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The protection of "whistle-blowers"

Report¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Pieter OMTZIGT, Netherlands

Summary

The Committee on Legal Affairs and Human Rights stresses the importance of whistle-blowing – concerned individuals sounding the alarm in order to stop wrongdoing that places fellow human beings at risk – as an opportunity to strengthen accountability, and bolster the fight against corruption and mismanagement, both in the public and private sectors.

All member states should review their legislation concerning the protection of whistle-blowers, keeping in mind some guiding principles, including that:

- this legislation should protect, from any form of retaliation (unfair dismissal, harassment, or any other punitive or discriminatory treatment), anyone who, in good faith, makes use of existing internal whistle-blowing channels;
- where internal channels either do not exist, or have not functioned properly, or could reasonably not be expected 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;
- any whistle-blower shall be considered as acting 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; and
- relevant legislation should afford bona fide whistle-blowers reliable protection against any form of retaliation by means of an enforcement mechanism that will investigate the whistle-blower's complaint and seek corrective action from the employer.

The committee also proposes that the Council of Europe be invited to set a good example by establishing a strong internal whistle-blowing mechanism within the organisation.

1. Reference to committee: [Doc. 11269](#), Reference 3358 of 25 June 2007. Draft resolution and draft recommendation unanimously adopted by the committee on 23 June 2009.



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A. Draft resolution

1. The Parliamentary Assembly recognises the importance of “whistle-blowing” – concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk – as an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors.
2. Potential “whistle-blowers” are often discouraged by the fear of reprisals, or of the lack of follow-up given to their warnings, to the detriment of the public interest in effective management and accountability of public affairs and private business.
3. A series of avoidable disasters has prompted the United Kingdom to enact forward-looking legislation to protect “whistle-blowers” who speak up in the public interest. Similar legislation has been in force in the United States of America for many years, with globally satisfactory results.
4. Most member states of the Council of Europe 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.
5. Whistle-blowing has always required courage and determination. But “whistle-blowers” should at least be given a fighting chance to ensure that their warnings are heard without risking their livelihoods and those of their families. Relevant legislation must first and foremost provide a safe alternative to silence, whilst avoiding offering potential “whistle-blowers” a “shield of cardboard” which would entrap them by giving them a false sense of security.
6. The Assembly invites all member states to review their legislation concerning the protection of “whistle-blowers”, keeping in mind the following guiding principles:
 - 6.1. “Whistle-blowing” legislation should be comprehensive:
 - 6.1.1. 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 as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies.
 - 6.1.2. The legislation should therefore cover both public and private sector “whistle-blowers”, including members of the armed forces and special services, and
 - 6.1.3. It should codify relevant issues in the following areas of law:
 - 6.1.3.1. Employment law – in particular protection against unfair dismissals and other forms of employment-related retaliation;
 - 6.1.3.2. Criminal law and procedure – in particular protection against criminal prosecution for defamation, breach of official or business secrecy, and protection of witnesses;
 - 6.1.3.3. Media law – in particular protection of journalistic sources; and
 - 6.1.3.4. Specific anti-corruption measures such as those foreseen in the Council of Europe Civil Law Convention on Corruption (ETS No. 174).
 - 6.2. “Whistle-blowing” legislation should focus on providing a safe alternative to silence.
 - 6.2.1. It should give appropriate incentives to government and corporate decision makers to put into place internal “whistle-blowing” procedures that will ensure that:
 - 6.2.1.1. disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary, and
 - 6.2.1.2. 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.
 - 6.2.2. This legislation should protect anyone who, in good faith, makes use of existing internal “whistle-blowing” channels from any form of retaliation (unfair dismissal, harassment, or any other punitive or discriminatory treatment).

6.2.3. Where internal channels either do not exist or have not functioned properly, or could reasonably not be expected 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.

6.2.4. Any “whistle-blower” shall be considered as acting 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.

6.2.5. Relevant legislation should afford *bona fide* “whistle-blowers” reliable protection against any form of retaliation by an enforcement mechanism investigating the “whistle-blower”’s complaint and seeking 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.

6.2.6. It should also create a downside risk for those committing acts of retaliation by exposing them to counter-claims from the victimised “whistle-blower” with the intention of having them removed from office or otherwise sanctioned.

6.2.7. Whistle-blowing schemes shall also provide for appropriate protection against accusations made in bad faith.

6.3. As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a “whistle-blower” were motivated by reasons other than the action of the “whistle-blower”.

6.4. The implementation and impact of relevant legislation on the effective protection of “whistle-blowers” should be monitored and evaluated at regular intervals by independent bodies.

7. The Assembly stresses that the necessary legislative improvements must be accompanied by a positive evolution of the general cultural attitude towards “whistle-blowing”, which must be freed from its former association with disloyalty or betrayal.

8. It recognises the important role of non-governmental organisations in contributing to the positive evolution of the general attitude towards “whistle-blowing” and in providing counselling to employers wishing to set up internal “whistle-blowing” procedures, to potential “whistle-blowers” and to victims of retaliation.

9. In order to set a good example, the Assembly invites the Council of Europe to put into place a strong internal “whistle-blowing” procedure covering the Council itself and all its Partial Agreements.

B. Draft recommendation

1. The Parliamentary Assembly, referring to its Resolution (2009) ..., stresses the importance of “whistle-blowing” as a tool to increase accountability and strengthen the fight against corruption and mismanagement.
2. It recommends to the Committee of Ministers to:
 - 2.1. draw up a set of guidelines for the protection of “whistle-blowers”, taking into account the guiding principles stipulated by the Assembly in its Resolution ... (2009);
 - 2.2. invite member and observer states of the Council of Europe to examine their existing legislation and its implementation with a view to assessing whether it is in conformity with these guidelines;
 - 2.3. consider drafting a framework convention on the protection of “whistle-blowers”.
3. It further invites the Committee of Ministers to instruct the Secretary General of the Council of Europe to:
 - 3.1. organise a European conference on the protection of “whistle-blowers”; and
 - 3.2. draw up a proposal for a strong internal “whistle-blowing” mechanism at the Council of Europe covering the Council itself and all its Partial Agreements.

C. Explanatory memorandum, by Mr Omtzigt, rapporteur

1. Introduction

“Only if the good intentions of any law are matched by a change in culture can a safe alternative to silence be created”²

1. From the very outset I should like to make it clear that whistle-blowing is a generous, positive act – someone putting his or her career on the line in order to stop a serious problem from causing preventable harm to others. Whistle-blowers are not traitors, but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent. To pass this message across Europe will be the most important contribution this report can make. It requires tackling 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. Maybe the long-standing absence of such circumstances has helped the United States and the United Kingdom to develop a much more whistle-blower-friendly climate than most countries in Europe. Representative Derwinski³ summed up the general attitude prior to the adoption of the United States Whistleblower Protection Act (WPA) in 1989 as follows: “The term ‘whistleblower’ is like ‘motherhood’, and we are all for ‘whistleblowing’ apparently.” In this climate, the WPA was adopted unanimously, both in the House of Representatives and in the Senate – it would have been “political suicide” for any American politician to be caught voting against it.⁴ But we will see that there is still a gap between rhetoric and reality, even in the United States; and in Europe, with the possible exception of the United Kingdom, we have not yet attained even the American level of pro-whistle-blowing rhetoric. It would be my wish that we might bypass the rhetoric stage and move straight on to concrete protection measures.

2. Two examples from the United States – one slightly amusing, one very worrying – demonstrate the value of whistle-blowing for society as a whole, which should come to see whistle-blowing as an opportunity and not as a threat.

3. The first concerns the fight against corruption, close to the heart of the United States Department of Justice (DOJ). A whistle-blower sparked the removal of top DOJ management staff after revealing systematic corruption in the DOJ’s programme to train police forces of other nations on how to investigate and prosecute government corruption.⁵ Hats off to the whistle-blower, and to the DOJ for reacting in such a way that this case became a textbook example for stopping corruption by exposing it.

4. The second example concerns the construction of a nuclear power plant in California. Instead of using costly, special “nuclear-grade” steel, key parts of the reactor were built with cheap steel made from scrap metal, with somebody pocketing the difference. Fortunately, for millions of Californians, a whistle-blower exposed the deception and the power plant, which was almost finished, was converted to coal-firing.⁶

5. Famous European whistle-blowers include the former Dutch European Union civil servant, Paul van Buitenen, whose disclosures on rampant corruption in the European Union executive prompted the resignation of the entire Santer Commission. He suffered serious retaliation from his employers, which prompted him to resign from his job and return to the Netherlands, where he was finally elected as a member of the European Parliament – and where he is continuing to act as an uncompromising anti-corruption watchdog.

6. I need not repeat here the cases of several courageous Russian whistle-blowers, whose plight has already been covered in previous reports of the Parliamentary Assembly. These include Mr Alexander Nikitin⁷ and Mr Grigory Pasko,⁸ who were imprisoned for alleged violations of state secrets after warning against nuclear pollution caused by ageing submarines and reckless waste disposal in the Arctic and Japanese seas,

2. Editors Guy Dehn and Richard Calland in *Whistleblowing Around the World: Law, Culture and Practice*, IDASA publisher (2004).

3. Cited by Tom Devine in “Whistleblowing in the United States: the gap between vision and lessons learned”, in: *Whistleblowing around the world: Law, Culture and Practice*, p. 74.

4. Tom Devine, *ibid.* (note 3), p. 84.

5. Tom Devine, *ibid.* (note 3), p. 82.

6. Tom Devine, *ibid.* (note 3).

7. See motion for a resolution “Arrest of the Russian environmentalist Alexander Nikitin in St Petersburg” ([Doc. 7609](#)).

8. See [Resolution 1354 \(2003\)](#) and the report on the conviction of Grigory Pasko, [Doc. 9926](#) (rapporteur: Rudolf Bindig).

and Mr Mikhail Trepashkin, the former Federal Security Service (FSB) agent, who told the committee his story about still uninvestigated criminal conspiracies involving his former employers at our committee's hearing in Moscow on 11 November 2008.⁹

7. In the United Kingdom, the adoption of the 1998 Public Interest Disclosure Act was prompted by a series of avoidable disasters, including the sinking of the ferry *Herald of Free Enterprise* and the destruction of an oil platform in the North Sea. If only the employees – who had been aware of the problems and had unsuccessfully tried to raise them within their hierarchies – had had at their disposal a safe channel to voice their concerns over the heads of their immediate superiors, hundreds of lives could have been saved. This is precisely what internal whistle-blowing procedures are about.

8. According to research carried out in the United States, potential whistle-blowers tend to remain silent for two main reasons: the primary reason is that they feel their warnings will not be followed up appropriately, while fear of reprisals is only a secondary reason.¹⁰ In order for society or individual organisations to benefit fully from the early warning potential of whistle-blowers, both issues need to be addressed, by ensuring that warnings are acted upon properly and by providing credible protection for whistle-blowers. The present report endeavours to make concrete proposals for this purpose.

2. Proceedings to date

9. This report stems from a motion for a recommendation tabled by Mr Bartumeu Cassany and others on 23 April 2007 ([Doc. 11269](#)) proposing that the Assembly consider the protection of whistle-blowers, bearing in mind their crucial role, not only in the context of corruption but also in the reporting of other illegal activities on the part of the authorities.

10. It should be recalled that the above-mentioned motion for a recommendation was itself motivated by [Resolution 1507 \(2006\)](#) on alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, whereby the Parliamentary Assembly invited the member states to “ensure that the laws governing state secrecy protect ... ‘whistle-blowers’, that is persons who disclose illegal activities of state organs, from possible disciplinary or criminal sanctions”.

11. On 27 June 2007, as a member of the Committee on Legal Affairs and Human Rights, I was appointed rapporteur and entrusted with the task of drafting a report on the protection of whistle-blowers.

12. During the April 2008 part-session of the Assembly, I presented an introductory memorandum¹¹ stating the objectives of this report, which aims at comparing relevant legislation and practice regarding whistle-blowers in Council of Europe member and observer states, with a view to presenting a recommendation calling on member states to undertake the necessary improvements in this area of law.

13. During its meeting in Moscow on 10 and 11 November 2008, the Committee on Legal Affairs and Human Rights held a hearing with the following five experts:

- Mikhail Trepashkin, a well-known Russian whistle-blower, who had spent four years in prison after accusing his former employers, the Russian Federal Security Service of serious wrongdoing;
- Hans-Martin Tillack (*Stern* magazine), a German investigative journalist who had disclosed serious corruption in the European Union institutions with the help of whistle-blowers, and who won a case against Belgium before the European Court of Human Rights for having tried to oblige him to divulge his sources;
- Elaine Kaplan, an American legal expert, former Special Counsel for the protection of whistle-blowers in the United States;
- Anna Myers, a British legal expert representing Public Concern at Work, the leading non-governmental organisation in the United Kingdom in the field of the protection of whistle-blowers;
- Drago Kos, (Slovenia) Chairman of the Council of Europe's Group of States against Corruption (GRECO).

9. See [Resolution 1551 \(2007\)](#) and the report on fair trial issues in criminal cases concerning espionage or divulging state secrets, [Doc. 11031](#) (rapporteur: Christos Pourgourides).

10. Surveys of federal employees by the US Merit Systems Protection Board, quoted by Tom Devine, *ibid.* (note 3), p. 81.

11. AS/Jur (2008) 09 of 3 April 2008.

14. In order to have a sound overview of the existing legislation concerning the protection of whistle-blowers in Council of Europe member states, in September 2007 a request, in the shape of a questionnaire, was addressed by the Secretariat of the Parliamentary Assembly, through the European Centre for Parliamentary Research and Documentation (ECPRD), to the research services of the parliaments of most of the member states of the Council of Europe and to the Congress of the United States of America, the latter having recently drawn up interesting legislation in this field. The questions were the following:

14.1. What are the relevant statutory provisions in your country's legislation or draft legislation on the protection of whistle-blowers (from, *inter alia*, criminal or civil liability, dismissal for breach of confidentiality, release of their identity, reprisals, etc.)? Does such protection extend only to the whistle-blowers themselves, or to the individuals or entities that either release the information publicly or have the power to take corrective action?

14.2. What is the definition of a whistle-blower under the relevant legislation or draft legislation?

14.3. Is there uniform national legislation, or plans for uniform national legislation on the protection of whistle-blowers?

14.4. Does the legislative (and draft legislative) protection extend to both the private and public sectors?

15. The Secretariat received 26 replies from member states of the Council of Europe and one from the Congress of the United States of America. The 26 Council of Europe member states that sent a reply are the following: 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 United Kingdom. For the remaining countries, no reply has been received, so that we only have part of the European picture in that field.

3. Definition of concepts

16. The replies received show that the concept of whistle-blowing is often not well-known. In most countries, whistle-blowing (the English term being used even in non-English speaking countries) somehow connotes the action of an individual who reveals information, usually in the interest of the public and without a direct self-interest, to expose misconduct of varying sorts, including fraud, corruption, dangerous conduct, or the violation of laws and regulations.

17. As there are no generally accepted statutory definitions of whistle-blowing in Council of Europe member states, as a starting point, we could make use of the following definition offered up by Mr Guy Dehn, former Director of the British NGO Public Concern at Work and author of a key report for the European Commission: "Alerting the authorities to information which reasonably suggests there is serious malpractice, where that information is not otherwise known or readily apparent and where the person who discloses the information owes a duty (such as an employee's) to keep the information secret, provided that wherever practicable he or she has raised the matter within the organisation first".¹²

18. The definition used by Transparency International ("the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action") drops the requirement of the whistle-blower first having to raise the matter within the organisation.

19. 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. Recent reports of the Parliamentary Assembly on abuses in the so-called war on terror are cases in point.¹³

12. *Whistleblowing, fraud and the European Union*. Report written for the European Commission (1996) by Mr Guy Dehn, former Director of Public Concern at Work. PCaW is an independent authority on public interest "whistle-blowing", which was established as a charity in 1993. PCaW focuses on the responsibility of workers to raise concerns about malpractice and on the accountability of those in charge to investigate and remedy such issues.

13. See report by Dick Marty (Switzerland/ALDE) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report (Doc. 11302 rev. and addendum; [Resolution 1562 \(2007\)](#) and [Recommendation 1801 \(2007\)](#)).

20. “Blowing the whistle” should be understood differently from making a (self-interested) complaint. Indeed, when people “blow the whistle”, they are raising a concern about a danger or illegality that affects others (for example, customers, members of the public, or their employer). The person “blowing the whistle” is usually not directly or personally affected. Consequently, the whistle-blower rarely has a personal interest in the outcome of any investigation into their concern and should be seen “as a messenger raising a concern for others to address it”.¹⁴

21. In the 1989 Whistleblower Protection Act (WPA),¹⁵ which provides statutory protection for United States federal employees who engage in whistle-blowing, which is defined as “making a disclosure evidencing illegal or improper government activities”.

22. The theme of whistle-blowing has been the subject of research and reports in different international organisations. To name the most recent occurrences, the Council of Europe Group of States against Corruption (GRECO) has addressed the issue of the protection of whistle-blowers in its Seventh General Activity Report (2006)¹⁶ and the European Parliament’s Committee on Budgetary Control has addressed whistle-blowing in the context of risk management.¹⁷ The protection of whistle-blowers has also been addressed in international legal instruments such as Article 9 of the Council of Europe’s Civil Law Convention on Corruption (ETS No. 174), stating that each party is required to “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”; in Article 33 of the United Nations Convention against Corruption (2003), stating: “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”.

23. Despite the increased interest of international organisations in the protection of whistle-blowers, much still remains to be done at the level of national legislation in European countries. The analysis of the 26 replies received from Council of Europe member states reveals that there is still a legal vacuum in that respect in many countries, although in some of them, the courts, in their interpretation of legal duties of secrecy and discretion resulting from criminal or employment law, have addressed issues pertaining to the protection of whistle-blowers through case law.

4. Overview of national legislation regarding the protection of whistle-blowers

24. Worldwide, legislation on the protection of whistle-blowers is still in its infancy. However, a quick look at the list of countries having drafted comprehensive national laws on this topic to date reveals that this trend is more present in countries with a common law tradition. Indeed, countries such as Australia, Canada, New Zealand, South Africa, the United Kingdom and the United States have such legislation. In Europe, a majority of national legislation appears to require that this topic be addressed more comprehensively. The present chapter will look at the situation in Europe, based on the replies to the questionnaire received from 26 Council of Europe member states.

25. Before addressing the situation at national level in more detail, it is interesting to underline a few general aspects stemming from the 26 replies received.

26. First, one can immediately note a problem of terminology and definition. There is no common definition for the term whistle-blower and some countries, like Estonia, Poland or Turkey, have no equivalent in their languages. The German Bundestag research service simply uses the English term. Even among the countries which have enacted specific legislation on the topic, no definition *sensu stricto* appears in the legislation except for Romania, which gives the following definition in its legislation: “A whistle-blower (*avertizor*) is an individual who reveals violation of laws in public institutions made by persons with public powers or executive from these institutions”.¹⁸

14. PCaW : www.pcaw.co.uk.

15. The WPA was passed by the Congress of the United States of America in 1989.

16. See GRECO’s Seventh General Activity Report (2006) adopted at GRECO’s 32nd Plenary Meeting, p. 10, www.coe.int/greco.

17. Björn Rohde-Liebenau, “Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions”, European Parliament, Directorate General Internal Policies of the Union, Budgetary Support Unit, Budgetary Affairs, European Parliament, 2006.

18. Law No. 571 (2004).

27. The problem in appropriately defining the term whistle-blower leads to a wider problem in most countries under analysis to the extent that, when asked about their national legislation in the field of protection of whistle-blowers, many countries refer to their witness protection laws (Bulgaria, Estonia, Italy, Poland, Turkey, etc.), which cover some aspects of the protection of whistle-blowers, but which may not take the place of a broader law covering the protection of all different aspects of whistle-blowing. Witness protection laws can and indeed should extend to whistle-blowers, if and when they appear before a court to testify as witnesses. But the notion of whistle-blower should not be confused with or limited to that of a witness. A whistle-blower will not necessarily wish to, or need to appear in a court of law, considering that whistle-blowing measures are designed to deter malpractice in the first place or to remedy it at an early stage.

28. What also transpires from these 26 replies is that the question of whistle-blowing is closely intertwined with the countries' legal cultures in general. Political and administrative norms in most European countries do not value whistle-blowing. In Poland or in France, for example, whistle-blowing can be quite easily considered as a denunciation, which is strongly condemned in both cultures. In some countries, the cultural argument is put forward as a justification for not enacting specific legislation to protect whistle-blowers, it often being considered that the few provisions scattered among various other pieces of legislation are enough to ensure any protection needed.

29. The 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. In France, for instance, the CNIL,¹⁹ the body controlling the protection of personal data, refused to authorise the introduction of an internal whistle-blowing mechanism in a company owning a fast food restaurant chain, arguing that it would neither respect the fundamental rights of the workers nor the legislation on the protection of private life.

30. In many European countries, because of the lack of a reporting culture with positive connotations, the whistle-blower is all too often seen as a traitor or likened to a police informer. This approach is detrimental. Society is insufficiently aware that the whistle-blower's action can prevent further wrongdoing, which can jeopardise the health, safety or life of others. Hence the societal interest in legal protection of whistle-blowers in Europe against dismissal or any form of retaliation. Another question is whether such protection should be laid down in a special law, or whether it can be left to the courts to apply general provisions of criminal and labour law in a progressive way.

31. Typical forms of retaliation, besides plain dismissal, can include taking away duties so that an employee feels marginalised; blacklisting the employee so that he/she is unable to find gainful employment; conducting retaliatory investigations in order to divert attention from the waste, fraud or abuse that the whistle-blower is trying to expose; questioning a whistle-blower's mental health, professional competence or honesty; or reassigning an employee geographically.²⁰ A whistle-blower is not an old-style informer or "snitch" in that he/she does not disclose information for his/her own personal gain, nor under the coercion of others. Attitudes have to evolve and the acceptance of whistle-blowers, and their protection, needs to be further addressed by European states.

32. When addressing the issue of the protection of whistle-blowers, we notice that relevant national laws closely intertwine it with other notions, such as denunciation, witness protection, or the protection of sources.

33. The protection of journalistic sources is linked to the protection of whistle-blowers when a disclosure is made public. On the one hand, it is up to the whistle-blower to disclose reliable and reasonable information to the media, especially when the matter has failed to be properly addressed after the use of appropriate internal channels. On the other hand, once the disclosure has been made to the media, the journalist should have the right to protect his or her sources. If a whistle-blower cannot make a disclosure internally because he/she reasonably fears that such action would result in internal sanctions or that the internal disclosure would not have the desired effect, and therefore decides to use the media as an external avenue to "blow the whistle", then he/she should benefit from indirect protection in the form of the journalist's protection of his/her sources. Whilst several examples across Europe tend to show that the protection of journalistic sources is still too fragile, such protection must also not be exaggerated to the point where it becomes a cover for ill-intentioned or reckless libel and slander. The recent French legislation on the protection of journalistic sources may well offer elements of a middle-of-the-road solution, involving the possibility of judicial scrutiny of the reasonableness of a divulgation.

19. Commission Nationale de l'Informatique et des Libertés: www.cnil.fr.

20. See Project On Government Oversight (POGO).

34. With respect to the protection of journalistic sources, the judgment of the European Court of Human Rights of 27 November 2007 in the case of *Tillack v. Belgium*²¹ is of particular importance. The Court's ruling upheld the right of a German journalist, working for *Stern* magazine, to protect his sources concerning the articles he had published on alleged irregularities in Eurostat and in the European Union's anti-fraud office, OLAF. The Court found Belgium to be in violation of Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) because of searches and seizures carried out by the Belgian police at the home and office of the journalist. 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. This judgment should incite lawmakers throughout Europe to also reflect on the importance of the media as an external voice for whistle-blowers.

35. The 26 answers we received to our questionnaire reveal that the majority of European countries do not have and are not planning to introduce specific legislation on the protection of whistle-blowers. In fact, three categories of countries can be distinguished: those that already have specific legislation on the protection of whistle-blowers (Belgium,²² France, Norway, Romania, the Netherlands and the United Kingdom); those in which draft legislation on the protection of whistle-blowers is pending in parliament or otherwise under preparation (Germany, Slovenia, Switzerland; in Lithuania, a far-reaching draft law on the matter has been rejected by parliament); and those that, to date, have no specific legislation on the matter but where some protection for whistle-blowers is provided by various statutory provisions, in particular of labour and criminal law (Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Georgia, Greece, Italy, Poland, Serbia, Slovakia, Sweden, "the former Yugoslav Republic of Macedonia" and Turkey).

4.1. Countries having specific legislation on the protection of whistle-blowers

36. The situation in the six countries with specific legislation on the protection of whistle-blowers differs widely: in most cases, the protection of whistle-blowers is only applicable in cases of corruption and does not cover other irregularities; not all provide a definition of what a whistle-blower is; and neither do all the laws cover both the private and public sectors. Most of the legislation in this field is quite recent, with the United Kingdom leading the way.²³

37. The United Kingdom indeed appears to be the model in this field of legislation as far as Europe is concerned. It was one of the first European states to legislate on the protection of whistle-blowers, its law was even described as "the most far-reaching 'whistle-blower' law in the world".²⁴ The decision to legislate at the time came after a series of avoidable tragic accidents,²⁵ following which inquiries revealed that staff had been aware of the dangers but had not felt able to raise the matters internally. This gave rise to the Public Interest Disclosure Act (PIDA) in 1998.

38. The PIDA gives protection to whistle-blowers against victimisation or dismissal, covering both private and public sector employees,²⁶ voluntary sector employees, as well as other workers including agency staff, home workers, trainees, contractors and all professionals in the National Health Service (NHS), who raise concerns about serious fraud or malpractice in their work place, provided they have acted in a responsible way in dealing with the concerns, that they make the disclosure in good faith, that they reasonably believe the information to be substantially true and provided they do not act for personal gain.²⁷ The PIDA does not define the term whistle-blower directly, but the provisions are directed at protected "disclosures" by "workers".

39. The PIDA defines the following categories of information as "qualifying disclosures": past, present and future criminal offences, failure to comply with legal obligations, miscarriages of justice, health and safety dangers, environmental risks and attempts to cover up any of these. The protection applies if the qualifying disclosure is made in good faith to the employer or, in certain cases, to a government minister. The worker must have a reasonable belief that the disclosed information tends to show wrongdoing.

40. The PIDA makes the distinction between internal disclosures and wider disclosures, clearly setting out that a wider disclosure should be used only if internal disclosures have been unsuccessful, or if there are reasonable grounds to believe that making an internal disclosure would be too risky for the worker. Protection

21. See European Court of Human Rights' ruling in *Tillack v. Belgium*, Application No. 20477/05.

22. The law in question applies only to the Flemish community.

23. The UK is therefore presented first, with countries subsequently appearing in alphabetical order.

24. "Far-reaching new law will protect whistleblowers" in the *Guardian*, 2 July 1999.

25. Accidents such as the sinking of the *Herald of Free Enterprise*, the Clapham rail crash or the collapse of the Bank of Credit and Commerce International. Source: PCaW.

26. The PIDA does not cover intelligence services or the armed forces.

27. See Section 1, ERA s.43 K of the PIDA.

of wider disclosures is subject to a number of stricter conditions. Moreover, for these public disclosures to be protected, an employment tribunal must be satisfied that the particular disclosure was reasonable. In deciding on the reasonableness of the disclosure, the employment tribunal will consider all the circumstances, including the identity of the person to whom it was made, the seriousness of the concern, whether the risk or danger remains, and whether the disclosure breached a duty of confidence which the employer owed to a third party.

41. In terms of compensation, the act provides that there is no limit on the amount of compensation paid to people unfairly dismissed for having “blown the whistle”. Moreover, if a whistle-blower is dismissed, he/she can apply to an employment tribunal for an interim order to keep his/her job, pending a full hearing.

42. Whilst Belgium does not have uniform national legislation on the protection of whistle-blowers, the Community of Flanders has legislated on the matter by implementing a specific decree applicable to its civil servants that is specifically aimed at protecting whistle-blowers, here called “denunciators”. This decree was adopted on 7 May 2004 and modified the decree of 7 July 1998, which instituted a Flemish mediation service dealing with the protection of civil servants who denounce irregularities. The decree states: “Any member of the staff attached to an administrative authority as foreseen under Article 3, can denounce to the Flemish mediation body, in writing or orally, any negligence, abuse or irregularities ...”. It further states: “The member of staff who denounces an irregularity as foreseen under Article 3, § 2, is covered, at its request, by the protection of the Flemish mediator. ...”.

43. Once under the protection of the Flemish mediator, any disciplinary procedures taken against the whistle-blower are suspended until further investigations are made by a tribunal.

44. However, the above-mentioned decree does not define the term whistle-blower as such and does not apply to the civil servants of the other Belgian communities.

45. Concerning the private sector, there are no specific provisions aimed at protecting employees in cases of denunciation. For civil servants, however, the duty to denounce criminal acts is the rule for public agents and is stated in the Code of Penal Instruction (Code d’instruction criminelle).²⁸

46. On 13 November 2007, France promulgated a law on the protection of whistle-blowers, which is only applicable in the context of corruption. It only extends, however, to the private sectors.²⁹

47. This law foresees a number of types of protection for whistle-blowers who uncover corruption-related offences in their workplace. The law aims at protecting the employee against any sanctions by the employer following a corruption-related disclosure made on sound grounds and in good faith.

48. Article L. 1161-1 of the law amending the French Labour Code 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”.

49. The law does not refer to the term whistle-blower as such, but it does refer to a person who would reveal information concerning corruption-related offences in the public interest.

50. Norway has also adopted specific legislation on the protection of whistle-blowers (Act relating to working environment, working hours and employment protection, etc. (Working Environment Act), last amended on 23 February 2007).³⁰ This act gives all employees, in both the private and public sectors, the right to notify suspicions of misconduct in their organisation on condition that the employee follows an “appropriate procedure” in connection with the notification. The employee’s good faith with regard to the correctness of the information, form and content of the notification and the potential damage that can either be prevented or, possibly, caused by the notification will be relevant in establishing whether the procedure followed by the employee is justifiable. Under this act, “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. Any bad faith in the whistle-blower’s motives will not hinder lawful reporting as long as the disclosure is in the public interest.³¹

28. See Code of Penal Instruction, Article 29, paragraph 1.

29. Law No. 2007-1598 creating Article L 1161-1 of the Labour Code, in force since 1 March 2008.

30. See the English version on <http://www.arbeidstilsynet.no/binfil/download.php?tid=42156>.

51. In addition, an employee who “signals” that he will notify suspicions of misconduct, for example by copying documents or by stating that he will notify unless the unlawful practice is changed, is also protected against retaliation.

52. As in the United Kingdom, if there is any kind of retaliation against the whistle-blower following his/her disclosure, the compensation awarded can be unlimited.

53. Whilst the act does not explicitly define the term whistle-blower, the employee who discloses information is referred to in the law as an employee who notifies “concerning censurable conditions at the undertaking”.³²

54. In Romania the protection of whistle-blowers is regulated by the Act on the Protection of Whistle-blowers (Law No. 571/2004).³³ The law refers to the protection of whistle-blowers against administrative measures by their superiors when they lodge official complaints based on good faith about suspected corrupt or unethical practices and violations of the law. The law respects the whistle-blower’s confidentiality.

55. The Romanian law is one of the rare European laws on the matter to propose a definition of the term of whistle-blower. The law 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”. This definition must be read in conjunction with that of “whistle-blowing in the public interest”, which is defined as reporting, in good faith, on any deed to infringe the law, the professional ethical standards or the principles of good administration, efficiency, efficacy, economy and transparency.

56. This law sets out a list of the persons, officials and organisations to whom “whistle-blowing reports” can be directed, and these include mass media and NGOs.

57. Whilst the Romanian legislation is fairly progressive, it only applies to employees in the public sector.

58. In the Netherlands, a 1999 law using the term “klokkenluiders” (“bell ringers”) to mean whistle-blowers, provides some protection to public servants. Doubts have arisen about the effectiveness of this law among public servants, as well as among politicians at all levels of governance, as the rules prescribe that the public servant must always first report to his/her supervisor, and that may well be where the problem is located.

59. As regards the private sector, a detailed report presented in 2006 to the Ministry of Labour and Social Affairs evaluates current, self-regulated whistle-blowing procedures in companies. Apart from a bill presented in parliament by a small opposition party, there seems to be no progress on this, either in government or in parliament. Discussions in the political sphere on this subject, and also on the effectiveness of the protection afforded to public servants acting as “bell ringers”, are still ongoing.

4.2. Countries where draft laws on the protection of whistle-blowers have been submitted to parliament

60. In Germany, two separate drafts are under discussion for private sector employees and for civil servants. As regards the private sector, a “draft for discussion” of a law on labour contracts was published by the Bertelsmann Foundation in August 2006.³⁴ In addition, a draft of a new paragraph 612a of the German Civil Code (BGB) for the protection of whistle-blowers from dismissal and other reprisals³⁵ was published in April 2008 and discussed during a hearing in the Bundestag’s Committee on Food, Agriculture and Consumer Protection on 4 June 2008.³⁶ Since then, the draft has not progressed any further.

61. As regards the public sector, the new Civil Service Status Law,³⁷ which came into force on 1 April 2009, includes a section (paragraph 37 II lit. 3.) relieving public servants of their normal obligation to maintain professional confidentiality in order to allow them to expose suspected cases of corruption. This provision is intended to implement Article 9 of the Council of Europe Civil Law Convention on Corruption of 4 November 1999.

31. See GRECO’s Seventh General Activity Report (2006) adopted at GRECO’s 32nd Plenary Meeting, Strasbourg, 19-23 March 2007, p. 10, www.coe.int/greco.

32. See Section 2.4 of the Act relating to working environment, working hours and employment protection, etc.

33. See (in Romanian only): <http://www.dreptonline.ro>.

34. Available under www.bertelsmann-stiftung.de/best.de/media/xcms_bst_dms_22399_22400_2.pdf.

35. See www.bundestag.de/ausschuesse/a10/anhoeerungen/a10_81/16_10_849.pdf.

36. www.bundestag.de/ausschuesse/a10/anhoeerungen/a10_81/index.html.

37. BGBl. 2008 I, p. 1010 (<http://217.160.60.235/BGBL/bgbl1f/bgbl108s1010.pdf>).

62. In Slovenia, a motion³⁸ to draft and adopt such a law was presented to the parliament in 2006, but has not yet produced any results. No further details concerning this motion have been provided to us to date.

63. In Switzerland, a motion³⁹ introduced simultaneously in the Lower House by Remo Gysin and in the Upper House by our colleague Dick Marty, asked the Swiss Government to present a draft law ensuring an “effective protection against unjustified dismissal and other discrimination against ‘whistle-blowers’”. It was accepted by the two houses of parliament in 2005 and in 2007 respectively, and the Federal Council (government) has begun working on draft legislation.

64. The motion underlines that the draft law on the protection of whistle-blowers should include provisions regarding the prevention of abusive dismissal and other forms of discrimination against a whistle-blower who discloses irregularities in a company; it should allow whistle-blowers to make a wider public disclosure only as a last resort; it should examine whether the existing sanction against employers who abusively dismiss their employees is sufficient (payment by the employer to the dismissed employee of up to six months’ salary), and, if not, consider strengthening the sanction.

65. Meanwhile, anonymous hotlines have been opened in Switzerland encouraging whistle-blowers to learn about their rights and find out who to contact with an allegation of corruption or fraud.

66. Among the 26 replies received, Lithuania is the only country where a draft law on the protection of whistle-blowers was introduced in parliament (in 2003), but subsequently rejected. In collaboration with British experts, a Law on Protected Disclosures⁴⁰ was drafted by the Special Investigation Service (SIS),⁴¹ submitted to parliament for further deliberation, but rejected in 2004. The draft law aimed at providing for the uniform protection of employees or other persons who report corruption-related acts. The main guarantees included the prohibition of retaliatory measures against them and, in the event that such measures were applied or a person was threatened with their application, it gave them the right to appeal to the institution duly authorised by the government or another law-enforcement institution to examine such reports. Moreover, the draft law prohibited the termination of a labour contract with an employee who reported a corruption-related violation without the consent of the authorised institution and set out measures to be applied to the employer violating these requirements.

67. The draft law also defined the whistle-blower or “reporting person” as an “employee reporting corruption-related offences which became known to him in the course of his service or labour-related activities”. It extended to both the private and public sectors.

68. Whilst GRECO’s Seventh General Activity Report indicates that Lithuania’s draft law on protected disclosures was rejected on the grounds that the Lithuanian authorities believed that there was no need for a separate law as it would repeat the effect of provisions in other laws,⁴² the Anti-Corruption Programme of the Lithuanian Government still foresees the enactment of specific legislation for the protection of whistle-blowers.

4.3. Countries having, to date, no specific legislation or draft legislation on the matter but providing varying degrees of protection for whistle-blowers in different laws

69. Scattered provisions related to the protection of whistle-blowers can be found in criminal codes, laws on the status of civil servants, on freedom of speech and expression, or in anti-corruption laws. A common element to all the countries mentioned below is that none expressly defines the concept of whistle-blowing.

70. In Austria, some laws permit or even demand disclosures and grant a certain level of protection, but there is no general regulation, let alone encouragement, of whistle-blowing to date. However, academic and political debate on whistle-blowing, especially regarding public servants, has begun to take place in the last five years, following some initiatives at European Union level, but no proposals have been presented so far.

38. For information (in Slovenian only) concerning this motion see p. 32 of the document on www.varuh-rs.si/fileadmin/user_upload/pdf/lp/Varuh_LP_2006_SLO.pdf.

39. See the site of the Swiss section of Transparency International on the Gysin/Marty motion and its current state of progress

(www.transparency.ch/fr/korruption/Schweizerische_rechtliche_Situation/Whistleblowers/index.php).

40. Draft law available only in Lithuanian on: <http://www3.lrs.lt/cgi-bin/getfmt?CI=e&C2=229608>.

41. This independent agency accountable to the president and to the parliament was established in 1997. Its task is to collect and use intelligence about criminal associations and corrupt public officials, as well as to carry out prevention activities. www.stt.lt/?lang=en.

42. See GRECO’s Seventh General Activity Report (2006) adopted at GRECO’s 32nd Plenary Meeting, Strasbourg, 19-23 March 2007, p. 11, www.coe.int/greco.

71. The theme of whistle-blowing is seen through the prism of the principles and tradition of administrative secrecy. Austria is currently trying to explore ways of making administration more transparent and accountable.⁴³ Some legal reforms under discussion in this context also concern the protection of whistle-blowers, such as the draft law to reform the penal code and criminal procedure to promote the fight against corruption, which was introduced by the Federal Ministry of Justice in July 2007. Article II paragraph 4 of the draft is aimed at encouraging whistle-blowing in a public or private body where corrupt practices are taking place.⁴⁴

72. As for Bulgaria, there are no laws specifically protecting whistle-blowers and it seems that Article 76 (3) of the Law of Encouragement of Employment comes closest to dealing with the protection of whistle-blowers in Bulgarian legislation, although no mention is made of this notion. The article states that: "The control bodies shall be obliged: to check up in due time the received warnings of offences; not to make public information representing state, official or trade secrets which have become known to them in connection with exercising this control; not to use the obtained information for their own benefit or that of other persons; to keep confidential the source from which they have obtained the warning of an offence".

73. The Bulgarian reply to the questionnaire also refers to the protection of witnesses under the Penal Procedure Code, but again, as we have seen earlier, the term whistle-blower should not be confused with that of "witness", because a whistle-blower's protection needs to start from the very moment he/she makes a disclosure and not only when a case comes to court, especially if we consider that whistle-blowing does not necessarily lead to litigation.

74. In Croatia, the only existing provision regarding the protection of what could be likened to a whistle-blower is linked to corruption-related offences. In that respect, Article 115 of the Croatian Labour Act stipulates, under the "reasons not constituting just cause for dismissal" that: "the worker turning to responsible persons or competent state administration bodies or filing a bona fide application with these persons or bodies, regarding a reasonable suspicion about corruption, is not considered to be a just cause for dismissal".

75. Croatia is in the process of drafting a new labour act in line with European Union legislation in the field of labour relations and, according to the answer received to the questionnaire, Croatia is planning to address the question of the protection of whistle-blowers in the new labour act.

76. In Cyprus,⁴⁵ only in the Civil Service Law can one find an article stipulating that "any civil servant who while performing his duties, ascertains or believes that another civil servant has been involved in bribery or fraudulent actions must report these incidences to his/her supervisor in written form together with all relevant evidence to support his/her case".⁴⁶ This provision makes no express mention of subsequent protection after such a disclosure has been made, but it is likely to be implied. It also fails to deal with the situation that arises when the supervisor in question does not follow up on the information, or is himself or herself part of the problem.

77. Regarding Estonia, the reply provided informs us that there is no equivalent for the word whistle-blower in the Estonian language, the closest term being "tunnistaja", which means "witness". Hence, the Estonian Witness Protection Act of 2005 is the closest one can get to whistle-blower protection, but as we have already seen, a witness cannot be compared to a whistle-blower.

78. Greece has no specific legislation concerning the protection of whistle-blowers. However, Greek legal practice accepts that an employee cannot be held liable if he/she reveals information aiming to protect the public interest.

79. A provision is included in Article 371 of the Greek Penal Code which provides that the breach of professional confidentiality by a lawyer, priest, notary public, doctor, pharmacist and others, shall not be punished if the person aims at protecting the public interest.

80. Hungary has no comprehensive set of laws protecting whistle-blowers to date. Anyone may obtain redress for their complaints or "announcements of public concern" filed with state or local organs under Act XXIX of 2004, the only exceptions being complaints that fall under judicial or public administrative procedures. An "announcement of public concern" is one that draws attention to circumstances that need to be addressed

43. See Österreich Konvent:

http://www.konvent.gv.at/portal/page?_pageid=905,643947&_dad=portal&_schema=PORTAL.

44. Draft law is available on: <http://www.parlament.gv.at/>.

45. The present explanatory memorandum does not cover the area which is administered by the Turkish Cypriot Community.

46. Article 69A of the Civil Service Law.

for the sake of a community or society as a whole and may also contain recommendations for action. According to paragraph 257 of the Criminal Code, anyone who takes detrimental action against a person who has made an announcement of public concern is guilty of a misdemeanour and may be punished by imprisonment not exceeding two years. However, no other protection or anonymity is afforded to whistle-blowers, nor has the potential conflict of disclosing state or official secrets for the public good been settled. As the system has many loopholes, whistle-blowing does not appear to be a widely used tool in the fight against corruption, Transparency International Hungary has recommended the adoption of more effective legislative rules to be complemented by adequate sectoral and organisational codes of conduct.⁴⁷

81. The Hungarian government is currently working on a new whistle-blower protection policy and legislation package. According to the draft bill, a new office to protect whistle-blowers should be set up. It would co-ordinate the government's anticorruption activities, provide training on ethics, receive reports of whistle-blowers and intervene to protect them. Furthermore, this office would also investigate cases, though any criminal cases would be forwarded to the police or the prosecution service. The office would be also able to impose fines in non-criminal cases.⁴⁸

82. Italy has famously well-developed mechanisms for the protection of "informatore", based on Article 203 of the Code of Criminal Procedure and other measures foreseen in a law of 13 February 2001 on "collaborators of justice" and "pentiti" ("repenting" former members of organised criminal groups). But this legislation does not appear to cover other types of whistle-blowers who denounce abuses in the public or private sectors, unless they appear in court as witnesses for the prosecution.

83. Moldova was the subject of the "leading case" considered by the European Court of Human Rights concerning whistle-blower protection. In the 2008 Grand Chamber judgment *Guja v. Moldova*,⁴⁹ the Court unanimously found a violation of Article 10 ECHR (freedom of expression) in the case of an employee of the Prosecutor General's office who was dismissed for having leaked official letters to the press documenting political interference in ongoing criminal investigations. It was precisely the absence of any legislation setting up designated channels for protected disclosures that allowed the whistle-blower to go straight to the press.

84. In Poland, the topic of whistle-blowing is very seldom mentioned and it seems that the term whistle-blowing has no real equivalent in Polish. The most serious obstacles to introducing rules on the protection of whistle-blowers are Polish cultural norms. Whistle-blowing can quite easily be misunderstood as denunciation, which is strongly condemned in Polish culture – understandably so, after Poland's long history of foreign domination and dictatorship. However, a recently published article⁵⁰ finds that informing on reprehensible behaviour in an organisation is gradually gaining acceptance by society, especially by younger people. But the law still fails to address the issue in any depth.

85. The term whistle-blower is not in use in Serbian law either. But the Serbian reply refers to some provisions related to public concerns, to communication based on the disclosure of wrongdoing and penal and administrative sanctions against fraud scattered in laws such as those governing labour relations, public administration, company law, the Criminal Code, and others,⁵¹ but these do not directly address the protection of whistle-blowers as such.

86. In Slovakia, no specific legislation on the protection of whistle-blowing exists or is being prepared. The concept of whistle-blowing is rarely discussed in the country and the practice is not encouraged. However, a provision in the Slovakian Law on Labour Relations is interesting in this context: "The enforcement of rights and obligations arising from labour law relations must be in compliance with good morals. Nobody may abuse such rights and obligations to the detriment of another participant to a work contract or of co-employees. In the workplace, nobody may be prosecuted or otherwise sanctioned in the performance of labour law relations for submitting a complaint, charge or proposal for the beginning of prosecution against another employee or the employer".

47. For further details, see Transparency International National Integrity Studies on the Hungarian public and private sectors (http://www.transparency.hu/nis_english).

48. The Hungarian chapter of Transparency International welcomes the initiative whilst disagreeing with the idea of making the same office responsible for protecting whistle-blowers and investigating the cases revealed by them. It would therefore prefer to leave all criminal investigations to the ordinary law-enforcement bodies.

49. Application No. 14277/04, judgment of 12 February 2008.

50. Research by Mr Arszulowicz, *Sygnalizowanie zachowań nieetycznych (Signalling unethical behaviour)*, Business Ethics Centre, <http://www.cebi.pl/texty/91whistleblowing.doc>.

51. See <http://www.lexadin.nl/wlg/legis/nofr/eur/lxweser.htm>.

87. Under Slovakian law, employees who suspect misconduct generally have four options: to ignore their suspicions and continue working; to raise their suspicions within the organisation; to draw public attention to their suspicions; or to pass on their suspicions anonymously within the structure of the organisation. Each option will have different consequences for the employee.

88. In Sweden, there are no plans at this stage to legislate specifically on the protection of whistle-blowers and the concept of whistle-blowing is not defined in Swedish legal texts. However, a number of provisions may be found in various pieces of legislation.

89. Journalists' sources of information are protected by law, for example.

90. Whilst defamation is still a criminal offence in Sweden, a "whistle-blower" who publishes correct information on fraudulent activities within a company or who has at least reasonable grounds to believe in the truth of such information, cannot be found guilty of defamation.

91. According to Swedish employment law, an employment contract can usually be terminated only for objective reasons. An employee has the right to criticise an employer as long as he/she addresses the information to the right authority. Factual information must be reasonably well grounded and the employee must first contact the employer and seek corrective action before making his/her criticism public. As long as those rules are followed, the employee does not risk losing his/her employment or other privileges at work.

92. In Sweden, some famous whistle-blower cases have given rise to specific legislation such as the Lex Sahra,⁵² which amended the Social Services Act, and which states that every person active in the care of elderly persons shall verify that these persons receive good care and have secure living conditions. Whoever observes or becomes apprised of serious abuse in the care of any individual shall report the matter immediately to the social welfare committee.

93. Overall, the existing provisions in the various Swedish laws appear to give stronger protection to whistle-blowers in the public sector than in the private sector.

94. The Turkish reply indicates that no specific legislation on the protection of whistle-blowers exists but provides a link to the law on the protection of witnesses.⁵³

95. As for Bosnia and Herzegovina, Denmark, Georgia and "the former Yugoslav Republic of Macedonia", all four replies only briefly underlined the absence of any kind of specific legislation regarding the protection of whistle-blowers in the respective national legislation.

96. As we have seen above, specific legislation on the protection of whistle-blowers still remains the exception in Europe and more efforts are needed so that existing rules do not remain purely theoretical. As long as potential whistle-blowers have reason to fear that speaking up against corruption and other abuses might jeopardise their employment or career or might place them in danger, many of them will prefer to remain silent. Hence the importance of improving law and practice on the protection of whistle-blowers in Europe.

4.4. The United States as a positive example

97. I should like to say very clearly that in this field, Europe has much to learn from the United States of America. The contribution on the Whistleblower Protection Act (WPA) of 1989, which the Congressional Research Service sent us in reply to our questionnaire, is also inspiring in that it does not pretend that the present situation is perfect. Elaine Kaplan, former United States Special Counsel, who testified before the Committee on Legal Affairs and Human Rights at its meeting in Moscow on 11 November 2008, provided additional valuable insight.

98. The United States was first to legislate in this field. Legislation in respect of whistle-blowing dates back to the 19th century, when the False Claims Act was introduced during the Civil War when it was discovered that companies were selling faulty supplies to the army.

99. Whistle-blowing also seems to be culturally better accepted in the United States than in most European countries. The American approach is based on an individual contract between the citizen and the state, which motivates citizens to counteract and control actions which are taken against the public interest. Denouncing abuses is thus considered as socially correct, irreproachable, and even a duty.⁵⁴ Whistle-blowers are seen as

52. The regulation was named after a young assistant nurse who became known to the public by speaking in a television programme about serious neglect of patients that occurred in a home for elderly run by a private company. The person that the regulation is named after did not suffer any negative consequences in her relations with subsequent employers.

53. See (in Turkish only): <http://www2.tbmm.gov.tr/d23/1/1-0346.pdf>.

public heroes, and whistle-blower protection laws are generally adopted unanimously, as it would be “political suicide” if a congressman or senator were seen to be opposing such a measure. At the same time, “there is a gap between rhetoric and reality by political leaders”.⁵⁵

100. Today, the WPA is the main piece of legislation protecting whistle-blowers in the United States. Unlike in the United Kingdom, this act only covers public sector employees, and only those working for federal bodies, but separate laws, in particular the Sarbanes Oxley Act of 2002,⁵⁶ also include private companies, and a majority of states have enacted their own whistle-blower protection legislation.⁵⁷

101. The WPA’s intent was to “strengthen and improve protection for the rights of the Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government – (1) by mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing ... that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration”.⁵⁸

102. In order for the protection of the WPA to be triggered, a case must contain the following elements: “a personnel action that was taken because of a protected disclosure made by a covered employee”.⁵⁹ A covered employee is generally understood to be a current employee, a former employee or an applicant for employment to a position in the executive branch of government.

103. 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. However, the WPA limits evidence of mismanagement to “gross” mismanagement. This restriction thus allows a certain freedom of interpretation considering that the law does not define under what circumstances mismanagement is considered to be “gross”.

104. In comparison with other laws existing in Europe, the enforcement mechanism⁶⁰ set out in the WPA is more robust and easily accessible, even compared to the United Kingdom, where the whistle-blowers themselves have to take their case to an employment tribunal. The WPA foresees that a whistle-blower suffering a reprisal can file a complaint with an independent investigative and prosecutorial agency, which will investigate the case and which will seek corrective action from the employer if the accusations are proved right.⁶¹

105. However, according to the Government Accountability Project (GAP)⁶² and other non-profit organisations, amendments to the WPA are urgently needed in order to restore the efficiency of the WPA, which appears to be eroding, especially since the terrorist attacks of 11 September 2001. Threats to the protection of whistle-blowers derive from provisions in the post 9/11 USA Patriot Act and the Homeland Security Act, which remove WPA coverage for the disclosure of any information pertaining to very broadly defined “critical infrastructures”.

106. Moreover, the protection afforded to members of the armed forces and the intelligence services is extremely limited, the biggest loophole being the absence of independent due process rights for actions to deny or remove an employee’s security clearance. Clearances are functional prerequisites for employment for

54. See “Salariés, héros ou délateurs? Du Whistleblowing à l’alerte éthique”, Françoise de Bry, in *Lettre du Management Responsable*, 6 October 2006.

55. Tom Devine, *ibid.* (note 3), p. 85; he gives as an example the birth of the WPA itself, which was delayed by a change of heart by President Reagan.

56. The Sarbanes Oxley Act of 2002 stipulates that international corporations that are either owned in part by United States companies or traded on the United States stock exchange are required to adopt whistle-blowing procedures.

57. Interestingly, the Moldovan Government, in attempting to justify the dismissal of an employee who had “blown the whistle”, argued, *inter alia*, that 21 states in the United States of America also did not afford protection for external whistle-blowing (*Guja v. Moldova*, note 48 above, paragraph 66).

58. WPA 5 U.S.C paragraph 1201 nt.

59. See *The Whistleblower Protection Act: An Overview*, L. Paige Whitaker, March 2007.

60. The WPA established the Office of Special Counsel (OSC) as an enforcement mechanism with the duty to “protect employees, former employees and applicants for employment from prohibited personnel practices and to receive allegations of prohibited personnel practices and to investigate such allegations, as well as to conduct an investigation on possible prohibited personnel practices on its own initiative, absent from any allegation”. WPA 5 U.S.C § 1212 (a) (2).

61. See GRECO’s Seventh General Activity Report.

62. GAP is a non-profit interest group in the United States that promotes government and corporate accountability by advancing occupational free speech, defending “whistle-blowers” and empowering citizen activists. www.whistleblower.org.

three million United States Government employees, and their loss means not only individual termination of employment, but makes blacklisting inevitable, as it means the employee's loyalty to the nation cannot be trusted.⁶³ Against this background, the public disavowal of the accusations on ethical grounds by military prosecutors in charge of cases against terror suspects detained at Guantánamo⁶⁴ deserves particular respect.

107. Finally, it seems that the enforcement mechanism of the WPA, the Office of Special Counsel, which is tasked with intervening on behalf of whistle-blowers and with helping them throughout the procedure of the WPA, is increasingly lagging behind in handling cases and its efficiency is currently being called into question by the public.⁶⁵

108. Despite these criticisms, the United States Whistleblower Protection Act is still an excellent source of inspiration in order to identify good practices that have functioned in the real world without causing unacceptable damage to legitimate government or corporate interests.

109. The Whistleblower Protection Enhancement Act of 2007⁶⁶ aims at rectifying some of these shortcomings, in particular by including employees of the CIA and other security services in the protection of the WPA. The act was adopted by a majority of 80% in the House of Representatives in March 2007, despite the threat of a veto by President Bush,⁶⁷ but it failed in the later stages of the legislative process. President Obama has reportedly vowed to further improve whistle-blower protection.⁶⁸

5. International instruments concerning the protection of whistle-blowers

110. The European Convention on Human Rights protects whistle-blowing as an aspect of the freedom of speech (Article 10 ECHR). The leading case heard by the European Court of Human Rights is that of *Guja v. Moldova*,⁶⁹ in which the Court, in February 2008, found a violation of Article 10 because the applicant had been dismissed for divulging, without ulterior motives, information that was truthful and of legitimate interest to the public. The Court has taken a fairly progressive position, in line with its strong stand in favour of freedom of expression as one of the essential foundations of a democratic society,⁷⁰ even in a case of a public servant divulging "internal" or even secret information:

"In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers 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".⁷¹

63. Tom Devine, *ibid.* (note 3), p. 88.

64. See BBC news of 25 September 2008 on the resignation of Lt. Col. Darrel Vandeveld, who was the fourth military prosecutor to step down in these circumstances.

65. See "The War on Whistleblowers" by James Sandler, published on 1 November 2007 at:

<http://centerforinvestigativereporting.org/articles/thewaronwhistleblowers>.

One of Elaine Kaplan's predecessors in the Office of Special Counsel, Haldane Robert Mayer, had to resign from that position in 1982 after the Office of Special Counsel was accused of holding seminars for political appointees and agency managers to teach them how to fire "whistle-blowers" effectively within the confines of the law. The scandal, which led Congress to strengthen the "whistle-blower" law, did not stop President Reagan from appointing Mayer as a judge of the Federal Circuit Court, which is competent to hear all federal "whistle-blower" cases and whose notoriously "whistle-blower"-unfriendly case law prompted Congress to intervene several times (see James Sandler, pp. 5-6).

Mrs Kaplan's successor is currently himself under investigation for allegedly retaliating against one of his own collaborators, who had "blown the whistle" on alleged abuses in the Office of Special Council.

66. Whistleblower Protection Enhancement Act, H.R. 985, 110th Congress.

67. See "Statement of Administration Policy" of 13 March 2007 at: www.whitehouse.gov/omb/legislative/sap/110-1/hr985sap-h.pdf and the Liberty Coalition's "Informed responses to Statement of Administration Policy (SAP) on HR 985 (published on 19 August 2008)" at <http://www.libertycoalition.net/informed-responses-to-statement-of-administraton-p>.

68. On the latest political developments concerning "whistle-blower" protection, see Jesselyn Radack, Tom Devine and Adam Miles, "Protecting Whistleblowers", 21 November 2008 at: <http://whistleblower.org/doc/2008/TransitionMemo.pdf>.

69. See paragraph 83 above for a summary of the facts.

70. See paragraph 69 of the *Guja v. Moldova* judgment (paragraph 84 above), with references to earlier cases upholding this principle.

71. *Guja v. Moldova* (*ibid.*), paragraph 72.

111. Another instrument of the Council of Europe, which has a bearing on the protection of whistle-blowers is the Criminal Law Convention on Corruption (ETS No. 173) of 27 January 1999, which foresees in its Article 22 that

“[E]ach Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a. those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b. witnesses who give testimony concerning these offences.”

The explanatory report to this Convention states in its paragraph 111 that “the word ‘witnesses’ refers to persons who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2-14 of the Convention and includes ‘whistle-blowers’”.

112. The Civil Law Convention on Corruption of 4 November 1999 provides in its Article 9 that “[E]ach 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”. Paragraph 66 of the explanatory report states that such employees shall be protected from “being victimised in any way”.

113. The United Nations Convention against Corruption⁷² and the Termination of Employment Convention of the International Labour Organization⁷³ have similar provisions.

114. What these instruments have in common is that they are limited to specific issues (in particular, the fight against corruption) and constitute a “lowest common denominator” that leaves much room for interpretation. Their very existence, and their implementation in national law, represent steps in the right direction, but they do not provide the robust protection of whistle-blowers that is required in all cases in which this would serve the public interest.

6. Best practices – to be identified and disseminated

115. We have noted that attitudes are becoming more open towards the concept of whistle-blowing and to the need to protect those who dare to expose abuses. International organisations and NGOs such as Transparency International and Public Concern at Work have made important contributions in this respect. Member states should continue to learn from one another and should exchange best practices in the field of whistle-blowing. I would like this report to make a useful contribution to this effect.

116. Here are a few interesting existing practices in the countries we have looked at above:

- a. Specific legislation on the protection of whistle-blowers: bringing together and further developing scattered provisions in different areas of law, such as the Public Interest Disclosure Act in the United Kingdom, would be useful. Such legislation should not only apply to corruption-related offences but to any kind of malpractice, abuse, or violation of the law that could be detrimental for the public interest in the widest sense, including the interests of shareholders and customers of private companies. The respective laws in the United Kingdom and the United States, for example, cover all kinds of malpractice, from corruption-related offences to specific dangers to health or safety. From the Council of Europe’s point of view, and in the light of the reports of the Assembly exposing a number of serious human rights violations that were made possible by the co-operation of whistle-blowers,⁷⁴ I submit that the disclosure of serious human rights violations should always be covered by whistle-blower protection laws, including (and especially) when they are committed under the cloak of official secrecy.
- b. Legislation on the protection of whistle-blowers should apply to both the public and private sectors, as is the case with the Act relating to working environment, working hours and employment protection, etc. in Norway or the PIDA in the United Kingdom.

72. Adopted by the General Assembly by Resolution No. 58/4 of 31 October 2003 and in force since 14 December 2005 (Article 33).

73. ILO Convention No. 158 of 22 June 1982.

74. For example, the reports by Dick Marty on renditions and secret detentions (Resolutions [1507 \(2006\)](#) and [1562 \(2007\)](#) and Docs. [10957 \(2006\)](#) and [11302 \(2007\)](#)) or that of Christos Pourgourides on disappeared persons in Belarus ([Resolution 1371 \(2004\)](#) and [Doc. 10062 \(2004\)](#)).

- c. Moreover, 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.
- d. Most existing whistle-blowing legislation focuses on protecting workers against reprisals by their employers. Legislators should consider extending the scope of protection to other persons outside of an organisation who might disclose information regarding serious irregularities, including by giving them immunity from prosecution for violation of state secrecy or the like.
- e. Whistle-blowing laws should include provisions to protect the identity of whistle-blowers who fear retaliation after they disclose information. In the United States, the WPA stipulates that the identity of the whistle-blower may not be disclosed without the individual's consent, unless the Office of Special Counsel "determines that disclosure is necessary to avoid imminent danger to health and safety or an imminent criminal violation".⁷⁵
- f. While most existing legislation protecting whistle-blowers allow the disclosures to be made either anonymously or confidentially, practice tends to show that confidentiality is preferred. A confidential disclosure⁷⁶ fuels less mistrust than an anonymous disclosure.⁷⁷ Moreover, it is easier for the whistle-blower to be protected against possible retaliation or victimisation from his/her employer if his/her concern is expressed under his/her own name, albeit confidentially. The accent on confidentiality rather than anonymity also helps ensure the protection of any persons who are unjustifiably accused of wrongdoing.
- g. All existing legislation protecting whistle-blowers which we have discussed in this report has underlined the importance of protecting disclosures made in "good faith", yet the legislation fails to define accurately what good faith entails. Sometimes it seems that the emphasis is put on the motives of the whistle-blower rather than on the veracity of the information itself. In Norway, "bad faith" or ulterior motives of the whistle-blower will not make the disclosure unlawful as long as it is in the public interest. In my view, as a matter of ethics and of the credibility of the information divulged, whistle-blowers should not be paid, and a disclosure should be considered as being made in good faith when the whistle-blower had reasonable grounds to believe that the information disclosed was correct, even if it later turns out that he or she was honestly mistaken. If, however, the purported whistle-blower made false accusations intentionally or recklessly, then he/she should not benefit from any special protection and should be held to account in the usual way.
- h. Where a whistle-blower is victimised following a protected disclosure, he/she should be given the opportunity to have access to an enforcement mechanism that will investigate the case of the whistle-blower's complaint and that will seek corrective action from the employer if the case is proved, as under the WPA in the United States. The victimised whistle-blower should be able to bring an action for compensation before an employment tribunal and, if dismissed, should be given the possibility to apply for an interim order to keep his/her job pending a full hearing, as foreseen under the PIDA in the United Kingdom. As in the United States, retaliation against a whistle-blower should also carry a downside risk for those responsible: the whistle-blower should be given the possibility to counter-attack and seek disciplinary action to punish the retaliatory acts. 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.⁷⁸
- i. The burden of proof should be apportioned in a whistle-blower-friendly way, as is now the case in the United States, after several legislative interventions designed to overturn hostile case law. For corrective action to be ordered, it is now sufficient that the employee has demonstrated that a disclosure was a "contributing factor" in the personnel action taken against him. After the worker establishes a *prima facie* case of retaliation, the employer must now prove by "clear and convincing evidence" – rather than by a mere "preponderance of evidence" as required by previous case law – that the same action against the employee would have been taken anyway for reasons independent of the whistle-blowing.

75. WPA 5 U.S.C § 1213 (h).

76. Where the recipient of the disclosure knows the identity of the person making the disclosure but agrees not to reveal the person's identity.

77. Where the identity of the person making the disclosure is totally unknown.

78. Tom Devine, *ibid.* (note 3 above), p. 99.

- j. Whistle-blowing procedures should remain a possibility offered to employees and should not give rise to an obligation to report, with the possible exception of cases of danger to life and limb. Whistle-blowing should generally be used for problems which cannot be solved under the usual hierarchical order, taking into consideration the risk of abuse, manipulation and wrongful denunciation. Employers should also bear in mind that, when implementing whistle-blowing systems within their organisations, they should treat any such information with due care, especially when it is related to persons.
- k. The implementation and impact of relevant legislation on the effective protection of whistle-blowers should also be monitored and evaluated at regular intervals by independent bodies. The United States Congress and the Dutch Ministry of Labour Relations have set good examples in this respect.
- l. Public sector organisations and private companies should complement legislative efforts by raising awareness among their employees about the positive effects of whistle-blowing and by setting up, on their own initiative, safe internal procedures to draw attention to abuses. In Norway and Romania, for example, the law obliges employers to set up internal whistle-blowing procedures that employees are aware of and trust. Such internal procedures could take the form of confidential bodies tasked with receiving the information from potential whistle-blowers, whilst guaranteeing confidentiality and advising them on further steps to be taken (as foreseen in France and Belgium). Not only will such internal procedures benefit the organisation or the company by demonstrating its ethical commitment, but also by encouraging employees to raise matters internally, thereby making disclosures to the “outside”(to the media or the police for example) less likely. Most importantly, such procedures would further the efficient running of the organisation by deterring corruption, fraud or any other type of mismanagement.
- m. Increased civil society involvement in counselling on whistle-blowing should be encouraged in order to raise awareness in society at large. Specialised whistle-blower groups such as Public Concern at Work in the United Kingdom or the Government Accountability Project in the United States, together with international anti-corruption groups such as Transparency International, contribute to popularising the concept of whistle-blowing by explaining how whistle-blowing helps deter and correct wrongdoing and promotes transparency and good governance. They can also assist countries and provide advice on adopting new laws in the field.
- n. The Council of Europe itself should set an example by establishing a strong internal whistle-blowing mechanism covering all sectors of the Council of Europe, including its partial agreements. The procedure, which should incorporate the best practices set forth in this report, should include the possibility to make protected disclosures on a confidential basis to a specially mandated body such as the service of the Internal Auditor, which should also be required to investigate such disclosures and ensure that appropriate follow-up is given to them. The mechanism should also provide the existing Administrative Tribunal responsible for adjudicating staff disputes with appropriate powers to review and correct, if necessary, the actions of senior management relating to the whistle-blowing procedure.

7. Conclusion

117. By way of conclusion, the Assembly should send a strong signal in the form of a resolution recognising the value of whistle-blowing as an effective tool to prevent mismanagement, corruption and other abuses, including all human rights abuses, and to strengthen accountability. It should also make concrete proposals for legislative improvements for an ameliorated protection of whistle-blowers, both in the public and in the private sectors, laying down standards derived from the observation of good practices and lessons learned in those countries which have already moved in this direction.

118. The Assembly should also recommend that the Committee of Ministers take further steps promoting whistle-blowing and improving the protection of whistle-blowers in Council of Europe's member states.

119. The Committee of Ministers could begin by drawing up guidelines for the protection of whistle-blowers, based on the standards put forward by the Assembly, and reflect on the possibility of drafting a framework convention in this field.

120. To set a good example for its member states, the Council of Europe should establish, without delay, a strong internal whistle-blowing mechanism covering all sectors of the organisation, including its partial agreements.