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Special Representative of the Director General of
The Treasury for International Affairs
Ministry of Economy, Finance and Industry
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Mr. Mochammad Jasin
Vice-Chair
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G20 Anti-Corruption Action Plan Implementation of whistleblower protection legislation by end 2012

14 September 2011

Dear Mme Jeanblanc-Risler, dear Mr. Jasin,

We welcome the commitment in the Seoul G20 Anti-Corruption Action Plan to enact and implement whistleblower protection rules by the end of 2012. By proposing best practice legislation the G20 is in a unique position to provide a benchmark in this field at the global level. With this letter we wish to contribute to this effort. Our recommendations on whistleblower protection build on and complement a civil society submission to the G20 Anti-Corruption Working Group, submitted in February 2011.

Several international conventions recognise whistleblowing as an effective tool for detecting and fighting corruption, fraud and mismanagement, and commit the signatory countries to implement appropriate legislation¹. However, existing national and international legal provisions often do not provide sufficient protection for whistleblowers.

In our efforts to provide a safe alternative to silence for the disclosure of wrongdoing malpractice or the risk thereof, we produced a set of guiding principles for whistleblowing legislation². These principles provide a comprehensive framework for related laws, building on international best practice. The key recommendations derived from these principles are summarized below:

1) A single, comprehensive legal framework is most effective

Legislation for protecting the whistleblower should be clear, comprehensive and easy to use. Ideally, a single legislative framework should be in place, covering the public, private and not-for-profit sectors, providing for reporting channels to communicate concerns and for independent review. Legislation should include a broad range of issues, from criminal

¹ E.g. the UN Convention against Corruption, the Council of Europe Civil Law Convention on Corruption, the Inter-American Convention Against Corruption, the African Union Convention on Preventing and Combating Corruption, etc.

² www.transparency.org/content/download/48454/774866/Principles_whistleblowing_legislation.pdf; for an overview of international best practices in whistleblower policies see also Tool G International Best Practices for whistleblower policies" ab S. 256 in Devine, Tom; Maassarani, Tarek F., The Corporate Whistleblower's Survival Guide, ISBN 978-1-60509-986-6, 2011

offences to the potential harm that wrongdoing can cause, such as to the health and safety of citizens and the environment. Whistleblowing legislation should provide that organisations in the public and private sector establish, maintain, and routinely publicise appropriate mechanisms for internal and external reporting and their application in practice.

While the key function of legislation in this field is to protect a whistleblower from retaliation and to guarantee effective and independent follow-up to the disclosure, the overall legislative framework must also promote and protect fair outcomes for all parties involved in or potentially affected by disclosures, including by respecting the presumption of innocence of alleged wrongdoers unless or until responsibility or guilt is sufficiently proven.

2) Ensuring safety and protection of the identity of the whistleblower

Both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, temporary workers, trainees, etc.) should be protected from reprisal for honestly reporting concerns. Protection should include a right to refuse participation in malpractice and it should cover disclosures made voluntarily as well as those that are part of normal duties. It should be extended to those attempting to report and to those acting as witnesses.

Legislation should ensure that the identity of the whistleblower must not be disclosed without the individual's consent unless required by law. In case of apparent or alleged retaliation against the whistleblower, it is vital that the burden of proof lies with the employer to show that the reprisal is not related to the disclosure. This reverse burden of proof helps to balance the power between the employer and the employee in the public interest. These protections should be guaranteed by access to normal court procedures.

Whistleblowers should be fully compensated for any damages suffered as a consequence of their disclosure. Where appropriate, they should receive professional or social recognition for having prevented harm to an organisation or society, potentially including financial rewards. Strenuous efforts should be made to strengthen witness protection programmes and to make these available to whistleblowers and their families who are threatened. If a whistleblower faces risk of imminent harm or persecution for exposing corruption, and his or her home country is unable or unwilling to provide adequate protection, the whistleblower should have access to effective asylum procedures.

3) Internal and external reporting should be protected

Research shows that whistleblowers prefer to raise concerns internally first, e.g. to their supervisors or to designated bodies within their organisation³. In many instances, however, internal reporting may not be safe or feasible. Whistleblowers may fear retaliation for filing an internal report, the report may not be followed up internally, or the public interest may be best served by immediately filing the report externally to the authorities or other agencies.

Whistleblowers should therefore always have a safe option to report to the regulator, enforcement authorities or to other competent oversight bodies. As a last resort and under certain conditions disclosures to the media or the wider public should also be protected. This is particularly important where there is an imminent risk to health and safety. Where there is protection for journalists' sources, the legislation should also include whistleblowers.

4) Ensuring adequate and independent follow-up

Public benefits of whistleblowing are only generated when disclosures are properly investigated. This requires independent persons or bodies that have sufficient resources and powers to factually and legally analyse the content of the disclosure and, wherever necessary, to implement corrective actions. Within these processes, the whistleblower should be recognised as an active and critical stakeholder, kept informed of any follow-up and outcomes of the disclosure, and given a meaningful opportunity to provide input into the process. Such procedures need to be transparent and the results, while protecting the

³ Miceli, Marcia P.; Near, Janet Pollex; Dworkin, Terry Morehead: Whistleblowing in organizations; ISBN: 978-0-8058-5989-8; 2008 Page 8 with further references

legitimate interest of the persons concerned, need to be sufficiently visible to encourage other potential whistleblowers to raise their concerns.

5) Enforcement and evaluation are essential

While the existence of a legal framework is a vital element in protecting whistleblowers and the public interest, it is not, in itself, sufficient. Legislation needs to be effectively enforced and should be as sound and consistent as possible. To ensure the proper implementation and evaluation of legal provisions, an independent public body with sufficient autonomy should be set up or designated to oversee the functioning of the law and to monitor those authorities charged with receiving and investigating concerns. The oversight and evaluation of law and policies should include consultations with key stakeholders like trade unions, business associations and civil society actors.

Comprehensive legislation without loopholes and with adequate follow-up mechanisms will lay strong foundations for providing a safe environment for the individual to disclose a suspicion or a case of corruption. Effective whistleblower protection legislation will be critical to advance the fight against corruption in G20 member states and beyond. We therefore recommend that a Technical Committee should be set up, similar to the one established under the OAS⁴, involving civil society and other relevant experts, to support the implementation of best practice whistleblowing legislation within the G20 member states.

We look forward to further engaging with you in this area, and would welcome a more formal consultation with the Working Group. Feel free to contact Anja Osterhaus, Transparency International (+49-30 343 820 722, aosterhaus@transparency.org) or Cathy James, Public Concern at Work (+44-203 117 2520, cj@pcaw.org.uk).

With kind regards

- Transparency International (global)
- Public Concern at Work (UK)
- Article 19 (UK)
- Federal Accountability Initiative for Reform (Canada)
- Government Accountability Project (USA)
- National Whistleblowers Center (USA)
- Project on Government Oversight (USA)
- Open Democracy Advice Centre (South Africa)
- Whistleblower Netzwerk (Germany)

⁴ http://www.oas.org/juridico/english/mesicic_intro_en.htm.