The winds of change?

Neil Swift considers the different approaches to whistleblowers taken by different enforcement agencies and asks whether more should be done to incentivise and reward UK whistleblowers

Different arms of UK law enforcement face near-identical challenges in discovering and prosecuting white-collar crimes, particularly those where there is no direct complainant. The evasion of taxes (investigated by HM Revenue and Customs [HMRC]), agreements not to compete (investigated by the Competition and Markets Authority [CMA]), and behaviour which amounts to an abuse or manipulation of the financial markets (investigated by the Financial Conduct Authority [FCA]) are, by their very nature, secretive and difficult to discover without extensive resources devoted to detection and investigation.

In order to conduct targeted investigations, based on intelligence of wrongdoing, the obvious source is reports from whistleblowers. However, different law enforcement agencies have taken different approaches to how, if at all, they incentivise and reward those who approach the relevant authorities with information.

Whistleblower protection

As it stands all whistleblowers who satisfy the criteria set out in the Public Interest Disclosure Act 1998 for making a 'protected disclosure' have a right not to be treated unfairly by their employer, including a right not to be dismissed because they have 'blown the whistle'. This provides those so treated with an uncapped claim for compensation against the former employer in an employment tribunal. But not all whistleblowers are employees, and not all those who are can afford to take on potentially lengthy and expensive legal proceedings, particularly with the attendant publicity and reputational risks.

So that leads to the question: *should we be doing more to incentivise and reward whistleblowers?* The starting point must be to consider at what law enforcement currently does in the UK.

There is a contrast in the respective policies adopted by, on the one hand, HMRC and the CMA, and on the other, the FCA. The contrast is greater still when one considers what other jurisdictions do.

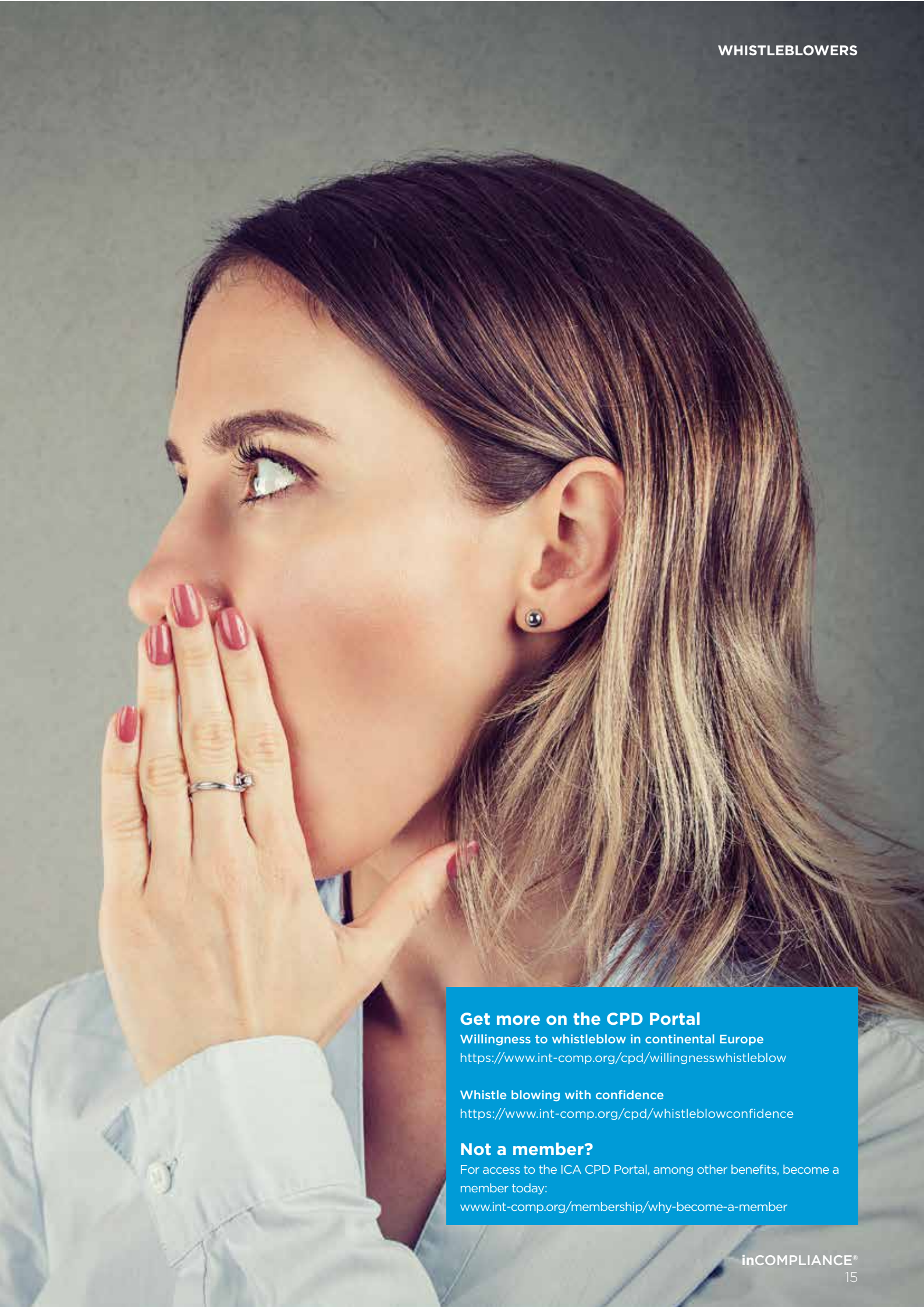
HMRC and the CMA

For many years HMRC has received tips from estranged spouses, disappointed paramours, business rivals, or simply concerned members of the public. That information has frequently been used to commence both criminal and civil investigations, resulting in the recovery of many millions of pounds of unpaid tax.

HMRC is prepared to pay for those tips. Its tax evasion hotline receives tens of thousands of calls a year. Although HMRC does not publish a breakdown of individual rewards, the majority of those who provide information receive very modest amounts – in many cases less than £100. The most recent overall figure for payment to informants was £343,000 in 2017/18, a figure that is more or less in line with previous years. However, in 2014/15 HMRC paid out a total of £605,000. The highest single reported amount was £100,000, paid in 2008 to an individual who provided details of bank accounts held by UK taxpayers in Liechtenstein.

Clearly, from HMRC's point of view, there are good policy reasons to incentivise and reward those who are prepared to bring tax delinquency to its attention. It is information that HMRC might not otherwise receive, it is paid only when tax is successfully recovered, and it is designed to be proportionate to the tax loss recovered. However, in light of the decision to pay a substantial reward to an individual who committed a substantial theft of data[1], it does raise significant ethical and legal concerns about the sort of behaviour that such reward schemes can appear to endorse.

The CMA (and its predecessor the Office of Fair Trading [OFT]) has a similar policy of rewarding those who provide inside information about the existence of a cartel (that is, an illegal agreement to fix prices and share markets). In exceptional circumstances the CMA can pay a reward of up to £100,000 for information. If satisfied that a reward is appropriate, the amount will be determined by the ►



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value of the information, the harm prevented, the effort invested in providing the information and the risks the informant has had to take. There is no publicly-available information about what payments the CMA (or the OFT) has made, but the policy for rewarding whistleblowers in this way is consistent with the leniency offered to companies who confess their participation in cartels: it is of huge assistance in the investigation of conduct that might otherwise go undiscovered.

The FCA

Notwithstanding the approach of these two law enforcement agencies, the FCA continues to shy away from incentivising those working in financial services to draw financial or regulatory misconduct to their attention.

In 2014, the FCA and the Prudential Regulation Authority (PRA) produced a joint report entitled *Financial Incentives for Whistleblowers*.[2] The report identified a number of concerns about the moral and other hazards posed by the provision of financial incentives for whistleblowers, including:

- **Malicious reporting** – there was concern that the uninformed opportunist might pass on speculative rumours leading to unfair reputational damage to innocent parties
- **Entrapment** – the availability of financial reward for information about wrongdoing could lead to the entrapment of others for financial reward
- **Conflicts of interest** – the evidence of a witness to wrongdoing who stood to gain financially from their evidence in a criminal prosecution could undermine the prosecution case
- **Inconsistency with regulatory expectations** – perhaps of most significance for the FCA and PRA is that both firms and individuals approved to carry out controlled functions are already subject to duties to deal with their regulators in an open and cooperative way, and to act with integrity. Rewarding whistleblowing is seen as undermining those regulatory obligations
- **Public perception** – the payment of substantial sums to high-income individuals for fulfilling what the FCA describes as a public duty could reinforce perceptions that the financial sector is at odds with the rest of society.

For these reasons, rather than concentrate on the 'carrot', the FCA has chosen to focus on the 'stick'. Whistleblowing protection forms a key part of the Senior Managers and Certification Regime (SM&CR), and all firms, regardless of whether they are presently subject to the SM&CR, are required to have adequate systems and controls in place to encourage and protect whistleblowers. That includes having a senior manager with the responsibility to act as a whistleblower's champion.

The US and the rest of the world

The FCA's position is to be contrasted further with the approach taken in the United States. As part of its reform of US securities laws, the US Federal Government included within the Dodd-Frank Act a raft of legislative provisions to enhance the abilities of federal securities regulators to target misconduct at financial services firms. As well as protections against retaliatory action by employers, the Dodd-Frank Act included a programme of rewards for whistleblowers whose tips led to successful enforcement action. Given the scale of penalties imposed following US regulatory enforcement action, the scale of those rewards can be mind-blowing: whistleblowers can receive 20-30% of a financial penalty, which often runs into the hundreds of millions of dollars. The largest figure awarded so far is $50m, awarded jointly to two individuals. In total, the Securities and Exchange Commission (SEC) has awarded more than $320m to 57 individuals since 2012.

A former SEC Director of Enforcement, speaking in 2016, has described the financial incentive scheme as 'transformative', enabling the SEC to "bring high quality enforcement cases quicker using fewer resources".[3] On the back of whistleblower reports, the SEC has apparently imposed sanctions in excess of $1bn.

Other jurisdictions have followed the US model. In Canada, the Ontario Securities Commission established its own financial incentives scheme in July 2016, albeit capping rewards at CAD 5m. South Korea operates a similar scheme.

Time for change?

When the FCA last looked at the issue, the provisions of the Dodd-Frank Act were in their infancy. The FCA's view, based on its consideration of the US system, was that there was at that time no empirical evidence of incentives leading to an increase in the number or quality of disclosures received. Dodd-Frank awards were only made when the information from a whistleblower led directly to enforcement action and financial penalty. The FCA took the view that most disclosures made to it lead to supervisory rather than enforcement outcomes.

Perhaps now would be the right time to look at the question again. Notwithstanding their regulatory obligations, many in financial services risk putting their career and future earning potential in jeopardy by blowing the whistle. The burden of providing substantial assistance to not just one but often multiple law enforcement agencies in different jurisdictions, and giving evidence against former colleagues in court, is not a light one. There is a very real risk that those who blow the whistle will never work again in their chosen field. There is clear evidence that incentivising whistleblowers works. It may be unpalatable, but the question is whether the public would consider rewarding whistleblowers an acceptable price to pay for holding more financial services businesses to account for wrongdoing.

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1. https://www.theguardian.com/money/2008/feb/25/tax.economy
2. https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf
3. https://www.sec.gov/news/pressrelease/2016-173.html