rewards possible, and there is plenty to suggest that lower rewards are ineffective. In 2019, the Chair of the UK Competition and Markets Authority (CMA) argued that rewards for reporting cartels were too low: 'The £100,000 limit that it has set on such payments is far too low. It is unlikely even to cover the loss that a typical whistleblower would incur from losing his or her job. It is very unlikely to compensate either for the resulting damage to the whistleblower's career prospects or for the distress suffered.'[824] Only in 2023 did they increase the reward to £250,000,[825] yet it is unclear if this will be more effective or what reasoning went into capping rewards at this level. In general, however, there is no evidence that rewards arbitrarily capped in this way have been effective. Eric Holder, Attorney General under the Obama administration, commenting on rewards offered under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA): 'Like the False Claims Act, FIRREA includes a whistleblower provision. But unlike the FCA, the amount an individual can receive in exchange for coming forward is capped at just $1.6 million – a paltry sum in an industry in which, last year, the collective bonus pool rose above $26 billion, and median executive pay was $15 million and rising. In

[823] This was suggested to me in person by Giancarlo Spagnolo.

[824] Competition and Markets Authority, 'Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy', (21 February 2019).

[825] Competition and Markets Authority, 'Blowing the whistle on cartels' (6 June 2023) <https://www.gov.uk/government/news/blowing-the-whistle-on-cartels> accessed 19 September 2024.

this unique environment, what would – by any normal standard – be considered a windfall of $1.6 million is unlikely to induce an employee to risk his or her lucrative career in the financial sector.'[826] The logic is by and large the same as that of the CMA Chair, but here the complaint is about $1.6 million being insufficient in contrast to £100,000. Yet, persons with knowledge of price rigging are typically also higher-ups in large organisations with substantial compensation packages. Another example illustrating issues with arbitrarily capping rewards is South Korea's reward programme for competition offences introduced in 2002. What is salient about their experience is that they successively increased the reward size, starting with $19,000 in 2002, to then be increased to $94,000 in November of 2003 because the level of reporting did not meet expectations.[827] The programme was still not considered successful which was partially attributed to the low reward. The Korean Fair-Trade Commission then modified the programme again in 2005, increasing the reward to around $1 million.[828] Finally, the Commission increased the reward cap again in 2012 from $1 million to $2.8 million.[829] This suggests that they believed more and/or better information could be solicited by increasing the cap of their reward programme.

While lower rewards appear ineffective, the above-mentioned programmes are in regulatory areas where larger rewards are expected to be necessary, as those with information on offences are likely well-compensated. This does not mean that alternative designs cannot be effective. In a sample of 3515 FCA suits between 1986 and 2009, David Kwok found that the relator's median share of imposition was $144,020.[830] Aisha Dey and colleagues found that the average payment under the FCA is $140,000,[831] suggesting that the millions of dollars often reported in news headlines are not necessary to incentivize reporting. Other evidence also indicates that even relatively minor financial benefits can incentivize reporting. A 2021 study utilizing a database covering 63 612 OSHA inspections and 120 564 workplace safety violations considered whether state-level increases in unemployment insurance (UI) make employees more likely to blow the whistle – which suggests employees fear job loss.[832] They found that an increase in unemployment benefits of at least 10% increases the number of employee complaints by 13.8%. The average UI benefit increase in their treatment was a mere $1347 per year – suggesting that modest increases in compensation have a sizable effect on willingness to report workplace safety violations.[833]

Other programmes also illustrate that precisely replicating the US programmes may not be necessary. The Ontario Securities Commission (OSC) introduced a reward programme based on that of the SEC in 2016.[834] However, the programme lacked some features of that

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[826] Eric Holder, 'Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law' (17 September 2014) <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> accessed 19 September 2024. For more details on FIRREA, see Chapter 2(D)(1).

[827] Korean Fair-Trade Commission, 'Annual Report' (2010) <https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=517&bbsId=BBSMSTR_000000002404&bbsTyCode=BBST11> accessed 19 September 2024.

[828] Kevin R. Sullivan, Kate Ball, and Sarah Klebolt, 'The Potential Impact of Adding a Whistleblower Reward Provision to ACPERA.' (*The Antitrust Source*, October 2011).

[829] Andreas Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?' (2014) CCP Working Paper 14-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405933> accessed 19 September 2024.

[830] Kwok (n 652) 239.

[831] Dey et al (n 263).

[832] Jonas Heese and Gerardo Pérez-Cavazos, 'The effect of retaliation costs on employee whistleblowing' (2021) 71 Journal of Accounting and Economics 101385.

[833] Ibid 2.

[834] OSC, 'Policy 15-601, Whistleblower Program' <https://www.osc.ca/sites/default/files/pdfs/irps/20160714_15-601_policy-whistleblower-

of the SEC, as it has a threshold of $1 million, rewards at between 5-15% of the total monetary sanctions imposed,[835] capped at a maximum of $5 million,[836] and a no-award decision cannot be appealed.[837] Between 2016 and 2022, the programme awarded over $9 million to 11 whistleblowers. More impressively, cases where whistleblowers made valuable contributions led to $48 million in monetary sanctions and voluntary payments between 2016 and 2022.[838] In the same period, the total amount of sanctions ordered was $288 million,[839] with one outlier year where $126 million of sanctions were ordered.[840] While this $48 million is a mere 17% of total sanctions in this period, it is still impressive for the first five years of its existence, as claims received typically take some years to process.[841]

It is also important to emphasise that 'large rewards' is a relative notion. In 2022 Luxembourg had an average GDP of $142,214 per capita, compared with the US at $76,399 and Brazil at $17,822.[842] The relative value of monetary rewards is also something that should have substantial weight, in addition to industry-specific characteristics and characteristics of the kind of person expected to provide information. Most importantly is to understand who is likely to have information on the sort of offence for which rewards should be made available. If it is the C-suite of large multinationals, then rewards in the multi-million category would likely be necessary. If it is the average Brazilian or American, however, lower rewards in the hundreds of thousands can be sufficient.[843] The FCA, for example, is much broader than competition law offences, and rank-and-file employees can more easily obtain information on fraud against the government. One example is nurses who may be asked to overbill for services they did not provide. When deciding how 'large' to make the rewards, numerous factors must be considered such as the economic situation of the typical person the programme seeks to incentivise, cultural factors, the urgency to deter and detect the specific offence type, and how much lawyers are expected to take (less lawyer-involvement may justify lower rewards as a larger share goes to the whistleblower, although this increases administrative costs).

2. Culpability, leniency, and immunity

One central design feature of reward programmes is the extent to which they allow culpable persons to receive rewards. This is a controversial feature but at the core of the US programmes considered in Chapter 4. The FCA's 1863 author famously stated that the best way to catch a crook is to use another crook to inform on him, and the necessity of allowing for this feature was also reaffirmed by the SEC when considering the implementation of their rules.[844] These are the programmes with the best evidence in their favour, so it is important to consider how the FCA deals with this issue, quoting at length:

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program.pdf> accessed 19 September 2024.

[835] OSC Policy 18(1).

[836] OSC Policy 18(5).

[837] OSC Policy 26.

[838] OSC, 'Update on the OSC Whistleblower Program 2016 to 2022' <https://www.osc.ca/en/enforcement/osc-whistleblower-program/update-osc-whistleblower-program-2016-2022> accessed 19 September 2024.

[839] OSC Annual Reports 2017-2023, 'Administrative penalties, disgorgement orders, settlement amounts'.

[840] Ibid, in the reporting period 2018-2019.

[841] See here for comparisons of the IRS Programme and SEC Programme in Chapter 4.

[842] Worldometer, 'GDP per Capita' (2022) <https://www.worldometers.info/gdp/gdp-per-capita/> accessed 19 September 2024.

[843] Peru took this approach when introducing rewards in antitrust, considering the wages of management at large Peruvian companies. See Indecopi, 'Antitrust Reward Program Guidelines' (December 2019) <https://cdn.www.gob.pe/uploads/document/file/6434502/5630180-the_antitrust_rewards_program.pdf?v=1717450121> accessed 19 September 2024.

[844] SEC Federal Registry (n 698) 34350.

> 'if the court finds that the action was brought by a person who *planned and initiated* the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate**,** *reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection*, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted *of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.* Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.'[845]

Two key elements are highlighted. First, those who planned and initiated a violation may have their rewards appropriately reduced below the statutory percentage ranges. Secondly, those convicted of criminal conduct arising from their role in the violation shall be dismissed from the civil action and not receive any proceeds. While the SEC programme shares the same standard as the FCA, the IRS standard differs from these:

> If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct *arising from the role described in the preceding sentence*, the Whistleblower Office shall deny any award.[846]

While the FCA has broader application, barring those whose 'criminal conduct arising from *his or her role in the violation*' the IRS has employed a narrower notion of ineligibility, noting that only a criminal conviction due to the planning and initiating makes whistleblowers ineligible for a reward. If a whistleblower is not determined to have 'planned or initiated' the wrongdoing, then a criminal conviction, even if it was related to the wrongdoing, is not sufficient to make an individual ineligible. A third standard appears to have been introduced by the new DoJ pilot programme, which states that individuals are ineligible for an award under the programme if 'They meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity'.[847] The topic of culpability is important, as the US now appears to have introduced three different standards on awarding culpable persons, and there are compelling reasons to believe that how this aspect will significantly impact its performance. Those partially culpable of wrongdoing almost always have better information. Barring those people from receiving rewards gives wrongdoers a compelling option: to make any employee with knowledge of the wrongdoing culpable to an extent they cannot cash a reward.

One example of persons who may be disincentivized is the most impactful whistleblower in the context of corporate wrongdoing: Bradley Birkenfeld. Birkenfeld was born in the US but worked as a banker at UBS, flying from Switzerland to the US quarterly to acquire new clients. Part of UBS's operations in the US involved offering wealthy Americans the opportunity to hide assets in offshore accounts. While Birkenfeld was involved in this practice, he started to inform the DoJ of UBS's activity in 2007 and requested immunity or

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[845] § 31 U.S.C § 3730(d)(3). Author's emphasis.
[846] 26 U.S.C §7623(b)(3). Author's emphasis.
[847] DoJ 2024 Pilot Program n (729) 2.

a subpoena because, without it, he could go to jail in Switzerland for breaking bank secrecy laws. Birkenfeld was later denied immunity because DoJ prosecutors alleged that he did not disclose his relationship with his biggest client, for whom he hid $200 million in offshore accounts. While he did not disclose this to the DoJ this was because they refused to offer him a subpoena,[848] he provided all the evidence of these accounts evidence to the Senate.[849] He pleaded guilty and was sentenced to forty months in prison for his involvement in the tax evasion scheme. Birkenfeld's information was instrumental in more than $21 billion being collected over the ensuing decades. Despite the conviction, the IRS still provided Birkenfeld with a $104 million reward as they determined he had not 'planned or initiated' the wrongdoing, although the IRS did not expand upon how they reasoned when they made that determination.[850] Later on, however, rule promulgation would lend some insight into their thinking. Commentators had urged the IRS to use a narrow standard for 'planned or initiated' such that only the 'principal architect' would be excluded from a reward.[851] The IRS rejected this suggestion, noting that 'More than one individual may plan and initiate the actions that lead to a tax underpayment violation, whether as co-planners or as planners of independent actions that each led to the underpayment or violation'.[852] By this logic, Birkenfeld was not a co-planner and, hence, eligible for a reward.[853]

The immediate reason why those who planned and initiated should not be rewarded is that it would encourage entrapment and related issues. One wrongdoer could enlist co-conspirators and then report them for a reward. Jennifer Pacella suggests that by rewarding convicted whistleblowers, 'the IRS whistleblower program creates a risk that such a program may prompt the occurrence of the very behavior that it seeks to prevent' and that 'A more palatable alternative to the IRS's current treatment of convicted whistleblowers may be to offer immunity or leniency in lieu of a bounty to those whistleblowers who are facing criminal prosecution – an opportunity that is already in existence and is likely to suffice in incentivizing culpable whistleblowers to come forward'.[854] Yet, leniency is unlikely to be an effective *ex ante* incentive for individuals engaging in profitable wrongdoing as long as they think there is a low probability of detection. Moreover, while an individual may be eligible for a reward, or provided leniency for some specific violation, that person may have committed other crimes that would likely be discovered if he or she blew the whistle.

The issue of whether and to what extent to reward culpable individuals is closely related to the problem of self-incrimination and leniency. While FCA and SEC standards for culpability have the most *prima facie* evidence in their favour, these may not be optimally designed in some contexts.[855] Large rewards coupled with lengthy jail sentences are unlikely to be a sufficient incentive to come forward.[856] A model that has not been explored enough

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[848] Birkenfeld (n 258) 181.

[849] Birkenfeld (n 258) 237.

[850] Jennifer M. Pacella. 'Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code' (2015) 17 University of Pennsylvania Journal of Business Law 345, 363.

[851] IRS, 'Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws' (2014) 79 Federal Register 47246, 47262.

[852] Ibid 47262.

[853] While this is an interesting case study for the issue of culpability, it should be noted that it is unlikely that the prospect of a financial reward was a driving motivation for Birkenfeld, as the new IRS programme had just come into existence and had not paid any meaningful rewards.

[854] Pacella 2015 (n 834) 372.

[855] Baer 2017 (n 273) introduced a useful framework which distinguishes between *Innocents* and *Complicits*. Programmes such as the SEC's, are unlikely to incentivize complicit individuals, as their role in the wrongdoing would entail self-incrimination should they blow the whistle.

[856] There is also some inferential evidence from the competition law context that illustrates how self-incrimination can deter reporting. After the leniency program became very successful in the initial period since

is providing *ex ante* leniency for certain offenses and significant rewards. This model would exploit the framework created by the audit-centric second-order compliance systems in place today. For example, money laundering is a criminal offence in most developed economies. Financial institutions not complying with AML regulations constitutes a civil offence in most developed economies. Yet none of these violations actually damage anyone; they are second-order offences aimed at preventing the first-order offences: criminals being able to use proceeds of crime as they please, which leads to sustained crime. Leniency for criminal money laundering charges and large rewards would enable those at the heart of sanctions and money laundering schemes to come forward.

Leniency, amnesty, or immunity could be a solution in areas with entrenched enforcement problems. While controversial, several countries have used amnesty programmes, with tax evasion being one example where evaders have been asked to return money without a penalty.[857] Moreover, leniency or amnesty is palatable in the white-collar crime context, more so than in the context of violent crime. This is because damages can be repaired through the disgorgement of funds, in contrast to the retributivist form of justice typically sought by victims of violent offences. As mentioned, violations like aiding tax evasion and money laundering are also derivative offences – a tax cheating advisor may be paying all personal taxes. A money launderer may not have anything to do with the predicate offences. Hence, it may be admissible to the moral standards of an ordinary person that he or she be provided leniency for these offences if that means turning in and convicting a predicate offence perpetrator and seizing his or her assets.

Neither the SEC nor IRS programmes guarantee leniency or immunity to whistleblowers. The SEC can and frequently does provide *ex post* leniency by considering a culpable whistleblower's cooperation. They can provide credits to whistleblowers if they offer substantial assistance, non-prosecution agreements, or agreements that they will not take action against a cooperator.[858] Some countries may adhere to the principle that those convicted of crimes should not be able to make money off them. In the US, a law even prohibits criminals from earning profits from book sales of their crime stories.[859] While that may be understandable for violent offences, it is less so for derivative ones such as money laundering and aiding tax evasion. Interestingly, while US leniency programmes do not provide leniency to ringleaders (initiators of cartels), leniency programmes in the EU were more aggressively designed to allow ringleaders to apply for leniency.[860]

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its introduction by the Commission, the number of leniency applicants at the European Commission declined significantly since 2016. Catarina Marvão and Giancarlo Spagnolo argued that this was due to the introduction of the Damages Directive in 2014, and the insufficient protections it provided to leniency applicants. This Directive aimed to enable cartel victims to sue cartel members for damages. The effect, however, appears to have been to significantly reduce the number of leniency applicants, as their leniency application can be used by private citizens as evidence and generate larger damage claims in private suits: 'the Directive facilitates damage claims in several ways but does not sufficiently protect the first leniency applicant (the immunity recipient) from becoming the first target of damage claims' Catarina Marvão and Giancarlo Spagnolo, 'Leniency inflation, the Damages Directive, and the decrease in cartel cases' (*VOX EU CEPR*, 9 March 2024) <https://cepr.org/voxeu/columns/leniency-inflation-damages-directive-and-decrease-cartel-cases> accessed 19 September 2024. Analogously to the whistleblower context is the feature that if whistleblowers risk incriminating themselves, the probability that they will blow the whistle is significantly reduced.

[857] See, for example, Dominika Langenmayr, 'Voluntary disclosure of evaded taxes – Increasing revenue, or increasing incentives to evade?' (2017) 151 Journal of Public Economics 110, 111 listing all the OECD countries with such programs, many of which have very lenient treatment of self-reporting such as no additional interest on the taxes that were evaded.

[858] Pacella 2015 (n 850) 377.

[859] Pacella 2015 (n 850) 371.

[860] Perhaps surprisingly, as the EU previously barred ringleaders (originators/leaders of cartels) from leniency, but that restriction was removed in the 2006 Leniency Notice, for a discussion see Catarina Marvão

While reward programmes, as presently designed, have proven effective despite a lack of amnesty and limited rewards for culpable employees, introducing these elements would likely prove incredibly effective at eliciting information about serious crime. Even if these individuals were rewarded, no amnesty and severe punishment for a criminal money laundering conviction – in addition to the potential of clients retaliating – will likely be insufficient for this category of people to blow the whistle. Not providing amnesty also allows for a powerful strategic move by wrongdoers: ensure that those who know about their offences also participate to an extent to cause criminal liability. Such a strategy would likely render reward programmes impotent in eliciting information from these sources.

3. Lawyers, agency discretion, and appeals.

Numerous other aspects of the US reward programmes considered in Chapter 4 are relevant for their success. A less discussed topic in the reward context is the role of agency discretion and the possibility of appealing a no-reward decision. There is little to no research on the topic either, which makes it difficult to evaluate the impact of these dimensions on willingness to report wrongdoing. However, these two factors could play a substantial role, and overlooking them will likely lead to suboptimal results. This is particularly true in a lawyer-centric reward regime, as lawyers are less likely to be interested in cases under regimes that lack these two elements. Typically, lawyers take on whistleblower cases on a contingency fee basis, with fees ranging fees between 33 – 40%.[861] If the award decision is uncertain and entirely up to the agency, without the possibility of appeal, then lawyers would either not take the case or price in the uncertainty by taking higher fees. Moreover, all the empirical evidence for detection and deterrence is on the FCA and SEC programmes where lawyers play a salient role, rewards are mandatory, and appeals are possible. There is also little to no evidence that programmes offering discretionary and unappealable rewards have been effective. That may also be due to other factors, such as lower and capped rewards, which are typical of these programmes. It may also be that the credibility of a reward programme is derived from its history of paying informants and that it is the signalling of credibility that leads more people to come forward, even if rewards are discretionary and there is no possibility of appeal.[862] More research is needed to disentangle these design elements and isolate their effects.

While research is lacking, regulatory agencies and lawmakers should not overlook these features as they are likely non-trivial. That does not mean that reward programmes necessitate a group of skilled lawyers to sift through claims, and some have even criticised the efficiency of relying on lawyers and law firms. Alexander Platt, for example, argues that the SEC and CFTC litigation regimes are non-competitive and that lawyers extract exorbitant fees. [863] Looking at data from Freedom of Information Act requests, he found that unrepresented whistleblowers underperform the most, while repeat-player lawyers perform better, and former SEC employees perform the best. He concludes that 'the SEC and CFTC have

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and Giancarlo Spagnolo, 'Cartels and leniency: Taking stock of what we learnt' in Luis C. Corchón and Marco A. Marini (eds), *Handbook of Game Theory and Industrial Organization, Volume II* (Edward Elgar 2018) 57-90, 63-65. Theory suggests that to maximally reduce trust between colluding parties, and therefore generate optimal deterrence, it is necessary to also grant leniency to ring-leaders, see Spagnolo 2000 (n 282).

[861] Kohn 2023 (n 315) 275.

[862] Armenak Antinyan and colleagues found evidence that citizens with high trust in formal authorities more often express a positive attitude toward whistleblowing (reporting tax evaders in this case) – a finding that is moreover cross-cultural, see Armenak Antinyan, Luca Corazzini, and Filippo Pavesi, 'Does trust in the government matter for whistleblowing on tax evaders? Survey and experimental evidence' (2020) 171 Journal of Economic Behavior and Organization 77.

[863] See Alexander I. Platt, 'The Whistleblower Industrial Complex' (2023) 40 Yale Journal on Regulation 688.

effectively privatized the tip-sifting function that is at the core of the WBPs [whistleblower programmes]'.[864] Yet, whether a cabal of well-connected persons could game the system is unclear. With the IRS and SEC, cases can be appealed if the initial verdict is perceived as unfair, and lawyers spend a significant amount of time to sift through claims and bring claims at their own risk. There is, however, considerable discretion at the level of deciding whether to investigate a case based on whistleblower information. Involvement by ex-SEC staff and repeat players may not be bad either. Concerning the FCA, David Kwok found that repeat player law firms maintain good track records regarding DoJ intervention – suggesting that they either bring quality claims or are better able to present evidence necessary to obtain recoveries.[865] Platt is right, however, that these programmes are not optimized to allocate every dollar efficiently and that increased competition among lawyers would be beneficial. Countries that, for various reasons, cannot outsource these tip-sifting functions to lawyers will have to allocate more resources to regulatory agencies to sift through claims. In practice, if whistleblowers proceed without lawyers, the reward ranges could be lower yet provide the same level of incentive for whistleblowers. This will be the most likely model outside the US.

4. Rewards for undertakings

Another possibility is to broaden award eligibility to undertakings or legal persons. This is effectively what is done in competition law under leniency programmes. Even though "leniency" may not appear like a reward, it often entails severe fines for competitors and presumably more reputational damages that should be a positive benefit to the leniency applicant. Reward programmes could be structured to make financial institutions, accounting firms, tax consultants, apply for rewards as legal persons. Presently, there are very few incentives for these undertakings to do more than box-ticking, and contracts with clients often prohibit reporting sensitive information even to authorities. As society is delegating more controls to the private sector (anti-money laundering being the prime example), positive incentives could be considered to undertakings that report clients whose information on their clients lead to asset seizures or successful prosecution. This Thesis has not considered rewards for undertakings, as outside of leniency in competition law, there are few to no example of positive incentives for firms to report wrongdoing, which has meant there are no administrative data or empirical evidence to consider. Moreover, cartel offenses are unique in that they are collusive agreements between two firms, which is a characteristic that is rarely found in other enforcement areas. Leniency programmes, however, have proven effective,[866] and many of the reasons to provide positive incentives to individuals are equally applicable to undertakings.

E. Additional Implementation and Design Features

The effectiveness of reward programmes is also contingent on other factors. A study on an Israeli reward programme, for example, concluded that a large media campaign concurrent with the introduction of a reward programme led to deterrence effects – even though no additional tax evasion was uncovered.[867] Offering a significant reward early in a programme's existence draws attention to the program and signals that the agency is serious about providing rewards. While there are no studies on the topic, signalling credibility can be an important feature that drives reports. Cases of large rewards at the IRS, SEC, and CFTC that became

[864] Ibid 688.

[865] Kwok (n 652) 248.

[866] Miller (n X) finds, for example, that leniency leads to 59% less cartel formation and 62% higher cartel detection rate.

[867] Amir et al (n 239).

widely covered in the media have also contributed to agencies suggesting that these increased the programme's visibility and reports in subsequent years.

In some cases, reward programmes can meet resistance and be perceived as a tacit accusation of inadequacy by the enforcement agencies. These programmes can be taken to insinuate that they cannot do their jobs properly without whistleblowers, that they fear that whistleblowers would affect their enforcement priorities and reduce their discretion, or that an effective whistleblower programme would justify cutting the agency's budget.[868] One Chief Enforcement Officer at the IRS stated of the 2006 amendments that: 'The new whistleblower provisions Congress enacted a couple of years ago have the potential to be a real disaster for the tax system. I believe that it is unseemly in this country to encourage people to turn in their neighbours and employers to the IRS as contemplated by this particular program. The IRS didn't ask for these rules; they were forced on it by the Congress'.[869] Senator Grassley criticised the IRS for assuming a narrow interpretation of this statute section and emphasised that 'the statute envisions having whistleblowers and their advisors helping to pull the oars in the examination and investigation – as is the successful practice for years with the FCA.'[870] Similarly, the 1986 False Claims Act amendments were not well received by everyone.[871] Agency resistance can blunt the effectiveness of any programme.

Yehonatan Givati notes other concerns, such as informers destroying trust in social groups and deleterious effects on trust and team spirit within corporations.[872] This is a concern that typically arise from considering informants under authoritarian regimes and is less applicable to large rewards for specific and severe offences. A related concern is that rewarding whistleblowers could turn the public against all whistleblowers. It is impossible to say what would happen if reward programmes became more common and how that would affect the public's view of whistleblowers. While it could have a negative effect, in most contexts whistleblowers would still not be eligible for rewards and are likely (if the inadequacies in current protection laws persist) to still suffer retaliation. There will be no reason to brand this large class of whistleblowers as egotistic or self-motivated. The rapid expansion of reward programmes suggests this has not materialised into public opposition. Yet, there are historical precedents for this concern. In England, incentivised informers obtained a poor reputation and became vilified, while some did perform a positive public enforcement purpose. If rewards are used in highly politicised contexts, such as for abortions in the US,[873] then that would be a concern for tarnishing the reputation of all whistleblowers. The largest risks for undermining the reputation of whistleblowers come from applying rewards in controversial contexts and for mundane offences. This is not a pertinent concern for severe economic and corporate crime and with the appropriate restrictions.

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[868] For the FCA, see Chapter 4(B)(4).

[869] Farag and Dworkin (n 662) 42, citing Tax Notes Today, 'IRS Whistleblower Office Closer to First Aware Determinations Under New Law' (2010, January 25) TNT 15-8.

[870] Charles E. Grassley, 'Letter to IRS Commissioner Shulman' 5 (13 September 2011).

[871] Helmer 2013 (n 318) 1275 details how the DoJ's attitude toward the 1943 and 1986 amendments were that 'the government did not need any help', the DoJ also 'refused to defend the constitutionality of the False Claims Act *qui tam* provisions, even when requested to do so by various federal judges'.

[872] This comes from page 27 in a discussion section in an earlier working paper, a section that was removed when it was published. The published version is Yehonatan Givati, 'A Theory of Whistleblower Rewards' (2016) 45 Journal of Legal Studies 43.

[873] Texas, for example, implemented a law that allows private citizens to cash in rewards for suing abortion providers and others who aid a woman in obtaining an abortion, see S.B.A No. A8, the 'Texas Heartbeat Act'. This law is also entirely an instance of private enforcement and differs substantially from even the FCA (1863), see KKC, 'The Texas Abortion Law is Not a Whistleblower Law' (16 September 2021) <https://kkc.com/laws-statutes-and-regulations/the-texas-abortion-law-is-not-a-whistleblower-law/> accessed 19 September 2024.

F. Boundary Conditions for Effective Reward Programmes

The practice of rewarding informants does not lack historical or cultural precedents, as often is claimed. This Thesis also concluded that there is little evidence that whistleblower protections, often hailed by researchers and policymakers as essential in enhancing enforcement, has been effective at detecting and deterring severe profit motivated wrongdoing. Finally, this Thesis has also shown that there is an unprecedented number of empirical, experimental, and administrative data showing that reward programmes are both inherently effective at detecting and deterring wrongdoing and comparatively more effective than random audits. This level of evidence is unprecedented in the literature on the deterrence effects of crime prevention policies, which largely remains elusive for many policies and crime categories.

A lot of literature and administrative data has been considered so far, along with analysis of their aggregate implications. Beyond the evidence that whistleblower reward programmes are effective, this Thesis has also focused on what design features make them effective. What follows below is an outline of boundary conditions for the effective use of reward programmes, based on the prior analysis.

Preconditions must be in place and the enforcement area must be suitable for a reward programme. This includes fines for violations that are sufficiently large to finance rewards and provide a compelling incentive to whistleblowers. Reward programmes would also benefit if the targeted non-compliance was difficult or costly to detect, cause significant economic or other damages, and detection and deterrence have been difficult to achieve with current enforcement mechanisms. It is also beneficial if there is a broad societal consensus that the wrongdoing in question is harmful and avoid implementing programmes in politically sensitive enforcement areas. Outside the US, it is likely that lawyers will serve less of a role in pre-screening cases. Smaller rewards to whistleblowers could then be justified (as lawyers are not paid), but more resources required for agencies to screen cases. Ensure adequate administrative resources and competence at the administrative agency. Once an enforcement area is considered, factors relating specifically to the enforcement area must be considered – who is the person most likely to provide the information needed? What would constitute a sufficient incentive for this person to come forward? How is information on the forms of wrongdoing in question kept and spread, how significant are the leverage wrongdoers have over potential whistleblowers? Could witness protection be needed? Leniency for whistleblowers for certain offenses?

Evidence-based policymaking would also suggest following the conclusions derived from the administrative data and the empirical and experimental literature. The insights below follow from our conclusions in Chapters 4 and 5. Financial incentives should be commensurate with the value of enforcement outcomes and the risks undertaken by whistleblowers. Empirical research suggests that reward levels ranging from 10-30% of recovered funds are optimal in incentivizing high-quality disclosures. A graduated reward structure should be implemented, ensuring that larger, high-impact cases receive substantial incentives while minor infractions do not result in disproportionate compensation. Thresholds (IRS $2 million, SEC $1 million) should be introduced to target high-quality information and reduce excessive submissions. Timely disbursement of rewards should be ensured, reducing unnecessary delays that could discourage potential whistleblowers. Measures can be taken to prevent strategic delay in reporting, ensuring that whistleblowers do not withhold information to increase potential payouts. If such behaviour can be identified, this counts toward going lower in the range toward 10% rather than 30%. Incentive weighting should favour individuals who first attempt internal reporting, ensuring that corporate governance structures remain relevant.

To anticipate interpretational issues that the IRS and SEC later resolved through

rulemaking, implementers of reward programmes should provide clear conditions for reward eligibility and explicitly state under what conditions a person would be ineligible for a reward. The main criteria should be that the whistleblower provided non-public, original information that leads to successful enforcement and material contribution to case resolution. Programmes can exclude those who by virtue of their position or employment should not be entitled to rewards. This would include, for example, enforcement personnel themselves and those who planned or initiated the wrongdoing. If overreporting becomes an issue, safeguards could be put in place to deter frivolous or false claims, including penalties for deliberate misinformation and barring serial submitters.

While there is little evidence that protection measures alone have been a significant driver of enhanced detection of severe corporate wrongdoing, they are important for those who do not qualify for rewards and provide a safeguard in the interim period between a whistleblower disclosure and a reward grant. Anonymity should therefore be guaranteed where feasible to encourage disclosures and mitigate risks of retaliation. Legal protections against workplace reprisals should be reinforced, covering dismissal, blacklisting, and retaliatory legal actions. Secure, independent reporting mechanisms should be provided, ensuring that whistleblowers can submit information without fear of exposure. Whistleblower offices (or knowledgeable persons responsible for handling whistleblower claims) should be established in agencies overseeing such programs to provide direct assistance and advisory services.

Several features of the IRS and SEC programmes are also non-policy related. These centre around regularly publishing information on their whistleblower programmes, which enhances exposure, improves accountability, and serve as a basis for policy improvement. A system of public accountability should be maintained, ensuring that anonymized data on whistleblower contributions and enforcement successes are regularly published. Clear communication strategies should be developed to inform potential whistleblowers about program mechanics and their rights. Public engagement and awareness campaigns should be conducted to improve trust in the system and encourage whistleblowers to come forward. Programs should establish self-financing mechanisms, with a portion of recovered funds reinvested to maintain program sustainability. This ensures that it is the wrongdoers that pay the rewards and not the taxpayers. Reward structures should be periodically reviewed and adjusted based on regulatory needs and observed impact. The program's governance must be politically and institutionally independent, preventing shifts based on changing political agendas.

By adhering to these conditions, whistleblower reward programs can be structured to function as an integral component of regulatory enforcement, ensuring both credibility and long-term effectiveness while preserving ethical and procedural integrity.

G. Conclusion

This Chapter considered important design features of reward progammes. Section B, *Administrative, Legal, and Cost-Related Issues*, showed that some concerns frequently raised are either overstated or can be remedied with simple legislative or administrative adjustments. It reviewed concerns that rewards trigger a bypassing of internal controls, and argued it is as plausible that they should improve internal controls. While design features can improve the administrative load of these programmes, current data and empirical evidence suggest that their benefits outweigh their costs by a large margin. The Chapter also argued that the fact that only a few employees would be eligible for rewards is a feature and not a bug – it minimizes a range of issues associated with smaller rewards for many forms of wrongdoing. Section C, *Motivational Misalignments*, showed that there is no empirical or experimental evidence which suggests that reward programmes crowd out intrinsic motivation, and concerns over fabricated information and false reporting have not been salient issues. Section

D, *Statutory Design*, dealt with other important design dimensions: how to think of threshold for rewards and reward sizing, rewarding culpable individuals and providing amnesty, the role of layers, private right of action, and public perceptions. Finally, *Additional Implementation and Design Features*, considered other issues not discussed in previous sections.

CONCLUSION

A. Summary of Thesis

Chapter 1 introduced the issue of corporate wrongdoing, its recalcitrant nature, high degrees of recidivism, and its significant damage to the environment, government budgets, and consumers. It discussed two main approaches to combating the problem: audits and incentivising self-regulation, to then go on and illustrate the shortcomings of these methods in three regulatory areas: securities fraud, money laundering, and taxation. Each of these aimed to highlight three different features of the present regulatory environment: that violations have been persistent throughout time despite numerous regulatory initiatives (securities fraud), that large paperwork regimes have developed with unclear effect (money laundering), and that incentivising whistleblowers looks like a compelling way to remedy the issue (taxation). Finally, the Chapter highlighted numerous general benefits of relying more on whistleblowers in enhancing enforcement of corporate wrongdoing and why incentivising insiders is an effective complement to present enforcement efforts.

Chapter 2 took a historical approach to understanding the issues that whistleblower laws have been a response to and how incentives have been utilised to enhance enforcement. It outlined how the *qui tam* enforcement mechanism was first introduced in England, and how it was eventually abolished, as well as its early uses in the US. It also showed how, post-World War II, whistleblowers then designated as 'informers' were despised. In the 1980s after neoliberal and new management revolutions, it became apparent that more control was needed of outsourced production and concurrently with an expansion of audit regimes, whistleblower laws start to be introduced in the 1980s. Finally, real momentum was gained in the mid-2000s up until 2020, culminating in international organizations recognizing the need to protect whistleblowers and the introduction of the EU Directive.

Chapter 3 then tried to assess the impact of this legislative fervour, noting that international recommendations had typically focused on protecting and not rewarding whistleblowers, and on how whistleblower protections had become a part of employment law. It then reviewed some of the laws and their legal and administrative outcomes to gain insights on possible improvements and discover learning opportunities. The Chapter concluded that prior protection laws whose design inspired the Directive, such as SOX (2002) and PIDA (1998), have had uncertain effects on incentivising claims and that whistleblowers alleging retaliation have a low win rate under these laws. It also noted that there has been no verifiable decline in some metrics protection laws aim to combat, such as retaliation rates and reductions in observed wrongdoing. Australia was a unique case in this respect, with thorough reporting and adequate outcomes. Although a public sector law, the transparency and reporting by the Ombudsman under Australia's PIDA allow for deeper assessments and policy adjustments. In aggregate, however, the Chapter concluded sceptically of protection law's ability to detect and deter severe corporate wrongdoing and noted numerous features suggesting that wrongdoers have too much leverage under protection regimes. Finally, the Chapter argued that the protection framework is poorly designed to enhance enforcement because disputes in labour law put no value on the information brought by whistleblowers. Moreover, more robust incentives under this regime will encourage more low-value claims. To optimise detection and deterrence of severe corporate wrongdoing the belief-based protection regimes need to be complemented with fact-based reward programmes.

Chapter 4 reviewed three US reward programmes in depth. It focused on how they have been amended throughout the years and what lawmakers and regulators considered when amending these programmes. It concluded that all three programmes have performed well, increasing detection and deterrence of offences in their respective areas. Numerous empirical

studies are available in support of this conclusion, and agency personnel's testimony is both bipartisan and universally supportive of them.

Chapter 5 focused on design dimensions, partially through the lens of criticism of these programmes, but also local factors of the US context that may have impacted their success. The Chapter concludes that these concerns are by and large exaggerated and do not constitute a compelling case against the introduction of reward programmes. The Chapter argued that some design features are crucial for the success of these programmes and discussed best practices regarding reward sizing, thresholds for rewards, and numerous other design aspects. It also comments on other aspects that enable the success of reward programmes.

B. Revisiting corporate wrongdoing

Given the compelling evidence for the effectiveness of reward programmes, it remains somewhat of a mystery as to why they are not used more frequently outside of the US, especially in the EU. There are two compelling reasons why we have not seen a more rapid adoption of these programmes. These are alluded to in the Preface: a widespread intuition that rewarding 'snitches' is not morally acceptable, that rewards taint the reputation of all whistleblowers, or that it is wrong to provide a selfish reason to do something one should do out of duty. There is also much residual guilt over informants during World War II, during which many were sentenced to death when reported on. It is difficult to say exactly what this argument amounts to, but it appears to be based on moral intuitions. What they do express is an intuition that, upon factual examination, needs to be revised. It needs to be revised because it is not entirely wrong: informants have been abused historically, both by authoritarian states but also as a means of turning less fortunate people against each other to enforce petty crimes such as working on the sabbath or practising a religious denomination not endorsed by the Church of England. As mentioned in the Preface, it is inadvisable to confuse a tool with the purpose it serves. The revival of laws aiming to motivate individuals to come forward and report on wrongdoing is an explicit recognition of the value of insiders and an admission that they can serve democratic ends. This is also important to remember because powerful tools can be used to serve anti-social aims. It is not hard to imagine how a corrupt autocrat can use these very programmes to harass and imprison political opponents. Delimiting these programmes to specific areas, persistently thinking about their moral implications, along with public diligence in ensuring their proper application, is as necessary in this context as it is in regulating police behaviour.

There are also more non-historical, organisational, non-moral reasons for why the practice of rewarding whistleblowers has not caught on until recently. Agency personnel may view relying on whistleblowers as 'outsourcing' their jobs, diminishing their value, and a tacit accusation of failed supervision and enforcement. Institutions can also become rigid and resistant to change, and in some cases, industry pressure successfully staves off effective enforcement mechanisms. Politicians financed by certain industries may be reluctant to introduce legislation to detect and deter wrongdoing in those industries. Not enforcing the law stringently may provide a competitive advantage, and too much enforcement may lead firms to threaten to exit. Politicians may only be interested in well-designed policies if they affect their electability or serve their political ends.

It also was a somewhat unfortunate side effect that the focus on and push for horizontal protections as a response to the uneven situation created by a prior sectoral focus in the EU made rewards appear misplaced. Reward programmes became seen as inextricably linked to protections and as an 'add-on' that would be unfeasible given the horizontal approach taken. The EU Directive on protection was seen as a victory, and the topic of whistleblowing was

considered to be dealt with.[874] Yet, as this Thesis has argued, protection laws have not proven sufficient to detect and deter the kind of wrongdoing that they were a response to. Protections can be complemented with reward programmes tailor-made for specific forms of wrongdoing. These are best suited for sector-specific enforcement agencies dealing with civil violations and are fact-based, while protections are typically dealt with by labour courts and are belief-based. The Whistleblowing Directive will, however, familiarise administrative agencies with taking in and handling whistleblower claims. Should urgent enforcement needs arise that threaten the integrity of the internal market, the Commission could propose reward programmes for the specific areas of EU law where protections became mandatory under the Whistleblowing Directive. In this sense, it may have created the administrative infrastructure and know-how to effectively implement reward programmes in the future.

It has also been suggested that rewards may be in conflict with the case law of the Court of Justice of the European Union.[875] The Impact Assessment of the Whistleblowing Directive notes that the majority of member states have not introduced rewards 'because they are seen a shifting the purpose of the reporting away from the public interest to the personal gain of whistleblowers, thus making whistleblowing appear as a commercial transaction, which may discredit whistleblowers in general'.[876] Yet, despite the Impact Assessment mentioning the US programmes reviewed in this Thesis, there is no evidence that specialised programmes for severe corporate wrongdoing have had this adverse effect. The notion that 'bad' whistleblower motivations and the public interest are incompatible is simply incorrect. Nowhere else in discussions over policies or incentives do we think that monetary incentives are unclean or expect people to act in favour of the public good against their interest. Viewing whistleblowing as an essentially moral, non-commercial activity has made the approach to the issue largely illogical from the point of view of enhancing enforcement.

The same Impact Assessment also suggests that rewards may be 'running counter to' ECtHR case law according to which whistleblowing 'motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection'.[877] It is difficult to say what this would entail in practice, as some Member States already have reward programmes, and the Commission itself has opened up the possibility for Member States to experiment with them.[878] Moreover, it could be argued that this ECtHR decision runs counter to the current EU Whistleblowing Directive, as there are certainly whistleblowers seeking protections and reporting wrongdoing 'motivated by a personal grievance or a personal antagonism'. The ECtHR judgment appears to harken back to a somewhat outdated idea that whistleblowing is only acceptable if it is 'pure' or done in 'good faith', as PIDA (1998) previously stipulated. The EU's approach from these documents appears very Kantian – that the public interest

[874] Another source may have increased the credibility of protections as an economic crime deterrent, namely a 2017 study commissioned by the EU Commission to estimates the benefits of introducing protections in public procurement. They found that benefits of protections vastly outweigh their costs, justifying the conclusions of their methodology by stating that 'The credibility of the study's findings is supported by a peer-reviewed published study on whistleblower protection from the United States' Jennifer McGuinn, Ludovica Rossi, and Meena Fernandes, 'Estimating the Economic Benefits of Whistleblower Protection in Public Procurement' (*Milieu Ltd*, July 2017) 14. That study, however, is Carson et al (n 657), which is on the False Claims Act that of course also offers substantial rewards.

[875] Dimitrios Kafteranis, 'Rethinking Financial Rewards for Whistle-Blowers Under the Proposal for a Directive on the Protection for Whistle-Blowers Reporting Breachers of EU Law' (2019) 2 Nordic Journal of European Law 38, 43.

[876] WB Directive Impact Assessment (n 5) 36.

[877] *Heinisch v. Germany* (n 453) para. 69

[878] Regulation (EU) No 596/2014, Preamble 74 'Member States should be allowed to provide financial incentives for those persons who offer relevant information about potential infringements of this Regulation'.

should not be served if whistleblowing is not done for purely moral reasons, 'out of duty'.

This Thesis does not argue that whistleblower rewards is the single solution to all the issues that regulatory enforcement and compliance are presented with. Rewards are part of a system of detection, controls, punishment, and audits. Even within areas covered by the most stringent reward laws, such as pharma in the US, there are several repeat offenders.[879] What two early scholars of regulatory governance recognised in their book *Responsive Regulation* was the following: 'there is no such thing as an ahistorical optimal regulatory strategy. There are just different strategies that have a mix of strengths and weaknesses.'[880] These strengths and weaknesses are not static but develop dynamically in the interplay between regulators and the regulated (and are, therefore, not ahistorical). Expanding this regulatory toolkit is essential, and much of this Thesis argues that whistleblower regimes should be better understood and developed to tackle corporate wrongdoing more effectively. In the process of reviewing whistleblower laws, deficiencies of other forms of regulatory governance also came to the fore. Many audit-based regimes today, for example, appear like legally enforced rain dancing, motivated by hopes that engaging in certain behaviours will cause certain outcomes, yet there is little evidence of any causal relationship. Audits and supervision are layered in complex paperwork regimes, with auditors auditing auditors who audit other auditors. Anti-money laundering is the prime example of this, but it can be found in almost any regulatory area. Much of this appears to be driven more by perception than by intelligently and well-thought-out policy that effectively deals with the issues at hand.[881]

The development of these forms of compliance regimes also appears driven by the unique context of enforcing laws governing corporate conduct. Personal accountability is an incomplete solution as corrupt managements can create incentives and contexts that enable wrongdoing and encourage wrongdoing, while never explicitly ordering it. *Mens rea* is incredibly hard to prove in these cases. Vicarious liability is viewed as unfair, as individuals under management can and do act of their own volition. Existential threats such as debarment from government procurement, recalled licences and permits, or the inability to audit public clients, have also lost their appeal due to their collateral effects. At large firms, hundreds if not thousands of employees are punished for mistakes committed by typically a few. Their families are affected, as are suppliers and customers. Large fines are appealing as this brings back money to the government and is not solely destructive. It is an extra tax for bad behaviour. There are, therefore, few tools available to detect and deter corporate wrongdoing that are palatable to our moral sentiments. This has led to the increased popularity of non-prosecution and deferred prosecution agreements. It is in this enforcement context that reward programmes are expected to work well. This is a world inhabited by MBAs who run a discounted cash flow analysis to determine the present value of future cash flows given a certain regulatory violation versus cash flows without it. They can then determine the probability of getting caught and multiply that by the expected fine to see if the expected discounted cash flows with or without regulatory violations exceed the probabilistically weighted fine. Whistleblower reward programmes throw a large wrench into such calculations by introducing ambiguity in the probability of detection that must be accounted for at a steep price in their models.

The need to ensure corporate compliance has also gained traction through another development. After the global financial crisis, governments effectively started acting like

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[879] See, for example, Liam Bendicksen et al, 'Federal Enforcement of Pharmaceutical Fraud under the False Claims Act, 2006-2022' (2024) 49 Journal of Health Politics, Policy, and Law 250, 253. They found that many pharmaceutical firms that lost or settled FCA actions in the past repeat their offenses in later years. Around 82% of their sample of cases were initiated by whistleblowers.

[880] Ian Ayers and John Braithwaite, *Responsive Regulation* (Oxford University Press 1992) 101.

[881] For a good paper on this in the AML context, see Pol 2020 (n 228).

insurers of systemically important banks. In a country like the UK, the bank bailout in the aftermath of the global financial crisis cost £133 billion and was equivalent to £2,000 for every person in the UK.[882] This fiscal stimulus continued under COVID-19 when favourable loans were provided to firms regardless of industry and central banks took on corporate bonds on their balance sheets. Governments and central banks handed out trillions of dollars in different forms of aid throughout the world. Given the de-facto insurance that the state appears willing to give to systemically important firms, which taxpayers pay for, society should be demanding more in return for such insurance. Most countries are already paying the price in the form of enormous deficits and debt servicing costs that threaten the stability of pension plans. This is occurring in a context where criminals and tax evaders park trillions of ill-gotten assets in tax havens, and many of the corporations reaping the benefits of these policies continue rent seeking at the expense of citizens.

The type of fiscal policy introduced after the financial crisis, and then reserved for financial institutions, has now become a mainstay after COVID-19 and is no longer reserved for banks. We have moved from 'too big to fail', to 'too big to jail',[883] to 'too big to fine'.[884] Antitrust enforcement has waned and yielded to the benefits of economics of scale.[885] The moral hazards and incentive structures created by this new form of capitalism warrants broader control and insight into organisational conduct, which whistleblower reward programmes provide. Consider one poster child for the moral hazard created by this form of comingling: Boeing. The company had repurchased an enormous amount of stock between 2014 and 2018, total outstanding shares at went from around 760 million to around 600 million – a decrease of 21%. At an average share price of $160, the buybacks would have cost $25.6 billion. In 2018, a new 737-MAX-8 crashed, killing 189 people, and in March 2019, a plane of the same model crashed, killing 157 people.[886] Covid hit Boeing severely, and its share price declined over 60% in February and March of 2020. The firm then went, 'hat-in-hand', to Washington asking for a $60 billion government bailout.[887] The bailout turned out unnecessary, as unprecedented stimulus enabled Boeing to sell $25 billion of bonds, and the stock recovered from its absolute lows. Still, the reassurance from the Senate that it would provide the funds for Boeing helped to restore investor confidence. In 2023, 37% of Boeing's revenue 'were earned pursuant to U.S government contracts'.[888]

In 2021, Boeing entered a DPA with the DoJ over the 737-MAX crashes, with an assistant attorney general stating, 'Boeing's employees chose the path of profit over candor by concealing material information from the FAA [Federal Aviation Authority] concerning the

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[882] Changing Banking Report (n 424) 82.

[883] Garrett (n 25).

[884] Catarina Marvão, Giancarlo Spagnolo, and Valerio Poti, 'Are banks too big to fine?' (2023) SSRN Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4441329> accessed 19 September 2024, found evidence that financial institutions receive lower fines due to financial stability concerns.

[885] For the US: Filippo Lancieri, Eric A. Posner, and Luigi Zingales, 'The Political Economy of the Decline of Antitrust Enforcement in the United States' (2023) 85 Antitrust Law Journal 441. For the EU, see Catarina Marvão and Giancarlo Spagnolo 'Leniency Inflation, Cartel Damages and Criminalization' (2023) 63 Review of Industrial Organization 155, 159, documenting the decline of convictions and fines although attributing this to the Damages Directive.

[886] Wim Vandekerckhove, 'What can European companies learn from Boeing?' (2024) European Whistleblowing Institute, <https://www.ewi.legal/blog/what-can-european-companies-learn-from-boeing> accessed 19 September 2024.

[887] David Slotnic, 'Boeing is expected to get billions of dollars in bailouts from the Senate, despite backlash over the 737 Max crisis and past stock buybacks' (*Business Insider*, 25 March 2020) <https://www.businessinsider.com/boeing-bailout-coronavirus-crisis-controversy-2020-3> accessed 19 September 2024.

[888] Boeing Inc., 'Form K10' Securities and Exchange Commission (2023) 12.

operation of its 737 Max airplane and engaging in an effort to cover up their deception'.[889] One condition for the deferred prosecution was that Boeing would improve its compliance and internal control procedures. Yet, scandals continued to unravel with doors blowing open mid-flight, loose parts found by airlines, not sharing information with government investigators, and Boeing whistleblowers ending up dead.[890] It is in situations like these where recidivism and non-compliance is widespread where whistleblower rewards can be effective, and as two whistleblowers ended up dead, this case also illustrates how witness protection can be incredibly important for those possibly deterred by these tragic events. While we do not know the fallout of the most recent scandals, Boeing entered into a plea agreement with the DoJ after violating its DPA 'by failing to sufficiently design, implement, and enforce a compliance and ethics program to prevent and detect violations of U.S. fraud laws throughout its operations'.[891]

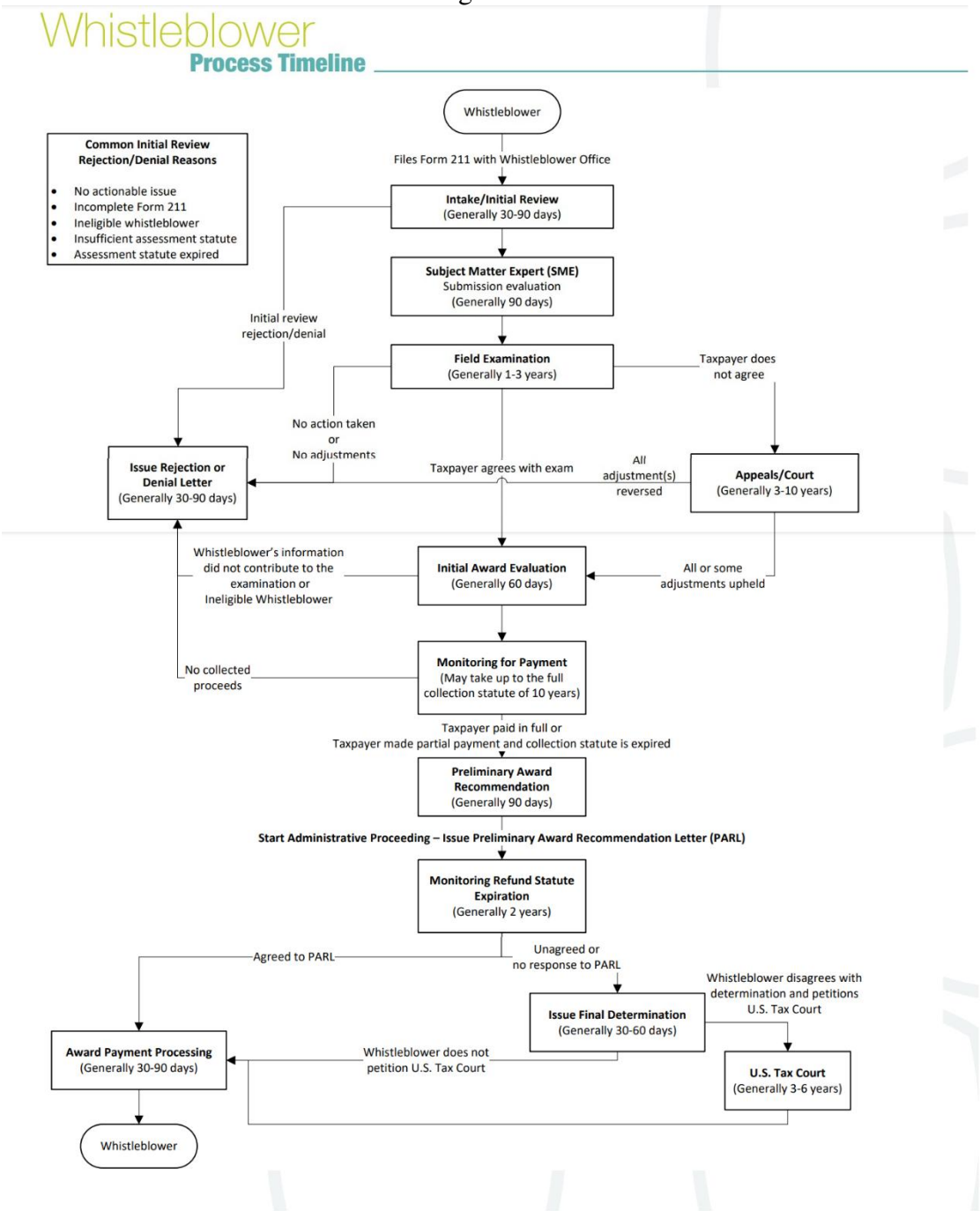
[889] Department of Justice, 'Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion' (7 January 2021) <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion> accessed 19 September 2024.

[890] Bill Chappell, 'How bad is Boeing's 2024 so far? Here's a timeline' (*NPR*, 20 March 2024) <https://www.npr.org/2024/03/20/1239132703/boeing-timeline-737-max-9-controversy-door-plug> accessed 19 September 2024.

[891] *The United State of America v. The Boeing Company* (4:21-cr-00005-O) 2.

APPENDIX 1: ADDITIONAL INFORMATION ON THE IRS PROGRAMME

Figure 17



'Intake/Classification

Intake/Classification process includes claims submitted to the Initial Claim Evaluation (ICE) Unit for review and analysis. The ICE Unit builds the claims, and the claims are then sent to the OD's classification function for further review. The primary function of this process is to determine which claims require additional review from the Whistleblower Office or the

ODs. This process includes claims that have no current status, claims that require additional information, incomplete claims, new claims, and claims awaiting classification.

OD Field/Investigation
OD Field/Investigation process includes claims sent to the various ODs for investigation after classification's review. The current statuses included in this process are claims under OD Field Examination, claims being reviewed by the OD's Subject Matter Experts, and claims under initial review by the Criminal Investigation Division prior to accepting the claim for investigation.

OD Field/Suspense
Claims submitted often include multiple taxpayers, potential related taxpayers, and claims which might fall under the Tax Equity and Fiscal Responsibility Act (TEFRA). The OD Field/Suspense process includes claims that are awaiting the closure of an associated claim, to allow all claims to be closed out simultaneously. This process includes the status for claims in which the case is suspended because the OD is evaluating a bulk claim involving a large number of taxpayers, or the claim still has related claims in process, or the claims are awaiting the resolution of a TEFRA key case.

Appeals
This process involves the status on claims in which the taxpayer has sought review by the IRS appeals function or the courts.

Preliminary Award Evaluation
Preliminary Award Evaluation process involves claims with current statuses including administrative proceedings for either rejections or denials, or for Preliminary Award Recommendation Letters (PARL).

Interim Award Assessment
This process includes the review of all claims that have been returned from the ODs that require additional review. The current statuses in this process include approvals for award percentages, award evaluations, final award approval, final award processing, Form 11369 award recommendation and coordination review, reviewing the results of the ODs to determine whether sufficient information exists to make an award decision, managerial PARL approval, and the review of pending rejection and denial letters.

Collection/Suspense
Collection/Suspense process involves the monitoring of tax accounts associated with claims for payment of the deficiencies.

Award/Suspense
This process includes cases that have been suspended, and cases in which the payment has been received but is awaiting final determination of proceeds.

Final Review
Final Review process includes Award Recommendation Memoranda and letters for rejections and denials, which have been approved, or are awaiting approval from management.

Litigation
The litigation process includes the claims where the whistleblower has sought litigation

regarding an award determination made on the whistleblower's claim.'[892]

Figure 18

Reasons for Closure	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Award Paid in Full	130	238	204	761	367	423	510	593	645	396
Allegation Unclear/Non Specific	1807	514	5633	12395	8259	8262	8524	5074	4402	
Issues Below Threshold for IRS Action	963	662	1116	2413	1572	1405	1235	697	1432	1415
Information Already Known	847	271	1165	1372		557	127	47	54	21
Lack of Rerouces/Other Priorities	66	78			1376					
Examination Result Was"No Change"	162	124	287	1443	845	573	850	1820	770	194
Examination Result on Whistleblower Issues Was "No Change"	58	57								
No Collected Proceeds	135	78	58	133	63	46	79	33	91	30
No Tax issue	916	2584					614	663	525	
Insufficient Time Remaining on Statute of Limitations	195	131	710	959	894	436	524	403	746	640
Statute of Limitations Expired Before Whistleblower Information	234	163								
Closed - Other	1082	1620	1229	999	42	41	37	19	32	12
Administrative Error			36	43	52	42	35	48	108	35
Ineligable Whistlelbower			7	13						
Failure to file Form 211			170	483	331	554	356	55	41	60
Anonymous Referred to 3949-Program				110	131	136	137	108	177	138
Closed – Unable to Contact/Undeliverable Whistleblower					375	321	190	73	45	23
Closed - Deceased Whistleblower Claims					104	23	4	27	10	14
Closed – Non-Compliant Whistleblower					27	10	65	1	7	1
Claim Rejected - Ineligible Whistleblower					7	4	7	2	15	10
Claim Denied - Surveyed by operating division							3361	969	500	172
Claim Denied – No Actionable Issue									1892	8193
Claim Rejected - Failure to Sign Form 211 Under Penalties of Perjury, or Incomplete Form 211									1092	251
Total	6595	6520	10615	21124	14445	12833	16655	10632	12584	11605

Reasons for Closure	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Award Paid in Full	2%	4%	2%	4%	3%	3%	3%	6%	5%	3%
Allegation Unclear/Non Specific	27%	8%	53%	59%	57%	64%	51%	48%	35%	0%
Issues Below Threshold for IRS Action	15%	10%	11%	11%	11%	11%	7%	7%	11%	12%
Information Already Known	13%	4%	11%	6%	0%	4%	1%	0%	0%	0%
Lack of Rerouces/Other Priorities	1%	1%	0%	0%	10%	0%	0%	0%	0%	0%
Examination Result Was"No Change"	2%	2%	3%	7%	6%	4%	5%	17%	6%	2%
Examination Result on Whistleblower Issues Was "No Change"	1%	1%	0%	0%	0%	0%	0%	0%	0%	0%
No Collected Proceeds	2%	1%	1%	1%	0%	0%	0%	0%	1%	0%
No Tax issue	14%	40%	0%	0%	0%	0%	4%	6%	4%	0%
Insufficient Time Remaining on Statute of Limitations	3%	2%	7%	5%	6%	3%	3%	4%	6%	6%
Statute of Limitations Expired Before Whistleblower Information	4%	3%	0%	0%	0%	0%	0%	0%	0%	0%
Closed - Other	16%	25%	12%	5%	0%	0%	0%	0%	0%	0%
Administrative Error	0%	0%	0%	0%	0%	0%	0%	0%	1%	0%
Ineligable Whistlelbower	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Failure to file Form 211	0%	0%	2%	2%	2%	4%	2%	1%	0%	1%
Anonymous Referred to 3949-Program	0%	0%	0%	1%	1%	1%	1%	1%	1%	1%
Closed – Unable to Contact/Undeliverable Whistleblower	0%	0%	0%	0%	3%	3%	1%	1%	0%	0%
Closed - Deceased Whistleblower Claims	0%	0%	0%	0%	1%	0%	0%	0%	0%	0%
Closed – Non-Compliant Whistleblower	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Claim Rejected - Ineligible Whistleblower	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Claim Denied - Surveyed by operating division	0%	0%	0%	0%	0%	0%	20%	9%	4%	1%
Claim Denied – No Actionable Issue	0%	0%	0%	0%	0%	0%	0%	0%	15%	71%
Claim Rejected - Failure to Sign Form 211 Under Penalties of Perju	0%	0%	0%	0%	0%	0%	0%	0%	9%	2%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

[892] IRS OWB FY2020 24.

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