

## CHALLENGES FOR IMPROVING THE LEGAL FRAMEWORK FOR PROTECTION OF WHISTBLOWERS IN THE MACEDONIAN LEGISLATION

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### ABSTRACT

The paper deals with the Macedonian legal framework for the protection of whistleblowers, emphasizing the "weak points" in the implementation of the law and by-laws.

A brief overview of the basic features of the Macedonian system for the protection of whistleblowers has been made, especially in the part of types of whistleblowing as well as the forms of protection of whistleblowers.

A comparison is made of specific legal solutions with the acts of the European Union and the Council of Europe, and potential solutions for improving the legal framework for the protection of whistleblowers are presented.

Reports of relevant institutions are analyzed and the "weak points" in the legal framework are presented through the analysis.

A special aspect is devoted to the protection of whistleblowers in legal entities in the private sector, that is, to the vagueness of legal decisions, the existence of legal gaps and the need for full regulation of specific issues.

The improvement of the legal framework for the protection of whistleblowers combined with taking measures to strengthen public awareness are factors for a better practical application of the Macedonian regulation for the protection of whistleblowers.

Whistleblowers are one of the strongest anti-corruption instruments, while the effective fight against corruption is a prerequisite for building a legal state, rule of law, respect for human rights, economic prosperity, stability and security.

**Keywords:** whistleblowers, crimes, protected reporting, corruption, public interest, rule of law

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## **Introduction**

For more than seven years, Macedonia has had the legal regulation for the protection of whistleblowers, namely, the law on the protection of whistleblowers was adopted in 2015 (Official Gazette of the Republic of Macedonia no. 196/2015) and amended twice, in 2018 (Official Gazette of the Republic of Macedonia no. 35/18) and in 2020 (Official Gazette of the Republic of North Macedonia 257/20). In addition, by-laws (Rulebook for protected internal reporting in institutions in the public sector, Rulebook for protected external reporting and Rulebook for guidelines for adopting internal acts for protected internal reporting in legal entities in the private sector) have been adopted for the implementation of the law, which regulate the way of dealing with protected reporting in institutions from the public sector and in the private sector.

However, in the area of practical implementation of the law, the results are modest. Namely, in accordance with the Law on the Prevention of Corruption and Conflict of Interest (Official Gazette of the Republic of Macedonia no. 12/19, Article 17) the State Commission for Prevention of Corruption (SCPC) keeps a register of authorized persons for receiving reports from whistleblowers. Thus, in the Annual Report (Annual Report on the work of the State Commission for Prevention of Corruption for 2021) on the work of the SCPC in 2021, it is stated that out of 1324 institutions, only 178 or 13.4% submitted notifications for appointed authorized persons for receiving reports from whistleblowers. In addition, according to the Law on Whistleblower Protection, institutions in the public sector are obliged to submit semi-annual reports on the receipt of whistleblower reports to the SCPC. From the data in the Annual Report of the SCPC for 2021, it is noted that in the second half of 2021, only 75 institutions from the public sector submitted a semi-annual report.

Such data show that a lot of work needs to be done on the implementation of the whistleblower regulation, both in the public sector and in the private sector, which is noted to have been omitted in the law in certain segments. It is for this reason that efforts should be made to strengthen the legal framework for the protection of whistleblowers in accordance with the leading European acts in this area. In addition, it is necessary to educate employees about the essence of the Law on Whistleblower Protection, both from the public and from the private sector, but such trainings should also include other related regulations,

because it is unrealistic to expect employees to know different regulations that refer to their relevant rights.

### Protected reporting in Macedonian legislation

According to the Law on Whistleblower Protection, protected reporting is a reporting, i.e. a disclosure that conveys a reasonable suspicion or knowledge that a criminal, unethical or other illegal or impermissible action that injures or threatens the public interest has been committed, is being committed or is likely to be committed.

A whistleblower is a person who makes a protected reporting in good faith.

There are several categories of persons who can appear as whistleblowers:

- employee for an indefinite or definite period of time in the institution or legal entity;
- job candidate, candidate for a volunteer or intern position in the institution or legal entity;
- a person who is or has been a volunteer or intern in the institution or legal entity;
- a person who on any grounds is or has been hired to perform a job by the institution or legal entity;
- a person who on any grounds is or was in a business relationship or another form of collaboration with the institution or legal entity;
- a person who uses or has used services in the institution or legal entity in the public and private sector.

A protected reporting is made as a protected internal reporting, a protected external reporting or a protected public reporting, anonymously or confidentially, in good faith and based on a reasonable belief at the time of the reporting that the information contained in the report is true.

The whistleblower is not obliged to prove the good intention and truthfulness of the report. The whistleblower is protected by law and is guaranteed confidentiality.

The whistleblower makes a protected reporting in the institution, i.e. the legal entity, where he has suspicions or knowledge that a criminal offense has been committed, is being committed or will be committed, or

other illegal or impermissible behavior that harms or threatens the public interest.

The whistleblower makes protected internal reporting to a person authorized by the head of the institution, i.e. the legal entity for which he is reporting, i.e. to a person authorized to receive reports from whistleblowers. In the institution, i.e. the legal entity where there is no authorized person for receiving reports from whistleblowers, protected internal reporting is done to the head of the institution, i.e. the legal entity.

The whistleblower can make a protected external reporting to the Ministry of Internal Affairs, the Public Prosecutor's Office, the State Commission for Prevention of Corruption, the Ombudsman or other competent institutions, i.e. legal entities, if:

- the misconduct involves the manager of the institution or company;
- he/she does not receive information on measures within the legal timeframe;
- measures have not been taken;
- he/she is not satisfied with the measures, or has doubts that measures will not be undertaken; or
- he/she fears harmful consequences to him/her or a person close to him/her.

A whistleblower may make protected public reporting/ disclosure by making information publicly available if:

- no proper procedures are in place for internal or external reporting;
- the person did not receive information about measures taken in response to an internal or external report within the legal timeframe;
- no measures were taken; or
- there is an “easily recognizable threat” of evidence being destroyed or the misconduct being concealed

The whistleblower and a person close to him are provided with protection from any type of violation of rights, when determining responsibility, sanction, termination of employment, suspension from a job, assignment to another job that is less favorable, discrimination or harmful action or danger of harmful actions occurring due to protected internal and external reporting or protected public reporting.

Protection is primarily provided by the institution, that is, the legal entity where the reporting was made. If protection is not ensured in the institution or legal entity, the whistleblower reports this to the State Commission for Prevention of Corruption, the Ombudsman, the Inspection Council, the Ministry of Internal Affairs and the Public Prosecutor's Office of the Republic of North Macedonia.

In addition to administrative protection, the whistleblower has the right to judicial protection in court. With a lawsuit, he/she can request a determination that a harmful action has been taken, a ban on performing a harmful action, annulment of an act, removal of harmful consequences, compensation for material and non-material damage.

### **Approach to improving the legal framework**

Acts of the Council of Europe and the European Union should be taken as basic documents for improving the legal framework for the protection of whistleblowers in North Macedonia, first of all the Recommendation CM/Rec(2014)7 of the Committee of Ministers of the Council of Europe to the countries members for the protection of whistleblowers and Directive (EU) 2019/1937 of the European Union for the protection of persons who report violations of Union law.

By comparing the Macedonian whistleblower protection law with the above-mentioned international acts, the "weak points" in the Macedonian law are determined, that is, the challenges for improving the national legal framework, which at the same time will mean harmonization with the law of the European Union.

Thus, the law states that in order to be protected, the person must make the reporting in good faith and based on a reasonable belief that at the time of the reporting, the information contained in the report was true. Under the law, individuals are not required to prove that they acted in good faith and that their report is true. The whistleblower is also required to act "with due care and conscientiousness." Such a provision is too subjective and opens up the possibility of testing the motives and denying the protection of the rights of honest whistleblowers. The essence is in the evidence, not in the motives, and this provision tests the whistleblower. It is necessary to replace the subjective with an objective approach (Law on Whistleblower Protection, article 3).

The EU Directive directs whistleblowers to make the report, first of all, through internal channels, however, which is very important, the Directive emphasizes that whistleblowers have the right to choose whether to make the initial report internally or externally.

In contrast, in the Macedonian legislation, there is no possibility of choice, that is, as a rule, reporting is the internal first. An external reporting can occur in one of the six situations provided for in the law, while it is quite clear that it will not result in an internal reporting if the report is directly or indirectly directed against the head of the institution, i.e. the legal entity where it is reported, and at the same time, an authorized person for receiving reports from whistleblowers has not been appointed.

Macedonian law does not specifically state that whistleblowers who report anonymously and who are identified later are protected from retaliation. In contrast, the EU Directive (Directive (EU) 2019/1937 Article 6 paragraph 3) states that whistleblowers who report anonymously and are later identified are protected from retaliation. Such reporting can be with reliable evidence of a larger scale and precisely because of this, the protection of such anonymous whistleblowers should be ensured.

The law prohibits "whistleblower abuse of reporting" and persons who abuse reporting by knowingly reporting false information with the purpose of causing harmful consequences or if they have not checked whether the reporting is accurate and reliable with due care and conscientiousness, to the extent that circumstances allow, they lose legal protection. It is stated in the law that the determination of the misuse of the reporting of the whistleblower, due to which harmful consequences occurred, is the basis for initiating a procedure to determine his responsibility.

The subjectivity of "whistleblower abuse of reporting" in the section "if with due care and conscientiousness, to the extent permitted by the circumstances, has not checked whether it is true and reliable" can easily be used to deny protection to legitimate whistleblowers and it represents absolute uncertainty for whistleblowers. Therefore, a change in approach is needed, that is, responsibility should be limited to knowingly reporting false information (Devine, Worth, Gap Analysis of Whistleblower Protection Laws in the Western Balkans and Moldova, pg. 85)

In North Macedonia, the Ministry of Justice supervises the implementation of the law, but the EU Directive requires that an Agency be appointed to provide assistance for reporting and protection from retaliation through free information and advice on rights, reporting channels, contact persons, procedures, legal remedies and protection against retaliation.

The above is not regulated by the Macedonian law and represents a gap that can have a substantial impact on its implementation, since it is unlikely that whistleblowers will know the procedure or their rights in detail if they do not have adequate training or information. Lack of information can lead to loss of protection if whistleblowers violate a legal provision.

In the same direction is the request from the EU Directive to appoint an Agency that will promote the whistleblower systems in order to foster positive public attitudes and facilitate reporting. This request is of an essential nature as it implies the establishment of a body to implement a public campaign for the successful implementation of the law. This is an issue that is not regulated in the Macedonian law and it has an impact on the situation with the weak practical application of the provisions of the law.

According to the EU Directive, the burden of proof is on the employer, that is, to show that any actions taken against the employee are not related to or motivated by the fact that the employee filed a report, considered filing a report, or helped someone to file a report. Employees are not required to establish a connection between the filing of a report and the actions taken against them.

It is similar in the Macedonian legislation, where it is stated that in the event of a dispute regarding the existence of a violation of the rights of the whistleblower and his close person for the purpose of reporting, the burden of proof is on the side of the institution, i.e. the legal entity that violated the rights of the whistleblower and the members to his family (Law on Whistleblower Protection, article 11). However, in order to comply with the EU Directive, the law should state more explicitly that the burden of proof is on employers to prove that any adverse action taken against an employee who has made a protected reporting is not related in any way to the fact that he/she filed an report (Devine, Worth, Gap Analysis of Whistleblower Protection Laws in the Western Balkans and Moldova, pg. 83).

The Law on Whistleblower Protection applies to protected reporting in the public and private sectors. But if the law is analyzed, it will be noticed that the central focus is on the public sector. One has the impression that protected reporting in the private sector is not fully developed, that some provisions are not clear enough while others are missing. Thus, even the SCPC in the Annual Report on its work for 2021 (Annual Report on the work of the State Commission for Prevention of Corruption for 2021, p. 45) states that although legal entities from the private sector do not have a legal obligation to submit semi-annual reports on receiving reports from whistleblowers, in 2021, 15 reports from the private sector were submitted to them.

All legal entities in the private sector with at least 10 employees have the obligation to implement the law.

The most significant by-law for the regulation of protected reporting in the private sector is the Rulebook for guidelines for the adoption of internal acts for protected internal reporting in the legal entity in the private sector.

The aforementioned Rulebook is a guide for legal entities in the private sector when adopting their internal acts, which is actually a legal obligation. The internal act must be publicly announced and available to employees.

Such internal acts should contain provisions for the authorized person for receiving reports, for the protection of the whistleblower and his close persons, for the nullity of provisions of employment contracts that are contrary to the purpose of the law, for the protection of the identity of the whistleblower, for the protection and storage of materials related to protected reporting, as well as for periodic self-assessment in order to improve protected reporting.

The Law on the Prevention of Corruption and Conflict of Interest states that the SCPC is competent to keep a register of authorized persons for receiving reports from whistleblowers in accordance with the Law on Whistleblower Protection. This provision means that the SCPC records all authorized persons, both from institutions and from legal entities from the private sector.

That the situation is incomplete is shown by the data from the Annual Report of the SCPC for 2021, where in the table section for the Register of authorized persons for receiving reports from whistleblowers,



the data for the number of institutions - 1324 is indicated, that is, legal entities from the private sector are not mentioned, nor authorized persons for receiving reports from whistleblowers for the private sector.

The above indicates that there is no complete and precise picture of the number of authorized persons who should be entered in the Register maintained by the SCPC. To make the situation more complicated, even the institutions do not submit a notification to the SCPC because out of 1324 institutions, only 178 submitted data for the appointment of an authorized person.

## **Conclusion**

The effective fight against corruption is a prerequisite for building a legal state, rule of law, respect for human freedoms and rights, economic prosperity, stability and security.

There are a large number of instruments to fight against corruption, but the inclusion of all citizens in that fight is an essential factor because the suppression of corruption rises to the highest level.

Whistleblowers are a very strong anti-corruption instrument because the reporting of illegal, illicit, unethical behavior comes from within, ie, from the institution or legal entity from the private sector with whom the whistleblower had some contact.

The law must protect whistleblowers, from every aspect, because through effective protection, citizens are encouraged to report illegal and other actions, and this is precisely the key to success.

North Macedonia has a regulation for the protection of whistleblowers, a law and by-laws, but several "weak points" are detected in the above and they should be overcome through amendments to the law, that is, through the implementation of solutions resulting from legal acts of the Council of Europe and the European Union.

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