



**THE LAW ON PROTECTION OF WHISTLEBLOWERS -
what is the meaning of norms and where it can be improved?**

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THE LAW ON PROTECTION OF WHISTLEBLOWERS –
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Legal Framework

The role of whistleblower protection in the fight against corruption

Protecting whistleblowers from retribution, or protecting the people who are willing to indicate illegal and harmful acts for the purpose of public interest, is one of the most important strategies that the government has to implement in order to fight corruption. The positive outcomes of such protection are multifaceted. Since the fear of adverse consequences is one of the most common reasons for not reporting corruption, by protecting whistleblowers from harmful legal and factual actions of other parties they become encouraged to share their knowledge with those who can solve the problem.

Protection is not an end in itself. It is a means for public institutions and private companies, national control authorities and, finally, the entire interested public, to become aware of a threat to public or their own interests and to engage available resources to eliminate this threat. When it comes to corruption, the protection to whistleblowers leads to a maximum number of cases to be detected and reported, and then effectively investigated.

Knowing that this protection system operates efficiently is not only beneficial for the detection of existing cases of corruption, but is also preventive. The potential participants in the corruption are faced with another risk factor – that they will be discovered, and they get one more reason not to get involved in an act of an uncertain outcome.

Protection of whistleblowers encourages civic engagement and strengthen moral values and cooperation within the community

Finally, various forms of protection of whistleblowers, presentation of the benefits to society that resulted from the whistleblowing system, and promotion of whistleblowers as conscientious protectors of public good, citizen rights and legal work, encourage civic engagement, and strengthen moral values and cooperation within the community. This significantly expands the number of those who are fighting corruption and establishes a system of defense that is many times cheaper and much more effective than engagement of a repressive state apparatus.

Whistleblower protection in Serbia - rules and strategies before the Law adoption

Even though the benefits of whistleblowing are anticipated in various areas, they may be the substantial in terms of protection of people's health and safety. In Serbia, this issue was mostly monitored within the context of fight against corruption - in the media, political discussions, and finally, regulations.

The main cause for such situation is reflected in the activities carried out by anti-corruption non-governmental organizations and national anti-corruption authorities in the Republic of Serbia. No less important was the impact of the global and European initiatives to fight corruption, the introduction of whistleblower protection in international anti-corruption conventions and finally, the establishment of mechanisms for monitoring the implementation of these conventions.

Before we go any further, it should be recalled and always kept in mind, that some of the issues that fall within the set of standards for the protection of whistleblowers already existed in our legal system even before the term "whistleblower" was first used in Serbian language. Among other things, very important are the rules that allow the termination of data confidentiality that was established to hide abuses, the possibility of exemption of liability in criminal proceedings, the rules on the confidentiality of journalists' sources, the general rules for protection against discrimination, the standards on prevention of workplace harassment, the rules for protection of witnesses in criminal proceedings, and certain provisions on the rights and obligations of public servants.

Serbia ratified the UN Convention Against Corruption in October 2005, and the Council of Europe's Civil Law Convention on Corruption in November 2007. Both conventions speak to a certain extent on the protection of whistleblowers. Article 33 of the most important global anti-corruption convention describes the "Protection of reporting persons". On the basis of this Article "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention". Separate article addresses the protection of witnesses.

This standard refers only to one part of whistleblowers, those who file criminal charges. We also point out that the Serbian version of the Convention uses incorrect translation of the English expression "in good faith" in its literal meaning "with good intent". In fact, the expression does not refer to any intent, but to conscientiousness - that the person filing a complaint believes in the authenticity of the information. Such a narrow definition is not mandatory for signatory countries, but only optional. The rules are not defined as a set of minimum standards, but the countries are left to define them, depending on the rest of the legal system, cultural, and other factors. However, it is very beneficial that this international standard seeks to provide protection from "any unjustified action."

Based on this provision, the advocates of protection of whistleblowers may request for the protection to be granted not only in relation to an unlawful legal act brought by an organ as a result of retaliation (e.g. a decision on dismissal), but also in relation to the actual action that harms whistleblower (workplace harassment, or denial of service). It is even more important to note that the UN Convention on the protection of whistleblowers is not conditioned by any kind

of association with the place where the corruption took place. Therefore, the countries that wish to comply with this Article of the UN Convention should provide adequate protection to anyone who reports corruption, regardless of whether this is a public official, an employee of a company, or any other citizen. In this regard, the Convention is committed to providing protection to a wider audience than the Laws that protect whistleblowers around the world, and which are mainly focused on whistleblowing within working or similar relationship. Based on this provision, protection should be given to those who addressed the competent authority (public prosecutor's office, and other agencies that may have some jurisdiction over specific suspicion of corruption - Anti-corruption Agency, Public Procurement Office, State Audit Institution, etc.).

Civil Law Convention on Corruption speaks of "Protection of employees" (Article 9): "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities. "

This Convention refers only to employees, which is equally applicable to public servants and persons employed in private sector. It refers to the obligation of the states, and not just to the possibility of regulating one area of legislation. The scope of protection is formulated somewhat differently than in the previously presented convention. In this case, the protection is requested from "unjustified sanctions", which could be interpreted as the fact that protection will be provided in cases when a punitive measure is imposed, but not in cases when an employee suffers actual and informal retaliation. The standard recommends that suspected corruption should be reported to the state body responsible for further action, but also to a "responsible person", which could be interpreted as providing an opportunity for addressing the special officer within the company or government institution in which the problem occurred. The whistleblower does not need to have complete evidence on corruption, it is sufficient that there is a doubt with grounded reasons to believe in it.

The introduction of the first forms of explicit protection of whistleblowers is a result of GRECO recommendations, after the first and second rounds of evaluation from 2006. The evaluators concluded that "there are no legal measures to ensure confidentiality and protect civil servants who report corruption from retaliation (the so-called "whistleblowers"), and recommended "to ensure that civil servants who report suspicions of corruption in public administration in good faith (whistleblowers) are adequately protected from retaliation when they report their suspicions".

In their attempt to obtain a positive assessment, Serbian authorities introduced changes to Civil Service Act, complaint committees, and special phone lines for reporting corruption. They also announced changes in the Law on free access to public information, which was sufficient for the assessment that the recommendation was partially filled. However, the assessment remained

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unchanged in June 2010, despite the fact that specific standards have been introduced to both of these laws in 2009, and to the adoption of the Law on prevention of workplace harassment. GRECO has particularly negatively assessed amendments to the Law on free access to information of public importance, because of their limited scope. After the report, Law on the Agency for the fight against corruption has been amended in the direction of providing protection for whistleblowers, but this was not a subject of additional GRECO assessment.

Protection of whistleblowers became a part of mandatory commitments after the adoption of strategic anti-corruption acts in 2005, although to a limited extent - Protection of persons who report corruption and witnesses (recommendation no. 48) and the Establishment of mechanisms for reporting unlawful and unethical work of civil and public servants and mechanisms for protection of persons who report such cases (recommendation no. 84). However, these recommendations have been denounced by the action plan adopted next year, because the activities were clearly not sufficient to achieve the objective. These activities were not implemented until the former strategy was in force.

Public procurement development strategy of the Republic of Serbia from September 2011 paid sufficient attention to the issue of whistleblower protection within the context of examining measures to fight corruption in the procurement process (section 5.1.3). "3) the introduction of effective legal mechanisms for protection of whistleblowers in public and private sector, which includes protection in cases of disclosing irregularities within the body or organization, and informing external supervisory bodies and general public in certain cases;"

The next strategy for the fight against corruption paid sufficient attention to adequate protection of whistleblowers. The condition and efforts in this area as defined in Chapter 4.9. **Establishing efficient and effective protection of whistleblowers (persons who report suspicion of corruption)**, as follows: "Current protection of whistleblowers is regulated by the Law on civil servants, the Law on free access to information of public importance, the Law on the Agency for fight against corruption, and the Rulebook on the protection of persons who report suspicion of corruption, which was adopted in 2011 by the Agency. Such protection is limited in scope on several grounds (definition of a person who enjoys protection, scope of protection, cases of granting protection, non-regulated area of sanctions for those who perform retribution, lack of regulation on providing compensations, as well as rewarding whistleblowers). Therefore, it is necessary to complete the legal framework in this area through the adoption of a special law that would deal with the protection of persons who perform whistleblowing in public interest, both in public and private sector. In addition, it is necessary to gain the trust of public and potential whistleblowers that the adopted laws would indeed guarantee full protection of these persons. "The activities were further defined in the Action Plan from 2013, which was significantly revised in July 2016. At that time, the two activities were identified as implemented (adoption of laws and bylaws), and new deadline was set for the other two activities that became a part of the Action plan for Chapter 23 negotiations between Serbia and the EU.

The framework of Law analysis

This review of the Law on the protection of whistleblowers was not written from the perspective of any of the possible target groups that the LPW most often interacts with (potential whistleblowers, employers, competent authorities, judges). However, it is expected that it will be beneficial for each of these groups of Law users and obliged entities.

Each of the norms of this Law and the accompanying bylaws was specified in the original text, and then commented on. The comments provide explanation of standards, and sometimes also point to other related regulations. During the analysis, we dedicated most attention to those issues for which we found that can create problems in the application. In some cases, this refers to the rules that are not clear enough and can be interpreted in different ways. In other cases, this includes the standards that are not needed because the matter was already regulated by other regulations or articles of the same law. Finally, the third group of cases implies the situations where it would be useful to amend the standards. Alternative solutions were presented for some issues, and those solutions constitute equally legitimate response to the problem and the existing standards.

The Law on the Protection of Whistleblowers does not function in a vacuum, but within the legal system and constitutional order of Serbia. As such, no analysis of its regulation and application can be complete unless it embraces the standards and application of other related regulations. This analysis only sporadically touches on these issues and cannot be considered to solve all possible concerns. And they do exist. The Law on the Protection of Whistleblowers contains the rules that could be interpreted as an authorization given to a court, in order to provide protection of whistleblowers, to ordain the person who retaliates to do something that he or she would not be obliged to do under another law, or to not do something that he or she would be allowed to do under another law. On the other hand, there are numerous provisions in which the LPW limited its application to the points of intersection with other laws. The intention of the legislator in this regard is supported by some parts of the presentations of the proposer of the Law, the Minister of Justice, during the adoption of this act.

Our analysis of standards in connection with possible interpretations has taken into account the explanation that the Government provided along the draft law, the report of the public debate that includes the reasons for the rejection or acceptance of certain proposals presented at the hearing (the first and second draft), the answers provided by the government in regards to the amendments in the process of Law adoption in the Assembly, as well as discussion of the authorities and the opposition, for some of the proposed amendments. In addition to these sources, our analysis utilized publications or manuals published by the Ministry of Justice, JRGA - Judicial Reform and Government Accountability Project, and internet portal "Pištaljka" ("Whistle").

It should be noted that Transparency Serbia actively participated in public debate after the first (December 2013) and the second (June 2014) draft of this law. In addition to our participation in public debates, we proposed the amendments or asked for explanations of almost every article of the law. During the parliamentary adoption stage, in mid-November 2014, we gave suggestions to parliamentary groups, on the basis of which the opposition MPs formulated amendments to 27 articles of the draft law. However, only two amendments were accepted. Mistakes were also corrected in two more articles, upon the recommendation of the Parliamentary Committee on Justice. Public discussion stage was more receptive to accepting suggestions. In fact, some of our recommendations about the first draft of the Ministry were

accepted, which was noted in the explanation. Thanks to this effort we made, the involvement of other participants in public debate, and the understanding of the Working Group, the text of the Law eliminated some cardinal mistakes that could have been included in December 2013 draft.

The major part of our recommendations and comments was not accepted in the final version of the Law. The explanations in this regard were not always logical, and in some cases were completely omitted. In addition to the themes that were the subject of amendments, there are many other issues that need to be clarified and discussed, and for which there was not enough time or opportunity. In some cases, this refers to legitimate differences of conceptual nature (e.g. will a whistleblower have the right to claim a reward in some cases). In many other situations, the cause of disagreement was probably a different view of the position that the law should take within the legal system, and the answer to the related question - should the law provide protection to a whistleblower who violated some other regulations by disclosing information of public interest?

Should the law provide protection to a whistleblower who violated some other regulations by disclosing information of public interest?

Part of the disagreement stems from the fact that the text of the Law focuses only on some form of whistleblowing and protection of whistleblowers - cases where whistleblowing is performed by persons with work engagement who suffer retaliation in their workplace. This led to an incomplete development of standards that are supposed to provide protection in cases where whistleblowing is performed by service users and other persons who may be whistleblowers or suffer adverse consequences due to their act of whistleblowing.

One part of criticism presented in the analysis of the LPW was already available to decision-makers (Ministry of Justice and members of parliament), and to public (in the form of press releases, initiatives, and analyzes published on the website of Transparency Serbia). However, these analyzes are now significantly amended, revised in some places, and many doubts and observations are presented to the readers for the first time.

Even though the "protection of whistleblowers" is greatly emphasized, the Law also deals with whistleblowing, and the actions that should be taken by employers and public authorities contacted by whistleblowers. These issues, which touch on the substance of the main purpose of protection of whistleblowers, are only partially regulated by the Law. This presents another intersection of the LPW with other regulations that has not been sufficiently explored so far and which should be given more attention in the future.

Some of the conceptual issues that were not discussed in detail when drafting the LPW were the subject of analysis in the preparation of the Model Law on whistleblowing and the protection of whistleblowers made by a working group that was established by the Commissioner for Information of Public Importance and Personal Data Protection. This working group, whose member was Nemanja Nenadic, Program Director of Transparency Serbia, presented the Model Law (the text shaped into specific standards) in April 2013, after which the Commissioner submitted the document to the Ministry of Justice.

Six months later, the Model was used as a source for the preparation of draft law within the

working group established by the Ministry of Justice, which included the representatives of several ministries, judicial authorities, and certain other authorities, several international institutions, as well as the web portal "Whistle". Even though there are similarities between these two documents, the solutions reached in the final text of the LPW mainly differ from those that were planned by the Model, including the issue of the authority that provides temporary protection to Whistleblowers (in the Model this is Ombudsman/court, in the LPW it is court), the conditions that whistleblower must meet in order to obtain protection (less strict in the LPW), the possibility of alerting the public by secret data (more presented in the Model), the question of rewards (allowed by the Model in some cases) and the question of the circle of persons who can enjoy legal protection (broader in the Model because it does not require previous association with the "employer").

Reasoning of the proposer of the Law

The Government of the Republic of Serbia, and the Ministry of Justice serving on its behalf, stated that the reason behind passing this law was the fact that this was stipulated by the National Strategy for fight against corruption for the period from 2013 to 2018 ("RS Official Gazette", No. 57/13) and the accompanying Action Plan, "Official Gazette of RS", No. 79/13).

Another immediate reason for the adoption of the Law was identified in international obligations in Article 33 of the UN Convention on the fight against corruption and in Article 9 of the Civil Law Convention on Corruption of the Council of Europe. It was noted that the adoption of this law fulfills the obligations under the recommendations of the Group of States against Corruption of the Council of Europe (GRECO). In this regard, it may be noted that the assessment of association with international standards is true when it comes to the Convention of the Council of Europe and the GRECO recommendations in 2006, but not in terms of Article 33 of the UN Convention. Specifically, this article addresses the protection of persons who report corruption to authorities, without requiring previous association between them. On the other hand, the LPW identifies whistleblowers only as persons who have had a previous relationship with the "employer" (e.g. work engagement, service provision).

The explanation acknowledges that "positive general legal acts in Serbia regulate certain protection of "whistleblowers", but only for limited categories of these persons, without establishing proper mechanisms for their protection. According to the proposers, the "Law provides the full scope of protection to persons reporting suspicion of corruption and thereby eliminates the disadvantages of inadequate and insufficient protection of certain categories of whistleblowers". "The protection of whistleblowers largely protects public interest, given that whistleblowers are persons who report corruption. Therefore, whistleblowers should not suffer any harmful consequences, and it is necessary to provide them with appropriate legal protection."

With the exception of more or less binding standards of international legal instruments, the main declared reason for passing the Law was to protect public interest, primarily through reporting suspicions of corruption, which would be achieved by improving the legal framework, by means of protecting whistleblowers from harmful consequences.

The main part of the reasoning, "the explanation of basic legal institutions and individual solutions" is not particularly helpful for the understanding and subsequent application of the Law, because it mainly restates the content of provisions. When it comes to the definition of "whistleblowing", it is emphasized that the term is broader than the standard set by the

Recommendation of the Council of Europe and Resolution 1279 (2010), so that "it includes the disclosure of information concerning the exercise of public powers contrary to their entrusted purpose and for the prevention of larger scale damages."

With regard to whistleblowers' personal data protection, the reasoning states that non-compliance with the provision of Article 10 (the obligation of every person to protect the data on whistleblowers) should be stipulated as a criminal offense under the Criminal Code, which was firmly promised. However, despite the fact that the Criminal Code was amended on the initiative of the same Ministry that prepared this act, no criminal offense relating to whistleblowers has been introduced or mentioned up to date. The end of the explanatory note contains the common false claim that "the implementation of this Law does not require funding from the budget of the Republic of Serbia".

An integral part of the reasoning is "the Analysis of the impacts of regulations", which states the intentions of the proposer in more detail. It is pointed out that "the protection of whistleblowers provides social support to this category of persons and protects public interest in fullest extent". It further discusses "the importance of adequate normative and efficient protection of persons who report suspicions of corruption", which prioritizes this theme of whistleblowing. There is a swift shift to statistical indicators of the protection of whistleblowers under the Anti-corruption Agency Law, and the reference is made to this report as a reason to expand the "circle of protection of persons outside only civil servants and employees in public authorities, to all categories of persons who should not suffer harmful consequences if reporting a suspected illegal action in good faith and in accordance with the law." It is interesting to note the reference to "the protection of all persons who report suspicions of corruption," while the Law guarantees such protection only to some persons.

The proposers of the Law expressed the hope that this Law would reduce the possibility of retaliation to a minimum and provide fast and safe navigation through the process of protection. It is further stated that "in any transitional society the risk of corruption fully justifies the need for the adoption of a special law to serve as a legal framework for the protection of whistleblowers as individuals who, among other things, report suspicions of corruption." "This legal framework also achieved the aim to support and encourage reports of suspicion of corruption or other illegal conduct as a means of protecting public interest. This should contribute to encouraging potential whistleblowers and establishing effective mechanisms of disclosure of violations and irregularities". "In addition, the Law ensures the trust of public and potential whistleblowers that the adopted Law would truly guarantee full protection of these persons."

According to this analysis of the effects of the Law, "the solutions proposed in the draft of this Law will have a positive impact both on the citizens of the Republic of Serbia and non-residents."

The main declared reason for passing the Law was to protect public interest, primarily through reporting suspicions of corruption, which would be achieved by improving the legal framework, by means of protecting whistleblowers from harmful consequences

"The solutions proposed in the draft of this Law will positively affect the individuals who perform whistleblowing..." "the Law also affects businesses or legal entities and entrepreneurs in business activities, both in private and public sector, by making them indirectly protected by whistleblowers from, among other things, the bribery in the municipal and city administration, or any other public service, the corruption in public procurement, abuse of the procedures for obtaining various permits to carry out commercial activities, etc., which increases social responsibility and awareness of the opportunities for such acts to be detected in this way. "In connection with these anticipated effects of the Law, it is evident that the subject of analysis, when it comes to the economy, was not the "flip side", or the whistleblowing expected to occur within private sector.

A separate item even argues that "the Law would not cause additional costs to citizens and businesses, or small and medium enterprises." This assessment can hardly be true in the context of the obligation of each employer with more than ten employees to adopt a special act on internal whistleblowing and determine a person authorized to act in connection with internal whistleblowing. "The Law will not cause additional costs, and its positive effects will be reflected in the budget and the economy in terms of reducing the room for corruption and other illegal activities that endanger economic development, competition, equal access to work, and control of public finances. This Law indirectly influences reduction of poverty in the society and the state, as well as restoration of public confidence in democratic institutions. The protection of public interest in its broadest sense is accomplished through preventing or indicating the violation of human rights, security, public health, environment, or any other indication of dangerous, irresponsible, and illegal behavior that can cause major damage."

When it comes to the opportunity for all interested parties to provide feedback on the Law, it is stated that public hearing lasted over a month, that it included "representatives of relevant state and public administration bodies, NGOs, eminent experts in this field, and other interested parties". In addition to the online publication, three round tables were held in Belgrade, Novi Sad, and Nis. The feedback on the draft law was given by the Agency for the fight against corruption; Council of Europe; NGOs: "Transparency", "Whistle", Center for Euro-Atlantic Studies, SHARE Foundation, and the Open Society Foundations, the legal adviser to the US Embassy, the advisor for the fight against corruption the U.S. Department of Justice, OPDAT; Public Concern at Work, the Alliance of Independent Unions of Vojvodina, USAID JRGa, and eminent experts. "The Law was developed with the support of Pol Stevenson, a British leading experts in this area, and a U.S. expert Tom Devine. The drafting of the law incorporated the comments and recommendations from the Technical report – the Review of the final version of the draft law on the protection of whistleblowers, prepared by Pol Stevenson, an expert of the Council of Europe (ECCO-PACS SERBIA-2014), and was reviewed and edited by the Secretariat of the Council of Europe (January TP8 and July TP13 2014)."

The reasoning also promised measures to achieve everything that was intended by the adoption of the Law. Thus, it is pointed out that the Judicial Academy needs to establish a continuous training with special emphasis on the protection of whistleblowers. "An important segment of the quality training is exchange of experiences through international collaboration and transfer of knowledge in the field of whistleblowing. This refers to a long-term goal that includes campaigns, promotion of ethical behavior, training, and professional development." "Citizens and other interested parties will be informed about corruption and illegal actions as socially unacceptable behavior that must be eradicated. Public needs to be particularly informed about the procedure of whistleblowing, protection of whistleblowers, protection of their identity,

types of whistleblowing, the prohibition of putting whistleblowers at a disadvantage, damage compensations, and other important facts related to whistleblowing."

Legislative measures were identified only in connection with the adoption of "relevant bylaws and statutory general acts". However, the need to amend other laws was not recognized.

With regard to the administrative and technical measures, the reasoning recognized only those related to the "employers" (that employers are obliged to provide all persons with work engagement with written notice of rights under the Law on Protection of Whistleblowers, appoint an authorized person to receive information by whistleblowers, and to conduct the proceedings in connection with whistleblowing). On the other hand, the need for building capacities of any national body to monitor the implementation of this new and important law was not recognized.

The analysis of Law provisions and the risks resulting from their weaknesses

Definitions

Title and subject

LAW ON THE PROTECTION OF WHISTLEBLOWERS

The title of the Law would be more complete if it included the other, equally important, matter to be regulated - whistleblowing. In practice, it is evident that, due to the title of the Law, (but certainly not just because of it) in the effect analyses of Law implementation more importance is given to the protection of whistleblowers than to the act of whistleblowing, for which this protection was introduced in the first place.

Scope of Law

Article 1

This Law governs whistleblowing; the whistleblowing procedure; the rights of whistleblowers; the obligations of state authorities and other bodies and organizations and legal entities and other natural persons in relation to whistleblowing; as well as other issues of importance for whistleblowing and the protection of whistleblowers.

More importance is given to the protection of whistleblowers than to the act of whistleblowing, for which this protection was introduced in the first place

Article 1. includes a customary and objective overview of the most important issues regulated by this Law. It is not uncommon that sanctions are omitted from that list.

The concept of whistleblowing

The meaning of the term

Article 2

For the purposes of this Law, the following terms have the following meanings:

- 1) "Whistleblowing" shall mean the disclosure of information regarding an infringement of legislation; violation of human rights; exercise of public authority in contravention of the purpose it was granted; or danger to life, public health, safety, and the environment; or with the aim to prevent large-scale damage;*

Whistleblowing is defined as disclosure of certain information. In linguistic terms, this implies that the information has not been known previously. However, the remaining provisions of the Law neither elaborate, nor resolve this fundamentally important issue. The potential risk lies in

The whistleblower does not know whether the information they intend to disclose will also be new to the person they are addressing

the fact that the whistleblower does not know whether the information they intend to disclose will also be new to the person they are addressing. If the addressed someone who was already familiar with the information, then there is no "disclosure" in true sense of the word, but only a "delivery of information". Therefore, the question is whether such cases should be regarded as whistleblowing and whether the protection of whistle-blowers should be provided.

The subject of "information" can be a violation of rules and regulations of any "rank" - laws, regulations, rules, decisions of the City Council or Municipal Assembly... International conventions ratified by Serbia are also

considered regulations. Human rights violations almost always represent a violation of some regulation.

The exercise of public authority contrary to its entrusted purpose can most often be expected when it involves a discretionary decision making. For example, if traffic police have the power to stop any vehicle for control, they will apparently use this power contrary to its purpose if they stop the vehicles that did not make any traffic violations, and fail to stop those that disrupted security and other drivers by unsafe overtaking.

Other instances that may not violate regulations, pose a threat to life, public health, safety, environment, or extensive damage to be prevented, may also be the subject of whistleblowing. These, for example, may refer to instances where someone discloses the information that a food item with large amount of ingredient dangerous to children health is circulating on the market, but the regulations in this area still do not recognize such health hazard. When it comes to "large scale damages" to be prevented by whistleblowing, it should be known that this implies a damage that can be caused to anyone. Therefore, this does not imply only damage to budget and public finances, but may include damage to an individual, private company or other legal entity. The incurred damage does not have to be in connection with any unlawful act, it can be tied to objective circumstances, such as, for example, changes in market conditions that can bring damage to a company. The damage that may occur to public interest may also be related to conclusion or implementation of contracts and other business arrangements that were otherwise concluded in full compliance with regulations.

The definition does not include the essential element of compliance with the rules of disclosure of information prescribed by this Law. On the other hand, these rules exist, both in terms of the form, and the content of disclosed information. Thus, among other things, Article 5 stipulates that "whistleblower is entitled to protection, in accordance with the Law... if they disclose the information to their employer, competent authority, or the public, in the manner prescribed by Law". Due to the fact that the definition does not include the element of legality,

Two categories of whistleblowing have been created - legal and illegal, as well as two categories of whistleblowers - those who enjoy the protection and those who cannot be protected

two categories of whistleblowing have been created - legal and illegal, as well as two categories of whistleblowers - those who enjoy the protection and those who cannot be protected. The fact that the society is still developing a positive perception of whistleblowing and whistleblowers is inconsistent with the fact that the Law does not provide protection for some cases of whistleblowing and for some whistleblowers.

Whistleblower

2) "Whistleblower" shall mean any natural person who performs whistleblowing in connection with his employment; hiring procedure; use of services rendered by public and other authorities, holders of public authority or public services; business dealings; and ownership in a business entity;

Definition of the term whistleblower shows that the Law was somewhat improved in comparison to the models of labor law and international conventions, but it also shows the unwillingness for making a full and complete improvement in this direction. The result is a compromise that has not been properly explained.

The origins of whistleblower protection lie in labor law, which also references "work engagement" as the first form of association that is required for someone to be a whistleblower. Work engagement is interpreted wider than the classic employment relationship. The Law recognizes various other forms of association between

The scope of possible Law application was most expanded in cases when the whistleblower status was granted to the persons who had business cooperation with a company or when whistleblower status was granted to numerous users

whistleblowers and legal persons or bodies. Thus, a whistleblower may be the one who seeks employment with the authority or someone who is a partial owner of a company where an illegal action took place (e.g. a small shareholder). The scope of possible Law application was most expanded in cases when the whistleblower status was granted to the persons who had business cooperation with a company (e.g. a buyer of that company, a seller of services or land, a person leasing office space to the company, etc.), or when whistleblower status was granted to numerous users of public services.

The Law was somewhat improved in comparison to the models of labor law and international conventions, but it also shows the unwillingness for making a full and complete improvement in this direction

Why limiting the scope of people who could be whistleblowers in the first place?

Therefore, if the scope is so broad, what seems to be the problem? Should this not cover all cases of whistleblowing? Why is it necessary to further expand their scope? The best way to respond to such questions is with another question - why the number of people who could be whistleblowers should be limited in the first place? Why should only the persons who are in a predefined relationship with the "employer" be allowed to have the status of whistleblowers? In one of the reports from the public hearing, Ministry of Justice pointed out that the scope of protection provided by the Law is now wider than what is stipulated by relevant international documents, so "it would not be suitable to abandon such decision without well-founded analysis and comparative legal examples". Similarly, the Government and MPs commented the proposed amendments in this area during the parliamentary debate, with some of them even claiming that eventual changes of this provision would be contrary to the documents of the Council of Europe.

There are the persons:

- who perform whistleblowing but are not considered whistleblowers;**
- who perform whistleblowing and who can be whistleblowers, but who are not entitled to legal protection;**
- who perform whistleblowing, who can be whistleblowers, and who are entitled to legal protection**

It is undoubtedly true that a comparative legal analysis would reveal numerous examples of conditioning, in cases where laws require the existence of some form of association between whistleblowers and bodies where a violation of the public interest took place. However, this is the outcome of historical circumstances, and in particular the fact that the protection of whistleblowers was developed within the framework of labor law regulations. Similarly, the minimum international standards that indicate the condition of being employed or having other similar association with the employer to obtain the protection are not intended to exclude other persons from the protection, but to ensure protection in areas where retaliation against whistleblowers could usually be expected.

The Law leads to illogical consequences. Imagine a situation where job tender was not carried according to the law. This irregularity is indicated by three persons - a job applicant, an employee of this state body, and a student monitoring the job tender for the purpose of writing a term paper. After the whistleblowing, the state body retaliates against all three of them – the job applicant is unfoundedly denied; the employee is demoted to another position; and the student's application for internship is denied a year later. Based on the provisions of the Law, the job applicant and the employee would obtain the protection: the applicant is entitled to protection because the whistleblowing is related to the recruitment process, and the employee would have the same entitlement because the whistleblowing is in some way related to his work engagement (as it is related to the same employer). The student would be left without legal protection, because his or her act was not covered under any of the grounds mentioned in the definition of whistleblowers. All three

persons pointed out to the same illegality and aimed to act in the public interest, they all suffered damage caused by the same person, but only in the first two cases the Law actually protects the whistleblowing.

Therefore, there are the persons who perform whistleblowing (e.g. disclose the information about violations of regulations) but are not considered whistleblowers (do not have a stipulated relationship with "employer"). Then, there are the persons who perform whistleblowing and who can be whistleblowers, but who are not entitled to legal protection (for example, due to the breached deadline). Finally, there are the persons who perform whistleblowing and who can be whistleblowers, and who are entitled to legal protection. All this creates confusion and ultimately negatively affects the popularization of whistleblowing and whistleblowers.

The status of whistleblower cannot be acquired permanently - it is dependent on the subject of whistleblowing and/or (the Law is unclear) the time when it took place. If an employee A was under a fixed-term contract in a company B, he or she can undoubtedly be granted a whistleblower status when disclosing an illegal action during the course of their employment, and probably after that period, if the illegal action is directly related to their work engagement (but not to any random action of the company B). For example, a patient from a public orthopedic clinic can be granted a status of whistleblower while waiting for surgery and during the recovery time, and may indicate the negligence of a doctor, a violation of regulations prohibiting smoking, or leaking ceiling. However, according to the Law, they would not be considered a whistleblower if they report illegal procurement of furniture for the office of clinic manager, which they became aware of while recovering from surgery (because it is not related to the service they received from the hospital), nor any other illegal action that took place after their recovery. A whistleblower may only be a person who performs whistleblowing in connection with their work engagement, use of services, etc. Therefore, a daughter who reports an unlawful action in the case in which the client is her mother, cannot be a whistleblower. A whistleblower can be a minor (e.g. a student in a dorm), or guardians on behalf of a minor.

According to the Law, the status of whistleblowers can only be granted to natural persons. In practice, whistleblowing is sometimes performed by legal entities (citizens' association, company, media). These legal entities can undoubtedly suffer consequences because of such actions, and their scope can be much greater than those suffered by an individual whistleblower (termination of contract on business cooperation, denied funding for programs and projects, boycott).

According to the Law, the status of whistleblowers can only be granted to natural persons

However, even though their whistleblowing is in public interest, according to the Law, they will not be entitled to protection from such retaliation.

The legal definition includes people who are most likely to perform whistleblowing and are most likely to suffer damage. This is actually the additional reason why the stipulation of the condition of prior association seems

A whistleblower may only be a person who performs whistleblowing in connection with their work engagement, use of services, etc.

redundant. One thing is certain - if these conditions did not exist, protection of whistleblowers would be simpler, because there would be one fact less to determine and prove in order to exercise one's rights.

Employer, responsible person, and work engagement

3) "Employer" shall mean any authority of the Republic of Serbia, provincial or local self-government unit, holder of public authorities or public services, legal entity or entrepreneur employing one or more persons;

The term "employer" is also important for several reasons. From the standpoint of "employers" and supervision of Law application, it is essential to determine who has the obligation in the case of whistleblowing. From the standpoint of potential whistleblowers, the identification of "employers" is essential to determine whom to turn to perform a legal "internal whistleblowing", as well as to determine if the status of whistleblowers can be granted.

The term "employer" is inappropriate and different in meaning from the parent law in which it is used (Labor Law). It implies authority, legal entity, or businesses (companies and entrepreneurial activities) in which/where a violation of public interest took place. The truth is that the authorities, legal entities, and businesses are also someone's employers. However, this association will be evident only in some cases of whistleblowing. When whistleblowing is performed by a user of the services of authorities, an owner of company shares, or a business associate in any of these, then whistleblowing is not considered as performed in relation to the employer (in the linguistic sense), but with the "employer" (in the legal sense).

"Employer" implies authority, legal entity, companies and entrepreneurs in which/where a violation of public interest took place

4) "Responsible person" shall mean any person who is entrusted, in a legal entity, with certain tasks related to management, business operations or business processes, or any person in the state, provincial or local self-government unit engaged in certain activities;

The need for the definition of "responsible person" is also questionable, as this term is used only in penal provisions.

5) "Employment" shall mean full-time employment, work outside of employment, volunteering, exercise of official duty, or any other factual work performed for an employer;

The term "working personnel" is used in the Labor Law, but is not defined for the purposes of this Law. Its meaning is certainly different from the one defined by the Law on the protection of whistleblowers. The Law says "employee or working personnel" (Article 35 of the Labor Law of 2005, with amendments until 2014), which means that employees are not covered by the term, but only those with some other work engagement. Another major difference in relation to Labor Law is the regulation that the term also includes acting office holders (in public and private sector). The difference originates from the fact that officials in some government bodies and legal entities do not need to or even should not be employed.

Competent authority for external whistleblowing

6) "Competent authority" shall mean any national, provincial or local self-government authority or holder of public authority competent to act upon information disclosed in accordance with this Law;

Several competent authorities can be responsible for "acting upon the received information"

Just as the term "employer" is essential for internal whistleblowing, the term "competent authority" is important for proper external whistleblowing. In some cases, addressing either "employer" or "competent authority" is a requirement for obtaining protection, hence the importance of knowing who the authority is. Even though this is not particularly emphasized, several competent authorities can be responsible for "acting upon the received information". Quite possible are the situations where an authority is responsible for acting upon only one part of the "information", and another authority acting upon a different part. Finally, it could be expected that, in many cases, it would be unclear which authority is responsible for acting, due to ambiguities of the "information" itself.

This is also an example of incorrectly chosen term. As it can be seen from the definition, the term actually implies a "competent authority" responsible for acting in relation to a problem indicated by a whistleblower. In other words, this definition essentially implies that the "competent authority is ... the authority responsible for acting". Since neither this section (nor other sections of the Law) stipulates who the "competent authority" is, or the manner of determining the competent authority in case of doubt, it appears that this definition was unnecessary. In either case, whistleblower will have to examine other regulations to find out who "competent authority" is, as this Law and the regulations made thereunder do not provide such answer.

Damaging action

7) "Damaging action" shall mean any action or omission in relation to whistleblowers which violates or infringes the right of a whistleblower or persons entitled to protection as a whistleblower, or which puts such persons at a disadvantage.

"Damaging action" is defined very broadly. The actor of such damaging action is irrelevant - it can be "employer", a person who reports to the employer, a dissatisfied colleague, or any third party, including those who seemingly have nothing to do with the disclosed law violation or other actions that are subject of whistleblowing. Of course, it will be much easier to make it credible that the damaging action was related to whistleblowing if it came from someone whose interests were directly affected.

Damaging action can be reflected in both performing an action or failure to act. Performing an action can be reflected in the adoption of an act that is

It is irrelevant who performs damaging action - it can be an "employer", a person who reports to the employer or any third party

damaging to whistleblower, revocation of a license, or provision of poorer service. Failure to act can be reflected in the lack of entitled promotion, failure to provide services, or failure to solve a problem that whistleblower expressed concerns about.

Damage is caused in one of two ways. The first is "endangering or violating" one's rights. In such cases, a whistleblower already has rights that need to be respected by an "employer", a person who causes damage, or any other person. Thus, an employee is entitled to vacation days and remuneration, and an employer can endanger that right (threaten to endanger it), or actually violate it by unreasonably withholding part of the employee's remuneration, or preventing the employee from using their vacation days in full extent. Or, when a citizen is entitled to receive a particular service from a municipal authority within 15 days (e.g. a license), and the competent authority does not issue the license within the legal deadline, and the like.

Endangering and violating rights of whistleblowers can also take more dangerous proportions, such as when the retaliation implies endangering the right to life, or property rights. Common to all these cases is that such harmful actions are always prohibited, regardless of the fact that they are being taken against whistleblower. In such cases, there is usually some other legal mechanism that should be applied in order to stop endangerment or violation of rights. The application of such legal mechanism does not require proof or cause that the damaging action was carried out as a result of whistleblowing.

It would be better if the definition was broader, and if the phrase "damaging action" included not only the meaning of endangering one's rights, but also the meaning of endangering one's interest

Some situations may involve a dispute over whether the right of a whistleblower was violated by an action undoubtedly harmful for them. For example, a citizen who previously acted as a whistleblower is entitled to be issued a license by the competent administrative authority within 15 days, if all the requirements have been met. The citizen has an interest for the license to be issued earlier, but not the right to request the competent authority to do so. Damage could be inflicted if the citizen was not issued a license until the fifteenth day, although the competent authority was able to do so earlier. Because of such cases, it would be better if the definition was broader, and if the phrase "damaging action" included not only the meaning of endangering one's rights, but also the meaning of endangering one's interest. This is particularly important in situations where the manner of exercising a right is not sufficiently regulated, or when the right is not precisely defined.

Another form of harmful action is "putting someone at a disadvantage." This refers to unjustified discrimination performed as a result of whistleblowing. The very action taken against whistleblowers may be allowed, or in other words, a failure to act on behalf of whistleblowers may not include any violation. Let us imagine that an employer has no obligation to promote an employee, or to send them for a professional training. Therefore, an employer's failure to do so, in case that there was no whistleblowing, would not be questionable. A situation where an employer fails to promote an employee or to send them for a professional training after whistleblowing act, is also not considered as direct law violation. The law will be violated only if the action of the employer was caused by whistleblowing, while, in the normal course of action, the employee would be

promoted or sent for a professional training.

The term "placing someone at a disadvantage," is hereby interpreted as "placing someone at a disadvantage as a result of whistleblowing", or "in connection with whistleblowing", as contained in other provisions of the Law. If this term was interpreted without the latter provisions, it would be possible to deduce different interpretations ("placing someone at a disadvantage in regards to other persons in a similar situation"). The first interpretation implies a certain level of knowledge about the motives of the person causing damage to whistleblowers. This potential problem is solved by the latter standards which set out the rules on burden of proof. The second interpretation allows for the impression of "placing someone at a disadvantage" to be made credible in a much easier and objective manner. However, it can also lead to a dead end if there are no "others" who were treated in the same way, and who could be compared to whistleblowers. For example, a whistleblower is the only person who was fired on the grounds that the position was no longer needed, and the only person who was performing such function in the entire company. If we accept the first interpretation, the comparison of equal treatment (towards whistleblowers and others), this can be used as a means to determine whether the damaging action was related to whistleblowing.

The discussion about the damaging action presented above should be interpreted by keeping in mind the phrase "in connection to whistleblowing". This provision can be, and most often is, the subject of disputes - whether an action or failure to act, that whistleblowers perceived as unfavorable, is an outcome of retaliation because of previously performed whistleblowing, or even more broadly, whether they are in any way related to whistleblowing.

The key words "in connection to whistleblowing" should be kept in mind in every discussion about damaging actions

Postulates

Prevention of whistleblowing and performing damaging action

*Prevention of Whistleblowing Prohibited
Article 3*

*Prevention of whistleblowing shall be prohibited.
Any provision of a general or particular enactment that prevents whistleblowing shall be null and void.*

This article stipulates a fundamental prohibition of the prevention of whistleblowing and very strict consequences in the event that some general or individual act of whistleblowing was prohibited. This is certainly one of the measures that can have significant positive impact and protect whistleblowers from the very beginning.

In the opening sections of the Law, whistleblowing is defined as "disclosure of information" on the violation of regulations and other damaging actions listed, but without the elements of legality. The remaining provisions of the Law stipulate the procedural and substantive grounds used for providing legal protection for some types of whistleblowing, and not for the others.

This creates a problem with the provisions of Article 3 of the Law, prohibiting not only the prevention of "good whistleblowing", but also the "bad" one. Moreover, preventing illegal whistleblowing is also the duty of state authorities. For example, the police are obliged to maintain the confidentiality of information on criminal investigations until the investigation is concluded. The problem of information leakage is recognized as important even in the negotiating chapters (23 and 24) with the EU and solutions for this issue are being sought. On the other hand, according to the Law, a situation in which a police officer publicly discloses information about an ongoing investigation meets all the requirements to be called "whistleblowing" - it refers to the discovery of "information" concerning the violation of the law (criminal investigation is related to criminal offenses). Such negligent police officer would not receive legal protection as whistleblower. However, any action of the director of the police that would aim to prevent the disclosure of information about the investigation would present an "an action that prevents whistleblowing" and as such would be void under Article 3, paragraph 2 of the Law. This was certainly not the intention of the legislator, but no actions have been taken to correct this mistake. Government's explanation for declining the amendment that intended to rectify this issue states "it is a norm of a general character stipulating the rule of prohibiting the prevention of whistleblowing".

Damaging Actions Prohibited
Article 4

Undertaking any damaging action shall be prohibited.

The Law prohibits any damaging action. This also includes the damaging actions caused by a failure to act.

The conditions for the protection of whistleblowers and the issue of conscientiousness

Entitlement to Protection of Whistleblowers
Article 5

A whistleblower shall be entitled to protection in accordance with this Law where:

- 1. He performs whistleblowing by disclosing information to his employer, competent authority, or the public as provided for herein;*
- 2. He discloses information referred to in Article 2, item 1 hereof (hereinafter referred to as: the disclosure) within one year of having learned of the performance of the action he blows the information for, and at the latest within ten years from the date of the performance of such action;*
- 3. At the time of whistleblowing, the truthfulness of the information disclosed would be credible to a person possessing the same average level of knowledge and experience as the whistleblower.*

This article stipulates the conditions required for either whistleblowing, or its protagonist, whistleblower, to enjoy legal protection. The first condition is for whistleblowing to take place on a specified site (employer, competent authority, public), while the underlying conditions are further prescribed in other sections of the Law.

The second condition refers to deadlines. Subjective deadline is one year of becoming aware of the "performed action", and objective deadline is ten years after the event. Deadlines are

clearly defined. However, this does not imply that the manner of their practical application, or the purpose of their designation, will always be clear.

Subjective deadline can be interpreted in "subjective" way. Therefore, it could be questionable whether a whistleblower discovered the information within the deadline, or if he or she were already familiar with some of the events in question. The whistleblower would then have the right to argue that only the discovery of the most recent information revealed the actual "action" they wanted to disclose. Another option is for the subjective deadline to be perceived in an "objective" way, from the moment the information first became available to the whistleblower (e.g. when they gained access to a harmful contract). In that case, the defendant could challenge in court the legality of whistleblowing, presenting evidence that the whistleblower had knowledge about that event for one year.

Article 4 of the Law on the protection of whistleblowers introduced the term "action", which aims to embrace everything that can be a subject of whistleblowing (e.g. law violation, endangering one's health, and so on). It would be better if that term had already been included in the definitions, and it also does not seem to be the best possible choice as some cases do not involve any kind of action (taken by a person), but an occurring event (e.g. a crack in a load-bearing wall). An "action" can also include a failure to do something, which can lead to danger for public health for instance.

Things get complicated if a whistleblower discloses several problematic actions at the same time, some of which have occurred within the period of one year/decade, and some before that.

The whistleblower would then undoubtedly enjoy protection in relation to one part of the

information that was disclosed. However, the person taking retaliation against the whistleblower could justify their actions by saying they refer to the other part of "information" that does not enjoy legal protection, and not to the one covered by the deadline,

concluding that the complaint should be rejected as inadmissible.

The logical question is - what are the deadlines set for in the first place? They (e.g. statute of limitations, deadlines for filing law- suits) are usually set so that the courts and other state bodies could deal with the issues that are more urgent and socially relevant. This could be an explanation in this case - why would the employers, competent authorities, and courts deal with something that took place more than ten years ago, when it is more productive to get engaged in new challenges. Another possible reason for setting deadlines refers to the conscientiousness of a whistleblower. Perhaps the legislators felt that it would not be appropriate to protect

The logical question is - what are the deadlines set for in the first place?

From the standpoint of protecting public interest, it is important to disclose any information related to a damaging action or event, regardless of the time when it took place, as long as such information can be useful

someone who discovers a disputed action and then waits for two or five years to disclose it (for example, to prevent being justifiably prosecuted for something else). Preambles of the Law did not provide a clear answer as to why these deadlines exist.

If these are the reasons that influenced stipulation of deadlines, then such regulation has not been done well. From the standpoint of protecting public interest, it is important to disclose any information related to a damaging action or event, regardless of the time when it took place, as long as such information can be useful. For example, the information that secret nuclear tests were carried out at some location 50 years ago is still important today because it may cause harmful consequences that can extend to present day. Information about bribing MPs twenty years ago is still relevant. Some of the actors may still be present in political life, and an underlying problem that caused bribery may still not be solved. As long as the "information" is useful, and it will be useful as long as it reveals new information, the harmful consequences are still present and the damage can be reduced, and any lessons can still be learned, whistleblowers should be provided protection, regardless of how much time has passed since the event.

Conditioning whistleblowers to reveal information within one year of the discovery is equally arguable. If the aim of the Law is to disclose information about harmful actions and events, it is more logical not to prescribe such a general deadline, but to provide protection to the whistleblowers who planned the time of disclosure/reporting, no matter how much time has passed. If, however, such behavior is deemed unethical, then the one-year deadline is too long.

A very important standard part of the conditions in international documents and some foreign laws that allow certain actions to be recognized as whistleblowing refers to the so-called "good faith" or conscientiousness of whistleblowers (the Law does not use either one of these two terms). Although the terms are not specifically mentioned, conscientiousness is referenced in the Law only in regards to truthfulness of the information, or, more precisely, the belief in the truthfulness of the information. The disclosed "information" does not necessarily have to be true in order for a whistleblower to receive protection. This simplifies whistleblowing and protects whistleblowers from the obligation to perform checks in regards to what might put them at risk. In the end, the truthfulness of any suspicions and allegations is usually determined in a procedure that is initiated after whistleblowing.

Examining if a person with average knowledge and experience comparable to that of whistleblower, would believe in truthfulness of the information on the basis of available details

The criterion was set "objectively". No matter how unusual it may seem, there is no investigation if the whistleblower believed in the truthfulness of the disclosed information, but whether "a person with average knowledge and experience comparable to that of whistleblower" believed in the veracity of the information. This assessment is based on data that was available to whistleblower before disclosing the information. Since a person can have "average knowledge and experience" or "knowledge and experience comparable to that of a whistleblower", but not both, there is only one logical interpretation of such condition: examining if a person with average knowledge and experi-

ence comparable to that of whistleblower would believe in truthfulness of the information on the basis of available details. This interpretation refers to a hypothetical person who may not testify in the protection of whistleblowers, so in practice, the fulfillment of this condition is determined by questioning the whistleblower or using court's estimation on how a hypothetical person would reason.

The outcome of criteria objectivity is that a whistleblower may be conscientious and believe in the truthfulness of the disclosed information, yet does not receive protection. This could happen if the court decides that a person with average knowledge and similar experience as a whistleblower recognized that information as untrue. On the other hand, a whistleblower may be negligent and knowingly disclose the disinformation, but obtain legal protection, if a person with "average knowledge" and similar experiences such as whistleblower believed in the truthfulness of the information. These are unfavorable and undesirable consequences of the formulation used by the legislator.

The term "truthfulness" is not further defined by this Law, which causes dilemmas as to whether this condition is being met. For example, such dilemmas may arise in connection to the question of whether the complete information was submitted (in other words, was there a belief that the "information" was true if the whistleblower, who was in possession of the entire document, revealed only one part of it, thus raising the suspicion of law violation, but not revealing the part that lifts such suspicion); whether the "information" was true if the document used to draw a conclusion on the violation of regulations, harm, or danger was replaced by a new document, which whistleblower was aware of (i.e. a harmful contract which has been amended by the annexes that made it acceptable). Finally, another important question is what exactly needs to meet the requirement of truthfulness – is it only a certain suspicion or allegation explicitly stated by a whistleblower, or is it a document composed or submitted by a whistleblower? The mere act of whistleblowing often does not consist of presenting suspicion, but of releasing documents or other evidence based on which it can be concluded that a violation of the rules or danger to the public interest took place.

What exactly needs to meet the requirement of truthfulness – is it only a certain suspicion or allegation explicitly stated by a whistleblower, or is it a document composed or submitted by a whistleblower?

Parliament has been presented with an amendment that aims at establishing additional conditions in terms of conscientious whistleblowing which would enjoy special legal protection. We will mention these conditions here, although they are not part of the legal text, because they anticipate potential risks for the implementation of the Law and the establishment of the concept of whistleblowing in general.

The first question is whether the information disclosed by a whistleblower was really new to employer, competent authority, or public? Was whistleblower truly "disclosing" information as defined by Article 2? if the "disclosure" is understood purely objectively (if the information was already known, for example, to an external controlling body), then the potential whistleblower

is in a very unfavorable position - he or she may not be aware of what the controlling body may or may not know. On the other hand, if the protection was provided for the submission of any information, including those that are already known to a controlling body, there would obviously be no "disclosure" under Article 2 of the Law, or "good faith of whistleblowers" (which is not even required under the current Law).

It seems that the best solution for future amendments to the Law, or its current interpretation,

This would protect whistleblowers who truly disclose unknown information, as well as those who did not know that the disclosed information was already known

when applicable, would be for a "disclosure" to be perceived "subjectively". This would protect whistleblowers who truly disclose unknown information, as well as those who did not know that the disclosed information was already known - for example, that the employer already received a complaint with a similar content, that the prosecutor already received a criminal complaint, or that the contract was already published on a less-known website. On the other hand, if such interpretation was accepted, protection would not be provided for the "whistleblowers" who indicate widely known cases of violations or danger to citizens, for example, a person who delivers copied parts of a criminal complaint to a public prosecutor, knowing that this complaint is already in his or her possession, a person who delivers a copy of the decision of budget inspection to the Minister even though

that ministry already received that decision, a person who delivers to media parts of publicly available reports of the state audit institution, and the like.

The latter provisions of the Law on the protection of whistleblowers also offer inconsistent resolution for this issue. Protection from retaliation is provided for the whistleblowers who disclose unnecessary personal information, but this protection does not cover liability for violation of the Law on protection of personal data. On the other hand, the whistleblowers who disclose classified information will, in some situations, remain without protection from this Law, and will be prosecuted for breach of confidentiality.

The risk to public interest is also reflected in the situations of initiating separate system of legal protection of persons who, according to the Law, are whistleblowers, but the significance of violations of regulations they point out to is very small. Just as there is a "small claim crime", or the situation in which, due to a very small value of the committed theft, criminal prosecution is not initiated, it is worth considering whether it is justified to switch the burden of proof claiming that the "damaging action" in

The risk to public interest is also reflected in the situations of initiating separate system of legal protection of persons who, according to the Law, are whistleblowers, but the significance of violations of regulations they point out to is very small

connection to the information disclosed by a whistleblower is of little significance.

For example, someone who "discloses" that their boss or colleague lit a cigarette in an empty office next to an open window, will enjoy the same legal protection as someone who discloses the threat to the health of a large number of citizens, or a large-scale corruption. The risk of such a legal concept diminishes the newly introduced concept of whistleblowing. Moreover, an additional risk to the system would be caused if the whistleblowing results in completely opposite effects and becomes a means for harassment, rather than the protection of public interest. A possible solution to this risk would be the distinction between cases of illegal actions whose disclosure always presents the endangerment of public interest (e.g. crimes, offenses punishable by a maximum fine, endangerment of public safety and health, etc.), and the cases in which the protection is provided only to whistleblowers who disclose a serious or consistent breach of regulations (as opposed to a slight and sporadic one). Undoubtedly, such a set of rules would create other risks – e.g. whistleblowers may become reluctant to disclose an illegal action because they do not know if they meet the criteria for protection, or may have dilemmas in assessing whether those criteria were met.

Protection of persons who are not whistleblowers

Protection is not dependent on conditions that must be fulfilled by a whistleblower

Articles 6 - 9 of the Law stipulate protection of certain persons who are not whistleblowers (associated persons, persons wrongly identified as whistleblowers, officials, information seekers). It is important to note that their protection is not dependent on conditions that must be fulfilled by a whistleblower. Thus, legal protection would not be enjoyed by a whistleblower who discloses the information about a violation of a regulation that took place 15 years ago, due to the expiration of the objective

deadline of 10 years. However, an individual who is wrongly considered a whistleblower by a person who performed or ordered the damaging action, shall enjoy legal protection.

Associated Persons

Protection of Associated Persons Article 6

An associated person shall enjoy the same protection as a whistleblower if such person makes probable that a damaging action has been undertaken against him due to his connection to a whistleblower.

Article 6 also stipulates protection of "associated persons". Since that term has not been defined, it should be understood that the circle of "associated persons" is not determined in advance (e.g. limited to a circle of relatives). A form of association is not limited either, and there are no limitations on the types of persons in question. Therefore, it could be questioned whether the legal entities, which are in some way associated with the act of whistleblowing,

Circle of "associated persons" is not determined in advance

Whether the legal entities, which are in some way associated with the act of whistleblowing, could also be considered "associated persons"?

could also be considered "associated persons". None of the provisions indicate that this was the intention of the legislator, but they don't pose an obstacle to such interpretation either. For example, a damaging action could be reflected in the case where a company is suffering retaliation from the city (breach of contract on business cooperation), after one of the owners publicly disclosed abuses of mayors and officials in the issuance of building permits and thus became a whistleblower.

Associated person may be a person that was in connection with whistleblowing (assisting in data collection, composing documents, encouraging whistleblowers to come forward, and the rest) or a person who was not even aware of whistleblowing. Legal protection of associated persons is not dependent on their relation to whistleblowing, but only on the presence of any harmful consequences caused by whistleblowing.

"Associated persons" have to "make probable" the interpretation that a harmful consequence was an outcome of "information" disclosure. The Court's makes decision whether to consider such interpretation as probable. In addition, "associated persons" are also responsible for proving association with whistleblowers. It seems that one of the main questions in these disputes could be (absence of) knowledge of the defendant as to whether the "associated person" was in connection with a whistleblower. In such situations, defendants could possibly try to defend themselves by claiming that no retaliation was performed towards the "associated person" because they were not aware of the connection with the whistleblower.

Non-whistleblower

Entitlement to Protection due to Wrongful Identification as Whistleblower Article 7

A person who makes probable that a damaging action has been undertaken against him, due to the fact that the person performing the damaging action wrongly believed that person to be the whistleblower or an associated person, shall enjoy the same entitlement to protection as the whistleblower.

Also interesting is the legal provision on the protection of "wrongly identified" whistleblowers, and "wrongly identified" associated persons. The Law provides for the possibility to perform whistleblowing anonymously, and still enjoy protection. As a result, we can expect a number of situations in which a person whose interests were affected by whistleblowing could only speculate who the whistleblower was. Retaliation ("damaging action") taken against an assumed whistleblower may be a part of "the search for the real whistleblower" (e.g. "no one in the department can leave the office until it's known who disclosed the information..."). In this scenario, the majority of people would be entitled to legal protection against harassment. Wrongful identification can also be direct - when a supervisor assumes that the compromising information was disclosed by an employee whom he had a conflict with, while in fact it was disclosed by his most trusted associate who tried to secure a promotion.

As a result of possibility to blow the whistle anonymously, we can expect a number of situations in which a person whose interests were affected could only speculate who the whistleblower was

It may be difficult to prove this kind of (absence of) whistleblowing. The problem will only be caused if the one who retaliates, for example, a supervisor from the presented scenario, unambiguously declares that the retaliation was an outcome of the whistleblowing. A wrongfully identified whistleblower can react by announcing that he or she had nothing to do with it. Thereafter, the supervisor can either leave them alone or the non-whistleblower can initiate legal action seeking protection and damage compensation. A wrongfully identified whistleblower can also pretend to be true whistleblower and seek protection. However, this is a risky tactic, because the act of whistleblowing is one of the elements that must be documented in court proceedings.

An interesting question is whether this policy can be applied not only in cases where someone

is wrongfully identified as whistleblower, but also when it is questionable if any type of whistleblowing took place at all. It can happen that someone wrongfully believes that whistleblowing took place and starts looking for the "culprit". For example, a shop owner who was unexpectedly visited by inspection can suspect that control was caused by a complaint of one of the employees for violating the regulations on proper food storage, while, in fact, the control was performed on a random sample of town stores.

If, according to this Article, the existence of true whistleblowing is a precondition for protection, this can pose a difficulty. Non-whistleblower would then have to prove to the court that whistleblowing took place, and only then to make credible that the damaging action was taken against him or her because of the mistaken belief that they were whistleblowers. It is unlikely that wrongfully identified whistleblower possesses such evidence (e.g. information pertaining to the time of document submission). A whistleblower has no information on the time when the person inflicting the damage found out about whistleblowing. That information can be of importance so that the claim regarding the harmful action and presumed whistleblowing would be convincing. When protection is sought by a wrongfully identified associated person, there is one more step to be proven.

Performing Official Duty

Protection of a Person Performing Official Duty Article 8

A person who has discharged the information while performing his official duty shall enjoy the same protection as a whistleblower, if he makes probable that a damaging action has been undertaken due to discharging his official duties.

Article 8 of the Law, which was supposed to regulate the protection of officials who act as whistleblowers, brought confusion. This confusion was only alleviated, but not eliminated, by setting more precise specifications during the parliamentary debate.

Disclosure of "information" by a public official, while performing an official duty, undoubtedly presents an act that falls under the legal definition of whistleblowing

Given the stipulation that a person who discloses the information while performing an official duty is entitled to protection "as a whistleblower," it can be assumed that the legislature intended to exclude these cases from the concept of whistleblowing. However, disclosure of "information" by a public official, while performing an official duty, undoubtedly presents an act that falls under the legal definition of whistleblowing. For example, when a police officer examines a crime scene and writes a criminal complaint against the driver of a public transportation vehicle who caused serious traffic accident, the officer "discloses the information" about "violations of regulations," "in connection with his or her work engagement" because writing such reports is the officer's job. Due to inconsistencies between Article 2 and Article 8 of the Law, officials enjoy parallel protection on two grounds in connection to the disclosure of the same damaging action.

If we interpreted what was written, but also what was indented to be written in the provision,

the following scenario would have happened: officials may enjoy the status of whistleblowers, like anyone else, when they do not perform official duties, or when they disclose the information that is not related to their official duties, but for example, their work environment. If the officials who "disclose information" perform official duties, they may not enjoy the status of whistleblowers; and in such cases they enjoy the protection "as whistleblowers" if damaging action was taken against them.

What are the consequences of such norms? When someone is a whistleblower, that person must meet the requirements of Article 5 of the Law, in order to obtain the protection - to address the required institution, to act within a deadline, and to meet the standard of probable veracity of the information. On the other hand, when one enjoys protection "as a whistleblower", they do not have to fulfil any additional conditions, and it is sufficient that, as in this case, they "submit information" and make credible that damaging actions were taken against them as a result of that. Of course, in order to file a complaint under this Article of the Law, that person first has to prove that he or she performed an official duty in this particular case.

Special attention should be given to consideration of the status of public officials and damaging actions that can be taken against them. Thus, for example, a state auditor, in the exercise of their function, indicates unlawful acts of budget beneficiaries (e.g. a ministry). Then the MPs of the minister's political party may launch an initiative for the dismissal of the auditor, relying on some other basis that already existed before, but has never been mentioned. Or, MPs can retaliate and decide not to renew the mandate of the auditor. The auditor could use the Law on the protection of whistleblowers to make a claim that a damaging action was performed against him/her, because he or she indicated the violation of the law, while carrying out official duties. In such cases, the court would not be able to provide protection from damaging action (which is otherwise stipulated under the Law on the protection of whistleblowers) because the damaging action is performed by MPs who exercised their constitutional powers. The question remains whether the court could prevent taking damaging action against the official if such action was performed under the authority of lower legal acts (e.g. Government's decision by which the auditor is denied the right to use the company car).

In such cases, the court would not be able to provide protection from damaging action because the damaging action is performed by MPs who exercised their constitutional powers

Information seekers

Entitlement to Protection for Requesting Information Article 9

A person requesting data in relation to the information shall enjoy the same protection as a whistleblower, if such person makes probable that a damaging action has been undertaken against him due to requesting such data.

The outdated alert cases, not followed by appropriate actions of government bodies or disclosed information on the taken measures, arouse public interest. A government aiming to

hide its poor work, or an official aiming to avoid responsibility, have a motive to silence those who ask questions. This is the probable reason why this standard was added to the Law without any explanation. However, the visible result leaves some doubts and risks. First, when it comes to "requesting information" a possibility was left for this term to be interpreted in a very limited way, as a request for the document that was submitted to an "employer" or an "authorized body" at the time this Law was in force. This would, for example, be the case of requesting copies of criminal charges or complaints.

When it comes to "requesting information" a possibility was left for this term to be interpreted in a very limited way, as a request for the document that was submitted to an "employer" or an "authorized body" at the time this Law was in force

Next, a broader interpretation would be that any request for data on actions or events that could be the "information" is protected, i.e. the data on any irregular or damaging action (as defined in Article 2 of the Law), regardless of whether they originate from a whistleblower. This might be the information established by a state authority or a public service – e.g. information about the increased pollution of water and air.

Even broader interpretation, for which there is no legal support, would be to provide protection for people who seek information that could be used for obtaining the status of a whistleblower. For example, if someone is collecting data on mortality rate from specific disease over a period of time, as well as the data on the emission of exhaust gases in the area, so that these could be used later to alert the relevant authorities should any correlation between the two was found. The report of the public hearing argued that this was the precise objective of this norm: "This formulation embraces all activities of potential whistleblowers with the aim of discovering information. These activities are not considered whistleblowing, but if the person makes credible that he or she suffers damage as a result of it, they can be pro-

ected as whistleblowers. In addition, this provision also includes a situation when a potential whistleblower seeks legal advice. Such activity does not present whistleblowing in terms of the Law, but it can be protected if the person suffers damage because of it." While it is good to have this interpretation in mind as a reflection of legislator's intentions, it is not adequately transformed into legal norms. Seeking information for future whistleblowing does not always imply the request for data related to the "information". A "potential whistleblower" still does not know whether they will really find something that constitutes a violation, or something suitable for performing whistleblowing.

Additional question is whether the protection would be provided in case of requesting data on the acts upon "information", and not only the data "related to informa-

Although a request for information on a disputed event deserves legal protection, such request can be executed along with the violation of another law

tion" (as such). Possible interpretations on all these issues determine if the seeker of information will be given protection "as a whistleblower."

On the other hand, provision of protection also includes risks. Although a request for information on a disputed event deserves legal protection, such request can be executed along with the violation of another law. For example, along with the request for disclosure of data, the information seeker can also publicly disclose personal information of third parties, false accusations of criminal offenses, and similar details. Such person should not be entitled to protection in relation to these actions. Judging by the responses of the Minister during the Assembly debate, it seems that the intention is not to provide such protection, but for whistleblowers to be held responsible for possible violations of other laws, and in accordance with the provisions of these regulations. For example, if the request stated "please submit the information on the reported irregularity in the public procurement of security services from 2015, when the Minister AB, which has homosexual tendencies, and is also a thief and a con man, allowed his junkie brother to conduct investigation", the information seeker should not suffer damaging consequences because of the requested report on the irregularities in public procurement, but could be prosecuted in criminal proceedings for defamation and on criminal and civil grounds, including discrimination.

Unprotected reluctant whistleblowers

At this point, we would like to remind all of the proposal to amend the Law with a special Article aimed to protect "reluctant whistleblowers" - people who disclose the "information" without the intent to specifically address "employer", "authorized body" or "public". The proposal was not accepted in the public debate and parliamentary discussion.

A reluctant whistleblower may be someone who discovers the information in the "relationship of trust", which is based on respect for the rules of professional ethics and protected even in the case of disclosing the information on criminal offenses (confession to a priest, doctor, or lawyer, constitutionally guaranteed privacy of correspondence). In the event that the unrelated person becomes aware of the secret information, protection from retaliation should be provided. The right to compensation from the person who violated confidentiality is already ensured under other laws.

Study participants whose confidentiality was violated are in a similar position. Citizens or employees of an institution who participate in surveys are granted confidentiality. They also point to some specific situations that constitute "information" about the violation of regulations or the danger, but they do not want anyone to know that they disclosed that information. For example, a citizen can say in a study that they gave bribe to an officer, but

**Reluctant
whistleblowers
also deserve
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Law does not
guarantee it**

without the intent to personally report that criminal offense or to alert the public on the corruption. Research may be compromised due to various reasons, during or after the implementation. The information about participants may be accidentally or intentionally given to unauthorized persons by any of the researchers; or a dissatisfied employer can conduct an investigation to determine who gave the information to researchers. In any case, reluctant whistleblowers also deserve protection, and the Law does not guarantee it.

Persons who disclose the information on irregularities and dangers, and were previously granted confidentiality, are not whistleblowers, because they did not perform such act in any of the three stipulated ways. They might be able to enjoy protection in case of a fairly unlikely scenario that would make them "persons associated" with someone who disclosed the information to unauthorized persons.

Personal data and their abuse

Protection of Whistleblower's Personal Data

Protection of Whistleblower's Personal Data Article 10

A person authorized to receive the information shall be required to protect the whistleblower's personal data and any data that may be used to discover the identity of the whistleblower, unless the whistleblower agrees to reveal such personal data in accordance with the law regulating personal data protection.

Any person who learns about the data referred to in paragraph 1 of this Article shall be required to protect such data.

A person authorized to receive the information shall be required to, at the time of receiving such disclosure, notify the whistleblower that his identity may be revealed to a competent authority if actions of that authority cannot be undertaken without revealing the identity of the whistleblower, and notify the whistleblower of the safeguards available to participants in criminal proceedings.

Where it is necessary to reveal the identity of a whistleblower in the course of proceedings, the person authorized to receive the information shall be required to notify the whistleblower of this fact before revealing the whistleblower's identity.

Data referred to in paragraph 1 hereof may not be revealed to any person named in the information, unless otherwise provided by other law.

The first paragraph of this article introduced the assumption that whistleblowers do not want anyone to know about their acts. Personal data of whistleblowers (name, address, etc.), as well as the data that could reveal their identity (e.g. cell phone number, IP address or email address) must be protected until whistleblowers agree otherwise. This is the duty of "the person authorized to receive the information." Other parts of the Law reveal that the allocation of such persons is stipulated as obligation only for the "employers", and not for the "authorized bodies", so it remains questionable whether the obligation to protect data on whistleblowers also applies to them.

**The assumption
that
whistleblowers do
not want anyone to
know about their
acts**

The consent of whistleblowers can serve as the basis for the violation of data confidentiality (as in the Law on protection of personal data). This may be a written consent given along with the information (in advance) or upon request of "the person authorized for receiving information".

Does the reference to the Law on the protection of personal data imply the possibility of violating the confidentiality of personal data, for the reasons stipulated by this Law?

would imply abandoning the purpose of special regulations on personal data protection of whistleblowers (the Law on the protection of personal data could be applied without doing so). On the other hand, during the discussions on the Law on the protection of whistleblowers, it was repeatedly emphasized that this Law does not take precedence over other laws, and that both Laws are simultaneously applied at their meeting points.

The second Article stipulates the obligation of extending confidentiality to "any person who acquires information". This causes a problem of practical nature - whether any person who acquires the information about whistleblowers will indeed recognize that this is the data that must be kept secret. In regards to the formulation from the related paragraph 1, it is also questionable whether the obligation to keep the data on whistleblowers secret applies only to cases where the information was first submitted to the "employer" (person authorized for receiving information), or it extends to other forms of whistleblowing - where the information was shared with external competent authorities or even with public (and the identity was not known to everyone).

Paragraphs 3 and 4 reference situations where the identity of a whistleblower becomes revealed. Upon obtaining information, the person authorized for receiving such information (again, the only reference is to a person in connection with the "employer", without any

In some cases, requesting such consent could be difficult (e.g. a whistleblower did not provide full address), and it is questionable whether authorized persons should request it at all.

This is one of the meeting points between the Law on the protection of whistleblowers and other laws, which may cause dilemma about proper implementation. The provision of the Law on the protection of whistleblowers stipulates for the consent of whistleblowers for disclosure of personal data to be performed in accordance with the provisions of the Law on protection of personal data. The Law provides the possibility of giving written or oral (recorded) consent, or only written consent for particularly sensitive data. However, Article 12 also stipulates the cases of "using the data without consent." Does the reference to the Law on the protection of personal data imply the possibility of violating the confidentiality of personal data, for the reasons stipulated by this Law? This would not be logical, as it

Questionable whether the obligation to keep the data on whistleblowers secret applies only to cases where the information was first submitted to the "employer" (person authorized for receiving information), or it extends to other forms of whistleblowing

reference to a person receiving the information within the relevant external authority) is obliged to inform the whistleblower that their identity may be disclosed to the competent authority under certain conditions. These are the situations where the authority *would not be able to act* without revealing the identity of a whistleblower. The authorized person is also obliged to inform the whistleblower "on measures for ensuring protection of participants in criminal proceedings." Similarly, if it becomes "necessary" to reveal the identity of a whistleblower during the procedure, there is a duty to inform the whistleblower accordingly. Although in some situations it is easy to inform the whistleblower immediately after receiving the information, this will not always be possible (e.g. when whistleblowers do not indicate their address). It should be interpreted that the authorized person had the duty to make reasonable efforts to inform whistleblowers about possible disclosure of their identity.

The biggest risk for whistleblowers and a challenge for the implementation of the Law is the question of establishing situations in which the authorities "would not be able" to take action. Will this be regarded as a scenario where the authority could conduct the investigation without the data on whistleblowers, which would then become more difficult? In any case, the opportunity for the violation of confidentiality of whistleblowers' personal data is an inconsistent solution. At the same time, the Law leaves the possibility of anonymous whistleblowing. Adverse effects of the possibility to reveal whistleblowers' personal data without their consent are reflected in increased number of cases of anonymous whistleblowing. This reduces the possibility for subsequent collection of quality data.

Referencing data on the extent of protection of participants in criminal proceedings may be appropriate in some cases of whistleblowing, but not in all such situations. Therefore, the fulfillment of this legal obligation could also be absurd.

The last paragraph of this Article prohibits the data on whistleblowers to be revealed to the "person indicated by the information." This may be a person indicated as a possible law offender or any other person mentioned in this regard (e.g. a witness, or an accidental participant in the event). As this norm is not precisely defined, different interpretations are possible – more precise would be the formulation "the person indicated by the information as the offender....". Another dilemma is created by the situations when the "indicated person" has not been identified by name, but as a member of a group (e.g. officials employed in certain sector). In this case, the data on whistleblowers should not be provided to any of these indicated persons.

An exception is provided for this rule as well. The data on whistleblowers must also be given to such a person, if a special law provides so. As in all other cases, the stipulations of other laws again take precedence over the Law on the protection of whistleblowers.

The opportunity for the violation of confidentiality of whistleblowers' personal data is an inconsistent solution

Abuse of whistleblowing shall be prohibited.

Abuse of whistleblowing shall be deemed present where a person:

- 1. Discloses information he knows to be false;*
- 2. Seeks illegal gain for himself in addition to seeking action to be taken with respect to the information disclosed.*

The notion of truthfulness is not sufficiently clarified in the Law, which can create problems in its implementation

The first kind of abuse recognized by the legislator is the "delivery" of information for which the whistleblower knows that is not true. Interestingly enough, the term "delivery" is used instead of "disclosure" at this point, so the question is whether there are any differences among the two and what are the legal consequences of such differences. The delivery of information, as opposed to disclosure, does not necessarily refer to the information that is new and unknown to an employer, authorized body or public. On the other hand, the "delivery" which is not the "discovery", does not meet the requirement to be considered whistleblowing on the basis of Article 2 of the

Law. Therefore, there can be no talk of the "abuse of whistleblowing" either. It is thus likely that the term "delivery" appeared here by chance and was taken from some earlier version of the legal text.

The notion of truthfulness is not sufficiently clarified in the Law, which can create problems in its implementation. It could be amended so as to specify that it includes accuracy, completeness, and timeliness. For example, when whistleblowing is performed by submitting a document that indicates a violation of regulations, without any comments from a whistleblower, it will undoubtedly be "true" that the document was drafted and that it indicates a violation of the law. But, it can also be true that the document was subsequently amended and that the illegality was removed (which the whistleblower was aware of, but did not indicate, nor deliver other documents at their disposal). On the other hand, such specifications could create new problems - some whistleblowers might start wondering if they meet legal requirements and refrain from whistleblowing.

The provision of paragraph 2 is not logical. A person can seek benefit for themselves or another person, regardless of whether they also sought actions to be taken in connection with the information. This can be done by a person who only provided information on the violation of regulations, without making any requests for the violation to be removed. The current provision carries the risk for some abuses, which the legislator intended to prevent, to stay "under the radar".

The Law states that whistleblowing is abused in cases when unlawful benefit is sought. This benefit may be requested for oneself or another person (not specifically stated). The Law does not provide any related situations, and the question arises if they could be included in the current definition of the term abuse. For example, a whistleblower may seek to cause damages

to someone or violate someone's rights, without benefiting from such actions in any way.

If the notion of abuse gets further extended or specified in the future, it could lead to the introduction of new grounds, such as requesting the authority to take an unlawful action, or to knowingly present unsubstantiated allegations as true.

Interpretation of the concept of unlawful benefit - whether it refers to any benefit that a whistleblower is not entitled to on the basis of regulations, or only to those benefits whose acquisition would be explicitly prohibited on the basis of a certain regulation

Main dilemmas in the existing text may arise in regards to the interpretation of the concept of unlawful benefit - whether it refers to any benefit that a whistleblower is not entitled to on the basis of regulations, or only to those benefits whose acquisition would be explicitly prohibited on the basis of a certain regulation? For example, the Law on the protection of whistleblowers does not recognize the practice of awarding whistleblowers who make significant contribution to public savings or revenues. If a whistleblower requests to receive a payment in the amount of 10% of the money that will be allocated to the budget on the basis of information provided, the authority shall not meet such request, since it has no legal grounds. On the other hand, no (other) Law prohibits citizens to submit such requests to state authorities, so it could be argued that these requests are not contrary to the law.

Dilemmas in the implementation of the Law may be considerable when the request is not explicit, but formulated in some indirect way, such as an appeal, expectation, inquiry, or suggestion about additional information, or in cases when the request is related to the award of a social recognition, which authority can always grant to a whistleblower by means of a special decision.

Given the fact that the legality of actions is not a requirement for a certain act to be characterized as whistleblowing, as we pointed out in the comments on definitions, the person who abuses whistleblowing can still be called a whistleblower, based on Article 11 of the Law. Although these abusers eventually do not enjoy legal protection, the mere fact that they are called "whistleblowers" will negatively impact public perception and moral of conscientious whistleblowers.

The process of whistleblowing

Classification

Types of Whistleblowing Article 12

Whistleblowing may be internal, external, or public.

Disclosing information to an employer shall be deemed internal whistleblowing.

Disclosing information to a competent authority shall be deemed external whistleblowing.

Disclosing information to the media, by means of the Internet, at a public gathering, or in any other manner that information may be made public shall be deemed public whistleblowing.

This Article defines specific types of whistleblowing (internal, external, and public). The terminology is not completely adequate, because the so-called "internal whistleblowing" is internal only for someone who is a part of that group, for employees, executives, or business owners. For business partners and service users, this is actually external whistleblowing. In such case, whistleblowing is "internal" only inasmuch as being solved within the institution where the problem occurred or has been identified.

The definition does not include the criteria for defining the “employer” that is being addressed by a whistleblower

In order to properly perform internal whistleblowing, a whistleblower should address the "employer". Surprisingly, the LPW provides little information about which "employer" is "the right one". In fact, the very definition of "employer" determines only the authorities, organizations, legal entities, and businesses that can be "employers" under the LPW. The definition, however, does not include the criteria for defining the employer that is being addressed by a whistleblower, and such criteria cannot be found in other provisions either. On the basis of Article 5. Para 1. Item 1. "whistleblowing is performed with the employer..." but there are no

specifications on who the "employer" should be. It would be logical if the "employer" was identified, in both terminological and normative terms, as an authority, organization, or legal person *within whose jurisdiction* the breach of regulations, endangerment of public interest, or damage took place.

In the absence of other criteria, the "competent" employer can be determined by using a reverse approach - on the basis of relationships (work or other engagement, business cooperation, etc.). The problem indicated by whistleblowing may be related to some other "employer", or to a person who does not have this role. For example, imagine that an employee in the Ministry of Culture in Belgrade was reviewing the documents on the restoration of a monastery, and accidentally found information that indicate that a Municipality in Southwestern Serbia did not obey the Law on public procurement as it failed to pass a mandatory internal act.

The problem indicated by whistleblowing may be related to some other "employer", or to a person who does not have this role

The adoption of the act is not a question that an official is required to address within the scope of their official duties, and such a verification does not fall in the jurisdiction of the Ministry of Culture. If a staff member from this example wishes to disclose this information, and to obtain the status of a whistleblower, they can contact only an authorized person in their ministry, and not the person authorized to act in the municipality where the irregularity took place, or the authority competent to monitor the work of local self-government. The ministry official and the local self-government are not in any relationship that the Law recognizes as a prerequisite for whistleblowing – the official is not employed in this body, does not use the services of a remote municipal government, and does not have a business cooperation with this authority. This is one of the absurd consequences of the legal definition that conditions whistleblowing by the existence of some form of prior association between the whistleblowers and the “employer”. The alternative would be even worse –interpreting that the ministry official cannot become a whistleblower at all in cases when he or she are disclosing the information on abuses in the municipality, because this information is not related to “their work engagement.”

Even in cases of disclosing a single "information", the number of "employers" to whom a problem needs to be reported can be large. Thus, a patient who suffers from a chronic illness and wishes to point out the irrational organization of the health system by disclosing a problem related to his or her health center, hospital, and health fund, may address any of these actors for the purpose of performing internal whistleblowing.

In cases of bodies and organizations with complex structures, it can be challenging to determine if an act presents internal or external whistleblowing

Externally to the "employer" and the person authorized to receive information, but not to the (external) "competent authority".

External whistleblowing refers to disclosure of information to an "competent authority". From the standpoint of the LPW, we believe that a whistleblower would not be wrong in case they contacted any body that may be responsible for acting upon any aspect of the disclosed "information". For example, if a whistleblower indicates an irregularity in the procurement of an

In cases of bodies and organizations with complex structures, it can be challenging to determine if an act presents internal or external whistleblowing. Thus, in the context of a public company, addressing the supervisory board essentially presents external whistleblowing, even though it takes place within the same legal entity, because the supervisory board, as an organ of the company, has a certain jurisdiction over the director. Since the Law does not stipulate whether a whistleblower should perform internal or external whistleblowing first, this dilemma has no practical significance for whistleblowers. However, there is a difference from the point of obligations fulfilled by this body. Some of the obligations are related exclusi-

A whistleblower would not be wrong in case they contacted any body that may be responsible for acting upon any aspect of the disclosed "information"

educational institution, which may have the character of the abuse in the procurement process, the right body to contact is competent public prosecutor's office. However, protection should be granted even if the whistleblower addressed the Public Procurement (the body supervising the implementation of the Law on public procurement), the State Audit Institution (the body in charge of compliance audit), the Ministry of Education, or the local self-government as the founder of the institution or the protector of public property, etc. More broadly, since each state administration body is required, under the Law on general administrative procedure, to act upon the received petition in some way (to decide to discard it, or to forward it to the competent authority), it could be argued that whistleblower's address to any authority that has the obligation of complying with the Law on general administrative procedure will have the character of external whistleblowing.

The provision related to informing the public is circular

The provision related to informing the public is circular - "Alerting the public refers to disclosure of information to the public ". The term "public" is neither defined in the Law, nor elaborated in its explanatory note. In order to eliminate this shortcoming, a more tangible criterion could be introduced – making the information directly available to "a larger number" of identified or identifiable persons. For example, these might be the situations when

information is distributed through mailing lists, or by putting up flyers on the streets, but not the situations when someone discloses the information in a conversation between their two friends. Without such precise criteria, the interpretation of the concept of "public" is left to the case-law. The situation is further alleviated by the possibility of referencing some international experiences, especially the ones of the European Court of Human Rights.

Mandatory elements

Content of Disclosure Article 13

The disclosure shall include information regarding any infringement of legislation; violation of human rights; exercise of public authority in contravention of its intended purpose; danger to life, public health, safety, and the environment; or information intended to prevent large-scale damage.

The disclosure may include the whistleblower's signature and data on the whistleblower. The employer and competent authority shall be required to act, within their respective remits, upon anonymous disclosures.

Article 13 uses these terms in a different way from the introductory definitions. Although it is not explicitly stated, the term "information" used here implies a document (letter, message, recorded note...) in which a whistleblower discloses the "information" (within the meaning of Article 2 of the Law). Such conclusion is indicated by the provisions of paragraph 1 which stipulates the information that must be included in such a document, and by paragraph 2, which stipulates which information may (but does not need to) be included.

On the other hand, the term "information" in Article 2 of the Law is stipulated as the subject of whistleblowing - "disclosure of information about violations of regulations, violation of human rights, the exercise of public power contrary to the purpose for which it was entrusted, danger to life, public health, safety, environment, and for the purpose of preventing a major damage." In

the definitions, the term information is not identical with the document indicated by a whistleblower when performing whistleblowing. This document contains the "information" (for example, the description of a crime or violation of human rights), but also includes the other data – e.g. the signature of a whistleblower, or consideration of other issues that the whistleblower brought into connection with the "information".

Of course, it would be far better if other terms that create fewer opportunities for confusion were selected instead of the term "information" in both cases.

The first paragraph of this article contains an error that is so obvious that results in the expectation that the Law should always be applied according to the intended definition, and not the stated definition. The description of the "information" (meaning the document) includes various forms of threats to public interest, but it seems as if each of them must be specifically mentioned (infringement, violation of human rights, threat to life, public health, large-scale damage, etc.), while in fact, the intention was for the whistleblower to identify at least one of the above risks.

Another omission was probably created by copying definitions from Article 2 to this Article. What may be applicable to the definition, may not be applicable to the description of the information content. Thus, the whistleblowing can actually be performed "in order to prevent a large scale damage" (the goal of this kind of whistleblowing). However, the information submitted by the whistleblower may refer to the fact "about the threat of major damage" (description of the threat to public interest).

It would be far more reasonable if the whistleblower was specifically authorized not to sign the document

the document, because of the other regulations that require other people who indicate an illegal or harmful action, or otherwise address state bodies and legal entities, to clearly identify themselves. In this case, the rule would undoubtedly affect the implementation of other related regulations. When we take into account the Ministry of Justice claims that the LPW does not modify the provisions of other laws, maybe that was the exact reason why the legislator decided not to set a clear standard.

This is another reason to open the second, considerably more important question - whether the submission of notice of an infringement, which is based on another regulation (criminal charges, the initiative for criminal proceedings, a petition to the court president or objecting the quality of goods sold or services rendered) should also be considered whistleblowing? From the

The term information is not identical with the document indicated by a whistleblower when performing whistleblowing

Article 13. para. 2. and para. 3 do not disclose the intention to allow whistleblowers to keep confidentiality (signing of the document is only optional), as well as the obligation of the authority that receives the document used for anonymous whistleblowing to act on it. The wording is awkward. The whistleblower is not otherwise prohibited to sign documents referred to legal entities and state authorities. Therefore, it should not be stipulated here that the whistleblower "can" do so (that such right is allowed). It would be far more reasonable if the whistleblower was specifically authorized *not to sign*

Whether the submission of notice of an infringement, which is based on another regulation should also be considered whistleblowing?

standpoint of the legal definition, such address can meet all the requirements to be considered whistleblowing – it discloses the information about an illegal or harmful action to an "employer" or an "competent authority", and there is a legally required type of relationship between an acting person and the body where the violation or damage took place (work relationship, business cooperation, etc.). This question is not just theoretical. On the contrary, when it comes to the form of address, the LPW and other regulation may come into conflict. The legislator's intentions were not clear enough, so it cannot be said with certainty whether they were properly translated into rules.

In the above context, the question of signing the document used for whistleblowing could be resolved by a mutual "compromise" if the whistleblower decided not to use legal remedies provided by another law, but to insist on the information being submitted by explicit reference to the provisions of the LPW. The obvious disadvantage of this solution is the creation of parallel channels for acting on the same issues.

Other personal data that may or may not be indicated by a whistleblower are equally important as signatures. It is not possible to provide legal protection for whistleblowers if there is no reliable way to determine that the person performed whistleblowing. This is not possible to do unless a whistleblower provides the information that can be used to establish their identity. On the other hand, if a whistleblower does not provide personal information, there is less chance that they will need protection, that is, that a harmful action will be taken against them. The persons who do not provide such personal information may be exposed to harmful action only if their identity is subsequently discovered, for example, through the investigation conducted for this purpose by the indicated culprit. In such situations, true whistleblowers may have an interest to deny the fact that they performed whistleblowing. Not only because they would avoid retaliation, but also because it is much easier to obtain legal protection as a "wrongfully identified whistleblower" than as a true one to which the conditions for providing protection do not apply (deadlines, the veracity of the information, non-conditioning, data secrecy).

True whistleblowers may have an interest to deny the fact that they performed whistleblowing

"Employer" and "competent authority" are obliged to act on anonymous complaints in connection with the information, "within their powers". The resulting problem is reflected in the question of unresolved relationship between the LPW and other laws. The standard could be interpreted as an employer and a body always being obliged to act on an anonymous complaint, even if other regulation prohibits that (e.g. if there was a provision according to which the body should not act on anonymous complaints). Another possible explanation would be that the company or authority who find themselves in this situation should act within their powers under other regulation. If the other regulation prohibits acting on anonymous complaints, they will have no obligations to act on whistleblowing cases of this kind. In cases

"Employer" and "competent authority" are obliged to act on anonymous complaints in connection with the information, "within their powers". But what does it mean?

where the body has the ability, but not the obligation to act on anonymous complaints (is authorized to decide whether to act on them), the possible interpretation would regulate either a duty to use its powers to act upon anonymous report/complaint, or a freedom to decide about it by using discretionary powers.

Another question is what is meant by acting, and at what time shall it be considered that the employer and the competent authority fulfilled this obligation. In other words, will it be enough if the body takes any action after the whistleblowers' complaint, or will the body be obliged to fully examine the case and take all available measures. It is entirely possible that the obligations of the authority are prescribed by some other act. However, this is not the issue here – the dilemma is whether the LPW brings any innovations in relation to the obligations that the employer or competent authority would have if this act had never been passed?

It would be good to prescribe the minimum action required to be taken by the body addressed by a whistleblower. For example, this could be the obligation to verify whether the allegations of infringement or other danger to public interest were supported by evidence, to determine whether a violation actually occurred, to inform the whistleblower about the outcome of the investigation, to initiate the procedure for penalizing the responsible parties and providing compensation, etc. Such standards could significantly complement the existing "loopholes in the system," or a number of situations when the authority responsible for acting did not do so using the excuse that the obligations were not strictly regulated.

The issue of the intent to perform whistleblowing and the awareness to act as a whistleblower is not mentioned in the LPW. Several provisions implicitly assume that the whistleblower is a person who is aware of this role (i.e. indicating the perpetrators of violations of regulations or public interest, or signing the "information"). However, none of the definitions or other provisions of the Law require a whistleblower to demonstrate awareness or intention to perform whistleblowing. From the standpoint of protection of whistleblowers there is no difference – a person should be protected from retaliation whether they had the intention to perform whistleblowing or not. However, from the point of the obligation of the employers and the competent authorities, it is very important for them to be able to recognize a whistleblowing. The risk for a whistleblowing to remain unrecognized is particularly large when the disclosure of information is performed as a secondary action within a longer notification or other form of address. For example, submitting the study on public procurements from a previous year to all relevant

Whether the LPW brings any innovations in relation to the obligations that the employer or competent authority would have if this act had never been passed?

The risk for a whistleblowing to remain unrecognized is particularly large when the disclosure of information is performed as a secondary action within a longer notification or other form of address

institutions in Serbia (including the authorities responsible for acting on such cases of irregularities) may represent a "disclosure of information" if the study included some particular cases of violations of the law which had not been known before. If the disclosure of this violation was not the prime objective of the address, but was listed as an example on page 54 of the text, it is neither realistic nor reasonable to request the competent authority to act on such case of whistleblowing.

Internal Whistleblowing

Obligations

b) Internal Whistleblowing

Obligations of Employer Article 14

Each employer shall be required to undertake all measures necessary to correct determined irregularities in relation to the disclosure.

The employer shall be required to protect the whistleblower from any damaging action, and undertake any and all measures necessary to terminate a damaging action and remove any consequences of a damaging action.

The employer may not undertake any measures to reveal the identity of the whistleblower.

The employer shall be required to notify, in writing, all persons employed of their entitlements hereunder.

The employer shall be required to designate an officer authorized to receive disclosures and be tasked with pursuing proceedings related to whistleblowing.

Despite the provisions of this Article, there are still some unresolved dilemmas concerning the relationship between the LPW and other laws. Thus, the obligation of authorities and companies to take "measures to eliminate the established irregularities" "within their powers" may be interpreted as an obligation to do everything possible (engage all capacities). Another interpretation would be for these bodies to, among other things, decide whether and to what extent to examine specific suspicion of illegality and establish the facts "within their powers". The differences in the outcome of the application of one or the other interpretation can be drastic.

On the basis of para. 2 the "employer" has two related obligations - to protect whistleblowers from adverse action (taken by the employer, or by another person) and to take measures to stop the harmful actions (e.g. warning other employees to stop harassing a whistleblower). Third obligation consists in eliminating the consequences of harmful actions (e.g. damage compensation). It is important to note that all these obligations stipulated for the employer are applicable only within its powers. So, if retaliation against a whistleblower is performed by a person who is not employed or hired by the employer there is no justification that the employer could use to prevent or stop adverse action. The only thing the employer could do is to help the whistleblower contact the state authority who can provide such assistance. Also possible are the situations with more than one "employer" is addressed by a whistleblower, in which case they have equal duty to protect the whistleblower from harmful actions within their jurisdictions.

All these obligations stipulated for the employer are applicable only within its powers

The degree to which a whistleblower protected their identity is irrelevant, as taking any action to establish this identity is strictly prohibited

Another important standard is the one prohibiting "employers" to take measures to establish the identity of anonymous whistleblowers. The mere attempt to establish the identity constitutes a violation of the Law, regardless of whether it was successful or not. Such attempts can be undertaken through interviews with employees, analysis of e-mails, calls, communication with computer servers, and in many other ways. The degree to which a whistleblower protected their identity is irrelevant, as taking any action to establish this identity is strictly prohibited.

blowers who formed a relationship of trust with the contacted authority and used their name, but did not want any other party to know their identity.

What makes this absolute protection of confidentiality even stranger is the fact that the same law anticipated numerous situations in which it can be possible or even required to disclose the identities of those whistleblowers

In order for the whistleblowing system to function well, it is important that potential users are very familiar with it. Therefore, a provision obliging an employer to submit a notice to its employees about their rights stipulated by this Law would be very useful. It would certainly be helpful to prescribe the obligation to release this information on the "employer's" website. The harmful effects of drafting the Law using the perspective of labor law are again evident in connection with this provision – even though the law should equally protect other persons

A notification is sent only to those with a work engagement, and there is no mechanism designed to notify other potential whistleblowers of their rights

(service users, business associates, small shareholders, and the like), a notification is sent only to those with a work engagement, and there is no mechanism designed to notify other potential whistleblowers of their rights. This omission has a significant impact on the fulfillment of one of the objectives the Law was supposed to accomplish, and that was particularly emphasized in its explanatory note - reporting corruption. This phenomenon is documented by the experiences of business partners and users of public sector institutions, and the fact that their preventive notification, even at elementary level (bulletin board, or internet website) is not prescribed as an "employer's" obligation.

In order for any law to be successfully applied, it is necessary to personalize responsibility. This Law stipulates that each employer "is obliged to appoint a person authorized to receive the information and conduct proceedings in connection with whistleblowing". Is this enough? It could be said that it would be better if minimum level of power or minimum qualification was stipulated for an authorized person. On the other hand, given the diversity of parties involved, and including the fact that some of them do not employ lawyers, this would be difficult to implement. In any case, the employer, or ultimately the head of the authority or the company, are responsible for the quality of their choice.

The Law uses a singular case, but this should not be an obstacle for the employer to appoint more persons in charge of receiving "information" and conducting proceedings in connection with whistleblowing. This would also be a more logical solution, especially when it comes to major bodies and companies, as well as those who can expect various causes of whistleblowing.

The amendments intended to make whistleblowing easier – by publishing internal document and name of the person authorized to act, were rejected in the parliamentary procedure. The first argument for the rejection was that "not all employers have websites". However, this obligation is not prescribed even for those who have a website. Another reason for not disclosing names of authorized persons is even stranger - "the appointment of such persons is the responsibility of the employer whose failure to act in this regard is sanctioned by penalty provisions, and whistleblowers' address is not conditioned by the appointment of the persons authorized to receive information." If the legislator considered that the name of the person authorized to receive information and the proceedings should be secret, then this should have been indicated. In this case, we have an absurd situation where employees, business associates, and service users are encouraged to contact the "authorized person", but they do not need to know who that person is.

An internal whistleblowing procedure shall be initiated by the disclosure of information to an employer.

The employer shall be required to immediately act upon any whistleblowing disclosure and at the latest within 15 days of receiving such disclosure.

The employer shall be required to notify the whistleblower of the outcome of the procedure within 15 days of the conclusion of the procedure referred to in paragraph 1 of this Article.

The employer shall, upon the whistleblower's request, provide him with information about the progress of any and all actions undertaken in the course of the procedure, and enable him to have access to the case files and participate in actions in the course of the procedure.

No whistleblowing can be performed before the information is delivered to the employer. When information is submitted by regular mail, dropped into a special mailbox, sent by e-mail, or submitted in other ways, whistleblowers often has no way to prove that they actually submitted the information (except when the employer wants to confirm the receipt or is obliged to do so on the basis of an act). It is logical that employers cannot have any obligation to act if they did not receive the information. However, unconditionally binding the right on the protection of whistleblowers to the delivery (receipt) of the information to the employer may give an advantage to those retaliating against whistleblowers. Such an employer can claim that they never received the information, and that the subsequent action that harmed the whistleblower cannot have anything to do with the fact that the whistleblower (allegedly) submitted such information.

"The obligation to act" can also be fulfilled by taking a minimal intervention, or "acting in any way" within 15 days period

Bearing in mind that "acting on information" in the full sense of the word can also refer to lengthy proceedings and examination of the facts, it is certain that this article did not want to create an obligation for an authority to conclude the entire procedure within 15 days. On the contrary, "the obligation to act" can also be fulfilled by taking a minimal intervention, or "acting in any way" within that period. And that is certainly an improvement, because it happened many times in the past that citizens' complaints ended up in a drawer", unless there was a direct obligation for the authority to act within a specified period. However, the obligation to initiate the procedure upon receiving a complaint does not guarantee its resolution.

It is unclear what happens when this provision of the LPW is put in correlation with provisions of other regulations. If there was a possibility for the beneficiaries of a body to file petitions concerning the work of that body, but not the deadline within which the body must initiate the process, such deadline will be stipulated now. If there was a deadline to initiate the investigation of a case, and was less than 15 days, this deadline will still be binding for the body. However, if the body violates the shorter deadline, prescribed by another law, the body will not simultaneously violate the LPW (such amendment was presented in the parliamentary procedure, but was not accepted). Finally, in situations where another regulation stipulates a

longer period than the one from LPW, it should be considered that the body is now bounded by the new, shorter deadline from the LPW to initiate the process.

All these considerations of deadlines are conditioned by the response to previous question: whether the process of whistleblowing is independent from all other processes that existed previously with the authorities, organizations, and companies, or the processes that would be established in the future, or is the whistleblowing an action that can be performed within another regulated procedure? The already discussed conclusions on the provisions go in favor of the second interpretation. Thus, the statement of intended whistleblowing is not an element that is required as a mandatory part of the act; the definition of whistleblowing references the discovery of information about specific issues to the employer, competent authority, or public, without prejudice to any aspect or medium that can be used to convey this same information in another proceeding.

If we accept this broader interpretation, which we believe would be closer to what is written in the Law (regardless of whether the legislator's intentions may have been different, as might be inferred from some of the reasons for the rejection of the amendment), this would have a negative consequence. People who use the same legal remedy would have different rights in some instances depending on whether they are eligible to be considered whistleblowers or not.

After the action is initiated, and until the end of the process, the employer is not bound by deadlines. It is only obliged to inform the whistleblower of the outcome within 15 days. This can also create doubts about what would be considered the termination of the procedure, but these issues should be more closely stipulated in the internal regulations of the company.

Powers of whistleblowers are not limited in any way, even though there might be room for such action

A significant tool in the hands of whistleblowers, which should oblige "employers" to take internal whistleblowing more seriously, is the power to request and obtain notices on the progress and actions taken in the proceedings, to examine case files, and to "be present at the proceedings." These powers of whistleblowers are not limited in any way, even though there might be room for such action. It is easy to imagine situations in which a procedure initiated on the basis of information provided by a whistleblowers could disclose some data that indicate whistleblower's culpability in another situation. It would be appropriate to examine this matter and keep potential evidence before a whistleblower is informed

about everything, and something like that cannot be performed with any restriction of whistleblowers' right to inspect case files and the actions taken in the proceedings.

Whether the whistleblowing is independent from all other processes or an action that can be performed within another regulated procedure?

Each employer with more than ten employees shall be required to adopt an internal enactment governing internal whistleblowing procedure.

The employer shall be required to post the general enactment referred to in paragraph 1 of this Article in a visible location that is accessible to each employee, as well as on its web provided that there are technical conditions to do so.

Provisions of the general enactment governing internal whistleblowing procedure must be consistent with the provisions hereof and the bylaw referred to in Article 17 hereof.

Provisions of the general enactment referred to in paragraph 1 of this Article may not reduce the scope of rights or deny any right to a whistleblower within the meaning of this Law.

Provisions of the general enactment referred to in paragraph 1 herein that is not consistent with this Law or bylaws adopted in accordance with this Law shall be null and void.

The adoption of internal act of whistleblowing is mandatory for all employers with more than ten employees. This refers only to the employees with open or fixed-term contracts, and not to all persons with work engagements of other types. The labor law character of the Law is also evident in another provision. Regardless of the number of customers or small shareholders who could act as whistleblowers, the authorities and companies with a smaller number of employees will not be have to adopt a special act on internal whistleblowing.

The second paragraph stipulates the obligation of displaying this act "in a prominent place" as well as on the website "if technical requirements are met". The act should be available to "every person with work engagement" (it is not stipulated for the act to be available to every client and business associate). When it comes to internet publications, there is no doubt that every website offers the possibility for publishing rulebooks. On the other hand, there is no legal requirement that all employers should have a website. If they do not have a website, they are not required to develop one for this Law (there is no legal obligation to do so). It would be useful if, similarly to the postings in the premises, the Law stipulated the obligation for the rulebook to be displayed both in a prominent place and on the internet, because it often happens that important documents are published on a website section that is hard to find or reach.

It would be useful if, similarly to the postings in the premises, the Law stipulated the obligation for the rulebook to be displayed both in a prominent place and on the internet

The remaining provisions of this article are redundant. The acts of lower legal power shall not be contrary to the acts of higher legal power. They cannot reduce the scope of the rights or deny any right arising from the law. During the public hearing, the proponent did not explain why these provisions were necessary, and this was not justified in the decision either.

The Minister in charge of judicial affairs shall adopt an enactment to closely regulate the manner of internal whistleblowing, the manner of appointment of an authorized person within an employer, and any other issue relevant for internal whistleblowing applicable to employers with more than ten employees.

On the basis of this authorization, the Minister of Justice issued the *Rulebook on the method of internal whistleblowing, the method of determining an internal whistleblower with an employer, as well as other issues of importance for the internal whistleblowing with an employer who has more than ten employees*. The act was published on the website of the Ministry of Justice on June 5, 2015. <http://www.mpravde.gov.rs/vest/9163/pravilnik-o-nacinu-untrasnjeg-uzbunjivanja.php>

The Rulebook brought some refinements, along with the number of repetitions of legal provisions. Written submission of the information is stipulated in Section 4 in the following manner: direct submission of written information, by regular or registered mail, "as well as e-mail, in accordance with the law and if technical requirements are met." There is also the possibility of a recorded oral submission. It is interesting to note that the Rulebook excluded some of the options for reporting illegal acts that have already been used in practice, and could also be used here, given the obligation to act upon anonymous complaints. Thus, for decades some local governments and companies have been using the practice of its beneficiaries to submit written comments on the work of the body into the special boxes provided. In recent years, online applications have been introduced to allow interested citizens to contact the authorities and express suspicion of corruption and other irregularities. However, this method of communication is also not permitted under the Rulebook! These evident omissions need to be corrected, but it is not possible to investigate the reasons behind them, except perhaps stating that this was an accidental omission due to the rush to adopt the act (the deadlines had already expired at the time).

When the submission of information is performed by direct oral or written submission, an issuance of receipt confirmation is required. When the submission is performed by mail or by e-mail, the receipt confirmation is also required to confirm that the "information relating to the internal whistleblowing" was submitted. In such case, the receipt date of a registered mail is indicated as the date when the mail was sent, and the receipt date of a regular mail is specified as the date when the mail was received by an employer. When a mail is submitted electronically, "the time of submission to the employer is defined as the time indicated in the confirmation of the e-mail receipt, in accordance with the law".

Therefore, the Rulebook specifies legal "submission" by establishing different criteria for determining the time when the information was submitted. For registered mail, the Rulebook introduced a fictional scenario - that the information was delivered when the mail was handed over to the post office. For regular mail, the time of delivery coincides with the actual event. For e-mail, the Rulebook references other laws and regulations on the receipt confirmation. This neglects the main problem with this mode of communication - some legal persons, who are not obliged to do so, do not issue a receipt confirmation for e-mails, as this obligation is not explicitly stipulated by this Rulebook either.

Article 5 contains a description of the receipt confirmation for the information relating to the internal whistleblowing. It specifies a brief description of the information facts, time, place and manner of delivery, the number and description of the appendices, whether a whistleblower wishes the information on their identity not to be disclosed, data on the employer, employer's stamp, signature of the person authorized to receive information, and guidance for the proceedings related to the internal whistleblowing. Signatures and the information about the whistleblower are optional parts. It is interesting that some elements that are relevant to determine whether the "information" meets the conditions stipulated by the LPW are not listed as required, as well as whether the conditions were met for the whistleblower to enjoy protection (e.g. some connection of the whistleblowers with the "employer", type of "information", time of the act or event referred to in the "information", etc.).

Very important is also the provision according to which the mail indicated to be delivered to the person authorized to receive information and conduct the proceedings related to internal whistleblowing with the employer, or the mail whose packaging reveals such information, may be opened only by an authorized person. Other forms of information delivery are not secured in this way, which could have been done with e-mails.

When it comes to anonymous whistleblowing, the Rulebook extends beyond the Law only in regard to prescribing "taking appropriate action, and accordingly informing an employer, as well as a whistleblower, if possible based on the available data", all of which is done in order to verify the information. This provision is not clear, although much can be assumed. Thus, it can be assumed that, despite the use of the impersonal form, the intention was to say that the authorized person shall take appropriate action and notify another person within the employer's jurisdiction (supervisor?). The standard is incomplete in the section that should indicate the scope of mandatory verifications performed in each case of anonymous whistleblowing, which should in no way be different in relation to the cases when the whistleblowing is known. It is also possible to notify an anonymous whistleblower, and this Rulebook stipulates so - if possible based on the available data. For example, such possibility exists when a whistleblower uses an obvious pseudonym, but provides an internet address which can be used for sending the notice.

In cases of taking statements, Article 8 stipulates drafting a written record that can be objected. According to Article 9, after the procedure is completed "a report on the actions taken shall be drafted... and measures shall be proposed to eliminate identified irregularities and consequences of harmful actions arising in connection with the internal whistleblowing". This report is submitted to the employer and the whistleblower, and the whistleblower shall have an opportunity to discuss it. It is further stated that "in order to eliminate identified irregularities and the consequences of harmful actions arising in connection with internal whistleblowing", "appropriate action based on the report" may be taken.

This standard also needs revision. The LPW defines "adverse action" as an act undertaken as retaliation against whistleblowers. If we start from the logical assumption that the Rulebook used the same terminology, that would mean that the employer's authorized person, acting on the "information" or dealing with the problem indicated by a whistleblower, would also investigate the retaliation taken against the whistleblower". However, at such moment, there still may be no retaliation or damaging action taken, so it certainly cannot present a mandatory part of the report on the action of the authorized person on whistleblowing.

The provision according to which the "authorized person" ceases their work after "proposing the measures", coupled with the fact that these proposals are not binding for anyone, is not good and does not meet required standards

Another good solution is for a whistleblower to get the opportunity to comment on the report. It would be even better if the commenting presented an integral part of the documentation that an authorized person submits to the "employer" (this should probably be interpreted as the "employer's" supervisor). On the other hand, the provision according to which the "authorized person" ceases their work after "proposing the measures", coupled with the fact that these proposals are not binding for anyone, is not good and does not meet required standards. The LPW obliges the employer to complete the proceedings after receiving the information and to inform the whistleblower about the outcome. Surely, it cannot be assumed that the employer has done all that was in his jurisdiction only by establishing recommendations on what should be done, but by actually doing it.

For example, when an employee within the company indicates to the authorized person that a concluded agreement is harmful to the company, the authorized person shall examine these allegations. That examination can lead to the conclusion that the assistant director probably intentionally concluded a damaging contract

because he or she had had a private interest in the business. The recommendation of an authorized person could be, for example, for the legal department to initiate proceedings for breach of the contract, for the assistant director to be fired, and for the criminal charges to be taken against him. However, "acting on information" does not end here, but only when the proceedings for the breach of contract, dismissal, and criminal charges truly become initiated.

Some important issues that were not clearly defined by the Law, are not regulated by the Rulebook either, so these could be included in future amendments. Among other things, this primarily refers to the manner of fulfilling the obligation of the employer to provide whistleblowers with requested information on case progress, to allow them access to the case, and presence in procedural actions. In addition, the Rulebook could more closely regulate whistleblowers actions in situations where a person authorized to receive the information is in some way involved, or actions in specific situations – e.g. when the information is provided by a beneficiary of the body and not an employee, etc.

Some important issues that were not clearly defined by the Law, are not regulated by the Rulebook either

External Whistleblowing

c) External Whistleblowing

Article 18

An external whistleblowing procedure shall be initiated by the disclosure of information to a competent authority.

Where whistleblowing pertains to employees of the competent authority, the whistleblower shall make the disclosure to the head of such authority; where whistleblowing pertains to the head of a competent authority, the whistleblower shall make the disclosure to the head of the authority directly superior to such competent authority.

The competent authority shall be required to act upon any disclosure referred to in paragraph 1 of this Article within 15 days of receiving such disclosure.

Where the competent authority to which the disclosure was made does not have jurisdiction to act in connection with such whistleblowing, it shall forward the information to the authority vested with such jurisdiction within 15 days of receiving such information, and shall notify the whistleblower of this action.

The authority referred to in paragraph 4 of this Article shall be bound by the safeguards provided to the whistleblower by the forwarding authority.

Where the whistleblower has not approved that his identity be revealed, and the competent authority to which the disclosure was made by the whistleblower does not have jurisdiction to act, it shall, prior to forwarding the disclosure to the competent authority, request approval for doing so from the whistleblower, unless otherwise stipulated by the law.

The competent authority shall, upon the whistleblower's request, provide him with information about the progress of any and all actions undertaken in the course of the procedure, and enable him to have access to the case files and participate in actions in the course of the procedure.

The competent authority shall be required to notify the whistleblower of the outcome of the procedure referred to in Paragraph 1 hereof after the conclusion of the procedure, in accordance with this Law.

"Competent authorities", within which "external whistleblowing" is performed, may be numerous, given the responsibilities they have and the complexity of the issues indicated by whistleblowers. The Law did not set priorities as to which body should be addressed first, which would have made whistleblowers' actions easier. However, whistleblowers will face an obstacle caused by the absence of the obligation for employers to publish the information on which external competent authorities are responsible for acting in some typical situations where whistleblowing can be expected to take place.

The rules of address from Para. 2 of this Article seem logical at first glance - if a whistleblower suspects that some official in the control body is corrupted, they will address the head of that body; if they suspect that the supervisor is corrupted, they will address the head of the body that immediately supervises that person. However, this logical assumption also includes lot of confusion. The first question is - why is this situation called external whistleblowing? If a whistleblower indicates a problem in the body competent to control other bodies and/or legal entities, such as corruption in an inspection or in the police, they will, according to this rule, address the Minister under whose jurisdiction that inspections is, or the director of the police. If they suspect that the minister was somehow involved in corruption, they will address the Prime Minister, as the immediate head of that authority (or perhaps the President of the National

When the "true" internal whistleblowing is performed, an authorized official should be addressed, and not the minister

Assembly, since this body is in charge of the appointment and dismissal of ministers). Indicating to the Minister that some of his officials are corrupted is by no means an "external" whistleblowing from the standpoint of that ministry, but an indication to a problem within "their house" that requires a solution - either made independently or with someone else's assistance. However, when the "true" internal whistleblowing is performed, an authorized official should be addressed, and not the minister.

This confusion is also created by the fact that paragraph 2 omitted the word "also" - "if the whistleblowing *also* applies to persons employed within the competent authority". This provision will make sense only if a whistleblower primarily seeks to draw attention to a problem that emerged somewhere else, with another "employer", along with the problem within the external competent authority. If we take the above example, this would be a situation where the whistleblower wishes to draw attention to the violation of consumer rights in a company, however, they do not address the market inspector in charge of that area in Serbia, because of the belief that the inspector is corrupted, but directly the minister of trade.

The rest of the provision is clear, but not completely logical. In some situations, a whistleblower will not have clearly defined suspicion about the supervisor in a "competent authority", but about that authority as a whole (e.g. because of the long time the authority took to decide on a case). Therefore, it would be good if this possibility was also mentioned. Second, in some situations, the same problem can be solved by several external control bodies (e.g. budget inspection of the Ministry of Finance and the Public Procurement Office). There is no reason for a whistleblower who suspects the Minister of Finance of being corrupted to be referred to a higher authority. The whistleblower should be presented with the possibility to address the other control body - in this case the Public Procurement Office. Finally, if a whistleblower directly addresses a superior authority, it is not necessary, and often not appropriate, to address the head of the institution, as addressing the body will suffice.

The ambiguities of the provisions relating to the obligation of the authority to act have already been discussed in the review of the Article regulating internal whistleblowing. In general, the conclusion is that it can be considered that the authority "acted" if any action was taken - asking for further information, passing the case to another competent authority, initiating the evidence collection... it is important to take at least some action, and to "take into consideration" the received notice within 15 days.

When it comes to control bodies, many situations will already stipulate an obligation to act in a certain way and in a certain time period from the time when some kind of illegal activity or other problem was reported. The question of what would happen when two deadlines are different has not been resolved. An additional problem is reflected in the fact that the body will have different deadlines for acting when the same problem is reported by the citizens who do not have the status of whistleblowers and those who do. For example, if after a shop robbery a criminal complaint to one public prosecutor is filed by a clerk who was hit by a robber at the workplace, this would be considered whistleblowing (discovery of an illegal action which the person became aware of in connection with their work engagement), and the public prosecutor would have a period of 15 days to act on that complaint. If the same complaint about an illegal

action is filed by police officer on duty who conducted an investigation, this would not be considered whistleblowing (because the revealed information is in connection with the exercise of official duties), and there would be no such deadline for the prosecutor to act. If the complaint is filed by a neighbor who witnessed the action from the house across the street, this would also not be considered whistleblowing because there are none of the required forms of association from the Article 2 of the LPW.

It is unfortunate that the adoption of the LPW was not used to specify the obligations of state control bodies to act in those cases that are not sufficiently regulated by their respective laws. Among other things, it could be predicted that, if it is not in conflict with the obligations established by other law, the inspection body will be obliged to determine the veracity of allegations of infringement, breach of public interest, damage, or other risks referred to in Article 2, item 1) to which a whistleblower pointed out, as well as those within its jurisdiction; to take measures for prevention or elimination of injuries and hazards; to determine who was responsible for the violations and resulting threats; to take appropriate action against the person responsible; to take appropriate action for the compensation of damages incurred due to injuries and danger.

The situation described by para. 4 of this Article is legally and logically impossible. The definition of "competent authority" includes the authority's competence to act, so it is impossible that the responsible body is also considered incompetent. When we put aside this terminological confusion, we have the solution according to which the authority that received a notification of a violation of some regulation, where the body has no jurisdiction for further investigation, would forward the information to the competent authority. The deadline for such action is the same as the deadline for acting on the information - 15 days. The authority also informs the whistleblower accordingly. However, as this type of whistleblowing requires whistleblower's consent, it can easily happen that the authority exceeds the stipulated deadline. It would therefore be useful if the deadline for acting on the information was shorter, or if the deadline for forwarding the information was longer.

It is known that people may be willing to address one control authority, but not another. For example, to have confidence in the services of their municipality, but not in the one at the central government level, or vice versa. The law recognizes this and gives them, to some extent, the opportunity to influence whether their information will be forwarded to another authority. The possibility to prevent forwarding the information was certainly not given to the whistleblowers who have not indicated that they do not want their identity revealed. This possibility was also not given to those whistleblowers who successfully hid their identity (anonymous complaints), or to those who have sought such protection, if it was stipulated by a certain law that such information must be submitted.

Let us consider the situation in remaining cases, where whistleblowers requested their identity to be hidden, but there was no legal obligation to forward the information. Whistleblower is the one who determines whether the body which was addressed will be allowed to submit the

It is unfortunate that the adoption of the LPW was not used to specify the obligations of state control bodies to act in those cases that are not sufficiently regulated by their respective laws

personal data to another authority responsible for acting. This is one possible interpretation of paragraph 6 of Article 18. That interpretation stems from the circumstances that forwarding information is conditioned by the approval of whistleblowers only in a situation where "whistleblowers did not agree to reveal their identity," and that it can otherwise be carried out without question. Another possible interpretation would be that a whistleblower who protects their identity, "is in control of forwarding the information", or the person who determines not only whether the authority will be allowed to forward the information about their identity, but also the information on the indicated problem.

Paragraph 7 stipulates that the designated authority shall, upon request, provide whistleblowers with the information on the progress and actions taken in the proceedings, and allow whistleblowers to examine case files and attend procedural actions. This obligation is, however, limited by the closing phrase "in accordance with the law". It could be interpreted as if a whistleblower enjoys these rights, if that is already stipulated by another law. However, in this case, the standard would be redundant, because it would not bring any novelty in the legal system. Another possible interpretation, which would give a meaning to this provision, would be that whistleblowers are entitled to receive notifications, gain insight, and the like, but only in case that this was stipulated by another law (e.g. parties in a proceeding), and whistleblowers are given the status of persons who have such a right.

The same dilemmas arise in connection with the obligation of an authority to inform the whistleblower of the outcome of their proceedings. Since the notification is done "in accordance with the law", if another law stipulates such a duty, that duty would also exist here, otherwise not. The deadlines stipulated by that other law would be applied (as they are not stipulated here). The third possible interpretation, which would bring a meaningful solution, but is minimally supported by the LPW, would be to interpret the phrase "in accordance with the law" as "if the law does not prohibit so".

Public Whistleblowing

d) Public Whistleblowing Article 19

A whistleblower may disclose information to the public at large without having previously disclosed it to an employer or competent authority in the event of an immediate threat to life, public health, and safety, the environment, to causing large-scale damage, or if there is an immediate threat to destroying the evidence.

When blowing the whistle to the public at large, a whistleblower shall be required to comply with the principle of presumption of innocence of an accused, the right to personal data protection, as well as not to hinder the conduct of the court proceedings.

The standard of imminence is determined by case-law

Unlike the other two forms of whistleblowing, the right to address the public is not always recognized. Article 19 of the Law makes no distinction according to the seriousness of the threat to protected interests and allows alerting the public without prior notification to the employer or the controlling authority only in most dangerous situations. Only several such grounds are provided, which poses direct threat to the life of any person. The standard of imminence is determined by case-law (for example, whether the weakness of a supporting wall presents an imminent danger to life, if such

wall fails "tomorrow," or lasts for years). The difference between imminent and "ordinary" risk can be explained by the following example: if a whistleblower has the information that a harmful substance is found in the products consumed by children and that such substance causes health problems for about 1% of children, this poses an imminent danger to public health. However, if such product causes adverse health problems after 5 years of use, this will not be an information that requires direct public address, but the first step would be to address the authority in charge of solving the problem.

When it comes to "major damages", the assessment of whether there was imminent danger and whether the whistleblower rightfully omitted other types of whistleblowing, may depend on the manner in which the public was informed about the danger. If the damage posed an imminent threat to a large number of citizens or a very valuable public property, then it does not matter whether the whistleblower managed to reach mass electronic media, newspapers, and open public gatherings, or just one internet website. It should be considered that the condition of imminence was satisfied and the whistleblower should enjoy the right to protection. Examples of this would be providing notification that flooding can be expected in a city, or precipitation that can destroy the entire harvest in a village, the beginning of implementation of a provision of the law which would lead to delays in the work of the courts or the inability to collect tax claims, or the preparation to conclude a contract to sell a valuable public asset for one third of the market price. If the notification is performed in such a way that is accessible only to a small part of the public, then it could be considered that the condition of imminence was satisfied for the situations of threats of "major damage", but only in a relative sense - for people who live in the area targeted by a whistleblower. An example of this would be disclosing the information on the city radio station that citizens have only one month to file a complaint on drastically increased heating bills for the previous month.

It would be useful if another reason was also stipulated as a reason that fully justifies public address without reaching out to other institutions - the disclosure of information that would otherwise had to be released (but it is not). For example, the authorities have to publish on the Public Procurement Portal and their websites the answers to the questions of interested parties in connection with the tender documents. If they do not do so, it is quite reasonable for this information to be published by a whistleblower anywhere else, without addressing anyone within the contracting authority, the Public Procurement Office, or other control body.

Whistleblowers also have the right to address public in other situations, but then have to meet another condition to be eligible for protection - that they have previously addressed the employer or a competent authority. The law does not impose any further limitations in this regard – a whistleblower can send an email notification to the authorized control authority or the person authorized by the employer, and seconds later send the same information to all media in the country. Such a solution seems unfeasible because exposes the employer and the control bodies to a pressure even before that is proven as necessary. It would make sense to allow the competent

In other situations, whistleblowers have to meet another condition to be eligible for protection - that they have previously addressed the employer or a competent authority

authority a reasonable time to act, after which a whistleblower would be allowed to address the public. Of course, when it becomes evident that the authority is not conducting a proper procedure, there is no reason to wait for the stipulated deadline or any other reasonable time period.

Finally, there are also situations where whistleblowers are forbidden to address the public, either before or after contacting the employer and the control body. These are discussed in the Article 20.

The data classified as secret

e) Handling Classified Information Whistleblowing where Disclosure Contains Classified Information Article 20

A disclosure may contain classified information.

Any information classified within the meaning of legislation governing the confidentiality of information shall be deemed classified information referred to in paragraph 1 of this Article.

Where a disclosure contains classified information, the whistleblower shall be required to first make such disclosure to the employer; where a disclosure pertains to a person authorized to act upon such disclosure, the disclosure shall be made to the chief officer of the employer.

Where the employer has failed to act upon a disclosure made by the whistleblower that contains classified information within 15 days, or failed to take appropriate action from within its remit, the whistleblower may contact a competent authority.

Notwithstanding paragraph 3 of this Article, where a disclosure pertains to the chief officer of the employer, such disclosure shall be made to a competent authority.

Where a disclosure contains classified information, the whistleblower may not disclose it to the public at large unless otherwise regulated.

Where a disclosure contains classified information, the whistleblower and other persons shall be required to comply with general and specific measures for the protection of classified information stipulated by the law governing the confidentiality of information.

The Data Secrecy Law

Data Secrecy Law, adopted in 2009, regulates the "unified system of classification and protection of classified information relating to national security and public safety, defense, internal and foreign affairs of the Republic of Serbia, protection of foreign classified information, access to classified information and termination of their secrecy, jurisdiction of the authority

Whistleblowers can often be in a position to disclose information that is protected by some degree or type of secrecy

and supervision of the implementation of this law, as well as responsibility for failure to perform the obligations under this law, and other issues of importance for the protection of data secrecy." Article 3 stipulates that "The data marked as classified with a view to concealing crime, exceeding authority or abusing office, or with a view to concealing some other illegal act or proceedings of a public authority, shall not be considered classified." This provision is potentially very important because whistleblowers can often be in a position to disclose information that is protected by some degree or type of secrecy.

Article 6 stipulates that the secret data should be "kept and used in accordance with the protection measures prescribed by this Law, regulations adopted based on this Law, and international agreements," and that "any person using classified data or any person acquainted with their contents shall be committed to keeping the data regardless of the manner in which they have learned about such classified data" and that this obligation shall remain even after the termination of office or employment, or the termination of duties or membership in a public authority or appropriate body."

Article 16 stipulates that the confidentiality of the data is terminated: 1) on the date specified in the document containing the secret data; 2) with the occurrence of a particular event specified in the document containing the secret data; 3) with the expiry of the time period established by law; 4) with declassification; 5) if the data have been made available to the public.

The following provisions stipulate, among other things, that a decision on the revocation of secrecy shall be brought on the basis of a "periodic assessment of secrecy, proposal for revocation, or the decision of a competent state authority" (Article 21), Article 23 determines who can propose revocation of secrecy, and Article 25 specifies that the secrecy can be revoked on the basis of "the decision of the Commissioner for Information of Public Importance and Personal Data Protection, in appeal procedures or based on the ruling of the competent court in proceedings upon complaint, in accordance with the law regulating free access to information of public importance and the law regulating personal data protection". "Data declassification which is in public interest" refers to the possibility for the secrecy to be abolished by the National Assembly, the President of the Republic and the Government", should that be in public interest or in order to perform international obligations."

The Law on data secrecy stipulates a specific criminal offense (in Article 98), whose provisions read as follows:

If a person should, without being authorised to do so, communicate, deliver to or make available for an unauthorised person any data or documents entrusted to him/her, or of which he/she has learnt otherwise, or if a person should obtain data or documents constituting secret data marked as "RESTRICTED" or "CONFIDENTIAL", as established by this Law,

the person shall be sentenced to prison term of three months to three years.

If the offence from paragraph 1 of this Article has been committed in connection with data marked as "SECRET" under this Law,

the offender shall be sentenced to prison term of six months to five years.

If the offence from paragraph 1 of this Article has been committed in connection with data marked as "TOP SECRET" under this Law,

the offender shall be sentenced to prison term of one to ten years.

If the offence from paragraphs 1 to 3 of this Article has been committed for gain or with a view to releasing or using classified data in a foreign country, or if it has been committed during a state of war or emergency,

the offender shall be sentenced to prison term of six months to five years for the offence from paragraph 1 of this Article, one to eight years for the offence from paragraph 2, and five to

fifteen years for the offence from paragraph 3.

If the offence from paragraphs 1 to 3 of this Article has been committed out of negligence, the offender shall be sentenced to prison term of up to two years for the offence from paragraph 1 of this Article, three months to three years for the offence from paragraph 2, and six months to five years for the offence from paragraph 3.

The intersection of the application of two laws

When these standards intersect the provisions of the LPW, it can be concluded that the current legal framework generally excludes the possibility of alerting the public in cases of information that contain classified information. A whistleblower then must contact the employer, and if the employer fails to act within 15 days, then the competent authority should be contacted (it is possible to directly address the external competent authority in case of doubt that the head of the "employer" is also part of the problem). Any other actions would lead to denial of protection under the LPW and possibly to criminal liability.

Particular caution of whistleblowers is needed in situations of dealing with secret data referred to in Art. 3. of the Data Secrecy Law

these reasons, they cannot be entirely sure that they will not be held liable after alerting the public, until the competent authority determines that the label of secrecy was abused. At the time of reaching the decision, a whistleblower will only have the act that already marked the document as secret, but not reliable knowledge about the motives of those who made the decision on such classification. Only after the label of confidentiality gets revoked, the whistleblower can safely alert the public and enjoy protection, if all other requirements of the LPW have been met.

In connection with the possible ways of terminating secrecy, the Data Secrecy Law does not stipulate the

Legal framework generally excludes the possibility of alerting the public in cases of information that contain classified information

Particular caution of whistleblowers is needed in situations of dealing with secret data referred to in Art. 3. of the Data Secrecy Law which stipulates that "the classified information does not include the information marked as secret in order to conceal a crime, acts of exceeding one's powers, abuse of office, or other illegal acts or practices of a public authority". A document can be marked as confidential even if it was not intended to be so, if the secrecy was marked in order to conceal a crime. Even if a whistleblower has a strong reason to believe that the secrecy was mislabeled for any of

At the time of reaching the decision, a whistleblower has not reliable knowledge about the motives of those who made the decision on document's classification

procedure for establishing that the document has already been made available to the public and that the label of secrecy should be terminated accordingly. In the context of possible criminal liability of whistleblowers for disclosing a secret, it could be concluded, that such liability cannot exist if a whistleblower re-discloses a "secret" information that was already "made available to the public" in any other way and by any other person. On the other hand, it is questionable whether this would be considered whistleblowing, because the information was not disclosed for the first time.

Regulating secrecy in the LPW and the parliamentary debate

When the LPW was adopted, an opportunity was missed to move things from a standstill in terms of resolving the documents that were mistakenly labelled as secret. Many suggestions were raised during the public hearing in connection with this issue. However, when it comes to this topic, these suggestions were only mentioned in the public hearing, and no reasons were given for their rejection and for the retention of existing solutions. Some of the reasons were presented during the parliamentary debate on the submitted amendments. MPs also addressed the amendment according to which alerting the public was absolutely prohibited only in situations where the highest level of secrecy was determined - "national secret", which is established in order to "prevent irreparable damage to the interests of the Republic of Serbia". In all other cases, alerting the public by disclosing secret data would be allowed according to the amendment and under two general conditions - that such whistleblowing does not cause more damage than the damage indicated in the information, and that the objective of whistleblowing cannot be achieved without disclosing the secret data.

Such a change was not accepted by the government "because the solution proposed by the amendment was contrary to the regulations governing data secrecy. In addition, according to the solution proposed by the amendment, the prohibition of disclosing secret data would apply only to classified information labelled by the degree of secrecy as "NATIONAL SECRET", and not to the data labelled by other degrees of secrecy, although the disclosure of such information to unauthorized persons poses a criminal offense, which would ultimately lead to collisions in the application of two laws". Based on the report of the parliamentary committee for constitutional issues and legislation, Minister of Justice, Nikola Selakovic, took a step further in the debate: "The end of the report states - after the examination, the Committee has concluded that the amendments to Article 20... are not in accordance with the Constitution and the legal system of the Republic of Serbia. This is included in the report signed by the colleague PhD. Aleksandar Martinovic, the president of the Committee on constitutional affairs and legislation, and I therefore believe that this is more than enough reason to not accept these amendments. If we have the amendments that in some way derogate the provisions of the Criminal Code, and are clearly stated not to be in compliance with the constitutional and legal system of the Republic of Serbia, then I think this requires no further discussion. Thank you".

The risk assessment of possible collision of two laws was undoubtedly correct when it comes to situations that should be avoided. However, it is equally true that there are legal rules for

Criminal liability of whistleblowers cannot exist if a whistleblower re-discloses a "secret" information that was already "made available to the public" in any other way and by any other person

dealing with cases of collision of two laws, based on which a special law can repeal the provision of a more recent and more general law. In a situation when there is a problem, as it is the case in Serbia with standards on data secrecy, the problem should be solved. It would certainly be better to do so by specifying the rules in Data Secrecy Law, instead in the Law on the protection of whistleblowers. By current practice on the protection in cases of disclosure of classified information, the whistleblowers remained on the same uncertain ground as before the adoption on the LPW.

The analysis of specific provisions

The first paragraph of this article stipulates that the information may contain secret data. Since this is already possible, this norm is redundant. It is possible that it was adopted for the purpose of non-legal, psychological effect, and encouraging whistleblowers to share with others some of the data labelled in this way. Paragraph 2 narrows the meaning of the term "secret data" only to the data labeled as secret "in accordance with the regulations," i.e. the Data Secrecy Law and other relevant regulations. This would mean that the limitations for whistleblowing in cases of using classified information do not apply when a whistleblower is confident that the information is not labelled as secret. However, the question is – what source of information could be reliable? These are probably situations where a whistleblower him/herself illegally established secrecy, and now wants to correct that mistake, and perhaps cases where a whistleblower directly witnessed such an act. In all other situations, the risk taken by the whistleblower is much greater.

It would be reasonable to interpret that the data known to have been incorrectly labeled as secret, should be aligned with the cases from the Data Secrecy Law when secrecy may have been determined properly in the initial moment, but the reasons for the secrecy ceased in the meantime, or the secrecy was revoked by some of the reasons, but the revocation was not implemented.

Quite possible and probable are the situations where the information is labelled as secret, but a whistleblower has reason to suspect that this was done in accordance with the regulations

The provision of paragraph 2 did not solve the problem of unfounded secrecy, but only moved it to the field of application of Data Secrecy Law, where the problem remained unresolved. In fact, quite possible and probable are the situations where the information is labelled as secret, but a whistleblower has reason to suspect that this was done in accordance with the regulations, as well as the situations where a whistleblower simply does not know and has no way of knowing whether the labeling of secrecy was initially done in accordance with the regulations, but believes that such information should be shared with others. The provision of the LPW does not offer a solution to such dilemmas of whistleblowers.

Paragraphs 3 - 5 of this Article stipulate the order of whistleblowers' actions when it comes to confidential data. The sequence is somewhat different than in the cases "non-secret" whistleblowing. Paragraph 3 stipulates the obligation for a whistleblower to address

the "employer" first, that is, no alternative address to external competent authority is stipulated. If the information is related to a person authorized to act on the information, a

whistleblower shall address the head of the "employer". It is interesting that such rules are not provided for "regular" internal whistleblowing, but the address is always made to a person authorized to act. True, in cases of "regular" whistleblowing, addressing the employer is not a necessary step, so whistleblowers can immediately reach out to external control body. According to the paragraph 5, in this case that can be done only if the "information" also refers to the head of the employer, or in other words, if a whistleblower also suspects that the authorized person and the head of the institution where the problem occurred participated in violation of regulations or other breach of public interest.

According to the paragraph 4, a whistleblower acquires the right to address an external control authority ("competent authority") only if the employer fails to act in accordance with the information within 15 days, if it fails to respond to it, or fails to take the measures within its jurisdiction. It's not clear when the deadline for addressing external authority ends, in cases when a whistleblower received a response within 15 days showing that the employer acted in some way. The reason to address the competent authority is then created by the failure to take action within the jurisdiction of the employer. If the deadlines for the employer to take certain measures are stipulated elsewhere, that may also be relevant here. However, if the deadlines for taking such measures are not stipulated, the matter can be interpreted as if a whistleblower may address an external authority immediately, or completely opposite - that they can never address such an authority.

Paragraph 6 refers to other laws in terms of alerting the public, which has already been discussed. Whistleblowers may then decide to initiate the procedure of revoking secrecy, but that is not the subject of consideration in the context of the analysis of this law (this could be done if they did not want to have status of whistleblowers).

Paragraph 7 does not bring anything new – even without this provision, whistleblowers and other persons would be required to abide by measures on data secrecy prescribed by the Data Secrecy Law.

It's not clear when the deadline for addressing external authority ends, in cases when a whistleblower received a response within 15 days showing that the employer acted in some way

How to protect whistleblowers?

Putting whistleblowers "at a disadvantage"

Chapter IV

PROTECTION OF WHISTLEBLOWERS AND COMPENSATION FOR DAMAGE

Putting Whistleblowers at a Disadvantage Prohibited

Article 21

The employer of a whistleblower must not perform an action or omit to perform an action that would place a whistleblower at a disadvantage, in particular in relation to:

- 1. Hiring procedure;*
 - 2. Obtaining the status of an intern or volunteer;*
 - 3. Work outside of formal employment;*
 - 4. Education, training, or professional development;*
 - 5. Promotion at work, being evaluated, obtaining or losing a professional title;*
 - 6. Disciplinary measures and penalties;*
 - 7. Working conditions;*
 - 8. Termination of employment;*
 - 9. Salary and other forms of remuneration;*
 - 10. Share in the profits of the employer;*
 - 11. Disbursement of bonuses or incentivizing severance payments;*
 - 12. Allocation of duties or transfer to other positions;*
 - 13. Failing to take measures to provide protection from harassment by other persons;*
 - 14. Mandatory medical examinations or examinations to establish fitness for work;*
- Provisions of a general enactment denying or infringing upon the right of any whistleblower or placing such persons at a disadvantage shall be null and void.*

It would be logical to think that this refers to a situation which is disadvantageous in relation to something else, or in relation to someone else

"Putting whistleblowers at a disadvantage" is a form of "damaging action", but this term has not been defined. Due to the use of comparative forms, it would be logical to think that this refers to a situation which is disadvantageous in relation to something else (a position that a whistleblower would have held if there was no retaliation), or in relation to someone else (a position that is disadvantageous in relation to other employees, other users, etc.). Numerous "cases" that are listed are not helpful to determine what the legislator wanted to achieve, because they only identified the areas in which someone can be "put at a disadvantage" (e.g. payment of awards and retirement), and not the criteria to determine that the situation is indeed like that.

Another form of "damaging action" (Article 2 of the Law), "any act or failure to act in connection with whistleblowing that... threatens or violates a right" is not included in the title and the first paragraph of this article, but is partly included in paragraph 2 (prohibition of adoption of the act that violates rights of whistleblowers).

Prohibition of "putting whistleblowers at a disadvantage" is a redundant provision because such acts, and all other forms of damaging acts, are already prohibited under Article 4 of the Act. The listed possible areas of putting whistleblowers at a disadvantage are examples only. It would be better if this guidance did not exist at all, because it only lists the areas in the field of labor law. This may encourage a deeply rooted idea that the protection of whistleblowers is something that applies only to employees and other persons with work engagement.

Paragraph 2 annulled provisions of the general act that deprive or violate whistleblowers' rights or put them at a disadvantage in relation to whistleblowing. The report of the public hearing lists collective agreement as an example of such general act. However, the manner in which this annulment would be determined is not clear. The Constitutional Court may suspend the provision of a general act if it is contrary to the law, which could be the case here. However, in proceedings before the Constitutional Court the act cannot be annulled, but only declared unconstitutional/illegal. The Law on administrative disputes provides that the Administrative court can annul the acts, but only in case of individual acts. In this regard, it remained unclear why the LPW stipulates annulment only for general acts, and not for individual acts that harm whistleblowers.

For example, in the current text, a provision that prohibits employees of a company or government's department (potential future whistleblowers) from communicating with public in relation to any matter referred to the work of those companies/departments before obtaining written approval, could be considered null and void. This would be a general act, as it refers to unlimited number of future cases.

This standard could be improved and amended by introducing legal presumptions that can already be found in other provisions of the Law. First, this would refer to an irrefutable presumption that putting whistleblowers at a disadvantage is reflected in any decision of the "employer" that is unfavorable for whistleblowers or related persons, and which explicitly cites whistleblowing as its cause. For example, this would refer to situations where the cause for a disciplinary action against an employee is expressly stated as the fact that the employee reported violation of a regulation. Another useful change would be to set a general rule for determining whether a whistleblower was put at a disadvantage. For example, that could be any act or failure to act of the "employer" that takes place after whistleblowing, and for which the employer cannot prove that it is not related to whistleblowing. In the event that an employee with a fixed-term contract, who performed whistleblowing, was not extended the contract, allegedly due to redundancy, there would be a doubt that this is a damaging action (retaliation). The "employer" could try to prove the opposite – e.g. that the employment contracts were not extended for any other employee at that workplace.

Compensation for Damage

Compensation for Damage Incurred due to Whistleblowing *Article 22*

In cases where damage is incurred due to whistleblowing, the whistleblower shall be entitled to compensation for damage in accordance with legislation governing contracts and torts.

This article of the law is redundant. Even if this provision was omitted, whistleblowers would be entitled to compensation under the Law on contracts and torts. The provision of compensation for damages would make sense only if this law provided more rights for whistleblowers than the

rights guaranteed by the Law on contracts and torts. This might refer to providing guarantees to whistleblowers that they will receive a fair remuneration in any required case, that is, that the court will not make a decision under Art. 185, para. 4. of the Law on contracts and torts on "establishing the former state," even though a whistleblower demanded monetary compensation. This guarantee would be particularly useful for whistleblowers who are facing "silent boycott" in their workplace or other form of retaliation that is difficult to prove. According to Article 185 of the Law on contracts and torts, the responsible person is obliged to restore the former state before the damage occurs. When the establishment of the former state does not eliminate the damage entirely, the responsible person shall make a monetary compensation for the remaining part of incurred damages. When the establishment of the former state is not possible, or when the court decides that the responsible is not necessary in charge of such establishment, the court determines that the responsible person shall pay the injured person appropriate amount of money as a compensation. The court awards monetary compensation to injured persons when such compensation is requested, *unless the circumstances of the case justify the establishment of the former state*. The amendment aimed to reduce the space for the free assessment of the court granting the requested compensation (instead of reinstatement for example) was rejected as unnecessary "because the Law on contracts and torts regulates the compensation of damages in detail."

The rules of procedure

Judicial Relief of Whistleblower Article 23

A whistleblower who has suffered a damaging action in relation to whistleblowing shall be entitled to judicial relief.

Judicial relief shall be exercised by lodging a lawsuit seeking protection in relation to whistleblowing with a competent court within six months of learning of a damaging action that has been undertaken, or three years from such time as the damaging action was undertaken.

The court competent to provide judicial relief shall be the high court with territorial jurisdiction over the location where the damaging action was undertaken, or in accordance with the domicile of the plaintiff.

Judicial relief proceedings in connection with whistleblowing shall be urgent. Appellate review shall always be permitted in proceedings for judicial relief initiated in connection with whistleblowing.

The provisions of the Civil Procedure Code applicable to labor disputes shall apply as appropriate to judicial relief proceedings in connection with whistleblowing, except where otherwise provided for herein.

Whistleblowers and other persons (not mentioned here) can also exercise judicial protection by submitting "lawsuits for protection in connection with whistleblowing". In this case, the deadlines are associated with the time of becoming aware of the damaging action. The deadline for filing lawsuits related to this action is six months. However, filing lawsuits would still be possible after this deadline if the damaging action was repeated. Regardless of the time of becoming aware of the damaging action, the deadline for filing lawsuits is three years. In most cases, a whistleblower will know whether a damaging action was undertaken against them, but that will not always be the case. We can imagine a situation in which an employer used to willingly pay additional insurance for employees, and then stopped making such payments for

one of the employees who performed whistleblowing, without informing that employee accordingly. The whistleblower may not find out about this until the retirement, by which time he or she would already have lost the right to seek court protection under the LPW.

A whistleblowers can sometimes choose which court to contact, because the jurisdiction is determined either according to the site where the damaging action took place (e.g. office of the company in Belgrade), or the place of residence of the whistleblower employed in that office (e.g. in Uzice).

The procedure for judicial protection in connection with whistleblowing is urgent. This is no guarantee that the case will be solved quickly, but it certainly increases the chances to make it so. Court proceedings conducted in connection with whistleblowing always allow for appellate reviews. Civil Procedure Code, which is relevant for determining the permissibility of that legal remedy, stipulates that an appellate review can be stated within thirty days from the date of delivery of the final decision of the second instance, if that is prescribed by a special law (which is the case here). The property lawsuit proceedings do not allow appellate reviews if the value of the dispute is less than 40 thousand EUR.

Cases of the protection of whistleblowers apply the Civil Procedure Code and its provisions relating to the conduct of labor disputes, unless otherwise stipulated by the Law on the protection of whistleblowers. The section XXIX of the Civil Procedure Code, Articles 436 - 441, provide special rules for proceedings in labor disputes. In the first instance, a case is decided by a single judge; the court "pays special attention on the need for urgent resolution of labor disputes," especially when determining deadlines and hearings; during the proceedings, the court may, within its official powers, order interim measures (in accordance with the Law on Enforcement and Security), in order to prevent violent behavior or to eliminate irreparable damage. When a provisional measure is adopted on behalf of a party, the court shall act within eight days. No appeals shall be allowed against the decision ordering a provisional measure.

When the court's decision orders the execution of some action, the court sets a deadline of eight days for the implementation of such measure

When the court's decision orders the execution of some action, the court sets a deadline of eight days for the implementation of such measure. If the defendant is not present at the main hearing, and after being duly summoned, the court will hold a hearing and decide on the basis of established facts. The court shall inform the defendant in the summons on the consequences of the absence. Also stipulated are the cases when the appellate review is allowed (disputes on the establishment, existence and termination of employment). For whistleblowers, the rules that allow the appellate review in all cases shall be applied.

In most cases, a whistleblowers will know whether a damaging action was undertaken against them, but that will not always be the case

Composition of the Court Article 24

A single judge shall always try in the first-instance litigation proceedings initiated upon lodged lawsuit in connection with whistleblowing, and the three-judge panel in the second-instance proceedings.

Possession of Special Knowledge in Whistleblowing Article 25

A judge acting upon a lawsuit in connection with whistleblowing or acting in special circumstances referred to in Article 27 hereof shall be a person who possesses special knowledge in protection of whistleblowers.

Acquiring special knowledge and personal development of persons acting in cases in connection with protection of whistleblowers shall be conducted by the Judicial Academy in cooperation with the Ministry competent for judicial affairs.

Curricula and other related issues of importance for acquiring special knowledge in protection of whistleblowers shall be regulated by an enactment of a minister in charge of judicial affairs.

According to the known data, the first trainings took place in early 2015, and the Rulebook was adopted by the Minister of Justice on January 15 of the same year. The future dynamics of this process remain unknown. The program includes three topics: 1) international and domestic legal sources; 2) the basic concepts stipulated in the LPW and types of whistleblowing (internal, external, public); 3) the protection of whistleblowers and compensation, the relationship between the Law and the general rules of civil procedure, the application of the Law in the labor disputes, as well as criminal provisions stipulated by the Law. In order to acquire the knowledge on all these topics, the Rulebook stipulates mandatory training in the duration of one working day, through five classes of 60 minutes. The familiarization with the topics is followed by a case simulation, in order to apply the acquired knowledge.

The program did not cover all issues that are relevant for whistleblowing and protection of whistleblowers. The program lacks a more thorough discussion of the application of other regulations that come into contact with the LPW. The exception is reflected in one part of the training related to the handling of confidential data, because that area does not allow the possibility to bypass the application of the standards of the Data Secrecy Act. In addition, the time allocated for attending the training is too short to cover all essential topics. Given the fact that there is no mandatory exam to test the knowledge, but only a practical exercise in which participants work together to solve problems, it can be concluded that the beginning of the application of the LPW was unduly delayed under the pretext that its application cannot begin before judges undergo a specialized training. If nothing else, the Rulebook could have been adopted, and the trainings could have been held much earlier.

The program lacks a more thorough discussion of the application of other regulations that come into contact with the LPW

The following can be sought in a lawsuit for relief in connection with whistleblowing:

- 1. Establishment of the fact that a damaging action has been undertaken against a whistleblower;*
 - 2. Prohibition of engagement in or repetition of a damaging action;*
 - 3. Remediation of the consequences of a damaging action;*
 - 4. Compensation for tangible and intangible damage;*
- 5. Publication of the judgment rendered upon a lawsuit filed for reasons referred to in items 1) to 4) above in the media, at the expense of the defendant.*

The lawsuit referred to in paragraph 1 of this Article may not contest the legality of an employer's individual enactment adopted to decide on an employee's employment-related rights, obligations and responsibilities.

Performing a damaging action is already prohibited by the Law

Of the five possible damage lawsuits' claims under the Article 26, a whistleblower may specify only one, all five, or any other combination. The first claim is to establish that damaging action was taken against a whistleblower, which may be a prerequisite for other lawsuits, or independent moral satisfaction. It is logical that a lawsuit may refer to the "prohibition of performing" and "prohibition of repeating" a damaging action. However, performing a damaging action is already prohibited by the Law, Article 4. The Court is not empowered to change the Law, or to confirm its provisions. Therefore, this lawsuit could more relate to a finding that a certain action had the character of a damaging action under the LPW, because this can be disputed between the parties. Once it has been determined that an action was damaging, it will also be known that such action is forbidden, and that it cannot be performed or repeated any longer. The request for removal of the consequences of damaging actions constitutes a separate lawsuit, including pecuniary and non-pecuniary damage compensations. The last among the lawsuits is the announcement of the verdict passed on the complaint.

When the damaging action is taken against employees, this is expected to happen through the adoption of individual acts by employers who decide on the rights, obligations and responsibilities. Therefore, the legal concept in which contesting these acts is exempted from the general regime of the protection of whistleblowers is disputable. Such an exemption would be easier to justify if the same rule was established for all other legal procedures and in relation to all other individual acts. This seems to be another consequence of focusing on the issue of labor law in protection of whistleblowers, and the fact that the application of other measures for protecting whistleblowers from damaging action was not equally considered when the Law was drafted. Also, this exemption was not justified in the report of the public hearing.

Whistleblowers in labor dispute

Rights of Whistleblowers in Specific Proceedings Article 27

When lodging a lawsuit to contest the legality of an employer's individual enactment adopted to decide on an employee's employment-related rights, obligations and responsibilities of a whistleblower in accordance with specific legislation, the whistleblower may allege that the employer's individual enactment constitutes a damaging action in relation to whistleblowing.

The allegation referred to in paragraph 1 may be made in the lawsuit or at the preliminary hearing, and may be made at any subsequent point in time only in the event that the alleging party makes it probable that he was unable to make such allegation at an earlier point in time without inculpating himself.

The court shall pursue separate proceedings to decide upon the merit of any allegation whereby the employer's enactment constitutes a damaging action in connection with whistleblowing.

Within the labor dispute, a whistleblower can also emphasize the fact that the employer's action towards them (e.g. a decision on dismissal or move) constitutes a "damaging action". This can be later included in the lawsuit or preliminary hearing only if a whistleblower was not able to do so sooner, due to external factors. Thus, an employee may initially launch a lawsuit against the decision of their employer because they believe that the decision was unlawful, and only then realize that such action was the result of whistleblowing, for example, the employee's disclosure of the problems in the company to the union meeting. The third paragraph indicates that, in the context of the current labor dispute (i.e. "special procedure"), the court decides whether an individual act (e.g. a decision on dismissal or move) constitutes an "adverse action" in accordance with the LPW (whether it was adopted in connection with whistleblowing).

Resolving dispute through mediation

Notice to Parties of the Right to Resolve Dispute through Mediation Article 28

The court providing relief due to whistleblowing shall, at the preliminary hearing or the first individual session of the main hearing, notify the parties of the option of out-of-court settlement through mediation or in any other amicable manner.

This is one of many provisions of the Law whose need has never been justified. In connection with these matters, Article 11 of the LPW (which duly applies to the protection of whistleblowers) already stipulates that "the court shall refer parties to mediation, or to an information session on mediation, in accordance with the law, or indicate the possibility for parties to resolve a dispute in amicable matter or in other agreed way."

An employee may initially launch a lawsuit against the decision of their employer because they believe that the decision was unlawful, and only then realize that such action was the result of whistleblowing

Any agreement between a whistleblower and an "employer" does not constitute grounds for the exemption from criminal or other liability for violations of the law

From the standpoint of expediency, the stimulation of whistleblowers and employers to settle a dispute in an "amicable" and "mutually agreed" manner, is also questionable. As the court proceedings can lead to disclosure of new information on the violation of public interest, out of court settlement can also be concluded to prevent disclosure of such information.

From the legal standpoint, any agreement between a whistleblower and an "employer" does not constitute grounds for the exemption from criminal or other liability for violations of the law - both the subject of whistleblowing, and the action that constituted retaliation. Such an agreement could regulate only the issues that were the subject of the lawsuit - for example, that it is not necessary to take further action because damaging actions have ceased, that whistleblowers will not ask for compensation because they already received satisfac-

tion, and the like. However, it is very likely that the termination of proceedings would lead to the failure to disclose the information on all violations of the employer, and especially to the failure to bring to the attention of the court and other authorities the information on violations of whistleblowers' rights that occurred during the retaliation.

In case the plaintiff has, in the course of proceedings, established the probability of having suffered damaging consequences in connection with whistleblowing, the burden of proving that the damaging consequences are not the result of whistleblowing shall lie with the employer.

The basic rule of protection of whistleblowers and the difference from the situation that would have existed had the law not been adopted, is a reversed burden of proof. The prosecutor must prove that the adverse action was "in connection with whistleblowing", and the defendant has the burden of proving otherwise ("that the action is not causally related to whistleblowing"). The standard of "making probable" is not defined by this Law and shall depend on the court. It is not sufficient that the connection between whistleblowing and damaging action is only a hypothetical one (e.g. due to the fact that the damaging action took place after whistleblowing), it also has to be logical and convincing. It will be much more likely to show the connection if the motive for retaliation can be recognized.

The report on the public debate, among other things, states that the phrase "in connection with whistleblowing" in fact implies that it is not necessary to prove that the harmful action occurred as a direct consequence of whistleblowing, but it is enough for this to be one of the reasons. Although this is not specified in writing, this paragraph might suggest that a different formulation for the type of proof that needs to be delivered by the defendant was chosen deliberately ("causal relationship").

On the other hand, the defendant may prove in many ways that his action was not caused by whistleblowing. His defense can be based on solid unrelated evidence for taking action (e.g. the service was not provided because the requirements have not been met; the employee was not sent on the expected business trip because his qualifications did not meet the amended agenda of the

On the other hand, the defendant may prove in many ways that his action was not caused by whistleblowing

meeting; an agreement on temporary work engagement

was not renewed because the company's financial situation changed, etc.). Arguments need not be morally justified, nor relieve the defendant of any liability. For example, the defendant may admit that they harassed a colleague, but also explain that the underlying reason was the conflict over the music to be played, rather than having been reported by a colleague for stealing from the customers.

The phrase "in connection with whistleblowing" in fact implies that it is not necessary to prove that the harmful action occurred as a direct consequence of whistleblowing, but it is enough for this to be one of the reasons

Argumentative defense should also include a comparison. Since retaliation against whistleblowers constitutes a form of discrimination (taken against them, and not against all those who were in a similar situation), one of the proofs that this was not retaliation would be to prove that it was not a case of discrimination, or at least that the discrimination was not performed as a result of whistleblowing.

Definition of the term "damaging action" already includes connection to whistleblowing

An illogical part of this article is that the definition of the term "damaging action" already includes connection to whistleblowing. Article 2 defines the damaging action as "any action or failure to act in connection with whistleblowing, which threatens or violates rights of a whistleblower or any person entitled to protection as a whistleblower, or which puts that person at a disadvantage". Thus, while Article 29 seems likely that there is a connection between whistleblowing and a damaging action, or that attempts have been made to

prove that there is no such connection, Article 2 stipulates that in cases when there is no such connection, there is no "damaging action" either! Linguistically speaking, a whistleblower or any person seeking protection before the court, has to "make probable" that "the action taken against them is in connection with whistleblowing"; however, the defendant has to prove that "the action taken against whistleblowers and related to whistleblowing, was in fact not caused by whistleblowing". This logical confusion can only be resolved by judges turning a blind eye and interpreting the definition of "damaging action" within the meaning of Article 29, and not Article 2, as an action which objectively harms a whistleblower or another person who enjoys protection, where the "connection" or causality will remain to be proven.

Principle of Investigation

*Principle of Investigation
Article 30*

In proceedings for judicial relief in connection with whistleblowing, the court may establish the facts even when these are not disputed by the parties, and may also independently investigate facts not presented by either party in the proceedings, if the court deems this to be important for the outcome of the proceedings.

This article stipulates great deviation from the rules of civil procedure that are being applied in Serbia today. Exceptions of this kind are stipulated by special laws, and are present, for example, in family matters (Article 205 of the Family Law from 2005). Principle of investigation helps ignorant prosecutors and defendants. For example, if a whistleblower specified only one argument in favor of the claim that retribution against them was taken because they disclosed the information (e.g. only the fact that retaliation occurred later), and the person who retaliates denies they ever knew about whistleblowing, the court may investigate the usual manner of functioning of communication

Principle of investigation helps ignorant prosecutors and defendants

The court is equally bound to investigate the facts that are important for the outcome of the proceedings, and that can help the defendant

channels within the company and determine that the head of the sector knew about whistleblowing, that he or she had a motive to conceal it, and that the person who retaliates acted upon the orders of the head of the sector.

This provision has not been established solely for the benefit of whistleblowers, although the report from the public debate states that this was the exact intent. The court is equally bound to investigate the facts that are important for the outcome of the proceedings, and that can help the defendant avoid liability for retaliation they performed. For example, a violation of certain regulation happened in July 2015, and a whistleblower revealed it in December 2016. The whistleblower's lawsuit claims that they became aware of this event one month ago, when

they gained access to the document. However, if during the proceedings whistleblower's statements or any other source suggest that the whistleblower was aware of all essential elements of the event back in August 2015, the court will be obliged to investigate this issue until the end and establish the truth, even if the defendant fails to requests so. The legality of whistleblower's action and the right to protection will depend on whether the whistleblower acted within a specific subjective deadline or not.

The rule of principle of investigation can also serve the protection of public interest, but was not specifically established for that purpose. The courts are obliged to govern the minimum of public interest even when the principle of investigation is not applied. This is related to basic rules of civil procedure that also apply to these cases. Thus, under Article 3 para. 3 of the Civil Procedure Code from 2011, "the court shall not allow the disposal of parties that are contrary to compulsory regulations, public policy, the rules of morality, and good customs". In connection, the Article 7. para 3. states - "the court is authorized to establish the facts and to demonstrate the evidence that were not presented by the parties, if the results of discussion and demonstration show that the parties have the requests which they should not have".

It cannot be expected that the civil court in charge of the proceeding for the protection of whistleblowers will investigate everything that can "emerge" from the testimonies and documents of the parties, and that can potentially indicate a violation of the law. This refers to the fact that the court should establish if the basic requests of the whistleblower and the defendant are contrary to law, public order, and rules of morality. The court could consider the application of this principle in situations where whistleblowers undoubtedly suffered adverse consequences because they disclosed certain information, but would otherwise be fully justified to suffer such adverse consequence (whether they performed whistleblowing, or not). Suppose that a director of a public company has long tolerated the employee's daily use of official vehicles and tools for conducting private business. When one of the employees discovered certain safety violations, the director sanctioned only that employee by deducting 20% of his salary, citing the unlawful use of company's vehicle as the reasons, and filing criminal

The rule of principle of investigation can also serve the protection of public interest, but was not specifically established for that purpose

charges against that employee. This punishment undoubtedly constitutes a "damaging action" and was taken as a result of whistleblowing (other employees who abused company's resources were not punished). However, it would not be appropriate for the court to order the repeal of this measure, as the punishment is fully justified and in accordance with regulations (the fact that other employees and the director should be punished as well constitutes a different issue). There is no doubt that the court should not order the director to withdraw criminal charges (as the whistleblower may have requested), regardless of the fact that filing such charges was an act of retaliation, and the fact that they would not have been filed, had it not been for the whistleblowing. In fact, such action must be prosecuted ex officio and the director was obliged to file criminal charges.

Ruling in the absence of defendant

*Absence of Defendant
Article 31*

In case a duly summoned defendant fails to appear at the main hearing, the court may hold the hearing in the absence of the defendant, and may also rule on the basis of the facts established at the hearing.

The rule prevents the defendant (employer or other person who performs damaging action) from stalling the process by not taking participation in it

Unlike the previous standard where deviation from general court rules may go in favor of a plaintiff or a defendant, the rule set out in Article 31 was established solely in the interests of whistleblowers. The rule prevents the defendant (employer or other person who performs damaging action) from stalling the process by not taking participation in it. The chance for a whistleblower to reach favorable court decision depends on the quality of the lawsuit and convincing evidence that the plaintiff can present in court.

It is not clear what was the intention of the legislator with this provision. In fact, it has already been stipulated that the proceedings on the lawsuits filed by whistleblowers apply the provisions of the Civil Procedure Code applicable to labor disputes. This chapter also includes

Article 31 of the LPW. The only difference is that, according to the LPW, the court may hold a hearing without the presence of the defendant (but is not obliged to), while, according to the Civil Procedure Code, the court is obliged to do so ("the court shall hold a hearing"). Since the difference has not been explained, a logical assumption is that the legislator wanted to authorize the court to use its discretion to decide if a hearing needs to be held without the defendant who was duly summoned. Otherwise, this provision would not be necessary because the Article 440, para. 2. of the LPW would apply. Another possible explanation would be to interpret this situation as a random discrepancy and that the word may in fact implies both the authority and the obligation of the court to hold a hearing without a duly summoned defendant.

It is interesting to note that the parliamentary hearing also addressed the proposed amendments (deputy Olgica Batic), according to which the lawsuit would be deemed withdrawn if a whistleblower or other prosecutor failed to show up at the trial for two consecutive times, after being duly summoned, and do not justify their absence. The

government has not accepted this amendment "because the decision of the Law is aligned with the Civil Procedure Code. It can be expected that the prosecutor, whistleblower, or a person who enjoys protection as a whistleblower, have an interest to solve the civil proceeding quickly, efficiently and without undue delay. In addition, the plaintiff is guaranteed a series of rights by the Civil Procedure Code (to justify their absence, restore the status quo ante, etc.), and for this reason the solution proposed by the amendment is unacceptable". The assessments that the prosecutor has no motive to stall the procedure are questionable. Interim measures may put the plaintiff at a favorable position, so that the defendant who considers not be guilty is the one whose interest is to complete the process as soon as possible, and a whistleblower whose arguments are weaker can have the opposite motive.

Interim Relief

Interim Relief and Jurisdiction

Article 32

The court hearing the case pertaining to relief in connection with whistleblowing or a case referred to in Article 27 hereof may institute interim relief pursuant to legislation governing enforcement and security.

A motion to institute interim relief may be made before the initiation of proceedings for judicial relief in connection with whistleblowing, in the course of such proceedings, or until such time as the court ruling has been enforced.

During the course of the proceedings, the court may also institute interim relief ex officio.

Since court procedures, no matter how "urgent", can last too long, the position of whistleblowers in some situations can be unbearable, and since damaging action can cause long-term adverse consequences, interim measures in court proceedings are of great importance.

Interim measures are determined on the basis of the Law on Enforcement and Security. We would like to note that, after the adoption of the Law on the Protection of Whistleblowers, a new Law on the procedure for enforcement and security was passed in late 2015, so it is possible that some of the solutions that the legislators had in mind when drafting this law differed from the standards that apply today.

Paragraph 1 of this Article does not provide for "analogous application" of the second law, as it is the case in the application of the Civil Procedure Code - the interim measures are always determined in accordance with the Law on Enforcement and Security. The proposal for determining temporary measures may be filed during the procedure, and before the process starts. The adoption of such measures may be requested after completion of the procedure, if the execution has not been carried out. Finally, the court may also order an interim measure ex officio, and not only upon the proposal of a party. Bearing in mind the Article 447, para. 1. of the Law on Enforcement and Security, the standards regulating the times when an interim measure in the LPW can be ordered are redundant, because the rules are identical.

According to Article 448 of the Law on Enforcement and Security, an interim measure is decided by the court conducting the proceedings on the protection of whistleblowers, or the court that would be competent to conduct such a proceeding (if the proposal was submitted before the lawsuit). In cases concerning the protection of whistleblowers, although this is not specifically mentioned, the court is always in charge, and not the public executor, judging by the fact that Article 4, para. 1. of the Law on Enforcement and Security established exclusive jurisdiction of

the court "for the execution of... actions, failure to act, or enduring an action (Articles 359 - 367), and the execution of executive documents in connection with... rehiring the employee".

According to Article 449, a temporary measure stipulates a financial or non-financial claim, depending on the creditor's ability to prove probability. In order to determine a temporary measure to secure non-monetary claim, in addition to proving the probability of the existence of claims, the creditor must also make probable that the fulfillment of his claims would be prevented or significantly hampered without interim measure, that force would be used, or that irreparable damage would be caused ("danger to the claim"). Interim measure can also be used to secure accrued, conditional, and future claims.

According to Article 453, the interim relief, among other things, includes an accurately stated claim, the type of the interim relief, and the means for its execution. According to Article 456, the duration of an interim relief shall be determined by the decision on interim relief. If the decision on interim relief was brought before civil proceedings, it shall also specify the deadline for filing a claim. Court may extend the duration of the interim relief upon request, if the conditions under which the measure was determined had not changed. That proposal must be submitted before the expiry of a previously determined interim relief.

According to Article 457, at the request of the debtor, the court shall revoke the interim relief and all implemented actions, if the lawsuit was not submitted within deadline, and after the expiry of the interim relief, if the conditions were changed in such a way that the interim relief is no longer necessary, if it was legally established that the claim has not ceased or been terminated, and in cases that are probably not relevant for the protection of whistleblowers. Article 458 stipulates the obligation of compensating the debtor against whom an interim relief was taken, if such relief was not grounded or subsequently justified. This right is exercised in a separate, civil proceeding.

Articles 459 and 460 stipulate types of interim relief that insure monetary and non-monetary claims. This includes, among other things, a "temporary arrangement of a dispute, if necessary to eliminate the danger of violence or major irreparable damage." However, it should be

A whistleblower must "make probable" that they suffered negative consequences due to whistleblowing, and that a "damaging action" took place

borne in mind that, in order to secure non-monetary claims, "any measure that achieves the purpose of security" shall also be considered interim relief.

In order to secure non-monetary claims, "any measure that achieves the purpose of security"

Although proposing an interim relief before court proceedings is a solution that also exists in the Law on Enforcement and Security, it is not clear why it was provided in the LPW. It is not clear why a whistleblower would not file a lawsuit along with a proposal for the interim relief. Both in cases of filing a lawsuit and in cases of submitting a proposal for an interim relief, a whistleblower must "make probable" that they suffered

negative consequences due to whistleblowing, and that a “damaging action” took place.

Interim Relief Prior to Initiation of Court Proceedings
Article 33

The court with jurisdiction to hear lawsuits for relief in connection with whistleblowing shall be competent to rule on a motion to institute interim relief prior to the initiation of court proceedings.

When instituting interim relief referred to in paragraph 1 of this Article, the court shall also set a deadline by which a lawsuit must be lodged with the competent court, taking into account of the deadlines for lodging lawsuits set under specific legislation.

The rules from Article 33 do not differ from those from the Civil Procedure Code. Higher court will be in charge in both cases. When determining an interim relief, the court shall also determine the deadline for filing a lawsuit. The exception can perhaps be reflected in the confusing ending of the paragraph 2. "... taking into account the deadlines for filing a lawsuit that are regulated by certain special rules". Since we are talking about protection of whistleblowers, and since other provisions of the Law already stipulate that only procedure that can be initiated in addition to the lawsuit for the protection of whistleblowers is a labor dispute challenging an individual act (e.g. dismissal decision), this provision could be interpreted as referring to the deadlines of this Law and of the Law governing labor relations. However, the standard with that meaning could have been much more clearly defined, so it remains unclear whether the legislator had something else in mind (some other specific regulations).

Motion to Grant Interim Relief
Article 34

A motion to grant interim relief may petition the court to defer the entry of an enactment into legal force, prohibit the performance of a damaging action, and remedy the consequences of a damaging action.

The court shall rule upon any motion to institute temporary relief within eight days from the day the motion is filed.

Article 34 stipulates the rules that are different from the Civil Procedure Code in terms of interim relief. Whistleblower is entitled to request the court to postpone the legal effect of an act. In this case, the request refers to an act of imposing the transfer of an employee to another job, an act of imposing a teachers' council reprimand to a student, a notice that terminates the contract on business cooperation with a natural person (e.g. an independent artist), the rejection of the request for connection to power grid, the decision on exclusion from golf club membership, or the decision to ban a whistleblower (a business associate) from entering the premises. If the effects of such an act are postponed, the whistleblower shall continue using the rights they had before, until the proceeding ends.

Whistleblower is entitled to request the court to postpone the legal effect of an act

Another type of mentioned measures is the prohibition of performing damaging actions. This article also uses the term damaging action in a different way than other provisions of the same Law. According to the definitions from Article 2, this term consists of various failures to act or actions taken against whistleblowers, which cause damage to them, and which were caused by

whistleblowing. Next, when it comes to the grounds for filing a whistleblower's lawsuit, the term damaging action is viewed objectively (as an action that harms whistleblowers), and the connection between whistleblowing and damaging actions are seen as an additional element which determines the merits of the lawsuit. Finally, the provision of Article 34 could be understood as if the term "damaging action" is used to include only the actions that harm whistleblowers ("performing damaging actions"). However, another interpretation is also possible, and is probably closer to the intentions of the legislator - that the term "performing damaging actions," also implies "the failure to act". In that case, the Court would, for example, have to make a decision on interim relief that would state: "the employer AA is prohibited from further performing damaging action that consists of failure to pass a decision on annual leave for the employee BB, and which made it probable that the specified damaging action towards that employee was performed as a result of disclosing an information to the body B by external whistleblowing". Such a decision would be contrary to the linguistic and common meaning of the term, but it would not present a unique case in Serbian laws.

The Court may prohibit further undertaking of (active) actions that cause damage to whistleblowers and other persons

The Court may prohibit further undertaking of (active) actions that cause damage to whistleblowers and other persons. In addition to the acts, this may be a violation or endangerment of factual nature – e.g. harassment by co-workers, issuing an employee with verbal orders that continuously impose urgent tasks before providing them with an opportunity to complete previous tasks, denial of services to which a patient is entitled, daily harassment by phone calls by a person who can be identified, and more. The Court may also order to eliminate harmful consequences caused by a damaging action, for example, to provide an office space to the employee who was denied one, to provide intensive care to a patient in order

to eliminate the harmful effects caused by missed treatment, etc.

The rules would certainly be more clear, and perhaps more conclusive, had it been specified that the court may order the "employer" or any defendant to take action on behalf of a whistleblower, if such action was within their powers and abilities. There are both similarities and differences between "eliminating the consequences caused by a damaging action", which may still be required, and the introduction of an opportunity to issue an order to the defendant. Eliminating harmful consequences and eliminating damaging action (which consists in failure to act) are two different things. If the Law was amended in this way, it would undoubtedly be possible to order the employee to issue a decision on allowing vacation days, to begin assigning tasks to an employee who was previously ignored, to solve the case of a party (if the whistleblower is a person not employed by the "employer", but a user of the services of that body), etc. However, the amendment that aimed to complement the standard in this way was not accepted "because it is unclear what constitutes an interim relief that would order the employer to take

Interim relief may be used to issue an order not only to the "employer" or another defendant (or future defendant), but also to anyone who performs damaging action

action on behalf of whistleblowers and associated person".

Interim relief may be used to issue an order not only to the "employer" or another defendant (or future defendant), but also to anyone who performs damaging action. For example, a candidate for director of a public company discloses that the selection process was rigged and publicly accuses the president of the city assembly for that act. This politician makes no response, but a neighbor of the whistleblower, a passionate supporter of the politician's party in question, starts to harass the whistleblower. The court may order measures to prevent this.

*Appeal against Order Granting Interim Relief
Article 35*

A separate appeal shall not be permitted against a ruling granting interim relief.

When a special appeal is not permitted, that means that a decision can be challenged in another procedure - the one conducted within a proceeding for the protection of whistleblowers or within a labor dispute. In any case, the absence of special appeal serves to satisfy the purpose of the interim relief itself - to act promptly and prevent or reduce the damage.

Monitoring the Implementation of the Law

Monitoring the Implementation of the Law

Article 36

The Labor Inspection shall be in charge of monitoring the implementation of the Law, or Administrative Inspection, in accordance with the law governing their authorities.

This provision is unacceptably ambiguous. The jurisdiction between the two aforementioned authorities is not clearly divided, nor is it clearly stipulated that both of these inspections are responsible for the control of the implementation of all provisions of the Law. In order for the control to be effective, one state administration body should be in charge of monitoring the overall implementation of the Law, and other authorities that maintain or gain some control powers should be listed as well.

This could be the Ministry of Justice, which has already governed the Law drafting process, has been in charge of by-laws and in partial control of the implementation of the Law, based on the decisions from the strategic anti-corruption laws. In any case, other ministries would continue to carry out activities within their jurisdiction: Ministry of Labor in connection with the implementation of labor regulations, Ministry of Health, Ministry of Trade, and others in connection with the provision of certain services to customers, and some forms of business cooperation, etc.

None of the control bodies has received the authorization to take care of the issues in "unassigned" sectors

ed" sectors – the actions of businesses and other legal entities in relation to shareholders and business associates. Because these sectors are not part of the public sector, administrative inspection does not control their work, but because these are not labor relations, labor inspection has no control either. Finally, another unassigned issue is the control of the implementation of the Law provisions related to dealing with "information" - none of these inspections is responsible for monitoring the actions of "competent authorities" after they receive information from whistleblowers.

The jurisdiction between the two aforementioned authorities is not clearly divided

Neither of the two aforementioned control bodies has received new powers – it was only mentioned that they perform control in accordance with their existing powers. On that basis, the labor inspectorate deals with control in connection with labor relations, administrative inspection controls if the authorities that fall under the supervision of the body made all the required acts, and

None of these inspections is responsible for monitoring the actions of "competent authorities" after they receive information from whistleblowers

Why is there no reward for whistleblowers?

The law does not include provisions based on which a whistleblower may be eligible for a reward. This is one of the few dilemmas that were discussed, and that were also addressed in the justification of the draft law (which was published by the Ministry of Justice in December 2013), as follows:

"Disclosure of corruption, or any other potentially dangerous action, should not be motivated by lucrative reasons. Monetary reward is in direct conflict with the development of morality and expressing social condemnation of illegal conduct, the elements that form the backbone of a healthy value system to be established in a society. The protection of the rule of law must be a key motive for any individual who discloses corruption and other actions. Any other scenario creates the risk that the individual motivated by a monetary compensation would disclose certain actions often and unfounded, undermining the protection provided by this law."

The statement of the Government on the amendments filed with the aim to introduce reward, includes the following: *"Potential reward for whistleblowers could lead to a large number of unfounded disclosures of information used to perform whistleblowing, which would not contribute to the goals ... because it might lead to overburdening of the bodies responsible for dealing with information"*.

Despite the fact that this attitude reflects a sincere concern for the ability of public authorities to fulfill their duties, it is also another indicator of wandering around in terms of the objectives that the Law should achieve. The main objective of the Law is to disclose the largest number of cases in which the public interest and the fight against corruption are at risk. This goal can be achieved by disclosing a greater number of cases. In this context, it would be more appropriate to select the cases where a state authority would act according to the importance of these cases, and not according to the fact who performed whistleblowing and what were the reasons behind it.

Justification of the reasons behind not providing rewards for whistleblowers is not consistent with the rest of the legislation. The truth is that the morale in society would be stronger if individuals disclosed the information on law violations or other actions harmful to public interest without expectation of reward. However, this argument could equally be used against the special regime of legal protection of whistleblowers. It would be equally desirable if Serbia was the community of courageous individuals who are always ready to disclose illegal and other actions harmful to public interest, regardless of whether they will suffer any harmful consequences.

Legal concepts and specific normative solutions should be considered from the standpoint of the objective pursued

Legal concepts and specific normative solutions should be considered from the standpoint of the objective pursued. In case of whistleblowing and protection (and potential reward) of whistleblowers, the goal is to disclose as many cases as possible in connection to threats to public interest, as well as to remove harmful consequences of harming public interest. This goal is supported by the effective protection of whistleblowers from prosecution. Also, there can be no doubt whatsoever that the number of those who are willing to share with others their knowledge of violations of law and treats to public interest will be even greater if they could count on the

reward that would be in proportion to direct gain they brought to the society as a whole, or to specific authority or company.

The statement that rewarding whistleblowers can result in the increased occurrence of "bounty hunters" is correct. However, it can also be argued that, in a similar manner, the protection of whistleblowers creates risks that people could report an illegal action they witnessed motivated by various other unethical reasons (e.g. intent to retaliate against their superiors or colleagues), and not because they wish to protect public interest.

Risks of adverse events can be best prevented if the protection of whistleblowers is supplemented by effective mechanisms for determining responsibility

The law needs to offer solutions that will reduce these risks and bring right balance of potential benefits and risks. For example, solutions of "conscience", or "good faith" in the actions of whistleblowers (which are omitted from the final text of the Law, but were included in the Draft), as well as sanctioning false whistleblowing. This could be reflected in the manner of allocating rewards, if the reward was stipulated only for cases when whistleblowing directly resulted in authorities, legal entities and entrepreneurs obtaining revenue, or if that revenue would not have been generated without whistleblowing, but not in cases

where it is hard to undoubtedly prove such benefit or in cases of greater opportunities for manipulation. For the same reasons, the amount of the reward can be limited to a modest amount between 1 and 10% of savings in order to reduce the "temptation" for the lucrative element to become crucial in individual decision to engage in whistleblowing. Finally, it should be noted that the risks of adverse events can be best prevented if the protection of whistleblowers (and potential rewards) is supplemented by effective mechanisms for determining responsibility, punishing responsible individuals in competent authorities and organizations, and providing (recourse) compensation for endangering public interest.

Relevant research, both in Serbia and abroad, shows that the main motive behind whistleblowing is intent to effectively solve the problem indicated by whistleblowers. In fact, regardless of protection and reward being provided or not, whistleblowers will inevitably face workplace or any other hostility, and will have to dedicate a part of their free time to seeking protection under the Law. No matter how effective, the Law will never be able to offset all negative effects of open or hidden retaliation against whistleblowers or to compensate them for all the efforts they invested in the protection of public interest.

The protection of whistleblowers creates risks that people could report an illegal action they witnessed motivated by various other unethical reasons

The main motive behind whistleblowing is intent to effectively solve the problem indicated by whistleblowers

There is no good reason to consider rewarding the citizen as a morally wrong act, as the citizen's notice led to public revenue

In this context, rewarding whistleblowers should also be considered as a part of socially accepted and morally desirable behavior. In fact, it is widely accepted that "honest finder" of someone else's money or property is entitled to compensation for that act. Honest finders fulfill their moral duty by returning the lost objects to the owner, and the owners fulfill their moral duty by rewarding the honest finder. In this sense, there is no good reason to consider rewarding the citizen as a morally wrong act, as the citizen's notice led to public revenue or legal entity's revenue that would otherwise not have been generated.

Absence of criminal offences

Penal provisions do not stipulate criminal offenses. This is good from the standpoint of legal technique, as all offenses should be covered by one provision, the Criminal Code. However, the proposal of the LPW was not accompanied by the proposal for amending Criminal Code, which is a big omission, because some very harmful acts are currently not stipulated neither as criminal offense, nor misdemeanor offense. What is even worse is that this omission has not been rectified before the beginning of implementation of the

Ministry of Justice stated the need to amend the Criminal Code as one of the reasons for the delayed start of the implementation of the Law

Therefore, the main aspect of the work of state authorities is not providing temporary or meritorious protection of whistleblower from direct violation of their rights and interests, or rewarding whistleblowers, but more efficient acting upon their notifications, and assurance of both whistleblowers and public that the indicated problems are successfully resolved, both at present and in the future. The second step should be to ensure that whistleblowers do not suffer any damage, or that they receive reasonable compensation for the damages suffered, so that they would not have any reason to regret having tried to protect public interest. In this

context, rewarding whistleblowers should also be considered as a part of socially accepted and morally desirable behavior. In fact, it is widely accepted that "honest finder" of someone else's money or property is entitled to compensation for that act. Honest finders fulfill their moral duty by returning the lost objects to the owner, and the owners fulfill their moral duty by rewarding the honest finder. In this sense, there is no good reason to consider rewarding the citizen as a morally wrong act, as the citizen's notice led to public revenue or legal entity's revenue that would otherwise not have been generated.

Some very harmful acts are currently not stipulated neither as criminal offense, nor misdemeanor offense

Law, or even in the years that followed, although there were opportunities to do so (the Criminal Code was amended at the end of 2016). The report of the public hearing explicitly stated that there was an intent to stipulate offenses in the Criminal Code, among other things, for endangering the confidentiality of whistleblowers' identity. The same document (not available electronically), stated the need to amend the Criminal Code as one of the reasons for the delayed start of the implementation of the Law.

Some of the offenses (formulated on the basis of the Model Law) could be stipulated in the following way:

Article ...

Infringement of Rights of Whistleblowers and Other Persons

Whoever directs the act of retaliation, unless there are characteristics of a severe criminal offense, shall be sentenced up to one year of imprisonment.

If the act of retaliation led to severe consequences for an injured party, the offender shall be sentenced up to three years of imprisonment.

Article ...

Unauthorized Disclosure of Whistleblower's Identity

An official or any other liable person who, with no approval, discloses the identity of the provider of information on threats to the public interest, or whoever, with no authorization, conducts any action with the aim of disclosing the identity of the provider of information on threats to the public interest shall be fined or sentenced to six months of imprisonment.

Misdemeanors

PENAL PROVISIONS

Article 37

A fine ranging from RSD 50,000 to RSD 500,000 shall be imposed against an employer incorporated as a legal entity with more than ten employees:

- 1. Failing to adopt a general enactment on internal whistleblowing procedure (Article 16, paragraph 1);*
- 2. Failing to post the enactment regulating internal whistleblowing procedure in a location visible and accessible to all employees (Article 16, paragraph 2);*

A fine ranging from RSD 10,000 to RSD 100,000 shall be imposed on the authorized officer of a legal entity or national, provincial, or local authority for the misdemeanor referred to in paragraph 1 of this Article.

A fine ranging from RSD 20,000 to RSD 200,000 shall be imposed on an entrepreneur for the misdemeanor referred to in paragraph 1 of this Article.

Article 38

A fine ranging from RSD 50,000 to RSD 500,000 shall be imposed against an employer incorporated as a legal entity:

- 1. Failing to protect a whistleblower from a damaging action or failing to undertake all measures necessary to terminate a damaging action and remove any consequences of a damaging action, within its purviews (Article 14, paragraph 2);*
- 2. Failing to provide every employee with the written notification on the right stemming from this Law (Article 14, paragraph 4);*
- 3. Failing to appoint an authorized person to receive and conduct procedure in connection with whistleblowing (Article 14, paragraph 5);*
- 4. Failing to act upon disclosure within the stipulated deadline (Article 15, paragraph 2);*
- 5. Failing to inform a whistleblower about the outcome of the procedure within the stipulated deadline (Article 15, paragraph 3);*
- 6. Failing to provide information to a whistleblower, upon his request, about the progress and actions undertaken in the procedure, or failing to enable a whistleblower to have access to*

case files and to participate in actions taken in the course of the procedure (Article 15, paragraph 4)

A fine ranging from RSD 10,000 to RSD 100,000 shall be imposed against a responsible person within the legal entity, state, provincial or local government authority for the misdemeanor referred to in paragraph 1 hereof.

A fine ranging from RSD 20,000 to RSD 200,000 shall be imposed against an entrepreneur for the misdemeanor referred to in paragraph 1 hereof.

Article 37 stipulates fines for employers - legal persons, entrepreneurs, and responsible persons within these bodies. One should bear in mind the provisions of Article 17 para. 2 of the Criminal and Penal Law, which exclude penal responsibility of the Republic of Serbia, autonomous province, local government units and their bodies. In these bodies, "responsible person" can be held responsible for an offense. Depending on the level of authority and the nature of an offense, liability can be assigned either to a manager or a person authorized to receive "information" and to act on them, or to someone else who is liable for certain actions on the basis of other regulations and internal acts. On the other hand, a legal entity and responsible person within that entity can also be held responsible for the offense. Therefore, the violators from private sector and public enterprises and institutions are at a disadvantage.

The violators from private sector and public enterprises and institutions are at a disadvantage

Article 37 stipulates the violations in cases of employer's failure to adopt a general act on internal whistleblowing, or failure to display such act in a visible place that is accessible to every employee. Article 38 contains all other violations:

- failure of the employer to protect whistleblowers from damaging action, to take measures for its suspension, and actions for the elimination of damaging action (Article 14, paragraph 2);
- failure of the employer to submit written notice of rights under this Law to all employees (Article 14, paragraph 4)
- failure of the employer to designate a person authorized to receive information and conduct proceedings in connection with whistleblowing (Article 14, paragraph 5);
- failure of the employer to act on the information within the prescribed period (Article 15, paragraph 2);
- failure of the employer to notify the whistleblower on the outcome of the proceedings within the prescribed period (Article 15, paragraph 3);
- failure of the employer to provide information to whistleblowers, upon their request, on the progress and actions taken in the proceedings, to enable them to examine the case files, and to attend the procedural actions (Article 15, paragraph 4).

Offenses are not stipulated for violation of the following provisions (some of them are partly included in some of the stipulated offenses)

- Article 3 (preventing whistleblowing)
- Article 4 (performing damaging action)
- Article 10 (failure to protect personal data of whistleblowers)
- Article 11 (the abuse of whistleblowing)
- Article 14, para. 1 (failure of the employer to take measures to eliminate irregularities indicated by whistleblowers)

- Article 14, para. 3 (taking measures by the employer for revealing the identity of anonymous whistleblowers)
- Article 16, para. 3 and 4 (expanding the general act with provisions that are not in accordance with the LPW and the Rulebook, or the provisions that reduce the rights of whistleblowers in relation to their legal rights)
- Article 18, para 3 (failure of the competent authority to act within 15 days of receiving "information")
- Article 18, para 5 (failure of the authority who received the information to implement the protection measures)
- Article 18, para 6 (failure of the authority to seek consent for disclosure of the identity of whistleblowers)
- Article 18, para 7 and 8 (failure of the competent authority to provide whistleblowers with information on the progress and actions taken in the proceedings, to allow them access to case files, to allow them access to procedural actions, or to inform them of the outcome of the proceedings)
- Article 19, para 2 (failure of whistleblowers to respect the presumption of innocence of the accused, the right to protection of personal data, as well as the obligation not to jeopardize the conduct of the proceedings) - these forms of violations of the Law can be prosecuted under other legislation
- Article 20 (acting against the Law on Data Secrecy) - these forms of violations of the Law can be prosecuted under other legislation
- Article 21, para 1 (putting whistleblowers at a disadvantage)
- Article 21, para 2 (the adoption of a general act which deprives whistleblowers of their rights, infringes their rights, or puts them at a disadvantage)

The beginning of law implementation

Chapter VI TRANSITIONAL AND FINAL PROVISIONS

Deadline for Adoption of Bylaws Article 39

The enactment referred to in Article 17 and Article 25, paragraph 3 of this Law shall be adopted within three months of the entry into force hereof.

Employers shall be required to adopt the general enactment referred to in Article 16, paragraph 1 hereof within one year of the entry into force hereof.

Transitional and final provisions are also incomplete. One of the stipulations was for the acts "to be adopted", without clearly specifying who is responsible for doing that. The deadlines were too long, and were not defined in a logical manner. Thus, the "employers" were given a period of one year from the enactment of the Law to adopt internal acts, although it would be logical that their obligation (with a shorter period) started from the time when the Minister fulfilled his or her obligation and issued a by-law that can be used as a basis for the employer's by-law. Finally, no deadline was stipulated for the Judicial Academy to conduct the training. In practice, these provisions caused some adverse consequences. Thus, the Act entered into force on December, 4 2014, and began to be implemented on June 5, 2015. The Rulebook on the training program was adopted on January 24, 2015, which was within the deadline. However, the Rulebook governing the internal whistleblowing came into force on June 13, 2015, more than three months after the deadline, which shortened the effective deadline for employers to adopt their acts on internal

whistleblowing (instead of 9 months, they had less than 6).

Repeal of other regulations

During the preparation of the LPW and its adoption, the discussion was held on whether to stipulate the termination of other regulations, but in a very limited extent. Until the last moment, there was the option for this Law to repeal the provisions of the Law on the Agency for fight against corruption (Article 56), relating to the protection of certain types of whistleblowers. On the other hand, there is no evidence on the discussion of the need to repeal provisions of the other two laws that were revised in 2009 with the same goal - to fulfill the recommendations from the first two rounds of GRECO evaluation in 2006 (Law on civil servants and the Law on free access to information of public interest). These changes were abandoned before the adoption of the Law.

The decision of the Constitutional Court, which has not yet been published at the time of adoption of the LPW, repealed the provision of the Law on the Agency for fight against corruption, which served as the basis for adopting the Rulebook on the protection of whistleblowers (Art. 56, para 4). The decision of the Constitutional Court necessitated that the Article 56 of the Law on the Agency for fight against corruption becomes revised, so that the persons who acquired protection thereunder could continue to enjoy this protection, regardless of the adoption and standards of the LPW. Since the amendments to the Law on the Agency have already been planned (the deadline was the end of 2014), it was appropriate for these changes to be used to regulate the position of persons who have previously received a "whistleblower status".

Entry into Force Article 40

This Law shall enter into force on the eighth day from the date of its publication in the Official Gazette of the Republic of Serbia, and shall enter into effect six months from the date of its entry into force.

The part related to the publication of the Law is standardized. Determination of different time of entry into force and beginning of implementation of the Law is regarded as not very good, but customary manner that has been present during last decade and a half. In any case, the time limit of six months for the start of implementation of the Law was too long.

Application of the Law

We examined the application of the Law on protection of whistleblowers using the data from published reports on the implementation of strategic documents and laws, reviewing websites of relevant institutions, and examining individual cases of Law application, or cases of possible whistleblowing. The cases of public address to Anti-corruption advisory center of Transparency Serbia¹ in 2015 and 2016 were used as the resource of information.

Report of the Ministry of Justice

Scope of research

The Ministry of Justice has published a study on the implementation of the Law on protection of whistleblowers² during its first year. Some findings from the study were used in the gathering that marked one year of the beginning of Law application and in subsequent statements to the media. It is notable that this monitoring does not represent systemic activity of state bodies, but an activity that was implemented due to the interest and foreign financiers, the Project for Judicial Reform and Government Accountability of the US Agency for International Development (USAID). Due to the completion of the project (2016) and the absence of clear responsibilities for monitoring the implementation of the Law on protection of whistleblowers within this and other laws, it can be expected for the application of the Law to be even less monitored in the upcoming years, than it was the case in the first year.

The author of the research³ says that "the study on the implementation of the Law on protection of whistleblowers was conducted six months after its implementation in late 2015, with the aim of analyzing existing and potential new mechanisms for collecting data related to whistleblowing." According to her words, this study "combined several methodological approaches, such as: 1. collection and analysis of publicly available information on whistleblowing; 2. conducting one-on-one interviews with representatives of key institutions in the protection of whistleblowers; 3. comparative analysis of national and international legal acts on the protection of whistleblowers; and 4. analysis of the criteria for monitoring progress in the process of joining the European Union within the framework of the negotiating chapter on Judiciary and Fundamental rights (Chapter No. 23)." It remained unanswered who conducted the study and whether it was published anywhere. The research was based on court records and surveys completed by ministries. The inspections in charge of supervising the application of the LPW received special surveys. Interviews with authorized persons were conducted within the ministries.

Application of the LPW in ministries

The report listed the following major results: all ministries have a procedure for internal whistleblowing stipulated by the Rulebook; all ministries have a person authorized for receiving information and conducting the procedure; and all employees were informed about the rights under the Law on protection of whistleblowers. It is also stated that there is a "mild tendency of increased number of procedures in regards to internal whistleblowing". However, the number is still negligible: during the first six months, only one case of anonymous internal whistleblowing was recorded (in the Ministry of Trade, Tourism and Telecommunications). In the next six mon-

¹ <http://www.transparentnost.org.rs/index.php/sr/aktivnosti/tekui-projekti/alac>

² <http://www.mpravde.gov.rs/tekst/14518/finalni-izvestaj-o-godinu-dana-primene-zakona-o-zastiti-uzbunjivaca.php>

³ The author is Mirjana Martić (ex Mihajlović), current judge of the Misdemeanor Court in Belgrade, member of the working group for drafting this Law and one of the people who had the greatest impact on the content of the Anti-corruption Strategy and Action Plan for its implementation in 2013 (advisor to the Minister of Justice at the time).

th, six cases were registered in the ministries. External whistleblowing is similar in this regard – during the first six months, only one case of that kind was recorded in the ministries, and 14 cases were recorded during the first year⁴.

The number of inspections performed by Administrative inspection increased from 5 to 20, and in case of Labor inspection from 282 to 949. Administration inspectors found three irregularities and passed them to the jurisdiction of other authorities. The control of labor inspection in the first six months is said to have been of "mainly preventive nature", but two misdemeanor charges were filed for the employer's failure to act within 15 days after the internal whistleblowing. During the second half of the year and after a considerably larger number of controls, five misdemeanor charges were filed. In addition, 48 decisions on removing irregularities were brought. The irregularities found during the inspections are related to the failure of giving written notice to employees, failure to assign authorized person, failure to act upon the information in a timely manner, failure to timely notify whistleblowers on taken actions, and preventing whistleblowers to examine the case files and attend proceedings.

Experiences of authorized persons

Based on the rather small number of case studies, authorized persons from ministries, among other things, observed the following: the need for education in the field of protection of whistleblowers with practical examples for addressing concerns, and difficulties in finding information on who the authorized person is "regardless of the fact that the Rulebook on internal whistleblowing and the Decision on appointment of authorized persons were posted on the board." This confirms the validity of TS proposal, dated before the adoption of the Law, that it is also necessary to publish information on the Internet; one ministry had two authorized persons who believed this to be a good solution (for example, if someone wants to report an authorized person). The practice of Transparency Serbia has shown that there is another reason - a situation in which the authorized person is absent for an extended period; some respondents pointed out the concerns in regards to the application of specific powers and the method for examination of internal whistleblowing allegations; the majority of respondents identified the position of the authorized person as a potential risk in regards to possible impact on the actions of that person; and the most risky task was identified as the protection of confidentiality of whistleblowers; it is not entirely clear whether separate records should be kept for external whistleblowing and in what manner, given that such an obligation is not stipulated by the law or the regulations. The degree of confusion that resulted from Law adoption and conducted trainings is also evidenced in the following quotations from the study: "Most ministries have no specific evidence of external whistleblowing because they (the competent inspections) act upon applications regardless of whether someone called themselves a whistleblower or not. On the other hand, there are also opinions that the law governing the inspection did not stipulate that inspection bodies shall act upon external whistleblowing, and these reports are addressed by persons authorized for internal whistleblowing who engage inspection bodies or other services depending on the information"; authorized persons noticed that external whistleblowers also often confuse their rights with the rights granted by internal whistleblowing in cases of access to information of public importance, and that they are not sufficiently familiar with the manner of protecting their personal identity.

The first whistleblower who received court protection was Milos Krstic who was fired when he discovered corruption in a primary school in Mladenovac. He was reinstated by the decision of

⁴Ten cases in the Ministry of Education, Science, and Technological Development, and four cases in the Ministry of Trade, Tourism, and Telecommunications.

the High Court in Belgrade. The first case of the protection of whistleblowers in private sector was recorded in a company in Sremska Mitrovica, where the employees disclosed the violation of the Labor Law. The publication also lists some examples of whistleblowing. In the first example, "the whistleblowing performed in the Ministry of Mining and Energy was qualified as external whistleblowing. The object of whistleblowing referred to the control inspection. Therefore, the procedure of internal whistleblowing was not initiated, as the action was taken in compliance with the provisions of the Law on protection of whistleblowers that govern external whistleblowing. Whistleblowing was performed in writing and the whistleblower was informed of the outcome of the procedure." The description does not clarify what makes this case of whistleblowing different from any other notification of the inspection body on a possible infringement or danger (e.g. which form of relationship existed between a whistleblower and a company or an authority within which a violation took place).

"Internal whistleblowing was performed within the Ministry of Trade, Tourism and Telecommunications. A whistleblower used e-mail to deliver an anonymous report to the inspection body on the operations of an entity in a mall, referring to the LPW. Due to the anonymous complaint and the object of whistleblowing, the authorized person could not determine with certainty whether this was an internal whistleblowing in connection with work engagement or recruitment process, so it was treated as a whistleblowing in connection with the use of the services of state bodies, or in connection with the business cooperation and ownership right to the company. The authorized person asked the competent sector for the information about the performed inspections of business entities and other participants in trade and transport operation in that mall. The whistleblower was informed about the actions taken (the process was not yet completed)." This action was positively assessed by the study author, because this case "refers to internal whistleblowing, even though the authorized person ... was not assured that all conditions were met for the specific case to be considered whistleblowing ... so whistleblowing was qualified as internal, which was more suitable for the whistleblower, although they were no available information that the whistleblower was employed or in the process of being recruited at the registered business entity". Perhaps the procedure of the authorized person of the Ministry of Trade can be regarded as positive, but it certainly reveals a failure of the legislator - to stipulate whether and how it will be determined if a whistleblowing was internal or external, when there is such a doubt, and whether the person has the status of whistleblower at all. This is in conjunction with other conceptual problem of the LPW: stipulating specific association as a condition for an action to be considered whistleblowing is actually counterproductive. If the information indicates some illegal or harmful acts, it would be logical that the authority investigated the case in accordance with the quality of the submitted information, regardless of the person who disclosed the problem. Introduction of different rules for acting on the complaint, if the body was contacted by a whistleblower or any person who does not fit this definition, creates difficulties not only in the application of the LPW, but in the regulations that already exist.

Experiences in applying the LPW indicate that a report on verification of the internal whistleblowing allegations is mainly submitted to the Minister, since he or she is the one who needs to take corrective measures. A potential risk is reflected in the fact that the authorized person, while investigating allegations of internal whistleblowing, inevitably has to interview other persons, and in most cases the direct supervisors of whistleblowers as well. In a small environment, immediate supervisor could, based on the facts, establish the identity of the employee, so the authorized person could be in danger of being held responsible for revealing the identity.

Some dilemmas are indicated by the following example of an authorized person from the report: "The first case refers to the institution of student standards and performed construction work. The question was raised in regards to who the competent authority is, so the inspection was conducted by the inspector from the ministry, even though there was a local inspection, and the inspection of the ministry was the second instance body. Another question was whether to carry out regular inspections or to apply the LPW, so we implemented the LPW and, in addition to the inspection, we hired another two sectors that would not have been involved in an ordinary case. Next question is whether a case of someone filing a complaint, or disclosing that their superior failed to calculate their salary in a lawful manner, shall also be considered whistleblowing? I think the LPW has not adequately determined whether a competent authority shall act upon external whistleblowing in the same manner as in ordinary cases or if there is a special procedure, as in the cases of internal whistleblowing. The eight referenced cases were initiated by the same person, who later complained about the conduct of inspectors, the head of the school administration, and all of those in charge of examining his initial allegations." Most of the authorized persons noted that there is no difference between external whistleblowing and the reports from persons who did not identify themselves as whistleblowers, and that the actions of the inspection body or other competent authority is the same in both cases. The only criterion for distinction is the fact that someone identified themselves as a whistleblower. This assessment is correct, but, as we have previously pointed out, a clear expression of a whistleblowing intent is not a legal requirement, so it is possible for a case to remain unnoticed, despite the application of this criterion.

Another practice that the survey identified as positive is the practice of the Ministry of Education and the Ministry of Trade, Tourism, and Telecommunications to "file the complaints of external whistleblowing with the person authorized for internal whistleblowing, and then forward them for further and regular inspection. In this way, there is no difference in the acting on complaints, and the requests of whistleblowers can be addressed with special attention in terms of efficiency and accuracy, or the examination of internal whistleblowing allegations."

One of the participants identified as problematic the fact that the definition "competent authority" is too broad and that, according to the Law on state administration, indicates that the head of the authority acts and signs the acts in a procedure of external whistleblowing. Since the inspection bodies, as the organizational units of the ministry, should act on any information, "the minister submits the information on external whistleblowing through an authorized person to the inspection body, after whose report or actions taken, the minister signs the report through a person authorized for internal whistleblowing and submits it to the external whistleblower, because the inspection does not have the status of "competent authority". On the other hand, in case of internal whistleblowing, the procedure and entire communication is conducted and the report is signed by an authorized person.

A reminder of the Minister's exposé

In connection with these dilemmas in the application of the Law, it would be good to recall the exposé of minister Selakovic when the Law was adopted⁵, in which he defended the decisions to condition the allocation of whistleblower status with some form of previous association, and his emphasis on the difference between whistleblowing and complaints:

"The expert opinion of the Council of Europe states - you, gentlemen of the Republic of Serbia,

⁵Minutes of the Eighth Sitting of the Second Regular Session of the National Assembly, 18. November 2014. Available at www.parlament.gov.rs

have to associate whistleblower status to the status of work engagement. The Council further explains why and states that, according to the European Court of Human Rights ... a whistleblower is an employee in the broadest sense of that word. It is the only person, or a small group of people, who are aware of illegal work practices and who are most competent to act in public interest and alert the employer to rectify these irregularities, or who are most competent to address society as a whole. Thus, a whistleblower belongs to a small circle of people who may be aware of the illegality precisely because they discover internal or so-called inside information and who may suffer direct consequences on their work status or other personal assets. Simply put, a whistleblower discloses internal information that may be of public interest and that would not be so easily available otherwise. The information that can be discovered or reported by other people constitute inside information to a lesser extent or present the information that are not internal and well hidden.

It is further stated by the European Court of Human Rights, and not by a random NGO, that the difference between whistleblowing and filing complaints should be pointed out. This is similar to the mentioned notion that Hungary has implemented absolute freedom in submitting complaints. According to the opinion of the Council of Europe and the European Court of Human Rights, we have implemented such freedom as well, as whistleblowing exists in any case when an employee states the allegations on the danger or illegality that can affect others. This is not a complaint. This is true, and it is clearly defined what the information disclosed by a whistleblower may be indicative of."

The legislator did not want to accurately regulate the relationship between the "disclosure of information" and other forms of indicating illegal and damaging actions

As it can be seen from the analysis of legal standards and from the few experiences of authorized persons, the minister's word that everything is "correct and clear" was not sufficient to resolve the dilemmas. On the contrary. Given that none of the standards from the LPW excluded "the protection of personal interests" from the notion of whistleblowing, the complaints are also included in this term, as long as other conditions are met. According to the LPW, the (non)existence of personal interests was not even investigated. Also, contrary to what the minister said in defense of the draft Law, whistleblowing is not exclusively associated with work engagement, but it may be related to the exercise of services before the authorities and in some other situations. The unsolved problem of the Law is the creation of a dual regime: there are complainants who are whistleblowers, and there are those who are not, depending on whether there is some form of association between the complainant and the

body in which a violation or endangerment of the Law took place, and their rights can therefore significantly vary. Yet the bigger problem is that the Law makes the difference between the people who indicate a problem of public interest, so some of them would enjoy protection as whistleblowers, while others would not. Finally, much worse than any unfair or unsuitable solution is the one that is unclear or can be applied in different ways, which is precisely the problem faced by authorized persons in Serbia, especially in regards to external whistleblowing, due to the fact that the legislator did not want to accurately regulate the relationship between the "disclosure of information" and other forms of indicating illegal and damaging actions. The Council of Europe and the European Court of Human Rights ground their viewpoints in

applicable regulations, just like the courts in Serbia. Therefore, referencing their authority is of little use to solving the problem that was exclusively caused by the provisions of domestic laws.

Recommendations

The Ministry of Justice's study recommended continued monitoring of the Law application, expanding the scope of institutions covered by the monitoring, raising awareness of the obligations and promoting good practices in private sector, introducing and clarifying the records on whistleblowing, considering the need of appointing more than one authorized person, rotating authorized persons after a certain period, establishing contact center at the Ministry of Justice for providing information on developments in the implementation of the Law and the interpretation of certain legal standards in practice, providing technical and other conditions that would enable authorized persons to protect the confidentiality of whistleblowers, and clarifying the procedures in cases of external whistleblowing.

Court protection

The report on the work of Serbian courts in 2016⁶ stated that the number of whistleblowing cases increased compared to the previous year, that is, its second half, when the Law was applicable, from 71 to 295 cases. Increase was also recorded in the number of provisional measures – from 16 to 36. It is noted that actions on temporary measures were taken within the deadline. Total number of unsolved cases at the end of the year was 80. Although it was expected that the largest number of cases would be recorded in labor disputes, only 14 of new cases of that kind reached basic courts during 2016.

Most new cases were assigned to higher courts, 149 complaints (with the aforementioned recommendations for provisional measures). The number of new cases also increased in other courts - 5 in the Supreme Court of Cassation (revision), 45 (appeals against decisions of the higher courts in cases of protection of whistleblowers), and 37 (appeals against decisions of basic courts in whistleblowing labor disputes) in Appellate Courts, 5 in the Administrative Court, 3 in misdemeanor courts, and 1 in the misdemeanor Court of Appeal. This report provides no detailed information on case outcomes or other details of case law.

⁶http://www.vk.sud.rs/sites/default/files/attachments/GODISNJI%20IZVESTAJ%20O%20RADU%20SUDOVA%20U%20REPUBLICI%20SRBIJI%20ZA%202016.%20GODINU_V6_0.pdf

Implementation of the strategic framework regarding the protection of whistleblowers

Anti-corruption Strategy

The protection of whistleblowers is regulated by several strategic acts. The Anti-corruption Strategy stipulates this measure in the area of prevention, while its monitoring, after the adoption of the Action Plan for Chapter 23 of the European Integration, was completely moved in the domain of the EU integration process.

Measure "4.9. The established efficient and effective protection of whistleblowers (persons who report suspicions of corruption)" contains a description of the current status of legal protection, but only when it comes to basic provisions of the regulations that were in force before the adoption of the LPW, and dealt directly with this subject (one article of the Law on anti-corruption, the Law on civil servants, and the Law on free access to information respectfully). The importance of other regulations was not mentioned (e.g. the Criminal Code, the Law on Data Secrecy, the Law on Trade Secret). The Strategy emphasized the need to pass a single law that would apply to the protection of whistleblowers, but without a closer definition of what that law would contain. Also, the Strategy failed to point out the following (from the draft of Transparency Serbia for amending this part of the text): "The public authorities shall best achieve this if they establish an effective mechanism for reporting violations and irregularities, if all allegations of such acts are effectively investigated, if they inform the whistleblower on the results of the investigation, and if they take measures to punish offenders and to eliminate the shortcomings in the system that allowed for the public interest to be threatened."

The annual report of the Anti-corruption Agency on the implementation of the Strategy for 2015⁷ states that the measure 4.9.1, which stipulates the adoption of the LPW, was implemented after the deadline. Measure 4.9.2. "The adopted by-laws which precisely regulated the procedure and action" only stipulated for the Ministry of Justice to draft and adopt bylaws within six months from the date of adopting the Law. The activity was carried out in accordance with the indicator ("regulations adopted"), but not within the deadline. The Rulebook on the method of internal whistleblowing, the method of establishing the persons authorized by the employer, as well as other issues of importance for internal whistleblowing with the employer who has more than ten employees, was adopted on June 3, 2015, three months after the deadline. The Rulebook on the acquisition of specific knowledge related to the protection of whistleblowers was adopted on January 15, 2015. The legislator has predicted that trials in cases of protection of whistleblower can be lead only by persons who possess particular expertise, so the implementation of the entire Law was postponed for six months, among other things, so that a certain number of judges could be trained in handling these cases. Agency presented the findings and assessments of alternative report of Transparency Serbia on the implementation of the Strategy, "However, after the adoption of the Rulebook on training, it turned out that the entire training that judges must pass takes one working day (and includes five classes of 60 minutes and practical exercise through a simulated case), and that no assessment of knowledge acquired during the training was included. TS also criticizes the Rulebook that governs the issues of internal whistleblowing, which in addition to some useful innovations restates some provisions of the Law, contains some ambiguous provisions, and fails to regulate some issues in more detail."

⁷<http://www.acas.rs/wp-content/uploads/2011/03/Izvestaj-o-rad-u-o-sprovodjenju-Strategije-2015.pdf>

Measure 4.9.3. "Conducting professional training for persons employed in public sector on the issue of protection of whistleblowers" stipulates for the Ministry of Justice to develop a plan and program of training employees in public sector within three months after the adoption of bylaws. In addition to this activity, a note was added that the development of training curriculum should include the representatives of the institutions responsible for the protection of whistleblowers under the Law. The activity was carried out in accordance with the indicator ("development of training curriculum") and within deadline. Other activity provided that the same ministry permanently implements the plan of training employees in public sector. This activity was also carried out in accordance with the indicator ("training plan implemented by the year of Strategy application") for the reporting period. The report says that the training curriculum was developed in 2014 in cooperation with the judge of the Misdemeanor Court in Belgrade, who was also a member of the working group for drafting the law. The plan presents a part of the Program for general continuous professional development (program area "Fight against corruption") and was adopted on March, 31 2015. By the end of that year, 62 civil servants were trained. In 2016, it was planned for this topic to be dealt within the two-day training for two target groups: 1) basic training intended for all civil servants; 2) training of persons authorized to act on such reports in connection with whistleblowing. The objective is to familiarize participants with international standards and practice of the European Court of Human Rights regarding the protection of whistleblowers on the right to freedom of expression and key terms stipulated by the Law, and in order to better understand the concept, whistleblowing, and the protection of whistleblowers. Given the number of participants, it is obvious that the previously held number of trainings was far from sufficient (one per 10,000 employees in public sector). This is particularly insufficient when one bears in mind that this is the first year of Law implementation, when uncertainties are numerous. The Agency further refers to the findings of TS report: "the quality of such programs is not possible to assess because the only published item was planned topics, and not the educational material." It is further added that "it is necessary to specify the Action plan so as to provide a minimum number of staff to be trained, as well as their profile, so these could be persons who work in sensitive positions, or trade union leaders. Special training is needed for persons who receive complaints from whistleblowers, given that they have an important role in not only meeting legal obligations, but also building confidence in this new legal institution."

European integration

The Action Plan for Chapter 23 of European integration, adopted in 2016, restates, in more or less modified form, some of the activities that were planned by earlier anti-corruption action plan. In most cases deadlines were moved. This is the case with the paragraph 2.2.7.1. "Establishing and completing a training program for the implementation of the Law on Protection of Whistleblowers for judges acting in cases of the protection of whistleblowers." The deadline for the training of judges was the fourth quarter of 2015, and for the training in public administration the fourth quarter of 2016. The report on the implementation of action plan states that the training was fully completed, and in accordance with the Action Plan. "The training program ... for judges ... was developed and is being implemented in the context of continuous training, as planned." "Training program of the Judicial Academy includes all judges, and the training was fully implemented as of the first quarter of 2016. The advanced stage of training for judges acting on cases of the protection of whistleblowers is currently in progress." It is further stated that the training program "with the support of USAID", "started in January 2015 and was completed in December 2015". During the first phase, 44 seminars on the Law were held and 1,477 participants from various types of courts were trained, as well as

participants of the Judicial Academy. During the second phase, 7 workshops were held for the judges acting in cases of whistleblowing, for 146 participants. When it comes to trainings of officers, government office for human resources management organized six trainings in 2016. Three were basic and had 55 participants, while three were intended for authorized persons and had 81 participants. "These trainings present an integral part of the Program for general continuous professional training of civil servants."

The activity "2.2.7.2. Conducting a campaign for raising awareness about the importance of whistleblowing and the use of channels for reporting illegal action (fourth quarter 2015)", is also said to have been fully implemented. It is pointed out that "authorized trainers hired by the Judicial Academy held over 50 trainings for the judges of all higher and appellate courts in the territory of the Republic of Serbia" (the relationship of these trainings with the campaign is not clear). "In addition, a well-organized and implemented TV campaign on the importance of whistleblowing evoked a positive reaction from public." However, this statement was not supported by any evidence or other relevant information (for example, the number of reviewed ads, or the number of website visits).

The activity "2.2.7.3. Monitoring the implementation of the LPW through the preparation of the annual report of the Ministry of Justice made on the basis of periodic reports of the relevant institutions on cases of conduct in connection with whistleblowing and needed legislative changes (once a year, starting from the first quarter of 2016)," is also said to have been "successfully implemented". "The annual report was prepared on the basis of periodic reports of relevant institutions on cases of conduct in connection with whistleblowing and was published on the website of the Ministry of Justice." However, there are several serious problems in connection with this activity. The first is the lack of regulation in the system of (periodic) reporting on the implementation of the Law, both from the bodies to the Ministry of Justice, and from the Ministry to public, government, or parliament. The first published report shows that it was made on the basis of data provided by courts and ministries. On the other hand, the LPW refers to a large number of entities from public and private sectors. To some extent, the data on the report of implementation of LPW can be found in annual reports on the work of courts, as well as in the reports of the working and administrative inspections that monitor the implementation of certain provisions of this Law. However, these data are sparse and mostly statistical, so they cannot serve as the basis for illustrating the application of the LPW. Another problem is that the funds allocated for this purpose are clearly insufficient. The Action Plan stipulates that the Ministry of Justice will be allocated 213 Euros per year for the preparation of the report. The first report was neither funded nor signed (but only published) by this ministry - it was prepared by a former advisor of the ministry with the help of state institutions, but in private capacity, and the only institutional logo present in the report was USAID. Therefore, it is highly uncertain if, and in what manner, will the monitoring be carried out in the future. Although the purpose of the report, among other things, is to change regulations if the need arises, and some suggestions in this regard have been outlined in the first report, there have been no indications about the progress on those changes.

Therefore, it is highly uncertain if, and in what manner, will the monitoring be carried out in the future

Performance indicators are not precisely defined

During the adoption of this action plan, we pointed out, among other things, that performance indicators are not precisely defined (positive opinion of the European Commission in its annual report for Serbia and the number of started and completed procedures for the protection of whistleblowers - English version states "criminal proceedings" by mistake), because it is not clear how the situation will be treated if the number of such procedures is, for example, 50, 200 or 1000. This is why we suggested that the success indicator is formulated as some of the following: "the number of cases in which the protection of whistleblowers who report corruption provided in accordance with the provisions of the new Law is at least twice the number of persons to whom the Agency for fight against corruption granted the status of whistleblowers in 2014"; "all whistleblowers were granted protection within the deadline"; "no reports on new cases of whistleblowing in relation to corruption that have led to adverse consequences for whistleblowers or associated persons, without these consequences been removed by the application of the protection mechanisms of the Law". With regard to trainings, we pointed out that they would have to include at least all heads of government bodies and officials responsible for "internal whistleblowing." When it comes to the campaign (if it is focused on reporting corruption), we pointed out that it would be logical for it to be implemented by the Agency for fight against corruption, as the body that has the widest range of competencies in this field, public prosecutor's office (as the body directly responsible for acting on reports of corruption as a criminal offense), or all bodies that have established an effective mechanism for whistleblowing, who, judging by past experiences, can expect a large number of reported cases of suspected corruption. Campaigns should never be carried out just because of legal obligations, but only after the functionality of the system of reporting and protection is verified in practice, which would probably point to the need for such campaigns to be carried out at a later stage and for their content to be subsequently designed, based on the analysis of the Law functioning in the first year of application. Also, we pointed out that the indicator of the campaign success cannot be reflected in the fact that the campaign was carried out, but it has to be established in relation to the objective – e.g. a larger number of reported cases (with clear specification about this number).

In connection with the subject of the protection of whistleblowers, we pointed out the activities that were completely absent from the Action Plan for Chapter 23, but above all the need for defining the standards of other regulations (e.g. in the area of data confidentiality).

Whistleblowers in Public Administration Reform

Action Plan for the implementation of the Strategy of Public Administration Reform in the Republic of Serbia for the period 2015-2017 also addresses this issue within the measure 5.2 "Strengthening the integrity and ethical standards of employees in public administration and reducing corruption by strengthening prevention mechanisms." Activity 5.2.2. Improved efficiency of the system for protecting whistleblowers (persons who report suspicion of corruption) in public administration included "providing technical conditions for effective implementation of the Law on protection of whistleblowers (the fourth quarter of 2015)," and the indicator used was the number of reports of the ministry in charge of judicial actions in cases of courts dealing in connection with whistleblowing". The responsible parties would be the Ministry of Justice - the Group for coordination of the implementation of the National Strategy for Fighting Corruption and Human Resources Management Service. The activities from the Action Plan for Chapter 23 were restated, but in some cases deadlines were different - establishing and implementing training programs (the second quarter of 2016), conducting

a campaign for raising awareness about the importance of whistleblowing and using channels for reporting illegal action (the second quarter of 2016) and monitoring the implementation of the Law on protection of whistleblowers through the preparation of annual report of the ministry responsible for judicial actions made on the basis of periodic reports of the relevant institutions on cases of acting in connection with whistleblowing (the fourth quarter of 2017). It can therefore be concluded that the inclusion of whistleblower protection in the reform of public administration, at least in the way this was already done, did not bring any changes, because all of these activities are already being implemented (or not) on the bases of other strategic acts.

Websites and Rulebooks of the authorities

Information on the websites of ministries

Strategic acts provided informing the public about the protection of whistleblowers as an important segment of reforms. All this should ultimately lead to reporting a higher number of corruption cases. However, a big problem in the application of the Law on protection of whistleblowers is the fact that it did not make the manner for citizens to exercise their rights any easier. The authorities are obliged, among other things, to regulate internal whistleblowing within this Law (to adopt a special act) and to designate a person authorized to act in the event of such whistleblowing. It is illogical that there is no stipulated obligation of publishing the information about that person and the manner of whistleblowing on the authorities' websites. Equal problem is presented in the fact that the law did not oblige the authorities to advise potential whistleblowers whom to contact in cases of external whistleblowing and what type of actions they can expect in such cases - for example, in situations where a whistleblower wishes to address a ministry because of a problem that arose in another public authority or a private company.

Research conducted by Transparency Serbia to a limited extent in February 2017 using the websites of the ministries revealed a devastating picture. The search by key terms was conducted on all websites and especially on their Rulebooks. The websites of several ministries contained institutional acts on internal whistleblowing, but in most cases nothing more than that. Not a single ministry's website contained clearly specified call and explanation to citizens using their services whom to contact if they wanted to perform internal whistleblowing. Such information was also absent from the promotional website of the campaign used to promote the Law on the protection of whistleblowers, and to which the visitors to this website were directed by the Ministry of Justice. When the ministries called citizens to report irregularities or corruption, they did not indicate the provisions of the LPW.

Only two of the reviewed Rulebooks included basic contact information of the person responsible for acting in connection with whistleblowing - the Ministry of Justice and Ministry of Economy. When it comes to external whistleblowing, contact information (e.g. inspection services) were posted on websites, but the

Not a single ministry's website contained clearly specified call and explanation to citizens using their services whom to contact if they wanted to perform internal whistleblowing

problem is that potential whistleblowers were not informed that they could submit the information in this capacity and then enjoy special rights provided the LPW. Information Directory presented one of the resources where such information must be included, in accordance with the Law on Free Access to Information and the Directive issued by the Commissioner within the chapter on the actions of authorities in performing their duties and powers, or in the context of services provided to interested parties.

Another item that should be present in the Information Booklet and the annual reports on the work of the ministries is the procedure in cases of internal and external whistleblowing. The only case that included such information was within the work inspection, but it did not present the scope and quality of action. The summary view states that the Labor Inspectorate, as a body within the Ministry of labor, employment, veteran, and social affairs during 2016 "took measures and activities in the field of labor relations and health and safety at work with the primary objective of ensuring the application of the provisions of ... the Law on the protection of whistleblowers ... "(one of the dozen of listed).

The analysis of the Rulebook on internal whistleblowing

For the purposes of this research, Transparency Serbia conducted a basic analysis of provisions from several Rulebooks on internal whistleblowing, which we were able to find among various authorities, primarily on their webpages.

| | | | |
|----|---|---|--|
| 1 | Ministry of Finance | v | about the ministry/internal acts |
| 2 | Ministry of Economy | v | regulations/bylaws |
| 3 | Ministry of Agriculture and Environmental Protection | / | |
| 4 | Ministry of Construction, Transport, and Infrastructure | / | |
| 5 | Ministry of Mining and Energy | / | |
| 6 | Ministry of Trade, Tourism , and Telecommunications | / | |
| 7 | Ministry of Justice | v | news |
| 8 | The Ministry of Public Administration and Local Self-Government | v | documents/laws and acts in the application |
| 9 | Ministry of Internal Affairs | v | documents/regulations |
| 10 | Ministry of Defense | v | documents/regulations |
| 11 | Ministry of Foreign Affairs | / | |
| 12 | Ministry of Education, Science and Technological Development | v | |
| 13 | Ministry of Health | v | documents/regulations |
| 14 | Ministry of Labour, Employment, Veteran and Social Affairs | / | |
| 15 | Ministry of Youth and Sports | v | about the ministry |
| 16 | The Ministry of Culture and Information | v | documents and regulation |
| 17 | Elektroprivreda Srbije | / | |
| 18 | PE Official Gazette | / | |
| 19 | PE Institute for Textbooks | v | about us/other documents |
| 20 | PE Srbijagas | / | |
| 21 | PE for underground coal exploitation Resavica | / | |

| | | | |
|----|--|---|--|
| 22 | PE National Park "Fruska Gora" | / | |
| 23 | PE Sesrbiaforests | / | |
| 24 | PE Roads of Serbia | / | |
| 25 | PE Nuclear Facilities of Serbia | v | about us /company general acts |
| 26 | Public Water Management Company "Srbijavode" | / | |
| 27 | PE "Poste Srbije" | / | The decision on assigning a person authorized to receive information and conduct the proceedings of internal whistleblowing in the PE "Poste Srbije" |
| 28 | „Vojvodinasume“ | / | |
| 29 | PE Electronetworks of Serbia | / | |
| 30 | PE Ski Resorts of Serbia | / | |
| 31 | Public Water Management Company "Vode Vojvodine" | v | documents |
| 32 | Belgrade | v | city government / city administration /useful links |

The table presents the overview of the information we obtained by examining websites of the authorities in mid-2016, after the deadline for the adoption of the Rulebook that governs internal whistleblowing. The sample included 16 ministries, 15 public companies, and 9 local governments. Less than half of those bodies, 17 of them, had at that time published an internal document on its web presentation. The situation was slightly better with the Ministries and the worst with public enterprises, where the document was found in less than one-third of the observed bodies. The Rulebooks were not always located at the same place on the websites, and were often not possible to see, except through the search.

When it comes to the content of the Rulebooks on internal whistleblowing, they were all very similar and followed a standard solution. However, there were items that contained some differences. For example, only three Rulebooks stipulated assigning the person who would conduct the proceedings, only slightly more than half of the Rulebooks include the information about the training of whistleblowers, and the situation was similar when it comes to handling classified information. Deadlines for whistleblowers' decisions differed significantly, so the time limits of 3, 5 and 8 days were equally represented, and the deadline of 2 days was provided for one case. Three Rulebooks did not include what must be contained in the proposed measures. Eleven Rulebooks contained no allegations that the protection was also enjoyed by a wrongfully identified whistleblower, while three rulebooks mentioned no right to the protection of the person seeking the information, and the right to protection of one's identity. The abuse of whistleblowing was omitted in five Rulebooks, and the prohibition of putting someone at disadvantage was left out in four Rulebooks. Finally, the data on the prohibition of damaging actions and judicial protection were not mentioned in three or four cases.

All this points to the need for control over the content of internal acts, and even more to the need to ensure their publication and availability.

Main conclusions and recommendations

Conclusions

Serbia adopted the Law on the protection of whistleblowers at the end of 2014 - almost a decade after this anti-corruption measure was initially planned by strategic acts and after the numerous cases of "whistleblowing without protection" became known to the public (primarily due to decisions being made in individual cases of access to information and public statements of the commissioner for information of public importance Rodoljub Sabic).

The beginning of the implementation of the Law was unduly delayed for six months. This was justified by the need for organizing trainings for judges, which were set as a prerequisite for acting on these cases, as well as the need to amend the Criminal Code. However, these turned out to be one-day training sessions with no individual assessment of acquired knowledge. The delay was not used to make the necessary changes in other regulations. So, even though it was promised, Criminal Code has not been amended to this date to include the offenses related to the violation of the rights of whistleblowers and other persons. Legislators have not considered the need to amend other regulations that are in some way related to the protection of whistleblowers or the actions of authorities after the whistleblowing.

The norms of this law undoubtedly have positive effects for some whistleblowers. In this respect, the greatest benefit is reflected in the reversal of the burden of proof. If the whistleblowing meets the requirements of legal protection, the defendant (usually the employer) would have to challenge the assumption that the resulting damaging act was associated with whistleblowing. Comparatively speaking, the rules of this law are better than the rules of many European countries. Among other things, this means that the right to protection is granted to other categories of persons and not just employees (e.g. the users of public services and business associates, wrongfully identified whistleblowers and associated persons), the subject of potential whistleblowing is defined very broadly (any violation of regulations and other dangers), there is a possibility of seeking temporary protection, and basic rules have been laid down for the treatment of bodies contacted by a whistleblower (the duty of notification).

However, our analysis demonstrates that the Law has a number of weaknesses. Furthermore, most of these weaknesses were known during the public and parliamentary debates, based on the proposals put forward by the Transparency Serbia and the amendments that were formulated by the opposition MPs on the grounds of our proposal.

In terms of the legislator's viewpoint, the biggest problem is reflected in the lack of will to utilize the Law on the protection of whistleblowers to overcome weaknesses of other regulations (or to amend these regulations along with the adoption of the LPW in the areas that need improvement). As a result of the implementation of the LPW, whistleblowers enjoy (more effective) protection against retribution. However, they are basically protected from the retaliation that was not allowed to happen at all. On the other hand, whistleblowers are in the same position as if there was no LPW if they violated a regulation in order to protect the public interest. This can be best seen in the case of disclosure of information that are protected by some, even the lowest level of classification, whether such confidentiality was justified or not. Under no circumstances can a whistleblower present such information to the public, and the LPW will not protect them from criminal or other persecution if they do so.

Another large area regulated by the Law but not sufficiently elaborated is whistleblowing and acting upon the "information" received through whistleblowing. Authorities are often confused as to whether they should, and in what manner, distinguish the actions taken in accordance with the procedures that oversight bodies were already familiar with from previous whistleblowing cases (appeals, petitions, complaints, requests, etc.). This is particularly common for the cases of external whistleblowing. The differences are not just of academic or statistical nature. Depending on whether a disclosure may be considered whistleblowing or not, there may be different deadlines for follow-up action and the scope of duties of the authority. The law requires the authority to inform the whistleblower about the actions taken upon the whistleblowing, but does not set the rules for minimal measures to be taken on resolving the identified problem.

There are numerous examples of provisions that need to be defined because they are unclear or mutually conflicting. Among other things, various provisions imply various meanings of the terms "information" and "damaging action". There are legal provisions that are clear, but not logical and consistent from the standpoint of achieving the proclaimed objective. Thus, on one hand, the Law asserts that the goal is to report and resolve as many illegal and harmful actions as possible, without getting into the motives of whistleblowers, but, on the other hand, it places various restrictions on the recognition of whistleblowing rights - the deadlines for submitting information and a specific forms of previous association with the "employer"; on one hand, the law guarantees the right to anonymous whistleblowing, and on the other, it opens the possibility for the information to be submitted to another authority against whistleblowers' will; the law stipulates the special procedure of judicial protection of whistleblowers, but this protection does not apply to the cases of labor disputes and so on.

Some changes to the rules can be made before the amendments to the Law – the bylaw of the Minister of Justice did not regulate all important issues for the internal whistleblowing. The entire law contains focus on labor relations, even though it is recognized that whistleblowers can also come from other categories. Due to the limitations of the law and incomplete provisions of the Criminal Code, we still cannot say that obligations of the UN Convention against corruption related to the protection of whistleblowers have been fully met.

The gap between legislation and securing the Law implementation can be bridged by means of the oversight provisions. However, these provisions are not particularly useful because they state that the control, within the scope of given powers (i.e. already existing), is performed by administrative inspection and labor inspection. Due to the scope of work restrictions placed on each of these inspections, the application of certain provisions of the Law is not monitored by anyone. The opportunity to place one body in charge of the general oversight of the law implementation was missed (e.g. the Ministry of Justice which prepared the Law). The analysis of the implementation of the Law during the first year, promoted by this ministry, was conducted as an *ad hoc* activity and implemented with the support of donor project.

For now, the majority of readily available data pertain to the implementation of the rules on the judicial protection of whistleblowers. Although problems have been reported in this area, especially in the beginning of the process, it is obvious that the norms have a positive effect because dozens of whistleblowers and associated persons received temporary or meritorious judicial protection during the first year. In some cases the protection would have been denied or more difficult to obtain unless the new rules were adopted. Application of this law was presented in the annual report on the work of the courts in Serbia in 2016.

On the other hand, there are much less available information on possible benefits of whistleblowing, whether in regards to solving specific problems, and in regards to repairing the system. Due to the unclear criteria and lack of obligation of producing reports, the number of cases of internal and external whistleblowing in Serbia is undetermined. Therefore, it remains unknown whether the Law achieved the main objective for which it was enacted.

The protection of whistleblowers is not an end in itself. It is a means for public institutions and private companies, national control authorities and the entire interested public to become aware of specific risks and to engage available resources to eliminate them. When it comes to corruption, the protection of whistleblowers is a means for a large number of cases to be detected and reported, and then effectively investigated. The possible knowledge on the efficient functioning of the system is not only beneficial for the detection of existing cases of corruption, but also as a preventive measure. The increase in the number of people who are fighting corruption strengthens the "immune system" of society and establishes the defense system that is much cheaper and more efficient than hiring the best repressive state apparatus. The data on the number of reported and investigated cases of corruption in 2015 and 2016 published thus far do not show that there has been a positive change compared to previous years.

Even though a campaign was organized to promote the Law on the protection of whistleblowers, as it was planned by the strategic anti-corruption acts, it seems that this activity was not well coordinated with the actions of state authorities. In fact, the research conducted by Transparency Serbia for the purpose of this publication showed that public authorities have not made almost any action to inform potential whistleblowers about whom they can contact and what they can expect. The information about whistleblowing generally cannot be found on the websites of ministries, while their Information Directories do not contain the information about the number of received and resolved cases. The insufficient use of the potential benefits of this Law and other mechanisms for fighting corruption is reflected in the fact that even the calls to report corruption and other illegal action posted on the websites of individual ministries do not contain any information relevant to whistleblowing.

Consequently, instead of immoderate assessments on the achieved success, which could be heard particularly during the celebration of the first year of the implementation of the Law, it is obvious that we should put a lot of effort into obtaining maximum benefit from the existing legislation, but also into their substantial improvement.

Main recommendations

- Clarifying ambiguous provisions of the Law through official opinions;
- Amending the bylaw on internal whistleblowing;
- Initiating the discussion on the need for changes and amendments to other laws, in order to resolve issues of importance for whistleblowing and the protection of whistleblowers (Criminal Code, Data Secrecy Act, and others) and/or amendments to the Law on the Protection of Whistleblowers;
- Organizing a comprehensive control of the implementation of the Law, particularly in regard to the actions of the public authorities upon whistleblowing;
- Linking the protection of whistleblowers and acting upon the received "information" with the implementation of other anti-corruption mechanisms;
- Promoting the positive changes brought by whistleblowers.

