

Project brief
Terms of Reference of National Whistleblower Protection Assessment
Provided by the TI Secretariat

In the framework of the project “*Blowing the Whistle Harder – Enhancing Whistleblower Protection in the European Union*”, current legislation, policies and practice regarding whistleblowing will be assessed in the following EU Members states: Bulgaria, the Czech Republic, Estonia, Ireland, Italy, Latvia, Romania and Slovakia. Hungary and Lithuania will participate in this assessment with their own means. This document outlines the content and process of the Whistleblower Protection Assessment.

The assessment aims at providing a concise overview of the country’s existing laws and current practices pertaining to whistleblower (WB) protection in the public and the private sector. This brief is structured as follows. First, it offers a definition of whistleblowing to be used for the research. Then, it outlines the key deliverable, namely a country report on WB Protection rules and practice. The next section lists the data collection tools to be used for collecting the information for the assessment. The final section describes the key questions and indicators which the assessment should address.

1. Definition of Whistleblowing

There are a wide range of competing definitions of whistleblowing in use. For the purposes of this study it is important to agree on a rather precise operational definition. In the context of this study, whistleblowing is defined as “*the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action*” (Near & Miceli 1985).

2. Whistleblowing Protection Country Report

Researchers are tasked to draft a country report of roughly 15 pages on whistleblowing protection, which is divided into the following sections:

1. Introduction
2. Overview of Whistleblowing Protection Rules & Protection in Practice
3. Extent of Whistleblowing Protection Rules & Their Application in Practice
4. Key Results and Recommendations
5. References & Sources

Each of these sections is explained in greater detail below.



Annotated WB Country Report Outline

1. **Introduction** (500 words)
 - Outline of project & objectives
 - brief description of research
 - brief outline of report structure
2. **Overview of Whistleblowing Protection Rules & Protection in Practice** (2000 words): seeks to provide an overview to the existing whistleblowing legislations, its enforcement in practice, the prevalence of WB and the cultural context, using information from *Section A of the research instrument*.
3. **Extent of Whistleblowing Protection Rules & Their Application in Practice** (13 x 300 words, examines the whistleblowing legislation and practice along a set of 13 assessment categories), using information from *section B of the research instrument*. In case there are separate legal regimes for the public and private sector, please highlight any discrepancies in your assessment of the two legislations.
4. **Key Results and Recommendations** (600 words)

Based on the information presented in sections 2 and 3 of the country report, the researcher should summarize the key results of the assessment and, together with the TI National Chapter and potential other stakeholders, identify key recommendations for how to improve whistleblowing legislation and practice in the country.

3. Data Collection Methods

Before starting the research work, the researcher is requested to engage with the following key documents, which are available from TI:

- Banisar (2009) Whistleblowing International Standards and Development
- Latimer & Brown (2008): Whistleblower Laws: International Best Practice
- “Blowing the Whistle Harder” (Summary of TI Project Proposal on Whistleblower Protection)

The following tools should be used to answer the questions posed in the research instrument in Section 4.

- **Desk review**: At the beginning of the research process, the researcher should conduct a desk review of existing analysis and documents on whistleblowing protection in the country. This includes academic papers, policy papers, and documents by national and international whistleblowing organisations, e.g. the national Anti-Corruption Commission.
- **Legal review**: The researcher is requested to gather information on the existing laws pertaining to whistleblowing and whistleblowing protection, both in the public and in the private sector. Pertinent provisions are usually found in the following legislation:

Generic law, e.g.

- Whistleblower Protection Act

Sectoral laws, e.g.

- Anti-Corruption Act
- Civil Servants Act
- Labour Law
- Criminal Code
- Civil Code
- Witness Protection Act
- Freedom of Information Act
- Environmental Protection Act
- Consumer Protection Act
- Specific Ministerial Legislation
- Free Expression/Media Laws

Case law, e.g.

- Individual Court Cases
- Tribunals
- Ombudsman decisions

Other, e.g.

- Secondary Legislation/statutory instruments/binding legal rules
- Parliamentary debates
- Legal opinions

- **Institutional policies** The researcher is requested to review the relevant ministry and company rules and policies (e.g. corporate governance rules, codes of conducts, internal ministry rules) for the following 5 national ministries¹ (Interior, Defence, Health, Justice, Finance) and 10 companies (5 largest by company turnover, i.e. total sales, and 5 medium companies (between 50 and 200 employees), randomly selected via list of Chamber of Industry) in the country with regard to their whistleblowing protection provisions. For these companies, the researcher should specify whether they are required to comply with the Sarbanes-Oxley Act or not. Please note that, for each relevant aspect, the researcher needs to provide a summarized assessment for all ministries/companies together. While the limited sample of ministries, and particularly companies, does by no means offer us a representative sample, it at least can provide some empirical indications of WB policies in practice.
- **Key informant interviews:** The researcher is requested to consult with whistleblowing experts and practitioners (e.g. Ombudsman, Anti-Corruption Agency, Ministry of Labour officials, corporate governance experts) and other well-informed persons in order to enhance the validity of the responses. A list of the persons consulted should be included at the end of the Report in the

¹ These ministries were chosen since they exist in most countries and cover both “soft” and “hard” subjects. If one or several ministries are not cooperative, please contact TI-S to provide you with a “B List” of additional ministries. Please also note that the researcher should only cover those policies which apply to the staff employed by the ministry. S/he does not have to collect policies for those institutions which are subordinate to the ministry, but have their own organisational policies.

Appendix. If the researcher sees a need to preserve their anonymity, then the institutions of the persons consulted should be listed.

- **Media analysis:** Where resources allow and access to media databases is available, a review of media reporting on whistleblowing in the country's main media outlets during the year 2008 should be included in the research activities.

4. Research Instrument

The research instrument for the WB protection assessment has two components, which correspond with section 2 and 3 of the country report outlined above. In section A of the research instrument, the existing WB laws, the actual use of WB mechanisms and the cultural context in the country should be described. In section B, the existing legislation and its application are then assessed according to a set of international best practices, which were identified based on a review of key documents.²

Some additional points of information for the researcher:

- In case there are separate legal regimes for the public and private sector within the same legislation, please answer the questions separately for the public sector and private sector whistleblowing regimes.
- Please note that the relevant legislation does not have to be explicit "whistleblowing protection legislation", but any legislation which covers acts that fall under the definition provided above.
- Please note that due to the limited scope of this review, a separation of the *de jure* and *de facto* dimensions was not deemed possible and they are mostly combined within a single indicator.
- In addition, due to the limited consensus on best practices and the limited scope of the study, a scoring exercise of the gap between national situation and international standards was also not deemed possible, since this would have required the development of a significantly more elaborate indicator matrix.

Nevertheless, the WB assessment is rather comprehensive and covers the following areas³:

- Societal values, public awareness and organisational culture
- Scope of subject matters covered by whistleblowing protection legislation
- Personnel covered
- Procedures for disclosure
- Scope of whistleblower protection provisions
- Oversight and enforcement

² Banisar (2009): Whistleblowing International Standards and Development; Calland & Dehn (2004): Whistleblowing- The State of the Art (Introduction to "Whistleblowing Around the World; Law, Culture and Practice", by Dehn and Calland); Rohde-Liebenau (2006): Whistleblowing Rules: Best Practice, Assessment and Revision of Rules Existing in EU Institutions; Devine (2006): International best practices for whistleblower policies at intergovernmental organizations; Latimer & Brown (2008): Whistleblower Laws: International Best Practice- all resources are available from TI.

³ While additional and more detailed assessment questions would have been possible, the current assessment framework is deemed appropriate for the purposes of this study, which is to give a comparative overview of existing whistleblower protection mechanisms, to identify gaps and to advocate for policy reform.

SECTION A. OVERVIEW OF WHISTLEBLOWING PROTECTION RULES & PROTECTION IN PRACTICE⁴

1. *WB Legal Provisions: What are the existing legal provisions covering whistleblowing in the public and in the private sector?*

- Is there a free standing WB protection law?
- Does the anti-corruption act including provisions on whistleblowers?
- Does the Civil Servants Act or national regulations governing the activities of civil servants have any provisions on WB?
- Does the Labour Act or national regulations on workers rights and duties have any provisions on WB?
- Is there a witness protection act? What types of protections for WB does it provide, if any?
- Is there any other legislation or regulation which contains protections on whistleblowing?
- Is there legislation which prevents disclosures (state secrets acts, criminal code, duties of confidentiality)?
- Have there been any court cases, tribunal decisions, or ombudsman's judgements on WB cases in the past five years? Please summarize in one paragraph each major decision (e.g. parties, date and court filed, criminal vs. civil action, summary of key facts, decision rationale and penalties/sanctions, if any)

Data Sources: legal review, desk review, key informant interviews

2. *WB Protection Policy & Practice: To what extent is the implementation/enforcement of these protections being promoted by government and the private sector?*

- Is there generally an appreciation of whistleblowing by organisational leadership (i.e. high-ranking officials and senior managers)?
- Is WB covered in codes of conduct?
- Are WB cases featured in annual reports? As positive examples of staff behaviour?
- Are staff in the public and private sector being trained sufficiently on WB policies?
- Is the independent investigation/compliance personnel independent and sufficiently resourced?

Data Sources: desk review, key informant interviews, Review of institutional policies of 5 key ministries/10 companies; staff handbooks, annual reports

3. *Incidence of Whistleblowing: How common is the practice of WB in the country?*

- Are there any statistics on the prevalence of WB? (e.g. via ALACs or WB/corruption hotlines)

⁴ To be used for Section 2 of the country report.

- Are there any statistics on state funds which were saved thanks to whistleblowing?
- What can be said about the incidence of WB over time? Is it being tracked? By whom?
- What is the development over time (e.g. over last 5 years) with regard to the number of reported cases (and cases brought to court) of reprisals by organisations?

Data Sources: desk review, specific information from government institutions

4. Cultural context: What is the public attitude towards the act of whistleblowing?

- Is there support for WB in the general population?
- How widely are existing government hotlines used?
- What are the attitudes of the elite in government, business, media and civil society?
- How supportive are law enforcement agencies and the judiciary to whistleblowers?
- How frequently does the media report whistleblowing cases? Is this reporting positive or negative?

Data sources: Existing public opinion surveys, media analysis, anecdotal evidence

SECTION B: EXTENT OF WHISTLEBLOWING PROTECTION RULES & THEIR APPLICATION IN PRACTICE ⁵				
No.	Indicator	Question	Benchmark/Best practice	Data Sources
1	Subject matter (definition of wrongdoing)	How widely defined are the subject matters covered by WB legislation?	Wide and comprehensive definition of subjects, including corruption, fraud, bribery, public wastage, maladministration (e.g. administrative irregularities, discrimination, failure to reply, refusal of information, unfairness and unnecessary delay) and danger to public health, safety and the environment.	Legal review
2	Scope of personnel coverage	How wide is the scope of personnel who is protected by the WB legislation?	Beyond employees to related classes of individuals, such as external consultants, contractors, secondees, applicants for employment, contracts and funding, and family members	Legal review
3	Internal disclosure channels ⁶	To what extent is there an adequate internal disclosure mechanism available?	Clear steps and procedures on disclosure which ensure that investigation is done properly and timely; disclosure should be based on limited burden of proof, e.g. based on “genuine suspicion”; disclosure should be to supervisor/manager first, then, if WB is not satisfied, disclosure higher-up (e.g. HR officer, corporate complaints unit) should be possible;	Legal review, key informant interviews, institutional policies
4	External disclosure channels ⁶	To what extent is there an adequate external disclosure mechanism to independent regulators?	Clear steps and procedures on disclosure; based on adequate burden of proof, e.g. based on “reasonable belief”;	Legal review, key informant interviews
5	Additional disclosure channel ⁶	To what extent does the external disclosure mechanism include a disclosure to the media, MP or civil	Should be possible; clear steps and procedures on disclosure; burden of proof should be higher than the burden in internal or external reporting, reasonable belief should be present that	Legal review, key informant interviews

⁵ To be used for Section 3 of the country report.

⁶ This information could be found in an existing law and/or institutional policies.

Blowing the Whistle Harder – Enhancing Whistleblower Protection in the European Union

		society organisations?	internal or other mechanisms will fail or have already failed	
6	Confidentiality	Does the WB legislation include provisions ensuring confidentiality? If so, how stringent and effectively applied are confidentiality rules?	Stringent confidentiality & secrecy rules and procedures re: WB identity, the fact of the disclosure and the allegations themselves; anonymous reporting allowed as well	Legal review, institutional policies, key informant interviews
7	Restrictions	To what extent do other legal provisions exist which prevent/restrict WB in certain areas? (e.g. state secret act)	Issues of state secrecy, national security etc are covered by WB legislation and receive the same protection as other issues, i.e. WB legislation explicitly overrides the secrecy provisions	Legal review, key informant interviews
8	Protection against reprisal/retaliation	What is the scope of reprisals which the WB is protected against?	No retaliation or harassment against anyone under any circumstances (disciplinary measures, demotion, termination of employment, but also passive discrimination, e.g. refusal to promote/provide training).	Legal review
9	Offered remedies	How wide is the scope of offered remedies available to WB?	Wide scope of remedies available to WB and his family in case of damages suffered, incl. return to job, lost wages, transfer to new job, rewards for WB	Legal review, key informant interviews
10	Right to refuse	To what extent does the WB legislation cover the right to refuse participation in illegal activities?	Right to refuse participation in illegal activities is equally protected (as WB)	Legal review
11	Legal liability	To what extent does the law impose legal liability for false or malicious reporting?	No additional liability; Reporting process filters out initial false reports	legislation, institutional policies, key informant interviews
12	Whistleblower participation	To what extent is the WB able to participate in follow-up process to the disclosure?	Whistleblower acknowledged as active participant in the follow-up procedure; WB kept informed about proceedings	Legal review, key informant interviews
13	Time scale	What are the limits on a time scale for	Reasonable statutes of limitation (e.g. 1 year after	Legal review

Blowing the Whistle Harder – Enhancing Whistleblower Protection in the European Union

		whistle-blowing?	consequential damage first realized)	
14	Independent Review	How comprehensive is the independent review system?	Independent review system, access to court system, incl. out-of-court mediation options; access to Ombudsman	Legal review, key informant interviews