Greece-OECD Project: 
Technical Support on Anti-Corruption

Whistleblower Protection 
in the Private Sector: 
Developing the Legal Framework
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About the Greece-OECD Project

The Greek government is prioritising the fight against corruption and bribery and, with the assistance of the European institutions, is committed to taking immediate action. Greece’s National Anti-Corruption Action Plan (NACAP) identifies key areas of reform and defines priorities towards strengthening integrity and transparency and fighting corruption. The OECD, together with Greece and the European Commission, has developed support activities for implementing the NACAP. This project is scheduled for completion in January 2018 and is carried out with funding by the European Union and Greece.

www.oecd.org/corruption/greece-oecd-anti-corruption.htm
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INTRODUCTION

Under the responsibility of the General Secretariat against Corruption, Greece’s National Anti-Corruption Action Plan (NACAP) identifies key areas of reform and provides for a detailed action plan towards strengthening integrity and fighting corruption and bribery. Through its Greece Technical Assistance Project, the OECD has committed to supporting the Greek authorities and to provide technical guidance to implement the reform agenda in a series of pre-identified areas.

This report has been produced under Outcomes 5.2 – 5.3 of the Technical Assistance Project. It contains technical proposals with the view to developing a legal framework for protecting whistleblowers in the private sector. The report conducts a comprehensive review and a gap analysis of the existing Greek legal framework relevant to the protection of whistleblowers in the private sector. It then provides legislative proposals taking into account international standards on whistleblower protection as well as insights from approaches in other Parties to the OECD Anti-Bribery Convention, with a focus on countries that have enacted standalone, comprehensive whistleblower protection legislation. Finally, the report includes a proposal on establishing a mechanism for the enforcement and monitoring of the future whistleblower protection legislation. The report aims to provide the Greek authorities and the legislative committee with guidance for setting up a comprehensive legal and regulatory framework that protects from discriminatory or retaliatory action private sector employees who report suspected wrongdoing.

This report supplements the proposal produced under Output 5.1 of the Technical Assistance Project on developing the legal framework for the protection of whistleblowers in the public sector. The proposal aims to assist the work of the legislative committee established by initiative of the Minister of Justice, by presenting international standards and best practices.

Greece will benefit significantly from a comprehensive legal and regulatory framework for the protection of whistleblowers. The absence of such a framework currently inhibits not only employees who want to report but are either afraid to because they risk retaliation or do not know how, where and under what circumstances to do so but also the early detection of corruption by companies and law enforcement authorities and the ability of the media to freely investigate and report on corruption cases that are in the public interest. The enactment of a comprehensive, dedicated whistleblower protection law in Greece would therefore, become the first step in developing a culture of whistleblowing whereby employees feel safe to report wrongdoing and Greek companies and employees stand ready to develop a culture of integrity within their organisations.

This report benefits from the peer review, comments and expertise of: Business and Industry Advisory Committee to the OECD (BIAC), Tom Devine (Government Accountability Project), Jane Ellis (International Bar Association), staff at the Securities and Exchange Commission, United States, David Lewis (Middlesex University London), Fereniki Panagopoulou-Koutnatzi (Hellenic Data Protection Authority), Soo-youn Jun (Anti-Corruption & Civil Rights Commission Korea), Constanze von Söhnen (UN Office on Drugs and Crime), Ursula Stapleton (Department of Justice and Equality, Ireland), Marie Terracol (Transparency International), Mark Worth (International Whistleblower Project) and Kalliopi Zouvia (Greek Ombudsman).

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1 For the purposes of this report the term “employee” should construed broadly and be read in light of the proposals in Section II.3.
I. OVERVIEW OF EXISTING FRAMEWORKS RELATED TO WHISTLEBLOWER PROTECTION IN GREECE

1. Greece does not currently have legislation that provides sufficient protection from retaliatory or discriminatory action for reporting persons. The main legal provisions that could impact whistleblower reporting in Greece are analysed below. This section includes provisions that concern both public and private sector employees for comparison reasons. However, as the objective of this report is to review the existing legislative framework concerning protection in private sector, the analysis is mainly focused on the pieces of legislation relevant to reporting persons in the private sector.

1. Witness protection provisions

2. When whistleblowers testify during court proceedings they may be afforded some forms of protection under witness protection laws. However, if the whistleblower does not have the first-hand knowledge of a witness, the subject matter of a whistleblower report does not result in criminal proceedings, or the whistleblower is never called as a witness, the witness protection will not be provided. Even if a whistleblower is entitled to witness protection due to eventual involvement in related criminal proceedings, a significant time gap occurs between the moment of blowing the whistle and the moment when a person is officially declared as witness, and the measures provided (such as relocation and changed identity) may not always be relevant. Given that whistleblowers are usually employees of the organization where the reported misconduct took place, they may face specific risks that are normally not covered by witness protection laws – such as demotion or dismissal. Furthermore, they may need compensation for salary losses and missed career opportunities. Witness protection laws are therefore not sufficient to protect whistleblowers and this should be kept in mind when considering Greece’s recent legislation providing protection to witnesses who report and cooperate in corruption cases.

1.1. Public interest witness protection (Law 4254/2014)

3. In response to its international obligations and in particular those arising from Article 33 UNCAC (ratified by Law 3666/2008), Article 22 of the Council of Europe Criminal Law Convention on Corruption (ratified by Law 3560/2007) and the OECD Working Group on Bribery’s Phase 2 and Phase 3 recommendations to Greece, Greece enacted Law 4254/2014 on measures for the support and development of the Greek Economy and other provisions. Law 4254/2014 added Article 45B on

§1. In cases involving the criminal offences under Articles 159, 159A, 235, 236, 237 and 237A of the Criminal Code any person who, without being involved in any way in such acts and without aiming at his/her own benefit, contributes substantially, by means of the information he/she provides to the prosecuting authorities, to their uncovering and prosecution, may be characterised as a public interest witness by act of the competent Public Prosecutor or the Corruption Crimes Prosecutor after an approval of the Deputy Public Prosecutor of the Supreme Court that supervises and coordinates the work of Corruption Crimes Prosecutors. The act of the Prosecutor under the previous paragraph can be revoked in the same manner and at any stage of the criminal proceedings, if the Prosecutor considers that the reasons that led him/her to issue such act do not exist.

§2. Where a complaint has been lodged for the criminal offences of perjury, false accusation or slander or violation of official secrecy under the Criminal Code, or acts under Article 22(4) or (8) of Law 2472/1997 in a case relating to the criminal offences referred to in the preceding paragraph, the public prosecutor competent for prosecution shall, before any other action is taken, inform the Deputy Public Prosecutor of the Supreme Court supervising and coordinating the work of the Corruption Crimes Prosecutors.

§3. If the competent Deputy Public Prosecutor of the Supreme Court supervising and coordinating the work of Corruption Crimes Prosecutors considers that the prosecution of the criminal offences of perjury, false accusation or slander

2 Committing to Effective Whistleblower Protection (OECD, 2016).
3 Code of Criminal Procedure Article 45B: Abstinence from the prosecution of public interest witnesses
“public interest witnesses” to the Code of Criminal Procedure, extending protection provided earlier only to witnesses of organised crime and terrorism under Article 9 of Law 2928/2001 to individuals reporting corruption and related wrongdoings. It has furthermore amended the Civil Service Code to ensure that no disciplinary or any other internal procedure may be undertaken against an official, who is accorded the status of public interest witness.

4. To receive such protection the competent prosecutor must designate the individual as a “public interest witness”. Three cumulative prerequisites need to be fulfilled for this to happen: (i) the individual has provided information that contributes substantially to the revealing and prosecution of the corrupt acts, (ii) the individual was not personally involved in any way in the offences in question and (iii) the individual did not aim to benefit him/herself by reporting the wrongdoing. Greece’s Phase 3 Report by the OECD Working Group on Bribery in International Business Transactions expressed concern at the high threshold for designation as a public interest witness.4

5. It is unclear whether the provision is contingent on the individual continuing to provide evidence during criminal proceedings. It is also unclear whether Article 45B requires that the person reports in “good faith”. The requirement that the person derive no personal benefit from the report and have no involvement in the criminal act would suggest a de facto good faith requirement. While some commentators5 support this opinion, neither the text of the provision nor the explanatory statement introducing the law to the Parliament refer to it. In principle, the law protects every person and not only employees and workers, but also consultants, contractors, trainees/interns, volunteers or even journalists and activists who provide information to the competent prosecuting authorities. It is, however, unknown whether the law applies to Greek workers based abroad or foreign workers based in Greece.

6. The protection offered to public interest witnesses under Article 45B is extremely limited. If a complaint is lodged against them for the offences of perjury, false accusation, defamation or violation of official secrecy and the Deputy Public Prosecutor of Areios Pagos deems that the prosecution of the public interest witness does not serve the public interest s/he may order the competent prosecutor to abstain from prosecution. The protection therefore is not automatic but it is at the discretion of the prosecutor and limited in any case to protection against criminal prosecution. According to the explanatory statement introducing the law to the Parliament: “in balancing the conflicting interests of such persons and those persons implicated who may consider that information rendered by the public interest witness may prejudice their honour and reputation, such a decision is always discretionary, granted only in the public interest and, once issued, revocable”. But even if the prosecutor decides to abstain, the public interest witness is not totally protected from such complaints, because the protection concerns criminal prosecution and not claims for civil damages, for example, for defamation. What is more, Article 45B does not provide any protection against discriminatory or disciplinary retaliation, such as dismissal from employment, demotion, punitive transfer or workplace harassment but only the protection of Article 9(7) of Law 2928/2001 (see below). It is unknown how many individuals have received protection under Article 45B of the Code of Criminal Procedure and the type of protection provided.

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4 Phase 3 evaluation of Greece’s implementation of the OECD Anti-Bribery Convention (p. 55, para 201).
The authors of this document are aware of only one case where an individual was designated a “public interest witness” and subsequently received the protection of Article 45B. More specifically, in 2012 an employee of the Public Power Corporation S.A., the biggest state-owned electric power company in Greece, reported to law enforcement authorities acts of mismanagement, fraud and abuse of power with regard to public procurement and to other public contracts that were to the detriment of the public interest and to the benefit of the members of its management. The Public Prosecutor of the Court of Appeals of Athens considered in his decision 7/2015\(^6\) that the information provided by the employee contributed substantially to the detection and prosecution of the corrupt acts, that the employee was not personally involved in any way in the offences in question and that finally he did not aim to benefit him by reporting the wrongdoing. As a result the employee was designated a “public interest witness”. However, as the prosecutor notes in the decision, the protection of Article 45B was not adequate to remedy the reprisals suffered by the employee such as the deprivation of salary and constant harassment as an immediate result of the reporting.

### Legislative Proposal

While it is not considered necessary to amend the public interest witness protection provisions in Article 45B of the Criminal Procedure Code, it is vital to raise awareness among competent Greek government authorities that these do not amount to whistleblower protection provisions and are only applicable under specific, limited circumstances. Protection provided under Article 9 should be extended beyond (both before and after) the criminal proceedings.

#### 1.2. Witness protection (Article 9 of Law 2928/2001)

8. Law 2928/2001 on the protection of citizens against criminal acts by organised crime and terrorist groups, which modified Article 187, 187A and 187B of the Criminal Code, introduced for the first time a comprehensive framework of protective measures for the main witnesses who assist with uncovering relevant criminal activities. Article 9 of the above law states that during the prosecution of these crimes all measures may be taken in order to effectively protect the main witnesses, or their relatives, from possible revenge actions or intimidation.

9. The list of measures ranges from extrajudicial protection, starting with police protection and audio and video surveillance in order to ensure that witnesses and their relatives remain physically unharmed, to relocation within and outside of the country, including the possibility of transferring a civil servant to another unit; to anonymity of the witness in the testimony report\(^7\) in order to ensure the proper balance of interests as a person may not be condemned only on the basis of an anonymous testimony. The protective regime is granted by ministerial decision upon a proposal by the Public Prosecutor, who must specify the measures requested. The special protective regime is only granted with the consent of the person concerned and the specific measures taken must not limit their personal freedom unduly and beyond what is strictly necessary under the circumstances of the case. Protective measures may be removed when the protected person requests in writing or when they do not cooperate effectively with the authorities.

10. What is more interesting is that Law 4254/2014 added Article 9(7) to Law 2928/2001, thereby expanding its scope to corruption offences. According to Article 9(7) in cases involving

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\(^6\) Ποινική Δικαιοσύνη, Volume 5/2015, May; 7/2015 ΓΝΜΔ ΕΙΣΕΦ (ΠΡΑΞΗ) (666970).

\(^7\) It has to be noted however, that during the hearing process in the court, the real name of a protected person can always be revealed by decision of the court.
corruption offences\(^8\) public interest witnesses under Article 45B of the Code of Criminal Procedure,\(^9\) private individuals under Article 253B of the Code of Criminal Procedure and any other person who contributes substantially to revealing such offences and, if necessary, their relatives, may receive the same protection from possible acts of revenge or intimidation as if they were witnesses. Article 9(7) of Law 2928/2001 should therefore always be read in conjunction with Article 45B as it expands its scope considerably.

11. Article 9(1) stipulates that protective measures may be applied during criminal proceedings without clarifying if they can be applied before the commencement of the proceedings or extended after their conclusion. The provision should be clarified to extend protection beyond the conclusion of proceedings. Moreover, while the list of protective measures includes the possibility of transferring a civil servant to another unit, no similar measure is provided for private sector employees.

12. It is unknown how many individuals have received protection under this provision and the type of protection provided since the enactment of these measures.

### Legislative Proposal

While it is not considered necessary to amend the witness protection provision in Law 2928/2001 (Article 9), it is vital to raise awareness among competent Greek government authorities that this does not amount to whistleblower protection and is only applicable under specific, limited circumstances. Protection provided under Article 9 should be extended beyond (both before and after) the criminal proceedings.

2. **Other pieces of Greek legislation relevant to the protection of whistleblowers**

2.1. **Public sector whistleblower protection (Civil Service Code)**

13. Some protection against discriminatory or disciplinary retaliation is available to civil servants under the Civil Service Code. After Article 45B was passed the Civil Service Code was amended to ensure that no disciplinary measures or any adverse discrimination directly or indirectly (particularly regarding career development, placement etc.) may be undertaken against an official because of their whistleblowing (Article 110(6)). If such an official is subject to disciplinary measures, the disciplining body must demonstrate that the measures are not retaliatory in nature i.e. the burden of proof is reversed (Article 139(4)). Officials who report corruption may also be transferred upon their request (Article 73(6)). Finally, the anonymity of officials who contribute substantially to revealing corruption is guaranteed during preliminary investigations and in certain circumstances thereafter (Article 125).

14. The main shortcoming with including protection related to retribution, retaliation, or discrimination at the workplace in the Civil Service Code rather than in a dedicated whistleblower law is that it leaves of out the scope of protection private sector employees and potentially civil servants in independent statutory authorities or employed by State-owned or controlled enterprises (SOEs). In the absence of such legislation, private sector whistleblowers must turn to their employers for protection and it is unclear how robust Greek corporate whistleblower protection measures currently are, in the absence of an overarching legislative framework.

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\(^8\) Articles 159 and 159A (active and passive bribery of public officials), 235 and 236 (active and passive bribery of civil servants), 237 (bribery of a judge) 237A (trading in influence) of the Criminal Code.

\(^9\) See above, Part 1.1, for the relevant analysis.
Legislative Proposal

Greece should consider harmonising the Civil Service Code whistleblower protection provisions with the new whistleblower protection legislation. Taking into consideration international best practice to legislate for comprehensive standalone whistleblower protection legislation, Greece should consider repealing these provisions and providing that the whistleblower protection legislation applies to both public and private sector employees.

2.2. General obligation to report (Criminal Procedure Code, Article 40)

15. Article 40 of the Code of Criminal Procedure\(^{10}\) contains a general obligation, under specific circumstances provided by law, to disclose to the Prosecutor or to any other law enforcement authority any illegal action that comes to one’s attention. While this obligation covers reporting of crimes by both public and private sector employees it does not specify any penalties for its breach. It is also not accompanied by any provisions to protect those who report in accordance with this reporting obligation. Greece noted in its Phase 2 report that there have been many convictions under Article 40 for failure to report a crime but could not provide supporting statistics.\(^{11}\)

16. The Article 40 reporting obligation is potentially undermined by criminal offences for violation of professional secrecy and official secrecy described below. More importantly, the obligation to report is not accompanied by measures to provide protection for those who report wrongdoing. The legal obligation to report illegal actions is not an alternative to providing legal protection for whistleblower reporting.\(^{12}\)

Legislative Proposal

Greece should evaluate the effectiveness of the Article 40 reporting obligation, noting that it may be undermined by criminal offences for violation of professional secrecy and official secrecy and does not appear to be enforced in practice (no statistics are available for sanctions for failure to report a crime). In the absence of effective protection for all who report in accordance with this general reporting obligation, it is unlikely that it will provide any real impetus for people to report suspected criminal offences. In light of the proposed comprehensive whistleblower protection legislation, Greece could consider streamlining the general reporting obligation in the Criminal Code with the provisions of the proposed whistleblower protection legislation.

\(^{10}\) Code of Criminal Procedure Article 40: Obligation of private individuals

§1. Even private individuals are under the obligation in specific cases provided by law when they notice the commission of an offence, to notify the public prosecutor or to any investigating official; this notification may be made either in writing or verbally, [in the latter case] a report is recorded.

\(^{11}\) Phase 2 evaluation of Greece’s implementation of the OECD Anti-Bribery Convention (p. 22 para 89).

2.3. Immunity or mitigated sanctions for reporting corruption in the civil service (Criminal Code, Article 263B)

17. Article 263B was included in the Criminal Code by Law 3849/2010 and provides for immunity or mitigated sanctions for reporting bribery or corruption in the civil service. The Article establishes four categories of immunity or mitigated sanctions depending on the degree of culpability and status of the reporting person as well as the status of the accused person: i) implicated private persons who report wrongdoing before the commencement of an investigation; ii) implicated private persons who collaborate with law enforcement authorities while the investigation is ongoing; iii) implicated civil servants who collaborate with law enforcement authorities while the investigation is ongoing; and iv) main civil servant perpetrators who collaborate with law enforcement authorities while the investigation is ongoing.

18. More specifically, according to para (1), a private individual who committed or participated in active bribery of a civil servant, bribery of a judge or bribery in the private sector and voluntarily reports to the competent authorities before any investigation commences will not be prosecuted for his/her involvement in the alleged acts. On the other hand, if the investigations are ongoing and the private individual makes a substantial contribution to the discovery of participation of a public official in the corrupt acts, s/he is punishable by a penalty reduced to the extent of the first subparagraph of Article 44 (2) of the Criminal Code. At the prosecutor’s request, the judicial council may suspend the prosecution and the competent court may also suspend the enforcement of the penalty, if the allegations are proved to be true.

19. Similarly, if the reporting person is a civil servant who participated in a corrupt act and during the investigations makes a substantial contribution to the discovery of a public official who is the main perpetrator of the corrupt acts, s/he is punishable by a penalty reduced to the extent of the first subparagraph of Article 44 (2) of the Criminal Code. At the prosecutor’s request, the judicial council may suspend the prosecution and the competent court may also suspend the enforcement of the penalty, if the allegations are proved to be true. If however, the reporting person is the main perpetrator s/he will be eligible for immunity or mitigated sanctions only if the following two conditions are met: i) the accused person holds a considerably higher rank than the reporting person ii) the reporting person transfers to the State all assets they personally and illegally obtained, directly or indirectly through the aforementioned illegal acts.

20. The main focus of Article 236B is to provide for immunities and mitigated sanctions to reporting persons in the civil service who have participated in the corrupt act. Article 236B provides therefore, incentives for implicated persons to come forward and report their collaborators in return for immunities and mitigated sanctions for criminal prosecution. Finally, Greece’s Phase 3bis Report expressed concern regarding Article 236B to the extent that it constitutes the defence of effective regret and is inconsistent with the Anti-bribery Convention. The OECD Working Group on Bribery recommended that Greece amend Criminal Code Article 236B(1) to ensure that the effective regret defence does not apply to the active foreign bribery offence.

13 Code of Criminal Procedure Article 44: Abandonment
§2. The perpetrator who, having completed the act, subsequently prevented, on his own will, the consequence that could have resulted from such act and which would have been necessary for the commission of the felony or misdemeanor, is punishable by the penalty of article 83 reduced by half. However, the court may find the attempt not punishable, by freely assessing all circumstances.

14 p. 17, paras 41-43.

15 Please also note UNCAC Article 37 regarding mitigated sanctions for implicated persons who collaborate with enforcement authorities.
Legislative Proposal

Consistent with the Phase 3bis Recommendation 2(d) of the OECD Working Group on Bribery, Greece should eliminate the effective regret defence in Article 263B(1) PC for the active foreign bribery offence. One way of doing this could be to provide for only discretionary immunity or mitigated sanctions, rather than complete immunity from prosecution, to cooperating defendants in corruption cases.

2.4. **Offence of violation of professional confidentiality (Criminal Code, Article 371)**

21. Article 371 of the Criminal Code\(^\text{16}\) creates an offence of violation of professional confidentiality. Article 371 provides that clergymen, lawyers and all legal advocates, notaries, doctors, midwives, nurses, pharmacists and others usually entrusted with confidential information of people because of their profession or capacity, as well as the assistants thereof, are punishable with a pecuniary penalty or imprisonment up to one year if they reveal private secrets entrusted to them or known to them because of their profession or capacity. However, Article 371(3) and (4) stipulate that prosecutions for violation of professional confidentiality can only be initiated following a complaint, otherwise the reporting is considered legal and remains unpunished if the reporting person aimed at exercising his/her duty or safeguarding a lawful or for any other reason justifiable and substantial legal interest of his/her own or of the State (public interest), which could not have been safeguarded in any other way.

22. The exception to criminal liability under Article 371 does not extend to employees other than those usually entrusted with confidential information of people because of their profession or capacity. The object and purpose of Article 371 is to criminalise violation of professional confidentiality except in cases where a justifiable and substantial legal interest is at stake. As such it does not provide for protection of potential whistleblowers.

Legislative Proposal

Greece should evaluate the effectiveness of the Article 371 offence of violation of professional secrecy, taking into consideration if and how often it has been enforced in recent years. Greece should ensure that it is not formulated or applied restrictively taking into account international standards including reporting standards for auditors and accountants. Furthermore, it could have a chilling effect on potential reporting by employees in these sectors, who would fear potential criminal consequences for making a report (along with workplace retaliation and discrimination).

\(^{16}\) **Criminal Code Article 371: Violation of professional confidentiality**

\(\S 1\). Clergymen, lawyers and all legal advocates, notaries, doctors, midwives, nurses, pharmacists and others usually entrusted with private secrets of people because of their profession or capacity, as well as the assistants thereof, are punishable with a pecuniary penalty or imprisonment up to one year if they reveal private secrets entrusted to them or known to them because of their profession or capacity.

\(\S 3\). Prosecution is made only upon complaint.

\(\S 4\). The act is not unfair and is not punishable if the culpable person aimed at exercising his duty or safeguarding a lawful or for any other reason justifiable and substantial public interest of his own or another, which could not have been safeguarded in any other way.
2.5. **Offence of violation of official secrecy (Criminal Code, Article 252)**

23. Article 252 of the Criminal Code\(^{17}\) creates an offence of violation of official secrecy for civil servants who disclose information known solely because of civil service, or a document entrusted or accessible to them. The offence is punishable with imprisonment of at least three months, for acts committed with the intent to benefit personally or to damage the state or another. The Article 252 offence applies only to civil servants as defined under Articles 13 and 263A\(^{18}\) of the Criminal Code and therefore does not extend to the employees of the broader private sector.

24. The offence also applies to third parties who, being aware of the source and origin of the information and the documents, use them with the intent to benefit personally or to damage the state or another. However, there is an exception to the offence for third parties who disclose necessary information or documents in the interest of informing the public (Article 252(3)).

25. The structure of the Article 252 offence is rather problematic and its scope limited. First, the exception to criminal liability for disclosure is placed only under paragraph 3 making it therefore applicable only to “third parties” and not to civil servants as defined in Articles 13 and 263A of the Criminal Code. The exception to liability could potentially extend to citizens or journalists. Second, the exception concerns information and documents related to official public service and not to business of the private sector. Finally, paragraph 3 inserts only a defence to criminal offence i.e. a negative standard and not a positive protection that could encourage reporting in the public interest.

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<th>Legislative Proposal</th>
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<tr>
<td>Greece should evaluate the effectiveness of the Article 252 offence of violation of official secrecy, taking into consideration if and how often it has been enforced in recent years. Greece should consider amending and streamlining Article 252 so that civil servants can report suspected misconduct without fear of criminal sanctions. Alternatively, Greece should consider making available a public interest defence for civil servants and third parties who violate official secrecy.</td>
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2.6. **Duties of loyalty and confidentiality (Civil Code, Articles 288 and 652)**\(^{19}\)

26. Under Greek law the parties to an employment contract are bound, pursuant to the principles of *bona fide* and diligent performance of the employment contract, to perform a number of principal and ancillary duties. As such, employees have a “duty of loyalty” vis a vis the employer under Article

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\(^{17}\) **Criminal Code Article 252: Violation of service secrecy**

A civil servant who, apart from the cases of articles 248, 249, 250 and 251, by violating his duties discloses to another: (a) anything he knows solely because of his service, or (b) a document entrusted or accessible to him because of his service, is punishable with imprisonment of at least three months, if he committed any of these acts with the intent to benefit personally or to damage the state or another.

\(^{18}\) Please note that Article 263A of the Criminal Code adopts an expansive definition of civil servants for an exhaustive list of crimes, including corruption. For the purposes of these crimes all employees of Greek SOEs, whether established under public or private law, of legal persons where the Greek state is a commercial stakeholder, of legal persons that have been entrusted with the execution of state programmes for economic reconstruction or development and/or receive public procurement and of commercial banks in Greece, are to be considered as public servants.

\(^{19}\) If and when Greece introduces whistleblower protection legislation, special attention should be given to the impact of the EU directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
652 of the Civil Code, a duty that emanates from the general principles of good faith under Article 288 of the Civil Code. The duty of loyalty is the obligation of the employee to avoid any harm to his/her employer or business. However, under Greek law it is accepted that the employee’s duty of loyalty is linked primarily with the actual performance of the contract and not generally with the behaviour of the employer. More specific aspects of the duty of loyalty are, in particular, the obligation of confidentiality, the obligation of non-parallel employment and the obligation to avoid competition which affects the legitimate professional interests of the employer. In turn, the obligation of confidentiality covers both industrial and commercial secrecy.

27. It is unclear whether the employee’s obligation of confidentiality also covers actions or behaviours of the employer or the business which contravene the law, rules, internal regulations etc. Academic opinion considers that the above actions or behaviours are not worthy of protection and therefore do not fall within the scope of the industrial and commercial secrecy. Moreover, it is argued that linking the disclosure of the above actions or behaviours with adverse consequences for the employee impinges on the constitutionally guaranteed freedom of expression, the content of which covers also the freedom of information to safeguard the public interest. The authors of this report cannot, however, confirm whether the prevailing academic view has been confirmed in case law. In the absence of a clearly defined legal and case law framework, the above provisions cannot be considered to provide an adequate protection framework for whistleblowers.

### Legislative Proposal

Greece should monitor case law to evaluate if and how these provisions are being used by employers, employees and workers in relation to whistleblower reporting.

#### 2.7. Data Protection (Act regarding Protection of Individuals with regard to the processing of Personal Data)

28. As company whistleblower reporting mechanisms often rely on the processing of personal data, the establishment of such reporting mechanisms would be subject to the Act Regarding Protection of Individuals with Regard to the Processing of Personal Data. Pursuant to this Act, a company must notify the Hellenic Data Protection Authority (DPA) in writing about the

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20 **Civil Code Article 652: Duties of the employee**

The employee shall perform diligently the work he has undertaken and is responsible for the damage caused to the employer on purpose or by negligence.

The degree of diligence for which the employee is liable is assessed on the basis of the contract in view of the education or the specific knowledge required for the job as well as the skills and qualities of the employee whom the employer knew or ought to have known.

21 **Civil Code Article 288: Fulfilment of obligations in good faith**

The promisor has the obligation to fulfil his/her obligations as required by good faith, taking into account common commercial practices.

22 Δημήτριος Γούλας, Η απόλυση εργαζομένου λόγω δημοσιοποίησης παρατυπιών της επιχείρησης (whistleblowing), Επιθεώρησης Εργατικού Δικαίου, Τόμος 76ος, Τεύχος 4 (2017).

23 Δημήτριος Ζερδελής, Οι παρεπόμενες υποχρεώσεις του εργαζομένου, Δελτίο Εργατικής Νομοθεσίας, Τεύχος 689 (2004)

24 Ibid.

commencement of data processing, therefore in order to set up an internal reporting mechanism companies must notify the DPA. A company must request approval from the DPA before transferring personal data that is collected via its internal reporting mechanism outside the EU. To date, the DPA has received a significant amount of notifications from companies that are in the process of setting up an internal reporting mechanism or transferring personal data outside the EU. Based on these notifications the DPA is developing relevant guidance for companies on how to best address those issues.

29. The DPA, in decision No. 14/2008, declared a Greek company’s internal whistleblower system illegal and sanctioned it for failing to abide by the regulations and procedures envisaged in the Greek and EU data protections laws. More specifically, the Greek company had failed to notify the DPA before setting up its internal reporting mechanism and did not seek approval for the transfer of collected personal data outside the EU. As a result, those who reported under this system failed to qualify for protection and the monetary sanctions imposed on the company may have deterred other companies from setting up whistleblower systems. It is important to ensure that data protection legislation does not create impediments for the development and implementation of strong and effective whistleblower reporting and protection within companies (see analysis in Part III(8) below).

### Legislative Proposal

In the context of potential amendments to the Act Regarding Protection of Individuals with Regard to the Processing of Personal Data to implement the GDPR, Greece should consider relaxing notification requirements with respect to internal reporting mechanisms and ensure an appropriate balance between respecting employees’ right to privacy and the need to allow for protected reporting.

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II. OVERVIEW OF INTERNATIONAL STANDARDS AND GOOD PRACTICES

30. While there is no internationally accepted definition of “whistleblower,” the need for effective whistleblower protection is recognised in numerous multilateral anti-corruption treaties, to many of which Greece is a party. The current international legal framework against corruption requires countries to take appropriate measures to provide protection for persons who report any facts concerning acts of corruption in good faith and on reasonable grounds to the competent authorities. Several international soft law instruments also provide for the protection of whistleblowers:

- The 2014 Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers (Council of Europe Whistleblower Protection Recommendation) envisages protection of both public and private sector whistleblowers who report or disclose information either within an organisation or enterprise, to relevant external regulatory or supervisory bodies or law enforcement agencies, or to the public on a threat or harm to the public interest in the context of their work-based relationship (Council of Europe Parliamentary Assembly, 2009).

- The OECD 2009 Anti-bribery Recommendation calls for the protection of whistleblowers in the public and private sectors. It recommends that member countries ensure that “appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.”

- The 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance (annexed to the 2009 Anti-Bribery Recommendation) is the first guidance to companies by governments at an international level and highlights the fundamental elements of an effective anti-bribery programme. In particular, it recommends effective measures for “internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds”

31. Providing protected reporting and preventing retaliation against those who report may also invoke fundamental human rights. For example, the International Convention on Civil and Political Rights, Article 19(2) provides for the “freedom to seek and impart information and ideas of all kinds”. On the other hand, international human rights law jurisprudence reinforces the protection of whistleblowers explicitly in circumstances where they are the only people aware of the reported misconduct and in the best position to alert the employer or the public at large.

32. A forward-looking whistleblower protection law will afford protection to whistleblowers regardless of their motives in making the disclosure and regardless of whether they report directly to law enforcement, or after first reporting within the company, to the media or to civil society (for

27 Committing to Effective Whistleblower Protection (OECD, 2016). United Nations Convention against Corruption, Art. 33; InterAmerican Convention against Corruption, Art. 3(8); Under the Council of Europe Civil Law Convention (1999) and African Union Convention on Preventing and Combating Corruption (2003), States Parties are required to establish appropriate protection for persons reporting corruption. See, CoE Art. 9; and African Union Art. 5(6). For a similar provision, see CoE Criminal Law Convention on Corruption (1999), Art. 22(a).
example, an advocacy group, an elected government official, or a non-governmental organisation). Moreover, given the significant legal disparity regarding the employment and post-employment protections available to whistleblowers in public and private sectors, Greece is strongly encouraged to consider whether introducing a standalone, comprehensive whistleblower protection legislation that applies to employees in both sectors would improve the public’s understanding of the whistleblowing protections afforded to them and the mechanisms to enforce those protections.
III. ELEMENTS OF A PROPOSED PUBLIC INTEREST DISCLOSURE LAW: ENCOURAGING PROTECTED REPORTING

1. Defining protected disclosures

33. Whistleblower protection legislation should establish clear and transparent criteria about the content of disclosures that will be protected from retaliation. It is equally important for the whistleblower protection legislation to define: (a) the relevance of whistleblower motivations (e.g. good faith) and (b) the degree of accuracy of whistleblower allegations required to be afforded protection. The precise definition of what constitutes a protected disclosure is vital not only for reasons of legal certainty but also for public confidence in the process.

34. There are currently 12 members of the OECD Working Group on Bribery with private sector whistleblower protection legislation that does not limit protection to a certain area of wrongdoing but promotes and facilitates the reporting of illegal, unethical or dangerous activities, in general. These broad whistleblower protection laws do not limit protected disclosures to reports of corrupt acts but encompass acts that constitute violations of codes of conduct, regulations or laws, gross waste or mismanagement, abuse of authority, dangers to the public health or safety etc. However, whistleblower protection systems should strike a balance between being overly prescriptive about permissible reports, which makes it difficult to disclose or require the discloser to have detailed knowledge of relevant legal provisions, and being overly relaxed, which allows for unlimited disclosures that in the end may not encourage the resolution of issues within an organisation. Whistleblower protection legislation should ensure that the scope of the term “wrongdoing” is sufficiently large to effectively safeguard the public interest.

1.1. International standards

35. The OECD Anti-bribery Convention, UNCAC, Criminal and Civil Law Convention of the Council of Europe on Corruption all focus on combating corruption. Accordingly, their disclosure provisions concern corruption offences. Section IX of the OECD 2009 Anti-bribery Recommendation recommends for example the protection of the reporting of suspected acts of bribery of foreign public officials in international business transactions whereas Article 33 of UNCAC recommends the protection of the reporting of all corruption related offences of the Convention. Similarly, Articles 22 and 9 of the Civil and Criminal Law Council of Europe Conventions call their Parties to provide effective and appropriate protection for those reporting corruption related offences. For multilateral anti-corruption treaties the terms “wrongdoing” covers active and passive bribery of domestic and foreign officials, including elected officials, judges and officials of international organisation, active and passive bribery in the private sector, trading in influence, money laundering, accounting offences, embezzlement, misappropriation or other diversion of property etc.

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29 Committing to Effective Whistleblower Protection (OECD, 2016), p. 44
36. The Council of Europe Whistleblower Protection Recommendation, which constitutes the only international instrument dedicated to whistleblower protection applicable to Greece, adopts a distinctive approach. While it allows states to determine what lies within the public interest for the purposes of implementing the Recommendation, it nevertheless requests states to specify the scope of the national framework and sets a minimum standard which at least, includes violations of law and human rights, as well as risks to public health and safety and to the environment.

1.2. National approaches

37. The following national whistleblower protection laws contain broad definitions of protected disclosures and can be considered as examples of good practice:

- The 2016 French Law on transparency, the fight against corruption and the modernisation of economic life30 (Loi Sapin II) defines a protected disclosure in Article 6: disclosure of a serious or manifest violation of an international obligation of France, a unilateral act of an international organisation taken on the basis of such an international obligation, of any law or regulation and of a serious threat or prejudice to the public interest.

- The UK Public Interest Disclosure Act (1998) (UK PIDA)31 defines protected disclosure in Article 43B: information which tends to show (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

- The Irish Protected Disclosures Act (2014) (Ireland PDA)32 defines wrongdoings in section 5, it contains the same wording as UK PIDA Article 43B, with the addition of: (f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur, (g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement.

- New Zealand’s Protected Disclosures Act (2000) (NZ PDA)33 defines serious wrongdoing in section 3 as: (a) an unlawful, corrupt, or irregular use of funds or resources of a public sector organisation; or (b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or (c) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or (d) an act, omission, or course of conduct that constitutes an offence; or (e) an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement. For the purposes of the Act, however, information protected by legal professional privilege is not considered a protected disclosure and persons are not authorised to disclose such information (s.22).

30 LOI no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.
38. For most of the examples provided above it is immaterial whether the relevant violation occurred, occurs or would occur within the jurisdiction of the state or elsewhere, and whether the law applying to it is that of the concerned state or of any other country or territory. In some cases, the protections also apply regardless of whether the wrongdoing occurred before or after the entry into force of the whistleblower protection legislation.

### Legislative Proposal

Greece should adopt a broad definition of “wrongdoing” that includes categories similar to the definitions of protected disclosures or wrongdoing in the UK, Irish and NZ whistleblower protection legislation. Specifically, protected disclosures should include information tending to show the contravention of any law, rule, or internal regulation that amounts to or incites maladministration, or abuse of public trust or miscarriage of justice or results in danger, or a risk of danger, to the wastage of public money, public property or to the health or safety of one or more persons or the environment. Similarly, the disclosure of information tending to show that any of the previous contraventions is being deliberately concealed should also be protected. It should be immaterial for the purposes of this definition whether the relevant contravention occurred, occurs or would occur in the Greece or elsewhere, and whether the law applying to it is that of the Greece or of any other country or territory. The law should also apply (and provide protection) regardless of whether the reported wrongdoing occurs before or after its entry into force.

*Note: The Greek government expressed concerns about the fact that the proposed approach provides a broad definition of protected disclosure. The authorities would prefer a two-stage implementation. In the first instance, they would restrict the protection to the reporting of most serious crimes such as corruption, serious financial crime, offences against the environment and the public health) and then, in a second time, they would consider expanding protection to reporting of other misconduct.*

2. Reporting in “good faith” or “the public interest” - is motive relevant?

2.1. International standards

39. The four main international anti-corruption conventions applicable to Greece (i.e. OECD Anti-bribery Convention, UNCAC, Civil Law Convention of the Council of Europe on Corruption) request Parties to protect reporting in “good faith” and on “reasonable grounds”. These elements which, are present also in the majority of corresponding domestic whistleblower protection legislation, seem to suggest that if a person has reasonable grounds to believe that the information shows wrongdoing and that the belief was reasonable for someone in his/her position based on the information available to him/her, that person should be protected. Hence, the elements of “good faith” and on “reasonable grounds” are linked in these instruments with the confidence of the individual in the relevance of the information to the alleged wrongdoings and not the personal motivation of the reporting person.

40. According to this interpretation it is irrelevant whether the reporting person acts with a predominantly honest motive or motivated by, for example, financial rewards, when disclosing the

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34 See also Φερενίκη Παναγοπούλου-Κουτνατζή, Ο θεσμός του μάρτυρα δημοσίου συμφέροντος (whistleblowing): Μια ηθικο-συνταγματική θεώρηση, Πρόλογος: Γεώργιος-Σταύρος Ι. Κούρτης, Εκδόσεις Σάκκουλα, Αθήνα-Θεσσαλονίκη 2016, p. 57 et seq.

wrongdoing provided that the person is confident that the information shows wrongdoing. If, however, someone reports information that they know or should reasonably have known to be untrue, then clearly there should be safeguards, meaning that the individual would not be able to seek protection from the law and could be sanctioned if harm was caused as a result of the reporting.

41. Although, this approach seems to be in line with the technical guides\(^{36}\) and explanatory reports\(^{37}\) of the international anti-corruption conventions it has created confusion and raised concerns in a number of jurisdictions that have over-emphasised the good faith element or have confused it with “motive”.\(^{38}\) Also due to this risk, the Council of Europe has not included the element of good faith in its whistleblower protection recommendations. In fact, the Explanatory Memorandum to the Council of Europe Whistleblower Protection Recommendation explains that the definition\(^{39}\) has been drafted in such a way as to preclude the motive of the whistleblower as being relevant to the question of whether or not the whistleblower will be protected.\(^{40}\) The same approach has been taken by a number of countries which have either clarified the issue or have omitted the so-called “good faith requirement” from their legislation.

2.2. National approaches

42. Under Norwegian law,\(^{41}\) for example, the employee should be granted a relatively wide margin of error and if he/she has reported correct facts in the public interest, this is sufficient, even if the information later proves to be incorrect. In other words, the information could be necessary and useful to uncover corruption, and the motive of the reporting person (e.g. poor working relationship with the accused), does not change this.

43. More recently, and following its Phase 3 evaluation,\(^{42}\) the UK amended the UK PIDA, dropping the element of good faith and replacing it with that of reasonable belief and public interest. As it stands now a “qualifying disclosure” under Section 43B of UK PIDA means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show a criminal offence, a breach of legal obligation, etc.\(^{43}\) Both the Ireland and NZ PDA’s require that the whistleblower has a “reasonable belief” or “believes on reasonable grounds” that the subject matter of the report constitutes one of the categories of wrongdoing defined in the Act; although it is not required that the report be made “in the public interest”. The US Securities and Exchange Commission (SEC) rule\(^{44}\) requires a whistleblower hold a “reasonable belief” that the provided information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess. The reasonable belief standard seeks to strike the balance between encouraging individuals to provide the SEC with high-quality tips without fear of retaliation, while not encouraging bad faith or frivolous reports, or permitting abuse of the whistleblower anti-retaliation protections.

\(^{37}\) Explanatory Report to the Civil Law Convention on Corruption, p. 10.
\(^{39}\) “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.
\(^{41}\) Norway Working Environment Act 2005 (WEA).
\(^{42}\) Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom, March 2012.
\(^{43}\) It has to be noted however, that that the employment tribunal has the power to reduce any compensation award by up to 25% if it considers the disclosure was made predominantly in bad faith.
44. It is therefore crucial to ensure in the proposed whistleblower protection legislation that good faith is not confused with motive, so as to ensure potential whistleblowers that the main focus would not be on their motive for reporting rather than on a proper assessment of the merits of the information they could provide. Finally, the proposed Greek whistleblower protection legislation should not deny protection solely because the report may have subsequently turned out to be incorrect. Instead, it should examine only whether the reporting person had reasons to believe that the information existed at the time of the reporting to support such a disclosure.

**Legislative Proposal**

Greece should protect those who have a “reasonable belief” that the subject matter of the report falls within the specified categories of protected disclosures, regardless of whether this belief turns out to be mistaken. The burden of proof regarding the reasonableness of his/her belief should not fall upon the reporting person but instead should be presumed in their favour. It understood however, that where it is proved that the report was false and not on reasonable grounds, there should be appropriate remedies to restore a damaged reputation in order to deter those who knowingly come forward with false allegations. If Greece nevertheless considers the element of “good faith” necessary for the purposes of the proposed whistleblower protection legislation, then it is recommended that a clarification is included in order to make clear that the requirement relates to the information being reported based on the belief that it is correct, and not relating to the personal motivation of the reporting person.

### 3. Who will be afforded protection?

#### 3.1. International standards

45. The OECD 2009 Anti-bribery Recommendation calls for the protection of public and private sector “employees” (Recommendation IX, Reporting Foreign Bribery). The OECD 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance recommends effective measures for “protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors”. In the context of evaluations of Parties’ implementation of the OECD Anti-Bribery Convention and related instruments, the OECD Working Group on Bribery has noted the need to protect foreign and expatriate workers as foreign-based employees who are most proximate to – and thus most likely to report – acts of foreign bribery.45

46. The UNCAC adopts the broadest approach to categories of protected reporting persons without however, specifying if all these categories need the same form of protection. Article 33 requests Parties to consider incorporating into their domestic legal systems appropriate measures to provide protection against any unjustified treatment for “any person”. The UNCAC Technical Guide suggests that State Parties consider protecting not only public officials, or employees of legal persons, but any person who reports a suspicion of corruption, irrespective of their status. It further specifies that the protection of journalists is of particular importance in so far as they publish stories within the same criteria as stated by the article.

47. Article 22 of the Criminal Law Convention of the Council of Europe on Corruption calls on each Party to adopt all necessary measures to provide effective and appropriate protection for the “collaborators of justice” and witnesses who report the criminal offences established by the

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45 See, for example, UK Phase 3 report, paras 199-200 and follow-up issue 14(e).
Convention or otherwise co-operate with the investigating or prosecuting authorities. While the scope of Article 22 seems to encompass *prima facie* only persons who face criminal charges, or are convicted, of having taken part in corruption offences and persons who receive the status of witness, the Explanatory Note to the Convention clarifies that the term witnesses should be interpreted to cover all persons who possess information relevant to criminal proceedings concerning corruption offences including whistleblowers.\(^{46}\) The Civil Law Convention of the Council of Europe on Corruption calls on each Party to provide appropriate protection against any unjustified sanction, for “employees” who report in good faith to responsible persons or authorities (Article 9).

48. The Council of Europe Whistleblower Protection Recommendation has a broader scope of protection, extending to all individuals working in either the public or private sectors, irrespective of the nature of their working relationship (paid or unpaid) and regardless of whether the working relationship has ended.\(^{47}\) It also requires protection to be provided in situations where the working relationship is yet to begin, such as cases where information has been acquired during the recruitment process or other pre-contractual negotiation stage.\(^{48}\)

3.2. National approaches

49. The UK PIDA adopts a broad definition of employee. At present, the protection is afforded to all “workers” a category larger than employees, which includes agency workers, non-employees undergoing training or work experience and homeworkers. Following the 2013 amendment the definition applies also to contractors and limited liability partners. As noted in the UK’s Phase 3 evaluation report, “[t]he Act does not apply to expatriate workers of UK companies who are based abroad unless there are “strong connections with Great Britain and British employment law.” This effectively excludes many foreign-based employees who are most proximate to – and thus most likely to report – acts of foreign bribery. The case of Foxley\(^{49}\) highlights this shortcoming: the whistleblower was a UK national (Tribunal Decision, para. 67) whose employer was a UK-incorporated company (para. 12). His employment contract stated “the point of hire […] was expressed to be in the UK” (para. 31). The tribunal also found that “the process of termination and […] notice was ultimately given in the UK” (para. 82) and that “the dismissal occurred in the UK” (para. 88). Foxley’s employment was based in Saudi Arabia but required him to work with individuals in the UK, including officials of the UK Ministry of Defence (paras. 34 and 70-73). While his employment contract was governed by Saudi law (para. 30), a separate confidentiality agreement was subject to English law (para. 38). He argued to the Tribunal that he had been unfairly dismissed because he reported suspicions of foreign bribery to his employer. Nevertheless, the Tribunal held that it lacked jurisdiction to hear the claim.

50. The NZ PDA defines “employee” as a former employee; homeworker; persons seconded to the organisation; individual engaged or contracted under a contract for services to do work for the organisation; person involved in the management of the organisation (including a person who is a member of the board or governing body of the organisation); or even a person who works for the organisation as volunteers without reward or expectation of reward for that work. France’s Loi Sapin II grants protection to permanent employees but also to consultants, contractors, temporary employees, former employees, interns and volunteers.

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\(^{46}\) Explanatory Report to the Criminal Law Convention on Corruption, pp. 21-22.

\(^{47}\) Article 3, Recommendation CM/Rec(2014)7.

\(^{48}\) Article 4, Recommendation CM/Rec(2014)7.

\(^{49}\) Serco Limited v. Lawson, [2006] UKHL 3 at paras. 35-40.

\(^{50}\) Foxley v. GPT Project Management Ltd., Employment Tribunal, No. 22008793/2011 (12 August 2011).
51. On the contrary, some countries do not define specific categories of employees to be protected in their whistleblower protection legislation. This is the case in Japan where the protection concerns employees in general. However, the definition of this notion is quite narrow: “worker [refers to] one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation.”

52. In Kosovo, a non OECD country, the Law No. 04/L-043 on protection of informants defines a whistleblower as “any person, who, as a citizen or an employee.” Similarly, in Hungary, the law stipulates that “anybody may make a complaint or a public interest disclosure to the body entitled to proceed in matters relating to complaints and public interest disclosures.” Korea’s whistleblower protection system provides protection to anyone who reports an act of corruption to the Anti-Corruption and Civil Rights Commission (ACRC).

**Legislative Proposal**

Greece should adopt a broad definition of protected persons in its whistleblower protection legislation, which nevertheless clearly sets out the categories of employment status, including former employees, which will benefit from protection. The Civil Service Code already contains a broad definition of public sector employees who can benefit from its whistleblower protection provisions. These categories should be equally applicable to employees in the public or private sectors. Protection should be granted to all employees, regardless of their formal status, whether they are full time, part-time, temporary, permanent, consultants, contractors, employees seconded from another organisation, interns, volunteers, self-employed or home workers. The protection should cover those who apply for jobs, contracts or other funding and also extend to former or retired employees who may have knowledge of misconduct from their previous employment. A clearly defined scope will certainly create confidence in the whistleblower protection system and provide incentives to come forward to reporting alleged wrongdoing.

4. **Defining reporting channels**

53. Whistleblower protection legislation should facilitate protected reporting by clearly defining channels of disclosure. The individual circumstances of each case should determine the most appropriate channel of disclosure (Council of Europe, 2014). Providing a variety of protected reporting channels will allow whistleblowers to choose between channels they trust most, depending on the specific circumstances of the case. Positive experience of using externally sourced channels can help employees develop enough trust to use more open and direct communication channels. Concurrent channels should complement each other. Confidential or anonymous reporting is essential to protecting whistleblowers and therefore encouraging them to report misconduct.

4.1. **International standards**

54. The UNCAC Technical Guide suggests that State Parties identify the competent authority or authorities to receive the reports, but also have the capacity to provide the necessary protection. It advises mandating several agencies to receive reports from potential whistleblowers. The Guide

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51 Whistleblower Protection Act.
52 Effective speak-up arrangements for whistle-blowers (ACCA and ESRC, 2016), p.13
54 UNCAC Technical Guide, p.106
suggests at least two levels at which reporting persons can report their concerns. The first level is defined as being an entity attached to the organisation, such as someone in the management or an internal or contracted external body. The second level institution can be independent bodies, such as an ombudsman, an anti-corruption agency, or an auditor general.

55. Reports can be made to the second level institution in cases where a first level report does not lead to an appropriate result (for instance a decision not to investigate); the investigation is not completed within a given period of time; no action is taken despite the positive results of the investigation; reporting internally constitutes a tip-off; or when the reporting person is not informed of the case within a given period of time. Reporting persons should also be given the option to address second-level institutions directly if they have reasonable cause to believe that they would be victimised if they raised the matter internally or with the prescribed first-level external body or if they have reason to fear a cover-up.

56. The OECD 2009 Anti-bribery Recommendation Section IX “Reporting Foreign Bribery” requires that Member countries ensure easily accessible channels and appropriate measures to facilitate reporting of suspected acts of bribery to law enforcement authorities. Section IX of the 2009 Recommendation is supplemented by the 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance which recommends effective measures for “internal reporting”.

57. The Council of Europe Whistleblower Protection Recommendation provides that the national framework should foster an environment that encourages reporting or disclosure in an open manner and where individuals should feel safe to freely raise public interest concerns (Article 12). Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures (Article 13). Additionally it spells out specific and detailed guidelines on establishing channels for reporting and disclosures such as: 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. It is made clear that several types of channel should be made available and that the individual circumstances of each case should determine the most appropriate channel. At a company level, the Recommendation suggests that employers should be encouraged to put in place internal reporting procedures. Workers and their representatives should be consulted on proposals regarding the set-up of the internal reporting procedures. As a general rule, internal reporting and reporting to relevant public regulatory bodies, law enforcement agencies and supervisory bodies should be encouraged and with credible assurances that they will not be retaliated against.

58. The World Bank Group Integrity Compliance Guidelines mainly concern companies participating in World Bank Group-financed projects and incorporate standards, principles and components commonly recognized by many institutions and entities as good governance, and anti-fraud and anti-corruption practices. Chapter 9, which deals with reporting mechanisms, requires companies to provide channels for communication, “including confidential channels”. Several other international instruments advocate for internal secure and accessible channels (APEC Anti-Corruption Code of Conduct for Business / Business Principles for Countering Bribery). To this end, companies should be encouraged to provide secure and accessible channels through which employees and others can raise concerns and report suspicious circumstances in confidence.

55 Recommendation CM/Rec(2014)7, art. 15.
4.2. National approaches

59. The US SEC, in its administration of the Dodd-Frank whistleblower protection provisions, has emphasised that “an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission.” Amendments to Korea’s Act on the Protection of Public Interest Whistleblowers in 2016 strengthened protection by introducing special measures for whistleblowers who report internally.

60. The UK PIDA classifies disclosures into three tiers with increasing thresholds for affording protection. The three categories of disclosure are: (1) internal disclosures to employers; (2) regulatory disclosures to prescribed bodies; and (3) wider disclosures, for example to the police, media, consumer groups or non-prescribed regulators. The UK Serious Fraud Office (SFO) is the designated agency for receiving public interest disclosures related to serious and complex fraud, including domestic and foreign bribery. While the legislation protects those making a disclosure either internally in the organisation or externally it has been suggested that the internal channels for whistleblowing should be exhausted before resorting to external whistleblowing. The UK PIDA Guidance provides a list of the prescribed persons and bodies to receive protected disclosures. A brief description about the matters that can be reported to each prescribed person is also provided.

61. The NZ PDA provides that an employee must disclose information in the manner provided by internal procedures established by and published in the organisation, or the relevant part of the organisation, for receiving and dealing with information about serious wrongdoing (s7). However, under specific circumstances the disclosure of information may be made to the head or a deputy head of the organisation (s8: absence of internal procedures; belief that the person to whom the wrongdoing should be reported is or may be involved in the serious wrongdoing; belief that the person to whom the wrongdoing should be reported is, by reason of any relationship or association with a person who is or may be involved in the serious wrongdoing), to the appropriate authority (s9: cases of urgency; belief that head of the organisation is or may be involved in the serious wrongdoing; no action or recommended action has been taken within 20 working days after the date on which the disclosure was made), or to the Minister of the Crown or the Ombudsman (s10: a substantially same disclosure has been already made in accordance with ss7-9 and belief that the person or authority has decided not to investigate the matter; to investigate the matter but has not made progress with the investigation within a reasonable time after the date on which the disclosure was made; has investigated the matter but has not taken any action in respect of the matter nor recommended the taking of action in respect of the matter, as the case may require).

62. France’s Loi Sapin II requires in principle the exhaustion of internal channels before resorting to external whistleblowing. Regarding the recipient of the report, the law requires the whistleblower to report in the first place directly or indirectly to his/her manager or to a designated representative. In the case where the competent person does not take action to verify the allegation within a reasonable period of time, the matter should be reported directly to the judicial authority, the administrative authority or professional associations. As a last resort, in the absence of action by one of the abovementioned bodies within three months, the report may be made public. However, as in other jurisdictions, there are some exceptions to the requirement to exhaust internal channels. Hence,

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57 See e.g. the ICAEW Chartered Accountants analysis of the 2013 amendment available at www.icaew.com/en/technical/legal-and-regulatory/information-law-and-guidance/whistleblowing/the-public-interest-disclosure-act-pida-1998. However, this reading is not compatible with the three tier system.

French law provides that in the case of serious and imminent danger or in the presence of a risk of irreversible damage, the matter may be reported directly to the abovementioned bodies and may be made public. The same approach is adopted by Sweden’s Act on Special Protection against Victimisation of Workers who Sound the Alarm about Serious Wrongdoings (2016).

63. The Dutch Whistleblowers Authority Act 2016 (Wet Huis voor klokkenluiders) requires Dutch and Netherlands-based foreign companies with 50 or more employees to establish an internal reporting procedure which defines inter alia under which circumstances employees can report wrongdoing outside the company. For example, in cases where the action taken in response to the report is inadequate, the employee will have to evaluate the public interest in reporting the wrongdoing externally against the employer’s interest in keeping the matter confidential. The Act requires that reports be made first internally within the company and requires companies to adequately investigate a concern about the wrongdoing that has been reported internally. When the reporting person cannot reasonably be expected to report internally first (e.g. in serious and urgent situations or when highest level management is involved), s/he can report directly to the relevant competent authority.59 While Slovenia has no specialised whistleblower protection law, the Chapter III of the Integrity and Prevention of Corruption Act (IPCA) dedicates Chapter III on the protection of public and private sector employees and contains many internationally recognised principles for whistleblower protection such as the requirement to provide internal and external disclosure channels. Kosovo’s Law No. 04/L-043 on protection of informants specifies that protection is provided when the report is made to the respective authority within public institution at central or local level, institutions, public and private enterprises (Article 1). Additionally the whistleblower shall submit information about the unlawful actions to the “official person dealing with reported wrongdoings or to any other supervisor”. Unlawful actions may be reported, disclosed in writing; through postal services, e-mail; and orally (article 5).60

**Legislative Proposal**

Greece should provide protection to those who report internally within their organisation, as well as those who report externally to law enforcement, the media or civil society. To maximise the flow of information necessary for accountability, clear, safe and diversified reporting channels must be available to disclose allegations of misconduct. The law should require or at least encourage organisations to set up internal channels for an initial handling of reports and provide guidance to employees on the use of these channels, in order to encourage resolution and follow up by organisations. The law should also allow external reporting under the circumstances elaborated above where the act presents a risk to the reporting person due to, for example, collusion. If the organisations are unable to set up such channels, the law should stipulate that they are required to provide in their annual report justifiable reasons as to why not. External channels could include (1) a broad range of bodies and entities or (2) an agency for protected disclosures (see below, Part V).

*Note: The Greek government would like to restrict protection to the reporting of most serious crimes in the first instance and considers that the main external reporting channel should be the prosecutor.*

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60 www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20protection%20of%20informants.pdf
5. Ensuring confidential reporting

64. The principle of confidentiality should not be confused with anonymity, which means that no one knows the source of the information. On the other hand, where the name and identity of the individual who disclosed information is known by the recipient but will not be disclosed without the individual’s consent, unless required by law one can talk about confidential reporting.

5.1. International standards

65. The 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance recommends effective measures for “where possible confidential reporting”. Principle 18 of the Council of Europe Whistleblower Protection Recommendation provides that whistleblowers should be entitled to have the confidentiality of their identity maintained, in order to reassure them and ensure the focus remains on the substance of the disclosure rather than on the individual who made it. International and national data protection frameworks also contribute to protecting the identity of reporting persons (see below, Part 8).

5.2. National approaches

66. Confidentiality can be guaranteed by ensuring that whistleblower reports are exempt from freedom of information legislation. Italy’s access to information law has an exception for public employees reporting offences, as does its new whistleblower protection law. The NZ PDA provides that a request under the Official Information Act may be refused if it might identify a person who has made a protected disclosure. Disciplinary provisions for breach of confidentiality requirements (and enforcement thereof) can boost whistleblower confidence in reporting mechanisms. In Korea, disclosure of a whistleblower’s identity, or facts that may infer it, is punishable by 3 years imprisonment or a fine of KRW 30 million. In the US, under SEC Rule 21F-7, subject to certain exceptions, the SEC must not disclose any information which could reasonably be expected to reveal the identity of a whistleblower. In New Zealand, a whistleblower is granted confidentiality unless s/he consents in writing to the disclosure of the information or the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information is essential to the effective investigation, to prevent serious risk to public health or public safety or the environment, having regard to the principles of natural justice. The Dutch Whistleblowers Authority Act requires the report to be treated confidentially when requested by the reporting person.

Legislative Proposal

Greece should consider requiring that the whistleblower’s name and identifying information are treated confidentially both in internal company reporting mechanisms and by relevant authorities receiving whistleblower reports. It could also consider ensuring that whistleblower reports are exempt from freedom of information legislation and provide sanctions or disciplinary measures for breach of confidentiality requirements. Greece should also indicate that a whistleblower’s identity must not be disclosed without the individual’s express consent as well as other possible circumstances under

62 Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell’ambito di un rapporto di lavoro pubblico o private, approved by the Italian parliament on 15 November 2017.
63 Act on the Protection of Public Interest Whistleblowers, Chapter V Article 30 (1).
which a whistleblower’s identity may be revealed (for example, if the case goes to trial and the whistleblower is called as a witness), and ensure that the whistleblower is afforded advance notice and additional protections, for example witness protection, in such cases.

6. Considering anonymous reporting

6.1. International standards

67. Article 13(2) of UNCAC requires States parties, where appropriate, to facilitate reporting by members of the public to anti-corruption bodies, including anonymously. The UNCAC Technical Guide further provides that State Parties may wish to consider the feasibility of accepting anonymous reporting. However, from a practical perspective, it is difficult to provide comprehensive protection to a person whose identity is unknown. Anonymous reporting also makes it difficult to obtain additional information from the reporting person that might be essential to understand and remediate the wrongdoing and could have the unintended consequence of generating false or vindictive allegations if the reporting person cannot be identified and held accountable. Furthermore, due to anonymity, the reporting person may not be updated of the outcome of the investigation carried out by the recipient of the information, e.g., the employer, and in consequence may escalate the reporting to other channels.

6.2. National approaches

68. The SEC Whistleblower Program allows anonymous reporting through an attorney. Qualified attorneys can provide according to SEC significant value in encouraging whistleblowers reporting, maintaining their confidentiality, submitting cogent reports, and managing communications with whistleblowers. Whistleblowers must also provide the attorney with a completed specific form (TCR) signed under penalty of perjury at the time of the anonymous submission. Whistleblowers are, however, required to disclose their identity before the SEC will pay them an award (see below, Part 9).64 The NZ PDA authorises Ombudsmen to provide advice and guidance to organisations and employees concerning the circumstances in which disclosures may be made anonymously (s.19(3)). In Kosovo, the Law No. 04/L-043 on protection of informants provides that the employer or one of the supervisors who receives the report should protect the anonymity of the whistleblower (Article 5).

Legislative Proposal

Greece should consider the abovementioned difficulties in providing effective protection and follow-up to anonymous whistleblowers when considering whether to provide for anonymous reporting. Furthermore, in the Greek context, encouraging the practice to make an anonymous report might not help to improve the negative perception of whistleblowers. Greece however, should provide in its legislation for the possibility to submit reports through an attorney.

7. Acting on disclosures

7.1. International standards

69. The Council of Europe Whistleblower Protection Recommendation requires that whistleblower disclosures be investigated promptly and the results acted on by the employer, and the

64 See Rule 21F-7.
appropriate public authority. It also provides that the whistleblower who reports internally, as a general rule, be informed of the action taken in response by the person to whom the report was made.

7.2. National approaches

70. The NZ PDA prescribes the actions that can be taken by Ombudsmen when they receive protected disclosures. In particular, s. 17(2) provides that when information is referred for investigation from one appropriate authority to another, the authority that originally received the protected disclosure must notify the person who made it. The Korean Anti-Corruption and Civil Rights Commission (ACRC) and the Dutch Whistleblowers Authority are mandated, in their corresponding statutes, with receiving, investigating and referring protected disclosures (see below, Part IV). The Dutch Whistleblowers Authority Act also gives the employee the right to obtain confidential advice, either from the company’s confidential counsellor, an advisor in the Whistleblowers Authority or a private lawyer or other advisor before reporting about the best course of action. It also requires companies define in their reporting procedure “the way the internal report is dealt with,” including which information the reporter can expect as a result of his or her report. Hungary’s Whistleblowing Act\(^65\) contains various time limitations for investigations: discretionary 6-month limitation periods for companies to investigate reports and a 30 day period to investigate whistleblower reports (see below, Part 8). While it is important to ensure that disclosures are acted upon promptly and efficiently, these time periods may be too short for reports involving suspected bribery or other complex financial crimes.

### Legislative Proposal

Greece should consider defining the investigative powers of the company, or public agency or agencies receiving protected disclosures, as well as their responsibilities to inform reporting persons of the actions taken in response to the report.

8. Ensuring data protection law is not an impediment to reporting

8.1. International standards

71. The implementation of whistleblower systems relies in the vast majority of cases on the processing of personal data through the collection, registration, storage, disclosure, transmission and destruction of data related to an identified or identifiable person. As such, ensuring data protection should be balanced with the need to ensure effective and protective whistleblower systems.

72. Privacy rights of the accused should also be balanced and considered. While existing law and regulations on whistleblowing are designed to provide specific protections to the whistleblower, they rarely make any particular mention of the protection of the person who is the subject of the report, especially with regard to the processing of his or her personal data. As the “Working Party under Article 29 of Directive 95/46/EC” stresses, whistleblowing schemes “entail a very serious risk of stigmatisation and victimisation of that person within the organisation to which he or she belongs” even before the person is aware that he or she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated.\(^66\)

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\(^65\) Act CLXV of 2013 on Complaints and Public Interest Disclosure (Whistleblowing Act).

73. The EU Data Protection Directive 95/46/EC as complemented by Opinion 1/2006 of the Working Party stresses that the application of data protection rules to whistleblower systems raises a number of questions regarding the legitimacy (Article 7), security and management (Articles 16 and 17) of the whistleblower systems, the proportionality and quality (Article 6) in the collection and management of data and the rights of the accused person (Articles 11 and 12). More specifically, the Directive requires that personal data be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not be used for incompatible or unrelated purposes and that the processed data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. Additionally, the Directive stipulates not only the right of the accused to be informed about the complaint but also to be given access to it in order to verify the submitted facts. Nevertheless, notifications may be delayed for as long as there is risk that they would jeopardise the ability of the company to effectively investigate the allegation or gather the necessary evidence.

74. Finally, and most importantly the Directive stipulates in Articles 18 to 20, incorporated in Greece with Law 2472/1997 Article 7, the obligation of companies which set up whistleblower systems to comply with the requirements of notification to, or prior checking by, the national data protection authorities (see above, Part 2.6). Under the current legal framework, Greek companies must not only to set up a system that abides by the rules and procedures relevant to data protection but also notify the DPA.

75. This framework will soon be reinforced with the entry into force of the EU General Data Protection Regulation (GDPR) in May 2018. The GDPR has tighter data protection provisions and requires stronger enforcement of those provisions both by companies and by regulators; maximum administrative fines for violation of data protection legislation are fixed at the higher of EUR 20m or up to 4 % of the total worldwide annual turnover of the preceding financial year). The GDPR will therefore have wide-reaching impact on internal reporting mechanisms within companies and the DPA will have an increased role in oversight and monitoring of their effectiveness. It will also be responsible for receiving complaints of employees who consider their data protection rights have been violated as a consequence of whistleblower reporting.

8.2. Other national approaches

76. Hungary’s Whistleblowing Act contains numerous provisions to ensure that private sector reporting mechanisms comply with data protection legislation. Employers are required to register their whistleblower procedure with the national data protection authority and data processing can only commence once the registration is effective. This requirement could result in fewer companies implementing reporting mechanisms to avoid the additional regulatory burden. The Act automatically allows transferring personal data to competent national authorities, courts and any entity involved in the investigation. It also stipulates that no sensitive data may be processed as part of the whistleblowing procedure, which could create obstacles to effectively following up on the report (for example, it may be important to obtain criminal records for suspected offences; political or religious affiliations for suspected discrimination, and so forth). The subjects of the report must be notified of the report—except for information relating to the whistleblower that is treated as confidential—and their data privacy rights and remedies once the investigation commences. The notification may, in exceptional cases, be delayed if the investigation would be jeopardised by the subject being notified promptly. The Act contains various time limitations: discretionary 6-month limitation periods for

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companies to investigate reports; 30 day period to investigate whistleblower reports; 60 day period to destroy all data related to the investigation if it concludes the report is baseless or that no action is necessary. While these limitations all ostensibly relate to the right to be forgotten, they are too short for complex cases involving bribery or other financial crimes. Any statutory data destruction requirement should be avoided and is likely to contradict with other legal obligations, such as data retention periods under accounting and auditing regulations.68

77. The Dutch Whistleblowers Authority Act requires employers to comply with the Personal Data Protection Act, for example by reporting to the Dutch Personal Data Authority and adequately informing employees about the processing of their data.

### Legislative Proposal

In the context of potential amendments to the Act Regarding Protection of Individuals with Regard to the Processing of Personal Data and any related data protection regulations to implement the GDPR, Greece should consider reconciling the need to promote and protect internal whistleblower reporting within both public and private sector organisations, and the need to ensure employees’ right to privacy. More specifically, Greece needs to strike a balance in the interaction between data protection law and protected disclosures in respect of keeping confidential the identity of the whistleblower and being able to carry out an investigation, and ensuring the person who has allegedly carried out a wrongdoing is treated fairly.

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9. **Financial incentives for whistleblower reporting**

9.1. **National approaches**

78. It is widely considered that financial incentives can encourage employees to report misconduct to external law enforcement authorities.69 Conditions for receiving financial rewards can also enhance the quality and increase the quantity of well-documented reporting. They can also incentivise the private sector to create more effective and trusted internal whistleblower reporting and protection programs. On the other hand, financial incentives are typically conditional on successful law enforcement outcomes and are calculated based on funds recovered from resulting enforcement actions, therefore they do not always compensate for, or correspond to, the full financial losses incurred by the whistleblower. There are currently two WGB member countries that provide financial rewards to whistleblowers: Korea and the United States.

79. The Dodd-Frank Act authorises the US SEC and Commodity Futures Trading Commission (CFTC) to reward individuals who provide information regarding securities or commodities law violations including bribes paid to foreign officials in violation of the Foreign Corrupt Practices Act (FCPA) and the Commodity Exchange Act that leads to an enforcement action resulting in over $1 million in sanctions. The whistleblower can receive between 10% to 30% of the amount recovered.70 In determining the amount of the award, the SEC evaluates several factors, including the significance

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70 15 U.S. Code § 78u–6 - Securities whistleblower incentives and protection
of the information or degree of assistance provided by the whistleblower that contributes to the success of the judicial or administrative action. All awards are paid from the SEC Investor Protection Fund which is separate from the funds used to compensate victims of securities and commodities fraud. As of October 2017 the SEC has awarded more than USD 162 million to 47 whistleblowers and the SEC’s enforcement actions from whistleblower tips have resulted in more than USD 975 million in financial remedies against wrongdoers.71

80. Under the US Internal Revenue Service- Whistleblower Informant Award, the IRS may pay awards to whistleblowers who provide information to the IRS if the information results in the collection of taxes, penalties, interest or other amounts from the noncompliant taxpayer. Two types of awards are provided under the law:

- If the taxes, penalties, interest and other amounts in dispute exceed $2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. If the case deals with an individual, his/her annual gross income must be more than $200,000.

- In cases where the amounts in dispute do not exceed $2 million or the individual taxpayer’s gross income is less than $200,000 the whistleblower may be awarded a maximum of 15 percent up to $10 million.

81. In Korea, the Anti-Corruption and Civil Rights Commission of Korea provides monetary rewards and awards for whistleblowers:

- If their report directly contributes to the recovery or increase of revenue or expenditure reduction of public agencies, the internal whistleblower is rewarded with 4-20% of the amount recovered, at a maximum amount of about USD 1.8 million (KRW 2 billion).

- If their report contributes to public interest, institutional improvement or a disciplinary action, the internal and external whistleblowers are monetarily awarded, up to about USD 180,000 (KRW 200 million).

### Legislative Proposal

Greece could consider introducing financial rewards or incentives for whistleblowers, calculated as a percentage of the amount recovered in sanctions resulting from the reported misconduct. However, taking into account that financial sanctions will not always result from whistleblower reporting, Greece should also consider carefully the financial sustainability of the reward mechanism in the long term. Moreover, Greece should consider carefully whether in the Greek context, providing financial rewards for the disclosure of acts of corruption could reinforce the negative cultural connotations associated with whistleblowers as traitors and informers. Other jurisdictions such as Australia are considering the introduction of financial incentives in their whistleblower legislation proposals. These could be useful interlocutors in Greece’s consideration of whether to follow this path.72

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10. Company whistleblowing frameworks as mitigating circumstances

10.1. National approaches

82. In 12 Parties to the OECD Anti-Bribery Convention, internal controls, ethics and compliance programmes or measures, including whistleblower reporting and protection mechanisms, can be relied on as a defence or a mitigating circumstance for corporate liability. In some countries, a compliance system could even negate an element of the offence that the prosecution must prove to establish the liability of a legal person. For example, in Chile, prosecutors “must prove that a company failed to properly design and implement an offence prevention model”. In other countries, the legal person can use a compliance system to establish a defence. For example, Australia’s Criminal Code Section 12.3(3) provides that certain methods for establishing a legal person’s fault will not apply “if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission”. In other countries compliance systems can be considered as a mitigating factor when imposing sanctions for foreign bribery and other offences. This legislation can be an important tool for promoting effective corporate compliance programmes and encouraging whistleblower reporting and protection to be included within the programmes.

83. While providing a corporate compliance defence as a mitigating factor may be an effective way of creating incentives for effective compliance, cooperation, whistleblower reporting and voluntary disclosure, the use of mitigating factors without clear criteria or instructions could render the sanctioning process less transparent and predictable. At least seven Parties provide guidance for judges, prosecutors or to the general public on how these sanctions are to be applied.

84. For instance, the U.S. Department of Justice (“DOJ”), Fraud Section recently published a list of topics and questions that it has “frequently found relevant in evaluating a corporate compliance program” in the context of a criminal investigation. The topic of effectiveness of the reporting mechanism focuses on how the corporation collected, analysed, and used information from its reporting mechanisms and assessed the seriousness of the allegations it received and whether the compliance function had full access to reporting and investigative information.

85. In the UK, “corporate failure to prevent bribery” is a strict liability offence under section 7 of the Bribery Act of 2010 (the “Bribery Act”). The only complete defence available to a company is proof that it had adopted “adequate procedures” to prevent bribery and corruption. The UK Ministry of Justice has developed a rubric for evaluating whether a company has adopted “adequate procedures” sufficient to avoid criminal liability under the Bribery Act. The UK Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles, which could include procedures for reporting of bribery such as “speak up” or “whistleblowing” procedures.

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71 Austria, Australia, Brazil, Chile, Colombia, Czech Republic, Germany, Greece, Italy, Korea, Netherlands, Norway, Portugal, Spain, Switzerland, the United Kingdom and the United States.
72 OECD Chile Phase 3 Report para. 50.
73 See e.g., Estonia Phase 3 pages 56-57 (Recommendation 2(c)) (“Provide appropriate guidance on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements and the degree of mitigation of sanctions, to ensure that plea-bargaining does not impede the effective enforcement of foreign bribery”).
74 These are Brazil, Chile, Germany, Israel, Korea, the United Kingdom and the United States.
75 U.S. Department of Justice, Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (available at: www.justice.gov/criminal-fraud/page/file/937501/download).
76 The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (available at: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf)
Greece could consider amending current corporate liability provisions or providing guidance to allow effective corporate compliance programmes (including whistleblower reporting and protection procedures) as mitigating factors in sentencing. It should further be specified in guidance, that the existence of an internal reporting channel and accompanying protections should be taken into consideration as an essential element of an effective corporate compliance program to mitigate the liability of a company.

IV. ELEMENTS OF A PROPOSED PUBLIC INTEREST DISCLOSURE LAW: EFFECTIVE PROTECTION AGAINST REPRISALS

86. Whistleblower protection against reprisals is essential to encourage the reporting of a wrongdoing. As the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected, protecting whistleblowers in both the public and private sector facilitates the reporting of active and passive bribery, as well as the misuse of public funds, waste, fraud or other forms of corruption committed by companies. Providing effective protection for whistleblowers supports also, by sending a positive message about the benefit and legitimacy of whistleblowing, an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. The protection of whistleblowers from all forms of retaliation is therefore integral to efforts to combat corruption, promote integrity and accountability, and support a clean business environment.

1. Defining the scope of reprisals in respect of which protection is provided

1.1. International standards

87. Retaliation against whistleblowers can take many forms including dismissal, suspension, demotion, transfer, reassignment, change in duties, pay, benefits, or awards etc. It can also appear in the form of harassment such as marginalising the whistleblower or questioning his/her professional competence, honesty or even mental health. The Council of Europe Whistleblower Protection Recommendation provides that “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” (Principle 21). Although the Recommendation does not provide for specific time period for the reprisals to occur, its explanatory memorandum clearly states that member States should consider fixing a time frame that takes into account the difficulty in establishing

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80 According to the United States’ Project on Government Oversight (2005), typical forms of retaliation include: (i) taking away job duties so that the employee is marginalised; (ii) taking away an employee's national security clearance so that he or she is effectively fired; (iii) blacklisting an employee so that he or she is unable to find gainful employment; (iv) conducting retaliatory investigations in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose; (v) questioning a whistleblower's mental health, professional competence, or honesty; (vi) setting the whistleblower up by giving impossible assignments or seeking to entrap him or her; (vi) reassigning an employee geographically so he or she is unable to do the job.
a causal link between them the detriment and the whistleblowing in cases where there is a lapse of time between them.\textsuperscript{81}

**1.2. National approaches**

88. According to Committing to Effective Whistleblower Protection (OECD, 2016) 16 OECD countries broadly protect against the discriminatory or retaliatory reprisals referred to above, while 26 respondent countries provide at least protection from dismissal, suspension or demotion.\textsuperscript{82} In doing so, some countries provide catch-all provisions to qualify for general prohibition of negative consequences or disadvantageous treatment, which were considered to apply to all personnel actions above. For example in Korea’s Act on the Protection of Public Interest Whistleblowers, the term “disadvantageous measures” covers any unfavourable personnel action that ranges from dismissal to suspension, disciplinary action, reduction in pay, reduction of duties, reassignment, restriction or discrimination in promotion or training opportunities, blacklisting, unfair audit or inspection etc.\textsuperscript{83} The same broad encompassing provision can be found in Article 10 of France’s Loi Sapin II\textsuperscript{84} and Article 15 of Belgium’s Loi relative à la dénonciation d’une atteinte suspectée (2013).\textsuperscript{85}

89. In other cases like Ireland’s PDA\textsuperscript{86} and the UK PIDA,\textsuperscript{87} with the exception of dismissal, no specific examples of retaliatory personnel actions are listed, but those law stipulate that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

90. It has to be noted that reprisals are not always immediate. In some cases reprisals can take place months and even years following a disclosure of wrongdoing and providing protection only for a broad range of discriminatory or retaliatory personnel action is not enough. The scope of reprisals should be therefore, extended in terms of time and duration. In Belgium for example, whistleblowers are protected against reprisal from the date they submit their disclosure until at least two years following the conclusion of the associated investigation.\textsuperscript{88}

### Legislative Proposal

Greece should define the scope of impermissible discriminatory or retaliatory personnel action. As stated above, the scope should be broad not only in terms of types of reprisals but also regarding the timeframe of the reprisals. There are two options in this regard: i) provide an exhaustive list of all types of reprisals that may trigger the protection of the reporting person or ii) define that any detriment suffered by the reporting person on the ground that he/she has made a disclosure may trigger the protection of that person. Without any doubt the first option provides more legal certainty and it is not open to judicial interpretations, especially in countries with no tradition of whistleblower protection, which may limit unfavourably the scope of reprisals. Providing a comprehensive and

\textsuperscript{81} Explanatory memorandum to the Recommendation CM/Rec(2014)7, p. 38.

\textsuperscript{82} Committing to Effective Whistleblower Protection (OECD, 2016), p. 79.

\textsuperscript{83} Korea Act on the Protection of Public Interest Whistleblowers (2011), Act No. 10472, Mar. 29, 2011. Article 2 (6).

\textsuperscript{84} Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

\textsuperscript{85} Loi du 15 septembre 2013 relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel.

\textsuperscript{86} Part 3: Protections, Section 11 and 12.

\textsuperscript{87} Section 2 and 5.

\textsuperscript{88} Loi du 15 septembre 2013 relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel, Article 15 para. 3.
exhaustive list of all types of reprisals could also ensure that employers cannot create loop-holes in terms of protection.

2. **Sanctions for whistleblower retaliation or discrimination**

2.1. **International standards**

91. Whenever an individual is retaliated against for properly reporting or disclosing information about wrongdoing in their workplace, it has a chilling effect on anyone else who may come across serious wrongdoing in that workplace or in any other. As a result, it is necessary to ban any retaliation, whether it is active in the form of disciplinary action or termination of employment, or passive, as in a refusal to promote or provide training. A whistleblower should be entitled to appropriate remedies, in civil, criminal or administrative proceedings, including orders and injunctions for the retaliation to cease and desist but also for the employer to be sanctioned and compensation for any damage incurred. The Council of Europe Whistleblower Protection Recommendation provides that 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 (Article 23). It further provides that 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 (Article 26).

2.2. **National approaches**

92. According to the OECD report on committing to Effective Whistleblower 22 OECD countries have penalties in place for those who retaliate or discriminate against whistleblowers.89 These penalties can be of criminal or administrative nature or both. For example, Section 425.1 of Canada’s Criminal Code makes it a criminal offence for employers, or anyone acting on their behalf, to threaten, retaliate or discriminate against a potential whistleblower or a whistleblower that has already made a protected disclosure. The offence carries a maximum term of five years’ imprisonment while the amount of the fine is unlimited for corporations when the Crown proceeds by indictment.90 On the other hand, the US Sarbanes–Oxley Act (2002)91 in combination with the Law on retaliating against a witness, victim, or an informant92 not only makes retaliation a federal offence with a maximum term of imprisonment of ten years but also treats it in the same manner as a violation of the Securities Exchange Act of 1934 subjects the offenders to the same penalties, and to the same extent, for a violation of that Act. Thus, if any publicly traded corporation discriminates or retaliates against a whistleblower, such discrimination would not only constitute a potential criminal obstruction of justice, but would also subject the employer and/or the company to administrative sanctions by the SEC and other enforcement actions. Korea’s Act on Public Interest Whistleblower Protection makes it a crime to disclose the contents of a report, including the identity of the public interest whistleblower, punishable by 2 years’ imprisonment or a fine of about USD 18,000 (KRW 20 million). Retaliation or discrimination against a public interest whistleblower is also criminalised, along with refusal to carry out protective measures for whistleblowers, and punishable by 1 year imprisonment or a fine of about USD 9,000 (KRW 10 million).

93. The SEC took whistleblower protection a step further in 2015 with its first sanction for prospective whistleblower retaliation in relation to confidentiality clauses that prohibit whistleblower

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89 Committing to Effective Whistleblower Protection (OECD, 2016), p. 82-83.
reporting. The SEC fined a company USD 130 000 for having requiring its employees to sign these agreements. The company subsequently amended its confidentiality statement by adding language making clear that employees are free to report possible wrongdoings to the SEC and other federal agencies without its approval or fear of retaliation. Furthermore, according to Section 29(a) of the Securities Exchange Act, employees cannot waive their anti-retaliation rights and any condition, stipulation or provision binding them to do so is void.

94. Civil and administrative penalties can also be effective to dissuade employers from retaliating against their current or former employees who blow the whistle or assist a government’s prosecution. For example, in the US, Section 21F(h)(1)(A) of the Securities Exchange Act authorises the SEC to seek civil penalties against employers that engage in a wide-range of retaliatory actions against whistleblowers who report possible misconduct to the SEC or assist in an SEC investigation, judicial or administrative action; or in making disclosures required by other laws. Ireland’s Protected PDA provides for an action in tort for suffering detriment because of making a protected disclosure (s. 13).

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<td>Greece should provide for criminal or administrative sanctions for those who retaliate against whistleblowers and for imposing confidentiality clauses that prohibit whistleblower reporting or otherwise restrict or impede whistleblowers’ right to report a wrongdoing or assisting in an investigation or prosecution. Moreover, given that criminal liability is not possible for legal persons under Greek law, Greece should provide for relevant administrative sanctions for legal persons in the proposed standalone whistleblower protection law. Greece should also provide for civil causes of actions for whistleblowers to claim compensation for detriment suffered as a result of retaliation for reporting misconduct.</td>
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3. Reversing the burden of proof

3.1. International standards

95. A system that requires an employee to demonstrate that his or her unfair treatment or dismissal is linked to the reporting of a wrongdoing, places a significant onus on the individual especially as many forms of reprisals may be subtle and difficult to establish. This is why whistleblower protection legislation reverses the burden of proof whereby the employer must prove that the conduct taken against the employee is unrelated to his or her whistleblowing. However, as the UNODC Resource Guide on Good Practices in the Protection of Reporting Persons notes, in most cases it is not in fact an actual reversal of the burden of proof, but rather the standard burden of proof in combination with other legal provisions, for example the prohibition in law against taking any detrimental action against a person for having reported alleged wrongdoing.

96. The burden-shifting approach means that an employee, if dismissed after making a disclosure, would only need to establish a prima facie case that he or she reported wrongdoing, had suffered retaliation, and that there was likely a correlation between these incidents (contributing factor). The burden of proof would then shift to the employer to demonstrate that the act was not a

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94 Committing to Effective Whistleblower Protection (OECD, 2016), p. 82

detrimental one and that the same action would nevertheless have been taken against the employee for reasons independent of the act of whistleblowing. The Council of Europe Whistleblower Protection Recommendation places the burden of proof on the employer for any detriment inflicted against the interests of the individual who made a report or disclosure in the public interest on the employer (Principle 25).

3.2. National approaches

The US Whistleblower Protection Act (1989), the UK PIDA (1998),96 and Norway Work Environment Act (2005)97 have long-established provisions reversing the burden of proof. This standard has recently been added to Slovenia’s Integrity and Prevention of Corruption Act (2010),98 France’s Loi Sapin II99 and Sweden’s Act on Special Protection against Victimisation of Workers who Sound the Alarm about Serious Wrongdoings (2016). In fact, since the US government changed the burden of proof in its whistleblower laws, it is estimated that the rate of success on the merits has increased from 1 to 5 percent annually to 25 to 33 percent, which gives whistleblowers a fighting chance to successfully defend themselves against unjustified retaliation.100

### Legislative Proposal

Greece’s whistleblower protection legislation should require the reporting employee to demonstrate only a prima facie case that s/he suffered retaliation or discrimination due to his/her disclosure. The burden of proof then must shift onto the employer who must then prove that any such action was fair, not linked in any way to the whistleblowing, and that it would have been taken against the employee for reasons independent of the act of whistleblowing.

4. Defining the scope of protection and remedies

Reporting persons are usually concerned that they may face a variety of unjustified treatment. As discussed above, retaliation can take many forms that harm directly or indirectly the whistleblower. Correspondingly, the tools to thwart such treatment should not only be commensurate to the posed danger101 but also appropriate and effective to remedy any damage suffered.102 It is therefore understood that providing a legal basis to sanction those who retaliate or discriminate against whistleblowers is not sufficient but that substantial remedies should be provided. These remedies can be grouped into four categories i) immunity from liability or mitigated sanctions, ii) reinstatement, iii) financial protection and iv) physical protection.

Depending on the reprisal suffered one or more categories of the remedies referred to below may be appropriate. For example reinstatement does not exclude the remedy of financial protection in the sense that the reporting person may still have suffered economic damage for litigation procedures, psychological treatment and of course, lost wages. Finally, interim relief such as temporary injunctions, pending the outcome of civil or other proceedings should be available for reporting

96 Section 5.
97 Section 2:5.
98 Article 25 para 5.
99 Article 10.
102 Explanatory Report to the Criminal Law Convention on Corruption, pp. 22.
persons. The Council of Europe Whistleblower Protection Recommendation makes an explicit reference to Principle 26 and the explanatory memorandum goes on to explain interim relief could be in the form of a provisional measure ordered by a court or the competent supervisory or regulatory body to stop threats or continuing acts of retaliation, such as workplace bullying or physical intimidation, or prevent forms of retaliation that might be difficult to reverse after the lapse of lengthy periods, such as dismissal.

4.1. Immunity from liability or mitigated sanctions

100. Criminal offences such as slander, violation of bank or professional secrecy, and corporate espionage can all be used to silence whistleblowers. In addition, civil defamation suits can have a chilling effect on whistleblowers seeking to speak up about wrongdoing in large, well-resourced organisations. It should generally not be a crime or civil violation to report a wrongdoing. Ireland’s PDA (s.14) expressly provides for this, with the exception of defamation suits where a qualified protection applies which would be lost if the defamatory statement was made maliciously. The Act also provides that in a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for the person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure (s. 15). New Zealand’s PDA goes even further, to provide that persons who make protected disclosures or refer protected disclosures to appropriate authorities are not liable for any civil, criminal or disciplinary proceeding by reason of having made that disclosure (s.18). This provision applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice. In the event that the protected disclosure contains information pertaining to official secrecy or professional confidentiality the reporting person shall be deemed not to have violated his/her confidentiality obligation by making a protected disclosure. Likewise, the reporting person should be immune for defamation and other related actions against him/her as well as for claims for damages caused by the protected disclosure. However, should the reporting person have been involved in the wrongdoing, it is important that whistleblower protection frameworks not operate as “effective regret” or complete defences. In these cases, legislation should provide for discretionary immunity or mitigated sanctions in the event of reporting and/or subsequent cooperation with law enforcement authorities in the investigation.

Legislative Proposal

In the event that Greece decides to retain the criminal offences of violation of official secrecy (Criminal Code Art. 252) and professional confidentiality (Criminal Code, Art. 371) Greece should ensure in its whistleblower protection legislation that those who make protected disclosures cannot be held liable for these offences. Greece should also provide immunity from civil, including the offences of perjury, false accusation, defamation or violation of official secrecy, or administrative proceedings in relation to the protected disclosure.

4.2. Reinstatement as a remedy

101. According to Committing to Effective Whistleblower Protection (OECD, 2016), 22 OECD countries provide reinstatement following a successful reprisal claim. Reinstatements are also on the

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103 See UK Public Interest Disclosure Act (1998), Section 9.
105 Committing to Effective Whistleblower Protection (OECD, 2016), p. 86.
rise in whistleblower cases globally, at least as far as public sector employees are concerned. In practical terms the reporting person who has been suspended, dismissed, or transferred within the timeframe in which protections are applicable, is reinstated or re-engaged to the prior status following the declaration of the decision by which he/she has been suspended, dismissed, transferred as invalid by the court or the competent body that examines the reprisal claim. Section 11 of Ireland’s PDA stipulates that courts following a reprisal claim may order the employer to reinstate the reporting person i.e. to treat the employee in all respects as if the employee had not been dismissed, or if not, to re-engage the reporting person in another position on terms and conditions not less favourable than those which would have been applicable to the employee if the employee had not been dismissed. Korea’s ACRC has a range of powers available to sanction companies for whistleblower reprisals, including ordering reinstatement of whistleblowers who have been transferred, demoted or fired. In a recent high-profile whistleblower case, Hyundai accepted ACRC recommendations to reinstate a former general manager who was fired after reporting information about vehicle defects to the Korean government, which resulted in product recalls. Hyundai filed an administrative lawsuit disputing the validity of the initial termination, but withdrew the lawsuit in May 2017.

However, it is understood that reinstatement is not always available or the best remedy for the harm suffered by the reporting person. For example, the employer may be unwilling either to reinstate or to re-engage the reporting person despite the order of the court or the body that examined the reprisal claim. It may be also the case that reporting person or the court may deem inappropriate the reinstatement due to the hostile environment that the reporting person would face upon returning to his/her previous post. To this end, financial protection either in the form of compensation for past or future losses should be available.

**Legislative Proposal**

Greece could consider providing for reinstatement as a remedy for retaliatory or discriminatory measures against reporting persons, either by empowering the relevant agency receiving protected disclosures, or relevant courts, to order reinstatement in whistleblower discrimination cases. In cases where reinstatement is undesirable due to the hostile environment that the person faces after being reinstated, financial compensation for the past and future losses should be offered.

### 4.3. Financial protection

Compensation is covered by Section 11 of Ireland’s PDA and Section 4 and 8 of the UK PIDA, which confer to courts the discretion to determine a just and equitable remedy, including reinstatement, re-engagement and compensation for any loss resulting from the retaliation. Compensation should also consider damage from past and future loss of income, expenses spent for physical or psychological treatment, moving expenses caused by change of occupation, change of position, or transfer of workplace or secondment, litigation expenses required to restore the status quo, and, in cases of egregious employer retaliation, penalties. These damages are covered by Article 27

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106 Ibid., p. 88.


109 Korean authorities have adopted one of the most expansive approaches to financial protection. For example, the Anti-Corruption and Civil Rights Commission has signed Memoranda of Understanding (MoU) with the Korean Neuro-Psychiatric Association to provide whistleblowers with support for psychiatric treatment and with the Korean Bar Association to provide them with legal aid (e.g. litigation service, legal advice).
of Korea’s Act on the Protection of Public Interest Whistleblowers (2011) and should be also taken into account by the court or the body that examines that reprisal claim of the reporting person.

104. Financial protection should be viewed broadly by considering not only actual damages but also less tangible factors such as the time period that the reporting person will need to find another suitable job or future disadvantages that the reporting person may face due to his/her protected disclosure. This financial security may be ordered as an independent monetary reward as described above in Part III(9) or as an amount that secures the reporting person for the period between losing his/her job and finding another. Such remedies must be credible and substantial to deter employers from engaging in retaliatory conduct.

**Legislative Proposal**

Greece should provide for financial compensation for a broad range of past and future losses suffered by whistleblowers as a result of retaliatory or discriminatory measures.

### 4.4. Physical protection

105. Finally, and where relevant, the reporting person may be in need of protection of his/her personal and physical safety and in hopefully rare cases change of location or identity. These types of measures are usually included in witness protection laws and as described in Part I, this is also the case for Greece. The shortcomings of witness protection measures in the case of whistleblower reporting are also described above: whistleblowers and their families may need physical protection even if their report does not result in criminal proceedings and they are never called as witnesses. Even if they are called as witnesses, that protection may need to start before the criminal proceedings are instigated and continue after their conclusion. Some countries are now providing for physical and personal protection in their whistleblower laws. Article 13 of Korea’s Act on the Protection of Public Interest Whistleblowers (2011) for example envisages immediate measures that may be ordered by an administrative body and/or a prosecutor when there is no need to wait for a court judgment, and which may apply to both the reporting person and his/her relatives to thwart a serious danger that these persons have faced or are likely to face to their lives or physical integrity.

**Legislative Proposal**

Greece should consider affording whistleblowers similar physical protection to that provided to witnesses pursuant to Article 45B of the Code of Criminal Procedure. This protection should last as long as is necessary and regardless of whether criminal proceedings result from the protected disclosure.

### 5. Ensuring effective ongoing whistleblower protection

#### 5.1. International standards

106. The Council of Europe Whistleblower Protection Recommendation suggests that national authorities periodically assess the effectiveness of the national whistleblower protection framework (Principle 29). The OECD 2009 Anti-Bribery Recommendation requests member countries to undertake to periodically review their laws implementing the OECD Anti-bribery Convention and
their approach to enforcement in order to effectively combat international bribery (Recommendation V).

5.2. National approaches

107. Several countries evaluate the purpose, implementation and effectiveness of their whistleblower protection systems, a process which plays a vital role in the assessment of progress made and the sound implementation of whistleblower protection laws. Systematically collecting data and information is an effective means of evaluating the effectiveness of a whistleblowing system and adjusting to new challenges or expanding to new areas that did not appear problematic at the time of the enactment. To this end, several OECD countries have provisions regarding the review of the effectiveness, enforcement and impact of their whistleblower laws.

108. Ireland’s PDA\textsuperscript{110} stipulates that every public body that has a role in receiving protected disclosures and supervising their treatment must prepare and publish annually a report in relation to the number of protected disclosures made to the body, the action (if any) taken in response to those protected disclosures, and any other information relating to those enforcement and effectiveness of the PDA. In Japan the Whistleblower Protection Act (2004)\textsuperscript{111} requires the Government to publish periodic reports about the reporting system and within five years after the Act comes into force examine the state of its enforcement and take any necessary measures for improvement.

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Greece would benefit from including a review provision in its whistleblower protection legislation that requires the Government to regularly monitor and evaluate the effectiveness of the entire whistleblower system by systematically collecting and analysing relevant data and information. In the collection of data, Greece could gather information on i) the number and types of reports received; ii) the number of reports received by each body or agency; iii) the number of investigations or other proceedings initiated as a result of the report and the time taken to conduct the investigation; iv) information to generically identify the persons who conducted the investigation (e.g., human resources, internal auditors, internal compliance officer, managers, senior managers, general counsel’s office, external law firm, external independent auditor, etc.); v) the outcomes of investigations or other proceedings initiated as a result of the report; vi) whether the whistleblower was provided protection, and if so, the protective measures provided; vii) whether there were any sanctions imposed for retaliation or discrimination against the whistleblower as a result of the protected disclosure; viii) whether the organisation’s policies were changed as a result of the disclosure; ix) the scope, frequency and target audience of awareness-raising efforts to educate and inform public and private sectors and the general public; x) the time taken to process cases. The data collected should not be made public or be anonymised, for the very purposes of protecting reporting persons and respecting confidentiality and data privacy. Greece should consider the US SEC’s approach to publishing information on reports made to its Office of the Whistleblower or the Ireland’s approach which requires that all public bodies publish relevant data annually.\textsuperscript{112}

\textsuperscript{110} Part 5: Miscellaneous and Supplementary, Section 20.

\textsuperscript{111} Supplementary Article 2.

V. RESPONSIBLE AGENCIES FOR RECEIVING PROTECTED DISCLOSURES

109. Whistleblower protection legislation that encourages individuals to disclose evidence of wrongdoing and that provides credible sanctions against retaliation needs to be accompanied by appropriate modalities and systems that give life to this legislation and promote its proper implementation. Such a system should ensure not only enforcement but also wide dissemination among relevant stakeholders. For example, the system should be able to provide support to companies in establishing and running sound and effective internal reporting channels and guidance on how to handle complaints. Such a system should be also able to receive and investigate or refer complaints when the internal reporting channels are inexisten, ineffective or not a viable option and ensure effective protection for the whistleblower in case of threatened or actual reprisals or retaliation.

110. To highlight the essential elements of such a system, the present section will use three recent examples of central agencies that have been established or designated to implement national whistleblower protection laws with a proper monitoring and enforcement mechanism. Greece could consider these examples, in the context of its own institutional framework, to determine the optimal model for implementing its proposed whistleblower protection legislation.

1. Korea: Anti-Corruption & Civil Rights Commission

111. The Anti-Corruption & Civil Rights Commission (ACRC) of Korea was established as an independent statutory body in 2008 with the Act on Anti-corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission (ACRC Anti-Corruption Act). The ACRC Anti-Corruption Act deals with reporting and protection of reporters of acts of corruption occurred in the public sector. In 2011, the ACRC enacted the Act on the Protection of Public Interest Whistleblowers to stipulate provisions regarding reporting and protection of reporters of acts of corruption and violations of public interests committed in the private sector. The ACRC has not only broad powers with regard to the monitoring and enforcement of the Acts but also functions as the main reporting or complaints channel for whistleblowers. According to Article 55 of the ACRC Anti-Corruption Act and Article 6 of the Public Interest Whistleblower Protection Act, any person who becomes aware of an act of corruption may report it directly to the ACRC. There is no need therefore, to exhaust internal channels in advance, nor to report to any other public supervisory body.

112. The whistleblower protection Acts of Korea require that the ACRC treat protected disclosures confidentially and prohibits disclosure of the identity of reporting persons. Moreover, whistleblowers may request the ACRC to take protective measures if they or their relatives risk pressure or retaliation or have already suffered reprisals. The ACRC has the power not only to set in place a protective shield for the whistleblower by instructing the relevant authorities to take the necessary measures but also to offer reconciliation between the whistleblower and the reported person upon the request of the whistleblower.

113. After receiving the complaint, the ACRC may then transfer it to law enforcement authorities for further investigation, if necessary. This is done following an inquiry by the ACRC which needs to

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111 Act on Anti-Corruption and the Establishment and Operation of Anti-Corruption and Civil Rights Commission, Article 64; Act on the Protection of Public Interest Whistleblowers, Article 12.

112 Act on Anti-Corruption and the Establishment and Operation of Anti-Corruption and Civil Rights Commission, Articles 62-64; Act on the Protection of Public Interest Whistleblowers, Articles 17-22.

113 Act on the Protection of Public Interest Whistleblowers, Article 24. It has to be noted however, that the reconciliation concerns only the retaliation measures and not the offence for which the employer is investigated.
be completed within 60 days. The ACRC can also supplement the prosecutor’s investigation with information collected during the inquiry process and to a certain extent also directs the investigation in the sense that the ACRC may instruct further investigative acts if it deems that the investigation was inadequate. Finally, the ACRC has the responsibility of informing the whistleblower of the status in his/her complaint and can provide interim monetary relief or orders other protections set out in the law.

2. **Netherlands: Whistleblowers Authority Act**

114. The Dutch Whistleblowers Authority Act (2016) is one of the most recent examples of a monitoring mechanism developed entirely for private sector whistleblower reporting and protection. The Act requires all companies with more than 50 employees to set up an internal procedure and channel for reporting wrongdoings, along with available protections against reprisals. Pursuant to the Act, except in cases of emergency or when highest level management is implicated in the wrongdoing, whistleblowers must first submit the complaint via the internal channel designated for that purpose. It is therefore, primarily the company’s responsibility not only to have in place proper reporting mechanism but also to adequately investigate and address a concern about wrongdoing that has been reported internally.

115. The whistleblower may also report externally when the internal reporting was not dealt with within a reasonable period of time or when he/she disagrees with the manner in which the wrongdoing has been dealt with. In all these cases, the whistleblower may indeed report directly to external supervisory authorities and in the absence such authorities or in cases where these authorities do not have in place reporting mechanisms the whistleblower may submit his/her complaint to the Whistleblower Authority’s Investigation Department. The Investigation Department has the power to open an investigation into the concern and also examine the manner in which the employer has acted towards the whistleblower in response to the report.

116. The Authority is also equipped with an Advice Department. The Advice Department may provide information, advice and support to the whistleblower regarding the steps to be taken with respect to the concern about wrongdoing. This may also include referring the whistleblower to the relevant agencies or supervisory authorities in the case of an external report. Moreover, the Department may also advise the officers that are operating the internal reporting mechanism of a company on how to handle specific complaints. Finally, the Advice Department formulates and issues general recommendations on how internal reporting mechanisms should be structured and handle complaints for wrongdoings.

3. **New Zealand: Ombudsmen**

117. New Zealand’s PDA mandates Ombudsmen to provide information and guidance to potential or actual whistleblowers on the types of protected disclosures, modalities for reporting, roles of various authorities, and protections and remedies available. Ombudsmen can also request information on internal whistleblower reporting and protection procedures from public or private sector organisations and provide advice on compliance with the Act’s confidentiality requirements. Ombudsmen can receive protected disclosures and, with the consent of the whistleblower, either investigate if it is related to a public sector organisation, or refer the disclosure to a relevant authority. Pursuant to the Act, Ombudsmen may also publish information on their role in implementation of the Act in their annual reports. The role of Ombudsmen in New Zealand is governed by the Ombudsmen Act 1975.
Greece does not currently have a central system to receive reports from whistleblowers. Also, as explained in Part III(4) on “Defining reporting channels” Greek companies do not currently have the obligation to set up internal reporting channels. As a result, Greece lacks both a comprehensive legislative framework for protection, and a proper mechanism to monitor and enforce such legislation. This report proposes therefore, that Greece in addition to the enactment of a dedicated legislation for protected disclosures, consider which of its current agencies might be best placed to receive protected disclosures, or consider establishing an independent statutory agency (for example a Whistleblowers Commission).

Some efforts to streamline the general framework for reporting allegations of corruption have already taken place in Greece and a proposal in this respect is being prepared under Output 6 of the Greece-OECD Project: Technical Support on Anti-Corruption in Greece. More specifically, Article 54 of Law 4446/2016 introduced in Greece the Office of Complaints under the General Secretariat Against Corruption (GSAC) and amended Laws 4320/2015 and 4325/2015.

Although the Office is not yet functional and the specific procedures for its operation have yet to be defined, the Office could potentially house the Whistleblowers Commission. Taking into account the central role of GSAC in the fight against corruption in Greece and the safeguards that the deployment of a public prosecutor would provide to the Office, the Whistleblowers Commission would stand to benefit in terms of visibility and resources if placed under GSAC. However, this proposal is being made with two important caveats. First, if Greece’s future whistleblowers legislation covers a broader range of protected disclosures beyond corruption, then the Whistleblowers Commission would be more appropriate to be placed under a body with independent jurisdiction and specific powers to oversee the proposed whistleblower protection legislation. Second, due to the sensitive and often confidential issues, which the Whistleblowers Commission will be called to handle on a daily basis, it is questionable whether the Commission could be subordinate to a Minister. To this end, this report recommends that Greece explores the possibility of establishing the Whistleblowers Commission as an independent administrative authority following the examples of the Hellenic Data Protection Authority or the Greek Ombudsman. Creating an independent, dedicated Commission would perform the dual role of bringing visibility to the future whistleblower protection legislation and provide the necessary enforcement and monitoring mechanism for its success. Alternatively, Greece could explore whether the New Zealand model might be more cost and resource-effective, and empower Ombudsmen to oversee and implement the new whistleblower protection legislation (noting that this would nevertheless require substantial investment in ongoing and intensive training, along with likely additional human and financial resources).

The agency(ies) responsible for oversight of the new whistleblower protection legislation need to have certain minimum powers and functions to perform effectively their functions regarding the monitoring and enforcement of Greece’s future whistleblowers legislation. These functions include the receipt, assessment and evaluation of reports, the provision of advice to companies and employers in establishing internal reporting channels, and advising whistleblowers on how to report a wrongdoing, and the power to order and oversee protection for whistleblowers who suffer or may suffer reprisals to sanction those who inflict such reprisals.

First, it is suggested that the agency(ies) have the power to receive reports from any person who becomes aware of information tending to show a wrongdoing. However, given that Part III(4) on “Defining the official channels for reporting” recommends that all companies and employer operating in Greece with a certain number of employees must have in place internal reporting mechanisms, the present report suggests that the agency(ies) function only as a backup reporting mechanism. That does

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116 Amending Laws 4320/2015 and 4325/2015.
not mean that whistleblowers should be required to exhaust all internal options before reporting to the agency(ies). That would pose many difficulties for whistleblowers in Greece where internal reporting systems are still nascent and the majority of companies does not have in place such systems. It does mean, however, that where such internal reporting mechanisms exist and are functional, whistleblowers should be encouraged to use first these internal channels (this will have the added importance of increased private sector support for the proposed whistleblower protection legislation) unless internal reporting is deemed a tip-off or doing so may present an imminent threat to the reporting person.

Second, it is recommended that the agency(ies) have in place a comprehensive, confidential and standardised process for assessing and evaluating the reports. This demands not only a straightforward and clear operational framework that sets the course of action, and relevant timeframes, and in line with data protection legislation but also human resources with experience in handling reports for wrongdoing that provide the necessary confidentiality and independence safeguards to the process. Relevant investigative powers and experience will also be essential. Also given that the agency(ies) will be called to deal on a daily basis with sensitive issues that touch upon matters of criminal procedure and data protection, to name a few, the placement of a senior judicial officer within the agency(ies) and/or ability for the agency(ies) to refer such matters to a designated unit within the Public Prosecutors Office would be strongly recommended.

Third, with regard to sanctions for companies and employers, it is suggested that the agency(ies) would be in charge of referring reports to the competent law enforcement authorities in its own name following the initial assessment of the reports. That would help keep the whistleblower’s identity confidential and allow the agency(ies) to monitor closely the progress of the investigation of the report. The agency(ies) should be required to inform the reporting person on the progress of the report. The agency(ies) should also have the power to impose administrative sanctions against employers found to have retaliated against whistleblowers. Similarly, it is recommended that the agency(ies) be the responsible authority for ensuring that the whistleblower receives effective protection and have the power to take all necessary actions, including by providing interim relief.

Given that the process of setting up internal reporting channels can be sometimes complex and burdensome for companies, the agency(ies) should provide guidance on internal reporting and protection mechanisms. The “OECD Whistleblower Protection – Guidelines for Greek Companies” could serve as an excellent starting point for guidance to companies and therefore, the agency(ies) should disseminate them widely and update them regularly in the future. In addition, the agency(ies) could provide advice on an ad hoc basis following an individual request by a company or an employer that is in the process of setting up an internal reporting channel and protection procedure. The agency(ies) should be able to provide information, advice and support to whistleblowers regarding the steps to he/she should take with respect to his/her concern about a wrongdoing. Finally, the agency(ies) should publish annual or other periodic report of their activities and use the relevant data to analyse the trend how whistleblowing practice is evolving.