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Technical Paper: Comparative analysis of practices for protection of whistleblowers in the area of corruption in CoE member states

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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 in Heading 2 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. The international requirements and some positive examples of Member State responses are discussed under Heading 3 in this paper. A degree of harmonization can be expected in the future, as a Council of Europe Recommendation on the protection of whistleblowers is expected to be approved by Council of Ministers shortly. That Recommendation will provide a template against which future legislative proposals can be measured.

The Recommendation 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.

Whatever the law may say, good practice starts in the workplace. Heading 4 discusses the measures that need to be put in place to make whistleblowing work as a safe alternative to silence. These include the promulgation of codes of conduct for employers, and the provision of advice to staff concerned about issues in the workplace. It also discusses the role of regulators, which is crucial to ensuring that the contribution of whistleblowers is valued and their concerns are addressed. Under Heading 4 we also consider the issue of compensation through the courts and the possible use of rewards and other incentives.

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[1] prepared by the European Committee on Legal Cooperation (CDCJ).

[1] http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/Whistleblowers/CDCJ%20%282012%299E_Final.pdf

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 ECtHR in the leading case of Guja.[2]

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.

2.1 Research

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[3] 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.[4] 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".

[2] discussed in Appendix 2.

[3] PwC Global Economic Crime Survey 2011. This includes the figures from previous years [www.pwc.com/en_GX/gx/economic-crime-survey/assets/GECS_GLOBAL_REPORT.pdf]

[4] Association of Certified Fraud Examiners, *Report to the Nations, 2006 - 2012*, under Key Findings, http://www.acfe.com/rttn.aspx.

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.[5] Those holding ethics-related positions in the various 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[6]. 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.[7] Another suggested external whistleblowing is more effective than internal because external whistleblowing often sparked investigations or other remedial actions by the organization.[8]

[5] 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.

[6] PricewaterhouseCoopers (PwC), 2010; *Fighting fraud in the public sector*. p.13

[7] Rothschild, J., & Miethe, T. D. (1999). Whistle-Blower Disclosures and Management Retaliation. Work and Occupations, 26(1), 107-128.

[8] 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 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[9].

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 (but not Russia). 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[10].

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,[11] though that remains excessively focused on internal reporting. It also commissioned Transparency International to carry out a study of EU Member State laws[12]. That study calls on the European Commission 'to follow the 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.'

[9] Under article 24-3-c.

[10] Whistleblower Protection and the UNCAC, 2013.

[11] SEC (2012) 679 final, 6.12.2012

[12] Whistleblowing in Europe: legal protections for whistleblowers in the EU, 2013.

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[13]. 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 draft Council of Europe Recommendation

In 2012 the Council of Europe commissioned a feasibility study[14] 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.

The latest draft of the Recommendation at the time of writing is dated 20 December 2013[15]. 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);
- 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)

[13] http://www.oecd.org/general/48972967.pdf

[14] The protection of whistleblowers – a feasibility study for Council of Europe, Stephenson and Levi, (CDCJ(2012)9FIN, published 20 December 2012).

[15] CDCJ (2013)31 prov.

- 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[16]. Some are limited to corruption cases[17]. 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.[18] 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 ongoing 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

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 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,

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

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

[18] The Protection of Whistleblowers - report of PACE Committee on Legal Affairs and Human Rights (2009, document 12006)

(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)

Source: U.K. Public Interest Disclosure Act 1998
(http://www.legislation.gov.uk/ukpga/1998/23/section/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

(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."

Source:*U.K. Public Interest Disclosure Act 1998*
http://www.legislation.gov.uk/ukpga/1998/23/section/2

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 a vis the whistleblower, the process does not address the 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.[19] 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[20], 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 Bill

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 Bill [currently before the Irish Parliament, expected to be enacted in April/May 2014] 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 Bill

The protection of whistleblowers has an important place in the Protected Disclosures Bill as well. The Bill proposes 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.

[19] Shipman Inquiry, Fifth Report (Cm 6394, 2004).

[20] *Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK*, (November 2013), available on the PCaW website.

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's identity.

Box 3 – Provisions regulating the protection of whistleblowers in the Protected Disclosures Bill of Ireland

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)

Source: Explanatory Memorandum to Protected Disclosures Bill
(http://www.oireachtas.ie/documents/bills28/bills/2013/7613/b7613s-memo.pdf)

3.2.3 Serbia

3.2.3.1 Draft 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;
- 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 draft 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

Add 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 [*Stichting van de Arbeid* = Labour Foundation] 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[21].

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[22]. 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'[23]. This advice was given in the context of implementing the European Data Protection Directive[24].

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

[21] Ministry of Justice, Guidance under section 9 of the Bribery Act, 2011.

[22] Commission nationale de l'informatique et des libertés, Dispositifs d'alerte professionale, AU-004.

[23] Guidance on Whistleblowing Schemes (2006), WP 117 (http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf)

[24] European Data Protection Directive (95/46/EC)

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 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 employer25;
- 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[26]. 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 (eg 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[27], 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.'

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

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

[27] 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.

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 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 (eg. 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 and 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'[28], 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[29]. 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[30].

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.

[28] PAS 1998:2008. Available on the PCaW website.

[29] *see footnote 19*

[30] See list of resources in Section C- 10 Seeking guidance – Detecting and reporting violations (p. 60) included in the *Anti-Corruption Ethics and Compliance Handbook* published in November 2013 by the OECD, UNODC and *the World Bank* (http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.)

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 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)[31].

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 counsel, 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.

[31] http://www.adviespuntklokkenluiders.nl/international

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.
(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).[32]

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

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

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.

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 ongoing, 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 ECtHR have stated that 'an act motivated by..... pecuniary gain, would not justify a particularly strong level of protection'[33]. 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

[33] See Appendix 2

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.

5 APPENDIX 1 - CASE STUDIES

5.1 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.

5.2 US - Defence Contracting case[34]

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.

5.3 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 (eg 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.

5.4 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

[34] See http://whistleblowercentral.com/case-studies/

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 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.

5.4.1 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.

5.4.1.1 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.

5.4.1.2 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.

5.4.1.3 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.

6 APPENDIX 2 - ECHR CASE LAW ON WHISTLEBLOWING

Whistleblowers have a right to bring cases to the ECtHR as any retaliation against them can be argued to be an infringement of their right to freedom of expression under Article 10 of the ECHR. The main relevant caselaw on whistleblowing was summarized in the Feasibility Study for the Council of Europe published in 2012[35].

6.1 Guja v Moldova

It is worth recalling the leading case of Guja v Moldova[36], 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.
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 ECtHR, 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.

6.2 Heinisch v Germany[37]

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 ECtHR 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

[35] See footnote 13

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

[37] 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.
- 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.

6.3 Bucur and Toma v. Romania[38]

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.

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