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THE PROTECTION OF WHISTLEBLOWERS IN ROMANIA

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1. Introduction

The term whistleblower² defines a person who exposes wrongdoing within an organization. As far as anticorruption policy is concerned, whistleblowing is extremely relevant for public and private organizations alike, since both face the risk of things going wrong or unknowingly harbouring corrupt individuals. And it is insiders - people who work in or with the respective organization – that are best positioned to observe wrongdoing and signalize it. However, these people also face sizeable risks of retaliation from those whom they expose, a fact which makes the protection of whistleblowers a must in any anticorruption strategy.

The importance of whistleblowing in the public sector is widely acknowledged at the international level, and regulated explicitly by landmark anticorruption conventions such as the *United Nations Convention against Corruption* (Article 8.4) and *Council of Europe's Civil Law Convention against Corruption* (Article 9). Both of them require the introduction of protection measures for public officials who report acts of corruption which come to their notice in the performance of official functions.

2. The Need for Whistleblower Protection in Romania: Problem Definition

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² Originating from the expression *to blow the whistle (on)* [Slang] = 1. to report or inform on 2. to cause to stop; call a halt to (according to Agnes, Michael (editor in chief).1999. *Webster's New World College Dictionary*, fourth edition, New York: Macmillan).

In Romania whistleblower protection was introduced in 2004 through *Law no. 571/2004 concerning the protection of personnel from public authorities, public institutions and from other establishments who signalize legal infractions*. The law has national coverage and addresses civil servants and contractual employees from virtually all public sector entities. Proposed in a favourable internal and international context, the introduction of whistleblower protection did not encounter strong opposition from public or private actors. Divergence of opinions related to detail regulation rather than the opportunity or usefulness of the measure itself.

The draft law contained a number of generous promises which fuelled consensus among decision makers and played a crucial role in its adoption. The instrument would respond to the need to shield public employees who refuse to execute illegal orders (although refusal was regulated by previous civil service legislation, in practice opposition often resulted in elimination from the public system). It would also protect the professional reputation of public sector employees, by allowing individuals to make a stand against corrupt fellow workers, it would parallel the internal channels of complaint (disciplinary commissions, hierarchical superiors and ultimately the prosecutor's office) with more responsive exterior ones (civil society organizations, mass media etc.) and finally it would facilitate a brake with a tradition of silence and complicity in the Romanian public sector.

3. Forms of Whistleblower Protection in Romania: The Policy Solution

In its final form, the law properly addresses the blind spots enumerated above and creates a solid protection regime for whistleblowers suffering reprisals for denunciation, in the form of abusive administrative or judicial sanctions. Thus, in a disciplinary commission or any similar body, the public interest whistleblower is assumed to be of good faith, until proven otherwise. Also, at the request of the whistleblower under disciplinary inquiry, following an act of whistleblowing, the disciplinary commission or any other similar body is obliged to invite the media and a representative of the trade union or professional association to its sessions. The sessions are to be publicly announced at least three working days before they are convened. Otherwise, the report or the disciplinary sanction is null. Added to this, when the subject of the denunciation is a hierarchic superior of the whistleblower, or is entitled to supervise, control or assess him/her, the disciplinary commission or similar body must assure the whistleblower's protection by concealing his/her identity. The provisions of Law 682/2002 regarding the protection of witnesses automatically apply to the whistleblowers in public interest.

Plus, in case of labour or working relations litigations, the court can repeal the disciplinary or administrative sanction given to a whistleblower, if that sanction was decided following a denunciation made in public interest and in good faith. Finally, the court must compare the extent of the sanction passed against a whistleblower with other sanctions passed in similar cases within the same authority, public institution or budgetary unit, in order to avoid future and indirect sanctions against whistleblowers in public interest, that are protected by Law 571/2004.

4. Factors of Success in the Agenda Setting and Adoption Stages

4.1. Enabling International Pressures

The international context surrounding the introduction of whistleblower protection measures in Romania was extremely favourable. European pressures and international judicial instruments played a key facilitation role from the initial agenda setting stages to policy formulation and, finally, the adoption of the law. As shown by the Government's *Head Note* to the draft law³, but also during debates in the Parliament⁴, whistleblower protection was closely connected to Romania's calendar of proposed measures for accession to the EU – more precisely, the closing of the “Justice and Home Affairs” negotiation chapter. Added to this, GRECO's *First Evaluation Report*⁵ recommends the Romanian Government to strengthen anticorruption measures by instituting appropriate witness protection in cases of corruption. This requirement became all the more urgent as Romania ratified in 2003 *Council of Europe's Civil Law Convention against Corruption*, which specifically provides for whistleblower protection. Finally, *Law no. 571/2004* was closely connected to Romania's ratification of the *United Nations Convention against Corruption*, which, as pointed out above, also requires specific whistleblower protection measures.

These concerted international influences and pressures not only enhanced receptivity of Romanian decision makers, but also allowed for an optimal construction of the legislative instrument, which institutes a proper regime of guarantees for whistleblowers.

4.2. Favourable Domestic Conditions

Apart from international influences, domestic conditions also aided the passing of *Law no. 571/2004*. An important enabling factor was the political homogeneity within the Government and the Parliament, both controlled by the Social Democratic Party. This has significantly shortened the period for negotiation and ensured that the law suffered minimal modifications during parliamentary debates, compared to the text proposed jointly by the Ministry of Justice and the Ministry of the Interior. Plenary debates in both the Chamber of Deputies and the Senate were marked by almost no divergence of opinions, which was clearly reflected in the final vote – the law was adopted with 211 votes for and 3 against by the Chamber of Deputies and 78 for and 1 against in the Senate⁶.

Moreover, the interest of political leaders was heightened by the fact that 2004 was an electoral year in Romania, (anti)corruption being on important stake in the then coming elections. Thus, one could argue that the fulfilment of international obligations before expiration of the term in office would constitute a major achievement, which could be easily transformed into electoral capital.

4.3. A Carefully Structured Decision Making Process

Apart from a favourable context, introduction of whistleblower protection measures was also supported by a carefully structured decision making process. *Law no. 571/2004* was part of a six-law package proposed by

³ <http://www.cdep.ro/proiecte/2004/600/50/1/em651.pdf>

⁴ Transcripts available online at <http://www.cdep.ro/pls/steno/steno.stenograma?ids=5768&idm=15> and

⁵ Group of States against Corruption. 2002. *First Evaluation Report on Romania*. Strasbourg. Available online at [http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoEval1\(2001\)13_Romania_EN.pdf](http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoEval1(2001)13_Romania_EN.pdf).

⁶ As shown in the transcripts of the parliamentary debates in the Chamber of Deputies and in the Senate.

Transparency International Romania to the Romanian Government as part of memorandum regarding a common platform for the fight against corruption. Among others, the package included:

- *Law no. 365/2004* for the ratification of the United Nations Convention against Corruption, which had the responsible public structures conduct an impact analysis and design an implementation plan and associated calendar;
- *Governmental Ordinance no. 14/2005*, by which a new and more detailed format for interest and wealth declarations was introduced;
- *Law no. 521/2004*, by which the sphere of offences punishable as corruption crimes was enlarged to cover all forms of abuse in office for private benefits;
- *Law no 477/2004*, which extends the provisions of the Code of Conduct for Civil Servants (*Law no. 7/2004*) to other categories of state employees, thus creating a uniform regime in the public sector;
- *Law no. 480/2004*, which enhances transparency and accountability in the activity of prosecutors by instituting an obligation to transmit to all interested parties decisions for commencement, suspension or non-commencement of criminal pursuit.

The inclusion of whistleblower protection in this package, and, more importantly, the direct dialogue between Government representatives and independent experts proved to be a rewarding advocacy strategy, which allowed for significant improvements to the Romanian anticorruption legal framework.

5. Conclusion

However, three years after the adoption of *Law no. 571/2004*, one finds widespread lack of knowledge or even suspicion among both beneficiaries and potential receivers of public interest denunciations. Despite its tremendous anticorruption potential, whistleblower protection in Romania is not used and therefore not reaping results. This state of affairs is certainly not singular – since the debut of the *National Program for Prevention of Corruption* in 2001 Romania has been experiencing an inflation of anticorruption legislation, often accompanied by weak enforcement. Establishment of an appropriate legal framework is certainly a crucial gain, but only the first step in building an effective and sustainable anticorruption effort.