1. The importance

IMMI is a unique and fascinating attempt to create very modern media law regulations in Iceland.[1] IMMI plans always included a strong focus on whistleblowing regulation.[2] Whistleblowing is not only an important issue in cases such as those of Wikileaks or Snowden. It has become a significant feature of international compliance systems. This particularly applies to international corporations bound by the US Sarbanes-Oxley Act (hereafter: "SOX").[3] SOX requires publicly held US companies and their EU-based affiliates, as well as non-US companies, listed in one of the US stock markets, to establish within their audit committee *"procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters".*[4] In addition, Section 806 of SOX lays down provisions aimed at ensuring the protection for employees of publicly traded companies that provide evidence of retaliatory measures taken against them for making use of the reporting scheme.[5] The Securities and Exchange Commission (SEC) is the US authority in charge of monitoring the application of SOX.[6] As a consequence, major European companies already have to install whistleblowing systems in compliance with the SOX requirements.

2. Whistleblowing in Europe

The importance of whistleblowing has been stressed by several European legislators and regulatory bodies. In its Resolution 1729 (2010) on the protection of "whistleblowers", the Parliamentary Assembly of the Council of Europe[7] stressed the importance of "whistleblowing" as an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors. It invited all member States to review their legislation concerning the protection of "whistleblowers". The Council of Europe demanded a strong protection for anyone who, in good faith, makes use of existing internal whistleblowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment). In its view, external whistleblowing, including through the media, should likewise be protected where internal channels either do not exist,

have not functioned properly, or could reasonably be expected not to function properly given the nature of the problem raised by the whistleblower.

Under the European Convention of Human Rights, the European Court for Human Rights (ECHR) ruled by judgment, dated 21 July 2011 (no. 28274/08),[8] that employees who publicly disclose deficiencies within the enterprise of their employer cannot be terminated without notice.[9] However, the Court determined a number of factors when assessing the proportionality of the interference in relation to the legitimate aim pursued. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates in this regard that there is little scope under Article 10 § 2 of the Convention for restrictions of debate on questions of public interest. Moreover, the ECHR stressed that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. The ECHR focused as well on the damage, if any, suffered by the employer as a result of the disclosure in question and the assessment of whether such damage outweighed the interest of the public in having the information revealed.

Finally, the EU Commission has recently published a new directive in the protection of trade secrets.[10] The draft of November 2013 includes the first express regulation on whistleblowing in the EU. According to Art. 4 (2) (b) of the draft directive, the (broad) protection of trade secrets is limited “for the purpose of revealing an applicant’s misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest”.

Apparently, the Commission used the criteria mentioned by the Council of Europe and the ECHR in the case mentioned above and integrated them in the directive. The Directive has already been agreed upon the Council of Ministers in Summer 2014 and will thus enter into face probably in Winter 2014.

3. And the duties: Public whistleblowing platforms and press law

A future regulation of whistleblowing systems should involve matters of personality rights or rights to privacy.[11] Public whistleblowing internet platforms are furthermore subject to press law and as such bound to the same duties and privileges by the same rights as traditional press.[12] This classification can be based upon the judgements, for instance, of the European Court of Justice. In the Satakunnan case[13], the Court ruled that the term "journalistic purposes" has to be interpreted broadly due to the significance of freedom of expression in a democratic society. It should include "the mere fact of making raw data available". For being classified, it is enough that the "information communicated relates to a public debate which is actually being conducted". This approach points to an inclusion of whistleblowing platforms into existing press law regulations.[14] Hence, if treated equally, the same principles as for the traditional press have to apply to whistleblowing platforms. This involves application of the standards for weighing data protection and privacy law on the one hand and freedom of press on the other hand, as determined by the European Court of Justice. The platforms have to consider and check the value of documents and not only in good faith pursuant to Art. 5, but according to the same ethical and legal standards as the traditional press.[15] As "press", whistleblowing platforms have in particular to consider the presumption of innocence. In return, they get the same privileges as the "press", including the protection of sources or exemptions from the application of data protection laws. [16]

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[1] See my comments on the first IMMI plans in CRi 2010, 141; published at http://www.uni-muenster.de/Jura.itm/hoeren/veroeffentlichungen/hoeren_veroeffentlichungen/IMMI_The_EU_Perspective.pdf

[2] See Disclosure of Information and Protection of Whistleblower Bill, case no. 453; http://www.althingi.is/altext/141/s/0572.html

[3] Cf. *Saelens/Galand*, (2006) 3 European Company Law, Issue 4, 170.

[4] Sarbanes-Oxley Act, Section 301(4).

[5] For the effect of SOX on whistleblowing see *Mowrey* et al., 1 William & Mary Business Law Review, 431-449 (2010)

[6] Sarbanes-Oxley Act, Section 406.

[7] Accessible at: http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm.

[8] Accessible at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105777.

[9] For the US approach see the US Supreme Court decision Garcetti v. Ceballos 547 U.S. 410 (2006).

[10] Proposal on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813 of 28 November 2013.

11 See for that balance WP 117/Opinion 1/2006 of the Art. 29 Group on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, published http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf

[12] It is interesting to note that Icelandic whistleblowing platforms call themselves “press” (i.e. the “Associated Whistle Blowing Press”).

[13] Case C-73/07 *Tietosujvaltuutettu v Satakunnan Markkinopörssi Oy and Others.*

[14] ECJ , Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Case C?73/07, I-09831 paragraph. 56.

[15] Cf. *Infobank*, (1995) 16 Business Law Review, Issue 2, 41, 48.

[16] There is a lot of literature focusing on external whistleblowing as press; see for instance *Corneil*, 41 Cal. W. Int’l L.J. 477 (2010-2011); *Bacon/Nash*, 21 *Australian Journalism Review,* 10 (1999) with further references.

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