Whistleblowing in Central Europe

Introduction

The first person to notice the threat of misconduct, mismanagement and corruption within a public or private organization will usually be someone who works in or closely with the organization. While employees are the people best placed to raise any concerns they are also the ones who have the most to lose by disclosing sensitive information. Consequently, it is vital for effective risk management that employees are confident that they can raise their concerns with their employer without suffering any detriment. Lacking this confidence might incline employees to stay silent when there is any threat. This denies organizations a fail-safe opportunity to deal with a serious problem before it causes real damage. The cost of such a missed opportunity can be huge – fines, compensation, higher insurance premiums, damaged reputation, regulatory investigation, lost jobs, and even lost lives, mistrust in public institutions.

Whistleblowing is “an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity”. [1] Whistleblowing is widely recognized as a means in the fight against corruption, and countries around the world are developing legal regimes that encourage good faith reporting on malpractices and protect whistleblowers from retribution. International treaties – like the United Nations and Council of Europe conventions on corruption – include expressed requirements to assure such laws at the national level.

There is reason to believe that people are more likely to take action with respect to unacceptable behavior if there are channels that offer near absolute confidentiality, protection from maltreatment and legal aid to disclose information on malpractices that threatens the public interest. [2] It is likely that many people do not even consider blowing the whistle, not only because of fear of retaliation, but also because of fear of losing their relationships at work and outside work. These persons take serious risks when they speak out against their employer, colleagues, business partner as they encounter with revenge. In order to inspire people to reveal their knowledge on maladministration, more and more countries adopt free standing legislations.

Our study intends to present the legislations and the practices of whistleblowers in the Central European region. The present paper is built on country reports from Bosnia and Herzegovina, Croatia, Hungary, Moldova, Poland, Serbia and Slovenia. Some of the countries under the scope of our survey are deeply affected by corruption: Bosnia and Herzegovina is ranked 99th on the Transparency International’s Corruption Perception Index 2009. Moldova is ranked 89th, Serbia 83rd, Croatia 66th, Poland 49th, and Hungary placed 46th. The sole exception is Slovenia which is ranked 26th on the list. [3] We are deeply convinced that well constructed whistleblower legislation would serve effectively the battle against corruption. Obviously, comprehensive whistleblowing legislation is rarely known in the region, thus we tried to identify legal means and concepts that can serve as a replacement to whistleblower procedures and protection. The national experts from the countries under the scope of the examination prepared their reports by incorporating the results of a questionnaire with
detailed explanation. The questionnaire focused on the legal and socio-cultural aspect of whistleblowing. The experts were asked to analyze the following: 1. how labor law protects an employee if he/she raises publicly his/her concerns on his/her employer’s activity; 2. does criminal law pursue retaliation or, contrary, does criminal sanctions threaten whistleblowers when they release sensitive information; 3. how does prevailing notion of public interest, freedom of information regimes and international public and private law influence the legal situation of whistleblowers in the region; 4. how do sectoral laws like anti corruption acts or civil servant acts help good faith reporting; 5. what do the socio-cultural dimension of whistleblowing look like.

The aim of the present study is to identify common deficiencies of the regional legislation, to find the most important barriers which hinder public interest disclosures, and to contribute to a more effective whistleblower protection by highlighting good practices in each country. The authors strongly hope that the drafting process of freestanding whistleblower legislation will be on the agenda of national parliaments, and that the NGOs participating in this study will receive the opportunity to contribute to future lawmaking.

This study consists of two major parts. Part ‘A’ focuses on all the legal aspects of whistleblowing in the CEE region. In Chapter I. of part A, we have analyzed the International requirements, the national efforts and deficiencies in fulfilling these requirements. Chapter II. gives an overview on how whistleblower laws are constructed. Chapter III. deals with the link between whistleblowing and anti-corruption policies. Since whistleblowing is always a public interest disclosure, the question of public interest as a subsidiary concept to whistleblowing has received great interest. Chapter V. summarizes all those separate regulations whistleblowers might rely on when there is no special whistleblowing regulation. Chapter VII. deals with acts on classified information or secret acts in the region. Chapter VIII. reflects on the importance of Codes of Conduct and the effects of the Sarbanes and Oxley Act. Chapter IX. focuses on the importance of data protection in connection with whistleblowing. Chapter X. is an overview of other key issues (time limits, rewards, compensation, burden of proof) relevant for whistleblowing. As a point of rescue for whistleblowers without real protection we analyzed the opportunities of media in disclosing information of public interest.

Part ‘B’ of this study gives an overall view of the socio-cultural aspects of whistleblowing in the CEE region.

A. Legal aspects of the whistleblowing in the CEE region

I. International requirements and national efforts, deficiencies

There are a number of international treaties that emphasize the importance of whistleblowing and encourage or oblige countries to protect disclosures made in the interest of the public good. From the point of view of our survey, two conventions in the field of anti-corruption are important.

Article 33 of the UN Convention against Corruption defines that “each party shall consider incorporating into its domestic legal system appropriate measures to provide protection against unjustified treatment for any persons, who report in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.” According to Article 9 of Council of Europe’s Civil Law Convention on Corruption each state party “shall provide in its internal law for appropriate protection against unjustified sanction for employees, who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons and
authorities.” It is not necessary to adopt a unique act on whistleblowing in order to meet the requirements of the international law; however, these treaties might have inspired the legislation or – at least – contributed to a discussion on the legal situation of whistleblowers. The Conventions do not prescribe any methods of how to solve the obligations; they simply determinate the goal to achieve. Ideally, there should be a single, comprehensive legal framework for whistleblower protection. The United Kingdom, New Zealand and South Africa have the most developed laws that are truly extensive[4]. In contrast to those examples, our survey found that whistleblowing legislation in the covered region at this point is still far from the idea: the majority of whistleblowing legislations are disunited, disconnected and lack instruments of effective enforcement.

Clearly, the means of international law are not satisfactory to force the signatories to implement the desirable level of protection or protection at all. The UN Convention contains a recommendation, in contrast to that, the CoE Convention obligates the signatories. Notwithstanding, the CoE uses only means of “soft law” to influence the national legislation. Under Article 14 of the Convention, “the Group of States against Corruption (GRECO) shall monitor the implementation of this Convention”. The monitoring is practically realized in compliance reports, which are useful to help the national governments to identify the deficiencies, but this can only be used to express political pressure, but not as a proper legal enforcement. Consequently, when the international requirement to adopt such laws does not meet the political will of the national decision makers, the outcome of the implementation is a weak law (Hungary), failed attempt to adopt new law (Moldova), political manipulation (Serbia) or negligence (Poland, Bosnia and Herzegovina, Croatia). As the sole exception, the Slovenian Parliament accepted on 26th May 2010 Integrity and Prevention of Corruption Act, which set rules on reporting corruption and unethical or illegal activity and the protection of whistleblowers.[5]

Even though, we can conclude that due to international treaties and the pressure expressed by NGOs, some countries moved towards a better regulation, however, the overall picture shows that no well-functioning comprehensive legislation exists in the countries covered by this study. For instance, the freshly adopted Hungarian system lacks effective institutional background since the setting-up of the planned institute (Public Interest Protection Office) failed, an office which would have been responsible to handle the procedures deriving from the good faith reports of wrongdoings. The most important factor of this failure was the veto of the President of the Republic, but the establishment received criticism from the ombudsman for civil rights and NGOs as well. In Serbia and Moldova, the proposed laws were tailed away in front of the Parliament, while the government of Croatia modified only some sectoral laws. Even though the Polish Ministry of Labor and Social Policy pledged to consider introducing a stronger protection after OECD Working Group on Bribery expressed its concerns on the deficiencies of the protection, the government repeated its standpoint that existing laws provide sufficient protection against reprisals. Consequently, it is unlikely that Polish lawmakers will adopt proper, free standing whistleblower legislation in the near future. The striking impassivity of the Bosnian lawmaker served as an extreme proof that even the condemnation published in the GRECO report makes no difference.

II. How whistleblower laws are constructed?

Comprehensive whistleblowing laws generally have broad definitions of wrongdoings, covering typically maladministration, criminal acts, danger to health or safety and abuses of power. Free standing whistleblower act has been adopted only in Slovenia. The law adopted
in Slovenia and all other attempts to adopt similar laws show us how lawmakers understand the scope of whistleblowing in the region. The failed Moldavian proposal included assumed violation of law, corruption infringements, economic and fiscal crimes, violation of deontological norms, other violations committed in either private or public sector which constitutes a threat for health and security. The recently modified Serbian Act on Freedom of Information affords the disclosure of data which are under the free access regime. The disclosure and the protection is privilege of public servants, ordinary citizens are not covered in the act. The Hungarian act offers protection for public or private sector employees who report breaches of fair procedure occurring while spending public money, administrative actions, public procurement, measures concerning the utilization and alienation of state property. Reports might be submitted to the employer, the supervisory body or oversight institution of the employer, a specialized anti-corruption office assigned in a different act (an institution which in the end has not been established), or “the organization assigned by the employer in the organizational regulations concerning the whistleblowing procedure”. [6] The Slovenian Integrity and Prevention of Corruption Commission deals with the reports of corruption both in the public and private sector. Besides this, officials with reasonable suspicion of an illegal or unethical conduct, or when any form of psychological or physical violence is exerted upon him/her may report this to his/her superior. The scope of the Act is broad enough to secure the status of whistleblowing as an effective means in the fight against corruption, nevertheless, it is too early to rate the new legislation. In Moldova, the whistleblower status would have been recognized if a person submitted a good faith report and received a confirmation certificate of whistleblower status issued by the protection body. Constitutive act of the public authority is the condition of the protection: the protection is guaranteed following the administrative decision. In contrast, by declarative act, the authority simply determines whether the person enjoys safeguards against retaliation, but the protection is granted and rights deriving from the protection are enforceable even if the authority fails to issue an administrative decision. Clearly, the latter solution is favorable, and that is how the Hungarian act is constructed: the whistleblower is protected by the very existence of the legal protection adopted by the Parliament. According to the freshly adopted Slovenian act, acting in good faith is the most important factor when the Corruption Prevention Commission decides – jointly with the Commission of Witness Protection – whether the protection of the whistleblower shall be granted or not. The Commission takes into account primarily the nature and the gravity of the reported activity, the threatened or caused damage, any breach by the reporting person of the duty to protect certain data or the status of the person to which the case has been disclosed. Clearly, this provides flexibility in the assessment, and the relevant practice will show how effective this solution is. In some states with comprehensive legislation, disclosures must be made within the organization. In others, legislation prefers external channels such as special authorities, anticorruption office, etc. According to the Moldavian attempt, the disclosure shall be submitted to the Centre for Combating Economic Crimes and Corruption, which fulfills the role of a protection and investigative body. This is a stricto sensu external disclosure procedure. In Hungary, the report can be submitted to the employer, the supervisory body or oversight institutions of the employer, an office assigned in a different act (in theory: the non-existent Public Interest Protection Office), or the organization assigned by the employer in the organizational regulations concerning the whistleblowing procedure. Slovenian regulation distinguishes between the reporting of corruption and the reporting of unethical or illegal activity. The former report can be submitted to the Commission or other external competent bodies while the latter report shall be made to the superior or a duly appointed person within the organization, and the Commission only plays a complementary role in this case.
III. Whistleblowing and anti-corruption

Since whistleblowing is also one of the instruments in the fight against corruption, it is of utmost importance to examine the existing forms of anticorruption regulations as well as the effects of the legal environment on the struggle against corruption. Having a specific anti-corruption law is not a must in fighting corruption; however, it might be an indicator for a coherent and long-term anti-corruption policy. Although several countries have a special anti-corruption regulation, it is often either completely inappropriate for the effective fight against corruption, or the state misses to implement other regulations or provide funding needed to make the measures work. Slovenia has adopted the Prevention of Corruption Act in 2003, which is one of the best anti-corruption acts according to the country study written by Integriteta – Association for Ethics in Public Service. However, NGOs also claim that the Commission established in that act has been the main target of the Parliament ever since, as the Parliament has been trying to abolish it several times to stop the Law from being successfully exercised and implemented. At the same time, the Commission for the Prevention of Corruption and the Ministry of Public Administration of the Republic of Slovenia prepared the Integrity and Prevention of Corruption Act, which might also bring new regulations regarding whistleblowing protection as mentioned before. The law was adopted on 26th May 2010. Bosnia and Herzegovina doesn’t have a specific anti-corruption law, but the country has a reasonable legal framework for fighting corruption. The regulations can be found e.g. in the Criminal Code, the Law on Criminal Procedure, the Law on Conflict of Interest, the Public Procurement Law and the Freedom of Information Law. Despite the firm legal basis, however, „Bosnia and Herzegovina faces major implementation challenges which may reflect a lack of political will to effectively tackle corruption‖. Concerning the current state of the legislation in force, Croatia, Serbia, Moldova, Hungary and Poland have no specific, free standing anti-corruption acts. The Government of the Republic of Croatia adopted the National Anti-corruption Program 2006-2008 and an Anti-corruption Strategy. Anti-corruption lawmaking in Moldova also concluded in the National Strategy for Preventing Corruption. Hungary had set up several anti-corruption boards in the last decade as well.

Chapter II of the United Nations Convention against Corruption includes model preventive policies such as the establishment of anti-corruption bodies. These anti-corruption bodies should be responsible for the implementation of anti-corruption policies and the dissemination of knowledge; furthermore, they must be independent, well-resourced and equipped with a properly trained staff.

With the exception of Bosnia and Herzegovina and Hungary, all countries have specific anti-corruption institutions. In Croatia, the Office for Suppression of Corruption and Organized Crime (USKOK) is the main anti-corruption body. Besides, there is also the National Council which monitors the implementation of the National program for the suppression of corruption. In Slovenia, we can find the above mentioned Commission for the Prevention of Corruption, but this institution has no real investigative power. In Serbia, the Anti-Corruption Agency is a relatively new organization, although its investigative powers are rather limited. The Moldavian Center for Combating Economic Crimes and Corruption is subordinated to the President of the country with all the possible drawbacks of such subordination. Poland has two institutions designed specifically to tackle the problem of corruption, i.e. the Central
Anticorruption Bureau and the Governmental Plenipotentiary for the Development of the Program for Preventing of Irregularities in Public Institutions. The Central Anticorruption Bureau has been subordinated to the Prime Minister, who has the authority to appoint and dismiss the Chief of the CAB, so its independence is questionable. The fate of some of the anticorruption bodies or organizations often set up in the different countries with great fanfare can be foretold already at the time of their birth: carrying out – without real judicial competence – only quasi activities, they become either a temporary communications channel of the government or get degenerated to being simply one of the instruments in the struggle between the political forces, which the ones in power use to discredit their political enemies. The country reports clearly show that the anticorruption bodies set up during the last period are unable to make a real breakthrough in the fight against corruption.

IV. Public interest – a subsidiary concept to whistleblowing

In absence of comprehensive laws, whistleblowers have to use other legal means when disclosing wrongdoings. The person blowing the whistle is usually not directly, personally affected by the danger or illegality. Consequently, the whistleblower rarely has a personal interest in the outcome of any investigation into their concerns: the whistleblower acts in the interest of the public. Every whistleblowing is a public interest disclosure, but not all public interest disclosure is regarded as whistleblowing. Traditionally, whistleblowing is an act of someone who believes that public interest overrides the interest of the organization he/she serves and reports that the organization is involved in corrupt, illegal, fraudulent or harmful activity.[7] However, there are other ways to make information related to socially harmful phenomena public. These specific rules might replace or function complementary to the whistleblowing procedure. Topic-specific public interest announcements and public interest litigation assume the existence and usage of the public interest concept. According to Bell, the public interest is “used to describe where the net interest of particular individuals may not be advanced, but where something necessary to the cohesion or development of the community is secured”. [8] The contemporary constructs of the public interest should at any time serve as a counterbalance to the power of the dominant interest groups of the society, yet also mesh with the prevailing view of the state and the social and economic apparatus and traditions. Well constructed public interest scheme can be a strong means of the opposition to develop and voice public interest claims contrary to dominant interest groups and values – polluters vs. environmentalists, multinational companies vs. consumer protection NGOs, etc. Generally speaking, the peculiarity of such schemes – in contrast to whistleblowing procedures – is that they provide means to fight against wrongdoings for people outside the organization. These public interest disclosures – or announcements – are typically made to a public agency of the government, and are investigated in an administrative process, but the concept may appear in the judicial practice. In Poland, for instance, the “public interest” seems to be frequently referred to in defamation claims. A well founded public interest can be a valid defense against charges – in civil and in criminal procedure alike. From the point of view of whistleblowing, the question arises whether an employee defamed the employer, and consequently, was the dismissal legitimate. Revealing negative information about someone’s inappropriate behavior undertaken in their professional life, may destroy their good reputation. Defamation liability is based on the presumption that a conduct undermining a person’s reputation was illegal. It is the employee’s role to prove that his/her conduct was legitimate. If the employee shows before the employment court that she/he acted for the sake of the public interest and within the framework of the legal order when revealing information undermining good reputation,
he/she will win the case. It is irrelevant whether the trespasser was acting in good faith or not. However, the Supreme Court has ruled lately that in the case of critical press publications, it is sufficient for a journalist to prove that he/she was acting for the sake of the public interest and with the due diligence while gathering the materials and verifying the facts for publication. Although such an interpretation is favorable for whistleblowers, this is not the kind of protection that is considered satisfactory. A right to report wrongdoings to competent authorities is generally prevalent, but this does not mean that the person who disclosed the information has strong means to influence the legal process if that is launched. Nevertheless, actio popularis, an action to obtain remedy by a person or a group in the name of collective interest, is considered as an effective judicial tool. For instance, in Serbia in the field of consumer protection, specialized associations of consumers can lodge action for protection of consumer rights. The Bosnian Freedom of Information Act provides a legal framework for public interest test. It says that the public authority shall disclose information which would be otherwise exempted form transparency, if public interest – e.g. miscarriage of justice, abuse of authority, neglect in performance, etc. – exists. Similarly in Croatia, the public interest test is used in the Secrecy Act: the classifier has to balance the proportionality between the right for access to information and of the values that can serve as a reason to classify public information as secret by using the public interest test. The possibility to override secrecy – and the sanctions that are attached to the breach of secrecy obligations – might serve as an incentive to disclose information even if it is classified, but avoiding criminal prosecution or other legal procedure when the public interest overrides the interest of secrecy, is not equivalent to whistleblower protection. The well established public interest scheme – let it be a special reporting channel or actio popularis – has foundations established within the core values of liberal democracy. Using this concept is an attempt to make democratic values trumps, and to avoid the otherwise inevitable dominance of the economically powerful, which may readily override presently vulnerable democratic promises and expectations of equality of citizenship. Some scholars argue that this theory generally carries no cleared and shared meaning and can lead to confusion, and if there is an alternative, clearer and less contentious concept available, then the public interest should not be utilized.[9] As a conclusion to our survey, we can state that the public interest procedures are not able to replace the missing comprehensive whistleblower law.

V. Separate regulations

The most important way of ensuring disclosure is the protection of people willing to blow the whistle. One of the possible reasons for not blowing the whistle is the fear of retaliations, mostly the fear of being fired or forced to resign. An effective protection is the main incentive to disclose information on wrongdoing. Every country’s legal system knows some other form of protection which may serve as an incentive – even though the freestanding whistleblowing legislation is missing. The channels of disclosure of information of public interest and the possible ways of protection remain on the level of sporadic chapters of different laws. In most countries, typically labour laws, civil servant acts and the witness-protection acts stipulate the cases where employees or witnesses of crimes might receive protection by the law. The channels of disclosure are supposed to be first internal, and only in serious cases (crimes) external. In Bosnia and Herzegovina for instance, according to the Law on Companies of Republika Srpska[10], “a company shall fully protect persons who, acting conscientiously, in good faith, indicate the existence of corruption to competent authorities.” Basic rights and duties of the employers and employees are secured in labor laws, which
might serve to protect the employee who discloses information on the harmful activities of his/her boss. On one hand, labor codes fix the general requirement to cooperate in good faith and fairness, respect the rightful interest or the right to refuse compliance with a harmful instruction. On the other hand, due to the general characteristics of these principles, we cannot interpret them as free standing whistleblowing rules. Firstly, the remedies offered are always ex post protection – indemnification or reinstatement –, consequently, they don’t serve as an effective incentive which protects the employee’s status and offers anonymity. Secondly, these laws lack the established procedure that promotes internal disclosure. Nevertheless, some legal means might be considered as useful. In Croatia, for instance, a dismissal is not justifiable when the employee addresses a report in good faith to the competent authority with justified suspicion of corruption. Meanwhile, the Polish report emphasizes that whistleblowers who renders work based on contracts governed by Civil Code are actually deprived of any protection. Labor Code governing employment agreements offers better but far from satisfactory protection.

Generally, citizens are obliged to report to authorities some extreme acts contrary to social norms. Penal Codes sanction the violation of the obligation of reporting at some extent. In Slovenia, anyone who fails to inform the competent authority of the identity of a perpetrator of a crime for which sentence of 30 years is prescribed, shall be sentenced for not more then 3 years. Public office holders who fail to report a yet undisclosed bribery are to be punished in Hungary. Heads of public institutions in Poland are liable if they fail to report any crime. (In the case of other citizens, the default of this duty is not followed by sanctions.) The perpetrator of certain kinds of bribery shall be exonerated from punishment if he/she confesses the act to the authorities first hand and reveals the circumstances of the criminal act. These rules are basically repressive in character, and this distinguishes them from whistleblowing. Whistleblower laws are of protective character and focus on defending the whistleblower from retaliation.

Witnesses and other participants in the penal process are to be protected from serious threats. Witness protection focuses mainly on most serious crimes, whereas the basic scope of the whistleblowing are less severe wrongdoings. Protecting witnesses or whistleblowers might overlap, as both offers confidentiality and protection of identity. In this sense, the two is similar, but the basic idea behind whistleblowing is not to protect the people who disclose information on the most serious crimes, but less severe harmful acts. Additionally, while witness protection is offered against threats against life or physical integrity, whistleblower laws protect the professional status of the person.

The special legal status of public officers distinguishes them from ordinary citizens. In some countries, the right and the duty to report is accompanied with protective measures. Policemen in Hungary have to file their complaints to their superior or even externally, to the minister who oversees the police. There are explicit rules protecting policemen against retaliation. In Croatia, the civil servants have the duty to report any wrongdoing discovered by the servant in connection with her/his duties. On the other hand, Croatian civil servants are effectively protected by law when they blow the whistle: they cannot be released and are protected against any kind of abuse. The Slovenian Law stipulates that Civil servants shall not be held liable for damages and not held disciplinary responsible if they committed a disciplinary violation, or caused damages by carrying out written directions or instructions of their superiors, or by carrying out oral directions in case the superiors failed to issue written directions or instructions despite a written request. The right of refusal of specific commands that result in breaking the law is a chance to
evade corruption or taking part in corrupt actions as an employee or civil servant. This differs from whistleblowing, however, it has the similar philosophy: one must have the possibility to maintain his or her personal integrity even if there is an official command or informal pressure to take part in wrongdoings. Almost every country taking part in our research has a regulation concerning this problem. Relevant provisions might be found in the civil servants act, but may also be a part of the labour law. In Bosnia and Herzegovina, a civil servant may commit a disciplinary violation in case he/she refuses to execute legal orders of the directly superior person, meaning a civil servant must not execute illegal orders of the superior. Furthermore, civil servants also have the obligation to indicate to the issuer of an order that the requested task is illegal. If the superior still insists on executing this order, the civil servant shall require a written confirmation stating the identity of the issuer of the order and precise contents of the order. Once the civil servant receives such a confirmation, he/she must execute the order, but is obliged to inform the direct superior of the issuer of the order. At the same time he/she does not have the obligation of executing the given order if the execution of that order would represent a criminal offence. If the order to execute a certain action remains, and the civil servant deems the execution of the order to be a criminal offence, the civil servant must report the criminal offence to the competent prosecutor’s office. Almost every country has similar provisions. The Hungarian Civil Servant Act also contains similar rules to the Labour Code on following instructions and refusing to comply with illegal instructions. There is a major difference at this part: the employee “shall refuse compliance with an instruction if it would result in direct and grave risk to the life, physical integrity or health of others”, whereas the public official “may also refuse” compliance in these cases if the instruction is contrary to the law. The right to refuse illegal orders does not always mean that an employee is really protected if refusing a command by its superior. The Moldavian and Serbian country studies point out that the protection guaranteed is not always sufficient. As the Serbian country report highlights: “Civil servants cannot be legally punished because of rejecting or reporting of wrongdoing of superiors. However, there is no protection if such a civil servant suffers damage somehow, on the basis of other legal ground”. We can find an interesting example in the Polish country study: “Janusz R. – a former employee of a state university. He worked in the economic department and was responsible for supplies made to all faculties within the university. He refused to follow an instruction made by his boss that all purchases should be made with one particular supplier. The refusal was based on the fact that the offer was one of the least competitive at that time. He raised his concerns internally and as a result the internal audit was carried out. Though, no financial losses were established and the case was closed, Janusz R. was transferred to a lower position within the archive department. He perceived the transfer as a reprisal which in his opinion was also meant to cut him off from the documents and information. Believing that behind the irregularities there was also an offense of corruption, he reported the case to the prosecutor’s office. Soon after, he was dismissed based on the grounds of provocative and conflicting behaviors. Although the investigation confirmed the university might have incurred financial loss, the investigation was eventually closed as the total amount of the damage did not suffice to constitute an offence. Janusz R. was not entitled to appeal from the prosecutor’s decision due to the fact that he was denied a formal status of a victim”. These excerptions may demonstrate that the ordinary protection of employees alone cannot substitute real whistleblower protection. Statistics quoted in some of the studies also show that the fear of retaliation restrains employees from reporting malpractices. Another conflict may arise in professions where employees can be threatened from both sides, not only by their superiors for not fulfilling tasks, but also by the penal code, which stipulates that not reporting
possible crimes is itself a criminal offence. As a conclusion, we can emphasize that these sectoral laws adopted whistleblower protection in a piecemeal fashion, which are found in a number of different statutes and typically cover certain type of people or information. The main disadvantage is that they are fragmented, do not cover many types of wrongdoings, and their emergence is hampered, because they are not well-known outside their own sectors. Protection and disclosing channels offered by sectoral laws come only after struggling with authorities and after a long time, which makes reporting and disclosing information even more risky.

VI. Acts on classified information or secret acts

Acts on classified information are significant barriers to anti-corruption efforts, because they give very powerful rights to data processors – and potential perpetrators of wrongdoings in the public sector – to hide information. Generally, penal sanctions are to be received if someone discloses classified information without proper authorization. The criminality of such acts deters people to speak out, even if he or she is aware of serious wrongdoings. A piece of information may be defined as classified if its disclosure to unauthorized persons would hurt or endanger the security or the independence of a country or cause serious economic and political losses. Proportionality between the right for access to information and protection of values guarded by the classification is a difficult question, and potential whistleblowers are not in the situation to influence the balancing process. So called public interest tests exist in several countries, which should be useful for whistleblowers to estimate the potential harm caused when they decide whether to blow the whistle or to stay silent, and also to avoid sanctions. Regrettably, these mechanisms do not work effectively. In Bosnia and Herzegovina, the assessment is obligatory whether the interest of the public to know certain information is more important than the interest of not disclosing the information with the aim of protecting specific values. If the authority determines certain information may be considered an exemption from freedom of information, but the public interest is more important, information should be made accessible to the public rather than protecting certain values in society, and the public authority shall make the requested information public. When the data processor denies the request, an administrative decision should be issued explaining in details why the specific information shall not be made public. This administrative decision can be appealed to, but the administrative procedure is complicated and ordinary citizens are not able to use available legal remedies. The Serbian law forbids classifying information as a secret in order to cover criminal offence, abuse of power or another illegal act or acting of the public authority. The problem is the lack of a prescribed mechanism to remove the classification of such data. The law provides the possibility to abolish the classification when public interest overrides the interest of secrecy, but this right to balance between two equally important goals is reserved for top state officials, consequently, low-ranking whistleblowers are not capable to release this kind of information.

Under the Slovenian freedom of information act, the information shall be disclosed if public interest prevails over public interest or interest of persons not to disclose the requested information, except in case of classified data of the two highest level of secrecy. Even though a public interest test exists, the most sensitive pieces of information are excluded. On 1st April 2010 entered into force the Hungarian act CLV of 2009 on protection of classified information which regulates the access, management, protection of classified information. A formal classification procedure is set up by the act in which the possible damage to protected public interests caused by unauthorized access or disclosure are assessed. According to the potential level of the damage caused by the transparency, information is
classified at different levels which may be regularly reviewed by the source of the information. The bill of the classification act foresaw a list of illegal classification for information where classification served the concealment of violation of law, administrative error, lack of efficiency or avoiding competition or embarrassment of a person or institution. Information classified contrary to this provision may not have had the classified quality, therefore disclosure of that would not have constituted a criminal offence. The same provision also provided for a public interest test where public interest in withholding and disclosing classified information would have been balanced. Unfortunately, neither the list of illegal classification, nor the public interest test was adopted in the final text of the law.

VII. Codes of Conduct and Sarbanes and Oxley Act

So called “soft law” is a possible way to implement some kind of whistleblowing protection. The term refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat “weaker” than the binding force of traditional law, often contrasted with soft law by being referred to as “hard law”. Traditionally, the term “soft law” is associated with international law, although more recently it has been transferred to other branches of domestic law as well. Soft law instruments are usually considered as non-binding declarations that lack effective enforcement mechanism, but which nevertheless hold much potential for morphing into “hard law” in the future. This “hardening” of soft law may happen when declarations, recommendations are the first step towards a law-making process, in which reference will be made to the principles already stated in the soft law instruments. Codes of conducts are such soft law instruments. A Code of Conduct is a collection of rules and policy statements intended to assist employees and directors in making decisions about their conduct in relation to the institution’s affairs. Each employee must manage his or her professional and personal affairs so as to avoid situations that might lead to a conflict or even suspicion of a conflict between self-interest and duty to the institution. However, no set of rules or policy statements will anticipate every situation with which one may be confronted. Codes of conduct are quite prevalent in the public sector. Characteristically, general codes of conduct modulate the daily activity of public servants. The Hungarian Parliament adopted a decree on the fundamental ethical requirements of the public sector. It has no obligatory power, but it sets the direction for public organizations. It prescribes setting up appropriate channels so that reports are surely forwarded to the investigating authorities concerned. Whistleblowing is covered in the Code of Ethics of Public Servants which ensures that public servant who reports violation of the code or criminal offences shall not suffer any kind of damage. However, this provision has no sanctions, thus its usefulness is questionable. The Serbian Code of Business Ethics provides anonymity to a person who reports to the Chamber of Commerce about violation of the code. Nevertheless, most codes of conducts in the public sector are poorly promoted, monitored and implemented. It would be useful for public sector whistleblowers to give codes more weight in order to turn whistleblowing into customary practice at least, if not into “hard” law.

Codes of conduct are spreading across the private sector, too. OECD in the Guidelines for Multinational Enterprises encourages companies to issue voluntary codes of conduct, which are expressions of commitments to ethical values in such areas as environment, labour standards or consumer protection. Specialized management systems are recommended to develop methods to evoke respect for these commitments – these involve information systems as well. [13]
International business is also strongly influenced by some national laws. It is commonsense, that the American business law serves as a sample for multinational companies. As a response to the Enron scandal, the Congress of the United States adopted the Sarbanes and Oxley Act of 2002 (hereinafter: SOX), because the scandal shook public confidence in the nation’s securities markets. As the whole scandal was triggered off by an internal whistleblowing, no one was surprised that SOX contains whistleblower sections. The Act attempts to encourage and protect whistleblowers in a variety of ways by providing channels for anonymous whistleblowing, establishing criminal penalties for retaliation against whistleblowers, and protection for whistleblowers in order to preserve their work status. It prohibits any kind of retaliation, such as discharging, demoting, suspension, harassment, or any other kind of discrimination against an employee in the terms and conditions of the employment against a whistleblower who reports covered information to someone within the organization who has the authority to investigate, discover, or terminate misconduct. It also requires channel for anonymous whistleblowing. The SOX applies to every publicly registered company issuing securities in an American secondary exchange market. A former chairman of the Security Exchange Commission once told at a conference, that “our mandate is to implement the Sarbanes-Oxley Act fully for all companies, foreign or domestic.”[14] The provisions of the SOX are mirrored in the Nasdaq and the New York Stock Exchange (hereinafter: NYSE) rules. If listed on NYSE, companies must certify their accounts to those markets yearly, and this certification process implies that companies are in a position to assert that they comply with whistleblowing rules.[15] The law is vague enough that it may cover U.S. citizens working for a foreign subsidiary or for a private foreign subsidiary of a covered U.S. company, or a foreign employee working for a foreign subsidiary. Section 806 virtually makes no distinction between domestic and foreign companies that have securities registered or listed in the USA. However, extra-territorial effect of the SOX is not recognized – neither by the US Courts, nor by foreign jurisprudence. Multinational companies under the scope of our survey tend to have some kind of internal channel to disclose wrongdoings. According to the reports submitted, the direct influence of the SOX is not proved. Nevertheless, the biggest Croatian telecom company for instance implemented a code of conduct of the Deutsche Telekom Group which formulates common rules for every subsidiary company. All employees, business partners, customers and stockholders can report violations as well as irregularities such as fraud or unlawful practices. Absolute confidentiality is guaranteed as it is possible to report anonymously. Furthermore, the code of conduct expressis verbis stipulates that a good faith reporting does not constitute grounds for dismissal. US Steel Serbia established reporting channels for violations of their Code of Conduct.

VIII. Data protection

The implementation of whistleblowing schemes relies on the processing of personal data: collection, registration, storage, disclosure of data related to an identified person. On one hand, personal information of the whistleblower is handled – except of course the anonym reporting scheme; on the other hand, personal information of the presumed wrongdoer is processed. As a result, in most European countries the data protection rules are applicable.

In Europe, the most important common ground of data protection rules is the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995. Traditionally, EU countries have data protection rules in harmony with the Directive, and those who apply for EU membership, have to adjust their data protection regulation to the EU Directive.[16]
Consequently, whistleblower or other public interest disclosure regulation must be implemented in compliance with EU data protection rules. To be legitimate, the data processing in a whistleblowing regulation has to satisfy one of the grounds set out in Article 7 of the Directive. Under Article 7 c.), the establishment of the whistleblowing system is legitimate if it is necessary for compliance with legal obligations to which the data controller is subject. This means that the establishment of a reporting channel should have the purpose of meeting a legal obligation imposed by the EU or member state law, and more specifically, a legal obligation to establish internal control procedures in well defined areas. According to Article 7 f.), the establishment of a reporting system may be found necessary for purposes of a legitimate interest pursued by the controller or by the third party to whom the data are disclosed. According to the Article 29 Working Group, “the goal of ensuring financial security in international financial markets and in particular the prevention of fraud and misconduct in respect of accounting, internal accounting controls, auditing matters and reporting as well as the fight against bribery, appears to be a legitimate interest of the employer that justifies the processing of personal data by means of whistleblowing system in these areas.”[17]

In Poland, anonym whistleblowing procedures recommended by economic organizations[18] or by law (e.g. SOX) might face data protection rules as a legal barrier with regard to securing confidential channels to raise concerns. The Act on The Protection of Personal Data imposes an obligation on the entity processing personal data to notify the individual whose data are being processed about the source of data origin. This means the identity of a whistleblower should be revealed to a person whose conduct raised ethical questions. Such notification should be made immediately after the data are entered into the data base and by own initiative of the processing entity. The Hungarian Data Protection Commissioner issued several statements in which he condemned the whistleblowing system because the consent of the employees who may become subject of the disclosure, is not required. The lack of explicit rules for processing personal data related to public interest disclosures is a potential barrier to lawfully blow the whistle. On one hand, the identity of the whistleblower is not protected; on the other hand, informational self determination of the subject of the disclosure might be effected without proper legal authorization.

IX. Other key issues

Procedural time limits, remedies and compensation are key issues in whistleblower protection. As there are no special regulations for whistleblowers in most countries, the usual **time limits** for legal procedures are supposed to enhance judging in whistleblower cases. Although most of the countries have regulations for the maximal length of court procedures (e.g. labour disputes), in reality, they often last much longer and turn such procedures into a nightmare for employees having a conflict with their employers. Even though the Hungarian government failed to install the competent institution, and consequently the procedural rules exist only on paper, the act contains time limits. The future office has to launch the process if the disclosure is well founded in 8 days after the information is received. Nevertheless, there is a subjective and an objective time limit: the whistleblower can file the disclosure in 12 month after becoming aware of the wrongdoing; and the disclosure is not investigated if 5 years had passed after its commitment. The Slovenian Act refers to the general administrative procedure, which contains strict time limits. According to the Moldavian draft law, the Protection Body has to make a decision within 5 business days after submission of the report, whether to launch a procedure itself or initiate an investigation at the competent body. The investigation body is obliged to examine the report
and notify the protection body about the results of the investigation within 45 days. If requested, the protection body has to notify the whistleblower about the results of the investigation within 3 business days.

Most whistleblowing laws provide compensation to the whistleblower in cases where they have suffered harms that cannot be remedied by any injunction. It usually means a compensation of the lost salary, but can also include money for harm. In countries with a working whistleblower protection, compensation starts soon after an employee lost their salary in case they can prove that it happened because of blowing the whistle. In the standard labour procedure, compensation is given only after the end of the labour dispute, when it turns out that the employee has been dismissed illegally. However, this kind of compensation comes usually much too late. The problem exists in every country of our studies, although theoretically, Hungary has a regulation for compensating whistleblowers. An employee whose income situation deteriorated due to his/her whistleblower activity might receive financial help if requested. The amount of the subsidy is at most the difference between the reduced and the original salary, but at least 50% of it. Employees made redundant or left without a salary receive 75% of their original wage. Aid can only be given if a legal dispute has been initiated, and has to be ceased after a final judgment in the dispute. According to the Slovenian legislation, if the whistleblower has been exposed to retaliatory measures and adverse consequences have occurred, he/she shall have the right to demand reimbursement of illegally caused damage from the employer. The Commission may offer assistance if casual relationship is established between adverse consequences and the retaliatory measures. Giving rewards to whistleblowers is a highly debated topic. Many whistleblower experts are weary of such provisions, seeing them as detracting from the public interest principles of legislation.\[19\] A number of Asian jurisdictions give huge rewards to people who have revealed corruption. In Eastern-Europe, the above detailed practice is relatively unknown. Only Hungarian legislation deals with this question, and offers rewards to whistleblowers of corruption and cartels. The Moldavian draft law also rewards whistleblowers with a maximum 10% of the amount of the material damage redeemed to the state.

Adversary systems of justice typically give the parties the task of adducing evidence on contested issue in litigation. Such a policy raises the problem of dividing that task between the parties. Burden of proof rules are the device courts employ to address this problem. By giving a specified party the burden of proof on a given issue, the court tells that party that he or she must either come up with evidence supporting his or her position, or otherwise suffer an adverse judgment.\[20\] The most significant contribution that the law’s burden of proof can make to moral practice is through the burden allocation principles. Cases in which one party has the burden of proof are exceptions. Generally, the burden of proof should be assigned to the plaintiff who seeks to change the present state of affairs and who naturally should be expected to bear the risk of failure of persuasion. Another general rule in continental legal systems is that a party is not required to prove a negative. Nevertheless, common law systems – which adopted comprehensive whistleblowing acts – place the burden of proof on the employer. Under the American federal whistleblower rules, the agency has to show by clear and convincing evidence that the dismissal would have taken the same personnel action in the absence of the public interest disclosure. To put another way: the agency has to prove that the dismissal is not related to the disclosure, it has to prove the negative. Countries under the scope of our study tend to do the same. In Hungary, the burden of proof is shared: the employee has to prove that he/she made a disclosure, and the employer has to show that the dismissal or other measure is not related to the disclosure, or the employee filed a false claim. According to the Slovenian act, if the person reporting the
case states facts in a dispute that give support to the allegation that the report caused that person to be subjected to retaliatory measures from the employer, the burden of proof shall be on the employer. The Polish labor code restricts this procedural rule in cases of discrimination: the whistleblower has to base his/her claim on antidiscrimination provisions if he/she would like to benefit from the evidence rule. In other words, a whistleblower shall demonstrate that the reprisal he/she suffered falls within the scope of discrimination as defined in Labor Code. The jurisprudence has not faced such cases so far. The question rises: how to justify the exception? The possession of evidence justify it to some extent: clearly, the party in possession of the documents should have the burden of going forward. As the employee and the employer are often in an asymmetrical informational position, the law must presume that the party in the stronger position – the employer – can prove with less difficulty that the employee’s claim was false or the disadvantageous measure would have occurred anyway.

Another interesting theoretical reason lies in the possibility of errors in the course of judicial procedure. Where one party has an interest of transcending value at stake – e.g. in case of a whistleblower defendant and his professional status, just like an accused and his liberty of movement –, the margin of error is reduced to him by placing the burden on the other party. In our point of view, the purpose of the judicial – or administrative – procedure is the most important factor when the legislator designs the rules of the burden of proof. If it aims solely the protection of the whistleblower, then the one-sided requirement to prove the negative seems legitimate. However, if the legal process aims to clarify the truth of the content of the disclosure and not just protect the whistleblower, than the community is interested to obtain accurate information, and consequently, it has a reason to devise systems that increase the probability of that information to be made public.

X. Whistleblowing and the media

The mere existence of a free media has a latent, deterrent effect on misconduct. However, even free-standing whistleblowing regulations recognize disclosure for the media as a last resort. In Canada, South Africa and United Kingdom, the law allows such disclosures as a last resort if a series of conditions have been satisfied.[21] The reason of the higher threshold is to encourage internal disclosures; disclosure for the media is the most extreme form of external disclosure. In the countries affected by our survey, the only conjunction between public interest disclosure and media is the protection of sources. The widely prevalent right and duty of the journalist to keep the identity of the source in secret recognizes the media’s role in whistleblowing. Simply put, it means that the authorities, including the courts, cannot compel a journalist to reveal the identity of an anonymous source for a story. The right is based on the recognition that without a strong guarantee of anonymity, many people would be deterred from coming forward and sharing information of public interest with journalists. Thus, if the media have the possibility to hide the identity of its sources, then whistleblowing is possible. Contrary, if the source has to be disclosed, whistleblowing is not promoted. As noted by the European Court of Human Rights: “Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public – watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”[22]
As the Organization for Security and Co-operation in Europe states, „journalists should not be required to testify in criminal or civil trials or provide information as a witness unless the need is absolutely essential, the information is not available from any other means and there is no likelihood that doing so would endanger future health or well being of the journalist or restrict their or others ability to obtain information from similar sources in the future.”

The protection of source is not absolute. In Serbia, journalists have to name the identity of the source when criminal offence concerned is punishable with 5 years imprisonment or more. In Poland, though the journalist’s obligation to secrecy can be under some circumstances revoked by the criminal court, the identity of the source of information will always remain secret. Even in case the whistleblower discloses classified information to a journalist and thus commits an offense, neither the prosecutor nor the court can demand his/her identity. The only exception was made for the most serious crimes referred to in section An Obligation to Report a Wrongdoing, where a journalist may be obliged by the court to reveal its source of information. In Slovenia, the journalist must – whenever possible – indicate the source of information, because the public has the right to know that in order to evaluate its relevance and credibility. The journalist can reject to testify if he estimates that the source may be at risk. Editorial personnel and journalists are obliged to reveal the source in cases stipulated by criminal legislation. Interestingly, in Bosnia, the right to hide the identity of the source includes the right not to disclose any documents or facts that might reveal the identity, particularly written, audio, visual or electronic material.

Another danger to the protection of source is the Data Retention Directive of the European Union. This Directive – adopted in 2006 – compels phone and Internet companies to indiscriminately collect and store data about their customers’ communications. Such generalized data retention puts confidential activity and contacts at risk of disclosure by the way of data leaks and abuses. The main problem is that telecommunication data is handled by entities different form the source or the journalist.

B. Socio-cultural aspects of whistleblowing in the CEE region

Whistleblowing is a highly unknown term and practice in Eastern-Europe, even in countries where whistleblower protection was already taken into consideration. There is practically no country in our survey that has any statistics on the incidence of whistleblowing-like activities. As a rare exception, PricewaterhouseCoopers conducted a research in Hungary, which mentions that 17% of economic crimes were discovered through whistleblowing. Only Slovenia (Žvižgač) and Croatia (Zviždač) have their own expressions for the word “whistleblower”. In Serbia, the English term is relatively well-known, but all Serbian synonyms have negative connotations. In Bosnia and Herzegovina, Moldova and Poland, there aren’t any neutral translations for whistleblowing and people tend to use the words “snitch” or “denouncer” to describe whistleblower activity. The situation is almost the same in Hungary, although the long existing term of “announcer in public interest” is increasingly used for whistleblowers.

In almost every country, the press reported several stories that can be considered as whistleblowing. In most cases, an employee disclosed information of public interest and as a consequence, he/she had to face retaliation which was mostly dismissal from the company or institution. The first whistleblower in Croatia to gain great media attention was a bank employee, who disclosed that the wife of ex-president Tudjman had made a huge bank deposit which Tudjman had not mentioned in his property card. She got fired from the company. An
example for the most brutal retaliation a whistleblower can receive is the story of Milan Vukelic, a civil servant who publicly accused officials in Bosnia-Herzegovina’s Republika Srpska of corruption. He was killed on November 7, 2007 when his car exploded. Milan Vukelic, a town planner for Banja Luka’s municipal authority, accused both his boss of corruption and the police of threatening him.

Common channels for reporting corruption are public **hotlines** and email addresses, most of which can be contacted anonymously. The aim of operating such a hotline is mainly to enable potential reporters to share their information with relevant instances without the fear of revenge. In this case one tries to substitute the necessary protection of the reporter by obscuring the reporter’s person, what often makes it impossible to carry out further investigations since the flow of information is in one way only and the authorities cannot make contact with the witness/reporter. In case of non-anonym hotlines, the hotline is simply a technical instrument and as such it is not much different from a traditional declaration. Bosnia and Herzegovina, Croatia and Serbia have general hotlines for reporting criminal offences. Besides, Transparency International BiH operates a service providing legal assistance to citizens, where you can also report corruption via phone or email. In Croatia, citizens mostly report corruption and malpractice anonymously and directly to NGOs such as Transparency International and the Association Whistleblower.

In Hungary, there is also an official hotline for providing information to the police anonymously. This hotline receives approximately 10,000 calls a year, but only 10-15% is relevant for criminal investigation or crime prevention. The National Development Agency, responsible for managing EU funds set up an online service for reporting any kind of irregularities connected to EU funded projects. Reports made on this site can be traced by anybody. From April 2010, in specific cases and upon certain conditions, those submitting indispensable information about so-called hardcore cartels might be entitled to an award. Information about cartels shall be submitted to the Cartel Section of the Hungarian Competition Authority.

In Moldova, almost all central and many local public institutions opened anti-corruption hotlines. To evaluate the quality of these services, TI-Moldova conducted a study in 2008, with the following results: The hotlines are not operated professionally and the operators show little interest in following the cases. Also, there is no clear mechanism of receiving, registering complains and passing them to the competent body/subdivision. And finally, operators do not have to take responsibility if they miss to forward a report to the investigative body.[23]

If the authorities fail to guarantee sufficient channels and protection for whistleblowers, and the press lacks the capacity needed to investigate and publish their stories, NGOs might help with advice and advocacy. However, the role of NGOs does not stop at guiding potential whistleblowers: non-governmental organizations may also operate as watchdogs monitoring governmental politics and malfunctions of the judiciary system. NGOs can enforce the adoption of new laws as well as bring in new aspects in the lawmaking procedure. In Bosnia and Herzegovina and Slovenia, there are no NGOs concerning whistleblowing. In Slovenia, the recently established Society for Integrity in Public Sector has an eye on national procedures regarding whistleblower regulations, but does not deal with specific cases. According to the Croatian country study, non-governmental organizations play an important role in Croatia. The Association Whistleblower (Zviždači, founded in 2008) provides a
hotline for reporting corruption for malpractices. As a consequence, more than 1500 people have reported corruption or malpractices in about one year. Transparency International provides advisory assistance for people who report corruption or malpractices and serves as an independent disclosure channel. As a part of the legal advice center, TI Croatia also operates a free hotline which might also be used anonymously. The reports received are being forwarded to the responsible governmental institutions. In Serbia, the Coalition for Free Access to Information (a dozen of NGOs) promoted the idea of whistleblower protection through the Free Access to Information Act. Transparency Serbia – also member of the Coalition – has been running an anti-corruption legal advisory centre for several years.

In Moldova, two NGOs have anti-corruption hotlines: Transparency International – Moldova and the Centre for Analytical Studies and Prevention of Corruption (the last one has been closed in 2010 because of lack of funds). Since NGOs do not have the right to get involved in any investigation, their capacity to help whistleblowers is very limited and they mostly function as advisers.

In Poland, two NGOs are active in supporting whistleblowing, namely the Stefan Batory Foundation and the Helsinki Foundation for Human Rights. Both NGOs offer legal counseling, the former one within the framework of Anticorruption Program while the latter within the Strategic Litigation Program. The Batory Foundation also offers a help-line to whistleblowers. In 2010, a research on the efficacy of the present whistleblowers’ protection in the experience of judges working in the employment courts is carried out. Transparency International Hungary and HCLU regard whistleblowing as a key issue in tackling corruption. TI Hungary drafted a concept paper in 2008 to promote a comprehensive policy concerning whistleblowing and participated in the legislative process by giving opinions on the governmental draft legislation. K-Monitor, another anti-corruption NGO provides an online opportunity for whistleblowers to share their information and experiences.

The attitude of the society and the press towards whistleblowing varies not only among countries but also within the society: On the one hand, people still regard reporting to the authorities as some kind of negative, snitch-like activity, whilst on the other hand, they support those who have the courage to stand up against misconducts. The fact is that whistleblowing is still highly unknown in this region, and there have not been any public discussions on its usefulness or raison d’etre. The press itself often reports about whistleblowing legislation or encouraging people to cooperate with the authorities in a negative way, although they themselves depend on stories received from informants. In Bosnia and Herzegovina, social perception of those who report possible irregularities in their environment is generally negative – according to the Bosnian country study. “Another problem can be the fact that the majority of population is ready to publicly speak about bad functioning of the state, or companies, corruption and visible crime, but these statements only represent general attitudes. Citizens are not ready to officially report these findings to competent entities in their environment, and it is common that citizens do not report even those criminal offences they encountered by chance. Citizens do not trust the institutions: police, prosecutor’s office, state authorities and they generally fear, often rightly, that they will only cause problems to themselves by reporting perpetrators of criminal offences which will lead to inconveniences for persons reporting, while there is a clear perception that the reported persons will suffer no consequences whatsoever.”
The Croatian and Serbian country study claims that the most common type of attitude towards whistleblowing in the press is positive and supportive, and in Croatia, the only discussion on whistleblowing and reporting to the police takes place in the media. The media’s role in whistleblowing activity is also recognized by the need for special privileges for the protection of their sources.

Official statistics of the Slovenian Commission for the Prevention of Corruption attached to the Slovenian country study show that citizens are more and more inclined to report on corruption cases: the number of the cases reported (in 2007-2008) is around 600 a year. In Poland, however, the general attitude towards whistleblowers is rather hostile. In some countries, there are available statistics on the willingness of people to report corruption or other malpractices to the authorities. In Hungary, a study carried out in 2007 by the Gallup Institute shows that 69% of the people taking part in the survey did not know who to report corruption to. 57% of the respondents said they would report corruption, but only 6% has already done so.

A survey conducted by Transparency International Moldova in 2008 inquired people on why they don’t complain about corruption to public institutions. Nearly half of them answered that complaining wouldn’t change anything. A quarter said it would take too much time, and another quarter thought it would result in new problems. 20% of the people queried did not even know who to report to. A second survey conducted in 2010 by TI Moldova among 418 representatives of 15 central public institutions asked whether they would report corruption to their superiors if they were aware of concrete cases. 34% of the answers were negative. The main reason for not reporting was the fact that “it would cause problems” – 53.4% of the respondents agreed with this respond –, and that “it would not change anything: 22.6%” – almost a quarter – of the people asked said so. In a research carried out by TI Serbia in 2006, asking “whom would you turn to if you would face corruption”, only 11.1% of the queried named the police. The Serbian country study points out that the main reason for not reporting is often the fear of retaliations or any other problem. Even if not expecting to suffer any damage, potential reporters do not have any stimulation to make such reports. Furthermore, they may often expect to be bothered later (to provide statement in investigation and court session). Therefore, such reports are more likely to be made by persons directly affected by wrongdoing. The research carried out in the different countries show well that in general the public is not aware of the channels available for reporting cases of corruption crimes, of its rights and obligations. This is due on one hand to the inadequate information and on the other hand to the lack of confidence in the authorities. It is not surprising therefore that in the region whistleblowing as such is an almost unknown phenomenon without any tradition.

Summary

A whistleblowing policy is a statement of the organisation’s commitment to good governance and a guide for employees on how to raise a concern responsibly. It can help create an environment in which employees understand their responsibilities and managements can demonstrate their accountability. Without such a safe alternative to silence, a concerned employee may feel their only other option is to say nothing or to disclose or anonymously leak information outside the organization. An effective whistleblowing policy will enable
everybody to find out when something is going wrong in time to take the necessary corrective action.

Having analyzed the country reports contained in the survey, we can make the following findings.

Without comprehensive legal rules the state of whistleblowers is insecure: it is impossible for them to identify the legal consequences of their steps (e.g. persecution of misappropriating a secret), and the dangers resulting from their special situation. In the majority of the countries under review, labour law is the last resort, still with an institutional framework which is far from being adequate. Though there are correct judicial judgments – in the first place referring to Hungarian and Polish judicial cases -, but as the legal systems of these countries are not based on the rule of precedents, it will be easy to depart from these in future cases. Besides, the region is not famous for predictable, calculable practice of legal judgments.

This insecure situation of the whistleblower can be well documented in Hungary, where it is officially forbidden for the employer to persecute a discloser of information of public interest (i.e. a whistleblower), nevertheless the respective law does not guarantee the possibility to control and/or to enforce this prohibition. In Slovenia, where a new whistleblowing act corresponding to international standards has been adopted lately, whistleblowing is still in its infancy and there are no analyzable practical experiences regarding the functioning of the law as yet.

To include a well structured law into the fabrics of the existing legal practice possesses enormous challenges: the Slovenian act does not make it clear how the rules regulating the protection of data and secrets will be harmonized with the new regulations aimed at the stimulation of disclosures and the protection of the disclosers, i.e. the whistleblowers. Generally speaking, whistleblowing should not take place in an empty space, but it has to be organically adapted to the broader legal environment of this highly complex institution. Remaining with the example of classified data, how can anyone be expected to report other misconducts if criminal prosecution by the state cannot be ruled out? The position as an employee may be secure, but if it is possible that he/she will be sued for compensation by the employer for damages caused by disclosing a business secret of this possibility, then he/she will most likely not risk his/her existence for protecting the public interest. On the other hand, it must be clearly stated that a public disclosure shall be made in good faith and with a great portion of prudence, since the potential whistleblower is moving on very thin ice. To ensure this, not only legal regulations are necessary, or, in other words, laws alone are not enough. A culture to protect the public interest is missing; whistleblowers are looked at with suspicion in most of the countries under review. It would be important, therefore, to strengthen the organizational culture at least in public institutions. In the countries analyzed, no efforts have been made pointing in this direction. A further cultural problem hindering the evolution of whistleblowing in the region is the reservation with which Eastern-European societies generally look at all kinds of procedures which involve supplying information to the authorities of a third party. The background of this phenomenon is mostly of a socio-cultural character and may change only in the long run. Hence, in the beginning it might be illusionary to expect that laws and regulations will meet high level of popular support.
The practices described in the country reports show that anticorruption institutions set up so far have not been able to deliver properly. They have been set up in the first place to serve the interests of a given political side and have been used by those in power at the time. Based on the findings of the reports, we can also conclude that the investigating authorities and/or the jurisdictions are not functioning fully independently from politics either. This means that there is a further missing link in the system of conditions for the effective functioning of a solid whistleblower-act, namely a reliable and effective institutional background.

Despite the incomplete preconditions, the effective legal protection (i.e protection by law) of the public disclosers is a requirement. Weak democracies of the region may in fact be strengthened exactly by institutions that are stimulating social activity and stressing the enforcement of law. The lack of protection, the feeling of helplessness against illegal actions reduce the trust in democratic institutions in these societies and lead to the further erosion of public moral.

Sándor Léderer is the chief executive of K-Monitor, Hungarian anticorruption watchdog (lederer@kmonitor.hu); Tivadar Hüttl is the data protection and freedom of information program director at Hungarian Civil Liberties Union (huttl@tasz.hu)

This study does not examine how such freestanding legislation should be constructed. Nevertheless, the authors basically share the view of the Transparency International on this issue. See Draft Principles for Whistleblowing Legislation at: www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protectio_of_whistleblowers
[5] The Slovenian country report was submitted a few weeks before the new law was passed. Consequently, the country report does not contain the detailed description of the current act. Nevertheless, the present study implies the new act, and our editorial comments are incorporated in the country report. You may find the full text of the Integrity and Prevention of Corruption Act at: [6] Article 20 para 1 of Act CLXIII of 2009 on the Protection of Fair Procedures http://www.u4.no/helpdesk/helpdesk/query.cfm?id=221
[10] Official Gazette of Republika Srpska number 112/08,58/09
[12] Bill T/6147 on protection of classified information, Section 5, see at: http://www.parlament.hu/irom38/06147/06147.pdf


[15] NYSE, Section 303§.06

[16] Only Hungary, Poland and Slovenia are members of the EU, but other countries examined are planning to join the EU, thus they will close the gap between their current national legislation and the Directive.


