

ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

WHISTLEBLOWING PROTECTION IN ROMANIA AND HUNGARY

QUERY

Could you provide information on the legal framework regulating whistleblowing protection in Romania and in Hungary? Does a law protecting whistleblowers exist in these countries? If so, does the Hungarian or Romanian national law provide an obligation for companies to implement a specific procedure to protect whistleblowers? Can you provide access to an English language version of these laws?

PURPOSE

We would like to provide guidance to a corporate member of our organisation.

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SUMMARY

Whistleblowers have a key role in detecting cases of corruption and other illegal behaviour or mismanagement inside public institutions and private companies. It is therefore essential to encourage reporting of wrongdoing by establishing safe, clear, independent and well-known reporting channels that protect whistleblowers against any form of retaliation.

Good practices in this regard equally apply to private and public institutions and include a broad definition of a whistleblower that protects both public and private sector employees against all forms of retaliation and discrimination, clearly communicated internal and external disclosure channels, including anonymous reporting, the right to confidentiality, to receive advice on their rights and to receive appropriate compensation from damages resulting from retaliation.

Romania is considered to have a strong whistleblowing protection legal framework that only applies to the public sector. While Hungary's new 2014 legislation extends whistleblowing protection in both the private and the public sector, its regime is considered weaker, none the least because it requires corporate compliance officers to inform targets of whistleblower disclosures that they are the subject of a complaint, undermining the credibility of subsequent investigations.

1 OVERVIEW OF GOOD PRACTICE PRINCIPLES IN WHISTLEBLOWING LEGISLATION

An increasing number of countries in Europe have adopted or are considering adopting whistleblowing legislation. Transparency International has assessed EU members according to their whistleblower legal framework in 2013, and considers that Luxembourg, Romania, Slovenia and the United Kingdom are the only EU members that have created comprehensive or almost comprehensive whistleblower protection. The rest of the EU members are considered to have partial or none-to-very-limited whistleblower protection provisions (Ioan Cuza 2015).

While some countries have specific laws protecting some categories of employees or relating to a specific sector, countries such as Romania and Hungary have opted to adopt a standalone law dedicated specifically to the protection of whistleblowers. Such legislation is usually considered preferable, ensuring the most complete coverage and providing whistleblowers with a more accessible overview of their rights and reporting channel options (Camarda 2013; Stephenson-Levi, 2012).

General principles

There is a growing consensus in the international community on what constitutes good practice in whistleblower legislation. Emerging principles include (Camarda 2013; Transparency International 2013a):

- A broad definition of whistleblowing. Transparency International's International Principles for Whistleblower Legislation refers to whistleblowing as "the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations, including perceived or potential wrongdoing – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action". This definition covers the disclosure or reporting of wrongdoing, including but not limited to corruption.
- A broad definition of whistleblowers that covers whistleblowers in both the public and private sectors. International guidelines and other instruments typically provide the broadest definition, such as the Transparency International principles which refer to "any public or private sector employee or worker" who discloses wrongdoing and is at risk of retribution. Although the term "whistleblower" typically refers to employees, some national laws provide for a broader definition extending protection not only to full-time workers but also to consultants, contractors, volunteers, part-time workers and job applicants.
- Reasonable belief. Protection should be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed. Disclosures demonstrated to be knowingly false are not covered by whistleblowing protection.
- Protection from all forms of retaliation and discrimination. Whistleblowing legislation should offer comprehensive protection against all forms of retaliation and discrimination in the workplace, including clear forms of retribution, such as dismissal, probation and other job sanctions as well as other forms of passive or attempted retaliation, such as refusal to promote or provide training. In this context, the UN Convention against Corruption (UNCAC) offers the broadest protection by granting protection against "any unjustified treatment". Whistleblowers should be entitled to receive appropriate compensation from damages resulting from retaliation, including interim remedy. Disclosures should also "be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection" (Transparency International 2013a).
- Burden of proof. As many forms of retaliation can be subtle and difficult to prove, international standards of whistleblower protection legislation require the employer to prove that action taken against the employee is not linked to his or her reporting of wrongdoing.
- Clearly communicated internal and external disclosure channels. Whistleblowers should have the option of disclosing wrongdoing inside the individual's organisation or company, and

outside it to an external body or to the public. Transparency International's principles distinguish three reporting channels, including reporting within the workplace, reporting to regulators and authorities and reporting to external parties such as the media. However, in principle internal reporting should be the first and preferred option, and external reporting should be made possible if internal attempts have failed or there is no infrastructure enabling internal reporting.

- Confidentiality and anonymity: the identity of whistleblowers should be protected by law, allowing for anonymous reporting or granting the right to confidentiality and subjecting the disclosure of his/her identity to the individual's consent.
- Confidentiality obligations. Workers are often subject to confidentiality obligations with their employers. In principle, disclosure of wrongdoing should override confidentiality issues, and whistleblowing laws should waive liability and grant whistleblowers immunity from sanctions in case of a breach of confidentiality obligations (Stephenson & Levi 2012). In other words, whistleblower rights should override employee "loyalty" oaths and confidentiality/nondisclosure agreements ("gag orders").
- Other rights of whistleblowers. Whistleblowers should be able to receive individual and confidential advice on their rights at an early stage of the process, to help them understand what rights and options for reporting are available to them. They should also have access to a fair review of retaliation cases against them. Protection should also be granted to employees who refuse participation in wrongdoing and should be legally protected from any form of retribution or discrimination as they also often risk retaliation, and have to take responsibility for proving in court or other authority that the order was illegal.

A previous Helpdesk answer on recent trends in best practices in whistleblower protection legislation can be accessed [here](#).

Whistleblowing protection in the private sector

Whistleblowing has traditionally been dealt with as a public sector issue, given its close link to public interest. As a result, many national laws still do not provide (or provide only partial) protection for disclosing wrongdoing in the private sector. International instruments, such as the UNCAC, implicitly cover private sector workers by adopting a broad definition of whistleblowers and referring to "any person". Some national legislation, such as that in the UK, explicitly grants protection to both private sector employees and public servants. Other countries, such as Australia, USA and South Korea, have whistleblowing protection provisions for private sector workers in criminal codes or sectoral laws (Camarda 2013).

Strong legislation can also create the basis for effective protection of whistleblowers in the private sector by requesting companies to create effective internal whistleblower protection mechanisms. Generally, principles of speedy and efficient reporting channels as well as the protection mechanisms that are valid for the public sector should apply to the private sector (Camarda 2013; Stephenson & Levi, 2012). For example, the Council of Europe recommends that internal disclosures are investigated properly and that information reach senior management in good time when necessary (Council of Europe Parliamentary Assembly, Resolution 1729 (2010): Protection of "whistleblowers" 2010, accessible [here](#)).

It is increasingly recognised that whistleblowing systems are an important element of corporate governance and some companies, including multinational firms operating in corrupt environments, have established whistleblower systems, including hotlines and similar reporting tools (Martini 2014).

While whistleblowing services can be operated internally or externally, the majority of companies still opt for establishing internal whistleblowing mechanisms to deal with reports and complaints (Whistleblower Security 2014). However, some companies have opted for hiring professional service firms, specialised companies or NGOs with a global reach that provide ready-made external and independent whistleblowing services for companies,

including the provision of case management support and investigation ready-made solutions with a global reach (Martini 2014).

While general principles and guidelines outlined above also apply to the private sector, a number of organisations have produced good practice guidelines on establishing whistleblowing mechanisms in the private sector, including among others:

- the International Chamber of Commerce Guidelines on Whistleblowing of 2008 that establish best practices for private sector whistleblowing systems and their anti-trust toolkit of 2013
- the OECD Guidelines for Multinational Enterprises (2011) containing non-binding recommendations for responsible business conduct
- the British Standards Institute's Whistleblowing Code of Practice (2008).

A previous Helpdesk answer on good practice and challenges for whistleblowing mechanisms in multinational companies can also be accessed [here](#).

2 WHISTLEBLOWING PROTECTION IN ROMANIA

General provisions

Romania was the first country in the continental legislative system to have a comprehensive whistleblower protection act as the result of an advocacy campaign initiated by Transparency International Romania as part of a larger project meant to strengthen and improve integrity in the public sector (Transparency International Romania no date). As a result of these advocacy efforts, Romania has a specific law on whistleblowing protection since 2004: Law no. 571/2004, often referred to as the Whistleblower Protection Act, on the protection of personnel who file a complaint about an infringement of the law within public authorities, public institutions or public companies. As such, the Romanian whistleblower's law covers the personnel from the public sector alone, while employees within the private sector are not protected by this law. In the case of conflict with other legal provisions, the Whistleblower Protection Act has priority (UNODC

2014).

Romania's Whistleblower Protection Act is considered very strong in theory, covering a broad range of disclosure types and providing protection for whistleblowers, but it faces implementation challenges due to a lack of knowledge of the law. In addition, one of the major flaws of Romanian's whistleblowing protection regime, is that it does not cover private sector employees, meaning that employees from private companies have no legal protection against retaliation if they decide to report acts of corruption within their workplace (Transparency International Romania no date).

- Scope of the legislation. According to the Romanian whistleblower's law, a whistleblower is the person making a notice in "good faith" concerning a violation of law, of professional deontology or of principles of a good administration, of efficiency, effectiveness, economic efficiency and transparency. This law covers both permanent and temporary staff, regardless of how they were hired or appointed, whether they are paid or not and what kind of duty they fulfil, and applies to central and local public administration, parliamentary staff, presidential administration staff, government staff, autonomous administrative authorities, national companies, autonomous regimes of national and local administration and state-owned companies (UNODC 2014).

The reference to "good faith" has been criticised for being too broad and unnecessary, since the reason for disclosing should be irrelevant to the act of whistleblowing (Transparency International 2013). Under Romanian law, it is presumed that the individual is acting in good faith unless proven otherwise.

- Channels of reporting. The Whistleblower Protection Act provides a range of internal, external or additional disclosure channels which can be used alternatively or cumulatively, including the hierarchical superior of the person having breached the legal provisions, the manager of the public authority, the discipline committees or to other similar bodies within the public authorities, the judicial bodies (prosecutor's

office or police), the bodies in charge of finding and researching conflicts of interests and of incompatibilities (in Romania, such a body is the National Integrity Agency), the parliamentary commissions, the mass-media, the professional, trade union or employers organisations or non-governmental organisations.

- Protections. There are four major protection measures for whistleblowers including (i) prohibition of the disciplinary/administrative sanctioning of the whistleblower for a notification made in good faith; (ii) protection of the identity data of the whistleblower, but only for certain notifications; (iii) increased publicity of the disciplinary investigation of a whistleblower; (iv) eight principles that govern the whistleblowers' protection.

For a more detailed account of whistleblowing provisions in Romania, please see [here](#).

Whistleblower protection in the private sector

There are no specific regulations for whistleblowers' protection in the private sector. However, company policies can establish protection measures similar to the public ones, but it is left to the companies' discretion, using the Whistleblower Protection Act as a good example for the companies that want to develop internal integrity policies (UNOCD 2014).

According to UNODC, based on findings from a study on integrity in the business sector in Romania, conducted in 2011 on 631 companies from 81 sectors, there is considerable interest by large companies and especially multinationals, joint stock companies listed or not on the stock exchange, for establishing whistleblower protection mechanisms in the larger context of corporate governance mechanisms in the country. Such interest for integrity and whistleblowing protection related issues is not that obvious in medium and small companies. However, in some sectors, such as the banking system, the national regulations and recommendations at industry level impose on the economic actors the obligation to have such a whistleblowing policy. In general, the compliance departments are in charge of implementing these

policies (UNODC 2014).

The Romanian whistleblowing protection law can be accessed [here](#).

3 WHISTLEBLOWING PROTECTION IN HUNGARY

General provisions

Until recently, Hungary offered limited protection to whistleblowers both in the public and private sectors. The Hungarian government has passed two whistleblower laws since 2010. However, according to Transparency International, neither law has offered whistleblowers any real and strong protection from firing, harassment or other types of retaliation (Transparency International 2013b).

The 2010 law did not set up or designate an agency to accept or investigate whistleblowers' disclosures. With no whistleblower agency in place, whistleblowers who have suffered from retaliation must seek reinstatement and compensation through the courts, where a positive outcome is uncertain.

The new legislation deals with private and public sector whistleblowers within the same framework and creates two reporting channels, a centralised, protected and electronic reporting channel at the office of the commissioner for fundamental rights (the ombudsman) and an institutional reporting channel operated by integrity advisors in the public sector or their equivalents in the private sector (OECD 2015). The new law particularly affects the processing of personal data under whistleblowing procedures and the employers' disclosure obligations.

The new 2013 law introduces a number of changes from the 2010 legislation, including, among others, (CMS Cameron McKenna 2013):

- The whistleblowing system must be based on the employer's publicly available code of ethics.
- The employer must publish on its website (in Hungarian) a detailed description of its procedural rules for whistleblowing.
- Employers must register their whistleblowing procedure with the Authority for Data Protection

and Freedom of Information (NAIH) on whistleblowing hotlines.

- Before reporting, whistleblowers must declare that they make their report in good faith.
- Before reporting, whistleblowers must be informed of (i) the consequences of reporting in bad faith, (ii) the procedural rules of the investigation, (iii) that their identity will remain confidential, and (iv) the investigation of anonymous reports may be refused.
- Employers can refuse to investigate reports of events which became known to the whistleblower more than six months earlier or where the damage in the public interest or justified private interest is not proportionate to the potential restriction of the rights of the persons affected.
- The subjects of the report must be notified of the report (except for information relating to the whistleblower that is treated as confidential), and their data privacy rights and remedies once the investigation commences. The notification may, in exceptional cases, be delayed if the investigation would be jeopardised by the subject being notified promptly.
- The subject of the report must have the right to provide statements and evidence.
- Reports must be investigated within 30 days (which can be extended to a maximum of 3 months in exceptional circumstances where the report is not made anonymously and the whistleblower is notified at the same time).
- The whistleblower shall be notified of the conclusion and consequences of the investigation.
- The employer must notify the relevant criminal authorities if its investigation concludes that criminal proceedings are necessary.
- The employer must destroy all data relating to the investigation within 60 days if it concludes that the report is baseless, or that no action is

necessary. Otherwise, it may process data by closing the investigation (in a binding and enforceable manner).

While it is still too recent to assess its implementation and impact on providing a safe channel for reporting wrongdoing (OECD 2015), Transparency International Hungary reports that in comparison with other European countries, Hungary has the lowest rate of reporting cases of corruption (Transparency International Hungary 2015). According to Transparency International Hungary, the law is seriously deficient for a number of reasons (Transparency International 2015):

- It does not designate an agency to protect whistleblowers or a specific procedure to examine whistleblowers' reports.
- While the law introduced a protected electronic system operated by the ombudsman, there are no robust and effective methods to examine reports. In practice, the ombudsman's function is limited to receiving and forwarding reports to the relevant authorities.
- Companies are expected to lay information on corruption reported to them before the authorities, making them hesitant to adopt compliance programmes.

Whistleblower protection in the private sector

The new law that came into force on 1 January 2014 is expected to motivate companies to introduce compliance programmes, which is considered a major step forward in light of the fact that one-third of leading businesses assessed by Transparency International Hungary have no mechanisms in place to protect employees who disclose wrongdoing. However, it requires corporate compliance officers to inform targets of whistleblower disclosures that they are the subject of a complaint, undermining the credibility of subsequent investigations (Transparency International 2013b).

As already mentioned, under the law, the reporting system must be based on its internal code of conduct and procedures, which are to be made publicly available. The new law gives companies certain latitude in this regard to organise their whistleblowing

system and internal procedures. While companies are not obliged to set up a reporting system, if they do, they must comply with the provisions of the whistleblowing act (Kinstellar 2015; Jalsovsky 2014). While the whistleblowing act does not provide any practical guidance in this regard, employers have to decide how to draft a code of ethics and the relevant procedural rules that will be accessible for anyone as required by the law, which has to remain effective, enforceable and tailored to the company's activity (CMS Cameron McKenna 2013).

Employees may report conduct they believe is in breach of their employer's code of conduct and employers are obliged to investigate such reports, unless they are clearly unfounded or anonymous. The identity of the whistleblower must be kept confidential (Jalsovsky 2014).

Whistleblowers are generally entitled to protection, and all detrimental measures taken against them as a result of filing a report are deemed unlawful. However, this does not apply if the whistleblower acted in bad faith.

The operation of the whistleblowing system can be outsourced to external legal advisors, subject to preconditions set out in the law (CMS Cameron McKenna 2013).

A 2012 survey conducted by Transparency International Hungary of leading Hungarian businesses showed that one-third of companies did not have mechanisms in place to protect employees reporting wrongdoing. According to TI Hungary, the law continues to feed the country's culture of corruption by reinforcing oversight systems that have failed in the past to control, prevent or uncover corruption in the country (Transparency International 2015).

The Hungarian whistleblowing act (Act 165 of 2013 on complaints and reports of public concern) can be accessed [here](#).

4 REFERENCES

Camarda A. 2013 *Recent Trends in Best Practices in Whistleblower Protection Legislation*
http://www.transparency.org/whatwedo/answer/recent_trends_in_best_practices_in_whistleblower_protection_legislation

CMS, Cameron McKenna. 2013. *Hungary: New Whistleblowing Law*
<http://www.lexology.com/library/detail.aspx?g=482b2d89-a20f-411b-80e1-aa2fb910c569>

Council of Europe Parliamentary Assembly, Resolution 1729. 2010. *Protection of Whistleblowers, 2010*,
<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en>

Ioan Cuza, A. 2015. *A Critical Analysis of Whistleblower Protection in the European Union*

Jalsovsky. 2014. *Time for Heroes or Villains? New Legislation Brings Rule for Whistleblowing in Hungary*

Kinstellar. 2015. *Whistleblower Protection Comes to CEE/SEE*
<http://www.kinstellar.com/expertise/news-and-insights/detail/energy/215/whistleblower-protection-comes-to-ceesee>

Martini, M. 2014. *Best Practices and Challenges for Whistleblowing Systems in Multinational Companies*
http://www.transparency.org/whatwedo/answer/best_practice_and_challenges_for_whistleblowing_systems_in_multinational_co

OECD. 2015. *OECD Public Governance Reviews Hungary: Towards a Strategic State Approach*.

Stephenson, P. and Levi, M. 2012. *The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees Who Make Disclosures in the Public Interest*, Prepared for the Council of Europe, CDCJ (2012)9 FIN, 2012

Transparency International. 2015. *Exporting Corruption Report: Assessing Enforcement of the OECD Convention On Combating Corruption*
http://www.transparency.org/exporting_corruption/Hungary

Transparency International. 2013a *International Principles for Whistleblower Legislation*
http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation

Transparency International. 2013b. *Hungary's Whistleblower Law Offers No Real Protection*
<https://blog.transparency.org/2013/11/12/hungarys-whistleblower-law-offers-no-real-protection/>

Transparency International Hungary. 2015. *Those Who Report on Corruption Should Not Be Afraid*
http://transparency.hu/Whistleblower_protection_cooperation.

Transparency international Romania. No date. *Report on Whistleblowing in Romania*
http://www.transparency.org.ro/politici_si_studii/studii/avertizarea_de_integritate_europa/RomaniaCountryReport.pdf

UNODC 2014. *United Nations Convention Against Corruption: Implementation of Article 33 in the Romanian*

Legislation

Whistleblower Security. 2014. *Whistleblower Hotline:*

Internal vs. Outsourced.

<http://www.acfe.com/content.aspx?id=4294984301>

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