

# Legal News

October 2006

Dear clients and business friends

The referee in football, rugby, ice hockey or many other sports blows the whistle when he spots a foul. In German and other languages too, the «whistleblower» in a business sense has come to mean someone who sounds the alarm, enabling a company's management to be informed early on about functional problems or weak points. If employees are encouraged to point out problems internally, there is less risk that any of them will turn directly to the media or the authorities.

In the USA and Great Britain, «whistleblowing» has been a subject of intense debate in recent years. In the UK, it was the obsolescence of the railway system which led, in 1998, to the enactment of a new law to protect whistleblowers (the Public Interest Disclosure Act).

Despite a certain degree of hesitancy, there are also companies in Switzerland which allow and support whistleblowing. Used properly, becoming aware of functional disruptions and grievances can serve the best interests of the company and comply with good Corporate Governance.

In this context, we also refer to Transparency International Switzerland, a non-governmental organisation to fight corruption which operates an independent hotline for whistleblowers (<http://www.transparency.ch>).

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## Whistleblowing and Corporate Governance

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### 1. The combating of bribery

The cases of bribery which actually come to court are rare because there is no direct victim. The only people who might incur damage are competitors on the market who fail to win a contract because someone else has indulged in one or other degree of material manipulation. Whistleblowing enables employees to point out problems which they identify and is aimed at reducing the risk of damage to a company's reputation or perhaps even criminal liability for the company, which was introduced in Switzerland in 2003.

Notifications in the sense of whistleblowing are not restricted to cases of bribery. They might also address issues such as safety or environmental protection regulations. Pointing out deficiencies can, under certain circumstances, help to avoid a catastrophe in the chemicals industry or aviation if, for example, comments made earlier by employees have been ignored. And last but not least, whistleblowing is an instrument to combat impermissible manipulation.

### 2. The risk of revenge

Until now, the cases of whistleblowing that have become known have been exceptions. In practice, the person who reveals a problem risks losing his or her job or suffering some other kind of revenge. There is still no specific legislation in Switzerland with regard to whistleblowing. The general provisions of the employment law apply. Every employee is obliged to maintain discretion

and loyalty vis-à-vis the employer (Art. 321a Para. 4 CO). They may not pass any confidential information on to third parties (such as the media) because this might damage the company and its reputation. This applies even if the employee is able to prove the correctness of the information. In rare cases, the passing on of information to third parties might be justified by higher interests. But the employee must first turn to his or her superior officer in any case. This gives the employer the opportunity to solve the problem internally without the matter leading to a scandal. That, of course, is the better solution.

On the other hand, the employer must protect the personality of the employee against any possible discrimination, particularly in the case of justified notification of serious problems within the company.

### 3. Amendment to Swiss law

In the federal government, for example, any officer can notify the Federal Financial Control Office of any observations which might indicate cases of fraud or bribery.

In addition, consideration has been given to mandatory introduction of a whistleblowing system for banks. The Federal Banking Commission rejected the enactment of mandatory regulations. One of the objections in the consultation process was that introducing whistleblowing regulations could damage the working climate because it would lead to an atmosphere of mistrust.

The question as to the protection of the whistleblower has not yet been solved either. If his or her identity is known, sanctions cannot be excluded. On the other hand, anyone attacked by denunciation has the right to find out who made the allegations. As a consequence of a motion lodged by National Councillor Remo Gysin, approved by the National Council and then by the Council of States in March 2006, the Federal Council worked out a draft act of law for better protection of the whistleblower.

The introduction of a system for notification of inadequacies and problems can protect the company. The prerequisite is that it is only used as a last resort and that the notifications are received by an independent body. This might include, for example, the Audit Committee, the Internal Audit Service, the Legal Department of the Compliance Officer.

#### 4. Regulations in the USA

Swiss companies listed on stock exchanges in the USA are already obliged to adopt measures for the protection of whistleblowers. According to the Sarbanes-Oxley Act, those companies are obliged:

- to set up a process under which questionable acts can be notified whilst safeguarding anonymity (section 301).
- to protect employees who report any such findings against any kind of discrimination. An instruction which exposes a supposed or actual informer to discrimination results in heavy sanctions (section 906).

A further example to be noted here is that of the UBS which, on its website, encourages all its employees to notify the Audit Committee of any breaches of laws, regulations or codes of ethics. Simultaneously, the procedure in a case of that kind is described («Whistleblowing, Audit Committee procedures regarding complaints on accounting matters»).

#### 5. Best Practice Study

An unpublished study by Ernst & Young in 2004 regarding the treatment of whistleblowing in more than 40 international companies came to the following conclusions:

- In about two thirds of the companies, it is the group's legal service which deals with the clarification and assessment of the problems that are notified. In one third of the companies, the Head of the Internal Audit Service is responsible for the same task. Sometimes, the duty is also carried out by other officers (Chief Ethical Officer, Chief Compliance Officer).
- Half the companies co-ordinate their activities in this regard by means of an internal notification service (e.g. by e-mail or telephone), whilst the other half makes use of the services of third parties (e.g. a call-centre or an external consultant).
- In general, a summary of the information received is discussed regularly (at least once each quarter) in meetings of the Audit Committee. In important cases, there is also assurance of immediate information of the Audit Committee or its Chairperson. ■

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#### Note:

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#### Imprint

**Legal News**  
Electronic publication in German, French and English.

**Designed and produced by**  
Ernst & Young Ltd  
Legal and Corporate Communications & Marketing  
P.O. Box, 8022 Zurich

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