



## Joint European Union – Council of Europe Project

### “Strengthening the Capacities of Law Enforcement and Judiciary in the Fight against Corruption in Serbia” (PACS)

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#### Technical Paper

#### EXPERT OPINION ON THE DRAFT LAW ON PROTECTION OF WHISTLEBLOWERS

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## Table of Contents

Executive Summary .....	3
1. COMMENTS AND RECOMMENDATIONS.....	4
1.1 The Draft Law .....	4
1.2 Missing provisions .....	14
1.3 Review .....	15
1.4 Offence of retaliation .....	15
1.5 Professional privilege and legal advice.....	15
1.6 Implementing the Law .....	16
1.7 Comments on the Explanatory Memorandum .....	16
2. CONCLUSIONS.....	17
3. APPENDIX I – Assessment of Conformity with Council of Europe Standards .....	18
4. APPENDIX II - Provisional Council of Europe Principles to Draft Recommendation on Whistleblower Protection.....	22
5. APPENDIX III – Draft Law on Protection of Whistleblowers.....	26

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## Executive Summary

In a letter addressed to the joint Council of Europe/European Union project “Strengthening the Capacities of Law Enforcement and Judiciary in the Fight against Corruption in Serbia” (PACS), the Minister of Justice and Public Administration of Serbia has asked the Council of Europe for expert opinion on draft Law on Protection of Whistleblowers. The draft law has been recently approved by the Working Group set by the Ministry.

This opinion focuses on the compatibility of the draft law with Council of Europe standards and good practice of different European jurisdictions.

In view of that the draft law was assessed against the only detailed international measure on this subject - draft Council of Europe Recommendation on Whistleblowing (hereinafter ‘the CoE Recommendation’). It shows the draft law achieves a high degree of convergence, although a few issues remain.

The draft law is skilfully drafted but like all laws seeking to regulate such a complex field, it is open to improvement. Therefore experts team raised several issues in this paper in the expectation that this law may also become a template for other countries, so it is worth going the extra mile to get it as right as it can be. Nevertheless, it is known that ‘the best is the enemy of the good,’ that compromises may have to be made in the Parliamentary process, and that it may not be possible at present to adopt a law that addresses all of the issues. The priority issues are identified in bold.

The longest experience of a specific law on whistleblowing is to be found in the UK, (the Public Interest Disclosure Act 1998). The operation of that law was recently reviewed by an independent commission and that report had been taken into account when comments in this paper were made (‘the 2013 Report’)<sup>1</sup>.

Given that the opinion was prepared on English translation of the draft law, several of the comments below may relate to simple translation issues which can be easily resolved.

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<sup>1</sup> Full title: Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK, (November 2013), available on the PCAW website.

# 1. COMMENTS AND RECOMMENDATIONS

## 1.1 The Draft Law

### Article 2.1

There are other laws in Serbia which contain provisions for disclosures to be made and which are not repealed by Article 38<sup>2</sup>. It may be preferable to state 'in accordance with this or any other relevant law', or possibly 'in accordance with the principles of this law'.

Disclosures to 'the public' are allowed by Article 12, and 'the public' should be mentioned here. A clearer formulation might be: 'to his employer, to an authorised authority or to the public'.

It would be helpful to define the phrase 'threat to or violation of the public interest' by reference to Article 5.

### Article 2.2

It is desirable to cover not only those who have made a disclosure but those who 'are about to disclose.' That might be discovered for example if they copy documents or state that they will notify unless the unlawful practice is changed. This clarification would prevent pre-emptive strikes and gagging orders.

The term 'good faith' is not used in the CoE Recommendation. It caused difficulty in the UK and was removed from the law in 2013. The problem was that the term, when left undefined, left the door open for argument about the whistleblower's motives. If it is retained, it would be good to make clear here that the term is used as defined in Article 6. The possibility of removing it from the draft law is discussed under Article 6.

### Article 2.3

The phrase "makes probable" is unclear. It is suggested that the burden of proof should be "can show on reasonable grounds". That fits in with the CoE Recommendation (Principle 22). The same point arises on Article 8.

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<sup>2</sup> For example, the Law on Civil Servants, and the Law on Free Access to Information of Public Importance.

The law should cover a person who is falsely accused of being a whistleblower. Failure to cover their cases has proved a problem in the UK<sup>3</sup>. This might be done by making clear here that 'associated person' includes persons with a 'real or supposed' connection with the whistleblower, as well as those wrongly supposed to be whistleblowers.

#### Article 2.5

There is no mention of part-time employment. It seems clear there is no intention to exclude it and it might be better to mention it (or else delete 'full-time'), as the current wording risks creating an argument.

There is no mention of contractors. It is assumed that they are in fact covered by the concept of 'any factual work', but it would be better to clarify the inclusion.

In accordance with the CoE Recommendation (Principle 4) it would be necessary to cover former employees, and desirable to cover applicants for employment:

- former employees because it is possible to retaliate effectively after a worker leaves the job, such as by cutting off pension benefits; and
- applicants to defend against blacklisting, which can be an even worse consequence than loss of the original job.

#### Article 2.7

It is desirable to mention not only 'awareness' of whistleblowing but the 'perception' that whistleblowing has taken place, to allow for cases of mistake.

#### Article 2.8

"Stipulated by law" may be too high a threshold, as victimisation can take many forms. The definition is presumably intended to include financial losses but it might be better to state that clearly.

#### Article 3

It seems odd to place a provision on abuse at the beginning. It would be more usual to find such a provision placed at the end, and to be accompanied by a penalty.

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<sup>3</sup> A recommendation to change UK law to cover these people was made in the 2013 Report (93-95).

## Article 5

The CoE Recommendation (Principle 2) requires clarity as to scope and suggests the framework “should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment”. “Three years’ qualification seems to be too restrictive. Most laws cover not only all criminal offences, but breaches of civil rights also. The requirement that risks be ‘immediate’ also appears too restrictive: ‘substantial and specific’ is used rather than ‘immediate’ in UN and World Bank policies. An alternative example of a clear statement of scope is found in the Irish Bill currently before their Parliament<sup>4</sup>.

The time limits could be an issue where criminal offences are concerned. It would be odd to leave someone unprotected for blowing the whistle on a crime before its statute of limitations had expired. That would discourage testimony that could still affect the outcome of pending cases. It would be better to specify that where criminal offences are concerned, the normal rules on statutes of limitation apply to whistleblowing. The limits specified here would apply only to wrongdoing that was not criminal.

The final reference to ‘paragraph 1’ here (and in Articles 6, 8, 9, 10 and 11) is confusing. It is assumed that such references are intended to cover the whole first paragraph of Article 5, including the types of act mentioned in both 1 and 2. If so, the numbering of paragraphs might usefully be clearer. **If not, there is an extremely significant loophole. It would mean that job duties only are protected when serious crimes are involved. That would be far narrower than best practices, because often there is no illegality, but misconduct seriously threatens the public interest from abuse of authority, or breakdowns in achieving missions to protect the public or environment.**

## Article 6

The CoE Recommendation (Principle 22) makes it clear that so long as the whistleblower can show there are reasonable grounds to suspect a threat or harm to the public interest, he or she should be protected even if mistaken. It does not mention ‘good faith’ and it may be preferable not to use this unclear term. Instead, the term ‘good faith’ in Article 2.2, Article 6, and Article 19 might be replaced with ‘on reasonable grounds.’ Irrespective of the decision on ‘good faith’ it would be neater to move points 1 and 2 in Article 6 to Article 3, as other instances of abuse of whistleblowing.

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<sup>4</sup> Clause 5 (3) of the Protected Disclosures Bill.

In English the phrase 'would agree' implies that no-one could disagree, or unanimity. 'Could agree' is preferable as it means the belief is reasonable, but there is room for fair disagreement. A requirement for universal agreement would disqualify virtually everyone, since there always are two sides when there is a dispute over exercise of power. It is important that the language does not leave any room for confusion.

The whistleblower may have received some legal benefits under point 1: for example if he/she had some legal costs paid or if he/she accepted a gagging clause in a settlement and then changed his/her mind. Therefore the benefits referred to in 1 should be limited to 'illegal' benefits, as in point 2.

#### Article 7

In line with the comment on Article 2.3, it would be useful to clarify here that the association with the whistleblower may be actual or supposed (mistaken).

#### Article 9

Article 9 covers some intending whistleblowers, but there may be others. For example, sometimes it will be necessary for a whistleblower to discuss his/her impending disclosure with other employees to verify the accuracy of information as required by Article 6. But the other employee may reveal the whistleblower's identity leading to retaliation before the whistleblower makes a disclosure to any company official. This article should cover that situation by referring also to seeking information from employees for Article 6 purposes.

#### Article 10

It would be desirable to start from the presumption that the whistleblower's personal data will be protected, unless he/she requests otherwise. Also, it should be clarified that 'personal data' includes any information that could be used to identify the whistleblower. Identifying information might include certain facts which represent the whistleblower's "signature" due to unique knowledge or some other factor that permits tracing them back to the whistleblower.

In the third paragraph, it would be preferable to say 'before receiving' rather than 'while receiving'. The warning would need to be made before the disclosure was (officially) received if at all practicable.

## Article 12

The definition of the term 'employer' in Article 2 looks rather limited for the purposes of Article 12 (though it is clearly appropriate for other articles such as 15). In practice the majority of whistleblowing disclosures that lead to retaliation start with an employee's disclosure to a supervisor. Disclosures might also be made to the organisational head, the Board of Directors, or associated organisations such as the relevant trade union. The simplest solution might be to add here (and in Article 14) 'or any person authorised by the employer under Article 15 to receive disclosures'. The Government Act under Article 14 might then clarify what kind of people employers should authorise. Supervisors (line managers) would obviously need to be among them. Trade Unions could be another possible channel, and in the UK the proposal is to ensure this by statute<sup>5</sup>.

## Article 13

This seems to place too many burdens on the whistleblower at the point of disclosure. The whistleblower may not know what law has been violated – and moreover Article 5 covers some cases where no law is violated. All that should be required of the whistleblower is reasonable belief that he/she has information showing a threat to the public interest (as defined in Article 5). Almost no one presents all the evidence when initially exposing a problem or challenging misconduct. In fact, if the disclosure is to a potential wrongdoer it could be obstruction of justice to expose all the evidence before law enforcement authorities see it. What is important is that the whistleblower can demonstrate his reasonable concerns, not that he can present all the evidence at the outset.

The last paragraph seems to apply to all anonymous disclosures, regardless of their importance. Presumably the intention is that it is limited to Article 5 cases and it would be clearer to say so.

## Article 14

The fifth paragraph refers to Article 4, but presumably means paragraph 4 of Article 14. It seems simpler to combine these two paragraphs.

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<sup>5</sup> The proposal in the 2013 Report is that access for whistleblowers to unions should be totally open, as access to lawyers is now.



In the final paragraph, the word 'closely' seems unnecessary and inappropriate. The Government Act should be subject to consultation with employers and should leave space for employers to think through what is appropriate for their organisation and 'own' the result. (It is noted that under the model, recently proposed for the UK, the Government would produce a broad Code of Practice for employers.<sup>6</sup> There would be no requirement for employers to follow the Code but it would be taken into account – by regulators and the courts - when whistleblowing cases arise).

#### Article 15

In the second paragraph, 'visible place' seems to imply a notice board but it might be helpful to make clear that publication on a website is not sufficient. This might be done by adding 'in addition to electronic communication, where available'.

In the third paragraph, should the reference be to paragraph 3 of Article 14? If not, would it not be simpler to combine the second and third paragraphs? More than one person needs to be authorised to receive disclosures in any employer with over 10 employees.

The experts' team do not recommend that access to the case file (as required in the final paragraph) can always be granted – for example the case may be with the prosecutor. Access should be subject to the rights to privacy and to a fair trial. (The same point arises on Article 17).

#### Article 17

It is suggested to add to the second paragraph the following: 'The competent authority shall be bound by commitments made by the initial authorised authority to the whistleblower to comply with confidentiality protection under Article 10'.

#### Article 18

In the first paragraph, it is presumed that conditions 1 and 2 are alternatives, not cumulative requirements. This should be clarified (e.g. by inserting the word 'or' between 1 and 2.)

The 'reasonable time limit' in 1 might be clarified by adding the phrase 'to make a difference in tackling the alleged misconduct.'

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<sup>6</sup> A draft code was drawn up in the 2013 Report, see 51-55.

It is not clear why it is specified (under 2) that the official procedure must be finalised. Is it not enough that the procedure should be irregular?

In the light of the ECHR case law<sup>7</sup>, there are other circumstances where whistleblowing to the public would be permitted under Article 10, even if there was no previous authorised authority disclosure. It would be desirable to add (possibly as new conditions 3 and 4):

- the whistleblower reasonably believes that otherwise there is risk that evidence may be destroyed; or
- the whistleblower reasonably believes that other alternative avenues for disclosure would lead to retaliation.

The question is also the penultimate paragraph necessary? Is it not already covered by the law on journalists' secrets? If that says something different – e.g. about the categories of journalist covered, there could be a problem.

In the final paragraph, it seems preferable to specify that the whistleblower has to comply with *the laws protecting* the right to privacy (etc). Otherwise, the restriction could be open-ended and subjective. There should be objective boundaries for restrictions, so that whistleblowers do not have to guess.

Should the same duty not fall on authorised authorities? The personal data of someone accused by a whistleblower should enjoy some form of protection at least until a formal trial is opened or guilt has been proved.

## Article 19

The second paragraph should refer to data 'specifically marked or designated as' classified. This was the subject of a key amendment to US law, because data was not marked and then was classified after the fact in order to attack the whistleblower. While there may be classified but unmarked data generally, for whistleblower rights there must be clear notice of its restricted status. Unless this is already clear in the law on classified data, that should be clarified for this purpose.

This paragraph contains a very broad definition of classified data: for example, there seems a risk that data referring to the relations of Serbia with international organisations or entities

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<sup>7</sup> Especially *Guja v Moldova*, case no. 14277/04, 12 February 2008.

might include anything on mismanagement of EU money. Article 10 of the previous draft law (version from April 2013), appears to be tighter in its definition of classified information, by referring to information with the highest degree of confidentiality. The previous draft Article 10 also stated that classified data (though not that classified to the highest degree) could be released if more serious damage could thus be avoided.

#### Article 20

It seems too specific to say that a disclosure must be made to 'the immediate supervisor'. What happens if the supervisor is suspected of involvement? It seems preferable to say 'a supervisor'.

#### Article 21

The two additional circumstances proposed for Article 18 should apply here too, namely –

- the whistleblower reasonably believes that otherwise there is a risk that evidence may be destroyed, or
- the whistleblower reasonably believes that the use of alternative avenues for disclosure would lead to retaliation.

#### Article 22

This should cover not only actions that the employer takes, but also those that he fails to take, that put the whistleblower at a disadvantage. It should also be clear that the employer must not cause *or permit* any damaging consequence.

Under point 7 on the list, there should be added, 'including removal of duties, reassignment, or harassment by co-workers'. It is also suggested to add two new points to the list:

9. Benefits, including pension or insurance compensation.
10. Psychiatric evaluation or mandatory medical procedure.

It is not clear what the final paragraph means or why it is needed.

#### Article 24

The reliance on court protection could be open to criticism, as the surveys show that civil courts in Serbia do not enjoy public trust when it comes to their effectiveness. There is a case

for ensuring whistleblower cases are heard by specialized judges, perhaps operating as a specialized section of the civil court. This would presumably require special funding.

'90 days' is too short given the usual internal trajectory preceding taking cases to court. One year is normal, and some laws have six year limits. 180 days is the minimum for credible laws. This is particularly true for such a new right, where employees may not be aware of it, and it is harder to find a lawyer.

#### Article 25

The article does not state against whom the lawsuit can be directed. Article 28 (on the burden of proof) implies that it must be the employer. The disclosure of serious wrongdoing at a small employer may result in the employer falling into insolvency. What is the remedy in such cases? Possibly there should be a right to compensation from a public fund at least in such cases where the whistleblower provided public benefits and fails to get other compensation.

The last paragraph is not clear, but it seems to undermine Article 25 point 2 and 3, and if so that would be a serious flaw, and would appear to conflict with the CoE Recommendation (Principle 11). The Commissioner for Information has also analysed this provision and criticised the inability of the law to protect whistleblowers to have acts on dismissal, suspension, downgrading, salary decrease, etc.

#### Article 26

It is understood that there are concerns in Serbia that this provision seeks to place on the Information Commissioner, the various Ombudsmen, and the Anti-Corruption Agency (ACA), duties that may not be within their remits or sphere of expertise. This may be less true of the Anti-Corruption Agency, which has a relevant role to assist civil service whistleblowers under Article 56 of the Anti-Corruption Act. The present draft law could amend their remits, but their agreement would be needed. That is a serious issue that requires discussion with the authorities.

#### Article 28

Although in line with the CoE Recommendation (Principle 25), the requirement to show that the damaging consequence was 'due to' whistleblowing makes this a less powerful reversal of the burden of proof than exists in some other laws. 'Due to' implies that retaliation for whistleblowing must be the primary cause for an action, before the burden of proof shifts. It would be preferable to provide that if the whistleblower proves illegal retaliation is any factor

in the decision, the burden of proof should shift. This is the cornerstone for the U.N., World Bank and U.S. whistleblower standards/laws. Other laws require only whistleblowing and subsequent detriment, so that the link is assumed. Possibly, the provisions of the Article 18 of the draft law from April 2013, could be a model for redefining this Article.

The phrase 'due to' also occurs in Article 9 and it is suggested that it should be changed in line with this suggestion.

#### Article 29

It is suggested to add at the end: 'If there has been an investigation by the Ombudsman, Anti-Corruption Agency or other authority under Article 26, the court may rely on that authority's fact-finding.'

#### Article 32

Subject to discussion with the authorities concerned, a new final paragraph is suggested as follows: 'An authority listed in Article 26 may file a request for temporary relief on behalf of a whistleblower. The request shall be addressed as a priority with deference to the authority's findings. The request shall be approved, unless formally denied within eight days.'

Temporary relief may be the most significant portion of the law in terms of making a difference against retaliation. Employers count on delays that whistleblowers cannot survive. When there is temporary relief, the employer normally settles on terms the whistleblower can accept. This additional paragraph is highly desirable for two reasons: 1) The listed agencies will have unique authority, particularly at the beginning, to understand the new rights, and unlike the parties will be acting on behalf of the government. As a result, their expertise and objective good government mission should receive deferential burdens of proof. 2) The problem of excessive backlogs remains a reality, and priority treatment is an unenforceable goal. There needs to be a structure locking in timely action. Passive approval, unless there is a formal rejection, will force courts to screen the cases for those they want to reject, while preventing backlogs from depriving a whistleblower of timely justice.

#### Article 35

The same issue applies as in Article 26.

## Article 36

It is not clear why different penalties apply in the second and third paragraphs. The second paragraph appears to apply to all public bodies. The fourth only applies to entrepreneurs. In Article 2.4 an entrepreneur is included in the definition of employer. If an entrepreneur is simply one type of employer, why does Article 36 treat him differently?

The last paragraph is not clear. No misdemeanour of revealing identity is mentioned in Article 36. Why should any such misdemeanour be limited to persons mentioned in the second para?

It would seem simpler and fairer to apply the same penalties to all.

## Article 38

Provisions about the repeal of Article 56 of the Anti-Corruption Act are doubtful. The third paragraph of that allows the Anti-Corruption Agency to extend to civil service whistleblowers any necessary assistance, in accordance with law. That seems useful in relation to the role proposed for the Anti-Corruption Agency under Article 26. It might be preferable to amend and update Article 56 rather than repeal it. It is noted that the 2011 Rulebook for whistleblowers would need to be reconsidered in the light of this law.

### 1.2 Missing provisions

#### No agreement with employer can prevent disclosures

The CoE Recommendation (Principle 11) seeks to ensure that any obligations to an employer which would prevent the disclosure of a public interest issue should be void. This proved a problem in the UK, where settlements between whistleblowers and employers often included 'gagging' clauses even though these are void under existing law<sup>8</sup>. It would be useful to include a new article, on the lines of the new simple provision proposed for the UK: 'No agreement made before, during or after employment, between a worker and an employer may preclude a worker from whistleblowing.'

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<sup>8</sup> See the 2013 Report, paras 105-109.

### 1.3 Review

It would be desirable to have a provision for review (as the current Irish Bill does<sup>9</sup>), to meet the CoE Recommendation (principle 29).

This could possibly be a role for the Ombudsman (subject to agreement with him).

For example:

- 1) requirement for Ombudsman to collect data on number, type, and actions taken by 'authorised authorities' through whistleblowing to them, and to report this to Parliament;
- 2) state that the Act and its by-laws are to be reviewed by the Ombudsman every few years, with recommendations for improving the Act.

### 1.4 Offence of retaliation

The draft law from April 2013 had a criminal offence of retaliation (its Article 34). This would be a helpful supplement to the possibility of civil action.

### 1.5 Professional privilege and legal advice

The CoE Recommendation states: 'These principles are without prejudice to the well-established and recognised rules for the protection of legal and other professional privilege' (Principle 6). The experts team is not aware if it has been decided that this point does not require a provision in Serbia but it is noted that it did require a small provision in the UK. That provision ensures that a lawyer who is approached for legal advice by a whistleblower is not protected as a whistleblower if he/she decides himself to pass that information on<sup>10</sup>. His/her professional duty is to maintain confidentiality, unless his/her client instructs him/her to make a disclosure on his behalf, or if exceptionally he/she is required to make a report by law, e.g. on money laundering.

If such a provision is made it would be useful for it also to make clear that a whistleblower has an unfettered right to seek legal advice, in confidence, before making any disclosure. This is relevant to the CoE Recommendation (Principle 28).

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<sup>9</sup> Clause 2 of the Protected Disclosures Bill 2013, which provides:

'The Minister shall—

- (a) not later than the end of the period of 5 years beginning on the day on which this Act is passed, commence a review of the operation of this Act, and
- (b) not more than 12 months after the end of that period, make a report to each House of the [Parliament] of the findings made on the review and of the conclusions drawn from the findings.

<sup>10</sup> 43B(4) in PIDA.

## 1.6 Implementing the Law

The Law might usefully be supplemented by informal guidance on which are the 'authorised authorities'. There have been problems with exclusive lists, and also it proved impractical in the UK to maintain up to date a list in a regulation made under the Act. However, a non-exclusive list in guidance would be helpful to whistleblowers and to others: Article 17 stipulates that if the whistleblower is mistaken, the recipient has to pass it on to the appropriate authority. Article 10 also suggests the desirability of a list of 'authorised authorities'.

It seems a lot to ask a whistleblower to verify the 'completeness' of data (Article 6). However, to be responsible, whistleblower should have to do their homework before making accusations. But the background guidance should make clear that the whistleblower may already have the verification needed, due to being an eyewitness or due to technical expertise. A new homework assignment is not always necessary.

Guidance should also clarify that it is still lawful and protected to make an unclassified summary of the misconduct, even if secret data is involved. Classified data simply cannot be disclosed publicly.

The implementation process should also address some points in the CoE Recommendation:

- consultation with workers and their representatives on proposals to set up internal reporting procedures, (Principle 16);
- wide promotion of the framework (Principle 27).

## 1.7 Comments on the Explanatory Memorandum

1. It would be helpful to explain why the draft covers all types of wrongdoing, when the mentioned Conventions cover only corruption. It might be worth adding to section II, for example:

'the decision to cover all types of wrongdoing is in line with the Council of Europe Recommendation and with international good practice. Corruption is not uniquely evil, nor is it the only type of offence that is difficult to detect without whistleblowers'.



2. The decision not to introduce a rewards scheme is not seen as an issue. The same conclusion was recently reached in the light of public consultation in the UK<sup>11</sup>. The reasons given included the risk of encouraging negative views about whistleblowers and undermining the credibility of witnesses in court proceedings that might arise. However, the dismissal of the idea in the EM seems rather over-assertive. There is a case for rewards, based on the fact that whistleblowers often undergo a great deal of stress, and compensation only restores them to where they would have been if they had not blown the whistle. As the draft from April 2013 did propose rewards, and some people remain in favour of them, it would be better to state something like:

‘We considered introducing a system of rewards but decided against this for several reasons. In our view.....’

3. The final paragraph states that no additional funds will be required to implement the law. This is open to question, especially in view of the additional court cases that can be expected, and the new duties proposed in Articles 26 and 35. Resolution of the issue mentioned under Article 24 would also be likely to require funding. Possibly it would be better to admit there are costs, but that the benefits outweigh the costs. Figures from South Korea show that in 2012, about \$10m was recovered in 40 cases raised by whistleblowers (and about \$1 m was given to the whistleblowers in rewards).

4. A final version of the document in which the provisions of the Council of Europe Recommendation are mapped against the draft law might helpfully form part of the EM.

## 2. CONCLUSIONS

In conclusion it can be said that this is already a draft law that has the potential to be very helpful to whistleblowers in Serbia. If the priority issues identified above are addressed it would represent an advanced law. There are however two major issues that possibly need to be further discussed – firstly, the controversy about the proposed role of some authorities in Article 26 and secondly the reliance on remedies from civil courts.

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<sup>11</sup> 2013 Report, 56-63.

### 3. APPENDIX I – Assessment of Conformity with Council of Europe Standards

#### Mapping of the Serbian Draft Law against the Council of Europe Recommendation on Whistleblower Protection (Provisional Principles)

Colour legend: green - full convergence; yellow - room for improvement; red - contradictory or missing

CoE Principle	Short description	Evaluation	Recommendations for enhancement
Material scope			
1	National framework should establish rules to protect rights and interest of whistleblowers		The draft law should be a valuable basis for the other elements of such a national framework, provided it intermeshes effectively with the workings of the Ombudsperson, the Information Commissioner and the courts.
2	Scope of 'public interest'		Art 5 outlines this, but in a way that seems too narrow and unclear in its application. Most laws cover not only all criminal offences, but breaches of civil rights also. The requirement that risks be 'immediate' also appears too restrictive.
Personal scope			
3	Wide understanding of working relationships		Covered by Art 2.2 and 2.5. The draft law covers both public and private sector. Some minor clarifications are proposed.
4	Covers individuals whose work-based relationship has ended, or those during a pre-contractual negotiation stage		In Art 2.5: Add 'former employees' and also, if possible, 'applicants'.
5	Special scheme or rules applying to information relating to national security		There is a risk of incoherence and ad-hoc decisions by authorities because the notion of 'classified information' is too broad in Art 19. It is suggested to refer to 'data specifically marked or designated as classified' and to reconsider some of the ideas from the previous draft: notably the restriction to 'highest classified'.

6	Without prejudice to rules for the protection of legal and other professional privilege		The draft law currently does not include such stipulation. Consideration needs to be given as to whether this principle can be met without any provision.
Normative framework			
7	Comprehensive and coherent approach to facilitating whistleblowing		The approach in the draft law gains its comprehensiveness and coherence especially through Art 12, 15-18, 22-24, 31-34, and 35. There are risks of incoherence if comments in bold (in particular on Art 5, 6, 13, 24, 25, 26, and 35) are not addressed. There are risks of incomprehensiveness if comments in bold (in particular on Art 2.5, 9, 19, 28, and 32) are not addressed.
8	Restrictions and exceptions should be no more than necessary		Restrictions are limited but see comments on principles 2 and 5, covered in respectively Art 5 and 19.
9	Ensure effective mechanisms for acting on public interest disclosures		The draft law includes such stipulations in Art 14, 15, 17, 18, and 21.
10	Protection and remedies under rules of general law for those prejudiced by whistleblowing are retained		The draft law does not remove existing protections and makes specific new provisions in Art 3, 6, and 18 (final paragraph).
11	Employers cannot call on legal or contractual obligations to prevent or penalise someone from making a public interest disclosure		It is desirable to add a provision to make this clear.
Channels for reporting and disclosures			
12	Foster an environment that encourages disclosure in an open matter		The overall effect of the law should be to encourage open reporting. Art 13 does require authorities to act on anonymous disclosures, but this is not unreasonable. However, Art 13 places too many burdens on the whistleblower at the point of disclosure and this might have a chilling effect.
13	Clear channels are in place		Clarity can be enhanced through a list of prescribed authorities and their competence to receive disclosures, though this might best be done in guidance rather than in the law.

14	Three tiers for whistleblowing		Covered by Art 12, 13, 14, 16, 17, and 18.
15	Encouragement for employers to put in place internal procedures		Art 14 requires employers to make internal acts and refers to a Government Act that will further regulate this.
16	Workers to be consulted on internal procedures		Not covered in this law, but should be in the Act announced in Art 14.
17	Internal whistleblowing or to regulatory bodies to be encouraged as general rule		Covered by Art 12, 16, 17, and 35.
Confidentiality			
18	Whistleblowers entitled to confidentiality		Covered by Art 10.
Acting on reporting and disclosure			
19	Prompt investigation		Covered by Art 15 and 17.
20	Whistleblower should be informed of action taken		Covered by Art 15 and 17.
Protection against retaliation			
21	Protection against retaliation of any form		Art 22 does not cover protection from retaliation by co-workers. In Art 24, time limits are too short to be effective. There appears to be a contradiction in Art 25 last para: this whistleblower protection should be able to revoke the legality of certain actions – that is one of the crucial things the law must do. As it reads now, Art 25 (last par) suggests that this law cannot revoke any action that is legal under another law (e.g. right to dismiss).
22	Protection not to be lost on mistaken disclosures only		Art 6 covers this.
23	Entitlement to raise the fact that disclosure was made in accordance with national framework		Covered by Art 24.

24	Passing-by internal procedure may be taken into consideration when deciding on remedies		Not specifically covered, but no barrier to court considering the issue. Also, restrictions on going public in Art 18 are relevant.
25	Burden of proof in detriment considerations is on employer		The reversal of the burden of proof in Art 28 is probably in line with this principle. However the wording 'due to' implies retaliation for whistleblowing must be the primary cause for an action before the burden of proof shifts. This amounts to requiring the whistleblower to win before the burden shifts. A better balance would be found if the requirement for the whistleblower is to show that blowing the whistle was one of the factors leading to the damaging actions.
26	Interim relief should be available		Art 31 is in line but it is desirable that it be enhanced because of the importance of such provisions for the effective working of whistleblower legislation.
Advice, awareness and assessment			
27	National framework should be promoted widely		Out of scope of legislation. The law has been subject to wide consultation but its implementation should still be promoted widely when it happens. Its operation to be discussed as part of provisions for principle 29.
28	Confidential advice should be available (preferably free of charge)		Covered by Art 35. Legal advice should also available to whistleblowers without any conditions, not even 'good faith'. It would be useful to make that clear.
29	Periodic assessments of the effectiveness of the national framework		The draft law does not include stipulations on this. Include Art that sets out a review process, possibly coordinated by the Ombudsperson in a report to Parliament.

## 4. APPENDIX II - Provisional Council of Europe Principles to Draft Recommendation on Whistleblower Protection<sup>12</sup>.

Excerpt from: Appendix II to the Draft Meeting Report of 88th Meeting of the European Committee on Judicial Cooperation, December 16-18, 2013 , CDCJ (2013) 31 prov. (Strasbourg, 19 December 2013)

### 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 public or private.
- b. “*Public interest report or disclosure*” means 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 clearly 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.

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<sup>12</sup> <http://www.coe.int/t/dghl/standardsetting/cdcj/whistleblowers/Whistleblowers%20meeting%20-%20Explanatory%20notes%20.pdf>

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. Encouragement should be given to employers 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 on the basis only 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 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.

## 5. APPENDIX III – Draft Law on Protection of Whistleblowers

### Chapter I

#### Introductory Provisions

#### Article 1

##### Scope of the Law

This Law regulates whistleblowing, whistleblowing procedure, rights of whistleblowers, obligations of the state authorities and other authorities and organizations in relation to whistleblowing, as well as other issues of importance for whistleblowing and protection of whistleblowers.

#### Article 2

##### Definitions

In terms of this Law, terms shall have the following meaning:

1. **“whistleblowing”** is disclosure of information made by a whistleblower in accordance with this Law to the state or another authority or organization about a threat to or violation of public interest;
2. **“a whistleblower”** is a natural person who, in terms of his working relationship; employment procedure; use of services rendered by public authorities, holders of public authorities or public services; business cooperation; ownership of shares in the company; discloses, in good faith, information about a threat to or violation of public interest in accordance with the Law;
3. **“an associated person”** is a person who makes probable that a damaging action has been undertaken against him, due to his connection with a whistleblower;
4. **“an employer”** is an authority of the Republic of Serbia, territorial province or local self-government unit, holder of public authorities or a public service, or legal entity or entrepreneur which employs one or more persons;
5. **“working relationship”** is full-time employment, work outside employment, volunteering, internship, or any other factual work for an employer;
6. **“an authorized authority”** is any republic, provincial, or local government authority or holder of public authorities competent to act upon the information disclosed in accordance with the Law.
7. **“damaging action”** is any action or omission, in particular a threat, by an employer or person in a working relationship with employer, that results from the awareness of whistleblowing.
8. **“damaging consequence”** is any violation of rights, harassment, or discrimination stipulated by the law, which is caused by a damaging action.

### Chapter II

#### General Provisions on Whistleblowing and Right to Protection

#### Article 3

##### Prohibition against Abuse of Whistleblowing

Abuse of whistleblowing is prohibited.

A person that discloses the information he knew was untrue, with intent to receive benefit for himself or another person, or with intent to cause damage to another person, abuses whistleblowing.

#### **Article 4**

##### **Prohibition of Undertaking Damaging Action**

Undertaking of any damaging action in terms of this Law shall be prohibited.

#### **Article 5**

##### **Right to Protection of Whistleblower**

A whistleblower shall have the right to protection in accordance with this Law, if he discloses information in good faith related to:

1. an action with the characteristic of a criminal offence punishable by prison sentence up to three years or a more severe penalty, that violates or causes a threat to the public interest;
2. an act causing an immediate threat to the life, health, or safety of people, the survival of plant or animal life, the environment, violation of fundamental human rights and freedoms, or serious damage not prohibited by law or any other regulation.

A whistleblower shall have the right to protection if the disclosure referred to in paragraph 1 herein is made within one year from the day he learned about the committed action and no later than 10 years from the commission of such action.

#### **Article 6**

##### **Acting in Good Faith**

A person shall act in good faith if, at the moment of disclosure of the information referred to in Article 5 paragraph 1 herein, he believes that the disclosure is true, and if before such disclosure he has verified the accuracy and completeness of the data, within his capacities, and if, based on this information, another person with average knowledge and experience similar to the person making a disclosure would believe that the disclosure is true.

It shall be deemed that a person acted in bad faith if:

1. he requested or received any benefit for himself or another person, or requested infliction of damage to another person, in order not to disclose information referred to in Article 5, paragraph 1 herein.
2. while disclosing the information referred to in Article 5, paragraph 1 herein, besides the request to act upon the disclosure, he also requested an illegal benefit for himself or another person.

#### **Article 7**

##### **Protection of Associated Persons**

An associated person shall have the same protection as a whistleblower, if he makes probable that damaging action has been undertaken against him due to connection to a whistleblower.

## **Article 8**

### **Protection for Disclosing the Information while Executing Official Duties**

A person who, while executing official duties, made a disclosure referred to in Article 5, paragraph 1 herein, shall have the same protection as a whistleblower, if he makes probable that damaging action has been undertaken against him due to such disclosure.

## **Article 9**

### **Right to Protection for Requesting an Information**

A person who requests from his employer information referred to in Article 5, paragraph 1 herein, shall have the same right to protection as a whistleblower, if he makes probable that damaging action has been undertaken against him due to request for information.

## **Article 10**

### **Protection of a Whistleblower's Personal Data**

A person authorized to receive disclosures shall, upon request by a whistleblower, protect the whistleblower's personal data.

Every person who learns about the data referred to in paragraph 1 herein, shall protect those data.

A person authorized to receive disclosures shall, while receiving a disclosure referred to in Article 5, paragraph 1 herein, inform a whistleblower that his identity may be revealed to the competent authority, if the actions of that authority would not otherwise be possible, and inform him about protection measures of participants in criminal proceedings.

If it is necessary to reveal the identity of a whistleblower in the course of proceedings, a person authorized to receive disclosures shall inform the whistleblower about it before revealing his identity.

A whistleblower's personal data shall not be revealed to a person to whom the disclosure referred to in Article 5, paragraph 1 herein is related.

## **Chapter III**

### **PROCEDURE**

## **Article 11**

### **Urgency in Undertaking Actions upon Disclosure**

Acting upon disclosures referred to in Article 5, paragraph 1 herein shall be particularly urgent.

While acting in accordance with paragraph 1 of this article, measures to protect personal data shall be applied.

## **Article 12**

### **Types of Whistleblowing**

Whistleblowing may be internal, external, or to the public.

Internal whistleblowing is making a disclosure to an employer.

External whistleblowing is making a disclosure to an authorized authority.

Whistleblowing to the public is making a disclosure through the mass media, internet, at public gatherings, or in any other way a disclosure may be made public.

## **Article 13**

### **Initiation of Whistleblowing**

Whistleblowing is initiated by disclosing information, to an employer, authorized authority or to the public in accordance with this Law.

The disclosure referred to in paragraph 1 of this article must contain information about violation of legislation causing threats to the public interests, information about the employer, facts, and circumstances causing a whistleblower to believe that a disclosure is true.

The disclosure may contain the signature of and data on the whistleblower, as well as any other important facts and circumstances.

An employer or an authorized authority shall act upon anonymous disclosures within their competences.

## **Article 14**

### **Internal Whistleblowing**

A procedure of internal whistleblowing is initiated by making a disclosure to an employer.

Every employer employing more than ten employees shall regulate the internal whistleblowing procedure by a general act.

If a disclosure is made within an employer with ten or fewer employees, it shall be made to a responsible person within that employer.

Provisions of the general act on internal whistleblowing procedure must be in accordance with this Law and by-laws adopted in accordance with this Law.

Provisions of the general act referred to in Article 4 herein not in line with this Law and by-law adopted in accordance with this Law are null and void.

A Government act shall closely regulate internal whistleblowing procedure for employers with more than 10 employees.

## **Article 15**

### **Obligations of Employer**

An employer shall protect a whistleblower and any associated person from any damaging action.

The employer referred to in Article 14, paragraph 2 herein shall post the general act regulating internal whistleblowing procedure in a visible place.

The employer referred to in Article 14, paragraph 2 herein shall appoint a person authorized to receive disclosures and act upon them, and inform every person in a working relationship with him in writing about their right to protection in accordance with the Law.

An employer shall act upon the disclosure by which a whistleblowing has been made within 15 days from the day the disclosure was received.

An employer shall inform a whistleblower about the outcome of the procedure within 15 days from the day of completion of procedure.

An employer shall, upon a whistleblower's request, provide to him information about the progress of and actions undertaken within the procedure, and enable him to have access to the case file and to participate in actions in the procedure.

## **Article 16**

### **External Whistleblowing**

A procedure of external whistleblowing is initiated by disclosure of information to an authorized authority.

## **Article 17**

### **Obligations of an Authorized Authority**

An authorized authority shall act upon a disclosure within 15 days from the day the disclosure was received.

If an authorized authority to which the disclosure was made is not competent to act upon such whistleblowing, it shall forward the information to a competent authority within the time limit stipulated by the law from the day the disclosure was made, and inform the whistleblower of this action.

If a whistleblower requested to keep his identity confidential, and an authorized authority to which the disclosure was made to by the whistleblower is not competent to act, it shall, prior to forwarding the disclosure to an authorized authority, request approval by the whistleblower to do so.

An authorized authority shall inform a whistleblower about the outcome of the procedure within 15 days from the day of completion of procedure.

An authorized authority shall, upon a whistleblower's request, provide to him information about the progress of and actions undertaken within the procedure, and enable him to have access to the case file and to participate in actions in the procedure.

## **Article 18**

### **Whistleblowing to the Public**

A whistleblower may make a disclosure to the public if he has previously made a disclosure to an authorized authority and if:

- 1) the procedure before the authorized authority is not conducted within the reasonable time limit,
- 2) he believes that the procedure finalized before an authorized authority was irregular.

Notwithstanding paragraph 1 of this article, a whistleblower may make a disclosure to the public without previous disclosure made to an authorized authority in the case of immediate threat to life, health, safety of people, survival of plant and animal life and the environment, if

there is a stipulated obligation to disclose the information to the public which is not fulfilled or if the information relates to the authorized authority.

An authorized authority cannot request any information about a whistleblower from a journalist or editor-in-chief, or any other information that might lead to revealing a whistleblower's identity, if a whistleblower requested anonymity from a journalist, except in the cases stipulated by the law regulating journalists' secrets.

While making a disclosure to the public, a whistleblower shall comply with the presumption of innocence in the court proceedings, right to privacy, right to personal data protection, and shall not jeopardize the conduct of court proceedings.

## **Article 19**

### **Whistleblowing when a Disclosure Contains Classified Data**

If a disclosure contains classified data, a whistleblower shall have the right to protection from damaging actions if he acted in good faith and if he complied with the whistleblowing procedure envisaged by this Law and the general act of the employer.

Classified data referred to in paragraph 1 of this article are those data classified in accordance with the regulations on classified data, and which refer to the national security of the Republic of Serbia, public safety, or defense, foreign affairs, security and intelligence affairs of state authorities, as well as relations of the Republic of Serbia with the other countries, international organizations, and other international entities.

If a disclosure contains classified information, a whistleblower cannot make it public.

If a disclosure contains classified information, a whistleblower shall comply with general and special measures for protection of classified data.

## **Article 20**

### **Internal Whistleblowing if a Disclosure Contains Classified Data**

If a disclosure contains classified data, a whistleblower shall first address his employer, and if a disclosure refers to a person authorized to act upon disclosures, such disclosure shall be made to the immediate supervisor of that person.

## **Article 21**

### **External Whistleblowing if a Disclosure Contains Classified Data**

In case an employer failed to act upon a disclosure by a whistleblower which contained classified data, did not reply within a reasonable time, or did not undertake any adequate measures within his competence, a whistleblower can address an authorized authority.

Notwithstanding the paragraph 1 of this article, in case a disclosure refers to a manager within the employer, such disclosure shall be made to an authorized authority.

## **Chapter IV**

### **PROTECTION OF WHISTLEBLOWERS AND COMPENSATION FOR DAMAGE**

#### **Article 22**

##### **Protection due to Whistleblowing**

The employer of a whistleblower shall not put a whistleblower or an associated person in an unfavorable position or cause him any damaging consequence due to whistleblowing, in particular in relation to:

1. employment procedure;
2. getting the status of an intern or a volunteer;
3. work outside employment;
4. education, training, or professional development;
5. promotion at work;
6. disciplinary measures and penalties;
7. working conditions;
8. termination of employment.

Provisions of a general act inflicting damaging consequences on a whistleblower or an associated person due to whistleblowing shall be null and void.

#### **Article 23**

##### **Compensation for Damage due to Whistleblowing**

In cases of inflicting damaging consequences due to whistleblowing, a whistleblower and an associated person shall have the right to compensation for damage in accordance with the law regulating contract and torts.

#### **Article 24**

##### **Court Protection due to Whistleblowing**

A whistleblower or an associated person who is likely to suffer damaging consequences due to whistleblowing has the right to court protection.

Court protection is exercised by lodging a lawsuit before a competent court within 90 days from the day of learning about the damaging action undertaken, or 3 years from the day of the occurrence of a damaging consequence.

In the court protection proceedings, the competent court is the higher court in the territory where the damaging action was undertaken or the court in the place where a damaging consequence occurred due to whistleblowing or in accordance with the place of adobe of a plaintiff.

The court protection proceedings shall be urgent.



A revision<sup>13</sup> shall always be permitted in court protection proceedings initiated due to whistleblowing.

The provisions of the Civil Procedure Law applied in labor disputes shall be applied accordingly in the court protection proceedings.

## **Article 25**

### **Content of a Lawsuit**

The following can be requested through a lawsuit for protection due to whistleblowing:

- 1) to establish that a whistleblower or an associated person suffers damaging consequences, or that a damaging action has been undertaken against him;
- 2) to prohibit engagement in or repetition of a damaging action;
- 3) to eliminate damaging consequences;
- 4) to compensate for material and non-material damages;
- 5) to publish the judgment rendered upon a lawsuit filed due to reasons referred to in items 1) to 4) above in the mass media, at the expense of the accused.

A lawsuit for protection due to whistleblowing cannot revoke the legality of an employer's individual act used to resolve rights, obligations and responsibilities of an employee from the employment, given that an employee has the right to court protection in accordance with other law.

## **Article 26**

### **Representation by Other Authorities**

With a written power of attorney, the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as: the Commissioner), Ombudsperson, Provincial Ombudsperson, Local Self-Government Unit Ombudsperson, or the Anti-Corruption Agency may also be a proxy in the court proceedings for protection of whistleblowers and associated persons.

## **Article 27**

### **Introducing the Parties to the Right to Resolve a Dispute through Mediation**

The court conducting proceedings for protection due to whistleblowing shall, in the preliminary hearing, or the first hearing for the main hearing, instruct the parties of the option of pre-trial settlement through mediation or in any other amicable manner.

## **Article 28**

### **Burden of Proof in the Court Proceedings**

In case the plaintiff has shown a likelihood during the proceedings that he had suffered damaging consequence due to whistleblowing, the burden of proof shall be on his employer and

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<sup>13</sup> [Translation note: a 'revision' is an extraordinary legal remedy by which the Court of Cassation can revoke a lower court decision. It functions in some ways like an appeal of an appellate decision.]

the employer shall have to prove that the damaging consequence is not in causal relation with whistleblowing or that the whistleblower failed to act in good faith.

## **Article 29**

### **Investigative Principle**

In a court protection proceeding regarding whistleblowing, the court may establish the facts even when not in dispute among the parties, and may also independently investigate facts not presented by either party in the proceedings, if the court deems it important to the outcome of the proceedings.

## **Article 30**

### **Absence of an Accused**

In case a duly summoned defendant fails to appear at the main hearing, the court may conduct the hearing without the defendant, as well as decide on the basis of the facts established at that hearing.

## **Article 31**

### **Temporary Protection**

If a whistleblower or an associated person makes probable that a damaging action has been undertaken against him, or that he suffers damaging consequences due to whistleblowing, he shall have the right to temporary protection before the court.

A temporary protection consists of an order for temporary relief.

A competent court before which the proceedings for court protection due to whistleblowing are conducted shall be competent to order temporary relief.

## **Article 32**

### **Request for Temporary Relief**

Request for temporary relief may be filed before initiation of the court proceedings for protection due to whistleblowing, in the course of the proceedings, or until the moment the enforcement has been realized.

A court may be requested, through a request for temporary relief, to stay the legal effect of an act or to prohibit damaging action causing damaging consequence.

Notwithstanding Article 31, paragraph 3 herein, if a request for temporary relief is filed before the court conducting the proceedings upon the lodged appeal against the decision concerning the subject of lawsuit, or in the proceedings concerning an extraordinary legal remedy, the court that decides on the legal remedy shall decide on the proposed temporary relief and shall with no delay inform the first-instance court.

If temporary relief is ordered prior to the lodging of a lawsuit, the court shall determine the time limit to lodge a lawsuit for whistleblower protection, taking into account the time limits stipulated by different regulations within which a lawsuit may be lodged.

The court shall decide upon the request for temporary relief within eight days from the day the request was filed.

## **Article 33**

### **Ex Officio Determination of Temporary Relief**

In the course of the proceedings, the court may, *ex officio*, establish temporary relief in accordance with the law regulating enforcement and security in order to prevent any violent action or to avoid irreparable damage.

## **Article 34**

### **Appeal against Resolution on Temporary Relief**

An separate appeal<sup>14</sup> shall not be permitted against the order for temporary relief.

## **Article 35**

### **Assistance in Relation to Whistleblowing**

The Commissioner, Ombudsperson, Provincial Ombudsperson, and the Anti-Corruption Agency shall provide assistance and information to any person interested in whistleblowing, protection of whistleblowers and associate persons due to whistleblowing, as well as any other rights in relation to whistleblowing.

## **Chapter V**

### **PENAL PROVISIONS**

## **Article 36**

### **Misdemeanors**

A fine ranging from RSD 50,000 to RSD 500,000 shall be imposed on an employer - legal entity:

1. If it fails to adopt a general act on internal whistleblowing procedure (Article 14, paragraph 2);
2. If it fails to post the act regulating internal whistleblowing procedure in a visible place (Article 15, paragraph 2);
3. If it fails to appoint person authorized to receive and act upon disclosures, or, if it fails to inform all employees about the right to protection of whistleblowers in writing (Article 15, paragraph 3);
4. If it fails to act upon a whistleblowing disclosure within the stipulated time limits, (Article 15, paragraph 4);
5. If it fails to inform a whistleblower about the outcome of a procedure within the stipulated time limit (Article 15, paragraph 5);
6. If it fails to provide information to a whistleblower about the progress and actions undertaken in the procedure, or fails to enable a whistleblower to have access to the case file and to participate in the actions in the procedure (Article 15, paragraph 6).

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<sup>14</sup> Translation note: In case that there are grounds for an appeal, a separate appeal on the order for temporary relief is not permitted. Nevertheless, these grounds may be brought within the appeal against the final court decision.

A fine ranging from RSD 10,000 to RSD 100,000 shall be imposed on a representative in a legal entity, state authority, authority of the autonomous province, or local self-government unit for the misdemeanor referred to in paragraph 1 of this article.

A fine ranging from RSD 20,000 to RSD 200,000 shall be imposed on an entrepreneur for the misdemeanor referred to in paragraph 1 herein.

A fine ranging from RSD 30,000 to RSD 150,000 shall be imposed on a responsible person referred to in paragraph 2 herein who undertakes the action with the aim of revealing a whistleblower's identity

## **Chapter VI**

### **TRANSITIONAL AND FINAL PROVISIONS**

#### **Article 37**

##### **Time limit for By-Law Adoption**

The act referred to in Article 14 Paragraph 6 this Law shall be passed within six months from the effective date of this article.

Employers shall adopt the general act referred to in Article 14, paragraph 4 herein, or shall harmonize an existing general act with provisions contained herein and the act by the Government referred to in paragraph 1 of this Article within nine months from the day this Law comes into effect.

#### **Article 38**

##### **Cessation of Validity of other Regulations**

On the day this Law takes effect, Article 56 of the Anti-Corruption Act ("Official Gazette of the RS", nos. 97/08, 53/10, 66/11 – Constitutional Court, 67/13 – Constitutional Court and 112/13 – authentic interpretation) and the Rulebook on Protection of a Person who Reports Suspicion on Corruption ("Official Gazette of the RS", no. 56/11) shall cease to be valid.

Persons with the right to protection and compensation under the provisions of law referred to in paragraph 1 this article at the time the rights were exercised shall apply the legal provisions in force at the time the right were exercised.

#### **Article 39**

##### **Coming into Effect**

This Law shall come into effect on the eight day from the day of its publication in the "Official Gazette of the Republic of Serbia", and shall start to be applied three months from the day of its coming into effect.