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TRANSPARENCY
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CONCEPT PAPER ON WHISTLEBLOWER

DEFINITION OF CORRUPTION IN AZERBAIJAN

According to the Azerbaijani legislation, corruption shall mean illicit obtaining by an official of material and other values, privileges or advantages, by using for that purpose his or her position, or the status of the body he or she represents, or his or her official powers, or the opportunities deriving from those status or powers, as well as bribery of an official by illicit offering, promising or giving him or her by individuals or legal persons of the said material and other values, privileges or advantages.

(Article 1, Anti-corruption Law)

Corruption takes roots in indifferent behavior of employees towards corruption cases at work, but insightful witness of some employees takes them to reveal corruption cases. Whistleblowers expose cases from multi-million dollar financial frauds to dangerous medical practices. By this way, they play a crucial role in saving public resources and lives. However, lack of legal protection mechanisms to protect whistleblowers from dismissal, insult, pressure, physical violence creates great risks for whistleblowers. In some cases, defamation law, non-appropriate investigation, lack of disclosure mechanisms or non-robust and non-viable disclosure mechanisms within the organizations prevent the witnesses from blowing the whistle. Moreover, they are libeled as betrayers or informants within the organizations. Like many countries, Azerbaijan is also a risky country for whistleblowers. Still, a legislative group of the Anti-Corruption Commission is working on the draft law on whistleblowers. In order to support the law making process the society shall be made aware of the concept of whistleblowing and to provide feed-back and comments. In this regard, Transparency International Azerbaijan proposes concept paper on whistleblowers for public discussion.

WHAT IS WHISTLEBLOWING?

There are different definitions of the whistleblowing. According to the definition of Transparency International, whistleblowing is the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organizations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action. Furthermore International Labor Organization (ILO) defines whistleblowing as the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers."¹

Whistleblowing can be described as a 3-stage process.

- **Employee has a reasonable belief** that corrupt, illegal, fraudulent or hazardous activities are being committed in or by public or private sector organizations which are of concern to or threaten the public
- **Employee does not tolerate** corrupt, illegal, fraudulent or hazardous activities and he/she discloses to individuals or entities believed to be able to effect action.
- **Employee becomes subject of retaliation** by organization members.

WHO IS A WHISTLEBLOWER?

According to Transparency International, a whistleblower is any public or private sector employee or worker who discloses "relevant information" and is at a risk of retribution. This includes individuals who are outside of the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees. But International Labor Organization (ILO) reduces the coverage of whistleblowers to employees or former employees. In the case of Kazakhstan, all citizens might be whistleblowers of corruption cases. Thus, a person who reported a fact of corruption offence or who otherwise renders assistance in anticorruption efforts shall be under protection by the state. Whistleblower Protection Act of Romania gives equal protection to disclosure made to journalists, activists and other parties outside the workplace. Based on the international experience, the coverage of definition whistleblower can be classified in 3 categories:

- **Whistleblower in a narrow sense**
 - Employees and former employees
- **Whistleblower in a broad sense**

THE DEFINITIONS OF CORRUPTION WHICH ARE USED BY TRANSPARENCY INTERNATIONAL

"The abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs".

Grand corruption is defined as "acts committed at a high level of government that distort policies or the functioning of the state, enabling leaders to benefit at the expense of the public good".

Petty corruption is defined as "everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies".

Political corruption is defined as "manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth"

- Employee, former employees, consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and
- **Whistleblower in a broader sense**
 - All persons, including citizens, journalists, civil society activists

IN WHAT INSTANCES IS WHISTLEBLOWING PERMISSABLE?

The spectrum of cases which may provide grounds for whistleblowing is broad in countries such as Luxembourg, United Kingdom, Slovenia, etc. Yet in certain countries the scope of these cases is narrower. It is possible to classify and apply international experience in whistleblowing under 3 groups:

For limited application of whistleblowing:

- There must be an act of corruption in labor relations.

For broad application of whistleblowing:

- There must be an act of corruption in labor and service relations (financial violations in taxes, audit, accounting, etc.).
- There must be a great danger to health in work environment (dangerous conditions leading to death).
- There must be a great threat to the environment as a result of the inaction of senior staff.

For broader application of whistleblowing:

- Code of conduct and the statutes of an organization must be breached. As well as there must be acts of corruption in provision of public services.

WHERE CAN WHISTLEBLOWERS APPLY?

Whistleblowing mechanisms are applicable at three levels:

Internal whistleblowing

This level of whistleblowing occurs through provision of competent department or official with information about wrongdoing (oversight body in state agency, audit in a firm, ethical oversight body, or person). State bodies, privately owned businesses prefer internal whistleblowing mechanisms to external whistleblowing mechanisms. The gist of this approach is that first of all a whistleblower must inform senior management of the organization of wrongdoing, including acts of corruption, through internal

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ARTICLE 3. PERSONS PROTECTED BY THE STATE

Person towards whom the relevant executive authority has made the decision on application of security measures is considered the protected persons.

Following are considered as protected persons:

1. Person, who informed law enforcement agency on the crime, or participated in the revealing, prevention or detection of crime;
2. Persons, who considered a victim under the criminal case, his authorized representative, special prosecutor or his representative;
3. Suspected or accused persons, his attorneys and representatives;
4. Civil plaintiff, civil respondent, his representatives;
5. Witnesses;
6. Expert, specialists, translator and witnesses.

Security measures can also be applied toward close relatives of secured persons in the event of influence on close relatives in order to put pressure on protected persons

notification system. Thus, leadership can avert a violation in time and protect reputation of the body or firm.

Whistleblowing to regulatory or oversight agencies

Frequently, communication channels for internal whistleblowing do not operate in organizations, especially, state bodies. As a result, state bodies record no complaints in their reporting to a respective higher authority. To solve this problem, some experts consider that a whistleblower must be free in choosing any one of various communication channels, because inefficient and unreliable internal whistleblowing mechanism may discourage whistleblower. As a result, it is appropriate for a whistleblower to use a whistleblowing mechanism of a higher, supervising body bypassing internal whistleblowing (anti-corruption agencies, supreme audit institution, law enforcement bodies).

External whistleblowing

External whistleblowing mechanism boils down to informing civil society and media about wrongdoing.

WHAT TOOLS ARE AVAILABLE TO WHISTLEBLOWERS?

- **Hotlines**

In many countries, firms and state bodies have established hotlines for whistleblowers. In Azerbaijan, several corporations with foreign investment, such as BP, SOCAR and others have hotlines, but information is not available on the number of people who have used them.

- **E-mail**

In some state bodies and firms, alongside with hotlines, managers or departments responsible for ethical issues have their own e-mails and individuals can fill out applications and send them to these emails.

- **Electronic application** (specific website)

In some of the states of the US, and in Malaysia, a single national webpage has been established. Filling out and submitting e-application is possible on that website.

HOW TO PROTECT WHISTLEBLOWERS?

Whistleblower protection mechanism is a necessity to encourage whistleblowers. Among European Union countries only four have advanced legal frameworks for whistleblower protection: Luxembourg, Romania, Slovenia and the United Kingdom (UK). Of the remaining 23 EU countries, 16 offer partial legal protection for employees, while another seven countries have either very limited or no legal frameworks.

LAW OF THE REPUBLIC OF AZERBAIJAN ON STATE PROTECTION OF PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS

ARTICLE 7. TYPES OF SECURITY MEASURES APPLIED TO PROTECTED PERSONS

There are following security measures provided:

1. Security of the protected person, his residence and property;
2. Issuance to protected person of special individual protection means, warning him on existing danger;
3. Temporary placement of protected person in safe location;
4. Maintenance of confidentiality of information on protected person;
5. Transfer of protected person to another work, change of his study or work place, his relocation to other residence;
6. Replacement of the protected person's document and change of appearance;
7. Implementation in order stipulated under the legislation of closed court hearings for the event of protected person's participation.

Rules for application of security measures are defined under this law and other legislative acts of the Azerbaijan Republic.

Slovenia has an anti-corruption law offers legal protection to both public and private sector employees. Though this act is not a dedicated whistleblower law, however, it contains many internationally recognized best practices, including such provisions as confidentiality, internal and external disclosure channels, a broad range of remedies, fines for retaliators, assistance from the state anti-corruption agency. It also places the burden of proof on employers who are obliged to prove that adverse personnel actions were justified.

The 2011 Luxembourg anti-corruption act extend legal protection onto public and private sector employees who report such crimes as corruption, influence peddling or abuse of office. Importantly, it also places the burden of proof on employers and, similar to the UK practices, allow employees to file appeals to a labor court.

CURRENT SITUATION IN AZERBAIJAN AND PERSPECTIVES

There is no law to protect whistleblowers in Azerbaijan, but current legislation protects persons participating in criminal proceedings. Still, there are some people who blow the whistle. Whistleblowers in Azerbaijan are mostly citizens and small businesses that report on petty corruption. Also, petty public officials and those working for enterprises funded from the state budget report on cases of corruption. One of petty officials interviewed, was dismissed from the office and accused of having mental health problems. His supervisor he reported on also filed a court case, accusing him of slander. In another case, a married couple, both teachers at the same school, were dismissed from work by the school principal that they had reported on.

In Azerbaijan today discussion on protection of whistleblowers is limited to protection of those who report on corruption, while protection of people who bring public attention to serious threats to public health and labor security is not in the centre of discussion so far. According to the Labor Code, only an official has the power to release information about work accidents and invite investigative group in, while usually such officials are inclined to conceal those facts. Therefore, it is believed to be expedient to make amendments to the Labor Code to recognize the power of the employees to whistle a blow and to protect the rights of those who do so.

Existence of a special public agency to ensure the rights of whistleblowers is a necessity. Today Azerbaijan has two agencies in the field of combat against corruption, namely the State Anti-corruption Commission and Chief Anti-corruption Department under Prosecutor General's Office (herein after the Anti-corruption Department). If the Commission is entrusted with developing and implementation of the anticorruption policy, the

Anti-Corruption Department's role is to conduct preliminary investigation and operatively search activities. It seems possible to use resources of the Anti-corruption Department to investigate the cases of whistleblowers. Thus, the department has about 140 employees that are engaged in search activities. These include the head of the Department, deputy heads, three chief prosecutors, prosecutors, investigators and operative officers. Also, the Commission could be engaged in organization of public awareness raising activities on the whistleblowing and provide assistance to set up robust disclosure mechanisms and clear procedures to report suspicions of corruption within public agencies. Along with this, Transparency Azerbaijan Anti-corruption Public Association could bring in its knowledge of support to whistleblowers in other countries and render legal assistance and advice to whistleblowers.

Existence of proper and reliable channels for whistleblowing is very important for whistleblowers. The global experience offers e-services, hotlines, e-mails and other tools for those who wish to report on corruption. Azerbaijan has sufficient experience in organization of mechanisms to provide information, as well as supporting technical infrastructure. Thus, the Anti-corruption Department offers a telephone based hotline (161), as well as online tools to report corruption.

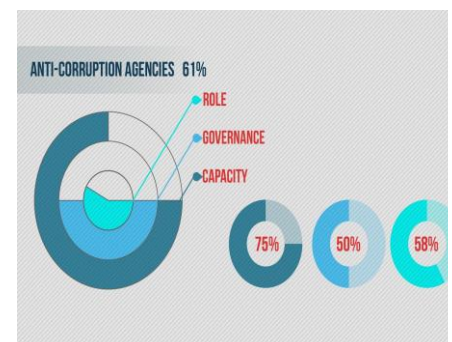
In today Azerbaijan practice, whistleblowers are more often than not dismissed from the jobs. Also, those who report on corruption are often accused of having mental health problems by their superiors. Moreover, they face court litigations and accusations of slander and libel. These instruments of pressure force many of whistleblowers to step back. Therefore, priority shall be given to development of the legislation to protect the rights of whistleblowers. A disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law. Also, the right to whistleblow shall supersede the oath of loyalty and confidentiality agreements.

Recommendations for Legislative Principles

In order to support the law making process, Transparency International Azerbaijan recommends the following legislative principles to protect whistleblowers. These recommendations have been developed in line with the TI expertise and bearing in mind the local context.

ANTI-CORRUPTION AGENCIES IN AZERBAIJAN

Anti-corruption agencies of Azerbaijan Republic include two entities – State Commission on Combating Corruption (Anti-Corruption Commission) and the Head Department on Combating Corruption under the General Prosecutor's Office (Anti-Corruption Department). Both are established in order to institutionalize and ensure an efficient fight against corruption in the Azerbaijan Republic. The Commission on Combating Corruption was established as a specialized agency in the field of preventing corruption through policy making; whereas the Anti-Corruption Department mostly has a mandate to prosecute for corruption offences. According to NIS report, the overall score for the pillar on the anti-corruption agencies was assessed at 61 out of total 100.



Scope of application:

1. **Broad definition of whistleblowing** – whistleblowing should not be limited to corruption disclosures, specific dangers for public health and labor safety also should be subject of whistleblowing.
2. **Broad coverage** – the law shall apply to all those at risk of retribution, including both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, contractors, temporary workers, former employees). For the purpose of protection, it shall also extend onto citizens and entrepreneurs who disclose petty corruption in provision of public services.
3. **“Reasonable belief of wrongdoing”**– protection shall be granted for disclosures made with a reasonable belief that the information is true at the time of disclosure. The law shall stop short of protecting deliberately false disclosures, allowing them to be handled through the normal labor, civil and criminal law mechanisms. Protection extends onto those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed.

Disclosure mechanisms

4. **Reporting within the workplace** – whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality; ensure timely and independent investigations of whistleblowers’ disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers’ retaliation complaints.
5. **Reporting to regulators and authorities** – if reporting at the workplace does not seem practical or possible, individuals may make disclosures to regulatory or oversight agencies or individuals outside of their organization. It could be either of the anti-corruption agencies, the supreme audit institution and Ministry of Labor.
6. **Whistleblower complaints authority** – the law may create an independent body (or appoint an existing one) to receive and investigate complaints of retaliation and/or improper investigation.
7. **Publication of data** – the law shall mandate public and private bodies of sufficient size to publish disclosures (duly made anonymous) and to report on detriment, proceedings and their outcomes.

Protection

8. **Protection from retribution** – individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation; punitive

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- transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and so on.
9. **Preservation of confidentiality** – the identity of a whistleblower may not be disclosed without the individual’s explicit consent.
 10. **Burden of proof on the employer** – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by a whistleblower’s disclosure.
 11. **Waiver of liability** – any disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law.
 12. **Full range of remedies** – a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering. A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.
 13. **Fair hearing (genuine “day in court”)** – whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum, with a full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective.
 14. **Right to refuse participation in wrongdoing** – employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution or discrimination if they exercise this right
 15. **Personal protection** – Whistleblowers, whose lives or safety are in jeopardy and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection.

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