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THE PROTECTION OF WHISTLEBLOWERS

A study on the feasibility of a legal instrument
on the protection of employees
who make disclosures in the public interest

prepared by

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Disclaimer: The views expressed in this study are solely those of the authors and do not necessarily reflect the views of the Council of Europe or its member States.

This report was commissioned by the Secretary General of the Council of Europe at the request of the European Committee on Legal Co-operation (CDCJ) in order to determine the feasibility of preparing a legal instrument on the protection of employees who make disclosures in the public interest (“whistleblowers”). The report was presented to the CDCJ at 87th plenary meeting (Strasbourg, 18-20 June 2012) on which occasion the committee agreed to approve its publication under the responsibility of its authors. At the same meeting, the committee agreed to begin work on a preliminary draft legal instrument.

Contents

1	INTRODUCTION.....	4
2	THE HUMAN RIGHTS DIMENSION.....	6
3	NATIONAL LAWS	11
4	INTERNATIONAL MEASURES AND THE CASE FOR A NEW COUNCIL OF EUROPE INSTRUMENT.....	23
5	PRINCIPLES.....	26
	Annex A - DRAFT RECOMMENDATION.....	37
	Annex B - ABBREVIATIONS	40
	Annex C - PUBLIC INTEREST DISCLOSURE ACT 1998 (PIDA)	41
	Annex D - SOURCES OF INFORMATION (BIBLIOGRAPHY)	43
	Annex E - ACKNOWLEDGEMENTS	46

1 INTRODUCTION

Scope of this study

1.1 This study was commissioned by the European Committee on Legal Co-operation (CDCJ) of the Council of Europe in March 2012 for completion by 1 May. Clearly our remit is to be seen in the context of previous action by the Council of Europe, including the provision on the protection of employees in its 1999 Civil Law Convention on Corruption (ETS N° 174). The explanatory report on the convention states ‘corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong’. They also risk losing their livelihoods through raising the alarm. This is particularly true when a junior employee becomes aware of misconduct by his or her superiors.

1.2 In Chapter 4 we see how the 1999 Convention built on earlier measures, starting with the ILO Convention of 1982, which states that filing a complaint or participation in proceedings against an employer are not valid reasons for dismissal. However, though there has been a growth in measures to promote anti-corruption whistleblowing, there is increasing concern that the existing international instruments are not sufficiently broad or effective. The European Parliament’s mid-term review of the EU strategy 2007-2012 on health and safety at work calls for an EU ‘directive protecting individuals who legitimately warn of OHS [Occupational Health and Safety] unacknowledged risks, notably by notifying the appropriate labour inspectorate’. The Parliamentary Assembly of the Council of Europe (PACE) recommends a cross-sectoral approach covering ‘warnings against various types of unlawful acts, including all serious human rights violations.’ In line with this thinking, this study considers proposals that could apply to warnings about all kinds of wrongdoing, from any worker, whether in the public or private sectors.

1.3 But why limit protection to workers? TI Sweden recently stated that ‘customers, clients, patients and pupils also deserve legal protection against reprisals’. This is undeniable, but the different issues involved would require a separate study, which might point to changes in consumer law. There is a logic to treating the workplace issue separately as it is an aspect of employer accountability and can find a legislative niche in labour law.

1.4 We were asked by the CDCJ to consider the position of human rights defenders in the context of this feasibility study for an instrument on employee protection. We concluded that it is important that they should be covered by an instrument, and that it should treat them in the same way as workers who raise other issues of public concern.

The concept of whistleblowing

1.5 This study uses the concept adopted in ‘Whistleblowing Around the World’ by Calland and Dehn (2004):

“The options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance. Whistleblowing covers the spectrum of such communications, from raising the concern with managers, with those in charge of the organisation, with regulators or with the public”.

1.6 National laws seldom use this term so precise translation is unimportant. Some languages have colourful expressions of their own to express the same concept - e.g. Dutch “klokkenluiders” (“bell ringers”). The main issue for the lawmaker is to find a term which conveys the idea of workers issuing warnings in the public interest. It is important to avoid terms with negative social implications: for example, in English, the term ‘informant’ tends to be used to describe a person who is involved in an illegal activity and uses disclosure as a means of reducing their own liability or to obtain payment from the police. This study does not address such cases. Likewise, the English term ‘informer’ carries negative police state overtones. In French, the term ‘donneur d’alerte’ has been used to avoid the overtones of ‘dénonciateur’. A whistleblower reporting wrongdoing to the authorities of a democracy is really the converse of a person informing on opponents of a police state.

The importance of whistleblowing

1.7 The crucial role of whistleblowing in uncovering and deterring secret or unaddressed wrongdoing has been established in practice and acknowledged by previous work. The Council of Europe’s Committee of Ministers stated in its reply to the PACE in 2011 that it shares their view that whistleblowers play an important role in increasing accountability and strengthening the fight against corruption and mismanagement, and agrees that their protection must be secured.

1.8 The emphasis on accountability is important: employers are increasingly recognising their own interest in encouraging whistleblowers to tell management about risks, so that they can be identified early enough to prevent serious damage or harm. Research shows that most whistleblowers try the internal route first. Where, in the circumstances, that route does not or cannot prove effective, regulatory authorities (such as auditors and inspectorates) and law enforcers are likely to be the appropriate recipients of the disclosure - they have the authority and power to deal with the issue and they need such disclosures to carry out their functions effectively. They also need to act on the information they receive to ensure they maintain public confidence.

1.9 Going to the press is – or should be - an option of last resort, albeit a vital one. Press involvement may generate more heat than light. Most whistleblowers find the press a difficult route and experience shows they are more likely to go to the press where no other clear channel is available. The European Court of Human Rights (ECtHR) have made clear that the existence of alternative channels is one of the factors they will take into account in considering cases brought by whistleblowers. The development of national laws to provide reporting

channels, and of systems to ensure reports are followed up, will both protect whistleblowers and strengthen effective lines of accountability and ensure greater compatibility in an increasingly globalised European society where so many businesses operate across borders.

2 THE HUMAN RIGHTS DIMENSION

2.1 In 2009 Thomas Hammarberg, the Council of Europe Human Rights Commissioner, said 'Human rights are not given, they have to be conquered again and again'. Whistleblowers - along with free media and an independent law enforcement and justice system - play an important part in that battle. Hammarberg quoted Sakharov's memoirs in which he asserts that the threat of public disclosure inhibits human rights violations. If responsible public disclosures are protected, by national laws and practical arrangements, human rights violations can be expected to diminish.

2.2 There is no country where whistleblowers - whether they are reporting a human rights violation or other wrongdoing - do not at times face retaliation. The ECtHR then plays a crucial role as, in all of the Council of Europe countries, a whistleblower may be able to bring a case under the ECHR. This applies equally to employees and to human rights defenders. Article 6 may be engaged if they are not given a fair hearing within a reasonable time, but in practice so far, whistleblower cases have focussed on Article 10, on the basis that their freedom of expression has been interfered with.

ECHR Jurisprudence

2.3 The ECtHR has held that "Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can apply to relations governed by private law [...] and that "member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals" (Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000).

2.4 Article 10 is a restricted right, so interference with a whistleblower's freedom of expression is permitted, provided that:

- it is prescribed by law;
- the interference pursues a legitimate aim (such as protecting the reputation or rights of others, or preventing the disclosure of information received in confidence) and
- it is "necessary in a democratic society".

This last criterion is normally the most complex issue to resolve.

2.5 In *Steel and Morris v. the UK* [no. 68416/01, § 94, ECHR 2005-II], the court held that "necessary", within the meaning of Article 10.2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision..... The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10'.

2.6 It is established that ‘what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’ [...] In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts...” (Sunday Times (no. 1) v. the UK, 26 April 1979, § 62, Series A no. 30).

Tillack v. Belgium [no. 20477/05, 27 November 2007]

2.7 Tillack, a journalist, published articles on alleged irregularities in Eurostat and in the European Commission’s anti-fraud office, OLAF, apparently based on disclosures from an official within OLAF. When OLAF’s internal investigation failed to uncover the official’s identity, they filed a complaint with the Belgian authorities alleging bribery.

2.8 The ECtHR found Belgium to be in violation of Article 10 because of the searches and seizures carried out by the Belgian police at the home and office of the journalist. They noted that OLAF’s allegation that the official may have been bribed was based on ‘mere rumours’ - for which lack of care OLAF had been criticised by the European Ombudsman. The Court stressed that the right of journalists to protect their sources is not a “mere privilege to be granted or taken away” but that it is a fundamental component of the freedom of the press. They stated that the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. The PACE Report of 2009 states that ‘this judgment should incite lawmakers throughout Europe to also reflect on the importance of the media as an external voice for whistle-blowers’. This case may also illustrate the difficulties faced by whistleblowers within international institutions. It certainly makes clear that once a whistleblower has gone to the media, the media cannot, except in the most exceptional circumstances, be required to reveal his identity (though experience shows it may be discovered anyway). It is uncertain what conclusion would have been reached if there had been any real evidence of bribery by the journalist.

Guja v. Moldova [no. 14277/04, 12 February 2008]

2.9 Guja was Head of the Press Department of the Prosecutor General's Office. After proceedings against some policemen for mistreating suspects were dropped, he sent the press two letters on the case, which suggested that the proceedings may have been dropped for improper motives. One of these letters was from a high-ranking official in the Parliament. Mr Guja was dismissed because the letters were held to be secret (though they were not so marked) and because he did not consult superiors before passing them to the press.

2.10 This Grand Chamber case set out 6 principles to determine whether an interference with Article 10 rights was “necessary in a democratic society.” (These principles are not always cited in the same order: we follow the latest order - from the Heinisch case.)

1. The public interest in the disclosed information. The court noted that 'in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence'.
2. Whether the applicant had alternative channels for making the disclosure.
3. The authenticity of the disclosed information. The Court reiterated that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.
4. The motives of the employee: the court stated 'For instance an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection.'
5. The damage, if any, suffered by the employer and whether this outweighed the public interest.
6. The severity of the sanction imposed on the applicant and its consequences.

2.11 The court held that there had been a violation of Article 10 and that in the circumstances, external reporting, 'even to a newspaper', could be justified. It noted in particular:

- the importance of the issues, which the public had a legitimate interest in being informed about and which fell within the scope of political debate. This was against the background of international concern about the breakdown of the separation of powers and the lack of judicial independence in Moldova; and
- that neither the law nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees, and there was no evidence to counter the applicant's argument that alternative channels (the top echelons of his office or the Parliament) would have been ineffective in the special circumstances of the case.

2.12 The applicant was awarded 10 000 euros compensation (he had sought 15 000). Guja was the first such case involving a civil servant and the Court stated that 'the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large'. It referred to the Explanatory Report to the Civil Law Convention. It seems clear that if Article 9 of the Civil Law Convention were to be properly

implemented, so that there were laws on channels for whistleblowing, there would be less scope for cases like Guja.

Marchenko v. Ukraine [no. 4063/04, 19 February 2009]

2.13 Marchenko was a teacher and Trade Union official who brought to the attention of public auditors and prosecutors allegations of criminal conduct by the head of the school where he worked. Neither found evidence of criminal conduct by her. Marchenko then participated in a demonstration in which posters defamatory of the head teacher were displayed. He was convicted of defamation and sentenced to a fine and to a suspended sentence of imprisonment for a year.

2.14 The Court stated that ‘while the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals’ reputations, they must not do so in a manner that unduly hinders public debate concerning matters of public concern’. The Court accepted that the domestic authorities acted within their margin of appreciation in convicting the applicant for defamation, in so far as his actions concerned the demonstration. However, they found a breach of Article 10 because, in convicting the applicant in respect of the letters he sent to auditors and prosecutors, and in imposing a lengthy suspended prison sentence, the domestic courts went beyond what would have amounted to a “necessary” interference with the applicant’s freedom of expression.

Kudeshkina v. Russia [no. 29492/05, 26 February 2009]

2.15 Kudeshkina was judge in a case alleging abuse of powers by a senior police investigator, Zaytsev. She was accused of bias by the prosecution and withdrawn from the case by the President of the Moscow City Court. She then stood down as a judge temporarily in order to stand as a candidate for the Duma, campaigning for judicial reform, and in media interviews she spoke about the case. She was not elected. She also filed a complaint against the President of the Court which, though it was supported by the lay assessors in the case, was dismissed. After lengthy disciplinary proceedings against her in respect of the media interviews, she was dismissed as judge for making statements that were false, damaging to the judiciary and the courts, and for publicly expressing an opinion prejudicial to the outcome of the pending Zaytsev case. Her case was heard by the Moscow City Court and, on appeal, the Supreme Court did not accept her contention that there could be concern about the impartiality of that forum in her case.

2.16 The ECtHR held that Article 10 had been violated. It noted the unhindered exercise of freedom of expression that should be allowed to parliamentary candidates. It said the applicant’s accounts of her experience in the Zaytsev case should be regarded as statements of fact which were inseparable from her opinions expressed in the interviews. Moreover, the applicant’s allegations of pressure had not been convincingly dispelled in the domestic proceedings. It stated that ‘even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements

were not entirely devoid of any factual grounds..., and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance'. It also found procedural guarantees had not been secured in that the possible bias against Kudeshkina in the Moscow City Court had not been recognised. Also, the penalty had been disproportionate.

Poyraz v. Turkey [no. 15966/06, 7 December 2010]

2.17 Interference with a whistleblower's freedom of expression was held to be justified in this case. Poyraz, a chief inspector of the Ministry of Justice, wrote a report in April 1996 in which the professional conduct of Judge Y.K.D. was severely criticised on account of acts such as political bias and sexual harassment. In May 1996 Y.K.D. was elected to the Supreme Court and the court ruled in 1997 that the Ministry's report was invalid in view of his new position. The report was leaked to the press in 1998 (it was not clear how) and the applicant appeared on TV to comment on it and made further allegations. Y.K.D. then brought a civil action against the Ministry of Justice, which paid him compensation in 2000. He also brought an action against the applicant, which was not settled until 2005. The Turkish court ruled against the applicant, doubting his good faith - they heard witnesses who stated that he had extorted their allegations against Y.K.D by threats of dismissal.

2.18 The ECtHR noted that Poyraz had defended the content of the report in the media, even though he may not have leaked it, and that great discretion was required of judicial authorities, who should not use the press, even to respond to provocations. Particular vigilance was to be observed by officials in the exercise of their freedom of expression in the context of on-going inquiries, in particular when the official himself was in charge of the inquiry. They stated that the authorities' interference with the applicant's freedom of expression was justified as the means had been proportionate to the pursued aim of protecting the reputation or rights of others. Therefore, there had been no violation of Article 10. There was however a breach of Article 6 in that the procedure before the civil court in Turkey had lasted over 7 years.

Heinisch v. Germany [no. 28274/08, 21 July 2011]

2.19 Heinisch, a nurse working in a home for elderly people, was dismissed when, after her management failed to act on her reports of serious deficiencies in patient care, she lodged a criminal complaint alleging fraud. The German court upheld her dismissal, holding that the criminal complaint amounted to a disproportionate reaction to the denial of her employer to recognise shortcomings and that she had breached her duty of loyalty towards her employer.

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

- the applicant had not only raised the issue of staff insufficiencies with her superiors, but also alerted the management to a possible criminal complaint through her counsel. It held that in the circumstances external reporting by means of a criminal complaint could be justified. The Court held that “if the employer failed to remedy an unlawful practice even though the employee had previously drawn attention to... [it], the latter was no longer bound by a duty of loyalty towards his employer.”;
- the applicant acted in good faith ‘even assuming that the amelioration of her own working conditions might have been an additional motive for her actions.’ The court held this finding was further corroborated by the fact that the applicant – once she had concluded that external reporting was necessary – did not have immediate recourse to the media but chose to first have recourse to the prosecution authorities;
- the public interest in having information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important that it outweighed the interest in protecting the latter’s business reputation and interests.

Sosinowska v. Poland [no. 10247/09, 18 October 2011]

2.21 Sosinowska, a specialist in lung diseases, was found guilty of unethical conduct after she wrote a letter to the regional consultant expressing concerns about decisions made by her superior and the quality of medical care given to his patients. This followed a lengthy history of personal antagonism between the two. She was reprimanded. The ECtHR held that such an approach to the matter of expressing a critical opinion of a colleague risks discouraging medical practitioners from providing their patients with an objective view of their state of health and treatment received. The Court also found that the applicant’s opinion was a critical assessment, from a medical point of view, of treatment received by patients from another doctor. Ms Sosinowska did not plan to discredit her superior. Her actions were motivated by a concern for the well-being of patients. Thus, it concerned issues of public interest and the disciplinary proceedings against her were in violation of Article 10.

3 NATIONAL LAWS

3.1 This chapter discusses the general conclusions of surveys of national laws which have covered Council of Europe countries. It also examines more closely some national laws, either because they have been seen as examples of a comprehensive approach or because we are aware of new developments there - or both (Croatia, France, Ireland, Italy, Luxembourg, Moldova, the Netherlands, Norway, Romania, Slovenia, Luxembourg, Sweden, Serbia, the Ukraine and UK). The US is also included, as it has observer status at the Council of Europe and is a member of GRECO, and its law has been influential internationally.

Multinational surveys

Report by the Parliamentary Assembly of the Council of Europe (PACE)

3.2 This 2009 study was based on the 26 members who replied to a questionnaire¹. It concluded that most 'have no comprehensive laws for the protection of "whistle-blowers", though many have rules covering different aspects of "whistle-blowing" in their laws governing employment relations, criminal procedure, media, and specific anti-corruption measures'. It found that specific laws existed only in Belgium, France, Norway, Romania, the Netherlands and the UK. In addition, some laws only concerned corruption, or only applied to the public sector.

3.3 Thanks mainly to the CDCJ national members, we have been informed of new legal developments since the study. These include intentions to legislate, which are at various stages. Where we have information on the nature of the proposals for change they are mentioned below (this is the case with Ireland, Italy, the Netherlands, Serbia, Sweden and the UK). There are also intentions to legislate in the Czech Republic and "the former Yugoslav Republic of Macedonia". In the limited time available for this study, we recognise that we do not have a complete picture. However, the welcome improvements actually made (described below) do not affect the general validity of the PACE report's conclusion that 'much still remains to be done at the level of national legislation in European countries'.

3.4 Looking at the reasons for this state of affairs, PACE noted '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'. Though it found that 'protection of personal data and the respect for private life are also other elements which add to this reluctance to enact specific legislation on this subject'.

3.5 The report concluded by setting out best practices in legislation, and made the important general point that 'governments should understand that witness protection laws are insufficient to protect whistle-blowers, the main reason being that whistle-blowers need protection from possible retaliation from the very moment they make their disclosures and not only when a case comes to court – something an effective whistle-blowing mechanism might be able to avoid in many instances'. It recommended a PACE Resolution inviting member States to review their legislation concerning the protection of whistleblowers, and setting out guiding principles. Such a Resolution was indeed adopted in 2010 and we refer to it at 4.8 and throughout chapter 5.

¹ Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Georgia, Germany, Greece, Italy, Lithuania, "the former Yugoslav Republic of Macedonia", the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Slovenia, Sweden, Switzerland, Turkey and the UK.

GRECO (2006 and 2009)

3.6 In its second evaluation round GRECO made a limited examination of whistleblowing laws in its member States as part of its monitoring of codes of conduct for public officials under Guiding Principle 9 of the CoE's 20 Guiding Principles for the fight against corruption. The interim findings were discussed in GRECO's 7th General Activity Report (2006). It noted that the widespread use of requirements for public officials to report corruption did not seem to have had much impact. It recommended its members to take further steps, notably to:

- ensure laws protect against all types of retaliation (not only dismissal);
- provide confidential advisers to assist staff who wish to make reports;
- address in the law any possible contradiction between whistleblowing and the disclosure of confidential information;
- ensure that the laws are properly promulgated to staff.

3.7 This work was updated in the paper 'The protection of whistleblowers in the light of GRECO's work' by Christophe Speckbacher in 2009, at which time it was clear that much remained to be done, and that some of what had been done was not considered satisfactory by GRECO.

Transparency International (2009)

3.8 TI's 2009 study 'Alternative to silence: Whistleblower protection in 10 European Countries' covers Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia. It found that 'whistleblowing legislation in those countries is generally fragmented and weakly enforced. There is no single, comprehensive legislative framework in place, with the exception of Romania.' It also made the important point that protection was limited to formal employees, leaving informal workers, consultants, contractors or suppliers outside the scope of the law.

National laws**Croatia**

3.9 The Act on Civil Servants was amended in 2008 to enhance protection for civil servants who report corruption to the authorities, so that it covers not only dismissal but all acts of retaliation. It also introduced a guarantee of anonymity for them in serious cases and made clear that it is a serious breach of duty to engage in retaliation. In 2009 a change to the Law on Work provided that if a whistleblower shows he has been discriminated against, the burden of proof falls on the employer.

France

3.10 An article inserted in the French Labour Code in 2007 states "No one can be prohibited to access a recruiting procedure or an internship or a period of training in a company, no employee can be sanctioned, dismissed or be subject to, direct or indirect, discriminatory measures, especially concerning salary, training, reclassification, appointment, qualification, professional promotion, relocation or renewal of contract, if he or she has disclosed, in good

faith, either to its employer, or to the judicial or administrative authorities, corruption-related offences that he or she would have discovered in exercising his/her functions. Any termination of contract which would be a result of this, any disposition or any contrary act would be void". There is no data on the use of the provision but it has given rise to jurisprudence: notably, in the Dassault Systems judgment (8 December 2009) the court ruled that the article only applies to reports of corruption-related crimes.

3.11 In 2007 the view was taken that it was unnecessary to extend the protection to public officials on the ground that Article 40 of the Code of criminal procedure was sufficient. That requires public officials who suspect corruption, or any other offences representing a threat to integrity, to report them to the state prosecutor without the need to seek their hierarchical superior's approval.

3.12 In France, works councils, staff representatives and trade unions fulfil the role of listening to workers and transmitting information. At any time, they may request explanations of accounts or on the operation of the business. They can be places for the collection and passage of information. French companies therefore have open operations which enable a vigilant reporting system, so it is argued there is no need to have recourse to tools exclusively oriented towards whistleblowing.

Ireland - Protected Disclosures in the Public Interest Bill 2012

3.13 Having previously decided to include whistleblower protection in sector-specific regulations, Ireland has now reconsidered its position in the light of criticism, notably from their Standards in Public Office Commission. The 2012 Report of the Mahon tribunal (set up in 1997 to investigate allegations of corrupt payments to politicians) said the fragmented approach has led to a complex and opaque system for protecting whistleblowers which is likely to deter at least some from reporting corruption offences. Now the Government has announced a single overarching framework protecting whistleblowers in a uniform manner in all sectors of the economy.

3.14 The law has yet to be fully drafted but a detailed outline is available online. It draws on the experience of national models, such as the UK's Public Interest Disclosure Act 1998 (PIDA) and South Africa's and New Zealand's Protected Disclosure Acts (both from 2000), along with the G20 principles. It goes beyond PIDA by adding new issues relating, firstly, to the unlawful, corrupt, or irregular use of funds in the public sector. These seem to go beyond criminal acts (which are separately covered) by referring to irregular use of funds. It also adds cases where 'an act, omission, or course of conduct by a public official is oppressive, improperly discriminatory, or grossly negligent, or constitutes gross mismanagement'.

3.15 The draft provides that a disclosure is not protected where the person making it does so knowing that it is false or misleading or where he/she made the disclosure recklessly without regard to whether it was false or misleading, frivolous or vexatious. It also says an anonymous disclosure cannot be a protected disclosure.

3.16 It provides immunity from both civil and criminal liability and introduces a new claim of 'tortious liability' under which a whistleblower can institute civil proceedings against a third party who retaliates against him.

3.17 It provides that every person to whom a protected disclosure is made or referred must not disclose information that might identify the whistleblower unless he consents or unless it is essential to the effective investigation of the allegation, to prevent serious harm or for reasons of natural justice.

3.18 The law will make special rules for public bodies, including the police and military, who have access to secret information relevant to the security of the State. It will limit the internal channels through which such disclosures can be made and also exclude any external public disclosures of such information, while maintaining the key principle of access to an independent third party by providing for a new disclosure channel to a 'complaints referee', who will report to the Prime Minister.

Italy

3.19 A draft law containing "Provisions for the prevention and repression of corruption and illegal practices in the public administration" is currently being considered in the Parliament. It does not cover the private sector. Its Article 4 provides that:

1. Except in cases of liability for calumny or defamation, a public servant who reports illicit conduct discovered in the course of his duties may not be sanctioned, dismissed or subjected to any discriminatory measure, direct or indirect, affecting his working conditions for reasons directly or indirectly related to the whistleblowing.
2. Without prejudice to the reporting requirements provided for by law, the identity of the informer may not be disclosed, without his consent, until such time as the disciplinary charge is contested.

3.20 Paragraph 1 makes reservations for cases of defamation (owing to the need to protect the reputation of persons who have been wrongly accused) and calumny (an offence against the administration of justice). Paragraph 2 protects the anonymity of the whistleblower, subject to the requirement (which applies only to certain persons) to inform the judiciary, until such time as any disciplinary proceedings are instituted against the whistleblower. It is to be interpreted as follows:

- firstly, in any case of whistleblowing concerning conduct that constitutes a criminal offence, the obligation for public officials to notify the judiciary also implies the obligation to disclose (to this authority) the identity of the informer - which is necessary for the purposes of the investigation, as the Code of Criminal Procedure prohibits the use of anonymous complaints or reports;
- secondly, if it is found that the whistleblowing is liable to constitute calumny or defamation, the identity of the informer must be disclosed to the judiciary in charge of the proceedings, irrespective of any disciplinary action which may be taken.

Luxembourg - Law of 13 February 2011 on the Fight against Corruption

3.21 This law amended the Labour Code and the Codes applicable to public officials, to protect from any retaliation employees ('salariés') who report corruption, traffic in influence, or abuse of office to a hierarchical superior or a competent authority. If an employee is dismissed, he can appeal to the Labour Court for re-instatement. (It is not clear what happens if the retaliation falls short of dismissal). It is provided that if the employee establishes that he was victim of retaliation - whether by the employer, colleagues or external persons linked with the employer - it is for the employer to prove that the action against him was justified by other objective elements.

Moldova - Law of 27 December 2011

3.22 Following the ECHR Guja judgment, 3 important changes have been made to the law:

1. The right for public officials to make disclosures in good faith concerning corruption (including corrupt behaviour and breach of the rules on the declaration of income or concerning conflicts of interest). Officials may make disclosures to their superior, the control authority, the prosecution, NGOs, or the media.
2. Measures to protect public officials, aimed at the presumption of good faith, the confidentiality of personal data and preventing unfair job transfers. The official will not be liable to disciplinary sanctions for having disclosed corruption (or related behaviour as above).
3. Sanctions which may be imposed on superiors who fail to provide protection to whistleblowers. The law now provides for a fine of between approximately € 64 and 194.

Netherlands - Whistleblower Regulation for Central Government and Police

3.23 This regulation began to take effect in 2010, and provisions in line with it have been established for the defence sector, and local government. The main improvements are:

- A new duty for management to ensure that the whistleblower is not hindered in any way to continue to perform his/her function, including preventing retaliation from colleagues.
- The opportunity to report confidentially any misconduct or breach of ethical standards, which can cause major damage to the public service, to a 'Confidential Integrity Counsellor' (CIC), one of whom is appointed within each government department. If a whistleblower uses the CIC, all communication back to him the must go through the CIC. It must include feedback about the progress and findings of the investigation (within 12 weeks), with an indication of further steps the whistleblower can make.
- An obligation for all officials within the organization who are involved in handling a report of misconduct to protect the identity of the whistleblower if s/he so wishes.

- The opportunity to blow the whistle on a malpractice in a department or organisation other than the one in which one is employed. Also, former employees can blow the whistle on their former organisation (up to two years after ending the employment).
- The whistleblower or the CIC who wishes to object to the findings of the internal or external investigation, and take matters to court, will be partly reimbursed for costs made during these procedures, for example the cost of legal assistance (up to € 5.000).

3.24 There is an existing avenue to raise concerns with the Integrity Commission (which is composed of independent experts but appointed by the Interior Minister), if the findings of the internal investigation are not satisfactory, if the investigation is unreasonably long (+12 weeks), or if there are good reasons to do so. (It is not stipulated what these good reasons should include). The Integrity Commission must keep the identity of the whistleblower confidential, unless the whistleblower does not want that. The Integrity Commission must also provide, based on an investigation, advice to the responsible authority to correct any malpractice. Disclosures to the media by officials are not protected.

3.25 Now, an independent Commission for Advice and Information on Whistleblowing (CAVK) will be established in 2012 under a Government Decision. This centre will act as a point of advice for (potential or actual) whistleblowers in both the public and the private sectors on how to raise concerns. It will check whether there are ways to raise the matter internally and, if not, it will assist the whistleblower to prepare the issue to be brought to an external agency. The identity of the worker is protected. The CAVK has no competence to investigate cases. It creates a 'safe haven' for potential whistleblowers to get independent advice, promotes awareness, and also gives advice to employers. It is based on the model of Public Concern at Work in the UK, except that it is funded by the Government and will be evaluated after 2 years' operation, after which there may be more formal legislation on whistleblowing. Discussions on further action, especially covering the private sector, are on-going.

Norway - amendments to Working Environment Act

3.26 At the end of 2006, Norway passed amendments to its Working Environment Act on whistleblowing ('varsling' in Norwegian, meaning literally 'notification'). These give all employees, in both private and public sectors, a right to notify suspicions of misconduct in their organisation. The misconduct need not amount to a breach of the law, it includes all conditions that are 'worthy of criticism'. The key is whether the procedure followed by the whistleblower is 'appropriate,' and this question will be subject to an overall evaluation. The burden of proof in showing that the procedure was inappropriate rests with the employer. It is assumed that internal reporting or reporting to public authorities will always be appropriate. When it comes to public disclosures (e.g. to the media), essential factors will be whether the employee has previously raised the matter internally, the public interest of the information and the employee's good faith regarding the correctness of the information. Any bad faith in the employee's motives does not automatically hinder lawful reporting, but at the same time, the public interest does not in itself imply that the procedure has been appropriate. All relevant factors have to be considered.

3.27 “Retaliation” – understood as any unfavourable treatment which is a direct consequence of and a reaction to the notification – against an employee who makes a notification, is prohibited. If information is submitted (from the employee) that gives reason to believe that retaliation has taken place, it is assumed that such retaliation has taken place unless the employer proves otherwise. If there is any such retaliation, compensation may be awarded and the amount is unlimited. Any compensation will be awarded by the civil courts if there is no agreement between the parties.

3.28 One innovative feature of Norwegian law is that it also protects employees who “signal” that they will notify suspicions of misconduct, for example by copying documents or by stating that they will notify unless the unlawful practice is changed. In this way, Norwegian law covers the stage before any disclosure is actually made. Also, the Act requires undertakings (in both private and public sector) to implement procedures that facilitate reporting.

Romania - Law 571/2004

3.29 This Law was devised and developed by the Romanian Ministry of Justice and TI Romania. It aims to protect whistleblowers against negative administrative measures by their superiors when they lodge official complaints about suspected corrupt or unethical practices and violations of the law. The law makes requires the whistleblower’s identity to be concealed if need be, and s/he benefits from a presumption of good faith unless and until proven otherwise.

3.30 The Law takes account of the various levers within Romania that need to be utilised if corruption – both actual and perceived – is to be successfully challenged. However, although it required public bodies to adjust their regulations before February 2005 to reflect the Law, there were no sanctions or incentives and in practice very few complied.

3.31 This law contains a definition of the term of whistleblower. It states: “A ‘whistle-blower’ (‘avertizor’) is an individual who reveals violation of laws in public institutions made by persons with public powers or executives from these institutions”. He must be a public sector employee. This definition must be read in conjunction with that of “whistleblowing in the public interest”, which is defined as reporting, in good faith, on any deed to infringe the law, professional ethical standards or the principles of good administration, efficiency, efficacy, economy and transparency.

3.32 This law sets out a list of the persons, officials and organisations to which “whistle-blowing reports” can be directed, and these include mass media and NGOs. Disclosures to the media, NGOs and professional bodies are thus protected in exactly the same way as disclosures internally. The Law also obliges public bodies to invite the media to attend any disciplinary hearing if the whistleblower so requests.

3.33 The law does not cover the private sector or prosecutors. Nor does it allow for transfer and/or compensation where the whistleblower’s continued employment in that post is not viable. It requires a whistleblower to be fully convinced of the issue, which may set rather a high standard, but it is difficult to prove or to falsify such a state of mind.

Serbia

3.34 There is no specific law on whistleblowing and the regulatory framework has not significantly changed since 2009. In that year, the Ombudsman submitted a draft introducing whistleblower provisions which was not accepted by Parliament. Reporting in 2010, GRECO stated that the legislative measures taken so far merely represent an initial step. However, the Law was passed in 2011 on Business Entities, which requires them to protect an employee who reports to relevant authorities a business secret in order to uncover an illegal act. Also in 2011 the Anti-Corruption Agency issued a Rulebook on the Protection of Whistleblowers which provides detailed reporting guidelines which advise the public which authority they should notify of a suspicion of corruption in the public sector and how they should do that. The Agency has recommended the adoption of a *lex specialis* on whistleblowing.

Slovenia - Integrity and Prevention of Corruption Act 2010

3.35 This Act protects those who report corruption to the Slovenian Anti-Corruption Commission (KPK) or any other competent authority. They will not infringe laws on classified information if they provide it to the KPK or to law enforcement agencies. Their identity will not be disclosed. The KPK will assess whether they made the report in good faith and whether they reasonably believed it. If they suffer retaliation, they may claim compensation from their employer and the KPK will help them establish the causal link between their report and the retaliation. Moreover, where the whistleblower cites factual grounds for the presumption that he has suffered retaliation from the employer for having filed a report, the burden of proof shall rest with the employer.

Sweden

3.36 According to Swedish constitutional rules, the principle of freedom to communicate entails a right for everyone, without penal consequences, to provide information – as a general rule, even confidential information – to the media for publication. (There are specific exceptions, notably to prevent the publication of secret documents and serious crimes against national security). Authorities and other public bodies may not investigate who has provided information, if this person has chosen to be anonymous, nor may they retaliate in any way against this person. This means that a public employer cannot (subject to the exceptions above), discipline an employee on the ground that he or she has provided information to the media. The same principle is applicable to employees of municipal companies and employees of certain bodies itemised in the annex to the Official secrets Act. The new development is that since January 2011 all the employers in question can be fined or sentenced to prison if they retaliate against the employee.

3.37 The situation in the private sector is described in the 2009 PACE Report. In brief, dismissal is only possible on objective grounds, and employees have the right to criticise an employer as long as they address their criticism to the right authority. Factual information must be reasonably well grounded and the employee must first seek corrective action from the employer before making any criticism public. Consideration is now being given to legal change to facilitate reporting by staff (for example in geriatric care homes) employed by private entities but paid out of public funds.

Ukraine

3.38 A new law on Access to Public Information was adopted on 13 January 2011. It provides that an official cannot be held legally liable for the disclosure of information about unlawful acts, or threats to the health or security of citizens and the environment, provided that s/he was guided by good intentions, and could justify his belief that the information was authentic (Article 11).

3.39 It also provides that 'Parties to information relations shall be immune from liability for disclosure of limited access information if adjudicated by court that the information is socially needed' (Article 30). 'Socially needed' means that it is of interest to society and the right of the public to know the information outweighs the possible harm of dissemination. This includes information on threats to national sovereignty; on the implementation of constitutional rights, liberties and obligations; on possible violations of human rights, on ecological harm or other negative repercussions from physical or legal persons' activities or inertia.

United Kingdom (UK) - Public Interest Disclosure Act 1998 (PIDA)

3.40 The 2009 PACE Report states: 'The UK indeed appears to be the model in this field of legislation.' PIDA is designed to protect most workers from being unfairly dismissed by their employer or suffering other 'detriment' (retaliation) whenever they have reported concerns about wrongdoing to the employer or the regulatory authorities. Details of any claim that is submitted to the Employment Tribunals under PIDA are forwarded, with the agreement of the complainant, to the relevant regulatory authorities, so that they can then decide whether to investigate the underlying issues (such as fraud or non-compliance with health and safety law) further. 'Detriment' is a very wide term and case law has determined that even a failure to investigate a concern can amount to a detriment. PIDA is a complex measure and is described in Annex C. Here we focus on practical experience of the law and proposals for change.

3.41 In the first ten years of PIDA's operation, the number of claims made under it annually increased from 157 in 1999 to 1761 in 2009. This is still a small proportion (under 1%) of all claims made to Employment Tribunals. Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won. There is only partial information on awards: in the known cases, the average compensation was £113,000 (the largest single award was over £3.8m) and the total known compensation was £9.5m.

3.42 In 2007 a survey by Ernst and Young found that 86% of UK senior executives in multinationals said they felt free to report cases of fraud or corruption, against an average of 54% across mainland Europe. The operation of PIDA has plausibly helped to create this confidence, but the law is capable of improvement. In 1998 it was discovered that a doctor, Shipman, had been murdering his elderly patients. The Inquiry into this case found that he had been suspected by several people, but they had not reported their suspicions for fear of the consequences. It looked at what factors might have discouraged reports and made recommendations for changes to PIDA.

3.43 PIDA requires a whistleblower to have ‘reasonable belief’ and the Shipman Inquiry, considered that this requirement (which is higher than the threshold of ‘reasonable grounds to suspect’ in the Civil Law Convention) ‘may operate against the public interest, especially in cases where the worker has access to incomplete or secondhand information’. (Though it accepted the higher standard could be justified for reports to the media). PIDA also requires ‘good faith.’ Its drafters believed that meant ‘honest belief’ but it has been successfully argued that in the context of PIDA it must mean something beyond that - the Court of Appeal held that a worker can fail the good faith test and lose PIDA protection where a tribunal finds that their predominant motive for making the disclosure was unrelated to the public interest objectives of the Act (for example, if it was malice). The Inquiry concluded that “if employers are able to explore and impugn the motives of the ‘messenger’..., many ‘messages’ will not come to light”. It recommended the removal of the ‘good faith’ requirement.

3.44 The UK Government are planning a technical change to the legislation to emphasise public interest. The Employment Appeal Tribunal has held that there is no reason to distinguish a legal obligation which arises from a contract of employment from any other form of legal obligation. This decision has raised the possibility that any complaint about an aspect of an individual’s employment contract could be the basis for a protected disclosure, which is contrary to the intention of the legislation. The planned amendment would mean that disclosures must in future satisfy a public interest test and excludes those which can be characterised as being of personal rather than public interest. A claimant would be required to show that s/he believed the disclosure was made in the public interest, and the tribunal would have to decide that the claimant’s belief was reasonable. The intention is to return to PIDA’s original purpose by excluding claims which are of personal rather than public interest.

3.45 Public Concern at Work (PCaW) have also drawn up proposals for change in the light of experience, notably:

- To provide for vicarious liability – a recent case at the Court of Appeal undermined the protection for whistleblowers through ruling that an employer was not liable for the acts of victimisation of whistleblowers carried out by its employees;
- To review the categories of wrongdoing covered by the Act to consider including gross mismanagement, gross waste of funds and abuse of authority;
- To enhance open justice – external oversight of the claims reaching the employment tribunal is necessary for PIDA to achieve its true potential to ensure accountability. At present the actual concern may never be made public, but known only the employer and the worker;
- to ensure whistleblowers know that they cannot be gagged or prevented from making a protected disclosure under the terms of any settlement or severance agreement.

3.46 There also remains a problem of awareness. GRECO found in 2006 that the UK Government had only partly implemented its recommendation to do more to promote whistleblowing. A survey commissioned in 2011 by PCaW found that 77% of UK adults did not know there was a law or thought that there was no law to protect whistleblowers.

3.47 PIDA is not the only measure which encourages whistleblowing in the UK. The UK Corporate Governance Code (C.3.4) requires companies listed on the London Stock Exchange to ensure that arrangements are in place for staff to raise concerns in confidence about possible improprieties, and for such concerns to be proportionately and independently followed up. This affects not only UK companies, but other companies doing business in the UK.

United States

3.48 The PACE 2009 report says 'in this field, Europe has much to learn from the United States'. Moreover, some of its law has international reach. The Sarbanes-Oxley Act (SOX) applies directly to any company listed on the US stock exchange, and also indirectly to European subsidiaries of listed US companies. It obliges companies to establish independent internal audit committees and to provide opportunities for employees to make protected and, if desired, also anonymous internal whistleblowing disclosures in relation to accounting or financially relevant issues (Sec. 301). At the same time, SOX (Sec. 806) foresees penal sanctions and a duty to repair damages for those disadvantaging whistleblowers. The primary background of this statute is the protection of the interest of the shareholders and not that of the general public.

3.49 Within the US, the Whistleblower Protection Act (WPA) is the main piece of legislation protecting whistle-blowers. It was adopted in the aftermath of the Challenger space shuttle disaster in 1986. This act only covers public sector employees, and only those working for federal bodies, but a majority of states have enacted their own whistleblower protection legislation. Any disclosure of information is protected if an employee reasonably believes and evidences a violation of any law, rule, or regulation or evidences gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to health and safety. The enforcement mechanism set out in the WPA is robust and easily accessible: the WPA foresees that a whistle-blower suffering a reprisal can file a complaint with an independent investigative and prosecutorial agency (the Office of Special Counsel), which will investigate the case and which will seek corrective action from the employer if the accusations are proved right.

3.50 If a purported whistleblower makes a disclosure that is required to be kept secret in the interest of national defence or the conduct of foreign affairs, the disclosure is prohibited and will not be protected unless it is made to the agency's Inspector General or the Office of Special Counsel.

3.51 Under the WPA the burden of proof of detriment is effectively shifted to the employer. The employee only has to establish that he - 1. disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. made the disclosure to the right type of party; 3. made a report that is either outside of the employee's course of duties or communicated outside of normal channels; 4. made the report to someone other than the wrongdoer; 5. had a reasonable belief of wrongdoing; 6. suffered a personnel action. If the employee establishes these elements, the burden shifts to the employer to establish that it would have taken the same action in absence of the whistleblowing.

3.52 The US False Claims Act has also attracted attention and is considered one of the strongest and most effective whistleblowing laws in the world, due to its 'qui tam' provisions. These allow citizens with evidence of fraud involving government contracts to sue, on behalf of the government, in order to recover the stolen funds. In compensation for the risk and effort of filing a qui tam case, the whistleblower may be awarded a portion of the funds recovered, typically between 15 and 25 per cent. According to the US Department of Justice, the US has recovered more than US\$ 21 billion since 1986 thanks to the False Claims Act.

4 INTERNATIONAL MEASURES AND THE CASE FOR A NEW COUNCIL OF EUROPE INSTRUMENT

4.1 This chapter considers the case for a legal instrument on protecting public and private sector workers who make disclosures in the public interest. It considers the precedents that are most relevant for Europe and concludes that a Council of Europe Recommendation, setting out the principles on which national laws and policies should be based, is both feasible and desirable. However, there is a case for beginning the process of making it in late 2012, after further preliminary work has been carried out.

Conventions

4.2 The UN ILO Convention of 1982 states that the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations, or recourse to competent administrative authorities, is not a valid reason for the termination of employment. A similar provision is found in the Appendix to the European Social Charter 1996 (under art. 24-3-c).

4.3 The first Convention to recognise the special role of whistleblowing in anti-corruption, and to broaden the protection to cover any unjustified sanction, was the Council of Europe's Civil Law Convention on Corruption (1999), which states (Article 9):

'Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities'.

4.4 This Convention has been ratified by 34 states, but Article 9 is a rather loose provision as it leaves open the issue of what is 'appropriate' protection. As we have seen, it has not led to widespread enactment of comprehensive whistleblower laws. It has however had an effect on ECHR case law (see 2.12).

4.5 There is also a relevant provision in the Criminal Law Convention on Corruption (1999) - Article 22 (Protection of collaborators of justice and witnesses), but as this provision covers all types of person who co-operate with investigators, it lacks the focus of Article 9. Neither of these provisions has been monitored by GRECO, but as we saw in Chapter 3 there is reason to suppose that the extent of compliance is very variable.

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

‘Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention’.

4.7 An obligation to ‘consider’ is however relatively weak. Nor does this provision place any emphasis on workers, so it also lacks focus. The implementation of UNCAC is currently being monitored by the UN Office on Drugs and Crime.

Principles

Council of Europe

4.8 In its Resolution 1729 (2010), the PACE invited all member States to review their legislation concerning the protection of whistle-blowers, keeping in mind certain guiding principles. It followed this with its Recommendation 1916 (2010) which recommended that the Committee of Ministers draw up a set of guidelines for the protection of whistle-blowers, taking into account the guiding principles stipulated by the Assembly.

G20

4.9 At the Seoul Summit in 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anticorruption agenda. They asked the OECD to draw up a study of best practice. The study, published in 2011, contains information on law and practice in G20 countries, including 5 of the 6 Council of Europe member States which are also G20 members - namely France, Germany, Italy, Russian Federation and the UK (there is no information on Turkey). It concludes with a compendium of best practices and guiding principles for legislation on the protection of whistleblowers. All G20 states have committed themselves to implementing these principles in legislation.

Others

4.10 As we saw at 2.10, the ECtHR established principles in the Guja case. Transparency International have recommended principles in their Policy Position No. 1/2010.

The case for a new Council of Europe Instrument

4.11 The PACE Report of 2009 said that much needed to be done at national level in the member States. As regards the EU, the Commission reached a similar conclusion in its Communication of 6 June 2011. It stated ‘the relevant legal framework in the EU is uneven, creating difficulties in handling cases with a cross-border dimension. The Commission will carry out an assessment... as a basis for further action at EU level’. It is not yet clear what that action will be: though the European Parliament has called for harmonisation of law, that does not seem likely in the short term. Even if the EU were to agree a Directive, there would remain a

need to address the situation in other Council of Europe states. There are good points in many countries' systems, but no single model brings them all together. The impetus for action is there, but there is a need for direction. In the circumstances, a new legal instrument from the Council of Europe could have a significant effect, both practical and declaratory. The development of whistleblowing legislation should also help in providing legal clarity and thus in reducing the burdens for the ECtHR.

A convention

4.12 The PACE proposed the drafting of a framework convention on whistleblowing. In its 2011 reply, the Committee of Ministers stated that it may come back to this issue once it has taken a decision on the possible elaboration of guidelines.

4.13 A Convention is the strongest and most positive measure that the Council of Europe can take. TI Sweden have argued for a Convention, stating that 'there still remain significant obscurities with regard to which concrete demands are to be made on the European countries concerning protection of, and conditions for, whistleblowers'. On the other hand, the negotiation of conventions is a laborious and time-consuming process and that is particularly likely to prove true in this very broad field, where member States have adopted a range of solutions. Also, even once they are adopted, the process of ratification takes many years. As we have seen, there are already relevant provisions in conventions. The most specific provision, in the Civil Law Convention, was agreed as long ago as 1999 but the Convention took 4 years to come into force and has still not been ratified by several major players - including Germany, Italy and the UK.

A recommendation

4.14 It seems to us therefore - without ruling out the formulation of a Convention in the longer term - that the most practical and swiftest means of supplementing the existing measures within the Council of Europe is a recommendation. This recommendation would set out principles, encouraging member States to take action, including legislative change, but leaving a wide margin of discretion to them. The result would be not uniformity, but guidance on minimum standards. This seems a reasonable approach on this issue, as each jurisdiction will need to take into account existing mechanisms - for example, what regulatory authorities may exist to receive whistleblowers' reports and whether a specialised tribunal is, or could be, available for hearing their cases.

4.15 As noted above, there are now several sets of principles. Is another set necessary? The G20 principles have not been agreed beyond the G20 and a Council of Europe recommendation would have a wider application, and might also be monitored by GRECO. The existing principles represent valuable work and clearly should be drawn on in formulating a recommendation - though there are differences between them which prevent a synthesis. Deliberations leading up to the adoption of a recommendation would aim to resolve the controversial issues and render the result more legitimate in the eyes of member States.

4.16 Recommendations are not normally monitored, though member States are invited to report on action after 3 years. We note that GRECO has yet to monitor the provisions relevant to whistleblowing in the Council's Conventions against Corruption. If a recommendation were to be adopted, this might be included in that review. GRECO's remit covers monitoring the implementation of international legal instruments 'to be adopted in pursuance of the 1996 Programme of Action against Corruption'.

The objective

4.17 This recommendation should have as its main objective to help member States put in place, or improve, national laws on the protection of workers against retaliation in circumstances where they make a disclosure of information, whose disclosure is in the public interest, which comes to their attention through their work. We put it this way to focus attention on the message rather than the messenger. As the Shipman Inquiry stated, 'the public interest would be served, even in cases where the motives of the messenger might not have been entirely altruistic'. The 'public interest' focus shows this is not meant to introduce mechanisms for resolving individual employment disputes, which are more appropriately dealt with through HR processes and procedures and through the industrial relations machinery for dealing with employment-related grievances.

Further work

4.18 There is a general lack of research in this field based on European experience. The EU recently commissioned from TI a study of whistleblowing laws in all 27 EU member States. If the CDCJ decide that more information on national systems is desirable before proceeding to a recommendation, one option is to await the results of this study (due in late 2012) and meanwhile examine the Council of Europe's member States who are not EU members. It would also be useful to make an analysis of the costs and benefits (financial and other) of whistleblowing laws in those states with experience.

5 PRINCIPLES

5.1 This chapter discusses the issues that would need to be addressed in a Council of Europe recommendation, taking into account the existing principles formulated by PACE and by the G20. (We suggest possible drafting for the recommendation in Annex A).

Form of legislation

5.2 The PACE principles state that 'Whistle-blowing legislation should be comprehensive'. The G20 identify, as a best practice, 'enactment of dedicated legislation in order to ensure legal certainty and clarity, and to avoid a fragmented approach...'. Dedicated legislation is the best way of ensuring complete coverage, and is easier to communicate to all possible users - including during the consultation phase, when social acceptance of the measure needs to be gained. However, we do not see this as a matter of principle. A sectoral approach is not excluded: though it is worth noting that Ireland, having set out that way, has found it necessary to change track, and now have to align the existing provisions already made in different sectors to the new general scheme.

5.3 It is feasible to provide separately for the public and private sectors (as in Sweden and the US). On the other hand, Norway, the UK, Luxembourg, Slovenia and now Ireland have decided it is preferable to cover both private and public sectors in a single law. This seems the simpler course, and is more consistent with the way in which the sectors overlap in the modern world. For example, many countries contract out public provision to the private sector, and it needs to be legally clear which rules apply. It is true that public officials may be subject to duties to report which are unusual in the private sector, but whistleblowing protection should apply irrespective of whether or not there is a duty to report.

5.4 The first G20 principle refers to the need for 'clear legislation and an effective institutional framework'. How clarity and effectiveness are achieved is for consideration in the national context. Institutional and legal frameworks do not by themselves generate effective whistleblowing, and effectiveness and clarity are a matter of degree rather than sharply demarcated.

5.5 It is vital that other laws are reviewed to ensure that, subject to the safeguards in para 5.34, there is no conflict that would undermine the protection or cause doubt to workers about their safety sufficient to risk stopping them from speaking up. This may include laws on defamation, official secrets, data protection, labour laws on discipline and dismissal and provisions on whistleblowing found in other instruments.

Issues for disclosures

5.6 The PACE principles state that 'the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals...' The G20 Principles recommend covering disclosures of 'a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or types of wrongdoing that fall under the term corruption, as defined under domestic law(s)'.

5.7 While we doubt this last item adds much as corruption will be unlawful, and thus already covered, we see sense in expressly mentioning this issue in any list. It is clear nevertheless that the G20 principles go beyond unlawful acts in other respects, while the PACE principles do not. We doubt there is any real difference here. The fundamental point is that whistleblowing is most effective as a warning, at the stage before anything has happened, to prevent damage and harm to those who are not in a position to protect themselves, so it cannot focus solely on '*faits accomplis*'. And before the event it may not be clear to a worker what, if any, law will be broken. One approach, which has been adopted in Norway, is not to list the issues for disclosure at all, but to allow reporting of all 'censurable conditions' in the workplace.

5.8 If there is a list, it needs careful consideration so that it does not exclude vital disclosures. We note that some risks to health and safety - like loose electrical wiring - may not be illegal and may not seem substantial, but may nevertheless lead to fatal accidents (as in the Clapham train crash in the UK). We do not think there need be concern about encouraging worthless reports on trivial matters - the effect of a whistleblowing law is to reassure workers

they will not be subject to formal retaliation if they raise the specified matters. It does nothing to inhibit organisations from swiftly rejecting unmeritorious reports. It should also be borne in mind that fears of longer term social and occupational stigma - promotional risks and even employability – discourage reporting whatever the legal protections.

5.9 'Gross mismanagement' and 'gross waste of funds' are not necessarily unlawful, but responsible organisations will certainly wish to know about them. The qualification 'gross' is probably necessary as simple mismanagement is too commonplace.

5.10 Miscarriages of justice may happen without any breach of a law (e.g. through a mistake in a forensic laboratory) but are surely matters of public concern, no matter what their scale. Also, damage to the environment is of increasing concern, and will usually involve a breach of the law, but there could be some issues of concern where no law is broken. (In some countries an accidental leakage of pollutants may not contravene a law). Both of these feature in PIDA and the draft Irish law.

Coverage of workers

5.11 The PACE recommends that the legislation should cover 'both public and private sector whistleblowers, including members of the armed forces and special services'. The G20 principles indicate that coverage should include 'not only permanent employees and public servants, but also consultants, contractors, temporary employees, former employees, volunteers, etc.'

5.12 It is arguable that volunteers should not fear to make reports as they do not rely on their job economically. However, they might psychologically rely on their job and some people might economically need unpaid internships to have careers afterwards. We think unpaid workers should be covered, though compensation levels may reflect their unpaid status. It seems justifiable also to cover former employees as PACE suggest, but it might be reasonable to limit coverage to wrongdoing that they raised during the time they were employed (though the retaliation continued or started later).

5.13 The 2009 PACE report states: 'in a number of situations, such as in the secret services or in the military, special standards and procedures may need to apply. But in view of the fact that abuses can and do occur in these services, and that their exposure could very well be in the public interest, their members should not be excluded from whistle-blower protection laws from the outset.' This is a controversial field. The UN Special Rapporteur stated in 2009 that 'some States tend to systematically invoke national security and public safety to restrict the scope of activities of [human rights] defenders'. We agree that whistleblowers working anywhere in state service should be protected, though we recognise that States may take the view that owing to the extraordinary legal position of the secret services, and the special risks they face, they need their own specific reporting channels. It remains essential that any laws applicable to them should be public, as PACE made clear in its resolution 1551(2007).

5.14 Intending whistleblowers are protected under Norwegian law, and this seems right, despite the fact they have not made any disclosure. The same should apply to those wrongly identified as being whistleblowers. If they suffer any retaliation they should be treated as whistleblowers who have complied with procedures.

Motivation

5.15 As we saw at 2.10, the ECtHR have stated ‘an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection’. We agree with the implication that the issue of motive should only come into play in assessing compensation, so it could affect the size of the award, but not rule out protection altogether. Otherwise those who feel their motives may be questioned will not speak up. Under Norwegian law, bad faith does not rule out lawful reporting (see 3.26). This recognises that the public interest is served if staff report reasonable suspicions, even if their personal motivation is malicious.

Grounds for reporting

5.16 The Council of Europe’s Civil Law Convention on Corruption requires that the whistleblower should have ‘reasonable grounds to suspect’ wrongdoing. He is not expected to become an amateur detective, just to report what he suspects. There is general agreement on the fundamental point that a whistleblower who has reasonable grounds to suspect wrongdoing should be protected by law, even if he is mistaken.

Good faith

5.17 The Civil Law Convention (like UNCAC and the first G20 Principle) also mentions ‘good faith’, as an additional requirement. The PACE principles include ‘Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives’. The last phrase would introduce scope for argument about motive which would be seized on by lawyers for employers. The term ‘good faith’ would not be problematic if the law defined it to mean ‘honestly’. It is also desirable that the whistleblower will be presumed to be acting in good faith unless the contrary is shown (as in Romania).

Internal reporting

5.18 We recommend a ‘stepped approach,’ with different grounds required at each stage. This would not mean that the first steps can never be omitted. However, if at any stage there is no response, then it is clear the whistleblower can go to the next level. Internal disclosures should be as easy as possible to make, and reasonable suspicion should be enough. It is not only what all responsible organisations wish to encourage and are entitled to facilitate, but what most whistleblowers do instinctively - 71% of callers to PCaW had previously raised the issue internally.

Reporting to External Authorities

5.19 The PACE Resolution states: 'Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected'. The G20 mention as a good practice that protection should be afforded to disclosures made directly to law enforcement authorities. They also mention, separately, 'Allowing reporting to external channels, including to media, civil society organisations, etc.'

5.20 A clear distinction needs to be drawn between disclosures to external public authorities, that have the authority and power to address the problem (and can be expected to act in confidence when necessary), and wider public disclosures. That is in line with the ECtHR's statement in the case of Heinisch that 'disclosure should be made in the first place to the person's superior or other competent authority. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public'. The appropriate competent authorities will include law enforcement agencies and regulatory authorities (such as auditors, inspectorates, ombudsmen and anti-corruption commissions where they exist). It will be useful to specify which are the appropriate authorities, which may depend on the issue raised (though this specification should be done in a form which is easy to update when need be). An alternative (which as far as we know does not exist) could be a one-stop agency which then refers the issue on to the proper place.

5.21 In order to funnel concerns appropriately and reinforce the value of internal reporting, it is appropriate to require some belief on the part of the worker that the information contained in the disclosure falls within the remit of the authority and that it was not unreasonable to have made the disclosure to that authority.

Public Disclosures

5.22 Whistleblowing is not the same as leaking confidential information to the press. Some matters are rightly confidential to governments, law enforcement agencies, or individuals and the public interest is not the same thing as what interests the public. Real corrective action may be prejudiced by disclosures in the media: for example, the right to a fair trial may be vitiated by premature public disclosures of evidence. Another essential reason for preferring other routes is that whistleblowing rightly covers suspicions that may turn out to be unjustified and their publication in the press can damage the rights of others.

5.23 Nevertheless there may be cases where the matter is of such significance that the wider public interest and law requires that whistleblowers can be protected if they approach the media - or use other channels which can be expected to 'go public', such as campaigning NGOs. This is right in a democracy in which freedom of the media is an important tool of accountability. It is clear from the ECHR case of Guja that direct disclosures of confidential material to the media can be justified in certain circumstances. We think laws should require the higher test of 'reasonable belief' (rather than suspicion), and that the disclosure is reasonable, bearing in mind the Guja principles (see 2.10).

Rewards

5.24 There are systems, well established in the US, and recently introduced in Lithuania and Hungary, that provide for financial rewards for whistleblowers. TI recommend that whistleblowers 'should receive some kind of professional or social recognition for having prevented excessive harm to the organisation or society. Such a system, potentially including financial rewards, should be carefully designed, taking the particular national and legal contexts into account'.

5.25 The ideal is to encourage a culture where the open reporting of wrongdoing is natural and is motivated by the public interest, but there can be no objection to the employer or a public authority giving rewards after the fact and in recognition of good conduct. The media have an essential role to play in showing the value of responsible whistleblowing, but the problem is that payments for whistleblowers from the press may discredit whistleblowers in general, encourage inappropriate disclosures and undermine attempts to implement a considered and balanced whistleblowing regime. In general, 'cheque-book journalism' is undesirable. PIDA does not protect wider disclosures for gain, but most other laws make no such provision. We think this is a matter on which there is particular scope for different national views so we suggest no principle here.

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

Openness, Anonymity and Confidentiality

5.27 The PACE principles include 'the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest'. The G20 include as a best practice 'protection of identity through availability of anonymous reporting.'

5.28 We think the value of open reporting should be underlined. Legal protection is an important way to reassure workers that it is right to raise issues of public concern in the normal way, i.e. openly. A considered and balanced law to protect whistleblowing legitimises and de-stigmatises genuine and responsible whistleblowing. Reassuring workers that they will be protected may not always be enough and so offering confidentiality – i.e. that a whistleblower's identity will not be disclosed without their consent – can provide the added reassurance someone may need to speak up. Anonymous reporting – i.e. when no one knows the identity of the person who reported the concern (e.g. the unsigned letter slipped under a door) – will always remain available, whatever the law says.

5.29 It is important to distinguish anonymity and confidentiality, which are often confused and used interchangeably. Legal and social problems stem from anonymous disclosures: anonymous information is rarely admissible as evidence in courts. There have been cases where, because the whistleblower has remained anonymous, another worker has been suspected and sacked. Also, the EU's Working Party on Data Protection has stated that compliance with the relevant Directive requires that those making a disclosure should be assured their identity will be kept confidential, and that anonymous reports should be accepted only under extraordinary circumstances. Besides this, research results indicate that auditors attribute lower credibility and allocate fewer investigatory resources when the whistleblowing report is received through an anonymous channel (Hunton and Rose 2011).

5.30 There are reporting systems which use technical safeguards which are designed both to protect informants' anonymity if they choose it and at the same time enable them to enter into dialogue with investigators. They operate like a 'blind' letterbox where both parties can drop off messages. The whistle-blowers' confidence may develop as the exchange progresses: if the intelligence is to be used effectively they will need to identify themselves to the authorities at some stage. However, the promotion of such anonymous systems is controversial and it is arguable that they may in the long run undermine the internal and external accountability of the organisation. It would help if organisations using such systems make clear that the purpose is only to get those to speak up who otherwise would not dare to come forward and that it aims at gaining trust to use confidential or open channels.

5.31 Where open reporting is not possible or realistic, to ensure a safe alternative to silence or anonymity, confidentiality should be guaranteed when requested. This means that knowledge of the whistleblower's identity will be carefully restricted to the few who need to know it in order to pursue the case. (The degree of confidentiality will depend on the circumstances and a risk assessment made by the employer as part of his duty of care). If it is fully understood that confidentiality will be properly respected and guaranteed, there will be less reason for anyone to use the cloak of anonymity. Putting the onus on an employer to discuss confidentiality with a worker who raises a concern and to abide by it unless informed consent is given may help to create a safer workplace culture. Such advice is important to ensure that a worker making a disclosure understands the scope of the guarantee of confidentiality (i.e. that it does not stop colleagues from guessing who raised the concern).

Advice

5.32 Many issues can be resolved if confidential advice is available at an early stage to a worker who is thinking of blowing the whistle. Internal contact points may be effective if they are trusted: but the ability to seek independent advice on a confidential basis is desirable. This may be provided by an Anti-Corruption Commission where they exist, or confidential advice lines such as those currently provided by PCaW or TI's Advocacy and Legal Advice Centres (ALACs), and shortly to be provided by the CAVK in the Netherlands (see 3.25). At the least, workers should be able to seek advice from trade unions and lawyers. The duty of client confidentiality owed by lawyers makes it possible to allow whistleblowers to explain their concern to them without any pre-conditions. It will need to be clarified that the lawyer

remains bound by confidentiality and cannot pass any information on without the whistleblower's consent. In Germany, companies offer access to external lawyers, who are paid by the company, but who are bound by the whistleblower's instructions, and only convey information back to internal channels if s/he so agrees.

Balancing the duty of confidentiality to employers and the public interest

5.33 Workers may be subject to confidentiality obligations, and whistleblowing law will need to make clear its relationship with these obligations. Laws on money laundering have familiarised member State with the idea that the duty to report suspicions of wrongdoing to authorities can over-ride normal duties of loyalty. There is a helpful principle of English law that 'There is no confidence in the disclosure of iniquity,' established in *Gartside v Outram*, a case from 1856, which might be widely adopted. Whistleblowing law should make clear that it over-rides any obligation or duties of confidentiality between the worker and his or her employer. This needs to apply also to severance agreements and settlements, to prevent the wider disclosure of the issue of public interest from being bartered for in the process.

5.34 It is reasonable that there should be limited exceptions to such a general rule: as a 'best practice', the G20 suggests that protection should not apply to 'disclosures that are prohibited by domestic laws in the interest of national defense or the conduct of foreign affairs, unless the disclosures are made in the specific manner and to the specific entity/entities those domestic laws require'. There are also duties of confidentiality within the legal and medical professions which should be maintained.

Forms of protection

5.35 The range of possible measures against whistleblowers is wide. There are examples of lists (e.g. in the draft Irish law), but it may be simpler and preferable to use a general term covering all forms of retaliation and leave this to be determined in each specific case (as in Norway). It is reasonable that the responsibility of the employer should extend (as in the Netherlands) to cases where the retaliation is carried out by co-workers. It may also (as in Luxembourg) reasonably extend to retaliation by third parties linked with the employer. There remains the problem of retaliation from third parties who are not necessarily linked with the employer. In general such forms of retaliation will be less subtle and should be covered by general laws. However, Art 257 of the Criminal Code of Hungary makes it an offence punishable by imprisonment to retaliate against a whistleblower and the need for such specific laws is worth considering. PACE state 'the most effective option to prevent retaliation may be the personal liability of those found responsible for violating whistle-blowing laws for any punitive damages awarded against the employer'. Ireland plans to allow whistleblowers to make a claim (it is called 'tortious liability' in their draft law) against any third party who retaliates against them. This issue is addressed in criminal and/or civil law.

5.36 Protection from civil suits is proposed both by the G20 and PACE. We doubt immunity is a good road to go down, in view of the need to protect the rights and reputations of others under Article 8 ECHR. Individuals need to be able to defend themselves against allegations - which may turn out to be mistaken - which are made public by a whistleblower in an irresponsible manner. It seems only reasonable that civil suits for defamation should remain available. PACE also calls for protection against criminal prosecution for defamation or breach

of official or business secrecy. As explained above, we think there is a public interest in keeping certain limited categories of information secret. We think the solution is that it should be a defence to relevant civil or criminal proceedings that the person has complied with the law on whistleblowing. Relevant proceedings are those in respect of any acts the whistleblower had to carry out in order to blow the whistle – for example, in explaining his concern he might have had no choice but to run the risk of infringing defamation, breach of secrecy or copyright laws. It would not be a defence against other possible proceedings - for example for bribery, if the person accepted a payment he was not allowed to take. No one needs to take money in order to blow the whistle.

Tribunals

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

Following up reports

5.38 As the PACE report notes, research shows the main reason potential whistleblowers remain silent is that they feel their warnings will not be followed up, while fear of reprisals is only a secondary reason. This is a vital issue, and one result of the operation of the law should be that employers and regulators can do their jobs more effectively. However, it is desirable to make provision that ‘retaliation’ can include a failure by the employer to follow up the report effectively.

Reverse burden of proof of retaliation

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

Remedies

5.40 The PACE principles include that the legislation should ‘seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone.’ Interim relief can help preserve the working relationship and avoid it breaking down completely. In view of the possibility that a whistleblower in a senior position might lose his job as a result of his report, it is desirable that the compensation should reflect his or her actual financial losses

and therefore should be uncapped. If the employer is unable to pay compensation, this should become a matter for the State. The possibility that an employer may escape financial liability through bankruptcy is one reason why it may also be worth considering making it a criminal offence for employers to retaliate against whistleblowers (as in Sweden).

Enhancing Corporate Social Responsibility

5.41 The G20 note that whistleblower protections are an important element of a company's internal compliance programme, which could demonstrate to shareholders and law enforcement that a company has made efforts to prevent and detect wrongdoing. They recommend as a best practice: 'requirement or strong encouragement for companies to implement control measures to provide for and facilitate whistleblowing'.

5.42 Companies should need little encouragement when a KPMG survey of 2007 shows that 25% of the frauds discovered in enterprises came to light thanks to whistleblowers. Also, as a condition of registration on the relevant stock exchanges, some European companies are already subject to requirements under the US Sarbanes-Oxley Act and the UK Corporate Governance Code (see 3.47 and 3.48). Wherever possible such measures of incentivisation should be introduced by member States. One useful simple measure is for the law to state that in considering whistleblower cases, the tribunal will take into account any policy the company has promulgated to the worker.

5.43 The PACE resolution calls for 'internal whistle-blowing procedures that will ensure that disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary'. The G20 principles state: 'The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels'.

5.44 In both the public and the private sector, it is in any organisation's own interest, especially in view of the ECHR case law, to ensure that clear internal procedures are established and promulgated, and that these allow for by-passing the hierarchy where necessary (for example where the immediate hierarchy are suspected of involvement). If the law foresees examining, as one of the facts, whether an internal procedure could or should have been used in deciding whether a wider public disclosure was reasonable and should be protected, a statutory obligation on authorities to establish such procedures may be unnecessary (and may have no more than a declaratory effect). The issue may be best dealt with by providing incentives. Guidance is available on what internal policies should look like (notably in the 2008 British Standards Institution (BSI) Code of Practice). A lead from the top is an essential feature, as is recognition of the duty of care which falls on the employer - once they have received a report they will need to ensure there is no workplace retaliation against the whistleblower.

Awareness raising

5.45 The law needs to be known if it is to operate effectively. It is also vital to ensure the law is promoted widely in order to change public and professional attitudes, so that whistleblowing is perceived not as an act of disloyalty but as a safeguard of public interest.

Evaluation

5.46 It is important to assess the effectiveness of the law in operation. This assessment should properly be carried out by an independent body, reported to the legislature and published. Ideally, this should take the form of a 'before and after' study, to better assess what changes have taken place.

Cross-Border Cases

5.47 Issues may arise in cross-border whistleblowing, as they have with Swiss and Liechtenstein bank employees leaking information - sometimes for reward - to foreign tax authorities. PIDA applies to workers with UK employment contracts regardless of the geographical location of the malpractice and regardless of whether the breach of a legal obligation arises under UK law or the applicable law of another country. This approach is adopted by the draft Irish Bill and can be recommended, to ensure a complete and coherent coverage of cross-border cases. Though the regulatory authorities to whom disclosures may be made in both models are domestic, they would be expected to pass on to foreign authorities any information relating to illegal acts abroad.

5.48 Even once there are minimum standards across Council of Europe countries there could be an issue where their nationals are employed outside Europe. Measures might be needed to ensure companies are not tempted to employ them on foreign contracts to evade the standards.

International Governmental Organisations (IGOs)

5.49 PACE Recommendation 1916 (2010) calls for a strong internal whistleblowing mechanism covering the Council of Europe and all its 'partial agreements' (such as GRECO). We agree that it is important for the Council to set an example and lead the way for other IGOs. The principles we recommend do not formally apply to IGOs but the more closely they are able to follow them (or the Code of Practice mentioned at 5.44) the better. Special consideration would be needed as to what form of independent outside scrutiny they should be subject to and politically can accept. In the absence of suitable arrangements, there may be an increasing number of cases of anonymous disclosures to the press as in the ECHR case of Tillack (see 2.7).

Conclusion

5.50 We have sought to use the best information available in order to develop this analysis. We hope that the Council of Europe will find it useful in developing a recommendation on whistleblowing, as part of its traditional mission in preserving and enhancing human rights in its member States.

Annex A - DRAFT RECOMMENDATION

There are precedents where the Committee of Ministers have made recommendations to member States whose main purpose is to promulgate principles, such as Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity. This Annex contains a first draft of the principles we think should be considered for inclusion in a recommendation on whistleblowing if the CDCJ decide to proceed in that way. These principles would set a minimum standard, which member States would be free to exceed. All of these principles will apply to defenders of human rights. The bracketed references are to the paragraphs in Chapter 5 where these principles are discussed.

Principle 1 – The framework for whistleblowing

States should ensure that clear legislation and an effective institutional framework are in place to encourage workplace whistleblowing in the public interest and that whistleblowing protection is not undermined or contradicted by other national laws (5.2-5.5).

Principle 2 – Issues for disclosures

The law should cover warnings or reports of any breach of a legal obligation, which should include human rights violations. It should also cover other issues that are in the public interest, even if no breach of the law is established. These should include miscarriages of justice, risks to the environment, danger to public health or safety, gross mismanagement, gross waste of funds, and abuse of authority (5.6-5.10).

Principle 3 – Coverage of workers

3.1 The law should cover public and private sector workers, including not only permanent employees but also trainees, consultants, contractors, temporary workers, former employees and volunteers. It should also cover the military and secret services, if necessary in a modified form (5.11-5.13).

3.2 It should also protect intending whistleblowers and those wrongly identified as whistleblowers (5.14).

Principle 4 – Good faith

‘Good faith’ should be defined to mean that the disclosure was made ‘honestly,’ and there should be a presumption of good faith unless the contrary is proven (5.17).

Principle 5 – Internal reporting

For internal disclosures the law should require only that the whistleblower has reasonable grounds to suspect wrongdoing and that the disclosure was made honestly (in good faith) (5.18).

Principle 6 - Disclosures to external authorities

For disclosures to external public authorities there may be an additional requirement of belief on the part of the worker that the information contained in the disclosure falls within the remit of the authority and that it was not unreasonable to have made the disclosure to that authority (5.19 - 5.21).

Principle 7 – Public disclosures

Provided a whistleblower has a reasonable belief the wrongdoing is occurring, makes the disclosure honestly (in good faith) and the disclosure is reasonable in the circumstances, the law should protect public disclosures, including to the media. 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. It might also take into account the issue of whether an illegal payment was involved (5.22 - 5.23).

Principle 8 – Obligation to protect confidentiality

Any organisation which receives a disclosure made confidentially should be obliged not to disclose information which might identify the whistleblower, unless (1) it has explained the obligation fully and the whistleblower consents to their identity being known or (2) in order to avert serious and imminent threats to the public interest (5.27 - 5.31).

Principle 9 – Advice

The law should permit advice to be sought from suitable sources such as trade unions and lawyers and also make clear its relationship with legal privilege (5.32).

Principle 10 – Balancing the duty of confidentiality to employers and the public interest

The law should make clear that it over-rides any obligation or duties of confidentiality between the worker and his or her employer. An exception may be made for disclosures that are prohibited by law in view of vital interests such as national security and foreign relations (5.33 - 5.34).

Principle 11 – Forms of protection

11.1 The law should protect the whistleblower who complies with procedures for disclosure against any form of retaliation from his employer or from his co-workers. It should also provide that it is a defence to any relevant civil or criminal proceedings against an individual (for example for defamation or breach of secrecy or copyright laws) that he complied with the law on whistleblowing (5.35 - 5.36).

11.2 Member States should consider whether measures to protect whistleblowers from retaliation from persons outside the workplace also need to be enhanced (5.35).

Principle 12 – Tribunal

The law should allow whistleblowers who suffer retaliation to bring cases swiftly before an impartial and specialised tribunal (5.37).

Principle 13 – Following up reports

Whistleblowers' reports should be followed up effectively and proportionately and they should be kept informed of progress. Failure by an employer to do so should be capable of being considered by the tribunal as a form of retaliation (5.38).

Principle 14 – Reverse burden of proof of retaliation

The law should provide that if the whistleblower can demonstrate that he suffered retaliation after making his report, it will be for the employer to prove that the retaliation was justified on other grounds (5.39).

Principle 15 – Remedies

The tribunal should be able to order the employer to provide interim relief pending a full hearing, to pay compensation and to undo the effects of the retaliation where possible (5.40).

Principle 16 – Encouraging Corporate Social Responsibility

States should encourage employers to develop policies as part of the CSR agenda. The law should state that, in considering cases, the tribunal will take into account whether or not any whistleblowing policy has been provided by the employer to the worker. (5.41 - 5.42).

Principle 17 – Action by employers

Organisations should ensure they have internal whistleblowing arrangements that will ensure that disclosures can be made openly or in confidence and that relevant information can reach senior management in good time, bypassing the normal hierarchy whenever necessary (5.43 - 5.44).

Principle 18 – Awareness

States should publicise the law effectively (5.45).

Principle 19 – Evaluation

States should commission and publish an independent assessment of the effectiveness of the law after a period of operation (5.46).

Annex B - ABBREVIATIONS

CAVK - Commission for Advice and Information on Whistleblowing (Netherlands)
CDCJ - European Committee on Legal Co-operation
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
EU - European Union
GRECO - Group of States Against Corruption (Council of Europe)
KPK - Anti-Corruption Commission (Slovenia)
OECD - Organisation for Economic Co-operation and Development
OLAF - European Anti-Fraud Office (European Commission)
PACE - Parliamentary Assembly of the Council of Europe
PCaW - Public Concern at Work (UK)
PIDA - Public Interest Disclosure Act 1998 (UK)
SOX - Sarbanes-Oxley Act (US)
TI - Transparency International
UN - United Nations
UNCAC – United Nations Convention Against Corruption
WPA - Whistleblower Protection Act (US)

Annex C - PUBLIC INTEREST DISCLOSURE ACT 1998 (PIDA)

C1 PIDA was devised by civil society - a group of individuals concerned about a common pattern in a number of tragic accidents, which could have been avoided if whistleblowing had been encouraged, came together in 1993 to form Public Concern at Work (PCaW). It took 5 years to devise PIDA and to have it adopted by Parliament. During that time its supporters considered and addressed the objections that were made to it. When it came before Parliament, Lord Nolan, Chairman of the independent Committee on Standards in Public Life, praised the drafters “for so skilfully achieving the essential but delicate balance in this measure between the public interest and the interests of employers.”

C2 The measure was designed to fit the UK’s legal system and it works well partly because of the existence of Employment Tribunals, to which whistleblower cases can be taken quickly and easily. If claims had to be made to civil courts in the UK they would take much longer and be so costly as to deter claimants. Nevertheless, other countries have successfully adopted laws based on the UK model, including South Africa and Japan.

C3 The main features of PIDA are that it:

- Covers most UK workers, including employees, contractors, trainees and agency workers and police officers;
- Defines wrongdoing broadly to include disclosures about corruption or any other crime, civil offences (including negligence, breach of contract or administrative law), miscarriages of justice, dangers to health and safety or the environment, and, importantly, a cover-up of any of these; the worker does not have to prove the wrongdoing, nor does it matter if the persons to whom the wrongdoing is reported are already aware of it;
 - Protects concerns raised internally with an employer (or to the Minister responsible in appropriate cases), and externally, to one of the many listed regulatory bodies, to the police in serious cases, and to the media in certain circumstances, particularly if the other routes have been tried and failed and the wrongdoing is on-going;
- Under this ‘stepped’ regime, each step requires a higher threshold of conditions to be satisfied for the whistleblower to be protected. Although the steps do not necessarily need to be followed in order, the effect is to encourage internal reporting with the use of the media as the last resort;
- Makes void any term in an agreement between a worker and his employer insofar as it purports to preclude the worker from making a disclosure in line with PIDA;
- Provides that a disclosure is not protected if the person making it commits a criminal offence by doing so. In effect the exception is limited to the restricted definition of official secrets now current in the UK. This covers only disclosures that damage the national interest and relate to national security, international relations, or which would assist crime;
- Compensates for dismissal or any other detriment (retaliation), including injury to feelings, and those who are dismissed can seek interim relief within 7 days to continue in employment; those found to have been unfairly dismissed for blowing the whistle are compensated for their full financial losses (uncapped).

C4 It should be noted that the UK law on whistleblowing does not mention or refer to confidential or anonymous disclosures of information. The law is meant to normalise, reinforce, and encourage staff to raise concerns in the normal course of their daily work.

C5 PCaW operates today to offer free, confidential advice for workers who wish to raise a public concern and are unsure whether or how to do that. All advisors have legal training and the advice given is covered by legal professional privilege. This means that any discussions are not revealed without their express consent. They help the individual to consider the options available to them, and they can raise the concern on the individual's behalf if asked to do so. They have dealt with over 20,000 calls since 1993. 71% of callers had previously raised the issue with their management.

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