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SECTION 4. CHALLENGES IN MONITORING AND EVALUATION OF PUBLIC ADMINISTRATION

RECEIVING AND SOLVING PUBLIC INTEREST DISCLOSURES: LEGAL NATURE AND RESPONSIBILITIES IN MANAGING THEM

Prof. Phd. Emil BĂLAN[*],
PhD. candidate Iuliana COŞPĂNARU[**]

ABSTRACT

Whistleblowing - public interest reporting or disclosure made by a person working in the apparatus of a public entity, aware of details of the administrative activity, otherwise non-accessible to third parties or the general public - plays an important role in preventing or early detecting those situations in which non-compliance with the principles of administrative procedural law may affect the validity of documents, the performance of the legal competencies of the institution or citizens` rights. This paper explores the legal nature of the whistleblowing report and what are the legal obligations that derive from this nature, with the aim of identifying what are the institutional structures responsible to manage it, what role plays each of these structures and how whistleblowing complaints should be handled such as to maximize its benefits for the public institution.

Key words: *public interest reporting, public institutions, whistleblowing, good administration.*

JEL classification: K23.

Public Interest Disclosures – General Considerations

Whenever maladministration occurs, a legitimate question raises regarding any option available to proactively identify such situations and prevent them before such maladministration occurs. Whistleblowing has been identified as such an option and defined as reporting or disclosure for *public interest***,** regarding actions or omissions which represent a *threat to or are detrimental to the public interest***,** made by a person who becomes aware of them while performing his/ her *professional activity*. This wide definition builds on the existing national and

[*] Prof. Phd. at NUPSPA, Faculty of Public Administration.

[**] Phd candidate at NUPSPA, Administrative Sciences and Deputy director at Transparency International Romania.

international legislation in the field as will be revised below, based on our previous paper "*Disclosure mechanisms for non-compliance with the general principles of administrative procedural law. The whistleblowing*[1]".

One key element of this instrument is the quality of the person submitting such complaint – a professional who becomes aware of a threat to the public interest at an early stage, before its risks materialize. A second such element is his/ her capacity to alert the responsible structures in a public institution to take the adequate measures to prevent and/or mitigate this thereat, before its consequences become irreversible.

To maximize the benefits of such instrument, adequate protection shall be granted to those professionals who take the courage to report a threat to the public interest. As indicated in our previous paper, most of the existing legislation has focused on these protection elements, while additional regulation is needed to ensure a standardized procedure to handle the complaints.

The whistleblowing concept has been developed and incorporated for the first time in the Code of US Federal Regulations - the equivalent of an administrative code - in Chapter 5, dedicated to the administrative staff. The legal provisions prohibits the sanctioning of a federal official if he/ she reports a fact about which has data that reasonably suggest a law violation, a misuse of public resources or any abuse[2]. Detailed provisions on how to handle these kind of complaints about possible violations of the law have been subsequently included in the law reforming the US public service since 1978[3]. In 1989 has been adopted the first legal document devoted exclusively to the whistleblowers protection[4] - freely translated the protection of those that "blow the whistle" or call attention about irregularities.

Globally recognized international legislation providing for a similar legal provision has been adopted in 1982, under the UN aegis, - the Termination of Employment Convention, which came into force in 1985. Among the grounds for unjustified termination of the labor contract, prohibited by the Convention it is also mentioned "the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities"[5].

It was in 2003 that whistleblowing has been officially linked to corruption prevention, when it was included in the UN Convention against Corruption, adopted in 2003 in Merida. Article 33 of the Convention stipulated that „*each of the*

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[2] Section 2302, (b) (8), of Chapter 5 of the Code of Federal Regulations, http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section2302&num=0&edition=prelim

[3] Civil Service Reform Act of 1978

[4] Whistleblower Protection Act of 1989

[5] Art 5 c) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312303

member states shall incorporate into the national legal system the necessary measures to guarantee the protection against the unfair treatment applied to any person who reports to the competent authorities, in good faith and based on reasonable grounds, any facts concerning offenses established in accordance with this Convention (that is corruption offenses)". Romania has ratified the UN Convention against Corruption by the Law no. 365/2004, while the convention came into force in 2005, after ratification by the 30st country.

The Council of Europe, through its Committee of Ministers[6] and Parliamentary Assembly[7], has adopted recent regulations in the field, which are considered the most comprehensive to the date. Following these models, a draft European Directive on the protection in the European Union of whistleblowers in the public and private sectors[8] has been elaborated and published in May 2016, which is still to be considered by the Commission and flow through the formal adoption procedure.

Romania has adopted specific legislation to protect whistleblowers since 2004, thus being the first country in the continental Europe to have a dedicated and comprehensive such law.

Romanian Legal Framework for Whistleblowing

As mentioned above, Romania has adopted a specific legislation on whistleblowing since December 2004[9], almost at the same time that it ratified the UN Convention against Corruption that stipulates the mechanism.

The law, as most of the existing legislation indicated above, provides mainly for protection mechanisms for the whistleblowers, while the managerial and risk preventive perspectives are less approached. However, the law empowers and requests each public institution to set up its own internal channel to receive public interest disclosures and also set its internal procedure to handle them. The term for transposing the primary legislation was 30 days after its adoption. Unfortunately, most of the transposition consisted only in including the name of the law into the list of legal framework applicable to different public institutions.

The National Anticorruption Strategy 2011-2015 included one objective regarding the implementation of whistleblowing mechanisms, including reporting

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[6] Recommendation No. 7 from 2014, http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282014%297E.pdf

[7] Recommendation No. 2073 (2015) on whistleblowers protection improvement, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMTkzNiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxOTM2.

[8] http://www.greens-efa.eu/the-right-to-speak-out-15199.html; http://www.greens-efa.eu/fileadmin/dam/Images/Transparency_campaign/WB_directive_draft_for_consultation_launch_May_2016.pdf.

[9] Law no. 571/2004 on whistleblowers protection.

on the disclosures received, but the results were not satisfactory, in many public institutions still lucking the necessary awareness on whistleblowing and its respective mechanisms.

However, it was over the last two years that several pieces of legislation have been correlated such as to provide a more comprehensive framework to set up specific public disclosure instruments and mechanisms.

In this context, in 2015 a new piece of legislation has been adopted regarding the internal managerial control. The Order no. 400 provides for 16 standards that need to be observed by each public institution, which are subject to be controlled. In order to make effective the internal managerial control, operational procedures shall be developed by each institution, for each standard, according to its specific activity profile.

These operational procedures shall be developed by a specific commission set by the manager of the institution, following a similar format with the ones developed under the ISO 9001:2015 quality management standardization. One such required procedure under Standards 1: Ethics and Integrity - is precisely the one on whistleblowing. While Law no. 571 provides for protection mechanism, Order no. 400 is mostly focused on setting adequate communication procedures such as to enable employees to disclose any irregularity. Both the law and the order are applicable to all public institutions and companies.

Furthermore, a new National Anticorruption Strategy has been adopted in August 2016[10], which includes a specific objective - no. 2.2 *on improving the effectiveness of the anticorruption preventive measures through closing the legislative gaps and inconsistencies regarding the ethical advisor, the protection of whistleblowers and the revolving-doors.*

To strengthen the power of the above-mentioned objective, Romania has also committed, at the Anti-corruption London Summit, in May 2016, to *revise and improve the implementation mechanisms for the protection of whistle-blowers*[11].

Thus, both the legal framework and the decision-making will have been put publicly so that whistleblowing mechanisms can be properly implemented in the public sector.

The Legal Nature of the Whistleblowing

According to article 3 of the law no. 571/2004, *the public interest disclosure, or whistleblowing, is the disclosure or complaint made in good faith, regarding any fact or act that entails a break of the law, of the professional deontology or of the principles of good administration, efficiency, efficacy, economy and transparency.* Whistleblower is a person employed in a public institution or authority, submitting a public interest disclosure.

[10] Government Decision no. 583/2016.

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522726/Romania.pdf.

According to article 2 of the Government Ordinance no. 27/2002[12], *petition is the request, complaint, disclosure or suggestion, submitted in writing or via e-mail, by a citizen or a legally organized civil society organization, to a public institution o authority, central or local.*

While analysing the two legal provisions, it should be noted there are no particular differences between the two definitions, except for the quality of the complainant – which in the first case is a qualified subject: an employee of the public institution, while in the second case the complainant is a citizen, which does not exclude in itself the possibility for that citizen to be precisely an employee of that public institution.

Thus, one can conclude that whistleblowing is a particular case of petition, submitted by an employee of a certain institution, in which case all provisions and rules applicable to petitions also apply to whistleblowings. Also we can conclude that law no. 571/2004 is a special law in comparison with Government Ordinance no. 27/2002, which entails that the first will have pre-eminence over the second, in case of conflict.

In practice, two special situations need closer attention and analysis. One regards the situation in which the whistleblower does not disclose his identity, in which case, according to art. 7 from the GO no. 27/2002, the complaint should be dismissed.

In this particular case, the authors' opinion is that whistleblowing mechanisms have two major roles. One is to provide employees with a secure communication channel where they can disclose in good faith any threat to the public interest they might come across with in their professional activity, thus playing the role of a protection mechanism for the public interest. The second one is to provide employees with protection means and mechanism against retaliation for the disclosure made. If the focus is on protecting public interest, meaning the managerial perspective, then, even if the disclosure can`t be treated as a petition, it still can meet its objective if used as a basis for self-investigation and risk mitigation. In this case special procedures shall be in place to allow the public institution investigate the situation disclosed and take the necessary measures to prevent eventual risks. To this end, special procedures can be drawn under the application of Order no. 400/2015 regarding internal managerial control. From the legal perspective, the situation analyzed above will not be qualified as petition.

The second situation regards the case when the complaint is a whistleblowing and the whistleblower requests an answer to his disclosure. There have been situations in practice when such request created confusion, as public institution representatives did not know how to legally qualify it, having in mind the fact that Law no. 571/2004 has no specific provisions on this matter.

[12] On regulating the activity of petitions solving.

The situation becomes even more complicated when the respective institution has already in place a special procedure and dedicated channels to receive whistleblowings, and such disclosure is received through a different channel. For instance, there is a web platform set to submit/ receive whistleblowings, and such disclosure is received by the public relations department of a public institution.

It should be noted in this case, that the legal nature of the public interest disclosure is not given by the channel it is received, but by its content and the quality of the complainant. Namely, if the disclosure regards a situation that my harm or threaten the public interest and is made by an employee of that institution, then it will always be a whistleblowing, and will be treated as such, receiving the adequate protection.

This interpretation is consistent with the wide range of institutions that can receive whistleblowings according to art. 6 of the Law no. 571/2004. According to the spirit of the law, whistleblowing can be submitted to any institution and, if in good faith, it entitles the complainant to receive adequate protection since the very first complaint, irrespective to which institution he/ she submitted it.

Therefore, in this case, the Law no. 571/2004 will prevail with regard to the nature of the complaint, while with regard to the answer requested, shall be applied provisions of art. 6 or 6^1 of GO no. 27/2002, which state petitions shall be answered by the competent departments of the public institution or reverted to such competent institution. According to art. 8 of the same GO, public institutions shall answer any petition, irrespective the nature of the answer, within 30 days from the date it was registered by the competent institution.

Legal provisions on petitions reporting are also applicable in case of whistleblowings. Furthermore, they should be coordinated with provisions of the Government Decision no. 583/2016 regarding the National Anticorruption Strategy that requests public institutions to report on integrity incidents, public interest disclosures consisting the basis for identifying such integrity incidents.

Last but not the least, we should consider for adequate analysis, provisions of Law no. 50/2007[13], which explicitly state that provisions on whistleblowers` protection shall prevail over the confidentiality obligations set by the ethical code, while public institutions shall report on the ethical incidents annually.

The same law provides the obligation for managers of public institutions to appoint an ethical advisor among the employees of the human resources department, whose role is to *advise and assist public servants from that institution regarding the observance of the provisions of the code of conduct*. The same law provides that *public servants can`t be sanctioned nor retaliated for disclosing in good faith to the competent disciplinary commission breaches to the ethical code*.

Last but not the least, it should be mentioned that reporting on whistleblowings shall be made regularly available both to the public and

[13] To amend Law no. 7/2004 regarding the ethical code for public servants.

internally, in order to meet the preventive role of the mechanism and raise awareness of the public employees on risks and mitigation measures adopted.

Recommendations on Elements of an Operation Procedure to Receive and Solve Whistleblowings

As demonstrated above, whistleblowings are petitions subject to a specific regime, where protection against retaliation shall be granted to the complainant.

To set a functional whistleblowing system for a public institution, several conditions need to be considered. The first one is to incorporate such a system into an operational procedure as prescribed by the Order no. 400/2015.

Such procedure shall include provisions on the dedicated channels set by the institution to receive public interest disclosures or whistleblowers. Such channels can include:

- A dedicated whistleblowing line of a public institution (letter, e-mail, web platform, phone);
- The public relations department
- The ethical advisor
- The internal Audit department
- The disciplinary committee
- The supervisor of the person against whom the complaint is submitted
- The chief of the institution
- The supervisory body of the institution (if the case)
- Or a third party authorized by the institution to receive the complaints

Irrespective of the channel used to submit such public interest disclosure, even if it is a different department or channel than the above-mentioned, it shall be directed to the ethical advisor, who shall be in charge of anonymizing the complaint in order to grant the adequate protection to whistleblower. This procedure shall be applicable also in case the disclosure is received by the public relations department.

Such competence can be established for the ethical advisor based on the administrative decision he/ she is appointed to this position, according to the legal provisions of Law no. 50/2007. The ethical advisor shall be under the direct coordination of the manager of the institution, in order to avoid double subordination and confusion about the prevalence of the tasks. This position also entitles the ethical advisor to offer assistance and advise, as well as coordinate the interaction between the different departments of the public institution.

The complaint thus anonymized can be sent to the competent department for appropriate investigation. The authors` recommendation would be to send the disclosure to the internal audit department, also set as an independent structure under the direct supervision of the manager of the institution, as long as it exerts the internal managerial control.

Once the disclosure is investigated and conclusions are drawn, it shall be directed to the disciplinary commission, if disciplinary sanctions are to be applied. In this case, the identity of the whistleblower shall be further protected. The disclosure shall also be directed to the special structure set based on art. 3 of the Order no. 400/2015, appointed to monitor, coordinate and advise the implementation and development of the internal managerial control.

It should be mentioned that such structure can be created even as part of the internal audit department, as long as the monitoring, coordination and advise functions are separated from the audit in itself, as according to the international standards for auditing, no auditor can rule and audit the effectiveness of his ruling.

The structure thus established has the role of analysing the complaint from the risk management perspective and incorporate any mitigation measures into the existing operational procedures, up-dating or adjusting them, as part of the monitoring, coordination and advise on their implementation.

Once the public interest disclosure is solved, solution shall be communicated to the complainant via the public relations department. For this to be possible, the answer shall return to the ethical advisor, who has protected the identity of the complainant, in order to correlate the complaint with the answer. Once this last step is finalized, the petition can be answered to the complainant.

Solutions and mitigation strategies adopted shall be communicated regularly both externally, as part of the reporting obligation, and internally to support the continuous learning process and raise awareness on existing risks, integrity incidents and measures adopted.

If the complaint has been submitted anonymously and used as a basis for self-investigation and risk mitigation, similar reporting shall be communicated regularly both externally and internally, in order to encourage further whistleblowers to take action and stand up to protect public interest against actions that may harm or threaten it.

The above-mentioned elements have been drawn to complement the existing legislation and to detail and further facilitate the application of the recommendations set in our previous paper, "*Disclosure mechanisms for non-compliance with the general principles of administrative procedural law. The whistleblowing*" as well as to substantiate the objective assumed through the National Anticorruption Strategy and indicate the benchmarks for the secondary and tertiary legislation in the field.