New Legal Standards for Whistleblowers in the Light of the Directive (EU) 2019/1973 on the Protection of Persons Who Report Breaches of Union Law. Case Study: Romania

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Abstract

According to the recently adopted Directive (EU) 2019/1973, the whistleblower protection is fragmented across Member States and the consequences of breaches of Union law with a cross-border dimension reported by whistleblowers illustrate how insufficient protection in one Member State negatively impacts the functioning of Union policies not only in that Member State, but also in other Member States and in the Union as a whole. The aim of this paper is to analyze what are the new legal standards imposed by the Directive to the Member States in order to ensure an effective protection for whistleblower in the Member States through national legislation. The case study of the paper will start by identifying and presenting the current legal standards for protecting the whistleblowers in Romania, explaining the mechanism and institutions in charge to do that. By making a comparison with the provision of the Directive, the research will offer some proposals for changing the current national legislation in accordance with the objectives imposed by the Directive.

Keywords: public interest, corruption, integrity, EU law, whistleblower directive, reporting channels.

Introduction: general aspects regarding the whistleblower

Corruption is, according to a working document of the European Parliament, the granting or guaranteeing of a material or immaterial improper utility, in the public and in the private sector, with the purpose of that person committing an act or refraining from committing it in the exercise of his functions, thus violating a requirement which he must comply with [1].

In the process of preventing and combating corruption, an important place is given to the institution of whistleblowers. The use of the institution of whistleblowers in the fight against corruption as a negative unlawful social phenomenon is impossible without the appropriate support from the state.

The protection of whistleblowers is one of the high priority areas in their global anticorruption agenda, this fact was also underlined at a study presented by the OECD, where it is stated that "the whistleblower protection is essential to encourage the reporting of misconduct, fraud and corruption. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. This applies to both public and private sector environments, especially in cases of bribery" [2].

There is no common definition of what means the whistleblower and of what constitutes whistleblowing.

It could be stated that whistleblowers are members of organizations (from the public or private sector) who, coming to know, or reasonably believing, the occurrence of wrongful or hazardous behaviours, decide to voice their concerns either to higher-level management (through internal channels) or, if this proves ineffective, by reporting the case to an external and independent oversight body that has the power (through external channels), but not the knowledge, to put in place adequate measures to counter wrongful and hazardous behaviours [3].

Regarding the whistleblowing activity there are various definitions. One given by the International Labour Organization, which defines the whistleblowing activity as "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers" [2, pp. 8]. And the OECD Anti-Bribery Recommendation refers to

protection from "discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities" [2, pp. 8].

In the European Union (EU), the use of the institution of whistleblowers as mechanism for combating corruption is no longer a new one. But, an important issue in the production of anti-corruption policy is the issue of introducing effective guarantees for the proper protection of whistleblowers, which is possible by securing them at the legislative level [4].

In these regards, at the EU level in January 2014, the EU institutions introduced internal whistleblowing rules covering the protection of whistleblowers. After long debates on the improvements of the European regulation of whistleblower protection, the European Parliament only adopted these internal rules in January 2016 [5]. Aside from the internal rules of the institution, codes of conduct and procedures within the political groups can provide an alternative framework for parliamentary personnel to refer to [5, pp. 1-3].

At the level of the EU member states, there were also progresses in the last years. According to a report prepared by Transparency International, several countries within the European Union have already taken major steps in regulating the legislation on integrity warnings. Also, the importance and value of integrity warnings in the fight against corruption are increasingly recognized [6, 7].

An analysis made on the way in which the EU member states designed the legal framework for the whistleblower shows that there is fragmented protection of whistleblowers. Also, at the moment, only 9 EU (27) countries have a comprehensive law protecting whistleblowers[1]. At EU level, there is legislation in only a limited number of sectors (mostly in the areas of financial services) which include measures to protect whistleblowers. And 17 of 27 EU countries have enacted at least partial legal protections for whistleblowers. Yet none of these laws fully meet European and international conventions and standards [Worth, M., Dreyfus S., Hanley, G. (2018). Gaps in the System: Whistleblower Laws in the EU, pp. 1-54, www.blueprintforfreespeech.net, accessed 06.04.2020].

For this reason, at the level of the EU decision making institutions it was adopted the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law (Whistleblower Directive). The directive has as main purpose to guarantee a high level of protection for whistleblowers by setting new, EU-wide standards [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, published in the Official Journal of the European Union, L 305/17/ 26.11.2019 and it entered into force on 16.12.2019].

New legal standards of the Whistleblower Directive

Generally, a regulation regarding the protection of whistleblowers should have between its objectives: the retaliation by the employer or others, facilitating or encouraging the raising of concern about malpractices at work, making recipients of such concerns obliged to investigate suspected wrongdoing, or ensuring that the wrongdoing is dealt with [8].

Thus, the purpose of the Whistleblower Directive, as expressed in the Article 1 is "to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law" [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, published in the Official Journal of the European Union, L 305/17/ 26.11.2019 and it entered into force on 16.12.2019].

It is to be underlined here that this directive, as well as all the other EU directives, according with the Consolidated Version of the Treaty on the Functioning of the European

[1] France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden. Data available at: European Parliament, Press room/ Protecting whistle-blowers: new EU-wide rules approved, online available at: https://www.europarl.europa.eu/news/en/pressroom/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved, accessed: 04.04.2020

Union (TFEU) art. 288, para. 3, are binding only as to the result it sets out to achieve; the means are up to the member states. Also, the standards set-out in the directive are considered to be a 'minimum level', giving the power of member states to extend protection under national law [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 2, para. 3]. The member states are obliged to transpose directives into their national law, and the final date to transpose these regulations is December 17, 2021 [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 26, para. 1].

The Whistleblower Directive has two main scopes: material and personal. The first one, as stated in the Art.2 and this includes:

- breaches falling within the scope of the Union acts, such as: public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection;
- breaches affecting the financial interests of the EU;
- breaches relating to the internal market.

The personal scope is also giving a very large understanding on the whistleblower. According to the provision of the art. 4, para. 1 the whistleblower is a "reporting persons working *in the private or public sector* who acquired information on breaches in a work-related context". What is here important to be underlined it is that the directive it is not making any difference between the sector in which the person carries out its activity.

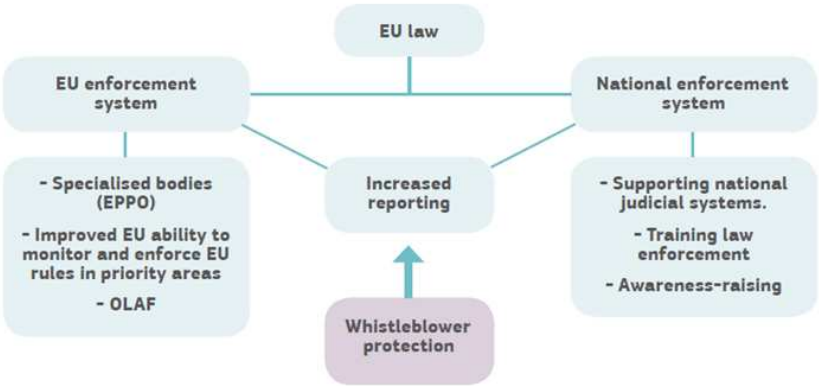

Fig. 1. Protection system for whistleblowers [9, p.1]

Even if the directive is not applicable to EU institutions[2]. As explained in the Fig. 1, it should provide for protection to be granted in cases where persons report, pursuant to Union legislation, to institutions, bodies, offices or agencies of the Union, and also, the competent authorities should refer cases or relevant information on breaches to institutions, bodies, offices or agencies of the Union, including, OLAF and the European Public Prosecutor Office (EPPO), without prejudice to the possibility for the reporting person to refer directly to such bodies of the Union.

The new legal standards for the whistleblower protection provided in the directive could be summarized as the following:

- *creation of reporting channels*. The whistleblowers should have clear reporting channels available to report both internally (within an organization) and externally (to an outside authority). Regarding the internal channel all private entities with at least 50 employees are required to set up secure and confidential internal reporting channels [The Directive (EU) 2019/1937 of the European Parliament and of the

[2] The EU staff enjoys whistleblower protection under the Staff Regulations and the Conditions of Employment of Other Servants of the European Union, Council Regulation (EC, Euratom) No 723/2004.

Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 8]. Also, the whistleblower can go directly to the external channel if there are reasonable grounds to believe that the internal channels do not function properly [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 7]. The external channels are created by the member states consisting in competent authorities that would be obligated to provide follow-up to the whistleblowers within three months [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 10].

- *clear procedures of reporting.* The whistleblowers are obliged to respect the hierarchy of the reporting channels and to act in good faith. Only in some exceptional situation that can skip this hierarchy. The procedure implies also clear terms that must be respected, such as the obligation to respond and follow-up to the whistleblowers' reports within 3 months (with the possibility of extending this to 6 months for external channels in duly justified cases)
- *public disclosure. The* whistleblowers are required to use internal channels first and if these channels do not work or could not reasonably be expected to work, they are required to use external channels. If no answer it is received, within the set time frame and has reasonable grounds to believe the breach constitutes an imminent danger to the public interest, the whistleblower can disclose the information to the media/press [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 15].
- *protection measures against retaliation*. If whistleblowers do suffer retaliation, they have easily accessible advice free of charge, they have adequate remedies at their disposal e.g. interim remedies to halt ongoing retaliation such as workplace harassment or to prevent dismissal pending the resolution of potentially protracted legal proceedings; reversal of the burden of proof, so that it is up to the person taking action against a whistleblower to prove that it is not retaliating against the act of whistleblowing [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 10-21].
- *system of penalties and protection of persons concerned*. Member states shall provide for proportionate sanctions to dissuade malicious or abusive reports or disclosures. The persons concerned by the reports fully enjoy the presumption of innocence, the right to an effective remedy and to a fair trial, and the rights of defence [The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, art. 22, 23].

Case Study: Romania

In Romania, the institution of the whistleblower, represented an instrument in preventing and combating corruption.

Then, in 2004, Romania became the first country in continental Europe to pass a dedicated law to shield whistleblowers from retaliation [6, pp.10]. The Whistleblower Protection Act [10] covers only the employees from the public sector and it use for the whistleblower the phrase "those who give integrity warnings".

Thus, within the meaning of the Law no. 571/2004, the whistleblower is: "the person who makes a complaint in good faith, about any fact that implies a violation of the law, professional deontology or the principles of good administration, efficiency, effectiveness, economics and transparency and which is framed in one of the public authorities, public institutions or in the other bodies provided by law". The main element in reporting an

integrity warning is the good faith. Thus, according to art. 4, h) of the Law no. 571/2004, the person making an integrity warning is in good faith if he acted convinced being: the reality of the state of fact or that the act constitutes a violation of the law.

The current regulation gives to the whistleblower the opportunity to report a wide range of facts that are considered to be *violations of laws*, thus, the warnings regarding public interest constitute:

- corruption or facts assimilated to corruption crimes;
- criminal offenses against the EU's financial interests;
- preferential or discriminatory practices or treatments in the exercise of the powers of the authorities and public institutions within the central public administration, local public administration, the Parliament, the Presidential Administration, the Government, the autonomous administrative authorities, public cultural institutions, education, health social sciences, national companies, as well as national companies with state capital;
- violation of the legal regulations regarding incompatibilities and conflicts of interests;
- political partisanship in the exercise of the prerogatives of the position, except for the persons elected or politically appointed;
- violations of the law regarding access to public information and decision-making transparency;
- violation of legal provisions regarding public procurement;
- incompetence or negligence in the service;
- non-objective evaluations of personnel in the process of recruitment, selection, promotion, relegation and dismissal;
- violations of administrative procedures or establishing internal procedures with non-compliance with the law;
- issuing administrative or other acts that serve the interests of a group or clientele;
- defective or fraudulent administration of the public and private patrimony of public authorities, public institutions and other public bodies;
- violation of other legal provisions that require respect for the principle of good administration and that of protecting the public interest.

Regarding the channels of reporting, the law gives employees the opportunity to choose from a wide range of channels, including various government institutions, NGOs and the media. The law guarantees the confidentiality of the integrity warning and assumes that the warning acts in good faith in the absence of evidence to the contrary.

The law does not provide for a certain form of the integrity warning. In certain situations, the written form is not required. For example, in case of press notification or notification of judicial bodies, referral can be made orally.[3]

Thus, the current legislation does not provide a specific institution at the national level to manage and resolve warnings in the public interest. The regulations refer to a number of institutions that are competent to receive the alerts for the whistleblower. In this regard, we mention:

- the public authority where the person is employed;
- judicial bodies;
- the bodies in charge of finding and investigating conflicts of interest and incompatibilities;
- parliamentary committees;
- media;
- professional, trade union or employer organizations;
- non-governmental organizations.

[3] According to Art. 222-223 of the Romanian Code of Criminal Procedure, the notified judicial bodies will record in a minute the oral notification they receive.

By analysing these legal regulations do not result that all these authorities also have the competence to directly resolve the integrity warning.

Regarding protection against retaliation, the current regulation for whistleblowers provides 4 protection measures:

1. protection against disciplinary/ administrative sanctions of the warning for integrity made in good faith;
2. protecting of the whistleblower identity, but only for certain integrity alerts;
3. ensuring an increased publicity of the disciplinary investigation of the warning made by a whistleblower;
4. the statement in law of some principles that govern the protection of the warning in the public interest.

One of these principles are provided in the art. 4 comm. d) thesis II of the Law no. 571/2004, within the principle of abusive sanctioning, according to which "in the case of a public interest warning, the ethical or professional rules are not applicable if by doing that it would be affected the public interest warning".

A study made by Transparency international underlined that "even if Romania's Whistleblower Protection Act is very strong in theory, it is weak in practice, because many government employees have little or no knowledge of the law, or misunderstand it, and public institutions have proven reluctant to apply it. Moreover, its provisions are missing from the internal rules of many public institutions that are legally required to have them" [6, pp. 73-75].

Thus, we consider that analysing the new standards imposed by the Whistleblower Directive, as shown in the Tab.1, it could solve some of these lacunas and improve the not only quality of the national legal act, but also the way was in which it is implemented.

Tab. 1. Comparison of national standards and the standards of the Whistleblower Directive [Source: Author]

Standards for whistleblower protection	**Whistleblower Directive**	**Law no. 571/2004**	**Observations**
channels of reporting	Effective and efficient reporting channels. The companies of over 50 employees are required to create internal reporting channels	Wide range of channels: •the public authority where the person is employed; •judicial bodies; •the bodies in charge of finding and investigating conflicts of interest and incompatibilities; •parliamentary committees; •media; •professional, trade union or employer organizations; •non-governmental organizations.	There is no distinction between internal and external reporting channels. There is not an obligation for the organization of the private sector to create reporting channels, they are not subject of the domestic law.
procedures of reporting	Clear internal procedures to be designed by the organization for the reporting channels The reporting mechanism can be operated internally by a designated person or department or may be outsourced. A clear time frame for answer to internal/external reporting	The law does not provide the obligation for an institution at national level to manage and resolve warnings in the public interest. There is an autonomy of each public organization to create its internal procedures according to the article 11/. Whistleblower can report alternatively or cumulatively, to the categories of authorities provided by the law	No clear provisions on the competence of the institutions to solve the reports made by the whistleblower in the national legislation (for example the parliamentary commissions). Confusion and sometimes overlaps of powers of the authorities to solve the reports.
public disclosure	It works only on reasonable grounds to believe the breach constitutes an imminent	The law gives employees the opportunity to report directly to NGOs and the media.	In the national legislation there not a clear provision or a procedure of when the whistleblower has the right

Standards for whistleblower protection	Whistleblower Directive	Law no. 571/2004	Observations
	danger to the public		to do public disclosure. There is only a general provision, valid also for all the others reporting, that he must act in good faith. There are no specific legal protections for employees of private companies, other than laws that require people to disclose information about criminal offenses if they become aware of them.
protection measures against retaliation	Protection against dismissal and demotion by the employer. Free legal aid, as well as financial and psychological support, during any legal proceedings.	Various protection measures. Administrative and disciplinary protection, judicial protection, identity protection of the whistleblower. For instance, in labor or service disputes, the court may order the cancellation of the disciplinary or administrative sanction applied to a whistleblower.	The competence granted to the courts regarding the labor litigations of administrative litigation regarding the cancellation of the possible abusive sanctions that the whistleblower can suffer. There are no protections in the private sector for whistleblowers who disclose information to the media or an NGO
penalties	proportionate and dissuasive penalties applicable to natural or legal persons that try to viciate a reporting or to retaliate a whistleblower or for those who knowingly reported or publicly disclosed false information.	No clear provisions The competence devolves upon the courts	The law does not make specific references to the applicable sanctions that the persons / authorities who have acted abusively in sanctioning disciplinary / administrative those who report acts of integrity or to the internal procedure of against retaliation.

Conclusions and proposals

From the analysis made in the second and third part of this work, a number of recommendations will follow, suggesting on a general level how legal protection could be improved, and what further steps should be taken at the Romanian national level:

- The revision the legislative framework in order that the protection of whistleblower can be also applicable to the private sector, taking into account the size of the organizations concerned and the level of risk that their activities present for the public interest.
- Regarding the external reporting channels, it is recommended to evaluate the procedures for receiving the reports by the authorities/organizations concerned, at regular intervals and at least every three years. In evaluating these procedures, the competent authorities shall take into account their experience and that of other competent authorities and shall adapt their procedures accordingly.
- The elaboration and implementation by all the organizations covered by the directive of a procedure for ensuring an adequate framework for reporting the breaches of Union law, of procedures for solving the reports issued and ensuring the protection of whistleblowers.

- Creation of an electronic reporting procedure - as an alternative for written reports, by protecting the identity of the whistleblower.
- Developing the institutional framework - by extending the competences of an autonomous administrative authority or creating a new one, in order to operationalize the external reporting channels and to ensure effective measures to protect the whistleblowers against abusive sanctions, including access to legal advice/assistance with regarding the applicable legal procedures and the remedial measures in the direct or indirect cases of retaliation and any provisional measures in case of waiting for the solution of the reporting.
- The introduction of effective, proportionate and dissuasive penalties (according to art. 23 of the Directive), such as administrative-disciplinary and administrative – contravention sanctions, applicable to natural or legal persons.

The comparisons conducted in the case study (see also Tab.1), helps us to conclude that even if Romania was one of the countries from the EU to adopt a special law for whistleblowers, the protection remains rather scarce and does not provide sufficient support for those ready to blow the whistle, or in some situations the regulations are not very clear, creating confusion. Also, legislative changes are required to provide for the elaboration of procedures regarding the reports of integrity in the private sector. In Romania, companies have no obligations in this regard, although the good practice of the European states highlights the importance of the domain and the vulnerabilities on the private sector. For these reasons, the implementation of the objectives stated by the Whistleblower Directive at the national level will increase the guarantee for the protection of whistleblowers in Romania and in the same time will contribute to a legal harmonization of the standards and procedures for doing the reports of the EU law breaches.

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