

## LEGAL STATUS OF WHISTLE-BLOWERS IN THE REPUBLIC OF SERBIA: FROM FRAGMENTED PROTECTION OF CIVIL SERVANTS TO THE FULL- SCALE PROTECTION MODEL

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### Abstract

The role of a whistle-blower is most commonly taken on by an employee, whose duty of loyalty to the employer is in conflict with disclosure of the employer's wrongdoing. This requires a balance between the interests of the parties to the employment relationship, on the one hand, and the public interest, on the other hand. It was taken into account in Serbian law when defining the legal status of whistle-blowers, from the fragmented protection of civil servants to the adoption of the Law on Protection of Whistle-blowers (2014). After elaboration of the evolution of protection, authors identify and analyze essential elements of the whistle-blowing concept, as well as its basic functions in Serbian and foreign law. This is followed by critical re-evaluation of the key aspects of protection of whistle-blowers in the legislation and case law of the Republic of Serbia (the circle of protected persons, motives for disclosure of information, damaging actions, the burden of proof and the gradual approach in whistle-blowing). The conclusion is that Serbia has achieved a slow but steady progress in the legal protection of whistle-blowers, and that there is need for further improvement, since certain legal solutions may separate the guarantee of protection of whistle-blowers from the purpose for which it was established.

**Keywords:** whistle-blower, public interest, employer's retaliation, Republic of Serbia.

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## **1. Evolution of regulation of whistle-blowers protection in the Republic of Serbia**

The relationship between an employer and an employee is based on their mutual fidelity (loyalty). Employees and employers are therefore obliged to refrain from any activity that could harm the other party, and take any action that helps protect their interests (Durand and Vitu, 1950, p. 586). For employees, this obligation also means having to refrain from revealing any information to the public that could harm the reputation or interests of their employer. This obligation, however, has its limits. Employees shall not be liable for breach of duty of loyalty, should they disclose certain information in order to stop illegal actions or other wrongdoings by their employer or another employee, since they would be defending values more important than the value of loyalty (public health, safety, the environment, etc.). They can be qualified as whistle-blowers who enjoy only limited protection in most European countries, for example, only for disclosing illegal practices in the public sector, or only for disclosing corruption. Also, in some countries, despite the legal gaps, protection of whistle-blowers is ensured by relying on the constitutionally guaranteed freedom of expression, as well as general rules of criminal and labour laws. Full-scale protection of whistle-blowers is oftentimes absent from the international level as well, although major international conventions against corruption are asking the contracting parties to ensure legal protection for the persons who, in good faith, report any evidence of corruption to the authorities (see: Carr and Lewis, 2010, pp. 56-59), while non-legally binding acts on protection of whistle-blowers have been adopted under the auspices of the Council of Europe.

Before 2014, Serbia didn't have legislation that included full-scale protection of whistle-blowers. Some protection of whistle-blowers was provided in the provisions of the Labour Law, which qualified 'addressing the trade union or agencies in charge of protection of employment-related rights by the employee' (Article 183, item 6) as unjustifiable reason for termination of employment. Limited and insufficient protection of whistle-blowers is also provided in anti-discrimination legislation and Law on Prevention of Moral Harassment in the Workplace which prohibit a call to accountability of the employee who offers evidence of discriminatory actions or mobbing of the employer or another employee.

The first form of special protection of whistle-blowers was introduced via the Amendment to the Law on Civil Servants of 2009. Civil servants were required to report suspicion of corruption and were provided protection if they notified their direct supervisor or manager, in writing, about having learned, in the course of their duty, that an official, civil servant or state employee committed acts of corruption in the government authority where they were employed. From that point on, any retaliation against civil servants is prohibited, and any misuse of the whistle-blowing mechanism is a major disciplinary offence. That same year, Amendment to the Law on Free Access to Information of Public Importance was adopted, guaranteeing protection for disclosure of information on corruption as well as for information on

‘exceeding authority, irrational expenditure of public funds and illegal acts or actions by the authorities’ (Article 38, paragraph 4). In addition to covering a wider range of information, this act protects a larger circle of persons (including those to whom the authorities are providing services, and parties in the proceedings before the authorities), although only with respect to disclosure of information available to all without limitation (Kovačević, 2015, p. 146). This trend continues via the Amendment to the Anti-Corruption Agency Law of 2010, which guarantees protection to persons who, in good faith, report to the Agency instances of corruption at their place of work (Article 56, paragraphs 2-5). Although limited to corruption cases, legal protection isn’t reserved only for people working in government authorities, autonomous provinces or local self-government units, and can be provided to people working in public enterprises and other organizations founded by the Republic of Serbia, the autonomous province or local self-government unit, as well as people working in enterprises whose founder or member is the Republic of Serbia, the autonomous province or local self-government unit. Although the aforementioned regulations represent the first steps towards direct regulation of special protection of whistle-blowers, full-scale protection started with the Law on Protection of Whistle-blowers, which came into force in June 2015.

Non-governmental organizations had a certain impact on the flow and the results of the legislative process in this field, with the organization ‘The Whistle’ being the most prominent one, helping citizens report corruption since 2010 (from January 2013 to June 2017, 1,685 cases of corruption were reported to this NGO, while legal aid was ensured for 1,153 whistle-blowers). Along with ‘The Whistle’, three more non-governmental organizations (‘Transparency Serbia’, ‘Association of Public Prosecutors and Deputy Public Prosecutors of Serbia’ and ‘Coalition for Oversight of Public Finances’) started a campaign in 2011 to adopt a special law on protection of whistle-blowers, for which they had the support of the Protector of Citizens of the Republic of Serbia (the Ombudsman), the Commissioner for Information of Public Importance and Personal Data Protection, the Anti-Corruption Agency, and the Anti-Corruption Council. They initiated the first round of consultations in which independent regulatory bodies played a special role. The Model of the Law on Whistle-blowing and Protection of Whistle-blowers was thus created as a result of a project implemented by the Commissioner for Information of Public Importance and Personal Data Protection, while the Ombudsman had a representative in the working group that drafted the Model Law. The Model Law was submitted to the Ministry of Justice in 2012, but the Government of the Republic of Serbia, without an explanation, decided not to put it before the Parliament for a vote. The Model Law included the following requirements for providing protection to the whistle-blowers: acting in good faith, gradual approach to whistle-blowing (while strictly limiting the possibility of external whistle-blowing) and the right to a reward. Temporary protection was available to the whistle-blowers until the final court ruling, which was supposed to be provided by introducing temporary relief by the court, or alternatively by the Ombudsman.

The regulation of the protection of whistle-blowers in Serbia also depended on the negotiations of political parties: the coalition agreement of the three political parties that went on to form the Government in July 2012 declared the enactment of a special law on protection of whistle-blowers an integral part of their anti-corruption strategy. The Ministry of Justice, therefore, produced a draft version of the Law on Protection of Whistle-blowers, with the advisory support of experts from the Council of Europe Office in Serbia, USAID and Whistleblowing International Network. Two members of the working group were whistle-blowers, which is the first such case in the world. A new, slightly modified Draft Law on Protection of Whistle-blowers was presented in June the following year, and was put before the Parliament in September 2014. In accordance with the participatory principle, the representatives of the NGO 'The Whistle' helped include the empirical evidence on the treatment of whistle-blowers, although its proposal for disclosure of data containing classified information was not included in the Draft Law, meaning that in such cases the protection of whistle-blowers remained very limited.

## **2. The whistle-blowing concept in Serbian legislation**

### **2.1. The notion of whistle-blowing**

There is no single whistle-blowing concept in modern legislation, theory or case-law, and a number of different functions and meanings are attributed to this idea. One view is that whistle-blowing should be considered as an aspect of freedom of expression, which is emphasized in the jurisprudence of the European Court of Human Rights. Whistle-blowing is also viewed as an instrument to fight corruption and other illegal actions, while the third, and the most widespread view, is that (internal) whistle-blowing is a mechanism for solving problems in the workplace. Although many functions are attributed to whistle-blowing, what all whistle-blowing concepts have in common is the disclosure of illegal, immoral and illegitimate actions of the employer to persons who can stop these practices (Bouville, 2008, p. 579; Near and Miceli, 1985, p. 4). In this sense, whistle-blowing represents the disclosure of illegal acts of commission or omission, at work, by employees or former employees, and possibly others as provided by law. In the broadest sense, this concept includes other elements such as: truthfulness or illusion of truthfulness of information, confidentiality, disclosure of information in good faith and in the public interest, inability to prevent or eliminate damaging effects by personal engagement (Dimitriu, 2016, p. 246).

At first glance, disclosure of information regarding illegal actions of the employer is in conflict with the duty of loyalty to the employer. Every whistle-blower is facing a moral dilemma – to refrain from disclosing information, or to defend the public interest, especially since many cultural and working environments see whistle-blowing as a form of 'snitching'. The two terms for whistle-blowing that are used in French and Belgian literature: *dénonciation* and *délation* support these claims. A similar view exists in the German doctrine, since, during the Third Reich, criminal prosecution for many acts (especially in relation to the purity of the German race) was based on the de-

nunciating reports (Tinnefeld and Rauhofer, 2008, p. 721). Negative relationship with whistle-blowing was also expressed in post-communist societies, because snitching was encouraged by the regime (Ogarcă, 2009, p. 105). On the other hand, employees who dare to point out the perceived illegal actions of their colleagues or superiors can count on the damaging consequences both in financial and professional terms (dismissal, lack of promotion, demotion to a lower rank and/or lower-paid job, etc.) as well as personal disqualification (James, 1983, p. 288), but their willingness to bear the consequences of their commitment for the interest of the general public is sometimes referred to in the literature as moral heroism (Grant, 2002, p. 396).

The duty of loyalty has special significance if the government is in the role of the employer. Civil servants have a duty to serve the community and protect all persons against illegal practices, in order to strengthen government authority and public confidence in civil service, which includes reporting of illegal actions discovered during the performance of entrusted duties. This is why it should be pointed out that the whistle-blowers' dilemma whether to report illegal activities or not, is not exclusively moral in nature, if the information indicates that a serious crime has been committed or will be committed. In this case, according to the Serbian law, whistle-blowing becomes a duty, and failing to do so may, depending on the severity of the crime that is not reported, result in criminal charges against him (Vuković, 2016, p. 323).

Some workplaces tend to insert a so called 'gagging clause' into the employment contract, which limits the rights of employees to disclose information on practices and/or policies of their employer. Its insertion into the employment contract has become common practice in sectors in which employers introduce codes of conduct that contain recommendations to their employees to report illegal activities at their workplace. Similar confidentiality clauses can be seen in Serbian law, in both the private and the public sector. In fact, they've become common place in many government departments, where the duty to keep information confidential is confirmed by law (e.g. Law on Security Information Agency, Article 23, paragraph 2). However, inserting such clauses shall not prevent disclosure of information under the Law on Protection of Whistle-blowers, since the Law expressly states that the provision from a general or individual act preventing whistle-blowing shall be null and void (Article 3, paragraph 2).

Law on Protection of Whistle-blowers defines the term 'whistle-blowing' extensively, as 'disclosure of information about violation of regulations, violation of human rights, the exercise of public authority contrary to the purpose for which it was entrusted, threat to life, public health, safety and the environment, as well as prevention of serious damage' (Article 2, item 1). Therefore, the concept of whistle-blowing is defined in a rather extensive way, since, in addition to the minimum mandatory elements provided for in the Recommendation CM/Rec(2014)7 of the Committee of Ministers of the Council of Europe, it includes illegal exercise of public authority, in order to take into account the national circumstances and to prevent the abuse of public authority. Although it could be argued that Serbian law limits the whistle-blowing

only to the listed categories of illegal actions, the fact that information may refer to any violation, actually allows whistle-blowing for any unlawful action (disciplinary, misdemeanour, criminal or violations of regulations in general), regardless of its severity or nature. However, the disclosed information should refer to an observed illegal, not only morally dubious, action.

## *2.2. The circle of protected persons*

The Serbian legislator has defined a whistle-blower as ‘a natural person who blows the whistle in relation to his job, recruitment procedure, using the services of the state and other authorities, representatives of the public authority or public services, business cooperation and ownership of a company’ (Article 2, item 2). Therefore, the whistle-blower doesn’t have to be an employee, but a person who is using the services of the public sector. What’s specific about the Serbian solution is the fact that it doesn’t only protect the whistle-blowers, but also protects others who feel consequences of their whistle-blowing. This kind of protection is rare in comparative law, even though retaliation against a whistle-blower’s associates may act as a deterrent (Thüsing and Forst, 2016, p. 15).

Unlike many European laws, that limit the protection only to the public sector, the Serbian law expanded the protection to the private sector. And yet, it should be pointed out that so far in the implementation of the Law on Protection of Whistle-blowers, most cases were related to civil servants and employees in the institutions entrusted with public authority (especially universities). We should also point out that the actual subject matter of the Law on Protection of Whistle-blowers is out of step with its title, since its content is almost exclusively related to protection of whistle-blowers who are working, and job applicants, and the provisions that were to ensure effective protection of people who don’t belong to a particular workplace, but are able to disclose information regarding the wrongdoings of employers, were left out.

The protection is limited to such situations where, based on the available data, another person with average knowledge and experience would believe in the truthfulness of disclosed information. This, however, does not mean that the whistle-blower will not enjoy the protection if the information is proven to be untrue, e.g. if the information turns out to be wrong upon further investigation.

The aforementioned Recommendation of the Committee of Ministers of the Council of Europe of 2014 does not encourage anonymous reports, since this type of whistle-blowing is accompanied with many negative consequences (higher likelihood of malicious reports, difficulty in proving that the person toward whom damaging action was taken was in fact the anonymous whistle-blower, etc.). However, according to the Law on Protection of Whistle-blowers, even anonymous disclosure of information to the employer or an authorized body may obtain the status of whistle-blowing, in which case the employer or an authorized body cannot refuse to act on the information and shall not take action in order to find out the identity of the whistle-blower. Unlike the Romanian solution, where certain provisions regulating government

proceedings prohibit the consideration of anonymous complaints (Dimitriu, 2014, p. 589), Serbian law does not have similar restrictions.

### *2.3. Whistle-blowing systems*

In light of the principle of good faith, the employee should first disclose information of any wrongdoing to his superior or another responsible person or department at his workplace, and should resort to external whistle-blowing only if the former is not possible (Reufels and Molle, 2012, pp. 1575-1576). Internal whistle-blowing is mainly regulated by the sources of autonomous law, by establishing an employer's reaction procedure to whistle-blower reports, both in relation to the person whose conduct is related in the report, and in terms of informing the whistle-blower about the measures undertaken by the employer, in order to investigate allegations and eliminate any possible errors (Hauser, 2013, p. 59). Some authors, who advocate a restrictive definition of whistle-blowing and narrow interpretation of the scope of protection of whistle-blowers (e.g. Jubb, 1999, p. 83), feel that whistle-blowing is established only if the disclosed information leaves the walls of the organization to which the whistle-blower belongs.

Serbian Law distinguishes between internal, external and whistle-blowing to the public (Article 12). Internal whistle-blowing is defined as disclosing information to an employer, while external whistle-blowing is achieved by disclosing information to the responsible authority. The third type is whistle-blowing to the public, with no prior notification of the employer or responsible authority. A similar three-step model exists in the British Public Interest Disclosure Act (1998), and is affirmed in the contemporary doctrine (Vandekerckhove, 2010, p. 15), because the gradual approach in disclosure of information provides the appropriate protection of interests of the employer.

Unlike many other legal systems, the Serbian legislator does not specify which authorities have the right to receive whistle-blower information. A report can for example be made to the public prosecutor's office, the Ombudsman, the Anti-corruption Agency, inspections, etc. There is a need for a precise definition of a person or persons authorized to receive this type of information, because this form of centralization would strengthen the scope and importance of external whistle-blowing, and, consequently, provide greater protection of whistle-blowers. In any case, if the whistle-blower provides information to the unauthorized body, it will be obliged to forward it to the authorized body and to notify the whistle-blower. If the whistle-blower requested that his identity remains a secret, the unauthorized body shall be obliged to seek approval of the whistle-blower (Law on Protection of Whistle-blowers, Article 18, paragraph 6).

In comparative law, external whistle-blowing is generally considered justified if an internal system does not exist or is functioning incorrectly, or when the whistle-blower estimates that due to the seriousness of the offense the employer is prone to cover it up (Larmer, 1992, p. 127). The Serbian legislator failed to specify these circumstances

when regulating external whistle-blowing requirements, so the whistle-blower has the option to contact, from the outset and without special conditions, the employer or authorized state bodies.

The model of whistle-blowing to the public, especially unconditional, is uncommon in comparative law, due to the significant risk of causing irreparable harm to the employer and his reputation by disclosing (unverified) information (De Maria, 1997, p. 148). In contrast to the competent authorities, who, as a rule, have an impartial attitude towards the credibility of the information disclosed, the media tends to prefer sensational reporting, which often creates a negative image of the employer in the public (Sinzdak, 2008, p. 1657). However, it seems that the predominant view in the literature is to allow whistle-blowing to the public in case of immediate danger to the public good, such as public health or security (Dworkin and Callahan, 1992-1993, p. 397). In the Serbian Law, internal and external whistle-blowing are alternative mechanisms equally available to the whistle-blowers, while whistle-blowing to the public represents a subsidiary measure. The whistle-blower therefore needs to try and blow the whistle to his employer or to the authorized person before going to the public. This rule however isn't absolute: whistle-blowing to the public is allowed without previously attempting internal or external whistle-blowing 'in the event of imminent danger to life, public health, safety and the environment, the occurrence of large scale damages, or if there is an immediate danger of destruction of evidence' (Law on Protection of Whistle-blowers, Article 19, paragraph 1).

### **3. Key aspects of the protection of whistle-blowers in the legislation and case law of the Republic of Serbia**

#### ***3.1. Content and requirements for protection of whistle-blowers***

If damaging actions were taken towards the whistle-blower, he will be entitled to judicial protection and can claim damages. The Serbian Law defines damaging action as placing a whistle-blower at any disadvantage due to whistle-blowing. Not every negative performance appraisal of a whistle-blower shall be considered retaliation, but rather only the appraisal not based on objective criteria. Exercising managerial, normative and disciplinary prerogatives may morph into retaliation only if an employer exceeds the limits of normal and reasonable actions and enactments of rules which are inherent to (subordinated and dependent) work within the employment relationship, but only on condition that these actions and rules were motivated by reasons related to whistle-blowing. The same goes for an employer's right to terminate employment, since the guarantee of job security lies at the very heart of the protection of whistle-blowers. This is significant for employees because they make their living, exclusively or almost exclusively, by working for their employer, with the possibility to develop their personality through that work. The effects of dismissal are especially serious for civil servants, as the fact that their employment was terminated due to a major disciplinary offence, represents an impediment to their (re)employment in state authorities (Law on Civil Servants, Article 45, paragraph 1).

The probability that the whistle-blower suffered damaging consequences due to whistle-blowing will be sufficient to provide protection, while the burden to prove that the damaging action wasn't caused by the whistle-blowing is on the employer. Transferring the burden of proof is very much a modern proposition, common in many European countries. Of course, the whistle-blower must provide evidence to support his suspicion regarding the perceived violations and other illegal actions. The whistle-blower who was aware that the reported person is not the perpetrator will be liable for a crime of false reporting (Criminal Code, Article 334).

The motive for disclosure of information, i.e. that it was carried out in good faith or in the public interest, is not a whistle-blowing requirement, as in some legal systems or international conventions. However, in Serbia the requirement to act in good faith can be found in the Law on Protection of Trade Secrets (Article 11, paragraph 5) and the Law on Companies (Article 74, paragraph 3), which stipulate that the legal entity is obliged to provide protection to the person who, in violation of the duty of keeping secrets, acting diligently in good faith, provides information to the competent authority regarding an offense punishable by law. Also, for most laws that require the whistle-blowing to be carried out in good faith, that requirement represents a (rebuttable) presumption, and the burden of proof is on the person who claims otherwise (Alistar and Nastase, 2009, p. 233).

However, according to the Serbian Law, a whistle-blower shall be eligible for protection irrespective of his objective, unless he provided information he knew to be false, and unless he required some form of illegal benefit to blow the whistle. It is unclear in which situations the disclosure of information would be considered malicious, and whether this condition is tied to the motivation of the whistle-blowers, the objective truth of the information or the subjective idea of its accuracy (De Maria, 1997, p. 145). If the information that the whistle-blower provided is true and discloses a major illegality, it would be unjustified to withhold the protection from him, simply because he has e.g. personal animosity towards the person who is affected by this disclosure; ethically dubious motivation does not imply that the allegations are false (Thüsing and Forst, 2016, p. 21). In addition, it can be assumed that the denial of legal protection in such cases could deter some individuals from blowing the whistle, which would perhaps make whistle-blowing more reliable, but, of course, scarcer (Bowal, 2013, p. 98). Finally, since proving the objective of someone's actions is regularly troublesome (Lewis, 2010, p. 433), the Serbian legislator left this requirement out.

On the other hand, moral acceptability of whistle-blowing motives is particularly desirable in situations where disclosure was proved to be false. Although such a result, according to the Serbian solution, doesn't preclude legal protection of whistle-blowers from possible retaliation, the question of whistle-blower's motivation would not be unwarranted. Many authors suggest that whistle-blowers may have ulterior motives for making malicious allegations against the employer, especially if they are aware that the employer may dismiss them, even if it's for legitimate economic reasons (e.g. savings), or take any other damaging action towards them

(Gobert and Punch, 2000, pp. 30-33). Providing legal protection to the whistle-blower, even if he disclosed false information – makes such a scenario very likely. A hindrance to misusing whistle-blowing is the possibility to be held accountable for a crime of bringing the employer into disrepute (Serbian Criminal Code, Article 239), but because of the explicit grounds of justification provided in the Law, that allow the disclosed information to contain classified information, he will not be liable, as a rule, for any crime regarding disclosure of secrets (official, business, military or state).

Many legislations require the whistle-blowing to be done ‘in the public interest’. This is a choice between two whistle-blowing concepts: according to the first concept, the whistle-blower shall get protection even if the disclosed information takes the form of a complaint against the employer, for taking illegal action towards him, and according to the second concept, whistle-blowing is only carried out in the public interest (De Quenaudon, 2015, p. 8). Legal protection of whistle-blowers, who are at the same time victims of illegal action, doesn’t necessarily have to be excluded in this model (in Great Britain, personal complaints, e.g. due to alleged harassment or discrimination, can represent whistle-blowing if they were made mainly in the public interest). However, it is very likely that in practice there would be a distinction between the whistle-blowing carried out by an impartial observer and the whistle-blower who was directly damaged by illegal action, which is why Serbian Law does not discriminate between the two.

If a whistle-blower explicitly asks for material gains to disclose information, the Law on Protection of Whistle-blowers will interpret this as misuse. This condition has its objections. First, in some countries if a whistle-blower exposes illegal actions, he can receive a share of the recovery as his reward (the so called *qui tam* action) and this represents an important form of whistle-blowing. This is how personal material interest became an incentive for whistle-blowing instead of an obstacle. Although this form of reward is, due to its corruptive potential, considered ethically questionable by some (Bowden, 2013, p. 22), there is no doubt that this mechanism proved to be a powerful tool in the fight against various forms of fraud, which saved billions of dollars in the United States (Carson, Verdu and Wokutch, 2008, pp. 371, 373).

### **3.2. Legal instruments for protection of whistle-blowers**

The whistle-blower against whom damaging actions were taken, has the right to judicial protection, provided that he blew the whistle in the prescribed manner, within the prescribed time frame and with the belief that the information disclosed was true. Besides the whistle-blower, associated persons or persons who have been mistakenly identified as whistle-blowers (putative whistle-blowers) have active legitimation for filing a lawsuit, if damaging actions were taken against them. The same is true for the person who provided information in the exercise of official duty, as well as the person who sought out information in relation to the relevant information, if they are likely to have damaging actions taken against them for providing or seeking out such information.

By filing a lawsuit for whistle-blower protection the following may be requested: a) to establish that damaging actions were taken against the whistle-blower; b) to cease and desist with the damaging actions; c) to eliminate the effects of damaging actions; d) compensation for damages; d) publication of the ruling in mass media at the expense of the defendant (Law on Protection of Whistle-blowers, Article 26, paragraph 1). On the other hand, the filing of a lawsuit for whistle-blower protection cannot challenge the lawfulness of an employer's individual act on employee's rights, obligations and responsibilities deriving from the employment relationship. This, however, does not preclude the employee from making an allegation in a separate procedure (labour or administrative dispute).

In addition to judicial protection, whistle-blowers in Serbia enjoy the so-called preliminary protection. It is essential for the effective and timely exercise of the whistle-blowers' rights, because otherwise they could be exposed to retaliation over a long period of time. The court may impose a temporary measure before, during and after the completion of the court proceedings. In the first case, a whistle-blower may ask for postponement of legal effects of a particular act, the prohibition of exercise of damaging actions or the elimination of its consequences, and the court will determine the deadline in which the lawsuit has to be filed, as the full protection of rights can be exercised only via court proceedings. During the course of the proceedings, the court may order a temporary measure both at the proposal of the whistle-blower and *ex officio*. Any temporary measure that guarantees the pecuniary or non-pecuniary claims can be taken into consideration, including reinstatement of the whistle-blower. Finally, the proposal to introduce a temporary measure may also be filed after the completion of the court proceedings, until the ruling is enforced.

### 3.3. Case-law: Key findings

Since it's only been two years since the entry into force of the Law on Protection of Whistle-blowers, it is difficult to draw reliable conclusions on its effectiveness and suitability to Serbian needs. There are certain difficulties in the gathering of data relevant for assessing the effectiveness of the protection of whistle-blowers, although the courts have established a special register for lawsuits, temporary measures and legal remedies that are submitted in accordance with the Law. In the first six months of implementation of the Law, 36 court proceedings were initiated, and 27 whistle-blowers received protection (Martić, 2016, pp. 11-12). For the first time, that kind of protection was given to an employee in Velika Krsna elementary school, who was reinstated by the decision of the Higher Court in Belgrade (I-Ppr-uz no. 4/15 of October 22, 2015). Most of protected whistle-blowers were employees of the Ministry of Interior, while only one whistle-blower from the private sector was protected. After one year of implementation of the Law, as many as 178 cases were received, 63.5% of which were solved (Martić, 2016, p. 5). Thus, for example, in one case, the Court of Appeal in Novi Sad found that the Inspectorate of the City of Novi Sad carried out a damaging action (transfer to another job without objective reasons) towards the employee who

disclosed illegal actions in the communal inspection (Judgement no. Gž. Uz 6/17, of May 22, 2017).

The gathering of data related to the implementation of the Law on Protection of Whistle-blowers has been made difficult because state authorities do not keep records of external whistle-blowing. Also, the manner in which the records on internal whistle-blowing in both the private and the public sector are to be kept hasn't been established. The Law does not provide for the possibility of obtaining the whistle-blower status, but the person who discloses information gets the confirmation about having blown the whistle. Also, the Ministry of Justice doesn't have the center for collection of information related to protection of whistle-blowers. Analysis of publicly available information on whistle-blowers in state authorities as well as on supervision performed by the administrative and labour inspectors showed a slight increase in the number of procedures related to internal whistle-blowing in state authorities. Six months after the start of the implementation of the Law there was only one case of anonymous internal whistleblowing (in the Ministry of Trade, Tourism and Telecommunications), only to have that number increase to four cases one year after the start of the implementation, in the Ministry of Defense and the Ministry of Foreign Affairs (Martić, 2016, p. 6).

The same tendencies are present in external whistle-blowing procedures, as the number of cases grew from one (recorded in the Ministry of Mining and Energy) to fourteen: ten cases in the Ministry of Education, Science and Technology and four cases in the Ministry of Trade, Tourism and Telecommunications (Martić, 2016, pp. 6-7). This period was also marked by an increase in the number of inspections carried out in connection with the protection of whistle-blowers, although it's important to bear in mind that the relevant inspections are acting upon reported cases, whether by whistle-blowers or not (irrespective of whether these are external whistle-blowing cases or not). The intensification of inspections regarding the protection of whistle-blowers is extremely important, bearing in mind its significance on the protection of whistle-blowers during the course of the whistle-blowing procedure, when their position is the most delicate due to the risk of retaliation.

#### **4. Conclusion**

Although there were some delays in the development of legislation on protection of whistle-blowers in the Republic of Serbia, we can conclude that a slow but steady improvement has been achieved in creating conditions for effective exercise of freedom of expression of whistle-blowers. Especially with regards to the circle of protected persons, since today it includes not only the civil servants and other employees in special regimes of employment relationships, but the whistle-blowers in the private sector, as well as persons who suffer the consequences of their whistle-blowing. The protection is nominally guaranteed to all persons who are placed at a disadvantage because of the whistle-blowing, regardless of whether they are employees, job applicants, persons working under a contract of civil or commercial law, 'undeclared'

workers or employer's clients. Despite that, the actual subject matter of the Law is almost exclusively related to protection of employees, while the provisions that were to ensure the effective protection of people who don't belong to a particular workplace but are able to disclose information regarding the wrongdoings of employers were left out. This is partly mitigated by the fact that, so far, in the implementation of the Law on Protection of Whistle-blowers, the proceedings for protection of whistle-blowers were almost exclusively initiated due to the violation of the rights of civil servants and employees in public institutions. Still, we believe that *de lege ferenda* a proposition can be made to regulate the key aspects of protection of other categories of whistle-blowers, in order to take into account their specific position and eliminate the risk that a considerable number of persons who fall within the scope of application of protective legislation would be deprived of the opportunity to enjoy protection. There are other issues that deserve special attention of the legislator, but also judges, such as designing a reliable set of criteria for evaluation of (il)legal external whistle-blowing. This is because the Law on Protection of Whistle-blowers doesn't fully acknowledge the need to ensure a gradual approach in whistle-blowing, which is important for the protection of legitimate interests of employers, who also have to be taken care of, because, amongst other things, it will ensure the stability of employment of the whistle-blower (in terms of minimizing the risk of termination of employment due to the conflict of interest).

The mere existence of solid legal provisions cannot be enough to truly protect the whistle-blowers, and relevant material and formal rules need to be complied with. Without consistent implementation, they're not worth more than 'dead letters on a piece of paper', nor can they influence the public to stand up in defense of the public interest, nor the employers and relevant institutions to more carefully investigate allegations of wrongdoing. Especially since the Law protecting the whistle-blowers, in addition to protecting the freedom of expression, indirectly contributes to the effective implementation of statutes in almost all branches of law, by inciting the employers and the competent authorities to investigate allegations of unlawful acts and to detect, prevent and eliminate them (Fasterling and Lewis, 2014, p. 88). Only then can the protection of whistle-blowers benefit all interested parties, and society as a whole, especially if we take into account the seriousness and complexity of the problem of corruption and other illegal behavior that weighs heavily on the performance of state authorities, public institutions and business entities in the Republic of Serbia.

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