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Technical Paper

Protection of Whistleblowers

Amendments to the Georgian Law on Conflict of Interest and Corruption in Public Service

prepared by

Tilman Hoppe, Project Long-Term Adviser

with input from Valts Kalniņš, Council of Europe Expert

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For any additional information please contact:

Economic Crime Cooperation Unit
Action against Crime Department
DG I - Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex
Tel +33 3 90 21 4214/Fax +33 3 90 21 5650
Email: Natia.JGENTI@coe.int
Web: www.coe.int/eap-corruption

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1 SUMMARY

This Technical Paper is the result of a desk review of legislation and a working meeting in Tbilisi on 26 September 2013 at the Ministry of Justice to discuss the draft law.

Following recommendations by GRECO, Georgia introduced amendments further regulating protection of whistleblowers in 2009 into the Law on Public Service and into the Law on Conflicts of Interest. With regard to the European Commission's "Action Plan on Visa Liberalisation with Georgia" of February 2013, Georgia has drafted further amendments to the Law on Conflicts of Interest.

The draft law significantly broadens the scope of whistleblowing and protection from retaliation against it. Besides some more technical aspects (for details see below at Chapter 4), the draft law would benefit from considering the following points:

- A clarification of the relation between whistleblowing to State and non-State stakeholders;
- A clarification of the extent to which employees of State-owned companies are included in the protection;
- Inclusion of incidents without (immediate) violation of any law (substantial and specific danger to public health or safety, gross waste of funds, etc.);
- Considering confidentiality as the standard case;
- Reviewing the timeframe of protection;
- Inclusion of breaching the confidentiality of the whistleblower's identity into the list of illegal actions;
- Protection of employees whom employers mistakenly believe to be whistleblowers;
- Leaving out or defining more concretely the concept of a "bad faith" whistleblower;
- Ensuring availability of other legal remedies;
- Clarifying the relation of whistleblower protection and administrative or criminal liability for information disclosure;
- Limiting "liability" of whistleblowers to cases of qualified negligence;
- Applying specific procedures for the Ministry of Internal Affairs only insofar State secrets are concerned.

2 BACKGROUND

2.1 Recent reforms

Following recommendations by the Council of Europe Anti-Corruption Group (GRECO), Georgia made amendments to the Public Service Law[1] in 2009. The new Article 73-5 par. 4 obliges all public servants to report to their superior evidence or grounded suspicions of illegal activities of another public servant (or to a law enforcement authority, in case there is no superior). These amendments also provide that the superior in question will not reveal the entity of the whistleblower, will not damage his/her reputation, and will protect him/her. In addition, amendments to the Law on Conflicts of Interest[2] (Chapter V-1)[3] entered into force on 1 June 2009, which stipulate that whistleblowers reporting illegal activities (or conduct contrary to that which is required of public employees) in good faith are not to be discriminated against, intimidated, threatened and may not be dismissed or temporarily discharged of their duties for the duration of the investigation. Furthermore, no disciplinary, civil, administrative or criminal proceedings may be instigated against whistleblowers (unless the public institution can prove that there is no relation to the act of whistle blowing). In 2011, GRECO has assessed these amendments as satisfactory.[4]

With regard to the European Commission's "Action Plan on Visa Liberalisation with Georgia" of February 2013, Georgia has drafted further amendments to the Law on Conflicts of Interest. The amendments would replace the existing Chapter V-1 on whistleblowing. This Technical Paper assesses whether the amendments implement good international practices.

The assessment is based on the English translation of the amendments as provided for by the Ministry of Justice of Georgia. During a meeting on 26 September 2013 in Tbilisi, a representative of the Ministry of Justice provided information on the ratio of each draft amendment.

2.2 International standards

The Council of Europe Civil Law Convention on Corruption of 4 June 1999 foresees in its Article 9:

> "appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities".

The equivalent provision in the United Nations Convention against Corruption (UNCAC) is Article 33 "Protection of reporting persons":

> "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the

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[1] Available in English at: http://www.csb.gov.ge/en/useful-links/legislative-acts.

[2] Available in English at: http://www.csb.gov.ge/en/useful-links/legislative-acts.

[3] The original is "Chapter V[1]"; however, in order to avoid confusion with footnotes, all Chapters and Articles with a similar number are shown as "Chapter V-1".

[4] Second Evaluation Round, Addendum to the Compliance Report on Georgia, 27 May 2011, Greco RC-II (2008) 9E, par. 23 f., www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)9_Add_Georgia_EN.pdf.

> competent authorities any facts concerning offences established in accordance with this Convention."

Within the limited scope of international bribery, the Council of the OECD has issued the following "Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions", of which No. IX iii echoes the above Conventions:

> "Member countries should ensure that [...] appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions."[5]

In addition, the G20 Leaders, the OECD Anti-Corruption Working Group, and the OECD Secretary-General have issued the "G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers".[6]

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[5] Adopted by the Council on 26 November 2009, www.oecd.org/dataoecd/11/40/44176910.pdf.

[6] Of 2011, www.oecd.org/dataoecd/42/43/48972967.pdf.

3 ASSESSMENT

The following boxes show the planned amendments with comments provided for each paragraph.

3.1 Article 20-1

Article 20[1]
The terms used in this chapter shall have the following meanings:
a) Whistleblowing – to inform an application reviewing body, police, public defender, civil society or mass media, by the civil servant or former civil servant (whistleblower) about the infractions of the law or if applicable, rules of Code of Ethics by the civil servant (exposed), which caused or may cause harm to public interests or reputation of public institutions.
b) Anonymous Whistleblowing – whistleblowing, where the whistleblower is not identified.
c) Application reviewing body – Structural subdivision of the corresponding public institution, which performs the control, audit and work inspection.
d) Retaliatory measures – Disciplinary sanctions provided in the Article 79 of the Law of Georgia on Civil Service, as well as to change the job of whistleblower without his contest, deterioration in the terms of the conditions of contract or any other action, that caused or may cause a restriction of his or her job duties /or a deterioration of working conditions;

Article 20-1 a) defines whistleblowing and notably includes informing of non-State stakeholders such as media, which constitutes a broad scope of protection. In this context one might ask the question what “civil society” is, as in the end, every citizen including family members of the civil servant or other civil servants are citizens and in that sense “civil society”. Civil society might be understood as organisations representing different interests of civil society, may they be mainstream interests or not. In any case, the question is whether whistleblowing to the media and “civil society” is an option available at any time or whether this draft law intends to make this a “last resort” option (see below at Chapter 3.5). In this context the question arises, whether non-State actors such as the media would or should also be bound by some obligation to protect the whistleblower (at least not to disclose his/her identity). At least in the case of legal entities (media companies, NGO-associations, etc.) this would seem feasible.

The Law on Conflicts of Interest applies only to civil servants, which raises the question about the protection of public employees not enjoying the status of a civil servant. However, according to Article 3 and 4 of the Public Service Law, all public employees are civil servants. As for employees of State-owned companies,[7] it seems questionable whether the following list as defined in Article 2-2 of the Law on Conflicts of Interest is broad enough for the purpose of whistleblowing:

1. For the purposes of this law, the institutions equalised with the public institutions are the following entities:
a) Independent national regulatory organs:
b) Non-commercial legal entities - foundations and the legal entities of public law, which:
b.a) which are entrusted with important governmental or other public authorities;
b.b) whose activities are subject to governmental control;
b.c) whose source of income is established by the law;

[7] See G20/OECD (above note 6) p. 36.

b.d) entities which dispose public property;
2. The list of the institutions stated in the paragraph b of present Article, is determined and renewed by the Government of Georgia annually.

This could for example concern State-owned hospitals operating for profit, as was the case in a decision by the European Court of Human Rights concerning whistleblowing.[8]

Incidents are limited to violations of regulations. It seems to be worth to consider including also the following incidents which might not necessarily amount to a violation of law. As these incidents do not concern violations of law, whistleblowing protection might possibly be limited to reporting to State bodies:[9]

- a substantial and specific danger to public health or safety;
- gross mismanagement;
- a gross waste of funds;
- concealment of information tending to show that a report-worthy incident is being or is likely to be deliberately concealed.

As for retaliatory measures, Article 20-1 d) includes some examples and a general clause which should in the right interpretation cover all necessary incidents of retaliation ("or any other action, that caused or may cause a restriction of his or her job duties /or a deterioration of working conditions"). As a matter of clarification one should consider to explicitly include "protection from failure to take personnel actions, such as selection, reinstatement, appointment, or promotion".[10] Protection from harassment, stigmatisation, threats, and any other such forms of retaliatory action are included in Article 20-4 par. 1.

3.2 Article 20-2 and 20-3

Article 20^{2}
1. *Whistleblowing must be made in good faith and should serve the detection of violation of the law or rules of ethics, prevention or suppression, and/or protection of the public interests.*
2. *Whistleblowing shall be deemed to be made in good faith, until the contrary is proved.*

The reversal of burden of proof of par. 2 goes to a higher standard than is currently internationally known, according to which such reversal is only recommended for retaliatory actions, but not for the good faith itself.[11] It is a very useful feature though and it is hence noteworthy it is not listed in the G20-recommendation.

Article 20^{3}
1. *Whistleblowing may be made in writing and verbally, electronically, by phone, by fax, or by any other means.*

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[8] ECtHR, Heinisch v. Germany, application no. 28274/08, 21 July 2011, when a nurse working for a State-owned corporation was dismissed after filing a criminal complaint against her employer for its knowingly failure to provide the high quality care promised in its advertisement putting the patients at risk.
[9] See G20/OECD (above note 6), Guiding principle 2, p. 30.
[10] See G20/OECD (above note 6) Guiding principle 3, p. 31.
[11] See G20/OECD (above note 6) Guiding principle 3, p. 31.

> 2. *Whistleblowing may be made anonymously.*
> 3. *On the request of the whistleblower, the application reviewing body shall keep the whistleblower's identity confidential.*

The broad scope of means for whistleblowing and the availability of anonymous and confidential reporting implement international standards.[12] Par. 3 provides confidentiality only upon request of the whistleblower. Since whistleblowers may not always be fully knowledgeable of their rights, can be under stress and unable to assess all of the consequences, a stronger protection would be to impose confidentiality unless the whistleblower gives express permission for disclosure. Moreover it is unclear whether confidentiality is guaranteed also for whistleblowers who report to other entities than "application reviewing bodies"; at least the legislation governing police and the public defender should contain the necessary provisions ensuring confidentiality.

A possible alternative wording of Article 20-3, par. 3 could be: "A recipient of information mentioned in lit. a) of Article 20-1 shall keep the whistleblower's identity confidential unless the whistleblower provides express permission for disclosure." It should be noted that under this formula, other state bodies and also the media and civil society would be included.

3.3 Article 20-4

> *Article 20[4]*
> 1. *It is prohibited to intimidate, oppress, coerce, humiliate, peruse, to cause moral or material damage, to use of violence or threat of violence, discriminatory, or any other illegal act with regard to the whistleblowing incident against whistleblower or his/her close relative.*
> 2. *The whistleblower may not be subject to administrative procedures, civil action, prosecution, retaliatory measures or be held responsible otherwise for the circumstances related to the acts of the whistleblowing, until the application reviewing body will make a decision on the facts of whistleblowing.*
> 3. *The disciplinary, civil, administrative and criminal procedures shall be suspended if such takes place unless there exist one of the following circumstances:*
> a) *Disciplinary, civil, administrative and criminal procedures are not related to the whistleblowing;*
> b) *The purpose of enjoying the protection guaranteed by this article is aimed to infringe the State sovereignty and public order, to overthrow of the constitutional order, to kindle ethnical and religious discord.*
> 4. *During disciplinary, civil, administrative and criminal procedures or implementation of the retaliatory measures against a whistleblower, application reviewing body shall prove that, the fact of whistleblowing is not a reason for using those measures and there is a legal base foreseen in Georgian Legislation for liability.*
> 5. *Protection provided by this article is being monitored by head of appropriate public institution.*
> 6. *During any stage of the proceedings, when the whistleblower's, plaintiff's or witness' or their close relative's life, health or property is under danger because of their participation in the case, the whistleblower, his/her close relative, the plaintiff, the witness may address to the Prosecutor's Office of Georgia according to the special measures of the protection, which are set forth in the Georgian Code of Criminal Procedures.*

[12] See G20/OECD (above note 6) Guiding principle 2, p. 31.

7. *In case of violation of the requirements of this Article by the Application Reviewing Body or appropriate public institution, the whistleblower is entitled to appeal in higher administrative authority, as well as in the court with regard to the order, instruction, decision, or action in accordance with the rules stipulated in the Law of Georgia on Civil Service, Chapter XIV.*

Article 20-4 par. 1 goes beyond Article 20-1 lit. d) insofar it provides protection against certain types of retaliation not covered by Article 20-1 par. 1. The difference between the two seems to be that actions of Article 20-1 par. 1 would be legal if not retaliatory, whereas the actions of Article 20-4 par. 1 will always be illegal, even if not retaliatory. Article 20-4 par. 1 hence so far probably has a purely declaratory function. It seems worthwhile though to include the breach of confidentiality (Article 20-3 par. 3) into the list of illegal actions ("or to break the confidentiality granted under Article 20-3 par. 3").

By following just the wording of the law, it logically follows from par. 2 and par. 4 that retaliatory measures can be legitimate under certain conditions. Although this is clearly not the case according to the ratio of the law, par. 2 literarily states that it is possible to take retaliatory measures against the whistleblower after the application review body has made its decision. It is recommended to clarify the wording to ensure that retaliatory measures are in fact never allowed (as retaliation), whereas such measures are allowed, if not retaliatory.

Close relatives are defined in Article 4 b) as "a member of a person's family, straight blood relative in ascending and descending line, stepchild, sister and brother, also stepchildren of parents and child."

There are two scenarios that are worth considering in this context:

- After an anonymous whistleblowing in a small unit, the employer might mistakenly assume that an "innocent" official of the same unit is behind the whistleblowing, because this official has indicated some complaints already in the past.
- A potential (anonymous) whistleblower in a small unit will not come forward because he knows that one of his/her colleagues would be perceived to be behind the whistleblowing, for example because of specific knowledge

In view of both scenarios, one should include "protection of employees whom employers mistakenly believe to be whistleblowers".[13]

Article 20-4 par. 3 refers only to procedures already ongoing at the moment of the whistleblowing (in the English translation the word "ongoing" is omitted).

Article 20-4 par. 3 b) describes whistleblowers who are in bad faith. The current version of this Article (No. 20-3 par. 3 in the version still in force) additionally limits whistleblower protection if it "is necessary in the democratic society for the interests of justice, protection of the state, commercial and personal information."

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[13] See G20/OECD (above note 6) Guiding principle 3, p. 31; similarly, Council of Europe, Opinion on Draft Law "On Amendments to the Law of Ukraine "On the Principles of Prevention and Counteraction to Corruption" (drafted by Tilman Hoppe, reviewed by Valts Kalniņš), Strasbourg, 12 December 2012, ECCU-BO-UA-1/2012, page 17.

The wording overlaps to a large extent with wording of the European Convention of Human Rights. The remaining description uses similarly broad language:

No protection if the whistleblower aims *"to infringe the State sovereignty and public order, to overthrow of the constitutional order, to kindle ethnical and religious discord."*

Language of international conventions is by nature very broad, whereas the wording on a national level regulating a technical matter such as whistleblower protection in a more concrete way. For example, "public order" could point towards a lot of legitimate reasons, such as protection against high treason, but the term could also mean rather less legitimate incidents, such as the occurrence of spontaneous outrage and mass demonstrations with a high risk of violence – if the whistleblower would aim at such a public reaction, would this be per se bad faith? "Public order" might be a clear term with jurisprudence defining the term for the last years; similar might be possible for the other broadly addressed issues such as "kindling ethnical discord". However, in order to avoid (deterring) misinterpretation by public officials as the main users of this law, it seems recommendable to base the wording rather on concrete criminal offences or link it to chapters of the criminal code. Leaving technicalities aside, it is even not clear why the description of a bad faith whistleblower is necessary at all. Article 20-2 par. 1 already limits protection to whistleblowers in "good faith", thus being in line with international standards.[14] In addition, all described – rather heavy – incidents would most likely constitute crimes, or at least the substantial risk of committing a crime. So if whistleblowing by definition,

- reports a violation of law,
- has to be done in good faith,
- and would not constitute a criminal offence,

it is hard, if not impossible, to imagine a case where the whistleblower would still be in bad faith.

There is however another theoretical possibility of abusing whistleblower protection which should be given some attention. According to Article 20-4 par. 2 it is not possible to prosecute a whistleblower "until the application reviewing body will make a decision on the facts of whistleblowing". In some cases, the whistleblower could be a participant or contributor to a criminal violation of law within public administration. In such cases, investigative measures – which by law are under the auspices of the prosecution services – might not be possible against the (known) whistleblower. It would seem questionable if a whistleblower would report a violation of law in which he/she was involved, but would be able to claim immunity until the general inspection has rendered a decision – possibly only after weeks. Hence, an addition such as "except for investigative measures" might be considered.

Provisions of the law are somewhat vague as to how long after the provision of information the whistleblower is covered by protection. Protection under Article 20-4 par. 2 is clearly limited by the time the application review body makes its decision. It is not so clear regarding protection under par. 4, which is crucial as it places the burden of proof on the application review body. It is also unclear what institution shall prove the legitimacy of measures against the whistleblower if the body, which undertakes the measure, is another one than the application review body, which reviews the case brought up by the whistleblower. Since the exposed persons can be intent on revenge for a long time after the whistleblowing took place, a defined longer period of

[14] See above Chapter 2.2.

time should be considered, during which any actions against the whistleblower would require additional proof of legitimacy.

Article 20-4 par. 5 declares that “protection provided by this article is being **monitored** by head of appropriate public institution”. Making protection to be “**responsibility** of the head” appears to be the stronger and clearer choice of word than “monitored”. In addition, it seems to need clarification whether the head of the institution is to be informed about the (identity) of the whistleblower if the head is not a member of the “application reviewing body”, and in addition, how this would be handled if the whistleblower requests confidentiality.

Article 20-4 par. 7 refers to Chapter XIV, Article 127 par. 3: “A servant may request the court to declare an order, decree, decision or action partially or fully illegal.” However, the legal interest of a servant is not limited to having the decision of the application body declared illegal. There is often also an interest in compensation etc. in case of discrimination or other retaliation. Hence, it should be ensured that a servant has also the right to other forms of legal remedies. Even though there is no explicit indication that other remedies would be excluded, an addition, such as “notwithstanding the use of other legal remedies by the servant or his/her close relatives”, seems recommendable for the sake of clarity.

With regard to criminal law, the law needs to take a clear stance whether whistleblowing protected by the Law on Conflicts of Interest would exempt liability from administrative or criminal offences protecting confidentiality such as the following examples taken from the Criminal Code:

- Article 157 – Disclosure of Personal or Family Secrets
- Article 175 – Disclosure of Secret of Adoption
- Article 202 – Illegal Gathering or Spreading of Information Containing Commercial or Bank Secrets
- Article 202-1 – Disclosure of the fact on giving information about a deal – subject to mandatory monitoring

3.4 Article 20-5

Article 20[5]

1. *The whistleblower is protected under this law regardless the fact, that disclosed information turns out to be right, or wrong, except for the cases when:*

a) *The information received from a whistleblower is wrong in essence, which was known or should have been known by the whistleblower;*

b) *A whistleblower acts for his personal or other’s profit, unless where exists the case, when granting special reward is established by the law;*

c) *The circumstances of disclosure are publicly known, or they were known for Application Reviewing Body.*

2. *In case of anonymous whistleblowing, a whistleblower is not protected by this law.*

Article 20-5 par. 1 a) lifts protection in case of intent and negligent disregard of the facts. It is questionable whether any form of negligence should already take away the whistleblower protection. A civil servant reporting a violation will often be under stress and using information not fully under his control. At the same time, it is necessary that the civil servant is making a

basic effort of verifying the information. In this context, for example an addition as the following would provide more clarity: “should have been known by the whistleblower **had he made the necessary basic effort of verifying the information**”. Based on the “reasonable belief”-concept,[15] it would also be possible to word as follows: “The information received from a whistleblower is wrong in essence, which was known or **was unreasonably held as true** by the whistleblower”.

With regards to Article 20-5 par. 1 b) it should be noted that a whistleblower would always act at least a little also for his/her own profit, such as getting rid of unethical, unpleasant colleagues or superiors. The Georgian authorities assert that the Georgian original of the amendments and the legal understanding clearly describe only cases where the whistleblower “only” aims for his/her profit, and not for any public good as at least a welcomed side effect.

Lifting of protection when the object of disclosure was known for the application review body (Article 20-5 par. 1 c) does not seem justified because the whistleblower may not be able to know what information the body already has and there is no harm done if the same information is provided repeatedly. The lifting of protection would only be justified if the whistleblower knew that the application review body knew already of the object of disclosure (and thus would intentionally try to benefit from the protection without good cause). In this case, according to the Georgian authorities, the burden of proof would lie with the State under general rules of evidence.

Article 20-5 par. 2 should be clarified by an addition making sure an anonymous whistleblower enjoys protection should his/her identity become known after the reporting; this is obviously the ratio of the law, but an explicit clarification would probably be beneficial. Moreover it is known in practice that officials who seek revenge sometimes manage to correctly identify who blew the whistle even when the identity of the whistleblower has not been disclosed. Therefore the legislator should consider an explicit option for an anonymous whistleblower to report his/her identity *ex-post* so as to qualify for protection.

3.5 Articles 20-6 to 20-10

Article 20^{6}

1. *Application Reviewing Body should examine the case within the month from the submission of application as established under the legislation and its statute. In case of absence of such rules, the case should be examined according to formal administrative procedure provided in Georgian General Administrative Code.*
2. *If the Application Reviewing Body decides that the violation committed by the exposed person can serve as the bases for the imposition of civil, administrative or criminal responsibility, it should refer the case to the competent authorities.*

Article20^{7}

1. *If the application of whistleblowing concerns the exposure of the official of structural sub-division responsible for the internal control, audit or inspection in the State institution, the whistleblower may apply to the head of such structural subdivision.*

[15] See G20/OECD (above note 6) Guiding principle 2, p. 31.

2. *It the application of whistleblowing is addressed against the head of structural sub-division responsible for the internal control, audit or inspection in the State institution, he/she may apply to the head of State institution.*
3. *When the application of whistleblowing is addressed against the head of State institution, application may be submitted to the supervising authority of the head of State institution.*

Article 20[8]
The complaint about whistleblowing should not be examined by the person, who has been exposed or who personally, directly or indirectly is interested in the outcome of the case, or if there exists substantial objective circumstances which question the impartiality of this person.

Article 20[9]
Exposed person should be given information about the application against him/her and the evidence of the case should be able to respond to the complaint concerning his/her exposer no later than 5 days before the final judgment is rendered, and the position should of the exposed person be reflected in the judgment of the Application Reviewing Body.

Article 20[10]
1. *The Application Reviewing Body shall issue judgment in the written form. The judgment should contain the following:*

(a) The description of factual evidences of the complaint;
(b) The list and description of explored evidences;
(c) Position of exposed person;
(d) The substantiation of the judgment.

2. *The judgment shall not be based on the circumstances, facts, evidence and arguments, which were not judged substantially during the examination of the application;*
3. *The judgment of the Application Reviewing Body shall be notified to the whistleblower and exposed person within 15 working days after taking the decision. In case anonymous whistleblowing, the judgment shall be notified only to the exposed person.*
4. *The judgment about the complaint is an administrative act. The entry into force of the administrative act, as well as the execution and its appeal is regulated under Georgian Administrative Legislation.*

Articles 20-6 to 20-10 establish a clear procedure for whistleblowing, as is required by international standards. The threefold distinction of application review bodies in Article 20-7 of the draft law, replaces the twofold distinction in the current Article 20-8: in cases of whistleblowing concerning the exposure of officials working for the internal control, audit or inspection in the State institution, the whistleblower may apply to the head of such structural subdivision (previously: head of institution).

On a note of caution, the requirement of Article 20-9 to give information to the exposed person can damage possibilities of possible criminal investigations because the potential suspect would be warned and able to take steps to destroy evidence or suspend continuous criminal activity, which could otherwise be detected with the help of undercover investigative means. Addition of the following wording could be considered: “The exposed person shall not be notified if the object of disclosure contains *prima facie* evidence of a criminal offence. In such case, the application review body shall refer the case to the competent authorities.” In such cases, it

should be left up to the investigators or public prosecutors to decide whom and when to inform within the framework of the criminal procedure.

Attention should be paid to whether the procedure determined in Articles 20-6 to 20-10 is fully compatible with the procedure set in Article 73-5 par. 5 of the Law on Civil Service.

As mentioned earlier (see above at Chapter 3.1), the relation of whistleblowing to the application review body, to other State bodies, and to non-State stakeholders, is not fully clear at first sight. Would ongoing disciplinary proceedings be suspended in case of immediate whistleblowing to the media or "civil society"? Would the application review body apply the procedure described in above articles in such cases? Or would whistleblowing to – alternatively – the application review bodies, the police, or the public defender be the first step, and whistleblowing to the media or civil society conditional – for example – to a prior reporting to a State body, followed by a failure of this State body to react according to the law and within a certain time?
In this context one needs to also mention, that the law needs to take a clear stance, whether reporting of confidential data that constitutes a criminal offence (for example Article 367 Criminal Code – Disclosure of Confidentiality in the Legal Process) would be protected if it is reported to a non-State stakeholder.

3.6 Article 20-11

Article 20[11] Whistleblowing issues in the systems of the Ministry of Defence of Georgia and Ministry of Internal Affairs of Georgia are regulated by the special legislation.

Special regulations for the defence or foreign affairs sector are a common exception in the interest of State security and foreign relations.[16] Similar is true for certain departments of security that deal with the secret gathering and analysis of intelligence (intelligence services). For those sectors, special channels of reporting whistleblowing incidents are necessary to maintain confidentiality of State secrets. However, subjecting the whole Ministry of Internal Affairs to a special regulation seems unnecessary, when only a small part of officials that deal with State secrets is concerned.

[16] See G20/OECD (above note 6) Guiding principle 2, p. 30.

4 RECOMMENDATIONS

1. Article 20-1: It should be reviewed if the law is sufficiently clear on whether whistleblowing to the media and "civil society" is an option available at any time and how this would relate to the procedures involving the application review body. In this context the question arises, whether non-State actors such as the media would or should also be bound by some obligation to protect the whistleblower (at least not to disclose his/her identity). At least in the case of legal entities (media companies, NGO-associations, etc.) this would seem feasible. Article 20-1: It should be reviewed if – for the purpose of whistleblowing – the list of entities described in Article 2-2 is broad enough. One could consider including employees of State-owned companies, in this or a separate legislation.
2. Article 20-1 a): In addition to violation of rules, it seems beneficial to consider including also incidents such as a substantial and specific danger to public health or safety; gross mismanagement; a gross waste of funds; concealment of information tending to show that a report-worthy incident is being or is likely to be deliberately concealed as an object of whistleblowing.
3. Article 20-1 d): As a matter of clarification one should consider to explicitly include "protection from failure to take personnel actions, such as selection, reinstatement, appointment, or promotion".
4. Article 20-3 par. 3 – consider a formulation such as: "A recipient of information mentioned in lit. a) of Article 20-1 shall keep the whistleblower's identity confidential unless the whistleblower provides express permission for disclosure."
5. Article 20-4: Since the exposed persons can be intent on revenge for a long time after the whistleblowing took place, a legally set longer period of time should be considered, during which actions against the whistleblower would require additional proof of legitimacy.
6. Article 20-4 par. 1: It seems worthwhile to include the breach of confidentiality (Article 20-3 par. 3) into the list of illegal actions.
7. One should include "protection of employees whom employers mistakenly believe to be whistleblowers" (Article 20-4 par. 1 or another suitable place).
8. Article 20-4 par. 3 b): It seems recommendable to base the wording rather on concrete criminal offences or link it to chapters of the criminal code; in any case, the necessity of defining a bad faith whistleblower should be reviewed.
9. Article 20-4 par. 2: An addition such as "except for investigative measures" might be considered if a whistleblower would report a violation of law in which he/she was involved.
10. Article 20-4 par. 5: replacing "being **monitored** by" with "is **responsibility** of" appears to be the stronger and clearer choice of formulation. In addition, it seems to need clarification whether the head of the institution is to be informed about the (identity) of the whistleblower if the head is not a member of the "application reviewing body", and in addition, how this would be handled if the whistleblower requests confidentiality.

11 Article 20-4 par. 7: It should be ensured that a servant has also the right to other forms of legal remedies. An addition, such as "notwithstanding the use of other legal remedies by the servant or his/her close relatives", seems recommendable.

12 With regard to criminal law, the draft law needs to take a clear stance whether whistleblowing protected by the Law on Conflicts of Interest would exempt liability from criminal or administrative offences protecting confidentiality, and if so, from which, and whether there is a distinction if the reporting is made to State bodies or to a non-State stakeholder.

13 Article 20-5 par. 1 a): For example an addition as the following would provide more clarity: "should have been known by the whistleblower **had he made the necessary basic effort of verifying the information**". Based on the "reasonable belief"-concept, it would also be possible to word as follows: "The information received from a whistleblower is wrong in essence, which was known or **was unreasonably held as true** by the whistleblower"

14 Article 20-5 par. 1 c): Lifting of protection when the object of disclosure was known for the application review body does not seem justified because the whistleblower may not be able to know what information the body already has and there is no harm done if the same information is provided repeatedly. The lifting of protection would only be justified if the whistleblower knew that the application review body knew already of the object of disclosure (and thus would intentionally try to benefit from the protection without good cause). Article 20-5 par. 2 should be clarified by an addition making sure an anonymous whistleblower enjoys protection should his/her identity become known after the reporting; this is obviously the ratio of the law, but an explicit clarification would probably be beneficial. The legislator should consider an explicit procedure for an anonymous whistleblower to report his/her identity *ex-post* so as to qualify for protection.

15 Articles 20-6 to 20-10: Review whether the procedure determined in Articles 20-6 to 20-10 is fully compatible with the procedure set in Article 73-5 par.5 of the Law on Civil Service.

16 Article 20-9: Consider adding provisions, which would prevent the risk of damage to potential criminal investigation: "The exposed person shall not be notified if the object of disclosure contains *prima facie* evidence of a criminal offence. In such case, the application review body shall refer the case to the competent authorities."

17 Article 20-11: Subjecting the whole Ministry of Internal Affairs to a special regulation seems unnecessary, when only a small part of officials that deal with State secrets is concerned.