

# Protection of 'Whistleblowers' Identity

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## Abstract

A whistleblower decides to reveal wrongdoings, having in mind the identity and labour legal protection and the corresponding legal praxis, either using the public or anonymous reporting. Confidentiality is based on rules that whistleblowers personal data are available to authorised subjects only, and not to a wider public. Protection of whistleblowers personal data is assured by officials' acting upon anonymous reports. Anonymity as a mode of whistleblowers identity protection, is important when speaking of reporting to public which has the right to receive information, and it technically becomes increasingly facilitated by the use of information technologies. The central part of the paper relates to analysis of the adequate protection of personal data and privacy of whistleblowers, which is in special focus of the European Union, through the work of European Data Protection Supervisor and the implementation of relevant legislation, having in mind that whistleblowing procedures contain processing of sensitive personal information. Legal analyses of the laws and relevant material has showed that the protection of identity and privacy of whistleblowers in posttransitional countries of the Southeast Europe is unreliable, and they do not enjoy the expected legal security in accordance with proclaimed strategies on fight against corruption.

**Keywords:** protection of whistleblowers identity, protection of whistleblowers privacy, anonymous reporting of corruption, reporting public interest violation

**JEL classification:** M14, K31

## Introduction

The protection of whistleblowers identity is a mode of protection of employee who submitted a report or informed the public about the corruption or other infringement of public interest by his employer (employed whistleblower), and the person who made a whistleblowing outside of working post or other kind of working engagement, who can be subject to retaliation. The protection enables the removal and diminishing the possibility of discriminating or retaliating against a whistleblower or doing other inappropriate acts, because the employer or other person who is targeted in a report, cannot retaliate against a whistleblower, if the latter's identity is not known to him. The protection of identity (personal data and privacy) of whistleblowers has some special features comparing to the protection of identity of other employees and citizens, due to the individual role of whistleblowers in the fight against the corruption. Being a part of protected reporting, it protects the individuals that are willing to submit data and proofs on corruption, which is an irreplaceable form of fight against this social evil, especially present in the post transitional countries. In these countries it is of utmost importance that preventive measures and anti-corruption policies are taken, that promote the participation of society including effective practices aimed at the prevention of corruption, as stated under Article 5

of the United Nations Convention against Corruption. Moreover, the introducing of whistleblower procedure may be also seen as contributing to an image of more ethical perception of society (Lewis, 2001, p. 69).

A potential whistleblower makes a decision on whether and how to report a corruption or other form of public interest violation having in mind the protection of rights of whistleblowers, including the protection of the identity, and the implementation of the protection regulations in legal praxis. A whistleblower makes a choice between revealing his identity and the possibility of protecting it through confidentiality and anonymity. The protection of the identity of employed whistleblowers in internal whistleblowing, enjoys greater attention comparing to the protection of identity of citizens reporting corruption as users of services or in other capacity. As the whistleblowing legislation takes further root, internal whistleblowing procedures become more spread out (Aras et al., 2010, p. 532). The important reason for that is the fact that internal whistleblowing influences the changing of substance of the relationship between the employed whistleblower and his employer comparing to relationship between the same employer and other employees. Employer and the person in charge are obliged to process the report and to protect the labour security of the employed whistleblower, but also to enable the freedom of whistleblowing, and to guarantee the regular deploying a message that it is acceptable to point to problems as a whistleblower. In that aim, the employers should explain to their employees the policies that offer them the right to confidentiality when they point out their suspicions within the company; they should explain when and how the suspicions may be safely reported to someone outside the company and should prescribe that (a) victimisation of a bona fide whistleblower and (b) malicious reporting of false accusations are a disciplinary felony (Stephenson, 2012, p. 24). The rules on whistleblowers data protection and the data protection of other persons that are not whistleblowers but are suffering the same consequences (persons connected to whistleblowing, persons wrongly identified as whistleblowers, persons performing an official duty, etc.) are to be regulated by law on the whistleblowers protection. The subject matter of the analyses are the rules on the protection of personal data of whistleblowers in the countries of Southeast Europe which have provided for the protection of whistleblowers by special laws, or only by laws relating to employees. Those are the laws which introduced the protection of identity of whistleblowers, within the protection of the whistleblowers in these countries. The importance of enacting of these laws and of regulating the protection of identity of whistleblowers, as well as other rights protecting them from retaliation is underlined by certain examples of whistleblowers in the EU countries who discovered the cases of corruption in the financial and banking sector, and were subsequently dismissed from work, fined, prosecuted and convicted. The situation in post transitional countries entering into the process of European integration is even less favourable. Having in mind the issues that have not been completely or at all envisaged by these laws, the whistleblowers may have their personal data protected according to regulations on the protection of personal data in labour legislation and regulations relating to protection of confidentiality of personal data. The protection provided under other laws does not depend on whether the whistleblowers law directly refers to those laws, but, according to nomo-technic rules, the introductory provisions (preamble) of the whistleblowers law should regulate the relation between the two laws.

This analysis is based on the presumption that the extent of legal regulation of the protection of the identity of whistleblowers impacts the freedom of whistleblowing, and depends on whether the regulations contain only prevention of

retaliation of whistleblower, or they contain also rules on sanctioning of persons who violate their duty to safeguard personal data, and whether the confidentiality and anonymity may be equalized. In that sense we may speak about the proximal effects of anonymous whistleblowing and whistleblowing which is not anonymous but which, in the aim of their coinciding effect, would require a high level of protection of whistleblowers identity. The difference is that the identity of the whistleblower is completely unknown when speaking of anonymous whistleblowing, what is not a case when speaking of whistleblower with the protected identity, as the identity thereof is known to restricted and precise circle of persons. Therefore, the illusion of anonymity is created. Accordingly, if we take into consideration the distinction of whistleblowing to open, confidential and anonymous one, the subject of analysis of this paper is a confidential whistleblowing which entails the necessity of the protection of personal identity of whistleblower.

## **Influence of European integration to regulation of protection of whistleblowers**

Providing for the protection of whistleblowers rights, and thus the protection of their identity comes due to importance and the degree of the corruption as internal problem, but also due to the fact that it has been provided for in certain European and international acts. Organization of United Nations has made recommendations on how to create a system of protection of whistleblowers, with reporting in good faith and the protection of retaliation being the basic guidelines, and anonymity and confidentiality an important issue. (Popescu, 2015, p. 137) Posttransitional countries of Southeastern Europe have agreed in their Stabilisation and Association Agreements to harmonise their internal laws with the European union law, and therefore they differ from other countries that face the question of how to regulate the protection of whistleblowers rights. Being countries with (un)finished transition process, they endeavor to finish the transition process of domestic law by harmonising the legal system with the EU law. The whistleblowing is currently in the focus of the European union, which tries to introduce or provide for the possibility of whistleblowing in its institutions. Encouraging whistleblowing and enabling of certain accompanying whistleblowing institutes, is considered to be very important in order that potential whistleblowers and every person which as an employee is capable of noticing illegal behaviour, get motivated. In that sense, in July 2016 the European Data Protection Supervisor issued Guidelines on processing personal information within a whistleblowing procedure (hereinafter referred to as 'the Guidelines'). The Council of Europe has also stressed out in its recommendation CM/Rec(2014)7 that whistleblowers should have the right to have the confidentiality of their identity kept, and that fair guarantees should be provided to him. With its Guidelines the EU wants to shine a light on the corruption, with the key challenge in the fight against the corruption being the revealing of bribery, fraud, theft and other acts of wrongdoing at the work place. The confidentiality is the most efficient way of encouraging the employees is to ensure that their identity is protected, because otherwise they could face the retaliation in the form of dismissal from work, placing on black lists, threats, ignoring their reports etc. Whistleblowing is a tool for making unethical behavior visible, in which the identity of the whistleblower should remain 'invisible'.

The aim of the adequate protection of the whistleblowing process is formalizing this process. The whistleblowing at the outset was spontaneous, unorganized, and was attributed only to most courageous and the most trenchant members of society. Having recognized the importance of protected whistleblowing, the EU wants to

formalize the whistleblowing process so that it includes the protection of identity of whistleblowers. Proliferation of whistleblowing schemes is being recognized also in European public and private sectors as an important factor for improved policy-making and thus improved whistleblower protection (Lewis, 2010, p.32). The process of whistleblowing or reporting entails the processing of sensitive personal data, which is nowadays, in the world of information technologies of the utmost importance. Properly conceptualized principles on data protection and enactment of proceedings, and creation of safe channels of whistleblowing makes this institute stronger. The most efficient way to encourage the employees to report irregularities is to ensure that their identity will be protected. According to the Guidelines, their identity should not be revealed, save in certain exceptions, i.e. if whistleblower allows for such disclosure, if that is necessary in the course of later criminal proceedings, or of the whistleblower maliciously makes false report, in which case the data can be revealed to judicial bodies. Persons in charge of administering the reports should be under additional obligation of non disclosure, and they should take care also of indirect identification, for example, through type of whistleblowing and nationality of whistleblower.

In that regard it is important that provisions of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, are taken into consideration especially with regard to Article 7a, according to which personal data may be processed, inter alia, only if the data subject has unambiguously given his consent.

### **Confidentiality as a mode of protection of personal data**

In order that social role of whistleblowing is achieved, it is important that confidentiality is protected, by guaranteeing the right to protection of personal data as one of the rights afforded to whistleblowers, since these rights only taken in their entirety can provide for the overall protection. For that reason, the provisions on the protection of whistleblowers in various laws, and especially in laws on state servants and labour laws, may provide a limited protection to certain categories of employees. For the realization of this role, it is important that also potential whistleblowers believe that the rules on confidentiality shall be respected and implemented. Confidentiality is inevitable for achieving aims of protected whistleblowing in a case when whistleblower does not want the public and persons pointed out to in the report as doers of corruption to learn his personal data. A confidentiality is seen as a fundamental aspect of effective whistle-blowing, when people are confident that they can raise concerns on a confidential basis and in particular that their identity is not made public (Giles, 2015, p. 279). Confidentiality as a mode of protection of identity means that personal data of whistleblower are available only to authorized subjects, and not available to person pointed out to in the information or report as having committed a corruption, or other violations of public interest, nor to public. The confidentiality entails other issues such as: the mode of collection and protection of personal data, sanctions for person who reveals personal data on whistleblower, rights to protection of personal data of persons connected with whistleblowing, etc. The EU Guidelines convey the mode of collecting personal data of whistleblowers, and the noxiousness of collecting sufficient data, relating to inter alia, racial and ethnic origin, political opinion, religious and philosophical conviction, trade union membership, etc. Personal data must be collected out of precise and legitimate reasons, and must not be processed further, contrary to those reasons. Only those data that are relevant for

the allegations of whistleblowers are necessary. Personal data, according to EU Regulation No 45/2001 are widely defined and refer to any information about the identified or identifiable natural person. Exactly for those reasons, it is necessary to limit the circle of important personal data for whistleblowing purposes, and to collect them in accordance with the EU Regulation (EC) No 45/2001 in just and legal manner, and for specific and legitimate purposes, and not to process them contrary to their purpose.

In order that personal data is revealed, a consent of whistleblower is necessary, and the exceptions are possible only in certain cases provided by law or by court decision. Starting from this rule as the most important one, it may be stated that the content of rules of confidentiality in the analyzed laws which regulate the protection of whistleblowers, is in accordance with the requirements of protection of whistleblowers in the Resolution of Council of Europe 1729 (2010) as follows: that legislation on whistleblowing should provide for certain impetus to those in charge of making decisions in state bodies and companies for creating internal procedures for whistleblowing, which will provide that the whistleblowers identity is revealed only in his/her consent or in case of a need for preventing serious and real threats to public interest. Various approaches on how the protection of personal data of whistleblowers should be provided, are poured in a dilemma – whether special provisions in the laws on whistleblowers protection should partly regulate confidentiality and additionally direct to subsidiary use of laws on confidentiality (protection) of personal data; direct to use of such law without special rules on the protection of personal data of whistleblowers or totally leave out the regulation of that issue in laws on protection of whistleblowers. The second and third case neglect the fact that whistleblowers are more exposed to retaliation, discrimination and ill treatment, that usually the extent of protection of personal data for all employees and citizens does not suffice, and that it is a problem for persons responsible for the protection of whistleblowers identity. If we presume that the potential whistleblower is expected to be capable of recognizing corruptive or other illegal act, and also to be aware of possible consequences including retaliation, and not to give up from reporting, then we must be aware how important the protection of his identity may be (Mirjanic, 2016, p. 795).

Neither protection of identity, nor the protection of other rights may be separated from the prohibition of abuse. The protection of personal data of whistleblowers is affected by the fact of whether the report of corruption and other violation public interest is done in accordance with law, and that whistleblower acted bona fide. The protection of freedom to whistleblow is accompanied with abuses of this right, and therefore the regulation of prohibition of abuse is the subject matter of laws on protection of whistleblowers. The relationship between the protection of identity of whistleblower and abuse of that right is pointed also by the examples from the comparative legislation, which indicates that persons who misuse the right of protected whistleblowing are not whistleblowers in the sense of legislative definition in the analyzed laws. Moreover, the whistleblower cannot be a person revealing internal information only for reason of obtaining personal gain and interest (Mirjanic et al., 2016, p. 100).

The legal validity of reporting and protection of whistleblower is affected by the fact of whether the report of corruption and of other violations of public interest is done bona fide. The whistleblower acts in good faith, or can be considered bona fide whistleblower if he believes that his report is directed for the well being of society and that it has been done in public interest. If the report was not done bona fide, then it misses an important feature prescribed by the analysed laws, and the reporter



would not have a right to be protected that is afforded to whistleblowers. According to Council of Europe Resolution 1729 (2010) on the protection of whistleblowers, it is considered that a whistleblower acts bona fide if he had reasonable grounds to believe that the information that he revealed are true, even if later they are found to be not true, and if he did not have an intention to accomplish some illegal or unethical cause. In line with the Resolution, national legislation should provide bona fide whistleblowers the reliable protection from retaliation (unfair dismissal, harassment or any other type of punishment or discrimination) and should order the employers to carry out corrective measures including interim measures pending the outcome of proceedings, and to determine the monetary redress in case that consequences of retaliation cannot be adequately removed.

## Protection of privacy of whistleblowers

Protection of identity of whistleblowers entails also the protection of privacy of whistleblowers. The mode of application of principles and rules on the protection of personal data of whistleblowers, and the quality of the protection of whistleblowers personal data, influences the protection of his private life, or his privacy. The protection of privacy is a part of the protection of whistleblowers, with the level of protection of privacy being even higher from the level of protection of privacy in general, and the higher sensitivity of whistleblowing is, proportionately higher the level of protection of privacy should be. The report of United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression points out that the right to protection of privacy and the freedom of expression are two interrelated issues, so that the violation of one right may be the cause and consequence of violation of another, where the need for adequate legal protection is especially underlined, in order to ensure that privacy of journalists, human rights defenders and whistleblowers will not be undermined by the state authorities. The right to respect of privacy under the European Convention of Human Rights, as pointed out *inter alia* in Niemietz case, assumes one imaginary inner circle surrounding the individual, in which the state cannot interfere, and the very fact of his crossing out that circle, by reporting the corruption and other illegal and unethical acts, does not mean that state authorities are permitted to infringe his privacy. If whistleblower knows that his privacy will not be jeopardized by his reporting of wrongdoings, he will opt to whistleblow. The protection of his identity is therefore a pertinent part of the protection of privacy and inherent to strengthening the whistleblowing institute.

## Conclusion

Whistleblowing as a mode of drawing attention of society to corruption and other illegal and unethical occurrences, is a tool which gets wider affirmation. The analyses shows that the protection of identity of whistleblowers in post transitional countries of Southeast Europe is uncertain and that it is a matter that should be further dealt with in the course of harmonization of national laws with with the European union law. Formalizing the process of whistleblowing and the protection of whistleblowers identity in confidential whistleblowing is in the focus of the EU and the Council of Europe, which makes an important model for countries of Southeast Europe which in their post transitional period and the period of acceding to the EU, adapt their legal systems to the urge of the fight against the corruption and the protection of whistleblower as an essential factor of that fight.

From the analyses at issue it appears that the stronger the protection of whistleblower identity and the more formalized the process of reporting including the safe channels of reporting, the stronger the protection of whistleblowing and the more efficient fight against the corruption. Therefore, the stronger protection of identity leads to stronger protection of privacy of whistleblowers and more often opting of these persons to do whistleblowing, which is a useful alarm to states fighting against corruption and similar demeanors in society.

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