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The 'whistleblowing' problem: A round-table discussion with John Armstrong (Aviva), Richard Fleck (Herbert Smith) and Alan Long (Safecall) held on Thursday, May 15, 2008, at Watermen's Hall, 18 St-Mary-at-Hill, London, EC3R 8EF, From 12:30–2:15pm.

Thanks to the media, the term "whistleblower" has taken on two very separate meanings that can lead to some damaging confusion, the first speaker said. Its primary and more correct meaning is someone within a company or organisation who wants to bring some wrongdoing to the notice of the authorities because they feel that is the right thing to do. The law has always protected these people from reprisal as long as they act without malice and in a proportionate way. This has now been enacted into the Public Information Disclosure Act and companies now have processes to deal with whistleblowers.

The second category covers people complicit in wrongdoing who have decided, perhaps because they are in too deep or realise they are about to be caught, to come clean and name names. Their motive is to avoid harsher punishment; not to do the right thing. It is a calculated move motivated by an assessment of the likelihood of being caught. This is increasingly being encouraged by the Office of Fair Trading, the European Commission, the US authorities and now the Financial Services Authority.

A recent example was Virgin Atlantic reporting a price-fixing cartel it had been part of to the OFT. The UK found itself in between the US, which was heavily pushing this type of exposure, and Europe where it was often against the law to breach confidences. Either way the growing trend towards plea-bargaining leads to questions about how this should be used. One member said calling this whistleblowing would discourage genuine ones from coming forward for fear of being thought complicit in what they were reporting.

The second speaker made clear that as a former policeman he had reservations over allowing companies that had been involved in a cartel for years to escape without penalty. One member highlighted a US device that allowed people who exposed public sector rackets to take a share of between 35 and 50 per cent of the savings. The second speaker said that had even greater reservations about that.

Instead he focused on how an external agency could act as a place for members of staff of a company to report their allegations or concerns. He likened it to Crimestoppers, where instead of the information going to the police it went back through the appropriate channels at the company. It enabled people who feel nervous about reporting it internally. One key feature is that people can report things anonymously. About 40% are on that basis, with the rest either on-the-record or ones that begin anonymously but become attributable. Anonymity is not ideal but a recent survey of fraud by Ernst & Young said it was a necessary part of companies' toolkits.

The external agency does not “chew over” the report – unless they have concerns that the caller is not telling the truth – but passes it to the company. Some members were concerned why the agency did not contact the FSA direct. The speaker said the agency was under no obligation to do that and other members pointed out that if a regulated company did anything other than to report the matter to the FSA it would be accused of covering it up. The system assumed companies would report it. One member said this highlighted the importance to the company of handling the information correctly when it came in.

The third speaker said that at his company an external agency had replaced an internal procedure that had attracted three calls a year. Now it gets one report a week. Of the 55 reported in 2007, 50 resulted in an investigation and criminal proceedings. Only three were anonymous. The increase report has allowed it to build a better pattern of frauds.

Many members were concerned about blurring the line between the innocent whistleblower and the plea-bargaining criminal – a strong theme of the roundtable. The first speaker concurred saying the plea-bargaining concept had to be promoted in a way that protected the key role that whistleblowing plays in corporate governance. External reporting agencies gave confidence to workers that there was a way of reporting their concerns in confidence, and that it would be treated in a way that was sympathetic to them. Ultimately that will be good for the companies that use them.