The Protection of Whistleblowers in Greece following the Introduction of Law-Nr. 4254/2014. Some Critical Remarks[1]

Professor Dr. Nestor Courakis
University of Nicosia, Cyprus

In April 2014, in compliance with various obligations undertaken by Greece (*inter alia*: art. 22 of the Criminal Law Convention on Corruption of the Council of Europe 1999, art. 9 of the Civil Law Convention of the Council of Europe 1999, and art. 33 of the United Nations Convention against Corruption 2003), a new legislation (Law-Nr. 4254/2014) was voted in Greece, which, inter alia, aimed at taking more efficient measures against corruption. Mainly, there has been a net-widening of the acts which are henceforth punishable in Greece as forms of corruption.

On the basis of this same legislation, steps were made towards encouraging persons who have knowledge about cases of corruption to disclose their information to the authorities. These informers can be divided into two categories: Those who are personally involved in acts of corruption, and those who have no such involvement.

As concerns the first category, the new legislation offers them the possibility, according to art. 263 B Penal Code, to have a favorable penal treatment, or even to remain unpunished (clemency measures), if they provide the authorities with all necessary information about various acts of bribery in both public and private sector.

On the other hand, in relation to the second category, the new legislation introduced a series of provisions in favor of the so-called whistleblowers, or, according to the Greek law, in favor of the "public interest witnesses". Moreover, Greek law identifies in its Explanatory Report of 28.3.2014 (p. 61) only whistle-blowers as "public interest witnesses" and therefore excludes from this status persons already involved in acts of corruption.

[1] Paper which was presented in Nicosia, within the frame of a Conference on Whistleblowing ("SpeakUp Conference"), organized by Transparency International Cyprus on 22.10.2015.

In my brief report, I intend to give a brief description of these new provisions and, on a parallel level, to make some critical comments on them.

One can distinguish these provisions in three separate units: (A) Those which protect whistleblowers against complaints lodged against them, as a result of their disclosures (art. 45 B of the Code of Penal Procedure); (B) Those which protect them from criminal attacks or threats against their life or from other similar acts of retaliation (art. 9 para 7 of the Anti-Terrorist Law-Nr. 2928/2001); and (C) Those which protect, more specifically, a civil servant from disciplinary measures to the detriment of his professional status and career (art. 26, 110 and 125 of the code for Civil Servants – Law-Nr. 3928/2007).

Let us now examine the new provisions in detail:

(A) The provision of art. 45 B CPP creates a frame of *protection for whistleblowers in connection with criminal prosecutions against them* because of their disclosures. This protection can be afforded to them if they have made their disclosures *in good faith* (no criminal protection for knowingly false disclosures: art 361 ff. Penal Code) and, furthermore, if they are proclaimed by all competent prosecutors as "public interest witnesses". The latter occurs if the following four prerequisites are cumulatively fulfilled: (a) the person discloses to the authorities information related to *only certain offences*, specified by the law: passive or active bribery of civil servants, of judges and of political officials (as, for example, members of Government) and, also, offences regarding trading in influence; (b) the *person is not personally involved* in these acts of corruption, *nor* (c) *aims at any personal benefit*, and (d) *contributes significantly to the revelation* and prosecution of these acts. It is noteworthy that, in principle, the law protects, under the a.m. conditions, every person and not only employees and workers, but also consultants, contractors, trainees/ interns, volunteers or even journalists and activists.

Opmerking [S1]:

Now, should a person be proclaimed as being a "public interest witness" and a complaint has been lodged against them for specific offences (perjury, false denunciation, calumniating defamation, violation of classified information or disclosure of personal data), then, there will be definitive abstinence from this person's criminal prosecution. The criterion for the decision of the competent prosecutors to proclaim a person as a "witness of

public interest" is the protection of public interest. Consequently, the competent prosecutors proclaim a person as such if they unanimously consider that the criminal prosecution against him is not necessary for the protection of the public interest. In addition, this status can be recalled, according to the law, at any time by the prosecutors.

Comments. It is obvious that this provision cannot adequately encourage persons to disclose criminal acts. In particular, the new legislation has, in my opinion, the following deficits:

(a) It has a *narrow field of implementation as far as concerns the offences.* It refers only to offences related to bribery committed by civil servants etc. and, therefore, it does not comprise neither acts of bribery in private sector, nor other acts of corruption in the wider sense (*lato sensu*), i.e. in the sense of abuse of power, such as gross mismanagement, gross waste or unauthorized use of funds, abuse of authority, conflict of interest, miscarriages of justice, risks to public health and safety and to the environment, cronyism and preferential treatment of individuals, cover ups of any of these.

(b) It restrains its object only to denunciations to the competent prosecutors. Hence, it *does not create intermediate stages of control and reporting mechanisms* before the involvement of the prosecutors, as, for example to establish, on a first level, internal controls in the public services, which could dissuade acts of bribery in these places. Further steps of this procedure could be to refer the case to a competent independent agency for the protection of the whistleblowers, then to the competent prosecutors or to law enforcement agencies, and finally, if the incident is of serious importance or urgency and the authorities have not timely responded, to give the case to the media, legal associations, trade unions etc. Besides, there are no provisions for other measures which could be taken in a public service to enhance the responsibility of the employees, such as ethics and compliance programs, information for employees on their rights to make protected disclosures, etc. On the contrary, there exist relevant regulations in the private sector, issued e.g. by the Hellenic Federation of Enterprises (SEV): Corporate Governance Code for Listed Companies.

(c) *The whistleblower's protection is uncertain.* The person who might disclose the information to the authorities cannot be sure, that they will be proclaimed as a "public interest witnesses", given that the criterion of public interest is indeed very vague and subjective and that, as a result, it is

not certain at all that the person in question will eventually enjoy the benefits of the status of a "public interest witness". On the contrary, they risk suffering measures of retaliation by the persons whom they have exposed, in case that such a status of witness is finally denied to them. But even if this status is approved, the informer is not totally protected from such measures, because their protection concerns penal prosecution and not claims for civil damages due e.g. to alleged slander (no complete waiver of liability for the whistleblower). Similarly, there is no specific protection for persons who simply decline to participate in corrupt, illegal or fraudulent acts, without however disclosing information on them to the authorities, nor for persons who disclosed information anonymously and who subsequently were identified and prosecuted (only civil servants' anonymity is safeguarded, but this occurs merely after they initially submit complaints with their real name –see *infra*), nor, finally, for persons whom employers mistakenly believe to be whistleblowers and consequently mistreat them.

(d) Furthermore, *the whistleblower has no positive reinforcements to make their disclosures*, such as the expectation of financial rewards (f. ex. to give to the informer a part of the fines levied or of the funds recovered by the State after the disclosures of this person –doctrine of *qui tam*), or even mere moral distinctions for their whistleblowing. These reinforcements are even more necessary, because in cases in which the professional career or -even more- the life or corporal integrity of a person are in jeopardy, nobody could easily disclose information against their own agency simply because they have a sense of duty or because a law's provision renders this disclosure obligatory (f.ex. in Greece, art. 40 of the Code of Penal Procedure: citizen's duty to report wrongdoing).

(e) There are *no additional safeguards* for both the witness and the State *for dealing with national security or state secrets-related disclosures* (f.ex. no internal monitoring).

(f) Furthermore, there are *no provisions for specific rights or safeguards for whistleblowers in court proceedings*, apart from certain general regulations concerning, *inter alia*, violations of classified information (art. 252 para 3 Penal Code), of professional secrecy (art. 371 penal Code) and of defamation, if the latter is not calumniating (art. 367 Penal Code). In virtue of these exceptional provisions relevant offences are considered as being non punishable if there is justified interest of informing the public or securing any similar legal interest.

(g) There are *no provisions to create an independent agency* which would have as a duty (aa) to provide legal or other advice on matters related to whistleblowing to any citizen who wishes it, (bb) to receive and record, in confidential and reliable way, complaints through telephone, fax, post, online portals or otherwise on various offences of corruption, but also in connection with any kind of retaliatory action taken against the whistleblower, (cc) to follow up the development of these complaints, in collaboration with competent bodies, (dd) to give relevant information to the persons who made the complaints or try to arrange the problem by mediation in minor cases. Such an agency could equally (ee) establish structured educational programs and other measures to change the people's derogatory labels that a whistleblower is a so-called "sneak" or "snitch", (ff) annually publish a detailed report on its activities (f.ex. giving information on the outcome of cases handled, penalties imposed, compensations afforded and funds recovered); the publication of such a report could help to promote necessary reforms connected with disclosures of the whistleblowers, esp. to correct legislative, policy or procedural inadequacies, and also to raise public awareness about the utility of whistleblowing as an instrument against corruption; it could also send a strong message to society that the protection of whistleblowers works in practice and that whistleblowers can play a positive role in disclosing cases which affect public and social interest; and finally (gg) to periodically review the effectiveness of the whistleblowing framework. The examples of the independent agencies against corruption which were created f.ex. in Hong Kong (Independent Commission Against Corruption) and in Singapore (Corrupt Practices Investigation Bureau), might provide inspiration to the western legislators about the ways and manners in which such an agency can function efficiently. Of course, for the time being, this mission of receiving and forwarding disclosures on matters of corruption is performed in Greece by agencies such as the Greek Ombudsman (Synigoros tou Politi), the General Inspector of Public Administration, the Police's Cyber Crime Center, and Transparency International Greece, but these agencies indeed have a more general competence (not specifically for Whistleblowing!) and, besides, they have overlapping responsibilities and low level of cooperation.

(B) The other new provision which aims at the protection of a whistleblower is included in art. 9 para 7 of the Antiterrorist Law (Nr. 2928/2001). It affords *protection from criminal attacks or threats* not only to those who have been proclaimed as "public interest witnesses" according to the procedure and the criteria mentioned above, but also to members of their family and to any other person who, according to the law, contributes significantly to the revelation of the above mentioned acts of corruption, i.e. bribery and trading in influence. The protection is the same as the one given to persons who reveal terrorist acts. Consequently, it *guarantees, mainly, the following services to the protected persons*:

-To have a properly trained police staff as a guard.

-To make a testimony before the judge by means of verbal and optical or only verbal transmission.

-Not to make reference in the report of the (real) name, the place of birth or of residence etc. of a person during their testimony before the judge.

-To change the personal information of a person's identity card.

-To transpose or remove a civil servant to another service for unspecified time.

However, during the hearing process in the court, the real name of a protected person can be revealed by decision of the court and, besides, if the identity details of the person are not revealed, their sole testimony is not sufficient for the conviction of the accused.

Comments: These provisions cannot be considered as being fairly satisfactory, although they are more efficient than the provisions which were mentioned before in relation to art. 45 CPP. The main problem is connected with the law's provision that the real name of a protected person can be revealed during the hearing process in the court. In such a case, the only alternative for this person, in order to avoid retaliatory acts, is to leave their country and to establish themselves abroad. Yet, the crucial question is how this person could live there without any revenue or other earnings, and why should a person undertake such a risk to inform authorities, for nothing. Of course things would be different if this person, as was mentioned above, could have a financial reward equivalent to a percentage of the money gained by the State after their disclosures. It is interesting here to note that in the USA, where the cost-and-benefit-analysis plays a

primordial role, a person named Bradley Birkefeld was awarded in 2012 with the huge amount of 104 million US dollars because he provided prosecutors with detailed information about the consultation services that a Swiss bank offered to rich American clients, thus enabling tax evasion (http://www.dailykos.com/story/2012/09/11/1130320/-BREAKING-UBS-Whistleblower-Gets-104M-for-Shattering-Swiss-Banking-Secrecy#).

(C) Concerning the modifications and amendments related to the disciplinary *protection of the civil servants against acts of retaliation in their service*, according to the Code for Civil Servants (art. 26 para 4, 110 para 6, and 125 para 4 of Law-Nr. 3528/2007), three measures are of particular interest:

(a) A civil servant who is proclaimed as a "public interest witness" according to the procedure and the criteria mentioned above, shall not be omitted from promotions, nor is submitted to disciplinary sanctions or to other similar treatment to their detriment, nor is dismissed, *nor suffers directly or indirectly from any other unfavorable treatment*, during the time which is necessary for the competent judges to investigate the case.

(b) Should a disciplinary prosecution be exercised against a civil servant who has given information to the authorities on cases of corruption, as described above, and who has contributed significantly in this way to the revelation and prosecution of these acts, *the disciplinary council has the burden to prove* that the disciplinary prosecution is not due to the efficient disclosures of this civil servant. Hence, the law establishes, in this case, a rebuttable presumption in favor of the civil servant who discloses information.

(c) Even when a civil servant is not proclaimed as a "public interest witness", his *anonymity is totally safeguarded* during a preliminary examination of acts of corruption as described above, provided that this person fulfills the prerequisites which can lead to the obtaining of such a status.

Comments: Also here, in spite of a certain effectiveness of these measures from the point of view of criminal policy, there are some loopholes in their cohesion. More precisely:

(a) The disciplinary *protection is offered* to the civil servant in their status of the "public interest witness", according to the law, *only for a definite time*, i.e. only during the time which is necessary for the investigations by the competent judges. Yet, what happens afterwards is something which is not

mentioned by the law. Therefore, the case of an unfavorable treatment or removal or even dismissal of the civil servant cannot be excluded.

(b) The protection is afforded *only if the civil servant continues to be considered a "public interest witness"*. Once again, if the competent prosecutors cease to recognize this person as such, then there is no protection for them.

(c) There is *no specific protection* nor reverse burden-of-proof *for employees or workers of the private sector* who make disclosures and are consequently dismissed or otherwise mistreated by their employer.

(d) There are *no provisions for prompt compensation* of any direct, indirect and future negative consequences (damages etc.) created by any reprisals suffered by the whistleblower due to their disclosures (f.ex. lost or expected income and social degradation), nor any specific penalties of civil, discipline or criminal nature for the employer.

(e) There is no explicit provision that the law's protection in favor of a whistleblower prevails over any *contrary agreements or regulations* agreed between employer and employee (f.ex. in case of a clause of confidentiality).

Conclusion: Greece made some first steps towards the protection of whistleblowers and this is an important evolution in the fight against corruption, because the acts related to this problem, as they involve two punishable persons acting in secrecy, may never otherwise be revealed, except if other (disputable) measures are implemented, such as hidden cameras or covert research.

However, these steps are rather timid, hesitant and legally incomplete, presenting obvious gaps. Besides, from the aspect of criminal policy, they concern only the criminal and disciplinary arsenal of the protection and do not achieve to establish a wider, comprehensive mechanism, in form of an independent agency, able to encourage people to give information on committed or about to be committed offences and to secure the protection and reward of these people, when they disclose offences. Of course, the situation would be totally different and the legislation by far more successful, if its framers had taken into consideration other successful Whistleblowing legislations (USA 2012 [WPEA] http://whistleblower.org/whistleblower-protection-enhancement-act-wpea, UK [PIDA] 1998/2003/20072013 http://www.pcaw.org.uk/guide-

to-pida , Romania 2004 http://east-legal.com/whistleblowing-legal-situation-in-romania/ , Slovenia 2010 http://east-legal.com/whistleblowing-legal-situation-in-slovenia/, Ireland [PDA] 2014 http://www.rte.ie/news/2014/0715/630799-whistleblowers-legislation/, Luxembourg 2011 http://www.wildgen.lu/publications/articles/whistleblowing-luxembourg-0 , etc.), and, as well, if they had studied carefully the pertinent Guidelines on Whistleblowing, which were created, *inter alia*, by the *Council of Europe* (Protection of Whistleblowers, Recommendation CM/Rec (2014)7 and Explanatory Memorandum, April 2014, plus previous Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe, both accessible in Internet), the *World Bank* (Summary of World Bank Group Integrity Compliance Guidelines, September 2010, chapter 9, accessible in Internet), *Transparency International* (http://www.transparency.org/whatwedo/publication/speak_up_empowering_citizens_against_corruption, Providing an Alternative to Silence: Towards Greater Protection and Support for Whistleblowers in the EU, esp. Country Reports Cyprus (November 2013) and Greece (April 2013), Transparency International, Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU (2013), all accessible in Internet), the *G-20* in their Anti-Corruption Action Plan, as it was prepared by the *OECD* (https://www.google.com/search?q=g20+anti+corruption+action+plan+protection+of+whistleblowers&ie=utf-8&oe=utf-8), etc. Yet, I am afraid, the framers of the new Greek legislation on Whistleblowing did not take these instruments properly into consideration, even though they mentioned most of them in their Explanatory Report of 28.3.2014, p. 60-61 (http://www.katraslaw.gr/ki/nomothesia/624--q-40462012-q) .