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Whistleblowing As A Transparency Tool
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<center>WHISTLEBLOWING AS A TRANSPARENCY TOOL.</center>

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1. Introduction

Transparency in an organizational context can be defined as the ability to know what and how decisions are being made within organizations and implemented. In the specific context of corporate social responsibility, it refers to a transparency of organizational decision making and implementation towards external actors -- stakeholders. In the context of corporate governance, it is the transparency of organizational decision making and implementation for internal actors – employees, boards, shareholders.

Access to information is critical for transparency. Therefore, transparency measures are to a large extent sets of rules on what information, under what form and measured in what way, ought to be reported to whom. In this sense, transparency mechanisms represent the functioning of an organization and its practices in a specific and selective way. Hence, these mechanisms can be critically examined in terms of adequacy of their selective representational abilities, or guarantees to the correctness of the information generated through them.

In this paper, we propose the potential of whistleblowing as a transparency tool, more precisely as complementing the 'reporting along standards' approach to transparency. We propose two rationales for whistleblowing, one in the context of corporate social responsibility and one in the context of corporate governance. In these, we also mention

necessary assumptions and possible risks of whistleblowing. Finally, we discuss how the recent whistleblowing legislation in the UK (Public Interest Disclosure Act) neutralizes those risks.

2. A rationale for external whistleblowing

The diversity in terminology used for the idea that corporations and their managers-owners had social responsibilities (corporate social performance, corporate social responsibility, corporate social responsiveness, corporate citizenship)[i], and the discussions on what concept is the most adequate one, it seems to us that what these discussions cloud is first, that all those concepts emphasize business relating to society, and second, that the subsequent rejection of one concept in favour of another coincided with the gradual integration of the stakeholder approach and the network perspective. All of these concepts are currently used with reference to the stakeholder concept and the network perspective.

For example,[ii] as we argue in Vandekerckhove and Commers (2005), the European Commission's framework on Corporate Social Responsibility (EC 2002) mentions stakeholder relations and definitely uses a network perspective.[iii] The definition of CSR mentions integrating interaction with stakeholders in business operations (EC 2002: 7), puts stakeholder expectations at the heart of business strategies (EC 2002: 7), and acknowledges the potential of CSR to strengthen the symbiotic relationship between enterprises and society (EC 2002: 12). All this clicks with corporations as webs of relations and with seeing stakeholder voice as legitimate. The 'Communication of the Commission' also sees the principle of continuous improvement and innovation at the heart of business strategies (EC 2002: 7, 12 and 22), and sees CSR as an element of a new form of governance, helping to respond to fundamental changes (EC 2002: 8). It also touches the issue of risk management (EC 2002: 12). In our opinion, these are all starting points to further develop a European framework on CSR along the metaphors of environmental change as a driver for the corporation. The same goes for communication and collaborative action as metaphors which best describe how businesses should be managed. The 'Communication of the Commission' sees the experience of co-operatives in stakeholder dialogue and participative management as a reference for good CSR practice (EC 2002: 13), and states that even though stakeholders might have conflicting interests, a partnership-based approach can be used to build consensus (EC 2002: 22).

The rationale for external whistleblowing as a transparency tool is appears when taking the network perspective to its fullest implications.

Calton and Lad (1995) have used the concept 'network governance' to designate a process by which social contract theory could best be understood and implemented within organisational settings. They focus on processes through which trust is being created and maintained within continuing contractual relations. According to Calton and Lad, this is a necessity in order to realise the competitive and ethical potential of network-organisations. Calton and Lad see networks as an emerging alternative to market transactions and hierarchical governance, because "network relationships overlay […] simple, dyadic (two-party) market transactions and bilateral relationships within hierarchies." (Calton and Lad, 1995: 274)

In fact, they argue two things. First, to perceive social contracting relations in organisations from a network perspective, beats the neoclassical economic theory and the agency theory, for these are dyadic interaction-based contractual theories of the firm, whereas a network perspective is able to integrate repeated, multi-party transactions, potentially conflicting and non-maximising interest, goals and stakes. Second, for Calton and Lad (1995: 274) "social contracting within networks is, essentially, an interactive, participant-driven, developmental trust-building process [and this] works to create and sustain a durable, resilient basis for effective and efficient organizational interaction by minimizing the moral hazard of participant opportunism."

Now, Calton and Lad link trust to their concept of network governance, and they write that "to the extent that trust is the essential glue and lubricant for long-term, value-creating organizational interactions, effective network governance would seem to hold the key, not only for ethical, socially responsible business performance, but also for business survival in the ever more turbulent competitive environment." (Calton and Lad, 1995: 274) Calton and Lad name seven propositions about network governance. The prescriptive, normative dimension of their propositions comes down to:

- a widespread and formal application of a micro social contracting process for defining and addressing collective, network-based problems,
- the right to negotiate should be regarded as the right which drives the interaction and legitimises the voice of autonomous, interdependent participants,
- unilateral power is a risk within the exchange structure of relational contracts, therefore, the maintenance of trust among network participants requires an equitable resolution of the problem of unequal power within relational contracts.

There is one particular proposition I would like to highlight here: "The maintenance of trust among network participants requires an equitable resolution of the problem of unequal power within relational contracts. (Calton and Lad 1995: 283)." Calton and Lad reproach neoclassical economic theory and agency theory for simply assuming bilateral power in voluntary contracting. Reality shows unilateral power does exist and can come up within the exchange structure of relational contracts, particularly in the form of discretionary authority. Calton and Lad argue that it is absolutely necessary for a trust creating and maintaining network governance, to recognise and compensate the existence of power differentials (Calton and Lad, 1995: 283-284). What is needed for such a compensation are institutional structures that serve the function of monitoring and enforcing the terms of the implicit contract. With Hill and Jones (1992), Calton and Lad propose trade unions, consumer unions and other special interest groups that have evolved to represent the interests of stakeholders. One of the concrete aims of these institutional structures is to reduce the information asymmetry which exists between managers and stakeholders.

It is exactly here that external whistleblowing finds its legitimacy as a transparency tool. CSR as network governance is a framework of 'preconditions, processes and outcomes' (Calton and Lad, 1995: 278) in which the preconditions are multilateral enforceable institutional structures balancing power and information amongst stakeholders. A whistleblowing policy – the set of norms and procedures to protect whistleblowers from retaliation – is such an institutional structure. Given an adequate policy, whistleblowing can increase transparency in the context of CSR in two ways. First, for those who read social reports by companies, knowing that adequate whistleblowing policies are in place can function as a guarantee that the information in the social reports is correct or that the social reports are more than rhetoric. Secondly, because the transparency offered through social reporting is always selective, whistleblowing could offer complementary transparency in the sense that society would also be informed on issues perceived as socially relevant by employees but not measured or reported by companies.

Of course, these functions rest on the assumption that concerned employees would find the whistleblowing policies encouraging enough to inform civil society organisations or relevant government agencies about the possible inconsistencies of or lack of coverage in the reporting.

3. A rationale for internal whistleblowing

The rationale for internal whistleblowing as a transparency tool is based on the potential it offers in getting a grip on organisational inefficiency is caused by a human factor. This kind of inefficiency occurs when organisational processes are designed as very efficient, but are not carried out the way they are planned or intended. Two such organisational inefficiencies have gotten very high on the agenda of both governments and businesses: fraud and corruption. Fraud is the deliberate misrepresentation in order to obtain an unauthorised benefit, and as such can be considered as an inefficiency in information providing. Corruption on the other hand is an inefficiency in allocation – of goods, of services, of contracts, etc. – in the form of rent-seeking, bribery, cartels.[iv]

In one way, state monopolies are being reproached with being corrupt and serving personal interests of power hungry politicians. But in another way, it is exactly in the privatisation process that corruption and fraud occurs (Račić 2002). In a third way, within private business too, the fear for fraud increases.[v] It seems that while decentralisation is necessary to ensure the efficiency of organisations in a highly turbulent and complex environment, at the same time it increases the risk of inefficiency. Decentralised decision-making and more discretionary power to people lower in the hierarchy increases opportunities for fraud and corruption, because more people are able to cause such inefficiencies and at the same time those able to do it are less likely to get caught, for decentralisation calls for new ways of control. It is precisely here that whistleblowing policies as a source of information come in.

Three factors seem important for the occurrence of fraudulent acts within organisations: (1) organisational conditions allowing the commission of fraud (both having the power to do it and weak internal control environment), (2) motivations for committing the fraud (poor liquidity position), (3) ethical attitudes indicating a possible willingness to commit an act of fraud (Loebbecke and Willingham 1988, cited in Hooks et al. 1994). Hooks et al. (1994) argue that the move towards total quality management (TQM) implies an emphasis on process controls. Therefore, auditors too might be placing more weight on the control of environment. As TQM approaches also imply empowerment and decentralisation, and come in a time of computerisation, Hooks et al. see difficulties for maintaining uniform accounting systems and internal control procedures. Instead, they bring forward the idea of an internal control environment, serving as the linkage between subunits, and being "in part, an operationalization of organisational culture (Hooks et al. 1994: 88)." As enhancing

communication within the organisation about fraudulent acts or risks is regarded as improving the internal control environment, Hooks et al. bring whistleblowing forward as a form of such enhanced – and 'upstream' – communication.

Basically, the rationale is that organising is becoming too complex to keep everything under control. Moreover, if organisations are getting flatter, this simply means that superiors have more subordinates under them doing different things, being flexible, and having more job control. At a certain point in that shift, the problem of how a manager can know what is going on at the work floor, needs to be answered differently. Whistleblowing policies can be a way to get information about what is going wrong on the work floor. Can be, indeed, on the condition that they work well. Methods used to collect information about inefficiencies are only legitimate to the extent that these methods themselves show to be effective. More precisely, whistleblowing as a source of information is only justified to the extent that it generates accurate and reliable information.

Building on Hook et al. (1994), Ponemon (1994) regards three organisational factors as important for constructing an effective 'upstream' communication. The first is an identified internal channel to do so. The second factor pertains to how well retaliations can be avoided and the reward structure – financial, honour, promotion – created by the organisation for truthful disclosures. The third, and according to Ponemon the most important factor however is the 'moral atmosphere' of the organisation. The moral atmosphere of an organisation is defined as that part of the organisation culture that deals with ethical problems and the resolution of moral conflict. A positive moral atmosphere will have people feel free to express and discuss diversity in moral point of views. We think it is Ponemon's most puzzling factor. He writes about the 'moral atmosphere' of an organisation as both result of and condition for accurate and reliable disclosures: upstream communication can foster the moral atmosphere of the organisation (Ponemon 1994:118), a negative moral atmosphere will censor or block disclosures (Ponemon 1994: 124). Hence, a negative moral atmosphere tends to make whistleblowing inefficient, but at the same time, organisations with a negative moral atmosphere are most in need of whistleblowing, since it is there that fraud is most likely to occur. Ponemon is aware of this paradox, but gives no answer to it (Ponemon 1994: 125, 128).

A second condition on which the justification of whistleblowing as a source of information depends is the extent to which the whistleblowing policy institutionalising the disclosure of information, itself is efficient. Anachiarico and Jacobs (1996) have argued that anti-corruption initiatives – including whistleblowing policies – have made government inefficient. Since the 1970's, ever more practices that are in one way or another undesirable, have been tagged as

'corruptive'. Anachiarico and Jacobs speak of a 'purity potlach' and the 'overproduction of political scandal'. They argue that along with the proliferation of the corruption concept, since the 1970's, the anti-corruption project has gained a panoptic vision. The term comes from Jeremy Bentham, designing the panopticon as an architecture in which the watcher could see everything – and more important – everyone, without being seen. It was explicitly proposed as a model of an inspection-house, "a new principle of construction applicable to any sort of establishment in which persons of any description are to be kept under inspection."[vi]

It is exactly here that whistleblowing as a source of information finds its legitimacy as countering organisational inefficiency. It is the panoptic vision that makes 'overregulation' unnecessary, as whistleblowing policies will generate information on whether something is going wrong. And in terms of fraud and corruption – practices that are only possible to the extent that they are hidden or invisible – the panoptic vision will scare off potential fraudulent or corrupt people and hence prevent organisational inefficiency. Moreover, any wrongdoing or malpractice will be detected at a very early stage, only requiring minimal action to rectify the damage. Such is the legitimation for whistleblowing policies as a source of information.

However, Anechiarico and Jacobs (1996) argue that the contribution of whistleblowing to detecting corruption is not measurable. On the other hand, the risks are real. Unguarded protection of whistleblowing can undermine the disciplinary authority of agency heads and supervisors over their subordinates.

Coupled with whistleblowing policy as a panopticon – every one is both a potential trespasser and an investigator – is of course the increased capacity to collect and order information and to monitor people, processes and transactions through information technology. This too adds to the panoptic vision. Dominique Bessire (2003) connects the panopticon to the current transparency discourse and argues that panopticism does not contribute to the moralisation of business, but rather to a generalised amorality, stemming from a general distrust and the assumption of calculating and opportunistic individuals. Indeed, how can we at the same time assume opportunism and responsibility? Ponemon (1994) points out that reliable information is more likely to be obtained from an unmotivated[vii] whistleblower. Thus, the necessity of designing a whistleblowing policy is based on the assumption of opportunistic individuals who, given the organisational complexity can not be adequately controlled through supervision, yet the effective functioning of such a policy needs the assumption of responsible, non-opportunistic individuals.

The above pertains to internal whistleblowing. This can be either a management tool, serving as an additional source of information on employee behaviour and performance, or it can create the needed transparency within a corporate governance framework, getting information about the managers to the board or even higher to the shareholders. Here, whistleblowing policies can allow certain information to 'jump hierarchical steps'.

4. A promising model for whistleblowing policies – the UK PIDA

Both rationales show that whistleblowing has a potential to enhance transparency, both in the context of corporate social responsibility and corporate governance. However, as noted in the above sections, the implementation of a whistleblowing policy is not free of risk. More precisely, we think caution is needed with regard to 1) the aim of whistleblowing as expressed in the policy, 2) the recipient prescribed by the policy (to whom can the whistle be blown) and 3) the societal context in which whistleblowing policies are legislated.

Recent developments in the UK appear to be exemplary in this regard. In 1999, the Public Interest Disclosure Act (PIDA) came into force in the UK by inserting sections into the Employment Rights Act 1996 (Sections 43A to 43L). The PIDA has been taken as a model in South African whistleblowing legislation, as well as in the law proposals in Ireland. It is also used in lobbying activities towards whistleblowing legislation in the Netherlands, Japan and in Switzerland. Moreover, discussions in Australia, New Zealand, India and Canada make reference to the UK PIDA as an exemplary piece of whistleblowing legislation, however without taking over its provisions.

Leading up to the PIDA were the Committee on Standards in Public Life (the Noland Committee) and Public Concern at Work (a London based legal advice center and lobby group on the issue of whistleblowing). Both of them stress that the protection of whistleblowers should be aimed at encouraging employees to take up responsibility 'in the public interest' by 'expressing concerns' rather than 'making allegations' (cf. for example Noland Committee 1995, PCAW 1999). Hence, it is important to distinguish whistleblowing procedures from grievance procedures.

The specificity of the PIDA lies in its recipient element, specifying to whom disclosures of information are protected. The PIDA shows an open ended tiered recipient element. Internal disclosures are the first step. These are disclosures made to a manager or directly to the

employer. If the whistleblower can show a reasonable suspicion that a malpractice has occurred, is occurring or is about to occur, then he/she is protected. The second tier involves disclosures to prescribed regulators (PIDA, Section 43F).[viii] Disclosing information to a regulator can not be regarded as a breach of secrecy of information. These disclosures are protected if the whistleblower reasonably believes the information is true.

Bowers et al. (1999) regard both tiers on the same level. The provisions of the PIDA with regard to blowing the whistle inside the organization or to a regulator indeed put a very low threshold. They even allow disclosure to a regulator without the requirement of making the disclosure to the employer first. On the other hand, disclosure to a regulator is only protected if the disclosure is made to the right regulator, meaning the person prescribed by the Secretary of State to receive disclosures about specific issues, in the Public Interest Disclosure (Prescribed Persons) Order 1999 (S.I. 1999 N°1549). This order prescribes 38 different persons with the respective issues on which disclosures can be made to them.

But the PIDA is open ended its third tier (Bowers et al. (1999) call it the second level) of the recipient element. Here, whistleblowers can blow the whistle to just anyone or any organization, on the condition that the whistleblower can show that it was reasonable to disclose to that recipient. Hence, disclosures to the media are allowed *if* it can be shown that to do so was reasonable in the given circumstances. But besides that, one of three preconditions must be met before wider disclosures are protected (Bowers et al. 1999: 35-37). The first is that "at the time he makes the disclosure, the worker reasonable believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer in accordance with section 43F (PIDA, Section 43G (2)(a))." A second possible preconditions is a reasonable belief in a cover-up: "that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence in relation to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer (PIDA, Section 43G (2)(b))." The third precondition is that second level disclosures are protected where the matter has previously been raised internally or to a person prescribed by the PIDA. What the whistleblower will have to show here is that his/her employer or the regulator have done nothing to investigate or correct the wrongdoing. The fact that the employer is imperfect and slow in doing that, is not enough for second level disclosure to be protected. However, an urgent threat to public safety would allow a disclosure to the media. Here, the PIDA shows its potential to be a transparency tool in a way that can not be accomplished by social reporting standards. Also, the PIDA would protect disclosures to a regulator or even to shareholders in cases resembling Enron. At the

same time, the PIDA discourages wild allegations made in a personal interest. Therefore, the PIDA is exemplary in the way it encourages organizations to set up sound internal whistleblowing procedures while at the same time offering guarantees to the public interest that malpractice will be known and dealt with should company procedures fail.

But the PIDA is complicated in its provisions. Each recipient tier having its specific conditions, 38 regulators with specified subject matters, the different levels in required evidence, good faith, reasonable belief, … all this would scare off concerned employees wanting to disclose malpractices. Here again – and perhaps especially here – the UK situation is again exemplary. Since 1993, an independent organization (Public Concern at Work) has been functioning as a legal advice center. It had a substantial input into the development of the PIDA, has given advice to thousands of potential whistleblowers free of charge, and has delivered consulting services to hundreds of private companies and government organizations on internal whistleblowing procedures. It has legal professionals at their helpline, which means that one is not breaching secrecy when telling their story (the PIDA covers any disclosure made while seeking legal advice). This means that Public Concern at Work – a civil society organization – can really help potential whistleblowers to take the right steps when making disclosures about malpractices *and* remain protected under the PIDA. This is an important precondition with regard to the societal context in which whistleblowing policies are implemented: the possibility of obtained independent legal advice on how to raise concern.

Another precondition rests in the independent monitoring of how concerns about organizational malpractices are dealt with. Here, the UK is a good example of what can go wrong. The problem lies not in the PIDA itself, but in the fact that, as Myers (2004: 111) notes, the public has no access to the details of the claims made under PIDA, which means that there is no way of knowing what issues were raised and whether or how serious the malpractice was. Public Concern at Work challenged the decision to keep secret the details of these claims, upon which the government decided to make only the names and addresses of the parties available on the public register of claims. Myers regards this as increasing the risk that PIDA will be used "to trade the public interest in exchange for a favourable out-of-court settlement" implicating that the concern about the malpractice is kept out of the public domain (Myers 2004: 111). This undermines the potential of whistleblowing policies to be a transparency tool.

So, the societal context in which whistleblowing policies can be successfully implemented is to be characterized by a strong civil society.

5. Closing comments

Given that transparency measures and reporting standards necessary remain selective, we have argued that whistleblowing policies (protecting the disclosure of malpractices against retaliation if these disclosures are made along specified procedures) can constitute complementary transparency tool.

We have offered rationales for external and internal whistleblowing, respectively in the context of corporate social responsibility and corporate governance. Yet along with these good reasons to have whistleblowing policies, we have also indicated in what ways they can be problematic.

We have also shown in what way the UK PIDA is able to stand the cautionary tests of aim, recipient element and societal context of whistleblowing policies. In this sense, the likeliness of the UK PIDA becoming the dominant model for whistleblowing legislation in Europe should be interpreted as a positive evolution and a step forward on transparency, both in the context of corporate social responsibility and corporate governance. However, we must remain cautious that both independent advice on *and* monitoring of whistleblowing policies and concerns raised under them can be adequately taken up by civil society organizations.

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[i] Weber and Wasieleski (2003), Matten et al. (2003) and especially Dentchev (2004) offer a clear overview of the evolution of and in concepts within the CSR-field.

[ii] Other examples are:
- Marjorie Kelly (2002) arguing that the next step for CSR is economic democracy.
- The Business Leaders Forum (BLF 2004) prime objective in the Latin America and Caribbean region is "to change current practice to good practice through: networks of civil society organizations, including non-governmental and community based organisations and academia; evolving intermediary structures and institutions such as business coalitions promoting responsible business practices; providing links and partnerships with established business networks such as chambers of commerce, management development organisations, trade associations, academia serving business executives."
- Although the Business for Social Responsibility (BSR 2003) reports of the meeting of CSR leaders does not mention networks, it does speak of applying the stakeholder model, being accountable to stakeholders, empowering stakeholders, provide information useful to stakeholders. But they have also issued a publication dealing with engaging with NGO's, and recognise that many find value in dialogue when seeking to enhance CSR.

[iii] Our argument is based on the usage of network metaphors in the 'Communication from the Commission on CSR' (EC 2002). As a first follow-up to that Communication, the Commission held several rounds of multi-stakeholder dialogues at European level throughout 2003 and 2004. In Vandekerckhove and Commers (2005) we argue that if the Commission wants to be consistent with its network perspective, they should be promoting – or even make it mandatory – multi-stakeholder dialogues at the micro-level.

[iv] To qualify corruption as an inefficiency in allocation covers both petty corruption and grand corruption. Petty corruption is any kind of administrative corruption, for instance in the case where offering a small bribe speeds up – 'greases' – bureaucratic processes. The inefficiency lies in the undue course of the process, for example going against queuing principles. Grand corruption is irregular influence in judiciary or in lawmaking, for example when a powerful lobby influence court cases or parliamentary voting on law proposals. The inefficiency there lies in the thwarting of political institutions such as democratic representation or impartial judiciary.

[v] Cf. regularly published 'fraud survey reports' by KPMG and Ernst&Young.

[vi] The quote is part of the title of Bentham's bundling of letters of 1787. He saw this model as relevant in particular for "penitentiary houses, prisons, houses of industry, poor-houses, lazarettos, manufactories, hospitals, and mad-houses."

[vii] Unmotivated in the sense that the reason for the whistleblowing is grounded solely in an ethical conflict for the whistleblower. Motivated whistleblowing then refers to the reporting of wrongdoing for purposes of personal gain (obtaining economic resources, social power or status) (Ponemon 1994: 120).

[viii] We understand a regulator to be a person described by the Secretary of State to deal with specific subjects and issues.