PRECOP-RF

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Technical Paper:

Proposals to regulate whistle-blower protection in the Russian Federation

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1 EXECUTIVE SUMMARY

Following an analysis of the current situation, it can be concluded that there is no convincing system of whistle-blower protection in the Russian Federation. There are witness protection measures which cannot be equated with whistle-blower protection, and 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.

A new law has been promised, but the proposal is limited to corruption cases, and to protection from retaliation by public officials. Moreover, this is far from being solely a legal issue, and there are many practical obstacles to be overcome, especially the lack of trust by citizens in the criminal justice system.

The unjustified harassment of entrepreneurs remains a major issue for the private sector. This paper sets out the broad lines of a general system of whistle-blower protection that would be in accordance with international standards. Under Heading 4 the paper addresses the legal framework, and under Heading 5 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. We outline a process for that under Heading 6 in this paper.

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

2 COUNTRY CONTEXT: RUSSIAN FEDERATION

This section sets out the current context which primarily focuses on law provisions that deal with a limited aspect of whistle-blower 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.

2.1 Definition of the term "Whistle-blower": 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 whistle-blower.

However, Article 33 of the UNCAC implies that whistle-blowers 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
- Obstruction of justice

These deeds are also listed in the Criminal Code of Russian Federation Adopted by Federal Law №63-FZ as of 13.06.1996. The only exception is illicit enrichment.

It should be noted here, however, that the UNCAC Technical Guide makes it clear that whistle-blowers 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 (eg. 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 25.12.2008. 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 introduces the term "corruption wrongdoing", which is left undefined. Although the corresponding draft of the law is being considered (http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=371176-6&02) by the State Duma, it is not adopted as of February, 20, 2014.

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

2.2 Procedural aspects of reporting corruption incidents

Although the term “whistle-blower” is not defined in the Russian legislation, the most prospective approach is defining the whistle-blower 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)
- 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 Criminal Procedure Code (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 № 200 of the General Prosecutor's Office dated 17.12.2007, by the order № 333 of Ministry of Internal Affairs of 04.05.2010, Order № 72 of the Investigative Committee of the Russian Federation dated 03.05.2011 and other acts.

2.2.1 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 N72 it is stated that anonymous reports of crime cannot serve as a pretext for a criminal investigation and sent to the law enforcement authorities. If the specified information in these messages requires immediate inspection, it should be immediately transferred to the body carrying out the investigative activity, by phone or by fax or other emergency communications.

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.

2.2.2 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 19 prohibits unreasonable refusal to accept a competent official statement about the crime. At the same time claim 20 contains the following wording:

> *"Messages, 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 21 of the decree of the Investigative Committee, which states:

> *"Notices, applications, appeals received by an investigative body of the Investigative Committee, in which the applicants disagree with the decisions of judges, prosecutors, heads of the investigating authorities, investigators or other employees of the investigative authorities suspect commission of the acts complained of above persons malfeasance and put in concerning the issue of bringing these individuals to criminal liability is also not subject to registration in the registration messages about crime and do not require verification in accordance with Articles 144 - 145 of the Code."*

Such reports, statements, appeals registered as incoming documents and considered in accordance with the Federal Law as of 02.05.2006 N 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 <u>report</u> can be considered an <u>application</u>. 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.

2.2.3 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.

2.3 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.

2.3.1 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."

2.3.2 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.

2.3.3 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.

2.3.4 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 03.03.2007 N 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.

2.4 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 Labor Code of the Russian Federation (LC RF). The Labor Code does not contain any measures that would protect the labor 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 Labor Code that allows for the employer's retaliation to the employee. The Labor Code establishes several ways to protect labor rights, among them - judicial

protection. In case of violation of labor rights the employee has the opportunity to submit an application to the court.

2.5 Public officials as whistle-blowers

Federal Law N329-FZ “On combating corruption”, 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.

Article 10 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 N 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.

2.6 Private entities as whistle-blowers

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 labor 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.

3 ISSUES IN THE EXISTING LEGISLATION

The above analysis confirms the findings of a study made for the G20 in 2011[1] 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 N309 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[2].

3.1 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 N294-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 whistle-blowers.

The Federal Law N78-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.

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

[2] Blueprint report [https://blueprintforfreespeech.net/document/Russia]

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[3]. 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. An example of the problems reported to the local Ombudsmen is mentioned in Appendix 3 (section 9).

3.2 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.'*[4] There also appear to be cultural and social attitudes that work against protecting whistle-blowers. 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[5]. 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[6].

[3] 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.
[4] The Protection of Whistle-blowers - report of PACE Committee on Legal Affairs and Human Rights (2009, document 12006)
[5] "Whistleblowing in the United States: the gap between vision and lessons learned", by Tom Devine, in Whistleblowing around the World, ed. Calland and Dehn (2004).
[6] Quoted in 'Russia needs more risk takers', article by Megan Davies, 25 September 2013, Reuters.

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 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[7].

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 whistle-blowers 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 whistle-blower 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 - eg. 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 "denunciateur" 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 'whistle-blower' 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[8].' 'Snitch,' a negative term from the school playground, is now little used in the UK, and research in 2013 showed that 'whistle-blower' is now seen as a neutral or positive term by 72% of UK workers[9]. 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 whistle-blower system that achieves demonstrable results.

[7] From Blueprint report, see footnote 2.

[8] "The media representation of whistle-blowers" in "Where's whistleblowing now? Ten years of legal protection for whistle-blowers", PCAW (March 2010).

[9] Research by YouGov commissioned by PCAW, available on PCAW website.

3.3 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.

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[10].

In this context, the creation of trusted channels for whistle-blowers 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 whistle-blower 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 whistle-blowers who have positive experiences in securing results would be encouraging to others.

There is also a crucial need to convince whistle-blowers 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 whistle-blowers in different national contexts can be applied whether or not the whistle-blowers 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 whistle-blowers 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 whistle-blower 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.

[10] 'Ombudsman Boris Titov outlines reforms for Russian business' by Irina Granik, Moskovskiye Novosti, 13 May 2013.

4 A NEW LEGAL FRAMEWORK

The technical paper providing a "Comparative analysis of practices for protection of whistleblowers in the area of corruption in CoE member states" discusses the international requirements for whistle-blower 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. The Report from Parliamentary Assembly of the Council of Europe on whistle-blower protection[11] 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 whistle-blowers. The Council of Europe's Recommendation on the Protection of Whistle-blowers which was recently approved by the Committee of Ministers[12] 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.

4.1 Definition of Whistleblowing

The CoE Recommendation defines "Whistle-blower" 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)".

4.1.1 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 whistle-blowers. The protection of whistle-blowers 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 whistle-blower 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*

[11] The Protection of Whistleblowers - report of PACE Committee on Legal Affairs and Human Rights [rapporteur Pieter Omtzigt] (2009, document 12006).
[12] CM/Rec (2014) 7

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.

4.1.2 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 whistle-blower that it is preferable to cover both private and public sectors in a single law at the outset. Moreover the ECtHR has made clear in several important cases that whistle-blowers 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 ECHR has been violated[13].

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.

4.1.3 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[14]].

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

4.1.4 Methods of disclosure

The law should cover any means of communication. Whistle-blowers 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

[13] See Technical Paper ECCU-PRECOP-TP-3/2014, Appendix 2
[14] 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[15]. The issue of protecting confidentiality is discussed below.

4.1.5 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 whistle-blowers (a 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 whistle-blower or for protecting the public interest. A good example is the case included in Appendix 1 of the comparative analysis of "Practices in Council of Europe member states to protection of whistle-blowers in the area of corruption" (ECCU-PRECOP-TP-3/2014) entitled "Alerting a Third Party" - under the UK law the whistle-blower 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 whistle-blowers (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 whistle-blower protection for those working in national security is now higher than ever on the

[15] A J Brown. (2011) Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia in D. Lewis & W. Vandekerckhove (eds) *Whistleblowing and Democratic Values.* International Whistleblowing Research Network
© 2011 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.

international agenda and there are good legal and policy reasons for ensuring national security whistle-blowers are protected; namely to ensure that whistle-blowers can protect themselves when they operate responsibly through proper channels. Guidance on whistle-blower protection can be found in the Global Principles on the Right to Information on National Security[16].

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.

4.1.6 Requirements on the whistle-blower

The law should ensure protection is not lost if the whistle-blower'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, whistle-blowers 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.

4.1.7 Disclosures to external authorities

The implication of the ECHR case of Guja (see ECCU-PRECOP-TP-3/2014, 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 whistle-blower and regulators should have an obligation to redirect the whistle-blower appropriately.

4.1.8 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 whistle-blower 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 whistle-blower (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, [eg., the draft Serbian law requires that if a whistle-blower goes public he should comply with the presumption of innocence and the right to privacy].

[16] Principles 37-46, The Global Principles on Right to Information and National Security http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

4.1.9 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 whistle-blowers 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 whistle-blower 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[17]. We do not recommend starting the process of strengthening whistle-blower protection measures with extra reporting obligations on individual whistle-blowers. 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.

4.2 Protections

4.2.1 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 whistle-blower is not protected as a whistle-blower if he decides himself to pass that information on[18]. 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, eg. on money laundering.

4.2.2 Legal advice

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

[17] Phase 2 Report on Implementing the OECD Bribery Convention in the Russian Federation, October 2013.

[18] This was done in 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[19].]

4.2.3 Protecting confidentiality

The preservation of confidentiality is an important aspect of whistle-blower protection. The CoE Recommendation states: 'Whistle-blowers 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 whistle-blower 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 whistle-blowers may be at risk of serious harm (eg. 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 whistle-blower to testify or to be identified. [Example: Slovenia Art 23.4 and 23.8].

Box 2: Protection of whistle-blowers in Slovenia

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

Source: Integrity and Prevention of Corruption Act- https://www.kpk-rs.si/upload/datoteke/ZintPK-ENG.pdf

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:

[19] The Advice Centre was discussed in the comparative analysis of CoE member state practices. See also http://www.adviespuntklokkenluiders.nl/

- being anonymous does not stop others from guessing who raised the concern;
- it is harder to investigate the concern if people cannot ask follow-up questions;
- it is easier to organise the protection of the whistle-blower against retaliation if the concerns are raised openly;
- anonymous reports can lead people to focus on the whistle-blower, 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 whistle-blower, and suffer accordingly, possibly without protection from the law which is designed to protect persons who actually do blow the whistle[20].

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.

4.2.4 Following up reports

The CoE Recommendation states 'public interest reports and disclosures by whistle-blowers should be investigated promptly' (Principle 19) and that whistle-blowers 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.

4.2.5 Forms of protection

The CoE Recommendation states 'Whistle-blowers 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 whistle-blower in relation to their work, as well as ensuring whistle-blowers 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 ECCU-PRECOP-TP-3/2014[21], the draft Irish law introduces a new right not only for whistle-blowers, 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 whistle-blower. 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).

[20] See G20/OECD Guiding principle 3

[21] Comparative analysis of practices in CoE member states to protect whistle-blowers in the area of corruption

4.2.6 Rewards

We discussed the controversial issue of rewards in the first paper prepared under the project (ECCU-PRECOP-TP-3/2014). We do not recommend any special provision on rewards. A law on the protection of whistle-blowers can work well without any overall system of rewards, though the reverse is not equally true. The UK system actually disbars from protection whistle-blowers who make disclosures for personal gain (whilst allowing regulators to offer discretionary rewards if they so choose).

4.2.7 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 whistle-blowers (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 whistle-blowers. 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.
- Article 130 of the Criminal Code with the offence of insult - “the demeaning of the honour and dignity of another person, expressed in an indecent form.”
- Laws on extremism that make it possible to crack down on any speech, organization, or activity that lacks official support.[22]
- 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 whistle-blowers who make honest mistakes will not be subject to proceedings under Article 306.

4.2.8 Personal protection

Witness protection is a separate issue (as discussed below) but if a whistle-blower’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 whistle-blowers in Slovenia

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.

Source: Integrity and Prevention of Corruption Act- https://www.kpk-rs.si/upload/datoteke/ZintPK-ENG.pdf

[22] *Supra*, note 2.

4.3 Procedural aspects

4.3.1 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).

4.3.2 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 whistle-blower, 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 whistle-blower has made a disclosure and is at the heart of effective whistle-blower 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 whistle-blower'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.

4.4 Implementation aspects

4.4.1 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. [23]

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 implement anti-corruption measures, and we recommend that should include the introduction of

[23] PCaW (2013) Whistleblowing Commission: Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK (http://www.pcaw.org.uk/whistleblowing-commission).

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[24]. 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.

4.4.2 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]

[24] See footnote 17.

5 INSTITUTIONAL FRAMEWORK

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

- Whistle-blower 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)
- whistle-blower protection is grounded in principles of democratic accountability and freedom of expression (Principle 8 , Council of Europe Recommendation; ECHR 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 whistle-blowers (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 whistle-blower 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 whistle-blower 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 <u>before</u> 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 <u>any person who reports</u> in good faith and <u>on reasonable grounds</u> to the competent authorities <u>any facts</u> 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 whistle-blower 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.

5.1 A specialised institution?

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

1 Giving independent advice to whistle-blowers 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.

5.2 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 N324-FZ [25] 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.

Examples of national advice centres were provided in ECCU-PRECOP-TP-3/2014 (section 3). There are other means of ensuring advice is available and the Netherlands provides a useful example in

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

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 whistle-blower confidential, unless the whistle-blower does not want that. All communication back to the whistle-blower 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.

5.3 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 (ECCU-PRECOP-TP-3/2014). 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 whistle-blowers 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.

5.4 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 Whistle-blowers in the Netherlands, the House would help whistle-blowers in all aspect of the process. Regulators can and should take steps to proactively protect whistle-blowers who contact them.

Laws to protect whistle-blowers 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 whistle-blower 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.

5.5 The role of employers

Section 4.4.1 recommends legal changes to oblige employers to put in place arrangements that allow those working with them to safely report public interest concerns, eg., 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[26]". 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 whistle-blowers 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.

5.6 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 whistle-blowers come forward. In fact, studies reveal that the vast majority of whistle-blowers only ever report issues internally (ie. 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.

5.7 Plurality of whistleblowing channels and institutional capacity to address concerns

The goal of protecting whistle-blowers 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 whistle-blowers 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
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

[26] Blueprint Report

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 whistle-blower is not adversely affected for having made the disclosure
f) any action taken to the detriment of the whistle-blower can be overturned or revoked or an appropriate remedy provided
g) there is no exception to protection simply due to the fact that the allegation turns out to be mistaken

6 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 whistle-blower 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 whistle-blower 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 whistle-blower law on which all can agree. The draft is now with the Ministry of Justice and in its final stages[27].

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 whistle-blower 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 whistle-blowers 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 whistle-blowers 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:

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[27] The background documents are available on the website of the Serbian Commissioner for Information of Public Importance

- Your Government cares about your contribution; that is why we are seeking your views on proposals for a new whistle-blowers system
- International research shows whistleblowing can uncover crime (see: ECCU-PRECOP-TP-3/2014)
- We listen to whistle-blowers – (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.
- 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.

7 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). [http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf]

National

Ireland: Protected Disclosures Bill 2013 (draft law currently in Parliament, expected to be enacted spring 2014)
Netherlands: Law on the House for Whistleblowers (33 258 Proposal for a law by the members of Raak, Heijnen, Schouw, Van Gent, Ortega-Martijn and Ouwehand, regarding the establishment of a House for whistleblowers. Currently in Parliament, before the Senate.)
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).

8 APPENDIX – LEGAL REFERENCES FROM RUSSIA

Codes
Criminal Code of Russian Federation
Code of Criminal Procedure of Russian Federation
Labor Code of Russian Federation

Federal Laws
Federal Law N79 "On State Service in the Russian Federation" as of 27.07.2004
Federal Law N119-FZ "On state protection of victims, witnesses and other participants in criminal proceedings" as of 20.08.2004
The Federal Law N294-FZ "On protection of legal entities and sole proprietors during control and supervision activities" as of 26.12.2008
Federal Law N329-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 21.11.2011
Federal Law N78-FZ "On Commissioners on protection of entrepreneurs' rights in the Russian Federation" as of 07.05.2013

Other legal acts
President's Decree N309 "On measures to implement certain provisions of the Federal Law "On Combating Corruption" as of 02.04.2013

9 APPENDIX – CASE STUDIES FROM RUSSIA

9.1 Bagadan – Extortion by Customs officers

This case shows how opportunities for corrupt behavior are created by loopholes in bureaucratic procedures (which may be in themselves over-elaborate), and how Business Ombudsmen can play a role in correcting things for the future, provided that they are listened to.

A consignment of imported chicken legs, which had been paid for in advance by local businesses, proved to be incorrectly labeled on arrival. Customs officials offered to adjust the labels on the consignment, in exchange for a payment of 5 euros per case. Some of the businessmen concerned refused to make the payment and complained to the Business Ombudsman. He raised the matter with the prosecutor who said he was unable to act. Meanwhile the consignment was deteriorating. The problem identified by the Business Ombudsman was that no procedure was prescribed in Customs law to be followed in circumstances of incorrect labeling. This loophole created the opportunity for extortion which apparently was not clearly illegal. The Business Ombudsman had proposed a solution for the future by a change in the law, but it had not yet been followed up by the Government.

9.2 Russian subsidiary of Hewlett Packard convicted in US for bribing Russian prosecutors

This is not a whistleblower case, but it shows how it can be worthwhile to report cases involving foreign companies, or their subsidiaries, even when there seems no prospect that Russian prosecutors will take action.

Hewlett-Packard A.O. (HP Russia), a subsidiary of the US company Hewlett-Packard Company (HP Co.), pled guilty in April 2014 to violations of the US Foreign Corrupt Practices Act (FCPA) and admitted its role in bribing Russian government officials to secure a large technology contract with the Office of the Prosecutor General of the Russian Federation (GPO). According to court documents,

in 1999, the Russian government announced a project to automate the computer and telecommunications infrastructure of the GPO. Not only was that project itself worth more than $100 million, but HP Russia viewed it as the "golden key" that could unlock the door to another $100 to $150 million dollars in business with Russian government agencies.

To secure a contract for the first phase of project, ultimately valued at more than €35 million, HP Russia executives and other employees structured the deal to create a secret slush fund totalling several million dollars, at least part of which was intended for bribes to Russian government officials. As admitted in a statement of facts, HP Russia created excess profit margins for the slush fund through an elaborate buy-back deal structure, whereby (1) HP sold the computer hardware and other technology products called for under the contract to a Russian channel partner, (2) HP bought the same products back from an intermediary company at a nearly €8 million mark-up and paid the intermediary an additional €4.2 million for purported services, and (3) HP sold the same products to the GPO at the increased price. The payments to the intermediary were then largely transferred through a series of shell companies—some of which were directly associated with government officials—registered in the United States, United Kingdom, British Virgin Islands, and Belize. Much of these payments from the intermediary were laundered through off-shore bank accounts in Switzerland, Lithuania, Latvia, and Austria. Portions of the funds were spent on travel and luxury goods. To keep track of these corrupt payments, the conspirators inside HP Russia kept two sets of books: secret spreadsheets that detailed the categories of recipients of the corrupt funds and sanitized versions that hid the corrupt payments from others outside HP Russia.

They also entered into off-the-books side agreements. As one example, an HP Russia executive executed a letter agreement to pay €2.8 million in purported "commission" fees to a U.K.-registered shell company that was linked to a director of the Russian government agency responsible for managing the GPO project. HP Russia never disclosed the existence of the agreement to internal or external auditors or management outside of HP Russia and conducted no due diligence of the shell company[28].

[28] Press release by Washington Field Office of the Federal Bureau of Investigation, 9 April 2014.