

ANNEX 12: COMPARATIVE TABLE ON THE PRINCIPLES OF THE COUNCIL OF EUROPE

The following table presents how the initiatives envisaged under the preferred option of the IA reflect the 2014 CoE Recommendation on Protection of Whistleblowers.

PRINCIPLES OF COUNCIL OF EUROPE RECOMMENDATION	DIRECTIVE AND COMMUNICATION
<p><i>Definitions</i></p> <p>a. “whistleblower” means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;</p> <p>b. “public interest report or disclosure” means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;</p> <p>c. “report” means reporting, either internally within an organisation or enterprise, or to an outside authority;</p> <p>d. “disclosure” means making information public.</p>	<p>The Directive under the preferred option will provide for compatible definitions.</p>
<p>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</p>	<p>Not relevant.</p>
<p>2. Whilst it is for member States to determine what lies in the public interest for the purposes of implementing these principles, member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment.</p> <p>Public interest is understood as the “welfare” or “well-being” of the general public or society. Protecting the welfare and well-being of the public from harm, damage or breach of their rights is at the heart of this recommendation.</p> <p>Non-exhaustive list of categories of information for which it is typically considered that a whistleblower should be protected: – corruption and criminal activity; – violations of the law and administrative regulations; – abuse of authority/public position; – risks to public health, food standards and safety; – risks to the environment; – gross mismanagement of public bodies (including charitable foundations); – gross waste of public funds (including those of charitable foundations); – a cover-up of any of the above.</p>	<p>Material scope of Directive under the preferred option will broadly match the categories listed.</p> <p>Higher threshold used to define the scope of application of the directive: areas where breaches can cause "serious" harm to the public interest.</p>
<p>II. Personal scope</p> <p>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.</p>	<p>The Directive under the preferred option will apply to all types of work-based relationships referred to in the Recommendation.</p> <p>The Directive under the preferred option will</p>

<p>4. <i>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.</i></p>	<p>also cover job applicants.</p>
<p>5. <i>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.</i></p>	<p>Not relevant, in the absence of EU competence.</p>
<p>6. <i>These principles are without prejudice to the well-established and recognised rules for the protection of legal and other professional privilege.</i></p>	<p>The Directive under the preferred option will make clear through the recitals that rules would not affect such privileges.</p>
<p>7. <i>The normative framework should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures.</i></p> <p>A comprehensive approach will ensure a coverage of persons and situations that is as wide as possible. It implies that the relevant norms may be legislative or contained in legal documents (such as collective bargaining agreements) and professional and employer codes. A coherent approach will ensure that potential whistleblowers are not discouraged or penalised by conflicting or restrictive legal provisions, and that their reports or disclosures are acted upon in an effective manner.</p>	<p>The Directive under the preferred option will adopt a comprehensive approach, and would be further promoted under the accompanying Communication.</p> <p>The Directive will further provide for coherence, through rules which protect whistleblowers from “gagging clauses” and in case of proceedings launched against them under laws on copyright, defamation etc.</p>
<p>8. <i>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.</i></p>	<p>The Directive under the preferred option will strike the appropriate balance between the different competing interests, in line with ECtHR case law.</p>
<p>9. <i>Member States should ensure that there is in place an effective mechanism or mechanisms for acting on public interest reports and disclosures.</i></p> <p>Need for arrangements that allow for the appropriate disclosure of information and, the prompt examination and investigation of any material issues. This also requires States to ensure that regulators have the right powers to handle disclosures and protect whistleblowers, and that they are properly resourced to set up effective systems.</p>	<p>The Directive will require the designation of competent authorities to receive, handle and investigate reports</p>
<p>III. Normative framework</p> <p>10. <i>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.</i></p> <p>Principle 10 concerns the rights of natural persons only, whether an employer or third party, who suffers loss or injury as a result of a report or disclosure. The normative framework should not take</p>	<p>The Directive will provide a full set of safeguards to protect the rights of reported persons.</p> <p>It will also make clear that protection is only granted to those who had reasonable grounds to believe that the information reported was true.</p> <p>The Directive further will provide for sanctions aimed at preventing malicious</p>

<p>away their rights under general law (civil and administrative) in cases where the report or disclosure contains inaccurate or misleading information.</p>	<p>reports.</p>
<p><i>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.</i></p> <p>No term or clause in any contract or agreement – whether a contract for work or a settlement agreement – between an individual and the person or body for whom they are working can be relied on to preclude someone from making a public interest report or disclosure. Provisions in regulations or service agreements covering the employment of civil servants or other public officials, as is the case in some member States, are also intended to be covered by the reference to legal obligations.</p>	<p>All “gagging” clauses will be included in the relevant provision of the Directive under the preferred option.</p> <p>The Directive will provide that competent authorities provide on their websites a statement about this.</p>
<p><i>IV. Channels for reporting and disclosures</i></p> <p><i>12. The national framework should foster an environment that encourages reporting or disclosure in an open manner.</i></p> <p><i>13. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.</i></p> <p><i>14. The channels for reporting and disclosures comprise:</i></p> <ul style="list-style-type: none"> <i>– reports within an organisation or enterprise (including to persons designated to receive reports in confidence);</i> <i>– reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;</i> <i>– disclosures to the public, for example to a journalist or a member of parliament.</i> <p><i>The individual circumstances of each case will determine the most appropriate channel.</i></p> <p><i>15. Employers should be encouraged to put in place internal reporting procedures.</i></p> <p><i>16. Workers and their representatives should be consulted on proposals to set up internal reporting procedures, if appropriate.</i></p> <p><i>17. As a general rule, internal reporting and reporting to relevant public regulatory bodies, law enforcement agencies and supervisory bodies should be encouraged.</i></p>	<p>All forms of whistleblowing are covered, included to the media/the public at large.</p> <p>The Directive requires setting up both internal channels within public and private organisations and external channels towards competent authorities. It also provides for consultations with social partners, if appropriate.</p> <p>The requirement of a tiered use of channels as defined in the Directive:</p> <ul style="list-style-type: none"> - Will ensure that the information gets to the persons who can contribute to the early and effective resolution of risks to the public interest - Will prevent unjustified reputational damages from public disclosures; - Will provide the necessary flexibility for the reporting person to choose the most appropriate channel depending on the individual circumstances - Will allow for the protection of public disclosures taking into account democratic principles such as transparency, and fundamental rights such as freedom of expression and media freedom, whilst balancing the interest of employers to manage their organisations and to protect their interests with the interest of the public to be protected from harm, in line with the criteria developed in the ECtHR case-law.

<p>Organisations or enterprises of sufficient size are likely to appoint persons with responsibility for receiving reports in confidence: designated officers or confidential advisors, for example. To be effective, such persons, while not necessarily being independent of the employer, should enjoy a certain degree of autonomy in discharging their responsibility. In large businesses, reports may also be made to the board and non-executive directors are now taking on more responsibility in this regard.</p> <p>To cater for the needs of small businesses, however, and even more generally, some member States may consider it beneficial to establish a public body or commission to receive such reports in confidence.</p> <p>Government departments, businesses and professional associations often provide support and guidance to small and medium-sized enterprises and can be encouraged to include guidance on whistleblowing.</p>	<p>Reflected in the Directive.</p> <p>The accompanying Communication will promote these points as a good practice, drawing from national practices.</p>
<p>V. Confidentiality</p> <p><i>18. Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.</i></p>	<p>Guarantees of confidentiality will be provided both in the internal and external channels and are strengthened by the provision for sanctions in case of breach.</p>
<p>VI. Acting on reporting and disclosure</p> <p><i>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.</i></p> <p><i>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.</i></p>	<p>Obligations to follow up and give feedback will be provided for in the Directive.</p>
<p>VII. Protection against retaliation</p> <p><i>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.</i></p>	<p>The Directive under the preferred option will provide for a broad definition of retaliation, in line with the Recommendation and include a non-exhaustive list of forms of retaliation, including those referred to in the Recommendation.</p>
<p><i>22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.</i></p>	<p>Safeguard will be included in the Directive under the preferred option.</p>
<p><i>23. A whistleblower should be entitled to raise, in appropriate</i></p>	<p>Right to such defense will be provided for in</p>

<p><i>civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework.</i></p>	<p>the Directive.</p>
<p><i>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.</i></p>	<p>The tiered approach for the use of the channels included in the Directive will fulfil this recommendation.</p>
<p><i>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</i></p>	<p>Reversal of burden of proof will be provided for in the Directive.</p>
<p><i>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.</i></p>	<p>It will be provided for in the Directive.</p>
<p>VIII. Advice, awareness and assessment</p> <p><i>27. The national framework should be promoted widely in order to develop positive attitudes amongst the public and professions and to facilitate the disclosure of information in cases where the public interest is at stake.</i></p>	<p>The Directive requires national authorities to publish information on the legislative framework in place for the protection of whistleblowers.</p> <p>The Communication accompanying the Directive will highlight the need for awareness raising amongst the public and in the workplace and suggests good practices.</p>
<p><i>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.</i></p>	<p>The Directive under the preferred option would require that comprehensive and independent information and advice free of charge on procedures and remedies available on protection against retaliation shall be easily accessible to the public.</p> <p>It will also require that private and public entities provide clear and easily accessible information on the internal procedures and information on how, and possibly also under what conditions, reports can be made externally to competent authorities.</p>
<p><i>29. Periodic assessments of the effectiveness of the national framework should be undertaken by the national authorities</i></p>	<p>The Directive under the preferred option will require competent authorities to review their procedures for receiving reports and their follow-up regularly, and at least once every two years</p> <p>The Directive will also provide for a review based on the assessment of its impact at national level.</p>