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COMPARATIVE ANALYSIS OF THE MONTENEGRIN LEGISLATIVE AND INSTITUTIONAL FRAMEWORK IN THE FIELD OF WHISTLEBLOWER PROTECTION WITH RECOMMENDATIONS FOR IMPROVEMENT

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CONTENT

I INTRODUCTION

Reports from Transparency International, as well as other organizations, indicate that corruption is the most prominent problem in the whole of Europe.
Within the general democratic processes in Montenegro, which include changes in the political, economic and legislative system, the fight against corruption represents a significant part.
Under Chapter 23 - Justice and Fundamental Rights, in addition to establishing an independent and efficient judiciary and protection of human rights, special attention has been paid to the fight against corruption. Namely, the reduction of this social scourge is a precondition for the stability of a democratic society and the rule of law. In order to achieve this goal, the European Union, above all, emphasizes the existence of a solid legislative framework and its consistent implementation.

Whistleblowers are certainly one of the most important mechanisms for fighting corruption.

The Agency for Prevention of Corruption, as the central anti-corruption body in Montenegro, started operating in 2016, with the entry into force of the Law on Prevention of Corruption. The implementation period of more than five years and 8 months enables the legal solutions to be adequately reviewed and improved in accordance with good practices, international standards and, especially, the EU Directive on the protection of whistleblowers from 2019.

The aim of this publication is to support the Ministry of Justice, Human and Minority Rights and Agency for the Prevention of Corruption in finding adequate and expedient solutions for improving the legal framework in the field of whistleblower protection. In this regard, the target groups of the publication are legal practitioners who deal with the analysis and preparation of amendments to legal solutions, as well as the practical application of the legal framework in the field of whistleblower protection.

From a methodological point of view, the publication initially defines the term “whistleblower” and related terms, after which international instruments in this area were presented, with a special focus on standards of: United Nations, the Council of Europe and the European Union. Having in mind the similar legal heritage of the countries in the region, the legal framework for the protection of whistleblowers in certain countries of the region—the Republic of Slovenia, the Republic of Croatia and the Republic of Serbia—is especially treated. Within a special chapter, the legal framework of Montenegro in this area was presented, with an additional focus on the results of the work of the key anti-corruption body in charge of reporting and protection of whistleblowers in Montenegro. All of the above resulted in a separate chapter at the end of the publication, which contains concrete recommendations for improving the situation in this area, with an emphasis on the necessary amendments to the legislative framework.

II CONCEPT

There is no general definition of a “whistle-blower” so different languages use different terms and definitions of this term originated in the English-speaking world.

“Blowing the whistle,” whistleblowing, or making a disclosure certainly cannot be equated with filing a simple report, complaint, or grievance aimed at protecting an individual’s rights. In this way, the person draws attention to the danger or illegality of not only him but also other people (for example of the general public, of consumers, etc.). In this regard, the “whistleblower” should be seen as a messenger who draws the attention of others to the need of addressing a problem. The term ”zviždač” (whistleblower) is used in the Montenegrin language and regulations.

Thus, whistleblowers are persons who disclose information about illicit activities, to which they should respond by taking appropriate measures. Therefore, they warn that something that is happening is illegal, unacceptable, impermissible (corruption, fraud, abuse or unethical behavior), that is, something that requires a reaction from the competent authorities, primarily the police and the state prosecutor’s office. They play a very important role in anti-corruption efforts, both globally and nationally. The whistleblowers warn and ask the state authorities to take measures in accordance with their powers, and they also point out to the heads of state bodies, state administration bodies, public services or economic entities that they are not protected powerful people or untouchables. Because of this behavior, whistleblowers may suffer the consequences of retaliation by superiors, which can negatively affect future reports, as well as their mental state.

The whistleblower may be an employee of the body or business entity in which he/she has detected information on irregularities, or of a state body that has the possibility to take appropriate measures. Also, in accordance with international standards, which will be discussed below, the whistleblower can inform the public about irregularities if he/she is afraid of retaliation, or if the institutions do not act in accordance with their competencies and powers.

INTERNATIONAL STANDARDS

1. General review

The United Nations and the Council of Europe, as well as other international organizations, have an important role to play in both the promotion of whistleblowers and the protection of whistleblowers in terms of setting standards and making recommendations in this area.

According to a study conducted by Transparency International in April 2019, only six EU member states have strong whistleblower protection (France, Italy, Ireland, Malta, the Netherlands and the United Kingdom), three countries have a medium level of protection (Hungary, Slovakia and Sweden), while all others have a low level of whistleblower protection. The reason for this situation when it comes to the European Union is undoubtedly due to the fact that there is no uniform protection of whistleblowers at European and national level. Out of the fear of payback, whistleblowers often are demotivated to report irregularities. This prompted the European Union to adopt the Directive on the protection of whistleblowers[1] in October 2019, which will be discussed in more detail below.

2. UN Standards

In the field of international human rights law, significant standards have been developed in the field of respect for and protection of freedom of expression, and whistling is by its nature closely linked to the exercise of that freedom.

The most important document of the United Nations, as a global international instrument on the protection of whistleblowers, is certainly the United Nations Convention against Corruption, which has been ratified by Montenegro[2].

The objectives of this Convention are:

- to improve and strengthen measures for more beneficial and effective prevention and fight against corruption;
- to promote, facilitate and support international cooperation and technical assistance in preventing and combating corruption, including the recovery of funds;
- to promote the integrity, accountability and proper management of public affairs and public property.

The Convention is a meaningful document that recognizes and sets standards for anti-corruption policies and actions in preventing corruption at the global level. From the preamble through each article individually, the Convention addresses issues that member states, after ratification, undertake to address in the national legal framework, and relate to all those corrupt activities that undermine the institutions and system of the state, and the overall values and standards of democracy, both in terms of the public and private sectors. Among other areas, certain segments of the Convention also address the issue of the position of whistleblowers.

[1] Directive (EU) 2019/1937 of the European Parliament and of the Council from October 23, 2019 on the protection of persons who report infringements of Union law

[2] Law on Ratification of the United Nations Convention against Corruption. („Official Gazette of Serbia and Montenegro - International Agreements “,no. 12/2005).

Article 8, paragraph 4, provides that each Contracting State shall consider, in accordance with the basic principles of its legislation, the possibility of establishing measures and systems which would enable public officials to more easily report acts of corruption to the appropriate authorities when they become aware of them in the exercise of their functions.

Furthermore, Article 13, paragraph 2, provides that each Contracting State shall take appropriate measures to ensure that the public is informed of the competent anti-corruption bodies referred to in this Convention and shall have access to those bodies where necessary, for the purpose of reporting, including anonymously, any cases that may be considered a criminal offense under this Convention.

Article 33 addresses the issue of the protection of applicants, with each State Party considering the possibility of providing in its domestic legal system for appropriate measures to provide protection against any unjustified treatment to any person who reports to the competent authorities in good faith and on a reasonable basis any facts relating to the offenses set forth in this Convention.

Finally, Article 39, paragraph 2, provides that each State Party shall consider encouraging its nationals and other persons domiciled in its territory to report to the national investigative and prosecuting authorities the commission of an offense under this Convention.

3. Council of Europe standards

The most important document of the Council of Europe is the Civil Law Convention on Corruption, which Montenegro ratified in the first decade of the 21st century. Another important document regarding the implementation and incorporation of Council of Europe standards in the field of whistleblower protection into national legal systems is the Recommendation of the Committee of Ministers of the Council of Europe on whistleblower protection. No less important are the following documents:

- European Convention on Human Rights,
- Resolution of the Parliamentary Assembly of the Council of Europe on the protection of whistleblowers,
- European Code of Police Ethics,
- Global standards combat corruption in the police forces/services of the international police organization INTERPOL, and
- United Nations Code of Loyalty and Whistleblowers.

Recommendation of the Committee of Ministers of the Council of Europe on the protection of whistleblowers

Recommendation of the Committee of Ministers of the Council of Europe on the protection of whistleblowers[3], which has already been incorporated into a binding legal act of the European Union – Directive on the protection of persons reporting on breaches of European Union law, defines the basic concepts relevant to the position and protection of whistleblowers. Thus, the Recommendation defines a "whistleblower" as a person who reports or discloses infor- mation on a threat or harm to the public interest or damage that may occur to the public interest in

[3] Recommendation CM / Rec (2014) 7 of the Committee of Ministers of the Council of Europe to member states on the protection of whistleblowers, adopted on April 30, 2014.

the context of their employment relationship based either in the public or private sector. When it comes to "reporting or disclosing in the public interest", the Recommendation defines that such activities constitute the reporting or disclosure of information on an act or omission that constitutes a menace or threat to the public interest, and that the term "notification" means reporting, either internally within an organization or enterprise, or to an external authority, and "disclosure" means disclosing information in public.

The Recommendation also defines 29 principles that national authorities should adhere to in the creation and implementation of public policies and the legal framework relevant to the position and protection of whistleblowers:

Principle 1 (Purpose): The national normative, institutional and judicial framework, including, as appropriate, collective labor agreements, should be designed and developed to facilitate public interest reports and disclosures by establishing rules to protect the rights and interests of whistleblowers.

Principle 2 (General interest): Whilst it is for member States to determine what lies in the public interest for the purposes of implementing these principles, member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment.

Principles 3 and 4 (Immediacy):

The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.

The national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage.

Principle 5 (Proportionality): A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defense, intelligence, public order or international relations of the State.

Principle 6 (Professional secrets) These principles are without prejudice to the well-established and recognized rules for the protection of legal and other professional privilege..

Principle 7 (Consistency): The normative framework should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures.

Principle 8 (Balance): Restrictions and exceptions to the rights and obligations of any person in relation to public interest reports and disclosures should be no more than necessary and, in any event, not be such as to defeat the objectives of the principles set out in this recommendation.

Principle 9 (Knowledge and experience): Member States should ensure that there is in place an effective mechanism or mechanisms for acting on public interest reports and disclosures.

Principle 10 (Protection of victims): Any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should retain the protection and the remedies available to him or her under the rules of general law.

Principle 11 (Inalienability): An employer should not be able to rely on a person's legal or contractual obligations in order to prevent that person from making a public interest report or disclosure or to penalize him or her for having done so.

Principle 12 (Integrity inspiring): The national framework should foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns.

Principles 13 and 14 (Significance of recipients):

13. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.

14. The channels for reporting and disclosures comprise:

- reports within an organization or enterprise (including to persons designated to receive reports in confidence);
- reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;
- disclosures to the public, for example to a journalist or a member of parliament.

The individual circumstances of each case will determine the most appropriate channel.

Principle 15 (Awareness): Employers should be encouraged to put in place internal reporting procedures.

Principle 16 (Participation): Workers and their representatives should be consulted on proposals to set up internal reporting procedures, if appropriate.

Principle 17 (Context of engagement): As a general rule, internal reporting and reporting to relevant public regulatory bodies, law enforcement agencies and supervisory bodies should be encouraged.

Principle 18 (Anonymous disclosures): Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.

Principle 19 (Procedures): Public interest reports and disclosures by whistleblowers should be investigated promptly and, where necessary, the results acted on by the employer and the appropriate public regulatory body, law enforcement agency or supervisory body in an efcient and effective manner.

Principle 20 (Right to information): A whistleblower who makes an internal report should, as a general rule, be informed, by the person to whom the report was made, of the action taken in response to the report.

Principle 21 (Prohibition of retaliation): Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

Principle 22 (Protection of the belief in good faith): Protection should not be lost solely on the

basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialized, provided he or she had reasonable grounds to believe in its accuracy.

Principle 23 (Defense of legality): A whistleblower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework.

Principle 24 (Employer assistance): Where an employer has put in place an internal reporting system, and the whistleblower has made a disclosure to the public without resorting to the system, this may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower.

Principle 25 (Burden of proof): In legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated.

Principle 26 (Interim measure): Interim relief pending the outcome of civil proceedings should be avail-able for persons who have been the victim of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment.

Principle 27 (Culture of protection): The national framework should be promoted widely in order to develop positive attitudes amongst the public and professions and to facilitate the disclosure of information in cases where the public interest is at stake.

Principle 28 (Counseling): Consideration should be given to making access to information and confidential advice free of charge for individuals contemplating making a public interest report or disclosure. Existing structures able to provide such information and advice should be identified and their details made available to the general public. If necessary, and where possible, other appropriate structures might be equipped in order to fulfill this role or new structures created.

Principle 29 (Supervision): Periodic assessments of the effectiveness of the national framework should be undertaken by the national authorities.

4. The views and practice of the European Court of Human Rights

The European Court of Human Rights provides special protection to whistleblowers and has established standards, precisely because of their important role in democratic societies. Persons who report information on irregularities, or harm to the public interest can contribute to strengthening transparency and democratic accountability.

Therefore, in order for a whistleblower to enjoy the protection of Article 10 of the European Convention on Human Rights, and if he addresses the public directly instead of his superiors, due to corruption and inefficiency, the publication of confidential information should meet several conditions:

- that there are no other mechanisms for reporting irregularities, or that these mechanisms are ineffective;
- that, to the extent permitted by the circumstances of the case, the whistleblower has

checked that the information he publishes is reliable and credible;
- that there is a public interest in finding out information regardless of whether there is a legal obligation to maintain secrecy;
- that the public's interest in knowing outweighs the damage that may result from its publication, as well as that the whistleblower acts in good faith.

In the case of Guja v. Moldova[4], The Court recognized the need to protect whistleblowers under Article 10 of the Convention. The Court considers, inter alia, that in the event of a report of illegal conduct or irregularity in the workplace, the employee or civil servant should, in certain circumstances, receive protection. This could be applied in cases where the employee or civil servant is the only person, or part of a small group of persons aware of what is happening at work, and is therefore in the best position to act in the public interest by warning the employer or the public. Despite the fact that the information should first be disclosed to a superior or other competent authority or body, the Court accepted that in the event that such a practice would obviously not yield results, the information could, as a last resort, be disclosed to the general public. The court concluded that the dismissal of the civil servant for disclosing two confidential letters from the state prosecutor's office to journalists constituted a violation of Article 10, referring also to the extremely negative effect that the applicant's dismissal has on other civil servants or employees, which discourages them from reporting any kind of irregularity.

In the case of Matuz v. Hungary [5], a journalist and presenter employed by the state-run Magiar Televízió Zrt. was fired after revealing that one of his superiors had censored parts of a cultural program he had edited and hosted. At that time, Matuz was also the president of the union of public media services. He has repeatedly openly called on the board of directors of the television company to put an end to censorship in news and television programs. He later published a book with documentary evidence of censorship on the state television, which led to his dismissal for violating the confidentiality clause contained in his employment contract. Following unsuccessful court proceedings in Hungary, Matuz appealed to the Court, alleging that his rights under Article 10 of the Convention had been violated. In the petition, he stated that, as a journalist and president of the union in public television, he had the right and the obligation to inform the public about the alleged censorship in the national television company.

The Court also recognized that the issue of censorship in the public media service is an issue of great interest to society. The court also found that the book was published only after Matuz felt that he was prevented from removing the perceived interference in his journalistic work in the television station itself, that is, due to the lack of any other effective channel. The court concluded that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society". For this reason, the Court considered that the dismissal of the journalists had violated Article 10 of the Convention, recognizing once again the importance of "whistling" in a democratic society.

5. European Union standards

In order to improve the implementation of rights and policies at specific level in the European Union, common minimum standards have been set which provide a high level of protection to persons who report violations of Union law by adopting Directive 2019/1937 of the European

[4] Guja v. Moldova, February 12, 2008 (VV), paragraph 72.
[5] Matuz v. Hungary, October 21, 2014.

Parliament and of the Council on the protection of persons who report violations of European Union law. The Directive was adopted on 23 October, 2019 and entered into force on 16 December, 2019. Member States are obliged to implement it by 17 December, 2021 and 17 December, 2023, respectively, when it comes to the part of the directive (Article 8) relating to the obligation of legal entities in the private sector with more than 50 employees to establish channels for internal reporting.

The Directive draws on the case law of the European Court of Human Rights as well as on the 2014 Council of Europe Recommendation on the Protection of Whistleblowers. Thus, the adoption of the Directive gave whistleblowers in the territory of the European Union a higher level of legal protection. Its importance is all the greater due to the fact that only a number of EU member states provide full protection to whistleblowers through adopted regulations at the national level. In most countries, this protection is insufficient and applies either to specific categories of employees or to specific areas.

It applies to applicants who are employed in the private or public sector and have acquired information on injuries in the work environment, which includes at least the following persons: workers, the self-employed, shareholders, members of the management boards, management or supervisory bodies of the company including non-executive members, volunteers, paid and unpaid trainees, persons working under supervision and in accordance with the instructions of contractors, subcontractors and suppliers.

Member States shall encourage giving priority to filing through internal reporting channels rather than filing through external reporting channels if the breach can be effectively addressed internally and if the whistleblower considers that there is no risk of retaliation.

The directive provides a wide range of measures to protect the whistleblower from retaliation such as the reverse burden of proof, remedies without time limits, protection from liability for breach of the confidentiality clause, protection from liability in court proceedings, protection from liability for obtaining information provided that the acquisition did not constitute a criminal offense.

As Montenegro is in the process of accession, the European Commission expects the state to enter the procedure of amendments to the Law on Prevention of Corruption in order to harmonize it with the aforementioned directive, to ensure greater protection for those who report irregularities, and thus encourage citizens to report.

COMPARATIVE EXPERIENCE IN LEGAL REGULATION OF THE POSITION AND ROLE OF WHISTLEBLOWERS

1. General review

Comparative legal practice shows that states are paying more and more attention to the protection of whistleblowers, both at the level of legal norms and in terms of their implementation. The necessity of the existence of this legal institute in order for anti-corruption activities to be undertaken by all social actors, including employees, has been recognized also for the purpose of protecting the public interest and encouraging the moral and legal actions of individuals and institutions.

As mentioned, the Whistleblower Institute is a newer legal institute within the framework of anti-corruption measures that has been confirmed as a European standard. However, the institute of whistleblowers is present in various forms and names in the legal systems of the countries of the European continent, and thus in legal practice. Most of the legal solutions at the level of the European Union and the member states of the Council of Europe have been adopted in the past 20 years and, therefore, it is considered to be a relatively new legal institute, which is continuously upgraded and adjusted to the legal systems of states, and on the basis of established principles of the European Union and the Council of Europe, as well as broader international standards established by United Nations instruments. When it comes to Europe, the first regulation was passed by the United Kingdom in 1998, and many consider it the best regulation governing the protection of whistleblowers. The provisions of the Law on Disclosure of Information in the Public Interest are aimed at the protected disclosure of information by employees, while the term employee in terms of this law refers to both former and current employees, as well as volunteers.

For the purposes of this document, the positive legal framework of the position of whistleblowers in the three countries that are geographically, historically and politically closest to Montenegro is analyzed, and yet each in its own way is to some extent in the forums and processes in which Montenegro is an actor: The Republic of Slovenia and the Republic of Croatia as members of the European Union and the Council of Europe and the Republic of Serbia as a member of the Council of Europe and a candidate for membership in the European Union. In each of the countries, the term whistleblower has a different name, however, the meaning remains the same: in the Republic of Slovenia it is “criminal acts reporter”, in the Republic of Croatia it is “reporter of irregularities”, while in the Republic of Serbia it is “alerter”.

The Republic of Croatia and the Republic of Serbia regulate the position of whistleblowers in their legal systems with a special law. This is not the case in Montenegro and the Republic of Slovenia. The position of whistleblowers is regulated by the systemic law in the field of corruption. In Montenegro this is the Law on Prevention of Corruption, and in the Republic of Slovenia it is the Law on Integrity and Prevention of Corruption. In all the above-mentioned countries, the position of whistleblowers is, to a certain extent regulated by certain material laws, especially in the field of occupational safety and non-discrimination.

In all countries, the application procedure, guarantee of protection, anonymity (if persons so wish), compensation for damages are clearly prescribed, the right to judicial protection and other issues in accordance with accepted international standards. A comparative analysis showed that only Montenegro prescribes the possibility of awarding a whistleblower, while this is not

the case in the other three countries.

The Agency for Prevention of Corruption is responsible for the implementation of the law regulating the issues of whistleblowers in Montenegro. In the Republic of Slovenia it is the Commission for the Prevention of Corruption, in the Republic of Croatia it is the Ombudsman, while in the Republic of Serbia the competence in that part belongs to inspection bodies. Certainly, in all countries, the possibility of internal registration is prescribed within the legal entity in which the whistleblower exercises his/her labor right – the so-called internal reports of irregularities.

2. Positive legal framework for the position of whistleblowers in the Republic of Slovenia

As is the case with Montenegro, Slovenia does not have a special law on the protection of whistleblowers, as opposed to the Republic of Croatia and the Republic of Serbia. In Slovenia, the position of whistleblowers is prescribed in detail by the Law on Integrity and Prevention of Corruption[6] in the field of corruption prevention from 2010, the text of which was further improved at the end of 2020, after many years of consultations at the national and international level.

In accordance with Articles 1 and 2, the main purpose of the Law is to strengthen the rule of law, through the establishment of measures and ways to strengthen integrity and transparency in the field of prevention of corruption and avoidance of conflicts of interest. In addition, seven key objectives of the Law have been identified, of which Objective 5 is dedicated to the issue of whistleblowers: "Promote and strengthen the process of recognizing, preventing and eliminating corrupt practices through the protection of whistleblowers."

The position and protection of whistleblowers is prescribed within a special Chapter III, Articles 23 to 25, as well as certain provisions within other segments of the Law on Integrity and Prevention of Corruption.

Article 23 stipulates that any person may report a suspicion of corruption to a state body or local government, an organization exercising public authority or any other legal or economic entity. Such report may be submitted by a person to the Commission for the Prevention of Corruption or another competent body, which does not prevent him from informing the general public about it. Paragraph 2 of the same article stipulates that the provisions of the Law on Free Access to Information do not apply in this case, nor that the information provided by the whistleblower to the Commission may be made available to the public before the end of the proceedings. It is also stipulated that the whistleblower may make classified information available only to the Commission or bodies dealing with criminal proceedings. If it is determined that a person has submitted incorrect information, he bears responsibility for a lesser misdemeanor, unless elements of a criminal offense have been established, which is prescribed by Article 77 of the Law, and the misdemeanor fine is set in the range of 400-1,200 EUR. If the Commission determines that the whistleblower's report may have harmful consequences for that person or his family members, it may propose further measures in accordance with the Witness Protection Act. Only the court can decide on the publication of the whistleblower's identity, in case it turns out to be in the public interest.

Article 24 prescribes provisions relating to the reporting of unethical and illegal conduct. Thus,

[6] "Official Gazette of the Republic of Slovenia ", no. 45/10, 26/11, 43/11 and 158/20;

it is prescribed that an official who reports that he has been required to perform a certain unethical and illegal activity or that he has been the subject of psychological or physical violence, may report such a situation to his superior or an authorized person in the legal entity. If the superior or authorized person does not provide feedback within five days, such a report is submitted to the Commission for the Prevention of Corruption, which assesses the situation and makes recommendations for further action.

Article 25 of the Law stipulates that whistleblowers are entitled to compensation and that the Commission may provide the whistleblowers with the necessary assistance in that regard. The Commission has a legal basis, in accordance with the Law, to act directly against the employer, if it is determined that the whistleblower suffers negative consequences at his workplace due to his report. In the case of a civil servant who, because of his application, is justifiably unable to perform the duties of the same position, the Commission may require the employer to transfer the employee to another suitable position. In each of these cases, the burden of proof is on the employer.

In accordance with Article 11 of the Law, the Commission for Prevention of Corruption is obliged to adopt internal rules and instructions on whistleblower protection, while Article 12 stipulates that the Commission is obliged to implement measures for the protection of whistleblowers. Article 13 stipulates that the Commission may, on its own initiative or upon the report of a legal or natural person, initiate a procedure for determining the violation of the provisions of the Law in the part of protection of persons who report corruption, the so-called whistleblower. Article 13b stipulates that during or after determining the violation of procedures, based on the whistleblower's report, the Commission undertakes activities in the direction of informing the head of the legal entity to which the report refers, with the aim of eliminating identified irregularities, eliminating the risk of corruption and preserving integrity, but also protecting whistleblowers.

Pursuant to Article 15c, in the case of a court proceeding, the Commission will make available the information obtained in a particular case upon the whistleblower's report, but will not reveal the identity of that person. The provisions of the same article also prescribe situations in which the Commission has the right to make a decision on obtaining access to data, which is prescribed in more detail by the Rules of Procedure of the Commission. Finally, Article 76 of the Law prescribes the manner of storing data and keeping records of whistleblower's reports.

The law does not prescribe possible rewards for the work of whistleblowers, which is the case in the other two analyzed countries as well, except Montenegro.

3. Positive legal framework for the position of whistleblowers in the Republic of Croatia

The Law on the Protection of Reporters of Irregularities of the Republic of Croatia entered into force on July 1, 2019. The Law regulates the reporting of irregularities, the procedure for reporting irregularities, the rights of persons who report irregularities, obligations of public authorities and legal and natural persons regarding the reporting of irregularities, as well as other issues important for reporting irregularities and whistleblower protection. In addition, Article 2 stipulates that the goal of the Law is the effective protection of whistleblowers, which includes the provision of accessible and reliable ways of reporting irregularities. Furthermore, within the General Provisions, Articles 3 to 8, along with the meaning of terms, prescribe provisions on: prohibition of preventing the reporting of irregularities, prohibition of placing whistleblowers at a disadvantage, good faith of whistleblowers and prohibition of abuse of reporting irregularities.
In accordance with the Law, irregularities are all violations of laws and other regulations and

negligent management of public goods, public funds and EU funds that pose a threat to the public interest, and which are related to doing business with the employer.

Within Chapter II of the Law, Articles 9 to 13 prescribe the rights of whistleblowers. Thus, among other things, Article 9 stipulates that a whistleblower has the right to protection in accordance with this Law, as well as the right to judicial protection, with the possibility of compensation and protection of identity and confidentiality, unless abuse of the right to report irregularities is established.

Chapter III deals with the procedure for reporting irregularities and acting on the report. In that sense, Article 14 prescribes three types of possibilities for reporting irregularities: (1) internal - implies registration with the employer, (2) external - implies a report to the competent authority, (Ombudsman) and (3) public disclosure – through the detection of irregularities in public. Pursuant to the Law, all legal entities have the obligation to establish a system of internal reporting of irregularities – employers, through the adoption of internal acts on the procedure, as well as through the appointment of persons for internal reporting, at the suggestion of at least 20% of employees. The employer is obliged to appoint a responsible person in the event that 20% of workers have not made a decision on the proposal of the responsible person. For the external reporting procedure, the Ombudsman was obliged to submit to the Parliament the Rules of Procedure which are harmonized with the provisions of this Law, in accordance with Article 36 of the Law.

Chapter IV, Articles 24 to 30, defines the judicial protection of whistleblowers, with special emphasis on the following issues: judicial protection of whistleblowers, jurisdiction and procedure of judicial protection of whistleblowers, special lawsuits for protection of whistleblowers, participation of third parties, burden of proof, interim measures and jurisdiction and proposal for ordering an interim measure.

At the end of the legal text, chapters V and VI prescribe misdemeanor provisions, i.e. fines for employers and persons who abuse the right to report irregularities, as well as deadlines for the adoption of general acts and the appointment of responsible persons in legal entities.

Until the enactment of this systemic law, the field of whistleblowers in the Republic of Croatia was regulated through several substantive laws, while in this way the subject issues are regulated for the first time in a systematic and detailed manner. Thus, in the past period, key issues of importance for the application process and the protection of whistleblowers were regulated, with among other things, other material laws, which provide a certain degree of protection to migrants who report corruption in good faith in the Republic of Croatia. These are regulations that provide protection for whistleblowers through provisions on criminal law protection in the case of a violation of the right to work, protection against dismissal, protection against discrimination after registration, protection against threat of dismissal, anonymity of whistleblowers, protection from liability for disclosure of official and business secrets in certain cases and similar. These are the following laws:

1. Labor Law[7];
2. Law on Civil Servants[8];
3. Law on Civil Servants and Employees in Local and Regional Self-Government[9];

[7]Labor Law ("Official Gazette of the Republic of Croatia", No. 93/2014);
[8]Law on Civil Servants ("Official Gazette of the Republic of Croatia", No. 92/05,142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15);
[9]Law on Civil Servants and Employees in Local and Regional Self-Government ("Official Gazette of the Republic of Croatia", no. 86/08, 61/11);

4. Law on the system of internal controls in the public sector[10];
5. Criminal law[11];
6. The Criminal Procedure Code[12];
7. Trade Act[13].

4. Positive-legal framework of the position of whistleblowers in the Republic of Serbia

The Law on the Protection of Whistleblowers of the Republic of Serbia[14], which is in force since June 5, 2015, regulates whistleblowing, whistleblowing procedure, rights of whistleblowers, the obligation of state and other bodies and organizations and legal and natural persons in connection with whistleblowing, as well as other issues of importance for whistleblowing and protection of whistleblowers.

The term "whistleblowing", in accordance with Article 2 of the Law, means the disclosure of information about violations of regulations, violations of human rights, exercise of public authority contrary to the purpose for which it was entrusted, dangers to life, public health, safety, the environment, as well as to prevent large-scale damage. Article 2 of the law also stipulates that a "whistleblower" is a natural person who does whistleblowing in connection with his employment, the employment procedure, the use of services of state and other bodies, public authorities or public services, business cooperation and the right of ownership of the company.

Within Chapter II of the Law, Articles 3 to 11 prescribe the principles which the law is based on and which should be adhered to by all legal entities and individuals in the application of this law. These are: prohibition of prevention of whistleblowing, prohibition of undertaking harmful action, right to protection of whistleblowers, protection of related parties, the right to protection due to mislabeling of whistleblowers, protection of persons in the performance of official duties, the right to protection due to the request for information, protection of personal data of whistleblowers, prohibition of misuse of whistleblowers.

The types of alerting and the procedure for reporting and deciding on the report are prescribed within the framework of Chapter III of the Law. Internal whistleblowing is the disclosure of information to an employer. External whistleblowing is the disclosure of information to an authorized body. Public whistleblowing is the disclosure of information through the media, via the Internet, at public gatherings or in any other way by which the notice can be made available to the public.

In addition to the obligations of the employer and the content of the procedure, Articles 17 and 25 stipulate that the Minister in charge of justice shall issue special instructions on the manner of appointing an authorized person and acquiring special knowledge regarding whistleblowers. Therefore, the following are currently in force: Rulebook on the Manner of Internal Alerting, the Manner of Appointing an Authorized Person at the Employer, as well as Other Issues of Importance for Internal Alerting at the Employer With More Than Ten Employees[15] and the Rulebook on the Program for Acquisition of Special Knowledge Related to the Protection of Whistleblowers[16].

[10]Law on the System of Internal Controls in the Public Sector ("Official Gazette of the Republic of Croatia", no. 78/15);
[11]Criminal Code ("Official Gazette of the Republic of Croatia", no. 125/11, 144/12, 56/15, 61/15);
[12]Criminal Procedure Code ("Official Gazette of the Republic of Croatia", no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14);
[13]Trade Act ("Official Gazette of the Republic of Croatia", no. 87/08, 96/08, 116/08, 76/09, 114/11, 68/13, 30/14);
[14]Law on Protection of Whistleblowers ("Official Gazette of RS", no. 128/2014);
[15] "Official Gazette of RS", no. 49/2015 and 44/2018 - dr. the law;
[16] Official Gazette of RS ", no. 4/2015;

As in the laws of the other States analyzed, under Title IV, Articles 21 to 36 prescribe provisions on whistleblower protection and damages, and especially issues of importance for: the ban on placing whistleblowers in a less favorable position, compensation for damages due to whistleblowing, judicial protection of whistleblowers, composition of the court, possession of special knowledge regarding whistleblowing, the content of the lawsuit and interim measures. Also, it is prescribed that the supervision over the implementation of the law is performed by the labor inspection, i.e. the administrative inspection, in accordance with the laws governing their powers. If a harmful action has been taken against the whistleblower related to his report, that person has the right to judicial protection, which is realized by filing a lawsuit for protection in a higher court. It is stipulated that the lawsuit is filed within six months from the day of ascertaining about the undertaken harmful action, that is, three years from the day when the harmful action was taken, and that such a procedure is urgent, and to ensure the proper application of the law on civil procedure which regulates the procedure in labor disputes. Also, it is important to point out that in such cases, revision is always allowed, as an extraordinary legal remedy.

Within Chapter V, Articles 36 and 37 prescribe penal provisions in the form of misdemeanors for the employer - a legal entity in case of non-compliance with the provisions of the Law on the Protection of Whistleblowers.

The Law on the Protection of Whistleblowers of the Republic of Serbia does not prescribe provisions on rewarding whistleblowers for the submitted application and conducted procedure, which is the case with legal norms in other analyzed countries, except in Montenegro.

As in other countries, in the Republic of Serbia, the issue of the position of whistleblowers is also prescribed by certain material laws. Thus, the whistleblower has the right to compensation for damage to which the provisions of the Law on Obligations apply accordingly.[17] When it comes to whistleblowers, their position is regulated, inter alia, through the following laws:

1. Law on Civil Servants[18];
2. Law on Free Access to Information of Public Importance[19];
3. Law on the Anti-Corruption Agency[20];
4. Companies Act[21];
5. Law on Prevention of Harassment at Work[22];
6. Criminal Code[23];
7. Code of Criminal Procedure[24].

[17]"Official Gazette of SFRY", no. 29/78, 39/85, 45/89 – CCY decision and 57/89, "Official Gazette of FRY", no. 31/93 and the Official Gazette of Serbia and Montenegro, no. 1/2003 - Constitutional Charter, further in the text and in the footnotes of the ZOO and "Official Gazette of the RS", no. 18/2020;
[18]"Un umbrella state body Official Gazette of RS", no. 79/05, 81/05, 83/05, 64/07, 67/07, 116/08 and 104/2009;
[19]"Official Gazette of RS", no. 120/2004, 54/2007, 104/2009, 36/10;
[20]"Official Gazette of RS", no. 97/2008 and 53/2010;
[21]"Official Gazette of RS", no. 36/2011 and 99/2011;
[22]"Official Gazette of RS", no. 36/2010;
[23]"Official Gazette of RS", no. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019;
[24]"Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019;

V

LEGAL POSITION OF WHISTLEBLOWERS IN MONTENEGRO

1. General review

For the first time, the position of whistleblowers in Montenegro has been systematically regulated by the adoption of the Law on Prevention of Corruption. The result of such a commitment of Montenegro lies primarily in its process of European integration and internally expressed readiness to face the problem of corruption. Work began on the preparation of overall capacities for conducting negotiations in specific chapters by opening accession negotiations on Montenegro's membership in the European Union in 2012.

The opening of negotiations in Chapters 23 and 24 in December of 2013, was preceded by a series of internal reform activities that enabled adequate preparation of human resources to create the conditions for the opening of negotiations. Such an approach has also enabled the adoption of action plans for negotiating chapters 23 and 24, on the basis of the transitional criteria established at the Intergovernmental Conference on the opening of negotiations between Montenegro and the European Union in Chapters 23 and 24.

One of the key transitional measures refers to the need to establish a legal and institutional framework, as well as the initial balance of results achieved in the field of corruption prevention. The result of such reform activities is the adoption of the Law on Prevention of Corruption in 2014, and consequently the establishment of the Agency for Prevention of Corruption, as an independent state institution, which began operating on January 1, 2016.

2. Legislative framework

The legislative position of whistleblowers in Montenegro is regulated by systemic, as well as a number of substantive laws. The systemic law that regulates the area of whistleblowers is the Law on Prevention of Corruption[25], whose application began in 2016. Chapter III of the Law on Prevention of Corruption, prescribes the procedure for submitting a whistleblower's report, the manner of resolving a report, as well as the procedure for a request for whistleblower protection.

The Law on Prevention of Corruption stipulates that a whistleblower can be any natural or legal person who submits a report on endangering the public interest that indicates the existence of corruption. Article 44 of the Law defines that endangering the public interest means violating regulations, ethical rules or the possibility of such a violation that has caused, is causing or threatens to endanger the life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or legal and natural person, as well as action aimed at preventing such violation. The same article stipulates that the application may be submitted in writing, orally by giving a statement, electronically as well as by mail.

Also, Articles 44-46 and 56 prescribe the possibility of anonymous reporting. In addition, the

[25]Law on Prevention of Corruption ("Official Gazette of Montenegro", No. 053/14 of 19 December 2014, 042/17 of 30 June 2017);

possibility is prescribed for the application to be publicly available if the whistleblower explicitly requests that the data be made available to the public, in which case the data on the whistleblower shall be handled in accordance with the law governing the confidentiality of data. Articles 48-50 stipulate that a government body, company, other legal entity or entrepreneur is obliged to appoint a person to receive and act on whistleblower reports, that will check the truthfulness of the allegations from the application and propose measures to the head of the body or the responsible person in the legal entity or entrepreneur, and inform the whistleblower about the outcome of the measures taken within 45 days from the date of submission of the application.

The law also prescribes the possibility of submitting a report directly to the Agency for Prevention of Corruption. Thus, Articles 51-54 stipulate that a whistleblower, in addition to directly submitting a report to the Agency, may also report if the whistleblower has not been notified or is not satisfied with the notification by the authority, company, other legal entity or entrepreneur. After verifying such allegations, the Agency shall issue an opinion and make a recommendation if a threat has occurred. In addition to acting upon the report, the possibility of the Agency to initiate a procedure for determining the existence of a threat to the public interest and ex officio is also prescribed.

The systemic law also prescribes provisions on the right of whistleblowers to protection and reward. Thus, Articles 59-63 and 69-70 prescribe that a whistleblower has the right to protection if he has been harmed, i.e. there is a possibility of damage due to the filing of a report, as well as the reward if he contributed to the prevention of endangering the public interest which indicates the existence of corruption.

The issue of the award remains open, given the new EU Directive[26], which, in Article 30 provides that this Directive should not apply to cases in which persons who, after giving informed consent, identified as whistleblowers or are registered in databases managed by bodies designated at national level, such as customs authorities, and which report breaches in exchange for a reward or compensation. In addition to the Directive, it is useful to keep in mind the OLAF Rules, according to which one of the principles is that no reward is offered for information[27]. Also, Montenegro is the only country in relation to the previous ones for which a comparative analysis was done, which, with its legal solutions, prescribes the possibility of awarding whistleblowers.

Apart from the provisions of the systemic Law on the Prevention of Corruption, the position and rights of whistleblowers are to a certain extent prescribed by other laws, including:

1. Labor Law[28];
2. Law on Prohibition of Harassment at Work[29];
3. The Law on Civil Servants and State Employees[30];
4. Criminal Code[31];

[26] Directive of the European Parliament and of the Council on the protection of persons reporting violations of Union law 2018/0106 (COD);
[27] Margareta Habazin, "Whistleblower Protection", Croatian Public Administration, vol. 10. (2010), no. 2, p. 331–348;
[28] Labor Law ("Official Gazette of Montenegro", No. 74/2019);
[29] Law on Prohibition of Harassment at Work ("Official Gazette of Montenegro", No. 030/12 and 054/16);
[30] Law on Civil Servants and State Employees ("Official Gazette of Montenegro", No. 2/2018, 34/2019 and 8/2021);
[31] Criminal Code ("Official Gazette of the Republic of Montenegro", No. 70/2003, 13/2004 - amended and 47/2006 and "Official Gazette of Montenegro", No. 40/2008, 25/2010, 32/2011, 64 / 2011 - other law, 40/2013, 56/2013 - amended, 14/2015, 42/2015, 58/2015 - other law, 44/2017, 49/2018 and 3/2020);

5. Criminal Procedure Code[32];
6. Law on Prohibition of Discrimination[32];
7. Law on Public Procurement[34].

Article 173 of **the Labor Law** stipulates that a justified reason for termination of an employment contract, in terms of Article 172 of this Law, does not consider the employee to address the competent state authorities due to a justified suspicion of corruption or to file a report on that suspicion made in good faith.

The Law on Prohibition of Harassment at Work, in Article 14, stipulates that an employee who commits mobbing, that is, he does not report behavior that may represent mobbing or abuse the right to protection from mobbing, is responsible for non-compliance with work discipline, i.e. violation of work duties.

The Law on Civil Servants and State Employees, in Article 95, prescribes the restriction or denial of rights of a civil servant among serious violations of official duty, that is, to an employee who files a report for a criminal offense against official duty or a criminal offense or action with characteristics of corruption.

Article 224 of **the Criminal Code,** in Chapter X - criminal offenses against labor rights, stipulates that whoever terminates an employee's employment contract who, due to a justified suspicion that a criminal offense with features of corruption has been committed, has filed a report or addressed the competent persons or bodies, shall be punished by imprisonment for a term not exceeding three years.

The Criminal Procedure Code, in Articles 120 and 121, which prescribes provisions on witness protection, it is prescribed that protection may also be provided to a whistleblower when heard as a witness, at his request.

The Law on Prohibition of Discrimination, in Article 4, stipulates that no one can suffer harmful consequences due to the reporting of a case of discrimination, giving evidence before the competent authority or offering evidence in a procedure in which a case of discrimination is examined. Persons shall be protected from any harmful conduct or consequence in response to a report or proceeding conducted in breach of the principle of non-discrimination. Analyzing the relationship between the Law on Prohibition of Discrimination and the Law on Prevention of Corruption, it is evident that judicial protection does not exclude administrative protection before the Agency and vice versa. This allows the whistleblower to have the right to initiate proceedings before the competent court at any time, without waiting for the results of the work of the Agency for Prevention of Corruption.

The Law on Public Procurement, in Article 39, prescribes the obligation to report corruption, in the manner that a person employed in public procurement or another person engaged with the procuring entity, who has knowledge of corruption in public procurement, is obliged to, depending on whom the knowledge relates, without delay inform the authorized person of the procuring entity, the Ministry, the body responsible for preventing corruption and the competent state prosecutor.

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[32] Criminal Procedure Code ("Official Gazette of Montenegro", No. 57/2009, 49/2010, 47/2014 - decision of the CC, 2/2015 - decision of the CC, 35/2015, 58/2015 - other law, 28 / 2018 - US decision and 116/2020 - US decision);
[33]Law on Prohibition of Discrimination ("Official Gazette of Montenegro", No. 46/2010, 40/2011 - other law, 18/2014 and 42/2017);
[34]Law on Public Procurement ("Official Gazette of Montenegro", No. 74/2019);

3. By-laws

In order to more effectively and efficiently implement the Law on Prevention of Corruption as a systemic law, a number of bylaws have passed for which the competent bodies are the Ministry of Justice, as well as the Agency for Prevention of Corruption. By-laws, primarily Rulebooks, prescribe in detail the manner of acting upon whistleblower reports, as well as the manner of keeping records of whistleblower reports and records of requests for whistleblower protection. These are the following:

1. Rulebook on a more detailed manner of acting upon a whistleblower's report on endangering the public interest that indicates the existence of corruption ("Official Gazette of Montenegro", no. 77/15)
2. Rulebook on the manner of keeping records of whistleblower reports and records of requests for whistleblower protection ("Official Gazette of Montenegro", no. 75/15)

In addition to the above-mentioned bylaws, Agency for the Prevention of Corruption has adopted additional documents which elaborate the legal provisions in more detail, especially in the area of acting upon the application and the request for protection, as well as the manner of determining the persons for receiving and acting upon the application report.

1. Rules on the work of the Agency for Prevention of Corruption on the procedure for reporting a threat to the public interest that indicates the existence of corruption and the request for protection of whistleblowers;
2. The form of the decision on determining the person for admission and acting upon the whistleblower's report.

Also, in accordance with the provisions of 44-70 of the Law on Prevention of Corruption, state administration bodies and other entities have the opportunity to, by adopting internal documents, additionally regulate the procedure for reporting and recording reports of corruption within their bodies. In this part, the Instructions for handling reports and records of reports of corruption within the Agency for Personal Data Protection and Free Access to Information, as well as the protection of the identity of the person who filed the report, can serve as an example.

4. Institutional framework

An umbrella state body for dealing with whistleblower reports and whistleblower protection in Montenegro is the Agency for Prevention of Corruption, in accordance with the Law on Prevention of Corruption. The key bodies of the agency are the Council and the Director.

The Director of the Agency for Prevention of Corruption represents the Agency, organizes and is responsible for its work, and performs other tasks in accordance with the law and the Rulebook on Internal Organization and Systematization of Workplaces. In addition to the director, the Agency also has an assistant director.

The Council of the Agency has five members, elected by the Parliament of Montenegro. In accordance with the Law on Prevention of Corruption, the Council, among other things, adopts the annual work plan of the Agency, draft budget and final accounts, gives the director initiatives to improve the work of the Agency and other tasks in accordance with the law.

Competence in the field of whistleblower reporting and protection is entrusted to the Sector

for Prevention of Corruption, Integrity, Lobbying and Application of International Standards, within which the organizational unit of the Department for Whistleblower Reporting and Whistleblower Protection operates.[35]

When it comes to other state bodies and state administration bodies, their legal obligation is to have a certain person to receive and act upon the whistleblower's report.

In addition to the Agency for the Prevention of Corruption, other state bodies, in particular the judiciary and the State Prosecutor's Office, have certain competencies in the field of whistleblower reporting and protection, in accordance with the positive legal framework and their competencies.

5. Results of the work of the Agency for Prevention of Corruption

The whistleblower has the opportunity to independently decide whether to file a report for endangering the public interest that indicates the existence of corruption within his institution or directly to the Agency for Prevention of Corruption. In accordance with Article 49 of the Law on Prevention of Corruption, every legal entity is obliged to designate a person responsible for receiving and acting on whistleblower reports. The report can be submitted in writing, orally through the minutes, but also by mail in printed or electronic form.

After the Agency receives the report, the procedure of establishing the necessary facts, collecting data and notifications is carried out. There is a possibility that the authorized officer will conduct the examination procedure, if that will contribute to the process of better determination of the facts. If the legal entity to which the report relates ignores the requests for information, the Agency for Prevention of Corruption submits a request to initiate misdemeanor proceedings before the competent court. The prescribed fines for a misdemeanor of a legal entity range from EUR 1,000 to EUR 20,000, and fines ranging from EUR 500 to EUR 6,000 are prescribed for the responsible person in the legal entity. On the other hand, if a legal entity does not act in accordance with the recommendation, the Agency shall inform the body supervising the work of that legal entity, as well as the public and the Assembly.

The Agency may provide protection to a whistleblower if he has been harmed, i.e. there is a possibility of damage due to the fact that he has filed a report on endangering the public interest which indicates the existence of corruption, which is clearly prescribed by Article 59 of the Law on Prevention of Corruption.

If the whistleblower initiates court proceedings due to the damage suffered, the Agency will, at his request, provide the necessary professional assistance in proving the causal link between the filing of the report and the damage caused.

Since the beginning of its work, 420 reports of whistleblowers have been submitted to the Agency for the Prevention of Corruption, of which 38.74% were anonymous reports.[36]

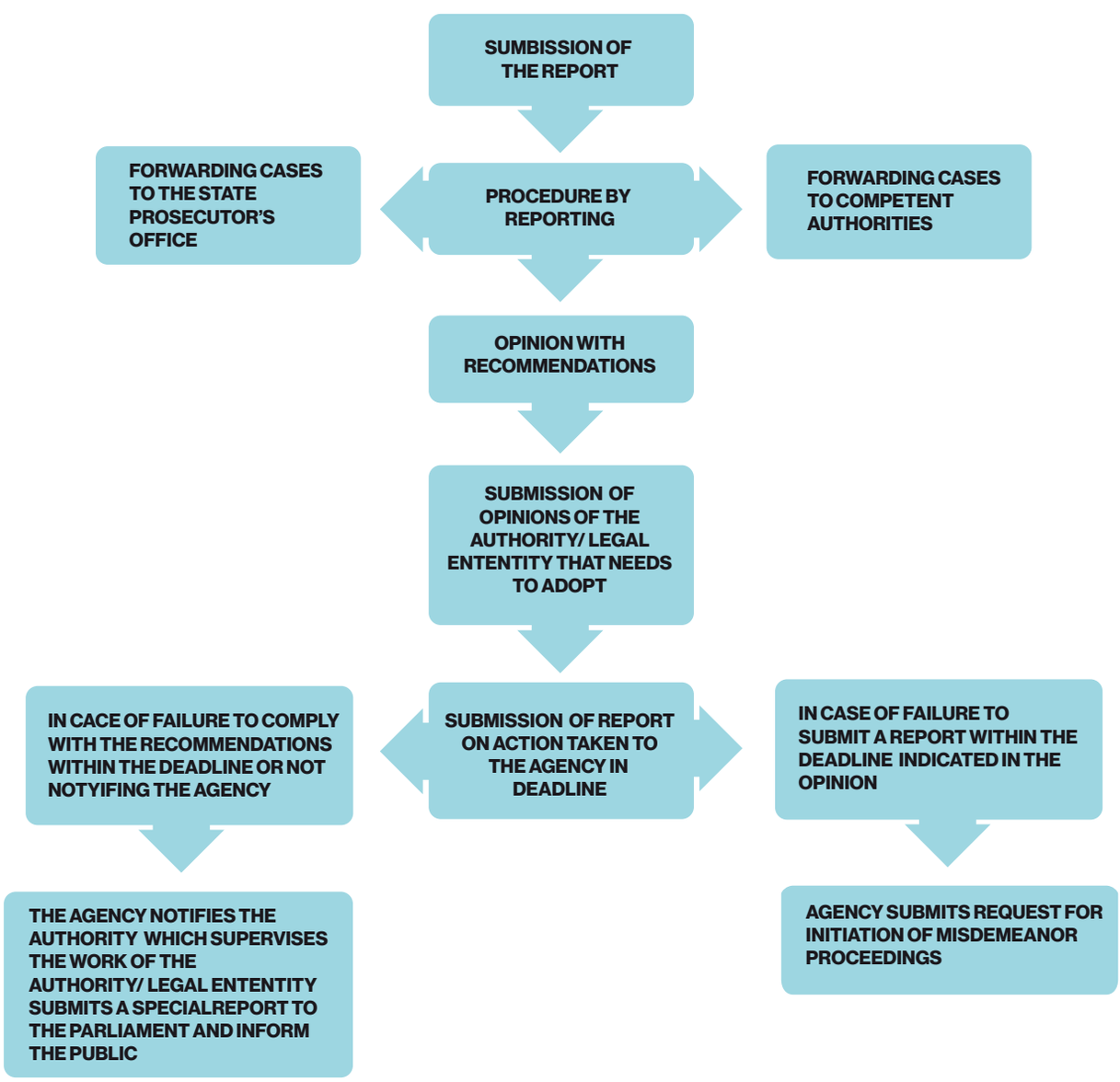
When it comes to areas where whistleblower reports were filed, according to the Agency for Prevention of Corruption, most reports were filed in relation to the actions of local authorities (23%) and in the field of labor relations (22%). In addition, the most common reports of

[35] Rulebook on Internal Organization and Systematization of Workplaces of the Agency for Prevention of Corruption, October 2018;
[36] Report on the work of the Agency for the Prevention of Corruption for 2020

whistleblowers are on the work of state administration bodies (17%), private sector operations (10%), judiciary (8%), state bodies (8%), public procurement (5%), disposal of state property (5%) and union affairs (2%).

In relation to the question of concrete application of the Law on Prevention of Corruption in the field of reporting and protection of whistleblowers, we highlight an example of good practice. The Agency received an anonymous report on endangering the public interest, which indicates the existence of corruption in a public institution. The Agency initiated the procedure of establishing the facts and circumstances and afterwards it sent the initiative for inspection supervision to the competent inspection body. After the inspection, the Agency was informed that certain irregularities have been identified and it gave the subject of the supervision a deadline within which it must eliminate these shortcomings. Through the inspection of all the documentation, the Agency determined the existence of suspition that a criminal offense – abuse of official position, has been committed, and it submitted a report with collected documentation to the competent prosecutor's office. The prosecution informed the Agency that one employee in a public institution was found guilty of the criminal offense of abuse of official position for an extended period of time an that he was given a suspended sentence of 90 days in prison.

The work process of Agency for Prevention of Corruption upon whistleblower reporting



VI

CONCLUSIONS AND RECOMMENDATIONS

A prerequisite for an effective fight against corruption is a good legislative framework, as well as its adequate implementation. When it comes to the protection of whistleblowers in Montenegro, after more than five years since the establishment of this institute in Montenegrin legislation, it is necessary to revise the provisions of the Law on Prevention of Corruption, in particular the issues that are the subject of the EU Acquis, as well as to eliminate ambiguities and revise the provisions of the Law that are subject to different interpretations.

This is because it is a specific category of persons who can be the most effective mechanism for fighting corruption, if they are adequately protected. A successful case of protection of these persons could encourage many experts from institutions to report illegalities and irregularities in the work of institutions without fear of retaliation. Providing adequate protection to whistleblowers is one of the biggest challenges.

Based on all the above and contained in the publication, a certain set of recommendations has been identified that may help decision makers and practitioners in the field of whistleblower reporting and protection in Montenegro in further determining public policies in this area.

Intensifying changes in the legal framework

In terms of adequate implementation of the existing legal framework, it is necessary to further encourage the involvement of all state bodies, their management and employees in order to fully provide effective protection to whistleblowers, as well as to strengthen the human resources of the competent department of the Agency, in order to be able to react in the right way to the potential threat to the public interest that indicates the existence of corruption in the public and private sector [37]. Also, when it comes to this area, it is necessary to show a more proactive approach.

Improvement of the legislative framework

Furthermore, harmonization of the Law on Prevention of Corruption with Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting breaches of European Union Law, is an obligation of Montenegro in the process of accession to the European Union. Member States have the obligation to transpose it into national law by December 17, 2021 and December 17, 2023 respectively (Article 8), and Montenegro is expected to start the procedure of amending the Law on Prevention of Corruption in order to adequately implement it.

Bearing in mind the aforementioned, and in particular the fact that the Directive draws on the views and case law of the European Court of Human Rights, as well as the 2014 Council of Europe Recommendation on the Protection of Whistleblowers, and the need to harmonize legal solutions to the needs of practice, I recommend:

Expanding the application channel

Of particular importance is the recognition of new mechanisms for filing applications through:

[37] Report on the work of the Agency for the Prevention of Corruption for 2020

1. submission of the whistleblower's report to the competent state prosecutor's office or the police, except in the case when the report refers to those bodies;
2. creating an opportunity for the whistleblower to address the public or the media, but only in exceptional cases, as a last resort (e.g. journalist, MP, etc.);

Designation of persons for admission and treatment upon application

With a large number of legal obligors, persons designated to deal with reports are often unable to effectively ensure data protection under the Law on Data Secrecy, (e.g. institutions/legal entities with a small number of employees), and it is necessary to find a criterion, i.e. a solution for reporting in these situations. So, must be found for the authorities, and the private sector should be guided by the size of the company, the number of employees, etc.;

Prescribing the obligation to submit data on the number of applications to the Agency

As a central anti-corruption body, the Agency should have the consolidated data on the number of reports and their outcome for all those obliged to apply the Law. In this regard, it is necessary to prescribe the obligation for all legal obligers of the Law to submit, as of March 31 of the current year, for the previous year, the stated data on a unified form prescribed by the Agency.

A special annual list for the publication of a special annual list of institutions in which corruption has been reported and legal entities that have not acted on the recommendations should be provided.

Providing preliminary examination of the contents of the whistleblower application

It is necessary to prescribe cases when the Agency will suspend the procedure (failure to act upon the request for supplementing the application), if what is reported does not constitute a threat to the public interest which indicates the existence of corruption, in accordance with the Law.

It is also necessary to provide a sanction for false reporting. When formulating this sanction, which is also an obligation prescribed by EU Directive 2019/1937, one should be careful and take into account that it does not have a deterrent effect on potential whistleblowers (in the Republic of Slovenia it is prescribed as a misdemeanor).

Providing protection for the person associated with the whistleblower

Given that only a definition of a related party is given and that person is mentioned in relation to harmful acts by "third parties", it should be defined how it is determined that a person is a person associated with the whistleblower. This procedure should precede the procedure of determining the occurrence of damage, i.e. the possibility of occurrence of damage.

Providing the duration of the granted protection

If the procedure is conducted before the Agency, the duration of the protection granted should be provided (e.g. period of protection for a maximum of two years, with the possibility of extension, for which the justification would be determined in the new procedure);

Clarifying the provision relating to professional assistance to the whistleblower

In the part of providing "professional assistance" in court proceedings to the whistleblower by the Agency for Prevention of Corruption, it is necessary to state that this assistance does not relate to the representation of whistleblowers in court, without further specifying what it means.

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