

As of 23 October 2008



13th International Anti-Corruption Conference
Workshop Session II

“Protecting the Whistleblowers—Asian and European Perspectives”

31st October 2008, 11:00-13:00
Athens, Greece

**“Establishing whistleblower protection mechanisms –
some findings from the work of the Group of States against Corruption
(GRECO) of the Council of Europe”**

Christophe Speckbacher
Head of Section, Secretariat of GRECO
Council of Europe

Note: this presentation includes and complements the substantive part on whistleblower protection of GRECO's 2006 annual activity report, which was drafted by M.Paul Stephenson (United Kingdom). This paper does not reflect GRECO's views.

Part 1. General considerations

1. The protection of whistleblowers is an international requirement, for instance under the United Nations Convention against Corruption (2003) and the Council of Europe Civil Law Convention on Corruption (1999), which are both "hard law" instruments. When the Council of Europe member states and some other countries elaborated in 1996 a programme of action against corruption, it was clear for them that the protection of whistleblowers was an important matter and deserved to be enshrined in an international legal instrument. However, the matter was so far addressed indirectly by GRECO, in the context of the Second Evaluation Round (2003-2006) which covered the provisions dealing with administration and public officials¹.

United Nations Convention against Corruption

Article 33 - Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Council of Europe Civil Law Convention on Corruption

Article 9 – Protection of employees

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

2. It is reasonable to assume that the protection of whistleblowers should be a logical consequence of the duty (often in place) for public officials, private sector employees (or certain categories of such employees) and sometimes every citizen to report (suspicions of) criminal acts to the police or prosecution bodies. Sometimes, a sector specific reporting duty also exists in specific regulations and provisions; for instance as a result of the anti-money laundering preventive requirements of the Financial Action Task Force on money Laundering (FATF), financial institutions (and by analogy several non-financial businesses and professions) are required to report suspicions of money laundering to the financial intelligence unit. Consequently, their employees should be protected by law from the consequences of complying with this duty.

¹ The monitoring of the Group of States against Corruption is applicable to the various Council of Europe anti-corruption instruments, whether they are hard law or soft law instruments. Since the beginning of GRECO's activities, it was felt more appropriate, in order to allow for more in-depth assessments, to use a system of evaluation rounds, each dedicated to a selection of standards: **Round 1** (2000-2002): a) independence, means and specialisation of bodies and authorities involved in the fight against corruption and b) immunities; **Round 2** (2003-2006): a) proceeds from corruption, b) public administration and public officials, c) legal persons; **Round 3** (2007-....): a) criminalisation of corruption; b) party financing.

FATF - Recommendation 14

Financial institutions, their directors, officers and employees should be:

a) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

(...)

3. The protection of whistleblowers is a specific requirement, distinct from another anti-corruption measure which can be essential to deal with high level corruption especially for countries that experience structural problems of corruption or intense organised crime activity, namely the protection of witnesses, collaborators of justice, victims and experts (this constitutes another international requirement). Although a person who reports suspicions of wrongdoing may ultimately be called upon to give a testimony to criminal justice bodies and to appear as a witness in court, the protection measures that should apply to whistleblowers are primarily of an administrative nature; it is not so much the physical security that is at stake, but the employment, the career, the psychological integrity of the whistleblower. It happens, when they report back on the implementation of recommendations contained in the evaluation report, that some GRECO countries provide information on steps taken to offer police or judicial protection (i.e. witness protection); this is often the case where the country has taken important steps in recent years in the area of witness protection and combating organised crime. This shows that there are risks of confusions between these neighbouring topics/mechanisms.
4. Although it is an international requirement, whistleblower protection is often not provided for in domestic law and regulations or human resource management policies. This is consistent with the speed of ratification of the Council of Europe Civil Law Convention on Corruption, which has been clearly slower than for the Criminal Law Convention on Corruption². At a recent *tour de table*, GRECO countries have discussed their general experience with the implementation of the Civil Law Convention and, clearly, the introduction of whistleblower protection can be quite challenging as it sometimes requires extensive domestic consultations, in particular with the employer unions and organisations. Another challenging requirement is the need to introduce compensation mechanisms for those who have suffered a damage as a consequence of an act of corruption, including the introduction of adequate limitation periods (Art. 3 to 7).
5. 44 countries were evaluated under GRECO's second evaluation round, which covered the general anti-corruption measures applicable to the administration and public officials; a recommendation was made to 25 countries (i.e. more than half of the GRECO members) to introduce a mechanism for the protection of persons who report in good faith suspicions of corruption, against negative consequences thereof (retaliation which would affect the employment, career etc.). These 25 countries include both older and new democracies.
6. The following table lists the countries that were asked to introduce or improve whistleblower protection. The right column indicates whether the country has subsequently adopted such measures. The information is the one available in the respective country reports at the time of their discussion and adoption, and it might not reflect today's situation.

² To date, 33 countries have ratified the Civil Law Convention on Corruption, and 41 the Criminal Law Convention on Corruption.

Countries which have been asked to introduce whistleblower protection	
Country	Measures adopted along the lines of the recommendation (according to the compliance report - 18 months after the evaluation report is adopted), or measures already in place
Albania	Yes (law of 2006: legal "immunity" against administrative, civil or criminal proceedings even if suspicion unfounded, anonymity can be granted etc.)
Andorra	(compliance report not yet examined)
Armenia	Yes but considered insufficient by GRECO (draft law on public service provides that "the relevant bodies should guarantee the safety" of a public servant who has reported in good faith)
Austria	(compliance report not yet examined by GRECO)
Azerbaijan	(a Draft law provides for the creation of a central body to receive reports from whistleblowers and grants it with powers to recommend any appropriate action to protect the official and reverse any consequence from retaliation) (report not public yet)
Belgium	Not yet ; is being discussed as part of a global whistleblowing mechanism
Bosnia and Herzegovina	(compliance report not yet examined by GRECO)
Bulgaria	Yes, but considered insufficient by GRECO (new administrative procedure code of 2006 provides that "nobody may be prosecuted [mistreated] only because of reporting under this law"
Croatia	Not yet (according to current provisions, whistleblowers in the private and public sector cannot be dismissed for having reported a suspicion of corruption; discussions are under way in the country to introduce further provisions)
Czech Republic	No yet but general draft administrative legislation will include such provisions
Denmark	No information available on country intentions and projects in this area
Estonia	Yes but considered insufficient by GRECO (anonymity is granted to the whistleblower unless the report was made in bad faith)
Georgia	(compliance report not yet examined by GRECO)
Greece	Not yet ; GRECO considered that trade union protection through their involvement in human resource decisions (participation in commissions and panels etc.) is not enough.
Iceland	Yes : General Circular issued by the Ministry of Finance in February 2006 states that public officials who give information in good faith on corruption offences, or other unlawful or improper activities, will not suffer in any way for doing so
Ireland	Yes, Measures are under way : Government has decided not to introduce a general mechanism but to include whistleblower protection where appropriate, in sector-specific regulations: Whistleblower protection provisions have been included for the police (including civilian employees) in 2007 in a "whistleblower charter", which, inter alia, provides that those who report an allegation of corruption or malpractice within the police in good faith must not be subjected to disciplinary action for doing so. Whistleblower provisions have also been included in the Consumer Protection Act 2007 and in the Health Act 2007. Idem for the Safety, Health and Welfare at Work Act.
Italy	(Evaluation scheduled for 13-17 October 2008)
Latvia	No yet ; it is foreseen that the new law "On Prevention of Conflicts of Interest", will include such provisions
Malta	<u>Public Administration act</u> in the adoption phase: provides for the creation of the Merit Protection Commission to ensure that no employee of a Government agency or entity is victimised for making a report to a superior or to any other relevant authority about breaches of the Code of Ethics or of any other provision of the Act. Moreover, where the Commission finds that an employee has been victimised in a manner that it is unable to prevent or redress, it shall make a report to the Prime Minister or to other relevant authorities to redress the situation in an appropriate manner (Article 34). The offences and penalties available to the Public Service Commission disciplinary regulations have been adjusted in 2006 to the effect that the victimisation of a witness or of an officer or person lodging a report has been added as a serious offence which may be sanctioned with dismissal from service. <u>Employment and Industrial Relations Act</u> : it is unlawful to victimise any person for having made a complaint to the authorities or for having initiated or participated in proceedings, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by the employer or persons acting in the employer's name and interests. Any person contravening these provisions is liable to a fine (up to EUR 2,284) and/or to imprisonment for a

	period up to six months (Article 32 of Chapter 452). In 2007, <u>these provisions were made applicable to service within the Government.</u>
Moldova	(compliance report not yet examined by GRECO)
Republic of Montenegro	(compliance report not yet examined by GRECO)
Monaco	(compliance report not yet examined by GRECO)
Portugal	Act 19/2008 of 21 April on new measures to combat corruption introduced the following protection for whistleblowers: 1. those concerned must not suffer negative consequences, including unwanted transfer to another department, for reporting offences of which they have become aware in the course of or because of their official duties; 2. in the absence of evidence to the contrary, applying disciplinary sanctions to those concerned during the year following the corruption report shall be deemed unjustified; 3. those concerned shall be entitled to (a) anonymity, until the person suspected of corruption has been formally charged, and (b) if they so wish, transfer to another department without the right of refusal by the hierarchy, once the person suspected of corruption has been formally charged.
Republic of Serbia	Appeal mechanisms were introduced in the Law on Civil Servants to allow civil servants to challenge administrative decisions that may impinge on their rights, notably through the creation of Appeal Commissions in different State authorities and public institutions. Confidentiality applications and hot lines have been introduced to allow civil servants to report suspicions of corruption. Amendments to the Law on Free Access to Information of Public Importance have been proposed to include certain provisions concerning whistleblower protection (i.e. by releasing the civil servant concerned of his/her confidentiality obligations if s/he has suspicions of corruption). Further discussions and potential solutions were planned to be discussed in the context of a UNDP regional project.
Switzerland	(compliance report not yet examined by GRECO); efforts to introduce whistleblowing protection date back to 2003. Legislation is under preparation to cover the public and private sector
Ukraine	(compliance report not yet examined by GRECO)

7. Although an overall picture of the situation is not available yet, certain characteristics are discernible:

- First, There are instances where countries have adopted measures and these were considered satisfactory by GRECO. For instance in Albania, a law of 2006 provides whistleblowers with some form of legal “immunity” against administrative, civil or criminal proceedings even if the suspicion turns out to be unfounded, and the whistleblower can be granted anonymity. In Iceland, a General Circular was issued by the Ministry of Finance in February 2006 according to which public officials who give information in good faith on corruption offences, or other unlawful or improper activities, will not suffer in any way for doing so. In Malta, with the adoption of the Public Administration Act, a Merit Protection Commission would be created to ensure that no employee of a Government agency or entity is victimised for making a report to a superior or to any other relevant authority about breaches of the Code of Ethics or of any other provision of the Act. Portugal and the Republic of Serbia too have included broader measures;
- there are other instances where countries have adopted measures or took the view that the mechanisms already in place are sufficient, but this was not considered satisfactory by GRECO. For instance Bulgaria had only included in the new administrative procedure code of 2006 a provision stating that “nobody may be prosecuted [mistreated] only because of reporting under this law”. The protection deriving from the participation of trade unions in human resource decisions (participation in commissions and panels etc.) was not considered to be enough either, in the case of Greece.

- Finally, some countries had/have plans to introduce whistleblower protection and the recommendations made in that context were mostly meant to support the finalisation of the drafts (Czech Republic, Switzerland). In the case of Ireland, the Government has finally decided not to introduce a general mechanism but to include whistleblower protection in sector-specific regulations, where appropriate.

8. Several countries were not asked to adopt whistleblower protection mechanisms. The table below lists these countries and gives an overview of the situation in the country.

Countries that were not required to introduce whistleblower protection	
Country	Measures in place
Cyprus	[Civil Service Law: compulsory retirement as a disciplinary measure cannot be imposed for reporting of suspected corruption. An official who imposes an unjustified punishment on a “whistleblower” for reporting corruption, commits an offence which may lead to imprisonment or a pecuniary penalty. Possibility to file a civil action for compensation is always open to a “whistleblower”.]
Finland	[non issue in the context of the country; general measures considered sufficient]
France	[Public officials who follow the reporting procedure/duties cannot be disciplined by their superiors (jurisprudential principle from 1996), or be accused of breaching their duty of professional confidentiality (Article 229-14 of the Criminal Code).]
Germany	(this is apparently a non issue in Germany since the Federation and Länder have introduced a system of contact points within the administration to whom all suspicions are to be reported (GRECO has suggested improvements to this system). There will be an amendment to the Civil service Code to exclude unfavourable measures when reporting a suspicion in good faith.)
Hungary	(measures provided under Article 257 of the Criminal Code, which establishes that “any person who takes any detrimental action against a person who has made an announcement of public concern is guilty of a misdemeanor and may be punished by imprisonment not exceeding two years, community service or a fine”)
Italy	(Evaluation visit on 13-17 October 2008)
Lithuania	A draft Law on Protected Disclosures was discussed and finally rejected in parliament in May 2005 (other provisions exist in the criminal legislation which can apply to whistleblowers). It provided for the prohibition of applying “illegal” measures against whistleblowers and their right to appeal against any such measure. The draft prohibited the termination of a labour contract with an employee who reports a corruption-related violation without the consent of the institution authorised by the Government and sets out measures to be applied to the employer violating these requirements.
Luxembourg	(the existing general mechanisms were found sufficient in the context of Luxembourg ³)
Netherlands	(Civil Servants Act: whistleblowers who report a suspicion of misconduct in good faith and according to the established procedures may not experience any negative consequence in the performance of their duties. Integrity counsellors exist in the NL: they are also protected from any prejudice connected to their advisory tasks concerning suspicions of misconduct.
Norway	(no specific measure in place concerning protection for employees or public servants who report suspected corruption/breaches of duties or code of ethics at the time of the evaluation; this matter was to be included in the proposed “The Working Environment Act” - for adoption in 2005; this was found sufficient in the context of Norway).
Poland	(no specific provisions in the civil service act; protection is granted pursuant to general – criminal and administrative – rules).
Romania	(Law 7/2004 lays down that staff members who report in good faith to the National Agency of Civil Servants or the competent disciplinary boards cases of violation of the legal provisions of the Code of Conduct or threats or pressure exerted on them to break the law should not be subject to any disciplinary measure. Lastly, Article 25 of Law No. 78/2000 stipulates that such reports do not entail any violation of professional or banking secrecy. Law No. 571/2004 comprises additional provisions to protect whistle-blowers in the

³ Since then, some Luxembourg practitioners consider proper whistleblowing mechanism would be a desirable tool (see Third Evaluation Round Report on Incriminations).

	public sector).
Russian Federation	(Evaluation report not yet examined by GRECO)
Slovak Republic	(Public officials are already protected under the Labour Code: "protection of whistleblowers against discrimination")
Slovenia	(Besides the general administrative and other mechanisms in place, the Commission for the prevention of corruption is competent for receiving reports of suspected corruption; the identity of reporting persons is kept confidential)
Spain	(no specific provisions; protection is granted pursuant to general – criminal and administrative – rules).
Sweden	(According to the Constitution an informant has the right to stay anonymous if s/he provides information to the media, and public bodies are prohibited from inquiring about the identity of a whistleblower. Moreover, anyone who reports irregularities to the police can have his/her identity protected up to the point of prosecution. Swedish labour law provides protection to employees, in that dismissal of an employee can only be justified on objective grounds and not as a result of "whistleblowing").
The Former Yugoslav republic of Macedonia	Some measures are contained in art.20 of the 2002 Law on the Prevention of corruption ("a person who has disclosed information indicating an act of corruption may not be subject to criminal prosecution or to any other liability; protection according to the law shall be provided to a person who has given statement or has testified in a procedure for an act of corruption. This person shall have the right to compensation of damages, which he/she or a member of his/her family has suffered, due to the statement made or testimony given").
Turkey	(The new Code of Ethics contains some protection for those who report corruption, in addition to the general provisions contained in Law No. 3628 on "the Declaration of Properties on the Fight with Bribe and Malversation")
United Kingdom	(Under the Civil Service Code, all departments must have internal procedures in place to ensure that civil servants can raise concerns without fear of victimisation or unfair treatment. Where a civil servant raises a concern with the Civil Service Commissioners, the Commissioners will investigate and report the outcome in their annual report. In doing so, they will protect the identity of the individual who made the complaint. They will also ensure that the department has put in place measures to prevent a reoccurrence and to ensure that there has been no victimisation or disadvantage to the individual who made the complaint)
United States of America	(The federal Whistleblower Protection Act of 1989 was enacted to remove any chilling effect on whistleblowing that might result from reprisals. The Act prohibits the punishment of public officials for reporting of violations of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a serious danger to public health or safety. Under the Whistleblower Protection Act (5 U.S.C. section 2302(b)), a public official who believes that s/he has suffered retaliation for making a protected disclosure may file a complaint with the United States Office of Special Counsel, an independent investigative and prosecutorial agency. That Office will investigate the complaint and, where it finds that an improper reprisal has occurred, will seek voluntary corrective action from the employing agency. It may also ask the employing agency to take disciplinary action against the agency official who engaged in retaliation. If the employing agency declines to provide voluntary relief, the Office of Special Counsel may prosecute a case on behalf of the injured employee and/or may file a case for disciplinary action against the retaliating official with the Merit Systems Protection Board. The Board has the authority to order the employing agency to provide corrective action to employees and/or to discipline agency officials who engage in retaliation. Local governments also provide additional protections to Whistleblowers.)

9. There were various reasons why no recommendation for improvement was made to these countries: whistleblowing measures were available as such (e.g. Cyprus, Germany, the Former Yugoslav republic of Macedonia, Netherlands, Romania, Sweden, United Kingdom, USA), other general measures were found to offer a satisfactory alternative to whistleblowing measures and/or the context of the country did not justify additional measures (e.g. France, Poland, Spain, Turkey). It should however be stressed that early second round evaluations were to some extent pilot evaluations; it is progressively that whistleblower protection has turned out to be an important topic also in the general context of preventive anti-corruption measures for the administration.

Part 2. Ten issues for policy makers

Is a specific law needed?

10. Some countries have taken the view that a specific law is not needed: general employment law usually prohibits unfair dismissal, and claims can be made in respect of unfair treatment (Finland, Poland, Spain and others). Other aspects of protection in practice – for example the appointment of confidential advisers - do not require legislation.
11. In Lithuania, a Whistleblowers Bill was considered and rejected by Parliament in 2004. The authorities believed that there was no need for a separate law as it would repeat the effect of provisions in other laws. In Ireland, a general Whistleblowers Protection Bill was rejected by the Government in 2006, in favour of a 'sectoral approach'. They have not clearly explained their grounds for this decision, for reasons of confidentiality, but they have referred to Article 30 (1) of Directive 2000/12/EC of 20 March 2000 as imposing professional secrecy obligations on those working in credit institutions. In Switzerland, there have been attempts, since 2003, to introduce a general whistleblower protection legislation; the initiative is strongly supported civil society. As indicated earlier, Ireland preferred to have sector-specific regulations. Besides the legislation on police activities, such provisions were included in 2007 in the legislation on consumer protection, health protection, safety and welfare at work.

Whistleblower protection should ideally apply both to the public and the private sector

12. GRECO's Second Round recommendations are only concerned with the public sector. However the Civil Law Convention requires protection to be available for all employees, whether in the public or private sector. Corruption is likely to occur where these sectors interact. One option is to provide for the 2 sectors separately. Romania's law 571/2004 applies only to the public sector, very broadly defined. The United States' federal Whistleblower Protection Act 1989 applies only to the public sector, but the private sector is covered by separate United States law. On the other hand, Norway and the United Kingdom have decided it is preferable to cover both private and public sectors in a single piece of law.

There is a gradation and scope of suspicion...

13. Most of the time, the reporting is based on a suspicion (for instance Albania, Croatia, Cyprus, Germany). As mentioned above, the United Kingdom has a stepped approach: for an internal report, the law requires only genuine suspicion. For a report to a regulator there is a slightly higher requirement: that the whistleblower reasonably believes the information is true. Romanian law sets out the principle of responsibility according to which the whistleblower must "sustain that complaint with information or evidence concerning the act committed".
14. Where the whistleblowing mechanism is enshrined in special anti-corruption provisions/legislation, it is not unlikely that the reporting is limited to corruption. Sometimes, there is a broader requirement: "announcement of public concern" by virtue of the Hungarian Criminal Code, corruption offences or other unlawful and improper activities, by virtue of a General Circular in Iceland, "corruption or malpractice within the police" in the Irish police "whistleblower Charter", "breaches of the code of ethics or of any other provision of the Public Administration Act" in Malta, general "suspicion of misconduct" according to the Dutch Civil Servants Act. Sometimes, the scope of reporting is quite broad but highlights certain areas of particular concern: in the United States, it concerns violations of law, rule or

regulation, gross mismanagement, gross waste of funds, abuse of authority or a serious danger to public health or safety.

...which may require the assistance/involvement of a third party

15. Normally, the whistleblower will be protected as long as he/she stays within the limits for which the protection is granted. There may be situations where the potential whistleblower is uncertain as to whether a suspicion is sufficiently grounded and/or qualifies for reporting and possible protection.
16. Involving a "third party" in whistleblower mechanisms (provided with advisory and other functions) is an option sometimes followed, for instance administrative contact points in Germany, integrity councillors in the Netherlands, the Commission for the Prevention of Corruption in Slovenia. Advisors can also encourage potential whistleblowers to speak more easily than they would do if they had to go to the police or prosecutorial authorities.

The dilemma of reporting lines: how far can I trust my colleagues and superiors?

17. There is a traditional distinction as regards reporting lines: either internally (to the superior or a special contact person), or externally to the police/ prosecutorial bodies or others (the Media for instance). The United Kingdom's Public Interest Disclosure Act 1998 sets out in some detail what responsible whistleblowing looks like. It is based on a 'stepped' approach, which tends to encourage, firstly, internal disclosures where possible and secondly, disclosures to the independent regulators appointed by statute to oversee particular areas – such as the Serious Fraud Office. While it then also sets out circumstances where wider disclosures (including to the media) are protected, the tests here are harder to meet. At the end of 2006 Norway passed amendments to its Working Environment Act on whistleblowing ('*varsling*' in Norwegian, meaning strictly 'notification'). These give all employees a right to notify suspicions of misconduct in their organisation. The key is whether the procedure followed by the whistleblower is 'justifiable': it is assumed that internal reporting or reporting to public authorities will always be justifiable. In justifying other external reporting, it is expected that elements of relevance would be the employee's good faith and whether the information is of public interest. The law states that the burden of proof in showing that the procedure was unjustified rests with the employer. Romanian law sets out a list of the persons or bodies officials can send reports to: these include 'mass-media' and NGOs, so that it appears from the face of the law that an official can go direct to the media with his concern.
18. GRECO has often made recommendations to the countries to introduce as much as possible external reporting lines or to make sure such reporting lines are in place, in order to ensure the effectiveness of whistleblowing mechanisms even where the superior(s) or employing entity of the potential whistleblower is involved in/ or affected by corruption (in which case internal reporting can obviously be useless). This is also to ensure that heads of agencies/departments are not tented to solve a (major) case internally to avoid repercussions for their own managerial reputation and career.

The scope of protection: how to take into account immediate but also disguised threats?

19. When it comes to the scope of protection, the first element that needs to be taken care of is probably the consequences of a potential breach of confidentiality or secrecy duty that most

(public and private) employees are subject to. This is normally covered by the general terms of protection adopted by the GRECO countries, but in some cases, administrative decisions are difficult to challenge by those seeking redress; the Republic of Serbia had to introduce appeal mechanisms for the state employees.

20. The protection applies insofar as proper channels are used by, and the scope of whistleblowing is clear enough to the potential whistleblower(s). GRECO found certain formula such as “nobody may be prosecuted [mistreated] only because of reporting” (Bulgaria) insufficiently clear and accurate. In some cases, countries have made it clear that complying with the reporting duty enshrined in the Criminal Procedure Code may not entail criminal proceedings for breaching the duty of professional confidentiality. French jurisprudence found it necessary in 1996 to specify in addition that this also excludes disciplinary proceedings by the employer. There was a need in Germany to include in regulation a similar clarification. In the Republic of Serbia, discussions have taken place about the need to provide for a mechanisms that would release the civil servant concerned from his/her confidentiality obligations if s/he has suspicions of corruption. United Kingdom law states that any contractual duty of confidentiality is void in so far as it prevents a worker from making a “protected disclosure”. However if a whistleblower commits an offence in making the disclosure, it is not protected. The main effect of this is to disbar disclosures which endanger national security in breach of the Official Secrets Act.
21. Whistleblowing can have many types legal consequences, including loosing a job or being revoked. Sometimes, the legislation refers to the protection of the employment relationship: in Cyprus, compulsory retirement cannot be imposed for reporting suspicions of corruption. Reporting can also damage the reputation of the person who is suspected of being corrupt and who ultimately turns out to be innocent. The Albanian legislation passed in 2006 protects the whistleblower from any criminal, civil and administrative consequences even if the suspicion was unfounded. In a similar way, the legislation of the Former Yugoslav Republic of Macedonia excludes “criminal prosecution or any other form of liability”.
22. Various national regulations provide for the protection of the whistleblowers’ identity. There is a distinction between confidentiality (where the whistleblower’s identity is known to the authority to which he reports) and anonymity (where his identity is entirely unknown). Anonymity is widely perceived as undesirable as anonymous complaints are harder to investigate, and may sometimes be – or appear to be - the cloak for malice. In corruption cases the ideal of open reporting may well not be practicable, but the preferable fallback position is confidential disclosure – that is, where the recipient knows the identity of the person making the disclosure but agrees not to reveal the identity when the information is used. GRECO notes the European Union’s Data Protection Working Party’s opinion that those making a disclosure should be assured their identity will be kept confidential, but that anonymous reports should be accepted only under extraordinary circumstances. Romanian law gives officials the right to have their identity withheld when denouncing a superior. It is also desirable to respect whistleblowers’ confidentiality in other cases, if they request it. But they should understand that the fact the identity of a whistleblower is not known tends to focus attention and speculation on his identity – and, as mentioned above, it may be that his identity can be discovered from the circumstances. It may also be required to be made known in any eventual legal proceedings. The Swedish police and the Slovenian anti-corruption commission are also entitled not to disclose the identity of the person filing a report. In Sweden, this is a constitutional right which prevents even the Media to disclose to the authorities the identity of the whistleblower who has provided information. Various countries have also established hotlines in recent years, which allow to disclose information

without revealing one's identity (for instance in the Republic of Serbia). Protective measures limited to the dissimulation of the whistleblower's identity were found insufficient by GRECO in the case of Estonia.

23. Retaliation can take various forms which can affect the career progression, the psychological integrity or other interests of the whistleblower. Below is an example (sent to the GRECO Secretariat via e-mail) of what have probably been disguised retaliation measures.

Example of a case

An inspector from the health and veterinary inspection administration observed that it was a common practice for certain meat suppliers and slaughter-houses to "refresh" (with bleach or another substance) meat, including giblets, which was near the consumption time limit. It was sold at low prices to the food industry and large food-cookeries that also supply hospitals and schools. He also observed how it was common practice for some of his colleagues to receive as gifts large quantities of steaks etc., and that strangely enough those inspectors tended to deliver a positive certificate they should not have delivered under normal circumstances, which partly encouraged the meat manipulation practices. The inspector reported this situation to the police. This was a requirement of the criminal legislation of his country, but he was also motivated by the fact that his administration, which he believed knew of the malpractices, would not react in the adequate manner to his complaint or report. A judicial investigation was started, and steps were rapidly taken by the administration to avoid any public scandal. The senior staff of the inspector's regional service were promoted whilst he was himself subject to a disciplinary proceeding for breach of professional secrecy duties. He was then transferred on another post in another region. After he appealed against the disciplinary measure and won the case on the grounds of the existing legal reporting requirements and whistleblower protection rules, his annual evaluation turned out to be negative for the first time in several years; this blocked his career development (there are no procedures to reopen a professional appraisal, the stress under which the whistleblower has been has probably affected his professional performance). He could not be reinstated on his former post, which had in the meantime been upgraded and given away to another person.

24. To address disguised retaliation measures, one may be tempted to provide broadly for regulatory measures, such as the prohibition of discriminatory measures under labour law (Slovak Republic) or threatening with criminal sanctions the taking of "any detrimental action" against a whistleblower (Hungary). In such cases, the general labour or penal court will have to examine any complaint. Another possibility is to give this task to special bodies created as part of a whistleblowing policy: in Malta, it would be the future Merit Protection Commission (currently it is the Public Service Commission), in the united Kingdom the Civil Service Commissioners and in the United States, the Office of Special Council who would look into allegations of unfair treatment, victimisation or other disguised measures.
25. Portugal has adopted in April 2008 an interesting set of measures that includes anonymity until the suspect has been charged, protection against unsolicited professional transfers and the possibility to be transferred to another department without the possibility for the hierarchy to refuse. Above all, it includes a presumption that any disciplinary measures imposed on the whistleblower during the year following the suspected corruption report shall be deemed unjustified.

(Good and bad) faith

26. There is, as with any law, a risk of abuse or misuse and the introduction of a good faith requirement is helpful to signal that whistleblowing legislation is not to be abused. In particular this can make plain that the law is not a means by which a wrongdoer can seek immunity for his crime. It is worth noting here that a good faith requirement can raise certain consistency issues in relation with a legal duty on officials to blow the whistle. The international instruments and most of the national provisions require that the report be made 'in good faith', but do not define what that means. Romanian law states there is a presumption of good faith which the whistleblower will benefit from until demonstrated otherwise.
27. There can be arguments about 'good faith' – does it mean 'honestly' or that the whistleblower's motives are wholly virtuous? It is important to recognise that a good faith requirement does not necessarily imply that the information is correct. While, naturally, nobody wants to receive reports that are known to be untrue, it is important that the law does not require the whistleblower to investigate and prove the corrupt act. Equally, if a true report is made in bad faith – because for example the employee holds a grudge against the manager - it will nevertheless be in the employer's or public interest that the report should be made. In Norway any 'bad faith' in the whistleblower's motives will not prevent lawful reporting, as long as the information is in the public interest.
28. In Germany a Federal Labour Court decision of 2003 set out the conditions under which an employee could disclose evidence of criminal acts by his employer. It reversed a decision of the lower court, which had not looked into the motives of the whistleblower at all. It upheld the right to blow the whistle in so far as the employee is not motivated to injure the employer with the disclosure. If that is his main motivation then he is not acting in good faith. Germany plans to clarify their civil code in line with the decisions of the Federal Labour Court. In the United Kingdom, the term has a similar meaning to that in Germany though as in Romania it is assumed the whistleblower will be acting in good faith and the employer must challenge this clearly, openly and with cogent evidence.

Obligations on employers

29. There are specific obligations in Norwegian and Romanian law for employers to establish whistleblowing procedures (however, in Romania this does not apply to the private sector). As mentioned above, United States law requires any company listed on the US stock markets to establish procedures for staff to report concerns about accounting. In the United Kingdom, the Civil Service Code requires all departments to establish internal procedures to ensure that civil servants can raise concerns without fear of victimisation or unfair treatment. United Kingdom legislation also obliges the tribunals to take into account whether the whistleblower complied with any scheme operated by the employer. In practice this encourages employers to establish such schemes.

Enforcing protection

30. The United States has a powerful enforcement mechanism set out in law, in the federal Whistleblower Protection Act 1989: it enables a whistleblower who suffers a reprisal to file a complaint with an independent investigative and prosecutorial agency (the Office of Special Counsel), who will investigate the case and, if they find it proved, may seek corrective action from the employing agency. Malta is introducing a Merit Protection Commission to protect

whistleblowers; where the Commission cannot by itself prevent or redress retaliation measures, it shall make a report to the Prime Minister or another authority, as appropriate.

31. In other countries, it is for the whistleblowers themselves to take their own case to a court or tribunal. In Norway, that means the civil court; in the United Kingdom, the employment tribunal for instance. Various countries (for instance Cyprus, Hungary, Malta, Poland) have also given this competence to criminal courts which have jurisdiction to sanction retaliating measures, including on the basis of the general provisions.

Compensation

32. A few countries provide explicitly for compensation measures, besides the provisions that protect the whistleblower from legal consequences for his action. In the Former Yugoslav Republic of Macedonia, the person has the right to compensation in case of damages s/he has suffered as a result from a the statement made or testimony given. This compensation is applicable also to members of his/her family. Under the new Norwegian law, if whistleblowers suffer retaliation, they can claim compensation from the courts regardless of the guilt of the employer. This is similar to the system in the United Kingdom, which operates through the employment tribunals. The employer has to pay any compensation awarded, which in both countries can be unlimited. In Cyprus, general compensation mechanisms are applicable to damage suffered by a whistleblower, but more countries are probably in the same situation.

CONCLUSION

33. A number of European countries have experienced totalitarian regimes in the past and some societies or people still feel uncomfortable with whistleblowing. However, it seems to me that things have changed in the last 10 years and that the usefulness of whistleblowing is being recognised in connection with the prevention and uncovering of corruption, but also in connection with other forms of malpractice or abusive/criminal behaviour that can endanger other collective interests (public health, financial markets).
34. Interestingly, most measures reported to date are mostly protective in nature rather than incentive and one may wonder to what extent corporatist cultures would prevent a whistleblower from receiving some form of reward or distinction instead of becoming a "black sheep".
35. This brings us to another human resource policy aspect, namely the introduction of anti-harassment measures, which is becoming progressively an important element of labour policies and HR management in Europe. The introduction of such measures can be beneficial also in the context of whistleblower protection since they follow a similar purpose (preventing discriminations, unfair treatment etc.).
36. GRECO does not have a final prescriptive solution to the issues mentioned in this paper. It is hoped that the above discussion will provide some pointers for countries who are considering possible means of enhancing the protection for whistleblowers. Interesting rules and practices in this respect can be found in quite a few GRECO member States.

Strasbourg, 14 October 2008