

PROTECTION OF WHISTLEBLOWERS



Legal instruments

Recommendation CM/Rec(2014)7
and explanatory memorandum

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

PROTECTION OF WHISTLEBLOWERS

Recommendation CM/Rec(2014)7
adopted by the Committee of Ministers
of the Council of Europe
on 30 April 2014
and explanatory memorandum

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Recommendation CM/Rec(2014)7

of the Committee of Ministers to member States on the protection of whistleblowers

*(Adopted by the Committee of Ministers on 30 April 2014,
at the 1198th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members, *inter alia*, for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Considering that promoting the adoption of common rules in legal matters can contribute to the achievement of the aforementioned aim;

Reaffirming that freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy;

Recognising that individuals who report or disclose information on threats or harm to the public interest ("whistleblowers") can contribute to strengthening transparency and democratic accountability;

Considering that appropriate treatment by employers and the public authorities of public interest disclosures will facilitate the taking of action to remedy the exposed threats or harm;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and the relevant case law of the European Court of Human Rights, in particular in relation to Article 8 (respect for private life) and Article 10 (freedom of expression), as well as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);

Bearing in mind the Council of Europe's Programme of Action Against Corruption, the Council of Europe Criminal Law Convention on Corruption (ETS No. 173) and the Council of Europe Civil Law Convention on Corruption (ETS No. 174) and, in particular, respectively Articles 22 and 9 thereof, as well as the work carried out by the Group of States against Corruption (GRECO);

Taking note of Resolution 1729 (2010) of the Parliamentary Assembly in which the Assembly invites member States to review their legislation concerning the protection of whistleblowers bearing in mind a series of guiding principles;

Taking note of the compendium of best practices and guiding principles for legislation on the protection of whistleblowers prepared by the OECD at the request of the G20 Leaders at their Seoul Summit in November 2010;

Considering that there is a need to encourage the adoption of national frameworks in the member States for the protection of whistleblowers based on a set of common principles,

Recommends that member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest. To this end, the appendix to this recommendation sets out a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.

To the extent that employment relations are regulated by collective labour agreements, member States may give effect to this recommendation and the principles contained in the appendix in the framework of such agreements.

Appendix to Recommendation CM/Rec(2014)7

Principles

Definitions

For the purposes of this recommendation and its principles:

- a. "whistleblower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;

- b. “public interest report or disclosure” means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;
- c. “report” means reporting, either internally within an organisation or enterprise, or to an outside authority;
- d. “disclosure” means making information public.

I. Material scope

1. The national normative, institutional and judicial framework, including, as appropriate, collective labour agreements, should be designed and developed to facilitate public interest reports and disclosures by establishing rules to protect the rights and interests of whistleblowers.
2. Whilst it is for member States to determine what lies in the public interest for the purposes of implementing these principles, member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment.

II. Personal scope

3. The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.
4. The national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage.
5. A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defence, intelligence, public order or international relations of the State.
6. These principles are without prejudice to the well-established and recognised rules for the protection of legal and other professional privilege.

III. Normative framework

7. The normative framework should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures.

8. Restrictions and exceptions to the rights and obligations of any person in relation to public interest reports and disclosures should be no more than necessary and, in any event, not be such as to defeat the objectives of the principles set out in this recommendation.

9. Member States should ensure that there is in place an effective mechanism or mechanisms for acting on public interest reports and disclosures.

10. Any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should retain the protection and the remedies available to him or her under the rules of general law.

11. An employer should not be able to rely on a person's legal or contractual obligations in order to prevent that person from making a public interest report or disclosure or to penalise him or her for having done so.

IV. Channels for reporting and disclosures

12. The national framework should foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns.

13. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.

14. The channels for reporting and disclosures comprise:

- reports within an organisation or enterprise (including to persons designated to receive reports in confidence);
- reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;
- disclosures to the public, for example to a journalist or a member of parliament.

The individual circumstances of each case will determine the most appropriate channel.

15. Employers should be encouraged to put in place internal reporting procedures.

16. Workers and their representatives should be consulted on proposals to set up internal reporting procedures, if appropriate.

17. As a general rule, internal reporting and reporting to relevant public regulatory bodies, law enforcement agencies and supervisory bodies should be encouraged.

V. Confidentiality

18. Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.

VI. Acting on reporting and disclosure

19. Public interest reports and disclosures by whistleblowers should be investigated promptly and, where necessary, the results acted on by the employer and the appropriate public regulatory body, law enforcement agency or supervisory body in an efficient and effective manner.

20. A whistleblower who makes an internal report should, as a general rule, be informed, by the person to whom the report was made, of the action taken in response to the report.

VII. Protection against retaliation

21. Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.

23. A whistleblower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework.

24. Where an employer has put in place an internal reporting system, and the whistleblower has made a disclosure to the public without resorting to the system, this may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower.

25. In legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated.

26. Interim relief pending the outcome of civil proceedings should be available for persons who have been the victim of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment.

VIII. Advice, awareness and assessment

27. The national framework should be promoted widely in order to develop positive attitudes amongst the public and professions and to facilitate the disclosure of information in cases where the public interest is at stake.

28. Consideration should be given to making access to information and confidential advice free of charge for individuals contemplating making a public interest report or disclosure. Existing structures able to provide such information and advice should be identified and their details made available to the general public. If necessary, and where possible, other appropriate structures might be equipped in order to fulfil this role or new structures created.

29. Periodic assessments of the effectiveness of the national framework should be undertaken by the national authorities.

Explanatory memorandum

Introduction

The importance of whistleblowing and protecting whistleblowers in Europe

1. The Council of Europe recognises the value of whistleblowing in deterring and preventing wrongdoing, and in strengthening democratic accountability and transparency. Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and is important in the fight against corruption and tackling gross mismanagement in the public and private sectors.

2. Whistleblowing refers to the act of someone reporting a concern or disclosing information on acts and omissions that represent a threat or harm to the public interest that they have come across in the course of their work; for example, harm to the users of a service, the wider public or the organisation itself, or a breach of the law. It covers reports to employers (managers, directors or other responsible persons), regulatory or supervisory bodies and law-enforcement agencies, as well as disclosures to the public, most typically via the media and the Internet, public interest groups or a member of parliament.

3. Whistleblowing can act as an early warning to prevent damage as well as detect wrongdoing that may otherwise remain hidden. It can help ensure the effective application of local and national systems of accountability by allowing those legally responsible for the alleged misconduct the opportunity to address the problem and to account for themselves, and by more readily identifying those who may be liable for any damage caused.

4. However, it has been shown time and again that whistleblowers often face indifference, hostility or, worse, retaliation, whether they report a concern within an organisation or enterprise, to an appropriate public authority or make a disclosure to the public. Instead of viewing whistleblowing as a positive act of “good citizenship” albeit in the context of work, whistleblowers are branded as disloyal to their colleagues or to their employer. When this happens, the attention is primarily or solely on the whistleblower, admonishing or sanctioning the individual for “breaking ranks” rather than examining and addressing the information reported or disclosed. When the organisation itself is acting improperly or attempts to cover up the problem, the focus is typically on stopping the individual from taking the matter further.

5. So while those at work are often the first to know that something is wrong and, therefore, are in a privileged position to inform those who can address the problem, they are discouraged from reporting their concerns or suspicions to their employer or to the appropriate authorities for fear of reprisals and the perceived lack of follow-up given to such warnings. As a result, a significant opportunity to protect the public interest is missed.

6. In order to bring about a change of culture within the workplace, whether it be private or public, it is important that member States send a strong message to employers to heed and properly act on information reported to them and that retaliation or victimisation of whistleblowers will not be tolerated in a democratic society. A law that provides clear and swift sanctions against those who take detrimental action against whistleblowers means that whistleblowers will have a real alternative to silence or anonymity.

7. Some member States already have laws to protect whistleblowers and provide them with remedies. A number of these initiatives were in response to disasters or tragedies in which lives were lost or livelihoods destroyed and it was revealed that those working in or with the relevant organisations knew of the problem and were either too scared about their own position to say anything or did not know who to address, particularly outside the workplace. In some instances it has been discovered that staff did raise their concerns early enough for the damage to have been averted but were ignored.

8. Laws to protect whistleblowers also help organisations understand that it is in their interests to make it easier and safer for those who work for them to report their concerns and that the public should be alerted to serious wrongdoing or risk, particularly when it is not addressed. On the other hand, organisations that flout the law, engage in wrongdoing to boost profits

or whose leaders are corrupt will not want to encourage whistleblowing. In such instances, it is important that whistleblowers are legally protected when reporting information to the appropriate authorities and that they have access to appropriate remedies.

9. Organisations that let those who work for them know that it is safe and acceptable for them to report concerns about wrongdoing are more likely to:
 - a. be forewarned of potential malpractice;
 - b. investigate it; and
 - c. take such measures as are reasonable to remove any unwarranted danger.

Thus implementing internal whistleblowing arrangements is increasingly understood to be part of establishing an organisational ethos of integrity, delivering high standards of public and customer service¹ and managing risk in a responsible manner.

10. Furthermore, the emphasis on accountability and democratic principles is important. Employers, governments and citizens increasingly recognise that while encouraging whistleblowers to speak up averts harm and damage, it also improves public services and strengthens organisational responsibility and public accountability. Research shows that the vast majority of whistleblowers report their concerns internally first (no matter what regulations or whistleblowing laws, if any, are in place) and so it is in the interests of everyone that such reports are heeded, and whistleblowers protected.

11. Where the internal route cannot prove effective because employers do not facilitate the communication of whistleblowing concerns, fail to protect those who speak up or are themselves involved in the wrongdoing or its cover-up, regulatory bodies, where they exist, are usually considered the most appropriate recipients of such reports. Such bodies have the authority and power to deal with the issue and they need such information to carry out their functions effectively. Like employers, however, they need to act on the information they receive in order to maintain public confidence.

1. In 2010, the Corporate Executive Board released details of its survey of 500 000 employees in over 85 countries which found a direct relationship between a culture of integrity in the workplace and lower incidents of misconduct. Twelve indicators were used, and the one that most strongly correlated with a higher level of long-term shareholder return (over 10 years), was employee comfort in speaking up. A lack of fear of retaliation was identified as a key element in ensuring comfort. See <http://news.executiveboard.com/index.php?s=23330&item=50990>.

12. In most legal systems, there is little or no readily available protection for someone who makes a report to a public authority or a disclosure to the public even if it is made honestly, is justified and is reasonable. Accordingly, such reports or disclosures are often made anonymously in the hope that the source will be protected. However, anonymity raises a host of issues. More often than not, anonymous allegations are assumed to be malicious or are considered to be less credible by those who receive them. Anonymous disclosures can also be much more difficult to investigate and even impossible to remedy. Finally, anonymity is not a guarantee that the source of the information will not be unmasked. Where the person is identified, the fact that they acted anonymously can be seen as a sign of bad faith, further jeopardising their position. In the worst cases such people forfeit their career. Their plight then attracts media attention, which can only discourage others from sounding the alarm.

13. There are also cultural and social attitudes that work against protecting whistleblowers. Some of these stem from traditional hierarchical organisational structures in which obedience is valued to the extent that it works against the flow of communication (including about wrongdoing) from the lower to the upper ranks, or similarly where obedience to an organisation is emphasised more than its accountability to those it is meant to serve. Furthermore, the Parliamentary Assembly of the Council of Europe report on whistleblowing (see references below) notes that in some countries there are “deeply engrained cultural attitudes which date back to social and political circumstances, such as dictatorship and/or foreign domination, under which distrust towards ‘informers’ of the despised authorities was only normal”²

14. Whistleblower protection laws, therefore, offer a safe alternative to silence and reinforce the value of facilitating channels to report risk or wrongdoing. They are also intended to ensure that regulatory authorities act on information they receive and protect those who provide it, and that wider disclosures, to the media for example, are protected when necessary. The latter is more likely to be seen as reasonable where there are no safe alternative routes for reporting such concerns or when they do not work and the wrongdoing is ongoing or covered up. Most legal systems, however, will protect disclosures to the police, for instance when the risk is so serious that any delays would

2. Protection of “whistle-blowers”, Doc. 12006 (14 September 2009), report of the Committee on Legal Affairs and Human Rights, paragraph 1.

cause irreparable or significant harm, particularly to the lives or safety of others.

15. The interests of employers – whether in the public or private sector – to manage information and the activities of their personnel must be balanced with the right of the public to know when their interests are at risk, or when the law is being broken. In the case of the public sector, access to information is a fundamental right which allows for increased democratic participation, sound policy formulation and public scrutiny of State action. In the private sector, information about how business is conducted is important for consumer protection, fair market competition and the appropriate regulation of financial and other business activities. Courts in many jurisdictions have ruled that there can be no confidentiality in wrongdoing and that public disclosures are valid and protected, particularly when the public interest in having the information outweighs the right of the employer to restrict it. The European Court of Human Rights has ruled similarly in a number of cases examining Article 10 of the European Convention on Human Rights (hereinafter “the Convention”) on the right to freedom of expression. See also paragraph 18.

16. While confidential and anonymous reporting systems are recognised in some jurisdictions as a valuable tool for receiving information, stronger whistleblower protection and effective handling of the issues reported will help ensure that those who come across wrongdoing or a risk to the public will feel safe and able to speak up in the normal way. As the opportunities for public disclosures, particularly to the media and public interest groups, are increasing with new technology, member States are encouraged to take a sensible and pragmatic approach to protecting whistleblowing in the public interest.

Whistleblower protection and the Council of Europe

17. The work of the Group of States against Corruption³ (GRECO), which monitors the Council of Europe’s corruption prevention standards that include the Criminal and Civil Law Conventions on Corruption (ETS Nos. 173 and 174), has helped keep whistleblower protection on the European agenda. GRECO has recommended to most member States that staff in public administration

3. See in particular the Second Evaluation Round – www.coe.int/GRECO.

should be trained in reporting suspected corruption and be properly protected when they do so.

18. In the context of human rights law, the European Court of Human Rights⁴ has made some significant rulings with regards to whistleblowing, setting out key principles to apply when considering, in particular, the right to freedom of expression enshrined in Article 10 of the Convention. In 2009, the former Human Rights Commissioner, Thomas Hammarberg, described the devastating impact of corruption on human rights and stated that, “the control of information and weak public oversight make it easier for corrupt people to escape sanctions and public censure”.⁵ In particular it is important to recall that protecting wider public disclosures of wrongdoing to the media, for example, is essential for accountability and transparency in a democracy based on the rule of law. There is growing recognition in Europe and elsewhere, however, that States need to do more to protect whistleblowers in law and in practice, and to facilitate responsible whistleblowing in all sectors.

19. In 2009, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe issued a report⁶ which concluded that while there were various rules in different member States, much more needed to be done at national level. The Assembly subsequently adopted Resolution 1729 (2010) inviting all member States to review their legislation concerning the protection of whistleblowers bearing in mind certain guiding principles. At the same time, it adopted Recommendation 1916 (2010) recommending that the Committee of Ministers draw up a set of guidelines for the protection of whistleblowers taking into account the principles as set out by Assembly.

20. Mandated by the Committee of Ministers, the European Committee on Legal Co-operation (CDCJ) commissioned a report in 2012 to explore the

4. The European Court of Human Rights decisions dealing with whistleblowing and Article 10 rights have been with respect to external disclosures in the public domain. The Court set out six principles in the case of *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008, to help determine whether an interference with the Article 10 right to freedom of expression was “necessary in a democratic society”. These principles were reiterated in the case of *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts) and again in *Bucur and Toma v. Romania*, no. 40238/02, 8 January 2013. The principles are set out in the commentary on the draft recommendation (paragraph 53 below).

5. “Corruption is a major human rights problem”, presentation by the Human Rights Commissioner (Hammarberg) to the High-level Conference on the occasion of GRECO’s 10th anniversary (Strasbourg, 5 October 2009).

6. See note 2 above.

feasibility of a legal instrument on the protection of whistleblowers.⁷ The report reviewed the steps taken by Council of Europe member States to address whistleblowing and found that few had comprehensive legislation covering the protection of whistleblowers per se – that is, rules for those working in any sector, whether public or private, and covering wrongdoing or serious risk as broadly understood. That said, some member States are currently in the process of legislating in this area or intend to do so.

21. The feasibility report noted other important international initiatives on whistleblower protection that will apply to some but not all Council of Europe member States. These include provisions in the United Nations Convention Against Corruption (UNCAC), a commitment by the European Commission to assess⁸ the state of whistleblower protection in the EU member States with a view to doing further work in this area, the European Parliament's resolution calling for the establishment of an effective and comprehensive European protection programme for whistleblowers and others in the public and private sectors,⁹ as well as a commitment on the part of the G20 member States to protect whistleblowers as part of its Action Plan to Combat Corruption¹⁰ and the publication of its compendium of best practices and guiding principles for legislation on the protection of whistleblowers issued in 2010. Finally, there are examples of domestic laws aimed at private sector corruption and financial malpractice that also apply to multinational companies operating in Europe.¹¹

22. While these initiatives confirm the necessity for member States to address whistleblowing, a closer look at the reality of legal protection even in countries where some form of whistleblowing protection is in place, reveals the need for clearer guidance and direction. For example, whistleblower protection is not actively endorsed by national governments and few resources are

7. P. Stephenson and M. Levi (2012), "The protection of whistleblowers: a study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest", CDCJ(2012)9FIN.

8. Transparency International Berlin assessed 10 European Union member states in 2009 on behalf of the European Commission. This was extended to the then 27 member states and the resulting report, *Whistle-blowing in Europe: Legal Protections for Whistleblowers in the EU* was published in November 2013 (www.transparency.org/whatwedo/pub/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_EU).

9. European Parliament Resolution (23 October 2013) on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)). See in particular paragraphs 14, 70 and 109.

10. Action Point 7 of the G20 Action Plan to Combat Corruption.

11. The "Sarbanes-Oxley" (2002) and "Dodd-Frank" (2010) laws, United States of America; the United Kingdom's Bribery Act, 2010.

committed to ensuring that where disclosures are made to regulatory bodies, for example, these are handled properly and the interests of the whistleblower are safeguarded.

Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers

23. Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers is designed to situate whistleblower protection firmly within the sphere of democratic principles and safeguarding the public interest. The purpose is to help member States design and develop a framework that protects whistleblowers in law, which is implemented in practice and which is properly tailored to national systems. While the recommendation is intended to create a common set of principles to which all member States adhere, the manner in which each member States gives effect to these principles will not be uniform.

24. The recommendation was prepared by a drafting group of members of the European Committee on Legal Co-operation (CDCJ) and finalised at its 88th plenary meeting (16-18 December 2013). It was adopted by the Committee of Ministers on 30 April 2014.

25. The consultation with various stakeholders on the draft recommendation was ensured throughout the drafting process. The CDCJ sought the views of its members prior to commissioning the feasibility study and throughout the drafting process (October 2012-October 2013). A meeting was held in Strasbourg (30-31 May 2013) to consult with experts and practitioners from across Europe on key issues emanating from the drafting of the recommendation already undertaken by the CDCJ Bureau in an enlarged composition. The aim was to bring together a cross-section of people working in the field and related areas including whistleblower support bodies, employers, regulators, lawyers, judges, privacy experts, fraud investigators, media representatives, unions, ombudsmen and whistleblowers. The discussion focused on three areas – free speech, transparency and privacy; legal framework; and remedies and proceedings – and the resulting conclusions led to the preparation of a revised draft recommendation.

26. Recommendation CM/Rec(2014)7 on the protection of whistleblowers has been drawn up on the basis of legal expertise and research from across Council of Europe member States. The principles build on existing international,

European and national laws and standards, and in particular the principle that there can be no confidentiality in malfeasance or wrongdoing. Protecting the public from harm is the guiding principle throughout and must be at the heart of the work member States do to protect whistleblowers.

27. Recommendation CM/Rec(2014)7 on the protection of whistleblowers is not only a declaration of principles but also aspires to be of practical use to governments, civil society, citizens, regulatory bodies, law-enforcement authorities and others in the creation and implementation of sensible national frameworks for receiving warnings of wrongdoing in the workplace and protecting those who report or disclose such information from unfair treatment.

Commentary

Operative clause

28. While many member States of the Council of Europe have rules covering, directly or indirectly, certain aspects of whistleblowing, most member States do not have a comprehensive national framework for the protection of whistleblowers. The key objective of the recommendation is to encourage member States to put in place such a framework.

29. The particular characteristics of the national legal systems of member States, and the political and legislative choices that they wish to make in this area, will determine whether or not a member State opts for a single law on the protection of whistleblowers. The recommendation takes no stand on this issue. What it does stress, however, is the importance of the various normative, institutional and judicial elements which, together, provide a comprehensive and coherent whole in which reporting and disclosure channels, investigatory and remedial mechanisms, and legal remedies for the protection of whistleblowers all interact with each other effectively. This is referred to as a “framework” for ease of reference in the recommendation. It should be understood as implying flexibility and synergy rather than rigidity and uniformity.

30. The recommendation focuses on the protection of whistleblowers since it is considered that through the provision of adequate legal measures for the protection of whistleblowers member States can best ensure the efficient and effective communication of information on threats to the public interest and the action by employers and the public authorities to remedy them. The principles appended to the recommendation do, in any event, include provisions on investigation and remedial action.

31. It is the *de facto* working relationship of the whistleblower, rather than his or her specific legal status (such as employee), that gives a person privileged access to knowledge about the threat or harm to the public interest. Moreover, between member States, the legal description of individuals in employment or in work can vary and likewise their consequent rights and obligations. Furthermore, it was considered preferable to encourage member States to adopt an expansive approach to the personal scope of the recommendation. For these reasons it was decided to describe the personal scope by reference to the person's "work-based relationship". This broad approach does not on the other hand imply that national law should afford to persons who are not, in strict terms, employees (such as self-employed persons, trainees, those set to work by their employer with another employer and volunteers) the same form of protection or legal remedy, for example in relation to dismissal or suspension. Indeed, the appropriate form and level of protection will depend on the legal nature of the person's work-based relationship and the nature of any detriment they suffer. See also paragraph 79 in this context.

32. As with all recommendations of the Committee of Ministers, the recommendation is to be applied within the context of each member State's own constitutional arrangements. Accordingly, in some member States, the framework, or elements of it, will be devolved to regional or local State authorities or, indeed, in some cases, to the social partners and the collective labour agreements concluded between them. What is important is that the framework as a whole is comprehensive and coherent, with its different elements capable of interacting effectively.

33. More specifically, in the case of constitutional systems that accord a normative role to collective bargaining arrangements, whether to all or only to part of the workforce, it is sufficient that the member States concerned ascertain the extent to which these arrangements include provisions on the protection of whistleblowers and, where necessary, encourage the social partners to take inspiration from the principles set out in the appendix to the recommendation. Moreover, and where possible, it would be helpful for such encouragement to be underpinned by the law.

Appendix – The 29 principles

34. As stated in the operative clause of the recommendation, the principles set out in the appendix are intended to guide member States when reviewing

their current laws or when introducing new or amended legislation. These principles are not exhaustive, and, because of their character, each member State can apply or modify them as it considers most appropriate in the context of its own legal system. As already mentioned, the key objective of the recommendation is to encourage member States to put in place a comprehensive and coherent national framework. The definitions aim to make it easier to read the appendix to the recommendation.

Material scope

Principle 1

35. The reference to a “framework” should be understood as an arrangement of various normative, institutional and judicial elements which, together, provide a comprehensive and coherent whole. It may be a single legislative act, although even if this is the case, the legislation is likely to build on existing regulatory and judicial structures. The reference to a “national” framework should be understood as referring to the application of the recommendation, in accordance with the specific constitutional arrangements of each member State.

36. Principle 1 makes it clear that the end objective of the national framework is to facilitate public interest reporting and disclosures rather than to control or hinder them, and that this objective is to be achieved by putting in place measures to protect whistleblowers. It should be noted that the action of facilitating, has been specifically chosen in this context in preference to that of promoting. By this it is understood that efforts should be made to make it effectively easier for persons to make reports or disclosures of information concerning threats or harm to the public interest. In order to ensure that there is in place an appropriate legal environment that can properly facilitate reporting and disclosures, it may be necessary for member States to conduct a thorough and systematic review of their existing arrangements with a view to identifying areas where existing rules need to be reformed and harmonised or new rules developed.

37. A normative framework takes into account the rules, rights and duties that govern and impact on employment or contractual or voluntary working relationships. Collective bargaining agreements include their own normative provisions. A review would enable the legislator to determine whether and

how such rules facilitate or hinder the honest¹² communication of warnings or reports of threats or harm to the public interest, whether within the working relationship (i.e. to the employer or person designated by the employer to receive reports in confidence) or outside it (e.g. to a regulator, the law-enforcement agencies or the media). In order to give an idea of the scope of a possible normative framework on whistleblowing, a review of relevant legislation, professional codes and internal rules could include, for example:

- human rights law – having particular regard to protecting the right to freedom of expression guaranteed in Article 10 of the Convention;
- criminal law – in particular with respect to protection against criminal prosecution for defamation; prohibiting retaliation against any employee who reports a crime;
- media law – in particular, the protection of journalist sources;
- other sector-based laws – on, for example, anti-corruption, competition, health and safety, accounting, environmental protection and company and securities;
- contract and employment law – in particular, protection against breach of confidentiality or loyalty; prohibition or nullification of any agreement which purports to preclude an individual from making a public interest report or disclosure; protection from unfair dismissal or any other form of employment-related retaliation including acts committed by peers or colleagues;
- labour law/labour agreements – in particular the collective right to report or disclose public interest concerns;
- professional reporting duties – protection for those who have specific duties to report or disclose (for example, compliance officers, health and safety officers, company directors, child protection officers);
- specific anti-corruption measures – having regard to those foreseen by the Council of Europe Civil Law Convention on Corruption (ETS No. 174);
- codes of conduct – rules on conduct and integrity and the reporting of breaches of the rules;

12. "Honest" or "bona fide" means "without fraud or deceit". It does not mean the individual is right nor does it mean he or she has no other ulterior motive. This distinction is important in whistleblowing as it means that only someone who reports or discloses information which he or she knows to be untrue or false should lose the protection of the law.

- disciplinary policies and procedures – particularly with regard to (administrative) offences of breaches of confidentiality or defamation;
- other organisational policies or rules – including data protection, disciplinary codes, media communications.

Clearly, a review of public law norms, created by legislation or law, would be carried out by the relevant public authorities, whereas those of a private law character (professional and employers' codes) would be carried out by the relevant professional bodies or employers.

38. The regulatory authorities, law-enforcement agencies and supervisory bodies comprise the institutional framework. They ensure that there are channels for reporting by whistleblowers, as well as structures and mechanisms to react to such information. It is important that they complement each other and offer effective linkages with the employers and court structures. It is important to review the overall framework of these structures in order to ensure that it is working properly, and that there are no gaps in the system.

39. In order to make protection a reality, swift and effective access to legal review, decision and remedy for any retaliation or detriment must be guaranteed. This judicial framework can include access to general or specialist authorities, tribunals and courts who have the power to sanction those found to have taken unfair action against a whistleblower or failed to properly examine the report or disclosure they received, and to provide a remedy to the whistleblower for any victimisation or retaliation for the report or disclosure. Ultimately, however, whistleblowers should have access to a court of law.

40. The “rights and interests” of whistleblowers include human rights (e.g. freedom of expression) as well as, more generally, those provided by a member State’s civil, administrative and criminal law.

Principle 2

41. Throughout Europe, the public interest is understood as the “welfare” or “well-being” of the general public or society. Protecting the welfare and well-being of the public from harm, damage or breach of their rights is at the heart of this recommendation. Thus, Principle 2 needs to be read in conjunction with Principle 1. The purpose of a national framework is to facilitate the reporting or disclosing of information about wrongdoing or risk to the public interest as it is in the public interest to prevent and punish such acts. Thus, the recommendation encourages a change of paradigm, from whistleblowing being considered as an act of disloyalty to one of democratic responsibility.

42. While what is in the public interest will in many areas be common ground between member States, in other areas there may well be a difference of appreciation. What constitutes the public interest is, therefore, intentionally not defined in the recommendation. This is left to each member State, a position reflected by the European Court of Human Rights in its case law.¹³ Principle 2 makes this clear, while also drawing attention to the importance of including the three areas mentioned (risks to public health and safety, risks to the environment and violations of law and human rights).

43. Most member States will have experience in balancing the interests of employers (public or private) to manage and run their organisations with the need to ensure the public is protected from exploitation or harm. This is helpful in defining the scope of information that falls within the definition of “public interest”. Some member States, like Norway, define it in simple terms, and other member States, like Romania and the United Kingdom, set out broad categories of risks or wrongdoing. The following is a non-exhaustive list of categories of (reported or disclosed) information for which it is typically considered that a whistleblower should be protected:

- corruption and criminal activity;
- violations of the law and administrative regulations;
- abuse of authority/public position;
- risks to public health, food standards and safety;
- risks to the environment;
- gross mismanagement of public bodies (including charitable foundations);
- gross waste of public funds (including those of charitable foundations);
- a cover-up of any of the above.

44. However, member States should define the public interest for the purposes of their national framework on protecting whistleblowers. Principle 2 refers to the importance of its scope being clearly specified in the relevant

13. See *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII. “The Court is of the opinion that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’ [...] The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 32, § 46)”.

law. This is so that any member of the public can be reasonably expected to understand what is covered and what is not, and make an informed decision accordingly.

Personal scope

Principles 3 and 4

45. Principles 3 and 4 take a broad and purposive approach to the range of individuals who might come across wrongdoing in the workplace or through their work-related activities. From the perspective of protecting the public interest, these are all individuals who by virtue of a *de facto* working relationship (paid or unpaid) are in a privileged position vis-à-vis access to information and may witness or identify when something is going wrong at a very early stage – whether it involves deliberate wrongdoing or not. This would include temporary and part-time workers as well as trainees and volunteers. In certain contexts and within an appropriate legal framework, member States might also wish to extend protection to consultants, freelance and self-employed persons, and sub-contractors; the underlying reasons for recommending protection to whistleblowers being their position of economic vulnerability vis-à-vis the person on whom they depend for work.

Principle 5

46. Principle 5 recognises that reporting or disclosing information about wrongdoing or serious malpractice related to national security, defence, intelligence, public order or international relations of the State is in the public interest but that there are legitimate reasons why member States may wish to apply a restricted set of rules in some or all of the cases mentioned. The principle is based on the assumption that member States may introduce a scheme of more restrictive rights in relation to the general scheme but that they may not leave the whistleblower completely without protection or a potential defence.

47. It is to be noted that Principle 5 refers to information only. It does not permit categories of persons (such as police officers, for example) to be subject to a modified scheme. Rather, it is the category of information that may be subject to a modified scheme. The principle, therefore, extends, for example, to non-military personnel who, through a work-based relationship with the military (sub-contractors, for example) acquire information on a threat or harm to the public interest.

Global Principles on National Security and the Right to Information¹⁴

The Global Principles were drafted by 22 organisations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative. The process culminated in a meeting in Tshwane, South Africa, which gives the principles their name. They were issued on 12 June 2013.

The Tshwane Principles provide that laws should protect public servants – including members of the military and contractors working for intelligence agencies – who disclose information to the public so long as four conditions are met: (1) the information concerns wrongdoing by government or government contractors (defined in some detail); (2) the person attempted to report the wrongdoing, unless there was no functioning body that was likely to undertake an effective investigation or if reporting would have posed a significant risk of destruction of evidence or retaliation against the whistleblower or a third party; (3) the disclosure was limited to the amount of information reasonably necessary to bring to light the wrongdoing; and (4) the whistleblower reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.

Even if the disclosure does not meet the above four criteria, the principles recommend that the whistleblower should not be punished so long as the public interest in disclosure outweighs the public interest in keeping the information secret. To the extent that a country does have laws that criminalise disclosure to the public of classified information, any punishment should be proportionate to the harm actually caused.

The principles reflect jurisprudence and practice from around the world including two significant cases of the European Court of Human Rights: *Guja v. Moldova* (2008) and *Bucur and Toma v. Romania* (2013).¹⁵

14. See <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>. The Parliamentary Assembly of the Council of Europe welcomed the adoption of these principles (the “Tshwane Principles”) which are designed to give guidance to legislators and relevant officials throughout the world on the protection of whistleblowers in the context of national security – Resolution 1954 (2013) on national security and access to information, paragraph 7.

15. *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008; *Bucur and Toma v. Romania*, no. 40238/02, 8 January 2013.

Principle 6

48. Principle 6 refers to situations where, for example, a lawyer learns from his or her client of a risk or harm to the public interest and decides to report or disclose the information without the consent of the client. In such a situation, the national framework of the member State should not allow the lawyer to escape being sanctioned for having breached the professional code of client confidentiality unless a breach is required by law (e.g. money laundering). Nor should persons working for the lawyer be able to avail themselves of protection under the national framework if they report or disclose information given to their lawyer-employer. The principle recognises the importance of professional privilege or client confidentiality between a lawyer and his or her client in a democratic society governed by the rule of law. The principle extends to all forms of professional privilege.

49. It should be noted that a person who seeks advice, whether it be from a lawyer or another person, or who makes a confession to a priest, is not making a report or disclosure for the purposes of this recommendation.

Normative framework

Principle 7

50. The importance of a comprehensive and coherent approach in national law and legislation to the protection of whistleblowers has already been mentioned (see paragraph 29). A comprehensive approach will ensure a coverage of persons and situations that is as wide as possible. It implies that the relevant norms may be legislative or contained in legal documents (such as collective bargaining agreements) and professional and employer codes. A coherent approach will ensure that potential whistleblowers are not discouraged or penalised by conflicting or restrictive legal provisions, and that their reports or disclosures are acted upon in an effective manner. Again, as already mentioned in connection with the term “framework”, the term “comprehensive and coherent” does not necessarily imply a single legislative act. Member States may prefer to maintain or build upon an arrangement of different provisions and measures, although, in this case, the need to ensure that the system as a whole is comprehensive and coherent will be all the more important.

Principle 8

51. In implementing the recommendation member States will wish to balance various interests and principles. For an individual who reports a concern about wrongdoing within the working relationship – to the employer or to a person designated by the employer to receive reports in confidence – there is usually little or no basis in law for an employer to take action against that person in any event. There is no breach of confidentiality or duty of loyalty.¹⁶ Outside of the working relationship, however, it is recognised that the interest of employers to manage their organisations and to protect their interests (for example, intellectual property rights) must be balanced with the interest of the public to be protected from harm, wrongdoing or exploitation. This balancing must take into account other democratic principles such as transparency, right to information and freedom of expression, and the media, all of which tend to favour disclosure over restricting information. The phrase, “no more than necessary”, strikes the appropriate balance between the different competing interests.

52. Principle 8 properly positions whistleblower protection as a democratic accountability mechanism. While this means that it is a matter of common sense and good governance that individuals should report concerns about wrongdoing or risks of harm to those closest to the problem and those best able to address it (i.e. to the employer or appropriate regulator), the law should also recognise and protect wider disclosures of information.

53. A disclosure made in the public domain (this means outside the employment or regulatory relationship) to the media for example, triggers other important issues as indicated above, and in this regard the European Court of Human Rights has made a number of important rulings. In the cases of *Guja v. Moldova* and later in *Heinisch v. Germany* and *Bucur and Toma v. Romania*,¹⁷ the Court has set out six principles on which it has relied in determining whether an interference with Article 10 (freedom of expression) of the Convention in relation to the actions of a whistleblower who makes disclosures in the

16. It is important that any rules on defamation do not hinder internal reports of suspected wrongdoing. In this regard, any action taken against anyone for misconduct as a result of an initial report should be based on the rules of natural justice, and, as a result, there should be a full and fair investigation of the facts and an opportunity for the person to respond.

17. *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008 and again in *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).

public domain was “necessary in a democratic society”. These principles are set out below in the order used by the Court in the case of *Bucur and Toma v. Romania*:¹⁸

i. whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure;

ii. the public interest in the disclosed information. The Court in *Guja v. Moldova*¹⁹ noted that “in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”;

iii. the authenticity of the disclosed information. The Court in *Guja v. Moldova*²⁰ reiterated that freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. The Court in *Bucur and Toma v. Romania*²¹ bore in mind Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe and the need to protect whistleblowers on the basis that they had “reasonable grounds” to believe that the information disclosed was true;

iv. detriment to the employer. Is the public disclosure so important in a democratic society that it outweighs the detriment suffered by the employer? In both *Guja v. Moldova* and *Bucur and Toma v. Romania* the employer was a public body and the Court balanced the public interest in maintaining public confidence in these public bodies against the public interest in disclosing information on their wrongdoing;

v. whether the disclosure is made in good faith. The Court in *Guja v. Moldova* stated 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”;

18. See note 15, *Bucur and Toma*.

19. See note 15, *Guja*.

20. *Ibid.*

21. See note 15, *Bucur and Toma*.

vi. the severity of the sanction imposed on the person who made the disclosure and its consequences.

Principle 9

54. Principle 9 refers to “mechanisms” as meaning the practical arrangements – supported by law where necessary – that already exist, can be strengthened or would need to be developed in order to ensure that individuals know where and to whom to make reports or disclosures, how the information will be handled and what protection can be expected.

55. Experience shows that where States have reviewed their systems and strengthened or implemented new arrangements that allow for the appropriate disclosure of information and, importantly, the prompt examination and investigation of any material issues, the change in workplace culture that ensures greater local accountability is much faster and deeper. This also requires States to ensure that regulators have the right powers to handle disclosures and protect whistleblowers, and that they are properly resourced to set up effective systems.

Principle 10

56. Principle 10 concerns the rights of natural persons only, whether an employer or third party, who suffers loss or injury as a result of a report or disclosure. The normative framework should not take away their rights under general law (civil and administrative) in cases where the report or disclosure contains inaccurate or misleading information.

Principle 11

57. Principle 11 makes it clear that no term or clause in any contract or agreement – whether a contract for work or a settlement agreement – between an individual and the person or body for whom they are working can be relied on to preclude someone from making a public interest report or disclosure. In this sense no one can contract out of the right to make a public interest report or disclosure.

58. Provisions in regulations or service agreements covering the employment of civil servants or other public officials, as is the case in some

member States, are also intended to be covered by the reference to legal obligations.

Channels for reporting and disclosures

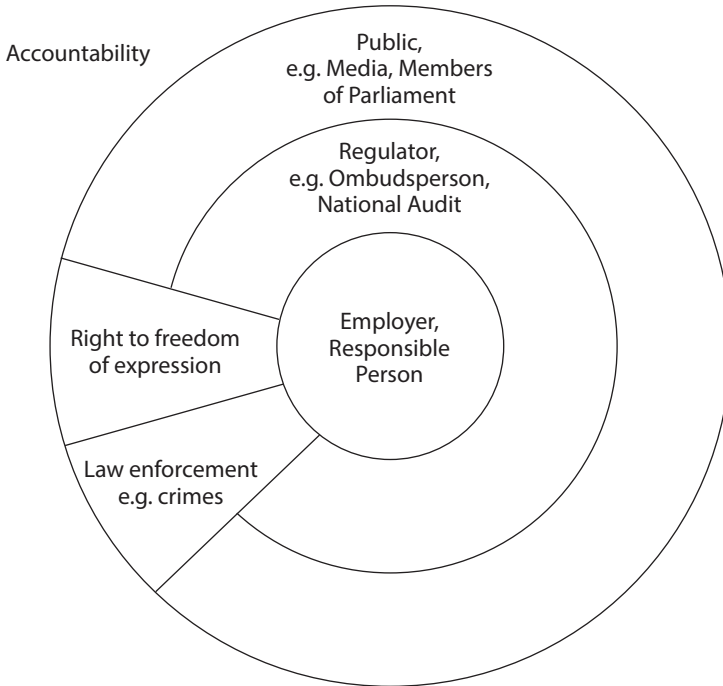
Principle 12

59. The purpose of Principle 12 is to encourage member States to put in place a normative framework that is clear and operational, and which furthers the general interest of transparency and accountability. By providing greater and sufficient protection to whistleblowers, member States will both encourage reporting, in an open manner, of threats and harm to the public interest and, in this way, discourage the making of anonymous denunciations. Reporting in an open manner does not, however, imply a right to disclose confidential information unrelated to the suspected threat or harm to the public interest.

Principles 13 and 14

60. Principles 13 and 14 identify potential recipients of information on acts and omissions that represent a threat or harm to the public interest. They should be read in conjunction with Principle 8, and the explanation given thereto in paragraphs 51-53 above. The channels, as they are described, follow the logic adopted throughout the recommendation of referring to “reporting” as an action that takes place within the organisation or enterprise and to public regulatory bodies so as to help ensure that the information gets to those people most able to investigate and with powers to deal promptly with the problem. In a democracy, ensuring that a public disclosure of information – to the media or a member of parliament, for example – can be made is a vital safeguard to protecting the public interest and is also enshrined in freedom of expression right.

61. The various channels indicated in Principle 14 recognise that responsibility for wrongdoing or harm resulting from acts or omissions in the workplace or work-related activities may rest primarily with the employer and responsible public regulatory authorities. Considering how legal accountability works in each system and who has power to address a problem or make changes will help member States identify the appropriate recipients for public interest reports and disclosures. It will also help identify the support and resources different recipients might need to handle and act on such information.



The figure shows who is closest to the problem (i.e. the object of the whistle-blowing) and, therefore, who is the closest placed in terms of accountability and potential reporting and disclosure. Reporting crimes and freedom of expression are included. All channels are interconnected, without any order of priority, and should be available and protected in an appropriate way.

62. In order to facilitate the communication of information about wrongdoing or risk, organisations or enterprises of sufficient size are likely to appoint persons with responsibility for receiving reports in confidence: designated officers or confidential advisors, for example. To be effective, such persons, while not necessarily being independent of the employer, should enjoy a certain degree of autonomy in discharging their responsibility. In large businesses, reports may also be made to the board and non-executive directors are now taking on more responsibility in this regard. To cater for the needs of small businesses, however, and even more generally, some member States may consider it beneficial to establish a public body or commission

to receive such reports in confidence. Such a body would not be responsible for remedial action as this, of course, remains within the prerogative of the employer or regulatory authority. Government departments, businesses and professional associations often provide support and guidance to small and medium-sized enterprises and can be encouraged to include guidance on whistleblowing.

Principle 15

63. Clearly member States will need to do more than implement a law on whistleblower protection to encourage employers to ensure their internal arrangements allow those working for them to raise issues early and safely. It must be recalled that in law most communications within a working relationship, to an employer or an employment-related structure – such as a staff association, a union representative or an organisational ombudsman – do not breach any duty of confidentiality owed to the employer (including the duty of loyalty in common-law systems). There should be few, if any, barriers to reporting concerns about wrongdoing or risks internally within the employment context and protection against retaliation should be as close to automatic as possible since it is in this context that employers can take an informed view of a problem and can address it before any serious damage occurs.

64. There are a number of ways in which member States can help employers understand the value of facilitating internal whistleblowing. The most important is to implement a clear and strong legal framework that makes an employer liable for any detriment caused to anyone working for them for having exercised their right to report a concern or disclose information about wrongdoing according to the law. Employers who understand that those who work for them can report directly to a regulator or independent body and that they will be liable in law if they try to deter their staff from doing so, will understand why it is in their interests to implement safe and effective internal arrangements. Furthermore, member States can make available the research in this area that shows the value of whistleblowing in terms of good governance and detecting wrongdoing.²²

22. The Association of Certified Fraud Examiners (ACFE), for example, confirmed that staff tip-offs have been found to be the most common form of fraud detection in all their research undertaken since 2002. The global headquarters of the ACFE are in the United States of America with regional and national offices around the world.

65. No explicit mention is made to providing employers with assistance in setting up internal reporting procedures. Indeed, in many cases this may not be necessary or even possible. Some member States may, however, wish to consider providing financial, technical or legal support, particularly for employers in areas where there may be more of a likelihood of threats or harm to the public interest.

Principle 16

66. Adherence amongst the workforce to new internal reporting systems is likely to be enhanced if employees and their representatives are consulted beforehand, particularly in large organisations. Whereas in some member States employee consultation will be a common practice, it may not, however, always be appropriate, and this principle has been drafted accordingly. The term “worker” is used in the recommendation to ensure that all workers, however their legal status is defined by the national legal system, are covered by this principle.

Principle 17

67. As indicated under Principle 14, this recommendation does not establish an order of priority between the different channels of reporting and disclosure. Such an order of hierarchy would in any event be difficult to establish as, in practice, each situation will be different and will determine which channel is the most appropriate. In some member States, constitutional rules on freedom of expression would also make such an exercise in giving preference to one or other channel impossible. While Principle 17 States that internal reporting and reporting to public regulatory bodies, law-enforcement agencies and supervisory bodies should be encouraged it is understood that this should not be to the detriment of the protection of whistleblowers. The encouragement for internal reporting is given in the recommendation because setting up effective internal reporting systems is part of good and transparent management practice and governance, and, together with reports to public regulatory authorities, enforcement agencies and supervisory bodies, internal reporting can contribute in many cases to the early and effective resolution of risks to the public interest.

68. Principle 17 reinforces the clear message to member States that a national framework to protect whistleblowers must build on democratic principles and therefore a law that seeks simply to manage and control information rather

than a law that seeks to ensure legal and public accountability will not meet Council of Europe standards for whistleblower protection.

Confidentiality

Principle 18

69. While reporting openly and without fear is ideal, experience shows that legal protection alone is not reassurance enough for an individual who comes across wrongdoing in the course of their work and is unsure whether or to whom to report it, or is worried about their position. For these reasons, confidentiality, as set out in Principle 18, should be offered and guaranteed to the individual disclosing the information in order to reassure them and ensure the focus remains on the substance of the disclosure rather than on the individual who made it. The principle of confidentiality (i.e. where the name of the individual who reported or disclosed information is known by the recipient but will not be disclosed without the individual's consent, unless required by law) in the recommendation should not be confused with anonymous reporting or disclosures (i.e. where a report or information is received but no one knows the source).

70. Principle 18 assumes that the whistleblower has given his or her name or is otherwise known to the person to whom the report has been made. It also assumes that disclosure of the person's identity, whether internally or externally, can only be made with his or her consent. However, the principle of confidentiality should not act as a barrier for sharing information related to the investigation or handling of a report between regulatory or investigatory bodies so long as proper safeguards are in place and these are explained to the whistleblower. Moreover, in legal systems where consent is not required because the overriding principle is one of openness, the existence of safeguards against misuse of the information by others to the detriment of the whistleblower would satisfy the requirements of Principle 18.

71. The principle also recognises that protecting the identity of the whistleblower can occasionally conflict with the rules of fairness (for example, fair trial and the common-law notion of natural justice). Where it is impossible to proceed – for example, to take action against a wrongdoer or those responsible for the damage caused without relying directly on the evidence of the whistleblower and revealing his or her identity – the consent and co-operation of the whistleblower should be sought, and any concern that he or she might have about their own position addressed. In some cases it may be necessary

to seek a judicial ruling on whether and to what extent the identity of the whistleblower can be revealed.

72. Member States will need to consider how best to enforce the obligation in Principle 18 in the context of their own national legal systems and, importantly, taking into account the rights of citizens to communicate with their elected representatives and the right of journalists to protect their sources.

Acting on reporting and disclosure

Principle 19

73. Acting on reporting and disclosure is the key concern of whistleblowers – they wish to see action taken to remedy the wrongdoing that they have highlighted. It is also in the interests of organisations, regulatory bodies, law-enforcement agencies and citizens that reports and disclosures are examined, investigated and where necessary, action is taken to remedy a problem, particularly to avoid more serious harm. “Promptly” means that action should be taken without delay, taking into account the resources available and the scale of the harm to the public interest that is revealed in the report or disclosure.

74. Research on whistleblowing in many jurisdictions consistently shows that one of the main reasons for not reporting concerns is that whistleblowers believe it will not make a difference. For example, American surveys of federal employees repeatedly found that fear of retaliation is only the second reason why some half a million employees choose not to blow the whistle. The primary reason is that they do “not think that anything would be done to correct the activity”²³

75. There are many ways in which member States can ensure that public interest concerns are investigated promptly and addressed where necessary. Along with providing appropriate and adequate resources to regulatory bodies to promote, receive and handle public interest reports, courts might be empowered to award damages to the individual whistleblower or directly sanction, fine or penalise an employer or other responsible person for failing to conduct a prompt and adequate investigation in light of the information received. Similar powers could be provided to regulatory bodies directly as part of their remit. There are other innovative ways in which member States

23. See T. Devine, “Whistleblowing in the United States: The gap between vision and lessons learned”, in *Whistleblowing Around the World: Law, Culture and Practice*, (2004), G. Dehn and R. Calland (eds.), London, British Council.

could encourage employers (private and public) to address whistleblowing responsibly. Some examples from the private sector include the approach of “comply or explain”²⁴ or introducing a strict liability offence for failing to prevent harm or damage and a defence of having in place “adequate measures.”²⁵

Principle 20

76. Ensuring that the individual who made the report is kept informed of the investigation and its outcome as far as is legally possible strengthens the national framework overall as it builds trust and confidence and reduces the likelihood that further unnecessary disclosures will be made. Principle 20 is focused primarily on reports made internally within the organisation or enterprise. However, member States may also consider it beneficial to extend the provision to reports made to public bodies within the confines of a regulatory, enforcement or supervisory framework.

Protection against retaliation

77. Principles 21 to 26 (as well as principles 18 and 20) make it clear that the manner in which reports and disclosures are handled makes a difference, both to the outcome of the issue reported or disclosed as well as to safeguarding the interests of the individual who raised it. While whistleblower protection is meant to offer a safe alternative to silence, it also offers a safe alternative for both the employer and whistleblower to the anonymous tip-off or leak. At a time where it is more and more difficult to control the communication of information, whistleblower protection helps guide such information in a responsible way.

Principle 21

78. Principle 21 (together with Principle 25, see below) seeks to ensure a strong level of protection in law for those who alert their employers, the authorities or the wider public to wrongdoing or risks that damage or harm the public. Experience from around the world demonstrates that the forms of harassment are varied and numerous. It must be recalled that whenever an individual is retaliated against for properly reporting or disclosing information about wrongdoing in their workplace, it has a chilling effect on anyone

24. Guidance on whistleblowing for audit committees is available from the Institute of Chartered Accountants for England and Wales (ICAEW) (<http://www.icaew.com/en/technical/legal-and-regulatory/information-law-and-guidance/whistleblowing>).

25. See for example the United Kingdom’s Bribery Act, 2010.

else who may come across serious wrongdoing in that workplace or in any other. As a result, it is necessary to ban any retaliation, whether it is active in the form of disciplinary action or termination of employment, or passive, as in a refusal to promote or provide training.

79. It is clear that the forms of retaliation will vary depending on the specific legal status of the whistleblower (or rather on the legal nature of his or her work-based relationship). As an example, a person who is not paid (a volunteer) cannot suffer retaliation in the form of a reduction in wages, a deduction from wages or with the loss of promotion opportunities. Retaliation, in this case, is more likely to take the form of no longer making use of the volunteer's services, or of giving a negative reference for future employment or otherwise damaging the person's reputation. A temporary worker cannot expect to secure a permanent contract of employment as compensation for retaliation. However, in cases where a person's contract includes a future option for an indefinite employment contract (for example, a person on probation or a trainee), denial of this option in the case of whistleblowing would constitute retaliation for the purposes of the recommendation.

80. When retaliation against an individual is recommended, threatened or attempted by the whistleblower's employer, such actions can also have a chilling effect on the whistleblower who may, as a result, be discouraged from properly raising the issue with a regulator and on any others who are aware of the problem. Thus, the prohibition against retaliation should cover such actions as well, particularly as this will help to guard against those in positions of authority (i.e. managers) from turning a blind eye as to why subordinates are targeting an individual for such an action.

81. The recommendation does not specify any time period within which the detriment suffered by the whistleblower should take place after the date of the public interest report or disclosure for it to constitute retaliation for the purposes of the recommendation. Clearly, the longer the lapse of time between the detriment and the whistleblowing, the more difficult it will be to establish a causal link between them. It is for member States to consider the appropriateness of fixing such a time frame.

82. Moreover, the recommendation does not indicate the form of protection that should be offered to the whistleblower. This is left for member States to determine in accordance with the general legal principles of their legal systems. See the explanation in Principle 26 below.

83. The term “retaliation” is employed expressly in the recommendation. It conveys exactly the close (cause and effect) relationship that must exist between the report or disclosure and the sanction that has been inflicted on the person who has made it in order that he or she can enjoy legal protection.

84. Moreover, Principle 21 makes reference to both direct and indirect retaliation. Examples of indirect retaliation would include, for example, actions taken against the whistleblowers’ family members.

Principle 22

85. Research shows that individuals raise concerns not only when wrongdoing has already occurred and damage has already been done but also, and more often, in order to avert further harm and damage.²⁶ Even where an individual may have grounds to believe that there is a problem which could be serious, they are rarely in a position to know the full picture. It is inevitable, therefore, in both situations that the subsequent investigation of the report or disclosure may show the whistleblower to have been mistaken. Principle 22 makes it clear that protection should not be lost in such circumstances. Moreover, the principle has been drafted in such a way as to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected. Principle 10 protects the position of anyone who suffers loss or injury as a result of someone who deliberately and knowingly reports or discloses false information. Also, a person who makes such reports or disclosures should not be protected by the law.

Principle 23

86. Principle 23 acknowledges that action taken outside the workplace can undermine an individual’s protection for reporting or disclosing information as intended in this recommendation. Thus it is important for member States to ensure that a whistleblower is entitled to rely, as a procedural right, on having made a disclosure in accordance with the national framework as a defence to proceedings or as a release from liability under civil, criminal or administrative law.

²⁶. See research into 1 000 cases from the confidential advice line of Public Concern at Work (United Kingdom) <http://www.pcaw.org.uk/whistleblowing-the-inside-story> and note 23 for further information.

Principle 24

87. Principle 24 refers to the situation where an employer has put in place an internal reporting system in order to react positively to reports of threats or harm to the public interest and to provide reassurance that it is safe and acceptable to use this system. In a case where an employee makes a disclosure to the public and having regard to the European Court of Human Rights case law, the normative framework may recognise the legal value of an expectation to use the internal reporting system as one of the factors in determining the appropriate remedy or level of protection afforded to the whistleblower for any reprisal or action taken or threatened against him or her for making the disclosure. However, the principle does not permit an employer to abuse the obligation to use the system or to rely upon it to dismiss the employee.

Principle 25

88. Principle 25 places the burden of proof for any detriment inflicted by an employer against the interests of the individual who made the report or disclosure in the public interest on the employer. Once an employee demonstrates a prima facie case that he or she made a public interest report or disclosure and suffered a detriment, the burden shifts onto the employer, who must then prove that any such action was fair and not linked in any way to the whistleblowing. A similar approach is taken in anti-discrimination law in some member States.

Principle 26

89. The recommendation makes no reference to the remedies that should be available for a whistleblower who has suffered retaliation. In most cases the appropriate remedy will be determined by the kind of retaliation that has been suffered. Time is, however, a key factor in ensuring adequate and appropriate protection for the whistleblower. The recommendation makes an explicit reference to the need for interim remedies to be available pending the resolution of legal proceedings that can be protracted. These could be in the form of a provisional measure ordered by a court to stop threats or continuing acts of retaliation, such as workplace bullying or physical intimidation, or prevent forms of retaliation that might be difficult to reverse after the lapse of lengthy periods, such as dismissal. Principle 26 also covers the interim remedies available to non-judicial bodies. Public regulatory bodies might also be empowered to take temporary measures to protect the whistleblower. The

principle does not imply the creation of a State fund to make payments to whistleblowers.

90. In some jurisdictions compensation is provided for economic losses, particularly in the case of dismissal, as well as damages for any injuries or suffering. The types of remedy will vary between legal systems but the goal should be to provide as full a remedy as is possible. It should also be recognised that it may be difficult or detrimental for a whistleblower to return to the same workplace and that where a transfer is possible such an option should be available.

Advice, awareness and assessment

Principle 27

91. The law on protecting whistleblowers and what it means in practice needs to be promoted across all sectors. The value of whistleblowing in detecting and deterring corruption, preventing wrongdoing and minimising serious risk to people or the environment, will not be recognised if the purpose and application of the law is not properly understood or promoted. Employers need to understand what will and can happen if they victimise or fail to deal with reprisals taken against a whistleblower and fail to investigate a report of wrongdoing or serious risk. In such circumstances, there is clearly a risk that the wrongdoing or problem will cause greater damage or harm, and that the whistleblower will have a strong claim against the employer and be protected in law for making a disclosure in the public domain. Importantly, employers need to understand why it is in their best interests to encourage those who work for them to report concerns about wrongdoing or risk of harm early enough and to make it safe for them to do so.

92. It is important to train judges and other decision makers, particularly those receiving and handling public interest reports and disclosures, on the detail of the law and, more importantly, on its public interest aim.

Principle 28

93. Access to confidential advice for individuals who have come across wrongdoing or risk in the workplace is very important. Such advice helps ensure that the information gets to the right person or body at the right time and helps protect the whistleblower and assists the employer and the public by ensuring the report or disclosure is made responsibly. Such advice can be provided by trade unions, independent lawyers or other bodies.

Principle 29

94. As with any legal initiative, how it works in practice may not be as expected. Moreover, as the law is implemented and the mechanisms for whistleblowing are used, more will be learned about what works and what does not. Experience shows that whistleblower protection evolves over time, in law and in practice, and that it is very sensible and important to review it regularly to determine what aspects need to be strengthened. Periodic reviews in all member States will ensure that the system works in the public interest and that there is public confidence and trust in it.

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E-mail: import@suweco.cz
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DENMARK/DANEMARK

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DK-1161 KØBENHAVN K
Tel.: +45 77 66 60 00
Fax: +45 77 66 60 01
E-mail: reception@gad.dk
http://www.gad.dk

FINLAND/FINLANDE

Akateeminen Kirjakauppa
PO Box 128
Keskuskatu 1
FI-00100 HELSINKI
Tel.: +358 (0)9 121 4430
Fax: +358 (0)9 121 4242
E-mail: akatilaus@akateeminen.com
http://www.akateeminen.com

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ITALY/ITALIE

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NORWAY/NORVÈGE

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PORTUGAL

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Recommendation CM/Rec(2014)7 on the protection of whistleblowers encourages member states of the Council of Europe to have in place a normative, institutional and judicial framework that protects the rights and interests of individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest. A series of principles is set out in the appendix to the recommendation to guide member states when introducing legislation and regulations or, where required, making amendments.

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