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**THE CIVIL SERVANT AND DISCLOSURE
OF INFORMATION IN THE PUBLIC INTEREST**

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1) About Transparency International

Transparency International is the global civil society organisation leading the fight against corruption. TI's mission is to create change towards a world free of corruption.

Transparency International is a global network including more than 90 locally established national chapters and chapters-in-information, fighting corruption in the national arena in a number of ways. They bring together relevant players from government, civil society, business and the media to promote transparency in elections, in public administration, in procurement and in business. TI's global network of chapters and contacts also use advocacy campaigns to lobby governments to implement anti-corruption reforms. The international secretariat is based in Berlin, Germany.

2) The benefit of whistleblowing

Whistleblowing is an important tool to prevent and detect corruption and other malpractice. By disclosing wrongdoing, whistleblowers can avert harm, protect human rights, help to save lives and safeguard the rule of law.

According to the definition of TI, whistleblowing is the disclosure of information about perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.¹ The ultimate goal of whistleblowing is to protect the public interest. It achieves this by informing people or organisations that are in a position to prevent harm, to investigate or to take action against those responsible for wrongdoing. Prominent whistleblowers have revealed the cover-up of SARS and other dangerous diseases and helped to avoid environmental and health hazards in the United States and elsewhere.

Data shows that occurrences of fraud in companies often come to light thanks to whistleblowers. Several recent studies found that whistleblowers detect internal problems more frequently than any other actor, including regulators, auditors and the media.²

The Financial Gains from Whistleblowing in the US

The US False Claims Act is considered one of the strongest and most effective whistleblowing laws in the world. It contains *qui tam* provisions, a mechanism that allows citizens with evidence of fraud against government contracts to sue, on behalf of the government, in order to recover the stolen funds.

In compensation for the risk and effort of filing a *qui tam* case, the whistleblower may be awarded a portion of the funds recovered, typically between 15 and 25 per cent.

According to the US Department of Justice Civil Fraud Division, the United States has recovered more than US\$ 21 billion since 1986 thanks to the False Claims Act. Studies estimate the fraud deterred by the *qui tam* provisions runs into the hundreds of billions of dollars.³

¹ This definition was developed in the context of a European project, based on existing definitions of Miceli/Near and others. For more information see

http://transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers/the_need_for_whistleblower_protection

² Association of Certified Fraud Examiners, 2009: Report to the Nations on occupational fraud and abuse, www.acfe.com/rtn/rtn-2010.pdf ; PriceWaterhouseCoopers: The Global Economic Crime Survey 2009, www.pwc.com/en_GX/gx/economic-crime-survey/pdf/global-economic-crime-survey-2009.pdf; KPMG, Profile of a Fraudster, Survey 2007, p.26 (Zurich, Switzerland: KPMG, 2007) [www.kpmg.co.uk/pubs/ProfileofaFraudsterSurvey\(web\).pdf](http://www.kpmg.co.uk/pubs/ProfileofaFraudsterSurvey(web).pdf).

³ US Department of Justice, 'Justice Department Recovers \$ 2.4 Billion in False Claims Cases in Fiscal Year 2009; More than \$ 24 Billion Since 1986', Press Release, 19 November 2009.

Protecting one's right to come forth with wrongdoings is closely related to protecting one's freedom of expression and conscience. It also is based on the principles of transparency and accountability.

3) Needed, but insufficient: legal protection of whistleblowers

Individuals who learn about corruption, fraud or mismanagement in organisations have a difficult choice to make. By reporting experiences or suspicions of wrongdoing they often expose themselves to high personal risk. Rather than being heard and praised for their courage, they may be ostracized by former friends and colleagues. They may face workplace reprisal or dismissal, their employer may sue (or threaten to sue) them for breach of confidentiality or libel, and they may be subject to criminal sanctions. They may even be subject to threats or physical harm. In many instances, in spite of their best efforts, they face indifference or mistrust, and their reports are not properly investigated.

International and regional conventions recognise the value of whistleblowing and the need to protect whistleblowers against retaliation: Article 33 of the United Nations Convention against Corruption establishes that „*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*”⁴

The Council of Europe (CoE) Civil Law Convention on Corruption establishes in Article 9 that “*each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.*”⁵ The CoE Criminal Law Convention provides for similar mechanisms.

These recommendations and provisions are in stark contrast with the existing legal provisions and frameworks in European countries. A study carried out by Transparency International in 2009, assessing whistleblowing policies and practice in ten European countries,⁶ found that related legislation is generally fragmented and leaves whistleblowers poorly protected. Where protection mechanisms exist, they are often weakly enforced. With the exception of Romania, none of the countries assessed disposed of a comprehensive legislative framework.

The act of reporting may be superseded by other laws which prohibit the release of information, and in many countries, libel and defamation regulations deter whistleblowers from making disclosures. While there is a legal duty to disclose corruption, fraud and other criminal acts, insufficient protection, and the absence of adequate follow-up mechanisms often create a dilemma for the individual who suspects wrongdoing. Where there are protection mechanisms, these are often drawn from labour codes. However, relying on questions of national labour laws means that only formal workers have some form of recourse. Consultants, contractors, third parties, suppliers and other individuals are typically

www.justice.gov/opa/pr/2009/November/09-civ-1253.html; Tax Payers against Fraud Education Fund, Website, Accessed on 1 September 2010. www.taf.org/whyfca.htm

⁴ http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf

⁵ <http://conventions.coe.int/treaty/en/Treaties/Html/174.htm>

⁶ Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia

outside the law. In addition, most existing legal provisions are inadequate in terms of outlining processes, establishing appropriate channels for disclosure, enforcing protection and setting out follow-up procedures for disclosure. They also fail to ensure effective sanctioning of reported wrongdoing.

Despite all evidence about the benefit of whistleblowing and the commitments to implement related legislation, there is a widespread lack of political will to develop and enforce related legal frameworks. The British Public Interest Disclosure Act (PIDA) was developed in 2000 in response to several disasters that could have been avoided - but staff who had been aware of the danger had not felt able to raise the matter internally or to pursue it if their concern was not taken seriously. At the time, staff felt it neither right, safe nor acceptable to challenge malpractice or misconduct in their workplace. This has changed significantly thanks to an effective law and the continuous work of a British charity, Public Concern at Work, which has been promoting whistleblowing for more than a decade. Even though not perfect, the British PIDA has certainly set the benchmark for effective whistleblowing legislation.⁷

4) Additional obstacles faced by whistleblowers

In addition to the absence or weakness of legal protection, cultural and political factors pose important obstacles to whistleblowing. Across the ten countries assessed in TI's research, a predominance of **negative connotations surrounding whistleblowers** was detected. In the countries assessed, most of which are located in Central and Eastern Europe and carry the legacy of the former Eastern bloc's secret police networks, the term 'whistleblower' is often associated with being an informant, a traitor, spy or a snitch.

Another key factor deterring employees from speaking out is the **lack of adequate and effective reporting channels**. Even where internal reporting mechanisms are available, there is little information about their procedures, effectiveness and results. Where the related codes and provisions are known, the reporting mechanisms tend to be limited to internal channels and they often fail to stipulate the body or office that is to receive the reports. When disclosures are reported anonymously, they are rarely pursued.

Another deterring factor is **lack of trust** by employees that their disclosures will be investigated and pursued adequately. Unless the leadership of a public body or company is truly supportive of whistleblowing, there is a risk that reports are not properly followed up.

Too many whistleblowers have faced severe **reprisals for disclosing malpractice**. As a result of speaking out, they may lose their jobs, dampen their career prospects, and even put their own lives at risk. To encourage the disclosure of wrongdoing, there is a need for fair compensation of the whistleblower: They should be compensated for any retaliation they faced, reinstated into their jobs or, if this is not possible, receive a fair compensation for any damage the disclosure may have caused to their career. But the reality looks different: TI's research found that policies regarding compensation for retaliation are mostly limited to compensation in cases of dismissal.

Very few countries have included rewards for the disclosure of wrongdoing into their legislation. In countries with small populations – such as Estonia, Latvia and Lithuania – the close-knit nature of communities can pose another significant challenge for whistleblowing mechanisms, particularly in terms of encouraging disclosures and assuring the confidentiality of whistleblowers who come forward.

⁷ For more information see <http://www.pcaw.co.uk>

Finally, across all ten countries assessed in TI's research, there is no systemic data collection on the number of whistleblowing disclosures or the proportion of cases that result in legal action. Owing to the lack of data, it is impossible to assess the public benefit of whistleblowing, or the damage to the public interest when wrongdoing is not disclosed.

5) Recommendations

Legal protection

Ideally, there should be a single, comprehensive legal framework for whistleblower protection. Such a framework should include the private and public sectors and allow for internal and external reporting. It should have clear and effective reporting and follow-up procedures that ensure independent review and appeal mechanisms, as well as adequate compensation for reprisals suffered by the whistleblower. The enforcement of this legislation is essential.

Strong and transparent policies in organisations

Employer leadership is required to establish efficient internal reporting channels and follow-up mechanisms that ensure adequate and independent follow-up of disclosures. Such mechanisms are an effective means of detecting fraud, corruption and gross mismanagement inside an organisation and pave the way for whistleblowers to report internally.

The need for a cultural shift

Given the negative connotations surrounding whistleblowing and the lack of political will to enforce existing provisions of UNCAC and the Council of Europe Civil and Criminal Law Conventions on Corruption, there is a need to raise awareness about the critical role whistleblowers can play in detecting wrongdoing. An educational process to de-stigmatise whistleblowing is essential so that citizens understand the value of disclosing wrongdoing and how this benefits the public good.