Levi Report on February Trier Conference on Whistle-Blowing

This was an interesting conference, focused around OLAF and its processes but drawing more widely on measures involving whistleblowing, even if there was not a sufficient focus on the importance of expected action in influencing why people might blow the whistle; or on what the impact is of Wikileaks, Brusselsleaks and other secure (for the moment) leak sites on the reporting of corruption and fraud and on our ability to do anything about the conduct – real or imagined – that gave rise to them.

OLAF needs to have automatic access to internal databases to see if there is a prima facie case, e.g. to find out if a person exists or is still employed before involving HR in an investigation. If there are low level complaints that are of no interest to prosecutors, this still freezes disciplinary measures until a criminal matter is finalised, even if it never will be. This is but one example of parallel proceedings problems.

Lothar Kuhl discussed the introduction of an independent review by someone appointed by the DG if there was a complaint by a person affected. The 'independent person' can give an opinion, not a 'judgment' that might be a pre-emptive strike against a legal decision. OLAF does not impose sanctions and therefore does not have an impact on their legal rights, but Kuhl thinks this can happen without causing further delays. A revised draft should be available by end February. Now OLAF have a sophisticated internal manual for operational investigations, so their position is now much better. Receive incoming info in more than 20 languages means that issues are hard to deal with urgently. OLAF have to be selective and extract info that is worth assessing. They are refining their working methods, and improving software for doing so. Freephone often used as a sort of rubbish bin with little substantive information, so getting a transcript is a waste of resources – around 1 in 100 freephone calls lead to an investigation. Unlike Europol, they do not need reports to be only from authorised sources – 46% of their cases are from informants from the outside (see OLAF annual report). Kuhl praised the OLAF Supervision Committee for work on de minimis issues and financial investigatory planning.

Discrimination against whistleblowers is a problem. Turkish legislation states that informants can be prosecuted if there is no substance to their reports, but yet they are under an obligation to make reports on witnessed misconduct. A former employee of EC was unhappy when OLAF closed a report made by him, but court ruled that a whistleblower had no right to have OLAF come to a particular conclusion on his complaint. In Ireland and in Portugal, particular elaborated rights exists for whistleblowers. OLAF is not in the front line on this, but should there be available a front line of advisers to talk to potential whistleblowers and advise them who to turn to, the aim being to reduce the amount of frustration by them and to reduce the amount of critical media attention?

They don't even open internal investigations if under €1,000. But there is always a reputational dimension depending on level. All cases are individual, but may be part of a bigger pattern of abuse so should be noted, as in abuses of travel expenses. (One question in the mind of your humble correspondent is how far people actually examine such patterns for preventative purposes.) Access to documents is far more transparent than a decade ago, but there are data protection issues

because anything they disclose goes on a public register. There is a plan for the European Commission to gain accession to GRECO.

Bacarese: discussed the new peer review mechanism for UNCAC, noting that it will take at least 8 years before all signatories to the UNCAC will be reviewed for all their obligations. A few countries have decided that they don't want the civil society to be involved at all in the review process, despite article 13's championing of the role of civil society. This is also extended to the world bank, IMF, and other international bodies etc. In year 1, 30 states will be reviewed; in year 2, 40 states. OECD has a new lease of life in the last year. The Dodd-Frank Act has a bounty program for whistle-blowers of 10-30% of the monetary sanctions over $1 million obtained by SEC: but there are implications for truthful testimony where there is a financial interest. OLAF has around 5 investigators to deal with 30 countries in Africa. Despite €22.7 billion foreign development aid by EU, OLAF is not investigating overseas fraud and corruption any more.

Rulaca Stefanuc (EC): there is a need for policy because of x-border dimensions and links with o.c., facilitating operation of illegal markets. Corruption has adverse effects on fair functioning of the internal market. She mentioned the Eurobarometer data on attitudes to corruption – there will be a new survey in 2011. Not all EU states have ratified UNCAC or the CoE Conventions.

The EC Finance committee is looking at budgetary support, which was also criticised by court of auditors. But it is the principal focus of the new aid strategy to give direct budgetary support since the Paris agreement.

Hetzer spoke eloquently of the inflationary use of the term 'crisis' to justify urgent drastic measures. He outlined 'corruption by incompetence' – a less clear construct than he asserted, at least to this author - and state failure. Fraudulent dissemination of financial products and insider trading by rating companies were stated to have contributed to the GFC and 'system failure' which also reflected individual failure.

Corruption controls must include corporate penality. Corruptability means that criminal law is insufficient for control. Corruption always signals failures of leadership. A particular form – corruption via incompetence – has recently developed, he asserted.

There was discussion also of the Fraud Notification System: internet-based fraud reporting anonymously if they want and can have anonymous dialogue with OLAF investigators. Automatic review and classification of incoming information via blind letter-box system and four EU languages currently. The interactive systems should improve Olaf decision-making, given that informants are principal method by which Olaf learns of corruption. It creates an 'irrelevant' folder for messages that are not disclosing sufficient information relevant: a third of all messages in the pilot study, or when broken down 10% of total were irrelevant. It recognises automatically the language of the sender and gives to reviewer in that language. 85% used the English interface. It is a self-learning system which improves screening over time.

EC has a broad policy definition of corruption of abuse of information for private purposes – but will *not* be aiming at a harmonised definition in Europe.

Eckert: has been a prosecutor and judge of white-collar and organised crime cases for 20 years. He stated that we need to ask first why people become whistle-blowers? Is the (implicitly German)

prosecutor allowed not to open a case if approached informally, e.g. when a company officer tells the judge something and doesn't want the security service to know who it came from? There are plenty of sectors e.g. the military, where helping the officials in an investigation is barely conceivable. There are ways of not prosecuting whistle-blowers who were involved in corruption [but didn't specify how], though they are required to divulge their involvement. They can not record names and place of domicile etc. to reduce identification, like s.69 of code of criminal procedure. In civil law, also, employment status is protected. But small companies make it harder to hide information. They need to prove who got the money before they can prosecute for bribery. A 65 yr old man came forward and stated that alone, he had paid €9 million, with no-one less than that. As an old man with a clean record, he got a 2 year sentence: more would have been unacceptable. They can have a general register like in Bavaria and access can be refused if there has been no action yet – tax advisers always want to know if there has been a case opened against their clients. Germany has not ratified UNCAC or signed MLA agreement like that on tax with Italy, which has been frozen for 7 years. These are political decisions for the national government to take.

Anagnostopoulos argued that one must look at reliability of different types of witnesses, depending on whether they were involved or no. The BA fraud case in the UK for price fixing and the role of Virgin in this was important: the trial collapsed because there was a huge amount of info relevant to defence which would have showed that virgin had decided to fix prices long before BA was not given to the BA lawyers by Virgin. This becomes more acute when whistle-blowers are rewarded with money. He raised a real case of a woman the US authorities offered an amnesty to but could not guarantee that the info about her role would not be passed onto the Greek authorities if they opened an investigation. She decided not to cooperate because there was no extradition of Greek nationals to the US. The Justice department threatened that they would get the UK to issue a European Arrest Warrant for her! She remained silent.

Werner: cannot have policy coordination if the two bodies do not communicate.

Spiezia - Italian eurojust rep – corruption is within the context of eurojust, especially since 2009, either as a college or through national members. His contribution includes whistle-blower legislation in other EU countries. In one case, Spain doesn't have legislation for protecting them, but Italy does and Eurojust arranged for the case to be begun in Italy. Role of eurojust can be as follows:

1. Eurojust can facilitate exchange of legal information, to prepare a good case for MLA to the requested country;
2. Provide assistance re the most protected jurisdiction – they have a duty to avoid conflicts of jurisdiction but no legal criteria as to how to do this
3. Follow a request for video-conferencing to avoid unnecessary movement of people
4. To find corroboration for WBs' statements, and follow the proceeds of crime in accordance with Falcone's advice.

Zora Ledergerber: Director Integrity Line, Switzerland. Whistleblowing in the private sector. Most of the time, firms don't want to know about a report because don't have time. >$20 billion recovered by US under false claims act till 2008. Average number of anonymous complaints was 8 per 1,000 employees per annum, though construction sector particularly low.

Wasmeier: head of OLAF internal investigations, gave a thoughtful presentation. Definitions in staff regulations only apply to EU staff. External informants (e.g. competitors) are termed 'informants', never whistle-blowers. Duty of employees is a duty of loyalty and is to report any irregularity or illegal activity – so there can be no payment as it is a duty. There is only an internal pathway – to hierarchy or direct to OLAF. Only if nothing is done can they report to another 'external' body like the President of the EU Parliament or the Court of Auditors. No right to report outside the EU institutions. Brusselsleaks.com now founded but nothing to connect to OLAF. Uptake of whistle-blowing within EU is currently very low, so OLAF is not seen as legitimate/ secure. There is a difference between anonymous reporting and confidential reporting. They cannot refuse to give the judiciary the name of a whistle-blower. They have a role in ensuring that there are no prejudicial consequences for WBs, such as excluding them from e-mails. OLAF has no control over HR, to offer a career service or alternative job for whistle-blowers.

de Moor: even if there is an internal report, it often comes via Freephone. Favouritism in recruitment and irregularities in tender procedures are common sources of complaint. In normal cases, they decide in two months whether or not to open an investigation but in one case they agreed to take 6 months to evaluate the information before making that decision. They have no wiretap powers or powers to examine the personal assets of suspects. There is no asset declaration system for EC public officials.

EU disciplinary action can never succeed without corroboration. There are WB protection clauses for external contractors working in Brussels but not without outside bodies. 6 cases on average go through the system of whistle-blowers annually, which is quite a small number. Olaf can appoint a senior person from outside to deal with a case. Wasmeier stated that it was important to define prejudicial effects.

Mark Schreiber, a partner in Edwards Angell Palmer & Dodge, noted that most US laws have anti-retaliation clauses and protect against any harm to employment, though this can be tricky to develop. Federal government investigations are enormously burdensome for companies, so whistle-blowing provisions are a cheaper method for finding out misconduct. SOX provides for confidential and anonymous submission of concerns. Very few Europeans have actually made reports, and these are given greater protection than US reports. It was almost impossibly complex for US companies to take account of all EU countries' different policies (which might have applied in reverse, given the diversity of US State legislation). It might take up to 2 years to develop and implement a European policy, and this is a huge undertaking with weekly telephone conferences with local managers, third party hotline vendors, but SOX requires extra-territorial hotlines. French allow for serious matters or vital interests of the company to be reported outside the scope. No anonymous reporting allowed in Spain or Portugal, though confidential complaints are ok. What does deletion of electronic information mean? Or do countries mean 'archive ' rather than 'delete'? The complexity of the process is related to a minimal reporting rate.

Italian Eurojust rep Spezia made the point that his and Schreiber's analysis pressed the need for a coordinated approach in the EU. Article 29 group did not grapple with realities of technology in data transfer, which are the same whether the information is transferred within the company on a dedicated hotline or a third party one. Privacy laws are industry specific and fragmented but there are only modest plans to develop a federal system. His firm handles data breaches which may span

European markets, and how do they notify victims of identity theft? EU has not come up with a requirement outside UK, Germany and Austria to notify losers. In the US, companies are mandated to bring in compliance programmes.

Cathy James: reviewed PIDA, as primarily an employment law protection issue. Small proportion of claims to employment tribunals, and since 70% of cases are settled, there is no record (or pattern), so we get a distorted view. Of the rest, 22% were won (suggesting to your correspondent that the other parties try to settle when they have a weak case). James raised the question of the employment status of non-executive directors. Not huge numbers of calls because encourage internal reporting within companies. Public Concern at Work have a contract with NHS for whistle-blowing, and also with some companies at different levels.

Rhode-Libenau : discussed the German experience of wb. What are the obligations of the ombudsman to report illegal behaviour to the public prosecutor? But if the company has appointed the ombudsman, then in cases like Siemens where the corruption is top down, this would be unlikely to command support. Problem also of the obligation to report if action is taken against those who remain silent: discourages any whistleblowing, according to Cathy James from Public Concern at Work.

G20 proposes compulsory whistle-blowing as part of its anti-corruption package, mandated by 2012.

Rene Slootjes, head of unit looks at disciplinary cases for misconduct. Don't do regulatory agencies, but do other bodies connected to EU. There is a problem of overlap between PIDA and civil service code in relation to classified information, the test for whose disclosure is very high. The French model is very culturally powerful and based around loyalty, whereas in Sweden it is illegal to try to find out who leaked information to the media. After reports from disaffected losers, information from voluntary disclosures to save people's skins under the leniency provisions of competition was the next most common line of reports.

Eckert – all the Siemens executives annually signed the conduct lines stating that they were not corrupt, but in reality, the problem they had was how to deal with the black money. Little discussion for wb protection in Africa and other less developed areas. Greek competition authority established leniency programme in line with eu practice, but DG was criminally convicted of demanding bribes and blackmail in relation to milk price fixing. The company named him and he was convicted but the company could not benefit from the leniency programme because the information was also in the public sphere. So instead of paying the €2.5 million bribe, they ended up with a €15 million fine and cannot pay it, so they now have to merge with another producer, reducing competition further. Gasmeier argued that there needs to be more support from HR to improve culture on wb and to support the employee. He suggested that the option or alternative of reporting to superiors is not working in an EC context, and people should report direct to OLAF. Maybe also an ombudsman to supplement Olaf. Olaf cannot offer leniency – only a judicial authority can do that. Whether Olaf could pay or give other incentives to external informants, though they cannot to insiders because the latter have an obligation to report anyway. Need some implementing guidelines to improve clarity.