

CHAPTER 14

It's All in the Game: Journalism, Whistleblowing and Democracy Under the Rules of the Global Economy

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Abstract: An increasingly opaque global economy demands new forms of collaboration for journalists and civil society actors protecting democracy and the rule of law. Countries and jurisdictions have developed a deeply intertwined network of financial services and a social, political and physical infrastructure enabling regulatory evasion, tax avoidance, and eradicating accountability in business operations. Whistleblowers have in recent years made a solid impact on new discussions of the role of the tax haven complex in the global economy. Collaboration with whistleblowers is a strategy that journalists and civil society have utilized to overcome the challenges of investigating big players in the economy. This collaboration calls upon parliaments to update their legislation affecting collaborative investigative journalism. This article examines discussions on whistleblower protection in both the EU and Norway in light of the Lux Leaks whistleblower-journalist collaboration, and the internal whistleblower in the Telenor/VimpelCom corruption case. Attention is also drawn to the increase in international collaboration among investigative journalists.

Keywords: investigative journalism, tax havens, regulatory evasion, whistleblowing, whistleblower protection

Introduction

Quality journalism can amplify popular opinion, improve the depth and range of political decision-making and discipline abuse of power. These are among the positive externalities of high-grade journalism (Møen,

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cited in Allern & Pollack, 2018). On the other hand, Allern and Pollack emphasize the fact that the lack of investigative journalism and the success of superficial, sensationalized journalism make it easier to cover up malpractice and crime in economic and political life (Allern & Pollack, 2018, p. 3). In economic terms, Hamilton argues that one dollar invested in an investigative story can generate hundreds of dollars in social benefits (Hamilton, 2016a).

Collaborative investigation into the black boxes of the global economy is now more relevant than ever in light of the string of recent tax haven revelations (ICIJ, 2014; ICIJ, 2015; ICIJ, 2016; ICIJ, 2017; ICIJ, 2018). This article analyzes two such cases to demonstrate the challenges faced by journalists and civil society actors who investigate the global economy. I will argue that these case analyses highlight the development of an opaque global economy thus demanding new forms of collaboration, which in turn calls for parliaments to update legislation affecting collaborative investigative journalism. An examination of the background, boundaries and the possible effects of current legislation on whistleblower protections is presented in the second part of this article.

The first case is the so-called Lux Leaks case. It revealed how consultancy firms negotiated tax avoidance agreements with the Luxembourg authorities on behalf of transnational corporations. The second case is the Telenor/VimpelCom corruption scandal. It revealed how complex company structures make it nearly impossible to impose accountability on a state-owned company when corruption connected to a major investment is taking place.

First, both cases offer valuable insights on the different types of collaboration needed to reveal the workings of the global economy. Second, both cases showcase the potential value of whistleblowers, when taken into consideration. Finally, both cases shed light on the ongoing debate on blowing the whistle inside an organization or to the authorities versus whistleblowing to journalists or civil society actors.

As we will see, increasingly complex ownership structures, regulatory evasion, use of secrecy jurisdictions and a global division of labor in the finance industry are main components of the global economy.

Investigating within this context is a fastidious task, and new forms of collaboration are needed.

The analyses in this article set out to answer two questions important to anyone wanting to understand investigative journalism within the global economy. What kind of cooperation can be used as a response to tax haven development in the global economy? Given the value to democracy of high-quality investigative journalism, how can parliaments facilitate the safe environment needed for collaboration among investigative journalists?

As shown later in this article, the infrastructure and financial innovations of the global economy create an opaqueness different from old time secrecy. While transparency is often put forward as the ultimate goal of any policy attempting to strengthen the rules of the global economy and “ending the era of tax secrecy”, as UK Prime Minister David Cameron said three years before being exposed in the Panama Papers (Gov.uk, 2013; Boot, Whatt & Pegg, 2016), I will argue that transparency is not always sufficient. If the ownership structures and financial instruments introduced below were available in a register, which journalists would have the capacity, knowledge and time to understand them?

Before analyzing the specific cases and answering the questions concerning journalist collaboration and whistleblower protection, a review of the work being done in corporate law, organizational management, economics and civil society research is needed to understand the issues. This will help break down the main features of the global economy and reveal the forces in play. Knowledge about the infrastructure and the actors serves as a background, delineating an important component of the reality to which journalists, civil society and lawmakers must be connected.

Litterature review

The tax haven complex

Jurisdictions and states defined as tax havens have established structures and regulations enabling corporations, organizations and individuals to hide the traces of both legal and criminal activity. Once a company is

registered in a tax haven, illegal amenities become more available. The structure of tax havens is a *driver of corruption*, as Moene and Søreide say. Opaque corporate structures make it lucrative for owners to make use of well-functioning capital markets, and at the same time hide illegal activity or activity that is damaging to the corporation's name (Moene & Søreide, 2015).

The classification of a country as a tax haven or not a tax haven is rarely fruitful. Countries falling within a definition of tax havens, as well as those that do not, may offer a whole array of financial services that make it difficult for journalists and civil society to investigate ownership or financial matters. This is why Tax Justice Network has developed the Financial Secrecy Index (FSI), ranking countries based on type of tax regime, regulations and financial services on offer to non-nationals, and the size of their financial sector (FSI, 2018). Financial centers can be governed both nationally and locally. While the UK is not considered a tax haven, the City of London district is described as “the spider in the web of tax havens” (Oswald, 2017).

However, if one was to define a pure example of a tax haven, some main features could be identified. First and foremost, the jurisdictions offer different tax regimes to non-residents and residents. This twofold tax regime is a so-called *ringfencing of the tax regime* (Ringstad, 2017). Furthermore, the jurisdictions offer simple, quick and flexible rules with little supervision or control, often in combination with low or no taxes. One last main feature is the use of so-called straw owners. This is a method of hiding the ownership of a company, fund or bank account. A person is paid to be registered as the owner of a company he or she *de facto* is not involved in. A shell company is a company with no employees, created to obscure the ownership of another company. Anonymity for beneficial owners is the most important service offered in the tax haven complex (see Sharman, 2010). *Secrecy jurisdictions* is the preferred term used by the Tax Justice Network.

As shown in emails leaked by the whistleblower behind the Panama Papers, the law firm Mossack Fonseca singlehandedly created 123 shell companies in Nevada so that a friend of the former president of Argentina could steal millions of dollars from government contracts (Hamilton, 2016b).

Different jurisdictions specialize in different markets. Garcia-Bernardo, Fichtner, Takes and Heemskerk (2017) found both geographical and sectoral specialization in offshore financial centers of all sizes. Geographically, the financial centers in developed countries in Europe and Asia have well established connections to a separate set of smaller offshore financial centers. Sectoral specialization can be seen in how different countries offer different organizational structures and services to industries such as oil, computer manufacturing or shipping. More than 60 percent of the bank accounts in Switzerland are established through a shell company. Gabriel Zucman observes that the different jurisdictions do not compete with one another, but use different yet deeply intertwined strategies (Zucman, 2017).

Tax evasion is often the main purpose of organizing a part of the company structure in a secrecy jurisdiction. However, regulatory evasion is a more apt term for what happens in these places. Organizational structures evolve into a network of different judicial units and judicial contracts, which in sum become tools for regulatory evasion (Anker Sørensen, 2016). Dating back to the 1980s the diminishing accountability of transnational corporations has been called “one of the great unsolved problems of modern company law” (Schmitthoff, 1982 in Anker Sørensen, 2016, p. 158).

The theoretical and political limitations of defining a country or jurisdiction as a tax haven (or not a tax haven) show that it might make more sense to consider a tax haven complex. Here, ‘complex’ is understood as a whole structure consisting of interconnected or related structures. The interconnectedness and specialization existing in the tax haven complex could be exemplified through the distinction made by Garcia-Bernardo et al. between sink and conduit offshore financial centers (OFCs). Sink OFCs are jurisdictions that draw in and retain foreign capital. Conduit OFCs are attractive intermediate destinations channeling the flow of capital. These include developed countries with the right regulatory infrastructure in place. The Netherlands, Ireland, Singapore, the UK and Switzerland channel the majority of offshore corporate investment globally (Garcia-Bernardo et al., 2017).

In this sense, while not being defined as a tax haven based on strict criteria, a country like the Netherlands arguably constitutes an important part

of the whole complex. The Netherlands is the largest host of shell companies globally, and is an important jurisdiction for corporate profit shifting based on internal debt and different income deductions. This attracts capital flows ranging from tax-financed, private Norwegian health companies to Vietnamese oil revenues (PWYP, 2011; Herning, 2016).

For companies and individuals to exploit the possibilities existing in the tax haven complex, they need help. Herein enters the industry that builds, maintains and manages transnational corporations' tax haven subsidiary networks (Jones, Temouriac & Cobhamb, 2018). How do they contribute to the global structures investigated by journalists and researchers?

Consultancy firms creating the infrastructure

Audit firms and consultancy agencies offer mainly two services for their clients, claim Fjeldstad, Jacobsen, Ringstad and Ngowi (2018). First, they make sure that the current accounts are correct. One job could be to make sure that all internal trading in a company is in line with regulations. Tax planning is offered inside this framework. Second, they audit finished accounts. The demand for these services is increasing, and four companies dominate this industry. The Big Four are: Pricewaterhouse-Coopers (PwC), Ernst & Young, Deloitte, and KPMG (Fjeldstad et al., 2018; Jones et al., 2018).

Jones et al. reveal a correlation between corporations' use of the Big Four and tax avoidance. Transnational corporations that are audited by the Big Four accountancy firms are more likely to have a larger tax haven subsidiary network compared to those corporations that do not use the Big Four to audit their accounts. The study also shows that the growth rate of a corporation's tax haven network is enhanced via the use of a Big Four firm (Jones et al., 2018).

For the purpose of this article, I will concentrate on two features of the tax haven complex. The first has to do with pure regulatory evasion, specifically, how consultancy agencies make agreements with a country to avoid taxes in this country or other countries. The second is how tax haven infrastructures facilitate corruption by concealing identity and ownership.

Despite an increasingly opaque global economy, several international journalism projects have succeeded in reporting excellent, accessible and engaging stories about company structures, regulatory avoidance and business operations that harm the public interest and challenge democracy.

Before the analyses of two examples of such journalistic work, an explanation of the choice of cases and other methodological reflections are needed. Why are the Lux Leaks and Telenor/VimpelCom cases important years after their closure? What elements do they contribute to the discussion of investigative journalism, whistleblower protection and journalist-whistleblower collaboration, and perhaps also to democracy in a broader sense?

Collaboration in investigating the global economy: Methodological reflections

To assess the status of whistleblower protection and the conditions for journalistic collaboration both with and without whistleblowers, I have analyzed the Lux Leaks scandal of 2014 and the Telenor/VimpelCom corruption case, which ended in 2016.

Here, whistleblowing is understood as “the act of telling the authorities or the public that the organization you work for is doing something immoral or illegal” (Collins Dictionary cited by Ottosen, 2018).

The reasons for analyzing the two cases are threefold. First, they demonstrate the different types of collaboration needed to latch onto the global economy. Whistleblower collaboration is showcased in the Lux Leaks investigation. International collaboration among investigative journalists is displayed in the Telenor/VimpelCom case.

Second, the two cases demonstrate how different actors can follow different routes when they receive notifications from a whistleblower. The Lux Leaks case shows the bumpy yet targeted road of whistleblower-journalist collaboration. Beyond communication and safety issues, employer retaliation and judicial struggles, the collaboration exposed, for the first time on a global scale, how Luxembourg works as a tax haven in the middle of Europe (ICIJ, 2014). Meanwhile, the Telenor/VimpelCom

case shows how a whistleblower had been effectively sidelined for years when information on the issue was finally called for in the public debate, both in the ongoing investigation in the media and in public hearings in parliament.

Third and most importantly for this analysis, the two cases highlight the need for improved whistleblower protection. An important element in the debate on whistleblower protection is to what degree collaboration between journalists and whistleblowers is acknowledged and inscribed into legislation. Whistleblowing to journalists or to civil society is often contrasted with internal recipients of whistleblower reports addressed to an employer, either private or public (EU, 2018; NOU, 2018; Loyens & Vandekerckhove, 2018). As we will see, the two cases offer insights into the processes and outcomes produced by the choice of different whistleblower recipients.

I conducted one interview by email with each of the two known sources of Lux Leaks, Antoine Deltour and Raphaël Halet. Bernard Benoit has produced a brilliant documentary film on Halet referred to in this article, offering useful perspectives on the details of the case. One *POLITICO* interview with Raphaël Halet also provided details to the string of events relevant to the Lux Leaks case.

To gain an insight into the Telenor/VimpelCom case, I have studied the two parliamentary hearings of the Standing Committee on Scrutiny and Constitutional Affairs. A journalist at that time in the Norwegian daily *Klassekampen*, Emilie Ekeberg contributed to finalizing the investigation on Norwegian and Swedish corruption in Uzbekistan in 2014–2015. She wrote a method report to the Norwegian investigative journalist institute SKUP that provides a comprehensive understanding of the Telenor/VimpelCom case and of journalistic collaboration and investigation in general. I conducted one telephone interview with Ekeberg to retrieve more details from the investigative work. Moreover, the work of Gottschalk (2018) and Allern and Pollack (2018) offer the necessary recap of the Telenor/VimpelCom case, along with the articles printed in *Dagens Næringsliv* in 2012 and *Klassekampen* in the autumn of 2014.

Finally, I made an explorative discursive analysis of a set of public documents on whistleblower protection. To explore the context and detect

the core of the wider societal debate in the EU, I rely on declarations in the EU Parliament and in the legislative background paper for new whistleblower protection presented by the EU Commission. The summary of the Lux Leaks Court of Appeals Judgment on Antoine Deltour, Raphaël Halet and journalist Eduard Perrin of March 2017 also adds valuable material to the debate on whistleblower protection.

To understand the Norwegian context in relation to the debate on and legislative development of whistleblower protections, I have analyzed the Ministry of Labour and Social Affairs' Official Norwegian Report (NOU) on whistleblower protection published in the spring of 2018. The NOU is the background for a new whistleblower act and a whistleblower ombudsman. Reflections on the legislative background work for earlier whistleblower protection in the Working Environment Act are also needed for proper consideration of whistleblower protection in Norway.

The range of parliamentary output highlights the development of new whistleblower protections, and offers insights into the debates and priorities as the process matures. As we will see, the analyses of the legislative background work in the EU Commission, the EU parliament and the Norwegian parliament feed into the response to the Lux Leaks whistleblowers and the parliamentary hearings on the Telenor/VimpelCom case, and vice versa.

To break down the elements of the problem at hand, I will start by presenting the Lux Leaks case.

Tax planning in Luxembourg

Luxembourg is developing into a central component of the tax haven complex. The finance industry comprises 40 percent of the economy of the small duchy and has specialized in tax agreements with corporations and investment funds (Zucman, 2017).

In 2011 the former PwC employee Antoine Deltour leaked information on secret tax agreements between transnational companies and Luxembourg authorities to the French investigative journalist Eduard Perrin. The material was first presented on French TV in 2012, before

it was handed over to the international journalist network the International Consortium of Investigative Journalists (ICIJ). Their network of publishing houses released stories on the Luxembourg tax agreements on a larger scale. In total, the leak exposed 548 different tax agreements made between transnational corporations and Luxembourg from 2002 to 2010. All the Big Four consultancy firms were involved. The companies involved were the partly state-owned Norwegian Bank (DnB), along with Pepsi, IKEA, Apple, Amazon and many more (ICIJ, 2014).

Lux Leaks was the second revelation of the tax haven complex from the ICIJ, which started with the Offshore Leaks of 2013. This streak of revelations has arguably changed the political climate on the issue of tax havens (Oxfam 2016). Lux Leaks preceded the Swiss Leaks (2015), the Panama Papers (2016), and the Paradise Papers (2017–18).

Raphaël Halet was the second identified whistleblower provoking the Lux Leaks scandal. Like Deltour he worked for PwC.

In June 2016 Antoine Deltour was sentenced to 12 months of conditional prison and a 1500 euro fine. Raphaël Halet received nine months conditional prison and a 1000 euro fine for his leak. The journalist Eduard Perrin was exonerated. Neither Deltour nor Halet was acknowledged as a whistleblower, which at the time was a huge setback for whistleblowing and investigative journalism according to Tax Justice Network (Furuly 2017). An appeal reduced the penalties for Deltour and Halet before a final appeal to the Supreme Court in Luxembourg acquitted Deltour and Halet of all claims. The Supreme Court acknowledged Deltour as a whistleblower. Halet's penalty was reduced and only the fine remained. Halet was not acknowledged as a whistleblower.

To understand the background for court decisions like the one on the whistleblowers Deltour and Halet, we need to review the literature.

Whistleblowing

Thanks to whistleblowers, many white-collar criminals have been exposed. While the police only account for two percent of the revelations of white-collar crime, Petter Gottschalk affirms that 101 out of 405

convicted white-collar criminals were exposed by journalists through the work of a whistleblower (Gottschalk, 2018). A background paper of the NOU concludes that the indirect benefit of whistleblowing is expected to be considerable, also from a socioeconomic perspective (Oslo Economics, 2018).

Therefore, whistleblowers are protected by law. But at what point is a person acknowledged to be a whistleblower?

In Norway whistleblower protection has been enshrined in the Working Environment Act. As we will see, the parliamentary report published in the spring of 2018 suggests changes. Still, the criteria found in the Working Environment Act represent the foundation of any future whistleblower protection in Norway.

This protection has two criteria. First, the notification must be about “censurable conditions”. Second, the employee shall “proceed responsibly”. The employer has the burden of proof that a notification has been made in breach of these criteria.

There is an ongoing discussion about who should be the receiver of a whistleblower alert. Gottschalk points out four criteria from the literature. The recipient must have enough knowledge about the subject to understand the substance of the notification; the recipient must corroborate or disprove the alert with other sources; the recipient must have knowledge of the nature and motives of white-collar crime; and the recipient must have experience with investigation.

The Norwegian Working Environment Act strongly emphasizes internal notification, due to the wording of “responsible” notification. The idea is that if you notify the organization where the misdeed was done, the organization has the ability and power to put an end to the censurable conditions. The Act mentions public authorities as a second option. The media are only acknowledged as a legitimate recipient of a notification if internal notification is tried first, or if the whistleblower has reasonable grounds to believe that internal whistleblowing will harm the case, such as fear of the destruction of evidence.

Gottschalk highlights the expectation that the whistleblower do the whistleblowing internally at first. As we will see, this is a fundamental question in whistleblower protection.

Internal and external whistleblowing

Lux Leaks

When Antoine Deltour was acknowledged as a whistleblower by the Luxembourg Supreme Court, the court referred to six criteria from Article 10 of the European Court of Human Rights (ECtHR). There is no definition of a whistleblower in the ECtHR, but a judgement summary from Vandendriessche states that ECtHR jurisprudence does “protect persons denouncing apparent or hidden facts, which are of general interest and which are contrary to law, ethics or the public interest” (Vandendriessche, 2017, p. 16). Illegality is not a precondition for blowing the whistle, according to Vandendriessche. Severe dysfunctions can also be denounced.

The six conditions assumed by the Supreme Court were: (i) the communicated information represented a real public interest; (ii) the information was authentic (exact and believable); (iii) communication to the public was a means of last resort; (iv) the importance that the public receive the information outweighed the damage caused to the employer by the revelation; (v) the whistleblower acted in good faith; and vi) the intervention was proportionate, meaning that the same revelations could not be made by a smaller leak.

Raphaël Halet did not fulfill the fourth condition, as he did not present any new information in addition to the leak already made by Antoine Deltour.

The Luxembourg Supreme Court spends surprisingly little time discussing criteria (iii), whether Deltour or Halet should have notified internally or to the authorities instead of to a journalist. A look at the Raphaël Halet case as it happened offers valuable insights as we proceed into the discussion of new legislation on whistleblower protection in Norway and the EU.

As a clerk working at the bottom of the hierarchy in PwC, Halet himself said that he was working “like a worker on an assembly line”, where you work on small pieces of a bigger whole you never see yourself (Bringer, 2016, *my translation*). The investigative story presented on French TV changed Halet’s perception of his job, since the TV report showed a reflection of the global economy in his daily tasks. Halet leaked

to the journalist a range of “tax rulings”, i.e. agreements on how companies registered in Luxembourg would be taxed in the future. The organizational structure coupled with political will allowed the companies to shift their profits to Luxembourg, where they had no production.

The whistleblower shared the documents on unencrypted platforms. This led to PwC exposing Halet’s leak by means of tracking software. Subsequently PwC forced Halet into a confidentiality agreement. PwC cooperated with the French police and retrieved information from Halet using the most questionable methods involving Halet’s family, described elsewhere (Bringer, 2016; Marks, 2016). Deltour and Perrin used encryption tools (Deltour, 2018).

Whistleblower collaboration can indeed suffer from a lack of resources in digital communication. On the other hand, besides technical skills in its use of tracking software, the employer also received judicial support. PwC obtained a search warrant from the Metz courthouse, quoted by journalist Benoit Bringer as giving PwC permission to “take copies of received and sent email, including all emails or attachments sent or received from a journalist”. Article 2 in the French press Freedom Act deems all actions aimed at exposing journalistic sources an indirect attack on source protection and are illegal (Bringer, 2016). This did not prevent the judge from providing the *ad hoc* search warrant, seriously challenging the fundamental right of source protection.

The PwC scandal was already known to the public, and PwC was in the process of taking on whistleblower Deltour and journalist Perrin in court. During the trial Halet took sides with PwC, and said that he worked as an accomplice for PwC to get information from Perrin. Two years passed before Halet would break the confidentiality agreement, speak the truth alongside Deltour, and win in court.

The ruthless response of the employer adds weight to both Halet’s and Deltour’s judgement faced with a whistleblower’s dilemma. How does one proceed to make an impact and maintain personal safety?

For Halet it was never an option to blow the whistle inside the organization. “There was no committee, no procedure, no contact person” (Halet, 2018). Deltour points out that tax avoidance is a part of the business model of the Big Four. “It is not possible to blow the whistle if [the

notification is] against the normal activity of the company,” says Deltour (Deltour, 2018). He says that PwC has channels for dealing with harassment and other types of discrimination issues, but not unethical business behavior.

Surveys done in the EU show that 49 percent of respondents did not know where to report corruption if they encountered it (Special Eurobarometer on Corruption, 2017). Only 15 percent knew there were laws protecting whistleblowers in their country.

One employee knowing very well how to blow the whistle by the book was the whistleblower in the Telenor/VimpelCom corruption scandal. He also came to realize the limitations of such an approach.

Telenor/VimpelCom

The unveiling of the Telenor/VimpelCom corruption scandal is the second case I will discuss here. The Norwegian state owns 54 percent of Telenor shares through the Ministry of Trade and Industry (Regjeringen.no). At the time of the revelations, Telenor owned 43 percent of the shares in VimpelCom (Ekeberg & Tallaksen, 2015).

Dating back to 2011, Swedish and Norwegian journalists had done thorough investigations on corruption involving the operations of each of the national telecom companies Telia and Telenor in Uzbekistan. Both the collaborative work of journalists and the reception of the whistleblower in Norway are of interest here.

The collaboration ranged from building on existing stories, to sharing material and personal on-site teamwork. The Norwegian daily *Dagens Næringsliv* picked up on the investigations done by Swedish Television (STV) into the national telecom company Telia in 2011, and ran a series of stories on the Telenor subsidiary VimpelCom (DN, 2012a; 2012b; 2012c). The first report showed how VimpelCom was used as a tool to prosecute opposition in Uzbekistan (Kibar & Eriksen, 2012). Two years later the Norwegian daily *Klassekampen* followed up and managed to shed light on systematic corruption practices in Telenor’s investments in Uzbekistan (Ekeberg, 2014; Ekeberg & Tallaksen, 2014; Ekeberg, Tallaksen & Lysberg, 2014). *Klassekampen* also showed that Telenor executives and

Telenor's representatives on the VimpelCom board should have known about the corrupt payments (Ekeberg, 2015).

The investigative work done by *Klassekampen* was possible due to two forms of cross-border collaboration. First, *Klassekampen* built on earlier work, especially the investigations done by STV. The Swedish journalist handed over all his material to his Norwegian colleague (Ekeberg, 2018). Furthermore, close collaboration with the Organized Crime and Corruption Reporting Project (OCCRP) was key in developing the story. Based in Sarajevo, Bosnia, the OCCRP was conducting an ongoing investigation into the Uzbek dictator's regime, with a network of sources and investigative journalists contributing to the work. The OCCRP managed to retrieve an account statement that was instrumental in revealing the corruption by VimpelCom in Uzbekistan (Ekeberg, 2018).

The methodology of the OCCRP highlights some points of entry into the tax haven complex. *Klassekampen* and the OCCRP spent weeks retrieving and analyzing tax haven company registers, which are mostly names, dates and key events like new directors. The OCCRP is experienced in eking out tax haven data, where an aggressive and brash style is needed. Calling officials continuously is mandatory, and from time to time the OCCRP visits the tax havens in question to retrieve documents physically from company register functionaries. The OCCRP has even developed its own visualization software to systematize the material (Ekeberg, 2018).

Klassekampen and the OCCRP had no collaboration with whistleblowers in developing the Telenor/VimpelCom revelations. One or more whistleblowers did however try to get in touch with the Norwegian owners. Whistleblower *reception* is our second topic of interest in the Telenor/VimpelCom case.

On two different occasions there was internal whistleblowing on Telenor's investments in Uzbekistan. First, several Telenor executives were notified in 2011, but this was finally rejected by the CEO of VimpelCom, Norwegian Jo Lunder (Gottschalk, 2018).

Then, one week before the public hearing in 2015, a Telenor employee contacted the Norwegian Ministry of Trade and Industry (NFD). The ministry forwarded the email to the hearing committee in the form of a

letter the day before the hearing. The ministry said it was too short notice to include the notification in the public hearing. At first the ministry said that the whistleblower provided some new information on the payments made by VimpelCom to a shell company in Gibraltar (260S, 2014–2015, p. 5), but that in general there were no new details on the issue. After further written questions from the hearing committee, the minister chose to play down the information from the whistleblower, maintaining that the whistleblower added no new information to the workings of the VimpelCom board and its Telenor representatives, which seemed to be their main concern (260S, 2014–2015, p. 6).

From the manner in which the minister and high officials responded in the two open hearings on the Telenor/VimpelCom case, it is difficult to know what kind of formal structures were in place in the ministry to handle whistleblowing, or if there was any formal structure at all. According to the government's homepage, all state employers shall have formal notification routines, "based on the needs of the entity"¹

In this particular case, such a structure does not seem to have been applied. Ministry Director General Mette I. Wikborg responded that the administration considers notifications on a case to case basis, and that in some cases they even forward the notification to the company involved (Attachment 16 in 413S, 2015–2016, p. 120).

The minister herself concluded earlier on a general basis that notifications should be forwarded to the relevant recipients and authorities for further review and follow-up (260S, 2014–2015, p. 6). In this case, the ministry forwarded the notification to the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) and did not itself develop contact with the whistleblower (413S, 2015–2016).

The whistleblower confirmed the work published by *Klassekampen* starting in November 2014, including details on payments to the shell company in Gibraltar. A lack of follow-up on whistleblower notification from both private and public stakeholders was fortunately compensated

1 «Alle statlige virksomheter skal ha utarbeidet egne varslingsrutiner, basert på virksomhetens behov», from Regjeringen.no. Retrieved 15.8.2018 <https://www.regjeringen.no/no/dokumenter/retningslinjer-for-utarbeidelse-av-lokal/id485618/>

by ongoing parallel investigations made possible by international collaboration.

In 2016 VimpelCom recognized the crimes committed and made a settlement with both Dutch and US authorities, where VimpelCom is registered. The chairperson resigned after the second hearing, along with the CEO when it became clear that he had withheld information to the hearing committee (Ekeberg & Ekeberg, 2015b). Telenor later sold all their shares in VimpelCom (Hinna, 2018).

The Lux Leaks revelations and the Telenor/VimpelCom corruption scandal offer several valuable experiences for a discussion on whistleblower protection.

The Lux Leaks and EU whistleblower protection

After several whistleblower induced revelations in recent years, the EU Commission presented a new whistleblower protection directive (EU, 2018). The commission highlights Lux Leaks, the Panama Papers and the Paradise Papers in the very first sentence of the regulation's background paper. Furthermore, the commission maintains that whistleblowers represent a "key element in preventing wrongdoings and protecting public interests" (EU, 2018a, p. 1). In the second paragraph the commission emphasizes that whistleblowers are a "crucial source for investigative journalism" (EU, 2018b, p. 1) and compares the protection of whistleblowers with the protection of journalistic sources in general.

Despite the strong wording on whistleblowers and journalism, the EU directive maintains that the "reporting persons are generally required to use internal channels first". Competent authorities are next in line. Reporting to the public or the media is considered a measure of last resort (EU, 2018b, p. 12). However, there are several provisions allowing exceptions to this requirement. Situations where the whistleblower has either tried to report internally or to public authorities, or situations where there is reason to believe that internal reporting is not expected to function properly, are mentioned.

The issue of disclosing material in a proportionate manner is not clarified in the EU proposal. Raphaël Halet was not deemed a whistleblower

because he provided tax agreements of the same type as were leaked by Antoine Deltour. Even though he added *more* material to the case, revealing more companies, the material was not *new*. His action was therefore not judged to be proportionate to the damage inflicted on Luxembourg, PwC, and the companies granted the tax agreements.

There is a non-exhaustive list of issues considered to be whistleblower worthy in the EU directive, but few further details on additional requirements, like the novelty criteria or one leak's relation to another, which were two elements that struck Halet. This causes uncertainty for future whistleblowers. One could hardly blame Halet for not assessing whether his leak represented something substantially new in the case compared to Deltour, as he did not have access to Deltour's documents. One further requirement is that the whistleblower must have reasonable grounds to believe that the information reported was true at the time of reporting. Honest errors do not disqualify you from protection.

On the question of advice for future whistleblowers, both Deltour and Halet highlight the need for collaboration with a lawyer as early as possible. However, Deltour also says that whistleblowers act "spontaneously and with a feeling of 'internal emergency'", which might hinder a cautious, judicious approach (Deltour, 2018; Halet, 2018).

Norwegian whistleblower protection

The Telenor/VimpelCom corruption scandal was among the cases that sparked a debate on whistleblower protection in the Norwegian parliament in 2016. Like the EU, Norway has made an effort to update its whistleblower protection. In 2018 the Ministry of Labour and Social Affairs published an Official Norwegian Report (NOU) on whistleblower protection. The NOU is the background for a new whistleblower act and a whistleblower ombudsman.

There are two main concerns regarding the perspectives presented in the NOU. The first concern is a definition of so-called "censurable conditions". It is unclear whether the authors want to narrow or broaden the scope of breaches deemed whistleblower worthy. "Corruption and other economic crime" is the first of six short categories

defining the scope of the protection. The categories are fresh proposals in the NOU.

In the legislative background paper on whistleblower protection from 2006 censurable conditions are defined as criminal offenses, breaches of ethical guidelines firmly stated by the company or institution in question and acts contrary to “ethical standards broadly supported in society” (Ot. Prop. Nr. 84, 2005–2006, p. 50, *my translation*). Petter Gottschalk concludes that the scope of censurable conditions is insufficient, and points out unjustifiable budgets, professional issues and questionable priorities as examples. Blowing the whistle on aggressive tax planning might also fall outside of the scope of the act. The NOU concludes that there is need for additional definitions of what is considered “censurable conditions”.

Meanwhile, the EU proposal is both more detailed and broader in defining censurable conditions and important public interests deemed whistleblower worthy. First, ten categories are mentioned, ranging from denouncements on transportation safety and public procurement to financial services. Furthermore, there are three more subparagraphs, where tax avoidance is explicitly mentioned:

Breaches relating to the internal market [...] as regards to acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law. (EU, 2018, p. 32)

Finally, there is a paragraph referring to sector specific rules on reporting listed in an annex.

Discussion

As seen in the Lux Leaks case, there is rarely talk of purely economic crime when harmful practices are established in the global economy. Also, despite being a clear-cut corruption case, ØKOKRIM dismissed the case against the VimpelCom executive and the Telenor representatives on the VimpelCom board for being held responsible for the corruption in Uzbekistan. VimpelCom made a settlement with US and Dutch authorities. Regardless of how the question of guilt was concluded in the

Telenor/VimpelCom case, the fact that revealing “crime” is a prerequisite in invoking whistleblower protection causes uncertainty for future whistleblowers.

Based on the complex judicial nature of questions related to economic crime, coupled with an opaque global economy, I will argue that “crime” is not a suitable precondition for whistleblower reporting. Future legislation on whistleblower protection should maintain that whistleblowers who have reasonable grounds to believe that misdeeds, whether crime, unethical behavior, acts against the public interest or severe dysfunctions are taking place, can denounce them.

Further, I will argue that whistleblowing to journalists and civil society organizations must be acknowledged as “responsible notification”. The NOU does not highlight the democratic value of journalism and whistleblowing. This runs contrary to the sentiments shown both in the EU directive and in the statement of the EU parliament, leading up to the directive.

First, in 2016 the EU parliament asserted that “Member States should ensure the protection of legitimate business secrets while in no way hindering, hampering or stifling *the capacity of whistleblowers and journalists to document and reveal illegal, wrongful or harmful practices* where this is clearly and overwhelmingly in the public interest” (EU 2016: 19, my emphasis). The EU parliament refers to Lux Leaks and the Panama Papers and “[s]trongly emphasizes that the work of whistleblowers is crucial for revealing the dimension of tax evasion and tax avoidance.” Second, the background paper for the EU directives gives credit to investigative journalism and the collaboration with whistleblowers at the very beginning of the paper.

Time will show if the Norwegian parliament has the same interest as its EU counterpart in highlighting the democratic value of whistleblower–journalist collaboration.

The starting point, however, is poor. Looking into the method chapter of the Norwegian NOU, one finds no journalistic material and no interviews with the media or civil society listed. The issue of notifications to the media is discussed in a subchapter on source protection in which a summary of the legislative status of source protection is provided. An interesting remark by the authors is that the unwavering source protection

enshrined in press ethics is contrary to current legislation. The current practice in journalism is in fact civil disobedience.

The NOU does not propose any changes in legislation to solve this problem. However, the authors call for clarification on what is deemed a “responsible notification”. The legislative background paper (Ot.prp. nr. 84, 2004–2005) explains some circumstances that must be in order for the whistleblower to report externally. Whether the notification is responsible will in each case depend on an “overall assessment” including: (i) if the reported criticism has a “sound basis”; (ii) the employee has taken due consideration of the employer’s objective interests; (iii) if the employer acted in good faith and was convinced of the authenticity of the information; (iv) who was notified and how; (v) the nature of the information and the damage potential of the information; and finally (vi) whether the information is of general interest. In the next paragraph it is nevertheless briefly maintained that there cannot be strict conditions on the employer, and that the employer should have some leeway in deciding how to proceed. (Ot.prp. nr. 84, 2004–2005, p. 50).

The authors point out other criticisms of these requirements. The requirements can seem unclear, create insecurity and limit employees’ freedom of speech. The NOU refers to judicial reviews concluding that there are very few cases in the courts and before the ombudsman that even question the legitimacy of external whistleblowing. This coincides with the Luxembourg Supreme Court’s consideration of the Lux Leaks case, in which the legitimacy of external whistleblowing was not questioned. The NOU concludes that cases brought to the courts and the ombudsman might already be constrained by strict conditions. Finally, they refer to the criticism that the requirements are based on a “mirrored principle”, and that the main responsibility is placed on the whistleblower and not the employer (NOU, 2018, p. 159).

In an individual remark, the General Secretary of the Norwegian Association of Editors Arne Jensen asserts that whistleblowing cannot only be considered a work environment phenomenon, but instead must be seen as a resource for society as a whole (NOU, 2018, p. 146).

In their final remarks on due process, the following recommendations are suggested. First, the whistleblower should report internally. Second,

reporting censurable conditions externally is not considered irresponsible if the notification is made internally first. Third, external whistleblowing is acceptable if others have earlier tried in vain, or if the notification concerns the executive management. Finally, external whistleblowing should be acceptable if there is reason to fear retaliation or destruction of evidence.

Conclusions

In this article I have described a set of challenges emerging from a century of the development of the tax haven complex. Countries and jurisdictions have developed a deeply intertwined network of financial services, and a social, political and physical infrastructure enabling regulatory evasion, tax avoidance, and eradicating accountability in business operations.

Consultancy firms represent an industry with excellent working conditions under these circumstances. As shown in the Lux Leaks case, these actors are a powerful factor that needs political attention. Gabriel Zucman claims that the extended use of tax havens is not only an issue of demand. He says that the part of the tax haven industry that offers the gateway into secrecy jurisdiction, such as the big consultancy firms, must be weakened if we are to reduce or end tax avoidance and tax evasion (Zucman, 2017).

There has been a surge in ‘tax haven laws’ all over the world, says Fjeldstad et al. (2018, p. 17). Indeed, it seems that what Fjeldstad calls ‘tax haven laws’ are becoming the laws of the global economy. However, any policy aimed at reducing tax avoidance or strengthening accountability must be tailored to the particular circumstances in those developed countries within the tax haven complex. It might also be worth mentioning that the policies should not be written by those developed countries alone, as is being tried in the OECD. The recent EU “black list” of so-called tax havens is revealing. None of the major conduit offshore financial centers identified by Garcia-Bernardo et al. (2017) are on the list.

Collaboration with whistleblowers is a strategy that journalists and civil society have utilized to overcome the challenges they face in investigating the global economy. In recent years, whistleblowers have been crucial

in developing ground-breaking stories on the dark side of a lustrous economic system, as well as the mundane workings of local government. Whistleblowers have a role in revealing how the global economy works.

Allern and Pollack site the World Bank study conducted by Stapenhurst (2000), which maintains that investigative journalism has the long term effect of considerably strengthening accountability among politicians, public bodies and institutions (Allern & Pollack, 2018). Journalists and whistleblowers seem to share a community of interest, because of the democratic ideals grounded in investigative journalism and the whistleblower ethos, as can be seen in the work of Halet and Deltour (Halet, 2018; Deltour, 2018).

Whistleblower protections are being developed in the EU and in Norway. The collaboration between journalists and whistleblowers is explicitly acknowledged by the EU, but is so far being played down in the Norwegian context. The strict conditions tied to external whistleblowing must be withdrawn to reduce the obstacles whistleblowers face. The perceived responsiveness of internal or external recipients can also affect the decision of potential whistleblowers to report their concerns or not (Loyens & Vandekerckhove, 2018). Regulations will decide whether the whistleblower remains silent or speaks up (Gottschalk, 2018).

Both the EU parliament and the Norwegian parliament have yet to ensure the needed protection for whistleblowers faced with unscrupulous employers or vested national interests.

The Lux Leaks case shows the indispensable need for collaboration between journalists and whistleblowers. The subsequent court cases also show that despite the lack of judicial protection for whistleblowers at the time, whistleblowing to a journalist was deemed legitimate. In the Norwegian context, external whistleblowing is rarely questioned in the relevant court cases, nor in the cases brought to the ombudsman.

Whistleblowers who do everything by the book can be marginalized, as seen in the Telenor/VimpelCom case. Strict formal conditions for external whistleblowing might hinder proper handling of important notifications. The similarity in the responses from Telenor and the Ministry of Trade and Industry are striking. First, the whistleblower was rejected after notifying the Telenor hierarchy. Then, one can argue that the whistleblower was not

properly considered by the ministry. Ekeberg claims that this is hardly surprising, as the ministry itself is a majority shareholder, and has the same interest in playing down the situation as Telenor itself (Ekeberg, 2018).

Not all unethical behavior is illegal, and as the ECtHR maintains; also “dysfunctional” or “questionable practices” could be disclosed (Vandendriessche, 2017, p. 5), as they are also a threat to democracy and the legal economy. The reasoning of the Ministry of Trade and Industry for why they forwarded the notifications to the investigative unit ØKOKRIM is therefore weak. ØKOKRIM is indeed not responsible for executing the Norwegian state ownership policy, which is the job of the ministry. The drawback of forwarding the notification to ØKOKRIM can be seen through the fact that ØKOKRIM dismissed the case in the end. The information provided by the whistleblower could have been valuable to the accountancy process in parliament. The ministry has a huge responsibility as a majority owner, especially keeping in mind that the ministry is a majority owner on behalf of the Norwegian population.

Without the massive work done first by Swedish then by Norwegian journalists with Bosnian and Uzbek assistance and guidance, the misdeeds in VimpelCom would probably never have seen the light of day. This investigative work took years. When *Klassekampen* latched onto the last phase, vast amounts of material were shared with the *Klassekampen* journalist. Allern and Pollack (2018) point out the increased cooperation and sharing of material among investigative journalists in the past decade. Ekeberg highlights a flexible employer, financial support, and supportive colleagues as other elements enabling the investigative work (Ekeberg, 2015).

How can parliaments facilitate a safe environment for whistleblowers? The EU highlights the ombudsman as a safe harbor for whistleblowers, in their insistence on notifying the authorities before considering notifying the media. The newly designated Whistleblower Ombudsman in Norway will likely create a much safer environment for anyone wanting to report censurable conditions in their workplace. However, it remains to be seen how such an institution will be able to handle the reports. A whistleblower might face the same limitations as seen in the Telenor/VimpelCom case, when the ministry forwarded the message to ØKOKRIM.

Discussing the range of recipient institutions is beyond the scope of this article. This is a growing concern among scholars. Loyens and Vandekerckhove maintain that rather than discussions on legislation, “the emerging policy question for the next decade will be through what institutional framework whistleblowing legislation can be implemented” (2018, p. 3). While this is an exciting field for further research, we cannot afford missed opportunities in strengthening journalistic collaboration with whistleblowers. This remains a political responsibility.

Gottschalk (2018) reminds us that any new legislation on whistleblower protection must have only one target group, namely the whistleblowers.

Protection from retaliation is not discussed in this article, but is one of the gravest challenges in whistleblower protection, especially for those reporting in the public sector (Ottosen, 2018). As seen in the Lux Leaks case, not even adequate law is enough to protect whistleblowers when powerful corporations request assistance from the authorities. Perhaps the most controversial aspect of the treatment of whistleblower Raphaël Halet is that the Metz court assisted a foreign company in using illegal methods against a national citizen.

Eduard Perrin, Antoine Deltour and Raphaël Halet managed to tell excellent stories on the global economy when they exposed the secret Luxembourg tax agreements enabling the snatching of tax revenues from other countries. Despite inexperience, lack of proper digital tools, and retaliations, Perrin and journalists from all over the world managed to tell intriguing stories on complicated matters in the global economy. Lux Leaks sparked an interest in tax havens never seen before.

Both cases shed light on whistleblower regulations from different angles. First and foremost, the Lux Leaks case shows the indispensable need for whistleblowing in revealing the workings of the global economy. Furthermore, the Telenor/VimpelCom case shows the questionable reception of internal notifications from both the corporation and the state as a majority owner. The truth behind the Telenor/VimpelCom case was nonetheless exposed through traditional journalistic handicraft, building on and sharing material, and finally, tight international cooperation.

These cases show that whistleblowing to the media must be acknowledged as responsible whistleblowing, and the strict limitations on

media–whistleblower cooperation must be withdrawn. Whistleblowing must be considered a broad democratic issue. Conditions for investigating the global economy are unfavorable, and the adversaries of investigative journalism and civil society are resourceful and fierce. However, the stories emerging from international cooperation in the last few years suggest that there are only more to come.

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