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(Final version)

Improving the protection of whistle-blowers all over Europe

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A. Draft Resolution

1. The Parliamentary Assembly considers that whistleblowers play an essential role in any open and transparent democracy. The recognition they are given and the effectiveness of their protection in both law and practice against all forms of retaliation constitute a genuine democracy indicator.
2. The protection of whistleblowers is also a matter of fundamental rights: it is based on freedom of expression and of information, which entails that everyone is entitled to express themselves freely, without fear of retaliation, within precisely defined limits (which prohibit hate speech and intentional defamation in particular). However, this protection requires specific legislation to take account of the particularity of whistleblowers, who place themselves at risk by pursuing a public interest objective.
3. Disclosing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal lives and those of their relatives, as too often happened in the past. Sounding the alarm must become a normal reflex of every responsible citizen who has become aware of serious threats to the public interest.
4. Without whistleblowers, it will be impossible to resolve many of the challenges to our democracies, including of course the fight against grand corruption and money-laundering, as well as new challenges such as threats to individual freedom through the mass fraudulent use of personal data, activities causing serious environmental harm or threats to public health. There is therefore an urgent need to implement targeted measures which encourage people to report the relevant facts and afford better protection to those who take the risk of doing so.
5. Accordingly, the term whistleblower must be broadly defined so as to cover any individual or legal entity that reveals or reports, in good faith, a crime or lesser offence, a breach of the law or a threat or harm to the public interest that they became aware of either directly or indirectly.
6. The Assembly notes with satisfaction that since its first report on the subject (Resolution 1729 (2010) and Recommendation 1916 (2010)) and Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers many Council of Europe member States (Albania, Croatia, Czech Republic, Estonia, Finland, France, Georgia, Hungary, Latvia, Lithuania, Republic of Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovak Republic, Spain, Sweden Switzerland and the United Kingdom) have passed laws to protect whistleblowers either generally or at least in certain fields.

Amendment 1

Tabled by Mr Alvise MANIERO, Ms Sabrina DE CARLO, Mr Alberto RIBOLLA, Mr Maurizio BUCCARELLA, Mr Simone BILLI, Ms Maria RIZZOTTI, Mr Fabio DI MICCO, Mr Gianni MARILOTTI, Mr Andrea ORLANDO, Mr Francesco LOLLOBRIGIDA, Mr Manuel VESCOVI

In the draft resolution, paragraph 6, after the word "Hungary" insert the following word: ", Italy"

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

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

- 8.1. a broad definition of the group of individuals protected, including those involved in pre- and post-contractual and non-remunerated professional activities, shareholders and self-employed people (such as suppliers and consultants);
- 8.2. clear reporting procedures and obligations for employers (private or public), who must create safe reporting channels, normally in two stages:
 - 8.2.1. firstly, at the whistleblower's choice, an internal report (via a specially created reporting channel) or an external report to the competent authorities (specialised regulatory authorities, judicial authorities, professional supervisory body);
 - 8.2.2. secondly, a public report, including in the media, if no appropriate measure is taken within a period of three months from the initial report or in the event of an imminent threat to the public interest, or if a report to the authorities would not be likely to be effective;
- 8.3. a ban on retaliation against whistleblowers, with no let-out clause and involving the effective protection of whistleblowers acting in good faith against criminal and civil proceedings, including "SLAPP" (gagging) proceedings; the confidentiality of the whistleblower's identity and also the protection of an anonymous whistleblower when his or her identity is discovered;
- 8.4. criminal and civil immunity for acts undertaken for the acquisition of the information reported, provided that these acts do not themselves constitute offences in their own right;
- 8.5. effective legal remedies and relief (compensation, reinstatement, interim measures), with a reversal of the burden of proof concerning the link between prejudicial measures taken against the whistleblower and the reporting of information;
- 8.6. financial penalties against those who try to prevent whistleblowing ("whistleblowing inhibitors"), carry out retaliation against a whistleblower or disclose his or her identity;

Amendment 4

Tabled by Ms Boriana ÅBERG, Ms Ann-Britt ÅSEBOL, Mr Alexander CHRISTIANSSON, Dame Cheryl GILLAN, Mr Andrej HUNKO

In the draft resolution, after paragraph 7, insert the following paragraph:

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

- 8.7. effective follow-up within a reasonable period (three months as a rule) with feedback to the whistleblower for all whistleblower reports;
- 8.8. legal and psychological support for whistleblowers;
- 8.9. the gathering and dissemination of information on the impact of reporting by whistleblowers.
9. The proposal for a European directive directly covers the reporting of breaches or abuses of EU law (especially in the areas of combating money-laundering, company taxation, data protection, protection of the EU's financial interests, food security, environmental protection and nuclear safety). However, nothing prevents countries that wish to do so from protecting those reporting on breaches or abuses of their national law according to the same principles. There are no grounds for giving less protection to national law and public interest at the national level than to the law and interests of the EU.
10. All EU member countries are legally required to transpose this directive into their national law within two years from its entry into force. However, the member States of the Council of Europe that are not, or not yet, members of the EU also have a strong interest in drawing on the draft directive with a view to adopting or updating legislation in accordance with the new European rules.
11. On the basis of its previous work, the Assembly considers that the following improvements aimed at clarifying, implementing or supplementing the draft directive would be desirable in order to reassure and give more encouragement to potential whistleblowers and promote a genuine culture of transparency:
 - 11.1. Allowing legal entities (especially non-governmental organisations) to "blow the whistle" on illegal practices or enjoy protection as "whistleblowing facilitators", in the same way that journalists are able to rely on the protection of their sources; "reporting auxiliaries" must be given increased protection, especially when put under pressure to reveal the identity of whistleblowers;
 - 11.2. Ensuring that individuals working in the field of national security can rely on specific legislation providing better guidance regarding criminal prosecutions for breaches of state secrecy in conjunction with a public interest defence, and ensuring that the courts required to deal with the question of whether the public interest justifies "blowing the whistle" themselves have access to all relevant information;
 - 11.3. Setting up an independent authority in each country tasked with
 - 11.3.1. helping whistleblowers, especially by investigating allegations of retaliation and failure to act on reports, and where necessary reinstating whistleblowers in all their rights, including full compensation for all the disadvantages they have suffered;
 - 11.3.2. ensuring that once a matter has been reported there is every chance of it being followed up, whatever the

Amendment 2

Tabled by Mr Nigel EVANS, Mr Pieter OMTZIGT, Lord George FOULKES, Mr Frank SCHWABE, Mr Raphaël COMTE

In the draft resolution, paragraph 11.1, delete the following words: "(especially non-governmental organisations)".

interests at stake, by condemning any action to suppress it; this role is particularly important when powerful economic or political stakeholders become involved and make disproportionate efforts at suppression and/or exert pressure on the whistleblower;

- 11.3.3. providing a link with the judicial authorities as a reliable source, in particular, of material evidence in connection with judicial proceedings. Such an independent authority will therefore be able (in the same way as authorities acting as Defenders of citizens' rights) to intervene in legal proceedings so as to give its analysis of a case and provide elements of assessment regarding the report made and the action taken by the whistleblower;
- 11.3.4. these independent authorities would be instrumental in establishing a genuine European network that would make it possible to share good practices and exchange experience regarding the stakes involved and difficulties encountered in their work. They would constitute an independent European observatory, which would act on a daily basis to ensure that whistleblowers and the alarms they sound are accorded their rightful place in our democracies. In its own field, this network of independent authorities would be a prime interlocutor for the Council of Europe;
- 11.4. Setting up a legal-support fund, fed by the proceeds from fines imposed on individuals or organisations that have failed to comply with whistleblowing legislation, with a view to financing high-quality legal support for whistleblowers in court proceedings, which are often long, complex and costly; the fund would be administered by the independent authority, which would grant assistance if it considered that the person being prosecuted, claiming to be a whistleblower, met previously established criteria;
- 11.5. Ensuring that whistleblowers and their relatives are also protected against retaliation perpetrated by third parties;
- 11.6. Ensuring that the burden of proof lies with those who attack the whistleblower, by providing in particular that:
 - 11.6.1. there is an explicit presumption that the whistleblower has acted in good faith;
 - 11.6.2. a person or authority that takes legal action against a whistleblower must prove that genuine harm has been done, including in the field of national security;
 - 11.6.3. in the case of a public disclosure, those attacking the whistleblower must prove that the conditions for public disclosure were not met;
 - 11.6.4. the reversal of the burden of proof in the whistleblower's favour also applies in cases of criminal prosecution for defamation;
- 11.7. Avoiding making the protection of whistleblowers subject to subjective and unpredictable conditions, such as the whistleblower's purely altruistic motivation, a duty of loyalty to an employer or an obligation to act responsibly, without any clear and precise indication of what is expected of the potential whistleblower; it is essential for a whistleblower to be able to have speedy confirmation that he or she meets the criteria required in order to benefit

from the specific whistleblowing legislation. While this can be finally determined only by a court decision, the assessment of these criteria at the earliest opportunity (especially by the independent authority) is an important element for keeping the whistleblower safe;

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

Amendment 3

Tabled by Ms Isabelle RAUCH, Ms Nicole TRISSE, Ms Jennifer DE TEMMERMAN, Mr Dimitri HOUBRON, Ms Yolaine de COURSON, Ms Nicole DURANTON, Ms Martine WONNER

In the draft resolution, at the end of paragraph 11.8, insert the following words: "These procedures specific to whistleblowers could be created through international agreements under the auspices of the Council of Europe; in any case it is essential to give some thought to the right to asylum in order to adapt it to the new challenges surrounding whistleblowers."

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

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

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

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

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

12. The Assembly invites:

Amendment 5

Tabled by Mr Pieter OMTZIGT, Ms Petra STIENEN, Mr Aleksander POCIEJ, Ms Karin

BROUWERS, Ms Tatevik HAYRAPETYAN, Mr Vladimir VARDANYAN

In the draft resolution, after paragraph 12, insert the following paragraph:

"The Assembly supports and encourages the appointment of a general rapporteur on whistleblowers, who will be able to raise her/his voice when necessary, for instance in individual cases."

- 12.1. Council of Europe member States that are also members of the European Union to:
 - 12.1.1. transpose, as soon as possible, the directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law into their national legislation in line with the spirit of the directive, which aims to set minimum common standards so as to ensure a high level of protection for whistleblowers, including for those who "blow the whistle" on breaches of national law or threats to the public interest at the national level;
 - 12.1.2. put in place, beyond the requirements of the European directive, the measures proposed in paragraph 11 of this resolution, especially the creation of independent authorities responsible for the protection of whistleblowers in order to form a European network and firmly embed the logic of whistleblowing in our democratic systems, as well as foster the emergence of civil society players engaged in this area;
- 12.2. Council of Europe member States that are not members of the European Union, as well as observer States or States whose parliaments have partner for democracy status, to revise their relevant legislation or pass new laws that draw on the proposal for a European directive and paragraph 11 of this resolution, in order to grant whistleblowers in their own countries the same level of protection as those from an EU member State;
- 12.3. all Council of Europe member States to take a decisive step towards the protection of whistleblowers, especially by setting up a European network of independent authorities whose role will be to ensure that whistleblowing and whistleblowers are accorded their rightful place in our democratic societies.
- 12.4. all Assembly members to raise the awareness of their national parliamentary colleagues concerning the importance of improving the management of whistleblowers' disclosures and giving whistleblowers better protection, to share good practices and to carry out their own appraisal of their laws in order to assess what legislative progress has been made in this area. To this end, they could refer to the self-assessment grid contained in the report.

B. Draft Recommendation

1. The Assembly refers to its Resolution ... (2019) "Improving the protection of whistleblowers all over Europe", its Recommendation 2073 (2015) "Improving the protection of whistle-blowers" and the Committee of Ministers' reply of 25 January 2016.
2. It recalls that a proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, the aim of which is to set minimum common standards to ensure a high level of protection for whistleblowers in all EU member States, is about to come into force. This draft directive is inspired in large part by the Committee of Ministers' Recommendation CM/Rec2014(7) on this subject, but it also contains clarifications of, and improvements to, that recommendation. The draft directive addresses an issue of particular importance for democracy, the rule of law and human rights, especially the fight against corruption and the protection of freedom of expression and of information.
3. In order to avoid a new legal divide in this area that falls within the Council of Europe's three priorities, the Assembly reiterates its invitation to the Committee of Ministers to begin preparations for negotiating a binding legal instrument in the form of a Council of Europe Convention as a follow-up to its Resolution 2060 (2015) and its Recommendation 2073 (2015). This instrument should draw on the above-mentioned European directive, taking due account of the clarifications and additions proposed in Assembly Resolution ... (2019).