PROTECTION OF WHISTLE-BLOWERS BY MAKING PUBLIC DISCLOSURES (ALERTING THE PUBLIC)

TENDENCIES AND EXAMPLES FROM PRACTICE

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Content

> "Disclosing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal lives and those of their relatives, as has happened too often in the past. Sounding the alarm must become a normal reflex of every responsible citizen who has become aware of serious threats to the public interest."
>
> From the Resolution of the Council of Europe's Parliamentary Assembly 2300(2019)

Public disclosures under the burden of unattainable requirements

In the text published in 2021, on the protection of whistle-blowers in security sector, it was noted that The Law on Protection of Whistle-blowers[1] poised extremely restrictive requirements for all whistle-blowers to address the public, especially when regards the so-called direct public address. It is an address not preceded by internal whistleblowing (revealing the information to the employer) or external whistleblowing (revealing the information to the competent authority) either.

Public disclosures may be made, without prior notice to the employer or authorised agency, in case of imminent peril against life, public health, security, environment, large-scale damage, i.e. imminent peril of evidence destruction. Albeit there are understandably tightened requirements for direct public address, the law noticeably places the bar for peril requirements too high – it is not sufficient to have a peril at hand (against life, public health, security, environment, large-scale damage, evidence destruction), but it must also be *imminent*. The term 'imminent' relates to a precisely specific moment when the specific peril occurs and becomes certain. Only then is a whistle-blower entitled to address the public without repercussions and with hopes of court protection.[2]

Thus, in order to remain eligible for court protection and to avoid the consequences of whistleblowing, a whistle-blower must make an accurate and correct assessment of whether the imminent peril, e.g. that of evidence destruction, has already occurred, or such peril is of principle nature (abstract). This assessment is very difficult to make, especially knowing that whistle-blowers are not obliged to know the nuances of legal terms; they do not have to be lawyers; precise information on degree of peril caused is often unavailable to them.

The highly placed threshold for direct public address should be observed in the context of the general principles set forth in the Law on Protection of Whistle-blowers[3] guaranteeing protection to whistle-blowers in case a person *with average knowledge and experience as a whistle-blower* would believe the authenticity of the information subject to whistleblowing , following the available data. Despite this principle, we can see that much more is expected from whistle-blowers in case of direct public address than in the relation between whistle blowers and the information they disclose. In other words, in assessment of peril that may occur by non-disclosure of the information, the whistle-blowers need to possess knowledge and information above average.

Such a combination of legal requirements and practical opportunities makes many potential direct public addresses end up with renunciation or impossibility to enjoy court protection, thus the protection from the repercussions of disclosure too. In this case, one becomes a whistle-blower by media recognising their actual status, but they do not acquire this official status, by court decision and in accordance with the law.

Besides this tendency with direct whistleblowing, we can notice that the whistle-blowers following the regular way of whistleblowing – addressing the employer, then competent authorities and the public only in the end – also experience challenges to the lawfulness of their public address on other grounds. Most often it is references to Article 20 of the Law on Whistle-blowers' Protection that completely prevents public address if the information that is subject to whistleblowing includes secret data.

Since we have seen in practice that those who flag irregularities in operations, especially if those are official persons and information on public authorities where they are employed, can bring about rapid response of the criminal justice apparatus, which initiates the prosecution of whistle-blowers for disclosure of secret data.[4] These persons most often face the accusations that they have disclosed the information by different designations of secrecy attached by the institutions where they are employed, as well as the accusations of acting unconscientiously and in contravention of the rules of the service. In such situations, whistle-blowers remain without potential court protection and, clearly, turn to their own criminal justice protection.[5]

We can therefore infer that the domestic case law fundamentally resists the public whistleblowing in two ways. On the one hand, it does so by stipulating conditions extremely difficult to meet for direct public address. On the other, it does so by invoking the non-disclosure of secret data to the public. The latter leads to criminal proceedings against whistle-blowers, exhausting to the defendants and extremely deterrent for other whistle-blowers.

Prosecution as a specific means of outplaying whistle-blowers' protection

From the beginning of the implementation of the Law on Whistle-blowers' Protection, in 2015, at least two cases occurred in Serbia with whistleblowing resulting in prosecution due to the alleged disclosure of secret data. Such prosecution sent a clear message that the information whistle-blowers disclose should not be subject to review, especially not by prosecutorial offices, but that it is precisely the whistle-blowers that should bear the most serious consequences, i.e. criminal justice, for unlawful public address.

The first case of this type was that of the members of the Ministry of the Interior, Milan Dumanović and Mladen Trbović, charged in 2017 with a criminal offence of disclosing public secret in extended period of time.

The second case is that of Aleksandar Obradović, whistle-blower from Valjevo's "Krušik" weapons manufacturer, who went public with data on abuse where the representatives of the political authorities and their family members mediated[6], trading weapons in the capacity of private weapon traffickers, to the detriment of "Krušik". Since 2019, practically from the moment he addressed the public, Obradović has been faced with a suspicion that he had disclosed a business secret. Three years later, the investigation of this case is still ongoing, while Obradović has been under labour suspension until the end of the criminal proceedings.

In both cases, according to the information on these cases available to public,[7], the defendants reported on the non-compliance in the work of their respective employers (the Ministry of the Interior and "Krušik" factory) first by using the internal channels, and them the external alert. It was only after these mechanisms proved to be ineffective that they addressed the public. In other words, neither case is direct public address, but public address as the last resort to prevent unlawful actions that the whistle-blowers pointed to.

Although Dumanović, Trbović and Obradović *de facto* found themselves in the position of whistle-blowers – because they did sound the alarm to the public – according to the available information, they never requested such status from the court in a civil procedure. In a way, they prevented from doing it, because they were immediately faced with accusations of disclosing secrets, thus with criminal proceedings.

Even if the accused had formally requested court protection, it is highly unlikely that it would have been provided and able to prevent further prosecution. The principle position of domestic criminal justice institutions, primarily prosecutor's office and court, is that harmful action referred to in the Law on Whistle-Blowers' Protection did not relate to prosecution which, once started, had to be carried out without hindrances. Such position exists even if harmful action under the Law on Whistle-Blowers'

Protection[8] was defined as *any* action or failing to act in relation to the whistle-blowing, which jeopardises the whistle-blower's right, or the right of any person entitled to protection as a whistle-blower, or whereby such persons are placed in disadvantageous position.

One of the possible reasons for such court's position is that the Law on Whistle--Blowers' Protection[9], in parts related to whistle-blowers' rights in special procedures, does not recognise the correlation between whistle-blowing and criminal proceedings or mechanisms of protection from whistle-blowing.

Therefore, the above criminal proceedings were and still are going on in the shadow of informal whistle-blower status of all the three defendants.

The Dumanović and Trbović case – the first-instance judgment from April 2022

Five years after indictment, former members of the MoI, Dumanović and Trbović, were relieved of the guilt of perpetrating the criminal offence of official secret disclosure by a first-instance (non-enforceable) judgment of the High Court.

The public was excluded from the entire trial, and details of the indictment were never communicated due to the need to protect official secrecy. The trial began in 2018, but was returned to the beginning after judge Zoran Božović was substituted.

Belgrade's High Court decided that Milan Dumanović and Mladen Trbović were not guilty of speaking in public about surreptitious recording of the commemoration in Potočari, Srebrenica, in 2015, when the then Prime Minister of Serbia, now the President, Aleksandar Vučić, was attacked. In other words, it decided that they had not revealed a state secret.

Dumanović and Trbović once gave a statement to Al-Jazeera TV on the illegal stay of the members of the MoI's Observation and Documentation Unit at the commemoration in Potočari, after which, in 2016, they pressed criminal charges against head of the Service for Special Investigative Methods, Dejan Milenković, head of the Observation and Documentation Unit Goran Nešić, his deputy Tomislav Radovanović and the then Secretary of the Crime Police Directorate Dijana Hrkalović.

According to the media reports from the judgment pronunciation[10], the court took the position that two criteria had to be met for something to be declared official secret – the information was declared official secret under the law and its disclosure caused damage. The second criterion, in the view of the court, was not met.

The above indicates that the criminal court did not deal with factual, but formal whistle-blower status of the defendants. The trial was closed for the public, in a solely criminal justice framework, which confirms the assertion of criminal procedure as a specific and efficient means of outplaying the protection of whistle-blowers.

International tendencies

With the above events taking place in Serbia, the European Union and Parliamentary Assembly of the Council of Europe, practically simultaneously, have been establishing new conditions for whistle-blowers' protection in the members states of the Union, but also of the Council of Europe, where Serbia also belongs.

Namely, in October 2019, the European Union approved the Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. Not long after, the Parliamentary Assembly of the Council of Europe adopted the Resolution 2300(2019) hailing the Union's Directive and calling upon all the member states of the Council of Europe to adopt its arrangements.

The Union's Directive introduces many new rules in the protection of whistle-blowers, with the common denominator being loosening the restrictive rules on whistle--blowing and establishing higher degree of protection from potentially detrimental actions against whistle-blowers. One of the novelties refers precisely to the new conditions for alerting the public, especially in case of the so-called direct public alert.

In Article 15, the Directive regulates new conditions on which one may address the public without prior internal and external whistle-blowing. These are the following conditions[11]:

- when the breach (of the EU law, author's note) **may constitute imminent or obvious peril against public interest,** site, e.g. in emergency situations or when there is a risk of irreparable damage; or

- when, in case of external whistle-blowing, **there is a risk of retaliation or low chances to efficiently respond to the breach** (of the EU law, author's note) **due to special circumstances of the case, such as those where evidence could be concealed or destroyed, or when the authority could be in collusion with the perpetrator of the breach or involved with the breach.**

The Directive's arrangements in many aspects differ from the domestic Article 19 of the Law on Whistle-Blowers' Protection, the disputable arrangements whereof have already been discussed.

Firstly, for direct public address it is enough to have **imminent or obvious** (meaning, one or the other) **threat to public interest.** In case of transposition of such provisions to the Serbian legislation, which the Council of Europe advised to its member states, whistle-blowers would not need to make an almost impossible assessment of imminent peril (the obvious one would suffice) to certain assets. Also, the assets that need to be deemed under threat in order for whistle-blowers to be able to address the public are not specifically listed, as in the current Serbian law, but it is enough to have a public interest under threat, which is by far a broader notion.

The other case in which whistle-blowers may address the public directly is perhaps even more important for the Serbian context – the case when there is a risk of retaliation if reported to the competent authorities, or when there are slender chances of efficient response to the breach due to specific circumstances of the case. Some of the circumstances relate to situations of evidence concealment or destruction, or when the competent authority is involved with the breach or is in collusion with the perpetrator.

Also, the Directive explicitly states in its Preamble, citation 92, that **it is not possible to rely on legal or contractual obligations of individuals, such as loyalty or confidentiality clauses in contracts or non-disclosure agreements, in order to prevent reporting, deny protection or punish the persons who reported** the information on law breach or alerted the public in case when the publication of the information belonging to the scope of such clauses and agreements is necessary for revealing the breach.

The Directive states that, where these conditions are met, whistle-blowers must **enjoy immunity from any liability, be it civil, criminal, administrative or employment-related.** In order for whistle-blowers to enjoy such protection, it is sufficient to have **reasonable grounds to believe** that public alert was necessary to reveal a law breach.

Conclusion

The protection of whistle-blowers addressing the public in Serbia, directly or after internal and external whistleblowing, is under extremely restrictive rules. The legal requirements are set forth in such a way that sounding alarm to the public is almost impossible. Practice has shown that the cases of public whistleblowing, especially those with salient political component, are quickly prevented by prosecution of the whistle-blowers, who have no protection mechanism related to whistleblowing during the criminal proceedings.

Had the rules from the Union's Directive discussed here been applied to the Serbian cases – the accused Dumanović, Trbović and Obradović – they could have addressed the public immediately for the suspicion of the competent authorities' involvement with the unlawful activities, subsequently receiving efficient protection as whistle-blowers. Also, they would not have been forced to prove the imminence of peril against a legally specified asset, but only to prove the probability of existence of obvious peril against public interest in the activities infringing the law. Lastly and most importantly, they must not be subject to any procedure of establishing accountability for the information published under the new EU rules, including criminal proceedings too.

Bearing in mind the Resolution of the Parliamentary Assembly of the Council of Europe, welcoming the Union's Directive and inviting all the Council of Europe's member states to adopt all its arrangements, amendments to the Serbian Law on Whistle-blowers' Protection could be expected soon, aligned to Directive 2019/1937 of the European Union.

When something like this happens, certainly depends on the requirements of the European Union in the course of the accession negotiations. Irrespective of the course of negotiations, it would be good for Serbia to recognise the need to amend the 2014 legal arrangements and align them to the international tendencies, especially in the part related to the requirements for direct alarming of the public and prohibition of prosecution of whistle-blowers for the information they publish.

Endnotes

1 Article 19 of the Law on Protection of Whistle-blowers

2 The term 'imminent' is not specified by the Law on Protection of Whistle-blowers, but in the criminal legislation it is used as temporal designation indicating a specific, certain moment (e.g. imminent peril against one's life referred to in Article 127 of the Criminal Code)

3 Article 5 of the Law on Protection of Whistle-blowers

4 Irrespective of business secrecy or a designation of secrecy envisaged by the Law on Data Secrecy (internal, confidential, strictly confidential, state secret)

5 p.3, Protection of whistle-blowers in security sector - opportunities, obstacles and recommendations, BCSP, 2021

6 In the specific case, it was the then Minister of the Interior, Nebojša Stefanović, his father and his fathers' business partners.

7 These data were restricted because the trial against Dumanović and Trbović was closed for the public, whereas the investigative procedure is closed for the general public by law.

8 Article 2 Of the Law on Protection of Whistle-blowers

9 Article 27 of the Law on Protection of Whistle-blowers

10 The judgment is not available to the public because the court excluded the public from the entire course of the procedure.

11 The translation of the Directive is informal, the English and Croatian versions were used.

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