



Southeast Europe
**COALITION ON
WHISTLEBLOWER
PROTECTION**



**NATIONAL
ENDOWMENT
FOR
DEMOCRACY**

SUPPORTING FREEDOM AROUND THE WORLD



**TRANSPOSITION OF THE EU 2019/1937
DIRECTIVE ON WHISTLEBLOWER PROTECTION
IN SOUTHEAST EUROPE:
CHALLENGES AND LESSONS LEARNED**

Transposition of the EU 2019/1937 directive on whistleblower protection in Southeast Europe: Challenges and lessons learned

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The Southeast Europe Coalition on Whistleblower Protection is a network of NGOs, media organisations and activists that specializes in protecting whistleblowers, strengthening whistleblowers' legal rights and protection, and promoting whistleblowing as a crime-fighting and anti-corruption tool. Founded in 2015, the Coalition is comprised of about 40 NGOs, journalism groups, research institutions and independent experts from 15 Southeast and Eastern European countries, as well as several regional and international organizations. In the framework of its ongoing work to fill in the gaps in whistleblower laws, polices and regulations in order to align them with the most advanced international standards, the Coalition promotes the transposition of the EU Directive on Whistleblowing through research, monitoring, and advocacy.

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EXECUTIVE SUMMARY

The present analysis conducted by the Southeast Europe Coalition on Whistleblower Protection aims to evaluate the transposition of the European Union's (EU) Directive on Whistleblowing in Croatia, Bulgaria, Greece and Romania. The objective was to assess the quality of the transposition process and share findings and lessons learned.

The EU Directive on Whistleblowing, effective from December 2019, aims to protect whistleblowers and prevent fraud, corruption and serious crimes. The transposition deadline for Member States was December 2021, but most countries, except Denmark and Sweden, experienced delays in adopting the relevant laws.

Bulgaria faced infringement proceedings due to delays in transposing the Whistleblowing Directive initiated by the European Commission in 2022.¹ The newly adopted law aims to protect whistleblowers but lacks provisions for anonymous reporting and excludes older breaches. It also raises concerns about support measures and clarity regarding the status of whistleblowers.

Croatia faced delays in the transposition process and was also confronted with infringement proceedings. While the Croatian legislation expanded protection, defined irregularities more precisely, and enhanced judicial protection, issues related to insufficiently accessible support measures and confusion regarding the scope, application procedures and reporting methods are still manifesting.


Greece's whistleblower legislation has limitations in scope, damages restitution and the definition of eligible individuals for protection. Moreover, concerns persist about confidential information, reporting channels and the protection of whistleblowers' privacy.

Romania also faced infringement proceedings due to delays in transposing the Whistleblowing Directive.² The implementation of whistleblower protection was initially problematic but improved after addressing issues such as anonymous reporting, burden of proof and shortened retention time for reports. However, problems remain, including impeding internal reporting channels and restricting reporting mechanisms.

The transposition process of whistleblower protection legislation across all the examined countries faces various challenges, including delays, incomplete implementation, as well as lack of clarity, insufficient regulated support for whistleblowers and limitations in scope. Therefore, there is a need for further amendments and awareness-raising efforts to enhance the effectiveness and close

¹ For more information, see: July Infringements package: key decisions, at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768

² For more information, see: September Infringements package: key decisions, at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5402



loopholes in whistleblower protection systems throughout the Southeast Europe region.

INTRODUCTION

The present analysis is based on the work undertaken by the Southeast Europe Coalition on Whistleblower Protection to monitor and evaluate the transposition of the European Union's (EU) Directive on Whistleblowing in Croatia, Bulgaria, Greece and Romania with the aim to share the findings and lessons drawn from the transposition process in these countries. In addition, it seeks to evaluate the quality of the transposition process based on a checklist of 20 requirements or “best practices” standards³ developed by the Government Accountability Project (GAP)⁴. These standards are internationally valid since they are based on a compilation of all national laws and intergovernmental organization policies on the matter, such as those at the United Nations and World Bank.

The “EU Directive on the protection of persons who report breaches of Union law” (Whistleblowing Directive), effective from 16 December 2019, institutionalises the protection of whistleblowers within the EU, which can have an important impact in preventing fraud and corruption, countering serious crime and promoting sustainable development. Defined as a “game-changing directive designed to protect whistleblowers across Europe”⁵, it focuses on the creation of effective, legally protected channels for information handling and introduces minimum standards for the protection from retaliation and legal remedies for persons who report on breaches of EU law and corresponding national legislation in a wide range of key policy areas. Consequently, effective implementation of the EU Whistleblowing Directive relies on solid national legislation and a strong institutional and organisational infrastructure, as well as on a deeper understanding of the fundamental values of the rule of law and democracy, including the right to freedom of expression and information enshrined in Article 11 of the EU Charter of Fundamental Rights⁶.

The deadline set by the Directive for Member States to transpose its provisions into their national legal and institutional systems was 17 December 2021. However, the majority of Member States (with the exception of Denmark and Sweden) were late in adopting the relevant transposition laws. By June 2023, 23 EU Member States (Austria, Germany, Hungary, Slovenia, Spain, the Netherlands, Denmark, Sweden, Portugal, Malta, France, Romania, Bulgaria, Greece, Italy, Cyprus, Belgium, Croatia, Finland, Ireland, Luxembourg, Latvia and Lithuania) had transposed the

³ The Government Accountability Project, International best practices for whistleblower policies. Source: <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>

⁴ The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers, employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has been a leader in the public campaigns to enact or defend nearly all United States national whistleblower laws and played partnership roles in drafting and obtaining approval for the original Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption and whistleblower protection policies at the African Development Bank, the World Bank, the Asian Development Bank, and the United Nations Secretariat and Peacekeeping Forces. Source: idem.

⁵ Press release, EU Whistleblowing Meter Launched to Monitor Transposition of EU Directive on Whistleblowing, at: <https://whistleblowingnetwork.org/News-Events/News/News-Archive/PRESS-RELEASE-EU-Whistleblowing-Meter-Launched-to>

⁶ Charter of Fundamental Rights of the European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

Whistleblower Directive⁷. The remaining Member States are still in the transposition process, thus delaying its effective implementation.

Bulgaria faced infringement proceedings for delays in transposing the EU directive on whistleblowing. The country experienced delays in creating national legislation due to the lack of established whistleblowing practices. The Commission for Personal Data Protection (CPDP) was designated as the central authority, but its governance structure faced challenges due to expired mandates caused by the ongoing political crisis. While the CPDP's expertise and non-political nature are positive aspects, concerns exist regarding its intermediary role and the verification process by competent authorities. Nonetheless, the adoption of the legislation and the involvement of the CPDP provide hope for enhanced whistleblower protection in Bulgaria. The Act aims to protect whistleblowers in various sectors, but lacks provisions for anonymous reporting and excludes older breaches. Internal reporting is encouraged, while external channels are advised for retaliation cases. Although the Act recognizes freedom of expression and media pluralism, concerns about anonymity, privacy risks, and stronger protections persist. Further enhancements are needed to build trust in the system.

The main problems identified in the law regarding whistleblower protection measures are as follows:

- 1. Lack of clarity in fulfilling support measures:** Although the law assigns the duties of providing support measures to the CPDP and the National Legal Aid Bureau, there is a lack of clarity on how these duties will be fulfilled. The law does not provide effective psychological and sufficient legal support or solid information norms regarding these services.
- 2. Inadequate support measures:** While the Bulgarian law recognizes the need for appropriate support measures, it falls short in providing adequate and to establish effective mechanisms for compliance with European and national legislation and fight corruption.
- 3. Inappropriate transposition of provisions regarding the status of whistleblowers:** Firstly, the wording related to the status of a whistleblower as a claimant in retaliatory damages proceedings does not clearly reverse the burden of proof as categorically prescribed in the Directive. Secondly, the provision regarding the status of a whistleblower as a defendant in proceedings for their whistleblowing action is criticized for potentially misinterpreting the Directive by referring to dismissing the case instead of dismissing the claim.

The first Croatian Whistleblowers Protection Act was introduced in 2019 but it was not fully aligned with EU standards. In April 2022, a new Act was implemented to comply with the EU Whistleblowing Directive and it expanded the scope of

⁷ EU Whistleblowing Monitor at: <https://www.whistleblowingmonitor.eu/>

WHITE PAPER, Expert Guide: Whistleblowing Laws in the European Union, <https://www.integrityline.com/expertise/white-paper/expert-guide-whistleblowing-laws-eu/>

protection, defined irregularities more precisely, introduced changes regarding the use of reporting channels, and enhanced protection. The transposition process in Croatia faced delays, leading to infringement proceedings from the European Commission. The Act was drafted with the involvement of a working group, including representatives from state institutions, academia, trade unions, employers' associations, and civil society. Public consultations were held, but concerns were raised about the limited impact of the civil society involvement on decision-making.

The main problems related to the quality of transposition include:

- 1. Insufficient support for whistleblowers:** There is a lack of accessible free legal aid and psychosocial support available to whistleblowers. Although the Act requires the adoption of subsequent legislation within certain timeframes to regulate specific aspects, such as the act on emotional support, the delay in adopting this regulation could hinder the effective implementation of whistleblower protection measures.
- 2. Knowledge gaps and awareness issues:** The Ombudswoman's implementation report emphasizes a lack of knowledge and understanding of the Act among both employers and employees. This includes confusion regarding the scope, application procedures and reporting methods. Insufficient awareness of rights and obligations undermines the effectiveness of the legislation and highlights the need for broader educational and promotional activities.
- 3. Review channels for effectiveness:** The Act obliges the Ministry responsible for judicial affairs to annually submit available statistical data on irregularities reported to the Ombudswoman to the European Commission. However, the Ombudswoman noted the need to collect relevant information from all other stakeholders involved in the application of the Act in order to enable systematic and comprehensive monitoring of its implementation.

The Greek whistleblower legislation presents issues vis-à-vis various issues including data protection measures, limitations on damages restitution, the area of application, and the absence of whistleblower protection in defense and national security subjects. Additionally, Greece was confronted with a delayed transposition process and the lack of inclusiveness in the legislative process.

The main identified issues are the following:

- 1. Limited scope of the Whistleblower Directive:** The Greek legislation covers only specific sectors of EU law, omitting others where whistleblowing is crucial, such as environmental crimes. Therefore, the current scope may result in misconduct in industries not covered by the law going unreported and unregulated.
- 2. Insufficient damages restitution:** The law lacks a comprehensive framework for complete damages restitution, which may discourage potential

whistleblowers from coming forward due to the absence of adequate compensation for their losses.

- 3. Subjective limitations in defining eligible individuals for protection:** The subjective scope of the law, which defines the individuals eligible for whistleblower protection, may be less encompassing than the EU Directive, leaving certain people with inadequate protection. There is also no definition provided for sectors such as defense and national security where whistleblower protection is absent.
- 4. Concerns regarding confidential information and public disclosure:** The legislation imposes conditions for the release of confidential information to the public, which may raise concerns about potential infringement on freedom of speech.
- 5. Deployment and availability of reporting channels:** While the law mandates the development of internal and external reporting channels, it is important to ensure that these channels are properly deployed and accessible to all individuals, irrespective of their status or position within a company.
- 6. Lack of complete protection of whistleblowers' privacy:** The law includes safeguards to protect the privacy of whistleblowers and their personal information but a clear framework should be established to prevent the unauthorized publication or abuse of whistleblowers' personal information while maintaining an efficient reporting process. Also, while the appointment of Integrity Councilors improves whistleblower protection, there is a potential protection gap if they are unavailable or unable to carry out their duties efficiently. This implies that there may be challenges in ensuring consistent and comprehensive protection for whistleblowers in all circumstances.
- 7. Lack of differentiation between whistleblowers and protected witnesses:** Proper legal safeguards and support should be provided to whistleblowers, distinguishing them from protected witnesses, as their legal standings and safeguards may vary.
- 8. Lack of comprehension and adherence to reporting standards:** There is a lack of clarity or understanding among reporting entities, an aspect which can affect the quality and accuracy of reports.

Romania's implementation of whistleblower protection has been uneven, thus undermining good governance and anti-corruption efforts. The adoption of the EU Directive faced conflicts and delays during the transposition process resulting in a negative impact on the coherence of the law and its ability to provide sufficient legal protection. The law was eventually passed after the main problems were corrected, but it still displays issues which may pose problems in the future. The

legislative process lacked inclusiveness, with civil society's concerns and proposed solutions not being considered. The level of protection for anonymous reporting was one of the main contention points as it was conditioned beyond the Directive's requirements, leading to criticism and subsequent amendments.

The main problems identified regarding the quality of transposition are as follows:

- 1. Elimination of the possibility to remain anonymous:** The draft law initially allowed anonymous reporting, but it was amended to require full identification, including name, contact details, and signature. This raised concerns about the protection of whistleblowers who may fear retaliation, but the final version of the law corrected this problem.
- 2. Shortened retention time for reports:** The requirement to keep whistleblower reports for 5 years was lowered to 2 years. This raised concerns about the ability to adequately investigate claims, but the final version of the law corrected this problem.
- 3. Impeding internal reporting channels:** The requirement for all public and private entities to establish and maintain internal reporting channels was changed, exempting smaller entities from this obligation. This contradicted the intention of the Directive and reduced protection for whistleblowers in smaller organizations. However, the final version of the law corrected this problem.
- 4. Restricting reporting mechanisms:** The draft law changed the requirement for whistleblowers to first file an internal report before addressing the press directly. It also added a new requirement for whistleblowers to prove the validity of their reasons for reporting, subjecting them to subjective assessment by authorities.
- 5. Imposing minimum deadlines for public disclosure:** The addition of a minimum 3-month deadline for public disclosure contradicted other provisions that required a previous internal or external filing of the report.
- 6. Lack of clarity on essential information exempted under the law:** The law does not clearly specify which categories of information related to national security are exempted from the whistleblower law.

In reviewing the quality of the transposition process in relation to the abovementioned requirements checklist, the following matrix was developed (see Table 1).

Table 1: Quality of implementation matrix

Countries/ compliance topics	Bulgaria	Croatia	Greece	Romania
Scope of coverage				
Comprehensive horizontal rights harmonising EU Directive and national law	Substantial compliance	Partial compliance	Partial compliance	Partial compliance
Broad whistleblowing disclosure rights with 'no loopholes'	Substantial compliance	Substantial compliance	Partial compliance	Partial compliance
Wide subject matter scope for scope of EU authority	Substantial compliance	Substantial compliance	Partial compliance	Partial compliance
Protection against spillover retaliation at the workplace	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Protection for non-employees who report work-related information	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Reliable identity protection	Substantial compliance	Substantial compliance	Substantial compliance	Noncompliance
Protection against full scope of harassment	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Shielding whistleblower rights from gag orders	Partial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Forum				
Right to a genuine day in court	Substantial compliance	Substantial compliance	Partial compliance	Substantial compliance


Burdens of proof				
“Merits test” to qualify for protection	Partial compliance	Substantial compliance	Partial compliance	Partial compliance
Realistic standards to prove violations of rights	Partial compliance	Substantial compliance	Substantial compliance	Noncompliance
Relief for whistleblowers who win				
“Make whole” compensation	Substantial compliance	Substantial compliance	Partial compliance	Substantial compliance
Interim relief	Noncompliance	Substantial compliance	Partial compliance	Noncompliance
Coverage for legal fees and costs	Substantial compliance	Partial compliance	Substantial compliance	Substantial compliance
Personal accountability for reprisals	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Institutional whistleblower channels	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Whistleblower enfranchisement	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
Education, outreach and transparency				
Guidance requirements	Substantial compliance	Substantial compliance	Partial compliance	Substantial compliance
Transparency requirements	Substantial compliance	Substantial compliance	Substantial compliance	Substantial compliance
National administrative support agency	Substantial compliance	Substantial compliance	Partial compliance	Substantial compliance
Review				
Review channels for effectiveness every 3 years	Substantial compliance	Partial compliance	Substantial compliance	Substantial compliance

Source: authors' compilation

In conclusion, there are several common problems and challenges faced by the examined countries in implementing whistleblower protection legislation, such as:

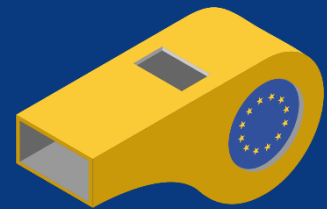
- 1. Lack of timely transposition:** All countries experienced delays in transposing the EU Directive into their national legislation, leading to infringement proceedings from the European Commission.
- 2. Incomplete transposition:** Each country displays a degree of incomplete transposition vis-à-vis different sections, requiring subsequent amendments to fully align national legislation with EU standards.
- 3. Lack of clarity:** The legislation in some countries lacked clarity and precise definitions, particularly in defining whistleblowers and determining their eligibility for protection. This ambiguity can lead to confusion and potential exclusion of individuals who should be protected.
- 4. Insufficient support for whistleblowers:** In all countries there were concerns about the lack of effective support measures for whistleblowers, including psychological support, legal aid, guidance and informational needs. The absence of these support mechanisms can deter individuals from reporting irregularities and undermine the effectiveness of whistleblower protection.
- 5. Privacy and identity protection:** The need for clear boundaries and rules to protect the privacy of whistleblowers and their personal information was emphasized in each country. Therefore, striking a balance between public disclosure and safeguarding individuals' rights is crucial.
- 6. Reporting channels and process:** Some countries faced challenges related to the deployment and availability of reporting channels. The rules and regulations surrounding reporting channels were amended over time, potentially causing confusion or inconsistency in the reporting process.
- 7. Limitations and exclusions:** The scope of whistleblower protection legislation in some countries was limited, omitting certain sectors or areas where whistleblowing is crucial. There were also concerns about exclusions in sectors such as defense and national security, where whistleblower protection is limited or absent.
- 8. Lack of awareness and comprehension:** There was a lack of knowledge and understanding of whistleblower protection laws among both employers and employees. This lack of awareness undermines the effectiveness of the legislation and highlights the need for educational and promotional activities to inform the public about their rights and obligations.

Overall, the transposition process of whistleblower protection legislation across these countries (Bulgaria, Croatia, Greece, Romania) faced various challenges,



including delays, incomplete transposition, as well as lack of clarity, insufficient regulated support for whistleblowers and limitations in scope. Given the late and recent adoption of transposing legislation, there is still insufficient implementation practice in some of these countries. It is therefore too early to draw firm conclusions on which legislative solutions will be effective, which need further development and improvement, or replacement by other, better working ones. None of the countries appear to be fully compliant with the Directive, but they have made efforts to align their legislation even though there are significant issues and areas for improvement identified in each country's implementation. Therefore, these aspects indicate the need for further amendments, and awareness-raising efforts to enhance the effectiveness and close loopholes in whistleblower protection systems throughout the Southeast Europe region.

TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN BULGARIA



TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN BULGARIA

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Introduction

Bulgaria faced infringement proceedings for delays in transposing the EU Whistleblowing Directive as the almost two-year absence of a permanent functioning parliament and a regular government led to difficulties in adopting national legislation. The final version designated the Commission for Personal Data Protection (CPDP) as the central authority. Despite the expiry of the mandates of its chairman and members, typical for many other electoral institutions in Bulgaria, caused by the political crisis, the CPDP's expertise and non-political nature are positive. Although concerns about its intermediary role and verification process are still being discussed, the Bulgarian Whistleblowing Act, effective since May 2023, aims to protect whistleblowers reporting violations in various sectors and its material scope is broader than that of the Directive. However, the Act lacks provisions for anonymous reporting and excludes older breaches. Internal reporting is encouraged, but external channels are advised for cases involving retaliation or doubts about effectiveness. The Act recognizes freedom of expression and media pluralism in protecting disclosures. Concerns persist regarding anonymity, privacy risks, and the need for stronger protections. While the Act represents progress, further enhancements are necessary to foster trust in the system.

Quality of the transposition process

Time needed for the transposition

Bulgaria, like many other EU countries, transposed the Directive late and under pressure of infringement proceedings initiated by the European Commission in 2022⁸

The delays in transposition and the incomplete transposition process are indicative of the fact that the practice of whistleblowing has yet to be established and generally applied when witnessing violations in an employment context. Although prior to the Directive many Member States had a number of legal provisions on this

⁸July Infringements package: key decisions, 15 July 2022, at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768

issue, scattered in a number of legal acts⁹ or collected in one act, the standards introduced by the Directive set new and higher requirements.

Inclusiveness of the legislative process

At the beginning of the pandemic COVID-19, in March 2020, a working group was set up at the Ministry of Justice of the Republic of Bulgaria, bringing together representatives of state institutions, experts, civil society organisations and businesses, to draft national legislation to protect whistleblowers. The working group developed a draft which was published on the Council of Ministers' portal for public consultations on 21 April 2022¹⁰.

After the completion of this process, in October 2022, the caretaker government at the time had submitted the draft to the National Assembly. A few days before, a group of MPs from the Democratic Bulgaria Party had already presented a similar draft. Both drafts were rejected in December 2022.

In early January 2023, a group of MPs from GERB, the political party with an overwhelming majority in the then and current parliament submitted its own draft with similar provisions to the previous two. The last proposal was adopted quickly and without public discussion and in-depth debate on 27 January 2023, just a week before the dissolution of the National Assembly.

The three draft laws submitted to the Bulgarian parliament generally follow the mandatory provisions of the Directive, which is why they are by and large similar. The main difference between the two rejected drafts and the one that was approved is the designated central institution for external reporting and follow-up.

The two rejected drafts proposed the Bulgarian Commission for Anti-Corruption and Illegal Assets Forfeiture (Anti-Corruption Commission) as the designated authority competent to receive, give feedback and follow up on reports for breaches of Union and Bulgarian law, in addition to its powers to investigate reports of conflict of interest and corruption. This caused a number of objections and criticisms due to the negative image of the Commission. Furthermore, the Commission was expected to undergo a critical reform, which was foreseen in the two anti-corruption draft laws tabled in 2022. Both drafts were adopted at first reading and merged into one consolidated version. In this regard, CSO experts have repeatedly suggested that anti-corruption legislation should be considered together with the new whistleblower protection act, including taking into account its decentralised structure and the experience of inspectorates and other relevant competent authorities in receiving and handling corruption reports. This idea was not taken into account and the procedure for considering and adopting the Anti-Corruption Draft Act has not progressed since that point in time.

⁹ See: Transparency International Bulgaria, Whistleblower protection in Bulgaria, 2021. available at https://transparency.bg/wp-content/uploads/2021/06/2019_Whistleblowing_PolicyPaper_BG_compressed.pdf (in Bulgarian)

¹⁰ <https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=6784>

The current legislative framework in Bulgaria

In the context of the political crisis that persists, the previous Bulgarian National Assembly approved on 27 January 2023 the *Protection of Persons Reporting or Publicly Disclosing Information on Breaches Act* (the Whistleblowing Act, or the Act)¹¹, which adopts the minimum standards of the EU Whistleblowing Directive to protect persons reporting breaches of EU law. It came into force on 4 May 2023, except the provisions establishing obligations for the employers in the private sector having between 50 and 249 employees which shall apply from 17 December 2023.

The adopted Law stipulates that the **Commission for Personal Data Protection (CPDP)**¹² should exercise the powers of a central authority designated to receive and process external reports which is one of the key differences to the rejected drafts. The Commission for Personal Data Protection is an independent supervisory authority which protects the individuals with regard to the processing procedure of their personal data and the access to this data, as well as supervising compliance with the GDPR and with the Act. Its structure consists of a Chairperson and four members, elected by the National Assembly after a nomination by the Council of Ministers for a five years term and may be elected for one more term. The *Personal Data Protection Act*¹³ provides that after the mandate expiration of the Chairperson and of the members of the Commission, they shall continue to exercise their functions until a new Chairperson and members are elected. At present, the CPDP is facing such a situation since the governing structure is in office with expired mandates. The reasons for this are rooted in the ongoing political crisis, the lack of a regular stable government, frequent parliamentary elections, hard-to-achieve majorities, etc.

Initially, the legislature's decision to designate the CPDP as an external whistleblowing channel was met with a number of criticisms, mainly due to the referral of the received reports to separate “competent authorities”. This is perceived as a rather intermediary function that could lead to a prolongation of the process and to a blurred responsibility of both the central institution and the competent authorities, since both would have to carry out verifications and impose sanctions. Moreover, the sanctioning process is also indirect since the report has to be verified by a respective competent authority, therefore it has to establish that infringements have been committed, but the acts establishing violations and the penal decrees are within the CPDP competences. The CPDP, however, is a non-political body, less exposed to political influences and biases, and has expertise in the field of personal data protection, has a good IT infrastructure and has started timely work on the preparation for the entry into force of the law and its promotion. This can be seen as a serious sign and grounds for positive expectations.

¹¹ Available in Bulgarian at: <https://lex.bg/bg/laws/ldoc/2137231156>

¹² <https://www.cdpd.bg/en/>

¹³ Available in English at: <https://www.cdpd.bg/en/index.php?p=element&aid=1194>

Quality of transposition

Scope

Following the Directive's approach, the Whistleblowing Act defines its *material scope* by specifying the key areas of violations of the EU and Bulgarian legislation which are listed in the Annex to the Act. As required by the Directive, the law applies to breaches in the areas of public procurement; financial services products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; environmental protection; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems; EU financial interests and internal market; EU competition law and state aid regulation; cross-border tax schemes (Art. 3, para1).

The Bulgarian legislator decided on a broader scope of breaches compared to the Whistleblowing Directive, where the Act applies not only to breaches of EU law, but also to breaches of **relevant provisions of Bulgarian legislation** as well as in the following areas: **performance of public service, rules for the payment of outstanding public State and municipal claims, labour legislation** (Art. 3, para2).

In addition, the Bulgarian Whistleblowing Act applies to **violations of criminal law** with the exception of private complaint proceedings (Art.3, para 1, p.5).

With regard to the *personal scope* of the Act, it refers to whistleblowers, defined as a natural person who reports or publicly discloses information acquired through a work-related relationship about a violation of which he/she has knowledge in their capacity as: an employee, public official, self-employed, freelancer, consultant, volunteer, trainee, shareholder, sole proprietor, board member, a person working for a natural or legal person, its subcontractors or suppliers, job applicant, etc. (Art.5, para 2) The Bulgarian list is **slightly more detailed** than the one in the Directive. Protection is provided to a whistleblower from the moment the report is filed or the information about a breach is made public.

Protection under Bulgarian law is also available to any other whistleblower who reports a violation of which he or she became aware of in a work context (Art.5, para3).

The protection also applies to individuals who assist a whistleblower to report or disclose information, to those who are associated with the whistleblower and who may be subject to retaliation because of the whistleblowing action (e.g. colleagues, relatives), as well as to legal entities in which the whistleblower has an ownership interest, works for, or is otherwise associated with in a business context (Art.5, para 4).

Persons who have anonymously filed a report in accordance with the law or publicly disclosed information about violations and who were subsequently identified and became the object of repressive retaliatory actions, also have the right to protection (Art.10).

The conditions to qualify for protection are in full compliance with the provisions of the Directive. However, the Whistleblowing Act does not make use of the opportunity provided by the Directive and **does not provide for anonymous whistleblowing to be accepted and be followed up by the relevant authorities.** Moreover, it **excludes reports relating to breaches committed more than two years ago** (Art.10). These two topics constituted points of contention that were discussed within the working group that drafted the legislation and they are still causing controversy.

Similar to the rejected two drafts, the approved Act **does not allow anonymous whistleblowing.** Whistleblowers should report their personal data to the relevant authority, which is obliged not to disclose them. However, in a corrupt administration based on informal networks and in the absence of specific safeguards, these obligations are less reliable. Disclosing the identity of whistleblowers may affect their rights as well as discourage them and anyone else who might report wrongdoing, including corruption, by their employer or another person. Encouraging blowing the whistle remains a critical issue for countries with higher levels of corruption.

Anonymous whistleblowing continues to receive considerable interest from civil society as it seems to be the most efficient measure against retaliation. Many civil society organisations support the idea of providing a platform to receive and process anonymous signals, although this is not a mandatory requirement of the Directive. On the one hand, the option for blowing the whistle anonymously is perceived as the measure which mostly encourages reporting and which should protect the whistleblower most effectively since his/ her identity would be protected. On the other hand, it is obvious that implementing this possibility would require more substantial human and capital resources. Moreover, if such anonymous reports are received via an online platform, the latter should provide an encrypted channel and/or metadata should be deleted after the signals are received. Thus, additional technical skills and trainings would also be necessary. In Bulgaria whistleblowing still has negative connotations and its violations remain neglected, including due to fear of retaliation and lack of trust in non-disclosure and protection mechanisms.

Internal and external reporting

The Directive obliges the Member States to ensure the establishment of **internal and external reporting channels**, as well as to maintain the confidentiality of the reporting person. It also provides for protecting **public disclosures**, taking into account democratic principles and fundamental rights such as freedom of expression, freedom and pluralism of media (Recital 33). Although the Directive provides for Member States to encourage reporting through internal channels over external ones (Article 7, para 2), it allows the reporting person to choose the most appropriate reporting channel depending on the circumstances of the case (recital 33).

In line with the Directive, the Whistleblowing Act provides for three channels for reporting violations: internal, external, and public reporting. Following the approach of the Directive, the Bulgarian law gives priority to internal channels.

External ones are recommended when there is a risk of retaliation and discrimination and/or there are suspicions that effective measures will not be taken. It encourages public disclosure of violations. The law allows whistleblowers (reporting persons or public disclosers) to choose the method of reporting: one method, a combination of two methods, or all three methods simultaneously (Art.11).

Persons who make public disclosures about breaches of EU and Bulgarian law enjoy, in addition to the protection of the law, the constitutional protection of free dissemination of information established in the Constitution (Art.11, para 3).

Internal reporting

Internal reporting should take place through an internally established reporting channel within the company or public organisation. This obligation, specified in the law (Art.12), applies to:

- 1.** public sector employers, except municipalities with less than 10,000 citizens;
- 2.** private sector employers with 50 or more employees;
- 3.** private sector employers, irrespective of the number of employees, if the activity they carry out falls within the scope of European Union acts relating to financial services, products and markets and prevention of money laundering and terrorist financing, transport safety, environmental protection.

For the entities with a total number of 50 to 249 employees the law provides the possibility to use a common channel for internal whistleblowing by designating a single person or unit. And for municipalities with a population of less than 10,000 or fewer than 50 employees, to share resources to receive and follow up on reports of breaches, subject to the duty of confidentiality. All obliged entities shall provide clear and easily accessible information on the conditions and procedures for whistleblowing (available on their websites as well as in prominent places in the offices and work premises).

In addition to establishing an internal reporting channel and providing information, the law imposes several obligations on employers, such as:

- 1.** adoption of internal reporting rules that must be reviewed at least once every three years;
- 2.** prohibiting retaliation (e.g. disciplinary measures, dismissals) against whistleblowers;
- 3.** keeping records, which must also comply with data protection laws;

4. regularly providing statistical information to the national external whistleblowing body in accordance with relevant reporting procedures;
5. appointing at least one staff member to be responsible for processing incoming reports (Whistleblowing Officer);
6. establishing and maintaining a register of whistleblowers (non-public) containing comprehensive data, as specified in the law, stored in a way that guarantees their confidentiality and security;
7. process the signals and verify the facts presented in the report;
8. ensure that the identity of the reporting person and any third party mentioned in the report is protected and that non-authorized staff members do not have access thereto.

The employee assigned to handle whistleblowing reports may be the data protection officer or he/ she may perform another function within the company or entity (Art.14, para 2 and 3). Officers responsible for handling reports should not have a conflict of interest for each case reviewed. The obliged entities referred to in the first and second groups may assign the functions of receiving and registering whistleblowing reports to another natural or legal person outside their structure, subject to the legal requirements, and may use an internal whistleblowing channel established by the economic group to which they belong, if the channel meets the requirements of the Whistleblowing Act (Art.14, para5).

The Act provides that a whistleblowing report must be made to the Whistleblowing Officer in writing (including by email) or orally. An oral report may be made by telephone, other voice messaging systems or, at the whistleblower's request, by an in-person meeting at a mutually agreeable time. The procedure for the submission of reports, their receipt and verification, the necessary follow-up, including for the termination of the breach, the procedure for record keeping, are regulated in accordance with the requirements and deadlines of the Directive.

After verifying the facts presented in the report, the Whistleblowing Officer shall forward it, when necessary, to the external channel and, in case of evidence of a crime, to the prosecutorial authorities (Art.15).

There is still insufficient information on the degree of readiness of obliged entities in Bulgaria to comply with the requirements of the law since they have had only a few months to adapt to many new challenges.

External reporting

The powers of the CPDP as a central authority for external reporting (external channel) and whistleblower protection are defined in the law (Art.19). Therefore, the Commission:

- organises the receipt of reports and refers them to competent authorities for verification and follow-up;
- approves forms for the reception of reports;
- coordinates and supervises whistleblowing activities of the obliged entities, as well as by all bodies and organisations that receive or deal with such reports;
- gives methodical instructions to the obliged entities, carries out training of their employees responsible for dealing with whistleblowing;
- adopts a regulation on the keeping of the register by the obliged entities and on the referral of internal whistleblowing to it;
- maintains a register of reports, analyses and summarises the practice of dealing with signals and transmit the necessary statistics to the European Commission (Point of contact with EU institutions, bodies, services and agencies);
- ensures the protection of whistleblowers or whistleblowers who make public disclosure for breaches, including by applying the administrative measures provided for in the Act, etc.

In order to verify the whistleblowers' reports and the publicly disclosed information on breaches and, consequently, to take appropriate action to prevent such instances or to remedy their consequences, the CPDP sends them no later than 7 days after their receipt to the competent authority depending on the subject of the report. The Commission forwards the report to the competent authority without disclosing the identity of the person who submitted the report. Where it is necessary to disclose the identity of the whistleblower in order to establish the truth of the facts stated in the report, the Commission may do so to the competent authority only after obtaining the written consent of the whistleblower (Art.20, para 1 and 2).

The competent authorities depending on the alleged type of infringement are the Commission for the Protection of Competition; the Financial Supervision Commission; the Chairman of the State Agency for Metrological and Technical Supervision; the Minister of Transport and Communications; the Minister of Environment and Water; the Chairman of the Nuclear Regulatory Agency; the Bulgarian Food Safety Agency; the Chief State Health Inspector within the meaning of the Health Act; the Consumer Protection Commission; The National Computer Security Incident Response Team; the Minister of Finance; the Executive Director of

the National Revenue Agency; the Executive Director of the Executive Agency "Main Inspection of labor"; the district governor of the district in which the municipality against which it is located is located signal given or other competent central executive authority accordingly the specificity of the signal.

If the whistleblower reports violations committed by persons holding senior public positions, the competent authority is the Commission for Anti-Corruption and Illegal Assets Forfeiture (Art.20, para 3).

The CPDP has the right at any time to request information from the competent authority on the status of the verification procedure and to give binding instructions to the competent authority concerned on how the verification should be conducted (Art.20, para 4).

The Act transposes the requirements of the Directive on the design of the external channel and on the provision of information on the receipt and follow-up of reports. The requirements for internal reporting channels shall be respected when designing the external reporting channel. Beyond this, the external channel should be an independent structural unit within the CPDP staffed by a sufficient number of employees specifically trained to deal with whistleblower reports. The staff of the unit may not provide information about the reports received, in particular about the identity of the senders, to other staff, including other members of the Commission (Art.21-22).

On the basis of a report by the employee concerned, the head of the unit shall propose to the Commission to take follow-up action (defined in Art.25), such as:

- specific measures to put an end to the violation in cases where such violations have been detected;
- forward the information contained in the whistleblower report to the competent European institutions, bodies, offices or agencies where this is provided for in European Union acts;
- referral to the public prosecutor's office where a criminal offence has been established;
- measures to protect the whistleblower;
- terminate the verification.

In each individual case, the CPDP issues a report on the actions taken within a period of no longer than three months, or in duly justified cases, six months, from the receipt of the report. It describes the information received, the follow-up taken, the final results of the review of the report and the decision. The latter shall be communicated to the reporting person and the affected individual (Art.26).

External audit requirements

The CPDP is subject to external audit (Art.30) by the Ombudsman of the Republic of Bulgaria in relation to the fulfillment of the obligations under the Whistleblowing Act and the correct handling of whistleblowing reports as well as the protection provided to whistleblowers themselves. The audit is on-site and includes, among

others, a review of compliance with deadlines for the reports' processing, interaction efficiency between CPDP and the other competent authorities etc. The results of the CPDP's audits are included in the Ombudsman's annual report to the National Assembly. The Ombudsman receives and reviews complaints against the CPDP from whistleblowers, including for failure to protect them or breaches of confidentiality of their information.

The introduction of an independent external audit of the work of the CPDP by the Ombudsman can serve as an additional guarantee for the proper application of the law.

Whistleblower Protection measures

Prohibitions against retaliation

The Whistleblowing Act provides a non-exhaustive list of prohibited retaliation forms against which whistleblowers are protected (Art.33). These include termination of employment, delay in promotion, negative performance evaluation, disciplinary sanctions, direct or indirect discrimination, unequal treatment, not prolonging a temporary contract, etc.

Also, competent authorities investigating a whistleblower report shall issue binding orders to cease retaliation pending the completion of the processing procedure.

If any form of retaliation is pursued, the whistleblower will be entitled to compensation for pecuniary and non-pecuniary damages (Art.34).

Support measures

All individuals who qualify within the scope of the Act are entitled to a number of support measures (Art 35):

- free and accessible information and advice on the procedures and protection measures;
- assistance in dealing with any authority necessary for their defence against retaliations;
- legal assistance in criminal, civil, administrative, and international civil litigation;
- out-of-court resolution of cross-border disputes through mediation, in accordance with the Mediation Act.

Although the duties of providing these measures have been assigned to the CPDP and the National Legal Aid Bureau, there is still a lack of clarity as to exactly how these duties will be fulfilled.

At the same time, neither the adopted Law, nor the two rejected draft laws provide for effective psychological and sufficient legal support or solid information norms regarding these services. Even though it is clear that in order to establish effective mechanisms for compliance with the European and national legislation and to fight corruption, whistleblowers must be provided with appropriate support measures, the Bulgarian law does not fully comply with the Directive.

Exemption from liability

Whistleblowers are exempt from liability for:

- the acquisition of, or access to, the information reported or publicly disclosed, provided that such acquisition or access does not constitute an independent crime;
- for breaching the restrictions on disclosure of information imposed by a contract, law, regulation or administrative act, provided that they have reasonable grounds to believe that the reporting or public disclosure of the information was necessary to disclose the breach;
- disclosure of information related to a trade secret in relation to which whistleblowing or public disclosure is considered lawful.

Two legislative provisions stipulated in the Whistleblowing Act are causing discussion among the legal expert community.

The first one refers to the status of a whistleblower as a claimant in retaliatory damages proceedings. Although the law (Presumption under Art.37) provides that “damages caused to the whistleblower in connection with the whistleblower’s report or publicly disclosed information are considered to be caused intentionally until proven otherwise”, legal experts argue that the wording for **reversing the burden of proof** on the person who took the harmful actions is not as categorical as it is prescribed in the Directive.¹⁴

The second one refers to the status of a whistleblower as a defendant in proceedings for his/her whistleblowing action (Objection under Art.38). In this case protection mechanisms include the possibility for the whistleblower to request the **termination** of criminal, civil or administrative **proceedings** initiated against him/her if there was reasonable cause to believe that the whistleblowing or public disclosure of the information was necessary to disclose a breach. This provision has sparked criticism

¹⁴ See Jordan Vladov, *Remedies for civil protection of whistleblowers or publicly disclosing information about violations*, available in Bulgarian at: https://www.cdpd.bg/userfiles/file/ZZLPSP0IN/адв_%20Йордан%20Владов%20-%20Средства%20за%20гражданскоправна%20защита%20на%20лицата,%20подаващи%20сигнали%20или%20публично%20оповестяващи%20информация%20за%20нарушения.pdf

and discussion since legal experts claim that it is a wrong translation of the Directive which refers to dismissing the claim, not to dismissing (terminating) the case.

Although there is still no practice of implementing the law, going forward it would be important to clarify in a dedicated discussion what changes and improvements are needed, including vis-à-vis these two provisions.

Persons concerned

The law also provides protection for the individuals subject to a report. They fully enjoy the right to a defense and a fair trial, as well as the presumption of innocence, including to be heard, and the right of access to documents relating to them. They have the right to compensation for all pecuniary and non-pecuniary damages, when it is established that the reporting person has knowingly filed a report with false information or publicly disclosed false information, as well as when, according to the circumstances, he/ she was obliged to assume that the information was false (Art.39).

Sanctions

The Whistleblowing Act provides for administrative sanctions for non-compliance with its provisions (Art.41-47). The sanctions vary depending on the type of breach and its recurrence.

For instance, obliged entities (for internal reporting channels) who fail to comply with the legal requirements are liable to a fine of between BGN 1,000 and BGN 5,000 (approx. between EUR 500 - 2500). Companies and entities may face a penalty between BGN 5,000 and BGN 20,000 (approx. between EUR 2,500 - EUR 10,000) for a first breach. For a repeat violation in both cases the fine is much higher.

Sanctions are provided for obstructing the submission of a whistleblowing report, failure to take the necessary follow-up actions in relation to the report within the statutory time limit, failure to provide the reporting person with information on the follow-up actions.

The Whistleblowing Act is strict when it comes to reporting or disclosing false information. For knowingly reporting or disclosing false information, a person is liable to a fine in the range BGN 3,000 - BGN 7,000 (approx. EUR 1,500 - EUR 3,500). The fine is also high for taking retaliatory action if the violation is not subject to a more severe penalty.

Acts of infringement shall be drawn up by officials designated by the Chairperson of the CPDP and penalty decrees shall be issued by the Chairperson.

Regulatory framework

Regarding the need to establish a comprehensive regulatory framework for external and public channels in view of implementing the Bulgarian Whistleblowing Act, the CPDP has started to develop the secondary and tertiary legislation.

Before the law came into force, the CPDP adopted amendments to its internal *Rules on the Activity of the CPDP*, effective as of 28 April 2023¹⁵. In fulfillment of the legal provisions for the creation of an autonomous unit within the CPDP, a new **Directorate "External Reporting Channel"** as part of the CPDP's specialised administration was created. Its main powers are listed in the new Art.25a¹⁶.

The new Directorate is responsible for registering and managing whistleblowing reports, overseeing the provision of the Unique Identification Numbers (UINs), maintaining a register of whistleblowing reports submitted through internal and external channels, recording and registering decisions and sanction rulings related to the reports etc. The Directorate assists the CPDP in implementing legal protection to the reporting persons, ensures the confidentiality and security of submitted information, safeguards the privacy of copies of whistleblowing reports, and takes steps to destroy them after their examination and retention periods have expired. It functions as a point of contact with the European Commission. The Directorate also participates in trainings related to the Whistleblowing Act and creates informational materials to explain its implementation. The new Directorate is staffed with 15 specially trained officials.

In order to ensure that every report received by the obliged entities will be registered and considered, as well as to ensure accountability and traceability of every report, the CPDP implemented the generation of a *Unique Identification Number* (UNI) for each report, which is obtained by the designated staff responsible for handling the reports. The UIN serves as a reference when registering the report and ensures that each is properly documented and can be easily tracked within the Commission's oversight powers.

The CPDP adopted a **Roadmap** for the system of protection for whistleblowers through external and internal channels, outlining the deadlines for the authority to finalise capacity building.

By decision of the CPDP dated 19 April 2023, the **Form for registering a report for submitting information on violations** according to the Whistleblowing Act and a **Model for the Register of reports** under Art. 18, para. 2 of the Act were approved¹⁷.

¹⁵ Official website of the Commission for Personal Data Protection, Motives for the Project for Amendment and Addendum to the Rules of Procedures of the Commission for Personal Data Protection, available at: https://www.cdpd.bg/userfiles/file/Documents_2023/Motivi_Pravilnik_KZLD_2023_public_consultation.pdf (in Bulgarian); Official website of the Commission for Personal Data Protection, Amendment and Addendum to the Rules of Procedures of the Commission for Personal Data Protection, available at: https://www.cdpd.bg/userfiles/file/Documents_2023/Pravilnik_KZLD_2023_public_consultation.pdf (in Bulgarian)

¹⁶ Rules on the Activity of the Commission for Personal Data Protection and its Administration, available in English at: <https://www.cdpd.bg/en/index.php?p=element&aid=36>

¹⁷ <https://www.cdpd.bg/index.php?p=rubric&aid=69>

The adoption of an **Ordinance on keeping the register of reports** is forthcoming.

The CPDP organised an information round-table *Promoting the implementation of the Whistleblowing Act - Questions and Answers on April 28 2023*, as part of the CPDP's national information campaign on the subject.¹⁸ Basic issues related to the technical organisation and legal aspects of the implementation were presented. Among the discussed topics were whistleblower protection, as well as the new roles and responsibilities of both institutions and private business in the implementation of the Law.

Conclusion

Despite the delay, the adoption and current development of the legal and regulatory framework in Bulgaria is a step forward. Its proper implementation is linked to the expectation that persons who encounter irregularities in their work are encouraged to report them and, thus, contribute to their prevention and detection.

Effective protection of these individuals and the promotion of a whistleblowing culture would have a positive effect on the whole society. By introducing entirely new concepts and procedures into the Bulgarian legal system in this act, its correct implementation is expected to have a significant impact on most businesses and the public sector, to increase business integrity and transparency¹⁹, as well as to contribute to strengthening the rule of law in the EU.

In order to create an effective whistleblowing system that results in a positive environment for both businesses and society in the Union in general and in Bulgaria in particular, it is necessary to continue training the responsible public and private entities, the employees of competent authorities as well as to focus on raising awareness on the matter within the general public and among potential whistleblowers' and to continue extending and strengthening protection measures by inserting the optional suggestions of the Directive into national law, thus going beyond its minimum standards.

¹⁸ https://www.cdpd.bg/index.php?p=sub_rubric&aid=286

¹⁹ Bulgaria adopts new whistleblowing legislation, 3 February 2023, <https://www.wolftheiss.com/insights/bulgaria-adopts-new-whistleblowing-legislation/>

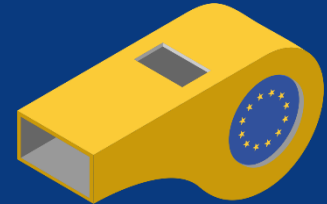
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TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN CROATIA



TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN CROATIA

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Introduction

The protection of whistleblowers in Croatia is regulated by the *Act on the Protection of Persons Reporting Irregularities* (hereinafter: *Whistleblowers Protection Act*) whose purpose is to provide effective protection of the reporting persons, including the provision of accessible and reliable reporting channels.

Until 2019, the Republic of Croatia did not have a single law that would regulate the issue of protection of whistleblowers specifically. In the Croatian legal system, persons who report irregularities were protected through regulations concerning particular legal areas which included criminal protection, protection from dismissal from work, protection against discrimination after reporting, protection against abuse by the employer, protection against the threat of dismissal, protection of the identity of the whistleblower, protection against accusations of disclosure of business secrets etc. However, this protection was particular and was often not sufficient to protect the rights of whistleblowers.²⁰

The first Whistleblowers Protection Act in Croatia was adopted in February 2019 and it entered into force on July 1st 2019.²¹ It unified all legal standards for the protection of whistleblowers into a special act that prescribes general provisions, the rights of whistleblowers, the procedure reporting of irregularities and handling of the report, judicial protection of whistleblowers and misdemeanour provisions, with the aim of ensuring accessible and reliable ways of reporting irregularities, protecting whistleblowers from harmful actions and promoting the prevention of irregularities by strengthening awareness of the necessity of safe reporting of irregularities.

In the light of the transposition process for the EU Directive on the protection of persons who report breaches of Union law (Directive (EU) 2019/1937)²², the recently adopted act had to be brought in line with the EU provisions. Even though many EU

²⁰ Human Rights House Zagreb, Position of the whistleblowers in Croatia in context of the upcoming legal regulation of reporting irregularities (2018) available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2019/02/KLJP_TematskilzvjestajZvizdaci.pdf

²¹ Act on the Protection of Persons Reporting Irregularities (Official Journal 17/2019), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2019_02_17_357.html

²² 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, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

standards were considered during the process of drafting the Whistleblowers Protection Act from 2019, largely due to the fact that its adoption partly coincided with the drafting process of the EU Whistleblowing Directive, there were still significant amendments left to be adopted in order to fully transpose its provisions into the national legislation.

The new *Croatian Act on the Protection of Persons Reporting Irregularities*²³ implementing the EU Whistleblowing Directive came into force on April 23rd 2022, thereby replacing the existing legal framework. Even though the main protection mechanisms for whistleblowers remained unchanged, the Act introduced several novelties in order to harmonize with EU standards.

The most relevant changes introduced concerned the area of application of the new law, the more detailed definition of irregularities and the way of submitting reports, the expansion of the circle of persons who can be whistleblowers, the possibility of choosing an internal or external reporting channel, the expansion of the jurisdiction of courts to provide judicial protection of whistleblowers, detailed regulation of the prohibition of retaliation, institute of a temporary measure for protection of whistleblowers which is decided in urgent procedure and independently form the main subject matter, as well as exemption of whistleblowers from responsibility for disclosing information. In addition to the whistleblowers themselves, the Act protects confidential persons and their deputies, as well as other related persons, including assistants of whistleblowers, relatives, colleagues, as well as legal entities they own.²⁴

Quality of the transposition process

Time needed for the transposition

The process of transposition in Croatia was completed four months after the deadline envisaged for transposition. Even though the Government initially planned the adoption of the new whistleblower legislation by the end of 2021, the transposition has still not been completed by 17 December 2021, which was the deadline set by the EU Directive. This led to the European Commission initiating infringement proceedings against Croatia for not fully transposing the EU Directive before the deadline.²⁵ Croatia was not the only Member State that was late with the transposition, as the letter of formal notice was sent to 24 out of the 27 Member States.

²³ Act on the Protection of Persons Reporting Irregularities (Official Journal 46/202), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2022_04_46_572.html

²⁴ Ombudswoman of the Republic of Croatia, Seminar on the new Act on the Protection of Persons Reporting Irregularities - Rights and obligations of employers, confidential persons and persons reporting irregularities, May 2022, available at: <https://www.ombudsman.hr/hr/seminar-o-novom-zakonu-o-zastiti-prijavitelja-nepravilnosti-prava-i-obveze-poslodavaca-povjerljivih-osoba-i-prijavitelja-nepravilnosti/>

²⁵ INFR(2022)0088, Formal notice Art. 258-260(3) TFEU, Lack of transposition of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, by Croatia, 27 January 2022, available at: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/screen/home

The transposition process in Croatia started in December 2020, when the Government of the Republic of Croatia adopted the Plan of legislative activities for 2021²⁶ which included amendments to the current whistleblowing legislation (from 2019) to be adopted in the third trimester of the following year. Such legal amendments were also envisioned by the Plan of harmonisation of legislation with the *acquis communautaire* for 2021²⁷, which was determined during the same Government session.

The group that worked on drafting amendments to the existing whistleblower protection act in order to transpose the EU Whistleblowing Directive into the Croatian legal system was established by a decision of the Minister of Justice and Administration on 21 June 2021.²⁸

The draft Whistleblower Protection Act was submitted for public consultations on the e-Consultation portal, where it was opened from 12 November 2021 until 2 December 2021. On 15 December 2021, the Croatian Government finally scheduled a discussion on its agenda, which was held two days before the official transposition deadline. A day later, at a conference entitled “Legal and practical challenges in protecting whistleblowers”²⁹, it was announced by the Minister of Justice and Administration that the draft Act would be forwarded to Parliament in early 2022. The Draft Act and Final draft act were discussed in the Croatian Parliament in January, March and April 2022.³⁰ The *Act on the Protection of Persons Reporting Irregularities (Whistleblowers Protection Act)* was passed on 15 April 2022 and entered into force on 23 April 2022.

Inclusiveness of the legislative process

Working group for drafting amendments to the Whistleblower Protection Act

The Working group for drafting amendments to the Whistleblower Protection Act established in June 2021 comprised sixteen members, including representatives of relevant state institutions, the Supreme Court, state attorneys’ office, and Ombudsman, as well as academia, trade unions, employers association and civil society.³¹

²⁶ Government of the Republic of Croatia, Plan of legislative activities for 2021, December 2020, available at: <https://zakonodavstvo.gov.hr/godisnji-plan-normativnih-aktivnosti/229>

²⁷ Government of the Republic of Croatia, Plan of harmonisation of legislation with the Acquis Communautaire for 2021, December 2020, available at: <https://zakonodavstvo.gov.hr/godisnji-plan-normativnih-aktivnosti/229>

²⁸ Ministry of Justice and Public Administration, Decision on the establishment of a Working group for drafting proposal of the Act on Amendments to the Act on the Protection of Persons Reporting Irregularities, June 2021, available at: <https://mpu.gov.hr/UserDocsImages/dokumenti/Pravo%20na%20pristup%20informacijama/Radne%20skupine/Odluka%20o%20osnivanju%20radne%20skupine%20za%20izradu%20nacrt%20prijedloga%20zakona%20o%20izmjenama%20i%20opunama%20zakona%20o%20za%C5%A1titi%20prijavitelja%20nepravilnosti.pdf>

²⁹ Ombudswoman of the Republic of Croatia, The new Act on the Protection of Persons Reporting Irregularities - How to better protect whistleblowers in Croatia?, December 2021, available at:

<https://www.ombudsman.hr/hr/novi-zakon-o-zastiti-prijavitelja-nepravilnosti-kako-do-bolje-zastite-zvzdaca-u-hrvatskoj/>

³⁰ Croatian Parliament, Draft Act and Final Draft Act on the Protection of Persons Reporting Irregularities, P.Z.E.242, available at: <https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2026365>

³¹ Ministry of Justice and Administration, Working groups for drafting proposals of laws, other regulations and acts, available at: <https://mpu.gov.hr/pristup-informacijama-6341/savjetovanja-s-javnoscju/radne-skupine-za-izradu-nacrt-prijedloga-zakona-drugih-propisa-i-akata/6230>

The Croatian Government Office for Cooperation with NGOs published an invitation for one representative of the civil society to join the working group on 28 May 2021, with a deadline to submit an application by 7 June 2021 following a selection procedure³². With regards to the process of candidacy and selection of civil society representatives, this Working group represents no exception from the generally detected trend in Croatia where this process commissioned by public authorities can itself be a factor that limits or encourages civic participation and pluralism. According to recent research on enabling environment for human rights defenders in Croatia³³, civil society organizations indicate that they consider the practice of candidacy and appointment of civil society organizations to working groups on proposals of acts and public policies at the national level to often be non-transparent and unsatisfactory.

The procedure for electing representatives of civil society organizations into committees, advisory or other working bodies at the request of institutions is a task of the Council for Civil Society Development, an advisory body to the Government of Croatia. In relation to its operation and work, civil society organisations continuously point out the issue that the majority of the Council is held by state administration bodies, which they find itself questionable. Namely, according to their views and experience, representatives of ministries and other bodies always vote the same, in unison, which reveals that state administration is coordinated in selecting suitable civil society for working groups on the adoption of, among others, anti-corruption laws.³⁴

As a civil society representative in the Working group for drafting the Whistleblowers Protection Act, Croatian Government Council for Civil Society Development selected a representative of civil society from the association which primarily deals with provision of social services for youth with disabilities, even though there was another nominated candidate who was experienced and active in monitoring whistleblowing legislation and whistleblower protection.

In this context, it is worrying that the Council with such a majority often fails to select candidates for members of working bodies and commissions based on the previous work of the organization that nominates them and the professional experience of the candidates themselves, preferring to appoint less qualified candidates. Such practices of the Council for the Civil Society Development send the message that the Government does not care about meaningful participation of civil society in decision-making processes.³⁵

³² Government of the Republic of Croatia, Office for Cooperation with NGOs, Invitation to nominate representatives of civil society organizations as members of the Working group for drafting the Act on Amendments to the Act on the Protection of Persons Reporting Irregularities, 28 May 2021, available at: <https://udruga.gov.hr/vijesti/poziv-za-predlaganje-predstavnika-organizacija-civilnoga-drustva-za-clana-radne-skupine-za-izradu-zakona-o-izmjenama-i-dopunama-zakona-o-zastiti-prijavitelja-nepravilnosti/5335>

³³ Human Rights House Zagreb, Human Rights Defenders: Challenges and Obstacles, December 2022, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2023/03/KLJP_ThematicDefenders1-1.pdf

³⁴ Gong, Token associations shape anti-corruption laws, September 2022, available at: <https://gong.hr/2022/09/09/zeton-udruga-oblikuju-zakone-protiv-korupcije/>

³⁵ Human Rights House Zagreb, Human Rights Defenders: Challenges and Obstacles, December 2022, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2023/03/KLJP_ThematicDefenders1-1.pdf

Public consultations on the Draft Act (e-Consultation)

In addition to participation in working groups and similar bodies for the adoption of public policies and laws, the possibility of civil society participation in Croatia should also be ensured through public consultations, which take place online through the Central Government Portal for public consultations (e-Consultation). The main purpose of e-consultation is to “gather information about the attitudes, proposals and interests of citizens in regard to a certain public policy, in order to raise the level of understanding and acceptance of policy goals, but also to identify weaknesses and negative effects of the public policy that should be eliminated in time.”³⁶

Public consultation on the portal e-Consultation on drafting the new Whistleblowers Protection Act was opened from 12 November 2021 until 2 December 2021.³⁷ Its duration was 20 days, which is ten days shorter than the standard duration of public consultation process prescribed by the law. Such occurrence is also consistent with the general negative trend of shortening the consultation period without justification, which is particularly concerning because shortening the duration of consultations in Croatia has become more of a rule than an exception only resorted to in exceptional cases.³⁸

According to the report on the conducted consultations, a total of 134 comments were received on the draft Whistleblowers Protection Act, submitted by several civil society organizations, certain individuals as well as the Ombudswoman of the Republic of Croatia. Out of the total number of comments and suggestions, 28 of them were entirely or partly accepted, with a certain number of them referring only to the syntax errors. The remaining comments were noted, while the majority (around 100) was not accepted. The largest number of comments was proposed by the Office of the Ombudswoman and the Centre for the Protection of Whistleblowers. Such an outcome is also in line with the general assessment of civil society organizations that regularly participate in e-consultations, who say that this form of consultations lacks significance, given that the comments of proponents addressed to public authorities are rarely considered, which is why they mostly see the e-Consultation process only as a way to fulfil formal obligations.³⁹

Quality of transposition

As mentioned earlier, the first Act on Whistleblower Protection in Croatia in 2019 already included many standards in line with the provisions of the EU regulation of whistleblower protection considering that its adoption partly coincided with the drafting process of the EU Directive. Nevertheless, there were still significant

³⁶ Central State Office for the Development of the Digital Society, State Secretary Gršić: E-Consultation project includes our citizens in the decision-making process, September 2022, available at: <https://rdd.gov.hr/vijesti/drzavni-tajnik-grsic-projektom-e-savjetovanja-ukljuujemo-nase-gradjane-u-proces-odlucivanja/1967>

³⁷ e-Consultations, Report on the consultation process - Consultation on the Draft Proposal of the Act on the Protection of Persons Reporting Irregularities, available at: <https://esavjetovanja.gov.hr/ECon/EconReport?entityId=19159>

³⁸ Information Commissioner, Report on the Implementation of the Act on the Right to Access Information for 2021, March 2022, available at: <https://pristupinfo.hr/wp-content/uploads/2022/03/1.-Izvjescje-o-provedbi-ZPPI-za-2021.pdf?x57830>

³⁹ Human Rights House Zagreb, Human Rights Defenders: Challenges and Obstacles, December 2022, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2023/03/KLJP_ThematicDefenders1-1.pdf

amendments left to be adopted to fully transpose its provisions into the national legislation.

Introducing amendments only two years after the adoption of the first act represented a good opportunity to reflect on what has been detected as main weaknesses and implementation issues of the existing Act, as well as to further improve the whistleblower protection legislation and bring it fully in line with the EU standards.

Since the number of amendments to the existing law from 2019 would have exceeded the amount originally planned, the lawmaker set the decision not to introduce amendments to the current law, but rather to adopt a new law through which Croatia would transpose the EU Whistleblowing Directive.⁴⁰

Definition of whistleblowers

According to the Act on Whistleblowers Protection⁴¹, a “reporting person” is a natural person who reports or publicly discloses information on breaches acquired in his or her work environment, which includes current, past, future or planned professional activities in the public or private sector through which persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information.

Those activities cover, among others, persons having the status of worker, persons having self-employed status, shareholders, persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees, any persons working under the supervision and direction of contractors, subcontractors and suppliers, as well as any persons involved in any way in the professional activities of a natural or a legal person.

Scope

When it comes to subject matter covered by the scope of the Act, it expands on the ten areas defined in the Directive to include other national provisions, the breach of which would endanger the public interest, whereas defence and national security are excluded insofar as EU law is not affected and separate reporting processes are established in this area by specific acts.⁴²

Reporting channels

The Whistleblowers Protection Act establishes three available reporting channels for whistleblowers: internal, external, and public disclosure. These channels were already established by the Act from 2019, but the rules regarding their use were

⁴⁰ Croatian Parliament, Draft Act and Final Draft Act on the Protection of Persons Reporting Irregularities, P.Z.E.242, available at: <https://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2026365>

⁴¹ Act on the Protection of Persons Reporting Irregularities (Official Journal 46/202), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2022_04_46_572.html

⁴² Ibid., Article 4

amended by the Act from 2022 which allows the reporting of irregularities to the external channel either after having previously reported them to the internal channel or directly. For comparison, reporting directly to the external channel was initially only possible under certain conditions (immediate danger, no internal channel established etc.).

Internal reporting channel⁴³ refers to the reporting of irregularities to the employer by submitting the information on irregularities to the confidential person (i.e. the person designated by the employer to perform this duty). Under the Act, employers with 50 or more employees have the obligation to establish an internal reporting channel, whereas those with less than 50 are given a choice of whether to do so or not. As an exception to this rule, this threshold does not apply to the employers falling within the scope of Union acts referred to in Parts I B and II of the Annex to the Act. The reporting procedure and the appointment of the person designated to receive reports of irregularities shall be regulated by the employer's internal by-laws. Confidential persons receive the reports of irregularities and acknowledge their receipt to the reporting person within seven days of that receipt as well as undertake immediate measures for the protection of the reporting persons.

External reporting of irregularities⁴⁴ is done to the Ombudswoman of the Republic of Croatia, who has the mandate of the designated external channel for the reporting of irregularities in Croatia since 2019. The reporting person can report irregularities to the Ombudswoman either after having previously reported them to the dedicated internal channel or directly. After receiving a report on irregularities, the Ombudswoman acknowledges its receipt to the reporting person within a seven-day deadline. If in their report the reporting person has made it plausible that she/he is being or might in the future be subject to retaliation for reporting irregularities, the Ombudswoman will investigate the claims and undertake measures falling within her mandates for her/his protection.

Having received the report, the Ombudswoman forwards it to the competent authorities within a reasonable time frame and in a safe manner and notifies the reporting person without delay. When following-up on a report, the Ombudswoman protects the reporting person's identity as well as the confidentiality of the information contained in the report and prevents any unauthorized disclosure of these data as well as their sharing with any other persons, unless regulated otherwise by a special regulation or unless the reporting person consents to the disclosure of this information. The competent authorities to which the report was forwarded to are obliged to notify the Ombudswoman on the actions taken within a deadline of 30 days as well as on the outcome of their proceedings within a deadline of 15 days.

The Ombudswoman notifies the reporting person on the status of the case and the follow-up actions taken within a deadline of typically no less than 30 and no more than 90 days. In case of justified reasons, this deadline can be prolonged to up to

⁴³ Ibid., Article 19-22

⁴⁴ Ibid., Article 23-25

six months. Following the finalisation of the proceedings, the Ombudswoman notifies the reporting person of their outcome without delay.

Third channel for reporting irregularities is public disclosure⁴⁵, which refers to the cases of making the information on breaches available in the public domain. A person who makes a public disclosure qualifies for protection if any of the following conditions is fulfilled: the person first reported internally and externally or directly externally (to the Ombudswoman), but no appropriate action was taken in response to the report within the deadlines prescribed by the Act or the person has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case.

Protection of persons reporting irregularities

According to the Act, the persons reporting irregularities have the right to protection of their identity and the confidentiality of their report, court protection, indemnity for the damages they might have suffered, primary free legal aid in line with the provisions of the special law regulating the provision of free legal aid, emotional support and other support measures as part of the procedures envisaged by the Act.

In order to obtain the right to these types of protection, whistleblowers must prove that they had reasonable grounds to believe that the information on breaches reported or publicly disclosed was true at the time of reporting, that this information falls within the scope of the Act and that they reported this irregularity in one of the three ways that provided by law.⁴⁶

Persons who anonymously reported or publicly exposed information about irregularities, who meet the abovementioned conditions and whose identity was subsequently determined and they face retaliation, have the right to protection even though they submitted the report anonymously.⁴⁷

The Act also regulates the issue of the protection of the whistleblower's identity and the confidentiality of reports in the process following the reporting by setting forth that the persons receiving reports on irregularities, confidential persons, and any other person participating in the follow-up procedure shall protect the confidentiality of the information contained therein. These data cannot be used or disclosed for any purpose beyond those necessary for the appropriate conducting of the follow-up procedure.⁴⁸

According to the Act, the reporting persons' identities, the information from which their identity may be deduced, as well as any other information contained in the irregularities report may be accessed only by the authorized staff members who are

⁴⁵ Ibid., Article 26

⁴⁶ Ibid., Article 12

⁴⁷ Ibid.

⁴⁸ Ibid., Article 14-16

in charge for receiving and handling the reports and are protected from disclosure unless the reporting person consents to it. However, the Act also prescribes the exception thereto by regulating that the identity of the reporting person may be disclosed in cases where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations conducted by national authorities or judicial proceedings. In such cases, the competent authority will inform the reporting person in writing before their identity is disclosed, including an explanation of the reasons for the disclosure of this information, unless such actions would jeopardize the related investigations or judicial proceedings. It should be noted that the same rules apply to the protection of the identity of the person stated in the report as responsible for the irregularities in question.

Concerning the protection against retaliation, the Act prescribes that persons reporting irregularities through an internal reporting channel can request that the confidential persons receiving their reports take appropriate measures to protect them from retaliation.⁴⁹

Persons reporting irregularities can also request protection from the Ombudswoman as the external reporting channel, provided that they have made it plausible that they are or might suffer retaliation as a result of reporting irregularities.⁵⁰ In such cases the Ombudswoman examines the report and undertakes measures for the protection of the whistleblower falling within her mandates. Following the investigation procedure, the Ombudswoman drafts a report and assesses whether the reporting person's constitutional and legal rights have been violated.

Persons reporting irregularities can also seek court protection in a special procedure initiated by a lawsuit for the protection of a person reporting irregularities.⁵¹ With the whistleblower's consent, the Ombudswoman, as well as organizations, institutions, civil society organizations and other natural or legal persons active in the field of human rights protection and combating corruption, can participate in such court proceedings as a third-party intervener.⁵²

Temporary measures

Act on Whistleblowers Protection foresees the possibility of determining temporary measures in a court proceeding⁵³ based on a claim related to a report of irregularities, which may be proposed before the initiation, during and after the end of the court proceedings, until the execution is carried out. Moreover, the whistleblower is exempted from paying court fees in proceedings initiated for the purpose of a temporary measure.

Through a proposal for the determination of a temporary measure, the court may be asked to prohibit retaliation, to eliminate the consequences caused by retaliation, and to postpone the implementation of decisions by which the

⁴⁹ Ibid., Article 20

⁵⁰ Ibid., Article 24

⁵¹ Ibid., Articles 27-34

⁵² Ibid., Article 30

⁵³ Ibid., Article 32-33

whistleblower was placed in a disadvantageous position or one of his rights was violated in the work environment. The court shall decide on the proposal for determining temporary measures within eight days from receiving the proposal.

Court fees exemption, legal assistance and burden of proof

In relation to the judicial protection, the Act provides for an exemption from payment of the court fees for the whistleblower in judicial protection procedures related to the reporting of irregularities.⁵⁴

In proceedings before a court or other body concerning the damage suffered by the applicant and provided that this person made it probable that he/she filed a report or publicly disclosed information in accordance with this Act as well as that he/she suffered damage, it is presumed that the damage resulted from retaliation for reporting or public disclosure. In these cases, the person who took the action of retaliation shall prove that this action or omission was based on justified reasons.⁵⁵

Persons reporting irregularities have the right to primary free legal aid in accordance with the law regulating the right to free legal aid as well as right to emotional support.⁵⁶ Primary legal aid includes the provision of general legal information and legal advice, drafting submissions before public bodies, the European Court of Human Rights and international organizations in accordance with international treaties and rules of operation of these bodies, representation in proceedings before public bodies, as well as legal assistance in out-of-court peaceful dispute settlement procedures.⁵⁷

The whistleblower may also be granted secondary free legal aid in accordance with the Act on Free Legal Aid, which is provided by attorneys at law and include the provision of legal advice, drafting submissions in the procedures for the protection of workers' rights before the employers, drafting submissions in court proceedings, legal representation in court proceedings, legal assistance in peaceful dispute settlement procedures, as well as exemption from the payment of the costs of court proceedings and the costs of the court fees.⁵⁸

In relation to emotional support for whistleblowers, the Act on Whistleblowers Protection obliged the minister responsible for judicial affairs to adopt an act regulating details of the provision of emotional support for persons reporting irregularities within six months of its entry into force⁵⁹ (by the end of October 2022), but such regulation has not yet been adopted.

⁵⁴ Ibid., Article 27

⁵⁵ Ibid., Article 31

⁵⁶ Ibid., Article 11

⁵⁷ Act on Free Legal Aid (Official Journal 143/2013), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2013_12_143_3064.html

⁵⁸ Ibid.

⁵⁹ Act on the Protection of Persons Reporting Irregularities (Official Journal 46/202), Article 41, available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2022_04_46_572.html

Review of the implementation of the Act

According to the Whistleblower Protection Act, the ministry responsible for judicial affairs is obliged to annually submit available statistical data on irregularities reported to the Ombudswoman to the European Commission⁶⁰. However, the Ombudswoman noted⁶¹ the need to also collect relevant information from other stakeholders involved in the application of the Act in order to enable systematic and comprehensive monitoring of its implementation. With that regard, the Ombudswoman suggested establishing a permanent working group gathering all relevant stakeholders that would collect data for a comprehensive statistical overview of submitted reports as well as to establish interdepartmental cooperation on systematic monitoring and improvement of the implementation of the Act.

Policy measures, awareness raising and outreach

When it comes to measures for whistleblowers protection on the policy level, the National Recovery and Resilience Plan 2021-2026⁶² for Croatia includes measures that take into consideration the fight against corruption and protection of whistleblowers. Moreover, the *Strategy for the Prevention of Corruption for the period from 2021 to 2030*⁶³, along with its *Action Plan for the period from 2022 to 2024*⁶⁴, foresee measures for further improvement of the normative framework around whistleblowers protection as well as education of judicial officials, confidential persons and employees in this context.

According to the available information,⁶⁵ the Ministry of Justice and Public Administration plans to conduct an extensive awareness raising media campaign and inform the general public about existing whistleblowing channels and whistleblower protection mechanisms with the goal to encourage citizens in combating corruption. The national campaign planned for 2023 and 2024 will include on-air advertising (TV spots, internet and radio campaigns), printed and promotional materials, as well as organisation of roundtables, conferences and teaching about corruption and whistleblower protection in schools.

In addition, strategic documents also foresee the development of an IT platform that will contribute to improving public awareness of anti-corruption legislation,

⁶⁰ Ibid., Article 40

⁶¹ Ombudswoman of the Republic of Croatia, The Parliament decides on the Final Proposal of the Act on Protection of Persons Reporting Irregularities, April 2022, available at: <https://www.ombudsman.hr/hr/sabor-odlucuje-o-konacnom-prijedlogu-zakona-o-zastiti-prijavitelja-nepravilnosti/>

⁶² Government of the Republic of Croatia, National Recovery and Resilience Plan 2021-2026, July 2021, available at: https://commission.europa.eu/system/files/2021-07/recovery_and_resilience_plan_for_croatia_hr.pdf

⁶³ Strategy for the Prevention of Corruption for the period from 2021 to 2030 (Official Journal 120/2021), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2021_11_120_2069.html

⁶⁴ Action Plan for the period from 2022 to 2024 along with the Strategy for the Prevention of Corruption for the period from 2021 to 2030, July 2022, available at: <https://mpu.gov.hr/UserDocsImages/dokumenti/Antikorupcija/dokumenti/Akcijski%20planovi%20-%20Strategija%202022-2030/Akcijski%20plan%20-%202022-2024.pdf>

⁶⁵ Oživeni, Comparative Study on Whistleblower Protection, 2022, available at: <https://www.oziveni.cz/wp-content/uploads/2023/03/Comparative-Study-on-Whistleblower-Protection.pdf>

including the Whistleblowers Protection Act, in the form of an online virtual assistant. Moreover, an IT solution that would make external reporting to the Ombudswoman Office easier and more secure is also planned to be developed in the upcoming period.⁶⁶

The Office of the Ombudswoman conducts various promotional and educational activities concerning the application of the Whistleblower Protection Act and protection of whistleblowers, including organization of workshops, seminars, lectures and conferences aimed at a wide range of stakeholders such as confidential persons, judges, lawyers, students, etc. Alongside the Office of the Ombudswoman, other state actors also engage in awareness raising and educational activities concerning whistleblower legislation and protection. Various promotional activities are being conducted by the Ministry of Justice and Public Administration, whereas the State School of Public Administration and the Judicial Academy engage into training activities for civil servants, confidential persons, and judges.⁶⁷

Evaluation of the implementation trends so far

Even though it is significantly early for an in-depth assessment of the implementation of the Whistleblower Protection Act, most reliable data concerning the evaluation of the implementation trends so far is available in the annual report of the Ombudswoman of Croatia, which is the state institution with the most comprehensive approach towards the protection of whistleblowers.

The Ombudswoman report for 2022⁶⁸ notes the increase in the number of external reports of irregularities by 60.37% and the decrease in the number of notifications about internal reports by 22.92% compared to the previous year, which may be due to the introduced possibility of choosing between internal and external reporting and which may also indicate the existence of distrust in internal reporting. However, the Ombudswoman emphasizes that no final conclusions can be drawn based on this data, since there are no official records of employers who are obliged to establish an internal reporting system, nor records of these reports. There were a few cases of public disclosure of irregularities in Croatia during 2022, but their number is lower than the one before the transposition of the Directive.

The Ombudswoman noted several issues when it comes to the implementation of the new legislation, such as the fact that many employers still do not adopt a general act or appointed an internal whistleblowing system, despite the legal obligation. Moreover, the labour department of the State Inspectorate submitted five complaints to the competent courts against employers, two of which refer to

⁶⁶ Ibid.

⁶⁷ Oživeni, Comparative Study on Whistleblower Protection, 2022, available at: <https://www.oziveni.cz/wp-content/uploads/2023/03/Comparative-Study-on-Whistleblower-Protection.pdf>

⁶⁸ Ombudswoman of the Republic of Croatia, Report for 2022, March 2023, available at: <https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravoraniteljice-za-2022-godinu/?wpdmml=15489&refresh=643559b4ca8a51681217972>

violations of the obligations according to the old Act, and three according to the new legislation.⁶⁹

All in all, the Ombudswoman highlights the need for continuing the education of both the employees and employers in order to inform them about all of their rights and obligations in terms of the new national legislation, as well as the need of respecting the deadlines when it comes to reports of employers on internal reporting systems.⁷⁰

The Ombudswoman report for 2022 brings detailed information and assessment of specific issues concerning internal reporting, external reporting as well legal and emotional support available to the whistleblowers, which are summarized below.

Internal reporting

Even though the Ombudswoman Office noticed positive developments in the understanding of the application of the Whistleblower Protection Act, it states that it is necessary to proceed with the continuous education of confidential persons for internal reporting, since the Ombudswoman often receives inquiries about whether an irregularity falls within the scope of application of the Act or how to apply the Act in a specific situation.⁷¹

Another indication of the need for continuous training of confidential persons are the cases where the Ombudswoman receives reports of confidential persons from which it is clear that they carried out procedures regarding individual violations of employment rights, the reporting of which is not of public interest and therefore does not constitute irregularity according to the Whistleblower Protection Act.⁷²

On a positive note, the Ombudswoman describes examples of good practice among employers with an established internal reporting channel even though they are not legally bound to do so (since their number of employees is under 50). For example, a company with less than 50 employees, which, despite the absence of a legal obligation, established an internal reporting channel and made it possible to ask questions related to irregularities via an online platform. Another example is received from the Croatian Employers Association, which notes that some employers have provided for additional rights that can be used by confidential persons, such as education, a separate office, external professional assistance in the implementation of the procedure regarding reporting irregularities and a reduced scope of work during the processing of reports.⁷³

External reporting

When it comes to external reporting, most reports received by the Ombudswoman Office in its role as the external reporting channel referred to public calls for

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

employment or appointment to management positions, access to information which affect the interests of citizens, public procurement, tax evasion, conflict of interest, and various cases of abuse of position and authority, trading in influence and other corrupt criminal cases work.⁷⁴

The applications were forwarded to the competent bodies authorised to act upon the report depending on the subject matter of their content. Although the bodies authorized to act on reports are mostly familiar with their obligations under the Act, the Ombudswoman indicates the occurrence of cases in which some, primarily local and regional self-government units, did not know how to clearly distinguish when they should act through a confidential person, and when as a body responsible for processing the report of irregularities forwarded by the Ombudswoman as the external reporting body.⁷⁵

Another issue noted by the Ombudswoman in that regard refers to the cases when individual bodies authorised to handle reports forwarded from the Ombudswoman did not provide them with appropriate notifications about the measures taken or the final outcome of the processing of the reports within the prescribed deadline. They add that in 13 cases opened in previous years, the authorities were still investigating the irregularities, which indicates the complexity of the reported irregularities as well as the lengthy duration of the proceedings.⁷⁶

Moreover, some of the notifications delivered to the Ombudswoman Office by the authorities which were responsible to handle the applications did not clearly indicate what actions were taken or what was finally determined. They also warn about the cases when the Ombudswoman received first concrete information from the media about the process and the outcome of individual procedures for which they forwarded the applications to the competent authorities, which is not the purpose of the Whistleblowers Protection Act.⁷⁷

Other issues concern cases when competent authorities established the existence of reported irregularities, but the employer did not eliminate them or sanction the responsible persons, that is, the competent authority did not do this when the irregularity was committed by a responsible person of the employer. This is indicated as discouraging for those who report irregularities as well as persons who are considering filing a report. At the same time, the Ombudswoman Office warns about insufficient understanding of what constitutes a harmful action/retaliation, since the unfavourable treatment by the employer is sometimes stated as an irregularity.⁷⁸

One of the main concerns that is common to the majority of applicants who have encountered some sort of retaliation are anxiety, fear and dissatisfaction with the fact that persons reporting irregularities **do not have the right to automatic protection against, for example, termination of the employment contract**, even though the irregularities were reported in public interest and confirmed as such by

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

the competent authorities. In such cases, they ultimately have to seek protection in court proceedings, which they consider to be too lengthy, despite the fact that the law defines them as urgent. At the same time, **persons reporting irregularities do not have the right to free legal aid regardless of their financial status, and they cannot exercise the right to psychological support**, which turned out to be more than necessary in most cases. Although the new Act foresees the right of the whistleblower to emotional support, in 2022 it was not possible to acquire it because the Ministry of Justice and Public Administration did not pass the act that would regulate its provision, even though it was obliged to do so by October 2022.⁷⁹

General impression described by the Ombudswoman is lack of knowledge of the conditions for realizing the right to protection under the Whistleblower Protection Act, mostly related to the lack of awareness and understanding of personal and material scope of the Act, as well as contents of the application and submission methods. Hence, the Ombudswoman continued to receive anonymous reports, reports submitted by persons who did not learn about the irregularities in their work environment, reports about irregularities that do not endanger the public interest but individual rights, as well as those previously submitted in ways that are not prescribed by the Act. Along with the already implemented trainings for confidential persons, informative materials on their website and responding to individual inquiries, the Ombudswoman Office emphasises the need to carry out wider promotional and educational activities that will provide citizens with information about the rights and obligations arising from the Whistleblower Protection Act.⁸⁰

As there are no relevant final decisions of national courts yet in terms of the protection of whistleblowers, the Ombudswoman points to the practice developed by the ECtHR related to freedom of expression at the workplace concerning reporting irregularities in the working environment. With that regard, the Ombudswoman emphasizes that the criteria for assessing the legality of restrictions on freedom of expression developed through ECtHR practice, are also applied in the Republic of Croatia as part of the EU acquis, while national judicial practice concerning the protection of whistleblowers is yet to be developed.⁸¹

When conducting its educational and informative activities, the Office of the Ombudswoman continuously highlights that the effective functioning of the entire whistleblower protection system largely depends on adequate education of employers, employees and trade unions, as well as confidential persons and their deputies, judges, and the general public. In addition, it is of great importance to ensure sufficient capacities for the effective functioning of internal and external reporting channels.⁸²

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ombudswoman of the Republic of Croatia, Seminar on the new Act on the Protection of Persons Reporting Irregularities - rights and obligations of employers, confidential persons and persons reporting irregularities, May 2022, available at: <https://www.ombudsman.hr/hr/seminar-o-novom-zakonu-o-zastiti-prijavitelja-nepravilnosti-prava-i-obveze-poslodavaca-povjerljivih-osoba-i-prijavitelja-nepravilnosti/>

Free legal aid and emotional support

Regarding the protection of whistleblowers, civil society organizations in Croatia continuously emphasize the importance of ensuring methods and forms of assistance available to whistleblowers in order to achieve an effective and comprehensive whistleblower protection system in Croatia. From the existing practice, it is clear that the importance and availability of free legal aid and psychosocial support as separate necessary components of adequate protection of whistleblowers is insufficiently recognized.

In relation to access to free legal aid, it shall be noted that there are no provisions relating specifically to free legal aid for whistleblowers considering that the Whistleblowers Protection Act enables them access to free legal aid under general conditions valid for all citizens in Croatia in all legal matters, which is further regulated by the Act on Free Legal Aid⁸³. In this regard, it is important to allocate sufficient financial resources for providers of free primary legal aid which could expand their activities to providing legal assistance to whistleblowers in order to enable their appropriate training and increase their capacity to perform this role. Existing organizations that provide free primary legal aid and psychosocial support services often do not have sufficient capacities to expand their activities to the area of whistleblower protection, which is why it is unlikely that the current circumstances will enable them to provide adequate support to whistleblowers.⁸⁴

Additionally, it is important to define in more detail the whistleblowers' access to emotional support guaranteed by the law, i.e. the availability of psychosocial support services, so that persons aware of irregularities are encouraged and empowered to report them to the competent authorities. In the light of that, it is of particular concern that, despite the expiration of the deadline prescribed by the Whistleblower Protection Act, the minister responsible for judicial affairs has not yet adopted an act regulating details of the provision of emotional support for persons reporting irregularities.⁸⁵ Regulating details of the provision of emotional support for persons reporting irregularities and specifying the modalities of available psychosocial support is an important element necessary to enable functioning of the entire system for reporting irregularities and legislative protection of whistleblowers in practice.

⁸³ Act on Free Legal Aid (Official Journal 143/2013), available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2013_12_143_3064.html

⁸⁴ 2022 Rule of Law Report - Targeted stakeholder consultation, Contribution by Human Rights House Zagreb, January 2022, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2022/02/2022-Rule-of-Law-Report-targeted-stakeholder-consultation_HRH-Zagreb-Croatia.docx.pdf

⁸⁵ 2023 Rule of Law Report - Targeted stakeholder consultation, Contribution by Human Rights House Zagreb, January 2023, available at: <https://www.kucaljudskihprava.hr/wp-content/uploads/2023/02/2023-Rule-of-Law-Report-targeted-stakeholder-consultation-contribution-by-the-Human-Rights-House-Zagreb.docx.pdf>

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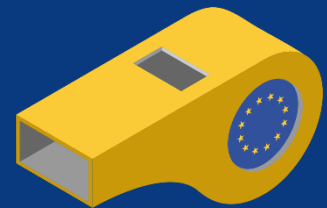
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TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN GREECE



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Introduction

The introduction of whistleblower legislation in Greece has been a key milestone in the fight against corruption and wrongdoing. The legislation was adopted to transpose the EU Directive on Whistleblowing (2019/1937)⁸⁶ and Greece is the eleventh country in the EU that did so. The breadth and provisions of Greek law are subject to some restrictions and criticisms, nonetheless. The present report analyzes the limited perspective adopted by Greek legislators vis-à-vis important aspects of the law, such as data protection measures, limitations on damages restitution, the area of application, and the absence of whistleblower protection in defense and national security subjects and explores the reliability of broad criticisms of particular Directive rules.

Quality of the transposition process

Time needed for the transposition

Nearly a year⁸⁷ after the deadline for its transposition passed, Law 4990/2022 (Government Gazette A' 210/11.11.2022) (hereinafter, the "Law") implements Directive (EU) 2019/1937 on the protection of whistleblowers (the "Whistleblowing Directive") into Greek law. Most significantly, the new Law adds further requirements to the precise whistleblowing guidelines/initiatives that have already been in place since 2018, requiring the adoption of a number of measures that would significantly affect a number of private organizations. The law has not steered away

⁸⁶ Failure to transpose EU Directive 2019/1937 into Greek legislation. Source: <https://govwatch.gr/en/finds/failure-to-transpose-eu-directive-2019-1937-into-greek-legislation/>

⁸⁷ Transposition was quite late (deadline: December 2021). Directive 2019/1937 has been transposed into Greek Law after the entry into force of Law 4990/2022 (GG I 210/11-11-2022). Nevertheless, not lagging behind the transposition compared to other EU Member States. Examples: The transposition procedure in Germany is being finished in June, Estonia and Hungary have not actually proceeded. Source: whistleblowingmonitor.eu

from the minimum standards of the Directive, despite the textual “encouragement” to do so (according to art. 2 par. 2 of the Directive⁸⁸).

Inclusiveness of the legislative process

Nikolas Leontopoulos, the co-founder of Reporters United, said⁸⁹: “The adoption of the law came one full year after the official deadline for transposition but the real problem is that the Greek government failed to consult with any of the relevant stakeholders in the field. The result is a weak law that falls short of real, extensive, and inclusive protection for whistleblowers”.

Transparency International Greece, as early as 2013⁹⁰, has been advocating for a comprehensive and broad protection of whistleblowers and the Directive provides a strong foundation for such protection throughout the EU. In this sense, on 11 November 2020, Transparency International Greece jointly with VouliWatch and ReportersUnited, as well as with the support of 20 civil society organizations, sent a letter to the Government and the Ministry of Justice, requesting the expansion of legislative process, in order to co-shape the draft law for the effective and modern protection of whistleblowers in Greece.

Furthermore, by using its right of access to public records, Transparency International Greece sent a request to the Ministry of Justice on 12 May 2021 inquiring about the status of the work undertaken by the relevant Legislative Committee so that it could contribute timely to the co-formulation of the bill before it went out for public comment.

On 19 July 2021, the relevant Legislative Committee responded that it was unable to deliver or publish the material as it was still being processed. On 15 September 2021, Transparency International Greece again sent a letter with attached material for the optimal legal and technical design of the upcoming bill, attaching for this purpose a specific Methodology Manual by article.

Transparency International Greece, faithful to the principles of integrity and accountability, continues to support and defend whistleblowers' right to protection, engaging in awareness and information campaigns about the benefits of the Directive, aiming to create a strong, inclusive, progressive and a modern institutional framework for the protection of whistleblowers and a #miliste culture⁹¹..

From the first moment⁹², Transparency International Greece welcomed the creation of the special law-making committee which was recommended by the Ministry of Justice with decision 19612/φ.337/20.5.2020 (ΥΟΔΔ 394). In addition, with a series of initiatives it requested the formation in a participatory manner of an integrated

⁸⁸ “2.This Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered [...]”

⁸⁹ EU Whistleblowing Monitor, Greece. Source: <https://www.whistleblowingmonitor.eu/?country=greece>

⁹⁰ Αίτημα για παροχή πληροφόρησης από το Υπουργείο Δικαιοσύνης. Link: <https://rb.gy/il31b>

⁹¹ Δίνουμε τέλος στην κουλτούρα της σιωπής! Link: <https://rb.gy/aul3m>

⁹² Αίτημα για παροχή πληροφόρησης από το Υπουργείο Δικαιοσύνης. Link: <https://rb.gy/7nbn3>

institutional framework for the protection of whistleblowers, which also covers reports of violations of national legislation.

Quality of transposition

Scope of the Law

The Greek law⁹³, with regard to its regulatory scope, covers, without any addition, the subjects covered in art. 1 of the Directive. That means that only reports about breaches of particular sectors of EU Law shall enjoy the protections of the Directive. This legislative path is regarded by Transparency International as not compatible with best practice in whistleblower protection.

Applicants for jobs, self-employed people, consultants, home workers, shareholders, members of the company's administrative, management, or supervisory bodies, including non-executive members, volunteers, paid or unpaid trainees, as well as anyone working under the supervision and direction of contractors, subcontractors, and suppliers are all eligible for benefits under the law.

Additionally, it should be highlighted that the Law⁹⁴ permits anonymous reporting by offering the same level of protection to anonymous whistleblowers in case they are discovered at a later time.

In addition to the many compliance requirements that already apply to private companies under European law, such as those pertaining to competition, data protection, workplace harassment and discrimination, anti-money laundering, anti-corruption, etc., the whistleblower protection law introduces additional compliance requirements that private companies must meet.

Criminal Sanctions and Preventing Reporting

Individuals who deliberately hinder or make attempts to hinder whistleblowers from disclosing unlawful or unethical conduct will face criminal penalties, according to the law. Potential whistleblowers may be intimidated, threatened, or coerced as a result of these behaviors, which foster fear and silence. Such conduct not only compromises the reporting procedure but also perpetuates a culture of secrecy that hinders efforts to bring misconduct to light. The law aims to deter any attempts to obstruct or impede the whistleblower's capacity to come forward by establishing criminal fines on anyone who engage in such activities.

⁹³ See, indicatively TI – position paper #1, p. 3: “National whistleblowing legislation should: have a broader material scope covering all breaches of law (whether national or EU law) and threats or harm to the public interest”.

⁹⁴ Το Πλαίσιο Προστασίας του Ν. 4990/2022 για το Whistleblowing. Link: <https://rb.gy/1oorc>

Retaliation and Malicious Actions

The Law also addresses retaliation and malicious actions against whistleblowers. Retaliation can take various forms, including termination, demotion, harassment, or other adverse treatment. Such acts are not only unethical but also have a chilling effect on potential whistleblowers, deterring them from speaking out against misconduct. To combat this, the law imposes both criminal sanctions and monetary fines on individuals found guilty of retaliating against whistleblowers. By holding perpetrators accountable, the law aims to create an environment where individuals can report wrongdoing without fear of reprisal.

Confidentiality of Whistleblowers' Identities

Protecting the confidentiality of whistleblowers is crucial to ensure their safety and encourage reporting. The law recognizes this importance and explicitly prohibits any infringement on the obligation to respect the confidentiality of whistleblowers' identities. Any unauthorized disclosure or breach of this obligation can result in criminal sanctions and monetary fines. This provision sends a clear message that the anonymity of whistleblowers must be preserved, fostering trust and encouraging individuals to come forward with their concerns.

False Reporting and Public Disclosure

While whistleblower protection is crucial, it is equally important to discourage false reporting or public disclosure of misleading information. The law recognizes this and establishes both criminal sanctions and monetary fines for individuals who knowingly report or publicly disclose false information. This provision ensures that individuals exercise responsibility and integrity when reporting concerns, emphasizing the need for accurate and truthful information to drive legitimate investigations and actions.

Administrative Fines for Infringements

To further enforce compliance and deter potential violations, administrative fines are instituted for infringements related to whistleblower protection. In cases where infringements have occurred for the benefit or on behalf of a legal person, these fines can range from 10,000 to 500,000 Euros. By imposing substantial financial penalties, the law emphasizes the seriousness of non-compliance and encourages organizations to prioritize whistleblower protection within their operations. These fines serve as a reminder that upholding ethical standards and ensuring accountability are essential for maintaining trust and integrity.

Promoting a Culture of Accountability

The imposition of sanctions and administrative fines within the legal framework surrounding whistleblower protection underscores the significance of accountability within organizations. These measures⁹⁵ act as strong deterrents against actions that

⁹⁵ A positive feature of the Greek law, besides the obligations put forth by the transposition of the Whistleblowers protection Directive. Law n. 4808/2021 provides for the implementation of policies for the report of incidents of workplace harassment, including reporting channels. This approach follows the ratification of Convention No. 190 of the

obstruct reporting, retaliate against whistleblowers, breach of confidentiality, or disseminate false information. By holding individuals accountable for their misconduct, the law promotes a culture where transparency, integrity, and ethical conduct are valued, thus contributing to a healthier and more trustworthy environment within both private and public sectors.

Reporting Protected Under the Law

Whistleblower protection⁹⁶ refers to the reporting of wrongdoing related to EU law and, in particular, to infringements:

- Concerning public procurement, financial services, products and markets, 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, as well as protection of privacy and personal data, and security of network and information systems;
- Affecting the EU economic interests; and
- Related to the EU internal market.

Compliance obligations are challenging and should be properly addressed through comprehensive compliance programs and processes due to the sanctions and administrative fines that may be imposed on private companies for failing to comply, as well as the civil liability on the part of companies and potential individual liability of persons with decision-making or supervision powers within a private company.

The cornerstone of whistleblower protection is the prohibition of retaliation against individuals who report illegal or unethical activities within an organization. This includes threats, acts of retaliation, or any form of adverse treatment. Whistleblowers are shielded from liability and are entitled to full compensation for any damages suffered as a result of retaliation. Furthermore, any acts of retaliation, including dismissal, are rendered invalid under the law.

Internal Reporting Channel

Private companies falling within the ambit of the law have an obligation to establish an internal reporting channel. This channel serves as a mechanism for employees to report concerns or wrongdoing within the organization. A designated person, either an employee or a third party, is appointed to operate this reporting channel. The law sets forth specific responsibilities for this individual to ensure effective handling of whistleblower reports.

International Labour Organisation (Violence and Harassment Convention, 2019). This is important, since labour law is not covered by the Whistleblower Protection Directive.

⁹⁶ Greece – New regulatory framework on the protection of persons who report breaches of EU law (whistleblowers). Link: https://www.platis-anastassiadis.com/en_gr/law-alerts/new-regulatory-framework-on-the-protection-of-persons-who-report-breaches-of-eu-law

Timing and Notification

The timeline for implementing the internal reporting channel varies based on the size of the company. Companies with 50 to 249 employees must establish the channel by no later than 17 December 2023. They are also required to notify the Labor Inspectorate or the competent supervisory authority within two months of setting it up. Companies with over 249 employees have an earlier deadline of 11 May 2023 for establishing the channel and providing the necessary notification.

Submission of Reports

To facilitate the reporting process, private companies must allow employees to submit reports in writing, orally, or through an accessible electronic platform hosted on the company's website. It is essential that these platforms are designed to accommodate individuals with disabilities, ensuring equal access for all. Oral reporting can be done via telephone or voice messaging systems, and face-to-face meetings can be arranged upon request.

Technical and organisational measures

To maintain the confidentiality of whistleblower reports and ensure secure communication with the competent authorities, private companies must implement appropriate technical and organizational measures. These may include pseudonymization techniques, which protect the identity of the whistleblower while still allowing for effective monitoring and communication.

Record-Keeping and Confidentiality

Private companies are obliged to maintain a record of each report they receive. The law sets confidentiality requirements for handling these records, which must be adhered to. Records should be kept for a reasonable and necessary period, at least until the conclusion of any investigations or legal proceedings initiated as a result of the report. Safeguarding the confidentiality of whistleblower reports is crucial to protect the identity of those involved and maintain trust in the reporting process.

Support for Whistleblowers

Recognizing the potential emotional and psychological toll whistleblowing can have on individuals, private companies are encouraged to provide support to whistleblowers. This includes access to free legal advice and representation, as well as free psychological support. By offering these resources, companies can alleviate some of the burdens whistleblowers may face and create an environment that encourages reporting without fear of reprisal.

This approach has significant advantages, since the Directive has a lot of positive characteristics. Inter alia:

1. It covers both the public and private sectors, for example: UNCAC explicitly provides for a reporting internal channel for public officials (art. 8 par. 4), but not for a similar internal channel for members of the private sector.
2. It covers a wide range of not only directly employed persons, but also contractors, people applying for work etc.
3. It allows the right of the reporting person to choose between internal or external reporting channels.
4. It prohibits any kind of retaliation against reporting persons, with important procedural guarantees.
5. It establishes an obligation to follow up on reports and to keep the whistleblower informed.

Narrow Scope and Exceptions

The limited breadth of Greek whistleblower legislation has drawn criticism. The regulation largely applies to certain areas of EU law, but omitting others where whistleblowing is crucial for disclosing wrongdoing. The effectiveness of the law may be hampered by its narrow reach because misconduct in industries that are not specifically covered by it can go unreported and unregulated.

Greek law is deficient in a number of important ways, including the absence of measures⁹⁷ for complete damages restitution. The law does not have a thorough framework for restitution, even if it seeks to compensate whistleblowers for their losses. This restriction can inhibit potential whistleblowers since they might be less confident in coming forward and reporting wrongdoing in the absence of complete restitution.

The objective scope and the subjective scope are the two main chapters of the Greek whistleblower law. While the subjective scope specifies the people who qualify for whistleblower protection, the objective scope describes the areas and industries to which the law applies. The subjective reach of the Greek law, however, may be less encompassing than that of the EU Directive, which could leave certain people⁹⁸ without enough protection⁹⁹. In fact, the scope of the law is quite narrow, since it covers specific sectors of EU law. As an exception, there is **no whistleblower protection with regard to defense and national security matters**. However, there is no definition for these sectors.

The development of internal and external reporting channels for whistleblowers in the public and private sectors is mandated by Greek legislation. This clause highlights the significance of giving whistleblowers a range of secure and safe reporting options. Nevertheless, it is imperative to make sure that these channels

⁹⁷ Whistleblowing programs – Νέος νόμος 4990/2022 – Ενσωμάτωση Οδηγίας Ε.Ε. Link: https://www.ey.com/el_gr/webcasts/2022/11/whistleblowing-programs-neos-nomos-4990-2022-ensomatosi-odigias-ee-2019-1937-sanctions.

⁹⁸ Point of emphasis: “The EU Directive definition of a worker is quite broad” – Directive recital No. 39.

⁹⁹ The law does not provide for the full reparation of damages. Basic chapters of law 4990/2022 – 1.

are properly deployed and available to everyone, regardless of their status or position within a company.

The Greek legislation specifies particular conditions for the release of confidential information to the public. This clause, however, presents a point of debate because it might infringe on the freedom of speech¹⁰⁰ that the constitution protects. To ensure that whistleblowers are not unnecessarily restricted or penalized for sharing information in the public interest, it is important to carefully balance the need for public disclosure against the preservation of individuals' rights.

Greek law includes safeguards to preserve the privacy of whistleblowers' personal information and to protect their identity. Whistleblowers must be protected from reprisal and harassment, which is why these data protection rules are so important. To prevent the abuse or unauthorized publication of whistleblowers' personal information while maintaining an efficient reporting procedure, it is crucial to set up clear boundaries and rules.

It is crucial to understand the difference between a whistleblower and a protected witness under Greek law in order to provide proper legal safeguards and support for people operating as whistleblowers. Although both are crucial in revealing wrongdoing and establishing accountability, their legal standings and safeguards could vary.

The effectiveness of the Greek legislation and money laundering activities

Greek legislation, specifically Law 4990/2022, encompasses provisions for reporting money laundering activities¹⁰¹. The inclusion of money laundering reports within the scope of this law is a critical step in identifying and preventing illicit financial transactions. By requiring the reporting of suspicious transactions that may be linked to money laundering, the legislation establishes a framework for financial institutions and other relevant entities to play an active role in combating this illicit activity.

Although it is a step in the right direction¹⁰² that money laundering reports are now covered by Greek law, there are still issues that need to be resolved if the law is to be even more successful. It is essential to make sure that reporting entities fully comprehend the standards for spotting suspicious transactions and properly reporting them. The quality and accuracy of reports can be improved, allowing

¹⁰⁰ Public disclosure in the narrow scope of the Directive Vs constitutionally protected freedom of speech (“in dubio pro libertate”)

¹⁰¹ Reports on money laundering are included in the scope of L. 4990/2022. However the commencement of a predicate offence is an essential prerequisite for ML. Therefore, the report of a crime according to national legislation (Theft, embezzlement, “national” tax evasion etc.) could be understood as a report on money laundering (esp. if the facts of the report are useful) E.g. A report on a case of embezzlement could include the transfer of illicitly gained assets. That transfer could also be regarded as money-laundering.

¹⁰² Basic chapters of law 4990/2022 – 2: Prohibition of retaliation; Exhaustive list; Measures for protection retaliation; The part expected to cause the most friction in practice: When “the acquisition of or access to the [reported] information” constitutes “a selfstanding criminal offence”?; An important distinction – crucial for the implementation; Criminal sanctions; Critique: the penal provisions against the wrongful reporting persons are heavier than the provisions against illegal retaliators.

authorities to respond quickly. This can be done by clear advice, training programs, and regular updates on new money laundering trends.

The inclusion of money laundering reports within the scope of Greek legislation¹⁰³, along with the connection to predicate offenses, has several implications for anti-money laundering efforts in the country. Firstly, it helps financial institutions and other entities involved in reporting transactions to identify suspicious activities that may be linked to money laundering. By providing a legal framework and guidelines, the legislation ensures that these entities have clear responsibilities and obligations to report potential cases of money laundering promptly.

Secondly, the connection to predicate offenses allows authorities to investigate and pursue money laundering cases more effectively. Reporting crimes under national legislation provides valuable information that can help trace the flow of illicit funds and identify individuals involved in money laundering activities. This strengthens law enforcement efforts and increases the chances of successfully prosecuting money laundering offenses. Additionally, effective anti-money laundering operations depend on collaboration between pertinent agencies, financial institutions, and other reporting entities. Regular interaction, information exchange, and investigational cooperation can assist in spotting trends, exposing intricate money laundering schemes, and dismantling criminal networks engaged in illicit financial transactions.

The Role of Integrity Councilors

The appointment of Integrity Councilors in public institutions, as introduced by Law 4795/2021, marks a significant step towards strengthening whistleblower protection. These Integrity Councilors serve as key figures within Ministries and the independent tax administration. Their primary responsibility is to act as focal points for the internal reporting channel for the Whistleblower Directive. By designating Integrity Councilors, public institutions can streamline and centralize the reporting process, providing whistleblowers with a dedicated point of contact.

Internal Reporting of Corruption Complaints

One crucial aspect of the Integrity Councilor's role is their competence to receive internal complaints about corruption. This authority empowers the Integrity Councilor to act as a conduit for reporting corruption-related concerns within public institutions. By having an independent and dedicated channel to address corruption, public employees can report incidents more confidently, knowing that their concerns will be handled appropriately. The presence of Integrity Councilors helps create a

¹⁰³ The provisions of the newly enacted legislation shall be applicable to the protection of those who report violations of Union law in the areas of public procurement, financial services, products, and markets, as well as the prevention of money laundering and terrorist financing, product safety and compliance, transportation safety, protection of the environment, food and feed safety, animal health and welfare, public health, consumer protection, and protection of privacy and personal data and secrecy. Greece transposes Directive (EU) 2019/1937 re Whistleblowing – Is your Organization Ready to comply? Link: <https://www.lambadarioslaw.gr/2022/12/greece-transposes-directive-eu-2019-1937-re-whistleblowing-is-your-organization-ready-to-comply/>.

culture of accountability and transparency within public institutions, fostering an environment where corruption is less likely to thrive.

The appointment of Integrity Councilors enhances the efficacy of Greek whistleblower laws in a number of ways. The handling of whistleblower reports is delegated to specific people, which streamlines and increases the effectiveness of the reporting process. Knowing that their concerns will be handled seriously and properly addressed, whistleblowers can approach Integrity Councilors with confidence. This increases the overall effectiveness of the whistleblower protection framework and also fosters a culture of trust among public institutions.

However, it is crucial to be aware of any difficulties that could result from the nomination of Integrity Councilors. As a relatively new institution¹⁰⁴, there can be a learning curve and a need for additional training and direction. To promote consistency and uniformity¹⁰⁵ in the treatment of whistleblower complaints across various public institutions, clear policies and processes should be established. The possibility of a protection gap must also be properly taken into account. While the Integrity Councilor may serve as a focal point for internal reporting, procedures should be in place to guarantee complete protection for whistleblowers in the event that they are unavailable or are unable to carry out their duties efficiently.

Greece should think about extending the Whistleblower Directive's purview in order to give whistleblowers complete protection, building on the appointment of Integrity Councilors. The Directive's current emphasis is on disclosing actions that involve financial misconduct and corruption. However, other types of wrongdoing, such as discrimination, harassment, or environmental infractions, could also call for the protection of whistleblowers.

Greece can develop a more inclusive system that motivates people to report a wider spectrum of wrongdoing by extending the Directive's purview. This would improve accountability and transparency while also fostering a society that is more moral and sustainable. The specific categories of wrongdoing that must be included and the relevant routes for reporting them should be carefully considered in order to accomplish this. Collaboration with stakeholders, including as civil society organizations and legal professionals, can assist identify and effectively address any potential obstacles to the Directive's scope expansion.

¹⁰⁴ Relatively new institution. Law 4795/2021 (art. 24-26, 82 of L. 4795/2021). In the public sector, in Ministries, and the (independent) tax administration. The appointment is a work in progress, however the authorities have been proceeding. If an integrity councilor has been appointed, it will be the focal point of the internal reporting channel for the Whistleblower Directive. This is important, since the Integrity Councilor has the competence to receive internally complaints about corruption.

¹⁰⁵ Greece passes long-awaited Law on the protection of whistleblowers. Link: <https://www.zeya.com/newsletters/greece-passes-long-awaited-law-protection-whistleblowers>

Suggestions for future policy/ legislation

A key component of fostering accountability, transparency, and the fight against corruption is protecting whistleblowers. Underscoring the dedication to establishing a secure and encouraging environment¹⁰⁶ for whistleblowers to come forward is the inclusion of criminal consequences, monetary fines, and administrative penalties.

1. Widening the Scope of Reports

One crucial aspect of promoting whistleblower protection¹⁰⁷ is to encourage the reporting of any form of illegal or unethical activities. It is essential to widen the scope of reports to the widest degree possible, ensuring that whistleblowers feel confident in reporting without unnecessary legal tribulations. By providing clear guidelines and examples of reportable incidents, organizations can help potential whistleblowers identify and report wrongdoing effectively. This approach minimizes ambiguity and reduces the risk of insecurity for individuals considering blowing the whistle.

2. Learning from the Private Sector

The private sector can serve as a valuable resource when it comes to implementing effective whistleblower channels. Many large companies have already established robust reporting mechanisms and can provide valuable insights and lessons learned. It is crucial to engage in dialogue with the private sector, exchanging experiences and best practices to strengthen whistleblower protection efforts. By leveraging the knowledge and expertise of companies that have successfully implemented whistleblower programs, organizations can enhance their own reporting channels and create a culture that encourages reporting and ensures prompt and appropriate action.

3. Accessibility of Reporting Channels

To encourage and facilitate reporting, private companies must make their reporting channels readily available to their workforce. This includes ensuring that employees are aware of the existence of such channels and know how to access them. Companies should provide clear instructions on how to submit reports in writing, orally, or through electronic platforms, ensuring accessibility for all employees, including those with disabilities. By making reporting channels easily accessible, organizations empower their employees to report concerns without barriers or fear of retaliation, further strengthening the effectiveness of the whistleblowing system.

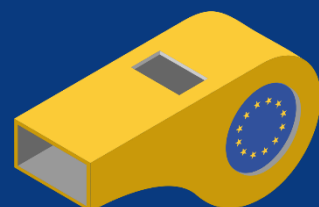
¹⁰⁶ Greek Whistleblower Law. Link: <https://kkc.com/greek-whistleblower-law/>

¹⁰⁷ Greece under EU pressure to transpose Whistleblower Directive. Link: <https://www.euractiv.com/section/media4eu/news/greece-under-eu-pressure-to-transpose-whistleblower-directive/>.

Conclusion

Whistleblower protection is a cornerstone of transparency, accountability, and the fight against corruption. By widening the scope of reports, engaging in dialogue with the private sector, and making reporting channels easily accessible, private companies can fulfill their obligations and create an environment where whistleblowers feel safe and encouraged to come forward. It is through these collective efforts that organizations can build a culture of integrity and foster trust among their employees. By valuing the contribution of whistleblowers and ensuring their protection, we can work towards a society that upholds ethical standards, promotes transparency, and holds wrongdoers accountable.

TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN ROMANIA



TRANSPOSITION OF THE EU WHISTLEBLOWING DIRECTIVE IN ROMANIA

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Introduction

Romania was one of the first countries in the world to adopt a specific regulation on whistleblower protection in public entities but the law's actual implementation had been uneven at best and weak at worst, thus undermining its impact in terms of good governance and anti-corruption efforts. The reasons are a mix of unclear and lax legal provisions and the lack of institutional and political will and/ or knowledge to actually comply with the law and set up the necessary internal and external channels and protections. As a result, there are few publically documented whistleblower cases and the ones which have been under public scrutiny did not contribute towards improving the general climate of distrust as to the actual support that is given to individuals by the responsible authorities.

The most important recent development was the adoption of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law and the subsequent need to transpose it in the national legislation. The transposition process was fraught with interinstitutional conflict not only between the civil society and, especially, the Chamber of Deputies, but also between majority parliamentary groups and the President, involving also the judicial branch. In a nutshell, the conflict revolved around the accusation that the transposition process was incorrect in that it intentionally ended up diminishing the level of protection envisaged by the Directive and even the legal protection provided by the previous whistleblower law. Ultimately, the main points of contention were corrected in the final version of the law thanks to the conditioning effect of Romania's National Recovery and Resilience Plan and the European Commission's repeated interventions. The current law is, by and large, a translation of the Directive but still displaying a few issues which might pose problems going forward.

Quality of the transposition process

Time needed for the transposition

The Romanian Ministry of Justice sent, in late November 2021, a draft law to Parliament transposing Directive 2019/1937 on the protection of persons who report breaches of Union law into Romanian legislation, even though the deadline for the Directive's transposition was 17 December 2021, while the one for its entering into force was 30 March 2022. Moreover, this law constitutes Milestone 430 of Romania's National Recovery and Resilience Plan (NRRP), part of Objective 14 "Good Governance", Reform 6 "Strengthening the Anticorruption fight". Despite this situation, the Government forwarded the draft law to the Parliament only several months later, in March-April 2022, thus forcing an emergency deliberation and adoption in both the Senate and the Chamber of Deputies.

On June 29th the final form was adopted by the Chamber of Deputies (decision-making chamber) and, at the beginning of July, the law adopted by Parliament was sent to the President of Romania for promulgation, but the Save Romania Union Party's parliamentary group challenged the law before the Constitutional Court on July 4th. Prior to this contestation, on June 29th, the APADOR-CH NGO officially urged the Ombudsman to act in the same manner citing constitutional problems vis-à-vis several articles. The Constitutional Court rejected on July 13th the complaint and ruled that the law is constitutional, thus allowing it to subject to promulgation by the President. On July 29th, the President refused to promulgate it and returned the law to Parliament which was obliged to re-examine it. On September 1st, the law was adopted by the Senate (as the first chamber), following re-examination. On September 20th, the Legal, Disciplinary and Immunities Committee of the Chamber of Deputies drew up its report following the re-examination of the law.

On September 23rd, the Romanian Ministry of Justice received several observations and proposed amendments on the re-examined form of the law from the European Commission (EC)¹⁰⁸. The final vote for the law was scheduled for October 4th but the procedure stalled for more than two months when, on December 12th, the draft re-examined version of the law was sent to the Legal, Disciplinary and Immunities Committee for a supplementary report. On the same day, the draft law was placed on the Chamber of Deputies' plenary session agenda and scheduled for the final vote on December 13th but pending the abovementioned supplementary report. This final review was drawn up in just one day and the final plenary debate and vote took place on December 13th.

The President promulgated the law on December 16th and it was published in the Official Gazette on December 19th, thus entering into force in December 2022, one year after its official deadline. Therefore, with regard to the time needed to transpose the Directive into national law, the executive branch delayed drafting the

¹⁰⁸ The project of the whistleblower law, criticized by the European Commission / PNRR money depends on this law / The Minister of Justice requests the correction of the whistleblower law in the Judiciary Commission so that the reporting of corruption cases can be done anonymously, G4Media.ro, 4 October 2022, available at <https://www.g4media.ro/proiectul-legii-avertizorului-de-integritate-desfiintat-de-comisia-europeana-de-aceasta-lege-depind-banii-pnrr-ministrul-justitiei-cere-corectarea-legii-avertizorului-de-integritate-in-comisia-jur.html>

national legislation and the legislative branch further delayed its adoption by engaging in partisan infighting over the actual content, a situation which devolved into calls for a constitutional check and a re-examination request from the President.

In February 2023, the Save Romania Union filed a legislative initiative to amend the new law especially due to the amendments made in December 2022 that conditioned the level of protection for anonymous reporting on requirements that go beyond those envisaged by the Directive¹⁰⁹. However, the majority coalition did not allow for this initiative to be placed on the parliamentary floor. Nevertheless, following continued critiques from the EC on this particular issue, on March 13th, the Government introduced a single amendment to the law that addressed the EC's concerns and on March 14th the new version was both debated and voted in the Senate and on March 21st in the Chamber of Deputies. On March 28th the change was promulgated by the President via Law 67/2023.

Inclusiveness of the legislative process

The level of inclusiveness of the overall legislative process can be evaluated as being extremely low.

Civil society bodies, especially NGOs active in the human rights and good governance sectors, had been vocal about the draft whistleblower law since April 2021 when discussions with the Ministry of Justice were taking place¹¹⁰. At the time, the NGOs pointed out¹¹¹ several problematic aspects relating to the envisaged provisions, but their arguments and proposed solutions¹¹² were not taken into consideration.

In December 2021, the APADOR-CH NGO - which has been implementing projects focused on protecting whistleblowers - sent a substantial list of proposals¹¹³ to the Chamber of Deputies. These suggestions included justifications that were also based on interviews and discussions with whistleblowers who themselves identified issues in the legislation, but also in procedures. The proposals were not taken into consideration at the time.

¹⁰⁹ Save Romania Union Party, USR: Whistleblower law puts billions of euros in funding at risk, 14 March 2023, available at <https://usr.ro/2023/03/14/usr-legea-avertizorului-de-integritate-pune-in-pericol-finantari-de-miliarde-de-euro/>

¹¹⁰ Ministry of Justice, Draft Law on the protection of whistleblowers in the public interest, 2021. The minutes of the April 2021 public debate on the draft law are on the website of the Ministry of Justice: <https://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public/>

¹¹¹ Idem

¹¹² APADOR-CH, APADOR-CH's recommendations regarding the draft Law on the protection of whistleblowers in the public interest, 11 October 2021, available at <https://apador.org/recomandarile-apador-ch-cu-privire-la-proiectul-de-lege-privind-protectia-avertizorilor-in-interes-public/>; APADOR-CH, Bill: It is illegal to disclose an illegality in the field of national defense and security, 6 April 2021, available at <https://apador.org/proiect-de-lege-e-ilegal-sa-dezvalui-o-ilegalitate-in-domeniul-apararii-si-securitatii-nationale/>

¹¹³ APADOR-CH, APADOR-CH proposals for the Whistleblowers Law - the draft in the Chamber of Deputies, 14 December 2021, <https://apador.org/propunerile-apador-ch-pentru-legea-avertizorilor-de-integritate-proiectul-aflat-la-camera-deputatilor/>

Advocacy efforts¹¹⁴ continued throughout the summer of 2022 but focused on obtaining a reaction from other relevant authorities by sending out open letters to the Ombudsman¹¹⁵ and the President¹¹⁶. The latter entity did use some of the arguments forwarded by civil society in re-examination request at the end of July 2022.

Active NGOs were also present during the debates that took place especially in the Legal, Disciplinary and Immunities Committee but the final drafts did not include their suggestions. The only parliamentary party that accepted and used the arguments provided by civil society was the Save Romania Union Party in the challenge it filed before the Constitutional Court.

NGOs also sent out an open letter¹¹⁷ to the political leaders and the Legal, Disciplinary and Immunities Committee within the Chamber of Deputies ahead of the September 2022 debates on the re-examined draft law. The letter was yet another effort to draw attention to several problematic aspects that had to be debated and corrected because, it was argued, that, essentially, even the re-examined draft law diminished the level of protection envisaged by the Directive and even the one provided by the law in use at the time.

Quality of transposition

Points of contention

During the initial discussions inside the parliamentary committees in the Chamber of Deputies (the decisional chamber), the draft law submitted by the Ministry of Justice received several amendments¹¹⁸ that were controversial.

- 1. The elimination of the possibility to remain anonymous.** The majority governmental coalition parties (Social Democrats, Liberals, the Hungarian minority party and the other minorities) focused on Article 6 in the draft law that described the content of the whistleblower reports and voted to eliminate completely the paragraph which allowed a report to be analyzed and handled “in so far as it contains sufficient information on breaches of law”. The result of this vote was that a whistleblower report could not be

¹¹⁴ Integrity whistleblowers, a threat to the ruling Coalition, Avertizori.ro, 29 June 2022, available at <https://avertizori.ro/avertizorii-de-integritate-o-amenintare-pentru-coalitia-de-guvernare/>

¹¹⁵ APADOR-CH, We have a Parliament and we must obey it blindly, 7 July 2022, <https://apador.org/un-parlament-avem-si-trebuie-sa-l-ascultam-orbeste/>

¹¹⁶ APADOR-CH, Mr. President, have you read the whistleblower law you are going to promulgate? It's an almost final draft!, 8 June 2022, available at <https://apador.org/domnule-presedinte-ati-citit-legea-avertizorului-de-integritate-pe-care-urmeaza-sa-o-promulgati-e-un-draft-aproape-final/>; APADOR-CH, The president's choice: protecting whistleblowers or dealing with corruption?, 13 July 2022, available at <https://apador.org/alegera-presedintelui-ocroteste-avertizorii-sau-tine-cu-coruptii/>

¹¹⁷ Open Letter - Do not enact the Public Interest Whistleblower Protection Act, Avertizori.ro, 14 July 2022, <https://avertizori.ro/scrisoare-deschisa-nu-promulgati-legea-privind-protectia-avertizorilor-in-interes-public/>

¹¹⁸ Chamber of Deputies, Legal, Disciplinary and Immunities Committee, 2022, <https://www.cdep.ro/comisii/juridica/pdf/2022/rp219.pdf>

submitted anonymously, but it had to contain: full name, contact details, signature. Relevant is also Article 11 which deals with the requirements in closing whistleblower reports in the sense that, paragraph 1, point (b) stated that anonymous reports were to be closed if they did not hold sufficient information about breaches of the law. This particular aspect was changed by the coalition parties to simply state that anonymous reporting will be closed, therefore ignoring those reports which could contain relevant information.

- 2. Length of time that the reports must be kept.** Article 7 refers to the need to keep a dedicated and detailed registry for the whistleblowing reports and establishes the obligation for those legal persons with at least 50 employees to keep statistics of those reports dealing with breaches of law, followed by them being destroyed. The same political grouping voted on the reports' retention time by lowering this requirement from 5 years to 2 years. This was seen as not proportional to the aim of the draft law which needed to establish adequate legal protection and a solid regulatory framework that allows sound verification of the claims put forward and, if need be, the application of penalties. This latter aspect was even more problematic if the claims lead to criminal investigations which can last longer than 2 years.
- 3. Impeding internal reporting channels.** Article 9 deals with the obligation to set up and maintain internal reporting channels for all public and private entities. However, those territorial administrative units with less than 10,000 inhabitants and entities without legal personality with less than 50 employees are allowed to share resources in order to receive and act upon whistleblower reports. Also, companies that have between 50 and 259 employees can also collaborate to set up internal whistleblowing channels. The same political grouping voted to eliminate these requirements by changing the wording threshold from "less than" to "at least", therefore exempting smaller entities from these rules.
- 4. Restricting reporting mechanisms.** Article 19 deals with public disclosure, while paragraph 1 sets the needed requirements for whistleblowers to be granted protection. While the old version of the law gave whistleblowers the choice to address the press directly, the draft law was changed so that the whistleblower would have to firstly file an official report internally and externally or directly externally to the responsible authorities, otherwise legal protection would not be granted. In addition, a new requirement was added: the whistleblower would have to have valid reasons which he/she would have to prove in order to receive legal protection. This would result in a subjective assessment from authority figures of the validity of the reasons invoked by the whistleblower.
- 5. Imposing minimum deadlines for public disclosure.** Article 19 (2) of the draft law stated that a whistleblower report/ information can be made public to various entities by whatever means. The abovementioned coalition voted to add a requirement by imposing a deadline for this public disclosure: minimum 3 months from the internal/ external filing of the report. This

addition was also in contradiction with paragraph 1 which conditioned public disclosure through a previous internal/ external filing of a report.

- 6. Lowering fines.** Article 23 grants the possibility to contest the retaliatory measure, while paragraph 6 stipulates that a fine can be given in case a court of law decides that retaliatory measures were taken, at least twice, towards the same whistleblower and the same report/ public reveal. The Social Democrats voted to lower the fine by 3 times, from 30,000 LEI (6,700 USD) to 10,000 LEI (2,200 USD).

All of the above points were discussed in the Chamber of Deputies' plenary and maintained in the final vote on June 29th 2022. As a result, the Save Romania Party filed a complaint to the Constitutional Court citing procedural (major differences between the changes made in the two parliamentary chambers as well as the lack of clarity and predictability) as well as the abovementioned content-related issues which were deemed to have a significant negative impact on the law's coherence and on its ability to offer additional legal protection to whistleblowers¹¹⁹.

Additional cited problems were the following:

- 1. The elimination of the good-will principle** which existed in the previous whistleblower law and which offered a higher degree of protection than that envisaged in the Directive. The same political grouping voted to eliminate this principle by arguing that the Directive does not mention principles¹²⁰.
- 2. The lack of clarity vis-à-vis which information deemed essential to national security is exempted under the whistleblower law.** The changes in the Chamber of Deputies resulted in the understanding that breaches of the public procurement law in the defense and national security sectors cannot be subject to this law but failed to indicate which precise categories of information these refer to.

The request made to the Ombudsman by the APADOR-CH NGO together with several former whistleblowers focused especially on issues pertaining to Article 1 and Article 9 by arguing that the national legislation would offer less legal protection than that envisaged by the Directive, thus risking an infringement procedure¹²¹. However, the official response was that the changes made “represent the legislator's option with regard to the protection of whistleblowers, a matter referring to the appropriateness of the regulation, an element of a subjective nature, the legislator

¹¹⁹ Chamber of Deputies, Save Romania Party legal objections, 2022, <https://www.cdep.ro/proiecte/2022/200/10/9/219sezUSR.PDF>

¹²⁰ Chamber of Deputies, Legal, Disciplinary and Immunities Committee, 2022, <https://www.cdep.ro/comisii/juridica/pdf/2022/rp219.pdf>

¹²¹ Renate Weber, criticized by integrity whistleblowers. She is summoned to attack at the CCR the law that discourages reporting acts of corruption, The Epoch Times, 9 July 2022, available at <https://epochtimes-romania.com/news/renate-weber-pusa-la-zid-de-avertizorii-de-integritate-e-somata-sa-atace-la-CCR-legea-care-descurajeaza-denuntarea-actelor-de-coruptie---331754>

being entitled to establish the conditions and criteria in this regard”¹²². Essentially, the Ombudsman argued that the draft law is a matter of political and legislative opportunity over which the Parliament has discretion and that an incorrect transposition will be tackled by the European Court of Justice, not the Romanian Constitutional Court¹²³.

The Constitutional Court rejected the complaint in early July and ruled that the law is constitutional. First, it argued that the bicameralism principle was respected since the changes made by the Chamber of Deputies were actually not substantial and did not change the content and structure of the draft law. Second, regarding each complaint, the Court ruled the changes to be either constitutional or that it did not have the competence to judge since those substantive issues were the legislator’s prerogative. In short, it argued that the draft law did not diminish the level of legal guarantees offered to the whistleblower by conditioning this status on respecting a certain procedure which was deemed to be impartial and coherent. Moreover, the Court saw as a positive effect the fact that the law disciplines the whistleblowers’ behavior by imposing the latter firstly file an internal report and not address it directly to the press (otherwise risking losing legal protection), in addition to abiding by a 3 month moratorium on revealing the report to the press¹²⁴.

Nevertheless, in late July, the President refused to promulgate the draft law and returned it to Parliament which was obliged to re-examine the text. The main reasons for this request focused on the need to align national norms to those envisaged in the Directive, especially in the larger European rule of law context which places emphasis on the anti-corruption theme as well as the vital role of whistleblowers, in order to avoid an infringement procedure. The aspects that were brought into question reiterated the issues mentioned above while also adding new problems¹²⁵:

1. Article 6 and the elimination of anonymous reports was also in contradiction with Article 2(2) which stated that the law applies also to those filling anonymous reports in various recruitment or work contexts;
2. Article 7 referring to the reports’ shortened retention time which was also pointed out to be in contradiction with Article 13 (2), point (d) of the draft law which stated that the relevant authorities need to keep whistleblower reports for a period of 5 years;
3. Article 9 referring to internal reporting channels. Additional issues that were underlined were that the changes made contradicted the Directive. First, these would lead to a reduction in the administrative burden of small administrative units but by blocking their ability to share resources in creating

¹²² APADOR-CH, We have a Parliament and we must obey it blindly, 7 July 2022, <https://apador.org/un-parlament-avem-si-trebuie-sa-l-ascultam-orbeste/>

¹²³ Idem.

¹²⁴ The Constitutional Court decision, 13 July 2022, available at <https://www.cdep.ro/proiecte/2022/200/10/9/dcc390.pdf>

¹²⁵ The President’s reexamination request, 28 July 2022, available at <https://www.cdep.ro/proiecte/2022/200/10/9/219reexPR.pdf>

and administering reporting channels. Second, the changes also contradicted the Directive's intention that the need to establish reporting channels is dependent upon a company's sector of activity, not the number of employees. It was argued that the draft law established the obligation for all companies with at least 50 employees to establish these channels and ignored the need to differentiate according to sensitive activity sectors.

4. Article 19 referring to public disclosure was considered to be unclear as well as omitting the Directive's indication that a feedback period no longer than 3 months from the date of receipt of the report be established.
5. Article 4 and the elimination of the good-will principle which, it was argued, read in conjunction with the conditioning to having filled a prior report in order to receive legal protection (Article 20), would have conditioned giving legal protection on a subjective element and an external evaluation that would not relate to the whistleblower's judgement at the moment the report was filled.
6. The omission to transpose Article 13, point (g) of the Directive which requires transparency from the responsible authorities in receiving and handling whistleblower reports by publishing relevant information on their websites. Therefore, it was requested that the obligation to publish information on the conditions for granting legal protection to whistleblowers in breaching confidentiality be specified in the draft law.
7. The omission to transpose Article 21 (3), (7), (8) of the Directive which requires the provision of protection against retaliation. It was also pointed out that although the draft law mentions compensatory measures to offset any damages suffered by the whistleblower, these were not actually described. Moreover, it was pointed out that the exoneration requirement was not fully transposed since protection from aspects such as slander, copyright violation, professional and/ or commercial secrecy violation and data protection violation was not clearly stated in the draft law. Consequently, it was requested that the lawmakers clarify and insert specific protective measures as well as set concrete reparatory provisions.

At the end of August, the Legal, appointments, discipline, immunities and validations committee (which also included representatives from the Ministry of Justice as well as from NGOs) in the Senate re-examined the draft law and accepted part of the objections raised by the President. Therefore, the following aspects were (re)introduced in the draft law via amendments¹²⁶:

¹²⁶ Senate, Legal, appointments, discipline, immunities and validations committee, 2022, <https://www.senat.ro/legis/PDF/2022/22L175CX.PDF>

1. The good-faith principle was reintroduced thus reverting to the text's initial form, as proposed by the Ministry of Justice.
2. The possibility to file anonymous reports was reintroduced but these had to contain at least contact data and information on the status of the whistleblower, the professional context, the person in question, if known, a description of the event as well as, depending on the case, actual evidence.
3. The reports' shortened retention time was increased to 5 years, thus reverting to its initial form.
4. The provisions pertaining to setting up internal reporting channels were reverted to their initial form, thus allowing smaller administrative units to share resources. Also, it was clarified that the need to establish reporting channels is dependent upon a company's sector of activity, not the number of employees.
5. The provision on closing anonymous reports was reverted to its initial form whereby additional conditions must be met, such as not presenting sufficient information as well as a 15 days deadline for providing more information.
6. The obligation to inform potential whistleblowers on the necessary conditions in order to receive protection for breaches of confidentiality was reverted to its initial form whereby the responsible state agency publishes a declaration on its website.
7. The obligation to disclose a report within 3 months from the internal/ external filing of the report was eliminated.
8. With regard to the necessary conditions for obtaining protection, the need for the whistleblower to prove that the report was necessary was eliminated, thus reverting to its initial form whereby the whistleblower needed to believe that the information was true at the time of the report.
9. Regarding the subject of reparations that are extended to other categories, the provision which included the anonymous whistleblower that was later identified and suffered retaliation had been eliminated, but was re-introduced, thus reverting to its initial form.
10. The amendments also clarified the concrete measures to be taken in protecting against retaliation and detailed the exoneration clause by addressing the abovementioned transposition gaps.

11. Regarding the provisions on contesting the retaliation measures, the amendments reverted to its initial form the stipulation whereby the court can also order any other measures to stop retaliation against a whistleblower who filed a complaint or revealed information to the public.
12. All the financial sanctions which had been diminished from the initial version of the draft law were increased compared to the initial draft with amounts ranging from 30% to 100%.

In early September the draft law passed through the Senate and reached the Chamber of Deputies where it received favorable reports from all committees and it was scheduled for voting in early October. However, in late September, the EC via DG JUST sent out several observations and proposed amendments on the re-examined draft law. The documents revealed by the press showed that the EC emphasized the need to correctly transpose Directive 2019/1937 into national law in the context of it being a milestone in receiving the 2nd NRRP payment worth 2,8 billion Euro¹²⁷. The main points of contention that were pointed out were the following:

1. Article 2(2) which allowed anonymous reporting only in a very specific case, i.e. when the information was obtained during the recruitment process or when the employment relationship has ended, and was thus in contradiction with the rest of the legal text which referred to anonymous reporting more generally. The suggestion was to clarify by referring to anonymous reporting separately. Also, it was emphasized that this paragraph did not cover those individuals “whose work-based relationship is yet to begin”, as required by the Directive.
2. Additionally, it was pointed out that Article 2(1) limits the scope of the law to only a closed list of beneficiaries and it was suggested that the Directive’s wording should be followed, i.e. to add the qualifier “at least” before listing the categories of individuals covered by the law.
3. Article 6(2) also presented problems with regard to anonymity since it required that the whistleblower include contact details and the status of the reporting person. These requirements were seen as potentially compromising anonymity. Therefore, the suggestion was to make providing contact details optional and to erase the need to divulge the status of the whistleblower.

¹²⁷ The project of the whistleblower law, criticized by the European Commission / PNRR money depends on this law / The Minister of Justice requests the correction of the whistleblower law in the Judiciary Commission so that the reporting of corruption cases can be done anonymously, G4Media.ro, 4 October 2022, available at <https://www.g4media.ro/proiectul-legii-avertizorului-de-integritate-desfiintat-de-comisia-europeana-de-aceasta-lege-depind-banii-pnrr-ministrul-justitiei-cere-corectarea-legii-avertizorului-de-integritate-in-comisia-jur.html>

4. It was also suggested that the implementation timeline for the responsible entities be shortened from 60 to 30 days in order to align it to the NRRP payment request. In the final version, the timeline was set at 45 days.

Following this exchange, on December 12th 2022, the draft law was sent by the Committee of the leaders of parliamentary groups to the Legal, appointments, discipline, immunities and validations committee in the Chamber of Deputies for an additional review that was received on December 13th. This new committee debate resulted in a consistent number of amendments (283 accepted, 8 rejected) being made to the draft law¹²⁸; the changes suggested by the EC were all taken into consideration. On the same day the draft text was voted and sent to the President for promulgation which took place in the following two days, resulting in Law 361/2022.

During the plenary debate¹²⁹, the Save Romania Union pointed out the rushed manner in which the vote was taking place while underlining that some of the recent amendments would still be considered as counter to the Directive's intent. In this respect, the amendments made to Article 6(2) were seen as a major problem since the controversial requirements (contact data, information on the individual's status, professional context, etc) attached to anonymous reporting were replaced by the need to provide "valid clues" as to actual breaches of law in order for an anonymous report to be reviewed. It was argued that such an obligation was similar to the burden of proof required in the Criminal Procedure Code and that it would have a clear dissuasion effect on potential whistleblowers. Additionally, this condition was not imposed for those reports made by whistleblowers that make themselves known, thus indicating a double standard in providing legal protection.

This particular issue was also the subject of continued criticisms from the EC in the context of evaluating the progress made in implementing the NRRP. The argument was that the national law did not transpose the Directive correctly since that condition would lead to a subjective assessment of anonymous reporting and no legal certainty for whistleblowers. Therefore, in March 2023, the Government initiated and successfully changed in Parliament Article 6(2) whereby the adjective "valid" was removed as a requirement for anonymous reporting. However, even though the Directive required that anonymous whistleblower reports contain sufficient information on potential breaches of law, the Romanian national law upheld the notion of "clue" in relation to these types of intimations.

¹²⁸ Chamber of Deputies, Legal, Disciplinary and Immunities Committee, 2022, <https://www.cdep.ro/comisii/juridica/pdf/2022/rs219.pdf>

¹²⁹ Chamber of Deputies, Minutes of the meeting of the Chamber of Deputies from December 13, 2022 <https://www.cdep.ro/pls/steno/steno2015.stenograma?ids=8479&idm=21,022>

Transposition compliance

Scope of coverage

Comprehensive horizontal rights that harmonize EU Directive and national law

With regard to this aspect, Article 1(4) still presents a problem because it is just a translation and not a harmonization of the provision within the Directive. Therefore, there is a persistent lack of clarity as to what constitutes essential national security military procurements that are exempted from whistleblower reports, thus having a dissuasive effect on whistleblowers.

Broad whistleblowing disclosure rights with ‘no loopholes’

This particular aspect also relates to the need to offer **reliable identity protection** as well as the issue of **“merits test” to qualify for protection** and **setting realistic standards to prove violations of rights** in the sense that one of the most controversial topics debated within Parliament was the issue of extending legal protection also to anonymous whistleblowers and the burden of proof imposed on the content of anonymous reporting.

As presented above, in Article 6(2) of the law, anonymous reports were initially eliminated altogether during debates in the Chamber of Deputies only to be re-introduced with the requirement that anonymous whistleblowers provide contact details and “valid clues” as to breaches of law. This was a heavier burden of proof than that required from known whistleblowers. Even though these issues were corrected in the final version of the law, this article continues to be problematic since legal protection is dependent upon providing “clues”, not “sufficient information”, as stated in the Directive.

Also, the need for the whistleblower to prove that the report was necessary, added during the committee’s initial debates, was eventually eliminated. In addition, the good-will principle, eliminated during those parliamentary debates, but eventually reintroduced, guarantees legal protection for an individual who has “good reason” to believe that the information was true at the time of the report.

Another issue regarded Article 19 (2) and, on the one hand, the amendment initially introduced by the deputies to impose a deadline of minimum 3 months from the internal/ external filing of a report to be able to address the public and, on the other hand, the omission of the need to establish a feedback period no longer than 3 months from the date of receipt of the report. This faulty transposition would have had a dissuasive effect since the whistleblower’s public freedom of expression would have been impeded by the need to firstly file a report internally and then wait a period of time during which retaliation or the destruction of evidence could occur. It was pointed out that, in comparison to the initial whistleblower law, this approach actually diminished the level of legal protection offered to whistleblowers. Nevertheless, the final version of the law follows the spirit of the Directive in providing adequate protection for public disclosure.

With regard to the need to specify that disclosures in the course of job duties are protected, Article 2 does state that it applies to those who obtain information in a professional context.

Wide subject matter scope

The extensive subject matter scope of the law is specified in Article 3 which defines breaches of the law in a wide sense and it also refers to breaches of EU laws. Also, Article 3(1) covers all the categories for illegality in the Directive. However, the law is silent on protection for those who expose abusive practices that are not technically illegal. This is the cornerstone for global laws. It should not take a lawyer for protection when challenging abusive practices that are not technically illegal but defeat the law's purpose and betray the public trust. In this sense, the National Integrity Agency's (NIA) regulations should specify that the law protects those who challenge abuses of authority as well as technical illegality.

Moreover, Article 1(5) lists the limits of the law's scope by safeguarding from violations of secrecy requirements for classified information, judicial proceedings, criminal procedure or legal and medical professional privilege.

Protection against spillover retaliation at the workplace and for non-employees who report work-related information

With regard to employment status, Article 2(2) was also controversial because the re-examined version of the law allowed anonymous reporting only when the information was obtained during the recruitment process or when the employment relationship has ended, but did not cover those individuals "whose work-based relationship is yet to begin", as required by the Directive. However, this problem was corrected and the final version of the law also covers applicants as well as all the other envisaged categories, including those individuals assisting whistleblowers and acting in indirect contexts.

Protection against full scope of harassment

Article 2, Article 20(2) and Article 22 reflect the Directive's requirements and the law offers protection from retaliation and it is mostly a translation of the Directive's provisions. However, the legislator chose not to include specific examples of passive retaliation. Even though civil society proposed that this article be expanded to include all the listed instances, the final version was not modified. This aspect might cause issues going forward especially in court cases since the lack of explicit examples could be used in denying the occurrence of retaliation.

Shielding whistleblower rights from gag orders

Article 27 of the law offers protection from any rules, policies or nondisclosure agreements that would otherwise override rights and impose prior restraint on speech.

Article 21 of the law, on the other hand, was controversial because of transposition gaps in the sense that the exoneration requirement was not fully transposed since protection from aspects such as slander, copyright violation, professional and/ or commercial secrecy violation and data protection violation was not clearly stated in the draft law.

Forum

Right to a genuine day in court

Article 23 of the law offers administrative and judicial due process rights in contesting disciplinary measures and in providing relief against retaliation.

Burden of proof and relief

Relief for whistleblowers who win

Regarding the topics of **adequate compensation, interim relief, coverage for legal fees and costs**, the final versions of Articles 22 and 23 do state provisions that legally guaranteeing these protections and remedies.

As presented above, the President's request for the draft law's re-examination also referred to the omission to insert specific protective measures as well as set concrete reparatory provisions.

The law does not provide for actual interim relief. Although this might be available as part of generic judicial procedures, the Directive calls for non-routine access to interim protection. Regarding this aspect, it was pointed out¹³⁰ by the APADOR-CH NGO that financial assistance would not be provided if the court decides to reject a whistleblower's contestation of retaliation measures. The suggestion that this issue be specifically addressed in the law was not taken into consideration.

Personal accountability for reprisals

Article 28 deals with civil and criminal liability for breaking the whistleblower protection law and lists the types of misdemeanors and the financial sanctions that will be applied.

During the initial parliamentary debates, the controversy related to Article 23(7) in the final version of the law that provides for a fine in case a court of law decides that retaliatory measures were taken, at least twice, towards the same whistleblower and the same report/ public reveal. The Social Democrats initially voted to lower the fine by 3 times, but this was eventually raised to 8,700 USD.

¹³⁰ APADOR-CH, APADOR-CH's recommendations regarding the draft Law on the protection of whistleblowers in the public interest, 11 October 2021, available at <https://apador.org/recomandarile-apador-ch-cu-privire-la-proiectul-de-lege-privind-protectia-avertizorilor-in-interes-public/>

Making a difference

Institutional whistleblower channels

The law establishes internal (Chapter III) and internal (Chapter IV) reporting channels that are in line with the provisions of the Directives.

The controversy referred to Article 9 which deals with setting up and maintaining internal reporting channels for all public and private entities. During the initial debates, the wording threshold with regard to the ability of small administrative units and companies to share resources was changed from “less than” to “at least”, therefore exempting smaller entities from creating and administering reporting channels. Another problem was focusing the law on the number of employees in obliging private companies to set up internal channels and not on the activity sectors in which these operate. These issues were eventually remedied in the final version of the law.

With regard to external reporting channels, in Romania, the National Integrity Agency was chosen to fulfil this role in light of its responsibility in managing an administrative verification system of public officials’ unjustified incomes, conflicts of interests and incompatibilities. Nevertheless, not only NGOs, but also the Parliament’s Legislative Council have pointed out that NIA would not be the best suited entity to deal with such issues since it did not have similar competencies, therefore no experience, especially in dealing with the private sector¹³¹.

Whistleblower enfranchisement

With regard to whistleblower enfranchisement measures, the abovementioned chapters in the final version of the law transposed all the transparency, information and feedback requirements present in the Directive.

Education, outreach and transparency

Concerning requirements vis-à-vis transparency, information and awareness, the national law does transpose all the provisions mentioned in the Directive, via Articles 10, 15, 23, 26.

Also, it is specified in Article 15 that the NIA will annually publish relevant statistics (the same as the ones envisaged in the Directive) on its whistleblower protection activities.

Review

The Directive’s review requirements were simply translated and inserted in the national law. Therefore, the obligation to periodically, but at least every 3 years, review institutional procedures and subsequent actions (for both public and private

¹³¹ The minutes of the April 2021 public debate on the draft law are on the website of the Ministry of Justice: <https://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public/>

entities) is present in Article 18 and it refers to the external reporting channel, i.e. NIA. Also, the obligation to send reports to the EC is enshrined in Article 35.

Evaluation of the implementation trends so far

Since the final version of the law came into force in December 2022 and the most recent amendment in March 2023, there are no major implementation trends so far.

The only important implementation step is the operationalization of a dedicated whistleblower unit inside the National Integrity Agency together with the required external reporting channel¹³².

The instrument offers multiple possibilities to transmit a report: an online channel (dedicated platform), a phone number and a postal address. In addition, face to face meetings can also be requested in order to discuss a report or to offer counselling or assistance in dealing with retaliation.

The dedicated website offers extensive information and explanations on the legal requirements and the possible services that the Agency can offer whistleblowers. Also, the platform also provides a whistleblowing report template, general information on the whistleblowing mechanism (together with a guide) and a FAQ section.

¹³² <https://avertizori.integritate.eu/informatii-generale/>

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