

OECD LABOUR/MANAGEMENT PROGRAMME

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WHISTLEBLOWING TO COMBAT CORRUPTION

Under the OECD Labour/Management Programme for 2000, a meeting of management and trade union experts on “Whistleblowing to Combat Corruption” was held in Paris on 16th December 1999. The meeting was prepared in collaboration with the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC).

Below you will find the discussion paper and the overall report which were both prepared by Mr. Guy Dehn, designated as General Rapporteur for this activity. He may be contacted at Public Concern at Work, suite 306, 16 Baldwins Gardens, London EC1N 7RJ. Tel 00 44 20 7404 6609. Fax 00 44 20 7404 6576. Email gd@pcaw.demon.co.uk Web: www.pcaw.co.uk

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SECTION I -- DISCUSSION PAPER

Whistleblowing - [a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (*Oxford English Dictionary*); [b] Raising a concern about malpractice within an organisation or through an independent structure associated with it (*UK Committee on Standards in Public Life*); [c] Giving information (usually to the authorities) about illegal or underhand practices (*Chambers Dictionary*); [d] Exposing to the press a malpractice or cover-up in a business or government office (*US, Brewers Dictionary*); [e] (*origins*) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.

1.0 PURPOSE

1.1 This meeting will consider what whistleblowing is, how it might play a role in the fight against corruption and what lessons (both positive and negative) have been learned from practical experiences in this area. As whistleblowing impacts on a number of issues the OECD is concerned with¹, the meeting will also be asked to consider what steps the OECD might helpfully take to address this issue.

1.2 This Paper seeks to inform these discussions by looking at the practical issues associated with whistleblowing. It examines the options that face a firm from whom a bribe is solicited or a worker who is concerned about corruption or wrongdoing in the workplace. It then looks at the wider consequences of the current culture. The purpose of this Paper is to help us consider three questions. Is it desirable that the whistle is blown and, if so, to whom? If whistleblowing is to be encouraged, how can this be achieved? To what extent do the interests of business, unions, governments and the wider public coincide on this topic?

2.0 INTRODUCTION

2.1 Whistleblowing is relevant to all organisations and all people, not just those few who are corrupt or criminal. This is because every business and every public body faces the risk of things going wrong or of unknowingly harbouring a corrupt individual. Where such a risk arises, usually the first people to realise or suspect the wrongdoing will be those who work in or with the organisation. Yet these people, who are best placed to sound the alarm or blow the whistle, also have most to lose if they do.

2.2 Unless culture, practice and the law indicate that it is safe and accepted for them to raise a genuine concern about corruption or illegality, workers will assume that they risk victimisation, losing their job or damaging their career. Firms and companies aware that a bribe has been solicited will fear not only that they will lose the contract if they do not pay, but that if they blow the whistle their future economic interests will be damaged and their people will be harassed.

2.3 In discussing this issue, it may be helpful to bear in mind the approach taken to a criminal who decides to testify against his or her former colleagues. The authorities in all states value such collaborators and will often offer them protection and rewards. This is explained by their role in providing the necessary evidence that helps the police and authorities to secure convictions. However, for a responsible worker or a law-abiding firm that blows the whistle on corruption the best they can hope for seems to be isolation and disapproval. The effect (albeit unintentional) is that someone who informs on corruption he has

¹ Governance, corruption, labour relations and public confidence in new technologies and world trade.

participated in will receive more respect, protection and help from the authorities than an innocent colleague or competitor who blows the whistle on it.

2.4 In the context of bribery this situation has particular relevance. Unless people are enabled and encouraged to blow the whistle when a bribe is solicited from them, it is not clear how far the fight against corruption can succeed. Without information from firms about the solicitation of bribes or from workers about corrupt colleagues, the authorities will have to rely on evidence from either the bribe payer or the bribe recipient. As these two people will have effectively conspired against the public good, it may be rather optimistic to rely on one of them to 'see the light' and to provide the evidence which will allow the law to be enforced.

2.5 In discussing this issue we should also bear in mind the scope for abuse. Malicious workers and aggrieved competitors do already make damaging disclosures. Put simply, they are able to exploit the absence of clear signals about how to blow the whistle properly. Because there is neither a safe procedure nor an accepted way to blow the whistle, they are able to maintain that they are justified in communicating false information to the authorities or the media anonymously. With nothing more than the anonymous but interesting allegations to go on, the authorities may start investigations and the media are likely to report damaging rumours. As explained in section 6.0, an effective whistleblowing culture may actually reduce the scope for and incidence of abuse.

3.0 THE DILEMMA

3.1 In practical terms, if someone is concerned about corruption or serious wrongdoing in or by an organisation, they have three options. These are

1. To stay silent.
2. To blow the whistle internally or with the responsible person.
3. To blow the whistle outside to the authorities or the media.

3.2 *Silence*

3.2.1 Silence is the option of least risk both for the individual worker and a responsible firm which comes across corruption. It will be attractive for many reasons. The whistleblower will realise that his or her facts could be mistaken or that there may be an innocent explanation. Where colleagues or competitors are also aware of the suspect conduct but stay silent, the whistleblower will wonder why he or she should speak out. In organisations where labour relations are adversarial and in cultures where corruption is common, the whistleblower is likely to assume that he or she will be expected to prove that the corrupt practice is occurring, rather than see those in authority investigate and deal with the matter. The whistleblower may feel some responsibility for the action that may be taken against the wrongdoer, even though he or she has no control over it.

3.2.2 Even if he or she thinks the alarm should be sounded, the whistleblower will want to consider his or her private interests before taking action. Without reassurance to the contrary, the whistleblower will fear reprisals – be it harassment or dismissal. The whistleblower may also suspect (rightly or wrongly) that the corruption involves, implicates or is condoned by more senior people in or outside the organisation, in which case he or she will fear the matter will be covered up. Even where these obstacles are overcome or reduced, the whistleblower will fear that he or she will be labelled as disloyal by the generality of colleagues or fellow firms whose respect and trust the whistleblower may want or need in future.

3.2.3 The results of this culture of silence are that:

- responsible employers are denied the opportunity to protect their interests;
- unscrupulous competitors, managers or workers are given reason to believe that ‘anything goes’;
- laws focus more on compensation and punishment than on prevention and deterrence.

3.3 *Blowing the whistle internally*

3.3.1 Addressing the effects of this culture in the public sector, the UK *Committee on Standards in Public Life* commented:

“Placing staff in a position where they feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff member and the organisation. We observed in our first report that it was far better for systems to be put in place which encouraged staff to raise worries within the organisation, yet allowed recourse to the parent department where necessary. An effective internal system for the raising of concerns should include:

- A clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters regarded as malpractice;
- Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure;
- Penalties for making false and malicious allegations;
- An indication of the proper way in which concerns may be raised outside the organisation if necessary.”²

3.3.2 In formulating these recommendations, the Committee took account of good practice in the private sector where there has been considerable experience (particularly in the finance industry and in food retail) of providing fail-safe reporting channels to senior management. More recently a few large firms have begun to use outside hotlines. These initiatives started in more competitive markets where there was little doubt that the early reporting of suspected wrongdoing was in the organisation’s self-interest³. They have since been given added impetus by legal requirements to demonstrate due diligence, where safety, competition, finance and certain criminal laws have been breached.

3.3.3 The importance of providing an alternative to (but not a substitute for) line management is that without it, organisations realised that their managers would have a monopolistic control over the information which went to those higher up. As with any monopoly, one weak link – be it a corrupt, lazy, sick or incompetent person – would break the communication chain and stop those in charge receiving information which could be critical to the organisation.

3.4 *Blowing the whistle outside*

3.4.1 If, however, it is not safe and accepted for people to blow the whistle internally, then we need to turn to the options which exist for those few people who consider some action is warranted when they come across corruption. Without a safe internal route, the only option is for them to disclose the matter

² Second Report, May 1996, page 22.

³ By analogy, competitive sectors were also the first to go to gather information from their consumers about how a product or service operates in use – a practice now adopted through much of the public sector. The approach many organisations now take to information from workers is similar to the attitude taken toward consumers thirty years ago (that they were troublesome, untrustworthy complainants). Not only is information from the workforce readily accessible and free to collect, it enables the organisation to put a potential problem right before it causes any real damage to it, its reputation or its stakeholders.

outside -- be it to the authorities or more widely⁴. A relevant example to consider in the context of the OECD Bribery Convention is where a worker or an audit firm discovers suspect account books or entries that may conceal bribes. If they feel unwilling or unable to blow the whistle internally, the only options they will have are to blow the whistle outside or to stay silent.

3.4.2 Such outside disclosures raise legal issues of confidentiality and business secrecy. They also influence the balance and relationships between business, the state and the media. An outside disclosure will involve at the least some regulatory intervention and inconvenience and, at worst, unjustified adverse publicity. This will cause unnecessary damage and disruption to a responsible organisation which would have dealt with the matter properly had it been aware of it. As indicated in para 2.5, a culture where – in the absence of safe alternatives – it can be argued that media disclosures are a legitimate first port of call is an open invitation to an aggrieved or malicious person to cause as much damage as they can (whether or not there is any substance in the points they raise).

3.4.3 In most legal systems, there is no protection for a worker who makes an outside disclosure – even if it is in good faith, justified and reasonable. Accordingly, such disclosures are often made anonymously. This raises a number of issues. Anonymity will be the cloak preferred by a malicious person. It makes the concern difficult to investigate. In any event, anonymity is no guarantee that the source of the information will not be deduced. If the person is identified then in many cultures the fact that they acted anonymously will be seen as a sign of bad faith and they become unemployable⁵.

3.4.4 The near certainty that an outside disclosure will lead to serious reprisals means that often the matter is not raised until the worker is leaving the organisation or the firm has lost the contract. By then the problem may be much worse (indeed the disaster may have happened), the evidence will be old and the motives of the whistleblower may allow the wrongdoer to distract attention from the corruption. In some cases this delay may also allow the information to be used by another person to damage or even blackmail the organisation.

4.0 THE WIDER EFFECTS OF THE CURRENT CULTURE

4.1 The implications of the current culture of silence can be far-reaching:

- The failure of officials in the European Commission to respond to the internal whistleblowing of an auditor caused him to disclose his concerns of financial misconduct to the European Parliament. This led to the resignation of the College of Commissioners, a crisis in confidence in the European Union and to the suspension of the whistleblower and – he maintains – lasting damage to his career;
- The Bingham Inquiry into the corruption at the Bank of Credit and Commerce International found that there was an autocratic environment where neither workers nor firms were willing to voice concerns⁶;
- The victims of HIV contaminated blood products in France complained that the ministers and officials had known of the problem but had said nothing and done nothing⁷;

⁴ The opportunities for wider disclosures particularly to the media and public interest groups are likely to be increased by new technology.

⁵ Their plight then attracts media attention, which can only discourage others from sounding the alarm.

⁶ This led to new rules in the UK on the duties of auditors and other firms to report suspected irregularities.

⁷ This led to criminal prosecutions against ministers and the resulting public scepticism about attitudes to safety has influenced the position the French Government has taken on the current dispute about UK beef imports.

- Two years before Robert Maxwell stole almost \$1 billion pension funds, he sacked a union official who had challenged what he was doing with the pension money at a Scottish newspaper. Maxwell, a powerful businessman, was able to ensure that the man could not get another job in the industry and then settled his legal claim for compensation with a business secrecy clause forbidding the whistleblower to raise his concerns with the authorities;
- The recent major leak at the nuclear power station near Tokyo was able to happen because no-one questioned poor safety practices based on an unauthorised manual drawn up by a key contractor⁸.

4.2 Time and again similar messages come out of official inquiries into major scandals and disasters. They reveal that people who worked in or with the organisation had seen the problem but had either been too scared to sound the alarm or had raised the matter in the wrong way or with the wrong person.

4.3 Quite apart from the tragic human costs and enormous financial damage caused in these cases, they undermine public confidence not only in the organisation concerned but also in business and governments more generally. These wider implications are serious. In a changing competitive world, the very success of business, public bodies and new technologies rely on public confidence in their openness and probity.

4.4 Whenever there is a scandal or major disaster that could have been averted, there is pressure for new regulatory controls. Although these are aimed at the reckless, they often impose burdens on responsible organisations in the sector, thereby damaging competition. Each disaster also calls into question the mechanisms by which law and society oversee the conduct of private and public bodies. And each successive scandal renews mistrust and scepticism about the role and work of governments and business. The resignation of the European Commission in March 1999 is a case in point. The Committee of Independent Experts remarked the facts demonstrated “the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also show how the reaction of superiors failed to live up to legitimate expectations”⁹.

5.0 THE AIMS OF A WHISTLEBLOWING CULTURE

5.1 The primary aim of a whistleblowing culture is that concerns about corruption and wrongdoing should be properly raised and addressed in the workplace or with the person responsible. It starts from the assumption that malicious and aggrieved people do already make damaging disclosures when there is not a whistleblowing culture. Accordingly a whistleblowing culture is concerned with the silent majority who think it is not in their interests to blow the whistle on corruption or serious wrongdoing. Drawing on the theory of efficient markets (that competitive forces begin to operate once one quarter of consumers will consider switching suppliers), it assumes that organisations and societies will deter corruption and wrongdoing if a significant minority of those who now stay silent can be encouraged to see internal whistleblowing as a viable, safe and accepted option.

5.2 The main beneficiaries of a culture which disapproves and penalises people who blow the whistle in good faith are those few corrupt firms and individuals. Knowing that the alarm will not be sounded, they are confident that their wrongdoing (especially if it is corruption or bribery) will go undetected and

⁸ Asia Week 19/11/99 – commented that Japanese culture deprecates whistleblowing yet seems to condone the resignation or even suicide of top executives when unchecked wrongdoing leads to major disaster.

⁹ Committee of Independent Experts, Second Report, para 7.6.9.

unpunished¹⁰. Quite apart from people with a predisposed criminal intent, the current culture adversely affects the conduct of the great majority of people. For them the strongest deterrent is the fear of being caught and the shame and embarrassment that goes with it. Where a culture of secrecy and silence exists, otherwise reasonable people may be tempted to engage in malpractice because they believe they will not be caught. Equally if such a culture exists in a society, then otherwise responsible organisations may feel they will be at a competitive disadvantage if they do not also pay bribes or engage in illegal practices.

6.0 THE ESSENTIALS OF A WHISTLEBLOWING CULTURE

6.1 A whistleblowing culture cannot succeed without a strong and clear signal from the very top of the organisation that it is against corruption and is resolved to go about its business lawfully. Such a culture will provide assurances against reprisals for whistleblowing on wrongdoing. These will apply even where the whistleblower is mistaken, provided he or she acted honestly and reasonably. In terms of disclosures such a culture will direct the worker toward seeking impartial advice¹¹ and/or to blowing the whistle internally or with the person responsible. This will help ensure that even if the whistleblower is mistaken, no unwarranted damage is done to the organisation or to individuals within it. Critically it provides a safe and viable alternative to silence.

6.2 To be effective, such a system will also provide that where there is good evidence to support the concern, whistleblowing to a designated authority will be protected. This will reassure the whistleblower that the matter can safely be raised internally. As one recent example demonstrates¹² such a provision encourages managers to be receptive to concerns about corruption and to deal with them properly. As importantly it will reassure those in charge that managers will address the matter properly. It will give a clear indication to the authorities that the organisation is seeking to operate responsibly and this will influence the conduct of any investigation that may prove necessary (whether prompted by a whistleblower or not). It will also enable the authorities to readily distinguish reputable organisations from reckless ones. The practical consequences of this provision will be that an organisation with a whistleblowing culture will be able to demonstrate that it is keen to regulate itself. Furthermore, it will itself be well placed to notify the authorities of any proven wrongdoing a whistleblower has raised with it.

6.3 If such a culture is to maintain the confidence of the wider community, society needs to address the particular circumstances in which a wider disclosure may be justified. Essentially this should be an option of last resort and, where reasonable, would include a disclosure to the media. An example of such circumstances would be a flagrant cover-up or the failure by the authorities to deal with a serious issue effectively. A carefully weighted four-step structure¹³ should also influence the actions of a malicious person as he or she will for the first time have reason not to go direct to the media. Where he or she does, society will have good reason to expect the media to look into his or her motives and bona fides.

7.0 WINDS OF CHANGE

¹⁰ When the successful investigation and prosecution of criminal activity outside of the workplace depends overwhelmingly on the information the police receive, it is not clear why the communication of information about wrongdoing in organisations is generally assumed to be undesirable.

¹¹ Be it from unions, lawyers, professional bodies or a designated ethics service.

¹² When Standard Chartered Bank ‘road-tested’ a new global corporate compliance culture ethic in all cultures said they did not believe assurances they would be protected. The bank then introduced new whistleblowing mechanisms and declared they would rather concerns were raised with regulators than left unreported.

¹³ [1] Impartial advice; [2] Internal whistleblowing; [3] Whistleblowing to the authorities; [4] Wider whistleblowing (where appropriate to the police, victims, shareholders, politicians or the media).

7.1 For all the above reasons there is growing recognition of the need for a new approach to whistleblowing. This sees it as a means to deter wrongdoing, promote transparency and good governance, underpin self-regulation and maintain public confidence. While the USA has had whistleblowing laws for over a century and legislative provisions now exist in Australia and New Zealand, there is some interest in the recent UK approach to this subject.

7.2 Essentially the UK approach as outlined in this Paper sees whistleblowing as a means to clarify and improve individual responsibility and organisational accountability. It helps everyone identify who is responsible for what and to whom. This led to strong support from business, unions and professional interests for legislative proposals based on the balanced and practical approach of jurisprudence¹⁴. Like race and sex discrimination laws, the pre-eminent aim of these UK initiatives has been to declare a change in culture. The resulting legislation was commended by one of the most senior judges¹⁵ for “so skilfully achieving the essential but delicate balance between the public interest and the interest of employers.”

UK practical examples

7.3 An executive at a major bank blew the whistle on a top executive who had been taking bribes. The whistleblower resigned on giving his information to the bank but was the key witness at the criminal trial that led to an 8-year prison sentence for the top executive. The Bank then gave the whistleblower a reward and subsequently rehired him to a senior position. Elsewhere, leading companies and public bodies in the UK fund a confidential legal helpline run by an independent charity¹⁶ to advise people who are unsure whether or how to blow the whistle. Firms out of their self-interest¹⁷ and public bodies in response to government pressure and legislation increasingly have whistleblowing policies that detail where whistleblowing outside (especially to the authorities) is acceptable. Unions, who in many areas such as health and safety have performed a vital and effective whistleblowing function, are now – in part due to the changing nature of employment – starting to offer helplines and backing for individual whistleblowers. One of the leading public sector regulators, the Audit Commission, asks whistleblowers if their employer has a policy which authorises staff to contact the regulator. If it does, then they advise the whistleblower to raise the matter internally first. If it does not, the regulator conducts its own investigation and charges the employer for the costs of it.

Current public initiatives

7.4 The approach in the UK legislation¹⁸ is being followed in South Africa and the Netherlands and is now being promoted by Transparency International in other jurisdictions. It mirrors the call of the Committee of Independent Experts for an effective whistleblowing system in the European Commission where “the duty of loyalty and discretion should not become an empty concept, but neither must it be used to install a conspiracy of silence.”¹⁹ The OECD’s work on Ethics in the Public Service²⁰ has recommended

¹⁴ These judge-made laws recognise both the public interest in maintaining confidences (esp. business secrets) and the particular circumstances where whistleblowing disclosures outside can be justified.

¹⁵ Lord Nolan, who had also chaired the Committee on Standards in Public Life.

¹⁶ Public Concern at Work, see note 1.

¹⁷ See for example, note 13 supra.

¹⁸ The Public Interest Disclosure Act 1998 provides protection against reprisals for good faith whistleblowing on wrongdoing. It directs the worker toward seeking confidential advice and to blowing the whistle internally or with the person responsible. Provided there is good evidence to support the concern, it also protects (a) whistleblowing to designated authorities and (b) wider whistleblowing where both the circumstances justify it [cover up, victimisation or failure to address the matter] and the particular disclosure is reasonable [having regard to recipient of the disclosure, seriousness, risk, obligations of confidence and the employer’s whistleblowing culture].

¹⁹ See note 9 supra, para 7.6.10. The European Commission’s proposals will be published in Feb 2000.

that public servants should know their rights and obligations when exposing wrongdoing and that impartial advice and guidance should be available. In implementing international laws on money laundering, many jurisdictions are now learning the practical implications of rules that protect the disclosure in good faith of confidential information about certain suspect financial deals. BIAC has advised the OECD that it should look at how governments can give practical support to and protection for companies that report corruption and, in particular, the scope and potential of confidential helplines to advise companies concerned about bribery and corruption. TUAC has for several years called on the OECD to include protection for whistleblowers in OECD instruments such as Ethics in the Public Service and the Bribery Convention. The fact that BIAC and TUAC have jointly initiated and organised this meeting is a testament to their common interest in addressing these issues.

8.0 ISSUES TO DISCUSS

1. Positive and negative experiences of business and unions where (a) the whistle was blown and (b) where it was not.
2. Examples of how business and unions are addressing the issue of whistleblowing.
3. The steps which should be taken to encourage firms and workers to blow the whistle on corrupt practices.
4. The extent to which the interests of business, unions and governments coincide on the need to signal a change in culture toward whistleblowing.
5. Suggestions for the OECD work programme.

²⁰ PUMA, May 1998, paras 4 & 5 respectively.

SECTION 2 FINAL REPORT ON THE MEETING

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1. GENERAL INTRODUCTION

1.1 *Introduction*

1.1.1 The Chairman welcomed the discussion. If OECD governments are to tackle corruption, the message must be understood through all organisations that bribery is criminal and wrong. To achieve this, those in charge of organisations need to give a clear lead. Where something is going wrong – perhaps a contracts manager is sailing too close to the wind or is actually offering a bribe – how does the organisation find out? While whistleblowing will have a role to play in detecting such activity, its main benefit will be as a deterrent.

1.1.2 The issue, however, goes wider than bribery and corruption. It was observed that with the changing nature of employment and with an increase in the flow of information the traditional approach to trust and confidentiality in the workplace is likely to operate differently in future. If people will be talking more freely about what happens in the workplace, are there ways to encourage this is done constructively and responsibly – particularly when the concern is about corruption or wrongdoing? If so, how can we minimise the risks of abuse?

1.1.3 This discussion of whistleblowing as a tool in the fight against corruption allows experts from labour and management to focus on these issues and to consider the mechanics of a whistleblowing scheme.

1.2 *OECD related work*

1.2.1 OECD officials briefed the experts on four particular areas where whistleblowing is a relevant issue in the current OECD work programme. These were:

- **Bribery** – the Convention²² came into force in February 1999, having been negotiated and signed at the end of 1997 by 34 OECD and associated countries. It is the centrepiece of the OECD's efforts to combat bribery in international business transactions. The OECD Working Group on Bribery is now monitoring and promoting the implementation of the Convention and related instruments. This process will be looking to see whether problems relating to bribery are not being properly addressed by either the Convention or the related instruments. As it is recognised that the role and protection of whistleblowers might be such an area, the Working Group is interested in this discussion of experts from management and labour.

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²² The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

- The *Anti-Corruption Network for Transition Economies* look at policies and strategies for countries of Central and Eastern Europe and the former Soviet Union to address and reduce public corruption. The network has, among other issues, been addressing the question of how an employee can blow the whistle on corruption. Identified options include the use of hotlines, the work and independence of ombudsmen, and the role of the media.
- **Public Services** – whistleblowing is moving very quickly up the agenda in public services. Two years ago the term was considered as too sensitive to use in the *Principles for Managing Ethics in the Public Service*²³, however a specific principle was dedicated to “exposing wrongdoing” in the OECD ethics Recommendation. The Public Management Service is preparing a survey on the implementation of the Recommendation in which a separate section deals with this issue. The report clearly shows the OECD countries are concerned about the problem and currently 13 of them address the whistleblowing issue by legal provisions and a further 6 by internal rules.
- **Multi-National Enterprises** – the draft Guidelines on MNEs²⁴ - scheduled to be made public at the Ministerial Meeting in June 2000 - will address whistleblowing generally, not just in the context of bribery, labour laws, disclosures or the environment. While this provision initially caused some controversy, the horizontal approach in the draft Guidelines is justified because the people will not have confidence that self-regulation will work in any of the areas covered by the Guidelines if employees are afraid to blow the whistle. The draft text states that employees should be protected from disciplinary action or reprisal for reporting breaches of the law and company codes internally or, where appropriate, to the competent authorities.

1.3 *Labour and management interests*

1.3.1 Both BIAC and TUAC welcomed the discussion. Whistleblowing is important to each respective interest and the meeting was an opportunity to clarify common issues and identify what steps might be taken in future. Both groups had produced papers²⁵ on why whistleblowing was a real issue in the fight against corruption.

1.3.2 For TUAC, whistleblowing was important for several reasons, the key ones being:

- a) It was clear that unions themselves play an important role in whistleblowing, as the more corrupt countries are those with no trade union representation. For this reason whistleblowing by individual workers will be a vital means to deter, detect and expose bribery and corruption in countries where there are no unions.
- b) In international trade, whistleblowing can help ensure that agreed rules are adhered to and that there is in practice a level playing field.
- c) The dilemma of the employee whistleblower – caught between conflicting loyalties and unsure whether to speak out about wrongdoing - is a real one. Unions which represent whistleblowers (particularly in health and public services) are keen that the issue now be addressed.

1.3.3 BIAC was committed to effective steps against corruption, as it distorts competition and undermines confidence in business. Business interests were working toward giving real effect to the

²³ PUMA Policy Brief no. 4 (OECD) May 1998.

²⁴ Draft proposal for revised OECD Guidelines for Multinational Enterprises released for public comment by the OECD on 12 Jan 2000 – see para 8 General Policies and Commentary thereon.

²⁵ Active Business Support in the Fight against Corruption, Pletscher & Tash, (BIAC) 1999; Curbing Solicitation of Bribes, Heimann, Pletscher & Vincke (BIAC) 1999; Corruption & whistleblowing (TUAC/PSIRU) 1999.

OECD Bribery Convention on the ground. The fight against corruption is one about cultural change and business welcomes any realistic steps to influence the culture and to deter and detect such illegal activity.

1.3.4 BIAC representatives emphasised that whistleblowing is a valid activity in deterring and detecting bribery and corruption, to the benefit of all concerned. Firms should be encouraged to blow the whistle on bribery themselves and also to deal properly with internal whistleblowers. If there is to be a regulation on the issue, the risks of abuse must be addressed as unjustified accusations can cause serious damage to organisations and to individuals. Any framework should be balanced and workable. Care should be taken to avoid giving new opportunities to a disaffected employee to damage the reputation of the employer.

2. THE NEED FOR PROTECTION

The experts at the meeting then discussed whether there was a need for whistleblower protection.

2.1 Cultural issues

The meeting considered whether whistleblowing was essentially an Anglo-Saxon problem. In this context it was pointed out that in the Netherlands there is a work culture that already encourages legitimate internal reporting in organisations – in part because of the tradition of strong employment protection. While it was recognised that whistleblower protection in the USA should be seen in the light of the absence of strong job protection there, the meeting decided to approach whistleblowing as a universal issue, seeing it as:

- a) the alternative to silence when someone comes across corruption, and
- b) a vital link in the responsibility line in (or accountability of) organisations.

2.1.2 The meeting agreed that in continental Europe clearer signals on whistleblowing would be welcome. The case of the auditor in the European Commission shows the damage that can be done both to the individual and the organisation if the particular culture and practice does not tolerate and channel legitimate and responsible whistleblowing.

2.1.3 This cultural issue was also apparent in Italy where the nearest term for a whistleblower was ‘the repented’. However this word was mostly used to describe someone breaking from and informing against the Mafia, often for reward or some personal interest. Quoting Gibbon²⁶ one delegate suggested that the meeting should consider whether corruption was an inherent part of political and public life and, if so, whether the costs of dealing with it might in practice outweigh the benefits. However, if societies were resolved to change this culture and to turn the tables then it was stressed it was essential to ensure that no stigma attaches to the honest (or bona fide) whistleblower.

2.1.4 On the basis of data presented by TUAC, labour experts maintained that cultural or national issues were not determining factors as the crux of bribery, corruption and other wrongdoing lay in the nature of privatisation, contracting-out, public procurement and the wider inter-face between the public and private sectors.

2.1.5 The Money Laundering Regime was also illustrative. It confirmed that the issue of blowing the whistle was a global rather than a national one. In the context of professional secrecy, it was noted that protection under the rules only exists where the disclosure is made in good faith.

2.1.6 Turning to the culture of labour relations, business interests recognised that trade unions often provide a valuable whistleblowing role and channel for concerns about wrongdoing. However, they felt it

²⁶ The Decline and Fall of the Roman Empire, cap 21, “Corruption, the most infallible symptom of constitutional liberty”.

important that organisations themselves should provide internal routes. The meeting thought whistleblowing schemes would be particularly important in areas and sectors where unions did not operate.

2.2 Scope

2.2.1 While whistleblowing will be valuable in deterring, detecting and exposing public sector corruption – both in developed and developing countries – the meeting was reminded that it is also an issue in parts of the private sector, such as defence and construction. The meeting recognised that some firms provided good examples of whistleblowing programmes.

2.2.2 Business and labour accepted that the issue applied *mutatis mutandis* in other fields – MNEs, SMEs, public services and trade issues. As one specific example, public service health workers can find that their managers require them to act in a way which contravenes the professional ethics they are required to uphold. It was not acceptable that, whichever course of action these workers then took, they risked damaging their career.

2.2.3 In the changing international economy, labour representatives pointed out that the categories of people who should be protected would need to be wider than the traditional employee.

3. THE MECHANICS OF PROTECTION

3.0.1. In any scheme an important issue would be to distinguish between the whistleblower as a witness and as an accuser (or complainant).

3.0.2 Where the only real alternative to silence for individuals is anonymous reporting, practical problems result. Such disclosures are hard to corroborate, difficult to investigate and often impossible to remedy. Setting up and publicising a hotline through which the public and employees could anonymously report suspected corruption was not felt to be the right answer.

3.1 The essential elements: a business view

3.1.1 On the business side, it was accepted that employers needed to create a culture where a worker who honestly believes something is going wrong has the confidence to raise the matter internally. The aim of any whistleblowing mechanism should be to give the employer the chance to corroborate the information and, if it is correct, to remedy it. To do this, firms need to implement reporting or whistleblowing lines as an alternative channel to the line management hierarchy. These could be to internal audit, legal department, compliance officers or top management. There is considerable experience of this in the USA.

3.1.2 At the end of the day, there should be protection. Care should be taken to ensure that SMEs are not burdened with too heavy reporting systems. A non-prescriptive approach like that in the UK legislation - which encouraged and challenged firms to set up such a channel in their own self-interest - seemed sensible. If such an approach could get top management to address the issue and give a lead, then that would be very important in itself.

3.1.3 While there should be protection against reprisals for whistleblowing, it is important that that did not extend to any immunity for participation in the actual violation.

3.1.4 Business interests saw the following points as key elements of any whistleblowing scheme:

- a) As the whistleblower will rarely have the entire picture, his/her belief at the time of the disclosure must be honest and reasonable if he/she is to be protected.

- b) The aim of any scheme should be that it will normally be best for all concerned if a whistleblowing issue is properly raised and addressed internally.
- c) The clear presumption should be that he/she will report the matter internally first, as any whistleblowing system should recognise and respect the principles of trust and confidentiality.
- d) While there is a general reluctance about promoting or encouraging external reporting, where it is necessary disclosures to competent authorities (perhaps to a new ombudsman) were preferable to ones to the media.
- e) In the case of a firm itself reporting corruption to competent authorities, there is a need to address how sensitive commercial information and the reputation of the firm can best be protected.

3.1.5 In the context of any wider disclosures, the principle should be to protect the least damaging disclosure. While a wider disclosure to remedy the wrongdoing would be justified, the media's interest would more likely be to report the mere fact that something has gone wrong.

3.2 *The essentials: a labour view*

3.2.1 The labour side stressed that it agreed with business that the approach should be that whistleblowing issues are best raised and addressed internally. It too liked the approach of the UK legislation which gave incentives to create safe internal routes but which also protected external disclosures. This external option was critical for four reasons:

- a) Without an external option, many people will not have the confidence that their employer will want to deal with the matter properly and will not victimise the whistleblower if he/she raises it internally.
- b) As the Discussion Paper shows there are more than enough cases where the internal route was used and did not work. If the balance is right then the employer is given a chance to sort any problem out and so is protected from any actual damage and also avoids the harm to its reputation of an unjustified public disclosure.
- c) While internal routes will normally work effectively in large unionised employers, in SMEs an internal whistleblower will be very exposed. However good the general labour laws, it is improbable these will provide practical protection in such a case. A clear line of responsibility will be a real help as it will focus minds on the problem rather than on the whistleblower in the first place.
- d) If the aim and structure of any regulation is to encourage rather than require organisations to act responsibly, the only way to prevent real harm and to create a level playing field will be by protecting justified external disclosures.

3.2.2 As the purpose of a whistleblowing framework is to deter corruption rather than to encourage external disclosures, some labour representatives were not persuaded that the motive or honesty of the whistleblower should be a critical factor in any new regime.

3.2.3 While accepting the need to respect confidentiality, where there was an even balance in any new regulation, the labour interests thought it should come down in favour of transparency. People need to be given a voice and reassured that – if in doubt – they can safely and lawfully raise a concern about bribery.

3.3 *Governmental issues*

3.3.1 In the context of bribery, two specific issues were also raised by the experts. First, that either a minister or a central government agency should be designated to deal with corruption across each government. This would reduce the risk that there would be particular pockets or areas where the public service turned a blind eye to bribery. Secondly, the BIAC proposal for governments to establish helpline offices should be considered by the Bribery Working Party.

4. FUTURE OECD ACTIVITIES

4.1.1 Neither BIAC nor TUAC wanted this discussion to be seen as an end in itself. Whistleblowing was an important issue which the OECD should be addressing in key work programmes. The OECD could also conduct research into whistleblowing among member countries and multi-lateral agencies. It would help if such research looked not only at whistleblower protection laws but at other relevant legal provisions, regulatory approaches, good practice, the presence of unions, the size of enterprises and cultural issues. The practical context would be clear if the research also considered what types of disclosures are and are not made in various jurisdictions and with what consequences.

4.1.2 BIAC and TUAC agreed that they would jointly call on the OECD to:

- a) Address whistleblowing issues in the forthcoming review of the anti-bribery Recommendation²⁷, taking account of the approach of this meeting and its view that the UK legislative scheme could helpfully serve as reference²⁸.
- b) Take account of and address the relevance and implications of whistleblowing in key work areas, including MNEs, trade issues, public services and transitional economies.

5. CONCLUSION

5.0.1 Both BIAC and TUAC felt that it had been a very valuable and positive discussion. Each side had a better understanding of the scope and implications of whistleblowing for their respective interests and were clear of its relevance for the future work of the OECD.

5.0.2 The Chairman remarked that while there was a difference of emphasis as to the action that should now be taken, there was a lot of common ground between business and labour on the need for a new approach to whistleblowing and on the structure and detail of any regime. This boded well for the future and he thanked everyone involved for their contribution.

²⁷ The 1997 Revised Recommendation on Combating Bribery in International Business Transactions.

²⁸ The UK legislation is explained in sections 6 and 7 and summarised in footnote 19 of the attached discussion paper.