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WHAT WOULD ADOPTING THE WHISTLEBLOWER PROTECTION BILL MEAN FOR SERBIA?

The intersection of provisions of labor, criminal, company and commercial law, although hard to imagine due to the diversity of these fields, does, however, exist. It becomes most visible in cases of whistleblowing within a company, when the whistleblower draws attention to the existence of corruption or financial fraud in the company in which he works. Pointing out irregularities in company operations, embezzlements, corruptions; in a word drawing attention to committed frauds, triggers a number of consequences for the whistleblower, from criminal to socio-economic, and can sometimes even drive the whistleblower to financial ruin. Losing his job is a consequence frequently suffered by anyone daring to report irregularities. Employers, however, are well aware of the fact that reporting irregularities is not a legal cause for termination, so they often resort to fabricating causes for termination and usually quickly remove the whistleblower from the work environment, as practice has shown (the pattern is the same in both public and private companies). Moreover, instead of a regular termination procedure, planned harassment at work frequently starts to occur after the whistleblowing, both horizontal (by peers, usually upon covert instructions from the director), and vertical (directly by the whistleblower's superior). Both cases are a direct, clear and unconcealed violation of the whistleblower's rights, by direct or indirect discrimination. To reduce such cases to a minimum, it is essential to have a clear and well-defined legal framework, with strict rules, structured in the spirit of the criminal doctrine, to regulate the issue at hand.

We have to mention that Serbia is among those countries struggling with corruption, although a mild improvement from past years has been observed. According to the latest Transparency International report for 2013, Serbia is 72nd of the 177 counties included in the list. Index 42 assigned to Serbia indicates the current level of corruption. If a country is assigned index 100, that means that corruption is practically nonexistent. Denmark is in first place in the EU, with index 91, while of EU countries Serbia could be compared with Greece, which has similar ranking.

Which solution and what kind of protection for whistleblowers does the Serbian legal system, i.e. the current legal framework, have to offer? The rights of whistleblowers are currently protected by various regulations and provisions contained in:

The Criminal Code, Anti-corruption Agency Act, Law on Free Access to Information of Public Importance, Law on Preventing Conflict of Interest in Exercising Public Functions, Antimonopoly Law, Labor Law, Prevention of Harassment in the Workplace Act, Company Law, Law on Financing Political Parties, Public Procurement Act.

Now to return to the abovementioned intersection. When a whistleblower encounters a problem in exercising his rights, diverse legal regulations need to be interpreted in light of the specific case, which in particularly sensitive cases usually causes great legal insecurity for the whistleblower, who is most often victimized, contributed to additionally by the press.

In 2011, with a view to protecting whistleblowers, a "Rulebook on Protection of Persons Reporting Suspicions of Corruption" was adopted as a transitional solution until the enactment of the Law. The Rulebook is a bylaw and not as far-reaching, and cannot achieve as much as the enactment of a Law regulating this matter could. This is supported by the deficiencies of the Rulebook itself, visible in the pronounced lexical impreciseness and occasional lack of legal logic and systematic coherency which can be seen in some of the provisions of this Rulebook.

Good news for Serbia, which could lead to an increased level of legal security, is that a Whistleblower Protection Bill has been prepared (hereinafter: the Law), and a public discussion has been held thereon in December 2013 and January 2014. As insecurity in a company indirectly affects its business partners, and as turbulence in the business world frequently begins with a whistleblower, this Law could become one of the pillars of security in business operations, and could thus protect not only the whistleblower, but his employers and coworkers as well, since its goal is to clearly define the procedure for reporting suspicions of unlawful acts, as well as the rights and obligations of all parties in the procedure. The enactment and implementation of this Law is expected to help increase the number of reported and investigated cases of corruption, but also to guarantee protection to any conscientious person reporting such abuses. According to research conducted in Europe and the USA, whistleblowers are to thank for the discovery of more than half of the frauds committed. To protect them from persecution, and to give the country an efficient weapon in the fight against corruption and other wrongful acts, it is necessary to enact this bill. For the first time this is agreed on by the governing structures, governmental authorities and members of non-governmental organization alike, so the adoption of this bill is advocated by:

The Association of Public Prosecutors and Deputy Public Prosecutors, Judges' Association of Serbia, Commissioner for Information of Public Importance and Personal Data Protection, Anti-Corruption Agency, Anti-Corruption Council, Transparency Serbia, portal "Pištaljka", Coalition for Oversight of Public Finances, etc.

Among the top priority goals this Law should achieve are higher publicity in decision-making processes and regulating harassment in the workplace, observance and strengthening of positions of independent governmental bodies in the fight against corruption and changing regulations governing the media in order to stop the practice of manipulating their influence.

In its previous report accompanying its opinion on Serbian candidacy, the European Commission stated that the application of whistleblower protection in practice is still poor, despite the abovementioned Rulebook (adopted by the Anti-Corruption Agency). Given the bilateral screening of chapter 23 in the negotiations between Serbia and the EU, and one of the main comments from the European

Commission being that the Whistleblower Protection Law needs to be enacted as soon as possible, the road that Serbia should take, at least in this specific matter, is very clearly defined.

For the system to function and be sustainable, it is essential to have a legal guarantee that nothing can happen if an issue is brought up in good faith to protect the public interest, i.e. that lawful conduct cannot bring about consequences for the whistleblower under criminal law, or indeed under labor law, or administrative law either, and that the whistleblower will be guaranteed protection against retaliation and potential revenge by effective protection under criminal law. Enacting a separate law on protection of whistleblowers is a much better move than the potential alternative – amendments and supplements to the wordings of the various laws governing this issue.

Due to the very nature of the regulation, the Rulebook contains certain restrictions that could not have been overcome because of the hierarchal structure of regulations defined by the Constitution of the Republic of Serbia. Thus we had situations in which certain forms of protection were to be provided in compliance with legal powers, yet no current law contained such powers, while, on the other hand, for the Rulebook to provide for such powers could be perceived as unconstitutional. So for instance the Anti-Corruption Agency Act itself did not specify the powers that the Agency could exercise in protecting whistleblowers, and neither did any other current regulation. Another shortcoming is that protection under this Rulebook is provided only for reporting to the Agency (and not, for example, to the public prosecutor), i.e. only for reporting corruption in the body in which the whistleblower works (e.g. corruption in a Ministry, but not reporting corruption in a public institution whose work this Ministry oversees). Moreover, the scope of protection offered to the whistleblower is extremely narrow. as the only power expressly mentioned in the Rulebook itself in the contest of assistance is "protection of anonymity", and only if this is expressly requested by the whistleblower at that.

On the other hand, the Law offers full protection to persons reporting suspicion of corruption. This would remove all the shortcomings of inadequate and partial protection provided only to certain categories of whistleblowers. The Law provides for three types/procedures for whistleblowing which are regulated in detail, and thus the Law classifies whistleblowing by origin as:

- internal whistleblowing (notifying the employer);
- external whistleblowing (notifying the proper authorities);
- public whistleblowing (notification by way of public media. the Internet, public gatherings or in some other public manner).

The condition for protection of the whistleblower's rights is that the notification must be aimed at disclosing an act classifiable as a criminal act punishable by three years in prison or more, or an act immediately endangering the life, health or safety of humans, flora or fauna, the environment, violating basic human rights and freedoms or causing great damage, regardless of whether the specific act is prohibited by a law or some other regulation. Furthermore, the Law specifies a subjective period of protection, namely one year from the date of learning of the act, or an objective period of ten years, after which legal protection is precluded.

Apart from protection of the whistleblower, the Law takes a step further and provides for protection of his related persons as well. Moreover, the procedure for related persons to seek protection is highly simplified, since the Law specifies that it is sufficient for the related person to demonstrate the

probability of a harmful act having been committed against him because of his relation to the whistleblower, which greatly facilitates exercising the right to protection.

In line with the current Personal Data Protection Act, special attention is paid to protecting the personal data of the whistleblower, and this Law determines the duty of persons authorized to receive notifications to treat the received data as confidential.

This Law also regulates the content of actions filed by whistleblowers with a court of law, and also defines the prosecutors attorneys in fact, whereby the whistleblower can be represented in the procedure by the Commissioner for Information of Public Importance and Personal Data Protection, Protector of Citizens, Provincial Ombudsman, Ombudsman for Local Self-Government Unit, and Anti-Corruption Agency, if the whistleblower so empowers them. Another novelty introduced by this Law is the whistleblower's right to damages, and also transferring the burden of proof to the defendant – the employer (similar to the mechanism specified in the Prevention of Harassment in the Workplace Act). Still, the Law does not provide for monetary awards for whistleblowers, although such suggestions have been put forth.

Since even the most perfect law is but a dead letter if not implemented effectively, the fact that a consensus has finally been reached on the public scene, both among government officials and the opposition and between representatives of the non-government sector, and that institutions are preparing and anticipating its implementation, certainly means good news. Now we have hope that after the elections, regardless of the results, this Law will be enacted, and will come into force in 2014, to be an integral part of Serbian legal culture, decrease corruption and increase legal security in the future.

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