New EU Directive on the Protection of Wistleblowers in the Context of the Private Sector in BiH
In December 2019, a new European Union directive on the protection of whistleblowers entered into force. The purpose of this directive is to improve the implementation of EU rights and policies in specific areas of protection of whistleblowers, i.e. persons who report suspected corruption and other harmful actions for the financial and other interests of the EU in the public and private sector. Although the obligation to gradually harmonize existing laws and future legislation with the acquis adopted by the signing of the Stabilization and Association Agreement with the EU, an adequate legal framework for the protection of whistleblowers has not yet been established in BiH. The Federation of BiH has not yet adopted a special law on the protection of whistleblowers, while this framework at other administrative levels, although adopted, is only partially harmonized with the new EU directive.
1. About the document

This document was created within the implementation of the project Assistance to Citizens in the Fight against Corruption, implemented in Bosnia and Herzegovina by the Anti-Corruption Association Transparency International (TIBiH), Centers for Civil Initiatives (CCI) and Center for Media Development and Analysis (CRMA). The project is funded by USAID and aims to increase citizen participation in the fight against corruption. The document provides an overview of the regulatory framework for the protection of persons who report corruption in Bosnia and Herzegovina, compared to the regulatory framework in the European Union (EU), specifically the new EU Directive on the protection of whistleblowers. The special focus of the document refers to the obligations of the business and private sector in BiH in the context of the mentioned EU directive, and the domestic regulatory framework. In addition to the findings regarding the regulatory framework for whistleblower protection, suggestions were made for improvements to the domestic regulatory framework.

2. Introduction

About the Directive

In order to establish minimum standards for the protection of persons who report corruption and other forms of illegality and harmful activities (whistleblowers) in the interests of the EU, and throughout the EU, the EU adopted the Directive on the protection of persons reporting breaches of European Union law (Directive), in force from December 2019. The Directive stipulates the obligation to implement this act for all EU members by 2021. Prior to the adoption of the Directive, only ten EU members had adopted a comprehensive legal framework for the protection of persons reporting corruption, while in other members, the issue of protection was regulated only in some sectors, i.e. only for certain categories of persons. According to the document Benefits for the Protection of Persons Reporting Corruption in Public Procurement, which was prepared for the needs of the European Commission in 2017, it is estimated that in the EU alone in the field of public procurement between 5.8 and 9.6 billion euro is lost annually, due to the lack of adequate whistleblower protection. Given these, as well as many other alarming assessments, there is no doubt about the importance of establishing a comprehensive and functional whistleblower protection system throughout the EU, and consequently, in candidate and potential candidate countries.

Purpose and key content of the Directive (what should the private sector provide)?

There are two important issues regarding the purpose of the Directive:

1. The Directive crucially regulates whistleblower protection issues. The purpose of the Directive, therefore, is not to regulate the issues of the manner of handling applications, the manner of using the information from applications, etc. but, as has been said, to provide protection to whistleblowers. Thus, it was established that the purpose of the Directive is to improve the implementation of EU rights and policies in specific areas by establishing common minimum standards that provide a high level of protection to persons who report violations of EU law. Although the purpose of the Directive is formulated in this way, one cannot fail to notice the significant scope that the Directive has when it comes to establishing communication channels, i.e. the manner of submitting applications, i.e. whistleblowing.

2. The Directive defines the personal scope in such a way as to establish that the Directive applies to whistleblowers who are employed in the private or public sector and have acquired information on injuries in the work environment. Thus, the private sector, like the public sector, is covered by the obligations arising from the Directive.

Regarding the key content of the Directive, i.e. the obligations it imposes on the private sector, the following key contents can be singled out:

1. As can be deduced from the title of the Directive, protection should apply to reports related to illegali ties/irregularities related to EU law, i.e. tax fraud, money laundering, public procurement, safety regulations in the field of products and transport, protection of life environment, protection of public health, protection of consumer rights, protection of personal data, etc. However, the Directive calls on member states to extend domestic rules to illegalities/irregularities related to national rules.

2. The protection does not only apply to employees who express doubts, but to a wider range of persons, including former employees, job applicants, persons providing support to whistleblowers, journalists, but also members of management and supervisory bodies, persons working under supervision or instructions of contractors and subcontractors, legal entities owned by whistleblowers, etc. The Directive, therefore, seeks to define a wider range of persons enjoying protection in accordance with its provisions.

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1 Broadly defined, whistleblowers are persons who indicate actions in the public and private sector that cause or may cause damage to the public good, and which may be the result of corruption, fraud, abuse, unethical or irresponsible behavior and the like.
3 France, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Slovakia, Sweden and the United Kingdom
5 What is left to the member states to regulate independently.
6 Article 2 of the Directive - Purpose.
7 Although the obligations arising from the Directive seek to adapt to the size of business entities.
8 Article 2 of the Directive.
9 Article 4 of the Directive.
3. Whistleblowers are protected from being placed in any less favorable position that may be associated with whistleblowing. Among other things, whistleblowers must not be fired, demoted, disciplined, fired, deprived of the right to advancement, training, etc., then intimidated, harassed and isolated, and their reputation must not be harmed. In addition to these harmful consequences, the Directive also prohibits the early termination of a contract for the supply of goods or services or its annulment, revocation of a license or permit, or referral to psychiatric or medical examinations. It can be seen from the above that the harmful consequences for whistleblowers are also defined in areas that are outside the employment or academic relationship.

4. Whistleblowers independently choose whether to make the whistleblowing internally, within the subject/organization, or directly to the competent authorities (external report). However, if nothing happens after such reports, or if the whistleblower has reason to believe that it is in the public interest, the whistleblowers may present the information directly to the public (public disclosure). These provisions indicate the chosen, so-called, a step-by-step approach to reporting, i.e. communication, where the two channels of communication, internal and external reporting, are at the discretion of the whistleblower, while the third form, public disclosure, is somewhat more conditioned.

5. It is the responsibility of the private sector to establish channels and procedures for internal reporting and further action upon the reports. The obligation relates to the enabling of alert for both employees and other persons who, in accordance with the Directive, may submit reports or information. These provisions indicate a clear intention for smaller businesses not to commit to demanding formal and other obligations regarding the establishment of reporting procedures.

6. The conditions for the protection of whistleblowers set out in the Directive are that the whistleblower had reasonable grounds to believe that the information in the report was true at the time of the report, that the information fell within the scope of the Directive, and that the reports have been submitted in the manner or in the order prescribed by the Directive. These are very important, but also sensitive restrictions for whistleblowing, because they condition the protection of whistleblowers with the motives of whistleblowers, i.e. the belief in the truth of allegations, then the scope of EU acts, and finally by respecting the prescribed communication channels.

Although it does not address the specific obligations of the private sector, very important provisions of the Directive govern support measures for whistleblowers. These measures cover a wide range of support for whistleblowers, and relate to the public availability and free and relevant information regarding available legal procedures and means of protecting whistleblowers; concrete and effective assistance of the competent authorities before the bodies before which protection is exercised; and legal assistance and counseling in cross-border criminal and civil cases. Also, the same article of the Directive provides for financial support in court proceedings, as well as psychological assistance to whistleblowers, and provides for the establishment of a single information body or body to provide the envisaged support measures.

The continuation of this document provides a comparison of the domestic regulatory framework for alerting and protection of whistleblowers in the context of the purpose and key contents of the Directive, and from the point of view of private sector obligations. In addition to the above, an overview of the practice of establishing whistleblower protection mechanisms in the Republic of Srpska is given, as it is the only administrative level in BiH that has legally established obligations for the private sector regarding the protection of whistleblowers.

3. Regulatory framework in Bosnia and Herzegovina

In accordance with Article 70 of the Stabilization and Association Agreement with the EU, local authorities are obliged to establish cooperation with regard to the gradual harmonization of existing laws and future legislation with the acquis of EU and, i.e. to cooperate in strengthening institutions and the rule of law and in the fight against corruption. In this regard, and given the importance of whistleblowing for the fight against corruption, the establishment of a regulatory framework for the protection of whistleblowers is particularly important.

Bosnia and Herzegovina

The law on protection of persons reporting corruption in BiH institutions (“OG of BiH”, no. 100/13) regulates the status of whistleblowers in BiH institutions and legal entities establishing BiH institutions, the reporting procedure, obligations of institutions regarding reporting corruption, whistleblower protection procedure, and prescribes sanctions for violations of the provisions of the law. This law does not regulate the protection of whistleblowers in the private sector. A probable reason for this policy is, given the specificity of the constitutional and administrative division of the country, that issues of whistleblowing in the private sector will be regulated by special regulations at lower administrative levels.

Having in mind the state law does not regulate the protection of whistleblowers in the private sector, this document does not deal with the comparison of this law with the obligations of the private sector arising from the Directive.

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11 Articles 7, 10 and 15 of the Directive.
12 Articles 7 and 8 of the Directive.
13 This obligation applies only to business entities that have 50 or more employees, except for specific areas of application to which this restriction does not apply.
14 Article 6 of the Directive.
Republic of Srpska

The law on protection of persons reporting corruption the (“Official Gazette of the Republic of Srpska”, no. 63/17) regulates the protection of persons reporting corruption, the procedure for reporting corruption, the obligations of responsible persons and competent authorities regarding the reporting and protection of persons reporting corruption, and other issues of importance to those who report corruption. This law regulates protection for all natural and legal persons who, in good faith, report corruption in the public or private sector.

Regarding the purpose of this law, it can be stated that it is to some extent harmonized with the Directive because:

1. The key goal is the protection of whistleblowers, which can be concluded on the basis of the very title of the law, and on the basis of the scope and content of the norms of the law that regulate the issues of internal and external protection of whistleblowers.

2. It binds entities in the private sector, as well as those in the public sector.

Regarding the key contents of the law, this law is only partially harmonized with the Directive for the following reasons:

1. The Directive defines that illegality/irregularities related to EU law are the subject of whistleblowing, listing the areas of interest for the financial and other interests of the EU as possible subjects of report. Unlike the Directive, the law in the Republic of Srpska identifies corruption as a subject of whistleblowing, with corruption defined as any act or omission, abuse of official authority or official position for private purposes, in order to gain illegal property or any other benefit for oneself or another, undertaken by a responsible person or a person employed in the public or private sector. Such a definition greatly limits the protection of other important public interests, because, to a large extent, it reduces the whistleblowing to reporting, i.e. providing information that are mostly related to the elements of criminal offenses. The seriousness and complexity of these acts and the reporting itself can certainly be a deterrent to potential whistleblowers, and employers themselves are deprived of potential information about other irregularities and illegalities that occur, which, by such a narrow definition, are not covered.

2. Similar to the Directive, the law stipulates that whistleblowers are not only persons employed in organizations, but that they can also be other persons engaged in employment, i.e. persons who work outside employment, perform functions, volunteer or in any other way actually work for the employer. Although the intention is to expand the circle of potential whistleblowers, the fact is that the circle of whistleblowers is much narrower than the Directive.

3. With regard to the prescribed prohibitions, it can be said that this law defines harmful consequences for the whistleblowing. The law defines possible consequences for whistleblowers in the field of education, access to health care and pension and disability insurance, social protection services, services of republic administrative bodies, public procurement, etc. Regarding this definition of harmful consequences, there is uncertainty regarding the effectiveness of judicial protection. Namely, most of the harmful consequences defined by law are in the sphere of work of the administration, i.e. administrative procedures, and adopted administrative acts. In accordance with the defined competencies, the courts in the RS cannot, except after the end of an administrative dispute, influence the execution of administrative acts. For these reasons, it is not clear how courts can provide external protection provided by the Law on the Protection of Persons Reporting Corruption if the harmful consequences are committed by administrative acts. In addition to the impossibility of applying these norms in practice, such norms can be misleading for the whistleblowers themselves, giving them the impression that they can be protected in connection with these harmful consequences.

4. Like the Directive, the law stipulates that whistleblowing can be internal and external, where the external report is not in any way conditioned by the previously submitted internal report, and the whistleblower is free to choose between two methods of protected reporting. The law, however, does not provide for informing the public as a form of whistleblowing. This represents significant limitations when it comes to the protection of public interests, especially in the context of the perception of weak institutions and low acquis in BiH, where there is strong distrust of citizens, including potential whistleblowers, that internal or external reports will produce appropriate consequences.

5. Like the Directive, the law obliges private sector entities to provide conditions for safe alerting. The law sets out the obligations of responsible persons in the private sector to enable reports to be filed; to receive reports and act upon them; to ensure the protection of personal data and the anonymity of whistleblowers; to inform whistleblowers about actions taken, results, etc. In addition to the above, the law also determines the obligation of employers in the private sector who have 15 or more employees to regulate by a special act in more detail the issues of harassment, handling of reports and ensuring the protection of whistleblowers.

6. As one of the conditions for the protection of whistleblowers, the law prescribes that the whistleblowing must be performed in good faith. The law defines a report in good faith as a report that contains facts on the basis of which the whistleblower suspects that corruption has been attempted or committed, about which he/she has his/her own knowledge and which he/she considers true, with the obligation to refrain from abusing the report. Although such a requirement is seemingly

16 Article 12, paragraph 1, item 1 of the Law.
17 Article 12 of the Law.
18 Article 16 of the Law.
19 Article 21 of the Law.
20 Article 18 of the Law.
21 Article 8 of the Law.
similar to the requirement of the Directive, because good faith is defined as the whistleblower’s belief in the truth of the allegations in the report, it can be said that the requirement from the law is stricter, because the report should contain factual grounds on the basis of which corruption is suspected, which is not a requirement of the Directive. Also, and again similar to the Directive, the law prescribes the minimum content of the report, and the obligation to submit it in accordance with the prescribed channels of communication.

Unlike the Directive, the law defines a narrower range of support measures for whistleblowers. Thus, Article 22 of the law prescribes that in the procedure of external, i.e. court protection, the plaintiff (whistleblower) is exempted from paying the court fee. In addition to the mentioned measure, the law also determines the right to free legal aid to whistleblowers, which is provided by the Center for Free Legal Aid of the RS.

**Federation of BiH**

The legal framework for the protection of whistleblowers in the FBiH has not yet been adopted, but is in a draft form, from 2018. The analysis of the Draft Law on Protection of Reporters of Corruption in FBiH indicates great similarity with the law in RS, and the assessment of compliance of this law with the Directive is also similar, both in terms of the purpose of the law and in terms of key content.

In terms of purpose, the Draft Law, as the dominant, contains norms on the protection of whistleblowers (internal and external), without particularly substantive provisions on the handling of reports, information, etc. Likewise, the Draft Law stipulates that every person has the right, in good faith, to report any form of corruption in the public or private sector, of which he/she learns in any way.

In some key areas, the Draft Law differs somewhat from the law in the RS. The most significant differences are reflected in the following:

1. The Draft Law defines the harmful consequences for the whistleblower somewhat more narrowly in relation to the Directive and the law in the RS, limiting itself mainly to the harmful consequences from the sphere of labor relations.

2. Unlike the Directive and the law in RS, the Draft Law stipulates external reporting: a) by the duration of internal reporting procedure, b) whistleblower’s conviction of improper handling of internal report and 3) whistleblower’s conviction that a responsible or authorized person can be linked to corrupt practices. This is a problematic limitation of external reporting, especially having in mind the already mentioned perception of weak institutions and low level of acquis in BiH.

The Draft Law does not provide for special support measures for whistleblowers. Accordingly, it can be said that the regulatory framework for the protection of whistleblowers in the FBiH is only partially in line with the Directive.

**4. The practice of applying the Law on Protection of Persons Reporting Corruption of the Republic of Srpska**

Although the law obliges responsible persons and competent courts to submit reports to the RS Ministry of Justice every year on the number and outcome of received reports and procedures for the protection of whistleblowers which are managed and which have ended in the previous business year, it is very difficult to obtain data on law enforcement practices because it is not clear to what extent these entities adhere to these obligations at all. The RS Ministry of Justice, although an obligation prescribed by law, does not publish the appropriate aggregated data, i.e. reports, on its website.

Limited insight into private sector practice was conducted by surveying a number of private companies based in the RS. The results of the questionnaire indicate that the practice of providing conditions for safe whistleblowing, i.e. protection of whistleblowers, has hardly taken root in the practice of the private sector in RS. This is particularly worrying because the law came into force more than four years ago. According to the results of the questionnaire, the majority of surveyed companies, 37.5% of them, at the time of the survey were not familiar with the law at all, i.e. the obligations arising from the law. An even smaller percentage of 25% has adopted a special act that regulates the issues of dealing with reports on corruption and internal protection of whistleblowers, although this obligation is prescribed by the law. Also, the vast majority of surveyed companies, about 92% of them, which have not adopted a special act regulating the handling of reports on corruption and internal protection of whistleblowers, do not have prescribed procedures for whistleblowing in accordance with other policies such as codes of ethics or codes of conduct. Having in mind such rough findings, it is no wonder that there were no reports of corruption in any of the surveyed companies.

During the training on the implementation of the Law on Protection of Persons Reporting Corruption, which was organized in September 2021 within the project Assistance to Citizens in the Fight against Corruption and which was intended primarily for representatives of the private sector in RS, the representatives of this sector stressed that the obligations arising from the law are quite demanding for the capacities of companies, especially smaller ones, having in mind that smaller business entities have smaller administrative and other capacities. In this regard, the need for continued practical support to this sector in meeting the obligations arising from the law was emphasized.

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22 Article 15 of the Law.  
23 Except in case of loss of lawsuit.  
24 Article 3 of the Draft Law.  
26 Article 16 of the Law.  
27 All surveyed companies have the obligation to adopt this act, since they have over 15 employees.
Such weak findings regarding the practice of creating conditions for safe reporting and protection of whistleblowers clearly indicate a lack of will to create conditions for whistleblowing, and especially the encouragement of whistleblowing in the RS private sector.

5. Conclusions and recommendations

Regulatory framework in the Republic of Srpska and the Federation of Bosnia and Herzegovina

Given the above findings of the regulatory framework, i.e. the need to comply with the Directive, the following amendments to the regulatory framework are recommended:

Republic of Srpska

- Redefine protected whistleblowing, with the aim of covering the notion of protected reporting of all, in the public interest, dangerous and harmful actions, and not only corruption;
- Extend the circle of persons who can be whistleblowers to all persons who have knowledge of illegalities/irregularities, and to whom they came not only as employees, but also as contractors/subcontractors, externally engaged experts, auditors, members of management and supervisory bodies, shareholders and others;
- Define informing of the public (public disclosure) as the ultimate way of protected reporting, prescribing clear conditions when such reporting can be considered as protected reporting;
- Amend the notion of harmful consequences in law, with the aim of defining the widest possible circle of such prohibited acts against whistleblowers and other persons, but especially taking into account the possibilities of effective internal and external protection of whistleblowers and other persons.

Federation of Bosnia and Herzegovina

As the process related to the discussion and adoption of the Draft Law on the Protection of Persons Reporting Corruption in the FBiH has been blocked for a long time, it is necessary to start drafting a new draft, taking into account the content of the Directive.

Practice in Republic of Srpska

Given the poor practice of policy making and implementation in the private sector in the RS, and with the aim of further encouraging of this sector to establish and implement these policies, and adequate support, it is recommended:

- Establishment of an alerting support center at the RS Chamber of Commerce;
- Development and publication of manuals and practical guides related to the application of legal and other regulations;
- Design and implementation of special programs/projects to support the improvement of integrity in the private sector, with the special focus on the adoption and implementation of management systems (e.g. ISO 37001: 2016; ISO 31000: 2018, etc.)

28 The European Commission’s 2020 Progress Report on BiH also points to the need to align whistleblower protection regulations with the EU acquis at all administrative levels in BiH.
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