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Nature and challenges of misconduct and corruption in the public sector and ways forward

Whistle-blower protection and the implementation of article 33 of the United Nations Convention against Corruption on the protection of reporting persons

This conference room paper was prepared by Constanze von Soehnen, United Nations Office on Drugs and Crime. It aims to support the initiatives of individual Member States and the global dialogue on whistle-blower protection. It comprises a snapshot of the topic. A detailed analysis and reflection on the roles of all different stakeholders and on the legal, institutional and technical details of whistle-blower protection is beyond the scope of this paper.

A. Results of the implementation Review Mechanism of the United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) is the only universal anti-corruption instrument. By now, it has been ratified or acceded to by 184 Parties.¹ Under its Implementation Review Mechanism (IRM), States parties' implementation of the Convention is reviewed in two cycles, the first looking at criminalization and law enforcement as well as international cooperation, the second looking at the prevention of corruption and asset recovery.

Article 33 of the Convention provides the following:

“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.”

The first cycle included the review of article 33 of the Convention on the protection of reporting persons. Approximately 70 percent of the reviewed States parties received a recommendation. Those varied, reaching from recommendations to consider adopting or amending legislation or to harmonize legislation into a coherent protection framework to recommendations to consider strengthening the effective implementation of protective measures.² Additionally, a high number of countries identified technical assistance needs either during their review or outside of the IRM process. Such needs included, inter alia, exchange and capacity building on different protection measures and on the handling and investigation of whistleblower reports tailored to the specific country context. During the second cycle of the IRM, internal and external reporting mechanisms will be looked at from a

¹ As of 18 April 2018. <https://www.unodc.org/unodc/en/corruption/ratification-status.html>

² UNODC (2017), State of Implementation of the United Nations Convention against Corruption: Criminalization, law enforcement and international cooperation – Second Edition, p. 152-157.

corruption prevention perspective, for instance, under article 8, para. 4, article 12³ and article 13⁴ of the Convention.

To respond to the growing number of requests received in the last four years, UNODC applied a tiered approach to the provision of technical assistance at global, regional and country levels, based on extrabudgetary resources. Past initiatives have included the publication of a *Resource Guide on Good Practices in the Protection of Reporting Persons*⁵, the organization of numerous regional workshops and conferences, and the provision of legislative advice and technical support at country- and organizational-level. It is expected that such work will be expanded and intensified in the future.

B. Global development

During the last decade, the global discourse on whistleblowing and whistleblower protection has been driven by various factors. First, there is a growing recognition by compliance officers, regulators, inspectors, and law enforcement authorities that reports by “insiders” are not only a crucial source of information for the initiation of targeted administrative or criminal investigations, but also that there is a need to provide such insiders with better protection when handling their reports and if retaliation happens. Secondly, several big scandals of national or international dimension have caught the attention of media, society and actors from the public and private sector and generated calls for improved protection. Third, policy transfer through regional and international standards and the increased global debate about good governance, compliance and related topics have accelerated the current development.

As there is, as of yet, neither a universal definition of whistleblowing nor an international convention on whistleblower protection, the Convention against Corruption plays an interesting and catalytic role in this field even though the focus of the Convention is on the prevention of and fight against corruption, including through whistleblower protection. As indicated above, the implementation reviews of many States parties concluded that more could be done to motivate people to “blow the whistle” and protect them and, thus, recommended that States parties consider adopting or amending relevant legislation or consider strengthening the effective implementation of whistleblower protection measures. These recommendations contributed to the increased interest in and debate about the topic and to follow-up action by multiple States parties.

Due to all the above-mentioned reasons, the adoption of either stand-alone whistleblower protection laws or the integration of whistleblower protection measures into other pieces of legislation is on the rise. However, multiple challenges remain, inter alia, gaps or inconsistencies in the legal and institutional frameworks, the absence of regulations and standardized processes, or a lack of conceptual clarity between the systems of whistleblower protection and, for instance, the protection of witnesses and cooperating offenders. As the topic is still relatively new, at least from a global perspective, there is a need for a more practically focused debate and specialized technical assistance.

³ Article 12 asks States Parties to take measures to prevent corruption and enhance accountability in the private sector. The article doesn't list whistleblowing systems and whistleblower protection specifically, but mechanisms for reporting and respective guidance material for employees are amongst the possible measures to achieve these goals.

⁴ Article 13 of UNCAC focuses more on the broad aspect of citizen reporting to anti-corruption bodies instead of the reporting by employees or similar, and encourages the establishment of the option to report anonymously next to the option of confidential reporting. A further discussion about those channels and their implementation in practice goes beyond the scope of this paper.

⁵ UNODC (2015), *Resource Guide on Good Practices in the Protection of Reporting Persons* (available in Arabic, English, French and Spanish) <http://www.unodc.org/unodc/en/corruption/publications.html>

Moreover, there is an increasing number of recommendations by various regional bodies across the globe that promote and encourage the adoption of whistleblower protection measures.⁶ The Parliament of the European Union even adopted a resolution in 2017, calling on the European Commission to propose an EU directive on the protection of whistleblowers.⁷ That resolution also calls on the Member States to take into consideration article 33 of the United Nations Convention against Corruption, underlining the role of whistleblowers in the prevention of, and fight against, corruption.⁸

Historic context

During the 1970s and 1980s, the term whistleblowing emerged in the academic debate. Ralph Nader started using it in the organizational context, reflecting when the public interest would override the interest of an organization. The most commonly used academic definition to date still seems to be the one from Near and Miceli (1985) who define whistleblowing 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 who effect action”.

The first international convention which included the notion of protection from employment related retaliation in the form of dismissal was the *Termination of Employment Convention of 1982*⁹, which specified that the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations was not a valid reason for the termination of employment.

Though this Convention has only been ratified by 36 States parties so far, many more States actually have a provision in their Labour Codes which more or less mirrors this standard. Whilst it only offers a very narrow employment related protection upon retaliation (as it is limited to cases of dismissal and doesn't provide other forms of protection), it is hoped that it could still be used as a fall-back option in relevant cases until more comprehensive protection measures are established.

Apart from UNCAC, a few other anti-corruption conventions include the notion of whistleblower protection, but neither provide more detailed provisions nor an equally broad global scope. Noteworthy are though, Article 9 of the Council of Europe (CoE) Civil Law Convention on Corruption and the CoE Recommendation on the Protection of Whistleblowers¹⁰ and Article III, para. 8 of the Organization of American States (OAS) Inter-American Convention against Corruption.

C. Some of the current key challenges

I. Insufficient conceptual distinctions

There is a tendency to merge the discussion of whistleblower and witness protection, to draft combined laws and to neglect the establishment of separate systems for the two topics.

The reason is that both whistleblowers and witnesses are sources of information and that there are some potential overlaps. For the purpose of demonstration of a potential overlap, I will describe two scenarios, whilst underlining that these scenarios are only exemplary and would depend on the

⁶ Recommendation CM/REC(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, ECOWAS Whistleblower Protection Strategy of 2016 etc.

⁷ European Parliament resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)).

⁸ Ibid, OP 8.

⁹ Available at: http://blue.lim.ilo.org/cariblex/conventions_8.shtml

¹⁰ Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Available at <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>

relevant legislation and the details of the case. In the first scenario, a person X “blows the whistle” on suspected corruption. X’s identity is protected and X is not required in the trial as sufficient corroborating evidence and/or witnesses are found to build the case without the involvement of X. In the second scenario, X might be needed to be called as a witness, i.e., to provide testimony or to authenticate some other evidence. Depending upon the facts, it may still be possible not to reveal X as the person who initially reported the crime and, hence, to treat X’s role as a whistleblower separately from X’s role as a witness.

In very simple terms and acknowledging that there is no universal standard and that overlaps exist, one could say that whistleblowing is much broader and different from witness protection in three key areas:

1. Whilst witness protection¹¹ is focused on reporting and/or providing testimony on alleged criminal offences (of a certain gravity), whistleblower protection includes the reporting of criminal offences as well as breaches of administrative or other regulations and other matters such as potential health and safety risks. Often it is a prerequisite for protection that the disclosure must concern a “serious wrongdoing” or, in regard to unauthorized disclosures, that there is an overriding “public interest” in the matter.

2. Witness protection is primarily focused on procedural and physical protection measures (before, during and after the criminal trial) to assure prosecution and testimony in court. In many of these cases, the identity of the witness is known and the reason for the need for protection. The choice of protection measures will depend on various factors, such as the type of the threat, and would need to be balanced with the rights of the accused. Whistleblower protection is primarily focused on intelligence and the detection of alleged misconduct, crimes, risks etc. The protection has several elements¹². The primary and immediate measures have the objective to ensure that the identity of the reporting person is not revealed (confidentiality measures)¹³. If, for any reason, the identity of the reporting person is known or becomes known, further protective measures could be used. Those are primarily, but not exclusively¹⁴, employment related protection measures against retaliation¹⁵, which can be enforced through labour courts if an act of retaliation happened. However, a few countries have also enabled other authorities to take (interim) protective measures such as directives to the employer for (interim) reinstatement of the reporting person.

3. Witness protection, as it concerns the reporting of criminal offences, means that the person reports and is in contact with law enforcement authorities and/or the prosecution during criminal proceedings. Whistleblower protection, as it is broader, encourages internal reporting (e.g. to the employer or a specific officer) or, alternatively, reporting to a designated person or authority (e.g. regulators or law enforcement). In exceptional cases, external reporting is protected. For the latter, there is a growing body of jurisprudence on human rights considerations, the balancing of different interests, and elements to consider, including from the European Court of Human Rights.

II. Narrow view

¹¹ For detailed information on witness protection, please see: UNODC (2008), Good practices in the protection of witnesses in criminal proceedings involving organized crime, available in Arabic, English, French, Russian and Spanish. <https://www.unodc.org/unodc/en/organized-crime/tools-and-publications.html>

¹² For a list of possible measures, see for instance: UNODC (2015), Resource Guide on Good Practices in the Protection of Reporting Persons, p. 47 et seq.

¹³ Not to be confused with anonymity (where the identity of the reporting person is not known to anyone).

¹⁴ For instance, protection against civil or criminal liability, rewards or the criminalization of retaliatory actions.

¹⁵ See also UNODC (2017), State of Implementation of the United Nations Convention against Corruption: Criminalization, law enforcement and international cooperation – Second Edition, p.153.

As mentioned above, many countries have at least some legal provisions which could be used at the moment, even though they will not provide comprehensive protection. Those might include provisions in anti-corruption laws, labour codes or in laws establishing the functions and powers of financial, health or safety regulators. If a Member State considers the adoption of more comprehensive legislation, the experience of relevant actors should be drawn upon. In parallel, the discussion should already then consider how such legislation would be effectively put into practice e.g. through standardized procedures and guidance, which reports could be considered as whistleblowing reports and which measures to take, through inter-agency agreements etc.

Further, whistleblower protection laws should consider a broad approach, including also protection for persons who report, for instance, cases of negligence and breaches of security standards which could cause a serious risk (e.g. skipped/sloppy control of building statics and safety standards by a relevant regulator which could create a risk of collapse of a building or absence of sufficient fire exits). Even though these cases will most likely not be criminal (as long as the risk does not materialize), but would be dealt with administratively, they might point to a serious risk and warrant protection of the reporting person against retaliation. Further, they might reveal the “tip of the iceberg” and could lead to the detection of broad scale mismanagement or even corruption.

III. Need for more in-depth analysis and a focus on the implementation in practice

Despite the growing number of laws, the implementation in practice, in particular the designation and handling of whistleblower reports, still poses a challenge for many countries (implementation gap). Information on, inter alia, the number of received whistleblowing reports and further details is often not collected or analysed by receiving persons or entities, and in many countries, there seem to be hardly any court rulings dealing with whistleblower protection. Continued dialogue on the roles and responsibilities of different actors, exchange of experiences, technical assistance, and research in those areas seems needed.

The focus should be on the reported concerns/matters and the handling of these concerns. Ultimately, the reason why a person reports alleged corruption or another issue is, in most cases, a serious desire that the issue will be investigated and, depending on the outcome of the investigation, addressed. This means that whistleblower protection measures will only be as strong as the response by the recipients (designated persons or agencies). More work is needed in this field, including in relation to the standardization of forms and procedures, capacity building on investigative techniques, data collection and analysis, and inter-agency collaboration. It is assumed that the efficient handling of incoming reports will create trust and ultimately contribute to corruption prevention and a deterrent effect. A similar effect could be assumed in other areas of regulation.

D. Conclusion

It is hoped that more practically focused work will lead to a richer, more comprehensive and mature discourse at all levels. Along these lines, UNODC recommends building on the IRM and its findings as well as on the on-going dialogue and exchange of experiences, challenges and good practices facilitated by the Conference of States Parties to the United Nations Convention against Corruption and its subsidiary bodies, such as the Working Group on Prevention, to avoid a duplication of efforts and further recommends collaborating with and tapping into the experiences of different stakeholders in the field of whistleblowing and whistleblower protection.