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Foreign whistleblowing: the impact of US extraterritorial enforcement on anti-corruption laws in Europe

Elina Karpacheva & Branislav Hock

Abstract

Purpose

Foreign whistle-blowers are foreign citizens that help national enforcement authorities to sanction both foreign-based corporations and home-based corporations that engage in economic crime. This paper investigates the expansion of US law in the area of transnational economic crime by discussing the case of foreign whistle-blowers.

Design/methodology/approach

This paper has developed from a literature review carried out as part of a wider study into policing international bribery.

Findings

The paper shows that extraterritorial application of US whistleblowing laws is part of a broad trend associated with extraterritorial enforcement of US anti-corruption statutes such as the Foreign Corrupt Practices Act. The extraterritorial reach of the FCPA and other statutes allowed the US to become the leader in sanctioning US corporations as well as non-US corporations for economic crime. In effect, some US enforcement practices have become the standard that has influenced law and law enforcement in other countries as well as internal compliance of corporations.

Originality

Despite the profound impact of foreign whistleblowing has on the effectiveness of national anti-corruption enforcement, this topic has been largely neglected by academic research. To the best of the authors' knowledge, this paper is the first to provide an overview of the role of foreign whistle-blowers and the significant impact foreign whistleblowing has for legal reform in European countries and internal compliance of corporations in Europe and beyond.

Keywords

whistleblowing; bribery; corruption; extraterritoriality; enforcement; policing

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Introduction

This paper investigates the expansion of US law in the area of transnational economic crime by discussing the case of foreign whistle-blowers. Foreign whistle-blowers are non-US citizens that help US enforcement authorities to sanction both non-US corporations and US corporations that engage in economic crime. Foreign nationals from 133 countries have sent tips to the Securities and Exchange Commission (SEC), with only some of them being rewarded millions for their efforts (SEC, 2021).

We argue that our understanding of the implications foreign whistleblowing in the US have on the evolution of whistleblowing regulation in other countries is limited. The paper shows that extraterritorial application of US whistleblowing laws is part of a broad trend associated with extraterritorial enforcement of US anti-corruption statutes such as the Foreign Corrupt Practices Act (FCPA). The extraterritorial reach of the FCPA and other statutes allowed the US to become the leader in sanctioning US corporations as well as non-US corporations for economic crime. In effect, US enforcement practices have become the standard that has influenced law and law enforcement in other countries as well as internal compliance of corporations. The paper concludes with a discussion of the significant impact foreign whistleblowing has for legal reform in other countries and internal compliance of corporations in Europe and beyond.

The remainder of this paper is structured as follows. The paper first provides the background analysis of the US anti-corruption enforcement and its extraterritorial reach. The paper then analyses the link between whistleblowing and foreign anti-bribery law before discussing the implications foreign whistleblowing. Finally, the paper provides a conclusion.

The US enforcement leadership and anti-corruption enforcement

The rise of US anti-corruption enforcement

Over the past decade, transnational anti-corruption enforcement has grown apace. Large corporations have been sanctioned for various forms of economic crime such as money laundering, foreign bribery, trade sanctions, and fraud (Button et al., 2022). According to Moody's, for example, European banks were fined over $16 billion from 2012 to 2018 in connection with money laundering and trade sanction breaches (Moody's, 2019). Similar trends can also be seen in other areas of economic crime such as international bribery. From 2008 to 2018, US authorities imposed over $13.6 billion in sanctions on non-US corporations that engaged in international bribery (Hock 2020, p.198). The majority of these non-US corporations were European firms such as Siemens, Alstom, VimpelCom, Telia and Rolls-Royce.

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Why the US has regulated foreign bribery so actively is subject to discussion. One argument is that the extraterritorial application of the FCPA levels the playing field between the US and non-US corporations. After all, it was the US business lobby that pushed the US administration to initiate the adoption of an international anti-bribery standard such as the OECD Anti-Bribery Convention (Rose 2019, p. 1). Furthermore, besides the US economic interest, countering national security threats has also become a strategic priority of anti-bribery enforcement. The DOJ, for example, has announced that it will prioritize international bribery cases that include Chinese companies and individuals as part of its initiative to combat Chinese economic espionage (Department of Justice, 2018).

The structure of global markets, however, makes it difficult to use the FCPA enforcement as an instrument to achieve specific economic effects. Global markets consist of complex capital relationships and it is not clear how enforcement actions against a large firm in one country influence other firms, not speaking about the impact enforcement has on economies of entire countries (Nichols, 2016, pp. 224-226). Choi and Davis (2014) found that the patterns of FCPA enforcement are more complex as they are also characterized by considerations of legality, altruism, and coordination.

No matter what rationales stand behind the enforcement, the standard of corporate internal controls has changed globally (Hock and Dávid-Barrett, 2022). Both the US and non-US corporations have been incentivized to comply with the US anti-bribery standard. For example, between from 2008 to 2018, out of the 40 biggest international bribery matters, only 13 concerned firms with their main headquarters in the US. The US firms were charged with approximately $2.3 billion in monetary penalties, which is less than 15% of all penalties (Hock 2020a, p.198). Therefore, the US enforcement authorities enforced their laws against non-US firms in the vast majority of cases.

The extraterritorial reach of the FCPA and other statutes allowed the US to become the leader in sanctioning US corporations as well as non-US corporations for economic crime. The way how extraterritoriality works is discussed in the following section.

Extraterritoriality makes the US enforcement effective

The US enforcement authorities lead in the enforcement of international anti-corruption laws. The size of the US economy and the dominant position of the US dollar are undeniable advantages of US enforcement authorities. Yet, their success also lays in the character of US anti-corruption laws and the way these laws are enforced. Because of a wide interpretation of territorial jurisdiction, the use of conspiracy charges, and the possibility to negotiate out-of-court settlements, the US has been able to sanction many non-US corporations extraterritorially.

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Extraterritoriality is key feature of anti-corruption laws because it makes it easier to hold large corporations accountable for economic crimes (Schuman 2011; Parrish 2012). This flexible approach allows the US authorities such as the DOJ and the SEC to sanction non-US corporations based on classic jurisdictional grounds as well as on grounds that are controversial. Without controversy are cases in which the US authorities have jurisdiction over acts of international bribery that are themselves committed in whole or in part in the US territory. For example, holding meetings between bribers and foreign government officials in the US clearly constitutes the territorial basis for jurisdiction.

Moreover, if a corporation is listed in the US, it must comply with the anti-bribery provisions (15 U.S.C. §§78dd-1) as well as the books and records, and internal controls provisions (15 U.S.C. §§78m(b)(2)(A), 78m(b)(2)(B),78m(b)(5), and 78ff(a)) of the FCPA. The prohibition to compromise the books and records and internal controls of issuers applies not only to these issuers but also to their associated persons such as foreign subsidiaries and agents. As these provisions do not require US territorial nexus, it is common to see US enforcement actions against companies headquartered in countries such as the Netherlands, Russia, and Sweden (Department of Justice, 2019; Department of Justice, 2016).

More controversy present acts that have only minimal links to the US territory. The theory behind these enforcement actions suggest that while a bribery scheme might have limited territorial link, effects that occur within the US may be significant (see Zerk, 2010). In the *Magyar Telekom* case, for instance, a Hungarian telecommunication company bribed Macedonian government officials in relation to its business activities in the Macedonian telecommunication market. The settlement documents indicate that the relevant link to the US territory was electronic communications that were transmitted by Magyar Telekom employees through US or stored on servers located in the US (SEC, 2011). Moreover, it is also common that the US authorities claim jurisdiction if money related to a criminal scheme pass through correspondent accounts in the US (Department of Justice, 2013).

Furthermore, one can identify a number of other expansive techniques. The DOJ and the SEC construct broad conspiracies. In the *Bonny Island* scheme, Halliburton and other related US-based firms, bribed Nigerian public officials in order to secure contracts to design and build natural gas plants. The US authorities, however, also sanctioned Marubeni, a Japanese corporation, with conspiracy, and aiding and abetting violations of the FCPA. Marubeni was not listed in the US and did not act while in the territory of the US. The jurisdiction in the *Marubeni* case was based on the fact that Marubeni conspired with its US business partners and other persons that acted while in the territory of the US (Department of Justice, 2014).

There are many other avenues of extraterritoriality. The SEC is well-known for imposing *de facto* vicarious liability of issuers over their foreign subsidiaries. The wide interpretation of the agency principle, and especially agency control, helps authorities to establish the liability of corporations even if they are not present in the US territory. Lastly, the

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use of out-of-court settlements further facilitates possibilities to extend jurisdiction by consent in order to enable an effective and efficient resolution of foreign bribery charges (Stuntz, 2004). The key issue is that the expansive nature of extraterritoriality has activated the enforcement of other countries. The way how these countries have amended their anti-bribery laws and enforcement practices is discussed in the following section.

Americanization of anti-corruption law

For many years the enforcement of foreign anti-bribery laws has been dominated by the US. Recently, however, non-US jurisdictions have stepped forward with their own regulatory responses and the enforcement has become a multilateral effort. Consider enforcement schemes such as VimpelCom, Embraer, Odebrecht/Braskem, SBM Offshore, Telia Company, Société Générale, and Rolls-Royce, which all entered into global foreign bribery settlements and agreed to pay fortunes to Brazilian, US, UK, French, Dutch, Swiss, and other authorities (Hock, 2020, p.184). It is true that the US authorities lead the vast majority of global negotiations, nevertheless, the US share part of agreed sanction with their foreign counterparts that actively engage in foreign anti-bribery enforcement.

The move from a unilateral form of enforcement regime into a multilateral regime is a phenomenon researched in the literature on international regimes (Young, 2011, p.19855). Hegemonic enforcers, as the US enforcement authorities in the field of anti-corruption law, adopt and enforce new legal norms relatively commonly even if multilateral action does not exist (see, generally Snidal, 1985; Getz, 2006). Such unilateral action can raise the level of concern among other states about the given problem, especially if such unilateral action is directed towards foreign corporations (Keohane et al., 1993, p. 397). As in the field of international anti-bribery laws (see, for example Kaczmarek and Newman, 2011), these extraterritorial enforcement action incentivize other countries to enforce their own laws.

The FCPA has become a model that inspired international anti-bribery law such as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, 2011). The FCPA and the OECD Convention has had an enormous effect on national anti-bribery laws and the enforcement practices of national enforcement authorities in Europe and beyond. To keep-up with the US enforcement, countries such as Brazil, France and the UK have adopted legislation that allows prosecutors to negotiate out-of-court resolutions with corporations. In exchange for cooperation with prosecutors, corporations might avoid a criminal conviction and receive lower penalties. While out-of-court settlements are not part of legal tradition in these countries, and not required by the OECD Convention, their effectiveness and possibility to share large corporate cases with the US counterparts, has incentivized their adoption. The enforcement pressure created by US enforcement authorities have resulted in an extensive Americanisation of anti-corruption approaches in Europe and beyond.

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Furthermore, as this system of enforcement requires corporation to adopt effective internal controls to prevent international bribery, extraterritorial enforcement has also influenced the way how both US and non-US corporations operate. The need to comply with the US law has created a compliance market led by US consultations, audit firms, and law firms (Hock and Dávid-Barrett, 2022). Clearly, the private sector has to self-regulate in this area. This self-regulation is to a large extent incentivized by the US regulatory standard. In other words, extraterritorial enforcement has incentivized private self-regulation, aiming to change foreign businesses into more compliant ones. Businesses under US anti-bribery laws regularly check their business partners' compliance with US laws in order to mitigate the risk of being accountable for the partners' bribery. Therefore, the anti-corruption law has been Americanised via public as well as private channels.

One important element of this process, as we argue in this paper, has been the use of foreign whistle-blowers. Foreign whistle-blowers decide to report international bribery cases to the US authorities as opposed to the authorities of their home countries because the US law offers more favourable terms than their domestic laws. How this fact influences, and should influence, our discussion about the desirable form of non-US whistleblowing laws is discussed in the following sections.

Whistleblowing and foreign anti-bribery law

Whistle-blowers deserve special legal protection

In recent years, whistleblowing has become a "panacea" for healing bad organizational behaviour. Every organization includes a myriad of internal relationships and power dynamics that cannot be observed by outsiders (Roe, 2004). This makes public policing of illicit corporate conduct a real challenge unless enforcement authorities have inside information (Holland, 2009). Such inside information about corruption, bribery, and similar unlawful and improper conduct is vital because it improves trust in the transparency and accountability of public and private institutions, the effectiveness of policing, the rule of law, public welfare, and market competition (European Parliament, 2017). This is the reason why international organizations and nation states have recognized and nurtured whistleblowing (OECD, 2009; Council of Europe, 2014).

Whistleblowing is useful from the perspective of both public policing as well as private policing of corporate illicit conduct (Button, 2019). In other words, a disclosure of inside information might be directed not only to public authorities but to any other person or organization with the power to take an effective action (Near and Miceli, 1985, p. 4). The key issue is that such disclosure should be released outside the normal channels of communication to an appropriate audience (Boatrigtht, 2000). In this work, we refer to "external whistleblowing" if a disclosure is made to an external authority having competence to deal with

the wrongdoing. We refer to "internal whistleblowing" if a disclosure is made to an internal body with competence to deal with the wrongdoing. Internal and external whistleblowing constitute two stages of the progression of a whistle-blower's decision to address an illicit corporate conduct (Near and Miceli, 1992, pp. 2 and 5-27).

Whistle-blowers engage in an activity that deserves special legal protection. Whistleblowing entails a disclosure of unique information about corporate wrongdoings voluntarily, without a duty to do so (Banisar, 2011). This implies a dilemma between being loyal to an organization and keeping up to societal and personal standards to dissent with behaviour that a whistle-blower perceives as illegal or immoral (Vandekerckhove and Commers, 2004). This dilemma can be difficult to resolve in organizations with a bad corporate culture. This is why a special legal protection of whistle-blowers is needed as an additional incentive to resolved such dilemma in favour of public interest.

Whistleblowing is gaining momentum in Europe and across the world. From a boutique topic, it has become a key tool in policing corporate corruption. Legislators see whistleblowing as a process that should feed their enforcement regime with information and evidence necessary for an effective detection, investigation, and prosecution of economic crime (EU Directive, 2019/1937: recital 2; US Senate, 2010). The new EU whistleblowing legislation has introduced a number of obligations that have significantly strengthened public scrutiny of corporate illicit conduct (EU Directive 2019/1937: 17–56). The EU policy-makers hope that under the threat of illicit schemes being exposed, corporations will be incentivized to limit the risk of corporate corruption.

The emerging EU-wide whistleblowing regime primarily aims to protect whistle-blowers from retaliation. Such protection is considered optimal for allowing employees to speak-up when confronted with organizational wrongdoing (EU Directive 2019/1937: recitals 1 and 3). Strong legal protection—steaming from the employment and privacy laws—, proper employee training, and "soft" organizational rules should allow and encourage whistle-blowers to disclosure corporate economic crime to public authorities. Ideally, issues should be reported internally, at an organizational level. External whistleblowing is the second step that should come up once internal compliance systems are ineffective in dealing with internal whistleblowing (Vandekerckhove, 2010).

Whistle-blower protection and US foreign anti-bribery law

Unlike the EU Member States, the US has a long history of collecting evidence for organizational wrongdoing. Whistle-blowers play an important role in the FCPA enforcement. Both the DOJ and the SEC give credit for self-reporting, cooperating in the investigation, and for having in place effective ethics and compliance systems (Department of Justice and Securities and Exchange Commission, 2012, pp. 54-65). This approach incentivizes organizational members to report violations of FCPA provisions internally. In addition,

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corporate insiders might report suspected violations by contacting directly the SEC and the DOJ. When it comes to criminal investigations, led by the DOJ, the individuals that speak-up are treated as confidential sources, informants, or cooperating witnesses, and as a reward they may receive the reduction of punishment (OECD, 2017, p. 48). When it comes to civil proceedings, the SEC can enhance the effectiveness of enforcement by cash rewards for whistle-blowers' tips, a feature rarely used in the European legal tradition.

The 2008 financial crash brought into life the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 922 introduced one of the most successful US whistleblowing programs to date (SEC, 2019), primarily intended to incentivize, compensate, and reward individuals who provide voluntarily original information to the SEC that leads to a successful enforcement action (Securities Exchange Act 1934 s.21F). The Congress' decision to create a "bounty" for internal information is a recognition that whistle-blower legal protection against retaliation is not sufficient (Moberly, 2012), especially when it comes to employees that risk to be stigmatized and ousted from their career path (Feldman and Lobel, 2010; US Senate, 2010, p. 111).

The SEC whistle-blower program grants a whistle-blower status to individuals that provide information of "possible violation of the Federal securities laws…that has occurred, is ongoing, or is about to occur'' (17 CFR § 240.21F-2). The SEC exercises absolute discretion over the substantive and procedural eligibility of the tip (17 C.F.R. § 240.21F-4 and F-8). After submitting the tip, a whistle-blower enjoys robust legal protection against retaliation, including an assurance of confidentiality (17 C.F.R. § 240.21F-2 (b) and F-7). The real identity of the whistle-blower is revealed in front of the SEC at the end of the proceedings, when the bounty is collected (17 C.F.R. § 240.21F-7(b)). However, the fact that an insider may become a whistle-blower and assist the SEC does not preclude the Commission from bringing an action against that person due to their own misconduct (17 C.F.R. § 240.21F-15). In cases of conviction for a criminal activity related to the action for which the whistle-blower disclosed information, they are not entitled to receive a reward (Pacella, 2015, pp. 357 and 390-391).

The SEC bounty program does not aim to undermine internal whistleblowing (17 C.F.R. § 240.21F-4(b)(7)). The SEC considers information as "original" even when it is first reported internally (17 C.F.R. § 240.21F-4(c)(3)). In fact, the amount of the award is higher when whistle-blower first spoke-up internally (17 C.F.R. § 240.21F-6(a)(4)).

In terms of personal reach, the SEC reward program applies to every individual, if the information disclosed is voluntary submitted, original, and derived from independent knowledge and analysis (17 C.F.R. §§ 240.21F-4(a), (b)(1)-(3)). However, organizational members in an employment relationship who have special "gatekeepers" responsibilities, such as accountants, auditors, internal counsels or the members of the compliance department, are generally not entitled to benefit from the bounty. This is understandable given the function of those professionals in the prevention and defection of corporate crime internally.

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Foreign whistleblowing

Whistleblowing and the effectiveness of US foreign anti-bribery enforcement

Whistleblowing enhances the effectiveness of foreign anti-bribery enforcement in multiple ways. It is true that internal whistle-blowers help company's governance system prevent wrongdoing by triggering internal control. However, because corporate compliance systems can never function perfectly (Moberly, 2006, pp.1121-25), it is external whistleblowing which remedies the deficiencies in internal system by increasing the likelihood of corporate misconduct being detected and punished. External whistleblowing improves the quality of information provided to enforcement agencies and supports the efficiency of policing (Skinner, 2016, p. 890; Call et al., 2017). Furthermore, external whistle-blower programs increase the flow of information, thus breaking the so-called corporate "bottleneck" that prevents information from getting outside the organization, by creating a direct link to enforcement authorities (Baer, 2017, p. 2240). Such programs also stimulate positive competition for information between compliance departments and employees and allowing for a timely disclosure of potential misconduct to enforcement authorities (ibid, p.2241).

The role of whistle-blowing in detecting and preventing foreign bribery is significant. OECD research indicates that 2% of 263 foreign bribery cases were detected thanks to external whistle-blowers (OECD 2017). In reality, however, more cases are detected by external whistleblowing because in 55% of the bribery schemes, the origin of detection is unknown. Moreover, emerging regulation in this filed has indeed incentivized internal whistleblowing (Arlen and Kahan, 2017). This is also reflected in the OECD data that indicate that 22% of cases are self-reported and out of these 22%, 4% are detected by internal whistle-blowers and 52% by unidentified internal source (OECD 2017, p.10 and 22).

The US has been a pioneer in incentivizing external and internal whistleblowing in the area of foreign bribery. This is extremely important because corporate insiders have generally low incentives to disclose international bribery. It is rather rare that an investigation is initiated by a direct victim of the offence because bribery does not generally cause direct harm. To the contrary, the harm is "highly diffused" and "evenly distributed among a large, and largely anonymous, group of people" (Engstrom, 2014, pp. 621-622). Moreover, the bribe-payer usually has significant control over receiving and transferring corporate funds (Langevoort, p. 101 and pp. 105-6). Hence, even witnesses of the scheme might not be aware that the offence is taking place, as its detection requires vigilance and training. And without additional regulatory incentives, the "perpetrator" or "complicit" would never speak-up (Baer 2017, p. 2241).

This is why the US system has provided additional incentives to encourage external and internal whistleblowing. From the US perspective, rewarding whistle-blowers is an important

tool that incentivizes employees to speak-up in cases of ignorance, inefficiency, or lack of internal compliance systems (Dyck et al, 2010). The pro-active support of external whistleblowing by providing rewards has recently extended also to internal whistleblowing. In May 2019, for example, the SEC awarded $4.5 million to a whistle-blower whose internal reporting led to the successful self-report of a company (SEC, 2019).

Furthermore, the US system aims to incentivize the implementation of effective internal compliance systems. In the best-case scenario, company's executives have sufficient incentives to self-disclose the violations and benefit from the leniency in the form of deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) and enjoy the full range of potential mitigation credit – a declination or a reduction of up to 50% of the applicable United States Sentencing Guidelines fine range. In such system, employees should be incentivized to speak-up by using the internal reporting channels and compliance officers would disclose the wrongdoing to the competent authorities without suffering retaliation or risking legal charges themselves (Griffith, 2016).

Naturally, it does not mean that the US system is fully effective and efficient as in many cases internal flow of information simply does not work – due to ineffective internal compliance systems or because key executives themselves were guilty of the underlying misconduct (Arlen and Kahan, 2017, p. 323). Nevertheless, as will be discussed in the following section, whistle-blowers from abroad, if they can, prefer the US system.

Extraterritoriality and foreign whistle-blowers

Foreign whistleblowing is rapidly raising (SEC, 2019). As of 2021, the SEC has received tips from individuals in 133 countries outside the US (SEC, 2021, p. 31). The US enforcement authorise reward these individuals much more often than the US-based whistle-blowers. In the financial year 2019, approximately 479 whistle-blower tips were submitted from outside the US. This represented 9% of all tips received (SEC, 2019). In, 2021 it was already 1350 tips submitted from outside the US, representing an increase to 11% of all tips received (SEC, 2021, p. 38). Nevertheless, non-US nationals represent approximately 20% of the award recipients (SEC, 2019, p. 19; SEC, 2021, p. 24). This indicates that tips from overseas have significantly higher chance of being rewarded by the US authorities than tips originating from the US.

The FCPA-specific tips represent approximately 4% of all tips received (ibid). While, we do not know how many FCPA tips come from outside the US, one may expect that foreign whistle-blowers are very important in the FCPA context. After-all, the US firms were charged by US enforcement authorities with less than 15% of all monetary penalties as compared to 75% of monetary sanctions awarded to non-US firms (Hock 2020, p. 198). The fact that the US enforcement authorities charge overseas firms in the majority of large FCPA cases indicates that the impact of foreign whistleblowing in FCPA cases is likely higher than in other cases.

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Rewarding foreign whistle-blowers is an important tool that increases the effectiveness of US foreign anti-bribery enforcement. Next to a wide interpretation of territorial jurisdiction, the use of conspiracy charges, and the possibility to negotiate out-of-court settlements, corporate insiders from abroad help the US enforcement authorities to charge non-US corporations for international bribery. How foreign whistleblowing influences, and should influence, the discussion about the desirable form of whistleblowing laws in Europe is discussed in the following section.

Extraterritoriality and legal change – US law in Europe

Foreign whistleblowing is an element of US extraterritorial enforcement. Recent regulatory developments in Europe and beyond show that once the FCPA enforcement starts hitting foreign businesses, the domestic jurisdictions of these businesses become more active in their regulatory and enforcement responses to international bribery (Hock, 2021). For example, out-of-court settlements are not part of legal tradition in countries such as the UK and France. Yet, the US enforcement pressure, the effectiveness of settlement in collecting monetary sanctions form corporations, and possibility to share large corporate cases with the US counterparts, has resulted in a convergence of foreign anti-bribery laws and enforcement approaches (ibid). As foreign whistleblowing is part of the exactly same process, the same premise about the Americanisation of foreign anti-bribery enforcement should also apply to whistleblowing law.

Monetary rewards of whistle-blowers are the key distinctive element of the US whistleblowing system. In some EU states such rewards are considered immoral, especially because whistleblowing can be motivated by a personal grievance and a personal antagonism. Moreover, the EU Commission indicates that such rewards are shifting the *"*public interest to the personal gain of whistle-blowers, thus making whistleblowing appear as a commercial transaction*"* (EU Commission, 2018, pp. 36-37). And perhaps exactly because the US foreign anti-bribery enforcement is about commerce and out-of-court resolution of allegation rather than about classic prosecution of criminal conduct, European external whistle-blowers prefer US law. Non-US whistle-blowers often report international bribery cases to the US authorities as opposed to authorities of their home countries because the US law offers more favourable terms than their domestic laws.

The Americanisation of foreign anti-bribery enforcement also applies to internal whistleblowing. German, French, UK, Dutch, Italian and other EU-based corporation have been caught by the long reach of the FCPA. These foreign corporations are incentivized to meet the same anti-bribery compliance standard as their US competitors. They negotiate settlements with the US authorities, some of them self-disclose their conduct, and they have to demonstrate an expected standard of internal compliance systems during such negotiations. The US whistleblowing law is clearly part of such standard.

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An effective internal whistleblowing system is an important condition of an effective compliance system. The standard of effectiveness has been set by the US as a dominant enforcer of foreign anti-bribery laws. While the EU is coming along with their own standards, many EU businesses that found themselves under the US regulatory scrutiny must have already adapted to the US system. The presence of American legal advisor and compliance specialist in the EU countries reflects the presence of the US foreign anti-bribery standard in Europe.

Conclusion

International anti-corruption law has become an important legal field that is recognized globally. This is largely thanks to the rise of extraterritorial application of US anti-corruption statutes such as the FCPA. The extraterritorial reach of US anti-corruption statutes allowed the US to become the leader in sanctioning international bribery all around the world. These enforcement processes have influenced legal reform and law enforcement globally. The role of foreign whistle-blowers and US whistleblowing law in this process has been, however, under-researched.

The US whistle-blower reward programs have been increasingly used by foreign nationals. Foreigners provide quality tips that proved to have higher chances of being rewarded by the US authorities than tips submitted by US whistle-blowers. Despite being controversial, rewarding foreign whistleblowing increases the effectiveness of enforcement against those engaged in transnational economic crime. This process also pressures other countries to consider similar model of enforcement.

While, the emerging EU-wide whistleblowing regime aims to prevent organizational wrongdoing, it refuses to proactively recruit whistle-blowers. Member States have in place procedures for utilizing disclosure of information to relevant authorities, but no one has implemented a comprehensive whistle-blower programs similar to the US programs. Instead, due to legal, historical and cultural reasons, economic crime detection mechanisms are based on traditional sources of information collected by, for example, Financial Intelligence Units that are collecting information from internal compliance departments of obliged entities, tax authorities, and through the process of statutory audit.

European countries have legitimate reasons why not to follow the US model. Nevertheless, the US model gives the US enforcement clear advantage as compared to their foreign counterparts. Whether or not to adopt the US reward model in Europe represents an interesting academic and policy discussion. Yet, the reality is that the US law takes the lead in Europe because Europeans use US whistleblowing laws. This is part of a broader process characterized a convergence of foreign anti-bribery laws and enforcement approaches. In addition, this process is aligned with the incentives of large businesses that are expected to

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design compliance programs that comply with US law. The US extraterritoriality in this field has created a global market led by US auditors, lawyers, and other consultants.

When discussing whistleblowing law, Europeans should consider principles associated with the impact of extraterritorial foreign anti-bribery enforcement. Foreign whistleblowing is an element of this more general process. If the historical pattern is anything to go by, non-US jurisdiction will again re-think their approach, at this time the one to whistleblowing.

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