



POLICY BRIEF

Author: Sanda Sandu, 1-year MAPP, SPP, CEU. December 2018

Policy paths to ensure Whistleblower protection BLOWING THE WHISTLE – UNMASKING ILLEGAL ACTIVITIES

As corruption in the Republic of Moldova is systemic, the whistleblower protection is the mechanism that can effectively curb corruption and promote accountability and integrity.

Currently, there is no protection ensured for whistleblower. Thus, they are exposed to retaliations.

Government, Parliament and law enforcement agencies should be committed to effectively protect whistleblowers.

EXECUTIVE SUMMARY

Moldova's lack of progress in fighting corruption is eroding democracy, undermining the judicial system and human development. Corruption is systemic and continues to exist in all aspects of society, including justice, education, health, public procurement, and private sector.

An effective measure to foster transparency and detect wrongdoing is by ensuring the protection of whistleblowers, which is indispensable for the protection of fundamental rights.

According to OECD, "corruption, fraud and wrongdoing are much more likely to occur in organisations that are closed and secretive. In many cases, employees will be aware of the wrongdoing, but feel unable to say anything for fear of reprisals, concern about acting against the organisation's culture, or lack of confidence that the matter will be taken seriously." Therefore, this phenomenon has negative consequences in the short and long term for the society.

The Republic of Moldova does not have a comprehensive and efficient mechanism of ensuring whistleblower protection. Thus, citizens that report wrongdoing are exposed to reprisals, such as dismissal and employer retaliation.

The policy options proposed are to draft a law designed to protect whistleblowers who, in good faith and in the public interest, report illegalities, thus, changing the paradigm towards whistleblowers. Information and awareness raising will overcome the 'culture of silence', hence, will lead to intolerance to corruption and human rights violations.

Table 1. Transparency International Corruption Perception Index 2017



WHISTLEBLOWER PROTECTION:

Legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace. (2009 Anti-Bribery Recommendation, OECD)

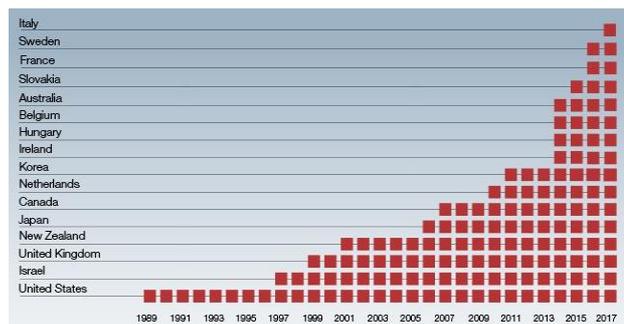
WHY IS THIS IMPORTANT?

Recent major scandals such as Dieseltgate, LuxLeaks, Panama Papers, or Cambridge Analytica highlight the importance of whistleblowers and their decisive role in exposing illegal activities that harm the public interest, the welfare of citizens and society. Many countries addressed this situation and implemented the whistleblower protection at national level (see Figure 1).

In the Republic of Moldova, whistleblowers are on their own. Under these circumstances, they are forced to seek justice at the European Court of Human Rights. "One of the most central discouragements of blowing the whistle is the fear of employer retaliation, whether in the form of termination, demotion, or other disciplinary action" (Beller 2011).

Whistleblower protection represents a huge potential to detect and prevent damages to the public interest, such as fraud, corruption, tax evasion, threats to public health and safety, mismanagement of public funds, and money laundering.

Figure 1. Timeline of adopting whistleblower protection laws, period 1989-2017



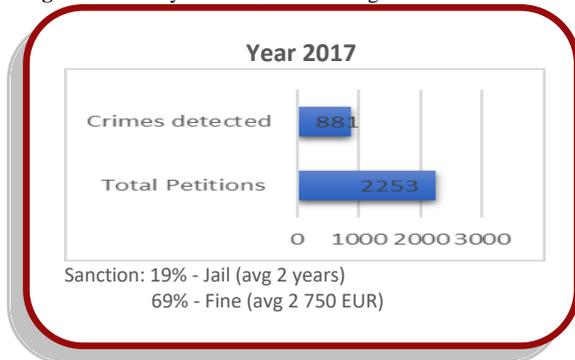
Source: OECD Report 2017, Committing to Effective Whistleblower protection.

Policy paths to ensure Whistleblower protection

The importance of whistleblower protection, as part of strengthening the fight against corruption, is encompassed in international conventions as the United Nations Convention against Corruption, the Council of Europe Civil and Criminal Law Conventions on Corruption. The Republic of Moldova ratified these conventions, hence, there is an international responsibility to apply whistleblower protection requirements.

Together with conventions that mandate states to protect whistleblowers, a series of recommendations derive from international bodies (European Union, Organisation for Economic Cooperation and Development, Council of Europe) on tools to encourage and manage disclosing wrongdoings as an integrated part of efforts to reduce corruption risks.

Figure 2. Activity of law enforcement agencies in Moldova



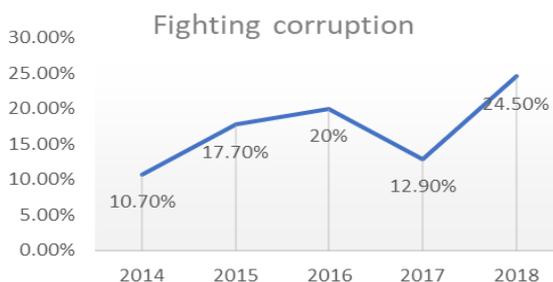
Source: Report of the National Anti-corruption Centre, 2017

In this respect, a recent study on Global Fraud (Association of Certified Fraud Examiners 2016) analysed over 2,400 fraud cases in 114 countries and demonstrated that 40% of cases have been detected by whistleblowers. In 2007 Global Economic Crime Survey (PricewaterhouseCoopers' 2007) on a sample of 5,428 companies in 40 countries found that whistleblowing contributes to detecting fraud better than internal security.

According to National Anti-corruption Centre of Moldova, the establishment of an effective mechanism for disclosing corruption and protecting whistleblowers will lead to increased level of unmasking illegal practices.

The public opinion polls demonstrate that citizens consider corruption a major problem for the Republic of Moldova (see Figure 3). The characteristics for the country, is that corruption is systemic in nature and affects the quality of life and services provided, thus, increasing inequality (see Figure 4).

Figure 3. Evolution of corruption perceived as a major problem in Moldova, period 2014-2018.



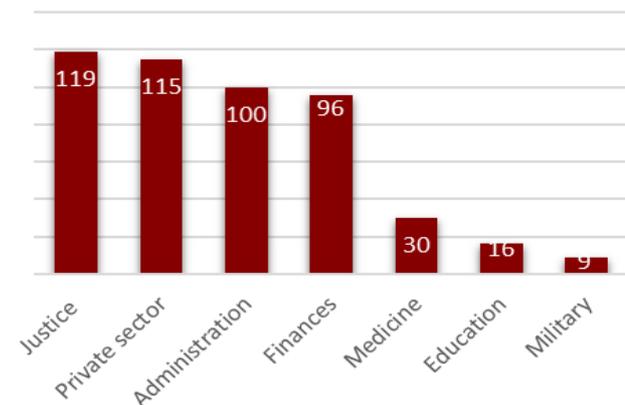
Source: Barometer of public opinion, Institute of Public Policy

One of reasons why corruption is perceived as a major problem is due to the lack of efficiency of the law enforcement agencies, including the National Anti-corruption Centre. According to the data for 2017, out of 2253 petitions and reports on corruption, only 881 crimes were detected. In the large majority of cases (69%) the judge is applying a fine, sometimes the amount of fine is smaller than the amount of bribe itself (see Figure 2).

Justice is a sector deeply affected by corruption (see Figure 4). A monitoring report developed in 2017 by Centre for the Analysis and Prevention of Corruption in Moldova, examined the denunciation of wrongdoing in the justice sector. According to the monitoring report, between 2012-2016, the Magistracy Council didn't receive any disclosure of wrongdoing. Hence, we could assume that magistrates fear possible pressure and retaliation at work, as the mechanism of whistleblowers protection is not well defined and developed by the existing legal framework.

Failure to provide adequate protection to whistleblowers is a problem constantly identified by international bodies in the assessment process of the national legislation.

Figure 4. Areas affected by corruption by number of cases detected, Republic of Moldova, year 2017



Source: Activity Report of National Anti-corruption Centre, 2017

INTERNATIONAL STANDARDS

Ensuring whistleblower protection is a fundamental right, as it is link to the freedom of expression, the right to dignity, the right to privacy and the right to protection against unjustified dismissal.

At the moment, more and more states are making constant efforts to develop and adopt legislation on the protection of whistleblowers. In order to provide consistent support, a number of international organizations have developed and made available a set of principles and minimum standards of compliance that shall be used in the process of creating the national mechanism of ensuring whistleblower protection.

The international organization Blueprint for Free Speech developed 23 fundamental principles that are modelled by experience in all regions and guided by an analytical approach based on evidence. The aim is to ensure that public interest information reaches the public space.

Principles are designed to ensure that: whistleblowers are protected against any form of retaliation, including civil and criminal liability, disclosures contribute to corrective actions and policy reforms, and the most important that offenders are brought to justice (Blueprint principles for whistleblower protection).

Checklist:

- Comprehensive legislation;
- Clear procedures and channels of reporting;
- Ensuring protection and confidentiality;
- Remedies and sanctions for retaliation;
- Responsible institution: Ombudsman;
- Information about the right, awareness raising;
- Systematic evaluation.

Source: Whistleblower protection: encouraging reporting, OECD, July 2012

Republic of Moldova should apply principles and guidelines developed by international organizations. Firstly, the country should comply with the ratified international conventions.

Secondly, Moldova seeks harmonization of the national legislative framework to international standards in the field of prevention and combating corruption, in particular, we refer to the Council of Europe Recommendation CM / Rec (2014)7 adopted by the Committee Ministers addressed to Member States on the protection of whistleblowers (30 April 2014) recommending Member States "to have a normative, institutional and legal framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest".

Another major international treaty is the United Nations Convention Against Corruption. Our attention is focused on Chapter 3 on "Incrimination, Investigation and Suppression", Art. 33 "Protection of Information Providers" that states "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".

Responsibility of authorities to ensure adequate protection against any unjustified sanction against employees denouncing acts of corruption is also foreseen by Article 9 of the Civil Law Convention on Corruption, ratified by the Republic of Moldova.

"Whistleblowing has been incorporated into the anticorruption, pro-transparency programmes of most major international organisations" (Wolfe et al. 2014), being a crucial element for many governments. Thus, Republic of Moldova should ensure the policy transfer on whistleblower protection.

POLICY PATHS TO ENSURE WHISTLEBLOWER PROTECTION

The main objective for the Government of the Republic of Moldova and the National Anti-Corruption Centre is to establish an effective denunciation mechanism. Thus, leading to increased denunciation of wrongdoing and disclosing cases of public interest. "A unified and integrated legal approach to whistleblower retaliation would offer certainty for employers and employees, would assist law enforcement's efforts to detect crime, and would serve society's interests in assuring legal compliance" (Ramirez 2007).

It is pivotal for the anti-corruption movement in Moldova to ensure an integrity climate in the public and private sectors. Reaffirming that transparency and accountability are key determining factors for social and economic development

Considering that there is no appropriate mechanism to ensure whistleblower protection, individuals are forced to seek justice at the European Court of Human Rights (ECtHR). An example with great resonance is the Case Guja vs Republic of Moldova, in which the country was convicted by ECtHR for violation of the European Convention on Human Rights, Article 10 on the Right to Freedom of Expression.

In the case of Guja vs Republic of Moldova, the European Court of Human Rights established a set of principles that determine whether the interference in the person's right to free expression could be justified. These principles are extremely important, as it should represent the backbone of the whistleblower mechanism in Moldova.

The principles laid down by the ECtHR:

- Public interest;
- Existence of alternative channels;
- The authenticity of the information disclosed;
- Good faith: reasons of denunciation;
- Damages, if any, suffered by the employer and if this has outweighed the public interest;
- The severity of the sanction/retaliation imposed on the person and its consequences.

Source: Guja vs Republic of Moldova case, ECtHR

POLICY OPTIONS

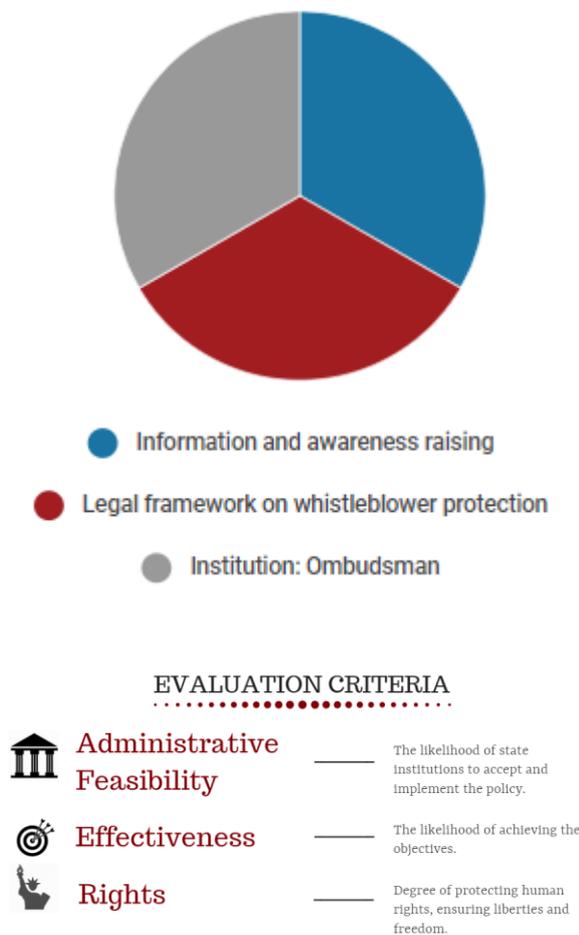
The solution is to design legal and institutional framework and create a raising awareness campaign on whistleblowers protection. In this sense, drafting a law aiming to protect whistleblowers who, in good faith and in the public interest, report illegalities, would lead to a change of paradigm towards fighting corruption. In this sense, focusing on information and awareness raising will overcome the 'culture of silence', hence, will lead to intolerance to corruption and human rights violations. In the aftermath, the trust of citizens in government entities will increase.

Policy paths to ensure Whistleblower protection

As Wood Borak notes, the main concern should be “whether legal protections properly capitalize on a whistleblower's information to improve overall governmental transparency” (Wood Borak 2005), the focus being ensuring accountability, not just individual's protection.

The policy interventions proposed are the following: providing effective protection through a comprehensive legislation, strengthening the capacities of the Ombudsman in ensuring whistleblower protection, and developing a comprehensive awareness raising campaign.

Table 2. Policy options to ensure whistleblower protection



Evaluation: Using a scale of 1 to 5.

1 – Poor; 2 – Fair; 3 – Medium; 4 – Good; 5 – Excellent.



DEVELOPING A LAW ON WHISTLEBLOWER PROTECTION

The legal framework should be clear and comprehensive. It should prescribe more than 2 reporting channels, including mass-media and Civil Society Organizations. The protection should be ensured in both public and private sector. The core element of the law would be

the mechanism of disclosing information and ensuring identity confidentiality of the whistleblower, guaranteeing fair trial. Remedies and sanctions for retaliation should be clearly established and enforced by legal agencies.

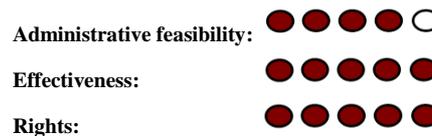
The reporting channels should be the following:

- internal - the whistleblower reports the illegality to the employer, head of the institution/company;
- external - the whistleblower reports illegalities to the responsible authorities (Ombudsman or National Anti-Corruption Centre);
- public - the whistleblower disclose the wrongdoings to civil society and / or the mass-media.

Having a comprehensive and clear definition of the whistleblower is very important. It is recommended to expand the definition according to the latest European Union trends. A recommendation would be to use the definition recommended by Transparency International: “Whistleblower is any public or private sector employee or worker who discloses or reports a wrongdoing and who is at risk of retribution. This includes individuals who are outside the traditional employee–employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees.”

The rights and obligation of the whistleblower should be clear and include the right to personal protection against retaliation, the right to confidentiality, right to free legal assistance ensured by state, and right to compensation resulting from the disclosure.

In terms of evaluation criteria, the policy option of developing a law on whistleblower protection has the following ranking:



The effectiveness of the law depends on the clarity of the protection mechanism and on the institutions that will be responsible to ensure the law enforcement. The same can be said about the extent to which the law will ensure the respect for freedom and the rights of the whistleblower. As stated in this policy brief, the legal framework is an important and effective tool to fight corruption

The administrative feasibility is high, the Parliament and the Government should show its commitment in fighting corruption. As the Association Agreement between Moldova and European Union states that a law on whistleblower protection should be developed by the state, thus, representing a conditionality. Seeking enhanced whistleblower protection means creating strong and independent law enforcement agencies.

In terms of developing a law on whistleblower protection, state institutions will ensure the policy transfer from South Korea, Romania and USA (see Table 3).

Policy paths to ensure Whistleblower protection

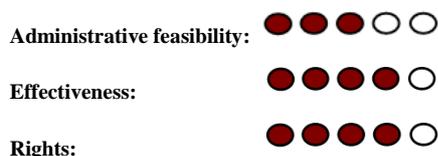
STRENGTHENING THE CAPACITIES OF THE OMBUDSMAN IN ENSURING WHISTLEBLOWER PROTECTION

A general requirement in ensuring the whistleblower protection is establishing an autonomous authority responsible for submitting and reviewing disclosure of wrongdoings, as well as ensuring adequate protection for whistleblowers.

In the Republic of Moldova, the independent authority that should be dealing with ensuring the whistleblower protection is the Ombudsman. Active debates between civil society and National Anti-corruption Centre of Moldova revealed that Ombudsman institution is the most feasible option, as it is dealing with the protection of the human rights and has the necessary leverages to promote an effective whistleblower mechanism at the national level.

The whistleblowing authority should have enough financial and human resources to provide support and ensure prompt protection of whistleblowers. The authority should also monitor if public and private institutions have in place the right internal mechanisms of disclosure.

In terms of evaluation criteria, the policy option of strengthening the capacities of the Ombudsman in ensuring whistleblower protection has the following ranking:



Ombudsman is the responsible authority in New Zealand, Hungary and Australia. The European Ombudsman is the institution that promoted the whistleblower protection rules and is encouraged EU institutions to adopt internal regulations.

The Administrative feasibility is medium, as the Government and Parliament should decide to increase the capacities of the Ombudsman. Therefore, shall be increased the budget and the number of employees.

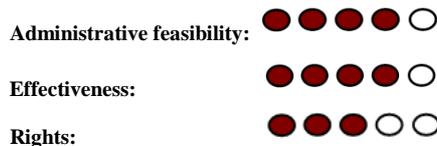
An independent institution will increase in short and long term the effectiveness of the protection of whistleblower, thus, the rights and liberties of the individuals will be ensured and respected. Therefore, contributing to the society *per se*, as it will foster the process of combating and preventing corruption.

IMPLEMENTING A NATIONAL RAISING AWARENESS CAMPAIGN

Launching a nation-wide awareness raising campaign on whistleblower protection aims to cultivate the culture of integrity and intolerance towards corruption and wrongdoings.

Civil society, mass media and state institutions should work together in order to craft an effective and inclusive campaign. Overcoming the ‘culture of silence’ is possible only if stakeholders will have synergetic and comprehensive actions. The awareness raising campaign should be present on a wide range of platforms and networks. Using TV, Radio, Newspapers and social media in order to achieve impact and inform the society.

In terms of evaluation criteria, the policy option of has the following ranking:



Administrative feasibility is high, the only reason of concern is the necessity to have enough financial resources for an effective campaign. Resources can be offered by the Government or international organizations that work in supporting the anti-corruption agenda.

Table 3. Overview of whistleblower protection mechanism. Comparison between USA, South Korea and Australia.

	USA	S. Koreea	Australia
Coverage	Yes	Yes	Yes
Reporting channels	Yes	Partially	Yes
External reporting channels	Partially	No	Yes
Confidentiality	Yes	Yes	Yes
Sanctions	Yes	Yes	Yes
Oversight	Yes	Yes	Yes
Remedies	Partially	Yes	Partially

Source: Data collected from Whistleblower Protection Rules in G20 Countries: The Next Action Plan, 2014

CONCLUSION

The purpose of the ensuring whistleblowing mechanism is to promote the integrity climate in the public and private sectors and to ensure adequate protection against ostracizations in the context of disclosing illegal practices. Whistleblowers expose a high personal risk.

Policy options presented in this brief aim to promote the culture of public integrity, intolerance to corruption, increasing openness and consolidating government and private sector accountability, while also, putting an end to the human rights abuses. The Government and Parliament should take into consideration the implementation of all 3 policy options presented. The effectiveness of the intervention depends on the systematic and comprehensive approach. While ensuring the policy transfer from countries that have in place a good

Policy paths to ensure Whistleblower protection

mechanism of protection, the policy-maker should tailor the policy according to the necessity of the Republic of Moldova and consider the systemic corruption and negative public attitudes towards it.

In the last 10 years, more countries developed mechanisms of whistleblowers protection (see Figure 1) and there is an external pressure to comply with the international conventions ratified and ensure the conditionality imposed by the European Union in the anti-corruption sector.

Whistleblowers are the backbone of public integrity. They protect the general interest of the community and the public good. For these reasons, the efforts of the international community to build and strengthen a robust system of protection of integrity whistleblowers are appreciated. The establishment of a system of protection of whistleblowers will imminently contribute to the cultivation of the integrity culture and the denunciation of corruption in all its manifestations.

A determined role in success of the policy lies in the effective implementation and ensuring compliance of all stakeholders. In this respect, it is necessary to develop clear enforcement mechanisms, taking into account the social, political and cultural context of Moldova, as well as the internal compliance and disclosing mechanism that should be ensured within private companies. Policy options presented will result in expected effects, if combined with the introduction of proportionate and dissuasive sanctions for those who have committed illegal activities and are involved in corruption cases.

Safeguarding transparency and integrity is possible if the Government and the Parliament will ensure the whistleblower protection, applying international standards and principles in the public and private sector.

References

1. Association of Certified Fraud Examiners. 2016. *Report to the nations on occupational fraud and abuse. 2016 Global Fraud Study*. <https://s3-us-west-2.amazonaws.com/acfe-public/2016-report-to-the-nations.pdf> (Accessed on 12 December 2018).
2. Barometrul Opiniei Publice, Institutul de Politici Publice, Moldova [Barometer of Public Opinion, Institute of Public Policy, Moldova]. <http://ipp.md/old/lib.php?l=ro&idc=156> (Accessed on 12 December 2018).
3. Beller, Rachel. 2011. Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance - A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China. *NYU Journal of Law and Business* Vol. 7:873. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nyujolbu7§ion=24 (Accessed on 12 December 2018).
4. Blueprint for free speech. *Blueprint Principles for Whistleblower Protection*. <https://blueprintforfreespeech.net/wp-content/uploads/2015/10/Blueprint-Principles-for-Whistleblower-Protection4.pdf> (Accessed on 12 December 2018).
5. Case of Guja V. Moldova, European Court of Human Rights (Application No. 14277/04), Judgment, Strasbourg, 12 February 2008. <https://hudoc.echr.coe.int/spa#%7B%22languageisocode%22:%5B%22ENG%22%5D%22appno%22:%5B%2214277%2F04%22%5D%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%5D%22itemid%22:%5B%22001-85016%22%5D%7D> (Accessed on 12 December 2018).
6. Civil Law Convention on Corruption, Council of Europe, adopted on 4 November 1999. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174> (Accessed on 12 December 2018).
7. Council of Europe. 2014. *Recommendation CM/Rec (2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum*. <https://rm.coe.int/16807096c7> (Accessed on 12 December 2018).
8. Investigations and Forensic Services. 2007. *PricewaterhouseCoopers' 2007 Global Economic Crime Survey*. https://www.whistleblowers.org/wp-content/uploads/2018/11/pwc_survey.pdf (Accessed on 12 December 2018).
9. Kreiner Ramirez, Mary. 2007. Blowing the Whistle on Whistleblower Protection: A Tale of Reform versus Power. *University of Cincinnati Law Review* Vol. 76. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ucinlr76§ion=14 (Accessed on 12 December 2018).
10. Organisation for Economic Co-operation and Development. 2012. *Whistleblower protection: encouraging reporting*. <http://www.oecd.org/cleangovbiz/toolkit/50042935.pdf> (Accessed on 12 December 2018).
11. Organisation for Economic Co-operation and Development. 2016. *Committing to Effective Whistleblower Protection*. Paris: OECD Publishing. <https://www.oecd-ilibrary.org/docserver/9789264252639-en.pdf?expires=1544637676&id=id&accname=ocid77016197&checksum=5110B09709D19551EE60C446FF251D21> (Accessed on 12 December 2018).
12. Raport de activitate CNA 2017 [Activity Report National Anti-Corruption Centre 2017]. <https://www.cna.md/doc.php?l=ro&idc=143&id=1823&t=/Studiul-si-analize/Rapoarte-de-activitate/Raport-de-activitate-al-CNA-pe-anul-2017> (Accessed on 12 December 2018).
13. Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Council on 26 November 2009. <http://www.oecd.org/daf/anti-bribery/44176910.pdf> (Accessed on 12 December 2018).
14. Transparency International. 2017. *Corruption Perception Index 2017*. https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table (Accessed on 12 December 2018).
15. Transparency International. 2018. *A best practice guide for whistleblower protection*. https://transparency.eu/wp-content/uploads/2018/03/2018_GuideForWhistleblowingLegislation_EN.pdf (Accessed on 12 December 2018).
16. United Nations Convention against Corruption, Adopted by the UN General Assembly: 31 October 2003, by resolution 58/4. http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf (Accessed on 12 December 2018).
17. Wolf et al. 2014. *Whistleblower Protection Rules in G20 Countries: The Next Action Plan*. <http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf> (Accessed on 12 December 2018).
18. Wood Borak, Sarah. 2005. The Legacy of Deep Throat: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002. 59 *University of Miami Law Review* 617. https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/umialr59&id=626&men_tab=srchresults (Accessed on 12 December 2018).