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Gregor Thüsing
Gerrit Forst *Editors*

Whistleblowing - A Comparative Study

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Gregor Thüsing • Gerrit Forst
Editors

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Editors
Gregor Thüsing
Institut für Arbeitsrecht und Recht der Sozialen Sicherheit
University of Bonn
Bonn, Germany

Gerrit Forst
Hengeler Mueller
Partnerschaft von Rechtsanwälten mbB
Düsseldorf, Germany

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Foreword

Whistle-blowing has become a topic of interest during the last decades, for practitioners, politicians, and academics likewise. While whistle-blowing legislation dates back more than a hundred years in some countries and it is likely that some form of behavior that we would describe as whistle-blowing today existed since the beginning of human civilization, only in recent years it has been identified as a potential weapon against corruption, mismanagement, and general noncompliance with legal obligations by a broader public. This was also the reason for the International Academy of Comparative Law to deal with the topic on their XIXth International Congress of Comparative Law (20 and 21 July 2014) in Vienna. This book is based on the preparations for and the outcomes of that convention.

The reasons for the gaining interest in whistle-blowing are diverse: Especially in the United States, the Enron and WorldCom accounting scandals triggered far-reaching legislation on whistle-blowing – the Sarbanes Oxley Act – that influenced legislators around the globe. That first wave of capital market-driven whistle-blowing was followed by a second wave in the wake of the global banking crisis, in the United States, namely, the Dodd Frank Act. However, other countries such as the United Kingdom have their own body of legislation which was not triggered by accounting scandals or economic considerations at all, but by human tragedy. In the United Kingdom, whistle-blowing was regulated and thereby introduced as a consequence of two catastrophes claiming many casualties – the Clapham Junction rail accident and the sinking of the MS Herald of Free Enterprise. In the United Kingdom, whistle-blowing seems to be used as an early warning system against all kinds of dangers in the first place. It comes hardly as a surprise on this canvas that opinions on what constitutes whistle-blowing are diverse. A common denominator is that a whistle-blower releases secret information to a third party with the aim to prevent or stop a maldoing or grievance.

There are countries in which whistle-blowing has been observed with a good deal of mistrust, based on historical experience with “informers” to the state.

In these countries (though not only in them), whistle-blowers are rather perceived as denunciators and troublemakers than as sponsors of public interests. A rather reserved approach to whistle-blowing can be observed throughout many countries of continental Europe especially. In Germany, the rule of National Socialism and, after 1945, the socialism of the former German Democratic Republic led to a deep mistrust against any kind of behavior that aimed at informing public authorities about the behavior of other people. In France, which had to suffer severely under the German occupation during WW II and the Vichy regime, similar reservations to whistle-blowing exist to the day. In addition to that, the European approach to data protection led to a rather restrictive approach to whistle-blowing during the last decade especially.

This tome tries to build bridges between the different points of view by giving authors from fourteen countries around the world an opportunity to present the legal situation on whistle-blowing as well as the cultural perception of whistle-blowing in their country. This, in itself, is a valuable source of information, as practitioners and legislators throughout the world may profit from insights into other countries' legislation when drafting new rules at home. In addition to that, the editors tried to combine the different perceptions of whistle-blowing and to name commonalities and differences between the legal orders with the aim to identify a general concept of whistle-blowing that distinguishes it from denunciation. The reader may judge whether the editors have been successful in this undertaking. We, however, want to express our deep gratitude to the International Academy of Comparative Law, all the authors of this book, and to all those people without whose help it could not have been completed.

Bonn and Düsseldorf
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Gregor Thüsing
Gerrit Forst

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Contributors

Shawn Marie Boyne Indiana University Robert H. McKinney School of Law, Indianapolis, IN, USA

Katrin Deckert Associate professor at Paris Ouest Nanterre University and deputy secretary-general of the International Academy of Comparative Law. Studied law in different universities in France and Germany. Since 2009, holds a PhD in German and French law from Panthéon-Sorbonne University (Paris I, France) and the University of Hamburg (Germany). Research fellow at Pantheon-Sorbonne University (2001–2004), research and teaching assistant at Panthéon-Assas University in Paris (2004–2006), research assistant at the Max Planck Institute for Comparative and International Private Law in Hamburg (2007–2009), lecturer in German law at Paris-Est Créteil University (2008–2010), and senior research fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg (2010–2011). Teaches and researches in German, French, and European civil, corporate, and capital markets law as well as in comparative law.

Paris Ouest Nanterre University, Nanterre, France

Paris, France

Raluca Dimitriu Labour law professor at the Bucharest University of Economic Studies, Law Department Bucharest, Bucharest University of Economic Studies, Romana P-ta no. 6, Bucharest, Romania.

Michael Doherty Department of Law, Maynooth University, Maynooth, Ireland

David Fabri Commercial Law Department, University of Malta, Msida, MSD 2080, Malta

Gerrit Forst Hengeler Mueller, Partnerschaft von Rechtsanwälten mbB, Düsseldorf, Germany

Júlio Gomes LLM (Columbia University), DPhil (Oxford), invited professor of law at the Portuguese Catholic University, member of the Católica Research Centre for the Future of Law, and judge at the Supremo Tribunal de Justiça (Portuguese Supreme Court).

Vila Nova de Gaia, Portugal

Constantinos Kombos Law Department, University of Cyprus, Nicosia, Cyprus

Rüdiger Krause Professor for civil law and labor law at the Georg-August-University of Göttingen (Germany). Director of the Institute for Labour Law. Director of the Sino-German Institute for legal studies of the Universities of Göttingen and Nanjing (PRC).

Institut für Arbeitsrecht, Juristische Fakultät, Georg-August-Universität Göttingen, Göttingen, Germany

Sandra Laleta Faculty of Law, University of Rijeka (Pravni fakultet), Rijeka, Croatia

John P. McEvoy Professor at the Faculty of Law, University of New Brunswick, Canada. Former president of the Canadian Association of Law Teachers. Presently president of the Canadian Comparative Law Association as well as a vice-chair of the New Brunswick Labour and Employment Board.

Faculty of Law, University of New Brunswick, Fredericton, NB, Canada

Jakub Morávek Jakub Morávek is a senior lecturer of the Department of Labour Law and Social Security Law at the Faculty of Law, Charles University in Prague. He works too as an advocate.

Jakub Morávek is an author or coauthor of numerous monographs and articles in the field of labor law.

University v Praze, Právincká Fakulta, Praha 1, Czech Republic

Darja Senčur Peček Associate professor at the Faculty of Law, University of Maribor, where she is teaching labor law and social security law. Head of the Labour Law Department and a head of the Institute for Employment Relations and Social Security at the Faculty.

Faculty of Law, University of Maribor, Maribor, Slovenija

Jan Pichrt Jan Pichrt is a head of the Department of Labour Law and Social Security Law at the Faculty of Law, Charles University in Prague. He has lectured in labor law more than 20 years.

Jan Pichrt decides disputes as an arbitrator entered into the list of arbitrators of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. He works too as an advocate.

Jan Pichrt is an author or coauthor of numerous monographs and articles in the field of labor law and a coauthor of a prestigious commentary on the Czech Labour Code and some textbooks on labor law.

University v Praze, Právincká Fakulta, Praha 1, Czech Republic

Björn Rohde-Liebenau Lecturer for integrity management and corruption prevention, Hochschule für Öffentliche Verwaltung, Bremen; founder of Risk Communication Concepts (RCC), ombudsman, mediator, and compliance counsel.

Hochschule für Öffentliche Verwaltung, Bremen, Germany

Desmond Ryan Trinity College Dublin, Law School, Dublin 2, Ireland

Dagmara Skupień Faculty of Law and Administration, University of Lodz, Łodź, Poland

Vanja Smokvina Faculty of Law, University of Rijeka (Pravni fakultet), Rijeka, Croatia

Morgan Sweeney Associate professor at the University of Paris Dauphine; specialized in national and European labor law, especially in discrimination law; and contributes to biannual reports on the French judiciary supreme court's implementation of European law. Also published an article on the European strategy to fight child poverty (in La symphonie discordante de l'Europe Sociale, L'aube, dir. N. KERSCHEN, M. LEGRAND, M.MESSU, 2013, p.265).

University of Paris Dauphine, Paris, France

Levallois Perret, France

Gregor Thüsing Professor for civil, labour, and employment law, Institut für Arbeitsrecht und Recht der Sozialen Sicherheit, Rheinische Friedrich-Wilhelms University of Bonn (Germany).

Abbreviations

about	Approximately
app	Appendix
Art/arts	Article/articles
c	Circa
C.F.R.	Code of Federal Regulations
Cass. soc	Cour de cassation
Cf	Confer
Ch	Chapter
Cons. const	Conseil constitutionnel
Dir	Directive
e.g.	For example
Ed/eds	Editor/editors
etc.	And other things/and so forth
f./ff.	And the following
fn	Footnote/footnotes
i.e.	That is
Ibid.	At the same place
n	number
No./Nos.	Number/numbers
p./pp.	Page/pages
para./paras	Paragraph/paragraphs
pt	Part (of statue)
Reg/regs	Regulation/regulations
s.	See
Vol/vols	Volume/volumes

Part I
General Report

Chapter 1
Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries

Gregor Thüsing and Gerrit Forst

Abstract This chapter gives a general overview of whistleblowing around the world. Its purpose is to disclose commonalities and differences between several jurisdictions and to give a general idea of what constitutes whistleblowing. The chapter is based on the country reports published in this volume and on a number of additional country reports the essence of which is given account of in the tabula in Part III. This chapter is also an updated version of the general report presented to the International Academy of Comparative Law at the XIXth International Congress of Comparative Law in Vienna.

Introduction

Whistleblowing has become omnipresent during the last decade, touching on almost every field of the law.[1] Yet whistleblowing is much more than a topic of legal interest. It is an issue that raises the attention of the broader public: The stories of *Julien Assange*, *Bradley* (now *Chelsea*) *Manning* and *Edward Snowden* first hit the front

[1] *cf.* J Bowers, M Fodder, J Lewis, J Mitchell, *Whistleblowing*: *Law and practice*, 2nd edn, (OUP Oxford, 2012); A. J. Brown, D Lewis, R Moberly, *International Handbook on Whistleblowing Research*, (Cheltenham, Edward Elgar Publishing Ltd., 2014); R Calland, G Dehn, *Whistleblowing Around The World*: *Law*, *Culture and Practice* (Pretoria, IDASA Publishers, 2004); A von Kaehnel, *Whistleblowing – Multidisziplinäre Aspekte* (Bern, Stämpfli, 2012); K Leisinger, *Whistleblowing und Corporate Reputation Management* (Mering, Hampp Verlag, 2003); D Lewis, *A Global Approach to Public Interest Disclosure*: *What Can We Learn From Existing Whistleblowing Legislation and Research*? (Cheltenham, Edward Elgar Publishing Ltd., 2010); X Patier, *La*

G. Thüsing (✉)
Institut für Arbeitsrecht und Recht der Sozialen Sicherheit, University of Bonn,
Adenauerallee 8a, 53113 Bonn, Germany
e-mail: thuesing@jura.uni-bonn.de

G. Forst (✉)
Hengeler Mueller Partnerschaft von Rechtsanwälten mbB,
Benrather Str. 18-20, 40213 Düsseldorf, Germany
e-mail: gerrit.forst@hengeler.com

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pages of newspapers around the globe and then led to a political aftermath. Notwithstanding the popularity of the topic, whistleblowing also raises several legal questions that have not yet been answered properly in every jurisdiction. The aim of the Vienna conference was and of this report is to allow researchers, judges and legislators around the world to learn from each other by comparing different approaches to whistleblowing and especially by presenting different legal solutions to real life problems that are basically the same everywhere on our planet. Comparative analysis may thus prove to be the "*Vorrat an Lösungen*" (stock of solutions) that German legal scholar and writer *Ernst Zitelmann* saw in it in 1900.[2]

A global comparison of different approaches to whistleblowing can be achieved successfully only in a team, as no single person is able to gather in-depth knowledge of more than 20 jurisdictions within a reasonable period of time. Therefore, we asked leading experts on whistleblowing from jurisdictions around the world to kindly help us in our task. At this point, we would above all like to express our gratitude to all contributors for their quantitatively and qualitatively impressing replies.

Before we start our survey, we would like to give an outline of our methodology: In preparation of this general report, we firstly sent a questionnaire of about 20 questions to the national experts.[3] Any statement on the situation in a specific country we make in this report is based on their country reports,[4] apart from Germany, which is our home jurisdiction and which we took the freedom to give additional comment on based on our own expertise. At this point, we would like to thank all national experts for their excellent contributions without which this report could not have been written. The structure of the questionnaire and the questions we asked are basically the same as the subheadings of this report. The exact wording and structure of our questionnaire can be derived from the tabula we attached to this report. Secondly, our task was to categorize the answers received to make them comparable. Therefore, we prepared the said tabula. It contains our questions and the answers we received. To allow for comparability, we did not take into consideration too much detail but tried to categorize the contributions. For instance, we used the term "good faith requirement" for limitations to whistleblower protection that stem from

prévention de la corruption en France (Paris, DL, 2013); W Vandekerckhove, *Whistleblowing and Organizational Social Responsibility*: *A Global Assessment* (Burlington, Ashgate, 2006).

[2] E Zitelmann, Aufgabe und Bedeutung der Rechtsvergleichung (1900), *Deutsche Juristen-Zeitung 5*: 329 (330) right column.

[3] The experts we consulted are: Daphne Aichberger-Beig (Austria), Daniel Cuypers (Belgium), Priscila Fichtner (Brazil), John P. McEvoy (Canada), Sandra Laleta (Croatia), Constantinos Kombos (Cyprus), Jan Pichrt with Jakub Morávek (Czech Republic), Merle Muda (Estonia), Jari Murto (Finland), Katrin Deckert (France), Rüdiger Krause (Germany), Maria Teresa Carinci (Italy I) and Edoardo Ales with Antonio Riccio (Italy II), Hiroyuki Minagawa (Japan), David Fabri (Malta), Björn Rohde-Liebenau (Netherlands), Dagmara Skupień (Poland), Júlio Gomes (Portugal), Raluca Dimitriu (Romania), Chandra Mohan (Singapore), Darja Senčur Peček (Slovenia), Sung-Wook Lee (South Korea), Owen Wamock (UK), Shawn Marie Boyne (USA).

[4] These shall become available at www.iacl2014congress.com/reports/ (as at 12.1.2015). To simplify matters, we will refer to "Country Report …, p. …" in this general report only.

either a whistleblower making allegations erroneously or his[5] motivation. We are perfectly aware that this categorization is quite imprecise and that the jurisdictions surveyed find quite different solutions to these legal challenges. However, we feel that this was the only way to achieve comparability at all. We tried to give more precise information on the solutions various jurisdictions opted for in this report. Also, at least some of the country reports we received are going to be published in a separate volume. Readers who are interested in the details of the answer a jurisdiction gives to a certain problem will hopefully be satisfied there.

In this report, we will at first take a look at the *status quo* of whistleblowing in the various jurisdictions (see below at section "Whistleblowing: a well-known phenomenon not yet fully understood"). Afterwards, we will commit ourselves to the following questions: Who is protected as a whistleblower? What kind of behaviour is protected? What is the level of protection offered? A summary concludes.

Whistleblowing: A Well-Known Phenomenon Not Yet Fully Understood

Professional Coverage of Whistleblowing

Whistleblowing is a well-known phenomenon in all the jurisdictions we surveyed. It has also been the topic of international consultations in relatively recent times, particularly by the United Nations, the Organisation for Economic Cooperation and Development, the G-20, the International Chamber of Commerce, the Council of Europe, the Organisation for Security and Cooperation in Europe and the International Labour Organisation.[6] Interest in the topic is massively gaining ground around the world. Several comparative legal analyses are already available.[7] This

[5] To improve legibility, we opted to use the masculine term only, although whistleblowers of course can be female or of another sex (a third sex is recognized e.g. in Australia, Germany and India) as well.

[6] *cf.* Art. 33 of the Convenction Against Corruption of the United Nations and Principle No. 10 of the UN Global Compact; Art. 9 of the Civil Law Convention on Corruption of the Council of Europe; G-20, Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment of 12.11.2010 (Annex III No. 7); ICC, Guidelines on Whistleblowing; OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26.11.2009 as at 18.2.2010 (Annex II-A Abs. 11 lit. ii); OSCE, Best Practices in Combating Corruption, 2004; Art. 5 lit. c of ILO-Convention No. 158: Convention concerning Termination of Employment at the Initiative of the Employer of 22.6.1982.

[7] Amongst others: R Calland, G Dehn, *Whistleblowing Around The World*: *Law*, *Culture and Practice* (Pretoria, IDASA Publishers, 2004); J Düsel, *Gespaltene Loyalität*: *Whistleblowing und Kündigungsschutz in Deutschland*, *Großbritannien und Frankreich* (Baden-Baden, Nomos, 2009); D Lewis, *A Global Approach to Public Interest Disclosure*: *What Can We Learn From Existing Whistleblowing Legislation and Research*? (Cheltenham, Edward Elgar, 2010); D Imbach Haumüller, *Whistleblowing in der Schweiz und im internationalen Vergleich – ein Bestandteil*

development was originally triggered by the global fight against corruption in the wake of the early 2000s recession and particularly the US-American *Sarbanes-Oxley Act*, but attention increased in recent times due to the disclosures made by *Edward Snowden*. He revealed a global-scale intrusion into the privacy of citizens by secret services in a scale unheard of and virtually unimaginable before.[8] On this canvas, the professional discussion of whistleblowing has become much more sophisticated in the last couple of years in many countries.[9]

It comes hardly as a surprise that countries having special legislation on whistleblowing in force for quite a while now, such as Canada,[10] the Netherlands,[11] the UK[12] or the USA[13] also feature a notable body of case law and literature on the topic. Exceptions are Japan and South Korea: Although Japan may pride itself of a very sophisticated piece of legislation since 2004,[14] neither jurisprudence nor commentators seem to have paid much attention to whistleblowing up to date. Similarly, in South Korea two acts are in force since 2008 and 2011.[15] Nevertheless, there is still only a manageable amount of case-law and literature on the topic available.

On the other hand, professional coverage of whistleblowing has become much more intense in countries that were historically not much interested in the topic. Examples for this development are Austria, Belgium, the Czech Republic (discussing legislative proposals from about 2012 onwards), France (which established new rules on whistleblowing in 2013),[16] Germany (discussing the topic since the late 1990s and more intensely after several legislative proposals were made in 2009 and again in 2012), Italy and Malta (which enacted new rules on whistleblowing in 2013).[17] Nonetheless, whistleblowing is not yet fully understood and there is not yet an international consensus on what whistleblowing exactly is and how it should be treated.

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einer effektiven internen Kontrolle? (Zürich, Schulthess, 2011); Rapporteur Omtzigt, in: *Parliamentary Assembly of the Council of Europe*, *Doc. 12006*: *The protection of "whistle-blowers"* (2009); Group of States Against Corruption in the Council of Europe (GRECO), Seventh General Activity Report (2006), 2007; W Vandekerckhove, *Whistleblowing and Organizational Social Responsibility*: *A Global Assessment* (Burlington, Ashgate, 2006).

[8] A first-hand insight into the facts of that case is given in No place to hide: Edward Snowden, the NSA, and the U.S. surveillance state, 2014 by the journalist Glenn Greenwald who supported Edward Snowden in making his revelations.

[9] *cf.* n 1.

[10] Public Servants Disclosure Protection Act of 2005, amongst others.

[11] Several statutes and decrees, *cf.* Country Report Netherlands, p. 1 f.

[12] Public Interest Disclosure Act (since 1998, amended in 2013, which equals Art. 43A ff. Employment Rights Act 1996).

[13] The first piece of legislation is the False Claims Act of 1863. Today, a large number of sector-specific legislation is in force, *cf.* Country Report USA, p. 3 ff.

[14] Whistleblower Protection Act.

[15] Act On The Prevention Of Corruption And The Establishment And Management Of The Anti-Corruption And Civil Rights Commission of 2008 and Protection of Public Interest Reporters Act of 2011.

[16] Art. L. 1161-1 Code du travail amongst others, *cf.* Country Report France, p. 2 ff.

[17] Protection of the Whistleblower Act.

The Legal Basis for the Protection of Whistleblowers

The legal basis for the protection of whistleblowers is quite heterogeneous: While in some countries special legislation on the protection of whistleblowers is in force, other countries do not know any legal protection of whistleblowers at all. In some countries, protection is granted by means of administrative procedures, while others rely heavily on the protection granted by the courts. The Netherlands take yet another approach in the private sector by relying on a non-binding code of conduct setting best practices for employers.

One of the most sophisticated acts on the protection of whistleblowers still is without doubt the Public Interest Disclosure Act, enacted by the UK in 1998 and amended in 2013. This act covers the public sector as well as the private sector. It contains detailed rules on what a whistleblower is allowed to report, how to report and whom to report to. The act also protects whistleblowers against unfair dismissal and other forms of detriment. Another very sophisticated statute is the Japanese Whistleblower Protection Act of 2004, resembling the British archetype in many ways, but going beyond it in some respect (e.g. the allocation of the burden of proof). Malta also established a high level of protection by enacting the Protection of the Whistleblower Act in 2013. This act also covers the public and the private sector. However, experience with the act is limited as it is still so new. South Korea has the Protection of Public Interest Reporters Act in force since 2011 (another act applying to the public sector is in force since 2008), which as well resembles the UK act in many ways. The UK act also has been the blueprint for special legislation in force in the Netherlands since 2001 in the public sector.[18]

Special legislation also is in force in Austria,[19] Belgium,[20] Canada,[21] France,[22] Germany,[23] Italy,[24] Malta,[25] Romania,[26] Singapore,[27] Slovenia[28] and the USA.[29] The scope of whistleblower protection legislation differs in these jurisdictions. A number of countries protect whistleblowers by means of special statutes in the public sector only. This includes Italy, the Netherlands, Romania and, in principle, Belgium and

[18] *cf.* n 11.

[19] Country Report Austria, p. 2.

[20] Country Report Belgium, p. 3 f.

[21] *cf.* n 10.

[22] *cf.* n 16.

[23] See above and Country Report Germany, p. 1.

[24] Country Report Italy I, p. 2 f. and Country Report Italy II, p. 1 f.

[25] *cf.* n 17.

[26] Country Report Romania, p. 3.

[27] Country Report Singapore, p. 1 f.

[28] Country Report Slovenia, p. 2.

[29] *cf.* n 13.

Canada. However, regional laws in Belgium (Flanders)[30] and Canada (Manitoba)[31] cover the private sector as well.

Several other countries do not draw a separation line between the public and the private sector but protect whistleblowers in certain situations only. France is a good example for this approach. Art. 1161 *Code du travail* (Labour Code) protects employees blowing the whistle. The act does not differentiate between employees employed in the private or in the public sector. Since 2013, French law additionally covers whistleblowing in the context of the protection of the environment as well as reports concerning a conflict of public interests. Similar legislation exists in Austria and Germany: Austria protects whistleblowers in the public sector (§ 53a *Beamten-Dienstrechtsgesetz* [Public Servants Act]) and persons reporting violations of laws protecting the environment (§°9b *Umweltinformationsgesetz* [Environmental Information Act]). Germany protects whistleblowers in the public sector (e.g. § 67 (2) Nr. 3 *Bundesbeamtengesetz* [Federal Public Servants Act]), persons reporting breaches of work place security standards (§°17 (2) *Arbeitsschutzgesetz* [Work Place Security Act]) and has whistleblower protection laws in force in public health care (§§°81a, 137d, 197a *Sozialgesetzbuch 5* [Social Security Code 5]).[32] In the USA, a piecemeal legislation on the protection of whistleblowers is in force, covering areas such as capital markets (Sarbanes-Oxley Act, Dodd-Frank Act), health services and consumer products. Although the USA established one of the first modern laws on the protection of whistleblowers, the False Claims Act of 1863, there is no general law on the protection of whistleblowers in force yet. However, the piecemeal legislation in force in the USA is extensive.[33] Singapore also features more than a dozen rules protecting whistleblowers in certain situations. In Slovenia, whistleblower protection legislation is part of an act on the prevention of corruption. Similar legislation is prevalent in Cyprus and in the public sector in South Korea.

In almost all the jurisdictions we surveyed, whistleblowers are protected by general laws to a certain extent. Often whistleblowing is perceived as behaviour falling into the scope of the fundamental right of freedom of expression (e.g. in Estonia, France, Germany, Italy, Poland and Portugal). This right is guaranteed by the Universal Declaration of Human Rights (Art. 19) as well as by the Charter of Fundamental Rights of the European Union (Art. 11), the European Convention on Human Rights (Art. 10) and by many constitutions. However, almost all jurisdictions surveyed balance this right against the legitimate protection of public interests or business secrets. Whistleblowers are often bound by a contractual or statutory duty of loyalty which limits their right to blow the whistle, as it obliges them to confidentiality to a certain extent. Some jurisdictions additionally protect whistleblowers by means of the fundamental right to equality (e.g. Poland).[34]

[30] Country Report Belgium, p. 3.

[31] Country Report Canada, p. 9.

[32] *cf.* G Forst, 'Whistleblowing im Gesundheitswesen' (2014), *Die Sozialgerichtsbarkeit 60*: 413–422.

[33] Country Report USA, p. 3 ff.

[34] Country Report Poland, p. 4.

In parts of Europe, whistleblowing is regulated by statutes on data protection as well (e.g. in the Czech Republic, Finland, France, Germany and Italy).[35] These statutes usually strike a balance between the right of the accused person to be informed of the source of information relating to them and the interest of the whistleblower to have his identity kept confidential. This kind of regulation is for instance known in the Czech Republic, Finland, France, Germany and Italy. It should be existent in other Member States of the EU as well, as the data protection legislation in these countries is based on the Data Protection Directive of the EU[36] that other Member States also have to implement according to Art. 288 (3) of the Treaty on Functioning of the European Union (TFEU).

The same applies to antidiscrimination legislation in the EU. According to the rapporteurs, several Member States protect whistleblowers reporting discrimination by means of domestic antidiscrimination legislation (e.g. France, UK). Rules of this kind should be prevalent in all of the Member States, as all of them have to implement the EU Directives on antidiscrimination.[37] The Directives allow persons discriminated against to complain to the employer about discrimination. They prohibit the employer to make use of any kind of retaliation following the complaint against the person complaining or persons supporting that person.[38] This mechanism can easily be qualified as a special kind of whistleblower protection in the field of antidiscrimination legislation.

In the fields of the prevention of money laundering, the protection of health and safety at work and of the environment, there are also EU Directives obliging certain persons to blow the whistle (see below at section "Is there an obligation to blow the whistle?").

In some countries, however, whistleblowers are primarily protected by administrative procedures. For instance, Brazil does not have special legislation on the protection of whistleblowers in force, but employees can report to the Labour Attorney's Office, which protects employees and can take action against employers in form of administrative fines or lawsuits. In France, the *Commission Nationale de l'Informatique et des Libertés* (CNIL) – the national data protection authority – issued several administrative decisions governing whistleblowing.[39] This action was triggered by the requirement of Section 301 (4) of the US-American Sarbanes-Oxley Act that subsidiaries of companies listed in the USA have to allow for anonymous whistleblowing by their employees. The CNIL decided that anonymous whistleblowing is permissible with respect to certain breaches of the law only and that

[35] For Germany, *cf.* G Forst, 'Whistleblowing und Datenschutz' (2013), *Recht der Datenverarbeitung 36*: 122–132.

[36] Directive 95/46/EC.

[37] Directives 2000/43/EC, 2000/78/EC, 2006/54/EC and 2010/41/EU.

[38] Art. 9 Directive 2000/43/EC, Art. 11 Directive 2000/78/EC, Art. 24 Directive 2006/54/EC.

[39] CNIL, Autorisation unique No. AU-004 – Délibération No. 2005-305 of 8.12.2005, amended by Délibération No. 2010-369 of 14.10.2010; Délibération No. 2011-345 of 10.11.2011 (concerning EDF), Délibération No. 2011-346 of 10.11.2011 (concerning Thales) and Délibération No. 2011-406 of 15.12.2011 (concerning Aggreko).

several other conditions have to be met to ensure that such a system is compatible with data protection law. This point of view was later, at least in principle, endorsed by the French *Cour de cassation* (Supreme Court).[40] In these French proceedings, data protection law turned out to be an ambiguous instrument, however: Although aiming at a protection of whistleblowers on the one hand, the CNIL also had to take into consideration the legitimate interests of the persons accused. Although it managed to strike a balance accepted by the *Cour de cassation* (Supreme Court), the outcome is highly problematic for subsidiary companies of companies being subject to the Sarbanes-Oxley Act. The situation in Italy seems to be very similar. The same could be true for other Member States of the EU, as the combined working group of Data Protection Authorities took a view similar to that of the CNIL in a working paper issued in 2006.[41]

The strong position of the *Cour de cassation* (Supreme Court) in the regulation of whistleblowing is not an exemption, but rather the rule: The courts generally play an important role in the protection of whistleblowers. Jurisdictions featuring special legislation on whistleblowing usually also have a substantial body of case-law interpreting the statutes. The UK is a good example for this.[42] Also in Japan, it was the courts that established whistleblower protection at first by means of general rules before the legislator took action in 2004. However, the existence of special legislation and supplementary case-law is not necessarily to the benefit of the whistleblower: In the USA, courts have shown a tendency to restrict the rights of whistleblowers by interpreting the legal bases of whistleblower protection restrictively.[43] The legislator therefore extended the scope of the relevant acts repeatedly to counterbalance this unwillingness of the courts to grant protection.

In jurisdictions not having special whistleblower protection in force, two patterns can be identified: In most jurisdictions of this kind, very little or virtually no case-law on whistleblowing seems to exist. This finding is to be treated with some caution, however, as whistleblowing is not always and everywhere given the same meaning and sometimes whistleblowing is not identified as such, e.g. in dismissal

[40] Cour de cassation (France), No. 08-17191, Judgement (Chambre sociale) of 8 December 2009.

[41] Art. 29 Working Group (the name refers to Art. 29 Directive 95/46/EC, the legal basis of the group), Opinion 1/2006 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 (Working Paper 117), available at www.ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm (as at 12.1.2015).

[42] *cf*. England and Wales Court of Appeal, No. A2/2010/2919/EATRF, Case *NHS Manchester v Fecitt & Ors*, Judgement (Civil Division) of 25 October 2011; No. A2/2006/0402, Case *Bolton School v Evans*, Judgement (Civil Division) of 15 November 2006; No. A1/2003/2160, Case *Street v Derbyshire*, Judgement (Civil Division) of 21 July 2004; No. A1/2001/1241&B, Case *ALM Medical Services Ltd. v Bladon*, Judgement (Civil Division) of 26 July 2002; United Kingdom Employment Appeal Tribunal, No. UKEAT/0141/09, Case *BP v Elstone*, Judgement of 31 March 2010; No. UKEAT/0275/08/DA, Case *Hibbins v Hester Way Neighbourhood Project*, Judgement of 16 October 2008.

[43] cf. Supreme Court (USA), No. 07-214, Case Allison Engine Co. v United States ex rel. Sanders, Judgement of 9 June 2008; No. 04-169, Case Graham County Soil and Water Conservation District v U.S. ex rel. Wilson, Judgement of 20 June 2005.

cases. On the other hand, case-law is the bedrock of whistleblower protection in some jurisdictions not featuring special legislation on whistleblower protection or knowing special legislation of limited scope only. This seems to be the case e.g. in Austria, Canada (before special laws entered into force), Croatia, France, Germany and Italy. In Austria, courts balance the right to freedom of expression and the duty of loyalty of employees in dismissal cases.[44] Before various acts on whistleblower protection entered into force in Canada, the Supreme Court held that an employee was allowed to blow the whistle "up the ladder", i.e. that he was allowed to report the issue to his immediate superior.[45] In another case, the court struck a balance between the right to freedom of expression and the duty of loyalty of public sector employees.[46] In France, the *Cour de cassation* (Supreme Court) issued a judgement on a decision of the CNIL on anonymous whistleblowing. In this case, a French subsidiary of a company that was listed in the USA and that was thus subject to the Sarbanes-Oxley Act had implemented a whistleblowing system allowing for anonymous reports. The French subsidiary based the system on a decision of the CNIL that allowed whistleblowers to report, amongst other violations of the law, insider trading and infringements of antidiscrimination legislation.[47] The *Cour de cassation* held that such a system was in principle compatible with French law but that the scope of the system had to be limited to auditing, financial reporting and corruption.[48] A similar development can be observed in Italy, leading to calls for an amendment of data protection legislation in 2009. In Croatia as well as in Germany, judgements of the ECtHRs (ECtHR) played an important role in the development of whistleblower protection:

– In *Balenović v. Croatia*,[49] the applicant in 2000 alleged to have found out that her former employer, the national oil company of Croatia, lost about 20 million Euros a year to fraudulent haulage providers who transported petrol from refineries to petrol stations on behalf of the company. Moreover, she claimed to have discovered that the company would be able to make an additional profit of about 35 million Euros a year by running its own fleet of road tankers. On 19 January 2001, she reported these facts to her immediate superior. One day later the company issued a public call for tenders for haulage services. In reaction to this, the applicant sent a letter to the general director of the company, repeating her allegations. When she did not receive any reply, she complained to the chairman of the supervisory board. The chairman met her and listened to her allegations but

[44] Country Report Austria, p. 2.

[45] Supreme Court (Canada), No. 30090, Case *Merk v International Association of Bridge*, Structural, Ornamental and Reinforcing Iron Workers, Local 771, Judgement of 24 November 2005.

[46] Supreme Court (Canada), No. 17451, Case *Fraser v Public Service Staff Relations Board*, Judgement of 10 December 1985.

[47] CNIL, Autorisation unique No. AU-004 - Délibération No. 2005-305 of 8.12.2005, amended after the decision of the Cour de cassation by Délibération No. 2010-369 of 14.10.2010 and again by Délibération No. 2014-042 of 30.1.2014.

[48] Cour de cassation (France), No. 08-17191, Judgement (Chambre sociale) of 8 December 2009.

[49] ECtHR, No. 28369/07, Case *Balenović v Croatia*, Judgement (Chamber) of 30 September 2010.

did not do anything to improve the situation. In April 2001, a newspaper published a series of articles on the issue. The applicant was quoted in these articles, accusing some of the managers of the company of corruption and nepotism. Shortly after these articles had been published, the applicant was summarily dismissed. The courts of Croatia held that the dismissal was justified as the applicant had acted contrary to the interest of the employer, was not under a civic duty to report crimes and that she had violated internal rules of the employer concerning communication with the media. In May 2001, the applicant filed a criminal complaint with some of the managers of the company. However, she claimed in the proceedings at the ECtHR to have informed the police of the facts of the case as early as in February 2001. The applicant argued that Croatia had violated her rights under Articles 9 (freedom of thought), 10 (freedom of expression) and 14 (right to non-discrimination) as guaranteed by the *European Convention on Human Rights* (ECHR). The ECtHR held that whistleblowing was covered by the right to freedom of expression only. In assessing whether the applicant had suffered a violation of that right, the court found that the Croatian courts pursued legitimate aims by confirming the dismissal as lawful, namely the protection of the reputation and the rights of others (i.e. the managers and the company). The ECtHR then considered whether the dismissal was necessary in a democratic society, which is required by Article 10 ECHR to justify an interference with the right to freedom of expression. The court held that "the applicant's freedom of expression, in particular her right to publicise her criticism of the business policy of the national oil company, as well as to impart information on alleged irregularities within the company, and, more importantly, the right of the public to receive that information, must be weighed against the requirements of the protection of the reputation and the rights of others…" The ECtHR stresses that "that Article 10 [ECHR] does not guarantee wholly unrestricted freedom of expression and that the exercise of this freedom carries with it 'duties and responsibilities'. Therefore, whoever exercises that freedom owes 'duties and responsibilities', the scope of which depends on his or her situation, the (technical) means he or she uses and the authenticity of the information disclosed to the public." Assessing the facts of the case in the light of these parameters, the court concluded that the dismissal was not disproportionate to the legitimate aim pursued and thus could be regarded as being necessary in a democratic society. The complaint therefore was held inadmissible.

– In *Heinisch v. Germany*,[50] the applicant had been working as a geriatric nurse for her former employer, a state-owned company offering health care services. As an employee, she was working in a geriatric nursing home where the patients generally depended on special assistance. In 2002 and 2003, a supervisory authority, acting on behalf of the public health care system, detected serious shortcomings in the care provided as well as inadequate documentation of care, and accordingly threatened to terminate the service agreement with the applicant's employer. In 2003 and 2004, the applicant and her colleagues regularly indicated to the

[50] ECtHR, No. 28274/08, Case *Heinisch v Germany*, Judgement (Chamber) of 21 July 2011.

management of the employer that they were overburdened on account of staff shortages and therefore had difficulties carrying out their duties. They specified the deficiencies in the care provided and also mentioned that services were not properly documented. By the end of 2004, the applicant fell ill due to overwork and consulted a lawyer. The legal counsel wrote to the management of the employer, claiming that due to a lack of staff, the basic hygienic care of the patients could no longer be guaranteed for and that the management and the employees were risking criminal responsibility. The management rejected these accusations. In reaction to that statement, the lawyer lodged a criminal complaint against the management of the employer, also to avoid criminal responsibility of the applicant, claiming that the employer knowingly failed to provide the high-quality care announced in its advertisements and hence did not provide the services paid for (i.e. committed fraud) and was putting the patients at risk. In January 2005, the public prosecutor's office discontinued the preliminary investigations against the employer. Two weeks later, the employer dismissed the applicant with a notice period on account of her repeated illness. The applicant reacted by contacting her friends and her trade union. They issued a leaflet demanding the revocation of the notice. The leaflet also informed of the facts reported above. One of the leaflets came to the knowledge of the employer who only then learned that a criminal complaint had been lodged against him. In February 2005, after hearing the works council and the applicant, the employer summarily dismissed her on suspicion of having initiated the production and dissemination of the leaflet.[51] A new leaflet was subsequently issued reporting of this dismissal. Moreover, the whole situation was reported in a TV programme and in two articles published in different newspapers. Meanwhile, the public prosecutor's office had resumed preliminary investigations at the applicant's request. These investigations were again discontinued some months later. The applicant sought protection against the dismissals at the labour courts. The first instance held that the dismissal without notice had not been justified as the leaflet – the content of which was attributed to the applicant – was covered by her right to freedom of expression and did not amount to a breach of her duties under the employment contract. However, the appellate court as well as the *Bundesarbeitsgericht* (Federal Labour Court) and the *Bundesverfassungsgericht* (Federal Constitutional Court) held that the dismissal without notice had been justified, since the applicant had based the criminal complaints on facts that she could not prove. The applicant's reaction also was held to be disproportionate as she had not attempted to have the allegations investigated internally and as she had provoked a public discussion of the issue. The ECtHR held that there had

[51] The dismissal with notice period from January 2005 had not taken effect at this point, as the notice period had not expired yet. It is not uncommon for employers in Germany to dismiss employees several times for different reasons just in case that a dismissal should be rendered void by a court. The employee has to challenge each dismissal individually to make sure that none of them takes effect. In this case, however, the employer wanted to dismiss the applicant *summarily* with the second dismissal.

been an infringement of the applicant's right to freedom of expression but that this infringement had been prescribed by Section 626 *Bürgerliches Gesetzbuch* (Civil Code), i.e. the rule allowing for employees to be summarily dismissed. Nevertheless, the ECtHR concluded that the infringement had not been necessary in a democratic society: On the one hand, employees were under a duty of loyalty, reserve and discretion. According to the court, a disclosure therefore should be made in the first place to the person's superior or other competent authority or body. Only as a last resort, information could be disclosed to the public. On the other hand, the court considered whether the applicant had had any other effective means of remedying the wrongdoing which she intended to uncover. The ECtHR also weighed the authenticity of the information disclosed. A state was allowed to answer proportionately to defamatory accusations made in bad faith. Other factors to be included were the potential damage suffered by the employer if the information was revealed and the potential damage suffered by third parties or the public if it was not revealed. Finally, the motivation of the whistleblower had to be taken into account. Striking a balance between these factors, the court finally held that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society".

The *Heinisch* case triggered a political discussion in Germany on whether to protect whistleblowers by a special statute or not. Although all political parties represented in the *Bundestag*, the federal parliament, agreed that whistleblowing could be a valuable instrument to fight corruption and to prevent harm to people and although the opposition parties made legislative proposals, no steps were taken by the governing coalition in the end. The German experience is similar to that of the Czech Republic, where legislative proposals were made in 2012 but also did not yield a statue. Also in Singapore, proposals to regulate whistleblowing were not pursued to the end.

Who Is Protected?

The first question legislators willing to improve their legal systems have to answer is who should profit of a statute, i.e. who should be protected as a whistleblower and whether a person should also be protected as a supporter of a whistleblower or as a witness proving his allegations.

Who Qualifies as a Potential Whistleblower?

There are huge differences between the jurisdictions we surveyed as to who qualifies as a whistleblower. These differences take their root in the legal basis of whistleblowing in the various jurisdictions. Legal systems that protect whistleblowers by

fundamental rights – such as the right to freedom of expression – tend to protect everyone, at least in principle. However, as whistleblowing in many jurisdictions is governed first and foremost by labour legislation, employees are the group of persons who are mainly protected in most countries (e.g. Austria, Croatia, Estonia, Finland, France, Germany, Italy and Poland). But even in countries featuring special legislation, the personal scope of whistleblower protection varies. Some countries protect public sector employees and civil servants by means of special legislation only (e.g. Canada [with broader legislation in force in some provinces], Cyprus, Italy, the Netherlands, Romania), while employees in the private sector are not included or covered by general rules only. Legislation in the UK protects "workers",[52] which includes a broader range of persons than the term "employee" (e.g. agency workers, self-employed persons). A similar broad definition of "employee" is in force in Malta, including former employees and volunteers.[53] Japan takes an intermediate stance, as it features special rules for employees only, but extends protection to agency workers in the enterprise of the host employer insofar as they are allowed to report to him rather than to their contractual employer. As far as special legislation is applicable, some countries such as Singapore, Slovenia and the USA do not have any restrictions in force concerning the person that blows the whistle. South Korea even covers anyone by its 2011 act that at the same time covers a very broad range of situations.

The Protection of Supporters

Whistleblowers do not always operate on a stand-alone basis. Sometimes they have to cooperate with others to be able to make their disclosures. Whistleblowers working in a team for instance may have to retrieve information from colleagues to verify and/or prove a wrongdoing. Whistleblowers also may hesitate to disclose information and may need exhortation by others to pluck up their courage and finally blow the whistle. The *Heinisch* case reported above is a good example, as it was the friends of the whistleblower and her trade union who issued a leaflet that finally persuaded the whistleblower to insist on further investigations by the public prosecutor and to disclose information through the media. If supporters of a potential whistleblower are not protected, he may shy from a disclosure because he fears a detriment for his relatives or friends. Whistleblowing also might be suppressed on a preliminary stage because information a potential whistleblower requires to fully understand the facts of a case and to recognise a wrongdoing might never reach him.

Although the need for a protection of supporters of whistleblowers is rather obvious, legal response so far has been chastening. Hardly any of the jurisdictions we surveyed have special provisions for the protection of supporters of whistleblowers in force. A notable exemption is Belgium, which features a special rule for support-

[52] See 43 K Employment Rights Act 1996.

[53] Country Report Malta, p. 2.

ers of whistleblowers in the public sector.[54] In some jurisdictions (Brazil, Canada, Poland, private sector in Belgium) supporters of whistleblowers have to rely on the rather wobbly ground of any general rule applicable in their specific case. All the other jurisdictions we surveyed do not seem to deal with the problem specifically at all, with the exception of EU Member States having to implement antidiscrimination Directives that also protect supporters of persons reporting discrimination against retaliation by the employer (see above at II.2.) and South Korea that treats supporters and witnesses in principle just like the whistleblower.[55]

The Protection of Witnesses

This is all the more surprising as most of the jurisdictions surveyed protect persons who affirm a whistleblower's allegations, at least if this happens in court trials. If a person confirms the allegations disclosed by whistleblowing in a court trial (i.e. as a witness), this person is protected by the general laws protecting witnesses in most countries. However, this also reveals a gap in the protection of witnesses: Hardly any jurisdiction we surveyed expressively protects witnesses giving testimony not in a court trial, but in proceedings outside such a trial, e.g. an internal investigation conducted by the employer. Notable exemptions are – again – Belgium, which protects witnesses in the public sector, and South Korea, that protects supporters in general (see above at III.2.). France also expressively protects witnesses in this situation, at least if they give testimony on certain wrongdoings, including environmental and health and safety issues, corruption, or a conflict of interest in the public sector (Art. 1132-3 *Code du travail*). Canada also has special legislation in force for witnesses, at least in the public sector.[56] Some Canadian provinces extend this protection to the private sector as well.

What Kind of Behaviour Is Protected?

Once a legislator has established whom he wants to protect as a whistleblower, he needs to ask himself what kind of behaviour shall be protected. Again, the jurisdictions surveyed vary widely with respect to the facts a whistleblower may disclose and the circumstance under which a disclosure qualifies as a disclosure protected by the law.

[54] Country Report Belgium, p. 8.

[55] Country Report South Korea, p. 3.

[56] Country Report Canada, p. 25.

Should Anonymous Whistleblowing Be Permitted?

An especially ambiguous instrument is anonymous whistleblowing. Comparative analyses conducted earlier[57] have led to the conclusion that anonymous whistleblowing is considered by some to offer particularly strong protection for whistleblowers while others perceive it as an invitation to denunciators. Critics also point out that the protection of whistleblowers by anonymity is far from perfect as their identity could be revealed by the facts they disclose, which may be known to one person or very few people only. If the identity of the whistleblower is revealed, he also cannot be protected against retaliation properly, as he cannot prove that it was actually him who blew the whistle and that he is facing detriment in retaliation for the disclosure he made. The Article 29 Working Party also identifies obstacles to anonymous whistleblowing based on data protection legislation.[58]

Irrespective of these arguments, most of the countries we surveyed allow anonymous whistleblowing or at least do not prohibit it (Austria, Belgium, Brazil, Cyprus, Czech Republic, France, Germany, Italy, Romania, Singapore, Slovenia, UK, USA). However, many of these countries restrict anonymous reporting in some respect: In Austria, anonymous whistleblowing is not permitted or prohibited by law, but it is used by the public prosecutor's office since 2013. In Belgium, anonymous reporting is excluded in certain proceedings including an ombudsman, but it seems to be allowed in other situations. In France, anonymous whistleblowing is not forbidden, but according to the CNIL, anonymous whistleblowing may not be promoted, a company must encourage whistleblowers to reveal their identity and information gathered anonymously must be treated with special care, i.e. suspiciousness.[59] In Germany, anonymous whistleblowing is not prohibited, but an anonymous whistleblower will not be protected by the fundamental right to freedom of expression according to the Federal Labour Court,[60] as in the judges' eyes, expressing one's opinion necessarily includes revealing one's identity. In Romania, only disclosures of persons identifiable shall be inquired. However, exceptions apply to the labour inspection, which has to investigate facts disclosed anonymously as well. On the other hand, Section 301 (4) Sarbanes-Oxley Act (USA) expressively obliges companies to enable anonymous whistleblowing.

In some countries, the legal assessment of anonymous whistleblowing seems to be somewhat opaque (Croatia, Estonia, Japan, the Netherlands, Poland, Portugal). In Japan, anonymous whistleblowing is not expressively prohibited. However, an employer who has received a complaint is obliged to give the whistleblower within 20 days information on the measures he has taken to stop the reported wrongdo-

[57] GRECO, Seventh General Activity Report (2006), 2007, p. 12; Rapporteur Omtzigt, in: *Parliamentary Assembly of the Council of Europe*, *Doc. 12006*: *The protection of "whistle-blowers"* (2009), para. 116 lit. f.

[58] *cf.* n 41, p. 11.

[59] *cf.* n 47, Art. 2.

[60] Bundesarbeitsgericht, No. 2 AZR 235/02, Judgement (Second Senate) of 3 July 2003, para. 34.