

## CHAPTER 7

# A Long Way to Go for Whistleblowers

*William Bourdon*

Founding partner, Bourdon & Associés

*Amélie Lefebvre*

Partner, Bourdon & Associés

William Bourdon has defended whistleblowers in France and abroad for more than fifteen years, sometimes from very different perspectives and under very different circumstances. This has led him to draw many lessons that he has tried to share in the *Petit manuel de désobéissance civile* published in 2016 by Editions Lattès. In this text, Amélie Lefebvre and William Bourdon sum up some of the key battles. Some have proved to be extremely difficult, and demonstrate that the anxiety of whistleblowers and their protection are in many ways complex issues. Some notable cases ended in victory, although much remains before a full societal recognition of the democratic significance of whistleblowers is in place.

The recognition of whistleblowers is primarily a question of protection. Whether outsiders see them as courageous informers or not is secondary. If the status of being a whistleblower does not afford them protection, they will be vulnerable. Hence it is crucial to define and provide demarcation criteria for whistleblowers. They need access to a very specific regime. Their right to a modicum of irresponsibility towards special interests (oftentimes those of their own employers), and their protection

Citation: Bourdon, W., & Lefebvre, A. (2019). A Long Way to Go for Whistleblowers. In R. Krøvel & M. Thowsen (Eds.), *Making Transparency Possible. An Interdisciplinary Dialogue* (pp. 67–79). Oslo: Cappelen Damm Akademisk. <https://doi.org/10.23865/noasp.64.ch7>  
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against retaliations that never fail to arise, must be part and parcel of the recognition of the responsibility whistleblowers have accepted to protect the *general* interest.

Put simply, the whistleblower is a person who has identified a danger and reports it to others. This signal must mechanically trigger decision processes and actions to face this danger, annihilate it and protect the community. The problem is to clarify the notions of danger, of reporting, and of general interest. Such terms, needless to say, are not objects of a spontaneous and unanimous common understanding.

However much the terms can be disputed, it bears repetition: a whistleblower must be protected, because the protection of the general interest is at stake. This key argument is not always heard, even in the most (in)famous cases in the media.

To mention only a handful of them from the United States: Chelsea Manning, Edward Snowden and his predecessor, William Binney, or Daniel Ellsberg, the original whistleblower for the Pentagon papers in 1971, are all iconic examples of watchmen who have suffered sacrifices, but who have also exposed the need to elevate the status of whistleblower protection. Their revelations have created shockwaves beyond the public sphere, in the minds of millions of citizens throughout the world.

Notwithstanding their celebrity, to define and outline the concept of whistleblower within a legal framework has required arduous but necessary work. The experience one of the authors of this article has as a lawyer may help elucidate the nature of this work.

## **The first encounters with whistleblowers and their defense**

The first whistleblowers came to William Bourdon's law firm in the 2000s. Back then, the expression "whistleblower" may have been used in different forums and by various researchers who had denounced some public health scandals, but it was definitively not popularized in France or anywhere else in the world as it is today.

We must bear in mind the vertiginous speed with which this term has not only imposed itself, but also how fast the perception has grown, year

after year, of whistleblowers as the avant-garde of a formidable global citizen movement, which no longer accepts that public and private actors multiply promises and ethical commitments while organizing irresponsibly, or refusing liability when questioned.

One of the first whistleblowers who met up with William Bourdon, was the commander Philippe Pichon. He was a brave French judicial police officer in charge of checking the regularity of the operation of the file called at the time “STIC” (the police’s file containing data sheets concerning thirty million French individuals). Disgusted by the apathy of police hierarchy, he believed that it was his duty to reveal the irregularities in this file.

He did this at a time when whistleblowers were very poorly protected. Pichon could scarcely have known the considerable risk he was taking. He was identified by the press as the person behind the disclosure of two data sheets of important personalities containing totally inaccurate remarks. Very quickly, the administrative machine was set in motion and crushed him. He was promptly sent into early retirement, which thus eradicated his ambitions for a great career in the national police. The judicial battle against him continues, even today.

He was prosecuted before the Criminal Court of Paris in particular for having breached professional confidentiality. Still, William Bourdon was able to obtain a relatively benevolent verdict which, for the first time, took into consideration what has become today the common protective shield for all whistleblowers: the recognition of an objective public interest. He provoked a public debate, having no other choice than to transgress the law.

Though Philippe Pichon has moved on in other directions in his personal life, the general lesson remains a tragic one: without full legal protection, or at least without very strong support from public opinion, the media, unions or specialised NGOs, the professional and social death of the whistleblower is certain.

An aggravating factor for Philippe Pichon at the time was the fact that he was a civil servant. In administrations around the world, something close to an omerta<sup>1</sup> always exists. This omerta often results from

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<sup>1</sup> A rule or code that prohibits speaking or divulging information about certain activities, especially the activities of a criminal organization (The Free Dictionary).

manipulating the obligation of discretion, an otherwise laudable principle. Such manipulation often involves the intimidation of officials in order to dissuade them from revealing serious dysfunctions encountered in the course of their civic duties.

By the same token, it is the very commitment to civic duty, instilled in William Bourdon's practice as a lawyer, that has made the dialogue with whistleblowers so natural for one of the authors of this article. All the actions Bourdon has piloted come from this sense of commitment. As President of the Association SHERPA, founded in the 2000s and more recently PPLAAF, founded in 2017, he has tried to find cures for the new forms of impunity stemming from globalization, especially in the fight against corruption.

## The case of Hervé Falciani

One whistleblower who came to Bourdon for help was a young computer scientist by the name of Hervé Falciani. He worked at HSBC in Geneva, and he revealed the conditions under which the bank had opened thousands of foreigners' accounts, not out of love for Switzerland, but to escape the scrutiny of their respective tax administrations.

Hervé Falciani's courageous revelations caused a huge scandal, which led to the opening of a criminal procedure in France against HSBC. The bank was charged, as well as its Swiss subsidiary and some of its top managers, with having knowingly, in a tax fraud laundering context, offered its clients services and means to organize the concealment of their assets from the tax authorities, and also for going further by having actively dissuaded some clients to regularize their tax situation, enabling them instead to reinforce the opacity of their assets and reduce the risk of being discovered by the tax administration. HSBC accepted a public interest court agreement to pay a fine of € 300,000,000. This type of agreement was only made possible in France in 2017.

Thus there will not be any public trial of HSBC. And if the size of the fine is exceptional according to French standards, it is a far cry from international standards, particularly those applied in the United States and Great Britain.

Overall, this agreement is a positive outcome in relation to the responsibility of the bank, but Switzerland still refuses to disclose the identities of French citizens holding accounts on its soil. The justification of this refusal is that the French administration has not proven that the localization of these accounts in Switzerland was motivated by morally or legally questionable reasons ...

Notwithstanding the legal steps in the right direction, we have a long way to go before countries like Switzerland and others offer effective and sincere cooperation in the fight against tax evasion.

Hervé Falciani certainly paid a high price for his action. He was arrested and detained in Spain on the basis of a Swiss arrest warrant. William Bourdon had the honor of defending him before the *Audiencia Nacional* in Madrid several years ago, and pleaded for the rejection of this extradition request. Besides strong legal reasons, the Prosecutor General also argued for the same rejection by stating, rightly so, that it would be paradoxical to extradite Hervé Falciani to Switzerland for prosecution and trial, given the immeasurable services he had rendered to European taxpayers ...

He was sentenced to five years' imprisonment by the Swiss court and is still subject to an international arrest warrant. He was arrested again in Spain as late as April 2018, and in a judicial merry-go-round was released again pending trial. It is likely that, again, the Spanish court system will refuse to uphold the senseless judicial harassment from the Swiss authorities.

The fate of Hervé Falciani was not, however, the unluckiest one. Other whistleblowers fell much further, because they were early visionaries who launched themselves without preparation and without anticipation, into a public battle that crushed them. We should not forget these anonymous and unsung heroes, because they were precursors of a dynamic that has today become visible on a global scale.

## **Antoine Deltour and the shockwaves of Lux Leaks**

The stage was now set for Antoine Deltour, a formidable French and European citizen. His revelations dealt a blow to the mechanism of tax

rulings by which Luxembourg managed to siphon off billions of euros from public purses.

With these secret agreements, large multinational companies were invited to locate their headquarters in Luxembourg. In exchange, they got tax agreements with extremely low rates, thus unfairly depriving the multinationals' home countries from receiving public resources.

The revelations of Antoine Deltour were welcomed and his action praised by a large majority of European parliamentarians, officials of the European Commission and politicians of diverse stripes and colors. Thanks to whistleblowers, but also to the actions of civil society actors, public officials increasingly understand and measure the value of seizing upon such revelations. In recent years, due to the financial crisis throughout Europe, an effective fight against tax evasion can be turned into political capital.

The exasperation of citizens and the awareness of public officials have mutually reinforced the need to recover billions of lost euros. The unfair and immoral behavior associated with tax evasion is deemed unacceptable, perhaps because it erodes the trust that democracy needs to exist, and the trust citizens need to have towards their elected officials. It also, dangerously, feeds all manner of populism.

Without Antoine Deltour, the scandal of Lux Leaks would not have caused the shockwave that has led to the creation of parliamentary committees or the adoption of new European directives. Of particular importance, when we now return to the arduous work of securing legal protection for whistleblowers, is the role of regional courts, and in particular the European Court of Human Rights (ECHR).

ECHR: *“The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”*

William Bourdon, with his Luxembourg colleague and friend Philippe Penning, was able to defend Antoine Deltour through a long judicial procedure. He has now been finally acquitted, in conformity with the European Court of Human Rights' jurisprudence.

According to the ECHR, the protection of whistleblowers is subject to several conditions. It is not sufficient that the object of the revelation be of general interest.

In its first judgment on this issue, *Guja v. Moldova* (ECHR, 12 February 2008, Req., No. 14277/04), the ECHR held that Moldova had violated Article 10 of the European Convention of Human Rights, which also applies to the professional sphere.

Following the dropping of criminal prosecution against policemen suspected of assaulting individuals in the course of an investigation, Jacob Guja, Director of the Press Service of the Moldovan General Prosecutor's Office, sent two letters of judicial origin to the press concerning the conduct of the Vice-President of the Parliament and the inaction of the General Prosecutor. He was dismissed on the grounds that the letters were covered by confidentiality.

The Court had considered "*The importance of the right to freedom of expression on matters of general interest; the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work; the duties and responsibilities of employees towards their employers; and the right of employers to manage their staff*," and ruled that "*The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence*".

From this case onwards, the now well-known six criteria for whistleblower protection were set out and defined (whether or not the applicant had other means of making the disclosure, the public interest in the information disclosed, the authenticity of the information, the harm caused to the entity involved in the disclosure, the good faith of the whistleblower, and the severity of the sanction).

The ECHR subsequently has gone even further, applying these criteria to the case of revelations of irregularities related to secret telephone tapings in the context of the prevention and repression of offenses affecting state security (*ECHR, 8 January 2013, Bucur & Toma v. Romania, application No. 40238/02*).

The ECHR also utilized these criteria in *Heinisch v. Germany* (ECHR, 21 July 2011, Req No. 28274/08) and in *Görmüs v. Turkey*, recalling that "*The disclosure of information in the hands of the state plays a vital role in a democratic society, since it allows civil society to control the activities of the government to which it has entrusted the protection of its interests*" (ECHR, 19 January 2016, Req. §48).

Thus, it emerges from this jurisprudence that the lawfulness or unlawfulness of the information disclosed is not a criterion for the application of the protective status of the whistleblower, nor is the respect or the violation by the whistleblower of his obligation of confidentiality a decisive factor.

In the case of Antoine Deltour, it is through such reasoning, broadly outlined here, that justification was granted to him as he fulfilled all the conditions: disinterestedness, dissemination of exact information, defence of the public interest, proof that it was impossible to act otherwise, and proof that the harm suffered by the civil party PricewaterhouseCoopers, was not equivalent to the benefits resulting from these revelations.

It must be recalled here that PricewaterhouseCoopers claimed it had suffered a loss limited to € 1, a symbolic amount. However, such a low amount was an implicit recognition by PricewaterhouseCoopers of its own turpitude since, as had been demonstrated during the trial, the company's profits had actually never been as high as they had since Antoine Deltour's revelations. This shows again, there is still a long way to go.

The glaring paradox is that Antoine Deltour received the European Citizen Medal and was at the same time unfairly criminalized, ultimately without success, but not without enduring a difficult and lengthy legal procedure.

This paradox speaks volumes in terms of the hybrid perception of whistleblowers. They are becoming saints and heroes to a large majority of the population, while simultaneously being seen as enemies and threats by parts of a worldwide oligarchy. Driven by greed, this oligarchy persists in maintaining its impunity by any means, and in taking many liberties with morality, if not the law. They can also thrive on the philosophical ambiguities of the term "general interest", to which we now turn.

## **Why whistleblowers need to be protected, a philosophical elaboration**

The general interest is traditionally defined in its "utilitarian" conception as the sum of particular interests, and in its "voluntarist" conception as the expression of the general will.

Taken in its “utilitarian” conception, it prioritizes the concerns of an individual. The difficulty is to arbitrate between two individual interests. In its broader “voluntarist” conception, general interest offers the possibility of going beyond the differences between singular individuals to satisfy, in principle, the greatest number of people possible. The risk inherent in such a concept is that agency is placed into the hands of those who govern.

A mistake that is too often made is the attempt to balance the individual interest of the whistleblower against the interest of the company or administration where the revealed behavior has occurred. The equilibrium should rather be sought *outside of this relationship* and apart from any consideration related to the personal interest of the whistleblower. He or she should instead be seen as the mouthpiece of a societal warning, a warning that tends to serve and protect the general interest abused by the practice or situation described.

It is easy to pin down the meaning of the general interest in cases of crime against a person, property or against public confidence in an administration’s probity, such as crimes of corruption or tax fraud. It is also fairly straightforward when the revelation concerns the violation of an international commitment related to human rights, or the protection of the environment, for instance.

In France, the object of the warning is broadly understood. It covers all crimes and offenses without restriction, as well as the notions of “*serious and manifest violation of an international commitment*” and “*threat or harm to the general interest*”, which covers a large number of hypotheses and thus widens the scope of the warning.

Quite traditionally, the text excludes several types of information or documents from the whistleblower’s protection, such as those covered by national defence secrecy, medical secrecy or the confidentiality of relations between a lawyer and his client.

The understanding of the term general interest becomes more complex when it concerns not unlawful behavior that has already occurred, but the threat that it *could* occur. Furthermore, even behavior that is not illegal *stricto sensu*, meaning it is not specifically prohibited by the law, may still be harmful to the general interest, immoral or contrary to ethics – as was the case with the Lux Leaks scandal.

Blowing the whistle in such cases is not impossible. On the contrary, and perhaps more so than in clear-cut legal cases, it is necessary. But the burden then falls onto the whistleblower. He or she must assess whether revealing the immoral but not illegal behavior is in the general interest. He or she must decide what exactly should be revealed, while making sure he or she can claim protective status.

The complexity and burden of this assessment and its heavy potential consequences could and still can dissuade the whistleblower from speaking out.

## **The lessons learnt for the future: Know thy enemies**

It can never be said often enough that even if there is a protective law in the country where the whistleblower wants to disclose his information, it is necessary to assess the civil strength of his or her supporters. When a citizen prepares to go from ordinary to extraordinary, it is decisive for him or her to consult with a technician such as a lawyer, in order to measure possible support from unions, associations or from the media.

Journalists can support those who are about to blow the whistle by invoking the right to protect their sources. But experience has shown that journalists can be under extremely strong pressure – or exert pressure on themselves – in ways that endanger the professional and social life of a whistleblower. Contacting journalists can in some cases run the risk of exposing whistleblowers to legal proceedings.

Since the outbreak of the first whistleblowers fifteen years ago, large movements of solidarity and support for whistleblowers have sprung up around the world. A “house for alerts” has been created in Paris and others are burgeoning throughout Europe. This movement is currently becoming universal, slowly and with some difficulty, but still moving in the right direction.

This new solidarity also requires new responsibilities that must not be underestimated. It is not enough to be indignant, to be competent, and to have the necessary expertise to anticipate political struggles, which are sometimes very complex to decipher and to thwart.

The underlying paradox is that the better the whistleblowers are protected by law, the less they will need to disobey ...

The new law issued in France on 15 September 2017, without being exemplary, offers reasonable protection to whistleblowers in France against their enemies.

There are two types of enemies of the “true” whistleblowers.

The first is obviously the “bad faith” whistleblower, the ones who use virtuous goals to actually conduct vendettas or enact personal revenge. French law will firmly punish such behavior as it is necessary to be extremely vigilant and rigorous, to avoid providing arguments for those who see in the emergence of whistleblowers a society of weasels and back-stabbers.

Good faith is “*the belief that one is exercising a right legitimately, under legal conditions.*” It is important, but not necessarily easy, to distinguish “good” muckrakers – pursuing a salutary goal, from bad ones – content with satisfying the curiosity of the public. The legitimate aim is, and can only be, the protection of the general interest.

This understanding corresponds to the factual reality of the situations whistleblowers encounter as they are rarely all completely “white”. The public alert is often given after several attempts at internal alerts. These may in turn have triggered retaliatory measures or pressures, against which the whistleblower has tried to protect himself with the means – often poor – at his disposal. Attempts to create a balance of power by the whistleblower may be neither prudent nor very effective, given his or her isolation and lack of the means to pursue a complaint, compared with those available to employers or administrations.

The need for protection rather than ill intention often explains the errors of individuals trying to sound the alarm internally. Such errors or missteps alone cannot suffice to obliterate the legitimacy of the goal pursued by the would-be whistleblower.

Anchoring the legitimacy of intention prompts new questions. Does this test require that the whistleblower, at the time of the revelation of the information, is motivated by the intention to act as whistleblower, and solely by this intention? Would any other motivation be acceptable?

In other words, is it possible to condition the protection of the whistleblower to the possibility of probing his soul and heart *a posteriori*, to discover his intentions at the precise moment of the revelation?

Without going as far as answering a definitive yes to these questions, experience shows that it is possible to use a series of external indicators, such as the use of a proportionate means to reveal the information in his possession, to identify whether the whistleblower was acting in good faith or at least, to verify that he was not motivated by bad faith.

In France, the law provides the whistleblower with the benefit of protection only if he has followed a defined procedure. The “alert” must go through various stages and channels of internal denunciation, then to the judicial authorities and finally, as a last resort, through the media.

Although this law has failed to simplify the process for whistleblowers in France, one must admit that it has set up a legal frame of protection that meets the best existing standards, like those applied in Great Britain or in other European countries. Only practice will show how effective this law is.

The judges will have their word to say and their role to play. The definitions of some of the terms in the law are broad and prone to various interpretations. Not everything rests in the hands of the legislator. It is also up to judges to strengthen this move in the right direction and make modern applications of these provisions.

The second enemy of whistleblowers, in the sense laid out in this chapter, is the one who only sees in a revelation an act of nature shedding light on his crime.

Even the best protective law in the world will never prevent major financial players from staying ahead of the game. New technologies, especially digital ones, offer new ways of hiding their activities. It is therefore from the depths of darkness at the heart of the activity of a bank, for instance, that a whistleblower’s action will be decisive.

These opponents of whistleblowers are mobilizing today in Brussels, Washington and elsewhere, as extremely active lobbyists. They are the ones who are behind the attempt, partly defeated, to get European authorities to criminalize the violation of trade secrets and business confidentiality.

Whistleblowers have, in effect, started a much longer battle.

What they have started is nothing less than trying to delay, limit and contain a terrible countdown to the explosive effects of the short-term logic that still feeds the strategy of major financial and economic actors around the world, whatever ethical commitments they espouse on the record.

In this battle, whistleblowers are the indispensable avant-garde of a global citizen movement that refuses to allow those in charge of making wealth and protecting the general interest to only pursue their own private interests.