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Resolution 2300 (2019)[1]

Improving the protection of whistle-blowers all over Europe

Parliamentary Assembly

1. The Parliamentary Assembly considers that whistle-blowers 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 whistle-blowers is also a matter of fundamental rights: it is based on freedom of expression and of information, which implies 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 whistle-blowers, 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 has happened too often 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 whistle-blowers, 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 whistle-blower 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 of which they have become aware 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) on the protection of "whistle-blowers") and Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers, many Council of Europe member States (Albania, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Hungary, Italy, 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 whistle-blowers 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 whistle-blowers in all of its member States. This draft directive, 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 European Council in March 2019.

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1. *Assembly debate* on 1 October 2019 (30th Sitting) (see Doc. 14958, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Sylvain Waserman). *Text adopted by the Assembly* on 1 October 2019 (30th Sitting).
See also Recommendation 2162 (2019).

8. The Assembly, in noting the following proposals, expresses its belief that these measures will only reach their full effect if they are underpinned by free news media, which cherish and defend their independence, and which are supported by legislation on press freedom and on public access to official records.

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

9.1. 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);

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

9.2.1. firstly, at the whistle-blower'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);

9.2.2. 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 effective;

9.3. a ban on retaliation against whistle-blowers, with no let-out clause and involving the effective protection of whistle-blowers acting in good faith against criminal and civil proceedings, including "strategic lawsuit against public participation" (SLAPP, or gagging) proceedings; the confidentiality of the whistle-blower's identity and the protection of an anonymous whistle-blower if their identity is discovered;

9.4. 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;

9.5. 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 whistle-blower and the reporting of information;

9.6. financial penalties against those who try to prevent whistle-blowing ("whistle-blowing inhibitors"), carry out retaliation against a whistle-blower or disclose their identity;

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

9.8. legal and psychological support for whistle-blowers;

9.9. the gathering and dissemination of information on the impact of reporting by whistle-blowers.

10. The proposal for a directive directly covers the reporting of breaches or abuses of European Union (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.

11. All EU member countries will be 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 standards.

12. 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 whistle-blowers and promote a genuine culture of transparency:

12.1. allowing legal entities to "blow the whistle" on illegal practices or enjoy protection as "whistle-blowing 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 whistle-blowers;

12.2. 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 an exception for defence of the public interest, and ensuring that the judges required to deal with the question of whether the public interest justifies "blowing the whistle" have access to all relevant information;

12.3. setting up an independent authority in each country, tasked with:

12.3.1. helping whistle-blowers, especially by investigating allegations of retaliation and failure to act on reports, and, where necessary, reinstating whistle-blowers and restoring all their rights, including full compensation for all the disadvantages they have suffered;

12.3.2. 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 whistle-blower;

12.3.3. 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 whistle-blower;

12.3.4. establishing a genuine European network with other independent authorities, making 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 whistle-blowers 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;

12.4. setting up a legal support fund, fed by the proceeds from fines imposed on individuals or organisations that have failed to comply with whistle-blowing legislation, with a view to financing high-quality legal support for whistle-blowers 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 whistle-blower, met previously established criteria;

12.5. ensuring that whistle-blowers and their relatives are also protected against retaliation perpetrated by third parties;

12.6. ensuring that the burden of proof lies with those who attack the whistle-blower, by providing in particular that:

12.6.1. there is an explicit presumption that the whistle-blower has acted in good faith;

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

12.6.3. in the case of a public disclosure, those attacking the whistle-blower must prove that the conditions for public disclosure were not met;

12.6.4. the reversal of the burden of proof in the whistle-blower's favour also applies in cases of criminal prosecution for defamation;

12.7. avoiding making the protection of whistle-blowers subject to subjective and unpredictable conditions, such as the whistle-blower'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 whistle-blower; it is essential for a whistle-blower to be able to have speedy confirmation that he or she meets the criteria required in order to benefit from the specific whistle-blowing 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 whistle-blower safe;

12.8. granting whistle-blowers the right of asylum, entitling them in exceptional cases to make their application from their place of stay abroad; the maturity of the legislation for the protection of whistle-blowers in their country of origin must be taken into account; these procedures specific to whistle-

blowers could be created under the auspices of the Council of Europe; in any case, it is essential to give some thought to the right to asylum in order to adapt it to the new challenges surrounding whistle-blowers;

12.9. granting, in connection with whistle-blowing, legal privilege to persons delegated by companies or administrative authorities to receive reports, the aim being to provide potential whistle-blowers with guarantees that these persons will if necessary be able to protect their identity;

12.10. 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;

12.11. ensuring that the criminalisation of acts involving the acquisition of information by whistle-blowers 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;

12.12. gathering and broadly disseminating, in co-operation with the independent authorities of each country, information on the functioning of mechanisms for the protection of whistle-blowers (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;

12.13. fostering the emergence in civil society of an ecosystem that encourages support for whistle-blowers, 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 whistle-blowers and back them in their efforts, as well as to bring about changes in national legislation. In the context of whistle-blowing and the protection of whistle-blowers, the drafting of legislation together with civil society is a particularly appropriate approach.

13. The Assembly invites:

13.1. Council of Europe member States that are also members of the EU to:

13.1.1. 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 whistle-blowers, including for those who “blow the whistle” on breaches of national law or threats to the public interest at national level;

13.1.2. 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 whistle-blowers in order to form a European network and firmly embed the logic of whistle-blowing in our democratic systems, as well as to foster the emergence of civil society players engaged in this area;

13.2. Council of Europe member States that are not members of the EU, 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 whistle-blowers in their countries the same level of protection as those from an EU member State;

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

13.4. all Assembly members to raise the awareness of their national parliamentary colleagues concerning the importance of improving the management of whistle-blowers’ disclosures and giving whistle-blowers 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.

14. The Assembly supports and encourages the appointment of a general rapporteur on whistle-blowers, who will be able to speak out on the matter when necessary, for instance in individual cases.