Strasbourg,12 July 2011

CDL-UDT(2011)015
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UNIDEM
CAMPUS SEMINAR

INFORMATION, (SOCIAL) MEDIA AND THE CIVIL SERVICE

Council of the Regione Friuli Venezia Giulia
Sala De Rinaldini
Piazza Oberdan 5
Trieste, Italy

2 – 5 May 2011

EAST-EUROPEAN PRACTICE IN IMPLEMENTING WHISTLE-BLOWERS' PROTECTION PUBLIC POLICIES - ROMANIA'S CASE -

by
Mr Victor Alistar
(Executive Director, Transparency International, Romania)

Introduction

The term whistleblower[1] defines a person who exposes wrongdoing within an organization. As far as anticorruption policy is concerned, whistleblowing is extremely relevant for public and private organizations alike, since both face the risk of things going wrong or unknowingly harbouring corrupt individuals. And it is insiders - people who work in or with the respective organization – that are best positioned to observe wrongdoing and signalize it. However, these people also face sizeable risks of retaliation from those whom they expose, a fact which makes the protection of whistleblowers a must in any anticorruption strategy.

The importance of whistleblowing in the public sector is widely acknowledged at the international level and established as best practice in Europe. The *Council of Europe Criminal Law Convention against Corruption*, under Article 22 ("Protection of collaborators of justice and witnesses") and the *Council of Europe Civil Law Convention against Corruption*, under Article 9 ("Protection of employees") both require the existence of protection measures for officials who report acts of corruption in good faith. Moreover, the Council of Europe's Committee of Ministers *Recommendation No. R (2000) 10 on codes of conduct for public officials* states under Article 12 "Reporting" the obligation of public officials to "report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment" and the corresponding obligation of public bodies to protect officials making a such a public disclosure in good faith and on reasonable grounds. At the international level, the *United Nations Convention against Corruption*, under Article 8 "Codes of conduct for public officials" requires the establishment of mechanisms to facilitate and protect reporting by public officials.

In Romania whistleblower protection was introduced in 2004 through *Law no. 571/2004 concerning the protection of personnel from public authorities, public institutions and from other establishments who signalize legal infractions*. The passing of the law in December 2004 did not encounter strong opposition from public or private actors. However, nearly four years after its adoption one finds widespread lack of knowledge or even suspicion among its beneficiaries, but also several ground-breaking cases of successful whistleblowers. Nonetheless, all things considered, the law has yet to deliver on the generous promises which fuelled consensus at the moment of its adoption.

The purpose of this paper is to analyse the reasons behind the successful passing of whistleblower protection in Romania, but also the factors leading to its mixed implementation record. In doing so, the context surrounding the adoption of *Law no. 571/2004* has been explored with a view to identifying the principal policy actors involved and their respective motivations, as well as the dynamics of agenda setting and negotiation processes. To account for the progress in implementation, the process by which regulations of national coverage contained by *Law no. 571/2004* were translated and diffused inside public organizations (thus reaching their beneficiaries) and the linkages established to other anticorruption instruments were considered in particular. Equally important, the paper gives an account of Transparency International Romania's[2] advocacy strategy on this issue, in order to provide an example of effective non-governmental involvement in the policy process. Illustrating the manner in which the same key anticorruption instrument is met with enthusiasm as well as resistance, the Romanian experience represents a source of relevant lessons for other transition countries struggling with corruption.

[1] Originating from the expression *to blow the whistle (on)* [Slang] = 1. to report or inform on 2. to cause to stop; call a halt to (according to Agnes, Michael (editor in chief).1999. *Webster's New World College Dictionary*, fourth edition, New York: Macmillan).

[2] Henceforth referred to as TI Romania.

Conceptual framework

In what follows we analyse whistleblower protection in Romania with reference to each of the five policy stages identified by Jann and Wegrich (2005). On the one hand, the paper presents the policy development and the relevant contextual factors, which influenced its evolution. On the other hand, it puts these elements into perspective, by illustrating the non-governmental response through a discussion of TI Romania's advocacy strategies and subsequent actions.

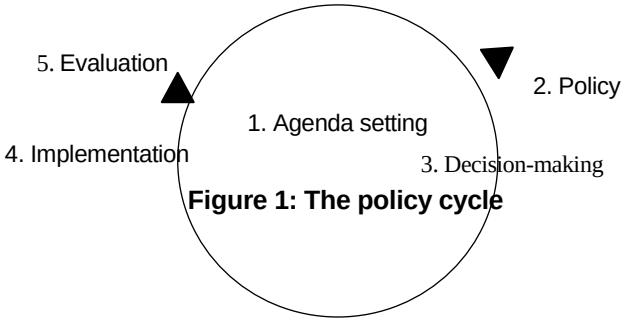

Figure 1: The policy cycle

Stage 1: Agenda setting

Whistleblower protection became an issue on the governmental agenda in the context of widespread popular discontent with corruption. In 2004 Romania's score on the *Corruption Perception Index*[3] was of 2.9 on a scale of 0 to 10 (where 0 means "completely corrupt" and 10 - "completely clean"), indicating the existence of systemic corruption in the country. This score is supported by domestic public opinion polls: a survey commissioned by Transparency International Romania[4] in 2004 concluded that most Romanians perceive corruption as being widespread in the society – 61% believed that most public sector employees are corrupt, 52% considered bribery as a common part of their daily lives and 80% declared that they knew at least one person who had paid a bribe. At the same time, social support for corruption in Romania was very low, with most respondents considering that corruption is never justified. The massive popular rejection of corruption is perhaps more visible in comparison to other European countries (in a ranking of 32 countries, Romania is placed in the 7th top position). At the same time, popular dissatisfaction with governmental performance in fighting corruption was extremely high, with 77% being expressing dissatisfaction on the matter[5].

However strong, popular rejection of corruption and demand for effective counter-measures should not be considered by itself a decisive factor in the introduction of whistleblower protection. Rather, this state of affairs has gained key importance in the context of upcoming general elections[6], where (anti)corruption proved to be a huge stake and a significant vote gainer. In this regard, it is illustrative that in 2004 87% of voters listed determination in the fight against corruption as the most important quality of the future president[7].

---

[3]Transparency International's *Corruption Perception Index (CPI)* is a composite index drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. The CPI ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians.

[4] Voicu, Bogdan, Mădălina Voicu, Cristina Băjenaru, and Claudia Petrescu. 2004*. Bribery in Romania. What Romanians say and think about petty corruption [Şpaga la români. Ce spun şi ce cred românii despre corupția mică]*. Bucharest: Centre for Urban and Regional Sociology CURS.

[5] Open Society Foundation Romania. 2004. *The Public Opinion Barometer [Baromerul Opiniei Publice]*. Bucharest: The Gallup Organization Romania.

[6] Local elections were held in June 2004, while general elections took place in November 2004.

[7] According to *The Public Opinion Barometer* 2004.

A number of international actors pressing the Romanian government for a more effective anticorruption policy, with visible and convincing results, backed the domestic mood. The most vocal and important of these was by far the European Union. After the breakdown of communism in 1989, Romania set as a primary objective of its foreign policy integration into the European Union. It officially applied for membership in 1995 and started accession negotiations in 2000; by 2005, all 31 negotiation chapters had been closed and effective membership commenced on January 1st 2007. Throughout this period, the European Union has been extremely vocal in requiring Romania effective action towards the containment of widespread corruption. In every *Regular Report on Romania's Progress towards Accession* since 1998 to 2004 corruption is singled out as a "widespread and systemic problem", undermining the legal system, leading to loss of confidence in public institutions and weakening the economy. Despite acknowledging the gradual development of a rather comprehensive legal framework, the *Reports* remained highly critical of the implementation potential displayed by newly created institutional structures in charge of the fight against corruption. As shown by the Government's *Head Note* to the draft law[8], but also during debates in the Parliament[9], the introduction of whistleblower protection was, like many other anticorruption measures, closely connected to Romania's calendar of accession to the European Union – more precisely, the closing of the "Justice and Home Affairs" negotiation chapter.

European pressure was supported by other international factors. By 2004, Romania had already ratified of at least two international anticorruption conventions, which provided specifically for the protection of public sector employees who report illegalities at their workplace, namely the *United Nations Convention against Corruption* (Article 8.4) and *Council of Europe's Civil Law Convention against Corruption* (Article 9). While the former requires merely the establishment of "measures and systems to facilitate reporting", the latter goes a step forward and explicitly provides for "appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion". The ratification of these conventions in November 2004 and April 2002 respectively obliged Romanian authorities to operate a harmonization of the internal legislation. The introduction of whistleblower protection fell squarely within the scope of this commitment.
Beyond the contextual factors, the introduction of whistleblower protection responded to a number of gaps in Romania's anticorruption policy framework in force at the time. In 2004 the legal and institutional framework did not allow public sector employees to signalize breaches of the law at their workplace without significant retaliation risks. Limited safeguards were available in the form of witness protection measures (introduced by *Law no. 682/2002*), applicable nonetheless to judicial proceedings only. The introduction of whistleblower protection would compensate for this shortcoming, by adapting and extending the mechanism to the everyday workings of public administration bodies, thus becoming a key element in the prevention of corruption. More specifically, the instrument would respond to the need to shield public employees who refuse to execute illegal orders (although refusal was regulated by previous civil service legislation[10], in practice opposition often resulted in elimination from the public system). Added to this, the draft law prescribed for a multitude of receptors of public interest disclosures, therefore doubling the internal channels of complaint (i.e.: disciplinary commissions, hierarchical superiors and ultimately the prosecutor's office) with more responsive and effective exterior ones (civil society organizations, mass media etc.). Whistleblower protection would also shield the professional reputation of public sector employees, by allowing honest individuals to make a stand against corrupt fellow workers. Finally, whistleblower protection would facilitate a brake with a tradition of silence and complicity in the Romanian public sector.

[8] http://www.cdep.ro/proiecte/2004/600/50/1/em651.pdf

[9] Transcripts available online at http://www.cdep.ro/pls/steno/steno.stenograma?ids=5768&idm=15 and

[10] According to *Law no. 188/1999 on the Statute of Civil Servants* refusing the accomplishment of a work-related task was punishable as disciplinary misconduct; the aggrieved person was allowed to file an administrative action for reversing the sanction.

The context outlined above illustrates a rather fortunate complex of factors, which aided the introduction of whistleblower protection on the governmental agenda and supported a positive outcome of the public decision-making processes. The combination of internal and foreign pressures shaped the policy problem as one of non-conformity to international standards, but also as a political opportunity to boost the Government's anticorruption credibility in the eve of national elections. Moreover, it created a sense of urgency among decision-makers, which ensured rapidity and smoothened conflicts in the policy formulation and decision-making stages.

Under these circumstances, the window of opportunity for non-governmental advocacy was extremely favourable. Transparency International Romania used it to strike a memorandum of cooperation with the Romanian Government regarding a common platform for the fight against corruption. Supported by this formal agreement, a team of legal and policy experts in TI Romania worked to identify and prioritize the principal weaknesses in the Romanian national integrity system, which were thereafter addressed through a package of draft laws presented to decision-makers. *Law no. 571/2004* was part of this package, together with other six proposals:

- the ratification of the *United Nations Convention against Corruption*, which had the responsible public structures conduct an impact analysis and design an implementation plan and associated calendar (became *Law no. 365/2004*)
- the enlargement of the sphere of offences punishable as corruption crimes to cover all forms of abuse in office for private benefits (became *Law no. 521/2004*)
- the extension of the provisions of the *Code of Conduct for Civil Servants (Law no. 7/2004)* to other categories of state employees, thus creating a uniform ethics regime in the public sector (became *Law no 477/2004*)
- the enhancement of transparency and accountability in the activity of prosecutors by instituting an obligation to transmit to all interested parties the decisions for commencement, suspension or non-commencement of criminal pursuit (became *Law no. 480/2004*)
- the establishment of a specialized agency to control officials' wealth and sanction conflicts of interest and incompatibilities, together with the improvement of the legal definition of conflict of interest, the establishment of a unitary regime of incompatibilities in the public sector and the introduction of a more detailed format for interest and wealth declarations (TI Romania's proposals were to a good extent materialized by *Governmental Ordinance no. 14/2005*, which introduced a new format for wealth declarations, and through *Law no. 144/2007*, which established the National Integrity Agency).

Targeted specifically at bringing the Romanian legislative and institutional framework closer to international standards and requirements, the technical expertise provided by TI Romania matched the Government's needs and proved to be a a rewarding advocacy strategy, which allowed for significant improvements to the Romanian anticorruption legal framework.

Stage 2: Policy formulation

The introduction of whistleblower protection coincided with the implementation of Romania's first national anticorruption strategy of the post-communist period[11], whose principal purpose and merit was to lay the building blocks of an anticorruption legislative and institutional infrastructure. As Freedom House (2005:160) concludes in its assessment of the strategy, the period 2001-2004 has brought "an impressive arsenal of legal instruments of transparency, accountability and anticorruption in Romania". Some of the most important are: the creation of the National Anticorruption Prosecutor's Office in 2002[12]; the introduction of wealth and interest

[11] The "National Program for the Prevention of Corruption" (henceforth referred to as the National Program) and the adjacent "National Action Plan against Corruption", covering the period 2001-2004. The National Program was updated in December 2002 by a set of measures aimed at accelerating its implementation ("Combating Corruption in Romania. Measures for accelerating the implementation on the national strategy").

[12] *Emergency Ordinance no. 43/2002 on the National Anticorruption Prosecutor's Office*.

declarations for public officials and the regulation of conflict of interest and incompatibilities[13]; the introduction of codes of conduct for several categories of public sector employees[14]; the regulation of public procurement[15]; the introduction of legislation ensuring access to information[16] and the transparency of decision-making processes in public administration[17]. The legislative overflow which characterized anticorruption reform in Romania between 2001 and 2004 facilitated the acceptance and eventual adoption by decision-makers of yet another draft law, focusing on the protection of whistleblowers.

Added to this, whistleblower protection was entirely congruent with the objectives of the National Program, despite the fact that the measure was never explicitly stated in governmental programmatic documents. The field of public administration had been repeatedly identified as highly vulnerable to corruption, and, connected to this concern, civil service reform was constantly prioritised in the government's anticorruption efforts. In this regard, it is important to point out several lines of action established by the National Program and reiterated or further developed by the 2002 supplementary measures: enhancing administrative efficiency and clarity through a reorganization of the civil service system; de-politicising the administrative apparatus by establishing mandatory methodologies for competitive personnel recruitment and evaluation, and setting up internal disciplinary commissions and the so-called "parity commissions"[18]; and, finally, introducing, monitoring and enforcing codes of conduct for public sector employees. By the end of 2004 most of these measures, which contextualize and support whistleblower protection, had already been adopted and their implementation was well underway.

The draft law on whistleblower protection was formulated to respond to the gaps in the anticorruption policy framework, while blending with reform measures already implemented in the field of public administration. Thus, the protection measures have national coverage and addresses civil servants and contractual employees working in virtually all public sector entities. The draft instituted a sound protection regime for public sector employees and also contained several strong provisions which discourage abuse of the mechanism.

The broad inclusive scope of the law is immediately visible in its generous definitions. Thus, Article 3 defines a pubic interest disclosure as "the disclosure made in good faith with regard to any action which involves a breach of the law, of the professional deontology or of the principles of good governance, efficiency, effectiveness, economy and transparency". The reference to general principles is especially salient, as it ensures that the law indiscriminately covers grave criminal offences as well as contraventions and disciplinary misconduct. The fact that the whistleblower is defined by reference to the definition of public interest disclosure[19] and not

[13] *Law no. 161/2003 on measures to ensure transparency in public positions, in the private sector, and on prevention and punishment of corruption* (the so-called *Anticorruption Package*)

[14] *Law no 7/2004 on the Code of Conduct for Civil Servants* and *Law no. 477/2004 on the Code of conduct for contractual employees in public institutions and authorities*.

[15] *Emergency Ordinance no. 60/2001 on public procurement*.

[16] *Law no. 544/2001 on free access to information of public interest*.

[17] *Law no. 52/2003 on the transparency of decision-making in public administration*.

[18] The disciplinary commissions are internal bodies established in each public agency, tasked with investigating disciplinary misconduct and establishing the corresponding penalties. The "parity commissions" are internal bodies as well, which review the implementation of accords between civil servants' labour unions and heads of institutions, and participate with a consultative role in the negotiation of such accords. Both institutions have been established by *Law no. 188/199 on the Statute of Civil Servants* and regulated in detailed by *Governmental Decision no. 1210/2003 on the organization and functioning of disciplinary commissions and parity commissions in public authorities and institutions*.

[19] "A whistleblower is the person who makes a public interest disclosure in accordance to letter (a) and is positioned in one of the public authorities, public institutions, or other budgetary units provided for by Article 2" (Law no. 571/2004, Article 3 (b)).

vice-versa also ensures maximum law coverage.

Added to the encompassing definitions, the law has extensive coverage of illegalities which may be signalized by a public interest disclosure (as enumerated in Article 5): corruption and fraud offences, breach of legal provisions on conflict of interest and incompatibilities, preferential and discriminatory practices, abuse, incompetence or negligence in office, breach of the legislation governing access to information and transparency in public decision-making, fraudulent or deficient administration of public assets etc. Article 5 should not however be interpreted as exhaustive - the principles which govern the law, listed under Article 4 (especially the principle of legality, the principle of the supremacy of public interest, the principle of good governance and the principle of proper conduct) provide coverage for other types of illegalities not nominated specifically in the legal text.

The Romanian whistleblower protection law is active on both the administrative and judicial tires, thus guarding against reprisals in the form of both disciplinary sanctions and judicial verdicts. If undergoing disciplinary investigations as a result of blowing the whistle, the employee is assumed to be of good faith, until proven otherwise, which effectively means that the burden of proof for demonstrating ill faith lies with the investigators. Also, at the request of the whistleblower under disciplinary inquiry, the disciplinary commission or any other similar body is obliged to invite the media and a representative of the whistleblower's trade union or professional association to its sessions. The sessions are public and should be announced at least three working days before they are convened. Otherwise, the report or the disciplinary sanction is null. Added to this, when the reported subject is a hierarchic superior of the whistleblower, or is entitled to supervise, control or assess him/her, the disciplinary commission or similar body must assure the whistleblower's protection by concealing his/her identity. The provisions of *Law 682/2002 regarding the protection of witnesses* automatically apply to the whistleblowers in public interest. Plus, in case of labour or working relations litigations, the court can repeal the disciplinary or administrative sanction given to a whistleblower, if that sanction was decided following the reporting of breaches of the law and in good faith. Finally, the court must compare the extent of the sanction passed against a whistleblower with other sanctions passed in similar cases within the same authority, public institution or budgetary unit, in order to avoid future and indirect sanctions against whistleblowers.

Added to the two-tier protection approach, the law shields employees by taking precedence in its application over any contrary deontological or professional norms (likely to be contained by general or sector-specific codes of conduct, the Labour Code – *Law no. 53/2003*, or the Civil Service Charter - *Law no. 188/ 1999*).

A commonly voiced concern in connection to whistleblower protection is the danger of abuse by malicious individuals seeking to denigrate their fellow colleagues or the public institution in its entirety (for example, Kinsella 2005). The Romanian law safeguards against the danger of high-jacking by conditioning the receipt of whistleblower protection on the existence of good faith. The fact that the good faith is presumed does not render the whistleblower unaccountable – in accordance to the principle of responsibility (Article 4 (c)), any person making a public interest disclosure is required to uphold it with concrete data or clues he/she may have, the lack of which overthrows the presumption of good faith. On the other hand, in accordance to Romania's Criminal Code, the submission of false evidence is punishable by prison from 6 months to 3 years.

Stage 3: Decision-making

The draft law presented by Transparency International Romania to the representatives of the Romanian Government in June 2004 was adopted by the Parliament on November 2004 with little if any changes to the original text. Key to this achievement was the political homogeneity within the Government and the Parliament, both of which were controlled by the Social

Democratic Party. This power configuration was decisive in structuring TI Romania's advocacy efforts, which targeted primarily the Executive as the key actor in the decision-making process. The non-governmental experts engaged in a sustained direct dialogue with representatives in the Government, thus ensuring a firm consensus of the parties on the final text eventually sent for adoption in the Parliament. It should also be noted that the requirement of legislative harmonization to international anticorruption conventions left little room for bargaining on the draft legal text.
All of these factors have significantly shortened the period for negotiation between decision-makers and ensured that the law suffered minimal modifications during parliamentary debates. Plenary debates in both the Chamber of Deputies and the Senate were marked by almost no divergence of opinions, which was clearly reflected in the final vote – the law was adopted with 211 votes for and 3 against by the Chamber of Deputies and 78 for and 1 against in the Senate[20].

Stage 4: Implementation

In the case of whistleblower protection policies successful implementation is very much dependent of the beneficiaries knowing and correctly understanding the measure. Blowing the whistle is essentially an individual choice, which by no means can be coerced by legislation, but merely incentivised through the institution of proper safeguards against retaliation. It is therefore an imperative prerequisite that policies in this field contain a strong awareness-raising component. *Law no. 571/2004* provides for this appropriately – according to Article 11, each public entity has an obligation to harmonize their *Interior Order Regulations* to the provisions of the law. Unfortunately, the complete lack of penalties for failure to comply with this measure has severely impeded the implementation of the law. A recent research report[21] focusing on the state of integrity in Romanian local governments shows that most public entities at the local level have not harmonized their internal regulations to cover issues of whistleblower protection, despite the fact that *Law no. 571/2004* – and, implicitly, the requirement for harmonization - has now been in force for almost four years. Moreover, interviews with public employees have indicated widespread ignorance on the provisions of the law, suspicion and the recurrence of preconceived ideas. Apart from lack of sanctions, large-scale unawareness can also be explained by the absence of government-sponsored campaigns to familiarize public sector employees with the provisions of the law and the specific mechanisms of protection.

Implementation of *Law no. 571/2004* was additionally hampered by the lack of an institutional structure to coordinate the process. Being closely connected to the area of ethics and conduct, the most likely institutional candidate for this function was the National Agency for Civil Servants[22]. According to *Law no. 7/2004 on the Code of Conduct for Civil Servants*, NACS is tasked with monitoring implementation and conformity to the *Code* in public institutions, developing studies on this subject and collaborating with NGOs whose mission is to protect citizens' legitimate interests in relation to civil servants. NACS issues a yearly report on the management of the civil service corps, which contains a distinct section on compliance with conduct standards and disciplinary sanctions incurred for failure to do so[23]. More importantly, NACS is empowered to investigate breaches of the *Code of Conduct* in public institutions (at its own initiative or at the request of an aggrieved person) and to recommend solutions, including the application of disciplinary sanctions. NACS's attributions of investigating and reporting on ethical breaches could have easily been extended to cover the area of whistleblower protection

[20] As shown in the transcripts of the parliamentary debates in the Chamber of Deputies and in the Senate.

[21] Stan, Valerian, Adrian Sorescu, Andreea Nastase and Gabriel Moinescu. 2007. *The Integrity of Local Public Administration [Integritatea administrației publice locale]*. Bucharest: Didactic and Pedagogic Press.

[22] Henceforth referred to as NACS.

[23] The reports are issued on the basis of mandatory reports received form public institutions around the country. They are available at http://www.anfp-map.ro/strategii_rapoarte_studii.php?sectiune=Rapoarte&view=23.

– unfortunately *Law no. 571/2004* does not include such a provision in its text and the institution was reluctant to supplement the deficiency through its own subsequent regulations[24].
Implementation of whistleblower-protection measures at agency level is also weak. Little if any on-the-job training has been delivered to cover this issue with employees. Moreover, until recently there was no ethical guidance available at agency level in the Romanian public system. The situation changed with *Law no. 50/2007,* which introduced an obligation for all public entities employing civil servants to appoint a so-called "conduct councillor", which would provide assistance and advice on conduct norms, would monitor implementation of the *Code of Conduct* and report periodically on the level of compliance. The existence of a conduct councillor can definitely improve ethics policies at institutional level. Unfortunately, the legal provisions have several shortcomings that may limit the utility of this newly established position. First, the absence of a transparent and competitive appointment procedure, including clear, relevant and impartial selection criteria is liable to compromise the councillors' objectivity and credibility from the very beginning. Second, application of *Law no. 50/2007* is inexplicably limited to civil servants, leaving uncovered the equally important category of contractual employees, who are subject to a code of conduct very similar to that of civil servants[25]. Third, the law makes no reference whatsoever to the protection of whistleblowers, which is bound to be a crucial coordinate in the councillors' activity (they can offer information and guidance to employees regarding whistleblower protection measures, they can become recipients of public interest disclosures or be whistleblowers themselves).

The significant deficiencies in the implementation framework explain the general ineffectiveness of whistleblower protection regulations in Romania. Without a coordinated awareness-raising effort and strong institutional mechanisms to oversee implementation, both in central government and at agency-level, the law is not used and therefore not reaping results, despite its tremendous anticorruption potential. Unfortunately, this state of affairs is not peculiar to whistleblower protection policies, but characterizes other anticorruption instruments as well, and is symptomatic of a purely formalistic approach of the Romanian government, which proved interested only in fulfilling international commitments and less so in the actual impact of an anticorruption measure.

Soon after the passing of *Law no. 571/2004* TI Romania has engaged in a series of activities aimed at assessing and supporting the implementation of whistleblower protection policies. This has been a constant concern of the organization in the following years as well.
After the 30-day deadline for harmonization of the *Interior Order Regulations* (i.e.: January 20th 2005) had passed, TI Romania sent out to all ministries information requests soliciting copies of their internal regulations, where the articles adapted to the provisions of *Law no. 571/2004* would be distinctly indicated. In the same request to the ministries, Transparency International Romania solicited information on the harmonization of interior regulations in all institutions and authorities subordinate to those ministries.

Only 13 of the 15 Romanian ministries answered our request. The analysis of the answers regretfully showed that the law was only partly implemented, in the best of cases. Several ministries[26] simply had not operated any changes to their interior regulations, nor informed their personnel of the protection measures contained in *Law no. 571/2004*. Others[27] had simply

[24] The most obvious option would have been to require disciplinary commissions to specify in their annual reports cases of whistleblowers. The manner in which these bodies operate is regulated by means of a Governmental Decision, drafted at the initiative of NACS.

[25] *Law no. 477/2004 on the Code of conduct for contractual employees in public institutions and authorities* is nearly identical to *Law no. 7/2004*. The similarity is explained in the *Preamble* as necessary to achieve uniformity of ethical standards throughout the public sector.

[26] The Ministry of Defence and the Ministry of Administration and Internal Affairs.

[27] The Ministry of Labour, Social Solidarity and Family, the Ministry of Education and Research, the Ministry of

quoted formally the law in the preamble or first articles of the *Interior Order Regulations*, without actually changing the contents of these documents. As few as five ministries[28] had actually operated amendments to the regulations and introduced new legal provisions to meet the requirements of *Law no.571/2004*, although only one – the Ministry of European Integration – had done so before the official deadline. More importantly, however, no ministry had actually proceeded to the implementation of the law, by informing the employees about the provisions of the new regulations, mentioning the procedures meant to ensure the protection of whistleblowers and asking the subordinate units to adapt their own interior order regulations.
Apart from assessment activities, TI Romania has supported the implementation of whistleblower protection measures through its *Advocacy and Legal Advice Centre (ALAC)*, mandated to offer legal assistance and counseling to victims and witnesses of acts of corruption, concerning the administrative and legal procedures of complaint. Since 2005 the Centre has set as a priority granting assistance to whistleblowers who notify breaches of law in good faith.

The activity of the ALAC is subject to a set of rules which limit strictly its engagement with clients. Thus, the Centre keeps and monitors only the intimations regarding exclusively acts of corruption or with a high potential of corruption in the public sector. It takes notice of the evidence presented, advises the petitioners, sends the cases to the competent authorities and monitors their solutioning, draws up periodical reports, and makes public the cases monitored. However, the ALAC does not grant legal assistance and counseling to the cases being judged in courts and cannot decide, instead of the criminal investigators or prosecutors, on the existence or non-existence of the acts of corruption, or on any other violation of the laws. The Center does not mount campaigns against individuals or institutions. Also, the Center is not entitled to represent its clients in court and does not draw up procedural documents on its clients' behalf. Moreover, it does not perform criminal inquiries or expert surveys. However, for clients who meet the legal requirements to be considered whistleblowers, the Centre applies a slightly different procedure, namely it issues a document which certifies that the respective person has notified an issue of public interest[29]. This document can subsequently be used by the ALAC client in front of a disciplinary commission or/and a court of law to prove his/her status as whistleblower and therefore benefit from the specific protection measures.

Since 2005 the number of whistleblowers who visited the Centre and were willing to continue the procedures, by offering evidence in support of their petitions, has increased (29 in 2005, 11 in 2006 and 18 in 2007, compared to 2 in 2003 and 3 in 2004[30]). The majority of the petitions submitted to the Center are made by people who have suffered directly from the abuse or disrespect or the laws or rules of conduct. They are forced to choose between their fear of retaliation and the need to solve a pressing personal problem. In 2005 the Centre had obtained permission to use publicly two successful cases of whistleblowers, which were repeatedly presented in the public awareness campaign run that year by TI Romania, convincingly demonstrating the existence of successful precedents and thus boosting the credibility of the new instrument among public sector employees. In the following years more cases of success followed[31], some of which are presently used in a new advocacy campaign centered on the

---

Transports, Constructions and Tourism.

[28] The Ministry for European Integration, the Ministry of Culture and Religion, the Ministry of Environment and Water Management, the Ministry of Communications and Information Technology, and the Ministry of Health.

[29] See Annex 1.

[30] According to ALAC internal records. In the period 2005-2007 around 5 to 10% of total caseload in the Centre was represented by whistleblowers.

[31] For a brief presentation of several whistleblower profiles processed through TI Romania's ALAC, please see Annex 2.

issue of whistleblowing[32].

Stage 5: Evaluation
To date there has been no official policy evaluation of whistleblower protection measures in Romania. This was to be expected viewing the lack of viable institutional structures to coordinate policy implementation and the government's disinterest with the concrete impact of anticorruption instruments.

The principal avenue by which TI Romania has evaluated the impact of whistleblower protection policies is the experience of the Advocacy and Legal Advice Centre. As shown before, the number of clients who come forward with complaints about illegalities at their workplace is increasing. However, many are unaware of their rights as whistleblowers and learn of these only when they reach the Centre, a state of affairs that only confirms that the implementation of whistleblower protection policies is practically non-existent at agency level. The several groundbreaking cases of success hosted by the ALAC over the years demonstrate clearly that the legislative instrument is correctly constructed and can work successfully in practice. Therefore decision-makers should prioritize the adoption of subsidiary measures with a potential to increase the impact of whistleblower protection policies.

To improve implementation at agency level, several actions are in order. First, a set of criteria should be developed to be used by the public institutions to harmonize their internal regulations with the provisions of this law, in order to avoid the preferential implementation or reference to certain articles, while passing over others. Moreover, institutions should be obliged to organize training sessions presenting the provisions of *Law no. 571/2004* and promoting the social values defended by it. Furthermore, the new office of conduct councillor, established by *Law no. 50/2007*, should be tailored to have consistent attributions in the area of whistleblower protection. More specifically, conduct councillors should be empowered to receive public interest disclosures and offer assistance to future or actual whistleblowers, while respecting strict confidentiality terms. The reports sent by these councillors to the heads of their respective institutions and to the NACS should include detailed information about pubic interest disclosures, including the follow-up on these cases.

Another reason for critical deficiencies in implementation is the lack of a strong central institution to coordinate the process. The National Agency for Civil Servants can accomplish this role in relation to the civil service corps. More sprecifically, it should include in its periodic reports consistent information on the state of agency-level implementation of *Law no. 571/2004* and on cases of recorded whistleblowers. Going a step further, NACS could be empowered to supervise and eventually sanction the public institutions, which do not amend their internal regulations according to the provisions of *Law no. 571/2004*. Moreover, NACS's attributions of investigation of ethical breaches should be extended to cover the area of whistleblower protection.

Apart from these measures, several improvements to the legal text are also in order. First and foremost, clear and compulsory administrative responsibilities and sanctions should be established for the public institutions that do not implement the provisions of *Law no. 517/2004*, for example by not harmonizing their internal regulations. Sanctions and legal consequences should be established for other instances as well. For instance, if the disciplinary commission or any similar body does not publish the invitation for the media and a representative of the trade union, the law now stipulates that the report and disciplinary sanction given are null; it should also stipulate sanctions for the members or chairman of that commission who did not observe

[32] The campaign, entitled *"Think you can't fight corruption? Now you can make the difference!"* unfolds principally at local government level, and is supported by monitoring reports on the implementation of the law, a series of training sessions with public sector employees, journalists and NGOs, and a dedicated website (www.avertizori.ro). The project is supported by the European Union, through PHARE 2005.

the law, as well as the sanctioning procedure. Were such provisions included in the law, the whistleblower would feel safer, knowing those guilty of violating his rights would be punished. The law should also include clearly defined administrative sanctions for the heads of public authorities who “hunt” minor errors made by the whistleblowers, but do not sanction similar errors made by other employees. This does not mean the whistleblowers cannot be given disciplinary sanctions; it only avoids discriminatory treatments or exaggerated disciplinary measures be taken against the whistleblowers.

Conclusion

In Romania whistleblower protection measures were relatively easy to introduce, principally owing to a remarkably favourable political context, both inside the country and internationally. The advocacy strategy adopted by TI Romania relied heavily on these contextual advantages, linking the measure tightly to Romania’s calendar of measures for EU accession and the harmonization to international anticorruption conventions, especially the United Nations Convention against Corruption. Reliance on favourable international pressures, coupled with a direct and sustained dialogue with decision-makers proved to be a profitable advocacy strategy, since the law on whistleblower protection was adopted by the Parliament with almost no modifications less that seven months after TI Romania first presented it to experts in the Ministry of Justice. However, the high hopes generated by this very promising start were not confirmed during policy implementation. Today whistleblower protection measures are virtually unknown to potential beneficiaries as well as receptors of public disclosures. The lack of appropriate institutional structures charged with overseeing implementation, as well as the absence of sanctions for non-compliance are the main causes which explain the present regrettable situation. More importantly, however, the evolution of whistleblower protection policy in Romania confirms the lack of genuine domestic political will to fight corruption. It demonstrates that although the establishment of an appropriate legal framework is certainly a crucial gain, it is only the first step in building an effective and sustainable anticorruption effort.

References

Alistar, Victor, Iuliana Stanescu and Gabriel Moinescu. 2005. *Ghid privind protecția avertizorilor de integritate [Guide on the protection of whistleblowers]*. Bucharest: Transparency International Romania, available online at http://www.transparency.org.ro/files/File/Ghid_avertizori.pdf.
Anderson, James E. 1994. *Public Policymaking*, 2nd edition, Princeton, NJ: Houghton Mifflin
Bardach, Eugene. 1996. *The eight step path of policy analysis. A handbook for practice.* Berkley: Berkley Academic Press
Commission of the European Communities. 1998, 2001, 2002, 2003, 2004. *Regular Reports on Romania's Progress towards Accession*. Brussels.
DeLeon, Peter. 1999. The Stages Approach to the Policy Process: What has it Done? Where Is It Going?, in: *Theories of the Policy Process*, edited by Paul A. Sabatier Boulder and Oxford
Freedom House, Inc. 2005. *The Anticorruption Policy for the Romanian Government Assessment Report*. Washington, D.C.
Jann, Werner and Kai Wegrich. 2005. "Theories of the Policy Cycle", in *Handbook of Public Policy Analysis: Theory, Politics and Methods*, edited by Fischer, Frank/ Miller, Gerald and Sidney, Mara. Routledge, pp. 1-48.
Kingdon, J.W. 1995. Agenda, Alternatives, and Public Policies. second edition. New York: HarperCollins College Publishers.
Kinsella, Lisa. 2005. "Whistle While You Work", in Cork Online Law Review COLR I (2005), available online at http://www.tbg-usa.com/Files/WhistleWhileYouWork.pdf.The Romanian Government. 2001. *Programul național pentru prevenirea corupției [The National Program for the Prevention of Corruption]*. Bucharest.
Open Society Foundation Romania. 2004. *Baromerul Opiniei Publice [The Public Opinion Barometer]*. Bucharest: The Gallup Organization Romania, available online at http://www.soros.ro/ro/program_articol.php?articol=19.
The Romanian Government. 2001. *Planul național de acțiune împotriva corupției [The National Action Plan against Corruption]*. Bucharest
The Romanian Government. 2002. *Combaterea corupției în Romania. Măsuri pentru accelerarea aplicării strategiei naționale [Combating Corruption in Romania. Measures for accelerating the implementation of the national strategy].* Bucharest.
Transparency International. 2000, 2001, 2003, 2004. *The Corruption Perception Index*. Berlin, available online at http://www.transparency.org/policy_research/surveys_indices/cpi.
Voicu, Bogdan, Mădălina Voicu, Cristina Băjenaru, and Claudia Petrescu. 2004. *Şpaga la români. Ce spun şi ce cred românii despre corupția mică [Bribery in Romania. What Romanians say and think about petty corruption]*. Bucharest: Centre for Urban and Regional Sociology CURS.
Young, Eoin and Lisa Quinn. 2002. *Writing Effective Public Policy papers – a Guide for Policy Advisers in Central and Eastern Europe*, second edition, Budapest: Local Government and Public Service reform Initiative, Open Society Institute.

Law no. 188/1999 on the Statute of Civil Servants, re-published in the Official Gazette no. 365/2007
Law no. 544/2001 on free access to information of public interest, published in the Official Gazette no. 663 /2001
Law no. 682/2002 on the protection of witnesses, published in the Official Gazette no. 964 /2002
Law no. 161/2003 on measures to ensure transparency in public positions, in the private sector, and on prevention and punishment of corruption, published in the Official Gazette no. 279/2003
Law no. 52/2003 on the transparency of decision-making in public administration, published in the Official Gazette no. 70/2003
Law no 53/2003 on the Labour Code, published in the Official Gazette no. 72 /2003
Law no. 571/2004 concerning the protection of personnel from public authorities, public

institutions and from other establishments who signalize legal infractions, published in the Official Gazette no. 1214/2004
Law no. 365/2004 on the ratification of the United Nations Convention against Corruption, adopted at New York on October 31st 2003, Law no. 521/2004, published in the Official Gazette no. 903/2004
Law no. 7/2004 on the Code of Conduct for Civil Servants, re-published in the Official Gazette no. 525 /2007
Law no. 477/2004 on the Code of Conduct for contractual personnel in public institutions and authorities, published in the Official Gazette no. 1105 /2004
Law no. 480/2004 for the modification and completion of the Criminal Procedure Code, published in the Official Gazette no. 1088 /2004
Law no. 50/2007 for the modification and completion of Law no. 7/2004 on the Code of Conduct for Civil Servants, published in the Official Gazette no. 1105 /2004
Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, published in the Official Gazette no. 359 /2007
Governmental Emergency Ordinance no. 60/2001 on public procurement, published in the Official Gazette no. 241/2001.
Governmental Emergency Ordinance no. 43/2002 on the National Anticorruption Prosecutor's Office, published in the Official Gazette no. 244 /2002
Governmental Emergency Ordinance no. 14/2005 on the modification of forms of the wealth declaration and interest declaration, published in the Official Gazette no. 200 /2005
Governmental Decision no. 1210/2003 on the organization and functioning of disciplinary commissions and parity commissions in public authorities and institutions, published in the Official Gazette no. 757 /2003.

Council of Europe's Criminal Law Convention on Corruption, adopted at Strasbourg, 27 January 1999, available online at http://conventions.coe.int/treaty/en/Treaties/Html/173.htm
Council of Europe's Civil Law Convention on Corruption, adopted at Strasbourg, 4 November 1999, available online at http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm.
The United Nations Convention against Corruption, adopted at New York, 31 October 2003, available online at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.
Recommendation no. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials, adopted by the Committee of Ministers of the Council of Europe at its 106th Session on 11 May 2000, available online at http://www.coe.int/t/dg1/greco/documents/Rec(2000)10_EN.pdf.

Annex 1
Profiles of whistleblowers counselled at the Advocacy and Legal Advice Centre at Transparency International Romania

The Public Radio
Immediately after the entry into force of *Law no. 571/2004* a group of editors working in the Romanian Public Radio signed a protest which was brought to the public's attention. The editors complained of maladministration, inadequate use of financial resources, the breaking deontological regulations by censorship and preferential and discriminatory practices in the human resources policy. As a consequence of the public protest a parliamentary inquiry commission was set up. The commission finally decided to dismiss the President and the entire Board of Administrators of the Public Radio. The editors who had signed the protest received no disciplinary sanctions whatsoever.

The National Administration Institute
In July 2005 a group of over 30 civil servants of the National Administration Institute within the Ministry of Administration and Internal Affairs drafted a memoir which was sent to the head of the Ministry as well as the ALAC. Following the inquiry ordered by the Minister of Administration and Internal Affairs the head of the National Administration Institute was dismissed from his position. Despite the organizational culture based on hierarchy and confidentiality, none of the 30 civil servants received any disciplinary sanction, as they were protected by *Law no. 571/2004*.

The Ministry of Public Health
An engineer working at the Technical Office for Medical Equipment within the Ministry of Public Health notified the ALAC with regard to a number of offences perpetrated by the manger of this unit– negligence in office, preferential and discriminatory treatment, abusive and fraudulent use of public patrimony etc. The manager had given the whistleblower a subjective personnel evaluation and had applied successive disciplinary sanctions, ending with dismissal, but also reversed to threats, blackmail and breach of correspondence. The ALAC gave the whistleblower a certificate and assisted him through the legal action brought against the institution for abusive dismissal. The court recognized that the engineer was in fact a whistleblower and consequently annulled all disciplinary sanctions and had him reinstated on his previous job.

The Ministry for Small and Medium Enterprises, Commerce, Tourism and Liberal Professions
A civil servant notified the ALAC of irregularities perpetrated during a public contest for the occupation of several posts within the Ministry for Small and Medium Enterprises, Commerce, Tourism and Liberal Professions. This person had participated in the respective contest and observed that all viable candidates, including himself, were under-evaluated in order to install pre-determined persons in the vacant posts. The ALAC issued a "whistleblower certificate" to this person and is supporting him through the legal action to have the contest annulled. At this moment the case is still being judged in the administrative courts of law.