

WHISTLEBLOWER PROTECTION: A GLOBAL APPROACH

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EXECUTIVE SUMMARY

Transparency and accountability are pivotal to building and sustaining public trust in modern institutions. Whistleblower protection “goes to the heart of transparency reform” (Brown et al 2013)¹ and detect wrongdoings.

The international legal framework prescribes the necessity to ensure the whistleblower protection, although the majority countries do not have a legislation or mechanism in place. In this condition, it is lost an enormous potential to detect and prevent wrongdoings as fraud, corruption, mismanagement of funds, abuse of power, money laundering affecting diverse areas.

Currently, there is an un-uniform and fragmented practice to ensure the whistleblowers protection, thus there should be developed a normative, institutional and judicial framework at the global level.

A global comprehensive approach in the area of whistleblower protection is lacking, as in a globalized world, there is a high tendency to seek for profit maximization, sometimes to the detriment of the law, thus, it is necessary to ensure a solid and efficient protection to whistleblowers.

The theory of change proposed by this policy brief refers to developing a multi-stakeholder

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)

partnership that will comprise the private sector, governments, civil society, international organizations, media, labour protection and anti-corruption agencies.

WHY IS THIS IMPORTANT?

The global cost of corruption is estimated at 5% of world GDP or 2.6 trillion USD, according to UN², while businesses and individuals pay more than \$1 trillion in bribes every year, according to data from World Bank.

According to Transparency International, Corruption Perception Index of 2018 “reveals that the continued failure of most countries to significantly control corruption is contributing to a crisis in democracy around the world”.

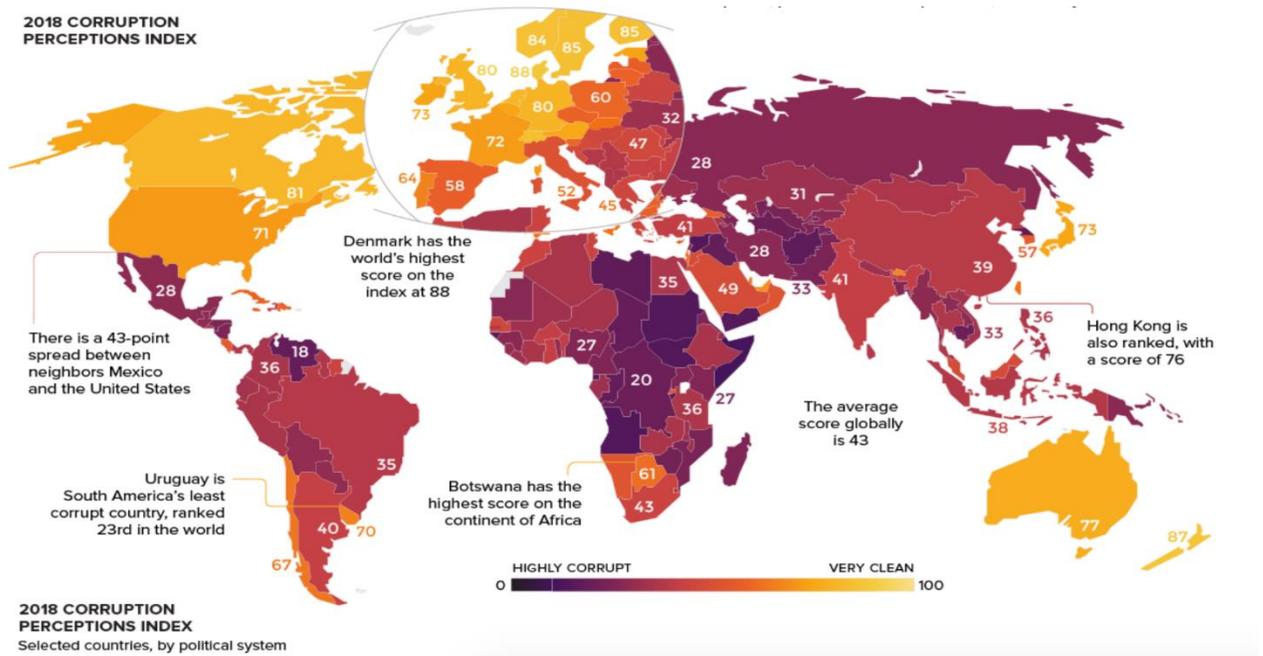
According to the latest estimates, corruption costs the European Community - € 990,000,000,000 per year. If the whistle blowers would only report 15%, the EU's annual budget would double to 155,000,000,000. The loss of potential benefits just in EU public procurement, due to lack of protection, is between €5.8 to €9.6 billion each year (European Parliament³).

¹ The Relationship between Transparency, Whistleblowing, and Public Trust, A J Brown, Wim Vandekerckhove, Suelette Dreyfus

² Global cost of corruption, the United Nations

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Figure 1. Transparency International, 2018
Corruption Perception Index



Source: Transparency International, CPI
<https://www.transparency.org/cpi2018>

The public debates about whistleblower protection gained more traction after leaks as Dieselgate, Panama Papers, Snowden, Cambridge Analytica and LuxLeaks. Recent events impose the idea that whistleblowers have a decisive role in exposing illegal activities that damage the public interest. The institution of whistleblower protection as an effective way to detect corruption is still emerging, the Figure 2, represents a timeline of whistleblower protection laws adoption.

“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).

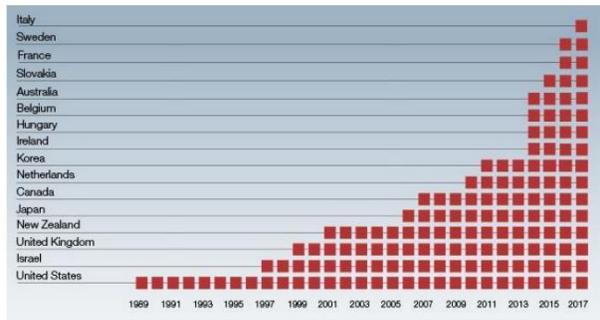
As an international legal framework, the United Nations Convention against Corruption (UNCAC) which was ratified by 161 countries impose to develop national whistleblower protection

systems, including confidential denouncing mechanism. Besides UNCAC, at the regional level Council of Europe developed 2 major legal documents the Civil Convention on Corruption and the Penal Convention on Corruption. The international organizations as Transparency, International, EU and OSCE developed a set of recommendations and standards on mechanisms to disclose the wrongdoings.

The importance of disclosure by whistleblowers was emphasized in “a recent study on Global Fraud (Association of Certified Fraud Examiners 2016) analyzed 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.” (Sandu 2018)

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Figure 2. Whistleblower protection legislation, period 1989-2017



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

The lack of global approach in whistleblower protection is leading to a fragmented perception of the problem and a lack of standardization in terms of the implementation of UNCAC provisions and other international and/or regional legal framework.

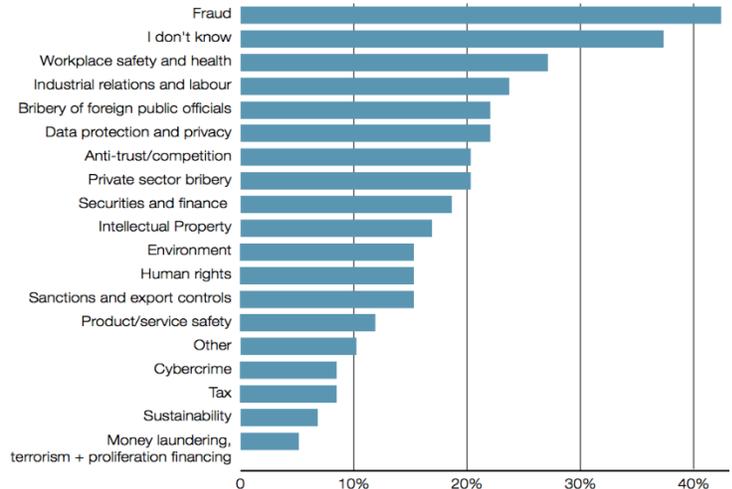
The public and private sector are both deeply affected by corruption. Whistleblower protection has favorable impact on exposing corruption risks and wrongdoings in all areas, thus, it should be consistent with an integral global approach. Whistleblower are at the confluence of anti-corruption and human rights and can be interpreted in a wider perspective.

According to OECD survey, 84% OECD countries developed whistleblower protection laws or mechanisms in the public sector, but the impact evaluation shows that the laws were scandal driven and are not comprehensive, thus does not include international standards and recommendations as confidentiality and remedies.

The majority of private firms and businesses do not have a compliance mechanism to receive reports, disclosures and investigate wrongdoings, and according to 2015 OECD Survey on Business Integrity and Corporate

Governance, even if firms had written policies the employees did not know that “such policy existed”. The Figure 3, presents the importance of internal mechanisms or compliance by the number of misconducts that were reported.

Figure 3. Types of corporate misconduct reported via internal company mechanisms



Source: OECD Survey on Business Integrity and Corporate Governance

INTERNATIONAL STANDARDS

Currently, 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 to the States principle guidelines and minimum standards to be respected in the development of national laws.

“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).

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It is necessary for the principles to be adapted to the political, social and cultural contexts of an individual country and to the existing legislative framework.

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

According to Transparency International, a principle is **to include all employees and workers under the protection of whistleblowers**. The public and private sectors should both be included and is necessary to have:

- accessible and reliable channels to report illegalities;
- strong protection against all forms of retaliation;
- mechanisms for disclosures that promote legislative, policy or procedural reforms and prevent future wrongdoings.

Protection against retaliation - whistleblowers should be protected from any form of retaliation, disadvantage or discrimination in the workplace that is connected or results from the warning. This includes all forms of damages, including dismissal; punitive transfers; harassment; additional taxes or reduced working hours; refuse to promote in function or training; loss of benefits, premiums or other benefits, as well as threats of such actions.

Ensuring confidentiality – whistleblower's identity cannot be revealed without his/her express acceptance.

Multi-stakeholder involvement - Regular development and review of warning laws, regulations and procedures should involve key stakeholders, including employee organizations, business associations / employers, civil society organizations and academia.

Blue Print also developed a set of principles which include the following:

Variety of internal reporting channels - A law must provide for a wide range of internal (organizational) reporting channels. This should include encouraging warning policies to implement mechanisms within these organizations, such as dedicated channels, review processes, and internal disclosure in each organization. It would have been strengthened by mandatory requirements to have and communicate internal disclosure procedures and to have external evaluations of the timely progress of these disclosures. Including mass-media, civil society, independent agency that will receive reports.

Fair trial - Whistleblower should have a fair trial that will allow to claim compensation for any loss suffered as a result of reprisals against him/her.

Besides international standards and principles developed by international organizations, there are cases at the regional courts as the European Court of Human Rights that laid down a set of guiding principles that should be taken in consideration during a whistleblower case. In the case *Guja vs Republic of Moldova*, the whistleblower's rights were interpreted through the prism of freedom of expression.

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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 OPTION

MULTI-STAKEHOLDER PARTNERSHIP

“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).

Multi-stakeholder partnerships (MSP) represent “a new paradigm in the discourse around international governance” (Partnerships 2030⁴). Taking into consideration that corruption is a global phenomenon and represents a problem “without passports”, the whistleblower protection is an efficient mechanism that aims to identify the corrupt practices and wrongdoings.

As “Whistleblowing has been incorporated into the anticorruption, pro-transparency programmes of most major international organisations” (Wolfe et al. 2014) it represents an innovative instrument in tackling corruption as a global challenge.

⁴ Partnerships 2030, Multi-stakeholder partnerships in the context of Agenda 2030 A practice-based

In this sense, MSP have the potential to face challenges by bringing together a variety of stakeholders, including their expertise, resources and network and technology. Global comprehensive cooperation consolidates stakeholders' capacities to increase transparency, ensure accountability by protecting whistleblowers.

Why MSP?

- Whistleblower protection is a complex problem that can't be solved by one single stakeholder;
- A diverse pool of stakeholders can contribute with complementary skills, expertise and resources;
- Results can be more sustainable;
- Cooperation based partnership can bring advantages.

The United Nations' Sustainable Development Goal 17 “Strengthen the means of implementation and revitalize the global partnership for sustainable development”⁵ focuses on a greater cooperation between different stakeholders to achieve the goals. By “bringing together national governments, the international community, civil society, the private sector and other actors will have to refocus and intensify their efforts on areas where progress has been slow”. Thus, MSP can complement the activities undertaken by the international community in the area of protecting whistleblowers.

analysis of potential benefits, challenges and success factors.

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The defining characteristics of multi-stakeholder partnerships:

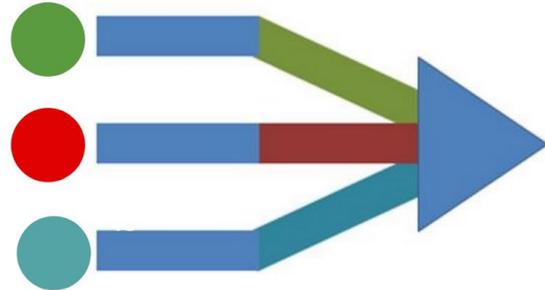
- The focus lies on overcoming social challenges and pursuing the common good through long-term cooperation.
- Several representatives from at least three of the four stakeholder groups (state, private sector, organised civil society and academia) voluntarily join forces. At least one member is from organised civil society.
- All the stakeholders are involved in the MSP's work on an equal footing.
- The partnership involves some degree of institutionalisation and independence.

The multi-stakeholder partnership will develop and establish standards and legal norms in the area of whistleblower protection, as an area with no bindings and clear regulatory mechanisms. The multi-stakeholder partnership will come with solutions in a more integrated and comprehensive approach due to the diversity of stakeholders involved.

Type of Multi-stakeholder Partnership

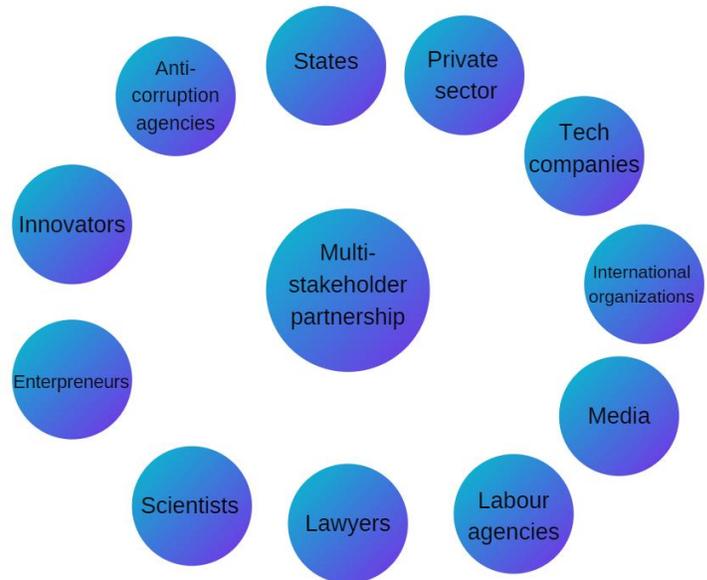
The Multi-stakeholder partnership on whistleblowers protection will use the Collective impact model having a long-term commitment of stakeholders in order to achieve system wide changes at the global level.

Collective impact: Long term commitment and common agenda to achieve system wide changes



Source: Peterson et al. 2014. FSG.⁶

Actors involved in the multi-stakeholder partnership



The partnership will contain a wide range of actors aiming at regulating from different perspectives the whistleblower protection. Will engage public and private actors, as well as civil society and media.

All actors will work together to establish a set of standards and norms. Thus, lawyers, states,

⁶ Peterson, K., Mahmud, A., Bhavaraju, N. and Mihaly, A. (2014). The Promise of Partnerships: A Dialogue between INGOs and Donors.

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international organizations, civil society, anti-corruption agencies will assess the current legal framework and propose a set of recommendations, as well, it will create incentives to follow the rules.

Private sector can benefit a lot from whistleblower protection, thus, their engagement will ensure comprehensive solutions and will consider private sector's grievances, fears and opportunities.

Activities that will be undertaken by the MSP

The main goal of the MPS is to develop international standards and norms in ensuring whistleblower protection, currently being an area with no well-established regulatory mechanisms. MPS will ensure uniformization of the regulations including ensuring compliance mechanism.

According to Waddell and Khagram, (2007⁷) there are different types of MPS based on their objectives including organise systems, generate knowledge, share visions, to produce reports and measures and provide financing. The MSP on whistleblower protection will combine different typologies.

Concerning the cultural and political conjuncture, there are obstacles to a favorable social perception of whistleblowers, especially in current or former totalitarian regimes. Thus, whistleblowers rather than being associated with public protectors, are associated with traitors or founders.

Similarly, there is a general lack of will in building a comprehensive legislative framework. Thinking of such a finding are the laws that come to counterbalance efforts to develop laws for

whistleblowers, such as laws prohibiting disclosure of information and defamation laws that discourage the noble intent of whistleblowers.

Challenges of MPS:

We identified a set of challenges that might appear in the process of establishing a Multi-stakeholder partnership, including inadequate financing, lack of organizational capacities to include all stakeholders and reach the common goal of ensuring the whistleblower protection.

Challenges:

- Inadequate financing;
- Competition for resources with other partnerships;
- political and economic risks;
- lack of organisational capacities;
- lack of political support due to changes at political level;
- no shared understanding about MSP objectives;
- ability to deliver solutions in the established time frame.

Structure of MPS

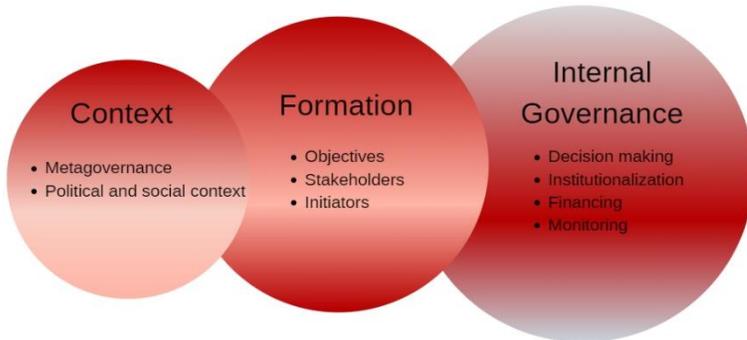
In terms of internal governance, the multi-stakeholder partnership will ensure equal representation of all groups in decision making

⁷ Waddell, S. and Khagram, S., 'Multi-Stakeholder Global Networks: Emerging Systems for the Global Common Good', Partnerships, Governance and

Sustainable Development: Reflections on Theory and Practice.

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process. It will establish internal and external monitoring mechanisms.



The main initiators of the multi-stakeholder partnership will be Transparency International and Alliance for Integrity. The former is a “business-driven multi-stakeholder initiative between private sector, civil society, political organisations and international institutions.”⁸

Currently, Alliance for Integrity has a limited outreach but if it will develop a stronger cooperation with Transparency International it will be able to increase capacities in terms of resources and expertise.

The United Nations will be involved as a major actor in the multi-stakeholder partnership, but we do not consider the United Nations as an initiator, due to the perception of being politicized and activities are too focused on states, rather than private firms.

The multi-stakeholder partnership should take into consideration that standards, norms and legislative provisions will result in expected effects, with the introduction of proportionate and dissuasive sanctions.

CONCLUSION

Modern society, as in any other era of its development, has the urgent need to cultivate moral values, such as: dignity, honor, truth, values based on integrity. The whistleblower protection is the pillar of ethical behavior in society. Whistleblower protection is undoubtedly an effective tool for preventing corruption, detecting fraud, detecting abuse and denouncing human rights violations.

Whistleblowers have helped prevent corporate collapse, disaster relief, and escalating conflicts.

The protection of whistleblowers is an increasingly important subject studied and appreciated, the latest events have spurred efforts to deepen the phenomenon, to develop minimum standards.

The G20 Anti-corruption Action Plan contributed to the public debates about the importance of whistleblowers. According to OECD “Whistleblower protection contributes to an environment of trust and tolerance and enhances the capacity for countries to respond to wrongdoing and matters of public concern.”

The multi-stakeholder partnership will strengthen the capacities of state and private companies to develop a climate of openness and integrity.

An effective and efficient system of whistleblower protection depends on open communication between different stakeholders. Therefore, the multi-stakeholder partnership will ensure cooperation, communication and compliance between actors.

The standards developed in the area of whistleblower protection regulation refer in particular to: expanding the whistleblower definition without imposing any limits, exploiting

⁸ Alliance for Integrity
<https://www.allianceforintegrity.org/>

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the available and secured channels of warning, ensuring the protection of individuals and family members, ensuring the confidentiality and anonymity of the whistleblower; developing and de-diversifying whistleblower counseling methods; considering the whistleblower at all stages of the investigation and operationalizing modern security systems techniques in order to ensure the protection.

A determined role in the successful protection of whistleblowers is the effective implementation of standards and legal provisions. In this sense, the multi-stakeholder partnership shall develop clear enforcement mechanisms, taking into account the social, political and cultural context of each state, as well as the policy promoted within private companies.

International conventions contain provisions that ensure the protection of whistleblowers through prevention, combating and sanction. Alongside conventions that mandate states to protect whistleblowers, there are also a number of international bodies' recommendations on tools to encourage and manage denunciations as an integrated part of efforts to reduce corruption risks.

Due to lack of uniform regulations and enforcement, the multi-stakeholder partnership will require the adoption of horizontal policies at the global level, in order to provide adequate protection aligned with human rights provisions.

It is noted that regulations devoted to the disclosure of illegal practices is generally fragmented and poorly applied. States have not developed a unitary and comprehensive system that includes whistleblowers from public and private sector

Although there is a duty to reveal corruption, fraud and other crimes, inadequate protection, limited laws and inappropriate implementation of policies often create dilemmas and integrity

vacuum.

The multi-stakeholder partnership on whistleblower protection will respond to the growing need to adopt a horizontal directive at the global level that would harmonize the efforts of different actors to promote integrity and fight corruption.

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