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Improving the protection of whistle-blowers all over Europe

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

Whistleblowers play an essential role in any open and transparent democracy. The recognition they are given and the effectiveness of their protection in both law and practice against all forms of retaliation constitute a genuine democracy indicator, and a matter of fundamental rights (freedom of expression and information). Disclosing serious failings in the public interest should become the normal response of every responsible citizen who has become aware of serious threats to the public interest.

The Committee on Legal Affairs and Human Rights welcomes the proposal for a European directive on the subject and recommends that all member States, including those which are not, or not yet, members of the European Union, to draw on the text in adopting or reforming their domestic legislation.

Lastly, it calls on the Committee of Ministers to begin the process of negotiating a Council of Europe convention on the protection of whistleblowers, drawing on the proposal for a European directive and the work of the Parliamentary Assembly, in particular the practical proposals made in the draft resolution submitted by the committee, seeking to improve the protection of whistleblowers all over Europe.

1. Reference to committee: Doc. 14483, Reference 4369 of 16 March 2018.

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A. Draft resolution[2]

1. The Parliamentary Assembly considers that whistleblowers play an essential role in any open and transparent democracy. The recognition they are given and the effectiveness of their protection in both law and practice against all forms of retaliation constitute a genuine democracy indicator.

2. The protection of whistleblowers is also a matter of fundamental rights: it is based on freedom of expression and of information, which entails that everyone is entitled to express themselves freely, without fear of retaliation, within precisely defined limits (which prohibit hate speech and intentional defamation in particular). However, this protection requires specific legislation to take account of the particularity of whistleblowers, who place themselves at risk by pursuing a public interest objective.

3. Disclosing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal lives and those of their relatives, as too often happened in the past. Sounding the alarm must become a normal reflex of every responsible citizen who has become aware of serious threats to the public interest.

4. Without whistleblowers, it will be impossible to resolve many of the challenges to our democracies, including of course the fight against grand corruption and money-laundering, as well as new challenges such as threats to individual freedom through the mass fraudulent use of personal data, activities causing serious environmental harm or threats to public health. There is therefore an urgent need to implement targeted measures which encourage people to report the relevant facts and afford better protection to those who take the risk of doing so.

5. Accordingly, the term whistleblower must be broadly defined so as to cover any individual or legal entity that reveals or reports, in good faith, a crime or lesser offence, a breach of the law or a threat or harm to the public interest that they became aware of either directly or indirectly.

6. The Assembly notes with satisfaction that since its first report on the subject (Resolution 1729 (2010) and Recommendation 1916 (2010)) and Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers many Council of Europe member States (Albania, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Hungary, Latvia, Lithuania, Republic of Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovak Republic, Spain, Sweden Switzerland and the United Kingdom) have passed laws to protect whistleblowers either generally or at least in certain fields.

7. It also notes that the European Parliament approved on 16 April 2019 a proposal for a directive aimed at improving the situation of whistleblowers in all of its member States. This draft instrument, broadly inspired by the Council of Europe's work on the subject, is a real step forward. In particular it permits free choice as to the channel employed to "blow the whistle", without imposing an order of priority between internal and external channels. The Assembly draws attention to the action taken by the European Parliament to achieve this excellent outcome in the context of the "trilogue" with the European Commission and the Council in March 2019.

8. The proposal for a European directive provides in particular for:

8.1. a broad definition of the group of individuals protected, including those involved in pre- and post-contractual and non-remunerated professional activities, shareholders and self-employed people (such as suppliers and consultants);

8.2. clear reporting procedures and obligations for employers (private or public), who must create safe reporting channels, normally in two stages:

8.2.1. firstly, at the whistleblower's choice, an internal report (via a specially created reporting channel) or an external report to the competent authorities (specialised regulatory authorities, judicial authorities, professional supervisory body);

8.2.2. secondly, a public report, including in the media, if no appropriate measure is taken within a period of three months from the initial report or in the event of an imminent threat to the public interest, or if a report to the authorities would not be likely to be effective;

8.3. a ban on retaliation against whistleblowers, with no let-out clause and involving the effective protection of whistleblowers acting in good faith against criminal and civil proceedings, including "SLAPP" (gagging) proceedings; the confidentiality of the whistleblower's identity and also the protection of an anonymous whistleblower when his or her identity is discovered;

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2. Draft resolution unanimously adopted by the committee on 24 June 2019.

8.4. criminal and civil immunity for acts undertaken for the acquisition of the information reported, provided that these acts do not themselves constitute offences in their own right;

8.5. effective legal remedies and relief (compensation, reinstatement, interim measures), with a reversal of the burden of proof concerning the link between prejudicial measures taken against the whistleblower and the reporting of information;

8.6. financial penalties against those who try to prevent whistleblowing ("whistleblowing inhibitors"), carry out retaliation against a whistleblower or disclose his or her identity;

8.7. effective follow-up within a reasonable period (three months as a rule) with feedback to the whistleblower for all whistleblower reports;

8.8. legal and psychological support for whistleblowers;

8.9. the gathering and dissemination of information on the impact of reporting by whistleblowers.

9. The proposal for a European directive directly covers the reporting of breaches or abuses of EU law (especially in the areas of combating money-laundering, company taxation, data protection, protection of the EU's financial interests, food security, environmental protection and nuclear safety). However, nothing prevents countries that wish to do so from protecting those reporting on breaches or abuses of their national law according to the same principles. There are no grounds for giving less protection to national law and public interest at the national level than to the law and interests of the EU.

10. All EU member countries are legally required to transpose this directive into their national law within two years from its entry into force. However, the member States of the Council of Europe that are not, or not yet, members of the EU also have a strong interest in drawing on the draft directive with a view to adopting or updating legislation in accordance with the new European rules.

11. On the basis of its previous work, the Assembly considers that the following improvements aimed at clarifying, implementing or supplementing the draft directive would be desirable in order to reassure and give more encouragement to potential whistleblowers and promote a genuine culture of transparency:

11.1. Allowing legal entities (especially non-governmental organisations) to "blow the whistle" on illegal practices or enjoy protection as "whistleblowing facilitators", in the same way that journalists are able to rely on the protection of their sources; "reporting auxiliaries" must be given increased protection, especially when put under pressure to reveal the identity of whistleblowers;

11.2. Ensuring that individuals working in the field of national security can rely on specific legislation providing better guidance regarding criminal prosecutions for breaches of state secrecy in conjunction with a public interest defence, and ensuring that the courts required to deal with the question of whether the public interest justifies "blowing the whistle" themselves have access to all relevant information;

11.3. Setting up an independent authority in each country tasked with

11.3.1. helping whistleblowers, especially by investigating allegations of retaliation and failure to act on reports, and where necessary reinstating whistleblowers in all their rights, including full compensation for all the disadvantages they have suffered;

11.3.2. ensuring that once a matter has been reported there is every chance of it being followed up, whatever the interests at stake, by condemning any action to suppress it; this role is particularly important when powerful economic or political stakeholders become involved and make disproportionate efforts at suppression and/or exert pressure on the whistleblower;

11.3.3. providing a link with the judicial authorities as a reliable source, in particular, of material evidence in connection with judicial proceedings. Such an independent authority will therefore be able (in the same way as authorities acting as Defenders of citizens' rights) to intervene in legal proceedings so as to give its analysis of a case and provide elements of assessment regarding the report made and the action taken by the whistleblower;

11.3.4. these independent authorities would be instrumental in establishing a genuine European network that would make it possible to share good practices and exchange experience regarding the stakes involved and difficulties encountered in their work. They would constitute an independent European observatory, which would act on a daily basis to ensure that whistleblowers and the alarms they sound are accorded their rightful place in our democracies. In its own field, this network of independent authorities would be a prime interlocutor for the Council of Europe;

11.4. Setting up a legal-support fund, fed by the proceeds from fines imposed on individuals or organisations that have failed to comply with whistleblowing legislation, with a view to financing high-quality legal support for whistleblowers in court proceedings, which are often long, complex and costly; the fund would be administered by the independent authority, which would grant assistance if it considered that the person being prosecuted, claiming to be a whistleblower, met previously established criteria;

11.5. Ensuring that whistleblowers and their relatives are also protected against retaliation perpetrated by third parties;

11.6. Ensuring that the burden of proof lies with those who attack the whistleblower, by providing in particular that:

11.6.1. there is an explicit presumption that the whistleblower has acted in good faith;

11.6.2. a person or authority that takes legal action against a whistleblower must prove that genuine harm has been done, including in the field of national security;

11.6.3. in the case of a public disclosure, those attacking the whistleblower must prove that the conditions for public disclosure were not met;

11.6.4. the reversal of the burden of proof in the whistleblower's favour also applies in cases of criminal prosecution for defamation;

11.7. Avoiding making the protection of whistleblowers subject to subjective and unpredictable conditions, such as the whistleblower's purely altruistic motivation, a duty of loyalty to an employer or an obligation to act responsibly, without any clear and precise indication of what is expected of the potential whistleblower; it is essential for a whistleblower to be able to have speedy confirmation that he or she meets the criteria required in order to benefit from the specific whistleblowing legislation. While this can be finally determined only by a court decision, the assessment of these criteria at the earliest opportunity (especially by the independent authority) is an important element for keeping the whistleblower safe;

11.8. Granting whistleblowers the right of asylum, entitling them in exceptional cases to make their application from their place of residence abroad; the maturity of the legislation for the protection of whistleblowers in their country of origin must be taken into account;

11.9. Granting, in connection with whistleblowing, legal privilege to persons delegated by companies or administrative authorities to receive reports, the aim being to provide potential whistleblowers with guarantees that these persons will if necessary be able to protect their identity;

11.10. Ensuring that persons delegated to receive and follow up on reports are sufficiently qualified and independent and report directly to the very top of the corporation or administrative authority concerned;

11.11. Ensuring that the criminalisation of acts involving the acquisition of information by whistleblowers is limited to actual break-ins for the purpose of gaining personal advantage, having nothing to do with the reporting of information in the public interest;

11.12. Gathering and broadly disseminating, in co-operation with the independent administrative authorities of each country, information on the functioning of mechanisms for the protection of whistleblowers (for example, the number of cases, their duration, their outcomes and penalties for retaliation), in order to improve assessment of the functioning of the law in each country and both share good practices and correct bad ones;

11.13. Fostering the emergence in civil society of an ecosystem that encourages support for whistleblowers, by drawing in particular on networks of voluntary organisations and the commitment of community volunteers. This ecosystem is essential in order to overcome the isolation faced by all whistleblowers and back them in their efforts, as well as to bring about changes in national legislation. In the context of whistleblowing and the protection of whistleblowers, the drafting of legislation together with civil society is a particularly appropriate approach.

12. The Assembly invites:

12.1. Council of Europe member States that are also members of the European Union to:

12.1.1. transpose, as soon as possible, the directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law into their national legislation in line with the spirit of the directive, which aims to set minimum common standards so as to ensure a high level of protection for whistleblowers, including for those who "blow the whistle" on breaches of national law or threats to the public interest at the national level;

12.1.2. put in place, beyond the requirements of the European directive, the measures proposed in paragraph 11 of this resolution, especially the creation of independent authorities responsible for the protection of whistleblowers in order to form a European network and firmly embed the logic of whistleblowing in our democratic systems, as well as foster the emergence of civil society players engaged in this area;

12.2. Council of Europe member States that are not members of the European Union, as well as observer States or States whose parliaments have partner for democracy status, to revise their relevant legislation or pass new laws that draw on the proposal for a European directive and paragraph 11 of this resolution, in order to grant whistleblowers in their own countries the same level of protection as those from an EU member State;

12.3. all Council of Europe member States to take a decisive step towards the protection of whistleblowers, especially by setting up a European network of independent authorities whose role will be to ensure that whistleblowing and whistleblowers are accorded their rightful place in our democratic societies.

12.4. all Assembly members to raise the awareness of their national parliamentary colleagues concerning the importance of improving the management of whistleblowers' disclosures and giving whistleblowers better protection, to share good practices and to carry out their own appraisal of their laws in order to assess what legislative progress has been made in this area. To this end, they could refer to the self-assessment grid contained in the report.

B. Draft recommendation[3]

1. The Assembly refers to its Resolution ... (2019) “Improving the protection of whistleblowers all over Europe”, its Recommendation 2073 (2015) “Improving the protection of whistle-blowers” and the Committee of Ministers’ reply of 25 January 2016.

2. It recalls that a proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, the aim of which is to set minimum common standards to ensure a high level of protection for whistleblowers in all EU member States, is about to come into force. This draft directive is inspired in large part by the Committee of Ministers’ Recommendation CM/Rec2014(7) on this subject, but it also contains clarifications of, and improvements to, that recommendation. The draft directive addresses an issue of particular importance for democracy, the rule of law and human rights, especially the fight against corruption and the protection of freedom of expression and of information.

3. In order to avoid a new legal divide in this area that falls within the Council of Europe’s three priorities, the Assembly reiterates its invitation to the Committee of Ministers to begin preparations for negotiating a binding legal instrument in the form of a Council of Europe Convention as a follow-up to its Resolution 2060 (2015) and its Recommendation 2073 (2015). This instrument should draw on the above-mentioned European directive, taking due account of the clarifications and additions proposed in Assembly Resolution ... (2019).

3. Draft recommendation unanimously adopted by the committee on 24 June 2019.

C. Explanatory memorandum by Mr Sylvain Waserman, rapporteur

1. Introduction

1.1. The role of whistleblowers in an open and transparent democracy

1. Whistleblowers play a key role in any open and transparent democracy. The recognition they are given and the effectiveness of their protection in both law and practice against all forms of retaliation constitute an important democracy indicator. Their protection is essential to freedom of expression (Article 10 of the European Convention on Human Rights), without which democracy cannot function. In a genuine democracy, everyone must be able to express themselves without fear of reprisal, within certain limits that prohibit hate speech and intentional defamation in particular. However, this protection requires specific legislation that goes beyond the legislation guaranteeing freedom of expression and of information. Effective protection of whistleblowers also makes it possible to reduce recourse to leaking documents under the cloak of anonymity via platforms such as WikiLeaks, which leads to saturating the public domain with information that is often unverifiable or manipulated and adversely affects the quality of democratic debate.

2. Moreover, the role of whistleblowers in the fight against corruption, organised crime and money-laundering has become indisputable, as was very clearly shown by the Assembly's report on "Laundromats"[4] and as illustrated by various scandals that have arisen in recent years (for example, Panama Papers, LuxLeaks and Football Leaks).

3. Lastly, the role of whistleblowers has also proved crucial in the field of security and the protection of everyone's privacy, as Edward Snowden demonstrated. In particular, it is the new democratic challenges linked to the protection of personal data, risks to health or the environment, or the misuse of new technologies, that make it urgent for progress to be made on protecting whistleblowing.

4. Revealing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal life, and in many cases that of people close to them, as has too often happened in the past. Sounding the alarm should become the normal reflex of every responsible citizen who has become aware of serious threats to the public interest.

5. It is today essential to strengthen and harmonise the legal protection of whistleblowers throughout Europe. This must be based on the previous work done by the Assembly and the Committee of Ministers and take into account the "Global Principles on National Security and the Right to Information" (the Tshwane Principles),[5] and also on sharing good practices that ensure better protection of whistleblowers in practical terms, in all sectors.

6. A major step in this direction is the European Commission proposal for a directive on the protection of whistleblowers,[6] which was inspired by the work and recommendations of the Council of Europe on this issue. The proposal was endorsed by the European Parliament on 16 April 2019[7] after difficult negotiations in the context of the "trilogue" between the Parliament, the Council and the European Commission. The directive seeks to guarantee a high level of protection to whistleblowers who report breaches of EU law. It puts in place a three-channel reporting system – internal, external and public – and effective protection against any retaliation towards whistleblowers who have duly used one of these reporting channels. According to the directive, whistleblowing is a means of feeding "national and EU enforcement systems with information leading to effective detection, investigation and prosecution of breaches of Union law".

7. The recitals of the proposal for a European directive describe the protection of whistleblowers in EU member States as being "fragmented". This description also applies to the other member States of the Council of Europe. Large disparities remain between the different national laws. While some national laws offer broad recognition and protection, others provide only limited and very heterogeneous recognition and protection, depending on the sectors concerned,[8] or offer no specific protection at all. A comparison between

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4. See Resolution 2279 (2019) and Recommendation 2154 (2019) "Laundromats: responding to new challenges in the international fight against organised crime, corruption and money laundering".
5. The Global Principles on National Security and the Right to Information (The Tshwane Principles), 12 June 2013.
6. Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM/2018/218, 2018/0106 (COD), 23 April 2018.
7. Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, P8_TA-PROV(2019)0366, 16 April 2019.

the results of the surveys conducted by the rapporteur of the 2015 report on the subject, Mr Omtzigt, and by myself, via the European Centre for Parliamentary Research and Documentation (ECPRD), shows that progress has been made since 2014, but there is still a long way to go (see paragraphs 89-94 below).

8. In France, until 2016, the protection afforded to whistleblowers was only applicable on a sectoral basis, for example in the context of fighting corruption[9] or conflicts of interest[10] and in the context of the protection of health and the environment.[11] Since the entry into force of the "Sapin II" Law,[12] the status of whistleblowers has been broadly recognised in France under a general law.[13] This is one of the most advanced laws of its type but will need to be further improved to meet the requirements of the new European directive.

9. Everywhere in Europe, the protection of whistleblowers still remains under threat because of the protection of certain interests which may be perceived as contradictory. For example, exceptions to the protection for whistleblowers in the interests of ensuring secrecy of issues related to national security,[14] trade secrets[15] and the protection of personal data[16] may all be a threat to the status and protection of whistleblowers. In addition, certain militant activities, such as Greenpeace entering French nuclear power stations to highlight security failings, raise questions about the definition of whistleblowers.

10. When applied to the protection of whistleblowers, the European regulation on the protection of personal data[17] which recently entered into force raises, for example, the question of striking a balance between the right to respect for private life and to the lawful, fair and transparent processing of personal data[18] and the obligation to deal with whistleblower reports,[19] especially by storing and processing personal data. By introducing provisions requiring the consent of a data subject before processing their personal data,[20] or by allowing them to obtain from the controller the erasure of their personal data,[21] the regulation reduces the ability of the relevant authorities to carry out an effective investigation of the facts reported by whistleblowers.

11. Moreover, certain shortcomings and grey areas remain, even in the legislation of member States whose protections for whistleblowers can be generally described as well-developed. This is the case when the information disclosed does not concern an illegal act, but one that is morally questionable. For example, in the LuxLeaks scandal,[22] the tax agreements between the audit firms and the Luxembourg tax authorities revealed to the press by Antoine Deltour complied with Luxembourg and international law. However, these arrangements were harmful to the general interest as they unfairly deprived other States of substantial tax revenues without their knowledge.

12. Similarly, the safeguards aiming to discourage malicious or unwarranted reporting and to prevent unjustified attacks on a person's reputation can unintentionally weaken the protection afforded to whistleblowers.[23] The fact that whistleblowers are not protected against dilatory or vexatious proceedings, so-

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8. See the 2009 report of the Committee on Legal Affairs and Human Rights on The protection of "whistle-blowers" (Rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD), Doc. 12006; Whistleblowing in Europe: Legal protections for whistleblowers in the EU, Transparency International, 2013.
9. Law No. 2007-1598 establishing Article L1161-1 of the Labour Code.
10. Law No. 2013-907 of 11 October 2013 on transparency in public life
11. Law No. 2013-316 of 16 April 2013 on the independence of expertise in relation to health and the environment and on the protection of whistleblowers.
12. Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption measures and the modernisation of economic life (known as the "Sapin II" Law).
13. Section 6 of the Sapin II Law.
14. See, for example, Principle 5 of the Recommendation of the Committee of Ministers CM/Rec(2014)7 on the protection of whistleblowers and recital 24 on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.
15. In France, for example, the draft law of 19 February 2018 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure transposing Directive 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
16. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.
17. Ibid.
18. Article 5, Regulation (EU) 2016/679.
19. Article 9, proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.
20. Article 6, Regulation (EU) 2016/679.
21. Article 17, Regulation (EU) 2016/679.
22. Le Monde, "Luxleaks : la condamnation d'un des lanceurs d'alerte français annulée en cassation", 11 January 2018, available online at https://www.lemonde.fr/evasion-fiscale/article/2018/01/11/luxleaks-la-condamnation-d-un-des-lanceurs-d-alerte-francais-annulee-en-cassation-au-luxembourg_5240227_4862750.html.

called “gagging lawsuits” or “strategic lawsuits against public participation” (SLAPPs) designed to intimidate them or wear them down financially with lengthy and repetitive judicial proceedings, also remains a problem in Council of Europe member States (with the exception of France).

1.2. Plan and objectives of the report, acknowledgements

13. The main part of my report will first of all set out the “acquis” of the Council of Europe with regard to the protection of whistleblowers (section 2). I will then describe the new elements introduced by the recent proposal for a directive of the European Parliament and of the Council on the subject, which primarily concerns EU member States (section 3). While setting out the key aspects of the draft directive, I will develop several proposals aimed at clarifying and supplementing the future regulations at national level that will hopefully result from the transposition of the directive throughout Europe.

14. My analysis and proposals are broadly inspired by the “48-hour whistleblower challenge” that I organised with regional civil society in Strasbourg on 14-15 March. During those two days, meetings took place with numerous whistleblowers, lawyers, researchers from the University of Strasbourg and the Ecole Nationale d’Administration, NGO representatives, trade unionists and local and regional councillors. I naturally also took account of the contributions made by the experts participating in the two hearings which I organised for the Committee on Legal Affairs and Human Rights, in January 2019 with Ms Anna Myers and Mr Christophe Speckbacher and in May 2019 with Ms Virginie Rozière, Ms Nicole-Marie Meyer and Mr Jean-Philippe Foegle. I wish to thank all these experts for their contributions and their co-operation throughout the preparation of this report.

15. As a French member of parliament, I would briefly like to describe the legal situation in my country following the adoption of the Sapin II Law and the law transposing the European Trade Secrets Directive (section 4). In the conclusion, I will summarise the results of the survey I conducted among Council of Europe member States via the ECPRD network. This will show the extent of the work that remains to be done and to which our draft resolution makes a modest contribution.

2. The “acquis” of the Council of Europe with regard to the protection of whistleblowers

16. The “acquis” of the Council of Europe is based on the previous work done by the Assembly and the Committee of Ministers and, in particular, on the case law of the European Court of Human Rights.

2.1. Previous work of the Assembly and the Committee of Ministers on the subject of whistleblowers

17. On several occasions the Assembly has asserted the importance of whistleblowing in democratic societies. It has played an active part in the development and promotion of guiding principles on the protection of whistleblowers and worked to ensure that member States adopt a comprehensive and consistent approach on this issue in their legislation.[24]

18. In 2010, its Resolution 1729 (2010) invited all member States of the Council of Europe to review their domestic legislation concerning the protection of whistleblowers, keeping in mind a number of guiding principles.[25] In its Recommendation 1916 (2010), the Assembly also recommended that the Committee of Ministers draw up a set of guidelines[26] for the protection of whistleblowers.

19. In 2013, in its Resolution 1954 (2013) and its Recommendation 2024 (2013) on national security and access to information, the Assembly expressed its support for the “Global Principles on National Security and the Right to Information” (Tshwane Principles)[27] in order to ensure the protection against retaliation of whistleblowers who in good faith disclose wrongdoing in the area of national security which is contrary to human rights and the public interest.

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23. See, for example, Article 22 of the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.
24. See the following Assembly texts: Resolution 1729 (2010), Recommendation 1916 (2010), Resolution 1954 (2013), Recommendation 2024 (2013), Resolution 2060 (2015), Recommendation 2073 (2015).
25. See Resolution 1729 (2010), paragraph 6.
26. See Recommendation 1916 (2010), paragraph 2.
27. See footnote 5.

20. In 2015[28] the Assembly welcomed the adoption by the Committee of Ministers of Recommendation CM/Rec(2014)7 on the protection of whistleblowers, which "recommends that member States have in place a normative, institutional and judicial framework to protect whistleblowers". The recommendation advises member States to adopt "a comprehensive and coherent approach to facilitating public interest reporting and disclosures" (paragraph 7) and broadly, although not completely, reflects the position expressed by the Assembly in 2010.

21. The 2015 report identified a number of shortcomings in Recommendation CM/Rec(2014)7. In particular, the recommendation excludes from its scope intelligence activities in the national security sector by allowing the application of "special schemes or rules, including modified rights and obligations" to information "relating to national security, defence, intelligence, public order or international relations of the State" (paragraph 5). In its Resolution 2060 (2015) the Assembly called on member States to "enact whistle-blower protection laws also covering employees of national security or intelligence services and of private firms working in this field". It Recommendation 2073 (2015) also encouraged States to take steps to draft a binding legal instrument (framework convention), which would be negotiated under the auspices of the Council of Europe. This convention should be designed to provide potential whistleblowers with equivalent legal protection regardless of where they live or where they make a disclosure.

2.2. A Convention on the protection of whistleblowers?

22. In its 2015 report, the Assembly proposed the drawing up of a Council of Europe convention on the subject. In its reply to Assembly Recommendation 2073 (2015)[29] the Committee of Ministers mentioned the "existing international legal framework that protects whistle-blowers from any form of retaliation" (paragraph 3).[30] "Without ruling out the possible preparation of a convention in the longer term", the Committee of Ministers considered that it was "more appropriate [...] for the Council of Europe to continue to support the promotion and implementation of Recommendation CM/Rec(2014)7" (paragraph 5) so as "to guide member States when reviewing relevant legislation and institutional set-ups aimed at protecting those who alert the public and/or competent authorities to potential threats or harm to the public interest" (paragraph 4).

23. Nevertheless, I remain convinced that it would be useful to agree on a binding legal instrument to protect all individuals who denounce wrongdoing that may violate the rights of other individuals enshrined in the European Convention on Human Rights ("the ECHR"). A new convention on whistleblowers would prevent the scope of legislation being restricted to specific sectors of activity and ensure that the various situations are covered on a broad and exhaustive basis. For instance, the Committee of Ministers defines whistleblowers through their employment relationships. This excludes the protection of any other individuals not in employment relationships, but who become aware of a threat or harm to the public interest and would be just as liable to potential retaliation. Recommendation CM/Rec(2014)7 could clearly serve as a starting point that ultimately led to the drafting of a convention. That convention should also draw on the recent proposal for a European directive on this subject by taking account of the adoption of the new European data protection regulation and the need to regulate gagging (SLAPP) lawsuits, which are still an issue today. It would be a basis for the creation of independent whistleblower authorities in every country that ratifies it.

24. On the eve of the Council of Europe's 70th anniversary, a convention on the protection of whistleblowers would show the determination to enshrine the greater protection of whistleblowers in the legislation of the States Parties to the ECHR. Protection needs to be strengthened, particularly in the fields of public safety, corruption and finance. The negotiations need not start from scratch as the new European directive provides a sound basis, common to all Council of Europe member States that also belong to the European Union.

25. A convention on the protection of whistleblowers would make it possible to stabilise and harmonise the law in this area, which is our main objective. Other legal means that form part of the Council of Europe's arsenal could also be employed to achieve this objective. For example, the adoption of an additional protocol to the European Convention on Human Rights would help the European Court of Human Rights to further develop its case law on the subject and, as a result, impose binding common rules in all States Parties to the Convention. Another possibility would be the adoption of an additional protocol to the Civil Law Convention on Corruption (ETS No. 174), the aim being to expand and redraft more precisely Article 9 of that instrument

28. See the 2015 report of the Committee on Legal Affairs and Human Rights "Improving the protection of whistle-blowers" (Rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD), Doc. 13791, and Resolution 2060 (2015).
29. Doc. 13949, 25 January 2016.
30. See the UN Convention Against Corruption, ILO Convention No. 158 (1982) concerning termination of employment and the Council of Europe's Criminal Law and Civil Law Conventions on Corruption (ETS No. 173 and No. 174).

dealing with the protection of whistleblowers. The advantage of such a protocol would be that its implementation would be monitored by the Group of States against Corruption (GRECO). I personally prefer a special convention on the protection of whistleblowers. An additional protocol to the European Convention on Human Rights would risk jeopardising the Court's existing case law, especially that based on Article 10 (see below), as long as not all States Parties to the Convention had ratified the protocol. Moreover, the solution of an additional protocol to the Civil Law Convention on Corruption would risk unduly limiting the protection of whistleblowers to the sector of fighting corruption, although the existence of a ready-made (and effective!) monitoring mechanism such as GRECO is not without its attractions.

2.3. Recent case law of the European Court of Human Rights

26. The ECHR and the case law of the European Court of Human Rights (the Court) remain a key source for the protection of whistleblowers, through the application of Article 10 of the Convention, which protects freedom of expression and the right to information. The Assembly 2015 report summarised the case law of the Court, which consistently seeks "to balance freedom of expression and information, especially when denouncing misconduct, including unlawful actions and human rights violations, and the duty to maintain national security-related information secret [...] in the interests of territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others".[31] As far as pre-2015 case law is concerned, I refer to the last report.

27. In the recent case of *Catalan v. Romania*[32] the applicant, a civil servant who worked for the National Council for the Study of Securitate Archives (CNSAS), had provided the national daily newspaper, Libertatea, with documents from the archives of the Securitate, the Communist-era secret police. The documents concerned T., the patriarch of the Romanian Orthodox Church then in office, and involved allegations of homosexuality and membership of the Legion, an anti-Semitic fascist movement active between the two world wars. The applicant was dismissed for misconduct by the CNSAS disciplinary board. The Court concluded unanimously that the applicant's dismissal was not a violation of Article 10 of the ECHR.

28. While the Court held that Mr Catalan's dismissal from the civil service constituted interference with the exercise of his right to respect for freedom of expression, it also considered that, in accordance with Article 10, paragraph 2, of the Convention, the interference was "prescribed by law" (paragraph 49) and pursued two legitimate aims: preventing the disclosure of confidential information and protecting the rights of others (paragraph 55), i.e. those of individuals included in the archives managed by the CNSAS. It considered that the interference was "necessary in a democratic society" because the civil service required of its staff a duty of loyalty and discretion and that certain manifestations of the right to freedom of expression that might be legitimate in other contexts were not legitimate in the workplace (paragraph 58).

29. Moreover, the fact that Mr Catalan had been able to join the civil service again as a teacher after his dismissal led the Court to conclude that his dismissal had not been a disproportionate sanction. The severity of the sanction was one of the six criteria set out by the Court in the cases of *Guja v. Moldova* [33] and later *Heinisch v. Germany,*[34] *Bucur and Toma v. Romania*[35] and *Matùz v. Hungary*[36] for the purpose of determining whether the interference with the applicant's right to freedom of expression, in particular the right to impart information, was "necessary in a democratic society".

30. In February 2008 the Court delivered a judgment in the aforementioned *Guja* case concerning the initial dismissal of the applicant following whistleblowing activities. In the judgment the Court recognised Mr Guja as a whistleblower. Following the 2008 judgment, the domestic courts ordered his reinstatement in his previous post. Ten days later, however, he received a dismissal order based on a provision of domestic law, the reason given being the appointment of a new prosecutor general. In *Guja v. Republic of Moldova (No. 2)*[37] the Court again held that Article 10.2 of the ECHR had been violated, taking the view that the interference with his right to freedom of expression was not necessary in a democratic society.

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31. Doc.13791, op.cit., paragraphs 15 and 16.
32. Application No. 13003/04, judgment of 9 January 2018.
33. Application No. 14277/04, judgment of 12 February 2008, §95.
34. Application No. 28274/08, judgment of 21 July 2011, §91.
35. Application No. 40238/02, judgment of 8 January 2013, §119.
36. Application No. 73571/10, judgment of 21 October 2014
37. Application No. 1085/10, judgment of 27 February 2018.

31. The “Guja” test and the related case law are reflected in the Tshwane Principles. The benefit of ensuring that the Guja test is incorporated in member States' legislation is all the greater since all domestic courts should take account of the Court's case law, even when it arises from judgments concerning other member States, so as to avoid judgments finding against their governments (*res interpretata).*[38]

32. The Grand Chamber judgment in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*[39] concerned the civil conviction for defamation of four non-governmental organisations (NGOs) based on a letter they had sent to the highest authorities of their district to complain about a person’s candidature for the post of director of the Brčko district multi-ethnic radio station. The letter was in response to information received by the NGOs from station employees. The Grand Chamber held, by eleven votes to six, that there had been no violation of Article 10 of the Convention relating to freedom of expression, basing its decision on Article 10, paragraph 2, which refers to the protection of the reputation of others. The nature of the statements was indeed such that they seriously called into question the ability of the person concerned to fill the vacant post. The Grand Chamber affirmed that the applicants could not be regarded as whistleblowers and that it was not necessary in that particular case to determine their status. However, according to the six judges who voted to find a violation of Article 10 the NGOs acted as quasi-whistleblowers. In the opinion of these judges, reporting alleged misconduct to the authorities in question in a private letter required “the application of a more subjective and lenient approach than in completely different factual situations” (paragraph 82).

33. In the *Berlusconi v. Italy* case[40] the Court emphasised the importance of the protection of whistleblowers, citing GRECO’s conclusions on the fight against corruption published on 1 July 2013 (paragraph 52).

34. A pending case worth following is that of *Robert Norman v. the United Kingdom.*[41] This case involves the sale of information to a journalist by a prison officer. The applicant was arrested and charged with misconduct in public office. The UK court ruled that he was not a real whistleblower. The ruling mentioned the fact that not all of the information sold by the applicant was in the public interest and that some details were aimed solely at attacking the prison governor; that the applicant was motivated by financial interests; and that, as a union representative, he could have sought to have matters addressed through official channels.

3. The proposal for a European directive

35. On 16 April 2019, the European Parliament adopted a proposal for a directive on the protection of persons reporting on breaches of Union law. This text was a response to two resolutions of the European Parliament[42] condemning the lack at EU level of a minimum level of protection for whistleblowers.

36. The proposal for a EU directive draws, in particular, on the case law of the Court relating to Article 10 of the ECHR and Recommendation CM/Rec(2014)7 of the Committee of Ministers on the protection of whistleblowers (para. 32). The latter broadly reflects the positions expressed by the Assembly in its Resolution 1729 (2010) and its Recommendation 1916 (2010).[43]

37. This draft directive represents real progress for all EU member States, which are legally required to transpose it into their domestic law. In formal terms, it only applies to persons who “blow the whistle” on breaches of EU law, but there is no reason for member States to exclude breaches of their national law from the scope of their transposition laws. Once the necessary structures have been created, it would be an aberration that national law should not benefit from the same protections as European law. Moreover, States that are not (or not yet) members of the EU have every reason to bring their own protection of whistleblowers up to the level in force in the EU. These are two key points that I have also included in the draft resolution. Before beginning a critical appraisal of the draft directive, I wish to stress the importance of the involvement of

38. See Assembly Resolution 1726 (2010) “Effective implementation of the European Convention on Human Rights: the Interlaken process”, para. 4 and Doc. 12221.
39. Application No. 17224/11, Grand Chamber judgment of 27 June 2017.
40. Application No. 58428/13, decision of 27 November 2018.
41. Application No. 41387/17, lodged on 1 June 2017.
42. See the European Parliament Resolution of 14 February 2017 on the role of whistleblowers in the protection of the EU’s financial interests (2016/2055(INI) and the European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest (2016/2224(INI)).
43. See Mr Pieter Omtzigt’s report on “Improving the protection of whistle-blowers”, op.cit., for elements of comparison between Resolution 1729 (2010) and Recommendation 1916 (2010) of the Assembly and Recommendation CM/Rec(2014)7 of the Committee of Ministers.

the European Parliament's rapporteur on this question, Ms Virginie Rozière, and the role she has played in the process of negotiating this key text. I would like to thank her for presenting the main achievements of this document to our committee at its meeting on 29 May 2019.

3.1. Material and personal scope

38. The draft directive obliges EU member States to adopt common minimum standards for the protection of persons reporting "unlawful activities or abuse of EU law" which may result in serious harm for the public interest in the areas listed in Article 2 of the draft directive. Article 2 (a) mentions, inter alia, public procurement, financial services, product and transport safety, protection of the environment, public health and public security. Breaches of human rights and infringements in other areas referred to in Tshwane Principle 37 are not expressly mentioned, but, according to the recitals of the draft directive, the enumeration in Article 2 can be extended in future (see recital 108), and member States are free to include other areas in the transposition legislation. Furthermore, in protecting disclosures regarding abuses of law the draft directive does not confine itself to protecting disclosures concerning illegal activities in the strict sense (Article 1).

39. The draft directive does not cover the disclosure of information relating to national security, like Recommendation CM/Rec(2014)7 (paragraph 5). In 2015 the Assembly[44] considered this exception too broad, especially in the absence of a definition of "national security". It emphasised the need to avoid intelligence agencies covering up serious human rights violations by improperly classifying all related information as matters of "national security". As the EU lacks jurisdiction in this area, it is therefore up to the member States themselves to work to develop specific legislation on a matter that cannot be dealt with in the general context of whistleblowers. In order to guide these efforts, I propose in the draft resolution that people working in the area of national security should be able to rely on legislation providing better guidance regarding criminal prosecutions for breaches of state secrecy in conjunction with a public interest defence. The courts, which have to decide whether the public interest justifies "blowing the whistle", should themselves have access to all relevant information in order to reach a determination, in accordance with the "Tshwane Principles" on national security and the right to information, already supported by the Assembly in its above-mentioned Resolution 1954 (2013).

40. In terms of personal scope, the provisions of the draft directive go beyond those recommended by the Committee of Ministers[45] and apply to all types of employment relationships irrespective of their nature, and whether or not the individual is paid, including employment relationships that have ended or not yet begun. The proposal also protects legal entities for which whistleblowers work, such as trade unions or NGOs, as well as shareholders, suppliers, consultants and self-employed persons. The future directive will thus offer protection to all whistleblowers working in the private or public sector who acquired information on breaches in a work-related context in the broad sense (Article 4).

41. In the context of a future Convention on the protection of whistleblowers it will therefore be essential to introduce a broader definition of a whistleblower than in the Committee of Ministers' Recommendation, so as to include situations outside employment relationships in the strict sense and cover the entire work-related context. Furthermore, as we heard during the "48-hour whistleblower challenge" in Strasbourg, it is necessary to protect individuals or legal entities that pass on in good faith information received from persons who want to remain anonymous. In this case, too, the whistleblower, such as a researcher, journalist or NGO official, could be personally affected by measures of retaliation.[46] However, whistleblowers in the true sense, namely people who report information they have personally obtained in the context of their employment, should be distinguished from witnesses and "reporting auxiliaries", such as a journalists or NGO officials, who examine and, if appropriate, pass on information received from whistleblowers. Witnesses and "reporting auxiliaries" also deserve increased protection, which is also in the interests of the whistleblower who initiated their report provided that they act responsibly. The protection of these individuals is very important, especially when they are put under pressure to reveal the whistleblower's identity. However, they are not themselves whistleblowers in the strict sense.

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44. Resolution 2060 (2015), paragraph 10.1.1.
45. CM/Rec (2014)7, paragraphs 31 and 79.
46. *Analysis and recommendations for key modifications in the draft EC Directive for the Protection of Whistleblowers*, 12 June 2018, available online at https://xnet-x.net/en/recommendations-modifications-draft-ec-directive-protection-whistle-blowers/

3.2. Choice between internal and external reporting procedures

42. Article 6 of the draft directive provides for three reporting channels: internal (Articles 7 to 9), external (to the competent authorities - Articles 10 to 14) and public (via the media - Article 15). The compromise solution adopted in the context of the "trilogue" no longer mentions the obligation to report information internally before making an external or public report. The whistleblower can choose from the outset between an internal report and contacting the competent authorities (for example the prosecution service or the supervisory or regulatory authorities). Three months after an external report, he or she can make a public disclosure if the external report has produced no result (Article 15, paragraph 1). In justified cases (imminent threat to the public interest with a risk of irreversible damage, or if there is an obvious risk of retaliation or collusion with the perpetrator of the violation in the case of an external report), an immediate public disclosure is also protected.

43. This solution, obtained after a hard fight by the European Parliament against the resistance of several "major countries" within the Council, corresponds to the case law of the European Court of Human Rights. The *Guja* judgment[47] pertinently points out that "in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence".[48]

3.3. The internal reporting channel: required attributes

44. Whistleblowers are generally encouraged to give priority to the internal reporting channel if available and if the whistleblower can reasonably expect it to function properly. According to the European Parliament resolution on the proposal for a EU directive, this principle "should help foster a culture of good communication and corporate social responsibility in organisations, whereby reporting persons are considered as significantly contributing to self-correction and excellence" (recital 47). In this context it should be emphasised that national laws should also "institutionalise" as far as possible the protection of what is in everyday life the most natural and most frequently used channel of communication employed by people who discover problems in connection with their work, namely communication through the chain of command.

45. Article 8 of the draft directive requires member States to "ensure that legal entities in the private and in the public sector establish internal channels and procedures for reporting and following up on reports", which is in keeping with the recommendations of the Assembly and the Committee of Ministers. These criteria take account of the size of the entities and also, in the case of private entities, the risks which their activities pose to the public interest. Small and micro-companies (less than 50 employees) are exempted from establishing such internal reporting procedures, unless they operate in the area of financial services.[49] Article 11 adds an obligation for member States to set up appropriate external reporting channels, which must be independent and responsive.

46. In the light of the results of our "48-hour whistleblower challenge", I would like to add that those to whom the employer delegates the task of receiving reports should enjoy legal privilege (professional confidentiality, in the same way as lawyers) so that whistleblowers can have full confidence and the person delegated cannot be forced by their employer to disclose their identity. A second point I would add concerns the quality of the internal channel: those who receive and/or investigate reports should be sufficiently qualified and independent and report directly to top management, which will increase the legitimacy of this channel and prevent senior management from plausibly denying having had any knowledge of the information reported.

3.4. Ensuring effective follow-up to reports

47. Genuine whistleblowers are motivated by the desire to change something. Articles 9, 11 and 13 of the draft directive, which seek to ensure that internal and external reports are followed up, should therefore be welcomed. As far as external reporting procedures are concerned, the draft directive is in line with the position of the Assembly and Tshwane Principle 39 in that it requires States to establish "independent and autonomous external reporting channels" (Article 12, paragraph 1) which are both secure and ensure confidentiality (recital 74). The Assembly's criticism[50] of the Committee of Ministers' Recommendation is thus taken into account by the draft directive.

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47. *Guja v. Moldova*, Application No. 14277/04, judgment of 12 February 2008, §74.
48. See also *Fressoz and Roire v. France* [GC], Application No. 29183/95, judgment of 21 January 1999; *Radio Twist, A.S. v. Slovakia*, Application No. 62202/00, judgment of 19 December 2006.
49. COM(2018)218 final, explanatory memorandum, page 11.
50. See the report by Mr Pieter Omtzigt, "Improving the protection of whistle-blowers", op.cit.

48. The draft directive also adopts the Assembly's position[51] regarding the independent body's investigatory powers concerning the subject-matter of the external reporting. In Article 11 the draft text calls for the competent authorities to be given such powers. It even gives whistleblowers the right to demand a personal meeting with those responsible in connection with the follow-up given to their reports. In the transposition laws it would be helpful to state that the investigations in question should be "thorough, prompt, impartial and effective", in line with the case law of the European Court of Human Rights on "procedural violations" of Articles 2 and 3 of the ECHR.[52]

49. The draft directive also provides for "a reasonable timeframe, not exceeding three months following the report, to provide feedback to the reporting person about the follow-up to the report" in the case of internal reporting (Article 9(1)f) and "a reasonable timeframe not exceeding three months or six months in duly justified cases" in the case of external reporting (Article 11(2)d). The imposition of these timeframes is generally positive, but when reporting takes place within a corrupt organisation this waiting period, from the whistleblower's point of view, can be misused in order to intimidate the informer or remove the evidence.[53] Hence the importance of enabling the whistleblower to refer a matter directly to an external authority and, in justified cases, to contact the media.

50. The draft directive leaves it to the member States to determine the authorities competent to receive and follow up on external reports. That may cause problems if the "competent authorities" set up do not possess the necessary expertise and are too few in number and susceptible to political influences. In Malta, for example, the "competent authority" to receive external reports is the Prime Minister's office.[54] It is therefore important for national transposition laws to clarify that all whistleblowers are protected if they send their report to any authority that they have reasonable grounds for believing is competent to deal with the information reported.

3.5. Confidentiality and anonymity: how should personal data be dealt with?

51. Article 12 of the draft directive provides that for external reporting channels to be considered independent and autonomous they must meet a number of criteria, including the ability to store information on a long-term basis so as to enable substantive investigations. Article 18 accordingly provides for record-keeping of reports received. The storage of such data may, however, conflict with Regulation (EU) 2016/679 on the protection of personal data, which recently came into force. It requires the consent of the persons concerned to the processing of their personal data and also enables them to secure their deletion. Article 17 of the draft reiterates that any processing of data pursuant to the directive must be in accordance with Regulation (EU) 2016/679.

52. The difficulty will arise when it becomes necessary to balance the imperatives of protecting individuals' personal data and the needs of reporting and investigatory mechanisms. If, for instance, an investigation into a report of wrongdoing proves unsuccessful due to lack of evidence, the company would be required to delete the data concerning the individual against whom the accusations had been levelled. Nevertheless, a succession of reports, even when unsubstantiated, could still be indicative of wrongdoing. Regulation (EU) 2016/679 remains vague about the adaptation of reporting procedures to its provisions. It is therefore desirable for member States to agree on the best means of ensuring that mechanisms for reporting and for protecting whistleblowers comply with the Regulation on the protection of personal data and, conversely, that the Regulation is not used to dissuade whistleblowers.

53. As far as data protection is concerned, the Tshwane Principles, which were endorsed by the Assembly, provide that "the names and other personal data of victims, their relatives and witnesses may be withheld from disclosure to the general public to the extent necessary to prevent further harm to them, if the persons concerned or, in the case of deceased persons, their family members, expressly and voluntarily request withholding, or withholding is otherwise manifestly consistent with the person's own wishes or the particular needs of vulnerable groups. Concerning victims of sexual violence, their express consent to disclosure of their

51. Ibid, paragraph 38.
52. See for example the judgment (GC) of 30 November 2004 in *Öneryildiz v. Turkey* (Application No. 48939/99, para. 103)
53. Whistleblower Information Network (WIN), Assessment of European Union Whistleblower Directive, 18 June 2018, working draft (unpublished, copy available from the secretariat), page 6.
54. See Pieter Omtzigt's report on "Daphne Caruana Galizia's assassination and the rule of law in Malta and beyond: ensuring that the whole truth emerges", Doc. 14906, which draws attention to the Prime Minister's excessive powers in many areas.

names and other personal data should be required. Child victims (under age 18) should not be identified to the general public." These common-sense rules may be useful guidelines for the member States in the transposition of the future directive.

54. In keeping with paragraph 18 of the Committee of Ministers' Recommendation CM/Rec(2014)7, the draft directive aims to protect the confidential nature of the whistleblower's identity (Article 16) and provides for penalties in the event of failure to fulfil this obligation (Article 23 (d)). The draft directive goes further than simply protecting the confidentiality of the identity of the whistleblower (who should in principle be known to the internal or external body charged with receiving reports). Article 5, paragraph 3 of the draft directive also provides for the protection of an anonymous whistleblower (which is important if his or her identity is discovered), while leaving it to the member States' discretion whether or not to impose an obligation to follow up on anonymous reports (Articles 5, paragraph 2 and 9 (e)).

3.6. Protection of reporting persons and the persons affected by reports: good faith, penalties, forbidden types of retaliation, burden of proof, effective remedy

55. The conditions for the protection of reporting persons provided for in the draft directive (Article 5) are consistent with the Assembly's guiding principles, which recommend that "all bona fide warnings against various types of unlawful acts" should be taken into account.[55] Article 5(1)a requires whistleblowers to have "reasonable grounds to believe" that the information reported was true and fell within the material scope of the directive at the time of reporting.

3.6.1. Penalties in cases of false reporting

56. In contrast, under Article 23, paragraph 2 of the draft directive member States may provide for "effective, proportionate and dissuasive penalties" applicable to persons making false reports. These penalties include compensation for "persons who have suffered damage from malicious or abusive reports or disclosures". This provision, which is consistent with Recommendation CM/Rec(2014)7,[56] is the "counterbalance", for the benefit of victims of false reports, of the strong protection afforded by the draft directive to whistleblowers who act in good faith. The provision may, however, appear superfluous, since the protection of whistleblowers is already confined to "bona fide" reports and member States' national law already includes measures punishing defamation, for instance.[57]

57. It is of prime importance that the whistleblower is de facto presumed to have acted in good faith as long as he or she has reasonable grounds for believing that the information concerned is truthful and that reporting or revealing it is necessary in the public interest. In my opinion, Articles 5, paragraph 1, 15 paragraph 1 and 21, paragraph 2 meet this condition, provided that the national transposition laws clarify the definition of "reasonable belief" in accordance with the usual legal definition, whereby it is sufficient that other people with equivalent education, knowledge and experience *could* be of the same opinion[58] or that the whistleblower had reasonable grounds for believing the truth of what he or she reported. The juxtaposition of other subjective criteria relating to the whistleblower's motivation (for example, not being motivated by a grievance or by the prospect of a personal advantage, or having acted "responsibly") is dangerous as it is unpredictable with regard to its application by the courts.[59]

3.6.2. Criminal and civil immunity also for the acquisition of the information

58. Article 21 of the draft directive in principle extends the whistleblower's criminal or civil immunity to the acquisition of the information reported, provided that the acquisition does not in itself constitute a separate offence. The recitals (94) clarify that this immunity must cover cases in which whistleblowers legally have access to the documents whose content they report or of which they transmit a copy, or cases involving a whistleblower removing documents from his or her employer's place of business. However, the immunity must also apply when the whistleblower acts in breach of a confidentiality clause or accesses information or documents outside his or her normal professional duties. Whistleblowers only lose their immunity when they commit a physical break-in or engage in hacking.

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55. Resolution 1729 (2010), paragraph 6.1.1.
56. Principles 10 and 22, Recommendation CM/Rec(2014)7.
57. WIN assessment, op.cit., page 9.
58. WIN assessment, op.cit., page 5
59. This criticism also applies to certain terms employed by the European Court of Human Rights in the *Guja v. Moldova* case, op.cit., in paragraph 75 of that judgment.

59. The implementation of this principle risks being rendered more complicated by widespread digitisation and the growing criminalisation of all those who access digital information without permission. Efforts should therefore be made to limit this criminalisation to computer hacking that is perpetrated for personal gain and has nothing to do with reporting information in the public interest. I have included this in the draft resolution.

3.6.3. Protection against any form of retaliation, burden of proof, penalties

60. Article 19 of the draft directive sets out an extensive, non-exclusive list of various forms of direct or indirect retaliation which are prohibited. Here it is entirely consistent with the recommendations made by the Committee of Ministers (Recommendation CM/Rec(2014)7 paragraph 21), the Assembly (Resolution 1729 (2010) paragraph 6.2.2) and the Tchwane Principles (Principle 41).

61. As far as the burden of proof is concerned, the draft directive provides that whistleblowers only need to prove that they have made a protected report and subsequently suffered prejudice. It is then up to employers to prove that their action with adverse effects for the whistleblower is based on duly justified grounds (Article 21, paragraph 5). The draft directive goes further than the Committee of Ministers' recommendation (paragraph 25) and is in line with the Assembly's position[60] in this regard.

62. However, in order to avoid the possible misunderstanding that a "duly justified ground" can excuse the intention to retaliate, it is important for transposition laws to clarify this wording. The recitals of the draft directive point the way forward (recital 95): the person who has taken the detrimental action must prove that it had nothing whatsoever to do with the whistleblower's report.

63. The draft directive imposes the introduction of criminal, civil or administrative penalties, in addition to possible damages, against people who retaliate against whistleblowers. This echoes the "downside risk" that the Assembly has long been advocating.

64. The draft directive will ensure that whistleblowers will not "lose out through winning" as they are guaranteed to be reinstated and to receive damages to compensate them for the prejudice suffered.

65. An important element of the protection from all forms of retaliation is protection from "gagging procedures" aimed at intimidating whistleblowers and wearing them down. Recital 93 of the draft directive states that the right to report under the directive removes all restrictions and threats, including those based on contractual non-disclosure clauses, trade secrets, data protection laws, copyright or breach of contract proceedings – provided that the whistleblower has "reasonable grounds" to believe that the report was necessary in order to put an end to the abuses in question.

3.6.4. In particular: temporary measures to avoid irreparable damage

66. The draft directive also provides for interim relief measures, to avoid a *fait accompli* causing harm to the whistleblower following lengthy proceedings on the merits even if he or she wins the case (Article 21, paragraph 6). This is a particularly important point and is also mentioned in the draft resolution, because the possibility of interim measures removes the advantage that an employer acting in bad faith would have in bringing long adversarial proceedings that could be very costly for the whistleblower and discourage many whistleblowers (see recital 98 of the draft directive). Transposition laws should therefore clarify that the alleged retaliation must be blocked until the end of the proceedings on the merits of the case whenever the presumed whistleblower succeeds in providing *prima facie* proof of his or her status.

3.7. Legal and psychological support measures

67. In Article 20, paragraph 1, the draft directive requires member States to give (potential) whistleblowers access to support measures, including free and independent advice. The competent authorities (responsible for dealing with external reporting) are obliged to provide effective assistance and to certify that whistleblowers who contact them are legally protected. Governments are also obliged to provide legal aid in criminal cases and cross-border civil cases. Lastly, the draft directive encourages States to provide whistleblowers with financial and psychological support.

68. Such support measures are extremely important. They were also mentioned by many participants in the "48-hour whistleblower challenge" that I organised with regional civil society in Strasbourg on 14-15 March 2019. The participants – whistleblowers, lawyers, researchers from the University of Strasbourg and the Ecole Nationale d'Administration, NGO representatives, trade unionists and local and regional councillors –

60. Resolution 1729 (2010), paragraph 6.3.

emphasised that whistleblowers feel isolated and face tremendous pressures – professional, financial, psychological and domestic. We discussed practical ways of providing such support, some of which are mentioned in the draft directive.

69. It is all the more regrettable that the final proposal for a EU directive no longer mentions the whistleblower's right to be represented by a trade union or the protection of non-governmental organisations that work with whistleblowers. I think that proper protection should also be given to "reporting surrogates" (see paragraph 41 above). These individuals, especially investigative journalists and NGO activists, if they do their work responsibly, play an important role as "filters" of information reported by whistleblowers and also protect whistleblowers, whose anonymity they can safeguard. I have therefore included this point in the draft resolution.

70. The role of civil society is crucial when it comes to helping and supporting whistleblowers, as well as becoming involved in drafting legislation. It is a fact that the States which have done the most to involve civil society players are those with the best laws in this area. Individuals can also feel more secure with representatives of bodies such as NGOs when intending to blow the whistle. These players have a vital role in helping whistleblowers to act, especially when it comes to sorting the data relevant to the public interest objective pursued and thus avoiding the disclosure of irrelevant information, such as a person's sexual orientation or the identity of undercover agents. The independent authorities that should be set up would have the task of encouraging the participation of these non-institutional players and would draw on their work and expertise.

3.8. Establishment of an administrative authority responsible for assisting whistleblowers

71. The draft directive provides for the establishment of independent external reporting channels tasked with receiving external reports and conducting the necessary investigations (Articles 11 and 12).

72. In each member State, an independent whistleblower authority would be set up, possibly on the basis of the aforementioned future convention. It would be one of the keys to the effective protection of whistleblowers and would make it possible to:

– help whistleblowers, especially by investigating allegations of retaliation and failure to follow up on reports and, when necessary, by reinstating the whistleblower in all his or her rights, including full redress for all adverse treatment suffered;

– ensure that a report made has every chance of achieving results, whatever the interests at stake, by condemning any attempts at a cover-up. This role is particularly crucial where powerful economic or political actors intervene and create disproportionate pressure regarding the disclosure and/or on the whistleblower;

– provide a link with the judicial authorities as a reliable source of material evidence in connection with judicial proceedings. An independent authority will therefore be able (in the same way as authorities acting as defenders of citizens' rights) to intervene in legal proceedings so as to give its analysis of a case and provide elements of assessment regarding the reporting and the action taken by the whistleblower.

73. These independent authorities would be instrumental in establishing a genuine European network that would make it possible to share good practices and exchange experience regarding challenges faced and difficulties encountered in their work. They would accordingly constitute an independent European observatory, which would act on a daily basis to ensure that whistleblowers and the alarms they sound are accorded their rightful place in our democracies. In its own field, this network of independent authorities would be a prime interlocutor for the Council of Europe.

74. These independent authorities will also be able to foster the emergence in civil society of an ecosystem that encourages support for whistleblowers, by drawing in particular on networks of voluntary organisations and the commitment of community volunteers. This ecosystem is essential in order to overcome the isolation faced by all whistleblowers and back them in their efforts, as well as to bring about changes in national legislation. In the context of whistleblowing and the protection of whistleblowers, the drafting of legislation together with civil society is a particularly appropriate approach.

3.9. Transparency and follow-up

75. The draft directive (Article 27) obliges member States to report on the impact of reports made by whistleblowers. In my opinion, national laws should clarify that information should also be collected and published on, in particular, the number of proceedings brought, the time taken to reach decisions, outcomes (cases won or lost by whistleblowers) and measures taken to punish retaliation. This information is necessary in order to assess the good functioning of the laws in question, thus facilitating a comparison between the member States in order to improve the sharing of good practices and to correct bad ones.

3.10. Whistleblowers' right of asylum

76. A point not mentioned in the draft directive (as the EU lacks jurisdiction in this area) should nonetheless be taken into account in future national legislation, namely conferring on whistleblowers the right of asylum if they risk being persecuted in their countries for exercising their freedom of expression (Article 10 of the European Convention on Human Rights). Essentially, that should not pose a problem under the law as it stands, but proper procedure requires an asylum application to be made in the territory of the intended host country. In my opinion, exceptions should be possible in special cases, such as that of Edward Snowden, who was no longer able to travel after his passport was cancelled by the American authorities. I confess that I was very moved by the exchange of views with Mr Snowden, by videoconference, during the "48-hour whistleblower challenge". He blew the whistle on an illegal and secret practice that concerns all of us, namely the mass surveillance of our communications by the NSA and others. He took this action while risking his career and even his personal freedom but without losing his optimism, his love of his country and his strong commitment to the protection of future whistleblowers. I therefore fully endorse the "case study" by Pieter Omtzigt in his 2015 report and the appeal made by the Assembly in its Resolution 2060 (2015) to the American authorities to allow Edward Snowden to return to his country without fear of criminal prosecution under such conditions that would not allow him to raise a public interest defence.

4. Case study: France

4.1. The law of 9 December 2016 on transparency, anti-corruption measures and the modernisation of economic life

77. The law of 9 December 2016 on transparency, anti-corruption measures and the modernisation of economic life (Sapin II Law),[61] established a confirmed definition of "whistleblower" in France. This is one of the most advanced laws in Europe and is on a par with the UK legislation. The Sapin II Law also lays down a three-stage reporting procedure which whistleblowers must follow and establishes a common protection system, thereby ending sector-based protection of whistleblowers in France.

78. Section 6 of the law defines a whistleblower as "any individual who reveals or reports, acting selflessly and in good faith, a crime or an offence, a serious and clear violation of an international commitment which has been ratified or approved by France or of a unilateral act of an international organisation adopted on the basis of such commitment, or a serious breach of a law or regulation, or a serious threat or serious harm to the public interest, of which the individual has personally become aware".

79. The personal and material scope of the law is very broad. It covers "all individuals" and, in addition to unlawful acts, includes any "serious threats or harm to the public interest". This aspect of the French legislation is interesting in the light of cases such as the LuxLeaks scandal.

80. However, in excluding from the protected reporting arrangements "facts, information or documents, in whatever form or on whatever medium, classified on national security grounds or covered by medical secrecy or legal privilege", the scope of protection afforded by section 6 is narrower than that advocated by the Assembly,[62] which recommends that protection be extended to members of intelligence services, who, like other public officials or private-sector employees, may also become aware of serious wrongdoing in the context of their employment relations. The confidential nature of the relevant information should not automatically preclude protected disclosures, as administrative authorities could otherwise escape from any type of public scrutiny by classifying information in an unwarranted manner. That is why it is necessary to

61. Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption measures and the modernisation of economic life.
62. Resolution 2060 (2015), paragraphs 7, 8 and 10.1.1.

have specific legislation for people who work in the area of national security. Such legislation would provide better guidance regarding criminal prosecutions for breaches of state secrecy in conjunction with a public interest defence.

81. Section 7 sets out the circumstances in which a person who reveals confidential information protected by law is not criminally liable. That is the case when disclosure is “necessary and proportionate to the protection of the interests involved, takes place in accordance with the reporting procedures provided for by law and the person meets the criteria defining whistleblowers” provided for in Article 6 of the law. The law unfortunately fails to specify the protection of whistleblowers from civil liability, as recommended in Tshwane Principle 41.

82. Section 8 places in sequential order the authorities to which whistleblowers must refer when making reports. In line with the principles adopted by the Assembly, the Sapin II Law provides that any reports must first be made through internal channels “to a direct or indirect superior or a person appointed for that purpose by their employer”. If these internal channels prove ineffective, i.e. “in the event of inaction by the person to whom the report is made”, the whistleblower may alert the judicial or administrative authorities or professional associations (external reporting). Public disclosure is allowed only after a three-month time lapse if there are no internal or external channels or if they are ineffective, or if there is a serious and imminent danger or a risk of irreversible damage. While this ranking of reporting channels complies with the Assembly's recommendations, it may be problematic for whistleblowers who, given vague criteria such as "inaction by the person to whom the report is made", cannot be sure of being protected in the case of direct disclosures through external channels or to the public until they come before the courts. As far as the ranking of reporting channels is concerned, the Sapin II Law will have to be amended in connection with the transposition of the future directive.

83. In accordance with the recommendations of the Assembly and the Committee of Ministers, Article 9 of the Sapin II Law ensures the confidentiality of whistleblowers' identities at all stages in the process and lays down penalties of two years' imprisonment and a fine of 30 000 euros for any disclosure of information relating to the identities of whistleblowers or the persons accused or of the information received by any persons to whom the reports are made. Whistleblowers may claim anonymity solely in accordance with certain conditions set out in Article 2 of the deliberation of the National Commission for Information Technology and Freedoms (CNIL).[63] That article also provides that the relevant body “must not encourage persons wishing to use the mechanism (for managing reports) to do so anonymously”. Accordingly, the confidentiality clause is all the more important in connection with the implementation of the European personal data protection regulation. In accordance with the Assembly's guiding principles, Articles 10, 11, 12, 13, 15 and 16 set out the retaliatory measures prohibited in respect of whistleblowers, including employees, civil servants, trainees and members of the armed forces. It is worth noting that the Sapin II Law includes members of the armed forces in the protection arrangements for whistleblowers, as advocated by the Tshwane Principles, but fails to add any other professions related to the security sector. The prohibition of retaliatory measures against reporting persons whose employment relationship has ended but who could still suffer retaliation from their former employers, for instance in terms of retirement pension, is not mentioned, contrary to the draft directive.

4.2. Recent law transposing the European Directive on the Protection of Trade Secrets

84. The recent law on the protection of trade secrets[64] transposes the Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure. The text includes a broad definition of the information to be protected from competitors and provides for compensation for the civil tort suffered by the victim company in the event of the unlawful possession or disclosure of a trade secret. If used inappropriately, provisions of this kind could jeopardise the status of whistleblower, as defined in the Sapin II Law.

85. However, this law very fortunately provides for exceptions to the protection of trade secrets. In particular, protection of a trade secret is not enforceable where “the acquisition, use or disclosure of the secret was carried out in order to exercise the right to freedom of expression and communication, including respect for press freedom, and to freedom of information, or to reveal illegal activity, misconduct or wrongdoing, in good faith and for the purpose of protecting the general interest, including when exercising the right to report as set out in Article 6 of the [Sapin II] law, or for the protection of a legitimate interest recognised by Union or

63. 22 June 2017, No. 2017-191.
64. Law No. 2018-670 of 30 July 2018.

national law, in particular to prevent or halt any threat to or endangerment of public order, public safety, public health or the environment" (Article L-151-7 of the Code of Commerce created by the above-mentioned transposition law).

4.3. The anti-SLAPP law

86. In France, Article L. 152-8 of the Commercial Code[65] introduces a civil fine for dilatory or vexatious proceedings brought against journalists or whistleblowers in order to intimidate them or wear them out financially in lengthy and repetitive litigation.[66] Proceedings of this kind, known as gagging lawsuits or Strategic Lawsuits against Public Participation (SLAPP), can discourage potential whistleblowers. For example, since 2009 more than 20 defamation actions have been brought by Bolloré or Socfin in France and other countries concerning press articles, audiovisual reports, reports by NGOs and even a book about the group's activities, in particular in Africa.[67]The inclusion, albeit after considerable debate, of this "anti-SLAPP" rule in French legislation is very good news.

5. Conclusions

87. Once formally adopted, the proposal for a European directive for the protection of whistleblowers will be binding on all EU countries. The Assembly's 2015 recommendation to propose a minimum level of protection for whistleblowers in all Council of Europe member States is all the more important if new legal divides are to be avoided and in the interests of the development of a democratic culture based on transparency in countries that are members of the European Union and those that are not, or not yet. Beginning such work on the protection of whistleblowers would, in the Council of Europe's 70th anniversary year, demonstrate the determination to enshrine greater protection of whistleblowers in the legislation of all the States Parties to the European Convention on Human Rights. In my opinion, effective protection of whistleblowers is a clear indicator of improved functioning of our democracies, and the Council of Europe therefore has real legitimacy and a key role to play here.

88. Finally, based on the experience of the "48-hour whistleblower challenge", I propose that some thought be given to how parliaments can genuinely work together with civil society in developing legislation on the protection of whistleblowers. At first sight, unlike areas such as bioethics, where the discussion partners and stakeholders are structured and clearly identified, this does not apply regarding whistleblowers. However, there are a number of specialised NGOs, trade unions and employers' organisations and, in particular, whistleblowers themselves who are prepared to share their experience and work together to develop a really positive legal and corporate framework.

89. In order to take stock of the current situation and assess how much remains to be done, I have availed myself of the network of the European Centre for Parliamentary Research and Documentation (ECPRD). Mr Omtzigt, the previous rapporteur, did the same in 2010, which makes it possible to analyse developments in this area.

90. My "survey" produced 27 replies, which was an excellent result for this exercise and shows the strong interest sparked by the protection of whistleblowers in many European countries (see the summary table in Appendix 1). We need to harness this momentum so as to have good laws passed in as many countries as possible. A comparison between the two "surveys", however limited and incomplete they may be, enables us to discern certain trends. Firstly, in 2010 six countries (Belgium, France, Norway, the Netherlands, Romania and the United Kingdom) stated they had passed specific legislation applicable to whistleblowers. The number of positive replies to the recent questionnaire doubled. In 2010, France and Norway replied that there were laws protecting whistleblowers in their respective countries, but in reality France only passed such a unified law in 2016: the "Sapin II Law" (see paragraph 77 and following above). Norway now says it only has certain provisions in the area of labour law, so it is not counted among the 13 positive replies. I would add that the Netherlands, which did not reply to the new questionnaire, has improved its legislation since 2010, thanks to the commitment shown by Mr Omtzigt in particular.

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65. Also created by Law No. 2018-670 of 30 July 2018 (law transposing the European Directive on the Protection of Trade Secrets).

66. See the text adopted by the Committee on Constitutional Laws, Legislation and General Administration of the Republic, Section 4, Article L. 152-6, available at: http://www.assemblee-nationale.fr/15/ta-commission/r0777-a0.asp.

67. Le Monde, "Des journalistes et des ONG dénoncent des « poursuites baîllons » de la part du groupe Bolloré", 24 January 2018, available at https://www.lemonde.fr/idees/article/2018/01/24/des-journalistes-et-des-ong-denoncent-des-poursuites-baillons-dela-part-du-groupe-bollore_5246496_3232.html.

91. In sum, the first lesson to be drawn from this survey is the trend towards codifying the protection of whistleblowers by passing specific laws. This trend is likely to accelerate after the entry into force of the European directive on this subject. Five countries that replied "no" to my questionnaire expressly stated that their governments were waiting for the directive in order to be certain that their legislation complied with the new European rules.

92. Among the Council of Europe member States that do not, or do not yet, belong to the EU, I noted with interest that some have a modern single law that protects whistleblowers. In the Republic of Moldova and Romania, well-known cases dealt with by the European Court of Human Rights led to improvements, when the Court's judgments were implemented by those countries (see the above-mentioned cases of *Guja v. Moldova* (2008) and *Bucur and Toma v. Romania* (2013)). On the other hand, in spite of the *Heinisch v. Germany* judgment (2011) the situation of whistleblowers in Germany is still very precarious. Nonetheless, it may on balance be worthwhile bringing "strategic litigation" before the European Court of Human Rights. For whistleblowers who are victims of non-existing or ineffective protections, a Strasbourg judgment often comes too late, but in order to further the protection of whistleblowers in general "strategic litigation" is an avenue to be explored by civil society, which should support whistleblowers who are prepared to embark on such litigation – including by providing lawyers with expertise in this area.

93. A third lesson drawn from this survey concerns the substance of relevant legislation, including some recent laws that still leave much to be desired. Some countries (Denmark, Greece, Luxembourg, Portugal, Spain, Switzerland and Turkey) provide virtually no protection for whistleblowers or only permit internal reporting to superiors. The Slovak Republic provides several reporting channels, whether an entity specially appointed by the company, the employer or a new authority for the protection of whistleblowers, but the possibility of reporting such information publicly is not recognised. Some replies to the questionnaire reveal that the very concept of a whistleblower is unknown in these countries' legal systems. These replies (for example, from Austria, Greece, Portugal, Spain and Turkey) mention the protection of witnesses, especially those who co-operate with the judicial authorities and enjoy protected witness status, or the protection of journalists' sources. All that is very well and good but it does not relate to the notion of a whistleblower in the modern sense. Other countries protect whistleblowers very well in certain very limited areas, for example Norway where working conditions are concerned, Poland in the financial sector, especially in the context of money-laundering or the funding of terrorism, and Denmark in the case of marine navigation. A surprising number of countries protect whistleblowers in the area of competition law. However, in other sectors there is no protection. Finally, a large number of countries impose subjective conditions (concerning the *forum internum*), including the whistleblower's altruistic motivation or "good faith" (for example, Albania, France, Georgia, Republic of Moldova, Romania, Slovak Republic and the United Kingdom), while others lay down the condition that whistleblowers must act "responsibly" (Norway) or take account of a "duty of loyalty" towards the employer (Switzerland). These are dangerous conditions for whistleblowers as they are unpredictable, so these dangers must be countered by adopting a de facto presumption in favour of the whistleblower.

94. The replies received from many countries abound with details of good practices and innovative ideas that should be taken into account elsewhere. Some countries (Estonia, Finland and Latvia) do not impose any particular condition for the whistleblower to be able to contact the media. Finnish legislation in particular even expressly refers to the constitutional provisions protecting freedom of expression and of information. The result in practice is not a permanent backdrop of scandals but simply more transparency and less corruption. Hungary expressly states in its reply that the whistleblower's motivation is not important, while in several countries (Republic of Moldova, Romania) good faith is expressly presumed – as well as the bad faith of the employer if adverse measures are taken against a whistleblower. Some countries also provide for a presumption of causality (with the report being presumed to have resulted in an adverse measure taken against a whistleblower), which are also points taken up in the proposal for a European directive.

95. All these elements, as well as the Venice Commission's work on the rule of law, have enabled me to identity criteria that make it possible to analyse the laws and practices that protect or, by contrast, disadvantage whistleblowers. Member states will be able to use these criteria to assess their legislation, as will civil society players and the independent authorities to be set up (see Appendix 2).

96. In the meantime, it can be noted that there is much work to be done if we want to "improve the protection of whistleblowers all over Europe" as the – very ambitious – title of my report says. "All over Europe" also means that every European country can benefit from the experience of others, whether or not it is a member of the European Union. The "cross-fertilisation" of ideas works in two directions, as shown by the genesis of the draft directive.

Appendix 1

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
Albania	**Yes, Law no 60/2016 "On whistle blowing and protection of whistleblowers"** (2 June 2016, no amendments) + **provisions** in other laws such as **Labour Code, Fight against Corruption, Prevention of Conflict of Interest**	"individual who applies or is working or has previously worked with the public authority or private entity, regardless of the nature of the employment relationships or its duration, and whether paid or not, which alerts an action or suspected corruption practice" (article 3) -motivation N/A	Acting in good faith (article 6)	Yes
Austria	**No.** But specific provisions exist in the criminal code and competition law ("crown witness" – type rewards for cooperation with the prosecution); Awaiting future EU WB Directive	n/a	Protection only from criminal prosecution	n/a the "leniency programme" does not distinguish between public and private sectors.
Croatia	Act on the Protection of Denouncers of Irregularities **scheduled to enter into force on 1 July 2019** (unifying for the first time all the legal standards for the protection of WBs into one *lex specialis*) -before that in different laws such as **Criminal Code, Labour Act, Civil Servants Act**	"a natural person who reports irregularities related to performing work with an employer" (any kind of work, such as self-employment, volunteering, service contract, student jobs..)	6 conditions (alternative): Imminent danger No possibility to report to the employer no information provided on internal reporting channels Subst. grounds that the rights might not be ensured in internal reporting Subst. grounds for WB to being put into a disadvantageous position WB no longer works with the employer	Yes
Cyprus	**No**, but provisions relating to WB in the Law on Termination of Employment L.24/1967 **Pending** before the Standing Committee on Legal Affairs**: government bill** and **private members' bill** on protection of WB	n/a	Both bills provide for specific conditions (but not specified in the answer) "good faith" requirement still under discussion	n/a Both **bills** extend protection to the **private and public** sectors

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
Czech Republic	**No**, but provisions in other laws such as **Labour Code** 262/2006 -Regulation of the Gov no. 145/2015 on reporting suspicion of **illegal behavior in civil service** -regulation of the Czech national Bank no. 123/2007 on WB in the **financial sector** -**Administrative Procedure** Code no. 500/2004 -**Criminal Procedure Code** no. 141/1961	**No general definition** -**financial sector** definition: "whistleblowing is a mechanism for reporting significant concerns of employees regarding the functionality and efficiency of controlling and management systems outside standard flow of information"	**No specific conditions** -however, WB should publicize **only information that cannot lead to** successful accusation of crime, such as slander, or to civil liability -Criminal Code regulates cases where **WB has a duty to go public** in order to avoid accusation of offence of non-prevention of crime	**Yes**
Denmark	**No**, but some WB-type provisions in the field of education, in the financial sector and in maritime transport	n/a	Going public not foreseen in the Financial Business Act; no specific conditions for WB in the maritime transport sector	n/a
Estonia	**No**, but WB provisions in **Anti-Corruption Act, Employer Contracts Act, Civil Service Act** Legislation likely in the future (reference to the future EU directive)	**No definition** -**Anti-Corruption Act does not take into account motivation,** but if the WB knowingly gives false information, the confidentiality of the notification will not be ensured	**No specific conditions**	**Yes, the Anti-Corruption Act extends to both** private and public sector, does not exclude national security employees explicitly, but there is no exception from prosecution for revealing classified information
Finland	**No,** but WB provisions **in Employment Contracts Act, Non-discrimination Act, Equality Act, sectoral legislation** such as Trade Secret Act, Act on Providing Insurances, Act on detecting and preventing money laundering and terrorist financing -new law likely in future (reference to the EU directive)	**No general definition** -however **sectoral** definitions, such as Section 5 Trade Secret Act (revealing misconduct), section 55 Act on the Processing of Personal Data in criminal Matters (procedure to report violations), section 72 Act on Providing Insurance (whistleblowing: procedures allowing employees to report any suspected violations of this Act)	**No specific conditions** -reference to the Constitution: freedom of expression and right of access to information as well as freedom of assembly	n/a

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
France	**Yes.** **Law no. 2016-1691** (9 December 2016) **on transparency, fight against corruption and modernization of economic life (Loi Sapin II)** treats the notion of WB -this law modified some provision in the Criminal Law and Employment Law -provision in other laws such as law on equality	"a natural person who discloses or reports, in a disinterested manner and in good faith, a crime or misdemeanour, a serious and manifest breach of an international commitment duly ratified by France, a unilateral act of an international organisation taken on the basis of such an undertaking, the law or the regulations, or a serious threat or prejudice to the general interest, of which he or she has personal knowledge."	"**in a disinterested manner and in good faith**" -information must not be disclosed "with intent to harm or with at least partial knowledge of the inaccuracy of the facts"	**Yes** National security workers dealt with in the Code of National Security
Georgia	**No,** Some provisions in the **Law on the Conflict of Interest and Corruption in Public Institutions (**2009) and the **Law on Public Service** -amendments to WB-related legislation in 2014, 2015 and 2017	Explicit definition of WB as current or former employees, who make an internal or an external public interest disclosure (to law enforcement bodies, the Prosecutor's Office, Public Defender, civil society and media)	good faith	**No**, WB protection extends only to the **public sector** In the ministries of defense and interior: to be regulated by special legislation
Germany	**No** Limited sectoral protections exist for civil servants, labour relations (health and safety complaints) and in the financial sector	Yes, very much so. Altruistic motivation necessary even in case of the WB making a complaint before law enforcement bodies, and for protection against criminal liability for disclosing a business or state secret.	public (external) whistleblowing is discouraged, except when internal whistleblowing is not feasible	Some limited types of whistleblowing are given some protection in both the public and the private sector
Greece	**No** The reply only speaks of witness protection (for certain types of crime)	n/a	n/a	n/a
Hungary	**Yes, Act CLXV on Complaints and Public Interest Disclosures** (2013, amended in 2015), Act on the Commissioner for Fundamental Rights (2011, amended in 2013), The Fundamental Law, Criminal Code, Act on Legal Aid, Labour Code, Act on the Prohibition of Unfair and Restrictive Market Practices	**No definition** -some **explanation**: "whistleblowing can relate to anything that is harmful or damaging to a community and the cessation of which would serve the interest of that community or the entire society" **-motivation does not matter**	**No specific conditions**	**Yes**

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
Lithuania	**Yes.** **Law on the Protection of Whistleblowers** adopted in 2017 and effective from 1 January 2019	"a person, who submits information concerning violation within an entity with which he/she is linked or has been linked by service, employment or contractual relationship, and who has been recognized as a whistleblower by the competent authority"	Conditions in article 4.8: information may be submitted publicly if -"urgent action is necessary to prevent threat to human life or environment and other ways of reporting are impossible due to a lack of time" -also in cases where timely actions are not taken upon notification -in other cases: submitted through employer's internal procedures or directly to the Prosecutor's Office	Yes National security related institutions also covered, however no protection by the state if WB discloses state or official secrets
Latvia	**Yes.** **Whistleblower Protection Law** adopted in October 2018, entry into force on 1 May 2019	A WB "is a person who has acquired reliable information or evidence of an offence or a threat through work" -WB may disclose cases of corruption, fraud, professional neglect, […] and other specific violations -falsified fact, confidential government info shall not fall under the category of protected disclosures	N/A	Yes
Luxembourg	**No.** Sectoral provisions in the **Law of 13 February 2011 strengthening the means to fight against corruption** -the government announced it would submit a bill to change the law of 2011 (following the LuxLeaks affair)	No definition	**WB cannot go public** Luxembourg transparency advocates **denounce** the fact that the alert can currently be addressed only to the employer or the Prosecutor's Office and only alerts made in the framework of employment relationships are protected	Yes National security employees have their own legal status (which is not public)

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
North Macedonia	**Yes.** **Law on Whistleblower Protection** adopted in November 2015 and amended in February 2018	"a person who does protected whistleblowing in good faith in accordance with the Law of Whistleblowers Protection, and belongs to the following categories" (related to work, such as employee, volunteer, business relation, person who uses services of an institution)	Three different procedures for protected whistleblowing: internal WB, external WB and **protected public WB** -> The protected public WB is possible only if the **internal or external procedures are not possible** or the WB does not receive information on follow-up or no measure is taken -the WB must not disclose any classified information or information which violates or endangers national security or personal data of a third party. -good faith required	Yes No provision excluding the national security workers from the scope of the Law
Republic of Moldova	**Yes.** **Law on Whistleblowers No. 122** adopted on 12.07.2018; sectoral WB protection clauses remain in other laws creation of special "WB protection authority"	WB = employee who performs a "warning on integrity", i.e. disclosure in good faith by an employee of an illegal practice which poses a threat or causes prejudice to the public interest. Good faith presumed	no	yes
Montenegro	**No**, but WB provisions in Law on prevention of corruption (2014/2017)	Any natural or legal person that submits a report on a threat to public interest that indicates the existence of corruption	no	yes
Norway	**No**, but WB – type provisions ("the right to notify censurable conditions") are included in the Working Environment Act 2007/2017)	No definition exists	The employee must proceed "responsibly", as further explained in a set of factors to be considered, including the duty to act with loyalty, the form of the notification, the position of the employee, potential damage to the employer's interests, soundness of the basis for the alert, motivation behind the notification.	Yes

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
Poland	**No**, but some WB protection foreseen in the 2018 Act on Counteracting Money Laundering and Terrorism Financing. Two Bills pending: One on Liability of collective entities (including for actions against WBs); and one on Openness of Public Life	Whistleblowing is defined as the anonymous notification of violations. .	Financial institutions are obliged by law to set up anonymous notification procedures. Protection conditional upon respecting these procedures. The Bills would extend the scope of WB protection considerably.	n/a
Portugal	**No**, but scattered provisions in the Companies, Criminal and Criminal Procedures Codes and the laws on Witness protection (1999) and Anti-corruption measures (2008) provide some protection in specific situations.	Portuguese law does not recognize whistleblowers. Reporting of corruption by a perpetrator or accomplice is rewarded by mitigation or waiver of punishment.	Reporting crimes to the public prosecutor is mandatory for public officials with respect to crimes they learn about during the exercise of their duties, but not when this implies a breach of professional secrecy.	n/a
Spain	**No, but specific measures exist in certain fields** such as "**complaint mailboxes**" in the fields of competition, criminal and labour & social security law, concerning securities markets and public sector contracts. **Private Members' Bill for a Comprehensive Law to Fight Corruption and Protect WB** (still awaiting the Mandatory Report by the Constitutional Commission of the Congress) **Regional laws**: Anti-Fraud Office of **Catalonia** (created in 2008), complaint mailbox; Law 2/2016 of **Castilla y León**; complaints and WB regulation in **Aragón** (Act 5/2017)	n/a (de lege lata) In the Private Members' Bill, WB are defined as: "senior officials, civil servants and other public sector personnel who reveal sufficiently truthful information on facts that may constitute a crime or administrative infraction, in particular crimes against the Public Administration or against the Public Treasury, or on facts that may prompt responsibilities"	n/a presumably, the "complaint mailbox" procedures must be used where they exist.	n/a

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
Sweden	**Yes**: Act on Special protection for workers against reprisals for whistleblowing concerning serious irregularities (**Whistleblowing Act,** 2016)	**No definition in the WB Act** Term "WB" **normally used** for a person inside an organization, for example a company or a public authority, who reports or raises an alarm regarding some sort of irregularities in the organization.	-internal WB as a rule -WB to an workers' organization (trade union) -external WB: protected only if WB first reported internally with no result, or for some other reason had justifiable cause to directly report externally -no protection if the employee raising an alarm makes him/herself guilty of a criminal offence -burden of proof on the employer that reprisals have not occurred	Yes
Switzerland	**No**, but other laws, such as the Law on the Employees of the Confederation (2011), the Criminal Procedure Code and rules in employment law, company law and data protection law provide limited protection to WB Draft laws pending since 2008 («to better regulate WB» and 2018 (reform of the Law on obligations)	**No definition**	External disclosure limited by the obligation of loyalty and protected only exceptionally.	Yes -clear rules for the public sector -not so clear rules for the private sector
Turkey	**No.** The answer refers to provisions in the Witness Protection Law (2007) and the Penal Code (2004)	n/a Criminal Procedure Law refers to "the witness whose identity shall not be revealed" Citizens are encouraged to report important crimes and corruption cases, reward is foreseen	n/a	n/a

Country	Integrated legislation for WB protection? Adoption/amendment date, Draft legislation pending?	Definition of whistleblowers? Does the WB's motivation matter?	Do specific conditions apply before the WB may go public?	Are both private and public sectors covered by WB protection laws?
United Kingdom	**Yes**, **Public Interest Disclosure Act** (1998) as amended and th**e Employment Rights Act** (ERA, 1996, last significant amendment in 2013)	**WB** is a person making a protected disclosure. The ERA applies to **workers**; extended to agency workers, police constables, but not to volunteers or job applicants or non-executive directors **Good faith** required: a disclosure will only be protected if the worker who made it reasonably believed it was in the **public interest**	PIDA and ERA offer protection to 'protected disclosures': particular kind of information disclosed in a particular way: -disclosed information must concern, for example, a criminal offence, environmental harm, miscarriage of justice, etc. -the disclosure must generally first be made internally or to a specially designated person; -Otherwise, certain criteria must be met (e.g. the worker reasonably believes he will be subjected to detriment)	Yes But no protection from criminal prosecution, e.g. for violation of Official Secrets Act.

Appendix 2 – Criteria for the effective protection of whistleblowers

In order to analyse legislation and practices relating to the protection of whistleblowers within Council of Europe member states, and to allow for the sharing of good practices, harmonised criteria are required. The approach underlying the criteria proposed below are inspired by the work of the Venice Commission on the rule of law checklist, and their content on the work and hearings carried out in preparation of this report.

The proposed self-assessment system is based on four rating levels:

– 0: nothing is in place in this area

– 1: an intention exists and action is underway to make progress in this area

– 2: elements are in place in the legislation in this area

– 3: implemented in law

1. **The legal framework for alerting and protecting whistleblowers**

1.1. Does the law include a broad definition of the circle of protected persons as whistleblowers, including pre- and post-contractual and unpaid professional relationships, shareholders and self-employed workers (e.g. suppliers and consultants)?

1.2. In the law, is the protection of whistleblowers subject to subjective and unforeseeable conditions, such as the purely altruistic motivation of the whistleblower, a duty of loyalty to the employer or the duty to act responsibly, without a clear and precise indication of what is expected of the potential whistleblower? In short, can a whistleblower have early confirmation that he or she meets the criteria required to benefit from the specific legislation protecting whistleblowers?

1.3. Does the law include clear reporting procedures and obligations for employers (private and public), who must create safe reporting channels?

1.4. Does the law guarantee anonymity for whistleblowers, but also for their intermediaries?

1.5. Is the choice between the internal and external channel (and as a last resort the media) left to the discretion of the whistleblower; in other words, can the whistleblower legally issue either an internal alert (via a specially created alert channel) or an external alert to the competent authorities (specialised regulatory authorities, judicial authorities, professional supervisory body)?

1.6. If no appropriate action is taken within a reasonable time after the alert, or in case of imminent danger to the public interest, or if the alert to the authorities would have no effect, is a public alert legally provided for, including in the media?

1.7. Are the confidentiality of the whistleblower's identity and the protection of the anonymous whistleblower in the event of discovery provided for in the law?

1.8. Does the law affirm criminal and civil immunity also for acts of acquisition of the reported information on condition such acts are motivated by issuing the alert?

1.9. Does the law provide for the prohibition of retaliation against whistleblowers in good faith without a loophole and their effective protection against criminal and civil legal proceedings, including "SLAPP" (gag) procedures?

1.10. Does the law provide for effective remedies and redress (damages, reinstatement, provisional measures)?

1.11. Is the right of defense guaranteed, if necessary by effective legal aid? If so, what is the legal basis of such a guarantee?

1.12. Does the law explicitly provide that the burden of proof lies on the persons attacking the whistleblowers, in particular by providing that:

1.12.1. the good faith of the whistleblower is explicitly presumed;

1.12.2. the person or institution pursuing the whistleblower must prove that they have suffered real damage, including in the field of national security;

1.12.3. in the event of a public alert, persons attacking the whistleblower must provide evidence that the conditions for a public alert were not met;

1.12.4. the reversal of the burden of proof in favour of whistleblowers also applies in the event of criminal proceedings for defamation;

1.13. Does the law provide for financial sanctions against those who try to prevent the alert (obstructing whistleblowing), retaliate against a whistleblower or disclose his identity? Are the sanctions provided for by law and are they sufficiently dissuasive?

1.14. In the rules governing the status of public officials, is there an obligation to account for any breach of the law? In other words, is a public servant expected to issue an alert when he or she is aware of a breach of the law?

1.15. Does the law require the appointment of a person mandated to receive alerts (sometimes the ethics officer) in public and private organizations of a certain size?

1.16. Does the law allow a legal person to be considered as a whistleblower and benefit from the related protections?

1.17. In the field of state secrets and in particular defense secrets, does specific legislation exist to prevent any alerts from being suppressed?

1.18. Is there an explicit specific right of asylum for whistleblowers?

2. **The actual situation of whistleblowers**

2.1. Has an independent authority been created in the field of alerts and whistleblower protection? And if so:

2.1.1. Does it have the task of accompanying whistleblowers, in particular by investigating allegations of retaliation and lack of follow-up to reports and, where appropriate, by restoring all the whistleblower's rights, including full compensation for all disadvantages suffered by the whistleblower?

2.1.2. Do its missions include ensuring that alerts issued have every chance of succeeding, whatever the interests at stake, by denouncing any maneuvers aimed at obstructing them; this role is particularly decisive in the event that powerful economic or political actors intervene and exercise disproportionate pressure on the alert and/or the whistleblower.

2.1.3. Does it have the task of liaising with the judicial authorities as a reliable interlocutor providing material and tangible elements in the context of judicial proceedings?

2.1.4. Does it provide whistleblowers with accessible information on the functioning of the judicial processes and the rules that apply to whistleblowers?

2.2. Does the independent authority, if it exists, contribute to a European network of similar authorities in other Council of Europe member states?

2.3. In practice, is effective follow-up provided within a reasonable time (usually three months), with feedback given to the whistleblower on the reports made?

2.4. Are there legal and psychological support measures for whistleblowers?

2.5. Is there a support fund to assist whistleblowers in view of the risks of precariousness they endure? Is this fund managed by a neutral entity such as the independent authority?

2.6. Has civil society taken up the issue of alerts and the protection of whistleblowers? Has it had any opportunities to participate in the co-construction of normative texts relating to the protection of whistleblowers?