

Xnet, a case study: the role of civil society in building the framework for whistleblower protection

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Abstract

Xnet's years of work to improve democracy in the digital era and the experience of fighting corruption have positioned it as one of the main drivers of legislative processes to secure protection for whistleblowers and implement tools and protocols, both within institutions and externally, to facilitate the disclosure of wrongdoing.



WHISTLEBLOWERS' BILL



Introduction

Xnet is a member of the Whistleblowing International Network (WIN) and comprises a group of activists working, inter alia, in the legal, technical and communications struggle to defend the use of the internet as a tool for improving democracy and fighting against abuses and corruption.

In 2012 Xnet launched ‘15MpaRato’, a platform which instigated the citizens’ lawsuit responsible for setting in motion and driving forward the Bankia Case, which was later heard in the Spanish National Court, resulting in almost a hundred politicians and bankers being put in the dock accused of committing fraud during the bank bailout. Sixty-five of those accused, who come from all the main political parties (PP, PSOE, IU) as well as the two leading trade unions (CCOO, UGT) and the Employers’ Association (CEOE), were recently convicted and 15 sent to jail.

The swift point of the lawsuit came about as a result of the action taken by Xnet members in 2012 to bring to the public’s attention what was later referred to by the press as ‘the Blesa e-mails’. These e-mails constituted Spain’s biggest ever internal leak on banking corruption to that date and took the form of thousands of corporate e-mails from the former





The vice president and minister of Economy and Finance, Pere Aragonès, and the minister of Foreign Action, Institutional Relations and Transparency of the Catalan Government, Alfred Bosch, they met with the cofounder of Xnet, Simona Levi, last May in Barcelona.

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chairman of Caja Madrid revealing several cases of corruption.

This information came because Xnet has operated its own safe **anonymous mailbox** whereby whistleblowers can leak information uncovering cases of corruption, safe from the threat of reprisals.

After that, Xnet has created an anonymous and safe whistleblower box at the Barcelona City Hall. This is the first time that an institution has recommended citizen use of encryption and anonymity tools, such as Tor, as a means of protecting whistleblowers. The experience is now being replicated in many other institutions such as the Antifraud Agency and the Government of Catalonia.

In 2015, Xnet produced a Decalogue of recommendations listing some proposals and changes to be made to the Spanish legislation in order to legally protect whistleblowers and they are now working proactively to ensure that these changes are implemented. In keeping with this stance, they have also led the Spanish chapter of the fight against the most

liberticidal aspects of the Trade Secrets Directive.

Xnet also contributed to revealing the connection between the former Spanish Minister of Economy, Luis de Guindos, and the LuxLeaks tax evasion scheme (Xnet, 2014).

1. From the European Parliament report to the European Whistleblowers Protection Directive and Xnet's legislative proposal

Reporting abuses, wrongdoing, corruption and irregularities is essential to protecting the public interest and preserving accountability and integrity in the public and private sectors, and should not be considered an act of heroism. On the contrary, this should be a normal occurrence that is internalised to the extent that it is made almost unnecessary by its own deterrent effect. However, in 70% of the corruption cases reported the whistleblowers experience retaliation and persecution afterwards. Whistleblowers who report information on breaches of law often do so at considerable personal and professional risk and, accordingly, pay a high personal and professional price.

Hence, it is necessary to have legislation protecting anybody who is privy to any kind of wrongdoing so that people are free to provide relevant evidence without fear of reprisal.

Without such protection, whistleblowers and people who assist them face all kinds

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Buzón de **Xnet** **XNETLEAKS**



**FILTRA CONTRA
LA CORRUPCIÓN**



Whistleblowers who report information on breaches of law often do so at considerable personal and professional risk and, accordingly, pay a high personal and professional price

of possible retaliation and are obliged to pay the costs of any legal proceedings. This exposes a clear asymmetry between the power of whistleblowers and that of institutions and corporations. In addition, whistleblowers are subject to an overwhelming burden of cost and various forms of injustice, which deter most people from reporting or disclosing unlawful conduct, irregularities and crimes. All this makes it impossible, in practice, for people, to fulfil their duty as citizens to report any information on breaches of which they may be aware, as well as to report improper behaviour, irregularities or illegal activities.

On 24th October 2017, in a motion led by the Greens/European Free Alliance (EFA) group, the European Parliament adopted a resolution in favour of implementing measures to protect whistleblowers. The resolution was driven by pressure from the organised civil society that had vehemently protested against the approval of the Trade Secrets Directive, which left whistleblowers unprotected in this area.

The process concluded with the approval by the European Parliament on April 2019 of the European Whistleblowers Protection

Directive, which obtained a broad, cross-group consensus in the European Parliament last April (591 for, 29 against, 33 abstentions).

During the entire process, Xnet, along with other European networks such as WIN, sought to ensure that the whistleblower protection outlined in the European Parliament's initial statements advocating strong, cross-sector protection of whistleblowers and encouraging both the public and the private sectors to tackle corruption and abuse was in no way diminished.

The directive includes many of the amendments submitted during the drafting and shows that international networks of activist organisations such as Xnet made key contributions in areas such as extending the definition of whistleblower — closely related to the concept of public interest; recognising the possibility for anonymity; and freedom of choice regarding the channels used to blow the whistle.

Meanwhile, the whistleblower issue became popular for many new populist political parties. In Spain, Xnet has addressed the Spanish Congress and MEPs to denounce the dangerous measures concealed in the Comprehensive Law Against Corruption and the Protection of Whistleblowers, which was initially supported by almost all the Spanish political parties and several 'famous' Spanish whistleblowers. The proposal would not only insufficiently protect whistleblowers but also undermine citizens'

The European Parliament approved on April 2019 the European Whistleblowers Protection Directive, with a broad consensus, and including many of the amendments of activist organisations such as Xnet



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rights and actually trump the disclosure of wrongdoings and abuses to the public and justice system. The draft law introduces elements of political control without a judicial ruling.

In general, the law is based on the profoundly erroneous and dangerous notion that institutions can monitor themselves and that they can do so better than citizens. But it has been more than amply demonstrated that only citizen scrutiny can put an end to corruption.

In this context, Xnet drafted a law aimed at preserving the spirit of the European Parliament resolution, which creates a template that could be replicated elsewhere.



This law was registered in the Catalan Parliament in June 2018. After the approval of the directive, Xnet modified its template by transposing the directive and Xnet's draft law was then registered in the Spanish Parliament in spring 2019, following the usual Xnet Do-It-Yourself methodology (Xnet, 2018). The principle behind this methodology is that true democracy is achieved through collaboration — not subordination — of organised civil society with the citizens' representatives in the institutions. The draft bill had the initial backing of the deputies who had committed themselves to supporting it before the elections.

With this action, Spain is the first country to have transposed the directive and Catalonia will probably be the first region in which legislation will be approved.

Xnet's proposed Comprehensive Whistleblowers Bill adheres to the most demanding international standards. It has been drafted taking rigorously into account other countries' experiences (Levi, 2019) such as the On Prevention of Corruption Act No. 1700-VII (Ukraine, 2014), the Protected Disclosures Act (Ireland, 2014), the Dutch Whistleblowers Act (The Netherlands, 2016), and the recommendations of, among others, organisations such as the Whistleblowing International Network, Blueprint for Free Speech, Public Concern, Whistleblowing for Change, the Courage Foundation, Expose Facts, the European Center for Whistleblower Rights and various rulings of the European Court of Human Rights and Spanish Organic Law 1/2004, of 28

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In Europe, from now on, whistleblowers will be endowed with robust, cross-cutting legislation, which will be useful not only in the fight against fraud and corruption but also against abuses in all public-interest areas

The whistleblower's protection must be clearly delimited to illegal activities or wrongdoings the consequences of which affect the public interest

December, on Comprehensive Protection Measures against Gender Violence.

The directive and, consequently, the proposed bills under consideration, constitute a turning point in the recognition and legal protection of the figure of the whistleblower in Europe. From now on, whistleblowers will be endowed with robust, cross-cutting legislation, which will be useful not only in the fight against fraud and corruption but also against abuses in all public-interest areas.

2. Aspects to be considered by institutions and policymakers

2.1. Whistleblowing must be in the public interest

The whistleblower may be someone who is personally affected by a crime, or a researcher, journalist or activist who uncovers evidence. In other cases, the whistleblower may be in a personal relationship with those involved in a plot or someone who has access to information about corruption or wrongdoing during the course of employment or within a professional relationship.

The protection granted to whistleblowers should protect all citizens and not just one specific sector in order to ensure that all citizens are afforded the protection they deserve when reporting wrongdoing. In exchange, the whistleblower's protection must be clearly delimited to illegal activities or wrongdoings the consequences of



which affect the public interest. We consider the following to be the subject of public interest: 1) the public administration and organisations administratively tied to the public administration; 2) any entity affecting more than 10% of the population of a legal constituency.

2.2. Preserve anonymity

The difference between anonymity and confidentiality resides in the fact that anonymity is the only way a source of information can wholly manage her or his own protection and the use that is made of the information. The weaknesses and porosity of reporting systems based solely on confidentiality have been extensively demonstrated. Hence, we must take advantage of the opportunities now being

We must take advantage of the opportunities now being offered by technology and online channels that enable widespread monitoring and disclosure by citizens

Anonymity is the most robust protection that can be offered to a citizen whistleblower

Administrations and corporations have the power to monitor and pursue us while we, the ordinary citizens, cannot do the same. This creates the asymmetry which is the source of all abuses

offered by technology and online channels that enable widespread monitoring and disclosure by citizens.

Anonymity is the most robust protection that can be offered to a citizen whistleblower (Kaye, 2015).

Anonymity enables us to rectify one of today's greatest inequalities — the position of the citizen in relation to the public administration and large companies. Administrations and corporations have the power to monitor and pursue us while we, the ordinary citizens, cannot do the same. This creates the asymmetry which is the source of all abuses.

2.3. Grant the freedom to determine the most appropriate channel for disclosure

Institutions and policymakers cannot require complaints to be first lodged internally or demand that whistleblowers justify why they have not used those internal channels. In fact, in the vast majority of cases, the whistleblower would not be protected under such circumstances (see the cases of Snowden or LuxLeaks, among countless others).

It is entirely legitimate to discourage the infliction of needless harm on an entity's reputation. However, the use of internal complaint mechanisms is not always appropriate and whistleblowers need to be able to choose the most effective course of action. To encourage the use of these internal channels it is best to include provisions that guarantee their effectiveness (e.g. independent reviewer, mechanisms allowing for anonymity).

It is also important to inform potential whistleblowers whether the channel they may use is anonymous or not so that they can make an informed decision before using it. In that sense, Xnet warns about the proliferation of channels catalogued as anonymous that did not comply with even the basic requirements for guaranteeing the protection of whistleblowers and their anonymity (Xnet, 2017). No mailbox for reporting corruption can promise anonymity unless it involves the use of tools such as Tor and Globaleaks, which make it possible for the whistleblower's IP address to remain anonymous.

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2.4. Protect intermediaries and facilitators

Persons who disclose information on breaches to the public domain (for instance, directly to the public via web platforms or social media, or to the media, elected officials, citizen platforms, civil society organisations, trade unions or professional/business organisations) are essential and indispensable in helping whistleblowers and in the vast majority of cases also suffer serious retaliations. The case of LuxLeaks in which the journalist was sentenced alongside the whistleblower is just one example.

Taking into account the value of the intermediaries and facilitators' role, they need to receive the same protection from retaliation that whistleblowers receive as a means of safeguarding freedom of expression and media freedom.



2.5. Do not misuse other rights and freedoms to the detriment of whistleblower protection

When powerful interests are involved it is common for those to whom the information revealed by the whistleblower pertains to initiate lawsuits for slander or violation of 'intellectual property' rights or trade secrets.

In recent years, we have also witnessed a surge in the misuse of data protection rights to challenge whistleblower protection. Xnet works to actively promote and protect fundamental rights to privacy and data protection, but data protection cannot and should not be used to dissuade people from reporting illegal activity (this is clear in articles 85 and 86 of the General Data Protection Regulations, GDPR).

Simona Levi, in the middle of the picture, in a press conference at the Spanish Parliament to explain the Draft law proposed by Xnet and registered on 30 May thanks to the support of various MPs.



Thus, clear provisions are needed to ensure that rights and freedoms cannot be used as an excuse to undermine and inhibit the public interest regarding the reporting and freedom of information. ■

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