

UK Options for Whistleblower Financial Incentive Programmes in Economic Crime Investigations

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On 13th February 2024, in a wide-ranging speech, the Director of the UK Serious Fraud Office (SFO), Nick Ephgrave, publicly stated his provisional support for financial incentives to whistleblowers in allegations of significant economic crime.¹ This was Mr. Ephgrave's first public speech, some six months after joining the UK's anti-financial crime unit. Like previous Directors, having identified the challenge of investigating and prosecuting suspected fraud and corruption cases at any degree of pace, Mr. Ephgrave has embarked on reimagining the rules of the game to provide shortcuts and efficiencies. For Sir David Green, Director from 2012 to 2018, it was DPAs and an extension of the "failure to prevent" concept to all corporate financial crime – changes that have been implemented in the decade following their first mention. Sir David's successor, Lisa Osofsky, suggested that wiretaps would improve the speed of investigations and the success rate of prosecutions. Fresh eyes on old challenges are always welcome.

Here, we take a deeper look at the realities of whistleblower payment schemes in comparative jurisdictions to England and Wales and cast light on the debate ahead for the current Director.

Incentives in the UK

Offering financial incentives to whistleblowers is by no means a new idea. Indeed, legal historians agree that the English invented the concept as far back as the seventh century. Back then, whistleblowers could bring proceedings in the name of the Crown, and in doing so they were entitled to share in any benefit awarded by the Court. It is believed that King Wihtrud of Kent famously remarked: "If a freeman works during [the Sabbath], he shall forfeit his [profits], and the man who informs against him shall have half the fine, and [the profits] of the labour."²

In modern times, this jurisdiction has been reticent in making payments to whistleblowers from the public purse. Financial incentives have been virtually non-existent for those who have come forward having witnessed serious economic crimes. The British have been queasy about the likely taste left in the minds of jurors when a key witness accepts that they have a personal financial vested interest in a guilty verdict – "It's just not cricket," so many believe. This perception may have its roots in the widespread characterisation of payments to whistleblowers as "rewards," leading some market commentators to call for such payments to be "reframed" not as "rewards" or "bounty" but instead as compensation for damage to a whistleblower's career prospects and future earnings.³

¹ <https://www.sfo.gov.uk/2024/02/13/director-ephgrave-speech-at-rusi-13-february-2024/>

² <https://www.ibanet.org/MediaHandler?id=a8bac0a9-ea7e-472d-a48e-ee76cb3cdef8>

³ <https://www.rusi.org/explore-our-research/publications/commentary/reframing-uk-debate-financial-crime-whistleblower-rewards>

Modest whistleblower incentive programmes do exist here. The Competition and Markets Authority (CMA) can award whistleblowers with up to £250,000 for their role in reporting illegal cartel activity.⁴ HM Revenue & Customs (HMRC) has adopted a reward programme that enables it to hand out discretionary amounts to individuals who report tax fraud. The programme was recently extended to include whistleblowers who report COVID-19 related tax frauds. In 2023, HMRC reportedly paid out £509,000 to whistleblowers who provided evidence about tax fraud.⁵

Analogous to whistleblower payment programmes are other systems to incentivise witnesses. This jurisdiction offers a limited selection of non-financial incentives and protections. Provisions within the Serious Organised Crime and Police Act 2005 (SOCPA 2005) allow for whistleblowers who are themselves implicated in the commission of an offence to be considered for sentencing discount, or even immunity from prosecution, if they have assisted the investigation and successful prosecution of others. The terms of a discount or immunity deal are hard to attain. The workings of the scheme throw an uncomfortable light on the suggestion that cooperation rewards and incentives are straightforward to navigate. Similarly, the Public Interest and Disclosure Act 1998 (PIDA 1998) offers protection to whistleblowers from retaliation by their employer and enables an employment tribunal to award compensation of a discretionary amount to a whistleblower in recognition of the adverse impact that blowing the whistle has had on a person's career prospects and overall professional and personal well-being. Whilst PIDA remains an important piece of legislation, the methods of enforcing its provisions (including, in particular, commencing and conducting litigation against the organisation alleged to have breached its terms) are often impractical for individuals, who may be unemployed and without the financial means to prosecute what can often be lengthy, costly and hard-fought public litigation.

Incentives in the U.S.

The absence of a whistleblower incentive scheme in the UK sits in stark contrast with that taken by U.S. criminal law enforcement. The U.S. whistleblower incentive regime is complex and spans across several key pieces of legislation. For a start, under the U.S. Securities and Exchange Commission (SEC) whistleblower programme, there is an office dedicated solely to whistleblowers and reports of suspected violations.⁶ Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), the SEC and the Commodities Futures Trading Commission (CTFC) have powers to pay awards to whistleblowers. Awards under Dodd-Frank can be significant and range between 10% and 30% of the overall monies collected from a successful prosecution of securities and commodities fraud arising from "original information" having been voluntarily provided by a whistleblower. Similarly, the False Claims Act allows payment to whistleblowers of between 15% and 30% of a fine collected if the whistleblower assists in the successful prosecution of a fraud in connection with a government contract or other government programme. Whistleblowers can also file a report to the SEC whistleblower programme for suspected violations of the Foreign Corrupt Practices Act of 1977 (FCPA). Moreover, under U.S. tax law, the IRS Whistleblower Law allows payment to whistleblowers of between 15% and 30% if they have assisted with the successful prosecution of tax fraud. The financial awards that are handed out under the U.S. whistleblower programme are often, therefore, substantial. In an update by the Organisation for

⁴ For more information, see <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>

⁵ See <https://www.cityam.com/hmrc-paid-out-over-500000-to-tax-fraud-whistleblowers-but-lawyers-say-rewards-should-be-higher/> and <https://www.rpc.co.uk/press-and-media/hmrc-paid-over-500-000-pounds-to-whistleblowers-in-the-past-year/>

⁶ <https://www.sec.gov/whistleblower>

Economic Co-operation and Development (OECD) in 2020, it was reported that, as of July 2020, the SEC had awarded over \$505 million to 89 individuals for whistleblowing in connection with violations of securities law. Moreover, the OECD revealed that the largest payment at that time was a joint award to two claimants for \$50 million, whilst the highest individual award was for \$39 million. Fast-forwarding to 2024, the most recent SEC award dated 11th January 2024 was for \$1,500,000. On 22nd December 2023, a payment of over \$13,000,000 was jointly awarded to four whistleblowers.

Research and Studies

In 2014, the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) conducted research into whether the UK should adopt a U.S.-style whistleblower incentive model. The review allowed the FCA to work alongside officers at the SEC engaged in whistleblower cooperation. In its conclusions, the FCA was doubtful as to the efficacy of a similar whistleblower regime being adopted in the UK. It found, at that time, that the incentives benefited only a small proportion of effective whistleblowers. The FCA noted there was no empirical evidence to confirm that offering incentives led to an increase in the number and quality of the disclosures being made to regulators. The FCA and PRA ultimately maintained the long-held English concerns that a whistleblower incentive regime would not have the desired effect and risked encouraging malicious reporting or cases of entrapment.

More recently, the Royal United Services Institute (RUSI) has undertaken research on the implementation of a whistleblower incentives programme and is due to publish its findings soon. RUSI is expected to conclude that a whistleblower programme would be beneficial to UK law enforcement. The tide of professional and public opinion may be changing in this jurisdiction.

Since the FCA report, RUSI has identified additional studies that have been undertaken and go to some lengths to rebut the concerns originally held by the FCA and PRA in 2014. RUSI recently reported that in the U.S., whistleblowers have responded positively to financial incentives and that a higher amount of financial incentive does not necessarily increase the amount of time it takes for a whistleblower to report unlawful conduct (with a previous held concern of the FCA being that whistleblowers could purposely hold back information so the misconduct worsens and therefore the potential penalty could be higher), and instead concluded that *"there is a mathematically definable 'sweet spot' in the relationship between external rewards and internal reporting."*⁷

Discussion

More is yet to be seen from RUSI's research. The anticipated conclusions of the RUSI report, together with Mr. Ephgrave's recent observations, leave us with the start of a more public debate as to whether a whistleblower programme could work in the UK.

It is understood that approximately \$80 billion has been returned to the U.S. government since the commencement of its whistleblower incentives programme in 1986. Moreover, according to reports, whistleblowers from the UK are the second biggest users of U.S. whistleblower programmes, with 774 UK nationals having filed reports to U.S. authorities since 2012.⁸ It is estimated that the UK economy loses

⁷ Ibid.

⁸ <https://www.spotlightcorruption.org/rethink-on-whistleblower-compensation/>

£100 billion each year to money laundering alone.⁹ Fraud offences are reported to make up 40% of all crimes in the UK.¹⁰

The next government in the UK may agree with Mr. Ephgrave's enthusiasm for the U.S. whistleblower incentive programme. For any programme to be of benefit to the SFO, it would have to incentivise whistleblowers of financial crime and not be confined solely to regulatory actions. It would also need to robustly address the concerns, previously raised by the FCA, of the perceived reliability of evidence given in criminal proceedings by whistleblowers who have been financially incentivised through a whistleblower scheme.

It is doubtful that the UK would offer whistleblowers the same incentives as the significant sums on offer in the U.S. Based on the HMRC and CMA programmes, payments to whistleblowers are likely to be more modest. A lesser "reward" scale than the U.S. is not necessarily an impediment to an effective incentive programme. A financial "sweet spot" is certainly achievable and countries such as Canada could be looked to for guidance. In July 2016, the Ontario Securities Commission implemented a whistleblower incentive programme similar to the U.S. but with a limitation of awards up to CA\$5 million.¹¹ A similar approach may well be considered by the UK. Careful thought would have to be applied to ensure that any statutory award range or cap is to have the desired effect of encouraging whistleblowers to come forward and recognise (and, to the extent possible, compensate for) the reality that those who do blow the whistle may risk years of personal and professional anguish.

The UK does not have the same criminal settlement culture as the U.S. and whistleblowers who report criminal and regulatory misconduct in the UK would likely have to wait a considerable amount of time before receiving a reward. Periods of 5 to 10 years between initial disclosure to final regulatory or criminal law enforcement outcome are no longer uncommon in complex financial crime matters in this jurisdiction. The experience of high-profile cooperators and whistleblowers in recent serious economic crime cases in the UK is largely unhappy. Most famous of all is Dr. Ian Foxley, who blew the whistle on his former employer, GPT, in 2009. The employer finally pleaded guilty to corruption charges in 2021, but the individuals alleged to have facilitated the corruption were both acquitted by a jury at Southwark Crown Court today, 6th March 2024.

Added protections for whistleblowers would also have to be considered. The UK would further have to look closer at the role of lawyers and the encouragement of the use of conditional fee arrangements to entice not only the most wealthy and senior officers (who may have limited "on the ground" knowledge) to blow the whistle. Just as with cooperation agreements under SOCPA, whistleblowers will require independent legal advice to safeguard their interests as they navigate the process of investigation and prosecution of those against whom they disclose incriminatory evidence.

The truth that dares not speak its name is that, in some cases, departing employees may prefer to try and deploy their knowledge of alleged corporate wrongdoing to improve their own terms of departure, or to obtain an advantage in any forthcoming litigation arising from their departure, rather than report allegedly illegal conduct to law enforcement. Any system designed to incentivise whistleblower protection will have to attempt to address this complexity. On this issue potential whistleblowers will

⁹ See <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-information-sharing-measures>

¹⁰ <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/fraud-and-economic-crime>

¹¹ See <https://www.osc.ca/en/enforcement/osc-whistleblower-program>

inevitably weigh up the competing risks and benefits of participating in any public whistleblower payment programme against other routes which, depending on their circumstances, may be available to them. The lengthy timescales of the UK system may make even the most generous possible financial rewards system unattractive – look at Dr. Foxley’s 15-year journey so far.

The question of a UK whistleblower incentive programme is again firmly on the agenda. However, implementation of such a programme would be far from straightforward. It seems unlikely that the legislative changes required for a U.S.-style whistleblower incentive programme for the UK would be introduced during the remaining 4½ year tenure of the current SFO director. In the meantime, the SFO will also have to look for other more immediate initiatives and investigative strategies to maintain a long arm over the sort of multinational fraud and corruption it was designed to investigate and prosecute.

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