
Whistleblower Bounties Could be Coming to the UK

MAY 26, 2016

An edited version of this article appeared in the Times Brief on May 26 2016.

Ahead of the anti-corruption summit earlier this month, the government faced fresh calls to introduce cash incentives for people who speak out about corporate crime. This is not without precedent. In the US—where a number of criminal and regulatory authorities operate such schemes—whistleblowers stand to receive up to 30% of the penalty collected as a result of enforcement action. Equivalent practices in the UK are far less developed, although the Competition and Markets Authority (CMA) offers—in exceptional circumstances and at its own discretion—rewards of up to £100k for information on cartel activity.

At present the UK is unsuited to reward schemes of this nature, at least in the criminal sphere where – even since the advent of Deferred Prosecution Agreements – corporate settlements are rare. The high threshold for corporate criminal liability outside the Bribery Act means that companies here are much more likely to contest criminal allegations than they are in the US. Far from assisting a prosecution, an incentivised whistleblower—particularly one who is implicated—would provide fertile ground for cross-examination by the defence and is unlikely to go down well with a sceptical jury. The acquittal of two directors in September last year, in a price fixing prosecution brought by the CMA, may be a helpful insight into how juries respond to incentivised witnesses: in that case the defence argued that the prosecution witnesses' admissions of dishonesty had been induced by the CMA's leniency programme.

Of course this may all now change. If the “failure to prevent” offence is extended to other economic crimes, as proposed by the government at the summit, alternative disposals will become more commonplace and so a reward scheme would make more sense.

Any financial incentive scheme introduced in the UK should, however, come with a requirement that whistleblowers report internally before approaching the authorities, unless of course there are cogent reasons for not doing so (for example, because the compliance and legal function are part of the problem). Without such a requirement, individuals may be encouraged by large financial rewards to bypass internal compliance completely. This would deprive companies of any opportunity to address the wrongdoing swiftly, potentially eroding the value of internal compliance

programmes and the whistleblowing mechanisms that regulated firms are now required to have in place.

The question whether culpable individuals should be excluded from any such scheme is not an easy one. On the one hand, there are obvious public policy—not to mention ethical—reasons for not giving significant financial rewards to convicted criminals. On the one hand, those most likely to know about misconduct are those who have been involved in it, so one might query the effectiveness of an incentive regime that does not encourage perpetrators to come forward. In 2012, Bradley Birkenfeld was awarded \$104m by the Internal Revenue Service for revealing illegal off-shore banking practices at UBS, despite serving a prison sentence for his own role. The award was not surprisingly controversial, but the information he provided was instrumental to the enforcement action and large fines that followed.

Although they still pale in comparison to those in the US, regulatory fines in the UK have increased substantially in recent years and so there is scope for offering real incentives to would-be whistleblowers. Given that where the US leads, the UK generally follows, we can no doubt look forward to a consultation on this topic soon.