

Legal protection of the whistleblowers

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Abstract

The importance of prevention in the fight against corruption is indisputable. However, prevention is effective and sustainable if it works, meaning that tools and strategies that are fit to achieve this goal need to be identified. The regulation of persons who give integrity warnings (whistleblowers) and, in this context, their legal protection are part of efforts to identify such instruments. The present study reveals aspects of the evolution of regulation for those who give integrity warnings in Romania and the world in an attempt to identify solutions for this instrument itself to become effective in preventing corruption.

Keywords: public alert; National Anticorruption Strategy; defend against corruption; integrity.

JEL Classification: K14, K23.

1. Introduction

By Government Decision no. 583/2016² approved the National Anti-Corruption Strategy 2016-2020 (hereinafter referred to as NAS), together with the sets of performance indicators, the risks associated with the objectives and measures of the strategy and the sources of verification, the inventory of institutional transparency measures and the prevention of corruption, evaluation indicators, and public disclosure standards. The strategy is based on the conclusions of the Ministry of Justice's assessment of the implementation of the National Anti-Corruption Strategy 2012-2015 (NAS), as well as the conclusions and recommendations of the independent SIA evaluation report 2012-2015.

One of the principles of NAS is that of preventing corruption and integrity incidents, according to which early identification and timely removal of the prerequisites for the occurrence of corruption are priority and imperative. According to this principle, both public and private institutions need to be diligent in evaluating partners, agents and contractors. Each entity should assess the risks of bribery associated with entering into a partnership or contracting agreements with other entities, and then be required to carry out periodic risk assessments. When concluding partnerships or contractual arrangements, they must verify that those organizations have policies and procedures that are in line with these principles and guidelines.

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In fulfilling this principle, NAS proposes a series of general and specific objectives. The main purpose of this study is the general objective of developing a culture of transparency for open government at central and local level, including among other specific objectives and increasing the effectiveness of preventive anti-corruption measures by addressing gaps and legal inconsistencies with regard to the ethics adviser, the protection of those who give integrity warnings in the public interest, and post-employment bans (pantouflage). Among the main actions envisaged for the achievement of these objectives, NAS also retains the elaboration of the secondary and / or tertiary regulatory framework in order to guarantee the protection of those who give integrity warnings in the public interest. By implementing these principles and directions of action, the recent evaluation missions approved within the NAS platforms were: Gift Announcement, Public Alert Protection, and Sensitive Functions.³

As can be seen from this brief introduction, the issue of regulating public-interest those who give integrity warnings and, in particular, their protection, plays a central role in corruption prevention policy. This positioning is established at both national and European level, where the institutional discourse is structured on two major coordinates, namely the adoption of regulations in the field and the efficiency of the adopted regulations. It is not necessary to ignore, in this respect, the public perception, the degree of acceptance of the society in relation to the institution of the person who gives integrity warnings.

2. Whistleblower's regulation in Romania

2.1. General aspects

A study conducted by Transparency International in 2013 (Whistleblowing in Europe: legal protections for whistleblowers in the EU)⁴ reveals that, despite the role of those who give integrity warnings in preventing corruption, only four EU countries have a legal framework that can be considered advanced for the protection of those who give integrity warnings: Luxembourg, Romania, Slovenia and the United Kingdom. Of the other EU countries at the time, 16 regulate partial legal protection, and seven remaining countries have a very limited framework or do not have a legal framework in the matter. The study also reveals gaps and exceptions, with the result that employees who believe they are protected by retaliation may, after making a complaint, discover that they have no legal remedy or sufficient legal protection. Incentively, over the last few years, several EU countries have taken steps to strengthen institution of those who give integrity warnings, for example Austria, Belgium, Denmark, France, Hungary, Italy, Luxembourg, Malta. Countries that have made proposals or announced plans for proposed laws include Finland, Greece,

³ <http://www.just.ro/strategia-nationala-anticoruptie-concluziile-reuniunilor-platformelor-de-cooperare/> (consulted on 1.11.2017).

⁴ https://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu (consulted on 1.11.2017).

Ireland, the Netherlands and Slovakia. In spite of those signs of progress, much remains to be done to ensure that those who denounce the offenses are given the appropriate protection in accordance with European and international standards, with the focus of the study being in this respect, above all, on the political will to regulate and implement effectively.

As we can see, Romania is well positioned to regulate the institution of those who give integrity warnings, the legal framework in this meaning being in existence since 2004, when Law no. 571/2004 on the protection of personnel in public authorities, public institutions and other units reporting violations of the law.⁵

2.2. Whistleblower. Status and legal protection

According to the Law no. 571/2004, those who give integrity warnings are the persons belonging to any of the public authorities, public institutions or other units provided by the law and who complain or report violations of the law in these units⁶. The provisions of the law apply to the public authorities and institutions within the central public administration, the local public administration, the apparatus of the Parliament, the working apparatus of the Presidential Administration, the working apparatus of the Government, autonomous administrative authorities, public institutions of culture, education, health and social assistance, national companies, autonomous enterprises of national and local interest, and national state-owned companies. The law also applies to persons appointed to scientific and consultative councils, specialized committees and other collegiate bodies organized within the structure or with public authorities or institutions.

According to the law, the warning in the public interest is the bona fide notification of any act involving a violation of law, professional deontology or the principles of good administration, efficiency, effectiveness, economy and transparency⁷. The referral for violation of law or deontological and professional norms may be made, alternatively or cumulatively, to the hierarchical superior of the person who violated the legal provisions; the head of the public authority, the public institution, or the budgetary unit of which the person is a person who has violated the legal provisions or where the illegal practice is reported, even if the perpetrator cannot be identified; disciplinary commissions or other similar bodies within the public authority, public institution or unit provided by law, including the person who violated the law; judicial bodies; bodies charged with finding and investigating conflicts of interest and incompatibilities; parliamentary committees; media;

⁵ published in the Official Gazette of Romania, Part I, no. 1.214 of 17 December 2004.

⁶ See Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016, p. 380.

⁷ On the analysis of the content of these principles see Cătălin-Silviu Săraru, *op. cit.*, p. 808-826; Cătălin-Silviu Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 110-129.

professional organizations, trade unions or employers; non-governmental organizations (art.6 of the law).

The notification may include corruption offenses, crimes assimilated to corruption offenses, offenses directly related to offenses of corruption, forged offenses and offenses of service or in connection with the service; offenses against the financial interests of the European Communities; practices or preferential or discriminatory practices or treatments in the exercise of the attributions of the units provisioned by the law; violation of incompatibilities and conflicts of interest provisions; abusive use of material or human resources; political partisanship in the exercise of the prerogatives of the post, except for the people elected or politically appointed; violations of the law on access to information and decision-making transparency; violation of legal provisions on public procurement and non-refundable funding; incompetence or negligence on the job; non-selective staff evaluations in the recruitment, selection, promotion, relegation, and dismissal process; violations of administrative procedures or the establishment of internal procedures with non-compliance with the law; the issuance of administrative or other acts that serve group or client interests; mismanagement or fraudulent administration of the public and private patrimony of the public authorities, public institutions and other units provisioned by art. 2; violation of other legal provisions requiring observance of the principle of good administration and of the protection of the public interest (art.5 of the law)

Regarding the protection of the persons who give integrity warnings, Law no.571 / 2003 stipulates that, before the disciplinary commission or other similar bodies, they benefit from the presumption of good faith, until the contrary is proved. At the request of the disciplinary investigator following a warning act, disciplinary commissions or other similar bodies within the public authorities, public institutions or other units provided by the law have the obligation to invite the press and a representative of the trade union or professional association. The announcement is made on the website of the public authority, the public institution or the budgetary unit, at least 3 working days before the hearing, under the sanction of the invalidity of the report and of the disciplinary sanction applied. If the person complained of in the public interest is hierarchically, directly or indirectly, or has control, inspection and evaluation powers over the person who gave the integrity warning, the discipline commission or other similar body will ensure the protection of the person, hiding their identity. Also, in the case of public interest warnings of corruption offenses, crimes assimilated to corruption offenses, offenses directly related to offenses of corruption, forgery and offenses, or in connection with the service, respectively crimes against the financial interests of the Communities European law will apply ex officio the provisions of Law no. 682/2002 on the protection of witnesses⁸ regarding the protection of the identity information of the protected witness. In disputes of work or in relation to service relationships, the court may order the annulment of the disciplinary or administrative sanction imposed on a person who

⁸ published in the Official Gazette of Romania, Part U, no. 964 of 28 December 2002.

gave the integrity warning if the sanction has been applied as a result of the warning, made in good faith. The court verifies the proportionality of the sanction applied by comparing with the sanctioning practice or other similar cases within the same public authority, public institutions or budgetary units in order to eliminate the possibility of subsequent and indirect sanctioning of public interest warnings, protected by law.

3. Issues and perspectives for the whistleblower's protection

3.1. Issues and perspectives in Romania

Even if Romania is at the forefront of the legal framework for the protection of those who give integrity warnings, the institution itself is not very well known or is approached with reserve, an attitude that reveals in itself an unknowingly place and role of this institution. The foundation of its acceptance ultimately lies in the formation of a culture of integrity, thus education in this spirit of the whole society, of a natural reaction to the rejection of acts of corruption, of any acts contrary to the idea of integrity in the exercise of public functions and dignities.

In recent years, efforts have been made to understand the institution of the persons who give integrity warnings, which includes, for example, the development of the Guidelines for the Protection of the integrity whistleblowers developed by the Transparency International - Advocacy and Legal Advice Centers, within the project of Advocacy and Legal Advice Centers within the program for the protection of those who give integrity warnings, funded by the Embassy of the Kingdom of the Low Countries, through the Matra – KAP program of the Netherlands government⁹. The guide presents and explains the legal provisions in the field, the concepts they use, with reference to the incidental criminal law.

It should also be noted that Article 11 of the Law no. 571/2003 establishes the obligation of public authorities, public institutions and the other budgetary units to agree, that in 30 days from the entry into force of the law, must put in the internal order those provisions. In our opinion, this agreement must be made in a comprehensive way, in the sense of establishing internal procedures for the application of the provisions of the law, as well as providing adequate information to the employees. From this perspective, setting as a monitoring objective within the National Anticorruption Strategy and the conclusions of the evaluation missions are essential for determining the effectiveness of legal provisions, how the provisions of the law are known, perceived and applied in practice. In particular, the effectiveness and confidence-building of protection measures must be achieved, and the whistleblower institution cannot function if the risks that those individuals have to assume are far too high compared to their protection in fact.

⁹ <https://www.transparency.org.ro/publicatii/ghiduri/GProtectieAvertizori.pdf> (consulted on 1.11.2017).

3.2. Issues and perspectives at European level

Examination of legislation in the Member States of the European Union reveals, as we have seen above, a incomplete regulation of the whistleblower institution and a lack of effectiveness of existing legislation. There are conclusions drawn from the recent European Parliament draft report on legitimate measures to protect those who give integrity warnings in disclosing confidential information to companies and public bodies and the European Parliament's resolution of 23 June 2017¹⁰.

The draft report is based inter alia on the Treaty on European Union, in particular Article 2, the Charter of Fundamental Rights of the European Union, also, in particular Article 11 thereof, which provides that “everyone has the right to freedom of expression” and that this right “includes the freedom to receive or communicate information or ideas without interference from public authorities and without borders”, which also means protecting the source of information, Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of know-how and undisclosed business information (commercial secrets) against illegal acquisition, use and disclosure, the European Parliament resolutions of 25 November 2015 and 6 July 2016 on tax decisions and other similar measures; with similar effects, Parliament's resolution of 23 October 2013 on organized crime, corruption and money laundering; recommendations on the actions and initiatives to be taken, the G20 anti-corruption action plan, in particular its guiding principles for legislation on the protection of those who give integrity warnings, the OECD report of March 2016 entitled “Engaging in the protection of whistleblowers”, Recommendation CM / Rec (2014) 7 of 30 April 2014 of the Committee of Ministers of the Council of Europe on the protection of whistleblowers, Principle 4 of the OECD Recommendation on improving ethics and conduct in public service.

The achievement of this approach of the European Parliament is based on the European Union's objective of maintaining democracy and the rule of law, the fact that transparency and citizen participation are some of the developments and challenges that need to be addressed by democracies in the 21st century, the important role that whistleblowers play in reporting illegal or inappropriate behaviors that undermine the public interest and the fact that in a number of cases, they are the object of retaliation, intimidation and pressure, with the intention of preventing or discouraging them, and the protection of them is not guaranteed in several Member States.

In this context of fragmented protection of whistleblowers in Europe, with the consequence of the difficulty of knowing their rights and legal insecurity in cross-border scenarios, and the lack of adequate action of the European Commission to protect them in the EU, the European Parliament invites the Commission to present a horizontal legislative proposal to effectively protect those who give integrity

¹⁰ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bCOMPARL%2bPE-606.289%2b01%2bDOC%2bPDF%2bV0%2f%2fEN> (consulted on 1.11.2017).

warnings in the EU. At the same time, stating that protection whistleblowers is essential, the European Parliament encourages Member States to promote the positive role played by them, notably through awareness-raising campaigns, but also through a clear reporting system and procedures.

4. Conclusions

The international documents assessed reveal that whistleblowers are important actors in national and global efforts to combat corruption. A person who assumes an integrity warning risks a career and sometimes even personal safety. Inappropriate regulation, lack of trust, lack of effective protection of whistleblowers can prevent them from reporting such facts, with the consequence of limiting the efforts to prevent corruption.

Despite the existing legislative framework, in Romania too whistleblowers can face the fear of losing their job, with the fear of direct or indirect retaliation of the employer and those who work for acting on behalf of the employer or of preconceived ideas of the people around. As a consequence, as the above mentioned Draft Report shows, adequate regulation of the anonymous reporting option would encourage the sharing of such information. In addition to the professional risks, the whistleblowers face psychological problems and financial risks, so that psychological support, legal aid, financial aid should be established at the legislative level by those who request it in justified cases.

Likewise, in line with the same European recommendations, it would be useful to set up an independent body responsible for collecting complaints / reports to verify credibility and guide the whistleblowers, especially in the absence of a positive response from their organization, in which sense, the European Parliament proposes the establishment of a similar EU body responsible for coordinating the activities of the member states, especially in cross-border cases. It is also important, as the European Parliament underlines, that no one should lose the benefit of protection solely on the ground that he has wrongly judged the facts or that the threat posed to the public interest, under condition that, at the time of the referral, there were reasonable grounds for believing that the issues and threats were real.

As far as we are concerned, we consider, without any preconceived ideas, that the appropriate understanding of this institution, in Romania, and the fact that any of us can be such whistleblowers, would serve a higher efficiency of the institution and the prevention of corruption. The conclusions of the evaluation missions carried out in the implementation of the National Anti-Corruption Strategy in the last quarter of 2017 will provide valuable information that will form the basis of a campaign of acknowledgement and awareness of the Romanian society on the corruption prevention component through the actions of whistleblowers. It should be noted that on the basis of the evaluation assignment, the expert teams draw up evaluation reports and recommendations which are subsequently submitted to the institution concerned. The novelty of the National Anti-Corruption Strategy 2016-2020 is the introduction of a compliance procedure according to which, in a

12 months term from which the evaluation report has been published on the strategy portal, the evaluated institution sends a report on the concrete measures taken to implement the recommendations formulated to the technical secretariat of NAS. On the basis of this contribution, the technical secretariat draws up an addendum containing recommendations for the evaluation report, which also becomes public¹¹. Thus, NAS represents a valuable tool for developing and harmonizing measures to protect whistleblowers¹². The conclusions of NAS platforms and evaluation missions can lead to the outline of a Good Practice Guide¹³, which is very useful in addressing the issue of whistleblowers¹⁴.

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