# WHISTLEBLOWER PROTECTION IN THE RUSSIAN FEDERATION


> Whistleblowing is in essence a voluntary act. Citizens are asked to take a personal risk by making a report, for the sake of the wider public interest. They need to have faith in the system if it is to work.

## Comparative Analysis and Recommendations

Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices (PRECOP-RF)

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**PRECOP-RF**

**Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices**

# Technical Paper on

# Protection of whistleblowers in CoE member states and proposals to regulate whistleblower protection in the Russian Federation

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**Abbreviations**

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|---|---|
| **ACFE** | The Association of Certified Fraud Examiners |
| **APKL** | Advice Centre for Whistleblowers in the Netherlands, [*Adviespunt Klokkenluiders*] |
| **BSI** | British Standards Institute |
| **CC** | Criminal Code |
| **CCP** | Code of Criminal Procedure |
| **CDCJ** | European Committee on Legal Cooperation |
| **CFTC** | Commodities and Futures Trading Commission |
| **CIC** | Confidential Integrity Counsellor |
| **CoE** | Council of Europe |
| **DM** | Divisional Manager |
| **ECtHR** | the European Court of Human Rights |
| **FAS** | Federal Antimonopoly Service (of the Russian Federation) |
| **FATF** | Financial Action Task Force |
| **G8** | Group of eight (leading industrialised countries) |
| **GPO** | Prosecutor General of the Russian Federation |
| **GRECO** | Group of States against corruption |
| **ILO** | International Labour Organisation |
| **OECD** | Organisation for Economic Cooperation and Development |
| **PACE** | Parliamentary Assembly of the Council of Europe |
| **PCaW** | Public Concern at Work |
| **PIDA** | UK's Public Interest Disclosure Act 1998 |
| **PwC** | PricewaterhouseCoopers |
| **RF** | The Russian Federation |
| **SEC** | Securities and Exchange Commission |
| **STAR** | Labour Foundation, [*Stichting van de Arbeid*] |
| **UN** | United Nations |
| **UNCAC** | United Nations Convention against Corruption |
| **UNODC** | United Nations Office on Drugs and Crime |

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# 1 EXECUTIVE SUMMARY

The Council of Europe recognises the value of whistleblowing in deterring and preventing wrongdoing, and strengthening democratic accountability and transparency. There is also a growing recognition by Member States of the value of the contribution of whistleblowers in uncovering hidden wrongdoing; this is backed by international research, which is outlined below in this paper.

Member States of the Council of Europe increasingly see the need for measures to support whistleblowers in making disclosures and to protect them from retaliation, and several have taken legislative action recently. The actions take a variety of approaches, reflecting the fact that the requirements of the relevant international measures are currently limited. International requirements and some positive examples of Member State responses are discussed in more detail below, thus providing guidance for action by other member states. A greater degree of harmonization can be expected in the future, following the adoption of the Recommendation[1] of the Committee of Ministers on the protection of whistleblowers.

The Recommendation provides a template against which future legislative proposals can be measured. It follows a recent general trend in Member State laws in seeking to cover those who report any kind of wrongdoing in the context of working relationships, in both the public and private sectors. In the terms of this project entrepreneurs may be found in small, medium and large enterprises. Therefore all examples of laws covering the private sector are relevant to them. In examining existing measures, however, there do appear to be some gaps relevant to the particular circumstances of smaller businesses – particularly where heads of businesses report corruption outside their own organisations. However some laws provide pointers towards different approaches which would enable their needs to be better catered for.

Following an analysis of the current situation in the Russian Federation, it can be concluded that there is no convincing system of whistleblower protection in the country. There are witness protection measures which cannot be equated with whistleblower protection; there are some legal provisions about whistleblowing, mainly in the public sector, but the system needs to be made more effective and needs to cover the private sector as well.

This paper sets out the broad lines of a general system of whistleblower protection that would be in accordance with international standards. The paper addresses the legal framework, and the institutional aspects. The institutional aspects present particular difficulties and we suggest one option would be to address them for entrepreneurs as a first step, giving a prime role to the Federal Business Ombudsman and his regional counterparts. We recommend that these issues be considered further by local stakeholders in the light of the specifics of the Russian situation. Once this has been done, we recommend that Russia should embark on a process of broad public consultation on proposals to introduce a whistleblowing system. A process for this is outlined in this paper.

Note: This technical paper provides updated information on country legislation and the newest development in the field of whistleblower protection. Its contents add to the previous analysis[2] prepared by the European Committee on Legal Cooperation (CDCJ).

This paper was reconsidered and revised in the light of discussion at a Conference in Moscow in April 2014.

[1] *CM/Rec(2014)7*, available at www.coe.int

[2] CDCJ updated the review on Whistleblower protection in Europe in April 2015, Council of Europe/CDCJ (2015), *Whistleblowing: update on Europe*, available at www.coe.int/

## 2 THE IMPORTANCE OF WHISTLEBLOWER PROTECTION IN THE AREA OF CORRUPTION

The Explanatory Memorandum to the Council of Europe's Civil Law Convention on Corruption states "In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong". This is a significant policy statement, which makes clear whistleblowing measures need to address both the public and private sectors. It was cited by the Grand Chamber of the European Court for Human Rights in the leading case of Guja v Moldova[3].

The policy considerations which underlie the provision of protection to whistleblowers – in all fields, not just corruption - have been set out in the Explanatory Memorandum to the Council of Europe's Recommendation on the Protection of Whistleblowers and there seems no need to repeat them here.

The value of whistleblowing is not just a matter of principle and opinion: there is extensive research to demonstrate that in practice it is the most common way in which fraud and corruption are exposed within organisations. In practice, inspection systems are not so effective in uncovering wrongdoing.

For the private sector, PricewaterhouseCoopers (PwC) conduct a Global Economic Crime Survey Global every two years. This is a survey of the chief executive officers, chief financial officers and responsible compliance executives from over 5000 companies in 40 countries. Their first survey, in 2005, found that 31% of corporate fraud was uncovered by "tip offs" and whistleblowing. They explain that "tip offs" are an informal blowing of the whistle, in the sense that the employee does not go through a formal whistleblower system. The survey concluded that internal "controls" designed to detect fraud were "not enough" and that whistleblowers needed to be encouraged to report wrongdoing and protected from retaliation.

PwC's survey in 2011[4] found that 11% of fraud was detected by internal "tip-off", while 7% was uncovered by external tip-off. Only 5% was detected by formal internal whistleblowing systems. Thus the total of whistleblowing was 23%, considerably lower than in 2005, but still significant.

The Association of Certified Fraud Examiners (ACFE) also studies this issue, and bases their work on reports from certified fraud examiners, whether in the public or private sectors. In their latest (2012) Report to the Nations on Occupational Fraud Abuse, which includes data from 96 countries, the ACFE found that 43% of all frauds were uncovered by whistleblowers. The AFCE strongly endorse corporate cultural changes designed to encourage whistleblowers.

In 2010 AFCE made a world-wide assessment which included a separate report on Europe. That also found that the most common source for information on fraud (40%) was from whistleblowing by employees[5]. That report makes clear that in many cases the terms of "fraud" and corruption are used interchangeably: it found the most common form of fraud was "asset misappropriation" and also says "corruption" is the most common form of fraud. The AFCE concluded that:

> "providing individuals a means to report suspicious activity is a critical part of an anti-fraud program… Management should actively encourage employees to report suspicious activity, as well as enact and emphasize an anti-retaliation policy".

As regards the public sector, a survey was made in Australia, on the basis of 23,177 questionnaires sent out to public servants in 118 agencies[6]. Those holding ethics-related positions in the various

[3] Presented in Appendix 2

[4] PwC, *Global Economic Crime Survey 2011*, available at www.pwc.com/ This includes the figures from previous years

[5] Association of Certified Fraud Examiners, *Report to the Nations, 2006 - 2012* under Key Findings, available at www.acfe.com/

[6] Brown, A.J. (2008, ed). *Whistleblowing in the Australian Public Sector. Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*. The Australian National University E Press.

public services reported that employee whistleblowing was the most effective method of exposing wrongdoing.

PwC issued in 2010 a report on fraud in the public sector based on replies from 170 government representatives in 35 countries. It found that 31% of fraud was detected by internal "tip-off", while 14% was uncovered by external tip-off, and 14% by accident. The report states that only 5% was detected by formal internal whistleblowing systems[7]. PwC said that internal audit and risk management in the public sector were less effective in detecting fraud than in the private sector. Thus the total uncovered by whistleblowing was 49%, significantly higher than for the private sector.

The differing figures do broadly support each other. If whistleblowing in the private sector accounts for about 23-30% of detections, and in the public sector about 49% (according to PwC), that would broadly support the median figure of about 40% which AFCE obtain from looking at both sectors.

There is research that suggests external whistleblowing (e.g. reporting suspected wrongdoing to a regulator or to the media) is more effective than internal whistleblowing (e.g. reporting the suspected wrongdoing to one's employer). One study showed that 44% of the external whistleblowers thought that their organization had changed its practices as a result of reporting the matter outside their organisation, while only 27% of the internal whistleblowers thought that their organization had changed its practices as a result of their report[8]. Another suggested external whistleblowing is more effective than internal because external whistleblowing often sparked investigations or other remedial actions by the organization[9].

[7] PricewaterhouseCoopers (PwC), 2010; *Fighting fraud in the public sector*. p.13
[8] Rothschild, J., & Miethe, T. D. (1999). *Whistleblower Disclosures and Management Retaliation. Work and Occupations*, 26(1), 107-128.
[9] Dworkin, T. M., & Baucus, M. S. (1998). *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, Journal of Business Ethics, 17(12), 1281-1298.

# 3 LEGAL FRAMEWORK FOR THE PROTECTION OF WHISTLEBLOWERS IN CORRUPTION CASES

## 3.1 International Instruments

The first relevant Convention was the UN ILO Convention[10] of 1982 which states that the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations, or recourse to competent administrative authorities, is not a valid reason for the termination of employment. A similar provision is found in the Appendix to the European Social Charter 1996[11].

The first Convention to recognise the special role of whistleblowing in anti-corruption, and to broaden the protection to cover any unjustified sanction, was the Council of Europe's Civil Law Convention on Corruption (1999), which states:

> "Each Party shall provide in its internal law for 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" (Article 9).

This Convention has been ratified by 35 states (the Russian Federation is yet to ratify). Article 9 is a rather loose provision as it leaves open the issue of what is "appropriate" protection. It has not led to widespread enactment of whistleblower laws.

There is also a relevant provision in the Council of Europe's Criminal Law Convention on Corruption (1999) - Article 22 - but as this provision covers all types of person who co-operate with investigators, it lacks the focus of Article 9. Neither of these provisions has been monitored by GRECO, the Council's anti-corruption monitoring body, though GRECO has considered whistleblowing to some extent as part of its review of codes of conduct for public officials, and that work has had some impact.

The United Nations included a relevant provision in their Convention Against Corruption (UNCAC) - Article 33, which states:

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

This article applies to any person, not just employees, but an obligation to "consider" is relatively weak. The implementation of UNCAC is currently being monitored by the UN Office on Drugs and Crime and Transparency International have published a review of the outcomes so far[12].

Until now the European Union has not shown any lead in relation to its existing members, though it does consistently raise whistleblowing as an issue for candidate countries. Recently the Commission has shown the beginnings of an interest by issuing new internal staff guidance,[13] though that remains excessively focused on internal reporting. It also commissioned Transparency International to carry out a study of EU Member State laws[14]. That study calls on the European Commission "to follow the

[10] UN ILO *convention* of 1982, art 5

[11] Under article 24-3-c.

[12] UNODC (2013), *Whistleblower Protection and the UNCAC*

[13] *SEC (2012) 679 final*, 6 December 2012

[14] European Commission (2013), *Whistleblowing in Europe: legal protections for whistleblowers in the EU*

call by the European Parliament in October 2013 to submit a legislative programme establishing an effective and comprehensive whistleblower protection programme in the public and private sectors."

### 3.1.1 The G20 principles

The G20 (the informal group of some countries with the largest economies), has been active on whistleblowing, at least on the theoretical side. In 2011 they published a study on law and practice in the G20 countries, including Russia. It concludes with a compendium of best practices and guiding principles on the protection of whistleblowers[15]. These guiding principles are very constructive, but though all G20 states committed themselves to implementing these principles in legislation by the end of 2012, it does not appear that they have fulfilled this pledge and there is no review mechanism to check this.

### 3.1.2 The Council of Europe Recommendation

In 2012 the Council of Europe commissioned a feasibility study[16] which concluded that the most practical and swiftest means of supplementing the existing measures within the Council of Europe would be a Recommendation. The result would be not uniformity, but guidance on minimum standards. This seems a reasonable approach on this issue, as each jurisdiction will need to take into account existing mechanisms - for example, what regulatory authorities may exist to receive whistleblowers' reports and whether a specialised tribunal is, or could be, available for hearing their cases. However the Recommendation should have the effect of putting a little flesh on the bones of existing international provisions.

Its principles set out some of the basic requirements of a good whistleblower law:

- to cover all individuals working in the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not (Principle 3);
- to also cover individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage (Principle 4);
- to permit a special scheme to apply to highly classified information. This refers to information only, so it does not permit categories of persons (such as security service personnel) to be subject to a modified scheme. Rather, it is the category of information that may be subject to a modified scheme. Security service personnel may have disclosures to make about issues that are not rightly secret (e.g. corruption in procurement) (Principle 5);
- to prevent an employer from being able to rely on an individual's legal or contractual obligations (e.g. confidentiality or loyalty) to prevent whistleblowing or penalise someone for having done so (Principle 11);
- to include disclosures to the public in the whistleblower protection framework (Principle 14);
- to require whistleblowers' reports to be investigated promptly (Principle 19);
- to ensure protection is not lost if the whistleblower's report is mistaken. All that is required is that "he or she had reasonable grounds to believe in its accuracy". There is no mention of "good faith", recognising that motivation is not important, as long as there is a public interest (Principle 22);
- to entitle whistleblowers to raise the fact that they made a disclosure in accordance with the national framework in civil, criminal or administrative proceedings (Principle 23);

[15] G20 Anti-Corruption Action Plan, *Protection of Whistleblowers study on Whistleblower Protection frameworks, Compendium of best practices and guiding principles for legislation*, available at www.oecd.org/

[16] Stephenson and Levi (2012), *The protection of whistleblowers – a feasibility study for Council of Europe*, CDCJ(2012)9FIN available at www.coe.int/

- to encourage employers to put in place internal reporting systems which then can be taken into consideration [by a court] when deciding on remedies where a whistleblower has made a disclosure to the public without resorting to it (Principle 24);
- to reverse the burden of proof, so that if a whistleblower can provide reasonable grounds to believe that a detriment was in retaliation for whistleblowing, it will be for the employer to show that the retaliation was not due to the whistleblowing (Principle 25);
- to provide that interim relief should be available pending the outcome of civil proceedings (Principle 26);
- to ensure that there are periodic reviews of the effectiveness of the framework by the national authorities (Principle 29).

## 3.2 National laws

Different approaches to whistleblower protection have been tried. Some are limited to the protection of employees in the public sector[17]. Some are limited to corruption cases[18]. None can claim to have achieved fully satisfactory results.

A survey of national laws in the Council of Europe Member States was made for the Parliamentary Assembly of the Council of Europe (PACE) with Pieter Omtzigt as Rapporteur in 2009[19]. That information was supplemented by the 2012 feasibility study. In 2013 there was a survey of all EU Member State laws by TI, as mentioned above in section 3.1.

The PACE 2009 Report identified the UK's Public Interest Disclosure Act 1998 (PIDA) as the model for Europe in this field. More recent work has called some aspects of PIDA into question, so it is worth examining the latest developments on that law here.

Since so much material is already available on existing approaches this report will otherwise deal only with those European countries where there is on-going action to tackle the subject in a meaningful way - Ireland, Serbia and the Netherlands. All of these new proposals would cover the private sector.

### 3.2.1 United Kingdom

#### *3.2.1.1 The Public Interest Disclosure Act*

The Public Interest Disclosure Act 1998 was created by parliament to protect whistleblowers from detrimental treatment or victimisation from their employers after they have made a qualifying disclosure. The Act provides a clear definition of the protected disclosures (see Box 1).

**Box: 1 United Kingdom's Public Interest Disclosure Act – Definition of the protected disclosures[20]**

43A Meaning of "protected disclosure".
In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable

[17] For example, the relevant Romanian law only applies to whistleblowers who are employed in the public sector – Art 3b of Law 571/2004.

[18] For example, in Slovenia, under the 2010 law on Integrity and Prevention of Corruption.

[19] Parliamentary Assembly of the Council of Europe (2009), *The Protection of Whistleblowers*, Rapporteur: Pieter Omtzigt (Netherlands), report of PACE Committee on Legal Affairs and Human Rights, available at http://assembly.coe.int/

[20] *UK Public Interest Disclosure Act 1998* available *at* www.legislation.gov.uk/

belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

#### *3.2.1.2 Protection provided to whistleblowers*

Prevention and detection of wrongdoing can be improved if those closest to the problem are able to report it, those working in or with an organisation. However, whistleblowing carries with it the risk of retaliation from the employer in various ways, be it by taking disciplinary actions, harassment in the workplace etc. For this reason whistleblowing legislation in jurisdictions where the risk of physical harm to whistleblowers is low and where there is trust and confidence in the judicial system, tends to focus on providing protection for the whistleblower's employee status.

**Box 2 - Right not to suffer detriment**[21]

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K".

#### *3.2.1.3 Analysis of the application of PIDA*

UK's Public Interest Disclosure Act 1998 (PIDA) has been adapted for use elsewhere (Japan, South Africa), and has had some success domestically, in that whistleblowers have brought cases and been compensated by employers, employers have learned to react better to whistleblowers, and there is greater public understanding and support for whistleblowing to protect the public interest. But the UK system remains flawed, in particular because no executive agency oversees it: this means that while there is in effect a dialogue between whistleblowers and employers under the supervision of the courts about the conduct of the employer vis-à-vis the whistleblower, the process does not address the

[21] *UK Public Interest Disclosure Act 1998* available at www.legislation.gov.uk/

underlying issue and so often it is not fixed. Equally problematic is the fact that whistleblowers who make out of court settlements, having suffered reprisals, may feel obliged by "gagging clauses" in their settlement not to pursue the issue further, even though PIDA makes such clauses invalid.

The undefined use of the term "good faith" also proved to be a problem, when the courts ruled that it allowed discussion of the whistleblower's motives. A report into a series of murders carried out by a doctor found that this ruling might have a chilling effect on whistleblowers[22]. Logically, motives should not matter as long as the whistleblower had reasonable grounds to believe in the accuracy of his disclosure. In 2013 the term was accordingly removed from the Act, and it is now irrelevant to whistleblower cases, except in the context of determining the amount of compensation. Compensation may be reduced if the whistleblower acted in bad faith.

PIDA has been in operation since 1999. In the absence of any prior official review, Public Concern at Work (PCaW), the NGO which drafted the law, established an independent Commission to consult widely and review law and practice. The resultant report, issued in November 2013[23], points the way for improving the overall system. It proposes a Code of Practice and means of strengthening the role of regulators.

### 3.2.2 Ireland

#### *3.2.2.1 The Protected Disclosures Act[24]*

In Ireland the 2012 report of the Mahon tribunal into scandals involving corrupt politicians led to proposals for a single national law, to replace sector-specific laws which had proved fragmented, created confusing standards of protection, and were insufficiently known to have any real effect. The Protected Disclosures Act is based on PIDA but goes beyond it in several respects:

- adding new issues going beyond illegal acts, notably, "gross mismanagement";
- providing that in proceedings involving an issue as to whether a disclosure is protected it shall be presumed, until the contrary is proved, that it is;
- introducing a new right not only for whistleblowers, but for another person who suffers detriment as a result of someone else's whistleblowing, to institute civil proceedings against the third party responsible for the detriment;
- requiring public bodies to establish procedures for dealing with protected disclosures made by workers who are or were employed by them;
- making special rules for those who have access to secret information relevant to the security of the State. It will limit the internal channels though which such disclosures can be made and also exclude any external public disclosures, while maintaining the key principle of access to an independent third party by providing for a new "Disclosures Recipient", a judge who will be appointed by the Prime Minister and report to him annually.

#### *3.2.2.2 Protection provided to whistleblowers by the Protected Disclosures Act*

The protection of whistleblowers has an important place in the Protected Disclosures Act as well. The Act introduces a set of provisions to regulate the protection of whistleblowers by ensuring that there are sufficient safeguards to protect the rights of the "workers" who have made a protected disclosure. Like PIDA, the legislation seeks overall to protect the whistleblower by putting an emphasis on the fact that disclosure rather than the whistleblower should be the focus of the attention. Unlike PIDA, it contains a specific provision on the protection of a whistleblowers' identity.

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[22] Shipman Inquiry, *Fifth Report* (Cm 6394, 2004)

[23] Public Concern at Work/PCAW(2013), *Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK*, (November 2013), available at www.pcaw.org.uk/

[24] The *Public Disclosures Act* came into operation on 15 July 2014

**Box 3 – Provisions regulating the protection of whistleblowers in the Protected Disclosures Bill of Ireland[25]**

Section 13
Tort action for suffering detriment because of making protected disclosure provides that where a third party causes a detriment to a worker who has made a protected disclosure the worker who has suffered the detriment has a right of action in tort against the person who causes the detriment. The term "detriment" includes coercion, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment), injury, damage or loss, and threat of reprisal.

Section 14
Immunity from civil liability for making protected disclosure provides that a person shall not be liable in damages, or subject to any other relief in civil proceedings, in respect of the making of a protected disclosure. The Defamation Act of 2009 is amended so as to confer qualified privilege on a protected disclosure.

Section 15
Making protected disclosure not to constitute criminal offence provides that in a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for the person to show that the disclosure is, or is reasonably believed by the person to be, a protected disclosure.

Section 16
Protection of identity of maker of protected disclosure provides that a person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred in the performance of that person's duties, shall take all reasonable steps to avoid disclosing to another person any information that might identify the person by whom the protected disclosure was made. A failure to comply is actionable by the person by whom the protected disclosure was made if that person suffers any loss. The requirement to protect the identity of the discloser is subject to the qualifications set out in subsection (2)

### 3.2.3 Serbia

#### *3.2.3.1 Law on whistleblower protection*

This Law regulates whistleblowing, whistleblowing procedure, rights of whistleblowers, obligations of the state authorities and other authorities and organizations in relation to whistleblowing, as well as other issues of importance for whistleblowing and protection of whistleblowers.

In Serbia, in recent years, the Information Commissioner became concerned about cases where whistleblowers uncovered wrongdoing, but lost their jobs. Such outcomes are patently unfair but also can have a chilling effect on anyone else who comes across wrongdoing in the course of their work, leading them to stay silent. The Information Commissioner started an inclusive process to draft a law to improve things, which the MOJ is shortly to present to the Parliament. The draft Law:

- covers a wide range of issues that represent a threat to the public interest;
- provides for the protection of the whistleblower's personal data, if he wishes;
- protects 'associated persons' if they suffer detriment as a result of whistleblowing;
- encourages internal disclosures, then disclosures to regulators, and protects public disclosures in exceptional circumstances;

[25] *Explanatory and Financial Memorandum*, issued by the Oireachtas relating to the Protected Disclosures Bill 2013, as Initiated, available at www.oireachtas.ie/; The Oireachtas has not as yet produced an Explanatory Memorandum for the Protected Disclosures Act 2014

- recognising the rights of others, it requires that if a whistleblower goes public he should comply with the presumption of innocence and the right to privacy;
- places requirements on regulators to act within a tight deadline and keep the whistleblower informed;
- recognising that regulators may fail to take action, it gives a special role to the Ombudsman, the Information Commissioner and the Anti-corruption Commission to assist whistleblowers, or associated persons, in bringing a case to a court;
- Provides a reverse burden of proof to assist the whistleblower in proving his case.

#### *3.2.3.2 Definitions in the Serbian legislation*

Article 2 of the Serbian law provides a detailed description of the terms used in the law and their meaning. The **"whistleblower"** is a natural person who, in terms of his working relationship; employment procedure; use of services rendered by public authorities, holders of public authorities or public services; business cooperation; ownership of shares in the company; discloses, in good faith, information about a threat to or violation of public interest in accordance with the Law; and **"an associated person"** is a person who makes probable that a damaging action has been undertaken against him, due to his connection with a whistleblower.

#### *3.2.3.3 Protection of whistleblowers foreseen under the draft law*

The Serbian legislation provides for the protection of whistleblowers and that of associated persons, if the latter makes probable that damaging action has been undertaken against them due to the connection with the whistleblower.

### 3.2.4 Netherlands

#### *3.2.4.1 Current legislation on whistleblower protection*

Legislation in the Netherlands is currently confined to public sector whistleblowers. They have internal and external reporting options:

a. Each public body has a Confidential Integrity Counsellor (CIC). If a concern is raised with the CIC, he/she is required to keep the identity of the whistleblower confidential, unless the whistleblower does not want that. This means that all communication back to the whistleblower will go through the CIC.
b. Any feedback to the whistleblower about the progress and findings of the investigations (this must happen within 12 weeks) must include further steps the whistleblower is able to make.

Regarding the external route:

a. Concerns can be raised with the Integrity Commission (independent but appointed by the Minister of internal affairs), if the findings of the internal investigation are not satisfactory, if it takes unreasonably long (+12 weeks), or if there are good reasons to do so. It is not stipulated what these good reasons should include.
b. The Integrity Commission must keep the identity of the whistleblower confidential, unless the whistleblower does not want that.
c. The Integrity Commission must investigate the concerns. Costs of the investigation will be charged to the organisation about which a concern is raised.
d. The Integrity Commission must provide, based on its investigation, an advice to correct malpractice to the body in charge of the organisation (about which the concern was raised).

#### *3.2.4.2 Other protections provided to whistleblowers*

At present, whistleblowing in the private sector is mainly regulated on a voluntary basis by the "Statement on dealing with suspected malpractices in companies". The latest version is dated 2010.

The statement is a product of STAR "Labour Foundation" [*Stichting van de Arbeid*] and thus supported by all national employers' and employees' organisations.

All whistleblowers, whether in the public or private sectors, may also seek advice from the *Adviespunt Klokkenluiders* (advice centre for whistleblowers) that was established in October 2012 (which is further described in section 4.1.2).

#### *3.2.4.3 New developments in Netherlands*

In the Netherlands a great deal of attention is being paid to the issue of whistleblowing. The latest development is that the House of Representatives has adopted a law on the "House for Whistleblowers". However, it is uncertain if the Senate will adopt this Law, because of a possible conflict with the Dutch Constitution: the question is if the Constitution allows expansion of the tasks of the National Ombudsman to the private sector (according to the law the House for Whistleblowers will be a department of the National Ombudsman). The House will take over the functions of the *Adviespunt Klokkenluiders*. The House of Whistleblowers will be able to carry out investigations into all types of case itself. For the first time in the Netherlands, a whistleblowing law would apply to the private sector.

However, social partners are criticizing the new law. The main worry is that in doing so it would undermine the work of specialist regulators. A model where the House oversees their work seems preferable to many.

### 3.2.5 Europe - overall

As things stand, no jurisdiction can claim to have a proved solution in place. What we see in Europe are a few countries that have made a serious attempt to tackle the issue after a national debate, with varying degrees of success, while others have not tackled the issue at all, or have made only token gestures, to "tick a box" for some international organisation or requirement. What is positive at present is the increasing recognition that while protecting whistleblowers is important, dealing with the issues that are raised by whistleblowers is essential. The role of regulators in ensuring that whistleblowing works in practice is an increasing and important focus.

### 3.2.6 International

It is much the same picture internationally, though there is an interesting model in South Korea, which since 2011 has covered both public and private sectors. It operates under the oversight of the Anti-Corruption and Civil Rights Commission, which combines the functions of an Anti-Corruption Commission with those of an Ombudsman, and which provides rewards, as well as protection where it is needed.

### 3.2.7 Other laws affecting the private sector

Specific whistleblower laws are not the whole picture. There are examples of other associated laws that encourage whistleblowing to protect against corrupt practices in the private sector, and which have international reach.

The UK Bribery Act 2010 (section 7) creates a new form of corporate liability for failing to prevent bribery, which applies to all companies wherever they are based or where they operate, providing only that they also operate in the UK. Statutory guidance under the Act makes it clear that implementing and promoting internal whistleblowing arrangements – which include access to advice – is part of a legitimate defence[26].

[26] Ministry of Justice (2011), *Guidance under section 9 of the Bribery Act*, available at www.justice.gov.uk/

The US Sarbanes-Oxley Act requires the audit committee of any company listed on the US Stock Exchange (which will include companies throughout the world) to establish a complaint notification, or whistleblower system, in order to facilitate the receipt, retention and investigation of complaints that cover accounting, internal accounting controls or auditing matters. Under Section 301, the audit committee is required to:

- Establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters. The system must be capable of receipt of complaints both from company personnel and third parties such as competitors, vendors, and consumers; and
- Maintain the anonymity of complaints made by company employees.

It should be noted that Section 301 confuses confidentiality and anonymity. Confidentiality is where the recipient of the disclosure of information knows who is making the disclosure and agrees not to share that information with anyone else. Anonymity, on the other hand, is where the recipient of the information does not know the identity of the individual(s) disclosing information. Anonymity can be problematic for both the individual and the recipient of information. For the individual it can be difficult for them to rely on legal protection due to causation issues. For the recipient it can be difficult for them to protect the individual, investigate the concern and provide feedback. Generally whistleblowing arrangements should encourage individuals to raise a concern openly and provide for confidential channels where the individual disclosing the information fears reprisal. Anonymity always exists as an option for an individual to raise a concern but it should not be promoted as it can be problematic for the individual and the recipient of the information. Promoting anonymity through "hotlines" or other systems has raised serious data protection concerns in France[27]. The EU's Data Protection Committee has stated: "Whistleblowing schemes should be built in such a way that they do not encourage anonymous reporting as the usual way to make a complaint"[28]. This advice was given in the context of implementing the European Data Protection Directive[29].

### 3.2.8 Regulations affecting entrepreneurs

The OED definition of an entrepreneur is "a person who sets up a business or businesses, taking on financial risks in the hope of profit." Entrepreneurs may thus be found in small, medium or large enterprises. In practice an entrepreneur will usually be employed by his own business, for example as chief executive. So he may well technically be an employee but in practice he is the boss, the employer. It is also possible that he may be self-employed or a sole trader. Whistleblower laws are mainly aimed at the reporting of wrongdoing within organisations by employees to their employer. The establishment of credible internal whistleblower schemes is a fundamental requirement for business success. (The practical evidence for that was outlined in section 1.) There are also legal requirements affecting companies operating internationally, mentioned above in this section.

More difficult issues may arise when entrepreneurs need to report corruption in other organizations and there are few examples of laws which will certainly apply in these situations, particularly when they are faced by small entrepreneurs or sole traders.

The overall scope of laws should be improved provided that Member States take into account the proposed Council of Europe Recommendation. This may depend on effective monitoring of the instrument by GRECO. The Explanatory Memorandum to the Recommendation explains that its Principles 3 and 4 aim to cover "all individuals who by virtue of a *de facto* working relationship (paid or unpaid) are in a privileged position vis-à-vis access to information and may witness or identify when something is going wrong at a very early stage - whether it involves deliberate wrongdoing or not. This would include temporary and part-time workers as well as trainees and volunteers. In certain

[27]Commission nationale de l'informatique et des libertés/CNIL, *Whistleblowing schemes* [*Dispositifs d'alerte professionnelle*], AU-004, available at www.cnil.fr

[28] European Commission (2006), *Guidance on Whistleblowing Schemes* (2006), WP 117, available at http://ec.europa.eu/

[29] European Commission (1995), *European Data Protection Directive*, 95/46/EC, available at http://eur-lex.europa.eu/

contexts and within an appropriate legal framework, member states might also wish to extend protection to consultants, free-lance and self-employed persons, and sub-contractors; the underlying principle of recommending protection to whistleblowers being their position of economic vulnerability vis-à-vis the person on whom they depend for work".

The main problems with existing national whistleblower protection laws in their application to entrepreneurs are:

- some apply only to the public sector;
- many only apply to wrongdoing within the organization where the whistleblower works;
- many only enable compensation to be claimed when there is retaliation by the employer[30];
- most do not apply to the self-employed.

The last point is particularly difficult to resolve, though it should only be relevant to a small number of entrepreneurs. PIDA does not apply to the "genuinely" self-employed, but it does apply to contractors, so that entrepreneurs working on contracts for the government (or in the private sector) would be covered[31]. This result is also achieved in the Irish Protected Disclosures Bill. Neither law requires the wrongdoing to be occurring within the whistleblower's place of work. However neither law would protect in the pre-contract stage. Nor would they cover, for example, an entrepreneur who has no contract because he failed to pay a bribe and reported that request for a bribe. He would be in the same position as any outsider reporting a crime. This may not be a problem in many cases, as he has nothing concrete to lose by making the report - indeed by doing so he might help clean up the system so that the next time he is not asked for a bribe. However he may fear that the system will not be cleaned up and that his best course is to keep quiet and pay the bribe next time.

The draft Irish law introduces a new right not only for whistleblowers, but for another person who suffers detriment as a result of someone else's whistleblowing, to institute civil proceedings against the third party responsible for the detriment. Similarly, the draft Serbian law provides some protection for any person associated with a whistleblower. Both these provisions might be of some benefit to entrepreneurs, who were not in a position to blow the whistle themselves (e.g. because they were self-employed) but faced retaliation because someone else did (possibly encouraged by them).

The proposed Dutch law on the House for Whistleblowers would cover employees who have a concern about wrongdoing, not only in their own organisation but in another[32], provided that they know about the wrongdoing through their work. That therefore would cover entrepreneurs fully (as long as they are employees).

As mentioned above, that Dutch law is not yet finalized and may not succeed but it is based on the existing temporary decree which set up the Whistleblower Advice Centre. Article 3 of that decree tasks them to advise "**anyone** who suspects wrongdoing that affects the public interest in:

- a business or organisation where he works or has worked; or
- any other business or organisation if he has obtained knowledge of the possible wrongdoing through his work."

This appears to represent a good model for defining a scope which would suit all entrepreneurs. It may be questioned why there should even be a need to require that the person knows about the wrongdoing through his work. The answer is twofold. The first is that by virtue of a working relationship, individuals may witness wrongdoing at an early stage and were it not reported by them would remain undetected to anyone without similar access, or would only be detected once the

[30] E.g. Article 25 (1) of the *Slovenian Integrity and Prevention of Corruption Act 2010*

[31] Section 230(3) of the *Employment Rights Act* and section 43K (1) (b) of *PIDA*.

[32] This is also true of the UK's Public Interest Disclosure Act as the focus is on protecting individuals in the workplace and covers a wide range of information about wrongdoing wherever it occurs, even outside the UK.

damage is done. Second, is that once any kind of work relationship is involved, the situation is more complicated for the whistleblower, as retaliation may be more direct (e.g. an employer has direct access to and power over those who work for or with him) but may also take more subtle forms than when an ordinary citizen reports crime. Ordinary criminal law should be able to address those cases, but cannot cope with the subtler forms of retaliation that may occur in work relationships.

### 3.2.9 Immunities

Some countries have provisions allowing immunities from prosecution to those who report bribes they have paid on request as long as they report them before they are discovered. This study does not intend to examine this issue, but we would observe that there is little evidence that these provisions achieve results in practice, and they are open to abuse. It seems to us preferable to allow courts discretion to take into account any co-operation provided by those involved in bribery, and this is a general feature of criminal law.

# 4 WHISTLEBLOWER PROTECTION MECHANISM

## 4.1 Public and Private Sectors

It is feasible to provide separately for the public and private sectors (as in Sweden and the US). On the other hand, Norway, the UK, Luxembourg, Ireland and Serbia have decided it is preferable to cover both private and public sectors in the same way. This helps with public awareness as it is the simpler course, and is also the current trend as it is more consistent with the way in which the sectors overlap in the modern world. For example, many countries contract out public provision to the private sector, and it needs to be legally clear which rules apply. Corruption typically involves two actors, one in the public sector and one in the private sector, and if private sector whistleblowers are not covered, half of the opportunity to detect and address wrongdoing is lost. It is true that public officials may be subject to duties to report which are unusual in the private sector, but whistleblowing protection should apply irrespective of whether or not there is a duty to report. In the case of protecting entrepreneurs from the corrupt practices of public officials in the areas of business regulation, taxes or procurement, for example, ensuring that whistleblower protection covers those working in both sectors seems sensible. Providing whistleblower protection to those working in the private sector not only serves the interests of honest entrepreneurs but also supports national programmes to tackle public sector corruption.

No matter what the law says, real protection starts with good practice in the workplace – actually listening to whistleblowers and valuing their reports. Such good practice can be put in place any time, irrespective of legal change. There would be a need to involve all employers in the public sector and, in the private and voluntary sectors, all organisations over a certain minimum size. Employers need to take ownership of their internal policies and to recognize the duty of care which falls on the employer - once they have received a report they will need not only to listen to it, but ensure there is no workplace retaliation against the whistleblower.

In the UK, advice on good practice was given to employers (public and private) in 'Whistleblowing Arrangements: Code of Practice'[33], which was developed by the British Standards Institute (BSI) in collaboration with PCaW. More recently a new Code of Practice, based on the BSI work, was issued by the independent multi-disciplinary Whistleblowing Commission set up by PCaW[34]. The idea in the UK is that this code of practice would have statutory standing such that it would be taken into account by courts and tribunals when whistleblowing issues arise. So that if an employer was found not to follow it and the standards it set, that fact would support the whistleblower's case. That would be a way of ensuring that the code was actually followed by employers. International efforts to engage private sector employers in the fight against corruption have also highlighted the importance of ensuring employers have arrangements to allow those working for them to raise concerns in confidence and are protected from reprisals[35].

### 4.1.1 Regulators

The role of regulators in any whistleblowing system is crucial. Where, in the circumstances, the internal route does not or cannot prove effective, the regulators are likely to be the appropriate recipients of the disclosure - they have, or should have, the authority, and the resources to deal with the issue. In so far as they do not have these, changes will need to be made. Whatever practical limitations regulators may face, they need disclosures to carry out their functions effectively. They also need to act on the information they receive to ensure they maintain public confidence.

Regulators should play the main part in disseminating the best practice, typically in the form of a code, in their specific sectors. In doing so they demonstrate that they take an interest in the

[33] Public Concern at Work/PCaW (2008), *Whistleblowing Code of Practice*, PAS 1998:2008, available at www.pcaw.org.uk/

[34] See footnote 19

[35] See list of resources in "Section C- 10 Seeking guidance – Detecting and reporting violations" (p. 60) in OECD (2013), *Anti-Corruption Ethics and Compliance Handbook*, UNODC and *the World Bank* available at www.oecd.org/

whistleblowing arrangements of the organisations they regulate. Their position enables them to ensure not just that employers are aware of the code of practice, but that they implement arrangements to comply with it, and actually operate those arrangements. They should make periodic checks to ensure that is the case and where arrangements are inadequate, particularly in a case where a whistleblower has not been protected by the employer, a regulator can take separate action against an employer (see discussion on regulatory powers below). Regulators should make clear that it is for employers to communicate their policies to staff and that if they do not have internal systems and communicate them to staff, their staff would be justified in making external reports. Putting a whistleblower policy in place means little if the staff do not know about it. In the UK, 93% of respondents in the PCaW business survey said they have whistleblowing arrangements in place, but less than 50% of UK workers are aware that their organization has a policy in place.

This is an important lesson from UK experience. The consultation exercise carried out by the PCaW Commission (mentioned above) showed that an overwhelming majority of respondents thought that regulators should take an interest in the arrangements and that regulators need to do more to protect whistleblowers. The majority of respondents did not think that regulators make adequate use of the information they receive from whistleblowers.

Following the collapse of several banks in the UK, a Parliamentary Commission has recommended that the Financial Conduct Authority (FCA) (the banking regulator) should check on whistleblowing schemes, and what is done with reports. The FCA is considering imposing heavy fines on banks which fail to protect whistleblowers. Similar recommendations on monitoring whistleblowing schemes have been made in the health sector in the UK, and are set to be made universal.

Internationally, a good example has been set by the International Civil Aviation Authority. It requires whistleblowing procedures (referred to as internal reporting systems) as part of mandatory safety reporting systems. In order to be licensed within the aviation industry, organisations and individuals must comply with mandatory reporting system regulations. And aviation safety is proving remarkably successful across frontiers.

An important step forward could be taken if regulators who have powers to grant licences or registrations to organisations were to take into account whether the organization has effective whistleblowing arrangements in place. This may or may not be possible without legal change. It should certainly be possible for regulators to include whistleblowing in their annual reports, as some already do. The reports might include:

a) the number and type of concerns received by regulators from whistleblowers;
b) the number of enforcement actions that have been triggered or contributed;
c) to by whistleblowers;
d) the number of whistleblowing claims that have been made to the courts;
e) the number of organisations which failed to have in place effective whistleblowing arrangements and what action was taken as a result; and
f) what action has been taken to promote and enforce the code.

In some countries (as is proposed for Serbia) regulators can intervene to support a tribunal claim made by a whistleblower. It would also be useful if, regulators can act to prompt investigations in individual cases or where there have been a number of reports of similar wrongdoing to ensure an investigation of a systemic or unaddressed problem. Such powers could be very helpful to entrepreneurs.

### 4.1.2 Advice Centres

Many issues can be resolved with a minimum of controversy if confidential advice is available at an early stage to a worker who is thinking of blowing the whistle. Internal advisors may be effective, provided they are trusted.

However the ability to seek independent advice at an early stage – before actually making a report - on a confidential basis, is highly desirable. Some organisations train people to be "confidentiality counsellors" for other staff. Employees should also be able to seek advice from trade unions and lawyers. The duty of client confidentiality owed by lawyers makes it possible to allow whistleblowers to explain their concern to them without any pre-conditions. It will need to be clarified that the lawyer remains bound by confidentiality and cannot pass any information on without the whistleblower!s consent. In Germany, companies offer access to external lawyers, who are paid by the company, but who are bound by the whistleblower's instructions, and only convey information back to internal channels if he so agrees.

Access to confidential advice helps ensure that the information gets to the right person or regulator at the right time and helps protect the whistleblower and assists the employer and the public by ensuring the report is made responsibly. The charity PCaW performs this function in the UK. There is also a relatively new state-funded body in the Netherlands, the *Adviespunt Klokkenluiders* (APKL)[36].

The APKL is incorporated and funded by the Ministry of Interior Relations and the Ministry for Social Affairs and Employment but is independent of them. It consists of a three-member committee - representing the private sector, the public sector, and the trade unions -and a small staff team including three senior legal counsels, a communications consultant and an office manager.

It is a confidential advice service available to anyone in work in the Netherlands and its tasks are to:

- Advise and support individual whistleblowers on the steps they can take;
- Provide general advice to whistleblowers and employers on whistleblowing and procedures;
- Report to government and employers on patterns and developments in the field of whistleblowing and integrity.

The Advice Centre opened in October 2012 and will operate until mid-2015 at which time it will be determined whether it will continue or another type of organisation is needed.

## 4.2 Protection and remedies

If any whistleblower suffers retaliation he should be able to have his case heard before an impartial tribunal with a right of appeal. It is desirable that the procedure should be swift and simple, and that the case should be heard by specialists in whistleblower cases. The ideal would be a specialised tribunal which is empowered, as the 2009 PACE report recommended, to 'investigate the whistleblower's complaint and seek corrective action from the employer'. If it has only the latter function (as in the UK) the risk is that the focus is on compensation for retaliation and the issue of public concern may be neglected. A specialised tribunal would accumulate expertise and could be given guidance - for example, on passing on issues raised to regulators where necessary. Failing that, the use of labour courts or employment tribunals may be preferable to the use of the ordinary civil courts. If a public agency can be charged to assist the whistleblower (who so wishes) in bringing his case - as in Slovenia currently, and proposed in Serbia - that is helpful.

**Box 4: Extract from Slovenian Integrity and Prevention of Corruption Act 2011**
*Article 25:*
*(Measures to protect the reporting person)*

(1) If the reporting persons have been subject to retaliatory measures as a consequence of filing the report referred to in Articles 23 and 24 of this Act, and this has had an adverse impact on them, they have the right to claim compensation from their employer for the unlawfully caused damage.
(2) The Commission may offer reporting persons assistance in establishing a causal link between the adverse consequences and retaliatory measures referred to in the preceding paragraph.

[36] Advice Centre for Whistleblowers in the Netherlands/Adviespunt Klokkenluiders, *Advice Centre for Whistleblowers in the Netherlands*, available at www.adviespuntklokkenluiders.nl/

(3) If during the course of the procedure referred to in the preceding paragraph the Commission establishes a causal link between the report and the retaliatory measures taken against the reporting person, it shall demand that the employer ensure that such conduct is discontinued immediately.
(4) If the reporting persons referred to in paragraph 1 of this Article are public servants, and if they continue to be the focus of retaliation despite the Commission's demand referred to in the preceding paragraph, making it impossible for them to continue work in their current work post, they may request that their employer transfer them to another equivalent post and inform the Commission of this.
(5) If a reporting person cites facts in a dispute that give grounds for the assumption that he has been subject to retaliation by the employer due to having filed a report, the burden of proof shall rest with the employer.
(6) The public servant's employer shall ensure that the demand under paragraph 4 of this Article is met within 90 days at the latest and shall inform the Commission of this.

It is hard for a whistleblower to demonstrate that any retaliation was caused by his disclosure. A reversal of the burden of proof in this respect forms part of the law in Norway, Luxembourg, Slovenia, Croatia, UK and US and is recommended both by PACE and the G20, as well as in the Council of Europe Recommendation.

The principles in that Recommendation include that the legislation should "seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone." Interim relief can help preserve the working relationship and avoid it breaking down completely. In view of the possibility that a whistleblower in a senior position might lose his job as a result of his report it is desirable that the compensation should reflect his or her actual financial losses and therefore should be uncapped. If the employer is unable to pay compensation, this should become a matter for the State. The possibility that an employer may escape financial liability through bankruptcy is one reason why it may also be worth considering making it a criminal offence for employers to retaliate against whistleblowers (as in Sweden)[37].

In the UK, the Commission established by PCAW recommended research into whether a state sponsored agency could carry out investigations into retaliation and provide an alternative system of dispute resolution. Such an agency exists in the USA in the Office of Special Counsel which handles whistleblowing for federal employees. There is no such agency in Europe at present, although the proposed Dutch House for Whistleblowers would be comparable.

## 4.3 Incentives for reporting

Compensation only restores the whistleblower to the place where he would have been if had not gone through the stress and difficulty of making his report. That may not be sufficient encouragement, depending on the risks involved. There are systems, established in the US and more recently introduced in Lithuania and Hungary, which provide more positive financial incentives for whistleblowers.

The US's False Claims Act, which dates back to the 19th century, contains "*qui tam"* provisions. *Qui tam* is a unique mechanism that allows citizens with evidence of fraud against government contracts to sue, on behalf of the government, in order to recover the stolen funds. In compensation for the risk and effort of filing a *qui tam* case, the whistleblower may be awarded a portion of the funds recovered, typically between 15 and 25%. These provisions have enabled a small number of citizens in limited circumstance to reap large financial benefits and have also made huge savings for the US Government.

[37] *Supra,* note 11 at 81.

In response to the financial crisis of 2008, the US took a further step with the Dodd Frank Act, which introduced measures to reward whistleblowers in the private sector through specific programmes set up by the Securities and Exchange Commission (SEC) and the Commodities and Futures Trading Commission (CFTC). In particular the SEC Whistleblower Program was created to incentivise those with knowledge about securities fraud to come forward and report the matter and present evidence to the SEC. The SEC whistleblower law prohibits retaliation by employers against employees who provide the SEC with "original information" (this information should not be publically available or known to the SEC already) about possible securities violations. Any person (the SEC defines whistleblower more widely and goes beyond a company insider) who voluntarily provides the SEC with original information about a violation of federal securities laws that has occurred, is on-going, or is about to occur, is eligible for a whistleblower award to be determined based on the amount of the money collected, and the quality of the information provided. Under the SEC program, eligible whistleblowers are entitled to an award of 10-30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by other regulatory and law enforcement authorities. For any award to be triggered, however, SEC action based on the whistleblower information must result in monetary sanctions in excess of $1 million. The SEC award scheme applies to non-US citizens.

Transparency International recommends that whistleblowers "should receive some kind of professional or social recognition for having prevented excessive harm to the organisation or society. Such a system, potentially including financial rewards, should be carefully designed, taking the particular national and legal contexts into account."

One fundamental issue is that most provisions that incentivize whistleblowing link the financial award to the amount of the fraud or the amount recouped once legal action has been taken against the wrongdoers. This means that such provisions cannot act as early warning systems of potential harm but rather can only apply to those cases where the wrongdoing has occurred and damage, often great, has been done. In theory they can even encourage non-reporting, as the longer the wrongdoing continues and the greater the damage, the greater the reward.

It is not unreasonable that an employer or a public authority should be able to give a reward after the fact and in recognition of good conduct. The media have an essential role to play in showing the value of responsible whistleblowing: but the problem is that press payments for whistleblowers may discredit whistleblowers in general, encourage inappropriate disclosures and undermine attempts to implement a considered and balanced whistleblowing regime. In general, "cheque-book journalism" is undesirable. PIDA does not protect wider disclosures for gain, but most other laws make no such provision.

The European Court for Human Rights have stated that "an act motivated by pecuniary gain, would not justify a particularly strong level of protection"[38]. It follows that in their view this issue affects size of compensation rather than disbarring protection. This implies that the issue of illicit payments can be left to other laws and though, in principle, a worker might be disciplined - or even prosecuted - for taking an improper payment he would still be entitled to protection in respect of his or her public interest disclosure. Clearly any payment he had already received, and the legality of that payment, should be considered in any award of compensation.

Any financial incentives will need to be carefully considered. The ideal remains to encourage a culture where the open reporting of wrongdoing is natural and is motivated by the public interest.

[38] See Appendix 2

# 5 COUNTRY CONTEXT: RUSSIAN FEDERATION

This section sets out the current context which primarily focuses on law provisions that deal with a limited aspect of whistleblower protection (i.e. within the criminal justice system) as well as the few provisions protecting public officials. The rest of the paper identifies the more fundamental issues that need to be addressed in order to establish a credible system of facilitating and protecting whistleblowing as part of a strong anti-corruption prevention strategy and considers how the challenges facing entrepreneurs in particular may require separate and focused attention.

## 5.1 Definition of the term "Whistleblower": what issues can be reported?

Item 4 of Article 15 of the Constitution of Russian Federation states that the norms set by international law have priority over the national legal norms. This fact provides for the use Article 33 of United Nations Convention against Corruption, by saying that any person can be considered a whistleblower.

However, Article 33 of the UNCAC implies that whistleblowers report facts concerning crimes listed in the Convention and this has been narrowly interpreted and may be equated with being a witness or requiring witness protection in connection with the criminal law.

These crimes are listed in Chapter III of the Convention:

- Bribery of national public officials;
- Bribery of foreign public officials and officials of public international organizations;
- Embezzlement, misappropriation or other diversion of property by a public official;
- Trading in influence;
- Abuse of functions;
- Illicit enrichment;
- Bribery in the private sector;
- Embezzlement of property in the private sector;
- Laundering of proceeds of crime;
- Concealment; and
- Obstruction of justice.

These deeds are also listed in the Criminal Code of Russian Federation Adopted by Federal Law №63-FZ as of 13 June 1996. The only exception is illicit enrichment.

It should be noted here, however, that the UNCAC Technical Guide makes it clear that whistleblowers are those that raise "indications" of corruption and therefore may not be "reporting" crime in the usual sense. Further, they may not always be reporting such indications of offences to law enforcement bodies but rather they may be raising these issues within their places of work or to related regulatory or oversight authorities (e.g. tax office, auditors, etc.).

The Criminal Code does not define the term "corruption". Its definition can be encountered in Article 1 of Federal law №273-FZ "On corruption counteraction" of 25 December 2008. There is a certain discrepancy between Article 33 of the UNCAC and the National Plan for Counteraction of Corruption. The UNCAC implicates criminalisation of deeds linked to corruption, while the logic of the National Anti-corruption plan implicates corruption and corruption wrongdoing infer criminal, administrative or disciplinary liability according to Article 13 of the Federal Law "On corruption counteraction". This Law[39] introduces the term "corruption wrongdoing", which is left undefined.

[39] Draft Law 371176-6 amending Certain Legislative Acts of the Russian Federation in terms of improving the anti-corruption measures, [*Законопроект № 371176-6 О внесении изменений в отдельные законодательные акты Российской Федерации в части совершенствования мер по противодействию коррупции*] available at www.duma.gov.ru/

Although the corresponding draft of the law is being considered by the State Duma, it is not adopted as of 20 February 2014.

From the above we can conclude that the Russian National Plan on corruption counteraction extends the domain of possible reporting.

## 5.2 Procedural aspects of reporting corruption incidents

Although the term "whistleblower" is not defined in the Russian legislation, the most prospective approach is defining the whistleblower as a person reporting facts involving corruption crimes, criminalized by Criminal Code of Russian Federation (referred to as "CC").

The following conducts are considered corruption crimes by the CC:

- Bribe-taking /giving (Articles 290-291);
- Swindling (Article 159. Item 3);
- Misappropriation or Embezzlement (Article 160);
- Spending Budgetary Funds for Wrong Purposes (Article 285.1);
- Spending Assets of State Non-Budgetary Funds for Non-Specified Purposes (Article 285.2);
- Bribery in a Profit-making Organisation (Article 204);
- The Legalisation (Laundering) of Funds and Other Property Acquired by Other Persons Illegally (Article 174); and
- The Legalisation (Laundering) of Monetary Funds or Other Property Acquired by a Person as a Result of an Offence Committed by him/her (Article 174.1).

Statement of corruption-related crimes should mean a reporting of any facts related to corruption, submitted by the applicant voluntarily to a specialized competent authority, compliant with the principles of integrity, validity, accuracy and reasonableness of the information provided in the application.

The person should be entitled to apply in cases where the facts have any information about corruption or has reason to believe and can provide relevant evidence confirming that a corruption offense was (to be) committed.

Current regulations of the Code of Criminal Procedure (hereinafter - the "CCP") refer to the statement (message) of the crime as a pretext for a criminal investigation.

General requirements for submission and consideration of reports of crimes established in articles 141 and 145 of the CCP. In this case, it is possible to submit an application in writing or in oral form - by having the protocol (form) be signed by the applicant; this document contains data on it.

Allegations of criminal intent can be obtained either directly from the applicant or from other sources, in particular: media, applications and complaints of citizens, the information transmitted by telephone, telegraph and other means of electronic communication and other public organizations, etc.

In addition to the norms of the CCP order of consideration of reports of crime, depending on the jurisdiction is governed by the order № 45 of the General Prosecutor's Office dated 30 January 2013, by the order №140 of Ministry of Internal Affairs of 01 March 2012, Order №72 of the Investigative Committee of the Russian Federation dated 11 October 2012 and other acts".

### 5.2.1 The possibility of anonymous reporting

By Article 141 of the CCP, anonymous statement about the crime *cannot* serve as a pretext for a criminal investigation. This prohibition is "duplicated" at the level of secondary legislation. In particular, in the order of the Investigative Committee of the RF №72 it is stated that anonymous reports of crime cannot serve as a pretext for a criminal investigation. If the specified information in

these messages about the committed or prepared crime requires immediate inspection, it should be transferred to the body carrying out the investigative activity or other public authority in accordance with the competence by decision of the head of the investigative body, the Investigative Committee or his Deputy.

Thus, at this stage, anonymous allegations of related corruption offenses, cannot serve as a pretext for a criminal investigation and in fact, deprive themselves of efficiency.

Despite the fact that anonymous statements in accordance with applicable Russian law cannot be a pretext for a criminal case, the anonymous statements are not prohibited.

### 5.2.2 A denial to receive and register the application

Criminal procedure law does not allow an unreasonable refusal to accept official statements about the crime. However, in practice, often, the applicant may refuse to accept the application without reason. The level of safeguards to protect the interests of the applicant in this case is low.

Example of regulatory mechanism reception applications (decree number 72 of Investigative Committee of RF):

Claim 22 prohibits unreasonable refusal to accept a competent official statement about the crime. At the same time claim 20 contains the following wording:

> "Statements and messages that do not contain information about the circumstances pointing to signs of a crime, are not subject to registration in the registration messages about crime and do not require verification in accordance with Articles 144 - 145 of the Criminal Procedure Code".

Such a formulation does not contain clear criteria for refusal of registration reports of crimes. This fact allows for a dispositional basis to decide on the messages received on the crime. In other words, the authorized person shall have the right to decide the fate of the posts at his discretion.

Regarding reports of corruption-related crimes, one of the barriers to their admission and registration can be attributed to claim 20 of the decree of the Investigative Committee, which states:

> "Statements and messages are also not subject to registration in the book of statements in case the applicants disagree with the decisions of judges, prosecutors, heads of investigating bodies, investigators or other investigators, complain of malfeasances committed by the above mentioned persons and raise an issue of bringing these individuals to criminal liability without giving the specific data on committed crime".

Such reports, statements, appeals registered as incoming documents and considered in accordance with the Federal Law as of 02 May 2006 №59 -FZ "On the order of consideration of applications submitted by citizens of the Russian Federation."

Thus the submission of reports on corruption offenses committed by a judge, prosecutor or investigator employee, a crime report can be considered an application. Moreover, while the report about a crime may give rise to criminal charges, an application cannot contribute to the effective criminal charges. This risk significantly diminishes the incentive to report crimes for the persons who witnessed corruption involving judicial and investigative system.

### 5.2.3 False accusation and slander: Implications for applicants

Existing criminal legislation provides for criminal liability for knowingly false denunciation (article 306 of the Criminal Code). At the same time the CCP establishes the rule that in the case of the decision to dismiss the criminal case, the investigator is obliged to consider whether to institute

criminal proceedings for misleading information regarding the person saying or spreading false information about a crime.

However, the imposition of charges is possible only for misleading information, which means that the presence of intent on the part of the applicant.

## 5.3 Protective measures

Russian law today does not define the terms “reporter of a crime", "protection of the person reporting the crime."

Federal Law "On state protection of victims, witnesses and other participants in criminal proceedings” №119-FZ (hereinafter - the Law №119-FZ) contains a definition of state protection of participants in criminal proceedings.

### 5.3.1 Who can be protected?

According to the law, №119-FZ of state protection - security measures to protect the life, health, property and social support for victims, witnesses and other participants in criminal proceedings. These provisions are solely concerned with witness protection within the criminal justice system and are not concerned with general protection of those who report indications of corruption, wrongdoing or harm to the public interest.
Thus, the Law №119-FZ is a question of providing protection in criminal proceedings against members of criminal proceedings.

Law №119-FZ establishes a closed list of protected persons (ie persons that protection measures can be applied to by the state):

1. Victim;
2. Witness;
3. Private accuser;
4. Suspect, accused, their lawyers and legal representatives, convicted or acquitted, and the person against whom criminal proceedings or prosecution has been terminated;
5. Expert, specialist, interpreter, and also involved in the criminal justice educator and psychologist;
6. Civil plaintiff, civil defendant;
7. Legal representatives, representatives of the victim, civil plaintiff, civil defendant and the private prosecutor.

Based on this list, the legislation does not provide guarantees for the state to protect persons who report suspicions and evidence of crimes, including corruption-related. This person may not fall under any of the following persons, and therefore does not acquire the status of a protected person within the meaning of the Law №119-FZ.

As an important step to improve the legal protection of persons reporting corruption crimes generally, it is necessary to amend the list of protected individuals, making it open. Furthermore, it should introduce a separate category of protected persons - "the person reporting a crime."

### 5.3.2 Types of state protection

Law №119-FZ highlights safety measures and measures of social support.
Security measures include:

1. Personal protection, protection of home and property;
2. Issuance of special personal protective equipment, communication and warning of the danger;
3. Ensuring the confidentiality of information about the protected person;
4. Relocation to another place of residence;
5. Exchange of documents;

6. Change in appearance;
7. Change of work (service) or study;
8. Temporary placement in a safe place;
9. Use of additional safety measures for the protected person in custody or is serving a sentence in place, including transfer from one place of detention or serving a sentence in another;
10. This list is open, the law allows to use other security measures;
11. Measures of social support suggest benefits and compensation to the protected person, his or her close relatives.

### 5.3.3 Grounds and procedure for the application of protective measures

By virtue of the Law №119- FZ safety measures are applied in case of evidence of a real threat to life of the protected person, violence against them, destroying or damaging their property in connection with participation in criminal proceedings established decision-making body on the implementation of state protection.

Security measures are applied on the basis of a written statement of the protected person, or with his consent, expressed in writing. Based on the application, the court, the chief of the body of inquiry, the head of the investigative body or investigator in 3 days' time (in cases of urgency, immediately) decide on the implementation of security measures or refusal of their application, which is made in the form of a decision (definition).

When the application of security measures affects the interests of the adult family members and other protected person residing with him people, their written consent with the application of security measures is required.

Resolution (ruling) on the application of security measures or refusal of their application may be appealed to a higher authority, the prosecutor or the court. The complaint shall be considered within 24 hours from the time of its filing.

The decision-making process offering protection is dispositive and does not contain conditions for a rapid response to the need to ensure protection.

### 5.3.4 Privacy protection

State protection is carried out in compliance with the confidentiality of the protected person. Procedure for the protection of information on the implementation of protection established by the Decree the Government of the Russian Federation as of 03 March 2007 №134.

This decree establishes the need to protect information on the implementation of state protection and the protected person, but did not disclose what relates to this information.

In addition, there are no clear and specific penalties for disclosure of confidential information about the measures taken to protect and protected persons.

## 5.4 Protection of labour rights

Oftentimes, the applicant of the facts relating to the crimes of corruption has the status of an employee and can become aware of information on corruption offenses in the workplace, or information that can be linked with the superiors of the employee or other employees.

Allegations of corruption create additional risks for the applicant - employee, in particular the risk of dismissal or risk of deprivation of wealth, which is usually expressed in terms of cutting the bonuses.

Currently, relations between an employee and employer in the Russian Federation are regulated by Labour Code of the Russian Federation (LC RF). The Labour Code does not contain any measures that would protect the labour rights of a person reporting wrongdoing, including corruption.

An employee having reported corruption facts can be dismissed demoted or his or her bonuses can be cut on the common ground set by the Labour Code that allows for the employer's retaliation to the employee. The Labour Code establishes several ways to protect Labour rights, among them - judicial protection. In case of violation of Labour rights the employee has the opportunity to submit an application to the court.

## 5.5 Public officials as whistleblowers

Federal Law №273-FZ "On combating corruption" dated 25 December 2008, requires all government and municipal officials to report any cases of corrupt inducements. According to Article 9 of the Law, they must report such offers, either to their employer, the prosecutor or other government bodies. For breaching this requirement, an official can be dismissed from government service or punished by lesser sanctions.
The Law obliges the official to submit a report only in cases where he was approached in order to facilitate a crime of corruption.

Paragraph 10 of Article 17 of the Federal Law on State Service in the Russian Federation forbids government officials to make public statements, judgements and assessments, including by means of the mass media, about government bodies of Russian Federation, their heads, as well as the decisions made by superior government bodies or government body that this official is employed by, unless such statements comprise the duty of the official.

At the same time, reporting corruption crimes is an obligation imposed on public officials and must not be qualified as public judgement or assessment. Nevertheless, the law does not define the base to recognise an action as "public".

Paragraph 21 of the Presidential Decree №309 of 2 April 2013 "On measures to implement certain provisions of the Federal Law on Combating Corruption" introduces special safety measures for public servants and employees of state corporations reporting on corruption. They may be applied for one year's term after the reporting has been made. The special procedure requires that all disciplinary offenses committed by the employee/servant are considered by the Commission on ethics and conflict of interests. A representative of the Prosecutors office may participate in the Commission's sessions.
One could call this a positive measure, if, firstly, the participation of the prosecutor was mandatory, not optional (as indicated by the verb "may"). Secondly, the Commission on ethics and conflict of interests is a division of the same organization.

It might be worth considering introducing the same obligation to report corruption issues along with government officials for employees of state companies and state corporations as well as other bodies where the government has a share.

## 5.6 Private entities as whistleblowers

Another possible category of potential applicants are government contractors and participants of public procurement process. The peculiarity of this category of applicants is that they are business entities. The main risks of this category of applicants - the risks of adverse effects associated with obstruction in the entrepreneurial activities, raiding. Although the legislation declares protection of private property, in practice existing guarantees are insufficient to ensure an adequate level of protection of the applicants - entrepreneurs.

In this context additional safeguards and protections for applicants - entrepreneurs by analogy with the proposed mechanisms for the protection of Labour rights are required.

Since the jurisdiction of the Law №294 -FZ is severely limited and does not cover many areas of relations between business entities and public authorities, it is also necessary to provide additional safeguards in special legislative acts regulating the fields of relations that are excluded from the jurisdiction of the Law №294 -FZ.

# 6 ISSUES IN THE EXISTING LEGISLATION

The above analysis confirms the findings of a study made for the G20 in 2011 that the Federal Law provides only for the protection of public officials who report corrupt offences committed by other public officials.

There is no universal mechanism for reporting corruption, and every government body sets its own rules. The legislation does not contain any provisions on how to deal with such reports. There is no special body tasked with protecting civil servants who are willing to blow the whistle. Government officials who report wrongdoing are considered to be protected by the government, and protection measures were introduced by the President's Decree №309 of 2 April 2013, but these appear to be vague and insufficient.

A GRECO compliance report on Russia in 2010 states that*:* "the Prosecutor General's Office has prepared a draft Federal Law on Making Amendments to separate and specific legal acts in order to protect persons who voluntarily report suspicions of corruption in the sphere of state administration. Amendments to this end are to be made to the Federal Labour Code and to the Federal Law on State Protection of Victims, Witnesses and other Participants of Criminal Proceedings (2004, №119-FZ). Moreover, the draft law envisages guarantees of protection for commercial and other organisations from ungrounded prosecution for reporting facts relating to corruption". We do not know what happened to this proposed law which was clearly intended to help entrepreneurs.

There was a proposal at the beginning of 2009 for a new law, which would allow press reporters investigating corruption in Russia to be protected. Under the proposed legislation, they would be able to apply for special protection in the same way as witnesses in Court. This was merely proposed and no legislation to this effect has been passed[40].

## 6.1 Practical issues for entrepreneurs

Although Russian legislation guarantees protection of property rights, in practice existing instruments are insufficient to protect entrepreneurs, especially those involved in government tendering processes and contracts, from "raids" (meaning hostile acquisitions with the complicity of law enforcement agencies) and from official harassment. They complain of activities, such as constant audits and the blocking of accounts, which impede any activity. Taking this into consideration, additional protection is required for businesses reporting instances of corruption.

The Federal Law №294-FZ "On protection of legal entities and sole proprietors during control and supervision activities" regulates the interaction between businesses and authorities and sets limits for authorities when carrying out inspections. Nevertheless, the Law does not contain any mechanisms to protect businesses that report corruption. Additional legislation that would cover the fields of interaction that are excluded from this Law's jurisdiction might also serve the purpose of protecting whistleblowers.

The Federal Law №78-FZ of 7 May 2013 introduced a new public body – the Presidential Commissioner for Entrepreneurs' Rights, known as the Business Ombudsman. The Business Ombudsman can appoint, and has in fact appointed, regional representatives. According to the Law, the Business Ombudsman has to submit a report on his activity and achievements at the end of each calendar year. The first report still had not been submitted or published as of 30 April. The federal Ombudsman and regional Ombudsmen's offices are one of the promising channels that should support businesses willing to report wrongdoing.

[40] Blueprint for Free Speech, *Russia – Whistleblowing Protection*, available at https://blueprintforfreespeech.net/

These offices only began to operate recently, and some of the regional ombudsmen currently lack any legal basis, and even lack salaries (though some saw this as a guarantee of independence). All however in principle has the possibility of raising issues with the Federal Ombudsman, who can take them up at the highest level of Government.

Such formal powers as they have (which seem to be mainly to issue opinions) only apply when there has been a violation of rights (such as the right to free speech) by public authorities. But they lack powers in a case where the whistleblower's rights have not (yet) been violated, or have been violated by a private sector employer.

Whether or not they have formal powers, the Business Ombudsmen could play a crucial part in giving advice to businessmen who want to blow the whistle but fear that local officials are complicit in the situation they wish to report[41]. They could help whistleblowers find the right avenues. They could also act informally on the whistleblower's behalf.

There are already been some positive experiences – for example in Tatarstan, where the Business Ombudsman, recognizing that the best protection is immediate reaction, forms part of a local 'Anti-corruption policy department', which can make arrests before there is any chance of retaliation.

Whatever formal powers the Business Ombudsmen may have, it will be useful that they record and report all the approaches made to them – these indicate what the issues are, and what alternative avenues are not working. Also, they should give feedback to the whistleblowers about what they have done, or tried to do, which will show they care.

## 6.2 Obstacles to whistleblowing

There may be problems of attitude which need to be overcome. Business faces specific public image issues in Russia because of the rigged privatisations of the 1990s, which enriched a very few.

A more general problem was identified in the Parliamentary Assembly of the Council of Europe report on whistleblowing: "deeply engrained cultural attitudes which date back to social and political circumstances, such as dictatorship and/or foreign domination, under which distrust towards "informers" of the despised authorities was only normal"[42]. There also appear to be cultural and social attitudes that work against protecting whistleblowers. Some of these stem from traditional hierarchical organisational structures in which obedience is valued to such an extent that it undermines the flow of communication (even about wrongdoing) from the lower to the upper ranks. In such structures, obedience to an organisation is emphasized more than its accountability to those whom it is meant to serve.

Research from the US shows that the main reason officials do not blow the whistle is not fear of the consequences, but a belief that nothing will be done[43]. The problems of corruption in the Russian judicial system are well known and the then President Medvedev stated in an interview in 2011 that corruption has penetrated all branches of power. Consequently, businessmen who report corruption may find themselves charged with crimes and imprisoned and the Business Ombudsman estimated that 13,000 businessmen had been imprisoned, in principle for economic crimes[44].

TI's Global Corruption Barometer 2013 showed that only 45% of Russians believe that ordinary people can make a difference in the fight against corruption. This is unsurprising, when the same survey shows that 84% of Russians believe the judiciary is corrupt (or extremely corrupt) and that the

[41] Such situations can arise in any country, and we refer to an example in the UK at 5.4.1.2 of our first technical paper.
[42] Parliamentary Assembly of the Council of Europe (2009), *The Protection of Whistleblowers*, Rapporteur: Pieter Omtzigt (Netherlands), report of PACE Committee on Legal Affairs and Human Rights, available at http://assembly.coe.int/
[43] "Whistleblowing in the United States: the gap between vision and lessons learned", in Tom Devine (2004), *Whistleblowing around the World*, ed. Calland and Dehn.
[44] Quoted in Megan Davies, (25 September 2013), '*Russia needs more risk takers*', Reuters.

same figures for distrust of the police and public officials are even higher (89% and 92% respectively). For comparison, the equivalent figures for Italy (which is not a good example within Europe) are 47%, 27% and 61%. The equivalent figures for Finland are 9%, 5% and 25%. Whistleblowing cannot be effective where there is no trust in institutions.

In May 2008, Ernst & Young experts approached 1186 directors and top managers of financial and legal departments of private businesses in 34 countries. Over 60% of respondents appraised the problems posed by bribes and corruption as "critical" or "very critical". The data compiled in Russia in the meantime differed: National anti-corruption legislation was viewed as efficient by 85% of Europeans but by only 26% of Russians[45].

Whistleblowing typically works best at uncovering clear wrongdoing by individuals or groups of people, or an organisation. It is a part, albeit an important one, of a wider system of accountability, rights, duties and powers, that does not leave nor expect all the responsibility for reporting or disclosing wrongdoing to rest on individuals (whether whistleblowers or organizational leaders). Where there is a wide systemic fault within a sector, which may not be clearly illegal, whistleblowing will understandably work less well but can act as a catalyst for change.

There may be a problem of terminology. The GRECO evaluation team in the joint first and second evaluation round report on Russia found that the term "whistleblowing" is the same as "informing" which has a very negative connotation. Just as ensuring that whistleblower protection is understood as being wider than witness protection, it is important that the term used is one that describes speaking up in the public interest - e.g. reporting or disclosing information about possible corruption or other wrongdoing, risk or harm. For example, in English this is how the term "whistleblowing" or "speaking up," is now understood; in French the term *lanceur d'alerte* ("alert sender") is preferred over *dénonciateur* and in Dutch *klokkenluider* ("bell ringer") is used. However, for the meaning of the words used to reflect a change in attitude - they must reflect conduct and action that is seen as positive for society and in the public interest. Whistleblowing laws must support a more open culture of reporting/disclosing information about risk or wrongdoing that is in the public interest to address and, along with some other key elements discussed in more detail later in this paper, the law must recognise a range of channels for whistleblowing, including to independent bodies or persons. An option that could be considered to be used in Russian legal documents - is *zayavitel (o korrupcii*).

However, the terms used in the law do not necessarily match the words people use – for example, the term "whistleblower" is not used in UK law, though it has become the popular term for people who make reports in the public interest. But the successful implementation of a law which protects disclosures can have an effect. In 1998, when the UK law was introduced, the Sunday Times ran a headline saying our "new community heroes are the people who snitch[46]." "Snitch," a negative term from the school playground, is now little used in the UK, and research in 2013 showed that "whistleblower" is now seen as a neutral or positive term by 72% of UK workers[47]. This demonstrates a change for the better and it appears that the successful operation of the UK law has significantly helped change the culture, and thus the words used. It is to be hoped there will be a similar development in Russia, but that will depend on the introduction of a whistleblower system that achieves demonstrable results.

## 6.3 Overcoming the obstacles

A fundamental change needs to be signalled in order to increase confidence. An amnesty for imprisoned businessmen was announced in 2013 but its extent and effects are uncertain. In principle, it should only apply to those who were imprisoned without proper justification as a result of official corruption.

[45] Blueprint for Free Speech, see footnote 39.
[46] "The media representation of whistleblowers" in PCAW (March 2010), *Where's whistleblowing now? Ten years of legal protection for whistleblowers*.
[47] Research by YouGov commissioned by PCAW, see PCAW website for further details at www.pcaw.org.uk

In order to prevent any recurrence of such unjustified sentences, the Business Ombudsman has proposed other measures, such as the introduction of jury hearings and of public arbitrators to consider cases, with the ultimate sanction of fines, rather than imprisonment[48].

In this context, the creation of trusted channels for whistleblowers would be invaluable. The Business Ombudsman might carry out that function for businessmen who wish to complain about official corruption but are reluctant to use official channels.

More generally, there is an opportunity for one or more public institutions to improve their own image by consulting widely on new whistleblowing proposals, and being open-minded about options for the new system.

The process should involve publicising cases (if need be in an anonymised form) where as a result of information from a whistleblower a case has been pursued to a final conclusion. Convictions of those in powerful positions would be the most persuasive outcome, but other final outcomes (such as dismissal of a wrongdoer from an official post) might be useful, as long as these could not be perceived as politically motivated. Any examples of whistleblowers who have positive experiences in securing results would be encouraging to others.

There is also a crucial need to convince whistleblowers that they will be adequately protected, and that their confidentiality will be respected if they so request. Any proposals will need to include convincing measures on these issues and the importance of this point cannot be underestimated.

The lessons that have been learned from the protection of workplace whistleblowers in different national contexts can be applied whether or not the whistleblowers are employees or not. In the context of this project, for example, the Business Ombudsman could conduct an exercise that identifies the sectors or areas in which corruption is having a serious and detrimental impact on the rights of entrepreneurs. The second step of the exercise would be to determine who would have knowledge of the wrongdoing and therefore be in a position to alert the authorities, and finally, the reasons that such individuals do not or are not able to report or disclose this information need to be identified and action taken to remove or significantly reduce these barriers.

The protection of workplace whistleblowers is important for the long term prevention of corruption and other wrongdoing whether it affects entrepreneurs or not. There may be other steps that can be taken in the short term to provide some form of protection or compensation to entrepreneurs who have been unwillingly involved in corrupt practices themselves. Such measures need to be distinguished from whistleblower protection but may nonetheless be relevant in the context of this project and the specific circumstances in which entrepreneurs find themselves vulnerable to corrupt practices.

[48] Irina Granik (13 May 2013). *Ombudsman Boris Titov outlines reforms for Russian business*, Moskovskiye Novosti

# 7 A NEW LEGAL FRAMEWORK

The first technical paper discussed the international requirements for whistleblower protection. Russia is party to most of the international instruments that discuss these, though it is yet to ratify the Council of Europe Civil Law Convention on Corruption, and we recommend that it should do so. The Report from Parliamentary Assembly of the Council of Europe on whistleblower protection[49] acknowledged that many states already have rules covering, directly or indirectly, certain aspects of whistleblowing. The Russian Federation is no exception in this regard. However, most states, like Russia, do not yet have a comprehensive national framework for the protection of whistleblowers. The Council of Europe's Recommendation on the Protection of Whistleblowers which was recently approved by the Committee of Ministers[50] is designed specifically with this objective in mind. As the Recommendation and its Explanatory Memorandum are helpful guides in considering the institutional aspects of a national framework these will be referred to regularly in this paper. As a member of the G20, Russia has also undertaken to implement the G20 principles of 2011 on whistleblowing. Russia is also party to the OECD Convention on the Bribery of Foreign Public Officials, and we refer to the recommendations made to Russia by the Working Group set up under that Convention which include whistleblowing.

Russia's new Action Plan against corruption promises a new law (to be prepared by November 2014) to prevent retaliation by officials against those who report corruption. That may reflect the priority need for Russia. But it is not comprehensive as it does not cover retaliation by private sector employers, nor does it cover non-corruption issues. It is thus not in accord with the new Council of Europe Recommendation. We hope that this commitment can be enlarged to take the new Recommendation on board.

In this section we consider the possible contents of a new comprehensive legal framework for whistleblowing, taking account of these measures and also of other guidance and good practice which would go beyond the Council of Europe's recommended principles.

## 7.1 Definition of Whistleblowing

The CoE Recommendation defines "Whistleblower" to mean 'any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether public or private'. We recommend that a suitably positive term be used to describe such persons in Russian legal documents - for example *zayavitel (o korrupcii).*

### 7.1.1 Scope: public interest and corruption

We assume that the legal framework should cover not only corruption, but all types of wrongdoing. Corruption is the focus of most international measures, as it is a crime from which both parties benefit, so it is rarely prosecuted without the help of whistleblowers. The protection of whistleblowers is thus essential to the anti-corruption agenda - but is also crucial in preventing and investigating many other types of wrongdoing. The public interest is protected by focusing on matters that might cause harm or be against the common good rather than focusing on conduct that might be against the law.

The need for whistleblower protection to extend beyond the field of corruption has been recognised in measures taken by the Parliamentary Assembly of the Council of Europe (PACE). The PACE Resolution 1729/2010 recommended a cross-sectoral approach on whistleblowing covering "warnings against various types of unlawful acts, including all serious human rights violations." The CoE Recommendation states: "*Whilst it is for member States to determine what lies in the public interest*

[49] Parliamentary Assembly of the Council of Europe (2009), *The Protection of Whistleblowers*, Rapporteur: Pieter Omtzigt (Netherlands), report of PACE Committee on Legal Affairs and Human Rights, available at http://assembly.coe.int/

[50] *Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers* available at www.coe.int/

*for the purposes of implementing these principles, Member States should clearly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment"* (Principle 1).

International experience demonstrates that whistleblowing laws that cover a wider range of public interest information are far more effective in combatting corruption than those laws that are limited to actual or potential criminal offences. Focusing on offences and "conduct" rather than harm also risks confusing public interest whistleblowing with "informing" or "denouncing" and may increase opposition to the law and distrust in its purpose. Limiting it to conduct that is criminal or akin to criminal conduct would not eliminate this fundamental problem. Whistleblowing is not about reporting others, it is about protecting the public interest and protecting those who help ensure that problems are addressed and dealt with early enough to avoid or significantly reduce damage or harm.

### 7.1.2 Scope: protection

It is practicable to deal separately with the public and private sectors. Indeed, the Netherlands provides an example of a non-statutory approach to the private sector with its "Statement on dealing with suspected malpractices in companies" operating as an informal standard to which the courts have regard. There are differing views as to whether this is satisfactory. It could also be possible to have a phased introduction of the protections for each sector, maybe by beginning with protections in the public sector and then extending the law to the private sector. However we argued in the comparative analysis of practices in CoE member states to protect whistleblower that it is preferable to cover both private and public sectors in a single law at the outset. Moreover the European Court for Human Rights has made clear in several important cases that whistleblowers in any walk of life who suffer retaliation may bring cases before it on the basis that their right to freedom of expression under Article 10 of the European Convention on Human Rights has been violated[51].

Our recommendation is therefore that an overarching law should be drafted to cover all workers, in public and private sectors, who report any kind of wrongdoing. That might form part of Labour Law. That would ensure that it becomes well known, applies to all employees and is recognised as an issue for the Labour Inspectorate. Separate action would need to be taken for any persons - for example entrepreneurs – who are not subject to Labour Law.

### 7.1.3 Issues for disclosures

In accordance with the CoE Recommendation (Principle 1), the law should apply at least to warnings or reports of illegal acts (planned or committed). Consideration should be given to how far it may be useful to go beyond illegal acts to include other behaviour that damages the public interest such as gross mismanagement and professional incompetence. [Example: Irish Bill[52]].

It should be specified that disclosures in the course of job duties are protected.

### 7.1.4 Methods of disclosure

The law should cover any means of communication. Whistleblowers may be easily discouraged from the risks inherent in reporting abuses and it is not helpful to require that reports should take any particular format (for example that they should be in writing). Consequently, simply telling someone with any responsibility that there is a concern that falls within the definitions of the law, or a Code of Conduct should be recognised as a disclosure under law. This increases the responsibility on agencies to put in place the systems for recognising and dealing with concerns, but also matches the apparent

[51] See Appendix 2

[52] Section 5 (3) covers acts or omissions by public bodies that are oppressive, discriminatory or grossly negligent or constitute gross mismanagement.

experience and preferences of most members of staff with public interest concerns, in most situations[53]. The issue of protecting confidentiality is discussed below.

### 7.1.5 Coverage of workers

In accordance with Principles 3 and 4 of the CoE Recommendation, protection should cover all kinds of employees - full-time or part-time, contractors and unpaid volunteers. It should cover all types of public sector workers, meaning those paid for out of public funds, whether elected or appointed. In the private sector it should also include Non-executive Directors and members of company boards. Also, as in the Netherlands, former employees should be able to blow the whistle on their former organisation (up to two years after ending the employment). Principle 4 states it should also "possibly" cover those whose employment is yet to begin "in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage". This addition would be important for entrepreneurs, who may have been improperly excluded from competing successfully for a contract.

As discussed at 3.2.8 in the comparative analysis of practices of CoE member states in the protection of whistleblowers (the first Technical Paper prepared under this project) there is an example in Dutch law of defining the scope to include those who report any wrongdoing whether in their organisation or another, as long as they became aware of it through their work. This should ensure all entrepreneurs are covered, whether they are employees or heads of their own business.

This follows the approach taken in the UK's Public Interest Disclosure Act (PIDA). While the protection is focused on the employment relationship - namely it protects those in work from any unfair detriment or dismissal - the substance of the concern itself can relate to any real or potential risk of harm or wrongdoing happening anywhere at any time and whether or not it relates to the work of the employer. In practice, it may be highly unlikely that an employer would dismiss a member of staff for reporting a crime or a health and safety risk wholly unconnected to the workplace but were this to happen, the member of staff could make a claim for protection. The public policy and legal reason for this is clear - it is in the public interest to ensure as broad range of information about potential risks, harm or possible illegal conduct can be disclosed, particularly as to do otherwise could unwittingly lead to perverse outcomes for either the whistleblower or for protecting the public interest. A good example is the case included in Appendix 1 entitled "Alerting a Third Party" - under the UK law the whistleblower would be fully protected if his employer victimised him for alerting the other company to the thefts occurring on the other company's premises.

It is desirable that protection should cover employees wrongly suspected of being whistleblowers (the failure to ensure rights in such cases in the UK has caused problems). Also that it should cover those associated with whistleblowers to avoid retaliation against, for example, their families.

The CoE Recommendation states *"A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order, or international relations of the state"* (Principle 5). As noted in Comparative analysis of Council of Europe member-states practices, the Irish draft law has dealt with this, while maintaining the key principle of access to an independent third party, by providing for a new "Disclosures Recipient", a judge who will be appointed by the Prime Minister and report to him annually. It should be noted that whistleblower protection for those working in national security is now higher than ever on the international agenda and there are good legal and policy reasons for ensuring national security whistleblowers are protected; namely to ensure that whistleblowers can protect themselves when they

[53] See A J Brown. (2011) "*Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*" in D. Lewis & W. Vandekerckhove (2008), *Whistleblowing and Democratic Values*, International Whistleblowing Research Network, The International Whistleblowing Research Network, ISBN 978-0-9571384-0-7 e-book. See also British Standards Institute (2008) *Whistleblowing Arrangements Code of Practice*, PAS 1998:2008.

operate responsibly through proper channels. Guidance on whistleblower protection can be found in the Global Principles on the Right to Information on National Security[54].

While the CoE Recommendation says a special scheme may apply to information about national security, the Explanatory Memorandum makes it clear that the Principle applies to "*information only. It does not permit categories of persons (such as police officers, for example) to be subject to a modified scheme. Rather, it is the category of information that may be subject to a modified scheme. The principle, therefore, extends, for example, to non-military personnel who, through a work-based relationship with the military (sub-contractors, for example) acquire information on a threat or harm to the public interest."*

It should be noted that in the UK, PIDA was extended to serving police officers in 2004. Amendments to the Irish Protected Disclosures Bill in 2014 will ensure that members of the Gardaí (Irish police service) are protected for going directly outside the police to the independent police regulator.

### 7.1.6 Requirements on the whistleblower

The law should ensure protection is not lost if the whistleblower's report is mistaken. All that is required is that *"he or she had reasonable grounds to believe in its accuracy"*. There is no mention of "good faith" in the CoE Recommendation, recognising that motivation is not important, as long as there is a public interest (Principle 22). If the law mentions good faith at all, whistleblowers should benefit from a presumption of good faith. [Example: Romania Art 7.1.a.] In the UK, "good faith" was removed from the law in 2013.

### 7.1.7 Disclosures to external authorities

The implication of the European Court for Human Rights case of Guja (see Appendix 2) is that it should be simple and easy for a worker to approach the responsible regulator. Regulators are in the direct line of accountability, and should have the power to put the problem right. It is helpful if there can be an authoritative list stating which authorities are appropriate for which types of report but disclosing information to the wrong regulator should not adversely affect the whistleblower and regulators should have an obligation to redirect the whistleblower appropriately.

### 7.1.8 Public disclosures

It is also clear from the Guja case (and from Principle 14 of the CoE Recommendation) that public disclosures can be justified in certain cases and therefore the law needs to allow for such situations. For public disclosures the test should be whether the disclosure is reasonable in the circumstances. Justification that it is reasonable will depend on the seriousness of the issue and on whether alternative channels do not exist, have not functioned, or cannot be expected to function. There should be special provision for exceptionally serious cases, so that the formal requirements on the whistleblower are minimised in these cases. [Example UK law - PIDA 43G and H]

The CoE Recommendation states that "Any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should retain the protection and the remedies available to him or her under the rules of general law" (Principle 10). However it should be a defence to any relevant civil or criminal proceedings against an individual whistleblower (for example for defamation or breach of secrecy or copyright laws) that he complied with the law on whistleblowing. Thus the law may need to make a specific provision about the need to recognise the rights of others, [e.g., the draft Serbian law requires that if a whistleblower goes public he should comply with the presumption of innocence and the right to privacy].

[54] Principles 37-46, Open Society Foundations (2013), *The Global Principles on Right to Information and National Security* available at http://www.opensocietyfoundations.org/

### 7.1.9 Obligations to report

There is an obligation for officials to report any corrupt approaches made to them to their employer, the prosecutor or other government bodies. To increase the safety level of whistleblowers employed by public bodies we recommend that the law should clarify that submitting reports about corruption in accordance with this obligation is not a public statement or assessment.

We also recommend that whistleblower protection should cover notifications that an official makes of any corruption that he or she knows about through work whether or not they are directly involved This is in line with the OECD recommendation that Russia introduce clear rules/guidelines requiring civil servants to report suspicions of foreign bribery, in addition to the existing requirements to report instances in which the civil servants are directly solicited[55]. We do not recommend starting the process of strengthening whistleblower protection measures with extra reporting obligations on individual whistleblowers. Experience shows that such obligations do not in themselves have much impact. However, advice and guidelines are important and we do recommend that any protection for whistleblowing in public or government service should be extended to employees of state companies and state corporations as well as other bodies in which the government has a share.

## 7.2 Protections

### 7.2.1 Duties of confidentiality to employers

In accordance with Principle 11 of the CoE Recommendation, the law should make clear that as a general rule it over-rides any obligation or duties of confidentiality between the worker and his or her employer.

**Box 1: Example Romanian LAW No. 571 of 14 December 2004, Art 4d.**

(…….) In a case of public interest whistleblowing, ethical or professional norms that might hinder public interest whistleblowing are not applicable;

It must be clear, both in law and practice, that non-disclosure orders must not operate to conceal wrong-doing, both at the time of initial disclosure and after settlement of any case, thus avoiding a problem that has been identified in the UK. In the UK, the law includes a provision which was intended to have this effect but the practice of putting "gagging clauses" into severance agreements has continued, in effect allowing employers to buy the silence of employees. The PCaW Commission has recommended that application of the law to severance agreements should be made clearer. The text proposed is: "No agreement made before, during or after employment, between a worker and an employer may preclude a worker from making a protected disclosure."

However, in accordance with Principle 6, there are some duties of confidentiality - notably within the legal professions - which should be maintained. That may require a small change in the law to ensure that a lawyer who is approached for legal advice by a whistleblower is not protected as a whistleblower if he decides himself to pass that information on[56]. His professional duty is to maintain confidentiality, unless his client instructs him to make a disclosure on his behalf, or if exceptionally he is required to make a report by law, e.g. on money laundering.

### 7.2.2 Legal advice

As discussed below, free legal advice is available in some cases to whistleblowers in Russia. It would also be useful to make clear that all whistleblowers have an unfettered right to seek legal advice, in

[55] OECD (2013) *Phase 2 Report on Implementing the OECD Bribery Convention in the Russian Federation*, available at www.oecd.org

[56] This was done in the UK - 43B(4) in PIDA.

confidence but not necessarily free, before making any disclosure. This is relevant to the CoE Recommendation (Principle 28). [Example: the Netherlands, Adviespunt Klokkenluiders[57].]

### 7.2.3 Protecting confidentiality

The preservation of confidentiality is an important aspect of whistleblower protection. The CoE Recommendation states: "Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees" (Principle 18).

It will be necessary to explain the difference between anonymity and confidentiality and why the latter is preferable. In fact there are three types of whistleblowing:

- **Open whistleblowing -** Where an individual reports openly or states that they do not ask for their identity to be kept secret.
- **Confidentiality -** Where the name of the individual who reported information is known by the recipient but will not be disclosed without the individual's consent, unless required by law.
- **Anonymity-** Where a report is received but no one knows the source.

In accordance with the CoE Recommendation (Principle 12) the aim of a whistleblower system should be to encourage the use of open channels. However this may not always be practicable and in situations where it is clear that individual whistleblowers may be at risk of serious harm (e.g. in a sector infiltrated by organised crime or where serious corruption has been identified or is suspected) systems which allow for anonymous reporting are sometimes implemented on a time-limited or reviewable basis. International practice is now, however, tending towards the view that confidentiality of identity should be assumed and guaranteed unless consent is sought [Example: CoE Recommendation (Principle 18); Irish Bill art.16]. Certainly, any request for confidentiality should be respected and the processes by which strict confidentiality will be assured will need to be explained. As is clear from Principle 18 there can be circumstances where confidentiality cannot be maintained – eg, if a court requires to know the source of the report in order for evidence to be assessed in accordance with the rules guaranteeing a fair trial. In such instances a court must rule and should explain the reasons for requiring a whistleblower to testify or to be identified. [Example: Slovenia Art 23.4 and 23.8].

**Box 2: Protection of whistleblowers in Slovenia[58]**

**Article 23.4**
The identity of the reporting person referred to in paragraph 1 of this Article, who has made a report in good faith and has reasonably believed that the information he has provided with regard to the report is true, which shall be assessed by the Commission, shall not be established or disclosed. The filing of malicious report shall be an offence punishable under this Act if no elements of criminal offence have been established.

**Article 23.8**
Only the court may rule that any information on and the identity of the persons referred to in paragraph 4 of this Article be disclosed if this is strictly necessary in order to safeguard the public interest of the rights of the others.

Overall, however, anonymity tends to be relied on where there is no belief in the possibility of protection and there are a number of good reasons for it not to be encouraged as the basis for whistleblowing schemes or arrangements:

- being anonymous does not stop others from guessing who raised the concern;

[57] Advice Centre for Whistleblowers in the Netherlands/Adviespunt Klokkenluiders, *Advice Centre for Whistleblowers in the Netherlands*, available at www.adviespuntklokkenluiders.nl/

[58] Commission for the Prevention of Corruption, *Integrity and Prevention of Corruption Act* available at www.kpk-rs.si/

- it is harder to investigate the concern if people cannot ask follow-up questions;
- it is easier to organise the protection of the whistleblower against retaliation if the concerns are raised openly;
- anonymous reports can lead people to focus on the whistleblower, instead of the message;
- an organisation runs the risk of developing a culture of receiving anonymous malevolent reports;
- the social climate within the organisation could deteriorate if employees are aware that anonymous reports concerning them may be filed at any time.
- it is possible that the wrong person will be identified as the whistleblower, and suffer accordingly, possibly without protection from the law which is designed to protect persons who actually do blow the whistle[59].

However, while not encouraged, it is recommended that anonymous reports are examined and dealt with appropriately and that where an individual has raised a concern anonymously they be able to avail themselves of protection of the law if it becomes clear they are the source of the information and they are at risk of suffering unfairly.

### 7.2.4 Following up reports

The CoE Recommendation states "public interest reports and disclosures by whistleblowers should be investigated promptly" (Principle 19) and that whistleblowers should, in general, be kept informed of any action taken (Principle 20). It may be useful for the law to specify time limits for responding, and/or for taking action. [Example: Art 17 of the draft Serbian law]. Time limits for completion may be impracticable because of the complexity of some cases. Failure by an employer to comply should be capable of being considered as a form of retaliation.

### 7.2.5 Forms of protection

The CoE Recommendation states 'Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer'. In Norwegian law retaliation is understood broadly as any unfavourable treatment which is a direct consequence of and a reaction to the notification. In the UK, the law covers any 'detriment.' It has been left to the courts to define this broad term and they have held that it includes failure to investigate the report properly.

The scope of protection can range from reversing, remedying or proactively blocking any detrimental treatment taken against a whistleblower in relation to their work, as well as ensuring whistleblowers and their families have access to physical protection or other remedies where necessary. Some of these may be required with respect to protecting the entrepreneurs who are business owners reporting on corrupt practices.

It is good practice to provide a right to bring a civil case against third parties who retaliate against them. As noted in above the Irish law[60] introduces a new right not only for whistleblowers, but for another person who suffers detriment as a result of someone else's whistleblowing, to institute civil proceedings against the third party responsible for the detriment. Similarly, the draft Serbian law provides some protection for any person associated with a whistleblower. Both these provisions might be of some benefit to entrepreneurs who were not in a position to blow the whistle themselves (e.g. because they were self-employed) but faced retaliation because someone else did (possibly encouraged by them).

[59] See G20/OECD Guiding principle 3

[60] Irish *Protected Disclosures Act* 2014, available at: www.per.gov.ie/protected-disclosures-i-e-whistleblowing/

### 7.2.6 Rewards

We discussed the controversial issue of rewards in the first part of the paper. We do not recommend any special provision on rewards. A law on the protection of whistleblowers can work well without any overall system of rewards, though the reverse is not equally true. The UK system actually disbars from protection whistleblowers who make disclosures for personal gain (whilst allowing regulators to offer discretionary rewards if they so choose).

### 7.2.7 Criminal offences

In view of the need to consider circumstances outside the workplace, it might be useful to create a new criminal offence of threatening or taking other measures against a person because s/he has reported wrongdoing. An example is found in the US in the Sarbanes-Oxley Act, which introduces criminal liability against those who retaliate against whistleblowers (Section 1107). This provision has not been used but may nevertheless have a declaratory or deterrent effect.

It might also be considered whether the persons in charge of the bodies concerned in retaliations should bear both criminal and disciplinary responsibility, if they reveal information about the identity of whistleblowers. However, in such cases disciplinary responsibility may suffice.

It will be worth examining laws governing the making of false allegations, rules on defamation, libel and immunities to see if any of these could be reconsidered to ensure that they do not go wider than they need to, and that any chilling effect on public interest whistleblowing is minimised. For example:

- A law that forbids "illegal entrepreneurship" – this sounds very vague and can be used against them.
- Laws on extremism that make it possible to crack down on any speech, organization, or activity that lacks official support[61].
- The Criminal Code provides criminal liability for knowingly making a misleading allegation (Article 306 of Criminal Code of RF). Along with that, the Code of Criminal Procedure provides that an investigator, in any case where criminal proceedings were not initiated, must consider the option of opening proceedings for knowingly making a misleading allegation against the person who reported the crime. It needs to be clear that whistleblowers who make honest mistakes will not be subject to proceedings under Article 306.

### 7.2.8 Personal protection

Witness protection is a separate issue (as discussed below) but if a whistleblower's personal safety is endangered he should have access to the witness protection programme. (E.g. Slovenia–Box 3). The programme should not be limited to cases where a criminal investigation has been opened.

**Box 3. Protection of whistleblowers in Slovenia[62]**

**Art 23.6**
If in connection with the report of corruption, the conditions for the protection of the reporting person or his family members are fulfilled under the law on witness protection, the Commission may submit a proposal to the Commission on the Protection of Witnesses Risk to include them in the protection programme or may propose that the State Prosecutor General take urgent safeguarding.

[61] *Supra*, note 2.

[62] Commission for the Prevention of Corruption, *Integrity and Prevention of Corruption Act* available at www.kpk-rs.si/

## 7.3 Procedural aspects

### 7.3.1 Time limits on bringing an action

A reasonable time limit should be allowed for the employee to exercise his rights to bring a case after he or she suffers retaliation. Example: in US, the Sarbanes-Oxley Act's limit of 90 days was found too short and they increased it to 180 days and clarified that it began running on the day the employee became aware of the retaliation (Dodd-Frank Act, section 922).

### 7.3.2 Cases taken to court

In accordance with Principle 23 of the CoE Recommendation there should be a right to apply to a court if there is any retaliation. The Recommendation also states: "Interim relief pending the outcome of civil proceedings should be available for persons who have been the victim of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment" (Principle 26). The court should also have power to order compensation at the end of the process if the worker suffers any retaliation.

It is good practice to make provision for some legal aid or support. [Example: Netherlands, where the current limit is €5,000].

The CoE Recommendation states "In legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated" (Principle 25). This is in effect a reverse burden of proof which would operate as soon as a whistleblower has made a disclosure and is at the heart of effective whistleblower protection. It should be noted that such a reverse burden applies in discrimination law to overcome similar evidentiary hurdles and redresses, to some degree, the power imbalance in such cases.

It is good practice, and essential in the Russian context, also, to apply the reverse burden to cases where retaliation occurs at an early stage, where someone has discovered the whistleblower's intention to make a disclosure, but he has not actually made it. The effect would be that any subsequent retaliation would be presumed to be motivated by his intended disclosure, unless the person responsible could prove otherwise.

## 7.4 Implementation aspects

### 7.4.1 Encouraging corporate social responsibility

The CoE Recommendation states "Encouragement should be given to employers to put in place internal reporting procedures" (Principle 15). It would be helpful if the law required them to do so, and specified that the courts, when considering cases, will take into account whether they have done so. An independent Commission in the UK recently recommended that the UK law on whistleblowing be amended to authorise the Secretary of State to issue a code of practice on whistleblowing arrangements and provide that such a code be taken into account by courts and tribunals wherever it is relevant. The debate and discussion on this issue among the various stakeholder groups is ongoing[63].

In Russia there is a new framework for taking action, under Article 13.3 of the Law on Preventing Corruption which came into force in 2013. That provision requires all Russian companies to

[63] PCaW (2013) *Whistleblowing Commission: Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK*, available at www.pcaw.org.uk/

implement anti-corruption measures, and we recommend that should include the introduction of whistleblower mechanisms. In this we agree with the OECD phase 2 report on Russia which contains a recommendation that Russia provide guidance on internal whistleblower mechanisms under Art 13.3[64]. The UK guidance to which we referred at 4.1 of our first technical paper provides one possible model. Once the Russian guidance is available, the Business Ombudsmen can play a role in encouraging companies to put the mechanisms in place.

We also recommend that Russia should ensure that such a provision applies to major companies operating in its territory, whether or not they are Russian. In particular, it could introduce a new provision requiring any company which wishes to be registered on the Russian Stock Exchange to put whistleblowing arrangements in place. We refer to the example of the US provision (in the Sarbanes-Oxley Act) at 3.2.7 of our first paper. We also refer there to the example of the UK Bribery Act, which encourages whistleblowing arrangements by providing that their existence will form part of a legitimate defence against the charge of failing to prevent bribery.

The international reach of bribery laws is demonstrated by a case we mention in Appendix 3 (section 9). In that case, a Russian company was convicted under US law for the bribery of Russian prosecutors.

### 7.4.2 Review

The CoE Recommendation states that "*Periodic assessments of the effectiveness of the national framework should be undertaken by the national authorities"* (Principle 29). It would be useful for the law to specify this to ensure that it actually happens. [Example Clause 2 of the Irish Bill]

[64] See footnote 17.

## 8 INSTITUTIONAL FRAMEWORK

No law will work without an effective institutional framework. When considering the institutional framework, certain principles should be borne in mind:

- whistleblower protection is distinct from and broader than witness protection (see Articles 33 and 32 UNCAC respectively);
- the objective of the national framework is to *facilitate* public interest reporting and disclosures, not to control or hinder it (Principle 1 , Council of Europe Recommendation);
- whistleblower protection is grounded in principles of democratic accountability and freedom of expression (Principle 8 , Council of Europe Recommendation; European Court for Human Rights case law);
- an institutional and legal framework must support a plurality of protective and accessible channels for disclosing information (Principles 12 - 17, , Council of Europe Recommendation; Guiding Principle 4, G20 Compendium of Best Practices)
- properly resourced systems need to be in place to receive information, react appropriately to material issues, and protect whistleblowers (Principle 9, , Council of Europe Recommendation; Rec 4, Whistleblowing Commission, UK; Guiding Principle 5, G20 Compendium of Best Practices);
- whistleblowing disclosures should be investigated promptly and results acted on in an efficient and effective manner (Principle 19, Council of Europe Recommendation).

The first point requires some explanation. Whistleblowing refers to the act of someone reporting a concern or disclosing information on acts and omissions that represent a threat or harm to the public interest that they have come across in the course of their work; for example, harm to the users of a service, the wider public, or the organisation itself or a breach of the law. It covers reports to employers (managers, directors or other responsible persons), regulatory or supervisory bodies, and law enforcement agencies, as well as disclosures to the public, most typically via the media and internet, public interest groups or a member of parliament.

It is important when considering how to strengthen the institutional framework for whistleblowing that a distinction between whistleblowing and witness protection is made and the implications of this distinction are fully understood. Otherwise, even where an existing institution is in a good position to deal with a broad range of public interest information or indeed protect individuals from reprisals, their mandate will be not understood as covering such a situation or will not be adjusted appropriately in order to be able to do so.

In very basic terms, in some situations a witness who testifies in a court may also be a whistleblower who, like any other witness, may need the state's protection. However, the act of whistleblowing need not end in court and in the vast majority of cases, the information originally disclosed and the whistleblower do not end up in court. This is because whistleblowing measures are designed to deter corruption or harm by ensuring that individuals can speak up early and safely about a broad range of public interest issues which in turn allows organisations and regulators to take steps to address potential problems and system weaknesses before a crime is committed and to prevent or limit harm or damage.

It is worth remembering that Article 33 of the United Nations Convention Against Corruption is not about witness protection, nor is Article 9 of the CoE Civil Law Convention on Corruption. Witness protection is covered by Article 32 of UNCAC and Article 22 of the Criminal Law Convention on Corruption.

Article 33, for example, states,

> "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 competent authorities any facts concerning offences established in accordance with this Convention." [emphasis added]

The Technical Guide to the UNCAC makes clear the distinction by stating that Article 33 covers "suspicions" or indications of corruption that fall short of evidence or proof in the legal sense. While in practice, as noted above, there may be some overlap when a whistleblower possesses evidence of a crime, generally whistleblowing as set out in Article 33 covers a much broader range of information whose disclosure should be protected notwithstanding that it does not lead to any formal proceedings or prosecutions.

## 8.1 A specialised institution?

The issue of whether a special institution should be established for whistleblowers requires early consideration. There are three basic functions (which may or may not be assigned to a single agency):

1. Giving independent advice to whistleblowers on the steps they can take;
2. Ensuring that the substantive issues they raise are pursued;
3. Addressing any case of retaliation against them.

If such an agency is set up it might reasonably be given other functions like promoting awareness and monitoring the law, but those other functions alone would not justify the creation of an agency.

If the decision is taken to address the needs of entrepreneurs as a priority, then consideration might be given to giving new formal powers to the Business Ombudsmen to ensure they can carry out all three functions for entrepreneurs who may have no confidence in other channels (though they should retain the right to approach other institutions if they prefer). These powers might reasonably be limited to allegations of official corruption, as the priority issue. The Business Ombudsmen might need access to a specialised and trusted prosecutor to carry out the second function above. He would need powers to prevent retaliatory harassment of whistleblowers by official bodies so that he can carry out the third function. They might include the power to over-ride official decisions or orders which in his view are retaliatory.

Some Business Ombudsmen are concerned that they themselves lack protection, and we recommend that they should be protected when carrying out their functions. This is not in our view a whistleblower protection issue, rather a fundamental point about their office. We understand there is a proposal to establish a protection similar to that which exists for the Human Rights Ombudsman.

## 8.2 Advice

The CoE Recommendation states that *"Consideration should be given to making access to information and confidential advice free of charge for individuals contemplating making a public interest report or disclosure"* (Principle 28).

This is partially met already by the President's Decree N309 of 2 April 2013, which obliges the participants in the state programme of legal advice listed in item 1 of Article 15 of Federal Law №324-FZ [65] to provide free legal assistance to citizens who wish to submit factual reports about corruption, as well as in cases of violation of citizen's rights in relation to such reports.

The participants are:
1) Federal executive branch bodies and their jurisdictional agencies;
2) Executive bodies of the regions of the Russian Federation and their jurisdictional agencies;
3) Executive bodies of state non-budgetary funds;
4) State legal bureaus.

[65] *Law "On free legal advice in the Russian Federation" of 21 November 2011*.

Examples of national advice centres are provided in this paper. There are other means of ensuring advice is available and the Netherlands provides a useful example in addition to the Advice Centre mentioned earlier in the appointment of Confidential Integrity Counsellors (CICs) in each Government organisation. If the concern is raised with the CIC, he/she is required to keep the identity of the whistleblower confidential, unless the whistleblower does not want that. All communication back to the whistleblower will go through the CIC. The scheme therefore also provides protection for the CIC. In Russia there is an ongoing discussion about the function of Public Councils in each government agency, so extending their functionality in order to facilitate whistleblowing would be one of the possible options. For businessmen, the Business Ombudsmen are clearly already a promising source of advice.

## 8.3 Pursuing issues raised

The duty to pursue issues will generally fall, in the first place, on regulators. Their roles, and ways of enhancing it, were discussed in the comparative analysis of the practices in Council of Europe member state to protect whistle blowers in the area of corruption presented in the first part of this document. The question is who should exercise oversight, in cases where regulators fail to act effectively or cannot be trusted. There are examples of co-ordinating agencies who may receive reports from whistleblowers and pass them on to others to investigate. Of these, the US Office of Special Counsel (OSC) has the strongest power, though its remit only extends to the public sector. It may order the head of another agency to investigate and report on the disclosed issue, and may determine if the investigation is adequate. The power and prestige of the OSC mean that it can be effective (though this has been seen to depend partly on the person appointed as Special Counsel). In some systems, a special role is given to Ombudsmen, and we have suggested ways this could work for businesses in Russia.

## 8.4 Protection against retaliation

The issue of addressing retaliation will inevitably fall on the courts as a last resort. The issue is whether anything effective can be done to address retaliation before that stage. In Slovenia, the Commission for the Prevention of Corruption has power to demand of employers that any retaliation cease immediately (Art 25.3). Under proposals for a House of Whistleblowers in the Netherlands, the House would help whistleblowers in all aspect of the process. Regulators can and should take steps to proactively protect whistleblowers who contact them.

Laws to protect whistleblowers ultimately rely on the independence and impartiality of the judicial system to protect those rights and freedoms including swift access to impartial tribunals and ultimately to a court of law.

Therefore under any system, there will remain a crucial role in addressing retaliation for a court, and a need for it to act quickly on the basis of a deep understanding of the law. In view of the need for speed in resolving issues, it is worth considering the idea of a specialist court, or special unit within the ordinary court, to deal with whistleblower cases. This may be hard to achieve but it is well worth the effort as the benefits that flow from an effective court process are enormous. Notably, the possibility of settling cases out of court would be enhanced by the knowledge that the court is capable of taking firm and swift decisions in those cases that come before it.

## 8.5 The role of employers

Section 7.4.1 recommends legal changes to oblige employers to put in place arrangements that allow those working with them to safely report public interest concerns, e.g., about wrongdoing and harm that may affect the organisations' activities, those they are meant to serve, or the public more generally. Employers can do this at any time, irrespective of the law in force, and some in Russia are taking relevant steps. "They are strengthening corporate governance by creating clearer separation of board and management competencies and responsibilities, introducing International Financial

Reporting Standards (IFRS), creating greater transparency of accounts, disclosure of shareholders and nominating independent directors to the board. At the management level, they are introducing ethical codes, internal audit procedures and diverse ways for employees to raise concerns about non-compliance[66]". This does not mention whistleblowing arrangements, but clearly that could and should form part of the same agenda.

Regulators and oversight bodies can have a significant impact - through the powers they already have or are given - to ensure organisations they regulate implement whistleblowing arrangements and that whistleblowers are properly protected for raising issues internally or with the regulator. For example regulators who have powers to grant licences or registrations to organisations might take into account whether the organization has effective whistleblowing arrangements in place. This may or may not be possible without legal change.

## 8.6 Facilitating whistleblowing

An institutional framework that ensures that organisations, regulators and law enforcement bodies act on the information they are provided will go a long way to ensuring that whistleblowers come forward. In fact, studies reveal that the vast majority of whistleblowers only ever report issues internally (i.e. to their employer or the organisation for whom they are working) and rarely raise their concern more than twice. Thus the more accessible and close to the individual the arrangements are for dealing with such reports - with the appropriate safeguards and oversight - the more likely that whistleblowing will work to prevent problems such as corruption.

As mentioned at the outset, many states have direct or indirect rules covering different aspects of whistleblowing. For example, there may be regulations obliging individuals in certain sectors to report specific issues, for example an obligation on a public official to report if they or someone they work with has been offered a bribe. However, where the breadth of information that is meant to be reported is narrowly defined, and there is no reliable system in place that allows the employee to by-pass management (in case that is where the problem or its cover-up lies) or to an outside authority, then the obligation is unlikely to change the status quo or make any significant inroads into the fight against corruption.

## 8.7 Plurality of whistleblowing channels and institutional capacity to address concerns

The goal of protecting whistleblowers is to facilitate the flow of information that can prevent wrongdoing, reduce harm and damage, as well as detect and prosecute those responsible. The law can and should offer remedies and protection to those who disclose such information in a variety of ways and to a variety of recipients, for example, to their employer, a regulatory or oversight body, or to the wider public. That said, developing and implementing a clear and reliable institutional framework for handling whistleblowing disclosures and protecting whistleblowers will help ensure that such information is directed in the most appropriate and effective way without limiting an individual's freedom of speech, for example. It should be noted here that Principle 8 of the CoE Recommendation states that any restrictions to the rights and obligation of any person in relation to public interest reports or disclosures should be no more than is necessary and, in any event, not be such as to defeat the objectives of the principles set out in the recommendation.

Thus it is clear that institutional arrangements for a) employers b) anti-corruption bodies c) law enforcement authorities, to name just a few, should be reviewed. It is recommended that this is done in order to ensure:

a) individuals know who they can contact easily;

[66] Blueprint for Speech Report

b) individuals understand that their identity will not be revealed without their consent (confidentiality) and whether and how anonymous reports will be accepted;
c) that information received is properly reviewed;
d) the person or organisation to whom a whistleblowing concern has been disclosed has the power and resources to instigate or direct others to instigate a fuller investigation where warranted;
e) there is a positive duty on the person or organisation to whom a disclosure is made to ensure that the whistleblower is not adversely affected for having made the disclosure;
f) any action taken to the detriment of the whistleblower can be overturned or revoked or an appropriate remedy provided; and
g) there is no exception to protection simply due to the fact that the allegation turns out to be mistaken.

## 9 THE PROCESS OF CHANGE

Whistleblowing is in essence a voluntary act. (There may be legal requirements to report but these are in practice not enforced). Citizens are in effect being asked to take a personal risk – for there is always some risk involved – by making a report, for the sake of the wider public interest. They need to have faith in any system if it is to work, so it is essential to engage civil society pro-actively in the policy process, before any final decisions are taken.

Civil society actors and non-governmental bodies whose public interest activities may focus on specific issues such as tackling corruption, access to information, environmental protection, or specific groups such as small business or trade associations, women's groups or human rights bodies will understand the importance of ensuring that information about breaches or abuses can be brought to light and addressed.

The successful operation of any whistleblower law will depend on public awareness. The awareness campaign needs to be founded on an open consultation process, where proposals are raised for discussion. That will demonstrate that the policy is not simply imposed on the public by the Government, and that the opinions and actions of citizens do count. If citizens have the opposite impression, no whistleblowing system can work.

Examples of good practice in the process:

- UK, where civil society, led by Public Concern at Work (PCaW), prepared the whistleblower law (PIDA) over a five year period. The law was presented to Parliament not by the Government but by an individual MP. All stakeholders were involved and a degree of consensus was achieved that saw all the main political parties agree on the draft law;
- Serbia, where a major effort has been made since early 2012, led by the Commissioner for Information (with the Ombudsman, and the Anti-Corruption Commission), to engage all stakeholders, including civil society, in the preparation of a whistleblower law on which all can agree. The draft is now with the Ministry of Justice and in its final stages[67].

If the policy is to cover whistleblowing not only on corruption, but on all kinds of wrongdoing, as the Council of Europe recommends, then devising the policy will require active consultation, including meetings, with a wide range of stakeholders. Within Government this includes not only all the relevant Ministries (Justice, Interior, Finance, Administration and Labour), but local government and the various regulators.

Though the first proposals may reasonably be formulated within government, there will be a need then to have further proactive consultation on the proposal with the business community and with civil society, especially those NGOs who are concerned about governance.

The process should also involve media representatives, as the media are one avenue for whistleblower reports. Going to the media is a vital option, even though it should be an option of last resort. It is better to raise the matter with a regulator, which has formal powers to fix the problem, where that is possible. Media involvement may generate more heat than light. Most whistleblowers find the media a problematic route and experience shows they are more likely to go to them where no other clear channel is available. The experience of whistleblowers themselves is important and should be taken into account, by listening to their stories.

A good example of public consultation was set in the Russian context by a tax collection campaign held in the early 2000s, with the catchword "pay your taxes and sleep well".
The messages for the public would be as follows:

[67] The background documents are available on the website of the Serbian *Commissioner for Information of Public Importance* and Personal Data Protection, available at www.poverenik.rs/

- Your Government cares about your contribution; that is why we are seeking your views on proposals for a new whistleblowers system;
- International research shows whistleblowing can uncover crime
- We listen to whistleblowers – (here are examples of cases pursued to a conclusion)
- We want to encourage more open whistleblowing, but will ensure strict confidentiality when the person wishes; and
- Comments welcome on our proposals regarding confidential advice, role of regulators, measures of protection, etc.

If the decision is taken to treat entrepreneurs as a priority, similar messages would be relevant. In addition, it could be made clear to entrepreneurs that, in exchange for a new start in their relations with the state, they should put in place effective whistleblowing arrangements for their own staff; this is in their own interests, as well as those of their staff, as the research makes clear.

# 10 APPENDIX 1 - CASE STUDIES

## 10.1 Netherlands – construction sector case

This case indicates the risks for entrepreneurs who report corruption in which they have engaged themselves.

Ad Bos, who blew the whistle on a massive construction sector corruption scandal, was threatened with prosecution for his own role in the affair. In 2001 Ad Bos, who worked for building firm Koop Tjuchem, went public with a set of parallel accounts which triggered a major investigation into bribery and price-fixing in the construction sector. Bos was later found guilty of bribing civil servants but was not sentenced, leading the public prosecution department to appeal. The high court ruled that Bos, who had lost his home and was unemployed, could face prosecution and ordered a re-trial. However the appeal court ruled that the department had taken unfair advantage of Bos's vulnerable position and had given him the impression he would not face prosecution in return for his evidence.

## 10.2 US - Defence Contracting case[68]

An example of the practical use of the False Claims Act.

The whistleblower was a quality-control engineer working for a Boeing subcontractor on a contract to remanufacture CH-47D helicopters for the U.S. Army. After fatal crashes in 1988, 1991, and 1993, the whistleblower discovered that Boeing had installed defective transmission parts. After trying in vain to draw attention to the problem inside the company, he was laid off in 1994 and filed his *qui tam* complaint in May 1995. After five years and paying for 27,000 hours of legal advice, he received $10.5 million as his share of a $50+ million government settlement.

## 10.3 UK – Defence Contracting case

This case involves an entrepreneur exposing a corruption scandal.

Evidence of a massive corruption scandal involving a defence contract between BAE and the Saudi government came to light when Peter Gardiner, who ran a small travel agency, blew the whistle by providing (to the SFO and to the press) details of the extraordinary hospitality provided by BAE via his agency to a Saudi prince and his entourage (e.g. a summer holiday costing £ 2m). Following a change in the law in 2002 which made it clear that these activities were illegal he withdrew from the arrangement. He was effectively in no danger of workplace retaliation as he had already decided not to continue the business with BAE, which was the major part of his work.

The SFO investigation was halted by the SFO following threats from the Saudi government to the UK government about the discontinuance of security co-operation.

## 10.4 UK – Misuse of position in NHS

This case illustrates the importance of independent advice.

Tim coordinated training for an NHS Trust. He was concerned that his boss was hiring a friend of his to deliver training on suspicious terms which were costing the Trust over £20,000 a year. More courses were booked than were needed and the friend was always paid when a course was cancelled. Although Tim asked his boss to get a credit note as with other training contracts, he never did. Tim also couldn't understand why the friend was paid for training sessions delivered by NHS staff. One day when the boss was out, Tim saw the friend enter the boss's office and leave an envelope. His

[68] Whistleblower Central, *Case Studies*, available at http://whistleblowercentral.com/

suspicions aroused, Tim looked inside and saw that it was filled with £20 notes, amounting to some £2,000. Unsure what to do, Tim called PCaW. Tim said his boss had lots of influence in the Trust and he was unsure who to tell, particularly as the Trust was being restructured and none of the directors were secure in their posts. Tim also recognised that the cash in the envelope was so brazen that there could be an innocent explanation.

PCaW advised Tim that the options were either to go to a director of the Trust or to the NHS Counter-Fraud Unit. Either way, they advised Tim to stick to the facts and focus on specific suspect arrangements and payments. They also said he should avoid the temptation to investigate the matter himself. Tim said he felt much better and would decide what to do over the holiday he was about to take.

On his return, Tim waited a few months until he had completed two of his key projects. He then raised his concerns with a director at the Trust, who called in NHS Counter Fraud. Tim's suspicions were right: his boss and the trainer pleaded guilty to stealing £9,000 from the NHS and each received 12 month jail terms suspended for two years.

***Variations of whistleblowing in small businesses***

The following cases, also from Public Concern at Work's Advice Line illustrate some of the many variations of whistleblowing in small businesses, as well as the value of advice.

***Fraud in a family company***

John was the personnel manager for a successful family-run engineering firm. To help with its expansion plans, it had recently raised investment capital. When in the past the directors had put through the books some private work done on their own homes, John had let it pass as it was a family business. Two employees had recently told him that the scale of these private works was now reaching new heights. John was worried about this and doubted that the non-executive directors, the new investors had put on the Board would approve. He thought something should be done but knew that the directors had a well-earned reputation as hard men in the local community. He feared that if he said anything to the non-executive directors he would lose his job or something worse might happen. Not surprisingly, the dilemma had undermined his commitment to the firm.

John sought advice from PCaW who advised him that if he wanted to stay with the firm the best way to deal with it was for him to raise the concern with the family directors. By referring to the fact that staff were talking about it and the risk that they might report the wrongdoing elsewhere, he could help the family see why the private works should be stopped. This approach made his role part of the solution and reduced the likelihood that he would be victimised. If the malpractice continued, PCaW could then discuss with him what his other options were. PCaW also explained that if he lost his job, he would be protected by PIDA. However, this meant he would be compensated if he suffered a detriment or lost his job. The other option was for John to find a new job and then decide whether to raise the concern himself. In the end John decided that it was too difficult to try to resolve it and left the firm.

***Alerting a third party***

Adrian worked at a local site of a major waste disposal firm. He was concerned that his colleagues were involved in the defrauding of a local paper mill. Adrian suspected that some employees of the mill were being paid to steal top grade paper, which was then concealed amongst waste paper in skips that were collected daily by a waste paper company. When the company delivered the waste to Adrian's firm, his colleagues sold it on for cash at a fraction of the market cost.

Adrian was reluctant to identify himself initially and was concerned that the perpetrators were influential in his firm and had good contacts with the local police. He described the atmosphere at the site as intimidating, and the managers as bullying and abusive. He feared that if he spoke out, not only would he lose his job, but his life would be made intolerable. From the information that Adrian gave PCaW, they were satisfied that the matter warranted being looked at more closely. With Adrian's agreement PCaW contacted the victim of the fraud, the local paper mill.

Although the company was initially suspicious they soon realised that their procedures left them open to such a fraud. Within a couple of weeks the mill caught two of its staff in the act. However, they were unable to identify the size of fraud or how long it had gone on. Having obtained assurances on his behalf, PCaW put the mill's investigators in touch with Adrian. He was able to show them how the fraud had been concealed in the paperwork.

With this information the company realised that the fraud had cost it some £3 million. The police were called in and arrests were made. The boss of the waste paper company where Adrian worked was convicted and sentenced to three years, and others involved were jailed for several months. Adrian's foreman was sacked, the charge-hand resigned and the manager of the site took early retirement. The local paper mill recovered almost £1 million from its insurers toward the loss and so averted plans to close down with the loss of over one hundred jobs.

***Company behaving badly***

Jo was an award-winning manager for a well-known fast food chain. She enjoyed her work and valued the company's ethics. However, a new Divisional Manager (DM) arrived who did things his own way. He told managers that they, not their teams, should fill in the staff satisfaction surveys and so boost their bonuses. Jo thought this was wrong and, following company policy, reported her concern to the Compliance team in the United States. They told Jo they would investigate and promised to keep her identity confidential. However, she then heard that the DM was telling other managers that Jo had "reported him" to head office. Jo took sick leave due to stress and was called to a meeting with human resources. Jo rang PCaW for advice.

PCaW explained her legal protection and how to handle the breach of confidentiality sensibly, particularly as her evidence might be essential to taking any action against the DM. At the meeting with HR, JO was told not to "rock the boat" as the DM was a high flyer and that perhaps she should take more time off. Jo rang the Compliance Team in the US who appointed their own investigators. The investigators met with Jo and said her claim was valid. However, two weeks later Jo was told she would have to attend another meeting with HR and respond to two claims against her, one for an incident that occurred a year previously and the other while she was off work.

PCaW advised her to stay calm, warning her that it seemed they were trying to set her up. At the meeting Jo was told she would get a final written warning. As she left the meeting Jo ran into the DM and got angry with him. At that point, she was suspended. Jo decided to sue under PIDA and just before the hearing; her case was settled by the company for over £100,000. PCaW advised Jo to be open with her job applications and she now has another good job and is studying law in the evenings. Jo said afterwards that she had no regrets and still values her former company, commenting that its ethics had been hijacked by one individual.

# 11 APPENDIX 2 - EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW ON WHISTLEBLOWING

Whistleblowers have a right to bring cases to the European Court for Human Rights as any retaliation against them can be argued to be an infringement of their right to freedom of expression under Article 10 of the European Convention on Human Rights. The main relevant caselaw on whistleblowing was summarized in the Feasibility Study for the Council of Europe published in 2012[69].

## 11.1 Guja v. Moldova

It is worth recalling the leading case of Guja v. Moldova[70], in which the Grand Chamber of the court established principles in case to determine whether an interference in a person's right to free expression could be justified. In summary the issues that need to be considered are:

1. The public interest in the disclosed information;
2. Whether the person had alternative channels for making the disclosure;
3. The authenticity of the disclosed information;
4. The motives of the person;
5. The damage, if any, suffered by the person's employer as a result of his disclosure and whether this outweighed the public interest; and
6. The severity of the sanction imposed on the person and its consequences.

Mr Guja was Head of the Press Department of the Prosecutor General's Office. After proceedings against some policemen for mistreating suspects were dropped, he sent the press two letters on the case, which suggested that the proceedings may have been dropped for improper motives. One of these letters was from a high-ranking official in the Parliament. These letters were stated by the authorities to be classified, but were not marked as such. For releasing them he was dismissed. The European Court for Human Rights, having considered the case against the 6 principles above, held that Mr Guja was justified in revealing information to the press in the circumstances of his case. They ordered that he should receive a certain amount of compensation.

## 11.2 Heinisch v. Germany[71]

This case is also worth recalling as it concerns a company, albeit a State-owned company. Heinisch, a nurse working in a home for elderly people, was dismissed when, after her management failed to act on her reports of serious deficiencies in patient care, she lodged a criminal complaint alleging fraud. The German court upheld her dismissal, holding that the criminal complaint amounted to a disproportionate reaction to the denial of her employer to recognise shortcomings and that she had breached her duty of loyalty towards her employer.

The European Court for Human Rights in its judgment recognised that employees have a duty of loyalty and stated "consequently disclosure should be made in the first place to the person's superior or other competent authority. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public". The Court looked at this case in line with the principles established in Guja and concluded that Article 10 had been violated. It noted in particular that:

- the applicant had not only raised the issue of staff insufficiencies with her superiors, but also alerted the management to a possible criminal complaint through her counsel. It held that in the circumstances external reporting by means of a criminal complaint could be justified. The Court held that "if the employer failed to remedy an unlawful practice even though the

[69] See footnote 16

[70] Case no. 14277/04, 12 February 2008

[71] Case no. 28274/08, 21 July 2011

employee had previously drawn attention to… [it], the latter was no longer bound by a duty of loyalty towards his employer";

- the applicant acted in good faith "even assuming that the amelioration of her own working conditions might have been an additional motive for her actions." The court held this finding was further corroborated by the fact that the applicant – once she had concluded that external reporting was necessary – did not have immediate recourse to the media but chose to first have recourse to the prosecution authorities; and
- the public interest in having information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important that it outweighed the interest in protecting the latter's business reputation and interests.

## 11.3 Bucur and Toma v. Romania[72]

This is an important new case. The facts were considered against the 6 principles in Guja, and a breach of Article 10 was found. The importance of this case was that it concerned an employee of the security services. Hence, national security concerns do not automatically trump freedom of speech.

[72] Case no. 40238/02, 8 January 2013

## 12 APPENDIX – LEGAL REFERENCES FROM OUTSIDE RUSSIA

### International

#### *Council of Europe*

Criminal Law Convention on Corruption ETS 173 (1999)
Civil Law Convention on Corruption ETS 174 (1999)
Recommendation on Whistleblowing CM/Rec (2014) 7, adopted 30 April 2014

#### *United Nations*

UN Convention Against Corruption (UNCAC) (2003)

#### *G20*

*Protection of Whistleblowers 2011* (principles and compendium of good practices prepared under the G20 Anti-Corruption plan).

### National

#### *Ireland*

Protected Disclosures Act 2014

#### *Netherlands*

Law on the House for Whistleblowers (Proposal for a law by the members of Parliament Raak, Heijnen, Schouw, Van Gent, Ortega-Martijn and Ouwehand, regarding the establishment of a House for whistleblowers. Currently in Parliament, before the Senate, 33 258.)

#### *Norway*

Amendments to the Working Environment Act passed in 2006

#### *Romania*

*Law on Protection of Public Sector Whistleblowers (Law 571/2004)*

#### *Serbia*

Draft Law on Protection of Whistleblowers (Ministry of Justice draft English version, January 2014)

#### *Slovenia*

*Integrity and Prevention of Corruption Act 2010 (Articles 23-25)*

### UK

Public Interest Disclosure Act 1998 (PIDA)

### US

(1) Sarbanes-Oxley Act 2002 (SOX) (sections 301, 806 and 1107) (2) Dodd-Frank Act 2010 (H.R. 4173: Wall Street Reform and Consumer Protection Act).

## 13 APPENDIX – LEGAL REFERENCES FROM RUSSIA

Codes
Criminal Code of Russian Federation
Code of Criminal Procedure of Russian Federation
Labour Code of Russian Federation

Federal Laws
Federal Law №79 "On State Service in the Russian Federation" as of 27 July 2004

Federal Law №119-FZ "On state protection of victims, witnesses and other participants in criminal proceedings" as of 20 August 2004

The Federal Law №294-FZ "On protection of legal entities and sole proprietors during control and supervision activities" as of 26 December 2008
Federal Law №329-FZ "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the improvement of public administration in the field of anti-corruption" as of 21 November 2011
Federal Law №78-FZ "On Commissioners on protection of entrepreneurs' rights in the Russian Federation" as of 07 May 2013

Other legal acts

President's Decree №309 "On measures to implement certain provisions of the Federal Law "On Combating Corruption" as of 02 April 2013.

**The Council of Europe** recognises the value of whistleblowing in deterring and preventing wrongdoing, and strengthening democratic accountability and transparency. There is also a growing recognition by Member States of the value of the contribution of whistleblowers in uncovering hidden wrongdoing. This technical paper provides updated information on country legislation and the newest development in the field of whistleblower protection.

Whistleblowing is in essence a voluntary act. Citizens are in effect being asked to take a personal risk by making a report, for the sake of the wider public interest. They need to have faith in any system if it is to work, so it is essential to engage civil society pro-actively in the policy process, before any final decisions are taken.

**The Russian authorities** have expressed concern that corruption and bureaucratic pressure on business is one of the main causes which hinders national economic growth and development in the country. It has also been recognized that raiding practices are carried out with the participation of bureaucratic structures or individual officials interested in gaining control of a business. Through the joint project on the "Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices" – PRECOP, the European Union and the Council of Europe in cooperation with the Business Ombudsman's Office in the Russian Federation and other stakeholder institutions aims to facilitate and contribute to the implementation of mechanisms to prevent corrupt practices affecting the business sector in the Russian Federation. Specifically, the project will strengthen the capacity of the Business Ombudsman institutions and other authorities involved in protecting the rights of entrepreneurs in the Russian Federation from corrupt practices.

**The project** on "Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices" is a joint action of the European Union and the Council of Europe. The project is implemented by the Council of Europe and has a foreseen length of 36 months starting from January 2013. The total amount of the budget is 1.3 million EUR jointly contributed by the EU Delegation in the Russian Federation and the Council of Europe.

www.coe.int/precop

**The Economic Crime and Cooperation Unit** at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

www.coe.int/corruption

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

**www.coe.int**

The European Union is a unique economic and political partnership between 28 democratic European countries. Its aims are peace, prosperity and freedom for its 500 million citizens – in a fairer, safer world. To make things happen, EU countries set up bodies to run the EU and adopt its legislation. The main ones are the European Parliament (representing the people of Europe), the Council of the European Union (representing national governments) and the European Commission (representing the common EU interest).

**http://europa.eu**

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