

Stalemate: Whistleblower Protection in Switzerland

Following in-country mission

March 7-9, 2022

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*** We extend our thanks and gratitude to the whistleblowers, civil society practitioners, journalists and academics who met with us and shared their knowledge and experience about the protection of whistleblowers in Switzerland.**

1. INTRODUCTION

The protection of whistleblowers is now being strengthened across the European Union with the implementation of the Directive on the protection of whistleblowers¹ in 27 countries. Yet despite significant OECD pressure in this area for many years and Switzerland being part of the Council of Europe which adopted the Recommendation on the protection of whistleblowers in 2014, whistleblowers remain largely unprotected in Switzerland. Some cantons have made moves, such as in Geneva which recently passed a law to protect public sector employees who “denounce” illegal acts.² The Swiss Parliament has been debating whether or how to protect whistleblowers at the federal level since 2003,³ but without any success in establishing a federal legal framework that covers both the private and public sectors. In fact, progress at the federal level stopped in 2020 with the rejection of a limited law to amend the duty of loyalty that employees currently owe employers in cases where an employee blows the whistle internally or in very limited circumstances to a regulatory body.

In Switzerland, whistleblowers who suffer retaliation fight alone against their employers, but also against their lawyers, insurance companies, and the legal system. Dismissals, criminal and civil sanctions for breaching confidentiality, moral harassment, mobbing, discrimination, and pressure, are only some of the actions taken against whistleblowers. Because there is no proper legal protection,⁴ there is also no organized civil society support for whistleblowers before, during and after someone reports or discloses information nor any concerted civil society movement, such as exists in France today, to advocate for the protection of whistleblowers, despite the efforts of some very committed organisations (see more later).

To better understand the stalemate situation in Switzerland and the challenges facing Swiss whistleblowers, the Charles Léopold Mayer Foundation (FPH) and the Whistleblowing International Network (WIN) conducted an in-country mission. Over three days in March 2022, we met with different actors including whistleblowers, lawyers, NGO practitioners, journalists, and academics in Geneva, Lausanne and Berne. These meetings provided a new perspective from which to consider how best to support efforts in Switzerland and the prospects for change that such support could engender, particularly to establish a collective process to protect whistleblowers in Switzerland.

This report is intended to offer an outsider’s perspective on the current state of play with respect to the challenges and the potential for advancing the protection of whistleblowers in Switzerland. It is neither an exhaustive review nor an in-depth analysis of each factor identified but rather an overview of the issues the authors view as being relevant after a series of in-depth discussions with different actors in Switzerland, including whistleblowers. We trust that this will serve as a helpful basis for further discussion and elaboration.

1 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>

2 <https://ge.ch/grandconseil/data/odj/020308/L12261.pdf>

3 See debates here: <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20033344> and <https://www.parlament.ch/en/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=6549>

4 There is no clear protection for whistleblowers in the private sector and while protections exist federally, they are far from satisfactory. Limited protections at the canton level are piecemeal and differ widely from local area.

2. HISTORY OF OUR WORK IN WHISTLEBLOWING

The Charles Leopold Mayer Foundation (FPH) is a Swiss foundation with offices in Paris and Lausanne. FPH began supporting NGOs working in whistleblower protection in France in 2013 which helped lead to the adoption of France's first whistleblower protection law "Sapin II" in 2016. As the field developed FPH also supported wider collaboration and the first organisation dedicated to supporting whistleblowers in France, the Maison des lanceurs d'alerte (MLA), which was established by 17 French NGOs in 2018. MLA advocated with other European organisations for the EU Directive to protect whistleblowers, adopted in 2019 and worked directly with lawmakers on the transposition of the new EU Directive into French law. As of February 2022, France has the most progressive law for whistleblowers so far in the European Union.

In 2016, FPH started supporting the Whistleblowing International Network (WIN), a long-standing informal network of NGOs sharing whistleblowing expertise. WIN has been very active in Europe, supporting the sector in its advocacy efforts nationally and regionally, including at the EU and Council of Europe levels. WIN formalised its structure in 2018 and the MLA is now a member of the network. Throughout this time, FPH has had an interest in helping to ensure greater protections for whistleblowers in Switzerland through supporting NGOs and their collaboration. In 2019, FPH provided support to Campax, a citizen mobilisation and campaigning organisation, following the creation of their SwissLeaks platform.

WIN experts have worked in Europe for the last two decades⁵ and the majority of WIN's current NGO membership is based in Europe. WIN works to promote their work, and provide technical, legal expertise and advocacy support – on organisational activities, cases, strategy, and legal reform efforts. WIN was an active member of the European civil society coalition that led to the adoption of the EU Directive providing legal and advocacy briefs that were widely shared and relied on by MEPs, relevant EU institutions, and national advocates. WIN publicly campaigned for improvements as the draft directive was examined and negotiated. WIN now runs the [EU Whistleblowing Monitor](#) to track transposition of the EU Directive in the 27 member states and works with 27 voluntary country editors.

WIN has followed Swiss whistleblower cases for many years, including those working at the UN and other international bodies based in Switzerland, and in Swiss banking and financial institutions. Dr. Yasmine Motarjemi, for example, the former VP of Food Safety at Nestlé, first came to WIN's attention when she was invited by Swiss officials to address a meeting organised by the CDCJ in Strasbourg in 2013. WIN supported Dr. Motarjemi's responses to Swiss legislative proposals in 2014 and in 2019/2020 and has continued to publicly support her as an important whistleblower whose experiences shed light on the challenges whistleblowers face in Switzerland and the cross-border impact of these cases. Campax - the NGO that set up SwissLeaks - joined the WIN network in 2019.

⁵ WIN's Executive Director was adviser to the Council of Europe on the development of the Committee of Ministers Recommendation on the protection of whistleblowers ([CM/Rec\(2014\)7](#)).

In 2020, FPH and WIN decided it was necessary to go and directly meet with the various actors working on the issue in Switzerland. This mission was completed in March 2022.

3. MISSION FINDINGS

3.1 State of play

There are strong obligations on Swiss workers to uphold their duties of confidentiality and loyalty to their employers and few, if any, protections for blowing the whistle on wrongdoing. In some sectors, such as banking, secrecy laws mean that whistleblowers can and are held criminally liable for making disclosures. This is in sharp contrast to other countries in Europe, including Serbia and France, which protect those who disclose information about suspected wrongdoing to the authorities and who are also protected when they go public. Serbia, like Switzerland, is a member of the Council of Europe and passed one of the strongest whistleblower protection laws in Europe in 2014, and France has recently strengthened its already strong whistleblower protection laws in transposing the EU Directive.

Despite the seriousness of the potential consequences and the lack of legal protections, there continue to be whistleblowers in Switzerland. However, the numbers are low with respect to the importance and impact their disclosures can have in a country that is a hub of international finance and corporate power. A survey published in 2019 showed that 35% of Swiss companies reported having received information about suspected embezzlement, tax fraud, money laundering or sexual harassment.⁶

3.1.1 Federal

The only federal standard adopted so far is found within the law governing federal personnel in general.⁷ Section 22 obliges employees to report any crimes or misdemeanours that come to their attention to prosecution authorities, their superiors or the Federal Audit Authority and gives them a right to report any other irregularities to the Federal Audit Authority. It states that employees reporting such issues in good faith will not suffer any professional disadvantages for doing so.

In the private sector, the Code of Obligations provides that the employee has a duty of loyalty to their employer. If this is challenged, it is up to a judge to weigh the interests in each case. There is no reverse burden of proof such that an employer must show the reason for the workplace detriment or dismissal is unrelated to the whistleblowing and independently fair which is considered a key element in internationally accepted best practice legal principles for whistleblower protection. Thus, judges often find in favour of the company. A proposal to include

⁶ https://www.swissinfo.ch/eng/whistleblowing_abuse-revealed-in-more-than-a-third-of-swiss-companies/44964418

⁷ Loi sur le personnel de la Confédération (LPers) du 24 mars 2000 (Etat le 1er janvier 2021)
https://www.fedlex.admin.ch/eli/cc/2001/123/fr#art_22_a

a process in the Code of Obligations whereby an employee would not be in breach of their duty of loyalty when reporting wrongdoing internally (or in limited circumstances to the authorities) was rejected by the Federal Assembly in 2020 and there is no other proposal on the Parliamentary agenda at the moment. The Federal Audit Office regularly receives whistleblowing reports regarding wrongdoing in the federal administration. The federal authorities reported receiving a total of 122 whistleblowing reports in 2017, a 36% increase over the previous year. The authorities attributed this to the introduction of an online platform for reporting irregularities and corruption set up in 2017 that allowed for reports to be made anonymously.⁸

3.1.2 Cantonal

A number of Swiss cantons protect whistleblowers to some extent. For example, the canton of Basel-Stadt has legislation to protect whistleblowers employed in public institutions. Cities such as Bern, Winterthur and Zurich have recently set up anonymous alert facilities.

In January 2022, the canton of Geneva adopted a legal framework⁹ that allowed for anonymous reporting as well as guaranteeing the confidentiality of the identity of whistleblowers in the cantonal administration, the parliament, the judiciary, universities, public law institutions and municipal authorities. By adopting the Whistleblower Protection Act (LPLA), the Grand Council embodied the principle of whistleblower protection guaranteed in article 26 paragraph 3 of its revised Constitution in 2013. The LPLA guarantees that a person who, in “good faith” and pursuing a public interest, reports wrongdoing, benefits from the confidentiality of his or her identity (s. 5 para. 1 LPLA) and from the protection from any professional consequences that he or she may suffer (s. 7 and 8 LPLA). The law also contains obligations for public entities to establish procedures for reporting such irregularities (Art. 9 LPLA) and to take the necessary measures to combat the reported irregularities (Art. 6 para. 2 LPLA).

The Geneva State Council announced the implementation of this law in March 2022. Reports can now be made via a secure external website. The example of the Canton of Geneva is particularly promising and may encourage other cantons to act.

3.1.3 International Organisations

Switzerland is host to major international bodies such as United Nations (UN), International Red Cross (IRC), and the International Olympic Committee (IOC) as well as smaller, well-established institutions such as international schools. Some of these organisations, like the UN, have a mandate to ensure States parties meet international standards to tackle corruption and protect human rights. They can also have their own “internal justice systems.”¹⁰ UN staff, for example, are first and foremost international civil servants rather than of any member state, and this can complicate matters for potential whistleblowers who can find themselves navigating diplomatic interests along with employment concerns when reporting wrongdoing. Such staff do not have

8 https://www.swissinfo.ch/eng/online-platform_swiss-whistleblower-alerts-increases-by-a-third/43925616

9 <https://ge.ch/grandconseil/data/odj/020308/L12261.pdf>

10 See Transparency International (December 2022) Whistleblower Protection at the UN at <https://knowledgehub.transparency.org/helpdesk/whistleblower-protection-at-the-united-nations>

access to local justice systems or independent courts. Yet the existence and links between the two systems – national and international – operating in the same space can create complex legal and practical challenges (and reinforce a mutual lack of regard for whistleblowers, thus seeming to prioritise institutional reputations over the protection of whistleblowers).¹¹

3.2 Obstacles to the protection for whistleblowers in Switzerland

This section synthesises the different problems and experiences our interlocutors described and is framed as a set of obstacles to try to understand why, in such a developed country as Switzerland, with a long-established democracy, the protection of whistleblowers remains so weak.

3.2.1 Culture of secrecy

Switzerland is an international centre of finance and banking with some of the strictest rules governing secrecy of banking information in the world. In recent years, however, Swiss banking secrecy has been criticised both for providing a cover for those who wish to hide the proceeds of crime and corruption and for how the authorities use it as a blunt tool to punish those who disclose information about wrongdoing. The fact that members of the press can be prosecuted for reporting on any information disclosed to them from within a bank has also been identified as a problem, particularly as there are few other avenues for the public to learn about wrongdoing within the financial sector (or any other part of the private or public sectors) and therefore access to information on matters of potentially serious public concern.

Beyond banking, Switzerland is one of the few countries worldwide which does not yet regulate the transparency of political life on the national level, including the financing of political parties, election and voter campaigns, and the few rules on lobbying are rudimentary. Along with weak labour laws and strong obligations of loyalty and confidentiality on employees, if issues are not addressed properly within organisations, there are few, if any, alternatives for individuals to safely raise concerns outside the workplace.

3.2.2 Collusion of Elites

Switzerland is a country where many powerful multinational companies and international bodies are headquartered. Some require a high level of security and support for their work and clearly see the benefit of being based in a central European jurisdiction with strong rules around confidentiality and a liberal labour regime. As many of our interlocutors pointed out, this has also resulted in the creation of a particular kind of Swiss «intelligence system» between financiers, companies, judges, and lawyers, amongst others, on which many large corporations and

¹¹ See upcoming book on the need to reform the UN's whistleblower protection system with perspectives from those who have experienced it and academic reflections to draw out recommendations for reform.
<https://bristoluniversitypress.co.uk/whistleblowing-and-retaliation-in-the-united-nations>

organisations rely with respect to protecting their reputations, promoting their interests globally,¹² as well as for the safety of their operations. Many whistleblowers describe this “system” as translating into difficulty in finding independent support for themselves or being able to call on the normal levers of accountability that those in other parts of the world depend – whether it is from lawyers and the court system, regulatory and law enforcement authorities, and even civil society organisations or the media. They described how their “story” can precede them which shuts doors that may have been previously open to them, or it follows them in such a way that those who, at first, seem keen to help do not sustain that position.

3.2.3 Weak labour laws

It is well known that there are few employment rights in Switzerland and that employees can be fired at will. Most whistleblower protection laws around the world provide individuals with protection against dismissal and unfair or detrimental practices in the workplace for reporting or disclosing information about wrongdoing and many do so by building on existing labour protections. So far, there has been little appetite by Swiss politicians to strengthen labour protections generally or to include specific protections for public interest whistleblowers. This makes it fairly easy, even “legitimate to lay-off a whistleblower subsequent to her/his reporting in full compliance with the law.”¹³

Even though there is no law to protect whistleblowers the Federal Audit Authority, for example, encourages people to report corruption and wrongdoing via a whistleblowing platform and private companies are setting up reporting systems through their compliance programmes. The issue remains, however, that whistleblowers must rely on those operating such systems to protect them from workplace reprisals or any other type of detriment without any independent legal recourse if it goes badly wrong.

While Swiss unions are active in pushing for better labour laws and protections for whistleblowers and can play a very important advocacy role (see section on national collaboration below) so far there is no dedicated structure for supporting individual whistleblowers.

3.2.4 Legal system under question

It would be surprising for many Europeans to learn that while it is the Swiss parliament that elects **judges**, it is the political parties that distribute the according to a formula based on their electoral strength.¹⁴ This means in practice that anyone who wants to become a judge needs to be formally affiliated with a political party. Once the party chooses its candidates, the election is all but

12 See investigation by Public Eye regarding intervention the State Secretariat for Economic Affairs (SECO) allegedly made on the request of Nestles questioning the Mexican government’s food labeling initiative to tackle obesity. Timo Kollbrunner (2022) How Switzerland danced to the Nestlé tune, Public Eye at <https://stories.publiceye.ch/en/nestle-mexico/>

13 See Reporting points in Swiss companies Whistleblowing Report (2018) at p.2: <https://www.ethics-compliance.ch/working-groups/wg-whistleblowing/>

14 https://www.swissinfo.ch/fre/politique/tutelle-problematique_les-juges-suisses-sous-le-joug-des-partis/43581440

guaranteed. Judges pay part of their salary to their political party. These contributions represent a significant source of income for the political parties. Such partisanship obviously raises the question of the independence of judges in the exercise of their office. The Council of Europe's Group of States against Corruption (GRECO) strongly criticised this system as being a form of indirect party funding. In 2018, GRECO recommended measure to make more effective the quality and independence of the recruitment process of judges and found the issue to remain relevant in 2019 and 2021 Compliance Report.¹⁵

Interlocutors with both individual and organisational perspectives raised questions about the role of **prosecutors**, reporting a significant lack of resources and skills in the prosecution service. The fact that Swiss prosecutors depend so much on mutual legal assistance – for resources and skill-sets – means they themselves are not as well equipped as they should be to enforce many of the criminal provisions that exist in Switzerland.

The culture of workplace confidentiality and loyalty has a strong legal framework to support it in Switzerland. This means there are few legal avenues for whistleblowers to defend themselves against dismissal or potential criminal liability for making disclosures and few **lawyers** who will take up these cases or who have any experience or expertise in challenging such outcomes. As some interlocutors pointed out, there is no legal tradition of defending those who make public interest disclosures nor awareness of how workplace retaliation for whistleblowing is distinct from a grievance or other form of breakdown in the employer-employee relationship.

Many of our whistleblower-interlocutors reported serious difficulties in finding a suitable lawyer who could defend their interests. They expressed similar concerns about the legal profession to those raised by anti-corruption experts about lack of clear boundaries between elites operating in the political, legal and corporate sectors in Switzerland (see below). Few interlocutors spoke positively about legal professionals' capacity and willingness to defend whistleblower-clients robustly and serious concerns were raised about how much information was shared between lawyers on opposing sides, between counsel and judges, as well as lawyers and any other law enforcement authorities involved. In one case, a whistleblower was asked to sign a document giving their lawyer full authorisation to reach a settlement with opposing counsel prior to any settlement being offered or any details being articulated, or any reassurance that such details would be shared. And in another case, the whistleblower was required to submit to repeated independent psychological evaluations by the courts and witnessed opposing counsel interacting with the court-appointed psychologist prior to the assessment being conducted.

3.2.5 Conflicts of interest/revolving doors

There are examples of potentially serious conflicts of interest arising from the flexibility with which parliamentarians and government officials can move employment between the public and private sectors – otherwise known as ‘revolving doors.’ A good example is the Secretary of State

¹⁵ <https://www.coe.int/en/web/greco/evaluations/switzerland>. See also: <https://rm.coe.int/quatrieme-cycle-d-evaluation-prevention-de-la-corruption-des-parlements/168094e861>

responsible for the banking sector who was responsible for preparing the revision of the law on money laundering who then left the government to become Director of the Swiss Association of Banks and subsequently sat in that capacity on the parliamentary committee that discussed the proposed changes to the laws.

Another example of a perceived conflict of interest and the close-knit nature of the legal profession in Switzerland arose in the case of Dr. Yasmine Motarjemi. The lawyer representing Nestlé in the claim Dr. Motarjemi brought against her former employer for harassment, is also a professor of law. While this lawyer was actively defending Nestle's, his book on labour law was regularly quoted during the hearings and was relied on by the judge as an academic source of expertise on the legal principles at stake during the trial.

3.2.6 Limits on press freedom

Since 2015, any Swiss journalist who investigates data that is leaked or given to them from within a bank, even when the public interest in the information is clear, risks being prosecuted. Amendments to Article 47 of the Banking Act provides for "*up to 3 years in prison for anyone who "reveals a secret entrusted to him [...] or exploits that secret for his benefit or for the benefit of a third party".*" This has produced an understandable caution when it comes to investigating any disclosures from whistleblowers in the financial sector.

A recent cross border investigation into a large trove of information and data leaked from Credit Suisse, was investigated by an international consortium of journalists who began publishing stories under the title "Suisse secrets" in February 2022.¹⁶ As the head of investigations at the Guardian wrote, no Swiss media organisation¹⁷ was involved in the investigation:

"....the possibility that Switzerland's prosecutors might use its banking secrecy statute to criminalise journalists led to the decision to protect Swiss media outlets from such a scenario by excluding them from the consortium investigating the leaked data.

There were more than 160 reporters from 48 media outlets involved in the Suisse secrets project – but none of them were in Switzerland. Perversely, Swiss citizens wanting to read how the country's second-largest lender provided services to corrupt leaders and money launderers can do so only via the foreign press."

Moreover, because of very restrictive Swiss privacy rules, the press and the few NGOs that do investigative journalism in Switzerland¹⁸ exercise caution in publishing any names, even when investigating potential criminal conduct, because of the legal jeopardy they face when reporting on their investigations or anyone who might be involved. This is on top of the more typical risk

16 <https://www.theguardian.com/news/2022/feb/20/suisse-secrets-leak-financial-crime-public-interest>

17 Tamedia was involved, but they refused to be part of the investigation because of the risks.

https://www.tdg.ch/en-suisse-le-secret-bancaire-entreve-la-liberte-de-presse-998910987159?idp=OneLog&new_user=no

18 <https://www.publiceye.ch/fr/regard/procedures-baillons>

assessments that most journalists and their media organisations conduct with respect to defamation and increases the likelihood of them facing SLAPP suits – threats or actual legal claims without serious merit that are designed to silence public criticism and scrutiny of an individual's conduct or business affairs. There is a broad civil society movement to address SLAPPs across Europe that is also calling for an EU Directive to limit the capacity to misuse the legal system in this way.¹⁹

Many of our whistleblower-interlocutors spoke of a lack of press interest in their stories, stories being dropped after initial interest and interviews, articles that quoted the company or senior leadership without seeking the views of the whistleblower and a failure to focus on the public interest at the heart of the disclosures.²⁰ Many referred to the power and prestige of corporations and other institutions as having a strong deterrence on media appetite for in-depth investigations into whistleblowers' stories and a high level of deference to those in power.

3.2.7 Idealisation of whistleblowers

There is a tendency within Switzerland to wait for the ideal whistleblower to convince the public they can support whistleblowers in general. Promoting an idealised version of a whistleblower also forces the individual to prove they are deserving of support rather than focusing on the public value of the substance of their concerns.

Whistleblowers are persons who come across wrongdoing and must decide whether to raise it. Focusing on whether the whistleblower is a good or bad person, ignores the fact that a system needs to be developed that allows people to bring forward matters of public or general interest which should be at the centre of the public debate. Protecting whistleblowers is not a question of judging the morality or placing a good faith burden on the whistleblower that they find hard to meet, especially if they have had to defend themselves in the workplace over a long period of time and stress. Rather it is about ensuring that the public interest message is heard, and where necessary addressed, and that the messenger does not get shot in the process. The legal requirement of good faith has been removed from most European-level laws because it created too high a barrier to protection for conduct that was considered reasonable in the circumstances, namely disclosing wrongdoing - ie. information that fell within an acceptable understanding of a public interest concern. Good faith has been replaced by a test of "reasonable grounds to believe" in the truth of the information at the time of reporting and evidentiary reverse burden of proof on the employer to show that any action or failure to act was unrelated to the whistleblowing and independently fair. Such legislative changes help to promote a healthier discussion about the social value of whistleblowing.

19 See the Coalition Against SLAPPs in Europe (CASE) at <https://www.the-case.eu/>.

20 They also mentioned some exceptions where their stories and disclosures were examined more fully.

3.3 The prospects for protecting whistleblowers in Switzerland

3.3.1 International pressure

Switzerland is a member of the Organisation for Economic Cooperation and Development (OECD) and a state party to the United Nations Convention Against Corruption (UNCAC). As early as 2011, the OECD has been putting pressure on Switzerland to protect whistleblowers, particularly in the context of implementing the OECD Anti-Bribery Convention. In 2020, the Working Group on Bribery stated in a follow-up to its Phase 4 Report that it regretted that Switzerland had given up on several important reforms including the protection of whistleblowers and that there were no further proposals on the table. Because of this, it stated that ‘in practice, whistleblowers continue to expose themselves to criminal proceedings after reporting cases involving foreign bribery.’²¹

In July 2022, the Working Group announced it will “commence preparations for a High-Level Mission to Switzerland in December 2022 unless the Swiss authorities take concrete steps to satisfactorily implement” two key recommendations, one of which is the compensation and protection of private sector employees who report foreign bribery.²²

Switzerland is also a state party to the United Nations Convention Against Corruption and has a duty, according to Article 33, to incorporate legal measures to protect anyone who reports, in good faith and on the basis of a reasonable suspicion, facts concerning corruption offences. Referring to the optional nature of this provision, Switzerland has not yet shown a willingness to guarantee such protection.

As a member of the Council of Europe, Switzerland has received recommendations under the peer-evaluation review mechanism of the Group of States Against Corruption (GRECO) on matters concerning the regulation of lobbying and potential conflicts of interest in public life, the independence of judges and the protection of whistleblowers. Switzerland is a signatory to Criminal Convention Against Corruption ETS 174 and is also subject to the Committee of Ministers Recommendation on the protection of whistleblowers (CM/Rec(2014)7), which is one of GRECO’s reference documents.

Switzerland is not part of the EU, but what is happening in neighbouring countries may put further pressure on Switzerland to move in the same direction. Switzerland is unlikely to remain indifferent to the EU Directive for the protection of whistleblowers and its transposition in the various countries of the European Union.

21 See page 5, <https://www.oecd.org/corruption/anti-bribery/Switzerland-phase-4-follow-up-reportENG.pdf>

22 <https://www.oecd.org/daf/anti-bribery/switzerland-should-urgently-take-concrete-steps-to-adopt-key-legislative-reforms.htm>

3.3.2 Corporate world and compliance

At the end of 2019, according to the Federal Statistical Office, more than 30,000 companies in Switzerland were part of multinationals. This means that any legal requirements or regulatory measures taken in Switzerland will have also have an international impact.

Many stakeholders in Switzerland observe that the large companies based there are often more advanced in their thinking about whistleblowing than politicians of the country. They understand the issues at stake in relation to the potential reputational risks and put in place the necessary mechanisms for reporting issues internally. About 70% of large companies and about 50% of SMEs have a compliance or protection mechanism for whistleblowing, according to a study by the Grisons University of Applied Sciences.²³ The question remains as to how well these mechanisms work in practice when it comes to wrongdoing that the organisation does not want revealed and how well they protect their staff from reprisals. Further, these internal mechanisms do not solve the more systemic corruption problems.²⁴

A European survey that included Swiss companies found that more than half of the Swiss companies in the survey reported that they complied with a new EU Directive on the protection of whistleblowers by setting up “offices for internal whistleblowing”.²⁵

3.3.3 Evolution of a whistleblowing culture

The interlocutors described how discussions on whistleblowing tend to focus on external cases, such as that of former US National Security Agency whistleblower Edward Snowden, which makes it more challenging to situate the issue as a Swiss problem. However, interlocutors said there was an awareness in Switzerland of the need to change archaic management systems, particularly because of a growing recognition of sexism in the workplace as well as greater openness to the idea of sharing information and working to minimise obstacles to doing so within the digital community.

Whistleblowers have been the subject of artistic projects including a play that focused on Dr. Motarjemi’s story and a well-attended open-air exhibit about whistleblowers in Geneva, though the latter again focused on whistleblowers from outside the country. Articles on the theme are also multiplying.²⁶

Finally, there is the capacity to tap into the force of citizen mobilization in Switzerland with popular initiatives and voting on key issues which is a unique and important resource.

23 See <https://www.integrityline.com/de-ch/knowhow/white-paper/whistleblowing-report/>

24 See Transparency International Switzerland (2021) Report on Corporate criminal liability at https://transparency.ch/wp-content/uploads/2021/02/Corporate_Criminal_Liability_Report.pdf

25 Supra, at note 6.

26 See, for example Global Geneva (2021) “Whistleblowing: Time for international Switzerland to meet the global standard” at <https://global-geneva.com/whistleblowing-time-for-international-switzerland-to-meet-the-global-standard/>

4. DEVELOPING THE FIELD

4.1 Collaboration

4.1.1 National collaboration

It is clear that there is civil society interest in the issue of whistleblowing and work is being done in Switzerland. It is spread geographically and linguistically, and different groups are focus on different issues or aspects of whistleblower protection. Those engaged in the topic over the years have included individual parliamentarians, academics and unions, as well anti-corruption and human rights organisations and whistleblowers.

Whistleblowers themselves have ended up taking a direct and active role in promoting the issue, whilst at the same time trying to get their own cases addressed. They have supported the work of many of those mentioned above over the years but remain very concerned that there is no independent organisation or experts specialising in the protection of whistleblowers able to offer direct support, confidential advice, and legal services to whistleblowers.

Unions could take the lead in offering and setting the standards for practical and legal support to individual whistleblowers as was the case at the national level in France for example (CFDT/CGT), and at the European level (Eurocadres).²⁷ The Swiss Union of Trade Unions, for example, has kept whistleblower protection on their agenda and wanted to see whistleblowers protected in law including in the Code of Obligations in accordance with the recommendations of the Council of Europe and the OECD but were concerned that the proposed reforms were too limited and did not offer clear protection.

Civil society organisations have been essential to the progress made in other countries as they play a fundamental role in terms of monitoring effectiveness, engaging in on-going advocacy and campaigns, investigating cases, and supporting whistleblowers. Several organisations have been working in the field in Switzerland.

Transparency International Switzerland (TI-CH) has been active at the federal and cantonal level for a number of years and improving the legal and institutional protection of whistleblowers remains a priority for the organisation. TI-CH is well connected with relevant stakeholders, such as the public administration, politicians, interest groups (especially employee and employer associations), academia and the media. The organisation was active in latest legislative efforts to improve the protection of whistleblowers in the private sector and has elaborated guides for companies how to better protect whistleblowers.

²⁷ Our whistleblower-interlocutors expressed clear disappointment in how unions have treated whistleblowers; failing to provide adequate support and sometimes giving the impression they did not appreciate the public interest aspect of a case or that they were focused on other priorities.

Campax, a citizen mobilisation and campaigning organisation, launched SwissLeaks in 2018 to receive information from anyone concerned about issues that affect the public interest including from workplace whistleblowers, victims, and witnesses and continues to monitor this space.

Public Eye is a human rights organisation that works with whistleblowers as part of its mandate to investigate, advocate and campaign against human rights injustices around the world that have their origin in Switzerland. They have written about whistleblowers and the lack of protections in Switzerland over many years. There is also a growing interest in whistleblower protection in the digital rights community in Switzerland as well as an increasing body of research work being done in the academic field (see more below).

There has also been a lot more attention given to the issue of workplace harassment in Switzerland in recent years. An association called Defending Employees and Whistleblowers (DEW) plans to be a hub of support and information for employees and whistleblowers in this regard.

4.1.2 Potential for External Cooperation

There is good potential for the civil society organisations who have worked in this area in Switzerland to participate in and reap the benefits of international cooperation. This includes working with WIN experts – whether as part of its formal membership or not – as well as linking Swiss academics interested in this field with the wider community of academics and researchers in the field including those who are part of the International Whistleblowing Research Network (IRWN).

Further there is greater interest in Europe among consortia of civil society organisations to address the legal barriers to those who publish or report information in the public interest including the Coalition Against SLAPPS in Europe (CASE) which cover Council of Europe member states and to work on the protection of whistleblowers as an essential element in the protection of an independent and free press. The role of union associations, like Eurocadres which hosted the coalition that advocated for an EU Directive on the protection of whistleblowers means there is a wealth of expertise available to unions that wish to address this issue in Switzerland as well.

The discussions held in Switzerland revealed a global concern about the barriers to the press to report on matters of serious public interest. There is room for Swiss civil society organisations to work with the media in Switzerland to examine the role of whistleblowers and their protection and the links to protecting the independence of the press. Early examination of the complex relationship between whistleblowers and the media in Switzerland has already been a matter of academic interest and there is room to explore this further.²⁸

28 C.Hauser and R.Nieffer, (2016) Whistleblower und Medien in der Schweiz (2016) University of Applied Sciences in the Grisons: <https://www.fhgr.ch/fh-graubuenden/angewandte-zukunftstechnologien/schweizerisches-institut-fuer-informationswissenschaft-sii/projekte/whistleblower-und-medien-in-der-schweiz/>

4.2 Research and Analysis

4.2.1 Case Studies

Case studies help illustrate the preventive value of whistleblowing as well as the need for legal protections for whistleblowers. These can include investigations into scandals or tragedies even where it is not clear at the outset if there were any whistleblowers. The questions such studies can answer or explore further is whether there were any concerns raised, and if not, why not. In 1990, a public inquiry into the explosion of the Piper Alpha oil rig off the west coast of Scotland killing 165 men in 1988, for example, found that: "Workers did not want to put their continued employment in jeopardy through raising a safety issue that might embarrass management." This was one of the reasons cited by Parliamentarians for supporting a new law to protect whistleblowers which was finally adopted in 1998.²⁹

Examining the cases of whistleblowers also demystifies who whistleblowers really are and what can happen if the message they try to deliver goes unheeded. Studies can examine any unfair treatment or actions taken to silence or discredit the whistleblower and the impact that has on addressing the issue they raised, and on the public view of whistleblowers. There are several whistleblower cases, past and present in Switzerland, that could form the basis of studies including: food safety whistleblower Dr. Yasmine Motarjemi in Vaud; patient safety whistleblower Dr. Casper K in Zurich; and other cases in the banking sector.

Both types of case studies – investigations into scandals and the experience of whistleblowers - along with other research studies, can provide important evidence on which to base legal and institutional reform as well as identify what other support options could and should be available to whistleblowers (union support, independent advice, access to psychological services).

4.2.2 Key issue analysis

Other types of independent research are also extremely valuable for situating legal and institutional reforms for the protection of whistleblowers. These can focus on certain sectors such as the pharmaceutical industry, or on the types of organisations like small and medium enterprises, or specific parts of government, such as local authorities. One of the largest whistleblowing research programmes has been conducted by Professor AJ Brown at Griffith University to examine levels, responses, and outcomes of whistleblowing in public, private and voluntary sector organisations.³⁰ Its findings have influenced whistleblower protection laws at federal and state levels in Australia, including the adoption of an organisational duty of care requiring companies to protect whistleblowers and liability if they fail to meet the standard.³¹

29 See <https://hansard.parliament.uk/Commons/1995-06-28/debates/a823e6c0-7ad9-4b9e-b95f-e7614d3e1599/WhistleblowerProtection>

30 See <https://hansard.parliament.uk/Commons/1995-06-28/debates/a823e6c0-7ad9-4b9e-b95f-e7614d3e1599/WhistleblowerProtection>

31 See <https://whistleblowingnetwork.org/Our-Work/Spotlight/Stories/test-3>

The research conducted by Professor Christian Hauser and colleagues at the University of Applied Sciences of the Grisons has produced important data on the current levels of corporate implementation of speak up procedures and their effectiveness in the Swiss corporate sector as well as comparative analyses between Switzerland, France and UK.³² The Working Group (WG) Whistleblowing of Ethics and Compliance Switzerland, of which Professor Hauser is co-chair, produced a White Paper on the legal proposals in Switzerland in comparison to recognised best practice principles as well as Guidance for companies setting up internal whistleblowing systems.³³

Academic research in other countries has made a significant contribution to the development of legislative proposals and institutional reforms grounded in evidence.³⁴ It is clear that whistleblowing is also becoming a topic of academic interest at the post-graduate level in Switzerland.³⁵ While more research and studies needed in Switzerland there is also room for cross-border collaboration and cooperation.

4.3 Advocacy

4.3.1 Legal

Regardless of further research work, efforts should be pursued in term of advocacy at the federal, cantonal and municipal level. New attempts can and should be made for a new revision proposal to improve the legal protection of whistleblowers in private law and to bolster and improve protections in the federal public sector. The impetus for this has to come from parliament.

As we noted earlier in the report, advocacy must also be broad enough to include measures to ensure a fair justice system and reinforce press freedoms.

4.3.2 Awareness and Public Support

In order to create a momentum in favour of protecting whistleblowers there needs to be greater public awareness of the value of whistleblowing and the injustice of individuals suffering unfairly for a) doing their jobs and b) speaking up to protect others. This means that where serious issues of public concern emanate from a whistleblower, he or she will be more likely able to avail themselves of a community of support, and the public condemnation of the unfairness of actions taken by employers or authorities against whistleblowers will be louder. This was the experience in the case of Antoine Deltour in what became known at the “LuxLeaks” scandal where the combined

32 See Hauser, C., Hergovits, N., Blumer, H. (2019). Whistleblowing Report 2019. Chur: HTW Chur Verlag. German. French. and Hauser, C., Brett-Rainalter, J., Blumer, H. (2021). Whistleblowing Report 2021. Chur: FH Graubünden Verlag.

33 <https://www.ethics-compliance.ch/working-groups/wg-whistleblowing/>

34 See for example the work of Jean-Philippe Foegle (Ph.D) and his role at the MLA working with French parliamentarians; and that of Dr. Vigjilenca Abazi at the University of Maastricht that supported the development of the EU Directive on the protection of whistleblowers.

35 See for example the dissertation of Jonas Doess, University of Geneva, Master, 2019 found at: <https://archiveouverte.unige.ch/unige:127623>

efforts of the organisations who had been advocating for tax justice in Europe for many years and those advocating for the protection of whistleblowers aligned and resulted in an outcry that forced politicians in Luxembourg and in the EU to take whistleblower protection very seriously.

4.3.3 Direct Support for Whistleblowers

Direct access to independent support and advice for whistleblowers has so far been lacking in Switzerland. Few lawyers have expertise in defending individual public interest whistleblowers and doing so well within a jurisdiction with limited formal legal remedies.

In France, Ireland, and Germany there are independent civil society organisations that provide this type of direct support to whistleblowers, not only offering early advice and access to lawyers, but social-psychological help as well.³⁶ Developing dedicated support services in Switzerland would fill an important gap and ensure that whistleblowers have access to specialist knowledge and skills.

5. CONCLUSION: TIME TO GATHER

This in country-mission helped us to better understand the situation: the obstacles and the prospects for protecting whistleblowers and supporting whistleblowing in Switzerland. While the situation in Switzerland with respect to secrecy laws, the lack of transparency, and the failure to protect of whistleblowers is viewed as a significant problem both inside and outside the country, it is also true there is a room for civil society to make a real difference for Swiss whistleblowers who continue to suffer disproportionately for raising genuine concerns about wrongdoing.

In light of what we heard and gathered in terms of information - analysis, research, testimonies, and comments - it seems to us this is an opportune time to organize a convening of the different actors, organisations, and institutions who can play a role in promoting and implementing effective protection for whistleblowers in Switzerland. This includes whistleblowers, civil society organisations, unions, academics, journalists and media bodies, lawyers and legal representatives, professional bodies, as well as political representatives at the local, cantonal, and federal level.

A convening would provide a space to fully appreciate the diversity of approaches and allow for an exchange of views, expertise, and methods between the different actors to better understand where these complement one another. It would also provide an opportunity to build a common base and lines of action from which to work together towards the protection of whistleblowers in Switzerland. It is only through creating alliances and joining forces on key issues that the process to bring about change can happen and for the role of whistleblowers in strengthening democratic accountability to be recognized and protected in Switzerland.

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36 See [Maison des lanceurs d'alerte](#) (France); [Transparency International Ireland](#); and [Whistleblowers-Netzwerk](#) (Germany)