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The Limits of Whistle-Blower Protection and Its Legal Consequences

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Abstract

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The term whistle-blower was introduced in Romania in the year 2004 through law 571, but it has not yet become a research subject for legal doctrine. The Romanian Parliament intended to create of a legal framework that defines the whistle-blower, its principles, limits and the guaranteed protection against the possible retaliation that may appear in the legal employment relations. The situation may become somewhat problematic when the protection offered is excessive or when it is inadequately regulated, enabling its exploitation by a whistle-blower who stops being of good-faith, considering the fact that this attribute is maintained till proven otherwise. This article aims to follow the legal consequences caused by a lacking regulation in the field of the whistle-blowers' activity.

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1. Introduction

The Whistle-blower notion, that was incorporated by law 571/2004, from the European legislation has an interesting history that starts from the notions of ‘traitor’ or ‘snitch’, meanings which were not agreed upon, in case the one leaking information to expose unlawful behaviour was acting to maintain the values of public interest. Thus in 1777 American Navy Officer filed a petition against the Supreme Commander of the Continental Navy, accusing him of torturing of British prisoners of war ‘treating them in the most inhumane and barbaric ways’ (Kohn, 2011). The Commander filed a complaint against those which filed the petition, with the result of the arrest of two Officers. The Officers sustained their plea that was read in front of the Congress in July 1778, saying that they were ‘arrested for something that they considered and still consider to be their duty’ (Kohn, 2011). Based on their plea and petition, the American Congress passed a law one month later, which became the first piece of legislation to grant protection for whistle-blowers. ‘It is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanours committed by any officers or persons in the service of these states, which may come to their knowledge’ (Ford, 1778). Along with this law, the two officers benefited from the full support of the United States in the trial against the Commander, the latter being relieved from duty.

Although the principles of whistle-blower protection started being effective since those times, the modern name for this concept appeared some years later. In the 60’s, the civic activist Ralph Nader, in order to avoid the negative connotations of the term ‘snitch’, made a connection between the activity of policemen and referees, who blew the whistle in order to signal illegal activities or foul-play and thus using the term ‘whistle-blower’ for the first time (Jubb, 1999). The Council of Europe used the term in one of the principles of the resolution 24/1997 ‘On the twenty guiding principles for the fight against corruption’: ‘Whistle blowers are employees working for corrupt enterprises who alert the authorities to the fact that their firm is engaged in corrupt practices. Such "whistle blowers" are often left without the appropriate legal protection and can be victimised for their actions.’ (Commission of the European Communities, 1997), recommending that ‘Member States should review and, where appropriate, amend their existing law to ensure that individuals who report instances of corruption are adequately protected from victimisation’ (Commission of the European Communities, 1997).

In 2003 The United Nations Convention against Corruption states in article 33, entitled ‘Protection of reporting persons’ that: ‘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 offences established in accordance with this Convention’ (UN, 2003).

In 2004 the Romanian Parliament adopted law 571 – ‘Concerning the protection of employees from public authorities or other institutions that signal unlawful behaviour’, thus becoming the first country from Continental Europe that adopts a special law that offers protection to whistle-blowers, against retaliation. Although this law offers protection only for the employees from public authorities or other institutions that signal unlawful behaviour, it is one of the few laws for the protection of whistle-blowers from the European Union.

The European Parliament considered, through the resolution from 26th of May 2013 that promoting an environment, in which the role of the civil society in exposing unlawful behaviour would be completely protected through the inclusion of efficient whistle-blower and journalistic sources protection system, would be a very important weapon against fraud, tax evasion, and tax havens (European Parliament, 2013).

2. Legal Framework

Law 571 – ‘Concerning the protection of employees from public authorities or other institutions that signal unlawful behaviour’, creates, in our appreciation, a minimal legal framework which can be considered a starting point in the foundation in law of the ‘whistle-blower’ concept. While the principles and the protection mechanisms of the law would enable the practitioner to create a complex and complete image of the notion, the limits and the conditions necessary for the identification of credible whistle-blowers are very unclear. We cannot state that there are enough norms that target the ‘abuse of the protection mechanisms and instruments’.

In order to understand the notion that is the subject of this article it is imperious to define and identify the structures of the main terms employed by the law:

1. **‘Whistle-blowing in public interest’** is defined as the ‘a notification made in good faith of any deed entailing any infringement of the law, of the professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency’ (Law 571/2004).
2. **‘The Whistle-blower’** is ‘the person making a notification according to subsection a) and who is employed by one of the public authorities or institutions or by the other establishments stipulated by art. 2’ (Law 571/2004).
3. **‘The Disciplinary committee’** is ‘anybody tasked with disciplinary investigation responsibilities, stipulated by the law or by the organizational and operating regulations of the public authorities, public institutions or of the other establishments stipulated by art. 2’. (Law 571/2004)

From the text of the law it may be concluded that one of the essential conditions of a report made by a whistle-blower, is that it must be in good faith. This works as a presumption until proven otherwise. As a result, the subject of the report will be the one who has to prove the bad faith, legal aspect that also represents a mechanism of protection. The report of any infringement of the law, of the professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency, represents in our opinion an extremely vast and obviously vague area of the object of petition.

From the interpretation of the analysed norm, it would result that the one that reports the unlawful conduct, could refer to any type of deed or activity that could be appreciated as infringement according to his/her own perception. The lack of legal criteria or remarks about the deeds, opens the way towards exaggerated approaches, which will block this mechanism because of the high number of whistle-blowers.

The law offers protection to the potential whistle-blower giving him/her the possibility to address alternatively or cumulatively the superior of the person in breach of the legal stipulations, the leader of

the public authority, public institution or budgetary establishment employing the person in breach of legal stipulations, the disciplinary committees or other similar bodies within the public authority, public institution or other establishment that employs the person breaching the law, legal bodies, bodies tasked with establishing and investigating conflicts of interests and incompatibilities, parliamentary commissions, the mass media, professional, trade union or employers' associations, non-governmental organisations. Thus, the legislator offers the whistle-blower a multitude of possibilities to spread the report without establishing a proper order, making the subject of the report very vulnerable in front of damage brought to his/her personal image.

Although in chapter 3, article 5 of law 571 we can identify the notion of whistle-blowing in public interest addressing disciplinary misconduct, offences or criminal offences, their enumeration has a character of generality. Thus, the deeds mentioned by the law are:

- a) Corruption offences, offences assimilated to corruption offences, offences directly connected with corruption offences, counterfeiting, offences involving misuse of office or work related offences;
- b) Offences against the financial interests of the European Communities;
- c) Preferential or discriminatory practices or treatment within the activity of establishments stipulated by art. 2;
- d) Breach of stipulations regarding incompatibility and conflict of interests;
- e) Abusive use of material or human resources;
- f) Political bias in exercising job responsibilities, with the exception of persons that are elected or politically appointed;
- g) Infringements of the law regarding access to information and decisional transparency;
- h) Breach of legal provisions regarding public procurement and non-reimbursable funds;
- i) Professional incompetence or negligence;
- j) Non-objective personnel evaluation in the recruitment, selection, promotion, demotion and dismissal processes;
- k) breaches of administrative procedures or establishment of internal procedures by breaching the law;
- l) Issuing of administrative or other papers serving special or client list interests;
- m) Faulty or fraudulent administration of the public and private patrimony of public authorities, public institutions and of the other establishments stipulated by art. 2;
- n) Breach of other legal provisions involving the principle of good administration and of the protection of public interest.

If most of the dispositions are well established, we have doubts about the possible interpretations that a whistle-blower could give the deeds described at letters c, l, and n:

- Letter c: Public servants may have different personal points of view that may, at any time, be considered as preferential or discriminatory treatment. The dissensions between the staff from the institutions mentioned at art. 2, or the bi-/multivalent conflicts between the members and the difference of individual opinion, may be considered as good reasons to forward a report on these grounds.

- Letter l: Concerning the issuing of administrative or other papers serving special or clientelist interests, we appreciate that the wording ‘other papers’ is very prone to interpretation and it does not clarify which are the categories of papers which are being referred to by the lawmaker. That is why we consider that it is absolutely necessary to either be specified which are the categories of papers, or to be removed from the above mentioned text.

- Letter n: Finally, when we are discussing the breach of other legal provisions involving the principle of good administration and of the protection of public interest, we find that the definition of the term ‘Whistle-blowing in public interest’ is also established through the expression ‘protection of public interest’ which leads to the definition of the concept through two different words: whistle-blowing in public interest and protection of public interest. Also, the grade of generality of this norm offers the possibility of any subject of petitioning, and for the whistle-blower, the possibility to qualify any deed as being against public interest.

Thus, the lawmaker offers the whistle-blower protection before the disciplinary committee or other similar bodies:

- This benefits from the presumption of good faith till proven otherwise;
- Upon the request of the whistle-blower under disciplinary investigation following a whistleblowing act, disciplinary committees or other similar bodies within the public authorities, public institutions or other establishments stipulated by art. 2, shall invite the press and a representative of the trade union or of the professional association.
- In case the person incriminated by the public interest whistleblowing is the direct or indirect superior, has control or inspection and evaluation responsibilities over the whistle-blowers, the disciplinary committee or other similar body shall ensure the protection of the whistle-blowers by hiding his/her identity according to art.12, subs.2 , letter a from the Law 682/2002 concerning witness protection.

Before the court, the whistle-blower benefits from protection only in job-related litigation or litigation regarding work relationships, where the court can only decide on the annulment of the disciplinary or administrative sanction applied to a whistle-blowers, if the sanction was applied following a public interest whistleblowing made in good faith.

3. Law 571/2004 in Court

I. In the year 2009, the Cluj Court of Appeal ruled in civil sentence 288/2009 in which the applicant’s request for a settlement under law 571/2004 is denied. In explaining the grounds for his application, the applicant showed that he submitted a notification on the 5th of December 2005 at D.N.A. – Territorial Service Cluj, under Law 571/2004, about the illegal lifting of a seizure of property that belonged to S.C. U. S.R.L. with the complicity of the Public Finance Administration leadership, fiscal institution in which he was employed as Head of Service.

An objection of inadmissibility of complaint was also submitted, arguing that in this case Law 571/2004 does not find any application since it does not provide any way for the court to rule, other than in the case of labour disputes concerning work relations of a whistle-blower. The request of the

applicant before the prosecuting authorities, although it is the result of an obligation imposed on a public servant plus Law 571/2004, has settlement arrangements specific for the Criminal Procedure Code. The rights of the person who filed the criminal complaint are provided within these limits.

In this regard, Law 571/2004 does not establish additional rights in favour of the whistle-blower in public interest, so that, the norms of the Code of Criminal Procedure prevail. Also, the High Court of Justice dismissed the appeal made by the plaintiff as unfounded, ruling that there is no reason for amending or modifying the sentence. (Curtea de Apel Cluj, 2016)

II. Through decision no.721/R/31.01.2004 the Targu Mures Court of Appeal ruled the reinstatement of a disciplinary dismissed public servant, without her being a whistle-blower.

The court of Appeal stated that „In order for the form of the regulated legal protection to be implemented, the disciplinary investigation should have started „as an act of notification” of the employee’. In this case, it is not clear from the files that there is a connection between the notification of the applicant and the disciplinary investigation according to art.7 paragraph 1 letter b of the Law 571/2004. The purpose of art.7 paragraph 1 letter b of the Law 571/2004 is not to discourage whistle-blowing in good faith and in public interest. (Ministerul Justitiei, 2016)

III. In the civil sentence no. 2778/CA from 05.02.2015 delivered by the Court of Brasov, the usage of the provisions of Law 571/2004 is encouraged and recommended in order to discourage vigilante behaviour. „Furthermore, in case the plaintiff did not receive the requested certificate, the procedural routes established by OG no.33/2002 (regarding the issuance of certificates by central and local public authorities were available or those provided by Law 571/2004 on the protection of the staff in public authorities, public institutions and other units who report violations of the law, and not to violate himself a legal norm, deed which is inadmissible in a state of law: illegalities cannot be eliminated by committing another’. (Ministerul Justitiei, 2016)

4. The Whistle-blower at the European Court of Human Rights

In January 2005, the prosecution ended the preliminary investigation. In the same month, the applicant's dismissal starting from the 31st of March was notified, due to her repeated absence due to her health. With the support of friends and a trade union, the applicant has distributed a brochure in which she qualified her dismissal as a „disciplinary tactic designed to silence employees” and informs about filing a complaint against the company. The company, which until then was unaware of the existence of the complaint, suspected the applicant to be the one who drafted and disseminated the brochure and fired her without notice. Considering that the applicant's complaint was a „compelling reason” to justify the immediate termination of the employment relationship, the domestic courts rejected the applicant's appeal against her dismissal.

The European Court for Human Rights rules that the applicant's dismissal without notice was disproportionate and that the courts did not ensure a fair balance between the need to protect the reputation of the applicant and the employer, and to protect the freedom of expression of the applicant.

Conclusion: The ECHR judges unanimously decided that in this case a violation of freedom of communicating information can be recognized. (European Court of Human Rights, 2016)

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