PROTECTION OF WHISTLEBLOWERS

Evaluation report on Recommendation CM/Rec(2014)7 of the Committee of Ministers to member states

Prepared by Anna Myers, Consultant, under the supervision of the European Committee on Legal Co-operation (CDCJ)

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EVALUATION REPORT ON RECOMMENDATION CM/REC(2014)7 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROTECTION OF WHISTLEBLOWERS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

This report is designed to provide a snapshot of the current state of play for the protection of whistleblowers in Council Europe member states in light of the adoption of Recommendation CM/Rec(2014)7 on the protection of whistleblowers. The report reviews the responses of 23 states to the questionnaire of the European Committee on Legal Co-operation (CDCJ), highlighting where progress has been made and also where work remains. The majority of the respondent have implemented specific provisions on whistleblower protection that vary from legislating for centralised systems of reporting, investigating and protections, with others describing protections that are specific to workplace whistleblowers that build on existing institutional, legal and normative frameworks. A few continue to rely on provisions in their prosecutorial or criminal law systems that implicitly cover whistleblowers who fall within the definition of victims or witnesses to crime.

The report reviews the evolution of the jurisprudence of the European Court of Human Rights (the Court) with respect to protecting whistleblowers. The report discusses some of the key changes that policy makers have made since the decision in the leading case of *Guja v. Moldova* and that the Court itself has begun to recognise in its more recent cases. This includes relying on the standard of a reasonable belief in the truth of the information rather than applying a good faith test to whistleblowers seeking access to judicial protections and remedies and an increasing. Other changes are apparent in more recent multi-lateral and legal instruments such as EU Directive 2019 and the Recommendation Anti-Bribery. The former focuses on certain standards required by employers and competent authorities in setting up their whistleblowing arrangements and sanctions against those who attempt to hinder whistleblowers or who breach their confidentiality and suggests that financial incentives could be considered to encourage reporting of bribery in the latter.

The report briefly also reviews the work carried out at regional level (Council of Europe and European Union) and at international level (Organisation for Economic Co-operation and Development (OECD), the United Nations and the International Standardization Organisation (ISO), in the light of the principles of CM/Rec(2014)7.

The report concludes by outlining a number of issues that the CDCJ might wish to examine further in order to determine whether an activity should be decided upon to update Recommendation CM/Rec(2014)7 on the protection of whistleblowers and its Explanatory Memorandum in order to ensure that comprehensive and up-to-date guidance is available to all states and their practitioners.

I. INTRODUCTION

1. At its plenary meeting in November 2020, the European Committee on Legal Co-operation (CDCJ) agreed to evaluate the effectiveness of Recommendation CM/Rec(2014)7 on the protection of whistleblowers (hereinafter the "Recommendation CM/Rec(2014)7"), including its implementation in the member states. This is in keeping with a reply from the Committee of Ministers to the Parliamentary Assembly that it believed it was more appropriate for the Council of Europe to *"support the promotion and implementation of Recommendation CM/Rec(2014)7 "* and to *"guide member states when reviewing relevant legislation and institutional set-ups"* than it was to begin preparations for a convention.[1]

2. In order to facilitate this current assessment, the CDCJ invited member states on 12 March 2021 to respond to an evaluation questionnaire. This report sets out the key highlights from the questionnaire (Section II); examines relevant case law from the European Court of Human Rights (Section III); and reviews the other instruments on the protection of whistleblowers that apply to member states (Section IV). Section V identifies some of the good practices in member states and Section VI sets out further areas and issues for the CDCJ to examine further considering recent developments in Europe.

3. It is worth noting that, in 2019, the Parliamentary Assembly reiterated 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 that it made in 2015.[2] The Committee of Ministers reaffirmed the importance of Recommendation CM/Rec(2014)7. While this report does not examine the 2019 Assembly Recommendation and accompanying report in detail, it does identify similar gaps and areas for further examination by the CDCJ.

II. SUMMARY HIGHLIGHTS FROM QUESTIONNAIRE RESPONSES

1) General Overview

4. Below is a summary of the key findings from the questionnaire responses. Twenty-three[3] states have responded (48%).

[1] Committee of Ministers Reply to Parliamentary Assembly on Recommendation 2073 (2015), §§ 4 and 5, Document 13949, 25 January 2016.
[2] Parliamentary Assembly Resolution 2060 (2015) and Recommendation 2073 (2015) on "Improving the protection of whistle-blowers"
[3] Armenia; Belgium; Croatia; Czech Republic; Denmark; Finland; France; Georgia; Germany; Latvia; Lithuania; Luxembourg; Monaco; Netherlands; Poland; Republic of Moldova; Romania; Russian Federation (member state at the time of circulation of the questionnaire); Serbia; Spain; Sweden; Ukraine; United Kingdom.

5. A majority of states who responded to the questionnaire in 2021 are also members of the European Union and are obliged to transpose the EU Directive on the protection of persons who report breaches of Union law (hereinafter the "EU Directive 2019") which was adopted in 2019.[4] Whistleblower protection was therefore already on their legislative agendas when they responded to the CDCJ questionnaire as the deadline for transposing the Directive into national legal systems was the 17 December of 2021.

2) Highlights from Questionnaire Responses

6. Highlights have been grouped according to the main issues arising in the responses. While this summary is not an exhaustive review of all the information provided, it does provide a reliable snapshot of the state of play in the protections available to whistleblowers in the respondent states and demonstrates that while steady progress has been made since the Recommendation CM/Rec(2014)7 was adopted, there is still important work to be done. While the protective measures contained in Recommendation CM/Rec(2014)7 are primarily administrative in nature, and regardless of the anti-corruption measures in place, states should remain cognisant of the importance of robust organisational policies, and protections from criminal and civil liability.

i. Self-identified protections for whistleblowers

7. All 23 of the respondents identified some form of protections for whistleblowers in their legal systems, although seven acknowledged that they did not yet have a dedicated law to protect whistleblowers (**Czech Republic, Denmark, Finland, Luxembourg, Monaco, Russian Federation and Poland**) and one reported the concept of a "whistleblower" was not officially recognised (**Russian Federation**). That said, 18 respondents stated that the Recommendation CM/Rec(2014)7 had been very useful or adequate in helping them to review their national systems. The **Czech Republic** noted that the Recommendation CM/Rec(2014)7 had been the basis for attempts to develop and adopt a comprehensive law to protect whistleblowers since 2015 although not successfully so far. Three states (**Serbia, Romania, and the United Kingdom**) stated that the Recommendation CM/Rec(2014)7 had not been directly used for their whistleblower protection laws as their adoption pre-dated it. However, later, all three stated that ongoing reviews by the CDCJ of national systems with reference to the Recommendation CM/Rec(2014)7 would be valuable.

8. Ten respondents stated they had developed new systems and nine reported having either built on existing systems or did both. Of the ten that established new systems, one of these was an entirely new institution (the Whistleblowers Authority[5] in **the Netherlands** in 2016) and another instituted new channels (for example, a new online

[4] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
[5] More information about the Dutch "*Huis voor klokkenluiders*".

reporting platform in **Armenia** managed by the Prosecutor General's Office in 2018). Of the nine that stated they built on existing systems, two (**Russian Federation and Spain**) referred to existing systems or protections not intended specifically for whistleblowers but that offer some form of protection to them, primarily via laws governing the protection of victims and witnesses in criminal proceedings.

9. Others, like **Ukraine, Georgia**, and the **Republic of Moldova**, gave new powers to existing institutions to handle whistleblower cases specifically. In **Ukraine**, for example, the National Anti-Corruption Bureau (NACB) can receive reports of suspected of corruption and persons can report both confidentially and anonymously. **Ukraine** amended several other laws, including labour law, and civil and criminal procedure rules to strengthen protections and a draft law to create a single secure portal for whistleblowing to ensure the "high-quality streamlining of the procedure for considering reports of corruption" as well a guarantee of legal protection of whistleblowers through full access to lawyers in the free legal aid system is currently before Parliament.

ii. Impact of Recommendation CM/Rec(2014)7

10. Fourteen respondents have introduced some form of whistleblower protection or have already reviewed or amended their existing laws.[6] Nine of these stated specifically that Recommendation CM/Rec(2014)7 aided them in developing their laws (**Belgium, Croatia, France, Georgia, Latvia, Republic of Moldova, Lithuania, Netherlands, Sweden, Ukraine**) and two described how several of the protections they had in place related to or fulfilled the Principles of Recommendation CM/Rec(2014)7 (**France and the United Kingdom**). Two stated that they had used Recommendation CM/Rec(2014)7 to draft legal proposals (**Czech Republic and Monaco**) not yet adopted, and two (**Luxembourg and the Netherlands**) pointed out that the EU Directive builds on the Principles of Recommendation CM/Rec(2014)7. Of the seven that said they do not have, or have not yet introduced, dedicated whistleblower protection laws, four are now doing so under their obligations to transpose the EU Directive 2019.

iii. Encouraging open and confidential reporting

11. In relation to how their national systems foster an environment that encourages reporting or disclosing information in an open manner and potentially avoiding the need for anonymous reporting, 19 responded.[7] One of these (**Monaco**) described how a proposed law would meet this goal. The majority responded by describing how their frameworks offered or guaranteed confidentiality to the whistleblower; two (**Spain and the**

[6] Armenia (limited to public sector); Belgium (limited to federal public sector); Croatia; France; Georgia; Latvia; Lithuania; Republic of Moldova; Netherlands; Romania; Serbia; Sweden; Ukraine; United Kingdom.
[7] Armenia, Belgium, Croatia, Czech Republic, Finland, France, Georgia, Latvia, Lithuania, Republic of Moldova, Monaco, Netherlands, Romania, Russian Federation, Serbia, Spain, Sweden, Ukraine, United Kingdom.

Russian Federation) described these in relation to criminal cases and protective measures during official investigations or at trial for witnesses. One respondent (**Czech Republic**) was of the firm opinion that ensuring whistleblowers can make anonymous reports would have a positive impact on public confidence without diminishing the need to ensure confidentiality and protections for anyone whose identity became known. **France** suggested that Principle 18 on confidentiality could be expanded, as in the French law, to ensure that anyone implicated in a disclosure is not impugned prior to its being substantiated,[8] and that information is not disclosed that renders the whistleblower vulnerable to reprisals.

12. Some of the respondent described aspects of their systems that increased confidence in reporting and can be viewed as interesting or good practices. These include a wide range of protections offered to whistleblowers and their families (**Lithuania and Ukraine**); a reverse burden of proof on the employer (**Georgia, Lithuania, Republic of Moldova and Romania**); engaging in awareness-raising campaigns (**Latvia, Georgia, Republic of Moldova**); providing legal aid (**Lithuania**); the requirement for judges to be specially trained before being allowed to hear whistleblower claims and claimants having access to swift injunctive relief at an early stage to enforce strong interim protective measures (**Serbia**).

iv. Role of civil society

13. Only one state (**Serbia**) spoke specifically on the importance of engaging with the work of civil society organisations who have been developing global best practices in the field of whistleblower protection.

v. Trends

14. Member states were asked about recent or general trends that required particular attention. Of the 15 that reported,[9] five specifically cited the requirement to transpose the EU Directive 2019 as a trend. As stated earlier, 14 of the 22 respondents are also members of the EU. One (**Finland**) stated that while various reporting channels had been established in different sectors over the years, these lacked the protections envisaged by the EU Directive 2019 and they are currently using Recommendation CM/Rec(2014)7 to assist in developing the proposals to meet the new EU requirements.

15. Several responses identified trends via data provided or collected by competent authorities or the courts, or research done to gauge awareness within the workforce or

[8] Principle 10 on protections for those prejudiced by a disclosure may also be relevant here.
[9] Belgium, Czech Republic, Finland, France, Georgia, Latvia, Lithuania, Republic of Moldova, Netherlands, Poland, Romania, Serbia, Sweden, Ukraine and the United Kingdom.

the public.[10] Early research findings in the **Republic of Moldova** and parliamentary reports from the **Netherlands** identified the need to raise awareness and confidence among civil servants about their rights to report.

16. While several respondents cited a general lack of public understanding of the term "whistleblower" and the value of whistleblowing as an act of public service, others reported a steady increase in public awareness of whistleblowing over the years (including since the adoption of Recommendation CM/Rec(2014)7). They mentioned there is renewed interest, particularly from national stakeholders, with the adoption of the EU Directive 2019.

vi. Self-identified challenges to protecting whistleblowers

17. Seven respondents said there were no challenges, or none of which they were aware to implementing Recommendation CM/Rec(2014)7.[11] Four stated they could not comment as they had yet to implement a law.[12] One (**Germany**) stated it had not implemented Recommendation CM/Rec(2014)7 but that it was now developing a law in response to the EU Directive 2019, and another (**Finland**) said it was a big challenge to have to develop new systems in light of both the EU Directive 2019 and Recommendation CM/Rec(2014)7.

18. Of the three that described specific challenges, two mentioned a lack of public understanding and the negative connotations still associated with the term "whistleblower" (**Georgia and Romania**). This lack of understanding was cited as the reason that so many non-work-related reports were made, and one respondent (**Latvia**) stated that because so few people understood that public disclosures could be protected, such disclosures were rare.

vii. Monitoring whistleblower protections

19. Most of the respondents stated that they could access some information about cases and ten respondents were able to provide specific case data and examples. Two described cases that can be understood as dealing with whistleblower issues, but which were not acknowledged as such by their national courts as there are no legal protections for whistleblowers in those states. One (**Czech Republic**) cited a case that focused on the scope of information that could legitimately be disclosed in the public interest even where it could harm a corporation such as with respect to trade secrets; and the other (**Russian Federation**) described a criminal case against state officials for unlawfully detaining and investigating a journalist who is well-known for reporting on the lawfulness of the income of some public officials.

[10] For example, Georgia, Latvia, Lithuania, Romania, Serbia and the United Kingdom.
[11] Belgium, Croatia, France, Sweden, Russian Federation, Ukraine and the United Kingdom.
[12] Luxembourg, Monaco, Poland and Spain.

20. **Sweden** noted that while only a handful of cases have been heard at court, this does not preclude cases at the organisational level where the largest majority of cases are dealt with in Sweden. **The Netherlands** reported that the Whistleblowers Authority Act (2016) was evaluated in 2020[13] but further evaluations are needed to fully determine its effectiveness. The Dutch researchers indicated that a shift in the burden of proof will likely contribute to improved legal protection for whistleblowers, a requirement of the EU Directive 2019.

21. Four respondents provided case examples (**Republic of Moldova, the Netherlands, Romania, and Ukraine**) that reveal the range of issues reported or disclosed, and how national authorities have handled these cases and with what powers. The case studies, set out in more detail in **Annex I**, show how different models are currently working and provide an interesting snapshot of steps taken across Europe. They also reveal how the focus of many governments has been on promoting whistleblowing within an anti-corruption rather than a wider public interest framework. **Romania** is the only state to have adopted a law prior to Recommendation CM/Rec(2014)7 that has not been amended since. A brief description of these four models is set out below.

22. Both the **Republic of Moldova** and **Ukraine** have provided their national anti-corruption bodies with powers to receive reports from whistleblowers and to investigate their concerns. The **Ukrainian** National Anti-Corruption Bureau (NACB) is empowered to address both the substance of a report and protecting those who make such reports.[14] In the **Republic of Moldova**, the Peoples' Advocate or "Ombuds Office" is separately entrusted with protecting whistleblowers and receives and investigates complaints about retaliation,[15] although it is the National Anti-Corruption Centre (NAC) that runs a hotline, receives and investigates disclosures of corruption and can pass reports unrelated to corruption to the relevant authority. The case studies in **Annex I** show how each of their authorities can apply or recommend administrative measures to protect whistleblowers and some of the challenges faced by these bodies when supporting whistleblowers through the courts.

23. The Moldovan law states that the good faith of the whistleblower is presumed unless proven otherwise and that it is up to the employer to demonstrate that any measures against an employee are unrelated to their having made a whistleblowing disclosure or to their involvement in any way with a whistleblowing disclosure.[16] The

[13] See Evaluation Report.
[14] Law of Ukraine on Amendments to the Law of Ukraine "On Prevention of Corruption" concerning Detectors of Corruption (Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2019, No. 50, p. 356, as amended in 2020).
[15] Law No. 122 of 12 July 2018 on whistleblowers.
[16] Law no. 122/2018, Article 18, para. 5.

Ukrainian law provides that in cases of alleged unfair workplace measures being taken against the whistleblower *"the burden of proving that decisions taken - were not motivated by the actions of the plaintiff or his relatives in the implementation of this notice, relies on the defendant."*[17]

24. The Romanian case studies focus on the public sector to which the Romanian's Whistleblower's Law applies.[18] The law is unique with respect to others in Europe in that it sets out the principles that govern the protection of "public interest warnings"[19] and separately, the types of violations that qualify as "public interest warnings". It also lists in non-hierarchical order the range of entities to whom disclosures can be made which includes trade unions, non-governmental organisations, and the mass-media.[20] Public officials can request the media to be present at any disciplinary meetings they believe are the result of having made a "public interest warning".

25. **The** Netherlands is one of the few states to establish a dedicated whistleblowing authority not specifically linked to anti-corruption. The *Huis voor Klokkenluiders* (the "Dutch Whistleblowers Authority")[21] provides free advice and support to whistleblowers and investigates whistleblowers' disclosures if requested (and there is no other authority in charge of matter). In response to one or more requests for advice from whistleblowers, the Authority can also investigate complaints of retaliation or abuses.

III. EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

26. This section briefly reviews the evolving jurisprudence of the European Court of Human Rights (hereinafter "the Court") with respect to whistleblowing and related aspects of Article 10 on the right to freedom of expression and the public's right to know.

[17] Supra, note 14, part three of Article 81.
[18] Law No. 571/2004 on the protection of staff of public authorities, public institutions and other units which report breaches of the law, dated 14 December 2004 (hereinafter "Romanian Whistleblower's Law").
[19] These include the principles of legality; the supremacy of the public interest; responsibility to notify; non-punishment for those reporting violations (i.e., abusing that principle by severely sanctioning for unrelated misconduct); good administration; good behaviour; balance (mitigation); the good faith of both parties.
[20] Supra, note 17, Article 6. These are to the: a) hierarchical superior; b) manager of the public authority; c) discipline committees of the public authority; d) judicial authorities; e) t bodies in charge of identifying conflicts of interests and incompatibilities; f) the parliamentary commissions; g) mass-media; h) professional trade union or employee association; i) non-governmental bodies.
[21] The Whistleblowers Authority Act (*Wet Huis voor Klokkenluiders*) (Wet HvK) came into effect on 1 July 2016.

1) Criteria established to benefit from the protection of Article 10

27. The decision of the Grand Chamber of the Court in *Guja v. Moldova* [22] is the leading case from the Court and sets out the elements that should be considered when determining whether an interference with Article 10 right is "necessary in a democratic society" under the European Convention on Human Rights.

28. In Fuentes *Bobo v. Spain,*[23] the Court has held that *"Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can apply to relations governed by private law [...] and that "member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals."*

29. Article 10 is a restricted right, so interference with a whistleblower's freedom of expression is permitted provided that: a) it is prescribed by law; b) the interference pursues a legitimate aim; and c) it is "necessary in a democratic society". The last criterion is normally the most complex to resolve.

30. In *The Sunday Times v. the United Kingdom (no. 1),* the Court had to look whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10 (2) (art. 10-2)" [24] In doing so, the Court had to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

31. In *Guja v. Moldova*, the Court had to consider a case in which a civil servant had publicly disclosed internal information. Mr Guja was Head of the Press Department of the Prosecutor General's Office. In 2003, shortly after a speech by the President of the Republic of Moldova stressing the need to fight corruption and calling on law-enforcement officers to disregard undue pressure from public officials, the applicant passed to a national newspaper two letters received by the Prosecutor's office. Neither letter was marked confidential. The first was a note from the Deputy Speaker of Parliament to the Prosecutor General enclosing a letter from four police officers who wished to apply for protection from prosecution after being charged with the illegal detention and ill-treatment of detainees. The note was critical of the Prosecutor General's Office, and commended the police officers, saying they were "from one of the best teams" at the ministry. It ended with a request for the Prosecutor General to "get personally involved in th[e] case and to solve it in strict compliance with the law". The second letter was from a deputy minister to a deputy prosecutor general and indicated that one of the police officers had a previous conviction for assaulting prisoners but had later been amnestied. The letters were published along with an article describing the President's anti-corruption drive and noting

[22] *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.
[23] *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000.
[24] *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30.

that abuse of power was widespread in the Republic of Moldova. Mr Guja was fired after admitting he passed the letters to the newspaper stating he did so in line with the President's anti-corruption drive and to create a positive image of the Prosecutor's Office, and that the letters were not confidential. He was dismissed for failing to consult colleagues and for disclosing allegedly secret documents. He was unsuccessful in his application to the civil courts for reinstatement.[25]

32. The Court *reiterated* that according to the Court's case-law, Article 10 (2) leaves little room for restrictions on debate on matters of general interest,[26] that exceptions to the general principles deriving from Article 10 (1) must be interpreted narrowly, and the need for restricting someone's freedom of expression must be convincingly established.[27] The Court affirmed the importance of granting protection to whistleblowers due to their vital role in democratic societies as a *"category of persons, aware of what is happening in the workplace and therefore best placed to act in the public interest by alerting their employer or the public at large."*[28]

33. The Court established six criteria that need to be met to benefit from the protection of Article 10 of the Convention in cases concerning public sector employees, but which can also apply to private law employment relationships. After assessing the case in relation to these six criteria, the Court determined unanimously that the interference with Mr Guja's right to freedom of expression, in particular his freedom to impart information, was not "necessary in a democratic society".

34. The six criteria are set out below and discussed in the following paragraphs considering some of legal and policy developments since this decision was made:

1 - The public interest in the disclosed information
2 - Whether the applicant had alternative channels for making the disclosure.
3 - The authenticity of the disclosed information
4 - The good faith of the applicant
5 - The damage, if any, suffered by the public authority and whether this outweighed the public interest
6 - The severity of the sanction imposed on the applicant and its consequences.

35. With respect to considering the public interest in the disclosure, the Court noted that *"in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and*

[25] See Information Note on the Court's case-law No. 105 (February 2008).
[26] See also *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV.
[27] See *Hertel v. Switzerland*, 25 August 1998, § 46, Reports of Judgments and Decisions 1998-VI, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II, and *Guja v. Moldova*, cited above, § 69.
[28] *Guja v. Moldova*, note 22, § 72.

public opinion. *The interest which the public may have in the information can sometimes be so strong as to override even a legally imposed duty of confidence.*"[29]

36. In *Sosinowska v. Poland*, the Court focused on the extent to which professional obligations can act as a blanket barrier to freedom of expression. The case concerned a specialist working in a hospital in Poland who was dismissed for "persistently expressing negative opinions about [another doctor's] qualifications in the presence of other doctors, medical staff and even - patients" and thus failed to comply with her duties under the Code of Medical Ethics. The Court found a breach of Article 10 on the basis Ms Sosinowska had been penalised for having "*expressed concerns - about the quality of medical care given to patients on her superior's orders*" and that her opinion was "*a critical assessment, from a medical point of view, of the treatment received*" from that doctor. The Court concluded the information concerned issues of public interest and found the interference was not proportionate to the legitimate aim pursued and therefore not "necessary in a democratic society."[30]

37. In discussing whether the applicant had alternative channels for making the disclosure, the Court in *Guja* specifically considered the role of civil servants, their access to information and the strength of their duty of discretion given that government may have an interest in keeping certain information confidential or secret for legitimate reasons. Thus, when assessing whether the restriction on freedom of expression is proportionate - the Court must take into account whether there was available "any other effective means of remedying the wrongdoing which he intended to uncover." This would include first alerting a superior or a competent body and "*only where this is clearly impracticable - the information could, as a last resort, be disclosed to the public...".*[31]

38. In setting out three broad channels for public interest reporting and disclosure (internally, to a relevant authority, and to the public) Principle 14 of Recommendation CM/Rec(2014)7 states that the "individual circumstances of each case will determine the most appropriate channel." While there is no explicit hierarchy in reporting channels in the EU Directive, Article 15 sets out the pre-conditions and time frames that individuals must fulfil to qualify for protection for making a public disclosure. The first is automatic in that having first reported the information internally and externally, or directly externally, and no appropriate action was taken within the allotted timeframe, individuals are protected for going public. The second sets out two types of circumstances in which an applicant can qualify for protection. When he or she has reasonable grounds to believe 1) there is imminent or manifest danger to the public interest, or there is an emergency or risk of irreversible damage; or 2) in the case of reporting to a relevant authority, there is a risk of retaliation, or a low-risk prospect of the matter being properly addressed.

[29] *Guja v. Moldova*, note 22, § 74. See also *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I, and *Radio Twist, a.s. v. Slovakia*, no. 62202/00, ECHR 2006-XV.
[30] *Sosinowska v. Poland, no. 10247/09, § 79 and § 83, 18 October 2011.*
[31] *Guja v. Moldova*, note 22, § 73.

39. Finally, Article 15 (2) states that Article 15 will not apply to cases where public disclosures are protected pursuant to specific national provisions relating to freedom of expression and information. This is understood to apply to Sweden where the Constitution protects the right of public servants to provide information – as a general rule, even confidential information – to the media for publication.

40. The Court stated with respect to the authenticity of the information, that freedom of expression carries with it duties and responsibilities, and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.

41. In identifying good faith of the applicant as one of the factors to take into consideration, the Court stated, for example, that *"an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection*." [32]

42. The issue of "good faith" has come under scrutiny since the *Guja* decision and it has been excluded from many of the important legal instruments since on the basis that it creates an unfair bar to accessing protections. The Court in *Bucur and Toma v. Romania* [33] , for example, took into consideration Parliamentary Assembly Resolution 1729 (2010)[34] and the need to protect whistleblowers on the basis that they had "reasonable grounds" to believe that the information disclosed was true. In *Soares* v *Portugal*[35], the Court found that disclosing as fact allegations someone knows to be based on "mere" rumour, without taking any steps to verify the information, meant that a finding of that someone did not act in good faith was justified. The Court distinguished this from the case where an individual can show they had a reasonable belief the information they disclosed was true. In 2014, "good faith" was omitted from the Recommendation CM/Rec(2014)7 so as "*to preclude either the motive of the whistleblower in making the report or disclosure of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is protected*."[36] Similarly, under the EU Directive 2019, reporting persons qualify for protection so long as they have reasonable grounds to believe that the information was true at the time of reporting.[37]

43. While the motives of a whistleblower may be of concern to prosecutors or competent authorities with respect to credibility concerns, as a matter of public policy what matters is the substance of the disclosures and having access to more information, not less. In 2013, the United Kingdom removed "good faith" from the Public Interest Disclosure

[32] *Guja v. Moldova*, note 22, § 77.
[33] *Bucur and Toma v. Romania*, no. 40238/02, § 107, 8 January 2013.
[34] Parliamentary Assembly Resolution 1729 (2010) on the protection of "whistle-blowers", § 6.2.4.
[35] *Soares v. Portugal*, no. 79972/12, § 46, 21 June 2016.
[36] See Recommendation CM/Rec(2014)7 - Explanatory Memorandum, paragraph 85.
[37] See EU Directive 2019/1937 on the protection of reporting persons Article 6 (1) (a).

Act 1998 as an element to consider when qualifying for protections. However, a Tribunal can reduce compensation for any unfair dismissal (by no more than 25%) if it considers that a disclosure was not made in good faith and that it is just and equitable to do so in all the circumstances.[38]

44. With respect to the damage, if any, suffered by the public authority as a result of the disclosure and whether they outweighed the public interest, this has been considered in all the whistleblowing cases since, particularly those that have strengthened the protection of whistleblowers. Two examples are *Bucur and Toma v. Romania*[39] involving the intelligence services and *Heinisch v. Germany*[40] involving a nurse in a partially state-owned company.

45. In *Bucur* and *Toma v. Romania*, the first applicant, M. Bucur, worked in the telephone communications surveillance and recording department of a military unit of the Romanian Intelligence Service (RIS). There, he came across several irregularities including the phone tapping of many journalists, politicians and businessmen, especially after some high-profile news stories received wide media coverage. M. Bucur affirmed that he reported the irregularities to his colleagues and to the head of department, who allegedly reprimanded him. When no one showed further interest in the matter, M. Bucur contacted an MP (a member of the RIS parliamentary supervisory commission) who said the best way to let people know what he had discovered was to hold a press conference. The MP said telling the parliamentary commission would serve no purpose in view of the ties between the chairman of the commission and the director of the RIS. On 13 May 1996, M. Bucur held a press conference which made headline news nationally and internationally. He justified his conduct by the desire to see the laws of his state, particularly the Constitution, respected. In July criminal proceedings were brought against him. Amongst other things, he was accused of gathering and imparting secret information in the course of his duty. In 1998 he was given a two-year suspended prison sentence.[41]

46. The Court stressed the high public interest value of information revealing abuses committed by high-level officials that affected the democratic foundations of the state. Given that the applicant had no other effective means of disclosing the information and the information was accurate, the Court found Bucur's prosecution was not necessary in a democratic society.

47. In *Heinisch v. Germany*, the applicant, Ms Heinisch was a geriatric nurse working home run by a company majority-owned by the Berlin Land. After making numerous complaints with her colleagues to management about staff shortages and poor care processes, and after an inspection found serious shortcomings in care provision,

[38] See Part 2 of the Enterprise and Regulatory Reform Act 2013, Chapter 24, Articles 17 and 18 relating to protected disclosures respectively.
[39] *Bucur and Toma v. Romania*, no. 40238/02, 8 January 2013.
[40] *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).
[41] See Information Note on the Court's case-law No. 159 (January 2013).

Heinisch's lawyer wrote to the employer asking how they intended to avoid criminal liability. The employer rejected the accusations, and the lawyer lodged a criminal complaint with the public prosecutor (who closed its preliminary investigations shortly after opening it). After being initially dismissed for repeated sick leave absences, Heinisch's colleagues and trade union circulated a leaflet denouncing her dismissal as a "political disciplinary measure taken in order to gag those employed" and mentioned the criminal complaint. The company, previously unaware of the complaint, then dismissed Heinisch without notice, suspecting she orchestrated the leaflet. The domestic courts rejected Heinisch's claims in respect of her dismissal after finding that her criminal complaint provided a "compelling reason" for terminating her employment without notice.[42]

48. The Court held that the public interest in having information about shortcomings in the provision of institutional care for the elderly by a majority state-funded company was so important that it outweighed the interest in protecting the latter's business reputation and interests. The case of *Halet v. Luxembourg* (discussed in the next section) is one of the first cases before the Court that involves a fully private company and raises some important questions about the interests at stake when examining whether the harm done to an employer outweighs the public interest benefit in disclosure.

49. The severity and consequences of the sanction imposed was considered in the cases mentioned above and more recently in *Catalan v. Romania*[43] in which a civil servant was dismissed for "breaching his duty of reserve" after publishing an article related to the area of his research at the National Council for the Study of Securitate Archives (CNSAS) (the former Communist-era secret police) where he worked.[44] The Court was unanimous in finding this was not a case of a journalist's right to protect their source or of a whistleblower concerned about the activities of his employer. The interference with the applicant's freedom of expression was found to be prescribed by law, and legitimate with respect to the aims of the CNAS to prevent the disclosure of confidential information and to protect the rights of others. Finally, the Court reasoned that while harsh, the sanction of dismissal was not disproportionate in part because he was able to work in the civil service.

2) The right of journalists to protect whistleblowers and whether a non-governmental organisation can be considered as a whistleblower

50. Other important cases that relate to the whistleblowing ecosystem, freedom of expression and the public's right to know, include a journalist's right to protect their

[42] See Information Note on the Court's case-law No. 143 (July 2011).
[43] *Catalan v. Romania*, no. 13003/04, 9 January 2018.
[44] See Information Note on the Court's case-law 214 (January 2018).

(whistleblower) sources under Article 10 and whether a legal entity, such as a non-governmental organisation can be regarded as a whistleblower. Two examples are set out below.

51. In the case of *Tillack v. Belgium*,[45] Hans-Martin Tillack, a journalist working for *Der Spiegel*, published articles on alleged irregularities in Eurostat and in the European Commission's anti-fraud office (OLAF) apparently based on information from sources from within OLAF. OLAF's internal investigation failed to uncover the official's identity and OLAF filed a complaint with the Belgian authorities alleging bribery.

52. The Court found Belgium to be in violation of Article 10 based on the searches and seizures carried out by the Belgian police at the home and office of the journalist. It noted that OLAF's allegation of bribery was based on "mere rumours" - for which OLAF was subsequently criticised by the European Ombudsman. The Court stressed that the right of journalists to protect their sources was not a "mere privilege to be granted or taken away" but fundamental to the freedom of the press. It found the national margin of appreciation circumscribed by the interest of a democratic society in ensuring and maintaining a free press. The Council of Europe Parliamentary Assembly Report of 2009 stated that *"this judgment should incite lawmakers throughout Europe to reflect on the importance of the media as an external voice for whistle-blowers*."[46]

53. The judgment of the Grand Chamber of the Court in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*[47] concerned the conviction for civil defamation of four non-governmental organisations (NGOs) that had reported to high-level authorities concerns they had received from employees of the multi-ethnic public radio station in Brčko. The private letter they sent included concerns about the procedure for appointing a new director and allegations that an editor at the station – proposed for the position - had acted in ways that were disrespectful of Muslims and ethnic Bosniacs. The letter was then published in three newspapers.

54. The Court held by eleven votes to six that there was no violation of Article 10, basing its decision on paragraph 2 which refers to the reputation of others and after examining the authenticity of the information disclosed. The Court found that as the applicants were not in any subordinated work-based relationship with the public radio station (thus binding them to duties of loyalty, reserve, and discretion), the Court did not need to enquire into issues central to its case-law on whistleblowing. The Court agreed with the domestic authorities that the applicants' liability for defamation should only be assessed in relation to their private correspondence, rather than its publication in the media, as it had not been proven they had been responsible for its publication.

[45] *Tillack v. Belgium*, no. 20477/05, 27 November 2007.
[46] Parliamentary Assembly Report on the protection of "whistle-blowers", § 34, Document 12006, 14 September 2009.
[47] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, no. 17224/11, 13 October 2015.

55. The Court determined that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press. In the area of press freedom, by reason of the duties and responsibilities inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in reporting on issues of general interest is subject to them acting in good faith to provide accurate and reliable information. This is in accordance with the ethics of journalism and the Court found the same considerations applied to NGOs assuming a social watchdog function. The Court found the applicants had not had a sufficient factual basis to support their allegations and that the interference was proportionate to the legitimate aim of protecting the reputation of the editor.

56. However, according to the six dissenting judges who did find a violation of Article 10, the NGOs were acting as "quasi-whistleblowers". In the opinion of these judges, reporting alleged misconduct to the authorities in a private letter required *"the application of a more subjective and lenient approach than in completely different factual situations"* and that it was unjustified to assess the truthfulness with the same rigour as if the information were contained in an article published by the applicants in the press. The dissenting judges stated, *"there is a strong element in this case relating to the right of citizens to inform public authorities about irregularities by public officials (or officials to be) which is linked to the concept of the rule of law and it should have been decided that way."*[48]

3) Pending cases

57. Halet *v. Luxembourg* [49] has been successfully referred to the Grand Chamber of the Court and will be heard in February 2022. *Halet v. Luxembourg* concerns the criminal conviction of one of the whistleblowers in the so-called "Luxleaks" scandal. The applicant was employed by the multinational company PricewaterhouseCoopers ("PwC") and disclosed sixteen company documents to an investigative journalist. The journalist had already aired a documentary based on the disclosures of Antoine Deltour, a former auditor at PwC, and the applicant's documents were used in a second programme about multinational companies and payments of tax. They were also published on-line by the International Consortium of Investigative Journalists (ICIJ). The applicant, Mr Deltour, and the journalist were both prosecuted. Mr Deltour was convicted but eventually had his conviction overturned, and the journalist was acquitted as he was not found to have been a co-conspirator or an accomplice to either whistleblower in breaching business or professional secrecy.

58. In domestic proceedings, and before the Court in Strasbourg, there was no dispute as to the public interest in the documents or the fact that they had contributed to a public

[48] See joint dissenting opinion of judges Sajó, Karakaş, Motoc and Mits in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina.*
[49] *Halet v. Luxembourg*, no. 21884/18, 11 May 2021.

debate about transparency and fairness in the tax system nationally and internationally. The Court agreed with the national courts that the fifth criterion of the *Guja* case-law had not been met because the information provided by the applicant was not *"essential, new, or unknown information"* and that as a result was of lesser public interest value, such that it did not outweigh the damage done to the reputation of PwC.

59. Two out of the eight judges dissented, stating the factors relied on by the national courts in assessing the fifth criterion run "*counter to the fundamental notions of public policy debate in a democratic society*." The national courts recognised that the disclosed documents had promoted a public debate on taxation of multinational companies in Luxembourg, and in Europe. The dissenting judges disagreed with the domestic courts that the question was the extent to which the disclosures were in the public interest, but rather the Court must assess the "*weight of any harm caused to the employer by the disclosure at issue and determine whether the harm outweighs the public interest in having the disclosure*." [50] These must be compelling reasons, based on concrete and substantial harm to the private interests at stake, to establish they clearly outweighed the benefits of the disclosure.

60. The dissenting judges pointed out that the Court in *Guja* found that the free discussion of matters of public interest was essential in a democracy and citizens must not be discouraged from expressing their views. Finally, the dissenting judges rejected the national courts' reliance on the alleged lack of "essentially, new and previously unknown" information contained in the disclosure and pointed out the Court's general position is that public debate already underway militates in favour of "*further disclosures of information feeding into that debate*"[51] citing per *Dammann v. Switzerland* [52] amongst other cases in support.

IV. RELEVANT LEGAL INSTRUMENTS, INSTITUTIONAL MECHANISMS AND TOOLS

1) Regional European legal instruments

61. This section briefly reviews the work of the Council of Europe and the European Union to promote and strengthen whistleblower protection in Europe.

i. Council of Europe

62. Over the last two decades, the Council of Europe has taken the lead in examining the role of whistleblowing in democratic societies in Europe and in developing principles

[50] Ibid, see joint dissenting opinion of judges Lemmens and Pavli, § 6.
[51] Ibid, see joint dissenting opinion of judges Lemmens and Pavli, § 13.
[52] *Dammann v. Switzerland*, no. 77551/01, § 54, 25 April 2006.

for the safe disclosure of information in the public interest, starting with its efforts to prevent corruption as a matter of the rule of law[53] and later as matter of human rights and democratic governance. The work of the Parliamentary Assembly led to the Committee of Ministers adopting Recommendation CM/Rec(2014)7 and the Assembly continues to urge the Committee of Ministers to consider a convention to fill the remaining gaps in protections across Europe and avoid a "new legal divide" between EU and non-EU member states as a result of the adoption of the EU Directive.

63. Other Council of Europe bodies also rely on Recommendation CM/Rec(2014)7 as a basis for their work. For example, in 2019, the Congress of Local and Regional Authorities of the Council of Europe published an in-depth report on the protection of whistleblowers in local and regional government." [54] The European Committee on Democracy and Governance (CDDG) referred to it in its guidelines on public ethics adopted by the Committee of Ministers in 2020 [55] as well as, more recently, in Recommendation CM/Rec(2022)2 of the Committee of Ministers to member States on democratic accountability of elected representatives and elected bodies at local and regional levels[56]. Likewise, the Monitoring Group of the Anti-doping Convention (T-DO) have adopted a Recommendation on the protection of whistleblowers in the context of the fight against doping in sport at their plenary meeting in December 2021.[57] Interestingly, the anti-doping Recommendation defines a whistleblower as "*any sportsman or sportswoman and any person involved in sport (such as coaches, staff, officials, third-parties, relatives), irrespective of the existence or nature of a contractual relationship with a sports organisation*" (emphasis added).[58]

Committee of Ministers

64. In 2014, the Committee of Ministers adopted the Recommendation on the protection of whistleblowers setting out 22 principles that should guide all Council of Europe member states in developing a legal, normative and institutional framework for the protection of whistleblowers. While member states should be familiar with the detail of the Principles in Recommendation CM/Rec(2014)7 and its Explanatory Memorandum, a guide to facilitate implementation of the recommendation by member states was prepared by the CDCJ and published in 2016.[59]

[53] Civil Law Convention on Corruption (ETS No. 174), Article 9.
[54] CG36(2019)14final "The protection of whistleblowers: Challenges and opportunities for local and regional government ".
[55] CM(2020)27-addfinal "Guidelines of the Committee of Ministers of the Council of Europe on public ethics" (adopted on 11 March 2020).
[56] Recommendation CM/Rec(2022)2 of the Committee of Ministers to member States on democratic accountability of elected representatives and elected bodies at local and regional levels.
[57] T-DO(2021)28 - "Final Recommendation on the Protection of Whistleblowers in the Context of the Fight Against Doping in Sport" (11 January 2022).
[58] Ibid. See Part II: Definitions and Scope of the Recommendation.
[59] Brief Guide for implementing a national framework.

Parliamentary Assembly

65. In 2010, the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly described whistleblowing as a "generous, positive act" by courageous people who "prefer to take action against abuses they come across rather than taking the easy route and remaining silent."[60] As the vast majority of member states did not have any laws to protect whistleblowers at the time, the Assembly recommended the Committee of Ministers to draw up a set of guidelines based on the principles it set out in Resolution 1729 (2010). The Assembly also invited the Committee of Ministers to consider drafting a framework convention on the protection of whistleblowers.[61] The Assembly has remained seized of the issue on the basis that *"whistleblowers play an essential role in any open and transparent democracy"* and that their *"protection in both law and practice against all forms of retaliation constitute a genuine democracy indicator*." [62]

66. From the outset, the Assembly called for comprehensive laws that covered all workers in the private and public sectors, including members of the armed forces and special services,[63] and for the scope of protected information to include all *"bona fide warnings against various types of unlawful acts including all serious human rights violations and any other legitimate interests of individuals as subjects of public administration […] or as shareholders, taxpayers, or customers of private companies*" (emphasis added*).*[64]

67. The Assembly revisited protections for national security and armed forces whistleblowers in 2015 in relation to "*the revelations of mass surveillance and privacy intrusions by the US National Security Agency (NSA) and other intelligence services*" [65] and did so again in 2019. In 2019, the Assembly called on all member states, including members of the EU, to ensure "*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*" (emphasis added).[66]

68. As indicated, in 2019 the Assembly adopted Resolution 2300 (2019) and Recommendation 2162 (2019) to "improve the protection of whistleblowers all over

[60] Parliamentary Assembly Report on the protection of "whistle-blowers", Document 12006, 14 September 2009.
[61] Parliamentary Assembly Recommendation 1916 (2010) on the protection of "whistle-blowers", § 2.
[62] Parliamentary Assembly Report on "Improving the protection of whistle-blowers all over Europe", § 1, Document 14958, 30 August 2019.
[63] Parliamentary Assembly Resolution 1729 (2010) on the protection of "whistle-blowers", § 6.1.2.
[64] Ibid, § 6.1.1.
[65] Parliamentary Assembly Resolution 2060 (2015) on improving the protection of whistleblowers, § 10.1.3.
[66] Parliamentary Assembly Resolution 2300 (2019) on "Improving the protection of whistle-blowers all over Europe", § 12.2.

Europe"[67] The accompanying report examined the provisions of the EU Directive 2019 and how these would impact on the strengthening of protections in Council of Europe member states in and outside the EU.

69. In its 2019 Resolution and accompanying report,[68] the Assembly stated that resolving some of the more glaring inconsistencies and gaps in protections across Europe would reassure and encourage potential whistleblowers and promote a genuine culture of transparency and democratic accountability. The Assembly reasoned that a convention would avoid a new "legal divide" between Council of Europe member states and the 27 EU member states who must comply with the new EU Directive 2019.

70. In its reply dated April 2020, the Committee of Ministers replied that *"given the complexity of the subject and the range of solutions adopted by the member states to protect whistle-blowers, it believes that the negotiation of a binding instrument, such as a convention, would be time-consuming and there would be no certainty as to its outcome."* and considered it more appropriate, at this stage, to encourage states to "*fully implement the recommendations that have been adopted by the Committee of Ministers or other bodies such as GRECO (...)"*.[69]

Group of States Against Corruption (GRECO)

71. The Group of States Against Corruption (GRECO), the enlarged anti-corruption monitoring body of the Council of Europe, started examining the protection of whistleblowers in 2003 in relation to public administration. It continues to make recommendations for strengthening reporting mechanisms and protections within the themes of its evaluation rounds, using Recommendation CM/Rec(2014)7 as one of its reference texts. For example, in its Fifth Evaluation Round [70] which focused on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, GRECO recommended that Germany should strengthen the protection of whistleblowers in the Federal Criminal Police Office and the Federal Police beyond the mere protection of their identity.[71]

72. GRECO included a section on the protection of whistleblowers in its General Activity Report for 2006.[72] This was when only four GRECO member states had dedicated whistleblower laws (Norway, Romania, the United Kingdom and the United States).

[67] Parliamentary Assembly Resolution 2300 (2019) and Recommendation 2162 (2019) on "Improving the protection of whistle-blowers all over Europe".
[68] Parliamentary Assembly Report on "Improving the protection of whistle-blowers all over Europe", Document 14958, 30 August 2019.
[69] Committee of Ministers Reply to Parliamentary Assembly on Recommendation 2162 (2019), § 8, Document 15099, 29 April 2020.
[70] GRECO Fifth Evaluation Round.
[71] GRECO Fifth Evaluation Round - Evaluation Report of Germany, § 165, adopted on 29 October 2020.
[72] GRECO (2007)1E Final, Seventh General Activity Report of GRECO (2006), adopted by GRECO at its 32nd plenary meeting (Strasbourg, 19-23 March 2007).

GRECO has mentioned whistleblower protection in every General Activity Report since the Recommendation CM/Rec(2014)7 was adopted. In its Report for 2020, GRECO stated that a majority of the states evaluated received a recommendation with respect to strengthening the protection of law enforcement whistleblowers. The Report stressed the importance for all member states to upgrade their legislative frameworks and that implementation in line with Recommendation CM/Rec(2014)7 remains "*pressing*."[73]

ii. European Union

73. Until the adoption of the EU Directive 2019,[74] the European Union and the European Commission relied heavily on the work of the Council of Europe. Candidate states to the EU, for example, were encouraged to protect whistleblowers as part of demonstrating their respect for human rights and their commitment to fighting corruption and organised crime. While it remains to be seen how the EU Directive will impact Council of Europe member states, the approach of Recommendation CM/Rec(2014)7 to situate protections within a public interest and human rights framework remains highly relevant.

74. The EU Directive 2019 makes it clear that whistleblower protection is part of the right to freedom of expression and that it draws on the work of the Council of Europe and the jurisprudence of the European Court of Human Rights (the Court).[75] The Directive is limited to providing for protection within its competencies – i.e., breaches of EU law. However, the EU Directive 2019 covers multiple areas of EU law including food safety and environmental protections, EU's financial interests, money laundering, data protection, etc.

75. When proposing the draft Directive, the EU Commission specifically encouraged EU member states to apply the Council of Europe's principles in Recommendation CM/Rec(2014)7 and the Court's case-law on the right to freedom of expression so that "*together with the principles set out in the proposed Directive, [these] can serve as a common framework for those Member States who intend to ensure, in a broadly consistent way, the effective protection of whistleblowers also beyond the areas covered by the proposal*"[76] (emphasis added).

76. As indicated above, the 2019 report of the Parliamentary Assembly provides a good review of the Directive in relation to the work done by the Council of Europe.[77] The goal is to provide minimum standards that improve the protection of whistleblowers across

[73] GRECO (2021)1-fin, Twenty-first General Activity Report of GRECO (2020), adopted by GRECO at its 87th plenary meeting (Strasbourg, 22-25 March 2021), p. 13.
[74] Directive (EU) 2019/1937, note 4.
[75] Directive (EU) 2019/1937, note 4, § 31 (Recitals).
[76] COM(2018)214 final - Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Strengthening whistleblower protection at EU level, p. 9.
[77] Parliamentary Assembly Report on "Improving the protection of whistle-blowers all over Europe", Document 14958, 30 August 2019.

the EU, maintain the stronger protections already in place, and encourage member states to go further. It sets out duties and responsibilities on employers and external competent bodies for handling whistleblowers and the information they report. The EU Directive maintains a choice of channels for reporting and disclosure without imposing a strict order of priority over internal or external disclosures to competent authorities. However, the wording of Article 15 on public disclosures leaves open a possibility that some states may be more restrictive in how they interpret the choice of channels when transposing the Directive (see more below).

77. The EU Directive 2019 includes immunity against prosecution for defamation and breaches of trade secrets (Article 21 (7)) but does not specifically address the protection of journalists or their sources except possibly in protecting those who "facilitate" whistleblowers (Article 4 (a)), and more directly in public disclosures to the media (Article 15). The EU Directive 2019 states that its provisions do not affect the powers of member states to ensure the protection of their national or essential security interests as this does not fall within EU competence. So far none of the six[78] EU member states that have adopted "transposition" laws have extended protection to cover those working in the field of national security.

78. A wide range of persons can be protected including the self-employed and non-remunerated, and those in pre- and post-employment positions. Protection is extended to "facilitators" (natural persons who assist someone who makes a disclosure), third parties (such as colleagues and relatives), as well as legal entities (such as a supplier or contracting company that a reporting person is connected to by way of work). The Directive provides a non-exhaustive list of 15 types of detriment that should be protected, ranging from unfair dismissal, withholding promotion or training, failure to renew a temporary contract, and psychiatric or medical referrals.[79] It also sets clear rules for protecting the confidentiality of whistleblowers and protects anonymous whistleblowers when their identity is discovered.

79. Persons who report or disclose in accordance with the Directive shall not incur any liability or be considered to have breached any restrictions on disclosure (subject to exceptions for national security, classified information and professional secrecy) provided they "*had a reasonable ground to believe that reporting or public disclosure was necessary*" to reveal a breach. Separately, the Directive also includes immunities from civil and criminal proceedings for having made a report or disclosure protected by the Directive. Importantly, there is a requirement on EU member states to provide access to

[78] As of 16 February 2022, Cyprus, Denmark, France, Latvia, Lithuania, Portugal and Sweden have adopted laws in relation to transposition the EU Directive 2019 into their national legal frameworks. See EU Whistleblowing Monitor for the latest updates.
[79] Directive (EU) 2019/1937, note 4, Article 19.

free independent and comprehensive advice and information on their rights and remedies, and member states are encouraged to consider extending financial aid and psychological support for whistleblowers.[80]

80. The EU Directive 2019 also stipulates that in any proceeding before a court or an authority, it shall be presumed that a detriment was made in retaliation for making a report or disclosure subject to the whistleblower establishing that he or she made such a report or disclosure and suffered a detriment. It is then up to the employer to prove that any detrimental measure taken was "based on duly justified grounds."81 This wording was changed from that originally proposed by EU Commission and supported by the EU Parliament and discussed further in Section VI.

81. The EU Directive also provides for penalties against those who try to prevent someone from blowing the whistle, for retaliation, and for disclosing a whistleblower's identity without their clear consent. This marks a shift towards separately holding employers to account for how they handle whistleblower cases and sanctioning those who fail to protect them.

82. In March 2022, the European Commission rolled out a whistleblower tool to facilitate the reporting of possible EU sanctions violation, secure online platform, which whistleblowers from around the world can use to anonymously report past, current, or planned EU sanctions violations.

83. The two main issues identified in the 2019 report of the Council of Europe Parliamentary Assembly as requiring further attention with respect to the EU Directive are:

a) protecting legal entities (especially non-governmental organisations) for disclosing information on illegal practices or as "whistle-blowing facilitators" similar to the way in which journalists can protect their sources; and
b) ensuring protections for individuals working in the field of national security, including specific guidance regarding criminal prosecutions for breaches of state secrecy with access to a public interest defence.[82]

2) International instruments, guidance and tools

84. Several international bodies have developed instruments or guidance to encourage states to develop their whistleblower protection mechanisms. However, the specific focus on corruption or other criminality can sometimes blur the distinctions

[80] Directive (EU) 2019/1937, note 4, Article 20.
[81] Directive (EU) 2019/1937, note 4, Article 21 (5)
[82] Parliamentary Assembly Resolution 2300 (2019) on "Improving the protection of whistleblowers all over Europe." §§ 12.1 and 12.2.

between measures to protect witnesses in legal proceedings with those to protect people who can provide information that allows for institutional accountability on a range of issues. Below is a brief description of the work done by the Organisation for Economic Co-operation and Development (OECD), the United Nations and recent guidance from the International Standardization Organisation (ISO).

i. Organisation for Economic Co-operation and Development (OECD)

85. In 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anti-corruption agenda and published a Monitoring Report of the G20 Anticorruption Working Group to support the compendium of best practices and guiding principles for whistleblower protection legislation prepared by the OECD.[83] Since then, it has published reports and guidance as well as engaged in a number of activities to promote whistleblowing in both the public and private sectors and with respect to specific topics such as supporting integrity in business, addressing cross-border challenges to protection and acting on corruption in sport.

86. The OECD Working Group on Bribery has included whistleblower protection as part of its monitoring programme. The 2021 newly revised Recommendation for Further Combating Bribery of Foreign Officials in International Business Transactions, originally adopted in 2009, includes significant provisions to strengthen the protection of persons ("whistleblowers") reporting bribery and focuses on enhancing international cooperation of these mechanisms.[84] The OECD Recommendation refers to the work of the Council of Europe and the European Union but not Recommendation CM/Rec(2014)7 specifically. It does, however list 24 protections that OECD member states should ensure for any natural person reporting corruption, including public officials.[85] It is worth noting again here, the wider application of the notion of reporting person outside of an employment or work-related context.

87. While all 24 protections are worth reviewing in full, two noted here are to:

a) provide a broad definition of retaliation against reporting persons that is not limited to workplace retaliation and can also include actions that can result in reputational, professional, financial, social, psychological, and physical harm[86] and

b) consider introducing incentives for making reports that qualify for protection.[87]

[83] See G20 Anti-Corruption Action Plan Protection of Whistleblowers.
[84] See Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, 2021.
[85] Ibid, at Section XXII. Protecting Reporting Persons.
[86] Ibid, Section XXII (viii).
[87] Ibid, Section XXII (xi).

88. As regards Council of Europe member states, two respondents mentioned including financial rewards as part of their whistleblower protection frameworks: Ukraine as part of the 2019 amendments to its law protecting people who report possible facts of corruption or corruption-related offenses, [88] and Lithuania where the Government Resolution to implement the whistleblower protection law that came into force in 2019, sets out the circumstances in which financial payments may be made to persons providing "valuable information" as well as the system of compensation for those adversely for blowing the whistle.[89]

89. Rewards or financial payments for providing valuable information is different from providing access to remedies such as reinstatement or compensating people for their losses (see Section VI).

ii. United Nations

90. The United Nations Office on Drugs and Crime (UNODC) published a Resource Guide on Good Practices in the Protection of Reporting Persons in 2015[90] which contains a number of good examples from around the world, including the work of the Council of Europe, and included a table of evaluation criteria for Recommendation CM/Rec(2014)7 (see **Annex II**). The Guide was designed to support the implementation of the provisions of the 2003 United Nations Convention Against Corruption (UNCAC) which provides for the protection of anyone, including witnesses and their relatives, from retaliation for reporting facts of corruption including limits on revealing their identities. By emphasising "facts concerning offences" UNCAC broadened slightly the scope of information that could be protected.[91] However, because UNCAC relates primarily to corruption offences the emphasis taken at state level is more often focused on witness protection and the actions law enforcement can take rather than administrative protection measures and institutional capacity emphasised by Recommendation CM/Rec(2014)7 or even in the UNODC Resource Guide. Interestingly, the 2021 OECD anti-bribery recommendation refers to protecting against any retaliation, including in the workplace which further supports the importance of distinguishing between witness and law enforcement protections and whistleblower protection measures more broadly understood.

91. In the same year the UNODC Guide was published, the UN Special Rapporteur on freedom of expression and opinion published a report on the protection of journalist

[88] Law of Ukraine "On Prevention of Corruption" of 14.10.2014 No. 1700-VII amended by the Law of Ukraine of 17 October 2019, No. 198-IX.
[89] Law on whistleblower protection No. XIII-804 was adopted on 28 November 2017 came into force on 14 January 2019.
[90] See Resource Guide on Good Practices in the Protection of Reporting Persons, UNODC, 2015.
[91] UNODC, 2004, United Nations Convention Against Corruption (31 October 2003), Articles 32 and 33.

sources and whistleblowers. This was the first major report to firmly situate whistleblowing within the international human rights framework.[92] The Special Rapporteur, like the Council of Europe Parliamentary Assembly, recommended that protections against retaliation should apply in all public institutions, including those connected to national security.

iii. International Standardization Organisation

92. In 2021, after a wide-ranging process of international consultation and drafting, the International Standardization Organisation adopted and published ISO 37002 - Guidance on internal whistleblower protection mechanisms.[93] The ISO Guidance details how to set up, run and maintain organisational whistleblowing arrangements that encourage staff and others to alert the organisation about any potential wrongdoing while ensuring the organisation meets its legal and ethical obligations, whether or not a whistleblower protection law exists. As both, set out, the ISO Guidance complements the principles and requirements of Recommendation CM/Rec(2014)7 and the EU Directive 2019 that should govern how organisations and competent authorities handle whistleblowing concerns by detailing a comprehensive management system. The ISO Guidance is generic enough that it can be used to guide employer systems as well as those run by competent authorities receiving extern reports and provides good detail about what is needed at the various stages to handle whistleblowing properly, to monitor how it is working in practice, and to use the results to improve organisational practice and public policy as a result.

93. Among many other elements set out in ISO 37002 is the principle that a whistleblowing system is not a substitute for managers taking responsibility for their workplace, and that dedicated arrangements should be complementary to the normal and protected reporting channels via managers and supervisors or as required due to specific job functions such as those that apply to those working in compliance or an audit function, for example.

V. GOOD PRACTICES

94. Several good practices identified in the responses to the questionnaire have been described throughout this report, demonstrating a commitment among some states to respond to the challenges that face individuals when speaking up about wrongdoing in different states. While remaining gaps in institutional practices and inconsistencies in legal principles still cause problems for whistleblowers, examining different approaches can be highly instructive to policy makers.

[92] See Report on protection of sources and whistleblowers, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2015.
[93] See ISO 37002: 2021, Whistleblowing management systems — Guidelines, 2021.

1) Public awareness and guidance

95. The **United Kingdom** has published comprehensive guidance to facilitate the whistleblowing process, in line with Principle 1 of Recommendation CM/Rec(2014)7. This includes guidance for:

a. whistleblowers[94] - information on how and to whom to make disclosures while preserving their employment protections and their rights if they are treated unfairly;
b. prescribed persons[95] (competent authorities) - describing their role in the whistleblowing process and information on complying with legal requirements and good practice beyond the whistleblowing legislation; and
c. employer[96] - guidance and a code of practice detailing their responsibilities and providing advice on implementing a whistleblowing policy that fosters an environment where disclosures in the public interest are encouraged.

2) Mandatory Training

96. **Serbia** has **made** it a requirement that judges receive a special certificate before they are allowed to hear a whistleblowing case. This entails that all judges must have undergone dedicated training or be removed from a case once it is understood that he or she had not received the required training. Prosecutors have now requested similar training through the Ministry of Justice.

3) Sharing good practice

97. A good **example** in this regard is **the Netherlands** with the establishment of the Network of European Integrity and Whistleblowing Authorities (NEIWA) on the initiative of the Dutch Whistleblowers Authority. The inaugural meeting took place in May 2019 and the purpose is to connect government organisations from various European states to work together and exchange knowledge in the field of whistleblowing and integrity.[97] Sharing practice, tools, as well as laws, is an important part of improving systems that engender confidence in the citizenry. Strong and consistent standards across borders are also likely to increase in importance as more whistleblowers raise issues of wrongdoing that cross borders or need protection in more than one jurisdiction.

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[94] GOV.UK Guidance "Whistleblowing for employees" (undated) and List of Prescribed Persons to whom whistleblowers can disclose information. First published on 1 October 2014 and updated on 27 October 2021.
[95] GOV.UK "Whistleblowing: guidance for prescribed persons" Department for Business, Energy & Industrial Strategy. First published on 20 March 2015 and last updated on 1 April 2017.
[96] GOV.UK "Whistleblowing: guidance and code of practice for employers", published on 20 March 2015.
[97] See European Network of National Integrity and Whistleblowing Authorities (NEIWA).

98. **Latvia** stated they had conducted two successful public awareness campaigns on whistleblower protection since their law came into force in 2019 and was asked to make a presentation on this work in Lithuania.

4) Reviewing, consulting and reforming

99. In response to a call for evidence and subsequent public consultation, the **United Kingdom** introduced a requirement for certain prescribed persons (competent authorities) to publish an annual report in 2017.[98] The information must include the number of disclosures received and the action taken. In 2018, the **United Kingdom** increased the scope of those protected by whistleblowing protections by extending it to job applicants in the NHS,[99] bringing it in line with Principle 4 of Recommendation CM/Rec(2014)7 to cover those whose work-based relationship has yet to begin.

100. As indicated earlier, members states who are part of the EU have been preparing to transpose the EU Directive 2019 into their national systems. Both **Lithuania** and **Latvia** described reviewing their existing laws and set out in detail the areas they intended to reform or extend. **Lithuania** had already amended its Code of Civil Procedure, for example, to ensure that whistleblowers' identities are kept confidential and that they are only called as a witness to a court where their testimony is essential.

5) Independent advice and legal aid for whistleblowers

101. While many member states have entrusted competent authorities to receive whistleblowing reports, a number described different authorities' powers to investigate reprisals, make recommendations to an employer to remedy detrimental treatment, and/or to make submissions on behalf of the whistleblower to a court (**the Netherlands, Republic of Moldova, Ukraine**). All three of these mentioned the importance of providing free legal aid to whistleblowers and **the Netherlands** specifically described how whistleblowers could access psychological support.

6) Protecting freedom of expression and national security whistleblowers

102. Both **Sweden**'s Constitution and its Freedom of the Press Act protect the right of public officials to Sweden's transparency and accountability. This means that, subject to certain limited exceptions (e.g., related to aspects of national security), a public sector employer is prohibited from disciplining an employee for providing information to the media to the extent that they have no right to inquire whether someone has been in touch with the media. Anyone who intentionally violates this prohibition on enquiries may be fined or sentenced to imprisonment for no more than one year. This too applies to employees of municipal companies and of specific bodies listed in an annex to the Swedish Official Secrets Act.[100] Where direct public disclosures are guaranteed by law, such as is the case

[98] The requirement was introduced through the Prescribed Persons (Reports on Disclosures of Information) Regulations 2017.
[99] This was introduced through The Employment Rights Act (NHS Recruitment – Protected Disclosure) Regulations 2018.
[100] Sweden (2009), Public Access to Information and Secrecy Act.

in Sweden, the conditions that apply for protecting public disclosures found the EU Directive 2019 do not apply where *"national provisions establish a system of protection related to freedom of expression and information"* (see Article 15 (2)). All disclosures will still be subject to the Article 10 rights under the European Convention on Human Rights.

103. Neither the **United Kingdom** nor **Ireland** specifically legislate for public disclosures in their whistleblower protection laws. Instead, they set out the conditions for protecting those who make a "disclosure in other cases"[101] - to persons or entities not already set out in the law. This means that the range of potential recipients remains open (be it a disclosure to a journalist or via social media, or to a non-governmental organisation for example).

104. **Ireland** has established a protected channel - a "Disclosures Recipient" - available to those who want to make a disclosure of wrongdoing that relates to security, defence, international relations, or intelligence information.[102] This does not preclude individuals making the disclosure to their employer, legal or union adviser, or to a Minister, but offers an additional secure and independent channel to handle such matters. The Disclosure Recipient is a judge (or retired judge) who is appointed for a 5-year term by the Taoiseach (the Irish Parliament), with the option to renew once.

VI. AREAS FOR FURTHER EXAMINATION

105. This **section** identifies some of the gaps and inconsistencies in current legal, normative and institutional protections and practices. These are analysed with a view to providing the CDCJ with a list of areas and issues that it might develop further with member states to ensure Recommendation CM/Rec(2014)7 and its Explanatory Memorandum is as effective as it can be tosupport the implementation of strong and consistent protections for whistleblowers across Europe.

1) Material scope: public interest information

Suggestion - to consider how member States have defined the scope of information covered under their whistleblower protection frameworks and provide them with more detailed information on the range of public interest information that should be covered and why - including matters of human rights and environmental protection.

[101] United Kingdom (1998) Public Interest Disclosures Act, ERA s. 43G; Ireland (2014), The Protected Disclosures Act, section 10.
[102] Ireland (2014), The Protected Disclosures Act, Part 4, Special Cases, section 18.

106. **Recommendation** CM/Rec(2014)7 defines "public interest reporting or disclosure" as meaning reporting or disclosing information on acts or omissions that represent "a threat or harm to the public interest." This needs to be read in conjunction with Principle 2 which states that, while it is for member States to determine what lies in the public interest, they should include, at least, violations of law and human rights as well as risks to public health and safety to the environment.

107. Many of the **States** who responded to the questionnaire have positioned whistleblower protection within their anti-corruption frameworks or provided detail of law enforcement protections or protections through the courts and criminal justice system. Recommendation CM/Rec(2014)7 encourages a much broader approach to public interest information.

108. Cases **like** *Heinish v. Germany* and *Sosinowska v Poland* highlight the fact that reports about poor or negligent provision of social and health care are viewed as matters of great public concern. Further, in many member states, public services are increasingly being provided by the private sector which emphasizes the importance of ensuring that whistleblower protections are comprehensive, covering all sectors and a broad scope of information. It calls into question the extent to which reputational damage can or should outweigh the public interest in the disclosure.

109. Finally, as **already** noted, the EU Directive 2019 covers a wide range of EU laws but is still limited to EU competence. National security is not covered, for example, but this does not mean member states cannot or should not provide for it. Not only does the EU Commission strongly recommend horizontal transposition at national level (i.e., to cover EU and national laws), it urges EU member states to look to Recommendation CM/Rec(2014)7 and the Court's jurisprudence for further guidance.

2) Personal scope: extending protection

Suggestion - to examine with member states the range of persons who can or should be protected and how protections may be extended to trade union representatives and independent legal entities such as non-governmental organisations who report wrongdoing on behalf of whistleblowers or on their own initiative.

110. Since the Grand Chamber of the Court ruled in Guja v. Moldova, the category of persons understood to be "whistleblowers" has expanded from employees to workers, and now to those associated with workers. This started with Recommendation CM/Rec(2014)7 and was further developed by the EU Directive 2019 to respond to both the changing nature of work and the importance of receiving as much information on wrongdoing as possible to prevent corruption, maintain integrity in public and private institutions, and

uphold human rights and the principles of democratic accountability. In the context of the Council of Europe's work on anti-doping it is recommended that protection extends to anyone involved in sport regardless of any contractual or work relationship.

111. The EU Directive 2019 makes it clear that "individual persons" who assist a reporting person and other "concerned" persons such as those who could suffer retaliation for being associated with the disclosure or the person who made it, should also be protected and it has extended protections to legal entities related to the workplace - e.g., to suppliers or independent contractors. Trade unions have expressed concern that the EU Directive did not go far enough to ensure that trade unions would be protected when supporting a whistleblower or raising a concern **on one of their members' behalf. France has amended its whistleblower law "Sapin II" in 2022 and extended the** protection of facilitators - those who support whistleblowers in making a disclosure - beyond "natural persons" as required by the EU Directive 2019 to trade unions and non-profit organisations.103

112. The Court's case law has also examined the protections of whistleblowers in relation to the rights of journalists to protect their sources and whether whistleblower protection should be extended to legal entities, such as non-governmental associations who act on behalf of whistleblowers or on their own initiative and suffer retaliation as a result.

113. **Serbia** mentioned the importance of working with civil society organisations who are often experts in the field, having set up advice and support services for whistleblowers. Many of these organisations support awareness-raising campaigns and public education, provide policy advice and conduct research to support it, and provide independent advice to workers in all sectors, including public servants.104 While it is important that these organisations remain independent of government, they often remain vulnerable to attack for their work in supporting whistleblowers.

114. By the present-day conditions, the application scope of the whistleblowing legislation should extend to people outside of traditional labour relationships as well, such as trainees/interns, student workers, volunteers, former employees, etc.

[103] See Lexis-Veille for a summary and the adopted legislation here (French only).
[104] See for example the list of non-profit organisations that provide legal advice and support to whistleblowers in different Council of Europe member states and often work closely with policy makers in their states on to improve protections in law and in practice. These include amongst others, the Maison des Lanceurs d'Alerte in France, Protect in the UK, Transparency International Ireland, Oživení in the Czech Republic, and Pištaljka in Serbia.

3) National security and professional Secrecy - public interest defence and immunities

Suggestion - to provide member states with an analysis of the boundaries of national security and of professional secrecy obligations with respect to protecting whistleblowers who disclose information in the public interest and what types of defence or immunities should be available

i. National security information

115. **Recommendation** CM/Rec(2014)7 is directed to national level implementation and sets out the range of public interest information that should be covered. Principle 5 relates to member states implementing modified rights and obligations that may apply to *"information relating to national security, defence, intelligence, public order, or international relations"* – i.e., information that is often deemed secret or confidential by the state.

116. **Regulating** national security is not within the competence of the EU Directive 2019 except in so far as it may relate to whistleblowing related to public procurement contracts in defence or security covered by EU law. Protecting national security whistleblowers thus remains the responsibility of EU member states, but it does not mean members states are prohibited from legislating in this area. While all nations must be sensitive to special national security requirements, none give national security agencies immunity from the rule of law.

117. **Extending** whistleblower protection does not need to - nor likely should it - be limited to those working directly for military or intelligence service but rather to anyone who engages with information deemed to be related to national security. This is how the Irish law described above has approached it when setting up a designated channel for those wishing to disclose information related national security.

118. It is not clear **that** any Council of Europe member state, other than Ireland, has developed a special scheme or modified rules related to national security, defence, intelligence, public order, or international relations information as per Principle 5. Ireland reported to the CDCJ how it had set up a system. Three member states mentioned national security information in their response to the questionnaire, but none indicated they had set up any such procedures, and one made it clear it was mentioning it to confirm such information was exempt from protection. This issue could be further explored by a competent Council of Europe steering committee or body, associating the CDCJ as appropriate.

119. The **Assembly** has repeatedly called for access to a public interest defence for those working in the national security sector and for those who make unauthorised disclosures related to national security or defence and did so again in 2019. In 2015, the

Assembly recalled its Resolution 1954 (2013)[105] and Recommendation 2023 (2013)[106] on national security and access to information, supporting the Tshwane Principles (the Global Principles on National Security and the Right to Information).[107] The Tshwane Principles includes a section on "public interest disclosure by public personnel" and Principle 43 provides for a public interest defence setting out the factors that judicial authorities should consider in determining whether the public interest in the disclosure outweighs the public interest in non-disclosure, including the extent and risk of harm to the public interest caused by the disclosure.[108]

ii. Professional secrecy in other cases

120. The "**Luxleaks**" cases raised the issue as to the extent that rules on professional secrecy or obligations on auditors and those working for them, can restrict the reporting of wrongdoing or concerns about wrongdoing. In the end, the courts in Luxembourg found they could not. In the case of *Sosinowska v. Poland*, the Court found that only a few months prior to Dr. Sosinowska's dismissal, the Constitutional Court of Poland had ruled that the article of the Medical Code of Ethics that stipulated that a doctor should in no way publicly discredit another doctor, was unconstitutional in so far as it prohibited a truthful public assessment of a doctor's activity by another doctor in the public interest. Similar issues arise in the other health and social care settings including care for children and other vulnerable people, as well as in banking and in legal and judicial settings.[109] It is clear, therefore that professional obligations, including obligations of discretion, confidentiality and secrecy continue to arise in whistleblowing cases in different sectors. What is also clear is that these obligations are evolving, and that professional secrecy cannot be seen as a blanket exception to the disclosure of information in the public interest.

121. **Recommendation** CM/Rec(2014)7 states that its principles are without prejudice to rules for the protection of legal and other professional privilege and the EU Directive

[105] Parliamentary Assembly Resolution 1954 (2013) on national security and access to information.
[106] Parliamentary Assembly Recommendation 2024 (2013) on national security and access to information.
[107] Open Society Justice Initiative (2013) The Global Principles on National Security and the Right to Information (Tshwane Principles).
[108] Ibid, Principle 43 (b) (ii).
[109] See 2018 Supreme Court decision that determined that judges are covered by the UK's whistleblower law under Articles 10 and 14 of the European Convention on Human Rights and a case, *Bruzas and Saxton*, [2018] EWHC 1619 (Fam), during which a paralegal disclosed documents (allegedly shared between the husband and his solicitor) directly to the court in a divorce case. The judge referred the matter to the President of the Court stating "[I]t is not difficult to see that if some employee of a firm of a solicitors can disclose what is otherwise prima facie privileged material, whether to the court or to the other side, the whole edifice of legal professional privilege might rapidly crumble. On the other hand, fraud is fraud, and my current understanding is that legal professional privilege cannot, in the end, withstand the unravelling of fraud or similar malpractices if (I stress if) they have taken place."

2019 specifically exempts the protection of legal and medical privilege but no other types of professional secrecy. In light of the role government and professional secrecy plays as to whether or to what extent a whistleblower is protected or believes they are protected, in practice and in law, is an important area to examine and clarify further.

122. **Finally**, while Principle 23 of Recommendation CM/Rec(2014)7 states that a whistleblower should be "entitled to raise" the fact that they have made a report or disclosure in appropriate civil, criminal or administrative proceedings, this does not necessarily go as far as providing for "immunity" to civil and criminal action as set out in the EU Directive 2019 for example.

4) Reverse burden of proof and specialised trainings

Suggestion - to clarify international best practices in relation to the operation of the reverse burden of proof and to consider judicial and prosecutorial training as a new Principle if Recommendation CM/Rec(2014)7 would be updated

123. Including a **reverse** burden of proof is essential to ensuring a whistleblower has a chance of successfully asserting their rights to protection in a court of law or before a tribunal or authority. It is the crux of effective whistleblower protection. Requiring a whistleblower to provide evidence to show the detriment was in retaliation for a disclosure or to show causation is unrealistic because it requires proving the employer's state of mind.

124. As stated earlier in this report, the EU Directive 2019 stipulates that, in any proceeding before a court or an authority, it shall be presumed that a detriment was made in retaliation for making a report or disclosure subject to the whistleblower establishing that he or she made such a report or disclosure and suffered a detriment. It is then up to the employer to prove that any detrimental measure taken was "based on duly justified grounds."[110] This wording describes the employer's burdens of proof in a far less controlled manner than the original proposal by the European Commission that was endorsed by the EU Parliament, and which is still found in the Recitals of the EU Directive 2019.[111]

125. It can be argued that the Recitals provides specific guidance for national laws on how to interpret "duly and justified grounds" found in Article 21 (5) - i.e., that the employer must demonstrate the "action taken was not linked in any way to the reporting or the disclosure"[112] (emphasis added).

[110] Directive (EU) 2019/1937, note 4, Article 21(5).
[111] Directive (EU) 2019/1937, note 4, §93 (Recitals)
[112] International Bar Association and the Government Accountability Project (March 2021) "*Are whistleblowing laws working? A global study of whistleblower protection litigation*." See section 12 on Realistic Standards to Prove the Violation of Rights at page 25.

126. The Explanatory Memorandum of the Recommendation CM/Rec(2014)7 is even clearer. It states that in proving that the action of the employer was not motivated by the disclosure (as per Principle 25), the employer must prove that any such action was "fair and not linked in any way to the whistleblowing (emphasis added)".[113]

127. As whistleblower protections are distinct from other employment protections, inconsistencies in how tribunals and courts apply certain legal principles, such as the "good faith" and the "reverse burden of proof" has meant that whistleblowers have struggled to be successful in asserting their rights to protection and/or accessing a satisfactory remedy to the harm done to them.

128. **Serbia**'s practice demonstrated that training at both the judicial and prosecutorial level is important, if not crucial. It is one of the only states to do so. Specialised training ensures judges and prosecutors have time to fully examine and understand the legal protections and their aim of protecting the public interest. The impact has been positive in that Serbian authorities report that interim relief determined by a judge on an urgent and temporary basis, has been one of the most successful measures of protection available to whistleblowers.

5) Effective institutional and normative arrangements - practices and requirements

Suggestion - to review the key elements of effective institutional and normative arrangements that build trust and strengthen protections, paying special regard to an organisation's duty of care to whistleblowers and penalties for breaching such duties

129. How individuals and information are handled at the institutional level is where the effectiveness of legal protections are tested in practice. It is at the early stages of reporting wrongdoing that much of the harm to whistleblowers occurs - whether it is because the information is ignored altogether or an investigation is mishandled, or there is a failure to adequately safeguard the identity of the whistleblower. It is also at the institutional level that trust and confidence in the legal protections are strengthened or undermined.

130. Organisations are increasingly subject to requirements in how they handle whistleblowers (and potential sanctions if they fail). The EU Directive 2019 requires "effective, proportionate, and dissuasive penalties" against those who hinder or attempt to hinder reporting, or breach their duty of confidentiality, for example. And in recent years, financial regulatory bodies such as the Financial Conduct Authority in **the United**

[113] Recommendation CM/Rec(2014)7 Explanatory Memorandum, paragraph 88.

Kingdom and the authorities in the United States have imposed financial penalties on companies and individual members of senior management.[114] Interestingly, outside of Europe, in 2019 Australia amended its corporate laws to include a duty of care on companies to prevent harm to whistleblowers, thus allowing liability to flow from a failure to fulfil that duty.[115]

131. Organisations - employers and competent authorities - in both the public and private sector are seeking access to more detailed information and support in how to implement and manage safe, sensible and effective whistleblowing arrangements. This includes how to properly train personnel, resource assessment and investigatory capacity, and engage in regular monitoring and evaluation of arrangements as part of good governance and to fulfil external reporting requirements (e.g., annual reports, regulatory reporting, reporting to parliament).

132. The ISO 37002 provides detailed guidance on internal whistleblower management systems that could also apply to competent authorities looking to set up reporting systems as per Recommendation CM/Rec(2014)7 Principle 14 and the EU Directive 2019 Articles 8 – 14 on requirements for internal and external reporting systems. ISO 37002 takes into account that external and public disclosures may also be protected by law.

6) Sanctions and incentives - failure to protect, compensation and rewards

Suggestion - review the effectiveness of remedies and compensation in holding organisations to account, including rewards

133. Without repeating what has been stated above, the CDCJ may wish to examine further the key institutional elements that should be required of employers and competent authorities when a) encouraging the reporting or disclosure of public interest information to them b) handling the information received c) responding to and caring for the position of the whistleblower d) holding to account those who have committed any wrongdoing, including actions taken against whistleblowers, breaching confidentiality or hindering whistleblowing, e) monitoring how the arrangements are working and learning from disclosures in terms of improvements and reform.

134. As whistleblower protection measures are intended to provide reassurance and clarity to allow for the freer flow of information required for institutional accountability, putting responsibility on the organisation to prevent harm is worth exploring further. This would allow organisations to be held liable for their conduct with respect to protecting whistleblowers and the arrangements they put in place. The sanctions taken against employers so far appear to be the result of employers failing to respect their own whistleblowing arrangements and targeted at senior leadership. In that sense, they may

[114] See the case of Jess Staley, former CEO of Barclay's Bank who was personally fined £624million by the UK's Financial Conduct Authority for attempting to unmask the identity of a whistleblower at the bank. The bank was then fined $15million by US authorities.
[115] Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 and see more detail on the corporate requirements and officers' duties for implementing whistleblower procedures on the Australia Securities and Investments Commission (ASIC) website.

be the logical next step to employers being required directly or implicitly to set up internal whistleblowing systems. However, to ensure employers take whistleblowing seriously and provide an environment that is conducive to reporting, Australia, as mentioned earlier, has imposed a duty of care to prevent harm. This seems a more nuanced approach and may support a positive change in attitude towards whistleblowing over the longer term.

135. Offering financial payments or "bounties" for reporting wrongdoing is a long-established practice in the United States, used as a way to encourage or "incentivise" the reporting of financial wrongdoing in particular. It is less popular as an approach in Europe and elsewhere for several reasons, including concerns that it is inconsistent with the public interest served by a whistleblower's disclosure and that it emphasizes fraud over other valid and genuine concerns that do not necessarily have a direct financial impact.[116] Some laws, like the US False Claims Act and the Dodd-Frank Act, offer whistleblowers a percentage of the portion of money recovered as an incentive for reporting. Though often lumped together, these laws represent separate branches of law, and are distinct from one another.

136. The False Claims Act is a *qui tam* law, which allows individuals to bring a civil action against powerful wrongdoers on behalf of the government, for fraud or corruption in government contracts. If the government takes over the action and is successful, the individual receives 15-20% of the taxpayer money returned to the government as part of a settlement. If the individual continues alone, the portion of the amount recouped increases to 25-30%. The US Securities and Exchange Commission's (SEC) whistleblower programme does not put resources in the hands of individuals in the same way. To receive a reward from the SEC, the whistleblower must provide "original, timely, and credible information that leads to a successful enforcement action." Whistleblower rewards can range from 10 to 30% of the money collected when the monetary sanctions exceed $1 million.

137. So far, most of the "reward" laws around the world have followed the SEC model rather than that of the False Claims Act. The vast majority relate to anti-competitive practices, financial malpractice in listed companies, tax fraud and other fraud or corruption against the government[117] and are found in the laws governing the powers of competent authorities in those areas – i.e., securities commissions, competition, or tax authorities. While the amounts awarded to some individuals are extremely high, few persons receive them[118] and advocates state that while the chance of getting an award remains extremely

[116] See opinion piece by Kyran Kanda (10 July 2020) *Whistleblower Reward Schemes: Who Really Benefits?* (Protect, UK)
[117] Stockholm Institute of Transition Economics, Working Paper, October 2019 "*Financial Incentives for Whistleblowers: A short Survey".* See also a list of laws with financial reward systems published by the Center for International Rights and Rewards.
[118] US Securities and Exchange Commission 2021, Annual Report to Congress: Whistleblower Program (Washington, DC). In 2021, the Commission received over 12,200 whistleblower tips—the largest number ever received in a year (p. 28). In the same year, the Commission issued eight awards, including the second largest award ($110million) to a single whistleblower in the history of the program (p. 23). Between 2012 and 2019, the SEC had awarded $387million to 67 people. In 2020 and 2021, the SEC awarded $562million to 106 people and $564million to 108 people respectively (p. 3).

small there continues to be a likely prospect of whistleblowers being the target of a retaliation.[119]

138. It should be underscored that in some cases, rewards are confused with remedies, in particular with financial compensation. In order to differentiate said notions, it is needed to understand their purposes. Put simply, the intention of granting a whistleblower with financial compensation is to restore his/her situation prior to unfair treatment. Unlike financial compensation, rewards aim to incentivize whistleblowing and embolden potential whistleblowers and most importantly help whistleblowing to be perceived as an action worthy of glorification. It is up to the member states to determine the range of rewards within their domestic context. However, rewards can be in the form of pecuniary and non-pecuniary advantages. Non-monetary privileges can manifest in different forms, such as early promotion, conferring honors, increase in salary, etc. Whichever form is preferred the intention remains to help a whistleblower to be perceived as a "responsible employee" or a "responsible citizen" by others. In addition, it is of prime importance to meet the requirements of confidentiality while rewarding the whistleblowers and not to disclose their identity without their explicit consent.

139. Separate from rewards or 'incentives" is the issue of remedies and compensation. It is not yet clear how effectively member states provide for swift and adequate measures to prevent further harm (such as easy access to interim measures or injunctive relief to allow whistleblowers to remain in their jobs); remedies (such as reinstatement or access to a new job that reflects the same level of pay, responsibilities and career potential); and full compensation when harm is done. This latter includes damages for financial, reputational, and psychological harm done to whistleblowers as well as reimbursement for legal fees where free and independent legal advice and representation is not available or easily accessible. The **Republic of Moldova** mentioned in its response to the questionnaire that the Peoples Advocate (or Ombuds) oversees ensuring whistleblowers are materially and morally compensated for any retaliation suffered. It would be very interesting to know more about what provisions are available in member states to both prevent harm and remedy damage, and the extent to which financial compensation (and to what level) is provided and under what conditions.

140. Finally, and importantly, is the issue of organisational accountability - which can be considered the missing piece of the puzzle. As set out above, organisations are increasingly subject to requirements as to how they handle whistleblowers. Recommendation CM/Rec(2014)7 does not currently include any principles relating to sanctions against those who breach their duties of care toward whistleblowers. The

[119] Compliance Week (18 February 2020) "*Whistleblowers finding system stacked against them*" also published here.

EU Directive 2019 is one of the first legal instruments to do so. While the Directive leaves it up to member states to determine what constitutes "effective, proportionate and dissuasive penalties" it requires penalties in relation to four types of detrimental actions. These are hindering or attempting to hinder whistleblowing, retaliating or bringing vexatious proceedings against a whistleblower, and breaching the duty to maintain the confidentiality of a reporting person.

141. The CDCJ may wish to consider how best to reinforce organisational accountability for heeding reports of wrongdoing and embedding arrangement that promote a positive speak up culture. One way is to identify the detrimental actions for which organisations and natural persons should be penalised. Another approach, although not necessarily a separate one, is to examine what would be involved in imposing a duty of care to prevent harm to whistleblowers, as was done recently in Australia.

142. These questions of whether or how institutional and normative frameworks are working, and what laws should underpin them highlights the importance of monitoring cases and finding effective ways to evaluate whistleblowing arrangements and the institutions that run them.

7) Free legal advice and support - access and independence

Suggestion: to examine how access to free independent legal advice, support and expertise for whistleblowers is provided.

143. Principle 28 of Recommendation CM/Rec(2014)7 provides that consideration should be given to making access to information and confidential advice free of charge for individuals who might be considering blowing the whistle. Article 20 of the EU Directive 2019 mandates it. Access to early advice can help prevent harm and as such, should not depend on someone having already experienced retaliation. One member state (**Lithuania**) described in detail how their system of free legal aid works, although **Latvia** made it clear that they also provide free support and legal aid. The **Netherlands** is running a pilot on legal support and mediation for civil servants at the national level and aims to start a pilot on psycho-social support for all whistleblowers with a view to determining how such support might be organised in future. Currently the Dutch Whistleblowers Authority provides free advice about the steps whistleblowers can take to raise concerns, including, for example, mediation or reporting to supervisory or competent bodies. The Authority offers a listening-ear and, on request, can monitor the process. Where necessary and possible, whistleblowers will be referred to persons or bodies more suitable to represent their interests, considering their professional position and level of knowledge.

144. It should be recalled that civil society organisations in several member states provide free and independent legal advice to whistleblowers and are actively engaged in ensuring whistleblowers are protected in the public interest. As effective as these organisations often are at what they do, they are often under-resourced, and because of

this may not be as accessible to the public as they would if better funded. The Parliamentary Assembly of the Council of Europe set out in its Resolution 2300 in 2019 the need to foster and protect the emerging civil society ecosystem that supports whistleblowers including working together with them in drafting legislation.[120]

8) Protection for public disclosure

Suggestion: to examine the importance of protecting public disclosures and ensure whistleblower protection provisions are not overly restrictive with respect to the right impart information and public's right to know

145. Member states described the various institutional systems they have in place to receive reports or disclosures, but none described in any detail whether or how protection is available for someone who makes a public disclosure. In fact, **Latvia** mentioned there is so little public understanding of the protection that is available to those who speak out publicly about wrongdoing, such that it rarely occurs.

146. The EU Directive 2019 states in its Recitals that reporting persons should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case. However, unlike Principle 14 of Recommendation CM/Rec(2014)7 which does not impose any hierarchy, Article 15 of the EU Directive 2019 imposes conditions on the public disclosure of information. It is not yet known how national laws will reflect these arguably different approaches in transposition. The current wording of Article 15 appears to mean that a public disclosure can only be automatically protected if a whistleblower raises the concern with a competent authority first even if they had already raised it internally and nothing was done in the allocated time. It can also be read as favouring external reporting over internal reporting as this would allow individuals to go public after three months, rather than the six months required if they raised it first internally and then externally. This, along with the other conditions in Article 15, takes the approach that only protects immediate public disclosure under exceptional circumstances, i.e., as the only way to prevent or address serious wrongdoing, rather than situating whistleblowing within a freedom of expression framework that emphasizes the right to impart information and the public's right to know.

147. Notwithstanding how national courts interpret any domestic provision on protecting public disclosures, their provisions will be subject to Article 10 of the European Convention on Human Rights and the oversight of the European Court in Strasbourg.

148. EU member states can, like Sweden, legislate to protect those who directly disclose information to the press without reporting internally to an employer or to a competent authority first as a matter of freedom of expression and press freedom.

[120] Parliamentary Assembly Resolution 2300 (2019) on "Improving the protection of whistleblowers all over Europe", § 12.13.

VII. CONCLUSION

149. States were asked through the questionnaire on the possible need for the CDCJ to engage in further examination of the implementation of the Recommendation. Nineteen states responded. Four stated they did not think there was a need[121] and three were equivocal either way.[122] The majority however (twelve states[123]) said there should be ongoing reviews, with three specifying that these should cover all aspects of Recommendation CM/Rec(2014)7 – i.e., take a holistic approach. Five mentioned the need to consider the EU Directive and that efforts should be made to coordinate reviews in some way and ensure there was no overlap.

150. States made suggestions as to the areas that the CDCJ could review, which included examining:

- the cooperation between authorities and the interaction of laws at the European level (**Luxembourg**);
- the importance and impact of Recommendation CM/Rec(2014)7 in national laws (**France**);
- the effectiveness of protections in practice (**Georgia**);
- institutional and normative frameworks; judicial norms as well as the value of developing a compendium of cases as well as a good practice guide (**Republic of Moldova** and **Romania**);
- administrative measures that increase confidence within the system, including trust, communications, social and psychological support, which, it was pointed out, are often developed by civil society organisations (**Serbia**).

151. It is clear from this present Report that while much progress has been made since Recommendation CM/Rec(2014)7 was adopted, member states have given it varying degrees of attention. While the majority have implemented protections specifically designed to protect whistleblowers, some of have done so more significantly than others. Continuous reviews and/or exchanges of good practices in this area can therefore be very useful for member states, through the CDCJ or other relevant bodies and committees, depending on the explored aspects.

[121] Croatia, Germany, Lithuania, Ukraine
[122] Latvia, Spain, Sweden.
[123] Belgium, Czech Republic, France, Georgia, Luxembourg, Republic of Moldova, Monaco, Netherlands, Poland, Romania, Russian Federation, Serbia, United Kingdom.

152. As the vast majority of EU member states appear to have missed the 17 December 2021 deadline to transpose the EU Directive 2019,[124] it is not yet clear how consistently the requirements of the Directive will be implemented. Further, as set out in this Report, there are differences and gaps between the Principles of Recommendation CM/Rec(2014)7 and the Articles of the EU Directive 2019, governments will have an opportunity to go further than the Directive and could be looking to Recommendation CM/Rec(2014)7 for more detailed guidance.

153. While the Council of Europe member states may not consider that they are in a position to negotiate a binding legal instrument in the form of a convention to help avoid a new "legal divide" between Council of Europe member states and the 27 EU member states as urged by Assembly, consideration should be given to updating Recommendation CM/Rec (2014)7 and its Explanatory Memorandum to ensure that comprehensive and up to date guidance is available to all member states and their practitioners. This update could consist of:

1) Additional new principles in the text of the Recommendation, in so far as national laws does not yet provide for them, on (i) specific training to professionals (judges, prosecutors); (ii) access to free legal advice and psychological support measures to whistleblowers; (iii) sanctions and incentives with a duty of care on employers to prevent harm, and any other new aspects that the CDCJ would consider pertinent.

2) Providing further information and guidance in the Explanatory memorandum on (i) the personal and material scope of the Recommendation (Principle 1-4) in light of the ECHR recent case law, including on specific schemes or rules for information relating to national security (principle 5) and professional secrecy (principle 6); (ii) on the protection for public disclosures (principle 13 and 14); and (iii) on the periodic assessments of the effectiveness of the national framework (principle 29).

[124] See the EU Whistleblowing Monitor operated by the Whistleblowing International Network, Eurocadres and Transparency International Europe to track the progress of EU member states in transposing the new EU Directive 2019. All the information posted is verified through publicly available information on government and relevant authority websites.

ANNEX I
CASE STUDIES

Ombuds Office

At the time of submitting its response to the CDCJ questionnaire, the Ombuds Office in the Republic of Moldova was handling 13 applications for whistleblower protection. In 2020, two cases were dealt with by the Ombuds Office which are summarised below. The Moldovan authorities indicated that whistleblower protections in the state are still fairly new and some aspects will need to be strengthened.

- In both cases the whistleblowers were civil servants who applied to the Ombuds Office for protection after having first reported illegal practices to their employer. When they disclosed the information to competent authorities (the General Prosecutor's Office and the National Anticorruption Centre), the retaliation against them by their employer intensified.

  The Ombuds Office determined whether whistleblowers qualified and needed protection by examining the causal link between the disclosure and the retaliation (i.e., the chronology of events and the time between the disclosure and the retaliatory action); the severity of the retaliation and the importance of the public interest in the information disclosed.

  By law, the Ombuds Office may make recommendations to the employer to cease or remedy any retaliation or threats of retaliation. In both cases, the employers were told to cancel all administrative (disciplinary) actions taken against the whistleblowers, including in one case, their dismissal, and to compensate them for any material and moral damages they had suffered as a result.

  - In first case the employer refused to implement the recommendations and challenged the decision in court. The Court[125] upheld the Ombud's Office conclusions which it submitted to the Court and the employer was ordered to reinstate the whistleblower. An appeal was unsuccessful and the Ombuds Office continues to monitor the case to ensure action is taken against those responsible for the retaliation.
  - In the second case the employer did not challenge the recommendations and the Ombuds Office's is monitoring compliance. Further, and as a result of its findings in this case, the Ombuds Office took the opportunity to issue a General Recommendation [126] to all managers of subordinate

[125] According to the Moldovan Administrative Code and the Code of Civil Procedure, the Ombuds' conclusions are submitted to the court in order to defend the rights, freedoms and legitimate interests of persons injured in their rights.
[126] The Law No. 164 of 31 July 2015 on the approval of the Regulation on the organisation and functioning of the People's Advocate Office (or Ombuds Office).

authorities/institutions on the handling of information under the provisions of Law no.122/2018.[127]

National Anti-Corruption Body

The two case studies from Ukraine show the increasingly important role of the National Anti-Corruption Bureau in developing the law to protect whistleblowers as well as how it interacts with whistleblowers and the courts.

- Case Example 1: In 2017, a customs officer noticed that overseas vessels of certain companies were regularly exempted from customs control and reported it (and the potential conflict of interest of the head of his customs post) to the Customs Administration, and then to the Prosecutor's Office, the State Fiscal Service, and the National Anti-Corruption Bureau (hereinafter the "NACB").

  The head of the post retaliated by changing the officer's work schedule and finding against him in two disciplinary proceedings. Finally, the whistleblower's job was eliminated and he was transferred to another customs post. In 2018, the whistleblower made a claim to the courts. NACB participated as a third party on the plaintiff's side - providing the necessary documentation and participating in court hearings in support of the whistleblower.

  The court found against the whistleblower in the first instance but was partially upheld on appeal. In 2019 the Supreme Court sent the case back for a new hearing. In 2020, the whistleblower won his case. NACB ordered that all sanctions be cancelled and the whistleblower was reinstated.

  The Ukrainian authorities stated that this case is important for the development of judicial practice in protecting the rights of whistleblowers - particularly with regards to granting a certain level of immunity to those qualifying as whistleblowers and in proving causation.

- Case Example 2: A district court judge was offered an illegal benefit to find in favour of a person against whom an administrative report had been lodged. The judge reported this to the Prosecutor's Office who launched a criminal pre-trial investigation. The head of the court began to take retaliatory action against the whistleblower who then applied to NACB for legal protection.

[127] On 12 November 2018, Law No. 122 on whistleblowers entered into force. Its purpose is to increase the disclosure of illegal practices and other matters of public interest by: (i) promoting a climate of integrity in the public and private sectors; (ii) preventing retaliation and ensuring the protection of whistleblowers.

NACB determined the whistleblower's rights had been violated: their timesheets were improperly marked for "absenteeism"; they were obstructed from taking reasonable vacation time; and their remuneration was incomplete. When the head of the court failed to respond, NACB recommended the High Council of Justice act and in 2018, the High Council issued a severe reprimand against the head of the court. The head of the court unsuccessfully appealed against NACB's findings up to the Supreme Court. This established NACB's legitimacy.

However, the High Council of Justice reprimanded the whistleblower after receiving complaints (from the head of the court and those alleged to have offered the bribe) about Facebook posts made by the whistleblower. The reprimand was later cancelled by the Supreme Court, but not before the whistleblower was prevented from entering a judicial competition for a position on the Supreme Anti-Corruption Court.

In 2020 NACB issued a new order to the new head of the district court demanding the elimination of ongoing violations. The whistleblower was fully reimbursed for monies owed and was able to access vacation time accumulated since 2016.

Public Sector Whistleblower Protection Law

Romania's Whistleblower's Law[128] protecting public officials has been in force since 2004. Its approach is unique with respect to other law in Europe as it sets out the principles[129] that govern the protection of "public interest warnings" and separately, the types of violations that qualify as public interest warnings. It also lists in non-hierarchical order the entities to whom disclosures can be made. Public officials can request that the media be present at any disciplinary meetings they believe are the result of having made a "public interest warning". These three cases show how the courts have determined whether a person is a whistleblower who should be protected.

- Case No. 1 (2017): The applicant appeared on television where he discussed irregularities at the public company where he worked. His employer disciplined him for speaking publicly and for failing in his duties of loyalty and confidentiality to the organisation and its employees. The employer said it considered the actions offensive "to the dignity of hierarchical superiors" and created a "degrading, hostile" professional environment. The applicant had his salary reduced for one month.

[128] Law No. 571/2004 on the protection of staff of public authorities, public institutions and other units which report breaches of the law, dated 14 December 2004 (hereinafter "Romanian Whistleblower's Law").
[129] These include the principles of legality; the supremacy of the public interest; responsibility to notify; non-punishment for those reporting violations (i.e. abusing that principle by severely sanctioning for unrelated misconduct); good administration; good behaviour; balance (mitigation); the good faith of both parties.

The applicant argued that he was protected as a whistleblower and the Court found in his favour. The Court stated the purpose of Romania's whistleblower protection law was to protect civic minded people who publicly disclose any abuse or violation of the law. It was adopted to provide a positive and protective framework to encourage staff to disclose wrongdoing within Romania's public administration to prevent corruption and uphold the principles of good administration. The Court stated the law provided whistleblowers a form of immunity against reprisals rather permitting misconduct on their part to go unpunished.

The Court determined the employer had violated the principle of not punishing those who make public interest warnings and the applicant had not waived his whistleblower rights by failing to request a media notice to his disciplinary meetings. The Court ordered the sanction to be annulled, and the employer was obliged to pay 1,515.50 RON in legal costs.

- Case No. 2 (2017): The applicant filed a complaint for unfair dismissal on the basis that he had blown the whistle on wrongdoing in the public body where he worked. The employer alleged the applicant had posted threatening and slanderous messages against management and other employees on a Facebook page with the same name as the official website of the institution where he worked. It was also alleged he posted confidential documents and violated employee data protection rights.

  The Court stated that according to the principles governing protection, a whistleblower is a person who makes a report in good faith concerning a violation of the law, professional ethics or of the principles of good public administration. The law states that the disclosure may be made internally or externally to one or more of the following entities, without order of preference: a) a hierarchical superior, b) the director of the authority concerned, c) the disciplinary commissions, d) the judicial authorities, e) the authorities responsible for investigating conflicts of interest and incompatibilities, f) parliamentary commissions, g) the media, h) professional body, trade union or employer organisations, i) and non-governmental organisations.

  The Court found that the reasons for dismissal were not related to the alleged whistleblowing. It determined the complainant had used the public space to post threatening or slanderous messages and that the way the applicant had expressed his views required his employer to intervene to maintain a safe, respectful, and disciplined working environment and to meet its data protection obligations. The Court also noted the applicant had posted most of the messages from work when he should have been performing his professional duties.

  While it was not enough for the applicant to be convinced, he was a whistleblower, the Court took into account his belief in so far as he had already been recognised

as such by a court in relation to a different report. Along with his clean disciplinary record, the Court found the sanction too harsh and ordered his reinstatement and a 3-month reduction in salary.

Case No. 3 (2020): The applicant was seconded to a subordinate unit after having found irregularities during an audit inspection of the same unit. The audit had revealed violations which applicant had reported to the authorities.

The applicant said the purpose of the whistleblower protection law was to optimise the professional functioning of the public administration and encourage public servants to participate in the fight against corruption. He argued the decision to second him was repressive and that as well as being intimidating, it would discourage effective controls in the structures subordinate to the institution in the future.

The Court agreed. The audit report drawn up by the applicant was sent to the Directorate for the Investigation of Organised Crime and Terrorism (DIICOT). The applicant also notified the National Anti-Corruption Directorate (DNA) of what he considered to be reasonable suspicions that a crime had been committed. In so doing, the Court found the applicant qualified as a whistleblower within the meaning of the law.

The Court ruled his secondment to the same unit he had reported for wrongdoing was contrary to the principles governing the supremacy of the public interest, good administration, and good faith. The secondment was annulled, and applicant awarded 61,675 RON (form material and moral damages).

Dedicated Whistleblower Authority

Below is brief summary of recent cases and investigations in the Netherlands, some involve the Whistleblowers Authority, and some, like the first case, have received a lot of media attention.

- A recent case concerned the dismissal of an employee of the Dutch embassy in Nigeria. The 2020 Court's judgment found in favour of the whistleblower on the basis that the facts and circumstances of the case, taken as a whole, substantiated the view that the dismissal was due to her having reported concerns about the Dutch Ambassador's dealings with the multinational oil company, Shell, and not to the "official grounds" given for her dismissal.[130]

[130] The ruling can be found at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:8886&showbutton=true.

- In 2020, the Dutch Whistleblowers Authority completed and reported on three major cases:
  - The first report related to an employer who submitted a European tender that was in violation of the rules. It was established that the two employees who reported the abuse were threatened with dismissal as a result.
  - The second report concerned industrial espionage in an international context. It is likely that a reporter was fired by his employer in the late 1970s because of his report on industrial espionage by a foreign power.
  - The third report concern an investigation into abuses at the Dutch government. Public servants made improper use of a government plane in the context of team building. Expenses were also incorrectly claimed for following multi-day training courses.

- In another high-profile case, the State Secretary of Finance (Surcharges and Customs) recently apologised to a former civil servant for having failed to take an in-depth look at his reports of suspected wrongdoing in the child benefits system. It has been agreed with the whistleblower that his experiences will be used to review the processes within the Tax and Customs Administration and Benefits. The review will pay attention to the culture of the Department including creating an open and safe working climate.[131]

[131] See 6th Progress Report on Child Benefit Payments (appendix to Parliamentary papers 31006, 805).

ANNEX II
EVALUATION CRITERIA BASED ON COUNCIL OF EUROPE PRINCIPLES[132]

Definitions	
	Definition of whistleblower
	Definition of public interest report or disclosure
	Definition of reporting
	Definition of disclosure
Material scope	
1	National framework should establish rules to protect rights and interest of whistleblowers
2	Scope of public interest
Personal scope	
3	Wide understanding of working relationships
4	Covers individuals whose work-based relationship has ended, as well as those in pre-contractual negotiation stage
5	Rules applying to information relating to national security in keeping with European Court of Human Rights jurisprudence
6	Without prejudice to rules for the protection of legal and other professional privilege
Normative framework	
7	Comprehensive and coherent approach to facilitating whistle-blowing
8	Restrictions and exceptions should be no more than necessary
9	Ensure effective mechanisms for acting on public interest reports and disclosures
10	Protection and remedies under rules of general law for those prejudiced by whistle-blowing are retained
11	Employers cannot call on legal or contractual obligations to prevent or penalise someone from making a public interest disclosure

[132] See Resource Guide on Good Practices in the Protection of Reporting Persons, UNODC, 2015, p. 81.

Channels for reporting and disclosures	
12	Measures foster an environment that encourages disclosure in an open manner
13	Clear channels for reporting are in place
14	Tiers for reporting include wider public accountability, such as media
15	Encouragement for employers to put in place internal procedures
16	Workers to be consulted on internal procedures
17	Internal reporting and disclosures to regulatory bodies to be encouraged as general rule
Confidentiality	
18	Reporting persons entitled to confidentiality
Acting on reporting and disclosure	
19	Reports should be promptly investigated
20	Reporting persons should be informed of action taken
Protection against retaliation	
21	Protection should be against retaliation of any form
22	Protection retained even where reporting person reasonably but mistakenly believed that a specific malpractice was occurring.
23	Entitlement to raise the fact that disclosure was made in accordance with national framework
24	By-passing internal arrangements may be taken into consideration when deciding on remedies
25	Burden of proof in claims for victimisation or reprisal on employer
26	Interim relief should be available
Advice, awareness and assessment	
27	National framework should be promoted widely
28	Confidential advice should be available (preferably free of charge)
29	Periodic assessments of the effectiveness of the national framework