Chapter 5.

Whistleblower protection in the private sector

This chapter describes different approaches to legislating for private sector whistleblower protection and accompanying recommendations for reform. It focuses on the practical application of dedicated whistleblower protection legislation and provisions within other laws to provide protection to private sector whistleblowers who report suspected wrongdoing, with reference to relevant case law. It also examines whistleblower protection from a business perspective, drawing on responses to the OECD Survey on Business Integrity and Corporate Governance, to illustrate how companies are organising themselves to provide protected reporting and to prevent retaliation.

International frameworks for providing legal protection to those who report suspected acts of corruption in good faith and on reasonable grounds to competent authorities are described in Chapter 1. Whistleblower protection provisions in multilateral anti-corruption treaties and instruments apply almost uniquely in the context of external reporting to competent authorities. To address all relevant aspects of whistleblower protections, there are several additional considerations to take into account. First, protection needs to be provided for those who report suspected misconduct both internally and externally (whether to designated law enforcement authorities or the media). The most recent international standards on whistleblower protection provide protection against retaliation for those who report externally and for those who report internally within the organisation.[1] This broader approach is already reflected in private sector whistleblower protection legislation in some countries. Second, a protected (e.g. anonymous or confidential) reporting mechanism, although a part of any system providing protected reporting, cannot alone protect those who report from retributory actions. Those who make reports using a protected mechanism should also be guaranteed effective protection from retaliation, both before and after reporting. Third, at the same time as ensuring that those who report are protected against retaliatory action, those who retaliate must be held responsible.

Drawing on analysis by the OECD Working Group on Bribery (OECD WGB) of countries' implementation of the Anti-Bribery Convention and related instruments (OECD, 1997), and data from the 2015 OECD Survey on Business Integrity and Corporate Governance (see Annex 5.A1), this chapter explores, with a focus on practical application, different approaches to private sector whistleblower protection. References to examples of whistleblower protection legislation do not constitute endorsement of that specific model. Instead, they are designed to describe the different approaches taken in different legal systems. The OECD WGB operates on the principle of functional equivalence, as set out in Commentary 2 to the Anti-Bribery Convention. Various models will therefore be considered acceptable as long as they attain the goal of implementing the Anti-Bribery Convention and related instruments.

Private sector whistleblower protection laws: Almost a legal vacuum

There are a multitude of international standards on encouraging the reporting of corrupt acts in the private sector and on protecting those who report. However, domestic legislation to implement these standards is much more advanced in relation to public sector whistleblowers than it is for private sector whistleblowers. Despite this, in common law countries[2] there has been a recent increase in the adoption of dedicated whistleblower protection legislation that encompasses both public and private sector whistleblower protection. Other forms of domestic legislation aimed at protecting private sector whistleblowers include criminal code provisions or sector-specific laws. In addition, some countries have adopted laws to recognise or incentivise the implementation of internal controls, ethics and compliance programmes by companies, for example by allowing mitigated sanctions if a company can prove that it has an effective programme in place[3]. These laws can indirectly lead to an increased adoption of internal whistleblower protection and reporting frameworks within companies, given that these tools constitute an important element in an effective internal controls, ethics and compliance programme.

Through monitoring parties' implementation of the Anti-Bribery Convention and related instruments, the OECD WGB systematically analyses legislative frameworks for

protecting private sector whistleblowers who report foreign bribery, along with the whistleblower protection practices of companies headquartered in the country under evaluation. Of the 41 Parties to the Anti-Bribery Convention, only 14 have been deemed to have adopted measures that satisfactorily meet the 2009 Anti-Bribery Recommendation's provisions on private sector whistleblower protection for those who report suspected foreign bribery. The WGB has stated that the implementation of effective whistleblower protection frameworks is a horizontal issue that confronts other Parties to the Convention.[4] Some countries have adopted laws that provide protection for whistleblower reporting in other areas, for example in relation to: anti-competitive or cartel-like behaviour; health; environment or occupational safety threats; or on a sector-specific basis, such as whistleblower protection in the finance sector.

Dedicated legislation

Although the legislation below sometimes applies to both public and private sector whistleblowers, the examples constitute the only dedicated legislation in OECD WGB Member countries that also provides protection in the private sector. Recent examples of dedicated legislation, such as Hungary's Act CLXV of 2013 on Complaints and Public Interest Disclosures, Ireland's Protected Disclosures Act (No.14 of 2014), and the Slovak Republic's Act No. 307/2014 Coll. on Certain Measures related to the Reporting of Anti-social Activities and on Amendments to Certain Laws, have not been fully evaluated by the OECD WGB and are described in Chapter 1 based entirely on country responses to the 2014 OECD Public Sector Whistleblower Protection Survey. In accordance with the established practice of the OECD WGB, draft bills are only evaluated once they have been enacted, hence, for example, Switzerland's draft bill on private sector whistleblower protection, described in Chapter 10, has not been considered. The following examples are taken from OECD WGB monitoring reports and are intended as illustrative case studies rather than examples of best or endorsed practice:

UK Public Interest Disclosures Act

The UK's Public Interest Disclosure Act 1998 (PIDA) provides protection to public and private sector employees from detrimental treatment for disclosing misconduct. As described in Part I, PIDA classifies disclosures into three tiers with increasing thresholds for affording protection. These three categories of disclosure are: internal disclosures to employers; regulatory disclosures to prescribed bodies; and wider disclosures, for example to the police, media, consumer groups or non-prescribed regulators. The UK Serious Fraud Office (UK SFO) is the designated agency for receiving public interest disclosures related to serious and complex fraud, including domestic and foreign bribery. The thresholds for protection for Tier 1 disclosures to an employer require that the disclosure be made in good faith and with a reasonable belief the information tends to show that the misconduct has occurred, is occurring, or is likely to occur. For an external disclosure, the Tier 1 threshold must be met and, in addition, the discloser must reasonably believe that the information and any allegations in it are substantially true and relevant to the regulator (for corruption this is the UK SFO).

During its Phase 3 evaluation of the United Kingdom, the OECD WGB expressed concerns about the territorial limitations of PIDA, specifically in foreign bribery cases where expatriate workers of UK companies are potential whistleblowers (OECD, 2012a). The report cited the 2011 employment tribunal dismissal of a whistleblower's claims of unfair dismissal and detriment for making protected disclosures in the case of Foxley v

GPT Special Project Management Ltd.[5] The OECD WGB therefore decided to follow-up on whistleblower protection under PIDA. The United Kingdom made subsequent changes to its whistleblowing framework through the Enterprise and Regulatory Reform Act 2013. These changes introduced a public interest test requiring individuals who make a claim at an employment tribunal to show a reasonable belief that their disclosure was made in the public interest. It also amended the good faith test so that the employment tribunal has the power to reduce any compensation award by up to 25% if it considers the disclosure was made predominantly in bad faith. According to the United Kingdom, the change to the good faith test was made to mitigate the prospect of two tests needing to be satisfied acting as a deterrent to whistleblowers (OECD, 2014a).

Japan's Whistleblower Protection Act (WPA)

Japan's Whistleblower Protection Act (2006) provides protection from dismissal and unfair treatment for public and private sector whistleblowers who report to enforcement authorities, and, in some cases, to external parties such as labour unions and the media. It does not, however, set out sanctions for those who retaliate against whistleblowers in violation of the act; whistleblowers must instead seek remedies through the provisions set out in the act, or under the Labour Contract Act or Civil Code. At the time of Japan's Phase 3 Written Follow-Up Report by the OECD WGB, Japan reported that more than ten cases had been brought to court, and that in many of these cases, the whistleblower claims were successful (OECD, 2014b). To understand the act's impact on the implementation of whistleblower protection mechanisms in the private sector, Japan undertook a study, completed in June 2013, which targeted approximately 3 000 private business operators. The results shows that the awareness of the Whistleblower Protection Act among large enterprises maintained a very high level (more than 95%) and small and medium-sized enterprises' (SME) awareness rose to 64%, from 61.4% in 2008. In addition, many private business operators showed a positive attitude about the effectiveness of installing a reporting desk. For example, 57.6% of respondents selected "[t]he environment where employees could report about injustice in comfort was improved" and 48.2% responded "[i]t is functioning as a deterrent against an illegal act" (OECD, 2014b, p.21).

Korea's Act on the Protection of Public Interest Whistleblowers

The Act on the Protection of Public Interest Whistleblowers mandates the Anti-Corruption and Civil Rights Commission (ACRC) to receive reports and grant awards to whistleblowers whose reports serve the public interest. The ACRC referred 1 704 whistleblowing cases to examination/investigative agencies out of the 4 158 cases reports it received since the act took effect on 30 September 2011. Among these, 60 cases, which were subject to a penal provision, were referred to an investigative agency under the "Guideline for referral of reported cases (OECD, 2014c)."

New Zealand's Protected Disclosures Act (PDA)

New Zealand's Protected Disclosures Act 2000 (PDA) provides private sector whistleblower protection for employees who report, in good faith, serious wrongdoing in or by an organisation. The PDA requires public sector entities to allow reporting to specified designated authorities, such as New Zealand's Serious Fraud Office (SFO), if the internal chain of reporting cannot be used because, for example, the wrongdoing may involve the head of the organisation in question. However, during its Phase 3 evaluation of New Zealand, the OECD WGB found that the PDA does not impose a similar

requirement on private sector entities to establish reporting processes and protection for its employees. The SFO reported receiving a total of 13 corruption-related whistleblower reports over the three years up to the Phase 3 evaluation in 2013. Several participants in the Phase 3 on-site discussions from both the governmental and non-governmental sector highlighted practical difficulties confronted by small countries, like New Zealand, in encouraging whistleblowing while ensuring confidentiality (OECD, 2013a).

South Africa's Protected Disclosures Act

South Africa's Protected Disclosures Act 2000 (PDA) provides protection for public and private sector employees who report the actual or suspected commission of a criminal offence by an employer or an employee of that employer. The PDA protects whistleblowers from being subjected to "occupational detriment", which includes: any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions. At the time of South Africa's Phase 3 evaluation by the OECD WGB in 2014, a bill was submitted to the Minister of Justice that aimed to address the WGB's concerns about loopholes in the PDA. The bill proposes changes including extending protection to independent contractors, consultants and temporary employees, and introducing a duty on employers to investigate disclosures of unlawful or irregular conduct.

A South African survey on economic crime reported that crime detected through whistleblower reporting dropped from 16% in 2007 to 6% in 2013.[6] The OECD WGB had grave concerns about reports of retaliatory acts against whistleblowers in South Africa at the time of its Phase 3 evaluation and therefore recommended that South Africa take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery in good faith and on reasonable grounds are afforded the protections guaranteed by the law (OECD 2014d).

Criminal Code provisions

Canadian Criminal Code, section 425.1(1)

Canada amended its Criminal Code in 2005 to introduce a new offence of retaliation against employees for reporting or planning to report a workplace offence to external law enforcement authorities, punishable by up to five years' imprisonment. Section 425.1(1) applies to three categories of person: the employer of the reporting person, a person acting on behalf of the employer and a person in a position of authority in respect of the employee. In the context of Canada's Phase 3 evaluation by the OECD WGB in 2011, the group decided it would follow-up on the new offence as it was too soon to conclude whether or not it was effective in protecting private sector whistleblowers. The report noted how the private sector and civil society viewed Canada's model for private sector whistleblower protection as ineffective due to: its reliance on prosecutorial action and requirement of a high (criminal) standard of proof of retaliation; financial and other burdens on the discloser (who will have been the victim of retaliation) that may discourage other potential whistleblowers; and recent poor examples of treatment of whistleblowers in the public sector, which undermine trust in whistleblower protection mechanisms. At the time of Canada's Phase 3 Written Follow-Up Report in 2013, there had been no cases brought under section 425.1(1) of the Criminal Code (OECD, 2011c).

Transparency International Canada's 2013 Civil Organisation Report for Canada's United Nations Convention against Corruption (UNCAC) Implementation Review notes that Canada's federal whistleblower protection model is limited because it does not provide statutory protection for whistleblowers who experience retaliation for internal reporting within private sector organisations (Transparency International Canada, 2013). The report further states that a system of deterring reprisals by criminalising retaliation is not the same as effective whistleblower protection as, while punishing those who retaliate, it does not redress the harm suffered by whistleblowers who are the victims of such retaliation. It notes that better, more comprehensive models, confirmed by case law,[7] exist at a provincial level in Canada. Transparency International Canada recommended that the government introduce more robust legislative protection for whistleblowers in the private sector that would apply irrespective of whether whistleblowers reported internally or to external authorities. It also recommended making available civil remedies that would enable whistleblowers who experience reprisals to recover damages for their treatment.

Labour Code provisions

French Labour Code, Article 1161-1

In 2007, France introduced amendments to its Labour Code, including article 1161-1, which provides that: "no employee may be punished, dismissed or subjected to any discriminatory measure, direct or indirect, in particular with respect to remuneration, training, transfer, assignment, qualification, classification, professional promotion, amendment or renewal of contract for having reported or disclosed in good faith, either to his/her employer or to the judicial or administrative authorities, acts of corruption of which s/he becomes aware in the exercise of his/her functions." This provision on private sector whistleblower protection also applies to candidates for recruitment, secondees and trainees. Article 1161-1 places the burden of proof on the company to demonstrate before a judge that the penalties imposed on the employee have no relation to that person's disclosures. At the time of France's Phase 3 evaluation in 2010, the Working Group noted that the amendments could lead to greater reporting with the help of increased awareness raising among companies. In its Phase 3 Written Follow-Up Report to the OECD WGB in 2014, France's Central Office for the Prevention of Corruption (SCPC) listed awareness-raising efforts and noted the addition of a new Article 40(6) to the Code of Criminal Procedure by No. 2013-1117 of 6 December 2013 on action against tax fraud and serious economic and financial crime, also naming the SCPC as a potential interlocutor for whistleblowers in corruption cases. However at the time of the report, the SCPC had not received any requests for intervention under this new provision (OECD, 2012b).

Luxembourg Labour Code, Article L.271.1

In 2011, Luxembourg amended its Labour Code to prohibit reprisals against private sector employees who protest against or refuse acts they consider to constitute: the acquisition of an illegal interest, bribery, or trafficking in influence (trafficking within the meaning of Articles 245 to 252, 310 and 310-1 of the Penal Code [Article L. 271.1(1)]). Likewise, reprisals may not be taken against employees for reporting such an act to a line manager or to the relevant prosecuting authorities (Article L. 271.1(2)). Protective measures come into effect when the alert is raised within the company and/or reported to the law enforcement authorities. Employees have two means of redress. The first is a

special action to set aside, using the expedited procedure in Article L. 271.1(4) of the Labour Code. This allows an employee to make an application to the Employment Tribunal, after which the President of the Tribunal must take a decision within 15 days. The President may decide that the termination of the employment contract is void and order the employee to be kept on or, where relevant, reinstated. Second, the employee is also entitled to seek damages for wrongful dismissal through the courts. At the time of Luxembourg's Phase 3 evaluation, the OECD WGB considered that although employees who report a suspected offence in good faith are afforded protection, they have the burden of proving that they have been unlawfully sanctioned. It is then up to the employer to use other objective elements to prove that the sanctions were justified and that no prohibited reprisals were taken. If the employee takes legal action to seek damages for wrongful dismissal, the Labour Code provides for a reversal of the burden of proof in the employee's favour (OECD, 2011d).

Norway's Working Environment Act

Norway's Working Environment Act was amended in 2007 to include provisions for notification of "censurable conditions" within an organisation (sections 2-4) and protection from retaliation against employees who use their legal right to notify (section 2-5). The act also applies to private sector employees. It includes provisions that require companies to establish reporting channels for employees who wish to notify of censurable conditions in the companies (section 3-6). Norway's Phase 3 evaluation report by the OECD WGB notes that several foreign bribery cases had been detected through whistleblower reports (OECD, 2011e).

Sector specific laws

Slovenia's Integrity and Prevention of Corruption Act (IPCA)

Chapter III of Slovenia's IPCA is dedicated to the protection of public and private sector employees who, reasonably and in good faith, report suspicions of any form of illegal or unethical behaviour. Slovenia's Corruption Prevention Commission (CPC) is responsible for the implementation of the law, which contains provisions on confidentiality, internal and external disclosure channels, a range of remedies for retaliation, fines for those who retaliate or disclose the identity of the whistleblower, and independent assistance from the CPC. The Slovene Sovereign Holdings Act also requires state-owned enterprises (SOEs) to establish whistleblowing mechanisms and protection measures. The OECD WGB commended Slovenia on its whistleblower protection provisions and recommended that it raise awareness in the private sector and among SOEs of the protections provided (OECD, 2014e).

US Sarbanes-Oxley Act and Dodd-Frank Act

The United States has multiple laws that provide for private sector whistleblower protection. "Issuers" (persons or companies who issue securities) are required to provide whistleblower protection under the Sarbanes-Oxley Act and extend such protection to auditors under Section 10A. Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) amends the Securities Exchange Act of 1934 to add section 21F and create incentives and protections for whistleblowers. These incentives take the form of monetary awards for providing information, heightened confidentiality assurances, and enhanced employment retaliation protections. The Dodd-Frank Act authorises the Securities and Exchange Commission (SEC) to provide monetary awards

to eligible individuals who come forward with high-quality original information that leads to a commission enforcement action in which over USD one million in sanctions is ordered. The range for awards is between 10% and 30% of the money collected. Additional monies can be awarded for related actions, which are defined as a judicial or administrative action brought by: 1) the Attorney General of the United States; 2) an appropriate regulatory authority; 3) a self-regulatory organisation; or 4) a state attorney general in a criminal case. The action must be based on the same original information that the whistleblower provided to the commission and that led to monetary sanctions totalling more than USD one million (Securities Exchange Act of 1934, Rule 21F-3(b)).

The SEC has the discretion to base the percentage of an award on seven criteria outlined in Rule 21F-6 of the Exchange Act. The following four criteria can increase the percentage of the whistleblower award: 1) the significance of the information provided by the whistleblower; 2) the assistance provided by the whistleblower; 3) a law enforcement interest; and 4) participation in internal compliance systems. The following three factors can decrease the percentage of an award: 1) the whistleblower's culpability; 2) if the whistleblower unreasonably delayed reporting the misconduct; and 3) if the whistleblower interfered with internal compliance and reporting systems.

Certain individuals, outlined in Exchange Act Rule 21F-8, are ineligible from receiving an award. These include: certain US law enforcement officers; employees of foreign governments; people who are convicted in criminal actions related to the information they provided to the SEC; and certain auditors, including those who would violate Section 10A of the Exchange Act by reporting information to the commission in order to obtain a whistleblower reward.

In addition to the financial incentives provided by the Dodd-Frank amendments, the statute also provides protection for individual whistleblowers who provide information to the SEC. Whistleblowers can make anonymous reports by instructing a lawyer to report to the SEC on their behalf. The act bars employers from retaliating against whistleblowers. Whistleblowers who are the victims of retaliation are entitled to be reinstated at their pre-whistleblowing level of employment, double back-pay with interest, and compensation for reasonable attorney fees, litigation costs, and expert witness fees. In addition, 18 US states have enacted legislation that provides whistleblower protection to non-issuers and non-government employees (OECD, 2010a).

On 4 August 2015, the SEC issued an interpretive rule[8] clarifying that individuals are entitled to the Dodd-Frank Act's protections against retaliation, regardless of whether they report internally in the company or directly to the SEC: "Under our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission." The US Court of Appeals for the Second Circuit confirmed this interpretation on 10 September 2015 in the case of Bergman v Neo@Ogilvy LLC[9], overturning an earlier judgment by the District Court for the Southern District of New York. The Court of Appeals found that the whistleblower involved, Daniel Berman, was entitled to sue his former employer, advertising company Neo@Ogilvy and its parent company WPP, for allegedly sacking him in April 2013 after he reported allegations of accounting fraud to the company, but not to the SEC. The Court defer to the SEC's interpretation as to whether Dodd-Frank's anti-retaliation provisions should apply to whistleblowers who only report wrongdoing internally because of a lack of clarity between whistleblower protection provisions in the Dodd-Frank and Sarbanes-Oxley Acts.

Following the Phase 3 evaluation, in 2011 the US SEC established the Office of the Whistleblower to administer its whistleblower programme. According to its most recent annual report, since August 2011 the SEC has received a total of 10 193 whistleblower tips, and the number of tips increased by more than 20% between Fiscal Year 2012, the first year for full-year data, and Fiscal Year 2014.[10] In addition, the programme has authorised awards to 17 whistleblowers. The largest award to date exceeded USD 30 million and was granted on 22 September 2014 to a whistleblower, living in a foreign country, for providing information that allowed the SEC to discover a substantial and ongoing fraud that would otherwise have been difficult to detect, and which led to a successful enforcement and related actions.

On 28 April 2015, the SEC announced its first award to a whistleblower in a retaliation case. The award was for the maximum 30% of the amounts collected, in connection with File No. 3-15930: In the Matter of Paradigm Capital Management, Inc. and Candace King Weir (16 June 2014). The SEC charged Paradigm with retaliating against the whistleblower following her report to the commission. The retaliation in question included: "removing the whistleblower from the whistleblower's then-current position, tasking the whistleblower with investigating the very conduct the whistleblower reported to the SEC, changing the whistleblower's job function, stripping the whistleblower of supervisory responsibilities, and otherwise marginalising the whistleblower."[11]

On 1 April 2015 the US SEC invoked Dodd-Frank Act Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC, to sanction a company USD 130 000 for using improperly restrictive language, that had the potential to stifle the whistleblowing process, in confidentiality agreements. The company in question required witnesses in certain internal investigation interviews to sign confidentiality statements that said they could face disciplinary action and even be fired if they discussed the matter with outside parties without the prior approval of the company's legal department. However, there were no apparent instances in which the company specifically prevented employees from discussing matters.[12]

Protecting the retaliator? Data protection laws and whistleblower protection frameworks

As noted in the OECD/G20 Study on G20 Whistleblower Protection Frameworks, data protection laws in some countries may impose legal restrictions on internal private sector whistleblowing procedures (OECD, 2012c). For example, companies in EU member countries must abide by national laws that implement the EU Data Protection Directive 95/46/EC.[13] In its Phase 3 evaluation of Denmark, the OECD WGB noted that despite the absence of private sector whistleblower protection legislation, Danish companies were increasingly adopting internal reporting mechanisms, but these had to be approved by the Danish Data Protection Agency (DDPA) to ensure compatibility with data protection laws. At the time of the evaluation in 2013, the DDPA had approved systems in over 100 companies. To further facilitate reporting, some companies provided measures to protect whistleblowers, however in the absence of legal protection these were judged to have limited weight. The OECD WGB recommended that Denmark promptly put in place public and private sector whistleblower protection measures (OECD, 2013b).

In France, courts have invalidated companies' internal whistleblowing procedures on the basis of data protection laws, including where the whistleblowing provisions were too

broad in scope and could apply to actions that could harm the vital interests of the company, or physical or moral integrity of an individual employee.[14] The Commission on Information Technology and Liberties (CNIL) has developed an expedited approval procedure whereby companies file a statement of compliance with the French data protection law (No. 78-17 of 6 January 1978). At the time of France's Phase 3 Written Follow-Up Report to the OECD WGB in 2014, the CNIL was aware of some 3 000 companies that had a "professional whistleblower system".

Translating intentions to actions: Guidance on private sector whistleblower protection

International guidance

As noted in the OECD/G20 Study on G20 Whistleblower Protection Frameworks (OECD, 2012c), a number of internationally recognised anti-corruption compliance tools for the private sector advise the adoption of protected reporting mechanisms and measures to prevent retaliation.[15] These include: the OECD Good Practice Guidance on International Controls, Ethics and Compliance (OECD, 2010b), Transparency International's Business Principles for Countering Bribery,[16] the International Chamber of Commerce's (ICC) Rules of Conduct and Recommendations to Combat Extortion and Bribery,[17] the OECD Guidelines for Multinational Enterprises,[18] the World Bank Integrity Compliance Guidelines,[19] and the World Economic Forum's (WEF) Principles for Countering Bribery.[20] The Anti-Corruption Ethics and Compliance Handbook for Business (OECD/UNODC/World Bank, 2013) contains a comparative table of business guidance instruments on anti-bribery. Table 5.1 brings together the main international standards and guidance relating to private sector whistleblower protection in the context of reporting suspected acts of transnational corruption.

The OECD Guidelines for Multinational Enterprises have additional guidance. In particular Commentary 13, which states:

> *Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect bona fide "whistle-blowing" activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative employment action, report practices that contravene the law to the competent public authorities. While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the Guidelines.*

The recently updated G20/OECD Principles of Corporate Governance[21] also provide guidance directed at company boards. Principle IV(E) states:

> *It is therefore to the advantage of the company and its shareholders to establish procedures and safe-harbours for complaints by employees, either personally or through their representative bodies, and others outside the company, concerning illegal and unethical behaviour. The board should be encouraged by laws and or principles to protect these individuals and representative bodies and to give them confidential direct access to someone independent on the board, often a member of an audit or an ethics committee.*

Table 5.1. International guidance for businesses on private sector whistleblower protection

Transparency International's Business Principles for Countering Bribery	The enterprise should make compliance with the [Anti-Bribery] Programme mandatory for employees and directors and apply appropriate sanctions for violations of its Programme.… To be effective, the Programme should rely on employees and others to raise concerns and violations as early as possible. To this end, the enterprise should provide secure and accessible channels through which employees and others should feel able to raise concerns and report violations ("whistleblowing") in confidence and without risk of reprisal. These or other channels should be available for employees to seek advice on the application of the Programme." (principles 6.3.4, 6.5.1, 6.5.2)
ICC Rules on Combating Corruption	Elements of an Efficient Corporate Compliance Programme: … offering channels to raise, in full confidentiality, concerns, seek advice or report in good faith established or soundly suspected violations without fear of retaliation or of discriminatory or disciplinary action. Reporting may either be compulsory or voluntary; it can be done on an anonymous or on a disclosed basis. All bona fide reports should be investigated" (part 3, article 10(m))
OECD Good Practice Guidance on Internal Controls, Ethics and Compliance	Companies should consider … providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions; ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and iii) undertaking appropriate action in response to such reports" (para 11(i))
WEF Principles for Countering Bribery	The [Anti-Bribery] Programme should encourage employees and others to raise concerns and report suspicious circumstances to responsible enterprise officials as early as possible. To this end, the enterprise should provide secure and accessible channels through which employees and others can raise concerns and report suspicious circumstances ("whistleblowing") in confidence and without risk of reprisal. These channels should also be available for employees and others to seek advice or suggest improvements to the Programme. As part of this process, the enterprise should provide guidance to employees and others on applying the Programme's rules and requirements to individual cases (principle 5.5)
World Bank Integrity Compliance Guidelines	Duty to report: Communicate to all personnel that they have a duty to report promptly any concerns they may have concerning the Programme, whether relating to their own actions or the acts of others. Advice: Adopt effective measures and mechanisms for providing guidance and advice to management, staff and (where appropriate) business partners on complying with the party's Programme, including when they need urgent advice on difficult situations in foreign jurisdictions. Whistleblowing / Hotlines: Provide channels for communication (including confidential channels) by, and protection of, persons not willing to violate the Programme under instruction or pressure from hierarchical superiors, as well as for persons willing to report breaches of the Programme occurring within the party. The party should take appropriate remedial action based on such reporting."(guideline 9)
UN Convention against Corruption (UNCAC)	Companies to provide disciplinary measures in case of non-compliance with company's anticorruption codes or standards. This principle is extrapolated from article 8 of the Convention which provides for States Parties to "…consider taking…disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article (8 §6)"

Source: OECD/UNODC/World Bank (2013), Anti-Corruption Ethics and Compliance Handbook for Business (Annex 1), www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm.

Finally, the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD 2015b), which are intended as a complement to the G20/OECD Principles, provide guidance that is also applicable not only to wholly state-owned entities but also to commercial enterprises, which for the purpose of this chapter are "private" but which have a non-trivial remaining state ownership share. Annotations to Guidelines V.A and V.C recommend the establishment of whistleblowing channels and whistleblower protections, for example via codes of ethics, to protect and encourage stakeholders, and particularly employees, who report *bona fide* concerns regarding illegal or unethical conduct.

Some companies have established an ombudsman to deal with complaints. Several regulators have also established confidential phone and e-mail facilities to receive allegations. While representative employee bodies in certain countries undertake the task of conveying concerns to the company, individual employees should not be precluded from, or be less protected, when acting alone. In the absence of timely remedial action, or in the face of reasonable risk of negative employment action to a complaint regarding contravention of the law, employees are encouraged to report their bona fide complaint to the competent authorities. Many countries also allow cases of violations of the OECD Guidelines for Multinational Enterprises to be brought to the National Contact Point. The company should refrain from discriminatory or disciplinary action against such employees or bodies.

National guidance

Some countries have enacted corporate liability legislation or guidance that takes into account the effectiveness of a company's compliance programme when determining corporate liability for a crime that may have been committed during that company's activities, or as a mitigating factor when sentencing. In some legislation and guidance, protected reporting and prevention of retaliation are included as elements of an effective compliance programme, some examples are provided below. It is important to bear in mind that although such legislation or guidance may encourage companies to provide protected reporting and prevent retaliation, it does not alone amount to private sector whistleblower protection legislation.

UK Adequate Procedures Guidance

In 2011, the United Kingdom published guidance on procedures that relevant commercial organisations can put in place to prevent bribery (UK Adequate Procedures Guidance).[22] This statutory guidance was promulgated following the entry into force of the UK Bribery Act 2010, which criminalised the failure by commercial organisations to prevent persons associated with them from committing bribery on their behalf (section 7). It is a full defence for an organisation to prove that despite a particular case of bribery it had adequate procedures in place to prevent bribery occurring. The UK Adequate Procedures Guidance (required under section 9 of the UK Bribery Act) is a statutory instrument that provides guidance on the procedures that commercial organisations can put in place to prevent persons associated with them from committing bribery.

Principle 1 of the UK Adequate Procedures Guidance includes: "The reporting of bribery including 'speak up' or 'whistleblowing' procedures" as one of the topics that a commercial organisation may use to prevent bribery, proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities.

Principle 5 concerns communication (including training) and reporting mechanisms and protection:

> *Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called "speak up" procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.*

US Sentencing Commission Guidelines Manual

For the purposes of determining the appropriate sentence for legal persons (e.g. companies) convicted of criminal offences, the United States Sentencing Commission Guidelines Manual[23] sets out, in Chapter 8, six factors to be taken into account by courts when sentencing. Of these six factors, the two factors that can help to mitigate a sentence are: 1) the existence of an effective compliance and ethics program; and 2) self-reporting, co-operation, or acceptance of responsibility. Under the Manual, an effective compliance and ethics program is defined to include, "reasonable steps … to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."[24]

Brazil's Clean Companies Law and implementing decree

In 2013, Brazil enacted its Clean Companies Law (Law No. 12 846 of 1 August 2013), which established a framework for corporate liability for offences against the public administration, including domestic and foreign bribery. Article 7 of the Clean Companies Law lists the factors to be taken into consideration when sentencing. These include the existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, and the effective enforcement of codes of ethics and of conduct within the scope of the legal entity. The law also provides for the possibility of entering into a "leniency agreement" with the company, and accompanying exemptions and mitigations regarding certain sanctions (OECD, 2014f).

In a recently adopted decree to implement the Clean Companies Law, the Brazilian government defined the basic elements of an integrity programme to consider when deciding whether or not to enter into a leniency agreement. These elements include channels to report irregularities that are openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistleblowers. During Brazil's Phase 3 evaluation, the OECD WGB considered that these provisions may result in an increase in the number of internal whistleblower protection systems, although it also noted that most Brazilian companies did not have such regimes (OECD, 2014f). A review of 27 major Brazilian companies showed that only 7 had publicly available codes of conduct covering whistleblowing. A 2013 study by the Brazilian Institute of Business Ethics (IBEN) found that out of 360 publicly available codes of conduct, only 43% contained a policy on whistleblowing.[25] The OECD WGB recommended that Brazil put in place effective measures to protect private sector whistleblowers who report suspected acts of foreign bribery in good faith and on reasonable grounds (OECD, 2014f).

Chile's offence prevention model

Chile's Law 20 393 allows corporate liability for a range of offences, including foreign bribery. Companies can avoid or mitigate liability if they have put in place an offence prevention model in accordance with the provisions of the law. One of the required elements of an offence prevention model is a channel for reporting violations. In Chile's Phase 3 evaluation report, the OECD WGB noted that these provisions offer whistleblowers a reporting channel but not protection from reprisals. They also do not detail the standards that the reporting channels should meet. Only Labour Code workplace harassment provisions provide any kind of recourse for private sector whistleblowers who suffer retaliation for reporting. The OECD WGB noted that such provisions require proof of repetitive conduct and that a single act of retaliation, such as dismissal or demotion, would not be covered. The report further noted a recent NGO survey of Chilean companies, which found that 61% of employees in 31 companies witnessed, but did not report, unethical conduct. Reasons for not reporting included a belief that remedial action would not be taken (31%), distrust in confidential reporting mechanisms (17%), and fear of retaliation (36%). The OECD WGB recommended that Chile enhance and promote whistleblower protection in the private and public sectors (OECD, 2014g).

Australian Standard 8004 – 2003 Whistleblower Protection Programs for Entities (AS8004-2003)

Developed by Standards Australia, AS8004-2003 forms part of the Australian National Corporate Governance Advisory Standards and sets a standard for structural, operational and maintenance elements that a whistleblower programme entity must meet. It explains how to establish, maintain, implement and effectively manage a whistleblowing mechanism that can apply to employees, executives, directors, outside agents and sub-contractors.[26]

British Publicly Available Specification (PAS) 1998:2008 Whistleblowing Arrangements Code of Practice

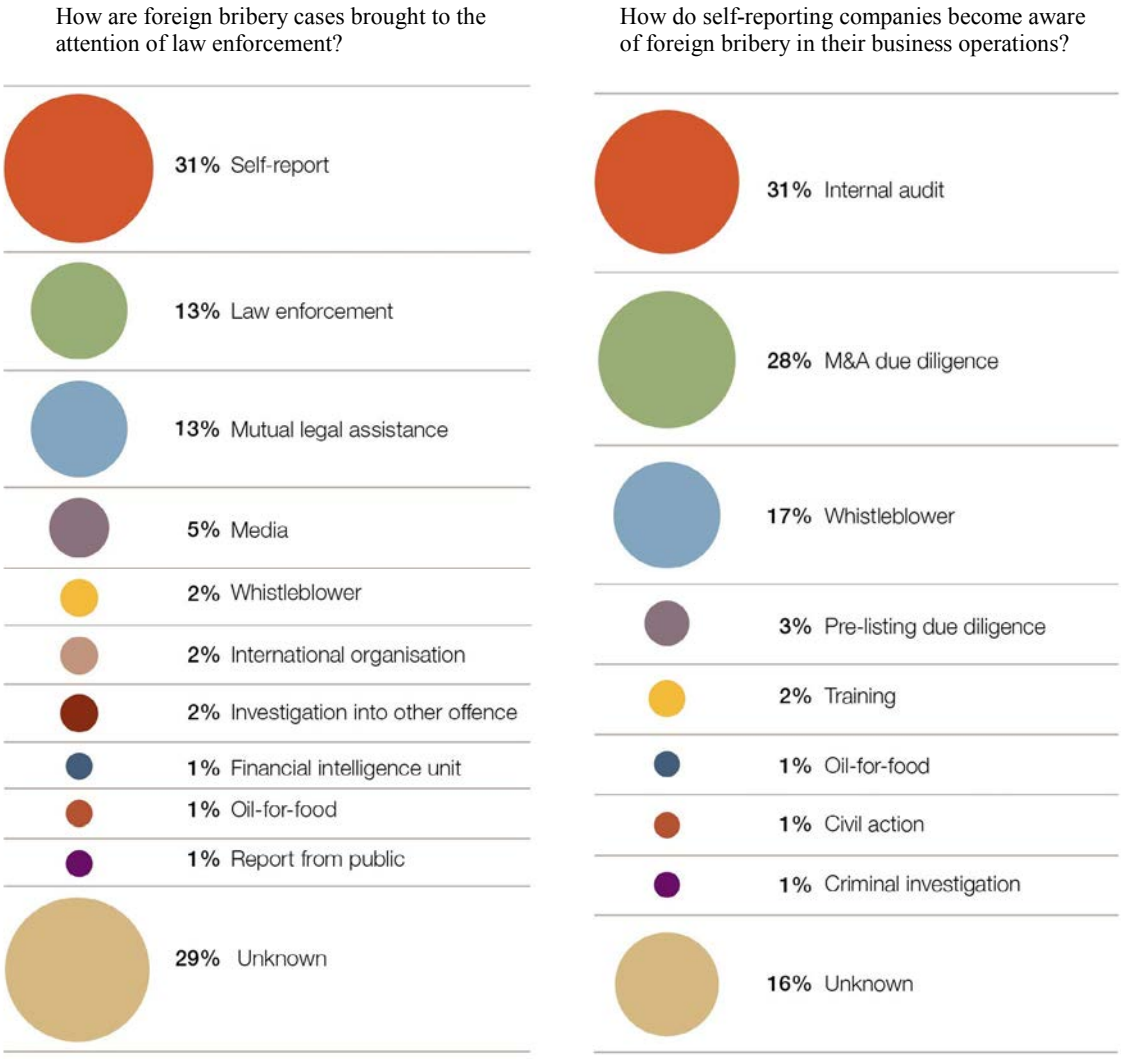
PAS 1998:2008 was developed by PCaW in collaboration with the British Standards Institution (BSI). It sets out good practice for the introduction, revision, operation and review of effective whistleblowing arrangements. It is informed, but not dictated to, by the UK PIDA and is designed to assist organisations across the private, public and voluntary sectors. The recommendations and guidance in PAS 1998:2008 are of particular relevance to public bodies, listed companies and organisations (e.g. in the health and care sectors) where there is legislative or regulatory expectation that effective whistleblowing arrangements are in place. It also covers application to small organisations.[27]

Private sector whistleblowers initially report internally

Although protection under domestic whistleblower protection laws are most commonly provided to those reporting misconduct externally to competent authorities, in reality, private sector employees report first, if at all, inside the company. According to a recent study of private sector employees in the United States, only one in six disclosers (18%) ever chose to report externally. Of those who do report externally, 84% do so only after first trying to report internally. Half of those who choose to report to an outside

source initially, later also report internally. Only 2% of employees go solely outside the company and never report the wrongdoing they have observed to their employer.[28] Of the private sector whistleblowers who have made reports to the US SEC's Office of the Whistleblower to date, over 80% first raised their concerns internally to their supervisors or corporate compliance officers before reporting to the commission.[29]

Figure 5.1. How often are foreign bribery cases revealed by whistleblowers?



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 01/06/2014 (OECD, 2014h).

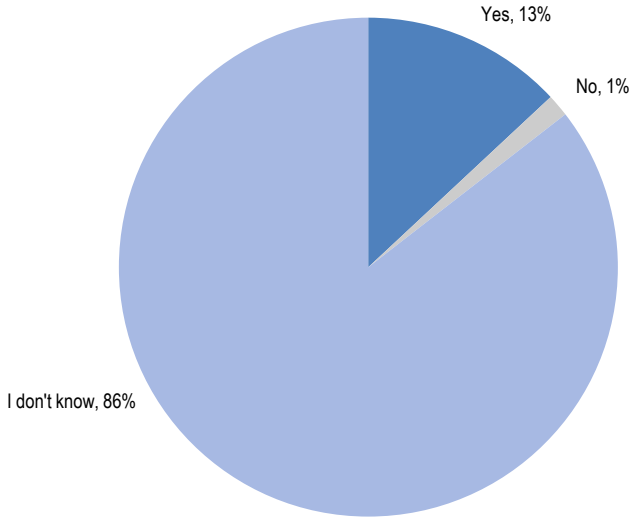
This finding is corroborated in the OECD Foreign Bribery Report (OECD, 2014h), which analyses the 427 concluded cases for bribery of foreign public officials since the entry into force of the Anti-Bribery Convention. Only 2% of concluded foreign bribery cases were brought to the attention of law enforcement authorities by whistleblowers, whereas 17% of companies that self-reported the corrupt acts became aware of foreign bribery in their business operations as a result of whistleblowers (Figure 5.1). This figure is indicative, but not conclusive, as information about whistleblower disclosures may be confidential, not disclosed, or not correctly reported in the press. In the absence of

legislation, it is up to companies to protect those who report internally and become the victims of retaliation. This section draws on the results of the OECD Survey on Business Integrity and Corporate Governance (the OECD Survey - see Annex 5.A1) to illustrate the approaches currently being taken by companies to protect reporting and prevent retaliation.

Whistleblower reporting mechanisms must be accompanied by effective whistleblower protection policies

One of the first steps companies can take towards putting in place an effective private sector whistleblower protection framework is to establish a reporting mechanism. As noted above, however, this alone does not amount to whistleblower protection. Out of 69 respondents to the OECD Survey, 59 indicated that their companies had established a mechanism, such as a hotline, whereby employees could report suspected instances of serious corporate misconduct (Figure 5.2).

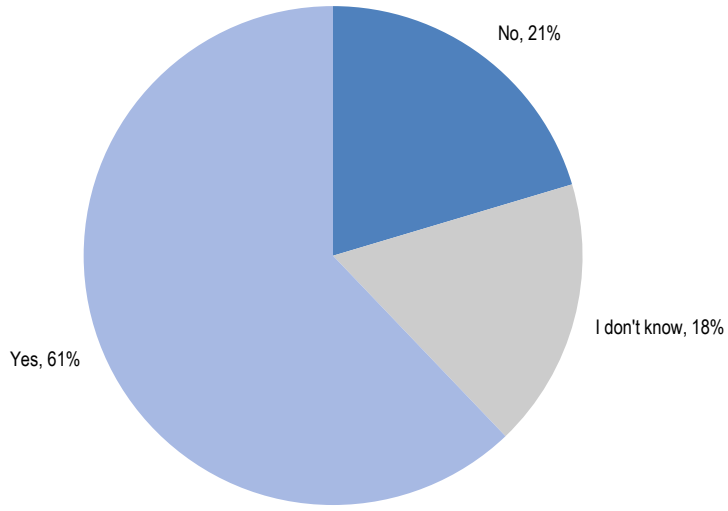
Figure 5.2. Does your company have an existing mechanism for reporting suspected instances of serious corporate misconduct?



Source: OECD Survey on Business Integrity and Corporate Governance (69 responses).

Over one-third of the respondents whose company had a reporting mechanism either indicated that their company did not have a written policy of protecting those who report from reprisals or that they did not know if such a policy existed; two respondents did not answer the question (Figure 5.3). Twenty percent of respondents whose companies did have a written whistleblower protection policy indicated that, under this policy, retaliation against disclosers was grounds for discipline up to and including dismissal. Others indicated that retaliatory actions against employees who report misconduct were prohibited in their corporate code of conduct or ethics. A non-retaliation policy alone, without a system to ensure its respect (such as disciplinary action against those who retaliate), is unlikely to encourage reporting. When asked why their companies had adopted a written whistleblower protection policy, 31 respondents indicated that such a policy was adopted on a voluntary basis. Three respondents indicated that they thought that a written whistleblower protection policy was required by relevant law.

Figure 5.3. Does your company have a written policy of protecting those who report from reprisals?

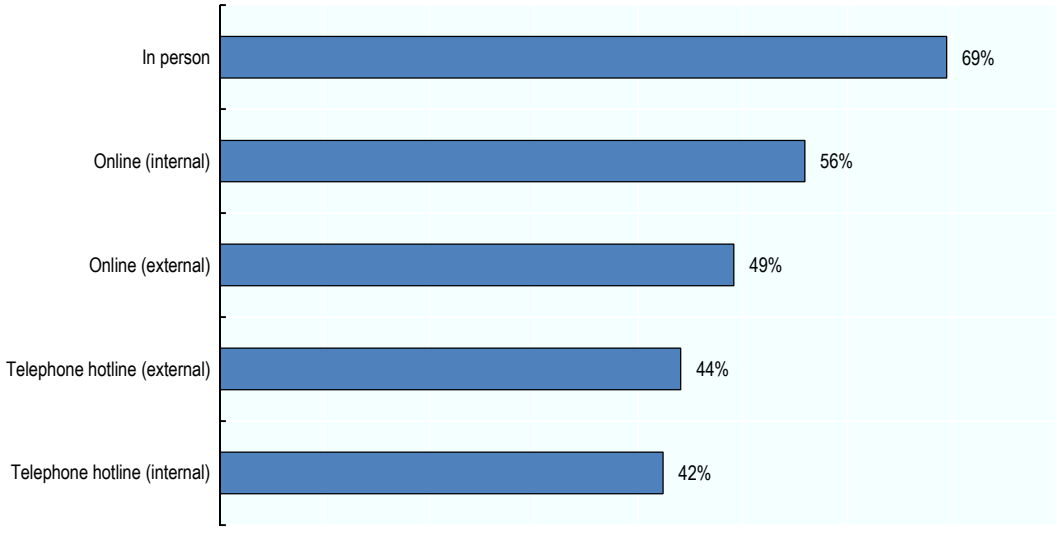


Source: OECD Survey on Business Integrity and Corporate Governance (57 responses).

Internal reporting mechanisms are varied but private sector organisations most commonly require reports to be made in person

The OECD Survey asked company respondents to indicate how serious corporate misconduct was reported in their company. Multiple responses were possible and percentages are therefore taken from the 59 company responses. Most respondents chose several or all of the available options, suggesting that companies generally chose to put in place several options for reporting persons to come forward, both internally and using external service providers (Figure 5.4).

Figure 5.4. How is serious corporate misconduct reported in your company?



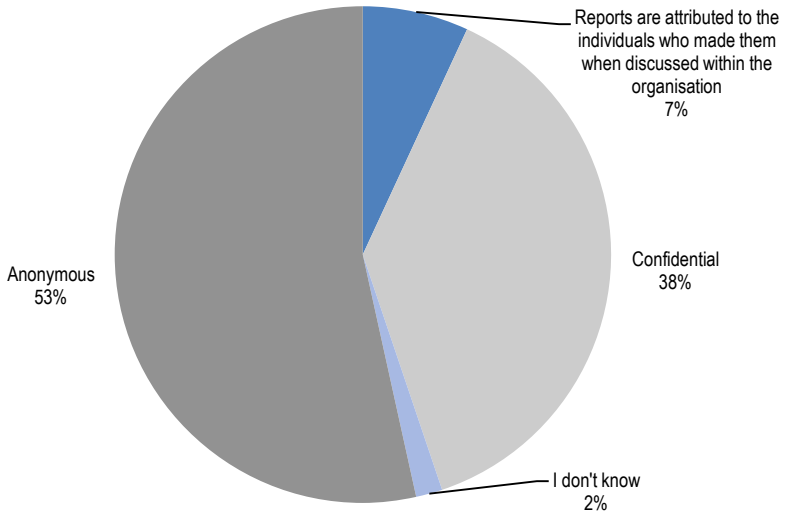
Source: OECD Survey on Business Integrity and Corporate Governance (59 responses).

The prevalence of in-person reporting mechanisms (69% of respondents) is likely to be a result of the widespread availability of this form of reporting and the ease with which this reporting mechanism can be put in place. (Individuals will almost always have the option of reporting to someone else in the organisation.) This form of reporting is likely to be available alongside the other, less direct mechanisms. In-person reporting alone could discourage whistleblowers from coming forward, particularly if the matter they plan to report involves the person to whom they are reporting. While there may be advantages to multiple reporting channels, such as providing options for reporting persons, depending on their preference, to report in writing or orally, it is clear that the more avenues for reporting, the more caution needs to be exercised to protect those who make such reports. For example, for telephone hotlines it is important to bear in mind that employees working in open-plan or shared offices will most commonly make reports after hours, from the privacy of their home. To be most effective, telephone hotlines therefore need to operate after hours as a whistleblower who gets through to a recorded message may be discouraged from recording his or her complaint.

More companies provide anonymous than confidential reporting

The OECD Survey asked respondents to indicate whether their companies' reporting mechanisms functioned on the basis of anonymity, confidentiality or attribution of the reports to the individual who made them (Figure 5.5). The slight majority (53%) of companies selected anonymous reporting, which leads to the crucial question of how to provide effective follow-up and protection to an unidentifiable person. Another 38% of respondents indicated that their companies provided confidential reporting; 7% indicated that reports were attributed to the individuals who made them, when being discussed within the organisation; and 2% did not know on what basis reports were made.

Figure 5.5. On what basis does your company reporting mechanism function?

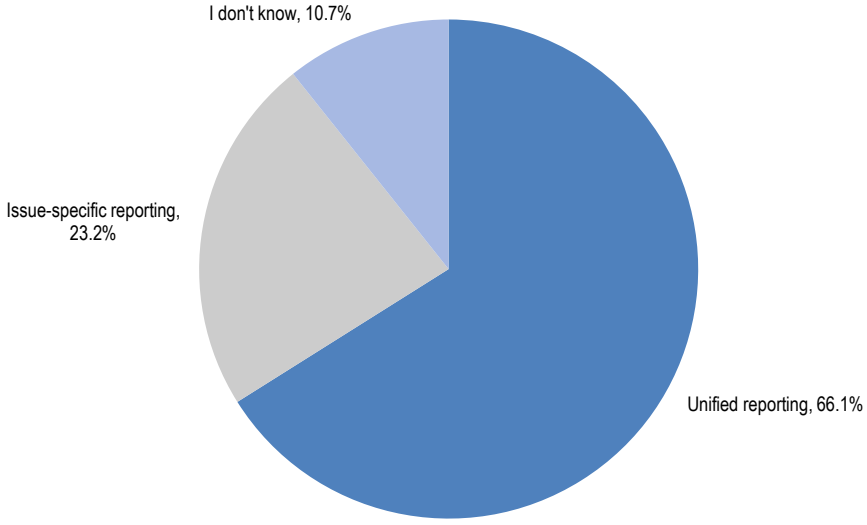


Source: OECD Survey on Business Integrity and Corporate Governance (58 responses).

Unified reporting is the most common model for internal reporting mechanisms

Companies prioritise risks differently and may choose to have reporting lines for specific risks. The OECD Survey asked respondents to indicate whether their company had separate reporting mechanisms for different categories of risk. Two-thirds of respondents indicated that there was unified reporting (i.e. in the form of a single internal reporting mechanism), 23% indicated that there was issue-specific reporting (for example, a dedicated anti-bribery hotline) and 11% did not know (Figure 5.6).

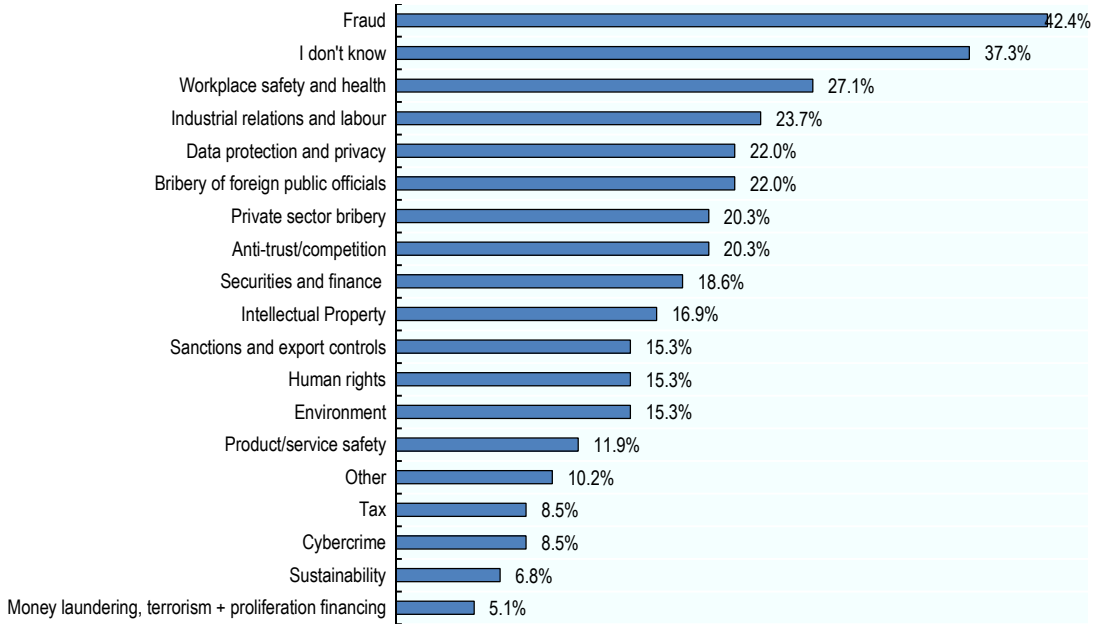
Figure 5.6. What mechanism does your company use for internal reporting?



Source: OECD Survey on Business Integrity and Corporate Governance (56 responses).

Respondents selected from a range of serious corporate misconduct categories that were reported via internal mechanisms. The most commonly reported categories were fraud (42%), work place safety and health issues (27%), and industrial relations and labour issues (24%). The most often reported economic and financial offences were foreign bribery (22%), private sector bribery and antitrust (20%), respectively. Money laundering was the least-reported category of offence, probably because the specific channels for reporting money laundering are well-established in most financial institutions.

Figure 5.7. Types of corporate misconduct reported via internal company mechanisms



Source: OECD Survey on Business Integrity and Corporate Governance (59 responses).

Recipients of whistleblower reporting

The G20/OECD Principles of Corporate Governance (OECD, 2015a) are key international standards on the roles and responsibilities of company boards, and include specific recommendations on the creation of whistleblower protection frameworks (Box 5.1). The OECD Guidelines on Corporate Governance of State-Owned Enterprises (OECD, 2015b) also provide guidance. (Box 5.2).

Box 5.1. Extracts from the G20/OECD Principles of Corporate Governance and corresponding annotations

Principle VI: The responsibilities of the Board…

D. The board should fulfil certain key functions, including:

6. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions. It is an important function of the board to oversee the internal control systems covering financial reporting and the use of corporate assets and to guard against abusive related party transactions.

These functions are often assigned to the internal auditor which should maintain direct access to the board. Where other corporate officers are responsible such as the general counsel, it is important that they maintain similar reporting responsibilities as the internal auditor. In fulfilling its control oversight responsibilities it is important for the board to encourage the reporting of unethical/unlawful behaviour without fear of retribution. The existence of a company code of ethics should aid this process which should be underpinned by legal protection for the individuals concerned. A contact point for employees who wish to report concerns about unethical or illegal behaviour that might also compromise the integrity of financial statements should be offered by the audit committee or by an ethics committee or equivalent body.

Source: G20/OECD Principles of Corporate Governance 2015, http://dx.doi.org/10.1787/9789264236882-en.

Box 5.2. Extracts from the OECD Guidelines on Corporate Governance of State-Owned Enterprises and corresponding annotations

V: Stakeholder relations and responsible business…

A. Governments, the state ownership entities and SOEs themselves should recognise and respect stakeholders' rights established by law or through mutual agreements.

…Employees should…be able to freely communicate their *bona fide* concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this. SOEs should establish clear policies and processes in this regard, for example whistleblowing policies. In the absence of timely remedial action or in the face of a reasonable risk of negative employment action to a complaint regarding contravention of the law, employees are encouraged to report their bona fide complaint to the competent authorities. Many countries also provide for the possibility to bring cases of violations of the OECD Guidelines for Multinational Enterprises to a National Contact Point.

…

C. The boards of SOEs should develop, implement, monitor and communicate internal controls, ethics and compliance programmes or measures, including those which contribute to preventing fraud and corruption. They should be based on country norms, in conformity with international commitments and apply to the SOE and its subsidiaries.

Codes of ethics should apply to the SOEs as a whole and to their subsidiaries… Codes of ethics should include…specific mechanisms protecting and encouraging stakeholders, and particularly employees, to report on illegal or unethical conduct by corporate officers. In this regard, the ownership entities should ensure that SOEs under their responsibility effectively put in place safe-harbours for complaints for employees, either personally or through their representative bodies, or for others outside the SOE. SOE boards could grant employees or their representatives a confidential direct access to someone independent on the board, or to an ombudsman within the enterprise. The codes of ethics should also comprise disciplinary measures, should the allegations be found to be without merit and not made in good faith, frivolous or vexatious in nature.

Source: OECD Guidelines on Corporate Governance of State-Owned Enterprises 2015, http://dx.doi.org/10.1787/9789264244160-en.

The OECD Survey explored current practices in this area by asking respondents who, within their organisations, received reporting via internal reporting mechanisms (Figure 5.8). In contrast to the recommendation in the G20/OECD Principles of Corporate Governance, few respondents indicated that the company's audit or ethics committee was specified as the contact point for employees to report concerns about unethical or illegal behaviour.

Figure 5.8. Person receiving reporting via internal company reporting mechanisms

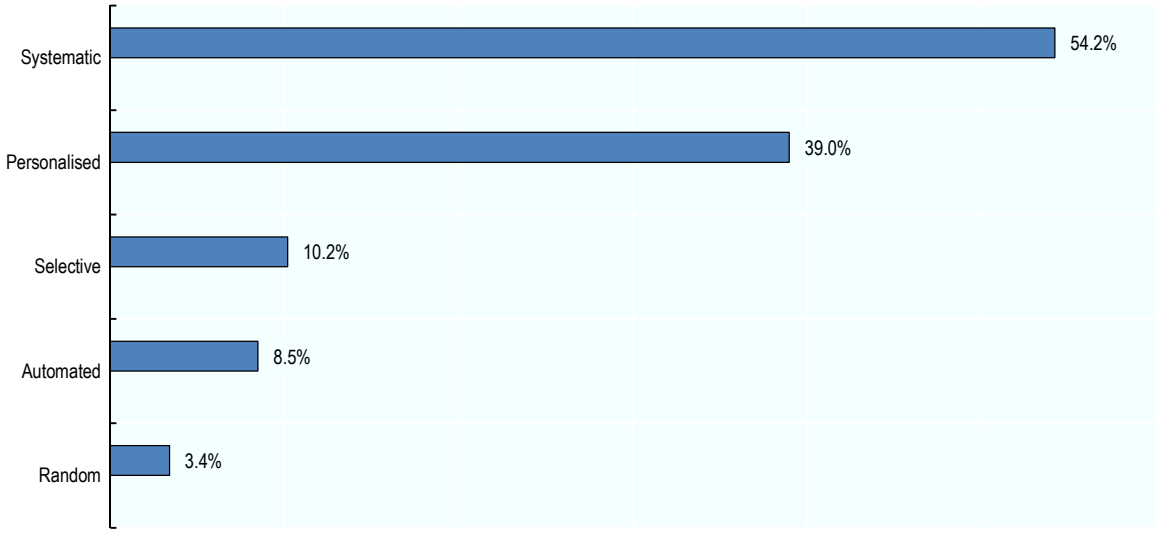
Source: OECD Survey on Business Integrity and Corporate Governance (59 responses).

The majority of respondents (51%) indicated that the Chief Compliance Officer received reports transmitted via the company's internal reporting mechanism (Figure 5.8). External service providers were the next highest response rate, which could correlate to the number of respondents who indicated that their company provided external online (49%) or telephone (44%) reporting channels. As multiple responses were possible for this question, it could also be assumed that reports would go first to the external service provider managing the reporting channels, then be transferred to the responsible officer within the company. Relatively few respondents indicated that internal reports went to their company's board committee (15%) or board (10%). While it would not be expected that all reports received via a company's internal reporting mechanism should be brought to the attention of the board, there may be occasional issues that merit attention from the highest levels of the company, for example where the matter being reported involves senior management. Periodic updates on the use of the mechanism and follow-up provided should form part of a company's overall compliance or integrity reporting.

Follow-up to internal reporting

The majority of respondents (54%) to the OECD Survey indicated that follow-up was systematic, for example in the form of automated responses to online reporting platforms. A significant number of respondents (39%) indicated that follow-up was personalised, which leads to the question of how this is possible for the 53% of respondents whose companies provided for anonymous internal reporting (Figure 5.9).

Figure 5.9. Company mechanisms for follow-up of disclosures



Source: OECD Survey on Business Integrity and Corporate Governance (59 responses).

Conclusion

The OECD WGB found that 27 of the 41 Parties to the Anti-Bribery Convention have non-existent or ineffective laws to protect private sector disclosers who report suspected bribery in international business. Enacting effective private sector whistleblower protection laws should be the next priority in the fight against foreign bribery. At the same time, countries should reflect on the adequacy of current OECD and international standards regarding whistleblower protection, and consider the possibilities for these standards to evolve in order to ensure more global protection for all potential reporting persons in both public and private sectors.

Notes

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2. Common law countries are those which apply laws established by judicial decisions in addition to laws established by statute.
3. Section 4.3 of the OECD report on Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices provides a preliminary stocktake of such measures, www.oecd.org/corporate/corporate-governance-business-integrity-stocktaking-corporate-practices.htm.
4. See, for example, Phase 3 evaluation of Denmark, commentary p. 47, www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf and Phase 3 evaluation

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15. OECD/G20 Study on G20 Whistleblower Protection Frameworks: Compendium of Best Practices and Guiding Principles for Legislation, para. 72, www.oecd.org/daf/anti-bribery/48972967.pdf.

16. TI Business Principles for Countering Bribery (2003), Section 5.5, www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery.

17. ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005), Article 7, www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-%282005-Edition%29/.

18. OECD Guidelines for Multinational Enterprises (2011), Guideline II(9), http://mneguidelines.oecd.org/text/.

19. World Bank Group Integrity Compliance Guidelines (2010), Guideline 9,

20. World Economic Forum, Partnering against Corruption – Principles for Countering Bribery, www.weforum.org/pdf/paci/principles_short.pdf

21. See www.oecd.org/corporate/principles-corporate-governance.htm.

22. UK Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing, www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

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24. USSG §8B2.1.

25. Decree No. 8 420 of 18 March 2015, Art. 42(X). This new regulation has not been evaluation by the OECD WGB or other bodies.

26. For more information, visit the Standards Australia website, www.standards.org.au.

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Annex 5.A1. **Methodology**

This chapter on whistleblower protection in the private sector is informed primarily by analysis of legal frameworks for private sector whistleblower protection in the 41 States Parties to the Anti-Bribery Convention. This analysis is conducted by the OECD Working Group on Bribery in the context of its monitoring of countries' implementation of the Convention. Information dates from the time of adoption of each country's respective Phase 3 evaluation report.

The chapter is also informed, in part, by the 2015 OECD Survey on Business Integrity and Corporate Governance (the Survey). The Survey was conducted in the context of the OECD Trust and Business Project and served as the basis for the report, *Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices*. (This report also contains a description of the survey methodology.) The Survey received a total of 88 responses and aimed to identify and describe how companies are organising themselves in order to address specific integrity risks. It included questions about mechanisms for reporting misconduct within the company and corporate policies for protecting reporting persons from retaliation. The Survey questionnaire was developed based on a review of previous surveys focusing on aspects of corporate ethics and compliance. It was further refined through a piloting process that involved seeking feedback on survey questions and structure from the Business and Industry Advisory Committee to the OECD (BIAC) Anti-Corruption and Corporate Governance Taskforces. The majority of questions were optional and allowed multiple responses; percentages have therefore been calculated for each question based on the percentage of respondents who answered that question. This method explains the variations in the number of responses per question and why the percentages for some questions do not add up to 100%.

As is the case for any analysis based on self-reporting, the possibility of error cannot be excluded. For example, survey respondents may have interpreted questions incorrectly or may not have provided accurate answers. It is also important to bear in mind that the respondents may be well aware of business integrity practices and challenges, and are not therefore representative of broader perceptions and approaches in this area. In addition, there were negligible responses from state-owned or controlled companies or small or family-run businesses. Survey results therefore do not necessarily represent the specific circumstances of these categories of company.

The Survey respondents' organisations were primarily headquartered in the United States (20%), United Kingdom and Germany (all 8%), Brazil, France and Portugal (all 7%). The remaining respondents' organisations were headquartered in both OECD member and non-member countries around the world. These organisations operated primarily in the following sectors: financial services (22%), manufacturing (17%), energy, IT and pharmaceuticals and medical devices (all 16%). In terms of the respondent's role within their organisation, most identified themselves as Chief Compliance Officers (28%), followed by Legal Counsel/General Counsel (16%) and CEO/President/Managing Director (12%). In total, 18% of respondents were board members, including chairperson and non-executive director (6%, respectively).