



Freshfields Bruckhaus Deringer

# Whistleblowing is on the rise.

But more can be done to encourage  
employees to speak up



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**Whistleblowing continues to make the headlines and the role of the whistleblower has become ever more prominent in recent times. Almost 40 per cent of all detected occupational fraud cases are identified by whistleblowers.<sup>1</sup> And when businesses uncover wrongdoing within their organisation, it is usually an employee who raised the first red flag.**

There are risks associated with any whistleblowing system (particularly one that allows anonymous reporting), the main risk being that employees might abuse the system and make false reports. These risks are, however, materially outweighed by the clear interest businesses have in ensuring that the right whistleblowing framework and culture is in place to encourage employees to speak up without fear of retaliation. This can allow businesses to identify problems, investigate internally and resolve any issues, all whilst retaining control of the process – something that may be lost if the employee feels they are not being taken seriously and goes to a regulator or the press with their complaint.

<sup>1</sup> 'Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study', carried out by the Association of Certified Fraud Examiners.

The background of the slide is a blurred photograph of two people, likely in a professional setting, engaged in conversation. The image is out of focus, with soft colors and indistinct shapes, creating a professional and modern atmosphere.

# **An increased whistleblowing experience but room for improvement?**

There has recently been an increase in employee involvement in whistleblowing but more could still be done to improve whistleblowing culture, according to a global survey by Freshfields Bruckhaus Deringer.<sup>2</sup> Freshfields commissioned a similar whistleblowing survey in 2014.

<sup>2</sup> A survey of 2,500 business managers across Germany, France, Hong Kong, the UK and the US conducted by Censuswide in September 2017.

# Survey results

Almost half of managers polled (47 per cent) said that they had been involved in whistleblowing – whether as the whistleblower, by witnessing a colleague whistleblowing or as the manager to whom the wrongdoing was reported – up from 34 per cent in 2014. The increase is most stark in Germany where there has been an increase in whistleblowing involvement from 29 to 54 per cent. The only country in which there has been a reduction in involvement is Hong Kong (from 59 to 48 per cent). The IT and telecoms sector reported by far the highest involvement, with 63 per cent of managers saying that they had been involved in whistleblowing, up from 37 per cent in 2014.

By far the biggest triggers for whistleblowing amongst the polled managers were if they suspected that a criminal offence was being committed (57 per cent) or if someone's health and safety were in danger (53 per cent). When asked what were currently considered to be issues for their organisation, concerns about cyber security came

top of the risk agenda, with 44 per cent of managers reporting that this was considered an issue (up from 35 per cent in 2014).

Whilst whistleblowing is therefore becoming more the 'norm', it is still the case that a significant proportion of managers polled think employees believe that blowing the whistle would have a negative impact on them.

Whilst 2 in 5 respondents said they thought the average employee would expect senior management to support or encourage them if they blew the whistle, almost 1 in 5 (18 per cent) thought they would expect to be treated less favourably – by being denied a bonus or a promotion – and 1 in 9 (11 per cent) thought they would expect senior management to look for ways to terminate their employment. Over half (55 per cent) of respondents thought that concerns about harm to reputation and career prospects would prevent a whistleblower from raising concerns internally within their organisation.



**47%**

of managers polled had been involved in whistleblowing

Up from  
**34%**  
in 2014



Highest involvement reported in the IT and telecoms sector



**But despite this increase, many still have concerns**

**Almost 1 in 5**



respondents thought the average employee would expect to be treated less favourably if they blew the whistle

**55%**

**Over half**

of respondents thought that concerns about reputation and career prospects would prevent whistleblowing within their organisation

# Survey results

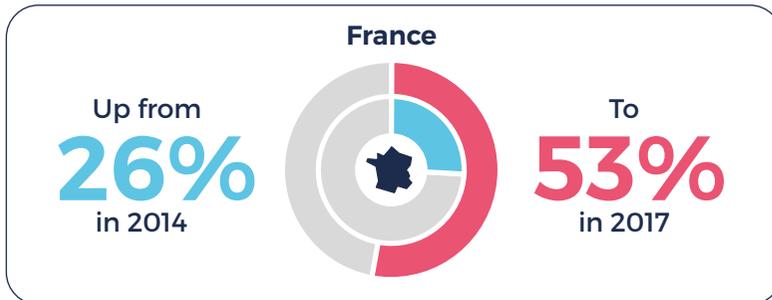
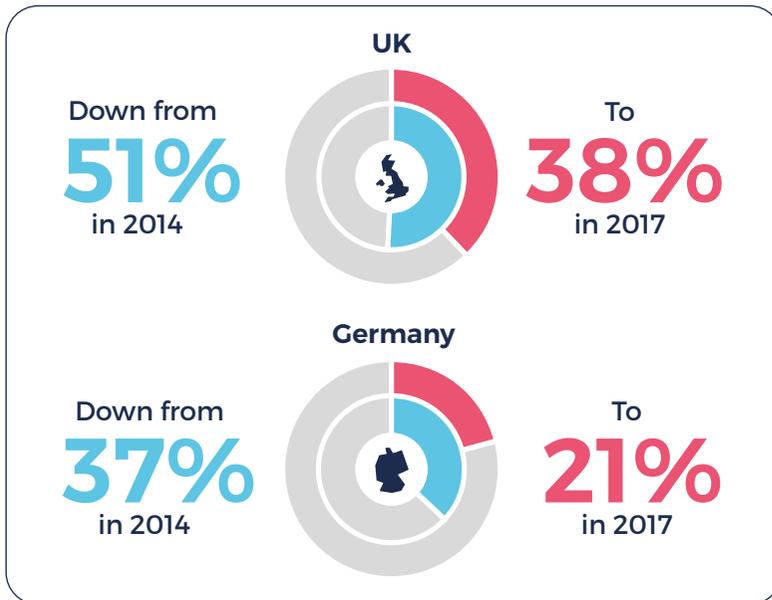
Although, overall, the perception of senior management support has improved slightly since 2014, the position in the countries polled differs significantly.

In some countries, there has been a real drop in the perceived level of senior management support since 2014 – in the UK from 51 to 38 per cent, and in Germany from 37 to 21 per cent.

In contrast, in France there has been a remarkable change in attitude – the proportion of respondents who thought the average employee would expect senior management to support or encourage them if they blew the whistle has increased to 53 per cent from 26 per cent in 2014.

‘The attitude in France towards whistleblowing has changed considerably in the last couple of years,’ says Gwen Senlanne, Head of Freshfields’ People and Reward team in Paris. ‘Historically, there has been very little support in France for whistleblowing – the idea of reporting on your colleagues was seen as wrong. The new whistleblowing law, Sapin II, is changing attitudes. By 1 January 2018 all French employers with a headcount of at least 50 will be required to have a whistleblowing procedure in place.’

## Perceived level of senior management support



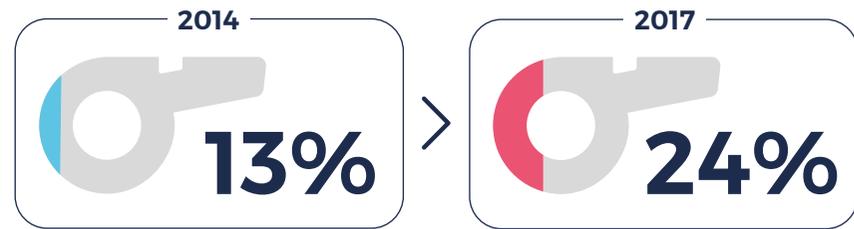
# Survey results

While the perception of senior management support varies from country to country, there has been a generally positive development in how organisations encourage whistleblowing:

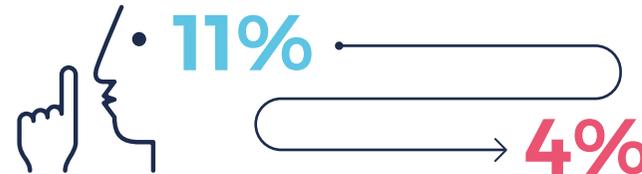
- 24 per cent of those polled said their organisation actively encourages whistleblowing (up from 13 per cent in 2014); and
- there has been a significant drop in the number of respondents who said their organisation actively discourages whistleblowing (from 11 per cent in 2014 to 4 per cent in 2017).

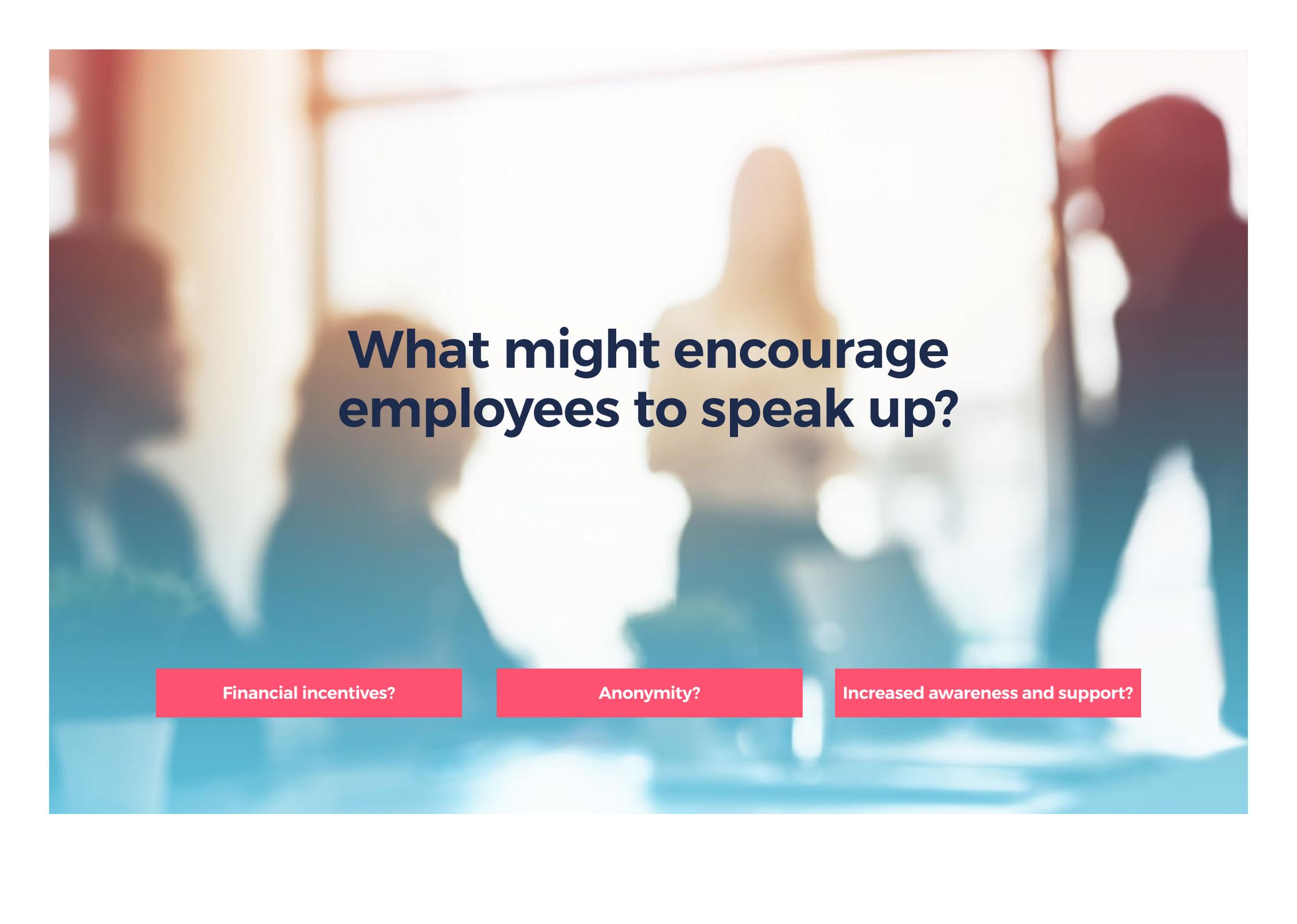
Whistleblowing culture within businesses seems to be moving in the right direction, but there is certainly room for improvement if businesses are to benefit fully from the early intervention opportunity offered by the whistleblower. Employees must be encouraged to believe that whistleblowing is something they can, and should, do when they see wrongdoing in the workplace. But what might encourage them to do this?

## Active encouragement of whistleblowing



## Significant drop in active discouragement of whistleblowing



A blurred background image showing several people in a meeting or office setting. The people are out of focus, and the lighting is warm, suggesting an indoor environment with large windows. The overall tone is professional and collaborative.

# What might encourage employees to speak up?

Financial incentives?

Anonymity?

Increased awareness and support?

# Financial incentives?

## Would financial incentives make it more likely that employees would disclose wrongdoing?

US government agencies certainly think so. Whistleblowing programmes set up by the SEC, CFTC and IRS have paid out multimillion dollar rewards to whistleblowers in the last few years.

Would there be the appetite in other countries for a culture where whistleblowers are rewarded in financial terms? It seems unlikely. The EU Market Abuse Regulation (which came into force in July 2016) allows EU member states to offer financial incentives to certain whistleblowers – no member state has yet decided to use this power. The UK has already considered and rejected the idea of financial incentives for whistleblowing (except for cash awards for cartel whistleblowers). In Asia, Hong Kong and Singapore have done the same.

Other than in the US, there was a high degree of scepticism amongst respondents as to the impact of offering financial incentives. 2 in 5 (40 per cent) of those polled said they felt that financial incentives might encourage false claims, with almost 2 in 5 (36 per cent) believing they would erode trust within their organisation. In some countries, this scepticism has increased significantly since 2014 – in France there has been an increase of 11 per cent in respondents who felt that financial incentives might encourage false claims, in Hong Kong an increase of 20 per cent in respondents who thought that financial incentives would erode trust within their organisation, and in Germany an increase of 13 per cent in respondents who thought that financial incentives would encourage secrecy within their organisation.

### High degree of scepticism



### Significant increase in scepticism in some countries



# Financial incentives?

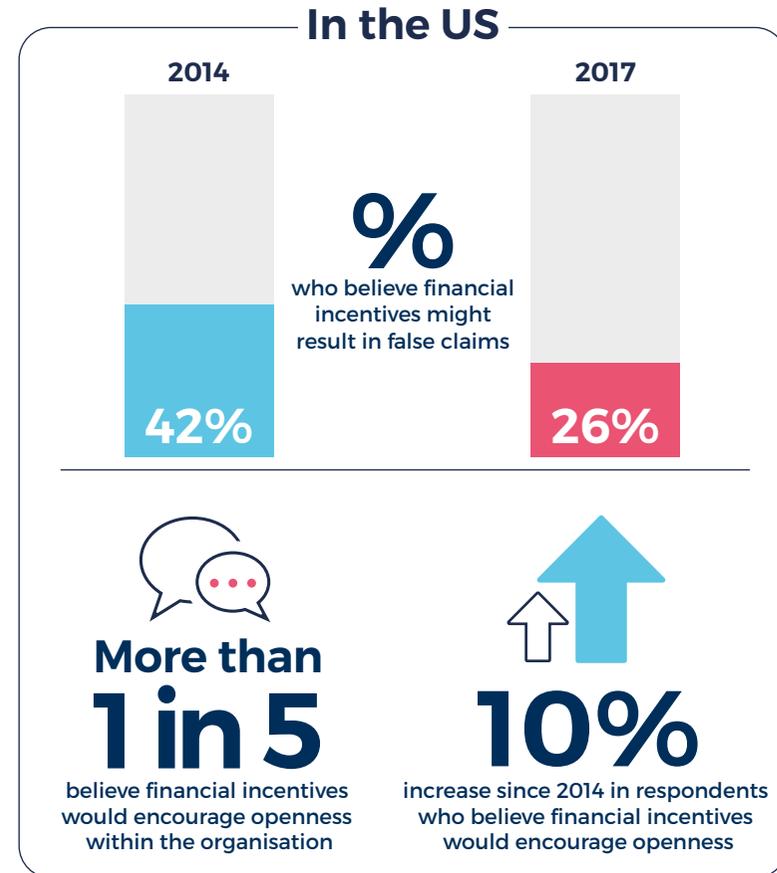
Unlike in the other countries polled, support for financial incentives has grown significantly in the US:

- there has been a significant drop in the number of US respondents who think that financial incentives might encourage false claims – from 42 per cent in 2014 to 26 per cent in 2017; and
- more than a fifth (21 per cent) of US respondents believe that financial incentives would encourage openness within the organisation – an increase of 10 per cent since 2014.

But has this resulted in whistleblowing being more common in the US than in other countries?

Not according to the survey results. In the US, 14 per cent of managers polled said they had blown the whistle (up 3 per cent from 2014) – this is the median of the countries polled and just below the mean proportion of 15 per cent. 25 per cent of managers in France stated that they had been whistleblowers, with Hong Kong reporting 17 per cent, the UK 10 per cent and Germany 9 per cent.

Since the proportion of whistleblowers is not remarkable in the US, it is difficult to draw any conclusion as to the extent to which the financial incentives available in the US operate to encourage whistleblowing there – without compelling evidence that they do so, it seems unlikely that other countries will adopt the US approach, at least in the short to medium term.



# Anonymity?

Would people be more likely to speak up if they could do so on a ‘no names’ basis and be certain their anonymity would be preserved?

Many whistleblowing regimes encourage businesses to respect the confidentiality of the disclosure and, in some cases, to preserve the anonymity of the whistleblower. Anonymity can create practical hurdles, however. ‘Sometimes identifying a whistleblower is necessary in order properly to investigate the concern raised,’ says Christopher Robinson, a Partner in Freshfields’ Global Investigations Group. ‘For example, if an employee of a bank anonymously reports that their head of desk is price-fixing, the bank needs to know who the desk head is, which will necessarily limit the pool of potential whistleblowers to a small group, most likely identifying the whistleblower.’

If the business has adequate technology in place, it may be possible for the business to communicate with the whistleblower on an ongoing basis whilst preserving anonymity but this is unlikely to be feasible for smaller organisations where the cost of such a system may be prohibitive. A compromise would be to agree with the whistleblower that their identity will be kept confidential within a small, trusted group who need to know for the purpose of the investigation. If that approach is not palatable to the whistleblower, an alternative is to ask the whistleblower to make contact again at an agreed time on an anonymous basis in case further information is needed and to update them.

These practical issues may be the reason why almost 3 in 5 of managers polled think it is important for their organisation to know the identity of a whistleblower. There may also be cultural reasons why anonymous whistleblowing is not supported – in France and Germany 20th century history has led many to be distrustful of systems that allow anonymous reporting on fellow citizens. 73 per cent of German respondents said that it was important to know the identity of the whistleblower – this is aligned with guidance from the German data protection authorities that whistleblowing systems should not encourage anonymous whistleblowing.



# Anonymity?

The position is similar in France, where the data privacy authority's standard conditions for authorising the operation of a whistleblowing procedure require that anonymous reports must not be encouraged and should be exceptional. There is also unease in Hong Kong where 70 per cent of respondents said it was important to know the identity of the whistleblower – there is a high level of suspicion about anonymous reporting in Asia, with many employers assuming that if a report is made anonymously the employee may have a personal axe to grind rather than be raising a real concern. Sector interest in the identity of the whistleblower varies considerably from legal (72 per cent), sales, media and marketing (70 per cent) and financial services (62 per cent) at the top end to education (41 per cent) at the bottom.

Another reason for the strong support for open whistleblowing might be that anonymous whistleblowing may provide a cloak for malicious whistleblowing. Aggrieved employees may raise spurious concerns about their colleagues or vent unfounded grievances, without fear of discovery. Almost half (46 per cent) of respondents said that one of the risks whistleblowing posed to their organisation was that employees might abuse the system and make false reports.

Notwithstanding their concerns over anonymity, over half (55 per cent) of respondents confirmed that they believed that whistleblowers might be prevented from raising concerns internally because of concerns that their report might not remain anonymous. In practice, if an individual whistleblower asks for their report to remain anonymous, it is generally best practice for businesses to respect that and to take steps to preserve that anonymity.



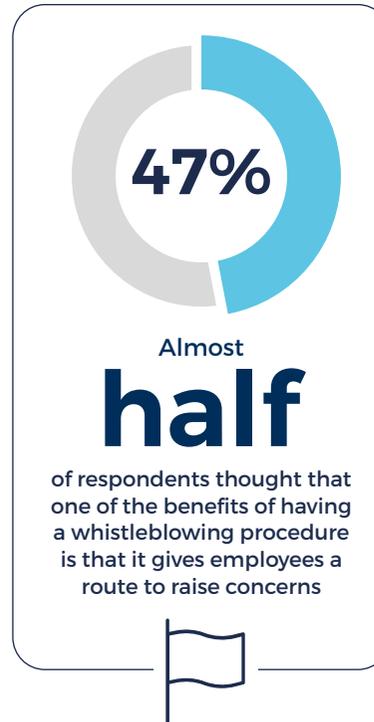
# Increased awareness and support?

A better whistleblowing culture, increased awareness of how to report and comfort that they will be supported by the business?

If a business is to ensure that concerns are raised early and with the right people within the business, it is essential to have a clear whistleblowing policy and process, a strong anti-retaliation message and a management team that encourages a culture of speaking up.

‘With an ever-increasing focus on holding companies responsible for misconduct coupled with an enhanced desire to pursue charges against individuals, an effective

whistleblowing process has never been a more valuable asset,’ says Adam Siegel, Co-head of Freshfields’ Global Investigations Group. ‘It can make the difference between learning about a problem when you still have the opportunity to address and remediate the situation and not discovering it until the regulator comes knocking on your door.’

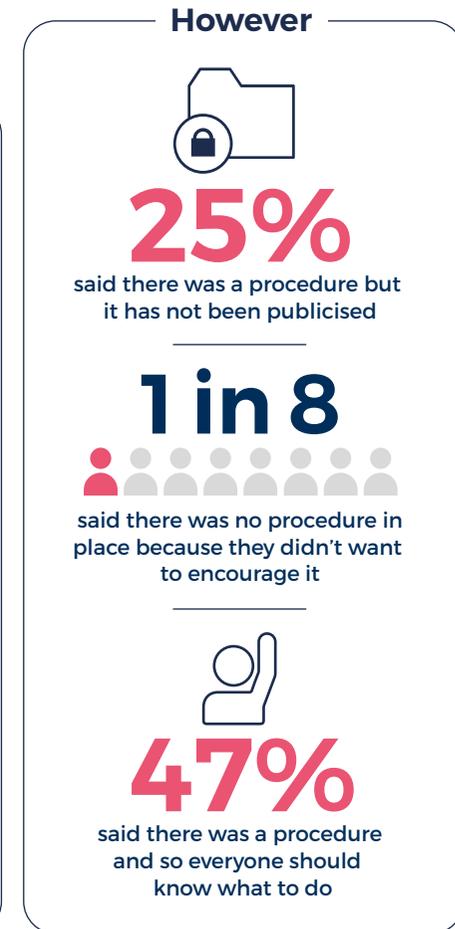
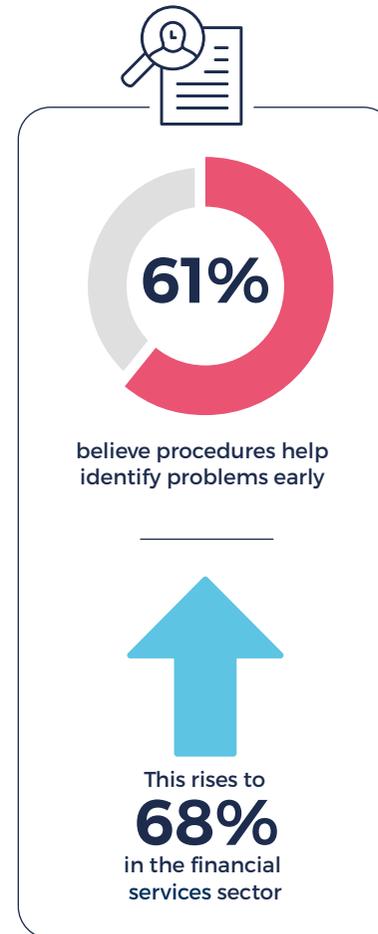


# Increased awareness and support?

The survey showed strong support for whistleblowing procedures – over 3 in 5 (61 per cent) respondents thought that a whistleblowing procedure helps identify possible problems at an early stage. This rises to almost 7 in 10 (68 per cent) respondents in the financial services sector. Almost half (47 per cent) of respondents thought that one of the benefits of having a whistleblowing procedure is that it gives employees a route to raise concerns, whilst a third (32 per cent) thought that having a whistleblowing procedure made it more likely that employees would report their concerns internally rather than externally.

Despite this strong support for whistleblowing procedures, a quarter of respondents said that, whilst there

was a whistleblowing procedure in place within their organisation, it had not been publicised. 1 in 8 (13 per cent) respondents said there was not a procedure in place because it was not something they wanted to encourage. And less than half (47 per cent) of respondents said that there was a whistleblowing procedure in place in their organisation and so everyone should know what to do. The survey showed a drop in publicity of whistleblowing procedures in the UK – from a position in 2014 where 60 per cent of UK respondents said that they had a procedure in place so everyone would know what to do to only 46 per cent saying the same in 2017.



# Increased awareness and support?

The survey also showed that whistleblowing is more common amongst the younger section of the workforce (those younger than 45) – with between 15 and 17 per cent of this group reporting that they had blown the whistle. This drops to 11 per cent amongst employees aged 45 and older. This difference could be the result of a generational change – younger employees may place more importance on corporate behaviour being consistent with their values instead of being driven by perceived corporate loyalty – if this is the case, this will drive whistleblowing as a longer term trend as this younger workforce ages. It could also point to there being inadequate engagement by the older section of the workforce with any whistleblowing policy messaging from the business – when a new or refreshed policy is released, it may be sensible for the business to ensure that the older members of its

workforce are fully educated on the importance of speaking up and how to do this.

So, how does a business go about improving its culture and setting up an effective whistleblowing framework? The first thing it will need to decide is its approach:

- (i) what process should be followed when a disclosure comes in;
- (ii) should motive be taken into account;
- (iii) will anonymous complaints be considered;
- (iv) will the policy be global or will a different approach be taken for each jurisdiction;
- (v) who in the business will be responsible for whistleblowing – at board level and below – and how will this be communicated to staff; and
- (vi) what education process needs to be put in place to ensure that all employees are made aware of the new or refreshed procedure.

The approach will need to reflect the legal and regulatory framework within which the business operates. When putting in place or refreshing a whistleblowing policy, the business should ideally look at it on a global basis – reflecting the global reach of most businesses, the way that regulators from different jurisdictions now co-operate and the extra-territorial reach of some laws (bribery, corruption and competition law).

Businesses should also consider whether to set up a whistleblowing hotline – local law requirements will govern whether there is a need to engage with a works council or comply with any data protection requirements, including any requirement as to whether complaints can be raised anonymously.

Businesses are increasingly aware of the significant risks – reputational, financial and regulatory – associated with mishandling a whistleblower. It is important that businesses review their processes and procedures to give them the best chance of reducing risk and benefiting from the upside of whistleblowing.

# Increased awareness and support?

Almost 22 per cent of respondents said that their whistleblowing procedures had been reviewed at least three years ago with 13 per cent saying they had never been reviewed. Just over 2 in 5 (41 per cent) respondents thought that a review would be prompted if a whistleblowing incident occurred within their business whilst almost 2 in 5 (36 per cent) thought this would be the case if there was a discovery of wrongdoing within the organisation.

When an issue has come to light and there has been a full-blown investigation into what happened, it can be very helpful to have a post-investigation review to see what went wrong and what lessons can be learned. 'We are helping businesses more and more by conducting culture and governance reviews following an investigation,' says Caroline Stroud, Global Head of People and Reward at Freshfields. 'It can be invaluable to take a proper look, with the benefit of hindsight,

at why the incident leading to the investigation came about, why the risk management process was compromised on that occasion, what lessons can be learned, and what could be improved for next time. This type of review can set the business on the right track for any future issues that might come along.'

A significant part of this culture and governance review involves looking at the whistleblowing culture and reporting process within the organisation – with the aim of ensuring that any future whistleblower feels confident about speaking up and that management will support them in doing so. Putting in place a strongly supportive whistleblowing culture will pay dividends when an issue is identified – finding out there is a problem early on will allow the business to be on the front foot when it comes to limiting reputational or financial damage.



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