

REPORTING WRONGDOING

Policy recommendations

Background

The earlier study on whistleblowing conducted in 2013 by *Transparency International* highlighted specific issues that inhibit reporting wrongdoing. Estonia has a very narrow and fragmented legal framework that addresses the matter of reporting wrongdoing. Although the main provisions that regulate reporting, such as obligation to report confidentiality, are in place in the public sector, implementation thereof is problematic.

As regards the private sector, already in 2013 it was highlighted that the law on personal data protection allows whistle-blower procedures to be set up only in the financial sector. However, there are other areas where limited regulation does not allow using whistle-blower mechanisms, but where the risks of corruption exist (e.g. construction, procurement and public enterprises). One example of limited regulation in the private sector is the requirement stipulating that in order to conduct an investigation of an incident of wrongdoing, the person being investigated has to give his/her consent.

An amendment of the Anti-corruption Act that has recently passed (11 March 2016) stipulates that the confidentiality of the fact of notification of a corruption incident shall be ensured if the notification comes from the private sector. How this is applied in practice will be clear in time. Nevertheless, this document provides further references on how to better regulate and implement anti-corruption measures (including reporting wrongdoing) in the private sector.

According to the study conducted in 2013, the political leadership has no apparent momentum to regulate whistleblowing more specifically and to improve implementation thereof. There are no regulations that require governmental authorities to develop measures/guidelines on how to report wrongdoing.

Although attention is paid to the prevention of corruption, internal notification procedures of possible corruption (i.e. whistleblowing) are not known within the authority. The attitude of society regarding reporting of wrongdoing is also passive (74% of people would not notify authorities about bribery).

At the same time, 57% of the managers of Estonian companies have personally experienced corruption in business and they would usually report it (only 3% would not report), but they would like to report an incident within the organisation.

This means that companies would like to manage corruption risks by implementing measures that the legal framework does not provide, although it should. Hopefully, this situation will change with the new amendments of the Anti-corruption Act. When implementing the act, these policy suggestions should be taken into account.

Limited legal framework and a tepid attitude of politicians and society towards reporting wrongdoing is dangerous. Lack of certainty and courage to report wrongdoing results in an increase in corruption. In addition to giving, receiving and mediating bribes, conflicts of interest, misuse of official position and influence, trading in know-how and insider information, nepotism etc. constitute also corruption threats.

In order to find out the latest developments and practices used to facilitate reporting of wrongdoing, we conducted four interviews with experts of this field in two responsible ministries (the Ministry of Justice and the Ministry of Financial Affairs) and in one subordinate authority (Tax and Customs Board).

Thereafter, Transparency International Estonia (TIE) prepared policy suggestions on reporting wrongdoing (or whistleblowing). These are intended for all authorities (and persons that are in a decision-making and control position or an adviser function) that perform public duties (government authorities, local authorities and public enterprises).

As whistleblowing is only one of many anti-corruption measures, the policy suggestions include also ideas on more effective management of corruption risks in public authorities and public enterprises. Although Transparency International (TI) suggests to regulate whistleblowing with a stand-alone law, both TIE and the interviewed experts find that **reporting wrongdoing should be facilitated by making the existing legislation more specific and by more efficient implementation thereof**. Prevention and distribution of information, internal rules, if necessary, a whistle-blower guide and, primarily, managers as an example are also important.

Suggestions on how to include more specific provisions in laws and implement them more effectively in public organisations, including public enterprises

Public enterprises are involved in activities where the general market regulation does not work and public resources are used. Consequently, it is important to treat them in the same manner as other government authorities in corruption prevention (and whistleblowing). Incidents and suspicion of corruption associated with Tallinna Sadam and Eesti Raudtee give a clear basis for a more efficient prevention of corruption in public enterprises.

1. The general methodology of assessment and management of corruption risks in public enterprises

The Anti-corruption Act must be implemented more effectively in public enterprises. Given the fact that corruption risks in public enterprises vary, every public enterprise has to assess and record its possible corruption risks and select the most effective prevention and control measures based on the assessment results. To ensure an improved assessment of risks, it is recommended to prepare a common corruption risk assessment and management methodology applicable to public enterprises.

A common methodology ensures that in every public enterprise attention is paid to the risks identified in the methodology. This would give an opportunity to compare the results of public enterprises (in turn it gives an opportunity to develop common risk management practices). Every year an assessment of the current situation, based on common principles must be conducted in every public enterprise in order to monitor changes in risk levels and adjust risk management measures accordingly.

2. When implementing effective prevention and control measures, attention must be paid to setting up more efficient whistleblowing procedures in public enterprises

Effective prevention measures include also clear internal rules and instructions (including on how to report wrongdoing); regular internal training; advising employees on how to resolve certain situations and implementation of the practice according to which violation of internal rules is taken into account during work performance assessment. Among other things, control measures include a register of given and received gifts, application of the “four-eye principle” when making decisions, conducting regular compliance or internal audits to assess company activities.

3. Specific and simple procedures on reporting wrongdoing must be established

The Anti-corruption Act does not provide a **clear reporting procedure**, meaning that an official may not know whom and how to notify. However, according to §6 of the Anti-corruption Act, this must

be specified (for example, which incidents of wrongdoing have to be notified, who has to be notified within or outside the organisation, the obligation of the receiver of the information to ensure confidentiality of the person that reported the incident, his/her protection) by an internal framework or at least sharing information.

4. Confidentiality and protection of whistle-blowers must be ensured by regulations and application thereof in both government authorities and private companies

§6 (2) of the Anti-corruption Act requires that the confidentiality of the notifier shall be ensured. However, Estonian governmental authorities and departments are too small so that the identity of the whistle-blower may become public very easily.

There have been several incidents in Estonia where whistle-blowers have experienced unfair treatment, e.g. they were laid off, lost their benefits and were harassed. Consequently, special attention must be paid to the confidentiality requirement, prevention of retaliation and punishing the harasser (zero tolerance of retaliation).

Furthermore, legislation in Estonia does not provide physical protection of whistle-blowers that may become very important depending on the situation and the person that has committed wrongdoing. Confidentiality and protection of whistle-blowers must be ensured by legislation in governmental authorities and private companies.

5. All persons that work for public authorities must be applied the same ethics requirements

Employees of public authorities employed under an employment contract must also follow the principles of the Anti-corruption Act and Civil Service Act because when performing public duties they have the status of an official (Anti-corruption Act §2).

Hence, it is necessary for the internal control unit to train people employed under an employment contract on the ethics of an official and how to report wrongdoing. In order to improve implementation, **the definition of an official should be extended to cover trainees, volunteers, temporary**

experts and members of the supervisory board of public enterprises.

6. Statistics on incidents of wrongdoing helps improve its prevention

In order to improve the implementation of the Anti-corruption Act and to gauge the efficiency of preventive work, **it is necessary to gather statistics on incidents of wrongdoing**. Statistics, based on regularly gathered data, is necessary to assess the effectiveness of the measures and this in turn helps to improve training and control activities in the future to meet the objectives. This information should be made public about every public enterprise.

Suggestions on how to include more specific provisions in laws and implement them more effectively in the private sector

1. Reporting wrongdoing in the private sector when not performing public duties

Although according to §6 (5) of the Anti-corruption Act, **reporting wrongdoing in the private sector when performing public duties** is required, the private sector must be allowed to implement wrongdoing reporting mechanisms in other situation when they are not performing public duties. It is recommended that when a private company performs a public duty, the relevant public authority that has asked the duty to be performed must inform the private company about its reporting obligation.

Another issue is related to allowing reporting and investigation of possible wrongdoing by persons in the private sector. Implementation of the reporting procedures and investigation of incidents of wrongdoing through them in the private sector is allowed only if it is allowed by law or the person gives his/her consent regarding processing of his/her personal data.

When information is forwarded to the appropriate departments of the authority (e.g. internal control), the personal data protection framework does not allow an investigation to be carried out (Personal Data Protection Act § 14). To enable reporting wrongdoing and thereby more efficient corruption prevention in the private sector, the laws must be changed so that the Personal Data Protection Act would not inhibit a company to investigate wrongdoing within its organisation.

The rules of a company must facilitate notification of unethical behaviour (e.g. violation of the rules regulating receiving and giving gifts, conflicts of

7. The Ministry of Justice and the Ministry of Financial Affairs in Estonia must assess the risks that arise from the revolving door practice

When assessing the risks of the revolving door, the need to apply provisions that address wrongdoing to persons that have already left their respective positions may become apparent.

The officials' restrictions on activities (Civil Service Act §60) must also include the risks that arise from the revolving door practice where the knowledge acquired when holding a certain position is used when working in the private sector, for example when offering advice or preparing project applications using insider information and submitting public procurement tenders to the previous employer etc.

interest, charging transaction fees) within the organisation. Resolution of problems related to unethical behaviour is much more efficient if conducted by the organisation itself.

2. Reporting wrongdoing in the private sector must be set down in legislation that regulates business

To make companies feel an obligation to regulate reporting wrongdoing, provisions that address reporting wrongdoing in the private sector must be included in laws that are more specifically linked to the economic, reporting or control activities of companies, e.g. in the Commercial Code. The obligation imposed on governmental authorities to report wrongdoing cannot be directly transposed because companies have different risks and the private sector does not always use public resources.

3. Development of an integral methodology to assess corruption risks in the private sector

The anti-corruption strategy for 2013-2018 has set an objective to facilitate and foster prevention of corruption in the private sector. To meet this objective, it is recommended to set a goal of the development and distribution of the methodology to assess corruption risks in the private sector in the state strategy and its activity plan.

The objective of an integral methodology is to facilitate assessment of corruption risks in companies. As a result of risk assessment, the management of a company has a better understanding of various risks and it can take measures to reduce them. While the methodology

does not have to differ in terms of addressed topics compared to the methodology designed for public enterprises, the methodology has to take into account the different size of companies to ensure its successful application. The methodology must be developed in cooperation with the

Suggestions to government authorities

ASSESSMENT OF RISKS AND APPLICATION OF MEASURES

1. Risk management measures must be proportional

Different public authorities have different risks that may make it more vulnerable to corruption. While in one authority, the problem may be gifts and benefits, in other authorities risks may arise from an auxiliary activity that causes a potential conflict of interests etc. In order to identify risks, **every authority must analyse risks and prepare relevant documents. Then the authority has to develop sufficient anti-corruption measures based on the risk analysis and, if necessary, a system of reporting**

ORGANISATION'S AWARENESS OF INSTRUCTIONS

2. Regular sharing of information is important for both managers and lower rank officials

New employees must be introduced ethical issues, including reporting wrongdoing, as part of their induction training. It is important to acknowledge risks, pertaining people that have worked for a longer period and repeat trainings regularly and systematically. Moreover, it is also important to **involve** lower rank officials into the process of analysing corruption threats because it will increase awareness and improve responsible behaviour.

Guides and materials necessary to help prevent corruption (also references to the public service ethics page at www.avalikteenistus.ee, www.korruptsioon.ee) must be easily accessible in the intranets of governmental authorities. The need to know them must be stressed to new employees and leading officials and regularly to the employees of the entire organisation.

umbrella organisations that represent companies to make companies aware of its necessity and facilitate introduction of this methodology. The suggestions must be logical, systematic and user friendly.

wrongdoing. Where risks and authorities are small, it is not necessary to adopt anti-corruption measures in the form of specific instructions. Instead that trainings could be developed and organised with focus on ethical behaviour or internal communication should be improved.

In an authority with clear corruption risks, these risks must be managed using appropriate measures. If a government authority finds that there is a sufficient number of risks that require implementation of anti-corruption measures (including reporting wrongdoing), it is reasonable to tackle this task in cooperation with TIE or the Ministry of Financial Affairs.

3. The best practices of corruption prevention must be shared between different actors

At the Ministries, no special attention has been paid to reporting wrongdoing in corruption prevention. Consequently, it is recommended that the officials of the Ministries that deal with ethics issues and implement internal control procedures, share **the best practices**. This information must be forwarded also to authorities under the area of government of the Ministries. Best practices should be also shared with the relevant authorities of other countries and networks. A common corruption risks assessment methodology developed by the state can be the basis of international cooperation.

4. The rules must be amended by the decisions of the Council of Ethics of Officials

It is necessary that the departments that are involved in the investigation of incidents of wrongdoing read the resolutions and suggestions of the Council of Ethics to include these principles in their internal rules.

The **Council of Ethics** resolves issues that give guidance to internal control departments. It would be a good practice if the work of the Council of Ethics was more visible for **regular officials and the public** to ensure a better understanding of the rules.