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The rationale for the Council of Europe Recommendations on the protection of whistleblowers 2014 and its implementation in member states : the view from the council of Europe.

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- 1 In the context of the human rights, the Council of Europe recognizes, « the value of whistleblowing in determining and preventing wrongdoings and in strengthening democratic accountability and transparency. Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and it is important also in the fight against corruption and in tackling gross mismanagement in the public and private sectors ».
- 2 In 2009, the former human rights commissioner, Thomas Hammarberg, said that Human rights are not given. They have to be conquered again and again which means that we need to continue, to view and review our legislations on a regular basis.
- 3 Although Article 6 ECHR on the right to a fair trial may apply when, in some cases, whistleblowers do not have an appropriate access of justice, in most of the times, the European Court of Human rights based its reasoning on article 10 ECHR on the freedom of expression.
- 4 In this respect, the Court has made some significant ruling with regards to whistleblowing, setting out key principles when considering whistleblowing, in particular, on the right to freedom of expression enshrined in Article 10 ECHR.
- 5 Interference with a whistleblower's freedom of expression is permitted, provided that :
- 6 - It is prescribed by law ;

- 7 - The interference pursues a legitimate aim (such as protecting the reputation or rights of others, or preventing the disclosure of information received in confidence) and
- 8 - It is « necessary in a democratic society ».
- 9 This last criterion is normally the most complex issue to resolve.
- 10 The reasoning of the Court in cases of whistleblowing is as follow :
- 11 Firstly, the Court will look at the public interest in the disclosure of information. According to the general interest in the disclosed information, the Court noticed that « in a democratic system, the acts and missions of the government must be subject to criticism not only of the legislative or judicial authorities but also of the media and public opinion. The interest which the public may have in the disclosure of the information can be so strong that it may override a legally imposed duty of confidence ».
- 12 Secondly, key point is whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure. In this respect, there are three different stages : internally, to appropriate regulated bodies and finally to the Medias.
- 13 The third key point is the authenticity of the disclosed information. The court states that the freedom of expression cannot be reduced by any duties and responsibilities and any person who chooses to disclose information must careful verify to the extent permitted by the circumstances that it is accurate and reliable.
- 14 The fourth key point is the motives of the employee. During the drafting of the Recommendation, there were important debates on the question of the good faith. Should whistleblowers act in good faith or in bad faith ? And, in particular, the question was : should whistleblowers acting in bad faith receive the same protection as whistleblowers acting in good faith ?
- 15 In this respect, the Court stated that an act (of disclosure) motivated by a personal grievance or by a personal atonalism including the expectation of personal advantages or including taking a gain or not taking a gain would not justify a strong level of protection but it does not mean that this person would not receive any protection at all.
- 16 The fifth key point is the damage supported by the employer according to the public interest in the disclosure of the information.
- 17 The sixth point is the severity of the sanction imposed to the applicant and its consequences.
- 18 Those six key points are the reasoning of the Court to see if the whistleblowers can benefit from a legal protection.

I- The Context on how Recommendation CM/rec (2014)7 was developed :

- 19 Further to the report of M. Peter Omzigt in 2009 from the committee of the legal affairs of the Parliamentary Assembly (PACE) of the Council of Europe, PACE adopted resolution (1729)2010 and subsequently adopted recommendation (1916)2010.

- 20 It should be noted here on the difference between Recommendation and Resolution of the Parliamentary Assembly.
- 21 Resolutions are addressed to all member states whereas recommendations of the Parliamentary Assembly are only addressed to the Committee of Ministers of the Council of Europe. The Committee of Ministers of the Council of Europe is the decision making body of the Council of Europe.
- 22 Mandated by the Committee of Ministers, the CDCJ commissioned a report in 2012 to explore the feasibility of a legal instrument on the protection of whistleblowers.
- 23 This study was prepared by M. Paul Stevenson (UK) and Michael Levi (UK).
- 24 In its conclusion, the study highlighted the crucial need to have a legal instrument. At that time, only few member states established a legal framework on whistleblowers protection.
- 25 Regarding the type of the legal instrument (binding or non-binding instrument), the CDCJ was in favor of preparing a recommendation (non-binding). The reason was that the negotiation of Council of Europe convention is a laborious and time-consuming process and that is particularly likely to prove to be true in this very broad field, where member States have adopted a range of solutions. Also, even once they are adopted, the process of ratification takes many years.
- 26 The recommendation was elaborated by a drafting group composed of CDCJ members. The drafting group sought views of all member states through the drafting process and organized a European conference with key Stakeholders on 30-31 May 2013 in Strasbourg. The Conference provided an opportunity to discuss with all participants on key notions such as the public interest, the issue of anonymity and confidentiality, the scope of application of such legal instrument.
- 27 At its plenary meeting (16-18 December 2013), the CDCJ finalized and approved the draft legal instrument which was subsequently submitted for adoption to the Committee of Ministers. The draft recommendation was adopted on 30 April 2014.

II- Recommendation CM/Rec(2014)7 on protecting whistleblowers :

- 28 The recommendation explains what public interest whistleblowing is and its value in deterring and preventing wrongdoing and malpractice. It also explains why we cannot rely on the *status quo* and describes what a robust framework for facilitating whistleblowing and protecting whistleblowers should look like, setting out a number of key principles to ensure that :
- 29 - Laws to protect whistleblowers cover a broad range of information that is in the public interest ;
- 30 - People have access to more than one channel to report and disclose such information ;
- 31 - Mechanisms are in place to ensure reports and disclosures are acted on promptly ;
- 32 - All forms of retaliation are prohibited as long as the individual whistleblower has reasonable grounds to believe in the accuracy of the information ;
- 33 - Whistleblowers are entitled to have their identities kept confidential by those to whom they report, unless they agree otherwise (subject to fair trial guarantees).

- 34 The recommendation is - unlike any Convention - very flexible. It should be seen as a practical tool for member states.
- 35 While many member States of the Council of Europe have rules covering, directly or indirectly, certain aspects of whistleblowing, most member States do not have a comprehensive national framework for the protection of whistleblowers.
- 36 By comprehensive framework, the recommendation stresses the importance of the various normative, institutional and judicial elements providing, together, a comprehensive, and coherent whole and in which reporting and disclosure channels, investigatory and remedial mechanisms, and legal remedies for the protection of whistleblowers all interact with each other effectively.
- 37 Regarding to the normative framework of the recommendation into the member states, the recommendation does not take into account whether or not it should be single law or plural laws as long as again it is effective.
- 38 Regarding to the personal scope, the recommendation covers employees or persons who have a working relationship with the employer. Whether the whistleblower is an employee, a consultant or a trainee and the fact that the person is paid or not should not be taken into account. In this respect, the ECtHR held that « Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can applies to relations governed by private law » [...] and that « member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals » (Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000).

III- Future of the recommendation and supporting activities to implement it

- 39 Regarding to the future of the recommendation, the Parliamentary Assembly asked the committee of the Council of Europe in 2015 to see if there is any possibility to make a Convention. The Committee of Ministers is of the opinion that it is too soon to start drafting a Convention. The Recommendation was only adopted in 2014 and it is necessary to give member states some time to implement it. The CDCJ is willing to promote and support the implementation of the recommendation into member states by several and different activities.
- 40 One of the first activities which have already been done was the publication of brief guidelines (which can be found on the CDCJ website). This brief guide is addressed primarily to government policy makers. It explains some key concepts and outlines steps member states can take to meet the requirements of Recommendation CM/Rec(2014)7 on the protection of whistleblowers (review of existing law and practice, consultation of relevant parties, reform, and evaluation). It also provides examples of good practice in Europe and a short list of resources that governments might wish to consult as they consider their options and work to tailor solutions that will make a difference in their jurisdictions. Practitioners will also find this guide useful.
- 41 The CDCJ has also adopted a plan of action in 2014 to promote recommendations on whistleblowers. The Action Plan aims to :
- 42 - inform and raise awareness on whistleblowers rights within society as a whole,

- 43 - encourage the adoption of national frameworks in the member States for the protection of whistleblowers based on a set of common principles,
 - 44 - guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments, as may be necessary and appropriate in the context of their legal systems,
 - 45 - assist in the development of further measures for countries already having a legal framework, and,
 - 46 - encourage inter-agency co-operation by promoting best practices.
 - 47 Possible activities might include :
 - 48 - Practical guides appropriately drafted for the different target groups (public administrations, employers in the private sector, trade unions, etc.),
 - 49 - Expert meetings, round tables, conferences, workshops,
 - 50 - General discussions on legal issues, such as the concept of « public interest », the terms ‘Openness, anonymity, confidentiality ». Etc.,
 - 51 - Training sessions for justice sector professionals,
 - 52 - Production of materials, and,
 - 53 - Social media activities.
 - 54 Other activities could be upon request by national authorities.
 - 55 Such activity could be, for instance the organization of regional conference on specific subject. Such event provides an opportunity to exchange views on best practices between member states having similar legal framework (Common Law countries, etc..) but also on difficulties encountered and what could be done.
 - 56 In conclusion, the message is that the Council of Europe is attaching a great importance in the fight for whistleblowing and welcome this new research project in France. Please do not hesitate to contact us if you need help on legal issues or on how to implement best practices.
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ABSTRACTS

Whistleblowing is a fundamental aspect of freedom of expression and freedom of conscience and it is important also in the fight against corruption. For several years, the European Court of Human rights has made some significant ruling with regards to whistleblowing, setting out six key principles when considering whistleblowing, in particular, on the right to freedom of expression enshrined in Article 10 ECHR. Those six key points are the reasoning of the Court to see if the whistleblowers can benefit from a legal protection. Further to the report of M. Peter Omzig in 2009, the Parliamentary Assembly of the Council of Europe (PACE) adopted resolution (1729)2010 and Recommendation (1916)2010. Recommendation CM/rec (2014)7 explains what public interest whistleblowing is and its value in deterring and preventing wrongdoing and malpractice. It also describes what a robust framework for facilitating whistleblowing and protecting whistleblowers should look like. Regarding to the normative framework of the

recommendation into the member states, the recommendation is very flexible. The recommendation should be seen as a practical tool for member states and it does not take into account whether or not it should be single law or plural laws as long as again it is effective. The CDCJ is willing to promote and support the implementation of the recommendation into member states by several and different activities. One of the first activities which have already been done was the publication of brief guidelines which can be found on the CDCJ website. The CDCJ has also adopted a plan of action in 2014 to promote recommendations on whistleblowers. Other activities could be upon request by national authorities and the CDCJ welcomes this new research project in France.

Le whistleblowing est un élément fondamental de la liberté d'expression et de la liberté de conscience. Il joue également un rôle important dans la lutte contre la corruption. Depuis plusieurs années, la Cour européenne des droits de l'homme (CEDH) développe une jurisprudence en matière de whistleblowing fondée en particulier sur le droit à la liberté d'expression consacré par l'article 10 de la CEDH. Elle a dégagé sur ce fondement juridique six points clefs qui constituent les critères de la protection juridique des lanceurs d'alerte. Suite au rapport de M. Peter Omzigt en 2009, l'Assemblée parlementaire du Conseil de l'Europe (APCE) a adopté la résolution (1729) 2010 puis la recommandation (1916) 2010. La Recommandation CM / rec (2014) 7 définit l'intérêt général en matière de whistleblowing ainsi que le rôle de l'alerte éthique dans la détection et la prévention des malversations. Elle décrit également les éléments constitutifs d'un cadre juridique solide permettant le lancement d'alerte et la protection des lanceurs d'alerte. S'agissant de la transposition de la recommandation dans le système normatif des Etats membres, le Conseil de l'Europe ne s'attache pas au caractère simple ou pluriel de la législation applicable mais à son effectivité. Le CDCJ œuvre en faveur de la promotion et de la mise en œuvre de la recommandation dans les Etats membres par plusieurs actions. L'une des premières actions menées a consisté en la publication de brèves lignes directrices qui peuvent être consultées sur le site Web du CDCJ. Le CDCJ a également adopté un plan d'action en 2014 pour promouvoir la mise en œuvre de la recommandation. D'autres actions pourraient être mises en œuvre à la demande des autorités nationales et le CDCJ se félicite du lancement en France de ce nouveau projet de recherche sur l'alerte éthique.

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Mots-clés: alerte éthique, CESDH, assemblée parlementaire du Conseil de l'Europe, APCE, CDCJ, recommandation CM / rec (2014) 7, intérêt général, protection juridique des lanceurs d'alerte

Keywords: whistleblowing, CESDH, article 10, parliamentary assembly of the Council of Europe (PACE), CDCJ, recommendation CM/rec (2014) 7, public interest, legal protection of whistleblowers

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